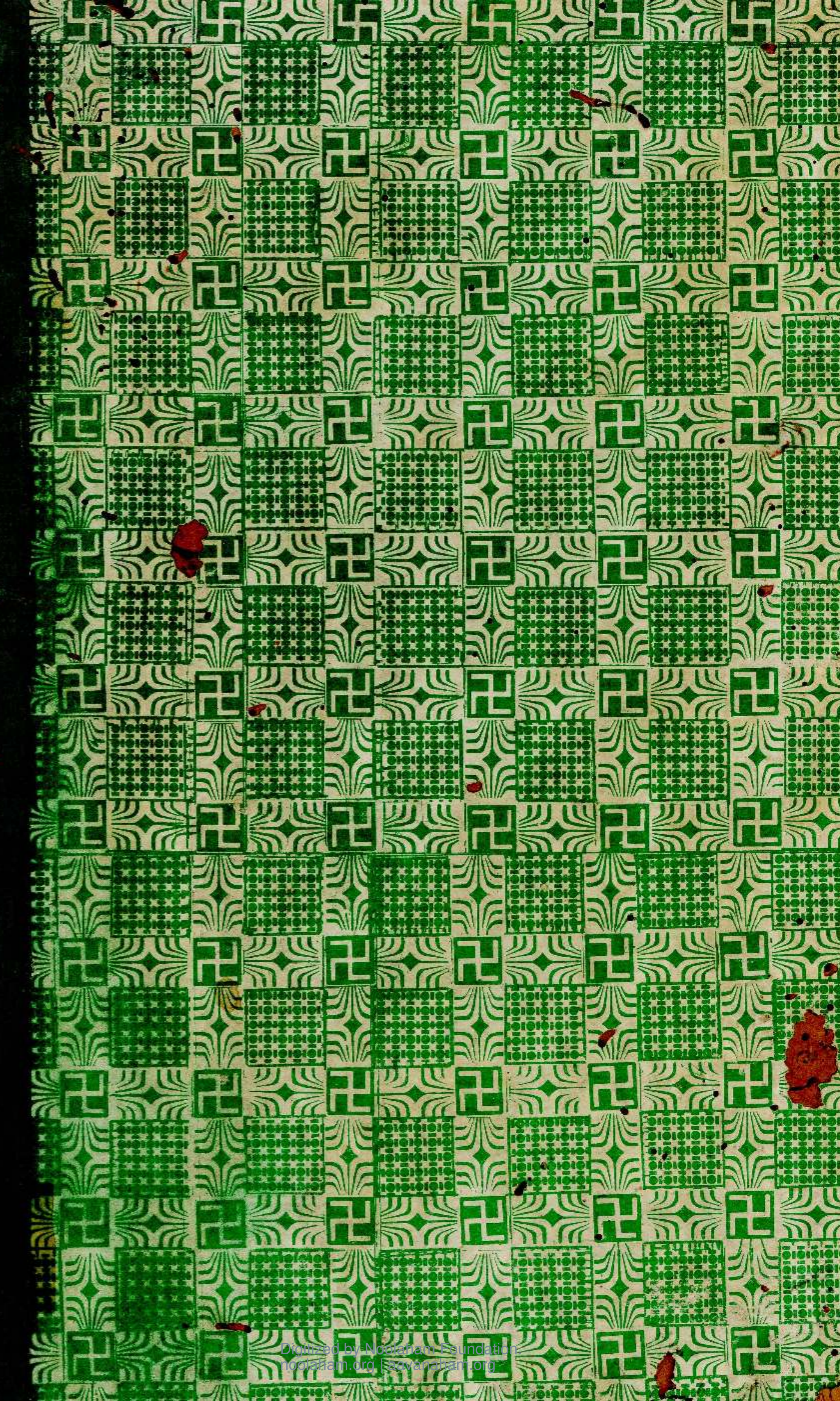

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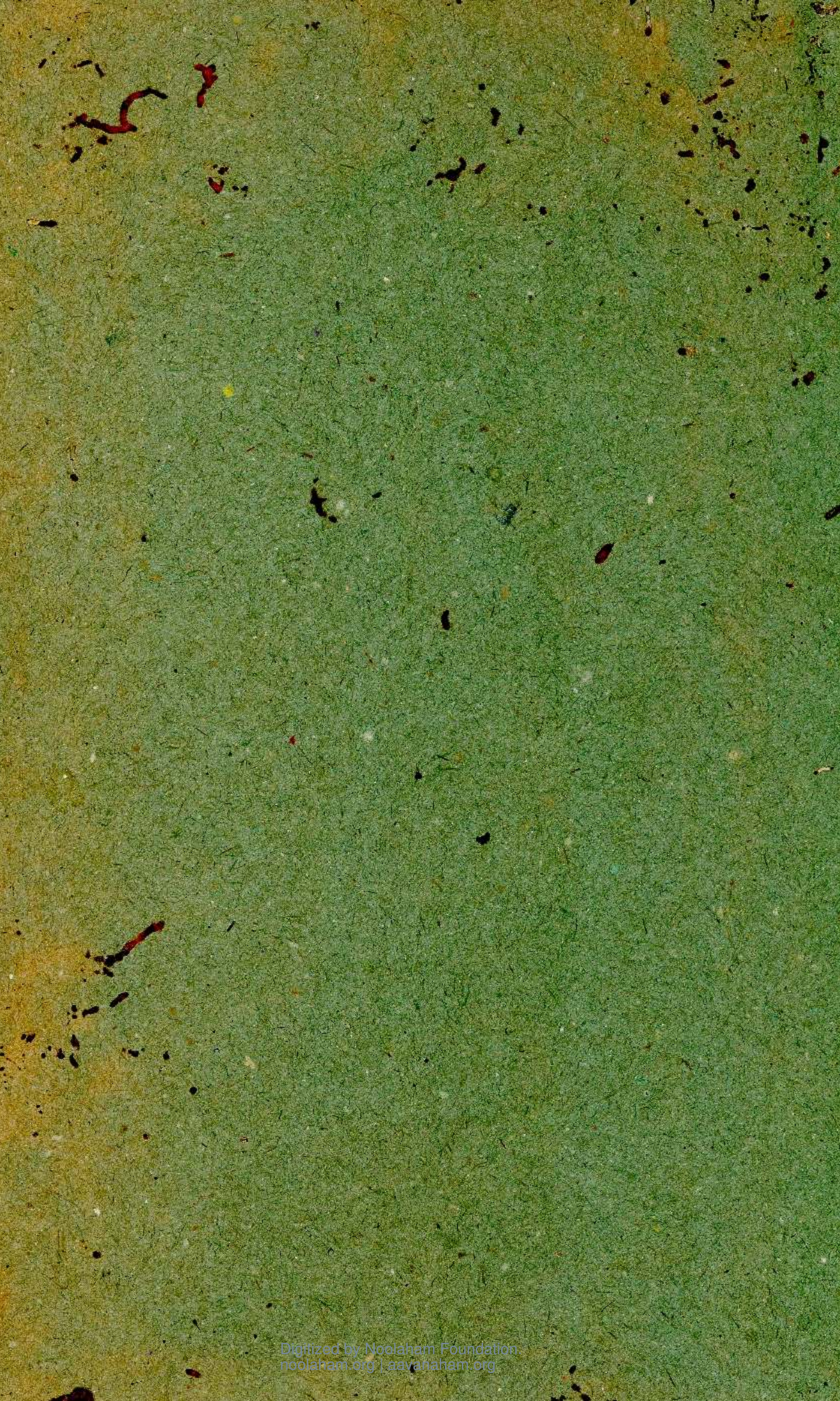
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CEYLON

POLICE COURT LAW

BY

MOHAN. H. KANTAWALA
M.A. (Cantab), Bar.-at-Law (Gray's Inn),
CEYLON CIVIL SERVICE

WITH A FOREWORD

BY

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"'*Ah! happy age,' the youthful poet sings,*
'When the free nations knew not laws nor kings:
.. ..
Bound by no ties which kept the soul in awe,
They dwelt at liberty, and love was law!'"

G. CRABBE.

"*Fear God, and offend not the Prince nor his laws,*
And keep thyself out of the Magistrate's claws."

TUSSER.

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PREFACE

(To the Second Edition).

THE reception accorded to the first edition of this book has been so overwhelmingly cordial that I am tempted to offer a second edition to the patronage of my readers. Were it not for my rejuvenation in a Magisterial office (at Galle), I would perhaps never have attempted the impossible. Pseudo-lethargy creeps like a canker into the bookmaking proclivities of youth and, as age advances, the various calls of service and a routine of eventide pleasure make one feel that he is not the master of his own time. Though this may be a mitigating circumstance, I plead guilty to the charge that the book has remained out of the market for over three years.

An endeavour is made in the present edition to incorporate the latest enactments of our fast-moving legislature and the stop-press decisions of the Supreme Court. On the suggestion of Mr. C. L. Wickremasinghe, J.P., U.P.M., Crown Proctor, Galle, a note on extradition is added. Some useful suggestions were made by Mr. A. Munasinghe, Proctor, S.C., Panadure. I am indebted to my friend, Professor C. Suntheralingham, for stepping into the breach of my judicial career and for not merely reading the proofs of Part III—an ugly task—but also for compiling a new and exhaustive index.

Dear friends and readers, I thank you all for your kind co-operation in the past and crave the same indulgence in my rebirth.

M. H. KANTAWALA.

COLOMBO, *27th October, 1934.*

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FOREWORD

It was a great honour which Mr. M. H. Kantawala of the Ceylon Civil Service conferred upon me, when he asked me to write this Foreword for him.

No words of eulogy are necessary from me to commend this volume to the notice of the members of my profession and the judiciary. It supplies a long-felt want and the book speaks for itself. To the law student, the legal practitioner and the Police Magistrate, especially the young Magistrate who is new to his work, the pages of this book will be invaluable. Instead of following the time-honoured custom, both in Ceylon and India, of quoting *in extenso* the bare sections of the Codes relating to the law which is administered in Police Courts, the author has written his treatise in narrative form and has done his best to make it interesting. He has, at the same time, given the necessary references to the case-law in India and Ceylon on the disputed points and thus enhanced the value of the book to the practitioner.

Part I deals with the law of Procedure ; Part II with the offences in the Penal Code ; and Part III with offences under the Statute Law usually tried in the Police Courts of Ceylon.

The Chapter on the conflict of jurisdiction between Police Courts and Village Tribunals is particularly useful ; so are the draft specimen charges. The author has taken infinite pains to chart the many insidious sunken reefs into which unwary Magistrates are apt to stray, from recorded instances taken from the law reports of the Island.

It has been a matter of wonder to me how Mr. Kantawala has found the time to prepare this book for publication, within the short space of six months to my knowledge, in the midst of his many exacting duties as Police Magistrate of Point Pedro. If genius is, as Carlyle says, " a transcendent capacity of taking trouble " or if it is, as another author says, " the outpouring into chance channels of an intense life of activity," then Mr. Kantawala is a living example of a genius in our midst.

In these days when members of the legal profession are pressing their claims to posts in the judicial service, a book of this kind has the effect of drawing our attention to the good work done by the members of the Civil Service as judges of original Courts and to the fact that their claims to an equal share in this branch of the Public Service cannot be lightly ignored.

M. T. AKBAR,
Solicitor-General.

Colombo, *29th May, 1926.*

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PREFACE

(To the First Edition).

In publishing this volume, I may be excused if I have the same nervous trepidation as the Editor of the "Spectator," of discovering my pages used as wrappers for tobacco or as fringes for candle-sticks. This nervousness possibly arises from the circumstance that, although in Ceylon there is a pronounced litigious mentality on the part of the masses, there is a corresponding disinclination to study legal treatises. An average villager, here, finds a peculiar pleasure in frequenting the Law-Courts; with him, as it were,

> All thoughts, all passions, all delights,
> Whatever stirs his mortal frame,
> All are but ministers of LAW,
> And feed its sacred flame.

The author has endeavoured to make this volume useful, as well to the initiated as to the laity, by presenting the law and practice of the Police Court in plain and simple language. This book, prepared in the apogean seclusion of Point Pedro (where "one's library is dukedom large enough"), is bound to have failings peculiar to the soil; and the author's task has certainly not been lightened by the continual emendations of our criminal law, both by the Legislature and by the rulings of the Supreme Court. The re-enactment, for instance, of our Habitual Criminals' Ordinance (by No. 2 of 1926), after the Mss had gone to the Press, makes certain passages of this volume rather archaic. An attempt has been made to outline the latest changes in our law in the Addenda.

The book is divided into three parts: the first deals with procedure, the second with the Penal Code, and the third with Ordinances. Ancillary subjects, like Medical Jurisprudence, Prison Rules, etc., have not been left out. Ceylonisms are retained in the language: thus, the word "accused" is often used as a substantive. Customary appendages, like an "Index of Cases cited" or a "List of Authorities consulted," are omitted for reasons of economy. Where cases are reported in different places, the new Law Reports are invariably preferred, as being more accessible. The Volumes referred to in the foot-notes are the Legislative Enactments of Ceylon (4 vols., 1923 edition) published by the Government Printer.

Although it is realized that a bare acknowledgment of gratitude to my numerous friends who have lent me both their brains and their books is but poor recompense for their generous loans, I venture to extend my heartfelt thanks to my friends, Mr. V. Canagaratnam, Proctor, S.C., and Notary Public, Chavakachcheri, for useful assistance and welcome suggestions throughout, Dr. G. C. Philips, L.M.S., L.R.C.P. & S. (Edin.), etc., of Jaffna, for revising the Chapter on Medical Jurisprudence, Mr. J. S. Nicholas, Assistant Superintendent of Excise, for hints on the Chapter of Excise, and Mr. M. Prasad, B.Sc., Barrister-at-Law, of the Ceylon Civil Service, for reading through the whole of Part II in manuscript form. Many other friends have rendered help in different directions; to them also, my thanks. I am highly indebted to our learned Solicitor-General, the Hon. Mr. M. T. Akbar, K.C., B.A., L.L.B., Barrister-at-Law, who has been kind enough to contribute a Foreword.

I wish to make it clear, at the request of the Ceylon Government, that this is not an official publication.

POINT PEDRO,
King's Birthday, 1926.

M. H. KANTAWALA.

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PART I.

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CHAPTER I.

PRELIMINARY.

Mr. Chichele Plowden, in his "Autobiography of a Police Magistrate,"[1] remarks: "If any one were asked to say why a Court of Summary Jurisdiction should be styled a Police Court, I imagine he would be somewhat perplexed. Such a style and title seems open to criticism, for lack of precision, but there is at least this to be said for it, that it serves to keep before the public mind the close connection of the metropolitan Police with the administration of justice, and this is right and proper."

These remarks apply with equal force to the inferior Criminal Courts of this Island. With us, unlike as in England or in India, every court of summary jurisdiction, whether in the metropolis or not, is styled a Police Court: and the connection of the local Police with the local courts is too well-known to deserve of any special mention.

Ceylon is divided into nine provinces, each of which is again subdivided into criminal divisions for the purpose of Police Court jurisdiction. This jurisdiction is conferred by the Court's Ordinance[2] which empowers the Governor, "to establish within each and every division one Court to be called the 'Police Court' to be holden by and before one person to be called the Police Magistrate at such convenient place or places within the Division as the Governor shall from time to time appoint." The Governor may also appoint more than one Police Magistrate for such divisions,[3] but such an additional Magistrate does not constitute an additional Police Court in the sense that it is a distinct and independent Court: his Court and therefore his proceedings are but a part and parcel of the permanent Court of the division.[4]

A Magistrate may hold his Court within the limits of his division at any convenient spot,[5] besides holding the regular Court at the proper Police Court building; but in that event, a Magistrate should give due notice of the fact that the Court would be sitting at a place other than the regular Court-house.[6]

This notice is presumed where a Magistrate proceeds and holds inquiry at the spot in a case of murder,[7] or records evidence *in Camera*,[8] or proceeds to hear urgent cases on Sundays and Holidays at his bungalow.[9] Ordinarily, therefore, the sittings of every Police Court in the Island are publicly held in the regular Court-house provided for the purpose at stated hours, and "the public may freely attend the same."

---

1. The book was published in 1910 under the title of "Grain and Chaff" by Fisher Unwin. It is now out of print.
2. No. 1 of 1889, sections 55 and 83, Vol. IV, pp. 376 and 383.
3. Section 3 of Ordinance No. 4 of 1891, Vol. IV, p. 149.
4. Jansen *vs.* Arnolis (1895) 1. N.L.R. 275.
5. Ordinance No. 12 of 1890, section I, Vol. II, p. 62.
6. Perera *vs.* Harmanis (1893) 2 S.C.R. 33.
7. Section 153 Cr. Pr. Code.
8. Sections 86 of the Courts Ordinance and 150 (2) of the Cr. Pr. Code.
9. A Police Magistrate is not affected by the Public and Bank Holidays Ordinance No. 1 of 1928, nor does he come within the pale of the Supreme Courts Vacation Ordinance No. 2 of 1928.

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Regular Police Courts are held at the following places :—

Western Circuit.	Midland Circuit.	Northern Circuit.	Southern Circuit.
1. Colombo	10. Anuradhapura	19. Jaffna	25. Galle
2. Negombo	11. Badulla	20. Point Pedro	26. Balapitiya
3. Panadure	12. Kurunegala	21. Mannar	27. Matara
4. Kalutara	13. Kegalle	22. Mullaitivu	28. Tangalle
5. Avisawella	14. Gampola	23. Trincomalee	29. Hambantota
6. Gampaha[1]	15. Kandy	24. Batticaloa	
7. Ratnapura	16. Matale		
8. Chilaw	17. N'Eliya		
9. Puttalam	18. Dandagamuwa		

There are thus 29 major Police Courts in the Island. Of these, some like Trincomalee, Hambantota, or Mullaitivu, are unimportant, being not presided over by a full-time Magistrate ; some, like Badulla, Ratnapura, Avisawella, Kegalle, Nuwara Eliya, Batticaloa, Tangalle and Anuradhapura, are merged in the local District Courts, the local District Judge being the presiding Magistrate as well.

Many of these Courts hold circuit sessions at a place other than the regular Court-house. The Police Magistrate of Gampola holds a circuit Court at Nawalapitiya on every Wednesday in the week. The Matale Magistrate sits at Panwila and Teldeniya on Thursdays and Fridays of every week alternately. A Circuit Court is held at Matugama from Monday till Friday in the last week of each month by the Police Magistrate of Kalutara. The Ratnapura Magistrate, who is also the District Judge, devotes three days to Balangoda and two days to Rakwana once a month. The District Judge of Batticaloa sits as Police Magistrate at Kalmunai during the third week of every month. The District Judge at Nuwara Eliya holds a Circuit Police Court on Thursdays, Fridays and sometimes Saturdays in every other week at Hatton. The Jaffna Magistrate holds Court at Jaffna on every alternate day, proceeding to Kayts on Mondays, and to Mallakam on Wednesdays and Fridays. The Point Pedro Magistrate itinerates to Chavakachcheri from Tuesdays to Fridays in every other week. The Badulla District Judge sits at Bandarawela during the first full week of every month as a Police Magistrate. The Itinerating Magistrate of Gampaha used to itinerate to Pasyala for three days in the last week of the month. The Magistrate of Mannar travels to Vavuniya and Mullaitivu and holds a monthly sessions for three days at each place. The Itinerating Court at Maravila, which was held every other week by the Magistrate of Chilaw, is temporarily suspended, so is the Circuit Court of Pasyala.

The Sessional Courts, for the purposes of records, etc., are regarded as separate Courts ; but a Magistrate who holds a Circuit Court may, for convenience or other reasons, direct that a particular case or inquiry may be heard at his permanent Court-house and *vice versa*.

Besides the stipendiary Magistrates, there are one or more honorary Magistrates in each division called Unofficial Police Magistrates. These have no summary jurisdiction. They cannot try or determine any offence which is summarily triable.[2] And even though they possess the same powers as a regular Magistrate with regard to non-summary inquiries, they seldom exercise these powers. Their functions in practice are limited to the recording of dying depositions and, in rare instances, to the suppressing of riots or dispersal of unlawful assemblies.

1. See Proclamation in *Gazette* No. 7,736 of 27th September, 1929, regarding limits of Gampaha jurisdiction.

2. Section 84A of the Court's Ordinance, Vol. IV, p. 384.

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A Justice of the Peace, who is not an Unofficial Police Magistrate, has very little powers : he can merely administer oaths and affirmations, differing in this respect but little from a Commissioner of Oaths.[1] He may also appoint special Police Officers, out of the members of the public, at the time of a riot or tumult.[2] Every Police Magistrate is an *ex-officio* Justice of the Peace within the limits of his territorial jurisdiction ; and every Unofficial Police Magistrate holds a separate appointment as a Justice of the Peace for his division. Every Chairman and Vice-Chairman of an Urban District Council is an *ex-officio* J.P., U.P.M., within the administrative limits of his Council.[3]

It will be our endeavour in the next following pages to discuss the law and practice of a Police Court. Generally, a Police Court has powers either to try or to inquire into every thing that is made an " offence " by our legislature. The word " Crime " has received a narrower significance in Ceylon ; and the definition of Crime given by Halsbury as " an unlawful act or default which is an offence against the public and which renders the perpetrator of the act or default liable to legal punishment,"[4] may well be applied to " offence : " for we can safely say that an offence is an act which is made punishable by our legislature, being an infringement of the Criminal law of the Colony. It will be the purpose of this book to describe what acts are so punishable and how they can be punished by a Police Court. Some offences, whether from their gravity or otherwise, are not punishable by a Police Court at all : for these, a short description will be given. A Police Court, whether it has the powers to punish or not, is the first place where all criminal prosecutions begin and a Magistrate, Peace Officer, or a Police Court Practitioner must know as much about non-summary offences as about summary ones.

The word " Crime " includes fourteen varieties of offences only : viz., homicide, attempted homicide, grievous hurt, hurt by dangerous weapons, rape, riot, robbery, burglary, cattle stealing, arson, abduction, exposure of children, theft over Rs. 20 and unnatural offence. Taking these offences as the criteria of crime, the most criminal districts in the Island in 1924 were Colombo city and Kalutara, Kurunegala, Ratnapura, Chilaw, and Tangalle Districts. In 1932 Colombo has still remained the most criminal district, but percentage of crime in the Central and Sabaragamuwa Provinces has appreciably increased. The following table showing the distribution of crime may be interesting :—

---

1. Appointed under section 13 of Ordinance No. 9 of 1895 as amended by section 2 of 22 of 1915, Vol. I, p. 678.

2. Section 28, Ordinance No. 16 of 1865, Vol. I, p. 601.

3. Section 18 of Ordinance No. 11 of 1920, Vol. III, p. 733.

4. Laws of England, Vol. IX, p. 232.

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Province	Homicide	Attempted Homicide	Grievous Hurt	Hurt with dangerous weapons	Burglary	Theft of cattle & praedial produce	Other offences	Total
Western	71	48	336	373	525	271	513	2,137
Colombo City	17	9	153	135	135	15	836	1,330
Central	30	11	105	202	467	45	444	1,304
Sabaragamuwa	41	21	140	200	417	135	346	1,300
Southern	47	15	193	266	342	158	259	1,280
North-Western	48	33	83	196	329	127	383	1,199
Northern	21	9	157	164	81	16	456	904
Uva	6	7	56	32	136	28	143	408
Eastern	8	2	43	67	25	24	180	349
North-Central	5	3	7	16	73	28	141	273
Total								
For 1932	294	158	1,273	1,651	2,560	847	3,701	10,484
For 1931	277	151	1,156	1,594	2,661	854	3,448	10,141
For 1922	202	58	718	1,097	1,682	810	2,478	7,045

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CHAPTER II.

CLASSIFICATION OF CASES.

(i). Summary and Non-Summary.

All cases instituted in a Police Court can be divided into

(i) Summary, and

(ii) Non-summary.

Summary cases are those where a Police Court has the power to try and punish (or acquit) the accused.

Non-summary cases are those where a Police Court's jurisdiction only extends up to a preliminary inquiry, after which the case is committed by the Attorney-General for trial before a higher Court.[1]

Almost all breaches of Ordinances other than the Penal Code are summary unless the Ordinance by special provision excludes the Police Court jurisdiction or confers jurisdiction on a higher Court. This is done, for instance, in certain sections of the Forest Ordinance.[2] Where no Court is mentioned in any law other than the Code, a Police Court can only try such offences as are punishable with six months' imprisonment or a fine of Rs. 100, or under.[3] With regard to the Penal Code, a Police Court can only try such offences as are made cognisable by it. Ordinarily, whenever the assessed value or damage is Rs. 100 and under, the case becomes summary. For instance, theft of a bull valued at Rs. 100, or mischief to a paddy crop where the assessed damage is Rs. 100, or criminal misappropriation of a bicycle valued at that figure, are all triable by a Police Court; but the Penal Code has made certain grave offences non-summary, irrespective of value or damage, *e.g.* arson of a hut valued at Rs. 5, robbery of a silver hair-pin on the high road after sunset valued at 50 cents, and so on. The question whether a particular offence under the Penal Code is summary or non-summary can be determined by a reference to the schedule published at the end of the Criminal Procedure Code.[4] All cases where the last column in this schedule shows a blank or mentions District Court alone, are non-summary: the rest are summary.

It may sometimes happen, as in grievous hurt with a blunt instrument, that the schedule shows both Police Court and District Court. It would then be difficult to determine whether the case is summary or non-summary. When a man is brought into a hospital with a fractured skull and a Magistrate records his dying deposition, the Police may file a plaint as for grievous hurt under Section 316, C.P.C.; but the Magistrate may exercise his discretion and, if the circumstances justify, alter the

---

1. A Draft Ordinance empowering certain Magistrates to commit directly was published in *Gazette* No. 7,841 of 10th April, 1931, but does not seem to have found favour.

2. Section 52A of Ordinance No. 16 of 1907, as amended by Section 2 of Ordinance No. 11 of 1912 Vol. II, p. 753.

3. Section 11, Cr. Pr. Code.

4. Section 10, Cr. Pr. Code.

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plaint to one for attempted murder or for indictable grievous hurt. The distinction, therefore, between summary and non-summary cases even under the Penal Code is sometimes arbitrary.

The old Habitual Criminals' Ordinance of 1914 has now been substituted by Ordinance No. 2 of 1926 as amended by Ordinance No. 27 of 1928.[1] The word "Habitual" is no longer recognized and is replaced by "Registered Criminal" who is defined as a person "who has already been at least twice convicted of a crime[2] and sentenced on those occasions to not less than one year's rigorous imprisonment in the aggregate." If such a person happens to be charged again with a crime[2] a Police Magistrate loses jurisdiction and the case becomes non-summary.

The procedure to be followed continues to be the same as in an ordinary summary case till the close of the case for the prosecution. If after the prosecution is closed, the Magistrate does not discharge the accused and is satisfied that there is a *prima facie* case against him, he will allow the accused to be finger-printed for the purposes of identification, adjourning the case to another date if necessary. If on this next date, the certificate of the Registrar of Finger-prints does not disclose that the accused is a registered criminal (as above defined), the Court Sergeant will tender no evidence on this point before the Magistrate who will proceed to hear the defence. If, on the other hand, the certificate shows that the accused is a registered criminal, the Magistrate will discontinue summary proceedings and commence a non-summary inquiry, tendering the prosecution witness to the defence afresh for cross-examination, etc. The procedure with regard to the production of the certificate of the Registrar in such cases is the same as in any non-summary inquiry. This certificate cannot be produced in evidence against the accused till after he has been committed. In every non-summary case as we shall soon see the accused is committed on an indictment presented by the Attorney-General. After a copy of this indictment is served on him and the accused is committed, he has to be confronted with the certificate of the Registrar and asked in question-and-answer form (which should be recorded and certified on the proper form) whether he admits the convictions as detailed in the certificate. If he does not admit them, the Magistrate must proceed to prove these convictions by calling the Secretary of the Court concerned to produce the record and by establishing the identity of the accused. These proceedings should form no part of the Magisterial record but have to be submitted along with the confidential schedule to the Crown Proctor or the Crown Counsel as the case may be—to be used by him after conviction.

---

1. The rules made by H. E. the Governor under section 4 of Ordinance No. 2 of 1926 will be found in *Gazette* No. 7,685 of 11th January, 1929.

2. Crimes under Ordinance No. 2 of 1926, are :—

	A. Penal Code Sections.		Offence.
1.	From 226 to 256 (inclusive)	..	Offences relating to coin and Govt. stamps
2.	296, 297, 300, 301	..	Murder and culpable homicide, etc.
3.	315 to 324 (inclusive)	..	Hurt by dangerous weapons, etc.
4.	367 to 371 (inclusive)	..	Thefts
5.	373 to 378 (inclusive)	..	Extortion, etc.
6.	380 to 385 (inclusive)	..	Robbery, etc.
7.	387	..	Criminal misappropriation
8.	389 to 392 (inclusive)	..	Criminal breach of trust
9.	394 to 397 (inclusive)	..	Receiving stolen property
10.	400 to 403 (inclusive)	..	Cheating
11.	411 to 426 (inclusive)	..	Mischief, arson
12.	433 to 451 (inclusive)	..	Criminal trespas, burglary, etc.
13.	452 to 466 (inclusive)	..	Forgery

14. An abetment of the above or attempt or conspiracy under sections 101, 490, 11[illegible]A and 113B.

B. Currency Ordinance No 32 of 1884, sections 21 to 23 (inclusive).

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A *reconvicted* criminal is one who has been previously convicted of a crime. A Magistrate can now sentence such a criminal to Police Supervision for any term not exceeding two years in excess of any other punishment. A *registered* criminal cannot be sentenced by a Magistrate at all: he must be committed for trial. If a Magistrate has evidence to show that a person thrice convicted of crime has been sentenced in the aggregate to more than three years' rigorous imprisonment and is leading persistently a dishonest or criminal life,[1] or that he has been previously sentenced to preventive detention, he can ask the Attorney-General to present another indictment against the accused to be used after his conviction in the higher Court.[2] On such an indictment which has to be served on him by the Magistrate the accused can be sentenced by the higher Court to preventive detention for not less than three and not more than five years. If no such indictment is presented, the accused being a *reconvicted* criminal is liable to be sentenced by the Higher Court to Police supervision for four years, or being a *registered* criminal, to extra rigorous imprisonment for two years.

Where one of several accused happens to be a registered criminal the case against him alone is non-summary; and the rest of the accused can be dealt with summarily. If a verdict of conviction has been pronounced against the accused who afterwards is found to be a registered criminal, such verdict is deemed to be null and void. Proceedings should then be commenced *de novo* as in a non-summary inquiry.

The requirements of the Ordinance then are, firstly, that the case being tried or inquired into should be one of crime, secondly, that the accused should have been convicted twice or oftener of crimes and, thirdly, that he should have been sentenced to more than one year's rigorous imprisonment in the aggregate. So that in the following instances the case would still remain a summary one :—

(*a*) Where the accused has had one previous conviction for theft, of 15 months :

(*b*) or two previous convictions ; one for theft, of one year, and another for criminal intimidation, of a fine of Rs. 100 :

(*c*) or two previous convictions ; one for theft, of 4 months, and another for criminal misappropriation, section 386, of 9 months :

(*d*) or two previous convictions : both for theft of 9 months each but where the present case is for an offence not defined as a crime under the Ordinance.

Non-summary cases other than these last mentioned can be tried summarily by a Magistrate—

(i) With consent of the accused, if they are within the jurisdiction of a District Court[3] ; but no cases can be tried with consent where the Supreme Court alone has jurisdiction, nor even where the accused is a registered criminal,[4] nor even where the case is of a very serious character.[5]

(ii) With or without consent, if the Police Magistrate is also a District Judge. Sometimes, as we have already seen, the local District Judge is also the presiding Magistrate : sometimes, a Police Magistrate

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1. See A. G. *vs.* Abdul Rahiman (1932) 1. C.L.W. 368.
2. Ordinance No. 27 of 1928.
3. Section 166 (1).
4. In revision P.C. Panadure 56910 (1910) 4 C.W.R. 123.
5. Ramasamy *vs.* Sinnochchi (1916) 2 C.W.R. 2.

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is specially gazetted as additional District Judge and his Court as an additional District Court, for the purpose of enabling him to dispose of cases under this section. Where a Police Court division, *e.g.*, Panadure, overlaps over two District Court areas, the presiding Magistrate can but be a District Judge of one of these areas (as a District Court must be holden within the District.[1]) Such Magistrates holding dual appointments may dispose of indictable offences summarily; but even they cannot assume jurisdiction in offences triable by the Supreme Court or in cases against registered criminals.[2]

To this subject we shall return in another chapter.

(ii) Cognisable and Non-cognisable.

Cases are further divided into

(i) Cognisable, and

(ii) Non-cognisable.

Cognisable cases are those where a Peace Officer can arrest offenders without a warrant; non-cognisable ones being those where he cannot. In the schedule attached to the Criminal Procedure Code, offences are so described in the third column. In practice, this distinction between cognisable and non-cognisable is seldom or never employed. It serves to show whether a warrant could or could not be issued in the first instance. All private plaints in non-cognisable cases are liable to a stamp duty: cognisable offences being exempt from this fee. In the nature of things, cognisable cases are more important and therefore take precedence over non-cognisable cases in the Daily Trial Roll.

In every Police Court two separate registers are kept, one for cognisable and one for non-cognisable cases: these give a brief summary of every institution. Even where the records are periodically destroyed, an extract from this register showing the necessary particulars may be obtained on payment of the usual fees.

(iii) Compounding.

Cases can also be classified as

(i) Compoundable, and

(ii) Non-compoundable.

Compoundable cases are those where the parties, without the intervention of the Court, settle their disputes amicably among themselves. In non-compoundable cases, they cannot do so. There is an intermediate class of offences which can be compounded with the permission of the Attorney-General.

The word "compounding" is not defined by our legislature. It means, ordinarily, that the person against whom the offence is committed has received some *quid pro quo*, not necessarily a pecuniary gratification, as an inducement for his desiring to abstain from prosecuting the accused and getting him punished by a Court of Law.

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1. Section 55 of the Court's Ordinance, Vol. IV, p. 376.

2. Anthony Appu *vs.* Noordeen. 1916) 19 N.L.R. 223. See Nadarajah *vs.* Gopalan (1930) 32 N.L.R. 115 : 8 Times L.R. 71.

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The complainant may have received adequate compensation for the harm done to him ; or the accused may contribute a certain sum to a benevolent or charity fund ; or the accused may apologise or express regret to the complainant or undertake not to molest him in future. Sometimes, a complainant is satisfied, as in the Jaffna Peninsula, if the accused "takes an oath" (usually on camphor) denying the charge. It must be noted, however, that though there is provision[1] for an accused person to challenge the complainant or any of his witnesses to take an oath, there is no provision and therefore no obligation for the accused himself or any of the witnesses for the defence to take an oath.[2] The absence of parties from the Court-house on the day appointed for trial would virtually denote that the case has been compounded out of Court. A complainant can withdraw his case under section 195 with the permission of the Magistrate if it is a compoundable offence ; but it is competent to a Magistrate, after the accused has pleaded, to refuse to allow the charge to be withdrawn, notwithstanding the fact of the offence having been compounded.[3]

Among the offences that can be compounded with the sanction of the Attorney-General, the most frequent are :—

(i) Hurt with a knife, section 315 C.P.C.

(ii) Grievous hurt by a blunt weapon, section 316 C.P.C.

(iii) And maiming, section 412 C.P.C.

The parties who desire this sanction must submit to the Magistrate a joint petition addressed to the Attorney-General mentioning the special circumstances which would justify the granting of the permission.[4] If the Attorney-General does not sanction the compounding, the case must proceed to trial in due course. Non-compoundable cases cannot be compounded under any circumstances. If a complainant is absent in such a case, his attendance can be compelled by issuing a warrant, though he cannot be dealt with as for contempt of Court.[5] In petty cases, however, a Magistrate may under section 325 of the Procedure Code merely warn the accused and order him to be discharged after necessary admonition without proceeding to trial, or may treat him as a first offender and order him to find bail for good behaviour. Non-compoundable cases are sometimes compounded indirectly, being then treated as having been instituted under a mistake of fact or law : thus, a man who prefers a charge against another of having issued a cheque without funds, or of having misappropriated his jewellery lent to him for the purpose of a wedding, loses further interest in the case if the money is repaid or the jewellery returned. The accused under such circumstances, though virtually guilty, can hardly be convicted for the belated repayment.

A compounding has the same effect as an acquittal.[6] Thus, it will be a bar to a further prosecution for the same offence, being as good a plea as that of *autrefois acquit*. In order to be effective, however, the compounding should be clear and unmistakable and the minds of the parties should be *ad idem*. Undue pressure of a Headman or of an out-

1. Section 9 of Ordinance No. 9 of 1895.

2. Mohamado *vs.* Kiri Banda (1930) 3 C.A.R. (Gratiaen's) 108.

3. Louis *vs.* Davit (1892) 2 C.L.R. 57.

4. In Police prosecutions a sum of Rs. 5 should be deposited by the parties, along with the petition, by way of medical fees, where a Government Doctor has examined the injured person. This sum is refunded to the parties if the permission to compound is refused.

5. In revision P.C. Kandy 16800 (1917) 4 C.W.R. 174.

6. Section 290 (5) Cr. Pr. Code.

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sider might vitiate the full force of a free and voluntary settlement; unequivocal consent of the parties is necessary. As per Trevelyan, J.[1]: "unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or compounding." But once a case is compounded, the complainant has no option: he cannot ask a Magistrate to re-open his case.[2] He cannot "eat his loaf and as well keep it."[3]

(iv) Bail.

Offences are further divided into

(i) Bailable, and

(ii) Non-bailable.

"Bail means the freeing or setting at liberty one arrested or imprisoned, upon others becoming sureties by recognisance for his appearance at a day and place certainly assigned, he also entering into his own recognisance."[4] Bailable offences are those where bail could be ordered; non-bailable being those where, as of right, bail cannot be demanded.

Ordinarily, all seemingly simple offences are bailable; and even where the offence is non-bailable a Magistrate is given ample discretionary powers by the Procedure Code.[5] In bailable offences, the bail may be claimed as of right and not merely as a matter of favour,[6] (unless the Court has a special right of detention for any other lawful purpose): for the section says that if the accused is prepared at any time to give bail, "he *shall* be released on bail." He may, however, be discharged in his own recognisance without sureties, or he may be allowed to remain out without any bail whatever.

In non-bailable cases, the accused has no right to demand bail; but a Magistrate may, in his discretion, admit him to bail. If, however, it appears to the Court that there are not reasonable grounds for believing that the accused has committed the offences with which he is charged, the accused has a right, pending further inquiries, to demand bail. The new section[7] reads as follows:—"A Police Magistrate or District Judge, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence, but he shall not be so released if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable under sections 114, 191 or 296 of the Penal Code." These are the only three sections of the Code which provide the extreme penalty of the law. Even in these cases the accused may now be admitted to bail pending inquiry by a Magistrate if the case against him is not very strong; but a Magistrate's discretion ceases, after committal, in cases punishable with death.[8] The Attorney-General may, however, direct that persons indicted or

1. Murray, I.L.R. 21 Cal. 103.

2. Kulanthavelu *vs.* Chelliah (1905) 5 Tam 64.

3. It is curious that in England to compound an offence is itself an offence: and therefore it is criminal to agree not to prosecute, it being regarded as a conspiracy to prevent the course of justice. But this would apply, I think, to felonies and only to grave misdemeanours.

4. Sohoni's Indian Criminal Code, p. 1048.

5. Section 395 Cr. Pr. Code as amended by Ordinance No. 19 of 1930.

6. 6 Central Province Reports (1892) 31.

7. Ordinance No. 19 of 1930.

8. Sections 114 (waging war against the Crown), 191 (fabricating false evidence in a case of murder) and 296 (murder).

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charged with these offences may be released on bail. The Supreme Court's powers of admitting persons to bail are unlimited[1] except in those rare cases where an appeal has been lodged to His Majesty in Privy Council.[2] The Supreme Court in considering an application for bail takes generally into account the wishes of the Magistrate and even in ordering bail leaves the amount to be fixed by him. Where the Crown opposes the application, the Supreme Court will not grant bail to a person charged with murder unless special grounds have been adduced.[3] An important consideration in an application of this nature is whether the case is *prima facie* a strong or a weak one against the applicant.[4]

When an accused appears on summons, no bail is usually taken: it is only when he is arrested or produced or surrenders on a warrant that he is asked to find a surety.[5] Rs. 200 with one surety is commonly considered a reasonable amount for a summary offence, but the amount is always a matter of the Magistrate's discretion. A report of worth certified by a Headman is necessary in order to show that the surety is a man of means. A stamped affidavit of worth is sometimes accepted. The Supreme Court has condemned the practice of a Proctor standing bail for his client.[6]

It is the function of the Magistrate to hear and determine objections raised by the Police against the granting of bail in non-bailable cases. The commonest objections are—that the accused would tamper with the witnesses, that he is a dangerous character, that he would dispose of stolen property (if any property is stolen), and that he might commit another offence against property in order to find means for his defence. These grounds are no doubt weighty in themselves but do not touch the root of the principle laid down in the Code, viz., that there should " appear reasonable grounds for believing that he has been guilty of the offence of which he is accused." Our Supreme Court in one of the older cases[7] has gone a step further and said, " The principles according to which judicial discretion as to bailing or not bailing should be exercised are well stated in Burn's Justice. It is truly pointed out that the test is to consider the probability or improbability of the accused persons appearing to take his trial or absconding; and not merely to consider whether he seems to be innocent or guilty; although this last mentioned consideration forms one of the elements of the true test. To adapt the words of the Editor of Burn, the enormity of the offence—the rank and station of the accused—the presumption of his guilt or innocence—the severity of the punishment for the crime charged, may all be taken into consideration in estimating the probability." In other words, " bail is not intended to be punitive."[8] Where an accused is entitled as a matter of right to bail, a Magistrate would not be justified in refusing it merely because he thinks that the accused would make

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1. The King *vs.* Toussaint (1909) 14 N.L.R. 65.
2. The King *vs.* Loku Nona (1908) 11 N.L.R. 119.
3. Rex *vs.* Velupillai (1931) 33 N.L.R. 378.
4. In *re* bail P.C. Dandagamuwa 12412 2 C.L.W. 246.
5. See however section 289 (4). This empowers a Magistrate, even where the accused has appeared on summons, to enlarge him on his own recognizance and the explanatory note to this sub-section empowers him even to remand.
6. A.S.E. *vs.* Velupillai (1923) 25 N.L.R. 65.
7. Regina *vs.* Ariacooty, Ram. (1863-8) 156 Full Bench.
8. Per Russel, L.C.J. In *re* Charles Rose 14 Times L.R. 213.

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a bad use of his liberty, if allowed to be at large until the trial.[1] Where there are long and frequent postponements, the Supreme Court has urged the necessity of admitting the accused to bail[2] ; and where an appeal is lodged against a conviction, the Lower Court is bound to make an order for the release on bail of every convicted person who prefers an appeal : even registered criminals are not excluded from the privilege granted by this section.[3] An accused, who is enlarged on bail and who behaves thereafter in a drunk and disorderly manner, does not thereby lose his right to liberty.[4] In an American case,[5] it has been held that even in murders, if facts do not sustain the charge, bail may be allowed unless " the proof be evident and presumption great."

Police and Excise and S. P. C. A. officers are given powers to admit to bail for appearance before a Police Court persons whom they arrest for committing various offences : such bail-bonds have the same effect as if they were executed by the orders of the Court.

The accused who fails to appear after giving bail loses his freedom[6] and forfeits his bond.[7] A witness, similarly, who has signed a recognisance for appearance at the trial before a higher Court forfeits his bond by non-appearance either on the trial day or on any subsequent date to which the trial has been adjourned.[8] The surety similarly forfeits his bond if the accused does not appear in pursuance of his undertaking. Where a case is laid by and the accused is asked to appear when noticed, the surety is not liable to the forfeiture if the accused fails to appear as notice could not have been served on him.[9] But his liability is not terminated if a case is laid by pending the institution of civil proceedings.[10] And a surety who has stood bail for another for his appearance to abide the judgment in appeal incurs the penalty if the accused absconds and therefore cannot be served with notice of judgment[11] : unless it is made to appear that the accused is not purposely evading or making default.[12] When the bail-bond of a surety is once forfeited and the penalty or a portion of it exacted, the bond becomes *ipso facto* exhausted ; it is therefore not open to the Court to declare a further forfeiture and exact a further penalty for a subsequent default of appearance on the part of the accused.[13] In any event, a surety's bond cannot be confiscated unless he is given an opportunity of showing cause against the forfeiture.[14] And if a surety is given time to produce the accused and the accused in the meanwhile is produced or surrenders to Court, the default of the surety gets condoned by the allowance of further time and his bond cannot be forfeited.[15]

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1. P.C. N'Eliya. 8110 (1871) Van. 284.
2. Maclean *vs.* Appan Kangany (1896) 2 N.L.R. 54.
3. Section 341 Cr. Pr. Code ; see the King *vs.* Don Martin (1923) 25 N.L.R. 113.
4. Elworthy *vs.* Kandasamy (1915) 1 C.W.R. 93.
5. People *vs.* The Sheriff of Westcester 1 Park 159.
6. Section 65 Cr. Pr. Code.
7. Section 411 Cr. Pr. Code.
8. The King *vs.* Ukkuwa (1916) 2 C.W.R. 203.
9. Chunalice *vs.* Saundias Appu (1924) 26 N.L.R. 101.
10. The King *vs.* Lawrence (1924) 3 Times L.R. 20.
11. Brown *vs.* Packeer (1924) 26 N.L.R. 379.
12. Murugaiyah *vs.* Muttiah (1913) 1 Wije. 9.
13. Arumugam *vs.* Downall (1920) 2 C.L.R. 104.
14. Modder *vs.* Ismail Lebbe (1905) 8 N.L.R. 1904.
15. Ins. Police *vs.* Punchi Banda (1933) 2 C.L.W. 136.

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It is within the discretion of the Court, even after ordering forfeiture, to remit any portion of the penalty for sufficient and valid reasons.[1]

Where the default of the accused is wilful, his bail-bond can be forfeited without notice to him ; and it is not necessary to excuss his property before the surety can be held liable under the recognisance.[2]

A surety may at any time during the pendency of the bond move to cancel his bond or to surrender the accused ; the Court may thereupon call the latter to find a fresh surety.

Where bail is refused or where the accused is unable to furnish the bail that is ordered, he is remanded to Fiscal's custody. The practice of a remand to Police custody, though often resorted to for the purposes of further inquiry, does not appear warranted by our Procedure Code.[3] No Magistrate can remand any person for a longer term than fourteen days at any one time (or longer than seven days in stations where there are local jails)[4]; but the number of times that a person can be remanded is unlimited though it should not be great : a Magistrate cannot, however, remand any person for further investigations for a longer term than fifteen days in all. No Peace Officer can detain in custody any person arrested without a warrant for a longer period than twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the nearest Police Court.

A bailee has a right to deposit security in cash in lieu of signing a bail-bond.

(v) Sundry.

Offences can again be grouped into

(i) Those punishable by the Code, and

(ii) Statutory offences.

There is not much difference in procedure between the two : but the latter are mostly non-cognisable. Whereas under the Penal Code a Magistrate's powers of punishment are limited, a large number of ordinances empowers him to impose very heavy fines.[5] Further, a Magistrate cannot punish for an attempt to commit a statutory offence[6] unless the Ordinance specially provides in that behalf.[7]

Offences can also be classified as

(i) grave crimes, and

(ii) simple offences.

This distinction is merely of academical interest ; and the real criteria of gravity have been considered in the last five classifications.

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1. Section 411 (4) Cr. Pr. Code.

2. The King *vs.* Seyna Packir (1924) 3 Times L.R. 17.

3. Section 162 A (2) as amended by Ordinance No. 31 of 1919.

4. Section 289 (2) Cr. Pr. Code empowers a remand only for seven days except in Police Courts which are specially proclaimed. In practice, the rule is mostly as stated above ; but "Jaffna" is specially proclaimed.

5. Though the amount of the fine is heavier, the term of imprisonment ordered in default is less and rarely exceeds six weeks.

6. Kachcheri Mudaliyar *vs.* Mohamado (1920) 21 N.L.R. 369.

7. In England an attempt to commit a misdemeanour would still be a misdemeanour. Reg. *vs.* Hensler 11 Cox 570.

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CHAPTER III.

INSTITUTION OF CASES.

Cases are instituted in a Police Court in one of the following ways :

(I) Police Plaints.

These are by far the most common except in Courts (like Point Pedro) where there are no Police Stations.

Every offence in Ceylon is reportable to the Police who, after making the necessary inquiries and satisfying themselves that a *prima facie* case is made out, file a plaint in Court. In all crimes like theft, robbery, hurt, arson, murder, and so forth, it is the Police who usually prosecute, though there is nothing to prevent any private individual from filing his own plaint. There are certain distinct advantages if the Police prosecute :

(i) The nominal complainant being a Police Officer, the complainant cannot be dealt with under Section 197 Cr. Pr. Code for bringing a false and vexatious case, if the case is afterwards held to be false.[1] The reason is that the legislature must have thought that the Police would not institute cases without having previously made due inquiry and satisfied themselves that there was a real substantial case which ought to be dealt with by a Police Court.[2] But the complainant does not escape liability if the Police are a mere medium of communicating the complaint of the party aggrieved to the Court, and where therefore the complaint is virtually by the party concerned.[3] In order to claim the benefit, the plaint must have been filed by a Peace Officer ; in other words, the proceedings should have commenced under section 148 (i) (b) of the Procedure Code.[4]

(ii) Some cases which would be ordinarily referred to a Village Tribunal cannot be so referred ; a Police Officer having " no nationality " is not in the abstract subject to V. T. jurisdiction ; and the mere accident of nationality of the particular officer who appears to support the charge does not determine the question of jurisdiction.[5] If, however, the offence is solely within the jurisdiction of a V. T. (*e.g.* gambling as distinguished from unlawful gaming), the fact that a Police Officer files a plaint does not oust the V. T. jurisdiction. But section 61 of the new V. T. Ordinance of 1924 now empowers a Public Officer to prosecute in Police Courts even in cases which are solely triable by a V. T.[6]

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1. There are numerous decisions on this point, see specially The King *vs.* Cornelis (1921) 22 N.L.R. 501 or Samarasinghe *vs.* Appuwa (1914) 2 C.A.R. 17.

2. Kuttalan Chetty *vs.* Ina Muttu (1896) 1 N.L.R. 326 and Mendis *vs.* Carlinahamy (1900) 4 N.L.R. 341.

3. Perera *vs.* Ukkuva Veda (1920) 1 Law Recorder 177.

4. See Gunaris *vs.* James Appu (1918) 5 C.W.R. 189.

5. Burah *vs.* Siniah (1917) 19 N.L.R. 383.

6. See Chapter on conflict with Village Tribunals, Infra.

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(iii) For a Police plaint, all the Crown witnesses, *e.g.* the Doctor, Ratemahatmaya or Maniagar, Vidane and others are summoned at the expense of the Crown.

(iv) If an intelligent Police Officer is in charge of a Station, he, and failing him the Court Sergeant, will generally conduct the prosecution, thus obviating the necessity of the complainant's retaining a lawyer to watch his interests.

(v) For the absence of the complainant from Court, though a warrant may issue, the accused cannot be readily acquitted.[1] If the Police Officer himself is absent, he incurs the risk of being reported to his immediate superior; but the case nevertheless proceeds.

(vi) No Police plaint need be stamped.

(vii) Police plaints do not "abate" on the death of the complainant.[2]

(viii) The question whether an action for damages for malicious prosecution after an acquittal in a Police plaint can lie against the actual complainant has not yet been finally decided. Though there is an obiter dictum of 1883[3] to say that if the Inspector himself had reasonable and probable cause for charging the defendant, it mattered not if some one else falsely and maliciously induced him to make the charge, a later decision states that an *actio injuriarum* of the Roman-Dutch law can lie against a person who with the necessary intent puts the law in motion though he may not institute proceedings in the Court.[4]

(ix) Lastly, a Police case being generally regarded as a case of some importance is usually given preference over other trials, is speedily disposed of and gathers round it, so to say, a halo of sanctity.

Thus, it is both advisable and safer to entrust one's case to the hands of the Police, provided it is a type of case which the Police would ordinarily take up. All cognisable offences the Police are bound to take up under section 121 (1) of the Criminal Procedure Code. In non-cognisable cases, *e.g.* cheating, the Police must have authority under section 129 (1) Criminal Procedure Code from a Magistrate, before they could investigate or file plaints. This authority is a mere matter of form but appears to be indispensable.

In certain cases the Police alone prosecute, *e.g.* all motoring offences, prosecutions under the Police Ordinance for being drunk and disorderly, or those under the Vagrants' Ordinance, and so forth; though even here, a private individual's right to prosecute for any injury or harm done to himself or his belongings is not taken away.

In all Police plaints, the prosecuting officer is usually the Police Officer. The complainant may retain his own Counsel to advise and direct the Police Officer; but no Counsel other than a Crown Counsel or a Crown Proctor can himself conduct a prosecution in a Police Court,

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1. Section 194 Cr. Pr. Code applies to private plaints under section 148 (1 *a*) only. A discharge in a Police plaint for absence falls under section 191—so that though a fresh plaint can be filed, the proceedings cannot be re-opened. See Rosario *vs.* Silva (1932) 2 C.L.W. 121.

2. Ameratunge *vs.* Perera *et al* (1931 32 N.L.R. 310.

3. Lebbe Marikar *vs.* Adumay Sarango 5.S.C.C. 230.

4. Appuhamy *vs.* Appuhamy *et al* 21 N.L.R. 436.

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unless he is specially authorized by the Attorney-General, to appear and conduct the prosecution.[1] In practice, however, this rule is relaxed.

When any offence is committed, the person wronged must at once lay information if possible at the nearest Police Station, leaving it to the discretion of the Officer-in-charge to investigate and take the necessary steps. If the Police fail to prosecute, the private party's right of proceeding against the wrong-doer is not thereby extinguished. A Police Officer cannot prosecute in certain cases, a list of which is given in section 147 (1) of the Criminal Procedure Code, without the previous sanction of the Attorney-General, unless the Police Officer is himself both the nominal and the virtual complainant. In defamation or criminal libel,[2] keeping[3] a lottery office and uttering words with intent to wound the religious feelings of another person,[4] the permission of the Attorney-General is a *sine qua non*. In forgery[5] committed or discovered during the pendency of a civil or criminal suit, the authority of the Court, where the forgery was committed or discovered, can be substituted for that of the Attorney-General. The same applies to cases of false evidence and offences against Public Justice.[6] In cases of contempts[7] of the lawful authority of Public Servants, the Police cannot file plaints unless they are themselves the public servants whose authority has been wronged. If a constable has been obstructed or resisted, the plaint should be filed in his name or in the name of his immediate superiors : but not in the name of another constable.

With these reservations and the exception above referred to in the case of non-cognisable offences, there is no limitation to the right of the Police in filing plaints. The Police usually, however, do not take up ordinary cognisable cases which are not regarded as cases of grave crime, unless the accused persons or one of them is a registered criminal, or unless the offence has taken place in a town properly so called. In all cases against the Excise laws of the Colony barring the Opium Ordinance, it is customary, though not necessary, for an Excise Officer—not a member of the Police force[8]—to prosecute.

The discretion of the Police in undertaking a prosecution is unfettered. The Police are mostly guided by the evidence produced before them by the complainant, by the witnesses and facts discovered by them in further investigations, and by the statements, often verified, of the accused persons. As in the nature of things they cannot have before them a true version of the defence story, every Police case cannot, and need not necessarily, result in a conviction.

If the plaint filed by the Police is for an offence which is summarily triable, the Court can and usually does issue summons or warrant on the accused, as the case may be, without recording any evidence.[9] In all breaches of Ordinances and in all minor offences under the Penal Code, summonses are ordinarily issued, unless the accused having given

1. Section 199 Cr. Pr. Code.
2. Chapter 19 of the Penal Code.
3. Section 288 C.P.C.
4. Section 291 C.P.C.
5. Sections 452, 459, 463, 464, C.P.C.
6. Sections 190, 191, 192, 193, 196, 197, 202, 203, 204, 205, 206, 207, and 223 in Chapter XI C.P.C.
7. Sections 170 to 185 in Chapter X of the C.P.C.
8. Miskin *vs.* Fernando (1914) 2 C.A.R. 34.
9. Section 149 (2) Cr. Pr. Code.

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bail before the Police fail to appear in Court on the appointed day: in all grave cognisable offences, a warrant can issue in the first instance. The issue of a warrant or of summons is entirely within the discretion of the presiding Magistrate.

If the plaint discloses a non-summary offence, the Magistrate must record the evidence of the complainant and all witnesses who are present in Court before issuing process. This evidence must be read over and signed by the witnesses and countersigned by the Interpreter Mudaliyar with a certificate[1] that the evidence has been so read and explained in the presence or absence of the accused, as the case may be, and admitted by the witnesses to be correct.[2] Failure to examine the complainant does not vitiate the proceedings[3]; but failure to have the depositions read over, interpreted and signed by witnesses makes them inadmissible under section 33 of the Evidence Act.[4]

If the accused is produced in custody along with the plaint, our Code says[5] that the officer producing him should be forthwith examined; but failure to do so is not a fatal irregularity.[6] The Supreme Court has recommended that, whenever possible, an inquiry officer should be examined after all the evidence for the prosecution has been led.

When the Officer-in-charge of a Police Station is satisfied after necessary investigations, either by himself or through one of his subordinates, that there is not sufficient evidence or reasonable grounds of suspicion against the accused, or that the information is not well founded, he may report the result of his investigations to the nearest Police Court (instead of filing a plaint); while so doing he may forward the accused if any, in custody, to the Court, if he has not already enlarged them on bail.[7] There is also a statutory duty on every Peace Officer (which term includes a Police Officer) to report forthwith to the nearest Police Court, any information received by him regarding the commission of any offence, or the occurrence of any sudden or suspicious death, or the finding of any dead body in suspicious circumstances, within the limits of his local jurisdiction.[8] There is a further statutory duty to report every arrest effected without a warrant by any Police Officer.[9] Failure to perform any of these statutory duties would render the officer liable in some cases to punishment as for disobedience of a positive direction of law.[10]

(II) Headmen's Reports.

What we have said above with regard to the Police applies, *mutatis mutandis* but with lesser force, to prosecutions by and at the instance of the village Headmen. Vidanes are the usual prosecuting officers in Village Tribunals, so that their activity in a Police Court remains

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1. Section 299 (5) Cr. Pr. Code as amended by Ordinance No. 31 of 1919.
2. The absence of a certificate does not vitiate the evidence, but only absolves the witness from liability to conviction for perjury in the higher Court if he were to contradict his original statements at the subsequent trial, Rex. *vs.* Heeni Appu (1908) 1 Weer. 29.
3. Codrington *vs.* Kandappuhamy (1915) 1. C.W.R. 236.
4. See Parupatham *vs.* Kandiah (1928) 30 N.L.R. 142.
5. Section 149 (4) Cr. Pr. Code.
6. Supdt., Dea Ela Estate *vs.* Mudalihamy (1915) 1 C.W.R. 216.
7. Section 126 Cr. Pr. Code.
8. Section 22 Cr. Pr. Code.
9. Section 38 Cr. Pr. Code.
10. See section 214 C.P.C.

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limited to such cases as affray, or using obscene language on the public roads, or possessing firearms, and so forth. They may, however, prosecute when their authority has been abused or when they have been obstructed or resisted while in the discharge of their duties. They are "Excise Officers"[1] and can therefore prosecute in Excise cases. They can also prosecute for breaches of the Police Ordinance.[2] Village Headmen are directed to report any crimes that occur within their division both to the nearest Police Station and to the Police Court; they are supplied with a Serial Report Book with foils and counterfoils for this purpose. They are also supplied with diaries in which every complaint made to them and a summary of facts disclosed during their inquiries must be recorded.

(III) Reports by Public Servants.

Public servants include not merely all officers of the Government but also of semi-Government institutions, like Local Boards, Municipalities, Sanitary Boards, and Urban District Councils. The offences for which plaints are filed by such officers are vast and varied, but all of a simple nature. Breaches of bye-laws or offences against the licensing laws or offences under the Registration of Births and Deaths' Ordinance or the Vaccination or the Schools' Ordinance form by far the majority of such cases.[3] Sometimes a Government Agent prosecutes for encroachments on Crown soil, or a Forest Officer files a plaint for an offence under the Forest Ordinance. In all cases the prosecution can be initiated by an ordinary report to Court under section (148) (1) (b).[4]

In Municipal towns, viz., Colombo, Kandy, and Galle, plaints by Municipal Officers must be filed in the respective Municipal Courts. In Kandy and Galle, the local Police Magistrate is also the *functus officio* presiding over the Municipal Court; but, in Colombo, the two Courts sit apart with separate Magistrates presiding over each.

Nearly all offences[5] other than offences against the Penal Code must be prosecuted for in the Municipal Courts whether the prosecuting officers be the Police or officers of the Municipality. It is thus that "the day's motoring chapter" in Colombo finds its finale in the Municipal Court.

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1. Ratnayake *vs.* Dionis (1913) 1 Bal. Notes 102.

2. Police Headman *vs.* Joseph (1923) 1 Times L.R. 238.

3. Special days, usually Saturdays, are set apart in many Police Courts for the disposal of such or similar plaints.

4. Lushington *vs.* Mohamado (1913) 16 N.L.R. 366.

5. Section 54 of the Municipal Council's Ordinance No. 6 of 1910 may in this connection be quoted *in extenso* :—

"(1) In every Municipal town there shall be a Municipal Magistrate who, unless the Governor otherwise appoints, shall be the Police Magistrate having jurisdiction in such town.

The Municipal Magistrate shall hear, try and determine any offence committed within the Municipality in breach of any Municipal bye-laws or under this Ordinance, and also any offences under any of the Ordinances (or under any enactment amending the same) mentioned in the first and second column of the following tabular statement which are shown in the third column thereof as triable by a Municipal Magistrate and shall have jurisdiction to award such punishment to the offender as is authorized by law.

Tabular statement of offences triable by Municipal Magistrates :—

No. and Year of Ordinance.	Title or Short Title.	Offences triable by Municipal Magistrates.
4 of 1841 ..	To amend the laws relating to vagrants	Any offence under the Ordinance
10 of 1861 ..	To amend the laws relating to public thoroughfares in the Colony	"
15 of 1862 ..	For the better preservation of Public Health and the suppression of nuisances	"
13 of 1864 ..	Regulating the sale of bread and preventing its adulteration ..	"
16 of 1865 ..	For the establishment and regulation of a Police Force in the Island	"
20 of 1865 ..	To provide against the removal of stones and other substances from certain parts of the sea-shore	"

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(IV) Private Plaints.

By far the commonest method of prosecuting is a plaint by a member of the general public. Any person who is wronged either in person or in property has two courses of action left open to him ; either he can report to the nearest Police Station (either directly or through the Headman) or appear in Court and make his own complaint. In the latter event, our Procedure Code says that " in the case of an indictable (*i.e.* non-summary) offence such complaint shall be made orally and in the case of a summary offence such complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant." In practice, this rule is observed more in the breach than in the performance. For, written complaints drawn and countersigned by pleaders are rare, even though pleaders appear in the case. What is commonly done is the submission of what is known as a " Caption " on something like the following form :—

" In the Police Court of..

No............

Kalu Banda
vs. complainant
1. Sudu Banda
2. Loku Banda
accused.

Offence : Section 367 C.P.C.
Date of offence : 1st January, 1925.
This 15th day of January, 1925.
Kalu Banda affirmed."

* * * *

No. and Year of Ordinance. (Repealed by No. 12 of 1911)	Title or Short Title.	Offences triable by Municipal Magistrates
8 of 1866 ..	To provide against the spread of contagious diseases in the Island	Any offence under the Ordinance
3 of 1871 ..	For regulating measures used in sales of gas	,,
8 of 1876 ..	To amend the laws as to weights and measures	,,
14 of 1876 ..	To amend the last named	,,
2 of 1883 ..	The Ceylon Penal Code	Sections 257, 258, and 259
27 of 1884 ..	To provide for the due protection of wells and artificial pits in this Colony..	Any offence under the Ordinance
20 of 1886 ..	To amend the law relating to vaccination	,,
5 of 1889 ..	For the suppression of Brothels	,,
7 of 1889 ..	To amend the law relating to vagrants	,,
8 of 1889 ..	Relating to Quarries	,,
15 of 1889 ..	Relating to Land Surveyors, Auctioneers, and Brokers ..	,,
17 of 1889 ..	Relating to gaming	,,
9 of 1891 .. (Repealed by No. 25 of 1900)	Relating to cattle disease	,,
12 of 1891 .. (Repealed by No. 8 of 1912)	To consolidate and amend the Licensing Ordinance of 1873 and 1877	,,
7 of 1893 ..	Relating to Rabies	,,
9 of 1893 ..	To amend the laws relating to Butchers and the slaughter of cattle	,,
3 of 1896 ..	To consolidate and amend the law in respect of the collection of Tolls	,,
9 of 1899 ..	The Cemeteries and Burial Ordinance, 1899	,,
4 of 1900 ..	To consolidate the law regulating the carriage of passengers and goods by boat	,,
9 of 1901 ..	To amend and consolidate the law relating to carriages, carts, and coaches	,,
13 of 1907 ..	The Prevention of Cruelty to Animals Ordinance	,,

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If no such caption is submitted by the complainant or his Proctor, the Interpreter Mudaliyar of the Court usually prepares one. Headmen's reports, if any, duly translated and Doctors' certificates, etc., must be filed along with the captions. On the submission of the caption-paper, the Magistrate commences to record the evidence of the complainant and of his witnesses, if any, present in Court. In simple cases, process can be issued against the accused forthwith : in other cases, a Magistrate may require[1] that further evidence may be adduced before process is issued : the complainant may, if he likes, apply for and obtain summons on his witnesses for this purpose.[2] A Magistrate cannot refuse to issue process after perusing the plaint without recording the evidence led on behalf of the complainant.[3]

Every private plaint, if it does not disclose a cognisable offence, must bear a stamp of 30 cents ; another stamp of 18 cents for each accused is necessary for the purpose of issuing summons on the accused ; except in maintenance cases where stamp duty may be waived.

The complainant, at the time that he makes his complaint in Court, must state all relevant and pertinent facts material to his case. Thus, in a case of theft of a bull, he must state when and how it was stolen and by whom, the names of his witnesses and the value of the animal. In a case of abuse or insult, he must state not merely that he was abused but he must repeat the very words of insult that were used against him.[4] In a case of mischief, he must state not merely the nature of the mischief complained of but also the amount of the damage caused to him.

It is hardly realized that section 150 of the Criminal Procedure Code requires that the examination held under the preceding section shall be reduced into writing, shall be read and, if necessary, interpreted to the deponent, and shall be signed by the person examined and also by the Magistrate. The failure to observe any of these requirements will render the deposition useless and cannot be treated as evidence in the case[5] ; so that if the deponent afterwards changes his story, the original evidence cannot be taken into consideration for convicting the accused.[6]

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(2) The Governor in Executive Council may, from time to time, by order in the Government Gazette, extend the jurisdiction of Municipal Magistrates to offences not comprised in the forcgoing statement. This has been done in the following offences created after the promulgation of this Ordinance :—

No. and Year of Ordinance.	Title or Short Title.	Offences triable by Municipal Magistrates.
25 of 1901 ..	The Dog Registration Ordinance	Any offence under the Ordinance
27 of 1906 ..	The Guides' Ordinance	,,
38 of 1908 ..	The Colombo Suburban Dairies and Laundries Ordinance ..	,,
7 of 1912 ..	Public Performances Ordinance	,,
19 of 1915 ..	Housing and Town Improvement (Gazette No. 7,786 of 20th June, 1930)	,,
4 of 1916 ..	Vehicles	,,
21 of 1919 ..	Criminal Law Amendment	,,
1 of 1920 ..	Education	,,
20 of 1927 ..	Motor Cars	,,

(3) The Municipal Magistrates of Galle and Kandy have jurisdiction under the Ordinance itself and in all those Ordinances which are specially proclaimed for them.

1. Section 149 (1) Cr. Pr. Code.
2. A stamp of 18 cents is necessary for the issuing of every summons to a witness.
3. Gunijee *vs.* Silva (1895) 2N.L.R. 85.
4. Sabaratnam *vs.* Perera (1916) 3 C.W.R. 120.
5. Cadasar *vs.* Muttamma 3 Browne 93.
6. Parupatham *vs.* Kandiah (1928) 30 N.L.R. 142

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Plaints are liable to be rejected :

(1) if the complainant's evidence discloses no offence ;

(2) if the offence disclosed is of the nature of a civil dispute which can be better settled in a Civil Court ;

(3) if the complainant's evidence, when required, is not corroborated by other testimony ;

(4) if the offence falls within any of the general exceptions narrated in Chapter III of the Penal Code ;

(5) if the offence is prescribed ;

(6) or, if the offence is within the sole jurisdiction of a Village Tribunal or a Village Council.

If a plaint is accepted, process is issued and the case proceeds to trial in due course.

(V) Mandates.

These are of three kinds :

(*a*) Mandates of the Attorney-General.

We have seen above that a certain class of cases cannot be instituted at all without the previous sanction of the Attorney-General. The party aggrieved must therefore petition to the Attorney-General who, after making due inquiries, will give the necessary sanction. Or, the Attorney-General may of his own motion institute an action. The want of Attorney-General's sanction where such sanction is necessary is not fatal to a conviction where it has not occasioned a failure of justice,[1] and especially, where no objection has been taken in the Court below.[2] Where a prosecution for giving false information against a Vanniah was based on a report made by the Police on the face of which was an endorsement signed on behalf of the Government Agent by the Office Assistant to the effect that the prosecution was authorized, it was held that as complaint was not made by the officer concerned, the Attorney-General's sanction was necessary, but section 425 excused the want of jurisdiction where it had not occasioned a failure of justice.[3] A District Court before whom an indictment is presented at the instance of the Attorney-General is not competent to inquire whether the proceedings which culminated in the committal were regularly instituted or regularly conducted.[4]

Where certain offences, *e.g.* forgery or perjury, are committed by parties to a case, the Attorney-General's sanction is necessary, unless the prosecution is instituted at the instance of the Judge in whose Court the offences are committed.[5] The phrase "parties to a case" is to be construed literally. Thus, a Police Vidane who adds the name of a witness to a crime report after the same is duly sent to Court is not a party to the case ; and hence, the Attorney-General's sanction is not required for his prosecution.[6] A person who offers himself as surety for an accused person is not a party to a case.[7]

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1. (1906) Lem and Aser 48.
2. Rodrigo *vs*. Fernando (1909) 1 Cur L.R. 129.
3. The Inspector of Police *vs*. Meera Saibo (1916) 3 C.W.R. 149.
4. The King *vs*. Harip Boosa (1908) 11 N.L.R. 355.
5. See section 147 (b) and (c) Cr. Pr. Code.
6. Wijesinghe *vs*. Ekanayake (1906) 3 Bal. 168.
7. The King *vs*. Harmanis (1903) 8 N.L.R. 140.

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(*b*) Orders of Courts.

These are necessary only in such cases where the prosecution is initiated at their instance.

(*c*) Mandates from Government Agents.

The Government Agent of a Province, although a Revenue Officer, sits in appeal from the decisions of Village Tribunals. The Village Communities' Ordinance[1] provides that any Government Agent having jurisdiction over the division may stop the further hearing of any case before a Village Tribunal and direct it to be tried by the Police Court of the District. The discretion of the Government Agent and his assistants in this matter is unfettered ; and no Police Magistrate can question why they have exercised their discretion. Once a mandate signed by a Government Agent (or his assistants) is received, a Magistrate has no option but to entertain the plaint, even though the case be solely and exclusively within V. T. jurisdiction and even though there appear to be no seemingly valid reasons why the V. T. jurisdiction should be superseded.

(VI) Knowledge or Suspicion of the Magistrate Himself.

Roughly speaking, a Magistrate " carries his Court with him ; " that is to say, he can hold Court wherever he goes. He has the powers therefore to arrest or punish persons found in the act of committing an offence.

The accused, however, have a right to demand that the case should not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but should either be tried by another Police Magistrate or committed for trial.[2] But if they had legal assistance at the trial, they cannot raise an objection in appeal that the case was tried by the very Magistrate on whose personal knowledge the proceedings were instituted.[3] Ordinarily, a Police Magistrate cannot be both a prosecutor and judge,[4] though the fact that a Magistrate has directed a prosecution does not disqualify him from trying the case,[5] or from committing the accused for trial before a higher Court.[6] Where, however, criminal proceedings were instituted as the result of a complaint made to an Assistant Government Agent and of instructions issued by him, it was held that the proceedings in the case tried by him as Additional magistrate were irregular.[7]

Where a Magistrate, after hearing a complainant and his witnesses, refuses to issue process and where a similar charge is brought by the accused person against the complainant, it would be expedient to have the second case tried by another Magistrate.[8]

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1. Section 64 of Ordinance No. 9 of 1924.
2. Section 148 (1. C.)
3. Rex *vs.* Brampy (1915) 5 Bal. Notes 9.
4. Jansz *vs.* Allis (1900) 1. Br. 209.
5. Vandort *vs.* Abdul Careem (1885) 7 S.C.C. 36.
6. The King *vs.* Alahakoon (1906) 9 N.L.R. 300. See however, an earlier case under the old Code The Queen *vs.* Appuhamy (1888) 8 S.C.C. 167.
7. Sinno Appu *vs.* Rajapakse (1928) 30 N.L.R. 348.
8. P.C. Point Pedro, 8,011 (1929) 31 N.L.R. 309.

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CHAPTER IV.

PROCESSES.

We have seen in the last chapter how cases are instituted in a Police Court. We shall now proceed to consider the various kinds of processes which a Police Court has power to issue. By process is meant a written order by or under the authority of a Magistrate requiring a person to do something, *e.g.* to appear, produce, or search.

(I). Summons.

Summonses are of two kinds:

(*a*) To the accused, and

(*b*) To a witness.

They must be on the prescribed form and must be signed either by the Magistrate or by his chief clerk. No person can sign a summons on behalf of the chief clerk[1] and no person is bound to obey a summons signed by another for the chief clerk.[2] Summonses are ordinarily served by the Fiscal or by a Peace Officer (meaning a Police Officer or a Headman), but may be ordered in special cases to be served by any other person. In the case of a Government servant, they may be served by the Head of the Department.

Two copies of a summons are issued: one for the person to whom it is directed and the other for the Court. The former may be in one of the vernacular languages: the latter must be in English. After service or non-service, the original must always be returned to Court on or before the returnable date. Ordinarily, personal service of summons is necessary: that is to say, the duplicate must be delivered or tendered to the person to whom it is directed. On his refusing to accept the same "it would be sufficient to inform him of its nature and throw it down in his presence."[3] If the person summoned cannot be found by the exercise of due diligence, it may be left with some adult member of his family or with some servant of his. In rare cases service can be effected, with the leave of the Court, by affixing the duplicate to some conspicuous part of the house where the person ordinarily resides. An affidavit, usually on the back of the original returned to Court, is conclusive evidence of the service or otherwise of the summons—(unless the contrary is proved). The fact of a subpoena being entrusted to a process-server does not give him a general right of entry into any house without obtaining the owner's permission.[4] Every summons must be clear and specific in its terms and must state the time and date when the person summoned should appear, and must direct in the case of the accused that he should remain in Court to be dealt with according to law, and in the case of

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1. Officers who *act* for Head Clerks are authorized to sign summons. See notification No. 32 in Government Gazette of 3rd September, 1915.
2. Sedris *vs.* Jadris (1895) 3 N.L.R. 125.
3. Redpath *vs.* Williams 11 Moore 333.
4. 28 Madras Law Journal Reports 504.

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a witness that he should not depart without leave of the Court. In an Indian case,[1] where the accused who was summoned to appear and answer a criminal charge attended the Magistrate's Court, but not finding the Magistrate present at the time mentioned in the summons, departed after waiting for two or three minutes, it was held that he was bound to have waited for a reasonable time ; so that although the summons in Ceylon requires attendance at 9 a.m., the person summoned must continue to wait till such time as his presence is required in Court ; in other words, till his name is " called " by the crier.

The summons to an accused person being of the nature of, and having the same practical effects as, a charge, must contain full particulars of the offence of which he is accused. The fact, however, that the summons is defective in this respect will not excuse non-attendance, unless the deficiency created reasonable ambiguity as to the time and place of attendance. The accused may apply for and get a copy of the details of the offence with which he is charged, if they are not specifically stated in the summons.

Failure to attend on summons makes the person summoned liable—

(i) to be arrested on a warrant ;

(ii) to punishment under section 172 of the Penal Code (with simple imprisonment for six months or a fine of Rs. 100). To abscond in order to avoid service of a summons is not an offence unless it can be proved that the accused knew that a summons was actually issued against him. The omission to attend must be wilful and intentional and if the accused did not know that a summons was issued against him, he cannot be said to have knowingly or intentionally kept away from Court.

No Court can take cognisance under this section without the previous sanction of the Attorney-General or on the complaint of the public servant concerned or some public servant to whom he is subordinate ;[2] so that a Magistrate cannot summarily deal with a person who fails to attend his Court on summons but must charge the offender before another Magistrate.[3] Failure to attend a Headman's inquiry after receipt of notice is not punishable under this section.

Any person appearing in Court on summons either as an accused or as a witness does not require a fresh summons to appear on a subsequent date, if he has been warned by the Magistrate (or his Interpreter Mudaliyar) to appear on that day. A verbal order given in Court on the due date has the same effect as the serving of a fresh summons. There must be an entry on record to the effect that the parties or the witnesses have been warned to appear on the next date : otherwise the Court will not be justified in issuing warrants for non-attendance on subsequent dates. An accused person appearing in obedience to a summons has usually the advantage of not being called upon to furnish bail for future appearance.

A summons on the accused is ordinarily issued in the first instance in all non-cognisable offences ; and also in all cognisable offences, where the Magistrate so directs. A large discretion is given to Magistrates by the Criminal Procedure Code with regard to the issue of summons ;

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1. 10 Indian Law Reports Bombay Series 93.
2. Criminal Pr. Code section 147 (1a).
3. Silva *vs.* Rajak (1932) 1 C.L.W. 213.

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so that where the Code says that a warrant may issue in the first instance, the Magistrate is not bound to issue a warrant unless the circumstances demand it. In extreme cases, the reasons for which should be recorded, a Magistrate may issue a warrant even though summons should have ordinarily issued in the first instance. Thus, in Excise offences, where the accused, having given bail before Excise Officers to appear in Court on a stated day, fail to appear, they lose the right of being served with a summons in the first instance. In such cases, non-attendance, besides justifying the issue of a warrant, renders the accused liable to a forfeiture of their bail-bonds.

(II). Notice.

A notice is another form of summons issuable by the Court in all quasi-criminal or quasi-civil matters. It requires the attendance of the person noticed at a particular time and place and has the same practical effect, with like consequences, as a summons. Notices are issued for various reasons; thus, in maintenance cases, the respondents are served with a notice to show cause why an order of maintenance should not be made against them: or in binding over cases, a notice is served on the respondent to show cause why he should not be bound over in a stated amount for a stated period. A notice may take the form of a summons, *e.g.* in the case of abatement of nuisances: or it may simply be issued for the purpose of preliminary investigation, *e.g.* in the case of a petition or for any other purpose.

(III). Summons to Produce.

A Police Magistrate may also issue whenever necessary a summons on any one to produce any document or thing believed to be in his possession. A witness summoned to produce may cause the document or thing sent to Court without personally attending: and if he attends, he cannot be cross-examined as a witness. A document or thing does not include a woman.[1] As said by Ameer Ali, J,[2] "A Magistrate has the power of calling upon any person to produce any document or thing in his possession or power, which has any connection with the offence which happens to be under investigation or enquiry. Of course, he cannot call for anything and everything from anybody and everybody. The thing called for must have some relation to or connection with the subject-matter of the investigation or enquiry or throw some light on the proceeding or supply some link in the chain of evidence. It may be that the thing called for may turn out to be wholly irrelevant to the enquiry; but so long as it is considered to be necessary or desirable for the purpose of the enquiry the power is there." Although in England "it is one of the inveterate principles of English Law that a party cannot be compelled to discover that which if answered would tend or subject him to any penalty, forfeiture, or ecclesiastical censure,"[3] and although our Evidence Ordinance says that no witness shall be bound to produce any document which would tend to criminate him,[4] it has been held in India, and the law applies to Ceylon, that a Magistrate has always the power to issue a summons on the accused to obtain the production of every

1. 11 Calcutta Weekly Notes 836.
2. 19 Indian Law Reports Calcutta Series 52.
3. Per Bowen, L.J., in Redfern *vs.* Redfern (1890) Probate division 139.
4. Section 130 (1).

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document or thing in his possession. Further, every Court has the power to have before it any property which forms a subject of the charge; and a power to summon an accused person to produce is therefore presumed.

Section 123 of the Evidence Ordinance says that no one shall be permitted to produce any unpublished official records relating to any affairs of state or to give any evidence derived therefrom except with the permission of the officer at the Head of the department concerned who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Governor. The power of a Magistrate therefore to order the production of any public document is subservient to this discretion of the Head of a department. If the latter gives his consent, a certified copy may be produced and proved.[1] Whenever a record of another Court is necessary for the purpose of adducing proof, a copy of that record must first be obtained before summons can be applied for, for its formal production, unless the Court desires to have the record produced of its own motion, or unless it is required in evidence by the Crown.

No bank can be compelled to produce the books of the bank in any legal proceedings where the bank is not a party. But the Court may order the bank to produce a certified copy of all the entries in its books, pertaining to the fact in issue.[2] Nor can any witness, who is not a party to a suit, be compelled to produce his title deeds or any document which is not relevant or material to the case of the party seeking its production.

No book, letter, post card, telegram or other document in the custody of the Postal or Telegraph Department can be ordered to be produced by any Magistrate: when such documents are necessary for the proper adjudication of a case, application must be made to the Supreme Court who will direct its production if it thinks fit.

A Magistrate can order the production of the Police Information Book, but the defence has no right to see it unless it is used by the Police Officers to refresh their memory or unless it is required for the purpose of cross-examining a witness who has made contradictory statements before a Police Officer.[3]

Subject to these reservations then, a Police Magistrate has the inherent power of summoning any person to produce any document or thing. Failure to produce after receipt of summons will render the person summoned liable (i) to have a search-warrant issued for the production of the document or thing, and also (ii) to punishment under section 173 of the Penal Code. When a person is served with a *subpoena duces tecum,* his refusal to produce the document or his inability to account for its non-production will be evidence of intentional omission.

(IV). **Warrant of Arrest.**

Every warrant issued by a Magistrate must be in English[4] and must be signed by him and contain full particulars[5] in the prescribed form. It differs from a summons in that, whereas a summons is directed

1. Ordinance No. 12 of 1864, Vol. I, p. 555.
2. See sections 130 (3) and 90 (d) and (e) of the Evidence Ordinance, Vol. IV, p. 715.
3. See sections 122 (3) of the Cr. Pr. Code, sections 161 and 145 of the Evidence Ordinance and Chapter VI, sub-section 5, *infora.*
4. Cornelius *vs.* Ulutise (1895) 1 N.L.R. 248.
5. Allsanday *vs.* Brampy (1896) 2 N.L.R. 182.

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to the person summoned, a warrant is usually addressed to a third party, either the Fiscal or a Peace Officer, directing him to produce the person named in the warrant before Court. The warrant must contain not merely the name but also the address of the person to be apprehended, lest there may be more than one person bearing that name in the locality. The description should be so minute as to leave no doubt as to identity.[1] A person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him. A number of English and American decisions[2] point to the fact that a warrant where the name is ambiguous or even unbecoming becomes wrongly executed and sometimes subjects the actor to an action for false imprisonment. In Ceylon, an action will lie for damages for illegal arrest.[3] A blank warrant is bad.

Every warrant is either bailable or non-bailable. In the former case, the person executing the warrant should offer the person arrested an opportunity of furnishing the required security. In the latter case, the person arrested must be forthwith produced before a Police Magistrate. No Police Officer has a right to detain any person so arrested for more than 24 hours in his custody: so that even where a person is arrested during the vacation, he must be produced immediately before a Police Magistrate (who will either remand him or let him out on bail). Even in non-bailable cases, a Magistrate may, in his discretion, issue a bailable warrant.

Every warrant remains in force till it is cancelled, or till it is executed, or till the expiration of its returnable date. So that a warrant remains in force, even after an accused surrenders, till the returnable date: an application should therefore be immediately made to the Magistrate to have the warrant recalled if re-arrest is to be avoided.[4] Warrants can be re-issued from time to time and, if the circumstances so require, an open warrant may be issued. An open warrant is a warrant without returnable date and remains in force till such time as it is withdrawn or is executed. Where the accused are absconding for a long time, an open warrant is generally issued along with a proclamation.

A warrant is issued in every case where the offence is of a serious nature, or where a person refuses to obey the summons previously issued against him, or where there is reason to suspect that the accused is in hiding or will not obey the summons.[5] Thus, the attendance of even a witness who fails to attend on a summons after the same has been proved to have been duly served on him, can be compelled on a warrant.[6] In summary cases, a Magistrate has the power to issue a warrant (and *a fortiori*, a summons) on an accused person, without recording evidence, on receipt of a Police plaint: but in non-summary cases, preliminary evidence of witnesses who are present must be recorded. The Magistrate may, however, require the examination of any or all witnesses before issuing a warrant. A warrant is also issuable where a person bound by any bond to appear before Court on a stated day fails to appear on that day. This bond may have been signed by him even before the Police or before an Excise Officer.

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1. Perera *vs.* Rutiyah Kangany 6 Tam 62.

2. See Hood's case (1 Moor's Crown cases 281) and Miller *vs.* Folley 28 Barbour's Supreme Court American) reports 630 and Scall *vs.* Ely Hendell's American Reports 552.

3. Fernando *vs.* Pieris (1916) 19 N.L.R. 264.

4. Amsa *vs.* Sinnady *et al* (1931) 8 Times L.R. 163.

5. Litten *vs.* Perera (1908) 11 N.L.R. 92.

6. Jayatilleke *vs.* Jayasekara (1910) 5 Bal. 7-.

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As pointed out by the Supreme Court "the issue of a warrant is a serious matter, and the Magistrate should exercise his own independent judgment on 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."[1] And, of course, no warrant can be issued without sufficient cause.[2] Thus, a warrant of arrest cannot 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.[3]

A warrant of arrest to be executed in the jurisdiction of another Police Court must be endorsed by the Magistrate in whose jurisdiction it is to be executed. Thus, a warrant issued by the Police Magistrate of Colombo to be executed at Kandy must be endorsed by the Kandy Magistrate. But the issuing Magistrate may direct the warrant specially to any person or to the Fiscal of the place[4] who may execute it in any jurisdiction if the delay and publicity occasioned by the endorsement were such as would prevent or hinder the execution of the warrant. In any case after execution the person arrested must be produced before the Magistrate in whose jurisdiction he is arrested and the latter may remand him to be produced before the issuing Court, or may admit him to bail to appear there on a stated day. The mere use of a rubber stamp is not sufficient to constitute an endorsement.[5] A warrant directed for execution to a Police officer designated by his office and not by his name (*e.g* The Inspector of Police, Maradana) may be executed by another Police Officer under his command without a special endorsement.[6]

Proceedings taken in pursuance of an illegal warrant are void: and consequently, resistance to an officer executing such a warrant is no offence—for he is not acting under lawful orders.[7] The accused would, therefore, be justified in the use of such criminal force in making resistance as is necessary for the exercise of his right of private defence,[8] unless it can be proved that the officer arresting was acting in good faith and under colour of his office and was in the *bona fide* belief that he had the power to make the arrest.[9]

The execution of a warrant is effected by notifying to the person arrested the substance of the warrant, and if so required by showing him the warrant and by touching or confining his body. If resistance is offered to the arrest, the person making the arrest may use all means necessary to effect the arrest, but cannot in so doing cause his death except in a case of murder. If he hides in another's house, it is the latter's duty to allow the person making the arrest free ingress and egress. If ingress cannot otherwise be obtained, the officer may break

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1. Wills *vs.* Sholay Kangany (1915) 18 N.L.R. 443.
2. Sheford *vs.* Arumugam (1912) 1 Bal. Notes 1.
3. Perera Kangany *vs.* Ran Menika (1909) 3 Leader II, 13.
4. Kalu Banda *vs.* Irulandy Kangany (1908) 1 Leader 38.
5. Hendrick *vs.* Fonseka (1917) 4 C.W.R. 122.
6. Mutaliph *vs.* Fernando (1923) 2 Times L.R. 11.
7. Silva *vs.* Pedris Hamy 6 Tam 60.
8. Menikrala *vs.* Kiri Banda 6 Tam 91.
9. Queen *vs.* Podi Baba (1895) 1 N.L.R. 23.

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open any outer or inner door for the purpose of gaining admission: similarly, he may break open any door or window for the purpose of liberating himself. The person arrested cannot be subjected to more restraint than is necessary to prevent his escape. The person arrested may be searched and any articles found on him including dangerous weapons[1] may be taken over and produced in Court: they will be at the disposal of the Magistrate.

We may here consider the right of arresting without a warrant. A Police Officer or a Headman or even a private individual has often the necessity of arresting another without obtaining a warrant from a competent Court. A Police Officer or a Headman may arrest without a warrant.

(1) Any person who in his presence commits a breach of the peace. A Police Officer has no power to arrest without a warrant parties engaged in committing an affray.[2] This decision does not appear to be sound, for an affray is certainly a breach of the peace and is a cognisable offence. Again, the Supreme Court has held that a Police Officer has a right to take into his custody without a warrant any person whom he finds behaving in a drunken and disorderly manner in a public place or thoroughfare[3]; although in an earlier case, the Supreme Court had held that he had that right only when the person arrested refused to give his name and residence or gave a name and residence which the officer had reason to believe to be false.[4]

(2) Any person who has been concerned in any cognisable 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. We have seen above what a cognisable offence means. This right does not extend to non-cognisable cases,[5] unless specially conferred by any special Ordinance. In England, a constable can only arrest for felonies and not for misdemeanours unless the latter are committed in his presence and the arrest is made when or immediately after the offence is committed.[6] What is a reasonable complaint or credible information depends on the circumstances of each case; but the word " credible " connotes that the constable should have believed in good faith that the information given was true. If afterwards the case turns out to be false, the constable will not be liable to punishment for wrongful arrest, though the person who got him arrested by lodging a false complaint may be liable to be dealt with under section 253 (ci) of the Criminal Procedure Code (if the Magistrate is of opinion that there was no sufficient ground for causing such arrest). Police Officers should, however, be careful in exercising the large powers conferred upon them by this section: they should not arrest, for instance, where the offence complained of is not of a serious description and where there is no likelihood of the accused trying to escape, or where the accused could easily be got at, whenever necessary, being a person of position or standing, or where it is deemed fit that the facts should be communicated to a Magistrate before process is applied for. " Police have no power to arrest persons, as they sometimes appear to do, merely

1. The King *vs.* Tajudeen (1902) 6 N.L.R. 16.
2. Jayen *vs.* Aloe Singho (1893) 2 S.C.R. 78.
3. Saffar *vs.* Siriwardene (1909) 13 N.L.R. 20.
4. Thiedman *vs.* Fernando (1896) 2 N.L.R. 149.
5. The Attorney-General *vs.* Captain Skinner (1912) 5 N.L.R. 222.
6. Fox *vs.* Gaunt 3 Barnevel's Reports 78.

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on the chance of something being hereafter proved against them."[1] They should not act on mere surmise or information. There must be a suspicion founded on definite facts and tending to show that the person arrested is concerned in the crime.

(3) Any person having in his possession without lawful excuse any implement of house-breaking. What are implements of house-breaking depends upon the circumstances of each case.

(4) Any person who has been proclaimed as an offender. Every person so proclaimed has had a warrant out against him in the first instance and becomes "proclaimed" only when he cannot be arrested on the warrant. A question, therefore, arises whether a Police Officer without a warrant in hand can arrest anyone against whom a warrant has been issued but who has not been proclaimed. Russel, in his book on crimes, is of opinion that he can ; for in such a case he is really exercising his power of arresting on suspicion or upon credible information.

(5) 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. There must be reasonable suspicion and not merely imagination on the part of the Police Officer that the property is stolen. A Police Officer has not the right therefore of stopping any and every passer-by and asking him to account for any and everything in his possession. Reasonable suspicion may arise from circumstances, *e.g.* unusual hour, poverty of the person suspected, attempt to hide himself, or attempt to bolt when challenged, and so forth.

(6) Any person who obstructs a Peace Officer in the execution of his duty or who has escaped or attempts to escape from lawful custody. What is the execution of duty or what is lawful custody we shall see in a later chapter. When a person who is lawfully arrested escapes, it is the duty of the Police to pursue and arrest him on the original charge as well—even though the person may have run away out of his local limits ; for Police constables, though attached to certain stations, have the power to perform their duties over the whole Island.[2]

(7) Any person reasonably suspected of being a deserter from His Majesty's Army or Navy.

(8) Any person found taking precautions to conceal his presence under circumstances which afford reason to believe that he is so doing with a view to commit a cognisable offence.

(9) Any person who has committed or is concerned in any offence committed outside Ceylon and which is "extradictable."[3]

(10) Any person accused in his presence of committing a non-cognisable offence and who refuses to give his name and address or gives a name and address which the officer has reason to believe to be false. The arrest in this case is merely temporary, *i.e.* only for such time as is necessary to ascertain his correct name and address ; when once this is ascertained, he may be released on bail.

(11) Any person accused of having committed a non-cognisable offence who has no permanent residence in the Colony or who is about to leave the Island.

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1. Per Markly ,J., in Sutherland's Weekly Reporter 8.
2. Gressy *vs.* Perera (1901) 5 N.L.R. 116.
3. Under the Fuguitive Offenders' Act of 1881, 44 and 45 Vict C 69. See below, section IX.

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(12) Lastly, any person whom he is authorized to arrest by any special statute, *e.g.* under the Prevention of Theft of Rubber Ordinance[1] or under the Opium Ordinance[2] or under the Forest Ordinance[3] or under the Ceylon Railway Ordinance,[4] and so forth.

B. A private individual can only arrest without a warrant—

(1) Any person who in his presence commits a cognisable offence,[5] "The law does not merely permit but requires the citizen to do his best to arrest such a criminal."

(2) Any person who has been proclaimed as an offender. This right is the same as the right of the Peace Officers.

(3) Any person who is running away and whom he reasonably suspects of having committed a cognisable offence. In the case of a Peace Officer, the person suspected need not necessarily be running away. The fact that a man is running away would naturally throw suspicion on him, but there must be some cognisable offence already committed which would tend to show that the person running away was concerned in its commission.

C. A Magistrate may arrest without a warrant in all cases where he would be competent to issue a warrant. He may also arrest or cause to be arrested any person who commits any offence whatsoever in his presence.

Under the Income Tax Ordinance[6] a Magistrate is empowered to issue "direction" to the Inspector-General of Police if any defaulter of Income Tax is about to leave the Island directing him to take such measures as may be necessary to prevent such person from leaving Ceylon without paying the tax or furnishing security therefor.

(V). Proclamation.

When a Magistrate has issued and re-issued a warrant against an offender who cannot be arrested or who is absconding or evading arrest, he can "proclaim" the accused and order the attachment of his movable or immovable property. Such proclamation and order of attachment can only be issued by the Court which originally issued the warrants of arrest.[7] It can be issued in all cases whether summary or non-summary, cognisable or non-cognisable. The essential requirements are that a warrant should have been issued in the first instance and that the accused could not have been arrested on that warrant. The proclamation should be in writing requiring the accused to appear at a specified time and place after 30 days from the date of proclamation, and should besides being publicly read in his village be affixed to his house as well as to the Court-house. As regards attachment, usually a list of property is called for from the chief Headman of the district and if this discloses any immovable property, it is forfeited through the Government Agent of the Province or his assistant. No property so attached can be sold till after the expiration of six months from the date of attachment and

1. No. 21 of 1908, section 16 (2) Vol. III, p. 536.
2. No. 5 of 1910, section 22, Vol. III, p. 2.
3. No. 16 of 1907, section 48, Vol. II, p. 753.
4. No. 9 of 1902, section 38, Vol. II, p. 585.
5. Dew *vs.* Angamuttu (1896) 2 N.L.R. 184.
6. No. 2 of 1932.
7. Nonchihamy *vs.* Christian (1896) 2 N.L.R. 211.

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notice of such seizure and attachment must be given by every Court to the Registrar of Lands. A conveyance to the purchaser can be executed by the Government Agent or his Assistant, to whom application should be made for the purpose, and vests the property absolutely in him.[1] If the accused surrenders or is arrested and produced within one year[2] from the date of attachment, and can prove that he did not abscond or conceal himself and that he had no notice of the proclamation, the property or the proceeds of sale after deducting the costs of attachment may be delivered back to him. It follows that no such property can be returned if the accused has surrendered after the lapse of one year.

A proclaimed offender, as we have seen above, is a person whom any one can arrest without a warrant.

(VI). Search-Warrants.

Search-warrants are orders issued by a Magistrate either to a Peace Officer or to any other person authorizing him to search the premises detailed in the warrant for the purpose specified therein. As laid down by the Indian High Court, " when a Court is about to issue a search-warrant on the strength of information as distinguished from a complaint, the Court should if feasible examine the informant on oath and if evidence cannot be taken on oath, the Court should act with due appreciation of the fact that it is taking upon itself the responsibility of considering the weight of the information as the information preparatory to issuing an order of a very serious nature."[3] Our Code says that if a Police Court upon information and after such enquiry 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 coins, 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 issue a search-warrant for searching such place for any such articles, for producing the same before Court and for arresting any persons concerned in the commission of these offences. The Police Court must have information and must hold such enquiry, as it considers necessary, before issuing a warrant. Where a search-warrant was issued at the instance of a seller of rice who complained that he had been cheated but where it appeared that the rice formed the subject-matter of a completed transaction of sale, it was held that the warrant was issued irregularly.[4]

A Police Magistrate may also issue a search-warrant where a party fails to comply with " a summons to produce " or in all cases where a general search is necessary. He may also order a search-warrant to be issued in gambling offences and Opium and Excise cases. These we shall consider in their respective chapters. He may also issue a search-warrant

1. Section 60 (8) Cr. Pr. Code.
2. Under the Indian Criminal Procedure Code the time-limit is two years, section 89.
3. 8 Allahabad Law Journal 517.
4. N. R. M. Chettiar *vs.* Darley Butler & Co. (1932) 9 Times L.R. 155. For the decision in connected case, see 1 C.L.W. 294.

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when he has reason to believe that any person has been confined under such circumstances as would amount to an offence. This power to issue a search-warrant does not derogate from the sole right of the Supreme Court to issue a writ of *Habeas Corpus*—and can only be exercised in extreme cases.

Every search-warrant should whenever practicable be executed by the person to whose name it is directed. The latter can, however, delegate his authority to another Peace Officer in writing. When the place liable to be searched under a warrant is closed, any person in charge thereof must on production of the warrant allow the officer free ingress thereto; and if ingress is otherwise impossible the officer may break open any outer or inner door for the purpose of obtaining ingress or egress. This does not entitle the officer to make a burglarious entry into the premises.[1] The officer must make a list of all things seized[2] and of the places in which they were found and must give a copy of the list to the occupant: he should also allow the latter (or somebody on his behalf) to be present at the search.

A Peace Officer may search without a warrant any premises when, during the course of his investigation into a cognisable offence, the production of any document or thing is necessary for the purpose of the investigation, and there is reason to believe that such production will not be had on summons, or when it is not known in whose possession such document or thing happens to be. This power is conferred on him by section 59 of the Police Ordinance.[3] Thus, in a case of burglary, a Police constable may search the house of suspected persons for the property supposed to have been stolen. Any Peace Officer not below the rank of a Sergeant or of a Korala or Udayar can also search any place without a warrant for any false weights or measures.[4]

(VII). Distress Warrants.

These are warrants issued by a Magistrate for the distress of a man's movable or immovable property. Only movable property can be distressed for non-payment of a fine. Some Ordinances empower Revenue Officers in case of non-payment of taxes to report the names of defaulters to a Police Court who are empowered to proceed to recover the amounts due, "as if they were fines imposed by the Court," in other words, by means of distress warrants addressed to the Fiscal. In maintenance cases no respondent can be sentenced to imprisonment for omission to pay maintenance unless a distress warrant has been issued in the first instance.

(VIII). Warrants of Commitment.

These are merely warrants committing the convicted prisoners to jail—they are orders on the Fiscal directing him to convey the prisoners named to the particular prison and authorizing the Superintendent of that prison to receive them in jail. A separate warrant is necessary for each convict. In the case of juvenile offenders sentenced to be confined to a reformatory, the warrant should be addressed to the person in charge

1. Excise Inspector, Pt. Pedro *vs.* Thankamma (1925) 26 N.L.R. 307.
2. Nicholas *vs.* Fernando *et al* (1931) 8 Times L.R. 149.
3. Sub-Inspector of Police, Alutgama *vs.* Fernando (1927) 29 N.L.R. 122.
4. Ordinance No. 8 of 1876, Vol. I, p. 819. Criminal Procedure Code, section 119.

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of that institution. These warrants are returned to Court on the expiration of the sentence imposed. In case of convictions under the Vagrancy Ordinance[1] vagrants from the Police Court of Colombo (and any other Police Court, the local authority of which makes an annual contribution) could be transmitted to the House of Detention under a warrant of commitment and detained there till such time as they are provided for or are otherwise disposed of.

Remand warrants are issued only when the accused are kept on remand pending an enquiry or trial. Usually the accused must be remanded to the custody of the Fiscal: only in extreme cases and for reasons to be recorded in writing, the accused may be remanded to the custody of the Police.

(IX). Extradition Warrants.

These are warrants for the purpose of enabling fugitives to be surrendered to or from foreign countries.[2] They are either provisional or real. Provisional warrants are obtained by laying information on oath that a particular fugitive is required for a stated offence in another country and that the real warrant is on its way; the Magistrate may on such information issue a warrant for the arrest of the fugitive and either remand him or admit him to bail till the arrival of the extradition warrant. Every Magistrate is empowered by section 427 of the Criminal Procedure Code to commit a fugitive to prison to await his surrender or return. An absconder from Ceylon may be similarly arrested temporarily in another country by telegraphic information to the Head of the Police in that country.

Real extradition warrants may be for surrender to Ceylon or from Ceylon and fall into three distinct categories according as the offenders are from "grouped" parts of the British Empire, or from other parts of the British Empire, or from foreign non-British countries.

(i.) Under the Fugitive Offenders' Act of 1881[3] Ceylon has been "grouped" with British India, Hongkong, the Straits Settlements, the Federated Malay States, Johore, Kedah and Perlis, Kelantan, Trengannau, Brunei, North Borneo, and Sarawak. Surrender of fugitives for *any* offence between any two of these countries is authorized and the procedure is extremely simple. A warrant in the name of the officer proceeding on escort giving full particulars of the offence, the fugitive offender, etc., and signed and sealed in the presence of the officer in charge of the escort, and bearing the Public Seal of the Colony (to be affixed at the office of the Chief Secretary), is handed over to the escort officer who may also be furnished with a copy of the record and the relevant Ordinance—which should bear the Magistrate's certificate. As all expenses in connection with extradition have to be borne by the complainant[4] the latter should be made to sign an Indemnity Bond unless the Inspector-General of Police otherwise directs and should also deposit a sum of Rs. 100 (or Rs. 200 in the case of the Straits Settlement) for every fugitive. The Inspector-General of Police will then

1. No. 4 of 1841.

2. For detailed information see R. F. Dias' treatise on "The Law of Extradition" published by the Ceylon Government.

3. 44 and 45 Vict C 69. See also Ordinance No. 10 of 1877 (Vol. I, p. 844) and Ordinance No. 12 of 1917 (Vol. III, p. 517).

4. General Order 1064.

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take the necessary steps to have the fugitives arrested and will probably send with the escort a person who can identify them.

(ii.) With regard to other parts of the British Empire with which Ceylon is not grouped, *e.g.* New Zealand or Australia, the fugitive Offenders' Act applies only to treason, piracy and every other offence (whether called felony, misdemeanour, crime or by any other name), which is for the time being punishable by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment.[1] In these cases the escort officer must be provided along with the requirements above stated with a certificate issued by the Governor of Ceylon authenticating the signature and office of the Police Magistrate and the currency of the Ordinance concerned.

(iii.) With regard to foreign countries, the Fugitive Offenders' Acts do not apply to the Native States of India although there is extradition between them and British India by the Indian Extradition Act of 1903. The Ceylon Government has recently refused to surrender fugitives from Ceylon to an Indian Native State.[2] With regard to other non-British countries, the Extradition Acts apply only in the case of extradition crimes.[3] Application for extradition from these countries has to be made to the Governor of Ceylon who should be supplied with the warrant, copy of the record, Indemnity Bond, etc. His Excellency after satisfying himself with regard to the extradition crime will communicate with the British Diplomatic Agent in the country and direct him to apply for a surrender to the Ceylon escort. No fugitive can be surrendered for political offences. It has been held[4] that in order to constitute an offence "of a political character," there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other. The question whether an offence is political or not should be decided by the Executive Government and not by the Judiciary.[5]

Exactly converse process applies in the case of surrender of fugitives by Ceylon to other countries. The Magistrate must satisfy himself that the warrant produced is legal, authenticated and valid and that the fugitive produced is the person absconding. If all the requirements are in order, the Magistrate must commit the prisoner to jail: he cannot, except in the case of grouped countries,[6] admit him to bail nor can he discharge him owing to triviality of offence,[7] etc. Proper application by way of *Habeas Corpus* should in such cases be made to the Supreme Court. Fugitives can be handed over direct to the escort in the case of grouped countries, but in the case of others they must be remanded to the jail and cannot be handed over to the escort till after the expiration of fifteen clear days. The escort after his lapse of fifteen days and after an appeal to the Supreme Court if any is decided must apply to and obtain from the Governor an order directing the return of the prisoner to the country concerned. It is

1. It does not matter if the act complained of is not an offence by the law of the country in which the fugitive is sought to be arrested.

2. Dias, p. 45.

3. *I.e.* murder, attempt to murder, manslaughter, forgery, counterfeiting, embezzlement, larceny, false pretences, fraud, rape, abduction, kidnapping, burglary, house-breaking, arson, robbery, extortion, piracy, crimes against bankruptcy, bribery, and slavery.

4. In *re* Meunier (1884) 2 Q.B. 415 and in *re* Castioni (1891) 1 Q.B. 149.

5. In *re* Arton (1896) 1 Q.B. 115.

6. Ellyathamby vs. Mohamadu (1920) 22. N.L.R. 217 ; 8. C.W.R. 215

7. In *re* Ganapathipillai (1920) 21. N.L.R. 487.

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one of the essentials of the law of extradition that no person extradited for a particular offence to a foreign non-British country can be charged in that country for another offence unless he has been given an opportunity of returning to the country from which he was surrendered.[1]

It has been held that the Fugitive Offenders' Acts do not apply to a person who in one part of His Majesty's Dominions commits an offence in, or abets the commission of an offence in, another part, and who was not in that part at the time of the offence, and has not since been there.[2]

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1. Alles vs. Pallaniyappa Chetty 1917) 19. N.L.R. 334
2. See, however, R. vs. Sittambaram (1918) 20. N.L.R. 261.

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CHAPTER V.

APPEARANCE.

(1) Framing of a Charge.

We have seen in the last two chapters how cases are instituted and what processes a Police Court is competent to issue. When a plaint is filed or a complaint is lodged before a Police Court, either the accused is produced (or is present) in Court, or he is not. If he is not, the Court issues process against him and compels his appearance. The procedure on appearance therefore differs in the two cases.

A. In summary cases—

(*a*) If he is produced in Court or is present—

(i) and if the offence is punishable with not more than three months' imprisonment, or a fine of fifty rupees, the accused is explained the charge from the Police plaint or the Headman's report, as the case may be ; but

(ii) if the offence is punishable with more than three months' imprisonment, or a greater fine than Rs. 50 a separate charge must be framed against, and explained to, him.

(*b*) If, however, he appears on summons or is produced on a warrant, no charge need be framed and he can be explained the charge from the summons or warrant, as the case may be : this summons or warrant in each case should be filed of record ; and the fact that the charge has been explained from summons or warrant should be recorded in the case-book.

B. In non-summary cases—

whether the accused is produced at the time the plaint is filed or is arrested on a warrant or appears on summons, no definite charge need be framed : but he should be explained the particulars of the offence with which he is charged : and this could be done either from a Police report or the summons or warrant. The accused should also be addressed in his own language as follows : " I am prepared to hear any statement which you wish to make. Anything you say will be written down and read at your trial. You may give the names of any person whom you wish to be summoned to give evidence and state what each can prove." This " statutory declamation " is generally made by the Interpreter Mudaliyar on behalf of the Magistrate. The statement of the accused is then recorded on the prescribed form either in his vernacular or in English, signed by the accused and the Interpreter, and countersigned by the Magistrate. The

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statement should be as nearly as possible in the words of the accused. It is a very important statement utilised at the time of trial before a higher Court, and should therefore be accurate and precise. When a charge is altered, or a fresh charge is added, a fresh statement on the prescribed form should be recorded. In non-summary cases, as a Magistrate acts like an Enquiry Officer and "discharges the rôle of a prosecutor,"[1] and as he takes instructions from time to time from the Attorney-General who generally sees that all the requirements of the Criminal Procedure Code are duly complied with, we need not labour to consider various points involved, in detail.

In summary cases, therefore, a charge must be framed in all cases, except where the accused appears on summons or warrant,[2] or where the offence is not punishable with more than three months' imprisonment or a fine of Rs. 50. "An appearance in Court by an accused person to show cause against a complaint when a summons or warrant has been issued is an appearance on a summons or warrant, even although the summons has not been served or the warrant executed; and the statement in the summons or warrant could in such a case be deemed to be the charge."[3] Thus, where a warrant was issued for the arrest of the accused on a charge of having caused grievous hurt and the accused was not to be found and was proclaimed and the Magistrate on his surrendering later read the charge to him from the warrant, it was held that the object of framing a charge and reading it to the accused being to inform him of the exact offence of which he was accused, the omission to frame a charge was not an irregularity as the charge was read from the warrant.[4] Again, where an accused person against whom a warrant was issued surrendered to Court and the Magistrate explained the charge to him from the warrant, it was held that it was a sufficient compliance with the provisions of the Code, as the warrant was in writing and contained all the particulars which a formal charge should contain, being in every sense identical with a formal charge.[5]

Failure to frame a charge is a fatal irregularity.[6] The entire absence of a charge when the Magistrate ought to have framed one is not a mere irregularity which may be overlooked but is a violation of the essential principle governing criminal procedure and vitiates a conviction.[7] Omission to frame a charge therefore even in cases where it has caused no prejudice to the accused is a fatal irregularity;[8] for 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.[9] But a charge need not be framed when it is not necessary under the Code. Thus, where the accused appeared on summons and the Magistrate should have explained

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1. Per Bertram, C.J., Fernando *vs.* Anna Bai (1918) 5 C.W.R. 184.

2. Even then a charge is necessary where a Magistrate tries an indictable offence with consent. See *infra* Ch. VIII.

3. Per Ennis, J., Ebert *vs.* Perera (1922) 23 N.L.R. 362 (Full Bench).

4. Hendric *vs.* Pelis Appu (1915) 1 C.W.R. 194.

5. Mudiyanse *vs.* Appuhamy (1920) 22 N.L.R. 169. See a contrary decision in Abanchy *vs.* Sirimalhamy (1923) 1 Times L.R. 183.

6. Coore *vs.* James Appu (1920) 22 N.L.R. 206.

7. Per De Sampayo, J., in Ebert *vs.* Perera (1922) 23 N.L.R. 362.

8. Dionis *vs.* Charles (1915) 4 Bal Notes 53.

9. Rex *vs.* Silva (1915) 5 Bal. Notes 53.

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the charge to him from the summons but explained it from the plaint, it was held that as the plaint, and summons, were equally precise as to the particulars of the alleged offence, it was no fatal irregularity to the conviction.[1] Nor is it irregular to read the charge from summons when the latter are copied from a defective plaint.[2] The mere entry on the record, "charge explained to accused," is not enough when there is no charge, summons, or warrant filed in the case-book.[3] So that in those cases where the Police do not file a plaint but merely make a report to Court under section 131 of the Criminal Procedure Code, referring the complainant to his own remedy if so advised, and produce the accused before the Magistrate, a distinct charge must be framed against the accused if the complainant wants to go on with his case.

If the offence is punishable with three months' imprisonment or a fine of Rs. 100 (and not Rs. 50), a charge is necessary.[4] It is also necessary where the maximum punishment for a first offence is Rs. 50 and for a second or subsequent offence more than Rs. 50.[5]

Section 425 of the Criminal Procedure Code says: "No judgment shall be reversed or altered in appeal on account of any error, omission or irregularity in the charge." It is now settled law that this section relates to omissions in the charge and not to the charge itself. A mere omission in the charge unless it has occasioned a failure of justice is a curable irregularity though the entire absence of a charge is a fatal irregularity.[6] Anything that has proved prejudicial to the interests of the accused in the trial should be considered to have led to a failure of justice. The Code says that a charge is necessary for the purpose of giving the accused notice of the matter with which he is charged; and without this notice he cannot rightly be convicted.[7] The Supreme Court, where no charge has been framed, may remit the record to the lower Court for compliance with proper procedure.[8]

To repeat then, a charge is necessary in all cases where the accused does not appear on summons or warrant, or where the offence is punishable with less than three months' imprisonment or a fine of Rs. 50. We shall now proceed to consider what a charge is.

(II). Essentials of a Charge.

A charge may be defined as a written[9] document, whether on the prescribed form or not, containing a description of the offence for which the accused is called upon to defend himself. A charge may consist of one or more counts, each of the latter being in itself a separate and distinct offence for which the accused has to defend himself.

Every charge must contain the following particulars:

(*a*) Name of the accused; all charges are in the second person; in this respect they differ from Police plaints where the accused are

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1. Boulton *vs.* Sanmugam (1915) 3 Bal. Notes 46.
2. Menon *vs.* Fernando (1928) 29 N.L.R. 371.
3. Perera *vs.* Cooray (1912) 7 Weer. 20.
4. Dunuvila *vs.* Sinno (1915) 3 Bal. Notes 50.
5. Sub-Inspector of Police, Padukka *vs.* Peter Perera (1927) 5 Times L.R. 11
6. Peris *vs.* Gunasekara (1914) 17 N.L.R. 476.
7. Sandanam *vs.* Appuhamy (1915) (1) C.W.R. 208.
8. Fernando *vs.* Mathes (1923) 1 Times L.R. 226.
9. Goonewardene *vs.* Babun (1908) 4 A.C.R. 141.

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referred to in the third person. So much of the name need be inserted as is necessary to identify the accused. The mere mentioning of the accused by their numbers is not enough. Father's name for the Tamil and the Gé name for the Sinhalese villagers should, whenever practicable, be inserted—any "aliases" may also be described.

(*b*) Name of the village or place where the offence is said to have been committed: along with this, the phrase "within the jurisdiction of this Court" is essential. For the Court, in order to try a case, must have jurisdiction. In respect of those offences which under the procedure Code become triable, by more than one Court, the phrase "within the jurisdiction of this Court" will not be quite appropriate, and therefore the reason why they have become triable by a particular Court, or the section of the Procedure Code under which they have become so triable, should be inserted. Thus, Railway offences are triable, wheresoever committed, by the Police Court within whose jurisdiction the offender is found. This fact should be inserted in the charge. The same applies to offences committed on the territorial waters of the Colony. Where offences are committed on the border-line of any particular Court and jurisdiction is doubtful, the "village list" of the district published by Government, or the Surveyor-General's Map of the Police Court area, will be helpful in determining jurisdiction.

(*c*) Date of offence. Where the exact date is not known, the approximate date or month (or even year) should be inserted and the words "on or about" added before the date. The date of offence is necessary in order to determine whether a particular offence is prescribed or not. It must be remembered that criminal proceedings conducted by the Police do not "abate" on the death of the complainant.[1] The date of offence is also necessary in order to enable an accused person to meet the specific charge against him, *e.g.* where a servant girl has been caned in the past but accuses her master of a specific caning on a particular day.[2] The following periods of prescription may be noted in this connection. :—

(i) Murder or treason is not prescribed by any length of time.

(ii) All other offences under the Penal Code and under Ordinances which do not fix a time-limit are barred by the lapse of twenty years.

(iii) Some offences under certain Ordinances become prescribed within a time fixed in the Ordinance itself; *e.g.* prosecutions under the Firearms Ordinance or under the Vehicles Ordinance are barred after three months; breaches of the Income Tax Ordinance are barred within three years after the year of assessment; prosecutions of Excise Officers under the Excise Ordinance are barred after six months; and so on. It must be remembered that what is barred is the actual prosecution and not the offence: so that, if the offence is a continuing one, the right of prosecuting revives for each continuance. Thus, though for non-renewal of a gun license before December the owner cannot be prosecuted after the 31st of March in the following year, this does not give the owner a liberty to possess an unlicensed gun for any length of time; the offence

1. Ameratunge *vs.* Perera *et al* (1930) 32 N.L.R. 310.
2. Rajapakse *vs.* Silva ((1931) 8 Times L.R. 137.

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of possession continues in fact till the accused appears in Court and can only be barred after three months from his last date of possession. The period of prescription for a stated offence can easily be gathered by a reference to the particular Ordinance in each case.

(*d*) The offence. This should describe both the *actus reus* and the *mens rea*, except in those cases where the law creating the offence gives it a specific name. Thus, the word, theft, denotes an offence : so the dishonest intention need not be stated : but there is no offence called "receiving of stolen property" unless the same was received "dishonestly and knowing or having reason to believe the same to be stolen." This, therefore, must be specified in the charge. The particulars of the offence should be such as to give a reasonably sufficient notice to the accused : hence sometimes the manner in which the particular offence was committed must be stated ; in other words, the charge must contain allegations of all the necessary ingredients making up the offence.[1] A charge of giving false evidence must state the portion of evidence which is alleged to be false ; or a charge of obstructing a public servant in the lawful discharge of his duties must state not merely what the obstruction was but what lawful duties the particular officer was performing ; for the defence has a right to shew either that the officer was not a public servant or that he was not acting in the lawful discharge of his duties.[2] Similarly, a charge which simply states "A did cheat B" is insufficient. The manner of cheating set out in the charge should disclose the offence of cheating ; where the manner of cheating so set out does not disclose an offence, the fact that the accused has defended himself and called witnesses would not raise any inference that the defect was not material. "Thus, 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."[3] Possession of, say, fermented toddy is no offence unless the possession exceeds the limit of sale by retail in contravention of section 16 of the Excise Ordinance : hence the fact of contravention must be specifically stated in the charge. In short, as a conviction in most cases depends upon the charge framed against the accused, the latter must state precisely the offence of which the accused is alleged to be guilty : for no person except in rare cases can be convicted of any offence unless he has been previously charged with its commission.[4] Thus, in a prosecution for abusing another[5] or using obscene words on the road to the annoyance of others, the words alleged to be abusive or obscene must be set out in the charge and in the conviction, "so that the Appellate Court may judge as to whether they were obscene or not."[6] And where a person is charged with being armed with a dangerous weapon with intent to commit an unlawful act, the charge should allege what unlawful

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1. Perera *vs.* Ranhamy (1916) 2 C.W.R. 201.
2. Nawagattegame Udayar *vs.* Madar 6 Tam 88.
3. Welakka *vs.* Dionis Appuhamy (1887) 8 S.C.C. 56.
4. Arnolis Silva *vs.* James Appu (1895) 1 Br. 150.
5. Sabaratnam *vs.* Perera (1916) 3 C.W.R. 120.
6. Nell *vs.* Muttu (1897) 2 N.L.R. 321.

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act he was intending to commit.[1] And in a charge of criminal trespass it is not sufficient to state that the accused intended to commit an offence ; the offence must be specified :[2] so that a charge which fails to specify with what intent the trespass was made[3] is defective and would entitle the accused to an acquittal,[4] (or to a fresh trial[5] as the case may be). A failure to set out the intention in a charge of criminal trespass will not vitiate the proceedings only if the evidence clearly shows the intention and the accused is not prejudiced by the omission.[6]

A charge which does not give the necessary particulars[7] is defective and therefore bad ; the proceedings will therefore be irregular and liable to be quashed[8] ; for the accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. The Court should as far as practicable adhere to the language of the particular statute and employ the very words used therein, for nothing is gained by a paraphrase : on the contrary, the accused gets an opportunity of "lurking behind legal loopholes" and of seeking to get his conviction set aside.

(*e*) The law and the section of the law under which the particular offence is punishable. In the case of offences under the Penal Code the number of the Ordinance need not be quoted : the words "Ceylon Penal Code" or "C. P. C." are enough. The section quoted should be the penal and not the prohibitive section. Thus, section 18 of the Excise Ordinance prohibits possession of arrack over the prescribed minimum, but this illegal possession is punishable under section 43 (*a*) only : hence the latter and not the former should be quoted. In the case of an offence made punishable under any bye-laws, *e.g.* sanitary or municipal offences, the particular penal bye-law may be quoted and not necessarily the principal Ordinance.

(*f*) The signature of the Magistrate, his designation and the date of framing the charge : these are routinal matters but most important.

(III). Joint Charges.

Joint charges are charges where there is either a plurality of persons or a plurality of counts. Though the Code says that for every distinct offence there should be a separate charge and every such charge should be tried separately, there is a provision for joinder in the following cases :—

(i) When a person is accused of more offences than one punishable under the same section with the same amount of punishment, he may be charged with and tried at one trial for not more than three of such offences committed within the space of one year. The offences should be all of the same description and punishable under the same section.

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1. Silva *vs.* Simon (1921) 22 N.L.R. 442.
2. Mendis *vs.* Silva (1915) 1 C.W.R. 124.
3. Jayawickrama *vs.* Pieris (1911) 1 Bal. Notes 3.
4. Obeyasekara Hamine *vs.* Gunasekara (1916) 3 C.W.R. 42.
5. Samuel Appu *vs.* Jaggarias (1923) 1 Times L.R. 181.
6. Karathelis Hamy *vs.* Francis (1920) 7 C.W.R. 184. In Henaya *vs.* Pandiya (1929) 6 Times L.R. 94 where the intention was not clearly specified in the summons from which the accused was charged, Akbar J. set aside the conviction.
7. Abeysuriya *vs.* Jayasekara (1921) 22 N.L.R. 380.
8. Miskin *vs.* Babun Appu (1920) 21 N.L.R. 492.

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Thus, three thefts or house-breakings[1] or three counts of cheating[2] if committed by the same accused within one year, could be tried together at one trial even though the persons wronged are different in each case. But an offence of theft cannot be combined with an offence of causing hurt on another occasion,[3] nor can the offence of criminal breach of trust and that of insult though committed in one month be tried together.[4] The jointly chargeable offences must be committed within the space of one year. Where they were committed during a period of about four years, it was held that the combination was illegal;[5] and where the date of the last offence was not established but was assumed to fall within twelve months from that of the first offence, it was held that though the charge and the trial were not invalid, the accused could not be tried for the last offence in the absenee of proof that it was committed within twelve months from the date of the first offence.[6] The jurisdiction to try more than one offence committed within twelve months by the same accused is not ousted by the aggregate value as disclosed in the different offences, but is determined by the highest value in each individual count: so that where three distinct charges of theft of articles the aggregate value of which exceeds Rs. 100 are framed against an accused, the Magistrate has still jurisdiction to try the case.[7]

No more than three counts could be so combined. Mr. Eardley Norton, in his Personal Reminiscences, describes[8] with vivid effect the "perfectly monstrous" manner in which forty-one counts were huddled up together in the famous case of *Subramaniyam Iyer* vs. *The Queen* which went up to the Privy Council and was quashed on account of a misjoinder of counts. Where a bribe was collected from four persons and given to the recipient in a lump sum, it was held that the recipient could not be charged at one trial with the receipt of the whole sum but only in respect of any three separate items.[9]

This section, it must be remembered, is only permissive, and if objection is taken on behalf of the accused at the beginning of the trial, *e.g.* on the score that his defence would be prejudiced, the Magistrate must direct a separate trial in respect of each of the separate counts.[10] The objection, of course, must be reasonable and taken at the earliest possible moment.

(ii) If more offences are committed in a series of acts so connected together as to form the same transaction by the same person, he may be tried at one trial for all such offences: there are many illustrations, given in the Criminal Procedure Code, to make the meaning of this section clear. What is essential is that the series of acts must be so connected together as to form the same transaction. Thus, while house-breaking and theft form one and the same transaction, theft of a bull and possession of beef which one is not able to satisfactorily account for under the Butchers'

1. The King *vs.* Senanayake (1917) 20 N.L.R. 83.
2. The King *vs.* Wijeysinghe (1919) 21 N.L.R. 230.
3. Illustration to section 178 Cr. Pr. Code.
4. Gray *vs.* Perera (1911) 1 A.C.R. 29.
5. King *vs.* Doraisamy (1905) 8 N.L.R. 79.
6. Gas Company *vs.* Mohamed (1906) Lem and Aser. 19.
7. P.C. Colombo (1905) Lem and Aser. 18.
8. The Looker-on of 7th Sept., 1918, p. 13.
9. Arumugathan *vs.* Subramaniam (1914) 2 C.A.R. 58.
10. The King *vs.* Wijesinghe (1919) 21 N.L.R. 232.

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Ordinance, create a misjoinder of charges,[1] for the simple reason that there is nothing to connect the beef alleged to have been found in the possession of the accused with the cow alleged to have been stolen. But if a man runs amock and stabs two or more persons on the way the different acts of stabbing form one transaction. "The word transaction 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."[2] The word transaction does not necessarily mean something which takes place between the parties; it connotes some connecting link between the various offences showing that really speaking "one breeds the other." There must be "a carrying through." Thus, the offence of illicitly digging plumbago from Crown land and of theft of the same cannot be combined properly with a charge of failing to furnish a declaration required by the Ordinance,[3] for the latter has no connection with the former.

If an offence falls within more than one definition and is punishable under more than one statute, the accused may be tried together for all such offences. The fact that there are two Ordinances, both of which provide punishment for the same offence, enables the prosecutor to elect under which Ordinance proceedings should be taken, unless there is something in either one or other of the Ordinances to show that it is intended to give exclusive jurisdiction by that Ordinance.[4] Although this section permits such a joinder of offences falling within two or more definitions of any law in force for the time being, our Supreme Court has held, for instance, that it is oppressive to combine in one charge an offence against the Forest Ordinance with an offence under the Code.[5] A better course would be to have two separate trials for the two distinct offences.

Further, when an offence consists of parts each of which is by itself an offence, the offender may be tried together for the major as well as minor offences. Thus, the offence of stealing a hackery and that of stealing a bull stolen at the same time may be tried together, though the accused will only be entitled to receive one punishment.[6]

Where in the course of one transaction an accused person has committed several acts, directed towards the same end, which when combined amount to a more serious offence, and he is charged with that offence, he should not be tried separately for any of the subsidiary acts.[7] Thus, he cannot be convicted for possessing a jemmy while the charge of attempting to commit house-breaking is still pending against him, on the principle of *Nemo debet bis puniri pro uno delicto.*

(iii) Where more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or where one person is accused of committing an offence and another of abetment or attempt to commit that offence, they may all be tried

1. Keerala *vs.* Appuhamy (1919) 6 C.W.R. 338.
2. Per Bertram, C.J., The King *vs.* Aman (1920) 21 N.L.R. 375 (Full Bench).
3. Sálneris *vs.* Amadaris (1916) 3 C.W.R. 322.
4. Sangarapulle *vs.* Ratnasekara (1916) 2 C.W.R. 158.
5. (1899) Koch 33.
6. Podiya *vs.* Baiya (1913) 1 Bal. Notes 33.
7. Sub-Inspector of Police, Chilaw *vs.* Erebinu (1930) 31 N.L.R. 446.

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together. Either they should have committed the same offence, *e.g.* the same murder or theft, or different offences forming the same transaction.[1] "According to its etymological meaning, the word transaction means carrying through and suggests not necessarily proximity in time, so much as continuity of action and purpose; a series of acts separated by intervals of time are not excluded, provided that those jointly tried have been directed throughout to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial even if incidentally one of those jointly tried has done an act for which the other may not be responsible. The foundation for the procedure is the association of two persons concurring from start to finish to attain the same end."[2]

Thus, the joinder for murder of two persons engaged in the same house-breaking, even though one of them in pursuance of the common object but exceeding his authority shoots at and kills one of the inmates would be perfectly regular: but where offences are distinct, the different accused must have a separate trial. Two persons cannot be tried together for possession or sale of toddy[3] if the possession is not common to both; nor for driving carts without lighted lanterns[4]; nor for writing two separate petitions, complaining of the same transaction[5]; nor for getting drunk and behaving in a disorderly conduct under the Police Ordinance[6]; nor can one accused be charged for theft of a bull and another for possessing beef which he cannot satisfactorily account for.[7] An accused charged with accosting a lady passenger under the Vagrants' Ordinance cannot be tried together with another who obstructs a Public Officer in the discharge of his duties in that connection [8]; nor can two prostitutes living in the same house be tried together.[9] But a charge of keeping a common gaming-house can be consolidated with one for unlawful gaming,[10] as the offences with which the accused are charged are committed in the course of the same transaction. Where two persons were charged together, the one with stealing a bull and the other with receiving it dishonestly from the first, it was held that the offences were distinct and the accused could not be charged together at one trial.[11] Where two accused went to the house of the complainant and the second accused used insulting words threatening to harm him and then both went away and where the first accused later assaulted him again with a club, it was held that the conviction of the first accused for hurt and of the second for insult and intimidation at the same trial was bad.[12] Where the appellant was charged with two other men with having dishonestly received stolen property, and where it was proved that the receipt by the appellant was at a point of time different from

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1. Abeyawickrama *vs.* Babuna[illegible] (1897) 2 N.L.R. 344.
2. 30 Indian Law Reports, Bengal Series 49.
3. Colette *vs.* Podda (1905) Lem. 81.
4. John Silva *vs.* Lewis (1909) 3 Weer. 53.
5. D. F. Matara *vs.* Don Carolis (1931) 33 N.L.R. 162.
6. James Appu *vs.* Manuel Silva and another (1926) 4 Times L.R. 97.
7. William *vs.* Dinorissa (1919) 6 C.W.R. 365.
8. Weerakoon *vs.* Mendis *et al* (1925) 3 Times L.R. 37.
9. Rahiman Saibo *vs.* Chellam and another (1923) 1 Times L.R. 280.
10. Alwis *vs.* Tillekaratne (1910) 4 Weer. 95; other decisions of the Supreme Court are not in keeping with this: for in Jayawardena *vs.* Don Thomas (1895) 1 N.L.R. 216, it was held that such a joinder was a misjoinder.
11. Fernando *vs.* Fernando (1913) 1 C.A.R. 30.
12. Gooneratna *vs.* Sinho (1916) 2 C.W.R. 20.

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its alleged receipt by the accused, it was held that the joinder of charges was illegal.[1] "The provisions of the Criminal Procedure Code 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 would 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 the case which can interfere with the definite proof of a distinct offence which it is the object of all Criminal Procedure to obtain." The trial, therefore, of two persons in the same case for two distinct and separate offences committed by them respectively on two different occasions is an irregularity that cannot be cured by section 425 of the Criminal Procedure Code[2]; nor can it be cured by the fact that the Proctor for the accused had consented to the joinder[3]; nor even by acquittal on one of the two charges so combined together.[4] A Magistrate has no power to try together two cases in which persons are separately charged even if these offences are committed in the course of the same transaction.[5]

But a person accused of committing an offence can be tried together with another accused of aiding and abetting him,[6] or even of attempting the same.[7]

(iv) In a case of doubt as to which particular section applies to the facts of a particular case, a Magistrate may frame alternative charges and try all of them together; and even if he has framed only one charge but the evidence discloses another offence for which he might have framed an alternative charge, he can convict the accused of the latter, even though no charge has been framed for it. But in all such cases, he can convict the accused of but one offence. Thus, a charge of dishonestly receiving stolen property is alternative to a charge of theft and a man can be convicted of one only of the two alternative offences.[8]

But when it is uncertain which of two or more persons have committed a particular offence, these cannot be charged alternatively. Where two persons were charged jointly and alternatively for causing injuries to several persons, the Supreme Court held that "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, a charge cannot be framed against two supposed offenders in the alternative; and, further, the assault upon each of the persons must be the subject of a separate charge."[9] This, however, does not take away the right of a Magistrate to proceed against any offender whose name is disclosed during the course of an enquiry or trial. Thus, where on a charge of having no proper name-board a carter comes and pleads "I am not guilty, it is not my cart, but the

1. Ponnan *vs.* Ukku Banda (1933) 4 C.A.C. 42.
2. Smith *vs.* Mahapila (1913) 1 Wije. 10.
3. Wijesekara *vs.* Ratnayake (1919) 6 C.W.R. 281
4. Daniel Appuhamy *vs.* Pedru Appuhamy (1917) 4 C.W.R. 288.
5. Excise Inspector, Talpe *vs.* Cornelis (1920) 7 C.W.R. 168.
6. Ahamado *vs.* Weeracutty (1909) 2 Leader 149.
7. King *vs.* Hendrick Singho (1903) 7 N.L.R. 97.
8. (1899) Koch 10.
9. Fernando *vs.* Anna Bai (1918) 5 C.W.R. 184.

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cart of Kalu Banda," the Court can at that stage cause process to issue against Kalu Banda as for the same offence and jointly try him in the event of his not pleading guilty. This is, however, not an alternative charge but a joint charge.

Where a man is charged with a major offence consisting of several minor offences and only one of the latter is proved, the Magistrate may convict him of the latter though the accused is not charged separately for it. Thus, a person charged with robbery may be convicted of theft,[1] and a person charged with causing hurt while committing robbery may be convicted of voluntarily causing simple hurt.[2] But a person charged with wrongful restraint using criminal force, intimidation and misconduct in public cannot be convicted of insult without a specific charge being framed against him for it.[3]

It may be noted that where a person is charged on more than one count and when a conviction has been had on one of these counts, either the complainant may move to withdraw the other counts, or the Magistrate may *ex mero motu* stay the trial on the others. This will have the same effect as an acquittal.

(IV). **The Plea.**

The next step after the framing of the charge is to explain it to the accused in a language which he can understand (unless he is a deaf and dumb person, in which case he is treated as a lunatic),[4] and to call upon him to show cause why he should not be convicted. In practice, this is always done by the Interpreter Mudaliyar who explains the charge from the report, summons, warrant or charge, as the case may be, and asks the accused if he is guilty or not guilty. The question "Do you plead guilty or not guilty" is not sanctioned by our Code, but has been adopted as a general rule in the vernaculars in all the Police Courts. What is essential is that the accused should be called upon to plead to the charge and that his plea should be recorded.[5] The plea should be recorded in the very words used by him[6] especially if he pleads guilty and is undefended.[7] Where a Police Magistrate fails to record an admission of an offence by an accused person in his own words, it is a fatal irregularity[8] (except in special circumstances).[9] The use of the stock phrase "The accused pleads guilty"[10] is to be highly reprobated; for the proper phrase would be "The accused states : I am guilty." If the accused does not say in plain words that he is guilty, he must, before he can be convicted on his own plea, make an unqualified admission of guilt or make a statement from which no other conclusion than that he is guilty and wants the Court to believe that he is guilty, is possible. Thus, in a charge of driving a cart without lighted lanterns, if the accused states : "I admit I drove the cart at night and that I had no lanterns,"

1. The King *vs.* Podisingho (1908) 11 N.L.R. 235.
2. The King *vs.* Alwis and another (1917) 4 C.W.R. 328.
3. Premawardena *vs.* Siriwardena (1928) 30 N.L.R. 292.
4. King *vs.* Pindorisa (1928) 29 N.L.R. 385 5 Times L.R. 101.
5. Silva *vs.* Silva (1887) 8 S.C.C. 78.
6. (1899) Koch 33.
7. Haniffa *vs.* Menia Mala (1908) 1 Weer. 86.
8. Aratchy of Angammana *vs.* Arumugam (1911) Leader 24.
9. Aratchy *vs.* Nicholas (1908) 2 Leader 169.
10. Jansen *vs.* Arnolis (1895) 1 N.L.R. 274, see also Davision *vs.* Perera : same 194.

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this statement is tantamount to a plea of "guilty." But where the statement shows that the accused has a defence to offer, even though he admits the particular act which is called the offence, the statement does not imply an unqualified admission of guilt: *e.g.* if the accused states, "I am guilty but I acted in self-defence." A conviction based on such an admission would be bad, even if the Magistrate records only the admission of guilt and not the qualifying circumstances.[1] The statement "I did not steal the bull, I saw it straying and caught it and tied it to my cart" is not an admission of guilt.[2] An admission that the accused played cards is not a plea of guilty to a charge of unlawful gaming.[3] Nor in a charge of removing timber without permit is an admission that he has no permit an unqualified admission that he is guilty of the offence.[4] In a charge of non-payment of motor car tax, the statement "I have not paid" is not an admission of guilt.[5] Where on a charge of mischief by breaking down a fence, the accused pleaded that he had a right to do so as he had a right of way over the land, it was held that this plea did not amount to an unqualified admission of guilt and the conviction was bad.[6] And, where in a charge of criminal trespass the accused stated that she still thought she had a claim to the land and it was true that she was on the land, and the Magistrate who had previously ordered her to quit convicted the accused, it was held that the conviction was bad.[7] Where the second accused in answer to the charge said, "I plead guilty. If Appuwa states I took part I can only plead guilty" and where Appuwa did not give evidence but the Magistrate convicted him on his own plea, it was held that this was not an unqualified admission of guilt and that the case should have been heard on the footing that he did not plead guilty.[8] It will thus be abundantly clear that the accused's plea must be recorded in the very words used by him as nearly as possible: though it is not necessary that it should be recorded in his own language.

Circumstances may even arise, where the accused's statement "I am guilty" may not be regarded as an unqualified admission of guilt in which event the Magistrate would be justified in not recording a conviction on such plea but in proceeding to trial.[9] Where in a charge of criminal trespass and theft, the accused states "I am guilty, I was drunk," the prosecution must nevertheless affirmatively prove intention, as this is of the essence of such a charge.[10]

We may here consider the question of an admission of guilt by the accused's Proctor on behalf of the accused. There is no provision for a Proctor offering a plea to a charge against his client especially when the client himself is not present in person at the trial. "The Code distinctly contemplates the accused being present in Court and the evidence being taken in his presence. A departure from the strict provisions of the Code might be justified in cases of a trivial nature

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1. Obeyesekara *vs.* Tegis Singho (1916) 2 C.W.R. 135.
2. Allar *vs.* Abdul Rahiman (1892) 7 Tam 2.
3. Perera *vs.* Fernando (1900) 1 Br. 147.
4. Katchy *vs.* Cooray (1909) 1 Cur. L.R. 47.
5. Hunter *vs.* Aladin Pieris 1 C.L.W. 191.
6. Fernando *vs.* Fonseka (1900) 1 Br. 172.
7. Mikalu *vs.* Anthonia (1916) 3 C.W.R. 65.
8. Ratnaike *vs.* Banda (1921) 23 N.L.R. 256.
9. Attapattu *vs.* Anthonipillai (1932) 10 Times L.R. 14.
10. Sub-Inspector of Police, Badulla *vs.* Muttusamy (1925) S.C. 639, P.C. Badulla 7,448.

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when the offence is punishable with a small fine and the circumstances seem to indicate that a plea of "guilty" offered by a Proctor might be accepted.[1] No conviction of an accused person upon such a plea could at any time be upheld should the accused not elect to abide by the plea offered by the Proctor.[2] In Tamil districts it is not customary for "young and marriageable" girls to appear "in public"—much less therefore in a Court of law. Proctors appearing for them submit a petition to the Court beforehand stating the circumstances (supported if necessary by an affidavit) and begging that their absence be excused from Court. Such a prayer can only be granted in "cases of a trivial nature" where the only punishment that the Court would be disposed to inflict would be a small fine. Thus, personal attendance may be dispensed with in cases of assault or of using criminal force or of causing simple hurt or of using abusive language but not in a case of robbery or of causing grievous hurt. With regard to "gentlemen," personal attendance may be dispensed with, for instance, in trivial motoring offences where they prefer to plead guilty and pay the fine, or in case of illness, etc. Whether personal attendance could be dispensed with or not is entirely a discretionary power vested with the Magistrate and its exercise should be invoked at quite an early stage in the proceedings.

To resume, when the charge is explained to an accused, he either pleads guilty or not guilty. If he pleads guilty he is sentenced straight-away; except in the case of "crimes" when he has to be remanded under the Habituals' Ordinance, for the purpose of identification. In lieu of remand, he may, if the circumstances permit, be allowed on suitable bail to appear on a stated day to receive sentence. In the event of his turning out to be a registered criminal the case becomes non-summary and a proper inquiry must be held *de novo*.

If he pleads not guilty, he is asked the names of witnesses and if he has none or if he is ready for trial the case proceeds to trial: if he is not ready for trial, it is fixed for trial on a subsequent date (generally within a fortnight).[3] If the accused is produced on a warrant he may be asked to furnish adequate bail for his due appearance on future dates.

In non-summary cases the plea of the accused must be recorded on the proper form with a certificate as follows: "I do hereby certify that the foregoing statement was made in my presence and in my hearing and contains accurately the whole of the statement of the accused person and (that it was made in English or) that it was not practicable for me to record in the Sinhalese (or Tamil) language in which it was made." The plea of the accused is a statutory statement and must be signed by him. Even if the statement is an unqualified admission of guilt, the Magistrate, if he has not tried the accused with consent or as a District Judge, must inquire into the whole of the case. This inquiry like in a summary case may be fixed for a later date. We shall consider the further stages of a trial and of an inquiry in the next two chapters.

The accused, while pleading not guilty, should state either the names of his witnesses or undertake to file a list later on. If he appears by

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1. Per Schneider, J., A.S.E. *vs.* Veluppillai (1923) 25 N.L.R. 67.

2. Saram *vs.* Neina Marikkar (1900) 4 N.L.R. 154.

3. "A Police Magistrate should fix as early a date for the hearing of a charge as he possibly can. The Procedure of a Police Court is intended to be summary and the efficiency of such a Court depends in no small degree upon the promptitude with which it determines the cases brought before it." Abdul Cader *vs.* Suppu Pulle (1880) 3 S.C.C. 89.

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Proctor, the latter may undertake to do so. The practice, however, of filing a list should not be countenanced in important cases, leading as it does to the fabrication of evidence for the purpose of "cooking up" a defence. It is realised that an accused when he appears in Court cannot be expected to know the names of all witnesses that he would require at his trial; but he has the option of submitting an additional list at a later stage.

The accused may apply for and receive summonses on his witnesses for their appearance on the day of trial. In a summary case where the accused is on remand and especially where he is undefended, the Magistrate will have himself to order the issue of summons on the witnesses mentioned by him[1]; else the trial will unnecessarily be delayed and the case will have to be postponed for a later date. As in the majority of cases, defence witnesses are seldom or never heard in a non-summary inquiry (unless the accused specially requests the Court to do so), it is superfluous to summon them in the lower Court. But it may so happen that in the course of an inquiry the case turns out to be summary and solely within the jurisdiction of a Police Court. In such a case, a proper charge should be framed against the accused[2] and after his plea has been recorded he should be given an opportunity, if he so desires, of summoning his witnesses and making a defence. The same procedure should be followed in all cases where a charge happens to be altered by the Magistrate or a fresh charge happens to be added during the course of a summary trial. A charge can be altered or a fresh charge added at any stage of the proceedings before passing sentence: but the trial, if it does not begin afresh, must be suspended *pro tempore* and the accused afforded an opportunity of meeting this fresh accusation.[3] The fact that the accused has had this opportunity should appear on the record.[4] Otherwise, even where the offences are cognate, the proceedings lay themselves open to a re-trial.[5]

In the event of the accused pleading not guilty the trial of the case does not usually take place on the day of appearance. This is not a general rule but a custom followed in almost every Police Court and approved of by the Supreme Court. Where on a "warrant returnable day" the complainant was not ready with his witnesses and the Magistrate thereupon acquitted the accused, it was urged in appeal that it was not the practice of the Court for the complainant to bring his witnesses and be ready for trial on the date for which the warrant was returnable; the Supreme Court 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 postponement under section 289 of the Criminal Procedure Code, and that apparently there was no conflict between that section and section 188.[6] Hence the "warrant or summons returnable days" are customarily the days when a trial does not usually take place and the parties need not necessarily come ready for trial.[7]

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1. Thomasz *vs.* Jusey Appu (1886) 7 S.C.C. 175.
2. Vally Nagan *vs.* Santia Seeman (1911) 6 Weer. 46.
3. The Queen *vs.* Gabriel Appu (1896) 2 N.L.R. 170.
4. S. Suscy Pulle *vs.* Peter Perera and another (1927) 5 Times L.R. 9.
5. Fonseka Inspector of Police *vs.* Francis Karune (1931) 1 C.L.W. 190.
6. Narayanam *vs.* Vengadasalam (1916) 2 C.W.R. 234.
7. Casivathen Pillai *vs.* Muthan (1925) P.C. A'pura 39043 S.C. 489 Leader Law Reports 15.10.25.

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(V). Specimen Charges.

The following specimen charges may be of assistance or guidance : the list is not meant to be exhaustive. If the proper forms are used, much of a Magistrate's time and labour will be saved. Police plaints, and plaints similarly framed, may also be written in the same fashion —with this difference that the third person, singular or plural, should be substituted for the second person plural. Police plaints are reports addressed to a Police Court whereas charges are indictments addressed to the persons accused. Judgment sheets, summonses or warrants may be similarly entered up.

A. SINGLE CHARGES.

I Theft.

In the Police Court of Colombo

Dated 2nd April, 1925.

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, commit theft of a gold pendant valued at Rs. 25/-, being the property of one Sudu Banda of Negombo and thereby committed an offence punishable under section 367 of the Ceylon Penal Code.

Sgd. A. B. C.,
Police Magistrate,
Colombo,
2.4.25.

II Hurt.

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Maradana, Colombo, on the first day of April, 1925, voluntarily caused grevious hurt to one Sudu Banda of Negombo by means of a club and thereby committed an offence punishable under section 316 of the Ceylon Penal Code.

Sgd. Etc.

III Cheating.

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, cheat one Sudu Banda of Negombo dishonestly inducing him to part with a sum of Rs. 45/- on your giving him cheque No. A 555000 on the National Bank of India, well knowing that at the time when the cheque would be presented at the said Bank there would be no funds to your credit to meet the said cheque, and thereby you have committed an offence punishable under section 400 of the Ceylon Penal Code.

Sgd. Etc.

IV Receiving Stolen Property.

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, dishonestly receive stolen property, to wit, a black bull valued at Rs. 75/- bearing brand marks A 145 S. B. and belonging to one Sudu Banda of Negombo, knowing or having reason to believe the said bull to be stolen property, and thereby committed an offence punishable under section 394 of the Ceylon Penal Code.

Sgd. Etc.

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V **Escape from Lawful Custody.**

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, escape from the custody of Police Constable 1212 Zainudeen of the Borella Police Station, in whose custody you were lawfully detained after arrest by the said constable Zainudeen on warrant No. 1001 issued by the Police Magistrate of Panadure, and thereby committed an offence punishable under section 220A of the Ceylon Penal Code.

Sgd. Etc.

VI **Insult.**[1]

You

Kalu Banda

are hereby charged as follows, that you did within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, intentionally insult Sudu Banda by using the following words, to wit (Here, set out the words) and thereby gave provocation to the said Sudu Banda, intending or knowing it to be likely that such provocation would cause him to break the public peace and that thereby you have committed an offence punishable under section 484 of the Ceylon Penal Code.

Sgd. Etc.

VII **Rash and Negligent Act.**

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, do an act, to wit, the firing of a loaded pistol on the Galle Face, so rashly and negligently as to endanger the life of one Sudu Banda who was pulling a rickshaw on the said Galle Face at the time of the firing of your pistol and thereby committed an offence punishable under section 327 of the Ceylon Penal Code.

Sgd Etc

VIII **Excise.**

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, possess 20 drams of arrack without a permit from the Government Agent, Western Province, in contravention of section 16 of Ordinance No. 8 of 1912, and thereby committed an offence punishable under section 43 (a) of the said Ordinance.

Sgd. Etc.

IX **Opium.**

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Colombo, on the first day of April, 1925, possess two lbs. of Opium without a license and thereby committed an offence punishable under section 8 (i) of Ordinance No. 5 of 1910.

Sgd. Etc.

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1. The Supreme Court has indicated this form in P.C. Galle A 266. S.C. of No. 397-8 of 6th October, 1933.

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B. JOINT CHARGES.

I Unlawful Gaming.[1]

You

1. Kalu Banda
2. Sudu Banda
3. Loku Banda and
4. Punchi Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Borella, on the first day of April, 1925, commit unlawful gaming by the side of the public road by playing a game called "Bebi" for money-stakes and thereby committed an offence punishable under section 4 of Ordinance No. 17 of 1889.

Sgd. Etc.

II Hurt.

You

1. Kalu Banda
2. Sudu Banda
3. Loku Banda and
4. Punchi Banda.

are hereby charged as follows, that you, the first accused, did within the jurisdiction of this Court, at Borella, on the first day of April, 1925, voluntarily cause hurt to one Bandappu by means of a pointed weapon, to wit, a knife, and that you, the second and the third accused, at the said time and place aforesaid, did aid and abet the commission of the said offence by the first accused and that you, the fourth accused, did at the said time and place aforesaid voluntarily cause hurt to the said Bandappu by means of a club; and that you have thereby committed offences punishable under sections 315, 315/102, and 314 of the Ceylon Penal Code, respectively.

Sgd. Etc.

III Assault and Robbery.

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Borella, on the first day of April, 1925, voluntarily cause hurt to one Bandappu by means of a club and at the said time and place you did rob him of his comb valued at Rs. 10/- and of his umbrella valued at Rs. 5/- and thereby committed offences punishable under sections 382 and 380 of the Ceylon Penal Code, respectively.

Sgd. Etc.

C. ALTERNATIVE CHARGE

You

Kalu Banda

are hereby charged as follows, that you did, within the jurisdiction of this Court, at Borella, on the first day of April, 1925, commit theft of an attiyal valued at Rs. 100/- belonging to one Sinnamma, wife of one P. Sinnetamby of Sea Street from her dwelling house, or in the alternative, that you did at or about the same time and place aforesaid dishonestly receive the said stolen attiyal, knowing or having reason to believe the same to be stolen from the possession of the said Sinnamma and thereby committed an offence punishable under section 369 or section 394 of the Ceylon Penal Code, respectively.

Sgd. Etc.

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1. It has been pointed out to me that this form is wrong. Section 11 of the Unlawful Gaming Ordinance requires that the charge shall be in the form B attached to the schedule of the Ordinance: to wit, "I ——— hereby charge you ——— as follows: That you, on or about the ——— at ——— unlawfully gamed and thereby committed an offence punishable under section 4 of Ordinance No. 17 of 1889. Sgd. ———, Police Magistrate." Personally I see very little difference between this form and the form above, but I would like to have a Supreme Court ruling on the word "shall" in this section.

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CHAPTER VI.

TRIALS.

(I) Postponements.

A trial has to be distinguished from an inquiry. A trial takes place in all cases where a Magistrate has jurisdiction to convict and sentence the accused. An inquiry takes place in non-summary cases only. A trial results, therefore, in either a conviction or acquittal ; an inquiry in either a committal or discharge.

On the day appointed for trial, if the parties are ready, the case proceeds to trial: otherwise it gets postponed. Postponements in summary cases are granted sparingly, but are nevertheless granted if either of the parties is ill or unable to attend Court and satisfies the Court by a proper certificate or a Headman's report to that effect ; or if material witnesses are not served with summons or are ill or unable to attend Court. Where a material witness was prevented on reasonable grounds (*e.g.* attending another Court at another place on the same day) from attending Court on the day fixed for trial, the Supreme Court held that the Court should have allowed an application of the accused for an adjournment of the proceedings.[1] Postponements are sometimes granted on the application of the Police (or the prosecuting officers) whose enquiries are yet incomplete. As per Middleton, J. "Under section 289 of the Cr. Pr. Code it would not be reasonable cause to adjourn a case whenever the prosecutions desires to make further enquiry, but I think myself that there are cases in which the Magistrate may deem it expedient to grant a postponement for further inquiry which might be deemed reasonable cause for such adjournment. The Police, for instance, in making an inquiry may want to get further evidence, and I think if the Police apply for an adjournment to make further enquiry that would be an adjournment for reasonable cause."[2] This rule has especially greater force in non-summary inquiries. A summary trial, as its name implies, denotes a summary and hence a "speedy disposal,"[3] and the Police are expected to complete their investigations before filing a plaint. In any event the defence, if they so desire, should be informed of the nature of these further investigations so that they may come ready for trial on the next date. Where evidence led on behalf of the prosecution is found to be insufficient in a summary case, a Magistrate has no power to postpone the case and direct the Police to make further inquiries.[4] For he is called upon to "sit in judgment." on the evidence led on either side and if the prosecution does not convince him of the guilt of the accused, he should acquit. So, where a Magis-

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1. P.S. Jensen *vs.* Punchi Singho (1930) 3 C.A.R. (Gratiaen's) 79.
2. Reid *vs.* Kiriwanti (1903) 7 N.L.R. 383.
3. Abdul Cader *vs.* Suppu Pulle (1880) 3 S.C.C. 89.
4. Although the Court has power to summon and examine material witnesses and even to recall them under section 429 Cr. Pr. Code and although it has power to ask any questions "in order to discover or obtain proper proof of relevant facts" under section 165 of the Evidence Act, these powers cannot be abused for the purpose of discovering *further evidence.*

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trate having found that the evidence adduced for the prosecution was insufficient to justify a conviction, adjourned the trial for further evidence to be searched and investigated into, and after hearing this new evidence convicted the accused, the Supreme Court held that the proceeding was illegal and the conviction could not stand.[1] Similarly, where a Magistrate heard the evidence for the prosecution and the defence and did not proceed to 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, it was held that "this was a lamentable miscarriage of justice," and the proper course was to acquit the accused if the Magistrate had any doubt as to his guilt.[2] It follows that after a trial has begun a Magistrate cannot allow a postponement for the sake of enabling the prosecution to discover evidence, though the Police may, before the trial, apply for and get a postponement, and may also add to the list of witnesses already submitted with the plaint.

Postponements are sometimes granted to "accommodate" parties or their Proctors and Advocates, but this is entirely a matter of the Magistrate's discretion.

Cases are often adjourned for "want of time," to try them. If the Court's "trial roll" is judiciously arranged, this eventuality will rarely occur. A summary case can hardly be allowed to drag on from day to day. "It is a denial of justice to postpone a summary case for an unreasonable length of time, for reasonable speed is essential in a summary trial. The answer to the question whether an adjournment is unreasonably long would depend upon the circumstances of each case."[3]

When a postponement is granted on reasonable grounds, the cause for granting the same should be entered on the record: similarly, where parties apply for an unusually long adjournment, the reason for their application should also be mentioned.

Ordinarily then a summary case takes three dates to come to trial:

(i) The day of institution of the case.

(ii) The day of appearance.

(iii) And the day of trial.

(II) Complainant Absent or Unready.

If on the day appointed for appearance of the accused or for the trial of the case or on any date that the case stands postponed, the complainant is absent, the accused is entitled to be acquitted. This power of acquittal is vested in a Magistrate only with respect to private plaints and, it is fancied, only in summary cases.

For in Police plaints the nominal complainant is the Police officer and if the real complainant is absent, his presence could always be secured by the issue of a warrant.[4] If the nominal complainant himself is absent, the discharge of the accused is under section 191 of the Procedure Code, so that the same case cannot be re-opened even if the default is satisfactorily purged thereafter, though such an order of discharge is no

1. Gomis *vs.* Agoris (1896) 2 N.L.R. 180.
2. Avaneris De Silva *vs.* Remanis (1898) 3 N.L.R. 301.
3. Government Agent, N.C.P. *vs.* Appuhamy (1912) 16 N.L.R. 39.
4. Soysa *vs.* Juliana *et al* (1922) 1 Times L.R. 122.

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bar to a fresh prosecution on the same facts.[1] And in non-summary cases an order of acquittal is *ultra vires* and acts merely as a discharge; a discharge by a Magistrate of an accused after non-summary proceedings does not amount to an acquittal.[2]

If, however, the complainant appears within a reasonable time and satisfies the Magistrate that his absence was due to sickness, accident or some other cause over which he had no control, the Magistrate may cancel the order of acquittal and re-open the case. The complainant must (i) appear within a reasonable time, and (ii) satisfy the Magistrate that his absence was due to some cause over which he had no control.[3] Thus, where an order of acquittal in the absence of the complainant was made at 1 p.m. and the complainant coming to Court after the acquittal found the Magistrate still sitting but though informed of the acquittal took no steps to have the order cancelled till two days after, it was held that the application to re-open was not made within reasonable time.[4] Where the cause of the complainant's absence is due to his being misinformed about the date of trial, it would be a reasonable cause for his absence.[5] What is a reasonable cause depends upon the circumstances of each case and the power[6] to re-open a case is purely discretionary: but there ought to be proof on the face of the record that the absence was due to a reasonable cause and that application to re-open was made within a reasonable time.[7] The accused ought to be noticed of the fact as soon as the case is re-opened. If necessary he may be allowed to challenge the application and disprove the fact that the complainant's absence was due to a reasonable cause. An accused, however, unlike a defendant in a civil case, has no right in every instance to challenge the complainant or to lead counter-evidence.

In an application for maintenance the absence of the complainant on a given date, though it sets the respondent free for the time being, does not give him the same rights as in an acquittal.[8] In all other cases the acquittal is final and can be pleaded successfully as a bar to a further prosecution; but if a complaint has been dismissed on account of the complainant's absence before process is issued, the dismissal is not tantamount to an acquittal and cannot be pleaded as a plea of *autrefois acquit*,[9] for the accused is never summoned, is never charged, and can never therefore be acquitted.

If the complainant is present but is not ready with his witnesses, etc., and can give no satisfactory explanation why he is not ready, the Magistrate should proceed to hear and decide the case on the merits of the available evidence, but should not discharge or acquit the accused without a trial. If he does, the acquittal would be no bar to a further prosecution. The Full Bench case of *Senaratna* vs. *Lenohamy*[10] has decided that the discharge of an accused without trial under section 191

1. Rosario *vs.* Silva (1932) 2 C.L.W. 121.
2. The King *vs.* Aron (1913) 2 Bal. Notes 71.
3. Amarasekara *vs.* Goonaratne (1910) 5 Bal. 60.
4. Kulandavelu *vs.* Chelliah (1905) 5 Tam. 34.
5. Roberts *vs.* Purani Kangany (1909) 2 Weer. 65.
6. Mourant *vs.* Seera (1917) 4 C.W.R. 172.
7. 6 Tam. 66.
8. Justina *vs.* Arman (1908) 12 N.L.R. 263, and Saboor Umma *vs.* Cooskanny (1909) 12 N.L.R 97.
9. Ibrahim *vs.* Kumaiapodi (1908) 3 Bal. 291.

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of the Cr. Pr. Code is no bar to the institution of fresh proceedings in the same case. In that case, the Magistrate had discharged the accused as the complainant was not ready to proceed with the trial. Later the complainant, who was the Vidane Aratchy, filed another plaint against the same accused, process was issued and a plea of *autrefois acquit* was pleaded ; the Magistrate held that the fresh case was virtually a revival of the old and as no appeal was taken against his previous order, the accused were entitled to an acquittal. The Supreme Court, Ennis, J. dissenting, held that the original discharge was no bar to a fresh proceeding. This judgment is important as it discusses the difference between a discharge and an acquittal.

If the witnesses are served with summons but are absent without a valid excuse, a Magistrate cannot proceed to trial if they are material, but must issue a warrant for their attendance. Where an application under similar circumstances was made by the Counsel for the defence for an issue of warrants on the absent witnesses and for a postponement and the Magistrate refused to grant either, it was held that he should have issued warrants to compel their attendance and should have adjourned the case for their appearance.[1]

It may here be mentioned that if the complainant is absent the accused can be acquitted, but the complainant cannot be dealt with as for contempt of Court.[2] Mere absence from the Court when his presence is required is hardly tantamount to a contempt of Court, though this would be different in the case of a temporary absence without leave or reasonable or unavoidable cause.[3]

(III) Presence in Court.

When the parties appear on the day appointed for trial and are ready for trial, the trial proceeds. A failure to ask the parties whether they are ready for trial, if such failure prejudices the accused, would vitiate a conviction.[4]

At the trial, the evidence already recorded of each witness in the absence of the accused should be read over to him. For an accused person is entitled to have the witnesses against him give their evidence in his presence and in his hearing, so that he might know exactly what course to adopt in his defence.[5] It follows that a trial must actually proceed in the presence of the accused (except in those rare cases of a trivial nature, where his presence has been dispensed with). So that no accused person can be ordered out of Court[6] when the other witnesses are giving evidence—even if he elects to give evidence and even if he has bought over the witnesses for the prosecution. Where a Magistrate with the consent of the Proctor for the accused so ordered him out of Court and failed to read over to him the evidence already recorded in his absence, the Supreme Court per Bertram, C.J. held : "The learned Magistrate justifies his procedure by a reference to section 120 (4) of

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1. Sampanther *vs.* Hini Appu (1916) 2 C.W.R. 109.
2. Police Court, Kandy, 16800 (1917) 4 C.W.R. 174.
3. See *infra* Chapter XXVI. The King *vs.* Nonis (1912) 2 Matara cases 84.
4. Malhonda *vs.* Ukku Banda (1920) 2 Law Recorder 150.
5. Dingirala *vs.* Podi Sinno (1916) 2 C.W.R. 136. See Parupanathan *vs.* Kandiah 30 N.L.R. 140 for the effect of former evidence recorded in the absence of the accused but not read over and explained to the witnesses nor signed by them.
6. Pieris *vs.* Perera 1 Bal. Notes 3.

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the Evidence Ordinance which declares that the accused may give evidence in the same manner and with the like effect and consequences as any other witness. He says that one of the consequences of a man being a witness is that he must go out of Court while the other witnesses are giving their evidence . . . . If this proposition were right, every accused would have to decide at the beginning of the trial whether he would give evidence and if he decided to exercise the privilege conferred upon him by the law, the trial would have to take place in his absence . . . .There is no authority for the procedure which he adopted."[1] Where one Mr. Lawrence of the Nigerian Service was recently convicted by the Nigerian Courts for cheque frauds and false accounting, the Privy Council in appeal squashed the conviction on the ground that the trial judge had altered the sentence in the absence of the accused, stating that " it is an essential principle of our criminal law that the trial of an indictable offence (meaning the whole of the proceedings, including sentence) must be conducted in the presence of the accused."[2]

Just as the accused should be allowed to remain in Court during a trial, the complainant, after he has given evidence, may be allowed to remain, unless the defending Counsel objects for valid reasons. Similarly, a prosecuting officer has a right to remain in Court and to conduct the case. If he is giving evidence as a witness, his evidence may be recorded at the earliest possible opportunity.

A complainant has a right to appear by a Proctor[3] and he can do so even in a Police case. Similarly, every accused person may of right be defended by a pleader.[4] He should be given every opportunity of retaining one and may even be granted a postponement for the purpose. This right cannot be taken away from the accused on insufficient grounds ; and if the pleader whom the accused has retained is ill or dies, the accused is entitled to a date to retain another pleader. A Proctor's absence from Court, to justify an adjournment of the hearing, should be on reasonable grounds or on grounds beyond his control. Where a Proctor who appeared for an accused person, on being refused a postponement, threw up his brief and retired from the case and the Judge then postponed the case to enable the accused to retain another Proctor ; but at the adjourned hearing the same Proctor re-appeared and claimed the right to conduct the defence ; the Judge declined to hear him and tried and convicted the accused who refused to take part in the proceedings as he was not represented by the legal adviser whom he had chosen, it was held that in the circumstances the conviction was right, as there was no justification for the Proctor's withdrawal from the case : it was a distinct breach of good advocacy : the provisions of the Procedure Code do not give an accused person a right under all the circumstances to be defended by any pleader whom it may please him to select, nor can it be allowed to over-ride the power of the Court to decline to hear any particular pleader on sufficient grounds.[5] The Supreme Court has recently condemned the practice of Proctors withdrawing from criminal cases at the last moment where their clients refuse to accept their advice for settlement or otherwise.[6]

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1. Police Vidane, Kandana *vs.* Amaris Appu *et al* (1923) 25 N.L.R. 400.
2. I am unable to give reference as this is a case decided by the Privy Council so recently as 1933.
3. Juakino *vs.* Fernando (1910) 3 Weer. 91.
4. Section 287 of the Cr. Pr. Code.
5. The King *vs.* Silva (1907) 1 A.C.R. 148.
6. Fernando *vs* De Jong (1932) 10 Times L.R. 13.

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(IV) The Trial.

The procedure at a trial is very simple : every witness called by the prosecution is examined-in-chief, cross-examined by the accused or his Proctor, and re-examined. When the case for the prosecution is closed, the Magistrate may acquit the accused or call upon him for a defence. In the latter event the accused, if he elects to give evidence, does so immediately after the close of the case for the prosecution : then his witnesses are examined-in-chief, cross-examined and re-examined. The defence Counsel may address the Court after the close of the case for the prosecution but generally does so after the whole trial is closed. There is no time-limit for a Counsel's speech.[1] Then follows the verdict : if the case results in a conviction, the accused may be sentenced forthwith or may be remanded in order to enable the Police to trace his previous convictions, if any. The reasons for the verdict and sentence which form the judgment may not necessarily be written then and there, but could be postponed for a later date : a judgment not delivered forthwith is not fatal to the validity of a conviction [2]; though a judgment delivered six months after the trial was regarded as not a mere innocuous irregularity.[3]

There are certain points in this procedure which we may proceed to consider in detail.

(V) Discharge.

Section 191 of the Procedure Code says that a Magistrate may discharge the accused at any previous stage of the case, but he should record his reasons for doing so. This section gives a Magistrate very wide powers and enables him to take " short cuts " when he is not satisfied with the evidence led by the prosecution. He may, thus, discharge an accused after examining the complainant alone or at any later stage, provided that he is not satisfied with the evidence led, or that he has come to the conclusion that the case is positively false. In such a case the proper order to make would be an order of acquittal : for " where a Magistrate in a summary proceeding after hearing evidence for the prosecution makes an order discharging the accused because he disbelieves the evidence, the order of discharge is tantamount to an acquittal under section 190. The discharge of an accused referred to in section 191 is a discharge as authorized by law, *e.g.* a discharge under the circumstances mentioned in section 196 or 151 (1) or a discharge consequent on acquittal under section 194 or 195."[4] The difference between a discharge and an acquittal must therefore be noted. An acquittal is an acquittal once and for all : an acquitted offender cannot be re-prosecuted for the same offence ; but a discharge is only provisional and is no bar to a further prosecution for the same offence.[5] Where a Magistrate hears evidence in a summary case and forms an opinion that the accused is not guilty, he acquits the accused once and for all, even though he may have entered an order " discharging " the accused,[6] but if without hearing evidence, he has occasion to set the accused free, *e.g.* where a com-

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1. Russel *vs.* Perera (1922) 1 Times L.R. 43.
2. Pieris *vs.* Silva (1905) 3 Bal. 165.
3. Assistant Government Agent, Kegalle *vs.* Podi Sinno *et al* (1914) 18 N.L.R. 28.
4. Eliyatamby *vs.* Sinnatamby (1905) 2 Bal. 20.
5. The King *vs.* Podisingho (1907) 3 Bal. 206.
6. Dyson *vs.* Khan (1929) 31 N.L.R. 136. 7 Times L.R. 47.

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plainant is absent or where the prosecution is stayed at the instance of the Attorney-General, he merely discharges. It is this latter discharge that is contemplated under section 191. And though a discharge of an accused under section 191 by a Police Magistrate in a case summarily triable by him is final and so long as it stands unreversed, it would prevent the Magistrate himself re-opening the prosecution[1] in the same case, it cannot be availed of as a plea of *autrefois acquit* in the event of a fresh prosecution.[2] An appeal lies from an order of discharge under this section,[3] even without the sanction of the Attorney-General.[4]

In non-summary cases a Magistrate cannot acquit but only discharges and this discharge is no bar to a re-opening of the same case against the same accused at any future date.[5]

Where a Magistrate is not competent to make an order of discharge or acquittal, his order would be a void order and would have no practical effect.[6] Thus, a Magistrate who refers the complainant to a Village Tribunal cannot lawfully make an order of discharge or acquittal[7] and even if he does, the order would be no bar to a fresh prosecution in the same Police Court of the same accused on a mandate of reference from the Village Tribunal. Whenever possible, all the evidence which a complainant wants to place before a Magistrate should be heard *in extenso* before an accused is acquitted or discharged ; for it may happen that the complainant's witnesses may throw additional light on the story. But where a Magistrate has made up his mind soon after the complainant has been examined and cross-examined, it would be futile to go through the formality of a long and protracted trial.

(V) Rules of Evidence.

It is not the scope of this book to discuss the various rules of evidence,[8] but a few general and important points with regard to the examination of witnesses may here be given.

Though witness-sheds are provided in every court-house there is no rule of law[9] which requires witnesses to be kept out of Court and of hearing. But it is best to see that all witnesses for the prosecution and defence, except those especially permitted, go into the witness-shed as soon as a trial commences, otherwise their credibility will be affected. A Magistrate cannot refuse to record the evidence of a witness merely because he is in Court instead of in the witness-shed when the previous evidence is being recorded. Such a circumstance, however, may militate against the weight to be attached to his evidence.[10]

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1. Vellavayaran's Case (1903) 7 N.L.R. 116.
2. Davidson *vs.* Appuhamy (1916) 2 C.W.R. 144.
3. Gunaratna *vs.* Burnado (1904) 2 Bal. 32.
4. Silva *vs.* Rahiman (1924) 26 N.L.R. 463.
5. This proposition may be open to some criticism. But the Solicitor-General can re-open the case, Dias *vs.* Perles (1930) 31 N.L.R. 487 7 Times L.R. 131. And the Attorney-General has the same right. Fernando *vs.* Fernando (1930) 32 N.L.R. 152.
6. Saliku *vs.* Appu Singho *et al* (1928). S. C. 361, P.C. Dandagamuwa 18981. Leader Law Reports of 1st September, 1926.
7. Attorney-General *vs.* William (1911) 14 N.L.R. 345.
8. Our Evidence Ordinance is by far the best and most comprehensive " treatise " on the subject of the law of evidence, based as it is on the Digest prepared for India by Sir James Stephen. Mr. R. F. Dias, Crown Counsel, has prepared, at the instance of the Ceylon Government, an excellent commentary on the same with copious notes and exhaustive decisions and the reader is referred to the same in case of necessity.
9. This is different in civil cases where express provision is made by section 174 of the Civil Procedure Code.
10. Inspector of Police Galle, *vs.* Sadiris (1930) 3 C.A.R. (Gratiaen's) 12.

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Every person who is examined as a witness must be duly sworn or affirmed.[1] So that a boy under seven, if the Court regards him as a competent witness (and this the Court can do after testing his general powers of understanding) must also be administered the necessary oath.[2] "When once the Court has elected to hear the evidence of a person it has no option but to administer either an oath or affirmation to such person ;" even if such person were deaf or dumb.[3] The administering of an oath or affirmation is the work of the Interpreter Mudaliyar, even if the witness be an English-speaking witness. Atheists and non-believers must also be affirmed.

Every witness thereafter is examined-in-chief by the party calling him ; in examination-in-chief he can only be asked relevant questions : all questions are relevant as would go to show that the accused has or has not committed the offence with which he is charged ; and he cannot be asked leading questions unless he is proved to be hostile to the party who has summoned him. The accused may, for instance, have "bought over" the witness ; the fact that the witness is so bought over or that he evinces a favourable disposition towards the prisoner must be apparent from his manner or method of answering questions. A leading question is a question which suggests the desired answer or which puts disputed matters to the witness in a form permitting of the simple reply of "yes" or "no."[4] Under the Indian Evidence Act the Court can permit leading questions as to "matters which are introductory or undisputed or which have in its opinion been sufficiently proved." Though this section in Ceylon is altered and though here leading questions can only be asked if the other side does not object or if the Court permits, there is a tendency in practice to lead a witness on introductory or undisputed matters.

After the examination-in-chief is over, the witness is cross-examined. The object of every cross-examination is two-fold : (i) to weaken or destroy the case of the opponent by impeaching the accuracy and credibility of the several witnesses, and (ii) to establish the party's own case by means of his opponent's witnesses. Cross-examination is therefore not confined to matters proved in the examination-in-chief, but may embrace all facts which have the remotest bearing on the facts in issue or which would enable the Court to come to a right conclusion. Thus, questions which would tend to shake the credit of a particular witness, however remote they may be from the fact in issue, may be permitted. And leading questions are the rule in cross-examination but—

(i) The questions must not put into the mouth of the witness the very words which he is to echo back again.

(ii) And the questions must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to facts.[5]

Able, though not necessarily lengthy, cross-examination is a weapon which proves very useful in shaking the case for the prosecution ; a good

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1. Sub-Inspector of Police, Chilaw vs. Maria Umma (1931) I C.L.W. I.
2. 1 Bal. Notes 3. Police Sergeant Jumal vs. Perera (1931) 1 C.L.W. 208.
3. 1 Bal. 185.
4. Phipson's Manual of Evidence, p. 129.
5. Evidence Ordinance, section 143 (1).

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many witnesses "trip" during cross-examination and thus help the cross-examiner.[1]

A Magistrate has, however, an inherent power of seeing that cross-examination is confined to reasonable bounds, that absolutely useless or scandalous, or scurrilous remarks are not indulged in.[2]

But as pointed out by our late Chief Justice,[3] "the Code nowhere allows the Magistrate to impose any time-limit either on cross-examination or on the remarks of pleaders."

The re-examination of a witness by the party who has summoned him can only be confined to facts arising out of the cross-examination and no new matter can be introduced except with the leave of the Court: in the latter event, the accused has a right of further cross-examination.

When a witness has answered a particular question which is relevant only because it tends to shake his credit, no further evidence can be led to contradict him. Thus, "a witness may, no doubt, be cross-examined with reference to previous litigation so as to shake his credit by injuring his character; but his answers to these questions must be accepted and they cannot be either impeached or confirmed by the attacking party by tendering in evidence the record of the case in question."[4]

No witness can be allowed to give evidence of hearsay. Hearsay includes oral or written statements by persons who are not called as witnesses. In a Police Court case, if the name of a particular witness is on the plaint, but if he is not available for cross-examination, any statement which he is reputed to have made becomes hearsay and is excluded. The real criterion for exclusion of such irresponsible hearsay is the inability of the other side to cross-examine the witness and thus test the veracity of his testimony. The few exceptions to the hearsay rule will be found in our Evidence Ordinance.[5]

No witness can be asked any questions that would show that the accused bears a bad character or has been previously convicted unless the defending Counsel himself originates the questions. One single similar occurrence may, however, be proved to show intention on the part of the accused if there is some nexus or connection between it and the crime alleged.[6] Nor can a confession made to a Police officer[7] or a Headman[8] by an accused person be elicited in evidence unless some fact has been discovered in consequence of such a confession; in which case, only so much of the confession as has led to the discovery may be proved, even if an inducement has been offered by the Police officer for the making of the confession.[9] Thus, if in pursuance of a confes-

1. In the Northern Peninsula witnesses have an actual rehearsal on the day previous to the trial, and therefore do not "trip" easily.

2. In my experience, I have sometimes noticed that where an accused knows that he is to be convicted and where he ought to have pleaded guilty, he would nevertheless prefer a trial and fee a pleader for the mere gratification of seeing his enemy insulted from the box.

3. Rowel vs. Perera 24 N.L.R. 456.

4. Falaloon vs. Cassim (1918) 20 N.L.R. 332.

5. Sections 32 and 33. Statements made by a deceased person before receiving injuries are not relevant. The King vs. Arnolis Perera (1927) 5 Times L.R. 34.

6. This is relevant under section 14 of the Evidence Act if not under section 15. King vs. Senevi-ratne (1925) 27 N.L.R. 100.

7. In the absence of any definition of the word Police Officer in the Evidence Ordinance itself, the definition of the term in section 3 of the Cr. Pr. Code may be availed of. Ratemahatmaya Uda Bulatgama vs. Pitawala (1925) 3 Times L.R. 131.

8. Vidane Aratchy Kalupe vs. Appu Singho 22 N.L.R. 412.

9. The King vs. Packeer Tamby (1931) 32 N.L.R. 262. 8 Times L.R. 117

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sion the Police are able to trace some of the stolen property, the fact that the accused said that the property was to be found at a particular spot can be proved.[1] The fact discovered must be relevant to the charge against the accused,[2] and the discovery may be even that of a new witness.[3] But a confession in order to be so must be made by a person who is an accused, though he may not have been actually charged at the time.[4] The person making it must stand in the capacity of an accused. Thus, if he becomes a complainant in a case, the statement which he may have made to the Police even though it is tantamount to a confession is still relevant.[5] Or, if he has made a statement before committing the offence or while he was committing it or if he has communicated his intention to commit the offence, such a statement is not a confession and is therefore relevant.[6] A statement by a Vidane that " the accused denied the cutting and said that Aron went to take the knife from his father and got cut " amounts to a confession and is therefore irrelevant.[7] And though confessions to Police officers are inadmissible, the fact that the accused complained to the Police is relevant : but the actual words used by the accused cannot be put in. An Excise officer is not a Police officer,[8] but any statement made to him or in his presence by the accused if it is an admission of guilt is not relevant and is inadmissible.[9] Confessions to persons in authority are irrelevant, only if made through any inducement, threat or promise in respect of the charge against the confessor.

Statements made by witnesses, or by the complainant[10] to the Police, are not admissible and the defence Counsel is not entitled to call for extracts from the Information Book, but may suggest to the Magistrate to call for the same, if the story narrated in Court differs materially from the version given to the Police. But if the Information Book or the Police Diaries are used by Police witnesses to refresh their memories, or if the Court uses them for the purpose of contradicting such witnesses, then the defence has a right of referring to them and cross-examining[11] those witnesses thereon. Any statement made by any witness to the Police may, however, be admissible if the person making the same is dead or cannot be found or is incapable of giving evidence ; and such statement is relevant, of course, in a charge of giving false information to the Police under section 180 of the Penal Code. Where a spontaneous statement alleging the commission of an offence the receipt of which sets a Police Officer or an Inquirer upon his investigation into the offence is made by a person, say, by an Excise Inspector, to a Police Officer, it is not a statement which falls within section 122 (3) of the Procedure Code and the contents thereof may be given in evidence for the purpose of corroborating complainant's testimony under section 157 of the

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1. 5 C.W.R. 297.
2. Nambiar *vs.* Pedru Fernando (1925) 3 Times L.R. 35.
3. The King *vs.* Sudahamma (1924) 26 N.L.R. 220.
4. 7 Tam 28.
5. P. C. Kegalle 26068 of 30th September, 1918.
6. King *vs.* Tissera *et al* (1930) 1 C.L.W. 244.
7. Weerakoon *vs.* Ranhamy (1926) S. C. 38. P. C. Kalutara 13216. This case was sent back for retrial by Branch, C.J.
8. 1 Cr. Appeal Reports 79.
9. In consequence of decision in Rose *vs.* Fernando (1927) 29 N.L.R. 45, the Evidence Act was amended by Ordinance No. 18 of 1928 by which confessions in Excise offences to or in the presence of Excise officers are made inadmissible.
10. Lavena Marikkar *vs.* Cassim (1884) 6 S.C.C. 65.
11. See sections 145 and 161 of the Evidence Ordinance.

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Evidence Ordinance.[1] Any Police Officer can, however, give evidence as to the enquiries he has made and can refer to the result of such inquiries, provided that in so doing he refrains from giving hearsay evidence. He can also orally narrate the statements made to him by each individual witness if the latter is giving or has given evidence in the case; but a Police Officer or any other inquiry officer should give evidence at the close of the case for the prosecution, *i.e.* after all the eye-witnesses have been heard. A Magistrate has an inherent right of calling for and referring to the Information Book at any time he pleases; but he is not entitled to use the statements entered in that book for the purpose of corroborating the evidence for the prosecution[2]; nor for the purpose of testing the credibility of a witness;[3] nor for the purpose of enabling him to issue[4] or refuse process[5]; nor can he base his judgment largely on what he finds recorded in the Information Book.[6] 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, it was held that such use was irregular and that where a Magistrate wishes to use the Information Book he should call the Police Officer who recorded the information in question.[7] Or where any matter of importance is discovered after such perusal bearing upon the case, the Magistrate should call for the necessary evidence to have the matter legally proved.[8]

A statement made by a witness to a Police Officer and afterwards denied by him at the trial cannot be used as substantive evidence of the facts stated against the accused: such statement is only relevant for the purpose of impeaching the credit of the witness.[9] A witness cannot be corroborated in advance. But a witness who denies that he identified an accused at an identification parade can be confronted with the evidence of others present at the parade; and the evidence of the latter will be relevant and admissible.[10]

There is no limit to the number of witnesses required for the proof of any fact; and a judge is not bound to hear all the witnesses whom a person proposes to call especially where he does not believe the case;[11] but he ought to examine a sufficient number to preclude the possibility of their having been bought over by the other side. A single witness may be sufficient, in law, for a conviction,[12] though, in practice, a Magistrate would seldom if ever convict on the uncorroborated testimony of the complainant alone. A conviction can hardly be justified on what is known as " oath upon oath " or rather on the sworn testimony of the prosecutor as against the presumption of innocence on the part of the accused. The tendency of our legislature is in the same direction. Thus,

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1. Silva *vs.* Abeysekere (1929) 30 N.L.R. 383. 6 Times L.R. 109. See also King *vs.* Publis 25 N.L.R. 424.
2. The King *vs.* Soysa (1924) 26 N.L.R. 324.
3. Wickremesinghe *vs.* Fernando (1928) 29 N.L.R. 403.
4. Inspector of Police, Gampaha *vs.* Perera *et al* (1931) 33 N.L.R. 69. 8 Times L.R. 170.
5. Supramaniam *vs.* Kathirasapullai (1931) 1 C.L.W. 135.
6. P.S. Matugama *vs.* Baby Singho (1926) S. C. 413, P. C., Kalutara 15921 Leader L.R. of 4th August, 1926.
7. Bartholomeuz *vs.* Velu (1931) 33 N.L.R. 161.
8. Paulus Appu *vs.* Don Davith (1930) 8 Times L.R. 59.
9. King *vs.* Silva (1928) 30 N.L.R. 193. Full Bench. Crown case reserved 6 Times L.R. 69.
10. Bartholomeusz *vs.* Kularatne (1932) 10 Times L.R. 114.
11. Arumugam *vs.* Vairavan, Ram. 107 (1843-55).
12. Perera *vs.* Podda (1880) 3 S.C.C. 72.

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under the Maintenance Ordinance, the uncorroborated testimony of a mother is not sufficient to foist paternity on the respondent; and in charges[1] for procuring women for immoral purposes and kindred offences a single witness is not sufficient for a conviction unless corroborated by evidence implicating the accused.

Though under section 133 of the Evidence Ordinance, a conviction is not illegal because it proceeds on the uncorroborated testimony of an accomplice, illustration (*b*) to section 114 of the same Ordinance shows that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. So that, where circumstances sworn to by an accomplice leave no reasonable doubt as to the guilt of the accused, the latter may be convicted[2]; though such conviction would be safer[3] if the evidence of the accomplice were corroborated by some intrinsic circumstance connecting the accused with the offence.[4] That corroboration in material particulars is essential is recognized by our Appeal Court[5] and the nature and extent of corroboration as laid down by Lord Reading in *King* vs. *Baskerville*[6] is approved[7] of as a safe guide for our Courts. "The corroboration must be in some material particular tending to show that the accused committed the offence charged; it must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of that of another; the corroboration need not be direct evidence, but may be circumstantial evidence of the connection of the accused with the crime, such as the discovery, in a case of theft, of any part of the stolen property in the accused's house or any place indicated by the accomplice." Any person is an accomplice who may be regarded as having taken part in, or induced to, the commission of the offence. Thus, a decoy in an Excise case is an accomplice[8]; and his evidence should therefore be received with caution.[9] The fact that an accomplice has been already convicted and has received sentence does not alter the rule.[10] The corroboration of the evidence of an accomplice cannot be supplied by another accomplice, for the law applicable to two accomplices is the same as the law applicable to one. Such corroboration must be in some material particular tending to show that the accused committed the offence and may be given by direct or circumstantial evidence.[11]

(VI) The Accused.

We have seen above that the accused person must remain in Court while the trial proceeds and he may, if he likes, give evidence on his own behalf with the like effect and consequences as any other witness; but his cross-examination as to credit must be limited to such extent as the Court thinks proper. The wife or husband of the accused is not a

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1. Section 360A of the Penal Code as amended by Ordinance No. 21 of 1919.
2. King *vs.* Walter Don (1901) 5 N.L.R. 375.
3. Silva *vs.* Wickramasuriya *et al* (1917) 20 N.L.R. 165.
4. Marikar *vs.* Juwanis (1908) 7 Tamb. 30.
5. See King *vs.* Wanigasekara (1917) 4 C.W.R. 361 or King *vs.* Loku Nona (1907) 11 N.L.R. 4.
6. (1916) L.R. 2 K.B. 658.
7. The King *vs.* Perera (1923) 25 N.L.R. 148.
8. Jansz *vs.* Gregoris (1901) 4 N.L.R. 359.
9. Appuhamy Aratchy *vs.* Lane Singho (1912) 15 N.L.R. 173.
10. Narayanpulle *vs.* Brampy (1916) 3 C.W.R. 316.
11. Pieris *vs.* Seneviratne (1931) 33 N.L.R. 157.

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competent witness for the prosecution except in cases[1] of bodily injury or violence inflicted on the spouse or of attempts at such injury, or of bigamy under sections 362 (*b*) and (*c*) of the Penal Code[2] ; but she or he is a competent witness for the defence. The wife or husband must be the legally married wife or husband : thus, a mistress has no privilege ; and the wife or husband of one of several prisoners under trial at the same time cannot be called by the prosecution.[3] A prisoner may, if he prefers it, make an unsworn statement from the dock instead of giving evidence from the witness box.[4] And an accused cannot be compelled to give evidence on his own behalf,[5] nor can the Court force him into the witness box,[6] just as the Court has no power to deprive an accused of his right to give evidence, even if it thinks that such evidence can be of little value.[7] The failure of an accused to give evidence is a circumstance which Courts are entitled to take into account in deciding the case.[8] Thus, for instance, where the accused sets up a plea (*e.g.* self-defence), the burden of proving which is, by the provisions of section 105 of the Evidence Ordinance, placed on the accused, his counsel takes a great responsibility in not calling the accused to give evidence in support of that plea.[9] Where one of several accused comes into the witness-box on his own behalf he becomes, save as to the proviso for the limitation of cross-examination to credit and the probability that evidence given by him may not be acted upon against his co-accused, a witness in every sense of the term. A co-accused may, therefore, cross-examine him[10] and may ask questions tending to exculpate himself.[11] He is liable to be charged with perjury for any false statement that he may make on oath in his defence[12] : unless the *onus* has been wrongly placed and explanations demanded from the accused, when there was no occasion to give any.[13] A statement made by one of several accused cannot be taken into consideration in convicting the rest[14] whether it is made in[15] or out[16] of Court ; but evidence given by an accused person on his own behalf which implicates a co-accused can be taken into account against the latter,[17] though the evidence of a co-accused should be accepted, like that of an accomplice, with great caution,[18] and must be corroborated by extraneous evidence.[19] In any case where there is no joint trial a co-accused is a competent witness against the other accused.

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1. In England he or she is also a competent witness in cases where the property of the spouse is involved, and happily the law in Ceylon is being brought into line with the law in England. See the draft Ordinance in " Gazette" of 24th April, 1925. (I am not aware why this draft did not materialize. Ordinance No. 16 of 1925 is silent with regard to property. M.H.K.).
2. Amendment of the Evidence Act by section 2 of Ordinance No. 16 of 1925.
3. The King *vs.* Marthelis Perera (1908) 11 N.L.R 29.
4. The King *vs.* Valcayan Sittambaram (1918) 20 N.L.R. 257 (Full Bench).
5. Simon Appuhamy *vs.* Romel Appu (1904) 1 Bal. 44.
6. The King *vs.* Thuriappah (1904) 8 N.L.R. 70.
7. 5 B.N.C. 54.
8. Pieris *vs.* Perera (1912) 15 N.L.R. 197.
9. Per Martensz, A.J. in The King *vs.* Sellammai (1931) 32 N.L.R. 350.
10. Amaris Appu *vs.* Palis Appu (1911) 15 N.L.R. 102.
11. Queen *vs.* Fernando (1899) Koch 1.
12. The King *vs.* Thegis (1923) 2 Times L.R. 65.
13. King *vs.* Dharmasiriwardana (1931) 33 N.L.R. 185.
14. Police Vidane, Kandana *vs.* Amaris Appu *et al* (1923) 25 N.L.R. 403.
15. Monis Appu *vs.* Heenhamy *et al* (1924) 26 N.L.R. 303 (6 C.L.R. 55).
16. Joseph *vs.* Pieris *et al* (1923) 24 N.L.R. 485.
17. Rex *vs.* Ukku Banda *et al* (1922) 24 N.L.R. 327.
18. Vythilingam *vs.* Kandavanam *et al* (1899) 1 Tamb. 28.
19. Iyer *vs.* Hendrick Appu *et al* (1932) 10 Times L.R. 18.

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Where two persons were charged with theft and the first accused after the Magistrate had convicted him and had passed sentence on him gave evidence against the second accused, it was held that such evidence was admissible.[1] A Magistrate has no right, however, after an accused has given evidence to recall him[2] as a witness even though the purpose of such recalling may be to elucidate points in his favour. Where four persons were charged and tried jointly and after the case had been closed on both sides, the Police Magistrate purported to convict only the second, third and fourth accused ; and then at his own instance called the second and fourth accused as witnesses against the first and convicted him also, it was held that where several persons are tried together, the Court should hear all the evidence first and dispose of the case as a whole and should not record convictions at various stages as each accused concluded his defence.[3] Where thirteen accused were charged with robbery and tried summarily by the Magistrate who at the close of the case for the prosecution called upon each accused in turn for his defence and thereafter convicted or acquitted him before hearing the evidence subsequently given on behalf of the other accused ; it was held that the procedure was irregular as the accused who were already convicted were entitled to the benefit of the impression which might have been made on the mind of the Magistrate by the evidence called on the part of the other accused.[4] So that where several accused are jointly charged they can all be convicted or acquitted after the whole case is over : and generally each of such accused should be called upon for his defence by turns, so that the other accused, if they elect to give evidence, should do so immediately after the case for the former accused is closed. But if one or a few out of several accused plead guilty and the rest contest the case, the Court would be justified in passing sentence there and then on the persons who have pleaded guilty : their sentence need not be deferred till after the whole of the case is heard and decided. So also, where some of the accused are absconding or cannot be found, the persons present before Court could be dealt with ; and under section 407 of the Pr. Code the evidence recorded *in absentia* may be utilised against the absconding accused if the deponents have since died or cannot be found. It would be essential, while recording evidence in the absence of any accused, to make an entry on the record that the evidence is being recorded under the provisions of this section, for proof is necessary[5] that an accused is absconding and that there is no immediate prospect of arresting him.

If an accused is undefended, the Magistrate must inform him of his right to give evidence and, if he elects to do so, he should call attention to the principal points against him in the evidence for the prosecution in order that he may have an opportunity of explaining them.[6] Failure to do so is an illegality[7] and if such failure prejudices the accused would vitiate a conviction.[8] Whether the accused is prejudiced or not depends upon the evidence given by him, for it may show that he was quite aware

1. Banda *vs.* Arumugam (1907) 3 A.C.R. 42.
2. (1920) 8 C.W.R. 69.
3. Karunaratne *vs.* Appuhamy (1918) 5 C.W.R. 206.
4. Mohamado *vs.* Banda (1915) 1 C.W.R. 196.
5. The King *vs.* Appu Singho (1920) 22 N.L.R. 359.
6. Visuvanather *vs.* Namasivayam (1914) 4 Bal. Notes 75.
7. Per Schneider, A.J., The King *vs.* Roma (1919) 7 C.W.R. 14.
8. Malhonda *vs.* Ukku Banda (1920) 2 Law Recorder 150 and Heenappu *vs.* Abdul Rahiman (1914) 1 Bal. Notes 52.

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of the effect of the evidence against him and was not prejudiced by the omission.

The Magistrate must record that he has explained the main facts to the accused and that the accused elects or does not elect to give evidence[1] or there must be something on the face of the record to show that the provisions of this section (296 (i)) have been complied with.[2] The requirements of this section are imperative.[3] So that, where the record does not show this, the Supreme Court, if it is satisfied that the accused has been prejudiced by the omission,[4] will either send the case back for a new trial or quash the conviction as it thinks fit, unless it appears from the evidence of the accused that he had understood the principal points in the evidence against him.[5]

An undefended accused has the same rights as to cross-examining witnesses as his pleader has, but he cannot "make a speech."

In summary cases, a Police Magistrate has no right of questioning the accused generally on the case even for the purpose of enabling him to explain any circumstances appearing in the evidence against him, unless the accused of his own accord gives evidence from the box : in other words, section 295 does not apply to summary cases. And the extent to and the manner in which an accused person should be cross-examined is limited and can be controlled by the Court.

Just as a Magistrate cannot compel an accused person to give evidence, so any accused person cannot require his co-accused to give evidence as a witness on his behalf. Saving this, an accused person may summon any and as many witnesses as he likes. He may also require the complainant's witnesses to give evidence for him. And a Magistrate cannot refuse leave to an accused to call a witness whom he wants because his name appears on the list filed by the complainant who elects not to call him.[6] Every witness whom the prosecution does not propose to call being unnecessary must be tendered to the accused, if he so desires, for cross-examination.[7]

Every accused person must keep standing during the whole of his trial unless he has applied for and obtained special permission from the Magistrate to take a seat. And all the accused must stand in their proper order, that is, the order in which their names appear on the plaint. The names of the several accused should be recorded at the beginning of each day's proceedings in the same order ; and the mode of their appearance, *e.g.* on summons, warrant, or bail, should also be recorded. The names of their several Counsels must be specifically mentioned and if the accused are undefended the record should state accordingly.

There is no limit to the number of persons that can be accused in a case, but they should be all *participes criminis* in the same offence. A Magistrate has the right of directing that some of several accused may be tried separately if he is of opinion that a joint trial would be prejudicial to all. But if two accused have taken part in the same offence a Magistrate should not ordinarily direct a separate trial so as to enable the

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1. Somaliya *vs.* Kaluwa (1917) 4 C.W.R. 121.
2. Fernando *vs.* Perera (1913) 16 N.L.R. 477.
3. Fernando *vs.* De Jong (1932) 1 C.L.W. 336.
4. Ex-Inspector Modder *vs.* Perera (1929) 7 Times L.R. 36.
5. Muhandiram *vs.* Simon (1928) 30 N.L.R. 151.
6. Palihavadana *vs.* De Silva (1908) 1 Weer. 26.
7. King *vs.* Iyampillai (1913) 4 Bal. Notes 14.

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prosecution to defy the provisions of the Code and call one of the two as a witness against the other. If, however, the offences committed by both are different, there would be no objection to this procedure. Thus, a thief may be a witness in the case against the guilty receiver and *vice versa*. But it is irregular to waive a charge against the accused to convert him into a witness.[1] Conversely, a Magistrate may direct that two or more separate plaints filed against the same accused may be tried together, provided the offences disclosed in the same do not constitute a misjoinder of charges and have taken place within the period of one year.

Unlike as in a civil case, no admission either by the accused or his Proctor could be binding on him in a criminal trial: so that even if the accused undertakes to plead guilty in the event of a certain contingency happening, and on the happening of that contingency refuses to plead guilty, the Court cannot convict him without proceeding to trial, though the undertaking may be regarded as a point against him. And in counter-cases the mere admission[2] of evidence recorded in the other case would be irregular,[3] for it is improper to impart into one case the knowledge which a Magistrate may have obtained from another[4]; but unless there is a failure of justice the Supreme Court will not tolerate a breach of any specific agreement on that behalf. Thus, where in two counter cases it was agreed by the parties and their Proctors that the evidence for the prosecution in one case should be taken as the evidence for the defence in the other and *vice versa*, and the Magistrate after trial dealt with the evidence in both cases in one judgment and convicted the accused and acquitted the complainant, it was held that the proceedings were not irregular.[5]

A court has the power under section 73 of the Evidence Ordinance to direct the finger impressions of an accused person to be taken for the purpose of comparison with the finger impressions found at the scene of the offence. The evidence of an expert on finger impressions on the result of such comparison is relevant.[6] The powers of the Court to get an accused person medically examined are discussed in the chapter on medical jurisprudence.

(VII) Verdict.

Immediately after the case is closed on either side the Magistrate must record his verdict. It should be recorded forthwith after hearing the evidence for the prosecution and defence.[7] It cannot be postponed.[8] Thus, where a Magistrate after hearing the evidence for the prosecution deferred judgment as the parties desired one month's time to settle their differences out of Court and no settlement being arrived at at the end of the period, the Magistrate convicted the accused and sentenced him to imprisonment, it was held that the conviction and sentence were

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1. Vaithialingam *vs.* Kandavanam (1899) 1 Tamb. 28.
2. Bilundahamy *vs.* Don Mathes (1908) 1 Weer. 29.
3. Velan Karte *vs.* Veluppillai (1905) 2 Bal. 58.
4. Queen *vs.* Piyaneris (1894) 3 N.L.R. 45.
5. Manuel Appu *vs.* Piloris Singho (1916) 19 N.L.R. 188.
6. The King *vs.* Suppiah (1930) 7 Times L.R. 139.
7. Rodrigo *vs.* Fernando (1899) 4 N.L.R. 176.
8. A.G.A., Kegalle *vs.* Podi Singho *et al* (1914) 18 N.L.R. 28. See however Samsudeen *vs.* Sithoris (1927) 29 N.L.R. 10.

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bad.[1] A Magistrate may, however, after recording the evidence on either side adjourn the case for a consideration of the legal points involved or for hearing arguments; but this in fact means that the trial is not yet over. No sooner the trial is over than a Magistrate must proceed to pronounce his verdict forthwith. And the sentence must follow the verdict. A Magistrate may defer writing his judgment till a later date, but he cannot postpone the verdict or sentence. Only in convictions for crimes can the passing of sentence be delayed till the Police have "identified" the accused and traced his previous convictions. A failure to record the verdict forthwith is not a fatal irregularity vitiating a conviction but would be good ground for altering or reversing the judgment in appeal.[2]

When an accused pleads guilty or is found guilty after trial by the Magistrate, a verdict of guilty should be recorded. Where an accused pleads guilty a Magistrate cannot refuse to accept the plea or proceed to trial and find him not guilty, unless the plea tendered is an equivocal one. Where an accused pleaded that he was guilty of an offence and the Magistrate thereupon "warned and discharged" the accused, it was held that this was in effect a verdict of acquittal and the Magistrate was bound to record a verdict of guilty and pass sentence according to law.[3] But now under the Amendment of the Criminal Procedure Code a warning is a form of sentence and the Magistrate may merely administer such admonition as he thinks fit without passing any material sentence.

When the Magistrate finds the accused not guilty he should record a verdict of acquittal. A Magistrate after trial cannot discharge the accused: he must acquit. If he has any doubts as to the sufficiency of the case for the prosecution, he must acquit: he cannot discharge with liberty for the complainant to bring a fresh action against the accused.[4]

Where a trial has proceeded on more charges than one there should be a separate finding on each of such charges, either a conviction or acquittal as the case may be. And where there are alternate charges, the verdict must be specifie as to the charge on which the accused is convicted: he cannot be convicted in the alternative.[5] There must be an acquittal on one and a conviction on the other charge.

The verdict of a Magistrate is final so far as he is concerned and he cannot alter it under any circumstances: nor can he alter the sentence, once it is passed. Where a Magistrate who had convicted the accused and recorded and duly signed the sentence, subsequently altered it on its appearing that the accused had been previously convicted, it was held that the Magistrate had no power to alter the sentence which he had signed, even though it had not been pronounced, as such alteration was not a mere rectification of an error.[6]

If an accused is not insane but is nevertheless incapable of understanding the proceedings, the Magistrate may proceed to trial and if he records a verdict of guilty, he cannot pass sentence[7] but should forward

1. 5 N.L.R. 140.
2. Sahul Hamid *vs.* Bamadu (1926) 4 Times L.R. 145.
3. Akbar *vs.* James Appu (1910) 5 Weer. 38.
4. Abrew *vs.* Siyatu (1915) 4 Bal. Notes 47. See also Canagasingham *vs.* Meydin Bawa (1931) 33 N.L.R. 356 7 Times L.R. 31.
5. Cornelis *vs.* Uluvitike (1895) 1 N.L.R. 248.
6. Kumarihamy *vs.* Perera (1919) 6 C.W.R. 325.
7. Caronchi Appu *vs.* Charlis (1919) 3 C.W.R. 340.

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the proceedings to the Supreme Court under section 288 of the Criminal Procedure Code.[1] A man who, though deaf and dumb, is able to read and write and to communicate his thoughts must be presumed to be able to understand the proceedings against him[2]; even in such a case, it would be safer to forward the record to the Supreme Court.

In the case of lunatics and insane persons who are accused of having committed an offence, a Police Court cannot try the case and record a verdict. If it appears to the Magistrate that an accused is of unsound mind, he should remand him, before or after recording evidence, "for observation" by the Medical Officer, generally for a period of 14 days; and after such time, he should proceed to record the evidence of the Medical Officer and decide whether the accused is, or is not, "capable of making his defence." If he finds him capable, he can proceed to trial: if, however, the accused is proved to be insane and therefore incapable of making his defence, he may, in bailable offences, release him on sufficient security being given that he will be properly taken care of and will be prevented from doing injury to himself or others. If such security is not forthcoming or if the offence is one in which the Magistrate does not consider it safe to liberate on bail, he should forward the record to the Attorney-General for an order of detention from His Excellency the Governor in a Lunatic Asylum. If at any future time such accused is declared to be sane and capable of making his defence, the Magistrate must proceed to trial *ab initio*.

An accused can only be convicted of the charge framed against him and of no other; hence the conviction of the accused of an offence with which he is never charged is fatal to his conviction.[3] So that where after evidence a Magistrate finds that a new offence is disclosed, he should frame a separate charge for the same, explain it to the accused, record his plea and tender the witnesses afresh for cross-examination if he so desires, or give him a date for meeting the new accusation if he is not ready to meet the same. Every conviction must be based on a specific charge unless the new offence is cognate and a fresh charge could be dispensed with under the Code of Criminal Procedure. The Supreme Court has repeatedly held that the application of section 181 must be carefully limited; thus a person charged with offences under sections 332, 343, 486 and 488 of the Penal Code cannot be convicted of an offence under section 484 without specific charge under that section.[4]

(VIII) Judgment.

A Magistrate may write his reasons for the conviction or acquittal as the case may be either forthwith or on a future specified day. These reasons form the judgment. A judgment is necessary in every case—nay "even in what may appear simple cases."[5] There is a prescribed form called, "the judgment sheet." It is necessary to fill in the judgment sheet, especially in appeal cases, for a judgment should specify[6] the offence, the section of the law under which the conviction is had, the name of the accused and the date of the offence. It is absolutely

1. The Queen *vs.* Simanchi (1898) 3 N.L.R. 189.
2. P.C. Kalutara (1905) Lem. 43.
3. Police Sergeant, Lindula *vs.* Stewart (1923) 25 N.L.R. 166.
4. Premawardena *vs.* Siriwardena *et al* (1928) 6 Times L.R. 62.
5. Per Wood Renton, C.J., Welle Kangany *vs.* Amadoris (1915) 3 Bal. Notes 64.
6. Jansz *vs.* Gregoris (1901) 4 N.L.R. 359.

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essential in every judgment whether written on the prescribed form or on plain foolscap to specify the offence[1] of which the accused is convicted or acquitted and it is not enough to refer merely to the charge.[2]

When the conviction is under the Penal Code and it is doubtful under which of two sections or under which of two parts of the same section the offence falls, the Magistrate should distinctly express the same and pass judgment in the alternative.[3]

When a judgment has been signed it cannot be altered or reviewed by the Magistrate, but he may rectify clerical errors at any time and may correct any other errors before he rises for the day ; this does not empower him to alter the verdict.

As one of the chief objects of writing a judgment is that the Supreme Court should have before it the specific opinion of the Magistrate on the issue of facts so that it may judge whether the finding is correct or not,[4] it is highly essential that the judgment should deal with the important points in the case and with the reasons for his opinions. Mr. G. C. Whitworth, a Sessions Judge of India, in his "Letter to Magistrates," published in 1900, writes : "Some Magistrates have a laborious method of repeating in their judgments the evidence of each witness, one by one, without much attempt at showing the bearing of one part of the evidence on another, or how their final conclusions are arrived at. Others, again, give their opinions and conclusions, assuming apparently that the reader has all the depositions before him. To this latter class of judgments, there is the specific objection that an appeal against it can never be summarily rejected under section 421 of the Code[5] without first calling for the record of the case. The best judgments, of course, take a line between these two extremes and while they show in substance—and in logical order, not the order in which the witnesses happen to have been examined—what the material evidence is, show also how, in the opinion of the Magistrate, the different parts combine to establish the case, or how and through what weaknesses or omissions they fail to do so."

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1. Alawatugoda Ratemahatmaya *vs.* Kiriwante (1895) 1 N.L.R. 73.
2. Murugesu *vs.* Arumugam (1892) 2 C.L.R. 79 (Full Bench).
3. Section 307 of the Cr. Pr. Code.
4. Verupodian *vs.* Sollamuttu (1901) 1 Br. 384.
5. The Code means the Indian Cr. Pr. Code. In Ceylon, the Supreme Court summarily disposes of a few revisionary appeals.

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CHAPTER VII.

INQUIRIES.

(I) Peculiarities.

We have seen in the last chapter that a trial takes place in all summary cases: in non-summary cases, there is no trial but an inquiry. An inquiry cannot result in a conviction at the hands of a Magistrate: it ends either in a committal to a higher Court or in a discharge.

For all practical purposes, an inquiry is conducted on lines similar to those of a trial. But the following points are worth remembering:

(i) A non-summary inquiry generally ends at the close of the prosecution. When all the witnesses for the prosecution are heard, the record, if the accused is not discharged by the Magistrate, is forwarded to the Attorney-General for instructions. The accused has a right of calling any witnesses he likes in the lower Court, but this right is seldom or never exercised.

(ii) No charge, but particulars of offence, are explained to the accused: no plea, but his statement on the statutory form, is recorded.

(iii) Generally speaking, an accused, besides making the statement, cannot give evidence on his own behalf in a non-summary investigation[1]; but he may be questioned by the Magistrate, either after the prosecution is closed or at any stage, for the purpose of enabling him to explain any circumstances in the evidence against him. The questions put and the answers given must be recorded in full in the manner in which the questions are put or the answers given. They are usually recorded on the proper form. There is apparently no limitation to the power of a Magistrate in asking questions under this section: he may even put questions the answers to which if given would tend to criminate him: and the accused may, either of his own accord or on legal advice, refuse to answer any questions so put to him. The number of questions should, however, be limited and cannot take the form of a regular inquisition; for the section is meant to serve the interests of the accused rather than to be a source of extra trouble to him.

"Even though the Magistrate may not think it necessary formally to explain to the accused any fresh offence which may be incidentally disclosed in the course of the inquiry and in respect of which it is possible that a specific charge may ultimately be preferred, yet it is open to him, and in appropriate cases he ought, if the facts constituting the alleged offence were not before the accused when he made his statement, to interrogate him under section 295 with reference to these facts and thus afford him an opportunity of giving any explanation with regard to them. This interrogation of the accused under section 295 is obligatory upon the Magistrate and should be administered not with the object of investigating the facts but in the interests of the accused. It is not an

1. (1899) Koch 52.

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ordeal through which the accused must pass; but a privilege to which he is entitled. One of the things which the Magistrate may well bear in mind in the course of the interrogation is the fact that allegations have been made against the accused in the course of the inquiry which may conceivably be made the subject of a count in the indictment. He may well say to the accused, 'Do you wish to make any statement as to this or that point?' "[1]

(iv) The deposition of each witness must be signed by him and must bear a certificate to the effect that the evidence recorded was read over and explained to him in his own language, in the presence or absence of the accused as the case may be, and that it was admitted by him to be correct. In practice, this certificate is usually affixed by means of a rubber stamp which is "franked" by the Interpreter Mudaliyar who signs the record after each witness has given evidence. This certificate with necessary alterations must also be attached to the statement of the accused or to the questions and answers referred to above.

The absence of such a certificate would not render the inquiry null and void or the subsequent committal illegal. The only effect of not having certified the deposition is that the statement of the particular witness cannot be accepted as his sworn testimony and that therefore he would escape the ordinary consequences of perjury, were he to contradict the same at the subsequent trial. Thus, where a witness made a statement in the District Court contradicting the statement made by him at the inquiry and where he was charged for giving false evidence under section 440, it was held that inasmuch as the evidence given by the witness in the lower Court was not read over and explained to him as required by section 249, there was no legal proof that he made the statement, and the mere production of the Police Court record was insufficient.[2]

(v) Each witness as he gives evidence must be made to sign a bail-bond for appearance at a higher Court if and when the case is committed for trial. The absence of such a bail-bond would render it highly difficult to gather the witnesses together again at the subsequent trial. If security has been given, attendance of witnesses could be secured on pain of punishment.

(vi) Witnesses in a non-summary case which is likely to result in a commital before a higher Court are entitled to receive batta and train-fare for all the dates of appearance both in the lower and in the higher Court, whether they appear as witnesses for the prosecution or for the defence.

The rates of payment differ in the different classes of witnesses and are as follows :—

	Batta per day	Mileage per mile	Class of Railway fare
First class	Rs. 7·50	30 cts.	First
Second class	Rs. 5·00	30 cts.	Second
Third class	Rs. 2·50	20 cts.	Second
Fourth class	Rs. 1·50	20 cts.	Third
Fifth class	Re. 1·00	10 cts.	Third

1. Per Bertram, C.J., The King vs. Vallayan-Sittampalam (1918) 20 N.L.R. 257 (Full Bench).
2. Rex vs. Heeni Appu (1908) 1 Weer. 29.

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The first class of witnesses includes advocates and proctors, superintendents and assistant superintendents of estates drawing not less than Rs. 250 per mensem, high priests and clergymen, principals of recognized secondary schools, Military and Naval Officers, Unofficial Police Magistrates, Gate Mudaliyars, Adigars and Disawas not in Government employ, Engineers and Surveyors in private practice, registered medical practitioners, and all persons having annual income or salary of Rs. 6,000, and over. The second class includes notaries and head teachers of primary and masters of secondary schools, Inquirers and Mudaliyars not in Government employ, priests, and persons having annual income or salary of Rs. 3,000, and under Rs. 6,000.

The third class includes catechists, soldiers and sailors not in Government employ, teachers of non-Government recognized primary schools and persons drawing an annual salary or income of Rs. 1,500, and under Rs. 3,000.

The fourth class includes others not included in the above and having an annual income of Rs. 500, and under Rs. 1,500. It also includes all persons included in Class V if they give evidence beyond the limits of the local Police Court. The fifth class includes all those not included in any of the above classes and having an annual income of less than Rs. 500. Women witnesses draw the same rates as their husbands or fathers and children draw the same rates as their fathers or mothers unless they are accompanied by a parent or other relative summoned as a witness in the same case—in which event they draw half rates, if under twelve years of age. Public officers may draw batta and mileage according to their usual rates, provided they give evidence regarding matters arising out of the discharge of their public duties.[1]

No motor mileage can be claimed for any part of the journey which might reasonably have been performed by the Railway or any regular motor, coach, steamer or boat service. For such journeys, the actual fare paid for the journey can only be claimed.

(II) Attorney-General.

An inquiry is necessary in all non-summary cases : for no person in Ceylon can be tried by a District Court or by the Assize Court, unless and until an indictment has been presented against him by the Attorney-General. In England, a Justice of the Peace can present an indictment directly to the Quarter Sessions or even to the Assizes. In India, a Magistrate can " commit " himself.[2] But even in England, some mode of formal accusation before the higher tribunal is necessary and this is obtained either by an " Information," which is a written complaint made rarely on behalf of the Crown by one of its officers and filed in the King's Bench Division (usually allowed in the case of misdemeanours) or by a " Presentment " by a Coroner's Jury or a Grand Jury. We have no " informations " in Ceylon. Nor is the Coroner's Court empowered to take non-summary proceedings, unless the Coroner happens to be a Magistrate himself. But the vestige of the Grand Jury[3] is found in the Attorney-

1. For batta to Minor Headmen, Inquirers and others, see page 169 *et seq* of Financial Regulations (1st Edition).

2. An attempt was made in 1931 to introduce some form of direct committal in Ceylon. *Vide* draft Ordinance in " Gazette " No. 7,841 of 10th April, 1931: but the procedure appeared to be cumbrous and the attempt does not seem to have found much favour.

3. The institution of the Grand Jury has now fallen into disuetude; the last Grand Jury sat in 1938.

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General, who, like the Grand Jury, revises the proceedings of the Magistrate and decides whether the case should be committed or not. This analogy—if analogy there is—cannot, however, be stretched too far. Perhaps, the system in Ceylon is parallel to that prevailing in Scotland where there is no Grand Jury except in treason and an indictment is an accusation by the Lord Advocate or the Procurator Fiscal.

We have seen that after the close of the case for the prosecution in a non-summary case, the Magistrate, if he does not discharge the accused, must forward the record to the Attorney-General. So that in all non-summary inquiries a Police Magistrate takes and records evidence for the prosecution with a view to ascertain whether there is such a *prima facie* case made out against the accused as would justify him in recommending a committal to a superior Court, and not with a view of determining his guilt or innocence which is in issue only in summary trials.[1] Even if a Magistrate is of opinion that the accused might probably be acquitted, he should, if he is satisfied that a *prima facie* case is made out against the accused, forward the record to the Attorney-General. What he should consider is not whether the accused would be convicted; but whether he should be committed. "A Police Magistrate holding a preliminary inquiry into a non-summary charge has the discretion of deciding whether there are sufficient grounds for committing the accused for trial. It is the duty of the Magistrate in such a case to ascertain whether there are grounds for putting the accused to the ignominy and expense of a trial, and the Magistrate would fail in his duty if he sent up a case for trial where he considered the prosecution was utterly unreliable and that there was no possibility of a conviction."[2] If there is some possibility of a conviction or if the chances are evenly divided, a Magistrate must commit.[3]

During the course of a summary trial if a Magistrate is of opinion that the case is not within his jurisdiction or that the punishment that he could lawfully inflict will not be adequate in the circumstances of the case, he should stop further trial and take non-summary proceedings. This can be done even after the defence has been heard, but in any case before the verdict is pronounced.

The record is forwarded to the Attorney-General with what is known as "the confidential schedule." This is a schedule to which is attached a list of all the witnesses called for the prosecution with their full names and addresses and a list of all the documents and productions that are exhibited at the inquiry. The Magistrate is expected to criticise the

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1. Saram *vs.* Weera (1895) 1 N.L.R. 95.

2. Mendis *vs.* Appuhamy (1893) 2 S.C.R. 148.

3. General Order 887 which is very important in this connection says, "In deciding whether the accused should or should not be committed the Magistrate should not be guided solely by the fact that there is in the case evidence of the commission of an indictable offence by the accused, or that, in the Magistrate's opinion, the evidence led in the case is unworthy of credit. The question involved is whether on the whole, the evidence recorded is, in the Magistrate's opinion, so far satisfactory as to justify the submission of the case to trial by a superior Court.

(ii) It is irregular for a Magistrate to forward a case to the Attorney-General with a statement that the Magistrate does not believe the evidence and recommending that the Attorney-General should discharge the accused. It is a condition precedent to the submission of a non-summary case to the Attorney-General that the Magistrate should recommend the committal of the accused.

(iii) If the Magistrate finds that there are sufficient grounds for committing the accused for trial he should forward the record to the Attorney-General, and at the same time indicate in the Confidential Schedule the specific offences for which the accused should in his opinion be committed for trial, the salient features of the case and the opinion which he himself has formed as to the credibility of the witnesses and the merits of the case generally.

(iv) Magistrate must note on the memorandum forwarding the records in non-summary cases to the Attorney-General whether the accused is on bail or under remand in order that the latter cases may receive the prior attention of the Crown Counsel."

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evidence briefly—to record his opinion whether a *prima facie* case is made out against the accused or not and whether he recommends a committal, and, if so, to what Court and under what sections.

Although the Criminal Procedure Code speaks of forwarding the record to the Attorney-General, in practice it is one of the Crown Counsels or the Solicitor-General who goes through the case-book and gives the necessary instructions in the case. The indictment is, however, presented in the name of the Attorney-General.

When a record is forwarded to the Attorney-General he may follow one of these courses :

(i) If he is satisfied that the proceedings are in order he may nominate the Court of trial and forward the indictment on which the accused should be committed.

(ii) If he thinks that no further proceedings should be taken he may direct the discharge of the accused. No appeal lies against such an order.[1]

(iii) If he finds the evidence defective he may require the Magistrate to take further evidence.[2]

If the Attorney-General directs in the schedule that further evidence should be recorded or that certain witnesses may be recalled or that the statement of the accused may be recorded afresh, this should be done on the lines suggested by him. As no accused can be committed on any indictment unless his statement has previously been recorded, it is open to the Attorney-General, if he thinks such a course appropriate, to instruct the Police Magistrate before committing a case for trial to explain to the accused the nature of any offence on which he contemplates indicting him, and to afford him an opportunity of making any statement under section 155, or cross-examining any witnesses on the depositions already taken, or of tendering new witnesses on his own account : for the Attorney-General has no power to indict the accused in respect of any offence with which he has not been charged under section 155, unless such offence is included in the original offence with which he was charged.[3]

In non-summary cases, a Magistrate acts rather like an inquiry officer than like a Judge : and it is his duty to see that proper evidence is led on behalf of the prosecution and that necessary questions are put to the witnesses.

When the Attorney-General decides that an accused should be committed, he forwards the necessary indictments, a copy of which should be given to the accused. If the case is committed to a District Court, the accused should be informed of the date, previously ascertained from the said Court, of trial ; and the accused, if not on bail, should be remanded to be produced before the District Court on that day. If, however, the committal is to the Supreme Court, the accused must be asked to elect the kind of Jury by whom he elects to be tried and he should be remanded till such time as his trial commences at that Court. In either case, if the accused is on bail, the Magistrate may allow him to remain on the same bail, or may enhance the bail or may cancel it altogether.[4]

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1. Kannangara *vs.* Kannangara (1928) 30 N.L.R. 149.
2. Wickramasuriya *vs.* Appusingho (1895) 1 N.L.R. 298.
3. The King *vs.* Valleyan Sittampalam (1918) 20 N.L.R. 257 (Full Bench).
4. In offences punishable with death a Magistrate cannot enlarge on bail persons who are indicted at the instance of the Attorney-General. See *supra* Chapter II, Section iv.

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At the time of committal the accused must be asked to give the names of witnesses whom he wishes to be summoned at his trial ; and the Magistrate must summon each of these, find out whether he is able and willing to give material evidence for the defence and, if so, must call upon him to sign a recognizance for appearance at the trial. After committal the record is forwarded to the Court to which the accused is committed with pages duly numbered and with a certificate that it contains the whole of the evidence recorded at the inquiry : a copy of the record becomes the "brief" for the Crown at the trial and the confidential schedule is stitched to this brief ; this is forwarded to the Crown Counsel or, in District Court cases in the moffusil, to the Crown Proctor or Crown Advocate of the District. The pages of this brief must be numbered similarly to the record : and so also the copies issued to the accused and others.

(III) Lesser Offence.

The power given to the Attorney-General to direct a commitment of the accused for trial before a District Court and the Supreme Court includes the lesser power to direct a summary trial in a Police Court.[1] But such a trial should be directed before another Magistrate ; for, where a Magistrate holds a non-summary inquiry and forwards the case to the Attorney-General for instructions, it is not proper for him to try the case summarily as he must have apparently made up his mind that the accused is guilty.[2] "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 role 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."[3]

But before making up his mind whether the accused should be committed or not, that is to say, while recording the evidence for the prosecution, a Magistrate may decide upon trying the case summarily, if he thinks that no indictable offence is disclosed against the accused. In that event, he must follow the procedure laid down for summary trials. Where a Magistrate recorded non-summary proceedings and at the close of the case for the prosecution, without framing a charge, convicted the accused, it was held that the proceedings were irregular.[4] Where in an inquiry into a complaint of an offence not summarily triable by a Police Magistrate, he finds at the conclusion of the prosecution that the facts proved against the accused amount to an offence summarily triable, he ought to stay the proceedings as a non-summary inquiry, make an order formally discharging the accused from the graver offence, frame a charge as for a summary trial, give the accused notice that he is on his trial and afford him sufficient time to prepare for his defence.[5] When a Magistrate is inquiring into a complaint containing offences both beyond and within his summary jurisdiction, and, after evidence is recorded, comes to the conclusion that the offence beyond his jurisdiction is not made out, he should discharge the accused from the graver offence and

1. (1899) Koch 26.
2. Jainudeen *vs.* Geomonis (1919) 21 N.L.R. 95.
3. Fernando *vs* Anna Bai (1918) 5 C.W.R. 184.
4. Vally Nagan *vs.* Santia Seeman (1911) 6 Weer. 46.
5. Charles *vs.* Charles (1896) 2 N.L.R. 187.

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formally record the discharge before calling on him to answer to a charge of the offence within his jurisdiction.[1] But he cannot immediately require the accused to defend himself on the summary charge on the evidence for the prosecution already adduced at the inquiry[2]: he should commence a fresh trial, recalling the witnesses for the prosecution and giving the accused an opportunity to cross-examine them if he so desires.[3] Where non-summary proceedings are taken against a registered criminal and it transpires afterwards that the offence not being a crime can be summarily disposed of, the Inquiry Magistrate should transfer the case to another Magistrate for trial, as he has already become familiar with the antecedents of the accused.[4] An acquittal by a Magistrate from offences which are ordinarily non-summary is irregular and cannot be upheld.[5]

As in a case not summarily triable an order of acquittal recorded by a Magistrate amounts only to a discharge[6] and as a discharge of an accused is not a final order so far as he is concerned, it follows that the case may be re-opened against him at any future date. If a prosecution is discontinued by the discharge of an accused, it can be renewed, the discharge not putting an end to the prosecution; and the prosecution being renewable as to the whole of the charge or charges from which the accused may have been discharged, the prosecution can be renewed as to a part of such charge or charges.[7] Such a resuscitation of the case may be rendered necessary by the discovery of fresh evidence against the accused or at the instance of the Attorney-General. The Attorney-General has the right to re-open proceedings not merely when an accused has been discharged under section 157[8] but also when the discharge has been made at any other stage, *e.g.*, under sections 151 (1) or 156 (2).[9] And where a Police Magistrate discharges an accused on the ground that the evidence does not establish a *prima facie* case of guilt and another Magistrate upon a fresh inquiry commits the accused for trial before a District Court, it is not competent for the District Judge to enter into the question, whether the Magistrate who ordered the committal had any right to hold the fresh inquiry which ended in such committal.[10] For a District Court is bound to try and determine a case where the accused has been duly committed on charges triable by it, even if the evidence discloses a higher offence beyond its jurisdiction.[11] For if the Attorney-General errs in directing a committal, it is an error which a District Judge cannot correct[12]. But a District Court is not bound to accept and proceed upon any and every indictment presented by the Attorney-General without regard to the question whether it is authorized by law or not.[13]

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1. Siyadoris *vs.* Gunawardena (1895) 2 N.L.R. 65.
2. Fernando *vs.* Don Pabilis (1932) 1 C.L.W. 358.
3. Saram *vs.* Weera (1906) Lem. and Aser. 44.
4. Nambiar *vs.* Ranasinghe (1924) 3 Times L.R. 25. This contingency would not now arise as the procedure has been remodelled.
5. Saliku *vs.* Appu Singho *et al* (1928) S.C. 361. P.C. Dandagamuwa 18981 Leader L.R. of 1st September, 1926.
6. Mathes *vs.* Samsudeen (1893) 2 C.L.R. 161.
7. 1 Tamb 59 (1899).
8. Dias *vs.* Pieris (1930) 3 C.A.R. (Gratiaen's) 59.
9. Fernando *vs.* Fernando (1930) 8 Times L.R. 47.
10. The King *vs.* Harmanis (1903) 8 N.L.R. 138.
11. Queen *vs.* Martino Perera (1897) 3 N.L.R. 43.
12. King *vs.* Kolonda (1901) 5 N.L.R. 236.
13. King *vs.* Vallayan Sittampalam (1918) 20 N.L.R. 257 (Full Bench).

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(IV) Points to Remember.

In order to save a number of "instructions" from the Crown Counsel, the following suggestions might prove useful. If the inquiry has been properly and fully held in the first instance, most of the queries might be avoided and a Magistrate's task will be considerably lightened.

(i) Generally, all the witnesses whose names have transpired in the course of the inquiry must be called. Thus, if a Police Vidane says that information was brought to him by a person other than the complainant, the informant should be called. The idea is that hearsay and double hearsay should be avoided by actually calling the witnesses whose names have been disclosed or referred to, either in the examination-in-chief or under cross-examination.

(ii) All productions in the case should be formally produced either by a Vidane or by a Police Officer or by the complainant in the case. They should, if necessary, be identified by the different witnesses.

(iii) In all cases of murder or house-breaking or robbery and in all other cases where a study of the scene is necessary, a proper plan should be produced by the Police Officer. This plan should be in triplicate in District Court cases and in quadruplicate for jury trials. On the plan, the relevant spots should all be marked with actual distances.

(iv) The evidence of the Medical Officer should be recorded in detail. It is not enough that he swears to the correctness of his report. He may produce a report of injuries or of the post-mortem examination, as the case may be. The Doctor is seldom or never summoned to give evidence before a District Court, his deposition in the lower Court being tendered as a production in the case.

(v) All productions should be suitably lettered for the purpose of identification, and they should be referred to by these letters in the course of the evidence.

(vi) The deposition of each witness should bear the necessary certificate and the signature of the Interpreter Mudaliyar.

(vii) Whenever practicable, one of the inquiry officers, be he the Vidane or a Police Officer, should give evidence ; and if he is a Vidane he should produce a certified copy of the extract from his diary. The extract should be lettered as a production. The officer who has arrested the accused must be called.

(viii) In murder cases, the persons who have identified the body of the deceased at the post-mortem examination should be called to speak to identification.

(ix) If the accused has one or more previous convictions, the Court Sergeant must produce after committal a list of such convictions together with the "Finger-Impression slip" : and the accused's admission of such previous convictions must be recorded on the proper form and signed by him. A Court has power under section 73 of the Evidence Ordinance to compel an accused to give his finger-impression.[1] Identification by means of finger-impressions can seldom go wrong.[2]

(x) All the evidence should be recorded legibly and intelligently and where a witness has been recalled, the fact that the previous evidence is read out to him (shortened into P.E.R.O.) must also be recorded.

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1. King *vs.* Suppiah (1930) 31 N.L.R. 435, 7 Times L.R. 139.
2. See the *obiter dictum* of Jayawardena, A.J. in King *vs.* Perera (1930) 31 N.L.R. 449.

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(xi) If any witnesses whose names have transpired in evidence are not called, being hostile, this fact may be specified in the confidential schedule.

(xii) Whenever a fresh charge is explained to the accused and his statement is recorded afresh, there must be an entry on the record or something to show, that the witnesses already examined have been tendered to him for fresh cross-examination.

(xiii) If any productions are forwarded to the Government Analyst for examination and report, the officer in whose presence the parcel was sealed must give evidence to the effect that it contained the identical productions and the constable or peon who took the parcel to the Analyst's office must testify to the fact that the parcel was delivered to him with seals intact and that he delivered the same to the Analyst in the same condition. The Analyst's report must also be formally produced and marked.[1] This report is admissible in evidence without the Analyst being called as a witness unless the Magistrate considers it expedient to summon the Analyst in the higher Court or is requested thereto by either party.[2]

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1. The Government Analyst does not undertake, in examining blood-stained articles, to carry out the test "whether the blood in question is human blood or not."

2. See section 406 (3) and (4) of the Criminal Procedure as amended by Ordinance No. 19 of 1930

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CHAPTER VIII.

Summary Disposal of Non-Summary Cases.

We have seen in the last chapter that if a Magistrate holding a non-summary inquiry is of opinion that the offence alleged to have been committed by the accused is merely a summary one, he could discharge the accused of the non-summary offence and proceed to try the summary one. But the Criminal Procedure Code gives two ways of disposing of non-summary cases themselves in a summary manner. These we shall proceed to examine in detail.

(I) The Magistrate also a District Judge.

Section 152 (3) of the Criminal Procedure Code says: "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 proceed to do so; and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose." This section is very important for, in a sense, it abolishes the criminal jurisdiction of District Courts, at least for those Police Courts where the Magistrate is also a District Judge. There are certain Police Courts, ordinarily called District Courts, where the presiding Magistrate is known as a District Judge (*e.g.* Anuradhapura, Avisawella, Kegalle, Tangalle, Ratnapura, Batticaloa, Badulla, and Nuwara Eliya). In reality he is both a District Judge and a Police Magistrate. There are other Police Courts (*e.g.* Panadure, Colombo, etc.) where the Magistrate is, for the purpose of vesting jurisdiction in him under this section, nominally appointed as an additional District Judge. This section relates to both these classes of Magistrates.

A Police Magistrate, who is also a District Judge, must not assume that cases usually triable upon indictment may properly be tried by him summarily, when a District Judge is available at the station to try the case.[1] The section only refers to cases which would necessitate the bringing down of another Judge from some other Court: though there is nothing in the section which requires a Magistrate who is also a District Judge, to decline to try the case summarily even if another District Judge is available.[2]

Although a Magistrate acting under this section has powers to impose District Court sentences[3] he, nevertheless, imposes them as a Police Magistrate; and he therefore acts as a Police Magistrate and not as a District Judge.[4] The effect of this section is to give him jurisdiction where he would have otherwise no jurisdiction. But the section does

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1. Vengadaselam Chetty *vs.* Mohideen Pitche (1900) 4 N.L.R. 339.
2. Hodgson *vs.* George (1909) 12 N.L.R. 273.
3. (1899) Koch 19.
4. Madar Lebbe *vs.* Kiri Banda *et al* (1915) 18 N.L.R. 376.

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not give him jurisdiction in the case of registered criminals,[1] for he is still a Police Magistrate and section 6 (2) of Ordinance No. 2 of 1926[2] requires him to discontinue summary trials in the case of habituals and to take non-summary proceedings.[3] In a recent case[4] from Mullaitivu, however, Dalton, J. while remitting a case tried by a Magistrate who was also a District Judge for retrial and non-summary inquiry before another Magistrate, advised the habitual to raise the plea of *autrefois convict* at the subsequent trial and held that if this plea was upheld, the original conviction would be held to be valid.

A Police Magistrate cannot deal under this section with charges within his own original jurisdiction. So that if he has jurisdiction to try an offence summarily, he could not get any enhanced powers of punishment.[5] Thus, charges under section 369 of the Penal Code are in certain cases triable by a Police Court: and unless it is clearly shown that the Magistrate has not independent jurisdiction to deal with the offence, he cannot deal with the matter as an additional District Judge.[6] It follows that where an offence is triable by either the District Court or the Police Court, the provisions of section 152 (3) which are clear and explicit in its terms do not apply.[7] And if, nevertheless, a Magistrate purports to act as a District Judge, there is nothing to prevent the Supreme Court from treating the trial as if it had been a summary trial by the Magistrate as such, and from affirming the conviction with such modifications, if any, to the sentence as may be necessary to bring it within the ordinary Police Court jurisdiction.[8] Where a Police Magistrate who was also a District Judge and purporting to act as such tried and convicted the accused of an offence summarily triable and imposed a sentence which a Police Magistrate had jurisdiction to impose, *viz.*, six months, it was held, on objection taken to the jurisdiction, that section 425 of the Procedure Code cured the irregularity.[9] But where a Magistrate is of opinion that the accused, though charged with a summary offence (*e.g.* section 315 C.P.C.), cannot be adequately punished by him as a Police Magistrate, he cannot arrogate to himself additional powers under this section, even if he were a District Judge. Nor can he sentence the accused to a greater punishment than he can lawfully impose: for the proper course is for him to refrain from convicting the accused and to forward the record to the Attorney-General as in a non-summary case.[10] Nor is it competent for him to take all the evidence for the prosecution as a committing Magistrate and then after remand try the case summarily as a District Judge.[11] Though the section enables a Magistrate to hear an indictable case summarily, it does not give jurisdiction to a District Judge to try a case without a committal.[12]

1. Anthony Appu *vs.* Noordeen (1916) 19 N.L.R. 223.
2. As amended by No. 27 of 1928.
3. Paramoo *vs.* Mohideen Cooppay(1916) 2 C.W.R. 230.
4. Nada Rajah *vs.* Gopalan (1930) 32 N.L.R. 115 8 Times L.R. 71.
5. The King *vs.* Jayasingha (1915) 18 N.L.R. 374.
6. Rex *vs.* Rodrigo (1915) 4 Bal. Notes 62.
7. Attapattu *vs.* Babu Sinnho (1910) 4 Weer. 12.
8. Madarsa Lebbe *vs.* Bandia (1915) 1 C.W.R. 146 (Full Bench).
9. Andris *vs.* Nickolas (1911) 14 N.L.R. 207.
10. Andris *vs.* Appuhamy (1900) 1 Br. 42.
11. The Queen *vs.* Kuppa Tamby (1900) 1 Br. 129.
12. King *vs.* Kulanthavelu (1904) 4 Tamb. 17.

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The Magistrate who is also a District Judge must be of opinion that the offence which is triable by a District Court may well be tried summarily. His opinion is a condition precedent to the trial; without it, he has no jurisdiction. He should state his reasons for holding that opinion.[1] The record itself should show that the Judge was a District Judge: that in the opinion of the Judge, the case was one which he might properly try summarily: his reasons for so thinking; and that he was trying the charge as a District Judge.[2] In order to facilitate proceedings, a special form is supplied in every Court and if this is filled in with the necessary particulars, the requirements of this section would fully be met. Where such formalities were not complied with, Wood Renton, C.J., forwarded the record back to the Magistrate to make the necessary amendments and to show that he was trying the case as an additional District Judge.[3] And though former decisions[4] of the Supreme Court required that a Magistrate could not make up his mind to try a case under this section till after the evidence required by section 149 was led, it is now finally decided by a Bench[5] of two Judges that the proceedings do not become vitiated by a Magistrate having decided to try a case summarily before taking any evidence, and the irregularity if any is curable by section 425: this decision has been followed recently in a later case,[6] and it is therefore now settled that a Magistrate may even decide to exercise the powers vested in him by this section immediately on receipt of a Police plaint.

A Magistrate cannot properly exercise these powers after he has heard the whole case for the prosecution,[7] though he may do so after a few witnesses are examined and after he has been enabled to form an opinion. Thus, where simple hurt turns out to be grevious during the pendency of a trial, a Magistrate may exercise the powers of a District Judge, but he must permit the accused to cross-examine the witnesses for the prosecution afresh.[8] Where on an accused being charged with causing hurt with a knife under section 315 of the Penal Code, witnesses were examined and the case postponed: and some days after, the injury became grevious and the offence automatically changed into one under section 317: the Magistrate informed the accused that he would try the case as a District Judge: the accused pleaded not guilty and the witnesses were recalled and tendered for cross-examination: the case was adjourned and in spite of the accused's objection on the next date to the summary trial, the Magistrate convicted the accused who duly cross-examined all the witnesses—it was held in appeal that as the amendment of the charge was not made too late and as the accused was not prejudiced in any way, the objection to the proceedings should not succeed.[9] The complainant must be recalled and the witnesses must be heard or cross-examined afresh *ab initio*.[10] If the Magistrate records as his opinion the reason that the case presents no complicated points of law or fact, the

1. Jeremiah Silva *vs.* Daniel Silva (1904) 7 N.L.R. 182 (Full Bench).
2. Danhia *vs.* Donhamy (1901) 2 Br. 230.
3. P. C. Kegalle 20736 (1915) 1 C.W.R. 6.
4. Mohamado *vs.* Apponsu (1915) 1 C.W.R. 170 and Keyzer *vs.* James Silva (1915) 1 C.W.R. 136.
5. Abanchihamy *vs.* Peter (1918) 24 N.L.R. 16.
6. Kalingahamy *vs.* Porolis Appu (1922) 24 N.L.R. 17.
7. Abdul *vs.* Balappu (1915) 4 Bal. Notes 81.
8. Gressy *vs.* Direckze (1901) 6 N.L.R. 33.
9. Abdul Cader *vs.* Fernando (1902) 6 N.L.R. 95.
10. Punchirala *vs.* Don Cornelis (1904) 8 N.L.R. 58, and Gooneratne *vs.* Perera (1917) 4 C.W.R. 89.

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Magistrate naturally cannot come to this conclusion till he has heard some evidence.[1]

The opinion must be of the Magistrate who is also a District Judge and who proposes to hear the case. Where a Magistrate after receiving the complaint of an offence and recording the evidence of the complainant requested another Judicial officer of the District who was both a Magistrate and a District Judge to hear the case, it was held that the latter could not do so without stating that the offence might properly be tried summarily by him.[2]

Where an offence is sufficiently grave or where there are circumstances which would necessitate the committal of the accused to a higher Court or where the facts are not simple, a Magistrate should not purport to act under this section. The mere importance of dealing with cases of that particular description promptly is not by itself a good reason to proceed summarily, unless the facts are simple.[3] In other words, the case should be "properly triable summarily."[4] Where a person after abusing another and tearing out some of his hair followed him for some distance as he was going towards the Court-house and deliberately stabbed him in the back causing a wound 2½" deep and 4" long and then stabbed three other persons who attempted to arrest him—it was held that this was not a case to be summarily dealt with by the Police Magistrate as the circumstances showed a murderous intention and were consistent with an attempt to murder, though the wound did not prove dangerous to life: it is not the nature of the wound but the intention of the accused, which is decisive as to the nature of the crime committed.[5] There are certain grave crimes which the Supreme Court does not approve of a Magistrate trying summarily as a District Judge: thus, offences under section 444 of the Penal Code ought never to be tried summarily,[6] nor should charges of simple house-breaking under section 443 be summarily disposed of,[7] though such a trial by itself would not vitiate a conviction.[8] There is no objection to a Police Magistrate applying this section to a case where an accused is charged with several offences, some of which are triable summarily by the Police Court, and others are not, provided that he inflicts no higher punishment in respect of the lower offences than he has ordinary jurisdiction to impose[9]; so that a Police Magistrate may in the same case exercise jurisdiction for the trial of one offence as a Magistrate and for the trial of another as a District Judge.[10]

In such trials, after the formalities are complied with, the case becomes to all intents and purposes a summary trial, with like effect and consequences save as to the maxima of punishment. Thus, there should be a proper charge.[11] And a Police Magistrate may inflict any

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1. Vamer Pasupathy *vs.* Ahamadu Levvai (1908) 2 Wee. 34.
2. Queen *vs.* Silva (1901) 5 N.L.R. 17.
3. P. C. Negombo 23506 (1915) 1 C.W.R. 16.
4. Sinnatamby *vs.* Mendis Appu (1899) 1 Tamb. 39.
5. Bastian Silva *vs.* Appuhamy (1900) 4 N.L.R. 47.
6. The Queen *vs.* Kuppa Tamby (1900) 1 Br. 129.
7. Danhia *vs.* Donhamy (1901) 2 Br. 230.
8. Peneris Appu *vs.* Babun (1919) 6 C.W.R. 319.
9. Madar Lebbe *vs.* Kiri Banda *et al* (1915) 18 N.L.R. 376.
10. The King *vs.* Jayasingha (1915) 18 N.L.R. 374.
11. Jusey Appu *vs.* Kadiravel (1923) 1 Times L.R. 230.

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sentence that a District Judge is by law empowered to impose. The fact, however, that he is trying the case in his superior capacity should not weigh with him in imposing a heavier sentence.

(II) Trial by Consent.

We have spoken so far of cases which a Magistrate who is also a District Judge can try by summary procedure: but there are indictable cases which a Magistrate can in certain circumstances dispose of, irrespective of the fact whether he is a District Judge or not.

Section 166 of the Criminal Procedure Code enacts that "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........

"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."

The punishment that a Magistrate purporting to act under this section can lawfully impose is double the punishment within his ordinary jurisdiction, *viz.*, imprisonment of either description for one year or a fine of Rs. 200 with an option to sentence a juvenile under 16 years of age to whipping.

What is essential, therefore, is that the accused must consent to the summary trial; and he must so consent after understanding the difference between summary and non-summary procedure. When he is represented by an advocate or a proctor it is presumed that he understands this difference.

A Magistrate purporting to act under this section must—

(i) frame a charge,

(ii) read and explain it to the accused, and

(iii) ask "Do you desire to be tried by a District Court or do you consent to be tried by me?"

(iv) and where he is not represented by a pleader, explain to him the difference between summary trial and a trial by a District Court.[1] Here again a specific form is provided which, if used, would embody most of these technical requirements.

It is necessary to frame a charge against the accused: it is irregular thus for the charge to be explained from a warrant.[2] Although the section says that a charge should be framed before the consent of the

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1. Punchi Naide *vs.* Ratranhamy (1905) Lem. 95.
2. P.C. Balapitiya (1905) Lem. 72.

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accused is obtained,[1] if the charge is framed almost immediately after consent is obtained, and the accused does not object to the procedure or consider himself injured by it, the irregularity complained of would not justify a reversal of the conviction in appeal.[2] Where a Magistrate obtained the consent of the accused to be tried summarily before he had framed a charge against them, and ultimately convicted them, and sentenced them to imprisonment, it was held that inasmuch as the accused knew what charge would be brought against them, the conviction was good.

The consent of the accused in such cases cannot naturally be obtained until the Magistrate has recorded evidence and upon such evidence has formed an opinion that the offence may be sufficiently dealt with and disposed of by a Police Court.[3] He may, however, form this opinion before recording such evidence : in fact it is not incumbent on him to do so. "It is sufficient if he examines the complainant on his written complaint or if, after personal inspection of the complainant, he is of opinion that the charge is one which may be sufficiently dealt with and disposed of by him in a summary manner."[4] If after the Magistrate has obtained the consent of the accused, the evidence discloses a different offence to the one for which his consent was obtained, the Magistrate should obtain a fresh consent from the accused to be tried summarily for that offence—unless the Magistrate is of opinion that the facts disclosed would not justify him in proceeding on with the summary trial, in which case he should commence non-summary proceedings.

It is the duty of a Magistrate to record the precise words by which the consent of the accused to a summary trial is obtained.[5] And if there are more accused than one the Magistrate should see that an express consent to trial under this section is given by each of them and is made a matter of record.[6] It follows that if an accused does not give his consent or gives it but half-heartedly, a Magistrate cannot try the case, but should take non-summary proceedings. A non-summary inquiry connotes "two strings to the bow ;" in that, if the accused is not discharged by the Magistrate in the lower Court, he may stand a chance of acquittal at the hands of the District Judge. Nevertheless, the delay and expense and the probability of a heavier sentence in the District Court are points which very often weigh with offenders who gladly welcome, and often invoke, a summary trial.

The offence must be within the jurisdiction of a District Court,[7] though it does not, therefore, mean that it should be within its exclusive jurisdiction.[8] And the offence should not be of a very serious nature : for the punishment that a Magistrate can impose under this section is not heavy and any case which in the opinion of the Magistrate calls for a heavier punishment or which has sufficiently serious consequences should be committed by him to a superior Court. Thus, the offence of house-breaking (whether under sections 443 or 444 of the Penal Code)

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1. Kurera *vs.* Fernando (1886) 7 S.C.C. 177.
2. Adonis Appu *vs.* Nicholas (1902) 6 N.L.R. 87.
3. Christian *vs.* De Soysa (1891) 9 S.C.C. 176. (Full Bench).
4. Hossen *vs.* Perera (1894) 3 S.C.R. 137.
5. Candamby *vs.* Kankanange Appu (1886) 7 S.C.C. 202.
6. Nadan *vs.* James (1915) 4 Bal. Notes 60.
7. Silva *vs.* Asana (1885) 7 S.C.C. 8.
8. Nadan *vs.* James (1915) 4 Bal. Notes 60.

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is of a very serious character and ordinarily should not be tried by a Magistrate even with the consent of the accused.[1]

The section says that the Magistrate must have regard to the character and antecedents of the accused : it follows that in the case of "bad characters" this section should not be made use of. At any rate, the section does not apply to registered criminals and, in the case of these, a Magistrate cannot try them even with their consent, but must take non-summary proceedings.[2]

This provision has a very salutary effect : for it enables Magistrates to "take short cuts" especially when the accused plead guilty. There is also a speedier dispensation of justice.

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1. Ramasamy *vs.* Sinnochchi (1916) 2 C.W.R. 2.
2. P. C. Panadure 56910, 4 C.W.R. 123.

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CHAPTER IX.

DEFENCES.

(I) General.

When a person is charged before a Criminal Court, he has various defences open to him. It is outside the province of this book to consider them all. The subject is so vast and varied that it may well-nigh fill a volume; the particular defence, moreover, to be put forward in a particular case is purely a question of able advocacy and is an art of its own. The practised pleader will always hit upon the right defence that will suit his case. But his field of action is often limited by the facts placed at his disposal; it is "circumscribed within his brief": he has therefore to fall back upon the only effective weapon that he can wield with daring: *viz.*, Cross-examination. We do not propose to deal with that topic at all: nor do we propose to deal with "defences of facts," *e.g.*, alibi, false case, and the like. Such defences turn mainly on the trustworthiness of evidence or the reliability of witnesses—in other words, on the balance of probabilities. They are distinct from the legal defences which only we propose to discuss below.

When a person is charged with a particular offence, the question whether, assuming all the facts alleged to be proved, they constitute the offence complained of is a question of law and should not be lost sight of in dealing with any and every case. The quantum of culpability necessary for any particular class of offences will be discussed in the next succeeding chapters. It should always be remembered that the prisoner is entitled to the benefit of this defence and it is the duty of the lawyers to point out the missing links in the chain of his guilt. Where an accused is seen taking a bag of coconuts and where it is established that a complainant lost on that night a bag-full of nuts from his heap, it can hardly be said without positive evidence on that behalf that the nuts which the accused was seen carrying were the nuts belonging to the complainant. So that here, even if the facts alleged by the prosecution may be admitted by the defence, the accused cannot rightly be convicted of theft. Or again, several persons may have been seen gambling with cards in a private house; they commit no offence, even admitting all the facts as proved. Or again, the accused who is charged with mischief may have broken a window pane; but he may have pelted the stone at something else.[1]

There will be other legal defences open to the accused arising from the particular facts or procedure of each case; some of these might prove fatal to the prosecution. Thus, an Excise Inspector who seizes a packet of ganja in another's house but fails to seal it immediately after seizure in the presence of the accused cannot successfully prosecute the accused. A Police Inspector who, without the previous sanction of a Magistrate, investigates into a non-cognizable offence cannot file a

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1. R. *vs.* Pembliton (1874) 12 Cox Crown cases 607.

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plaint. A Headman who unlawfully seizes another person cannot charge the latter afterwards for obstructing him. A husband being not a competent witness against his wife cannot complain against her for theft of goods. A Government Agent cannot prosecute holders of gun and cart licenses for non-renewal after the 31st of March. A Chairman of a Sanitary Board will not succeed in cases of breaches of bye-laws which have been framed *ultra vires*, and so on. These illustrations show the prime necessity of studying exhaustively the facts and the law of each case and then considering whether there are any technical or legal difficulties in the way of the prosecution.

Then there is the question of jurisdiction. Some cases are exclusively within the jurisdiction of a Village Tribunal. There are others where the particular Police Court has no territorial jurisdiction or where the offence appears to be non-summary and not triable by a Police Court.

Apart from these special legal defences, there are general legal defences applicable to all classes of cases for which there is provision in our Codes and which we shall proceed to consider in detail.

(II) Mens Rea.

The English doctrine of *Mens Rea* is not known to us in its exogenous form. There, *actus non facit reum nisi mens sit rea*: in other words, to constitute a crime, there must be a guilty act and a guilty intention. With us, the guilty intention and the guilty act are both necessary[1]; but as our law is codified the particular nature of *mens rea* that is necessary for any given offence is also dictated by the Code; and the absence of that form of intention, being an absence of *mens rea*, makes the act complained of an innocent one. In *Weerakoon vs. Ranahamy*[2] the Full Bench of our Supreme Court considered the question of absence of *mens rea* as a probable defence: "the absence of *mens rea* is a plea in justification: it is based upon a principle of construction applicable to criminal enactments.....when the definition or the statement of the offence contains the word 'knowingly' or some corresponding expression, it is for the prosecution to establish the guilty knowledge. Where it does not, it is for the accused to prove the absence of *mens rea*. As it is often put, the absence of the word, knowingly, merely shifts the onus." This judgment is well worth perusing. It was adopted successfully by De Sampayo, A.C.J., in a recent case of possessing a false measure where he set aside the conviction of a rice-dealer who had acted in good faith and had no fraudulent intent or knowledge in possessing it.[3] When all the elements forming the *actus reus* are present, the *mens rea* is usually presumed: so that the fact that there was no *mens rea* will have to be established by the defence. In fact, in some cases the law casts this onus on the accused in express words, *e.g.* in possession of beef or possession of recently stolen property. There are offences, however, mainly under the Ordinances—where even the absence of *mens rea* will not help, *e.g.* failing to register a birth or death—or breaking a sanitary bye-law. Where the law enjoins a positive duty, the breach thereof is *per se* punishable without any reference to the existence or absence of *mens rea*.[4] And where the law says that a certain act should not be done and you con-

1. Superintendent *vs.* Kangany (1905) Lem. 49.
2. (1921) 23 N.L.R. 33.
3. Medudaku *vs.* Muttucaruppen (1923) 1 Times L.R. 239
4. Percy *vs.* Gorden (1911) 14 N.L.R. 428.

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sciously do it, the law presumes intention or knowledge on your part and you commit an offence.[1]

The chapter on general exceptions in our Penal Code deals with the doctrine of *mens rea* in a condensed form. The absence of *mens rea* may be due to :—

(i) *A mistake of fact* : if a man who would otherwise have been an offender proves that he acted under a *bona fide* mistake of fact, this is a sufficient defence. But there must be a mistake of fact and not of law. For *ignorantia facti excusat* : *ignorantia juris non excusat.* "If a man intending to kill a thief or house-breaker in his own house by mistake kills one of his family, this is no criminal action : but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him and does so, this is wilful murder."[2] But ignorance is not the same as mistake. The absence of knowledge that a medicine imported from India contains a trace of ganja is a case of reckless ignorance and not a mistake of fact; as such, it is no defence.[3] The possession of articles, which the Legislature has prohibited the removal of, is an offence unless the accused proves a degree of ignorance sufficient to excuse him.[4] A person who merely forwards goods or receives them as a commission agent has no right to open the packages to see whether they contain what they are said by the owner to contain and has therefore no means in this way of knowing whether the owner has concealed illicit goods in the packages ; so that even if they contained ganja, the forwarding agent would hardly be said to have the necessary *mens rea* for a conviction.[5] But the addressee of a consignment is not so immune from legal liability. When a parcel said to contain king yams was found to contain two balls of opium, it was held that the onus lay upon the accused, when once it was proved that he had taken charge of the parcel, to show that his possession of the contents of the parcel was innocent.[6]

Mistake implies a positive and conscious conception which is in fact a misconception.[7] This is illustrated by the American case where a constable was charged with arresting a man unlawfully and the facts were that the man had fallen down in the street in a fit and his friends had plied him with whisky and then gone away to seek help : the constable "smelt the whisky" and arrested him for being drunk and disorderly ; he was acquitted.[8] The mistake, therefore, should be a reasonable one and should be a *bona fide* mistake of fact. The accused, who was charged with having unlawfully supplied liquor to a constable while on duty, pleaded that as the constable had no armlet on, he was in the *bona fide* belief that the constable was not on duty: his conviction was set aside.[9] The accused, a respectable lady, was acquitted of theft of coke from the Railway yard because she was in the *bona fide* belief that this coke was derelict and could be appropriated by any one.[10] Thus, in the case of lands where the accused are under the *bona fide* belief that

1. Shaikali *vs.* Leisahamy (1911) 14 N.L.R. 349.
2. Blackstone's Commentaries.
3. Casie Chetty *vs.* Ahamadu (1915) 18 N.L.R. 184.
4. Davit Singho *vs.* Juanis Appu 8 S.C.C. 139.
5. The Attorney-General *vs.* Rodriguesz (1916) 19 N.L.R. 65.
6. Rex *vs.* Ansalavarnar (1922) 1 Times L.R. 46.
7. Per Bertram, C.J., in Weerakoon *vs.* Ranhamy (1921) 24 N.L.R. 45.
8. Commonwealth *vs.* Presby 14 Gray 65.
9. Sherras *vs.* De Rutzen (1895) 1 Queen's Bench 918.
10. Gnanaprakasam *vs.* Bulner (1916) 19 N.L.R. 190.

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they are entitled to the lands, any damage done by them while under that belief can hardly be regarded as a criminal act.[1] A constable who acts in good faith and in the *bona fide* discharge of his duties will not be afterwards liable for his act[2]; for the law says that if a person by reason of a mistake of fact in good faith believes himself to be justified by law to do a particular thing, his act is not tantamount to an offence. Thus, constables who run up to help another constable in response to a signal cannot but help him in arresting a person whom he charges with assault and it is not their duty to satisfy themselves as to the truth of the charge.[3]

The mistake must be an honest mistake and should not have been known to the actor as a mistake at the time of acting. In other words, he should not have known that what he was doing was wrong or contrary to law. Nor will a mere mistake and even an honest mistake suffice, unless there are reasonable grounds for such a mistake. The mere dreaming of a certain state of facts without any logical grounds for such an impression can hardly be a sufficient excuse.[4] But the grounds may appear to be illogical or unreasonable to others, though they may afford a chain of logical reasoning on the part of the actor. A constable who arrested an ill-clad person carrying three bundles of cloth under his shoulders because the person said that the cloths were made in England, whereas they bore Gujarati characters, was acquitted of wrongful confinement because he had sufficient though apparently illogical grounds for arrest.[5]

While a mistake of fact will, therefore, be on the whole a good defence, a mistake of law even though it is *bona fide* and even though the law is obscure and not universally known will excuse no one. A carter who goes at night with one lamp cannot plead that he did not know that in law he should have had two lamps for his cart. There is a general presumption of publicity in the favour of all laws, and every citizen, if his intelligence is not otherwise impaired, is presumed to be familiar with the laws of his land. But if the mistake of law is a *bona fide* one—or if the mistake is partly one of law and partly of facts, his action will not be regarded with that degree of criminality which would ordinarily be attached to it. The Muslim women of Ceylon, whose marriages till now were dissolved by an unauthorized lebbe, were, nevertheless, regarded as guilty of bigamy when they married again.[6]

(ii) *Age*.—A child under seven years of age is deemed in Ceylon to be incapable of committing an offence: so is a child above seven and under twelve if he has not attained sufficient maturity of understanding. Whether the child above seven is able to judge of the nature and consequence of his conduct on a particular occasion is a question of fact to be determined by the Magistrate; but his immunity is not so general as that of a child under seven. If the child is just seven years the judge should specifically mention whether he is above or below. The fact that "the boy is of an impressionable age and that four years in the Maggona Reformatory would do him all the good in the world" is not sufficient

1. Obeyasekara *vs.* Menik Naide 4 C.W.R. 126.
2. Rodrigo *vs.* Webster 6 Tam. 47.
3 King *vs.* Tajudeen (1902) 6 N.L.R. 16.
4. Leete *vs.* Hart 3 Common Pleas 322.
5. Bhawoo *vs.* Mulji I.L.R. 12 Bombay 371.
6. See the recent Kegalle case affirmed in appeal. The King *vs.* Miskin Umma (1925) 26 N.L.R. 330

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evidence of the fact that he had sufficient maturity of understanding.[1] Though the child is thus immune, the person who employs him as a cat's paw or who abets him cannot escape criminal liability for his own acts.

(iii) *Insanity.*—"Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law." This plea of insanity has to be distinguished from "inability of making a defence." In the latter event, the trial proceeds after the accused is found capable of standing his trial: in the former case he has to be acquitted with this proviso, however, that section 374 (1) of the Criminal Procedure Code enacts that whenever the verdict states that the accused committed the act alleged, the Court before which the trial has been held shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be kept in safe custody in such place and manner as the Court thinks fit, and shall report the case for the orders of the Governor. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his actions unless the contrary is proved: so that the plea of insanity is a plea in defence. The unsoundness of mind, whether it is mental deficiency or delinquency, must be of that degree which makes the "moron" incapable of knowing the nature of his act; in other words, he should not have known that what he was doing was either wrong or contrary to law: the proper test is the power of distinguishing between right and wrong not in the abstract, but in reference to the particular offence complained of[2]. But insanity arising from mental delusions will not always exempt one from criminal liability, for the law places him in the same position as regards responsibility as if the facts in regard to which the delusion occurred were real. A person who plunges his knife in another's heart with a view to sending him to heaven,[3] or who sacrifices his son under a religious hallucination expecting him to be reborn within three days,[4] is equally guilty of murder; for the law does not treat him as *non compos mentis*, but as a person perfectly sane, and regards his actions devoid of the religious mania. A lunatic, on the other hand, who commits a grave crime while insane cannot justly be regarded as responsible for his actions, and if he afterwards regain his sanity would be entitled to an acquittal for his former misdeeds. In the case of temporary insanity or delirium the proper test to be applied is whether the offender was conscious of the nature of his act. The accused who was suffering from high fever felt annoyed at the cries of his two children, cut their throats, went to bed and fell asleep. He had shown no signs of insanity before or after: as there was no evidence of delirium or proof that the accused was unable to know that what he was doing was wrong and contrary to law, his conviction was affirmed, but he was commended to the mercy of the Government.[5] Perhaps from a medical point of view such a man would be regarded as a lunatic; but the law goes further and regards only those persons as insane who have been proved to have been unable to know the nature of their acts. There must be proof positive of mental aberration which has clouded and clogged the reasoning faculties to that extent where the actor becomes incapable of distinguishing right from wrong.

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1. King *vs.* Christina (1914) 4 Bal. Notes 11.
2. Reg. *vs.* Mac Naughton Kenny's select cases 43.
3. Kader Nasyer Shah I.L.R. 23 Calcutta 604.
4. Emp. *vs.* Bishendharee Kahar 7 Cal. Weekly Reporter 64.
5. Emp. *vs.* Lakshman Dagda I.L.R. 10 Bombay 512.

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A deaf and dumb person, if accused, is in Ceylon treated on the same lines as a person of unsound mind.[1]

(iv) *Intoxication.*—This is no defence unless the thing which intoxicates the offender is administered to him without his knowledge or against his will: and even then he should have been so intoxicated as to be incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law. In all cases of self-induced intoxication it is a question of fact whether the accused actually entertained the intention necessary to constitute the crime : where knowledge is an essential element of the crime, the drunkard is presumed to have the knowledge of a sober man : where intention is an essential element of the crime, the drunkard is presumed to have the knowledge of a sober man in so far as that knowledge is relevant for the purpose of determining his intention. The law does not allow a drunkard to say that owing to his intoxication he did not know that a particular stab with a particular instrument was likely to cause the death of a human being. In the Crown case reserved,[2] where the above dictum of law was laid down, the accused was sentenced to be hanged for having killed another while in a state of drunkenness. It follows, therefore, that while intoxication may affect a man's intention, voluntary drunkenness is no excuse for not possessing the knowledge of an act. So that, "although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that the man was in drink in considering whether he formed the intention necessary to constitute the crime."[3] Involuntary drunkenness has the same consequences in law as insanity.

(v) *Accident.*—"Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner, by lawful means and with proper care and caution." Thus, where the hand of a hatchet flies off when the accused is working with it and kills a passer-by, the act of the accused is excusable under this section. Where the driver of a defendant's horse which had been alarmed by the rattle of the shutters of a shop could not rein in the animal, but was able to guide it to some extent and where the only alternative, in order to avoid death, was to turn and take the chance of passing between a tree and the plaintiff's carriage, the driver's action in so doing and in consequently knocking down the latter and killing the plaintiff's horse was regarded as an accident, pure and simple.[4] And in all motor car accidents the only real questions to be decided are whether the driver had not taken proper care and caution, that is, whether he was driving in a rash or negligent manner or at excessive speed or whether he had efficient or defective brakes. If the driving is (1) in a lawful manner, namely, under the regulation speed, (2) by lawful means, namely, with proper lights or proper brakes, and (3) with proper care and caution, namely, after sounding the horn or trying to stop or turn whenever necessary, the resulting accident would be regarded as pure misfortune for which no guilt could attach to the driver. An accident is an unusual occurrence which cannot be foreseen or provided against. Every act, therefore, which can be anticipated will not be an accident : nor will it be an accident if unlawful means are employed or proper care is not taken.

1. King *vs.* Pindorissa (1928) 29 N.L.R. 385.
2. The King *vs.* Rangasamy (1924) 25 N.L.R. 438.
3. Per Stephen, J., R. *vs.* Doherty 16 Cox Crown cases 306.
4. Sellamutto *vs.* Fraser (1902) 6 N.L.R. 170.

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The woman who flings an iron poker in order to frighten her child is guilty of manslaughter if the poker goes and hits another child passing along the street, for she is doing an unlawful thing.[1] Every man is presumed to foresee the consequences of his acts and is, therefore, liable for them. The man who supplies an improper quantity of liquor to a child, even out of sport, would thus be responsible for the consequences of his action.[2] The man who handles loaded firearms does so at his peril: so the man who having a right to the possession of a gun and well knowing that it was loaded, snatched it from the hands of the deceased and the gun going off accidentally killed the deceased, he was held to be guilty of culpable homicide not amounting to murder.[3] If, however, ordinary and reasonable precautions are taken, if the act is in itself not unlawful and if the means employed are perfectly legal, then no *mens rea* can attach to the deed. It is misadventure pure and simple.

Contributory negligence in such cases is no defence. The only criterion is the culpable negligence of the accused himself and the want of reasonable and proper care. Cases may arise where the negligence of the accused is heightened by the negligence of some one else: here the act of the accused alone should be considered, divested from the act of that other person. Where the prisoner was stocking fireworks contrary to statute and where the fireworks becoming ignited by the negligence of his servants burnt the complainant's house in which there was an inmate, it was held that the keeping of the fireworks though illegal did not alone cause death; plus that act of the prisoner, there was the negligence of the accused's servants: the accused could not, therefore, be held responsible for the resulting death.[4]

(vi) *Necessity.*—Even where an act is done with a knowledge that it may cause harm, it will not amount to an offence if there is no criminal intention to cause harm, and if it is done in good faith for the purpose of preventing or avoiding other harm to person or property. A man who pulls down houses in order to prevent a fire from spreading commits no offence if he does so in good faith. The draftsmen of our Code quote instances of a man who jumps from a sinking ship into an overloaded boat and causes the death of the occupants of the latter; or of the blacksmith who coerced by threats and torture breaks open the door of a house to enable the dacoits to loot. The principle involved is *necessitas vincit legem.*[5] This defence cannot be accepted where the evil averted is a less evil than the offence committed to avert it, or where the evil could have been averted by anything short of the commission of the offence, or where more harm is done than is necessary for averting the evil. Indeed our law says that if a person is "compelled" to do a particular thing by threats, unless it is an offence punishable with death, it is no offence if the threat had caused reasonable apprehension of instant death.[6] But here he should not have of his own accord placed himself in the situation in which he became subject to such constraint. Marital compulsion will, in certain circumstances, be a good defence.[7]

1. R. *vs.* Conner, 7 Carrington and Payn 438.
2. R. *vs.* Martin 3 Carrington and Payn 211.
3. R. *vs.* Archer 1 Foster and Finlayson 351.
4. R. *vs.* Bennet, Bell's Crown cases 1.
5. Reg. *vs.* Dudley and Stephens, Kenny's select cases 61.
6. Section 87 C.P.C.
7. Carey *vs.* Kalai (1909) 12 N.L.R. 257

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(vii) *Consent.*—Harm caused by consent given by a person above eighteen years of age exonerates the offender from all blame if death or grievous hurt is not intended. And even grievous hurt becomes exempted if the hurt is caused for the benefit of the person consenting. The consent may be express or implied. In the case of children under twelve years of age the consent may be that of the guardian or person in charge. The consent should be voluntary : it should not have been given by a person under fear of injury or under a misconception of facts, or by a person who being of unsound mind or drunk is unable to understand the nature and consequence of what he has consented to. Thus, consent on the part of a girl under seven or eight years of age is no defence to a charge of using criminal force on her with intent to outrage her modesty.[1] Consent is not merely the concurrence of wills, but a consciousness or knowledge of the consequences of the act consented to. It implies the free exercise of the will of a conscious agent. A person who does not know the risks of a surgical operation and is in fact unwilling to its being performed can hardly be said to have given his consent.[2] Where no consent is given, it will not be an offence to cause harm if it is impossible to get the necessary consent and the harm is caused in good faith and for the benefit of the person harmed. Thus, where a person is attacked by a bear, the man who in order to save his life takes a risk and shoots at the bear is not guilty of any offence, even if in so doing he mortally wounds that person. The voluntary laying of " traps " for seizing thieves or for detecting crimes does not come within the meaning of consent. If unforeseen consequences supervene (*e.g.*, tetanus) after voluntary consent has been given and obtained, the person causing the harm may claim the benefit of its being an unavoidable accident.

(viii) *Triviality.*—" Nothing is an offence by reason that it causes or that it is intended or known to be likely to cause any harm if that harm is so slight that no person of ordinary sense and temper would complain of such harm." Thus all trivial harms are exempted. *De minimis non curat lex.* " As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommodate him by pressing against him in getting into a carriage." These are acts which are unavoidable in society and which the law does not ordinarily penalise. Where the complainant entered the accused's land, without his permission, to measure it and the accused ejected him and damaged his measuring tape, it was held that as the accused was justified in ejecting, the damage caused to the tape was but trivial and therefore negligible.[3] But the fact that there are no marks on the complainant who complains of hurt is no ground for declining to issue process, for all hurt does not necessarily leave marks, and therefore such hurt can hardly be regarded as trivial.[4]

(ix) *Privilege.*—Whatever a Judge does when acting judicially in the exercise of any power which is, or which he in good faith believes to be, given to him by law is no offence. He must be acting judicially and must be exercising powers which are vested in him by law : even if he acts outside his jurisdiction, he must have a *bona fide* belief in his powers. Just as a Judge is protected, so is everything done in pursuance of his judgment or order : even where there is no jurisdiction, it is enough that the person

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1. The King *vs.* Kalimuttu (1919) 6 C.W.R. 142.
2. Sukaroo's case 14 Calcutta 566.
3. Ratnahbarty *vs.* Gunawara Singhe 6 Tamb. 21.
4. Silva *vs.* French (1920) 21 N.L.R. 498.

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doing it believes in good faith that the order is legal and binding. Similarly, anything done by a person who is justified by law in doing it is no offence: this plea of justification holds good even where by reason of a mistake of fact it is believed that he is justified in law in doing it. Thus, it is no offence at all if harm is caused in good faith and for the benefit of a person under twelve years of age or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person: it should not be grievous hurt or murder. It is possibly under this section[1] that chastising of school children by their teachers could be justified. For Ceylon schools, there is a departmental rule regarding caning which should be followed if the privilege is to be claimed.[2] A mistake of law will not help. An Excise Inspector is justified in law in arresting a person whom he detects committing an offence under the Excise Ordinance in his presence, *e.g.* coming down a palmyrah tree with a pot. Even if the pot afterwards turns out to contain bee-honey, the original arrest followed by immediate release will not be regarded as illegal.

(III) Self-defence.

This subject is so vast that only scant justice can be done to it in this volume.[3] Our Code[4] says that nothing is an offence which is done in the exercise of the right of private defence and goes on to define what this right is, when it begins and ends, and how far it extends. Private defence could be the defence of the person (either of one's self or of some other person) and the defence of property. The law allows every individual to defend himself or his property: this right is absolutely necessary for our society. In the words of Bentham, "the vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum-total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men."[5]

Every person has a right to defend his own body and the body of any other person against any offence affecting the human body: and in the exercise of this right he may even cause death or any other harm to the assailant if the assault on him creates a reasonable apprehension of (i) murder, (ii) grievous hurt, (iii) rape, (iv) gratification of unnatural lust, (v) kidnapping or abduction, (vi) and wrongful confinement with impossibility of approaching the authorities for release. In any of these six events, the person exercising the right may even cause death; in all other cases he can cause any harm whatsoever to the assailant, other than death.

Similarly, every person has a right to defend the property whether movable or immovable of himself or of any other person against any theft, robbery, mischief or criminal trespass or against any attempt at committing these offences; and in the exercise of this right he may even cause death or any other harm to the wrong-doer if the offence amounts

1. Section 82 C.P.C.

2. Latest regulations for Assisted Vernacular and Bilingual Schools will be found in the "Gazette" of 12th July, 1929, and those for Government Schools in the "Gazette" of 2nd October, 1929.

3. The reader is referred to the excellent treatise on the subject entitled "The Law of Private Defence" by A.C. Moitra (Messrs. Butterworth, Calcutta), all the important Indian decisions are discussed there.

4. Section 89-99. C.P.C.

5. Bentham's Principles of Penal Laws.

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to (i) robbery, (ii) house-breaking by night, (iii) arson, (iv) and theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right is not exercised. In the case of all other thefts, mischiefs or trespasses, the person exercising the right may cause any harm other than death.

There is no right of private defence against any act done by, or under the direction of, a public servant acting in good faith under colour of his office if it is known or there is reason to believe that the person doing the act is a public servant or one acting under his direction, though the act or the direction may not be strictly justifiable in law—unless the act causes a reasonable apprehension of death or grievous hurt. Where a constable attempted to arrest a person in the *bona fide* exercise of his duty, it was held—though the arrest was not justifiable in law—that the plea of self-defence will not avail against the constable, as there was no apprehension of death or grievous hurt.[1] "This important exception was put in section 92 to cover the acts of public servants acting in good faith, even beyond their authority, because what was done wrongly in the name of the law would be set right by the law in due course."[2]

The right of private defence of the person commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed : the right continues as long as the apprehension lasts. The right of private defence of the property commences when a reasonable apprehension of danger to the property commences—and continues till such apprehension of danger to the property continues. In the case of thefts, it continues even till the property has been recovered. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and the right does not extend to the inflicting of more harm than is necessary for the purpose of defence. In all cases where a reasonable apprehension of death arises, the right of private defence extends, however, to the incurring of the risk of causing harm to innocent persons if that risk is unavoidable.

These are the main principles of our law on the subject ; but the applicability of the principles is a matter of some difficulty : for cases arise almost every day in our Courts where the right is invariably claimed. This right is but a plea in defence. "Where a person pleads the right, it is not necessary to establish the fact conclusively : all that need to be proved is that he has grounds for believing that violence was attempted and that belief was under the circumstances such as any rational man may have entertained."[3] So that it is not necessary to be actually struck before striking in self-defence. "A man who is attacked by another who wears a sword is not justified in killing him on the chance that he may use the weapon, but if he sees him about to draw it, it is not necessary to wait till he draws it."[4] A man is entitled to defend his property, to arrest a person whom he catches stealing and who is running away with his property and to use any reasonable force that is necessary for the purpose ; and the question of reasonableness cannot be too closely scrutinized ; for, if a man is placed in a position where he

1. King *vs.* Dias *et al* (1917) 4 C.W.R. 200.
2. Per Akbar, J. in Vancuylenberg *vs.* Fernando (1930) 32 N.L.R. p. 46. 7 Times L.R. 132.
3. Joseph Casorati (1897) Punjab record 36.
4. Mayne, Section 236.

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has to defend himself or his property from a thief, he is not likely to use the same calm consideration as to what are the necessary steps for his protection as one would be, when looking at the matter afterwards when the excitement of the heat of the moment has passed away.[1]

A prisoner discovered a thief in his garden with a bag of coconuts in his hands one dark night and challenged him, whereupon the thief took to his heels: the accused raised his gun and fired low and hit the thief in the buttocks: it was held that the accused had not exceeded his right of private defence.[2] The same view was expressed in another case where the accused, finding a thief up on a coconut tree against which there was a ladder, warned him not to come down on pain of being shot at and when the thief attempted to descend with a knife, shot and wounded him on the foot.[3] It must not be forgotten that no more force can be used than is reasonably necessary. Thus, one exceeds his right of private defence if he uses his knuckle duster and breaks the ribs of one of the trespassers on his land.[4] Nor does the right of private defence of person arise when a man armed with a gun sees and shoots at night, upon property he is set to watch, a thief armed with a knife if the thief shows no intention of using it for purposes of resistance or attack.[5] There is no right of self-defence where a person, for instance, has lawfully entered your premises and is by law empowered or authorized to make a search, *e.g.* an Excise Inspector under section 36 of the Excise Ordinance.[6]

An attacking party has no right of private defence against a defending party. Thus, trespassers cannot use knives when they are repelled by force[7]—for the law presumes in favour of persons who are in exclusive possession of property, irrespective of the question whether such possession is also supported by title. If neither side is in possession, then the right will accrue to none.[8] The complainant had one-eighth share of fishing in a certain tank: the accused and other co-owners who had three-fourths share went to the tank armed with clubs to protest against the complainant's right to fish. A fight ensued and the accused were convicted, it being held that the accused could not claim the benefit of the right of private defence of property.[9] When a party has been sleeping over his rights and has allowed another party to obtain and remain in possession for some time without any interference on his part or attempt at ouster, the latter's trespass becomes condoned, and it is the former who is regarded in law as an aggressor if he afterwards takes the law into his own hands.[10]

The right of self-defence is often urged in cases of voluntarily causing hurt: it is here that it is most difficult to understand how far the right extends. There is no doubt that in order to extricate one's self from the violent clutches of a "man with a murderous frown"—one may inflict any injury: for here there is a reasonable apprehension of death. Where the deceased who was the aggressor inflicted injuries

1. Nicolle *vs.* Perera 2 C.W.R. 110.
2. Fernando *vs.* Fernando (1910) 5 Bal. 1.
3. The Queen *vs.* Perera 9 S.C.C. 1.
4. Amaris *vs.* Mutucumaru 6 Tam. 56.
5. Jansz *vs.* Appuhamy 6 Tam. 6.
6. King *vs.* Fernando (1930) 32 N.L.R. 156.
7. Punchiappu *vs.* Mohideen 6 Tam. 103.
8. Q. *vs.* Peary Mohon Sarakar (1883) I.L.R. 9 (Calcutta) 639.
9. Anant Pandit *et al vs.* Mudhusudan Mandal I.L.R. 26 (Calcutta) 574.
10. Dadabhoy *vs.* Sub-Collector Broach (1870) 7 Bombay H.C. Reports 82.

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on the accused, felled him to the ground and seized him by the throat, whereupon the accused inflicted one wound with a knife in consequence of which the deceased expired, it was held that the accused was merely acting in self-defence.[1] The degree of violence which can be used with impunity mostly depends upon the particular circumstances of each case. Where a man was murdered by his brother and nephew, while in the act of dishonouring the brother's wife, and where fifteen ribs of the deceased were found to be broken each in several places, the accused were found guilty of man-slaughter, for more force was used than was necessary to protect the wife from the outrage.[2] The question of force repelling force is subject to the fundamental principle that right is not required to yield to wrong. Where a person strikes another and commences the fray in which afterwards both use knives, the former would clearly be the aggressor and would have himself to blame for any fatal consequences that might ensue ; for a "person who is assaulted is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over."[3] "A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor killing him ; he is even entitled to follow him and to endeavour to capture him ; but if the aggressor is captured or is retreating without offering resistance and is then killed, the party killing him is guilty of murder."[4] So that the essential point to remember is that no more force could be used than is necessary for the purpose of defending oneself or one's property, and that such force should not be used if there is no reasonable apprehension of danger or of violence, or if there is a chance of having recourse to the protection of public authorities. The right of private defence is not a legalized pass-port for taking revenge ; nor does it afford impunity where one assumes the rôle of a dispenser of justice. The very existence of our whole judicial system would be jeopardised, if one were given the liberty and license of taking the law into his own hands. If one gives you a slap, you cannot slap him in return with impunity : you must seek the protection of the Law-Courts : self-help can only be invoked in defence and not in attack. Thus, where a thief lay prostrate and could thus have been easily secured, but the prisoner called for an axe which was not lying handy and which was evidently demanded with the deliberate intention of killing, and chopped him to death, he was held to have used force which was not justifiable.[5] But where the accused, an old man, was so severely assaulted by the complainant that his life was in danger and the Magistrate recorded his dying deposition, the Supreme Court held that the accused in striking back with what came into his hand, namely, a stone, had not exceeded his right of private defence.[6]

It must not be forgotten that a plea of self-defence can hardly succeed unless the accused gives evidence on his own behalf in support of that plea, except where it is manifest from the evidence for the prosecution that the plea must be upheld.[7]

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1. Emp. *vs.* Chhabil Das 1923 Lahore 172.
2. Q. *vs.* Maithiya Gazee and Esoff 6 Calcutta Weekly Reporter 42.
3. Emp. *vs.* Clingal Kunpinayan (1905) I.L.R. 28 Madras 454.
4. Halsbury's Laws of England.
5. Q. *vs.* Durwan Geer 5 Calcutta Weekly Reporter 73.
6. Mailvaganam *vs.* Ramanather (1925) P.C. Point Pedro 1806 S.C. 523.
7. The King *vs.* Sellammal (1931) 32 N.L.R. 351.

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(IV) Res Judicata.

A person, who has been previously convicted or acquitted of any particular offence, cannot be charged with or re-tried for the same offence or for any other similar offence on the same facts.[1] This similar offence should be one for which he could have been previously tried under sections 181 or 182 of the Procedure Code. The underlying principle is : *nemo debet bis vexari pro una eademque causa.* So that a person who has, for instance, been acquitted of a charge after trial cannot be re-tried again on a fresh charge while the acquittal is still in force, if the facts on which the second prosecution depends are the same as in the former case.[2]

But a person acquitted or convicted may be afterwards tried for any distinct offence for which a separate charge might have been made against him at the former trial. Thus, a person acquitted of unlawfully removing arrack may afterwards be prosecuted for an assault committed at the time of the removal.[3] The offence of gaming is distinct from that of keeping a common gaming-house and a person acquitted of the former cannot set up a plea of *autrefois acquit* when charged with the latter.[4] A conviction for affray is no bar to a subsequent conviction for causing hurt to one of the members of the fray,[5] nor for criminal intimidation.[6] A person convicted of removing timber without a permit may afterwards be tried and punished for theft of the same timber.[7] An order to pay Crown costs and compensation cannot operate as a bar to a subsequent prosecution under section 208 C.P.C.[8] A Fiscal's Officer removing a person who sets up a claim to a property, in execution of a writ issued in pursuance of a decree, after being acquitted of criminal trespass and mischief, cannot raise this plea when subsequently charged for disobeying an express direction of the law under section 162 C.P.C., though the facts may not warrant his conviction under the latter section.[9] An order of discharge on a jury refusing to reconsider their verdict is no bar to a re-trial on the same indictment.[10]

A person convicted of any offence may be tried again for the consequences of the offence if these had not happened or were not known at the time of his conviction. A person convicted of hurt may afterwards be re-tried for murder if death supervenes : but a person convicted of culpable homicide cannot again be re-tried for murder.

A person can always, however, be re-tried for a distinct offence arising from the same facts, if this offence was not within the jurisdiction of the Court which had first tried him. A person convicted of theft alone may afterwards on the same facts be indicted for burglary which is not a summary offence.

But a person acquitted of theft and of receiving stolen property cannot afterwards be charged of criminal misappropriation on the same

1. Sections 330 and 331 Cr. Pr. Code.
2. Jordan *vs.* Hendric Appu (1886) 7 S.C.C. 160.
3. Andree *vs.* Fernando (1888) 8 S.C.C. 184.
4. Ratwatte *vs.* Kadoris (1909) 12 N.L.R. 245.
5. Avalia *vs.* Khan (1914) 17 N.L.R. 222.
6. Murkesu *vs.* Karunakara 2 Times L.R. 64.
7. The King *vs.* Harmanis (1916) 19 N.L.R. 142.
8. Dineshamy *vs.* James (1913) 1 Wije. 35.
9. Weerasinghe *vs.* Wijeysinghe (1928) 29 N.L.R. 208.
10. *In re* Thomas Perera (1927) 29 N.L.R. 6.

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facts, even if a Magistrate has reserved the right in the prosecutor to file a fresh charge, for a Magistrate has no power to take away the effect of the bar by reserving rights in his judgment.[1]

It is necessary to examine what an acquittal means in a plea of *autrefois acquit*. The section says that he should have been tried and acquitted. The plea, therefore, is of no avail when the first trial has not ended in a competent verdict or judgment; it does not apply when the first trial has proved abortive;[2] it does not apply where the acquittal is merely nominal and not an acquittal in fact.[3] Where on account of the absence of the complainant, before even process is issued on the accused, a Magistrate dismisses the case, the dismissal does not act as an acquittal.[4] And a discharge because of the absence of witnesses on the day fixed for trial even after process has been issued would not bar fresh proceedings.[5] This merely amounts to an indefinite postponement of the case and does not act as a bar to a further prosecution for the same offence.[6] A discharge, therefore, under section 191[7] or section 202[8] does not amount to an acquittal. There must have been a full trial, and then a final order made. The true test by which the question whether such a plea is a sufficient bar in any particular case may be decided is whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first.[9] It is not necessary that the judgment of acquittal should be in fact correct and proper, for while unreserved it will support a plea of previous acquittal in bar of a second trial—even though it may have been erroneously given and even though the plaint or proceedings may have been defective.[10] Thus, where a person is charged under section 210 of the Penal Code with accepting a gratification for screening an offender from punishment and acquitted, he cannot be charged again on the same facts under section 158, with accepting a gratification as a motive or reward for rendering a service with a public servant, even though the Magistrate at the earlier trial has erroneously entered an order of "discharge" and not of "acquittal," this discharge being tantamount to an acquittal as the evidence had failed to establish the charge.[11] But a mere order of release on the direction of the Attorney-General under section 196 of the Procedure Code, or under the probation rules, is not an acquittal after trial. The failure to maintain a wife and children is not "an offence" and hence no plea of *autrefois acquit* can be set up,[12] though where the paternity of a child is in question the Magistrate's finding would act as *res judicata* for determining the same issue in respect of the same child between the same parties.[13]

1. Canagasingham *vs.* Meydin Bawa (1931) 33 N.L.R. 356. 9 Times L.R. 31.
2. Van Dort *vs.* Abdul Careem (1885) 7 S.C.C. 36.
3. Julihamy *vs.* Fernando *et al* (1932) 2 C.L.W. 95. In this case an acquittal of section 316 C.P.C. was held to be no bar to a conviction under section 314 by the same Magistrate on the same facts.
4. Ibrahim *vs.* Kumarapodi (1908) 3 Bal 291.
5. Seneratne *vs.* Lenohamy *et al* (1917) 20 N.L.R. 44. This is a Full Bench Judgment where Ennis, J., did not concur.
6. Ekanayake *vs.* Fonseka (1932) 10 Times L.R. 1. Jayawardena, J. condemns the practice of such indefinite postponements.
7. Davidson *vs.* Appuhamy (1916) 19 N.L.R. 57.
8. The Attorney-General *vs.* Appuva Veda (1907) 10 N.L.R. 199. The Indian Code of Criminal Procedure expressly excludes this and other sections.
9. Archibald's Criminal Law, p. 177.
10. Russel on Crimes, p. 1983.
11. Dyson *vs.* Khan (1929) 31 N.L.R. 136.
12. Anna Perera *vs.* Emaliano Nonis (1908) 12 N.L.R. 263.
13. Subaliya *vs.* Kannangara (1899) 4 N.L.R. 121

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The plea is a plea in defence and must be raised by the accused at the earliest possible opportunity. It should be tried and decided before any other issue. The onus of proving the plea is on the accused. He can do so by producing a copy of the original case or judgment. If the facts are not admitted, he must proceed to prove them : that is, he must proceed to prove that the offences are in reality the same, though they differ in immaterial circumstances. Thus, where he has been tried for and acquitted of the murder of a particular man on a stated day, in a retrial for murder of the same man on another day[1] he can prove the former facts and establish that the charges were identically or practically the same.

It may here be mentioned that the compounding of a compoundable offence has the effect of an acquittal[2] and would, therefore, bar a subsequent prosecution for the same offence.

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1. Sohoni's Criminal Procedure Code (1924), p. 851.
2. Section 290 (5) Cr. Pr. Code.

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CHAPTER X.

CONFLICT WITH VILLAGE TRIBUNALS.

There are, in Ceylon, petty tribunals scattered over the various parts of the Island, called Village Tribunals or Gansabhawas, with civil as well as criminal jurisdiction. We are not concerned with their powers except in so far as they come into conflict with the powers and jurisdiction of a Police Court of the district. The territorial jurisdictions of Gansabhawas are often smaller than those of a Police Court; sometimes there being three or more such tribunals within the local limits of one Police Court. Often, there are no Village Tribunals at all, as in the Jaffna Peninsula (except in the island of Delft) where they are replaced by the Village Council Courts. The latter have very little criminal jurisdiction and they rarely come into conflict with a Police Court except, perhaps, in cases of abuse in the outlying villages. For the rest, they deal with petty breaches of village committee rules and could therefore be disregarded for the moment.

A Village Tribunal, on the other hand, is a regular Court-house with regular criminal jurisdiction. And though our Criminal Procedure Code lays down that "a Police Court shall not have 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,"[1] the problem becomes all the more complicated because most of our Ordinances, instead of giving exclusive, have given apparently, concurrent jurisdictions. Nay, even the Village Communities Ordinance[2] which has brought these Courts into being has left this question open by leaving it to the discretion of the President or of the Magistrate as to the applicability of his own jurisdiction in any particular case. It follows, therefore, that not infrequently parties are "shuttle-cocked" from one Court to another and this vacillation is inconvenient not merely to the suitors but to the Courts concerned. There are certain points, however, and various decisions which must be remembered in order to elucidate this question.

It is only in cases of assault, theft, mischief, cattle trespass, and gaming that this conflict arises: and we shall endeavour to consider each of these questions in detail. A Magistrate is sometimes too prone to refer a complainant to the smaller Court, and a President of the Village Tribunal is equally unwilling to take up additional burdens. Hence the conflict.

A Magistrate cannot refer the complainant or the parties to a Village Tribunal in the following cases though the offence be otherwise within the exclusive jurisdiction of a Village Tribunal.

(i) If the particular offence is committed within the local limits of a Municipality or an Urban District Council or a Local or a Sanitary Board.

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1. Section 9 Cr. Pr Code.

2. Ordinance No. 9 of 1924, sections 55 to 69. The decisions quoted here apply to the old Ordinance (No. 24 of 1889, sections 26 to 39) but the principle underlying is the same.

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(ii) If it is committed by a registered criminal. But the fact that a person has been once previously convicted does not render the case more properly triable by a higher Court.

(iii) If one or both of the parties are not natives of Ceylon or are Burghers. It is held that Indian Tamils resident in Ceylon though not domiciled are natives within the meaning of this Ordinance[1]; also that a Eurasian is not a native, and a charge of theft brought by one could not be tried in the V.T.[2] Indian Tamil Coolies are, however, not natives, but an Indian trader living temporarily in Ceylon is not "an excepted person."[3] By a party is not meant a "person aggrieved" but the real parties in the case. Thus, the fact that a European is in charge of an estate where unlawful gaming takes place does not oust the jurisdiction of the Police Court.[4] But if the Police are prosecuting, the nationality is determined not by the accidental nationality of the particular officer who prosecutes, but by that of the Police Force who are regarded as "non-natives"[5] within the meaning of this Ordinance. A Police Officer cannot file a plaint in a Village Tribunal.

(iv) If the complainant is the Government itself. Thus, a Government Agent who has powers of transferring cases from a Gansabhawa to a Police Court can direct the prosecution of a particular offender in the latter Court.[6] Where a Public Officer makes a report to Court on behalf of a Government Department or of the Crown itself, he must be considered as acting on behalf of his department, or on behalf of the Crown and not to be vested with any particular racial character which would affect the jurisdiction of the Village Tribunal.[7] Section 61 of the V.C. Ordinance provides that nothing in this section shall preclude a public officer from prosecuting in a Police Court any offence which but for the provisions of the Ordinance would be cognisable by a Police Court. Though the word "public officer" is not defined, it is presumably equivalent to "public servant." And this provision does not exempt from its operation those cases where the public servants concerned are themselves the persons injured. So that a person can be rightly convicted in a Police Court for causing hurt to a public servant in the discharge of his duties, even though the conviction is under section 343 C.P.C.[8]

(v) In cases of thefts where the estate is over five acres in extent.

(vi) A Magistrate has a further discretion; he may, if he is of opinion that a particular offence, *e.g.*, a blow on the head with a club, cannot be adequately dealt with in a Village Tribunal, entertain the plaint himself; but in so doing he will have to record his reasons why the V.T. jurisdiction is superseded, though the fact that a Police Magistrate has dealt with the offence would in itself show that in his opinion it could not have been adequately punished there.[9] The actual sentence ultimately passed is, however, not the test of jurisdiction.[10] The real

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1. Peter Singho *vs.* Doraisamy *et al* (1914) 17 N.L.R. 243.
2. De Lile *vs.* Sedoris (1884) 6 S.C.C. 95.
3. Nadar *vs.* Leon (1928) 30 N.L.R. 123.
4. Burah *vs.* Sinniah (1917) 19 N.L.R., p. 383.
5. Don Thomas *vs.* Dionis (1921) 3 C.L.R. 87.
6. Munasinghe *vs.* Sinnappu *et al* (1917) 4 C.W.R. See also Burah *vs.* Sinniah 19 N.L.R. 383.
7. Gatekeeper, C.G.R. *vs.* Elaris *et al* 23 N.L.R., p. 255.
8. Banda Aratchi *vs.* Madar Saibo (1929) 31 N.L.R. 202. 7 Times L.R. 59.
9. Podisingho *vs.* Charles, 1 Bal. Notes 17 and Perera *vs.* Salgado (1914) 3 Bal. Notes 47.
10. Arasaratnam *vs.* Nalliah *et al* (1921) 5 C.W.R. 109.

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test is whether or not the offence was such as could have been adequately dealt with in a Village Tribunal. In such cases the Magistrate's decision is only optional. He could if he chose refer the complainant in the first instance to the Gansabhawa, for him to return to the Police Court through the proper channels. The mere fact that a Magistrate thinks that the offence is of a serious nature does not oust the V.T. jurisdiction.[1]

A Magistrate, however, cannot refer the plaint to a Village Tribunal without recording the evidence of the complainant and of any other witness, who is found necessary for the purpose of determining the nature of the offence,[2] for it is incumbent on the Magistrate to adjudicate after examination of the complainant or his witnesses whether the offence is properly cognisable by a Village Court[3] or not. The Magistrate himself must exercise this discretion.[4]

Contrariwise, cases from a Village Tribunal could be referred to a Police Court—

(*a*) if it appears to the President and his Councillors that the case is one which from its circumstances may properly be tried before the higher tribunal,

(*b*) by the Attorney-General, and

(*c*) most frequently, on the orders of the Government Agent of the district (or his delegated assistant) who has the right to stop all further hearing of a case before a Village Tribunal and direct it to be tried by a Police Court. In a Criminal case, there was an appeal from the President's finding to the Assistant Government Agent who directed a new trial before a Police Court. The Magistrate held that this order was *ultra vires* as he could only order a new trial before the Gansabhawa. It was held by the Supreme Court that this amounted to a stoppage of all further hearing in the Village Tribunal and that the Assistant Government Agent had jurisdiction to make the order. The discretion of the Government Agent in this respect is not limited to any particular type of cases but extends to all. He could even transfer a case of gambling.[5]

We shall now proceed to consider the different classes of offences where the two jurisdictions often come into violent conflict.

A. *Thefts.* The Village Communities Ordinance says that a Village Tribunal can take cognisance of all petty thefts, that is to say, thefts where the property stolen does not exceed in value twenty rupees or where the theft is not preceded or accompanied by violence to the person and which may adequately be punished by no higher punishment than a fine of twenty rupees or rigorous imprisonment for two weeks. Now, it may be contended that a President may if he chooses sentence a man to a fine of Rs. 20/- for a petty theft of Rs. 20/-. But we are not concerned with paradoxes. In the recent Full Bench decision of *Sedris vs. Sinno*,[6] this point is fully considered and it has been decided that in order to oust the jurisdiction of a Police Court with regard to petty thefts, it must not only be shown that the property stolen does not exceed Rs. 20/- in value but also that the offence can be adequately punished

1. Gunatileke *vs.* Punchi Singho (1907) 3 Bal. 113.
2. Sellathurai *vs.* Susai (1916) 2 C.W.R. 262.
3. Fernando *vs.* Fernando (1878) 1 S.C.C. 13.
4. Munasinghe *vs.* Solomon *et al* (1922) 1 Times L.R. 24.
5. Ibrahim Saibo *vs.* Abaren Appu and another (1931) 1 C.L.W. 76.
6. 23 N.L.R., p. 171.

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by a Village Tribunal. Quite apart from the fact that a cattle theft can seldom be considered trivial, it seems to be unreasonable to suggest that theft of an animal worth Rs. 18/- can adequately be punished by a fine of Rs. 20/-.[1] The gravity of the offence depends not merely on the value of the property stolen but on attendant circumstances, *e.g.*, where several persons invade an estate and pluck nuts of the value of a few cents.[2] As criminal trespass is not triable by the V.T.,[3] thefts accompanied by such trespass are not petty thefts under this section.[4] So also thefts from a dwelling house could not adequately be punished by a Gansabhawa; nor could thefts by a servant of his master's property less than Rs.20/- in value.[5] Thefts which are accompanied by violence, *e.g.*, robbery, howsoever small the value of the property may be, cannot be tried in a Gansabhawa. And thefts of praedial produce, or of tea, rubber and coconuts from estates over five acres in extent, are not regarded as petty thefts triable by a V.T. Under the new Ordinance, the receiving of stolen property where possession is transferred by theft and where the value does not exceed Rs. 20/- is triable by a Gansabhawa. A Village Council Court has no jurisdiction in thefts.

B. *Mischief*. Where damage to property does not exceed Rs. 20/-, a Village Tribunal has exclusive jurisdiction to try the case.[6] But often in order to take away this jurisdiction, the complainant alleges some such concomitant offence as criminal trespass; hardly any damage to immovable property can take place without trespassing thereon. It would in each case be a question of fact whether the plaint could be entertained as for pure mischief or for trespass and mischief. The amount of damage depends upon the loss actually sustained by the complainant whose valuation must be accepted for the purpose of issuing process, as a fair criterion in the absence of any assessment-report from a Headman. Mischief by damage to boundary-fences is triable by a Village Council Court.

C. *Assault*. All simple assaults and all cases where criminal force is used are within the exclusive jurisdiction of a Village Tribunal, only if they are adequately punishable by a fine of Rs. 20/-.[7] Here too, it is not unusual to "tack on" additional counts like criminal intimidation (section 486) or wrongful confinement and restraint (sections 332 and 333) which give the assaults a graver character. All ordinary cases under sections 314 or 343 are solely triable by the V.T. The inclusion of section 312 in the schedule of Ordinance No. 9 of 1924 does not confer jurisdiction on the V.T. in cases of knifing under section 315.[8] Abuse is triable both by a Village Tribunal and a Village Council.

D. *Cattle Trespass*. The Cattle Trespass Ordinance[9] gives concurrent jurisdiction only for offences under section 12; and not for those under section 13. But the new Village Communities Ordinance of 1924 gives jurisdiction to a Village Tribunal in all cases under the Cattle

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1. Per Bertram, C.J., *ibid.*
2. Nagalingam *vs.* Hendrick (1915) 1 C.W.R. 62.
3. Fernando *vs.* Fernando (1910) 4 Leader 63, and Rosa *vs.* Tissera (1916) 3 C.W.R. 46.
4. Appuhamy *vs.* Lazarus Appu (1910) 5 Weer. 48.
5. Fonseka *vs.* Pieris (1920) 7 C.W.R. 266.
6. Appuhamy *vs.* Louisa (1907) 3 Bal. 179.
7. The King *vs.* Alwis (1917) 4 C.W.R. 328.
8. Mendis *vs.* Zoysa (1925) 3 Times L.R. 163 27 N.L.R. 161.
9. Ordinance No. 9 of 1876, Vol. I., page 827.

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Trespass Ordinance (section 55) and apparently therefore, under section 13 as well.

E. *Gaming*. There is a Village Committee rule against gambling and cock-fighting[1]; but the Village Communities Ordinance does not give the Village Community power to frame rules in respect of the offence of keeping a common gaming house.[2] Hence, the essential point to remember is the difference between gambling and unlawful gaming.[3] In the former case, Village Tribunals have exclusive jurisdiction,[4] even though the plaint is filed by a Police Officer. The fact that the Police take upon themselves the responsibility of prosecuting does not oust the exclusive jurisdiction of the Village Courts. The meaning of unlawful gaming will be considered in a later chapter.

This conflict between Village Tribunals and Police Courts has some times curious results. For, an assault by a club may be tried by a Gansabhawa but not intimidation (without assault) by means of that very club. "Beat and you go to the V.T.; brag and you go to the P.C."—as a Magistrate jocularly remarked. A theft of one "Kurumba" from an estate of eleven acres is triable by a Police Court; whereas a theft of 100 coconuts from an estate of four and a half acres goes before a Village Tribunal. Such is the anomaly of law.

Objection as to jurisdiction should be taken at the earliest possible opportunity; and once the objection succeeds, a Magistrate has no option but to refer the parties to the Gansabhawa. He cannot acquit or discharge.[5]

This exclusive jurisdiction of Village Tribunals is not affected by the fact that the charge against the accused is interwoven with more serious charges against his co-accused,[6] nor even by the fact that the accused is acquitted of the graver of two charges, one of which was triable by a Police Court and the other by a Gansabhawa.[7]

Where a false charge is tacked on to other charges in order to oust V.T. jurisdiction, a Magistrate if he acquits the accused of the false charge should refer the complainant to the lower Court as regards the other offences.[8]

II. SCHEDULE.

The following is a list of offences for which Village Tribunals are given jurisdiction by section 55 of Ordinance No. 9 of 1924. Besides this, they have jurisdiction in all breaches of rules made under section 29 of the same Ordinance. Village Committees have jurisdiction only in breaches of these rules or in cattle trespass (section 56).[9]

1. Mortimer *vs.* Singho *et al* 22 N.L.R., p. 347.
2. Tabuvana *vs.* Sadris (1910) 7 Tamb. 93.
3. Police Headman of Kiriwattuduwa *vs.* Carolis (1910) 5 Weer. 44.
4. Borham *vs.* Silva (1921) 23 N.L.R., p. 276.
5. The Attorney-General *vs.* William (1911) 14 N.L.R. 345.
6. Arnolis Appu *vs.* Carolis Appu *et al* (1922) 1 Times L.R. 69.
7. Weerakody *vs.* De Silva (1928) 29 N.L.R. 321.
8. Nadar *vs.* Fernando (1925) 6 C.L.R. 176.
9. An attempt (in my opinion, laudable) is being made in the present State Council to introduce legislation which would empower Gansabhawas to recover maintenance already ordered by a Magistrate. Appeals if any from a President's order should however be allowed to be heard by the Magistrate and not by the Government Agent: otherwise there would be greater conflict.

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Ordinance	Title	Section or Enactment	Nature of Offence
2 of 1883 ..	The Penal Code ..	§ 312 ..	Voluntarily causing hurt.
Do. ..	do. ..	§ 341 ..	Using criminal force.
Do. ..	do. ..	§ 342 ..	Assault.
Do. ..	do. ..	§ 366 ..	Theft—Provided that the offence of theft shall not be deemed to include the following cases :— (*a*) Cases in which the property stolen is produce of a plantation. (*b*) Cases in which the value of the property stolen exceeds twenty rupees. (*c*) Cases in which the theft was preceded or accompanied by violence to the person.
Do. ..	do. ..	§ 393 ..	Receiving stolen property—Provided that only cases in which the possession of the property has been transferred by theft and the value of the property does not exceed Rs. 20 shall be included.
Do. ..	do. ..	§ 408 ..	Mischief—Provided that the damage caused does not exceed twenty rupees.
10 of 1861 ..	"The Road Ordinance, 1861" ..	§ 91 (4) ..	Injuring thoroughfare.
		§ 91 (8) ..	Injuring side drains by causing cart to be loaded or unloaded in front of offender's dwelling.
		§ 94 (1), (2), (4), (5), (8), (10).	Nuisances on thoroughfares.
15 of 1862 ..	"The Nuisances Ordinance, 1862"	§ (1) and bye-laws under section 6 ..	Nuisances.
9 of 1876 ..	"The Cattle Trespass Ordinance, 1876" ..	All offences under the Ordinance	Cattle Trespass.
20 of 1886 ..	"The Vaccination Ordinance, 1886"	§§ 10, 15, 18 ..	Vaccination.
7 of 1893 ..	"The Rabies Ordinance, 1893" ..	§ 12 (1) ..	Breach of muzzling regulations.
25 of 1901 ..	"The Dog Registration Ordinance, 1901" ..	§ 11 ..	Dog Registration.
13 of 1907 ..	"The Prevention of Cruelty to Animals Ordinance, 1907"	All offences under the Ordinance	Cruelty to animals
1 of 1909 ..	"The Game Protection Ordinance, 1990" ..	do ..	Game Protection

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CHAPTER XI.

JURISDICTION AND PUNISHMENT.

(I) Territorial Jurisdiction.

Every Police Court has powers to enquire into and try every offence that takes place within the local limits of its jurisdiction. These local limits are shown in the second schedule attached to the Courts Ordinance and can also be determined by looking at the Surveyor-General's maps which are found in every Court-house. The alphabetical list of villages published by the Government Printer and obtainable in every Kachcheri or Court-house shows to which particular Court each village is attached. Sometimes two or more Police Courts[1] have concurrent jurisdiction over the same area. It is then a matter of arrangement between the respective Magistrates (sometimes with the approval of Government), as to the particular portions that should belong to each Court. The villagers come to know their proper Court and the question becomes a recognized custom in course of time.

When an offence is committed in the territorial waters of this Colony, the law is that that Court has jurisdiction within the limits of which the accused is found.[2]

When some fishermen of Kalutara were charged with robbery of fish from other fishermen on the high seas outside the territorial waters of the Colony, it was held that the Police Court of Kalutara had jurisdiction.[3]

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1. Thus

(1) The Police Court of Gampaha has no original but only concurrent jurisdiction with the Police Courts of Negombo, Avisawella and Colombo.

(2) The Police Court of Avisawella has concurrent jurisdiction.

(a) with the Minor Courts of Colombo over the Meda Pattu of Hewagam Korale,

(b) with the Minor Courts of Kegalle over the Three Korales and Lower Bulatgama,

(c) and with the Minor Courts of Ratnapura over the Kuruvita Korale.

(3) The Police Court of Kegalle has concurrent jurisdiction

(a) with the Minor Courts of Avisawella over the Three Korales and Lower Bulatgama,

(b) and with the Minor Courts of Gampola over certain villages and estates in Paranakuru Korale :- *viz.*, Deyyanwela, Aranayaka, Arama, Salawa, Dumbuluwawa, Kehelpannala and Bulatgamuwa ; and the estates of Gadadessa, Roslin, Kekuneboda, Wakketetenna and Bukanda in Four Korales.

(4) The Police Court of Gampola has concurrent jurisdiction with the Minor Courts of Kegalle over the villages and estates in Paranakuru Korale and Four Korales mentioned above.

(5) The Police Court of Matale has concurrent jurisdiction with the Minor Courts of Kandy over the estates known as Pendleton, Syston, Duncrest, Lollagaha Ella, Barton, Vellana, Upper Pansalatenne, Ancoombra, and Kepitigalla in Harispattu division.

(6) The Police Court of the Jaffna Division has concurrent jurisdiction with those of Point Pedro and Chavakachcheri, Mallakam and Kayts.

(7) All Police Magistrates who hold sessions at more than one Court have jurisdiction over the whole of their division, the holding of Courts at different places being a matter of convenience to suitors. Thus, the Police Magistrate sitting at Point Pedro can entertain plaints for offences committed in the artificial division of Chavakachcheri. And even a Police Magistrate who itinerates over two judicial districts can entertain, while sitting in one district, plaints for offences committed in his other district. *King vs. Sengina* (1905). 8 N.L.R. 102.

2. Section 136 Cr. Pr. Code.

3. Sinnappu *vs.* Silva (1918) 20 N.L.R. 347.

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When an offence is committed partly in one local area and partly in another, or when it continues to be committed in different local areas, it may be tried by any Court within these local areas.[1] Thus, offences by cause and effect, or offences committed on a Railway train, need not necessarily be confined to the Police Court in whose jurisdiction the final or terminal act in the crime took place. If a man stabbed in Colombo dies in Kandy, both the Courts of Colombo and Kandy have jurisdiction; so would they have if a diamond pendant stolen from Colombo is found in Kandy, or if a thief arrested in Colombo escapes from custody and is re-captured in Kandy. In an Indian case,[2] it was held that a servant of a Cawnpore Company, who was in Bengal in charge of goods belonging to that Company, having failed to remit the value of goods to Cawnpore, the Court of Cawnpore also had jurisdiction, inasmuch as the loss to the Company which was a consequence of the act charged occurred in that city. Criminal intimidation by a letter posted at Polgahawela which is outside the judicial limits of Kegalla can nevertheless be taken cognisance of by the Police Court of Kegalla, if the letter is proved to have been written within its limits.[3] But an offence arising from a breach of contract at Mannar can only be tried in the Mannar Court although the contract be actually entered into at Negombo.[4]

A charge of abetment may be enquired into either by the Court where the original offence was committed or by the Court where it was abetted by the accused. All offences relating to Railways, Telegraphs, Post Office, or Arms and Ammunition, may be tried by any Court,[5] no matter where it is committed, provided that the offender is found within its local jurisdiction. In all cases of doubt, the record can be transmitted for the opinion of the Attorney-General whose order in the matter is final and binding. The Attorney-General, moreover, has power to transfer cases from one Court to another by a fiat under his hand,[6] the aggrieved party having a right of appeal to the Supreme Court.

It will thus be apparent that the question of territorial jurisdiction does not play a very important part in Police Court proceedings; and no sentence or order of any criminal Court is liable to be set aside merely on the ground that it is made in a wrong Court.[7] The Supreme Court will ordinarily affirm a conviction if the accused has not been prejudiced in his defence.[8]

(II) Powers of Sentence.

A Police Court in Ceylon has practically the same powers that a Bench of two ordinary Justices, (or what is known as a Court of Petty Sessions), or a Stipendiary Magistrate, in England, has. A single Justice there is comparable to our Presidents of Village Tribunals with power to pass a limited sentence, *viz.*, an imprisonment of not more than 14 days or a fine (including costs) of not more than twenty shillings. But

1. Sub-Inspector of Police, Walasmulla *vs.* Silva (1919) 7 C.W.R. 55.
2. O'Brien I.L.R. 19 Allahabad 111, per Edge, C.J.
3. The King *vs.* Perera (1916) 19 N.L.R. 310.
4. Manuel *vs.* Lasaru (1908) 3 A.C.R. 127.
5. Section 144 Cr. Pr. Code.
6. Section 47 of Ordinance No. 1 of 1889, Vol. IV, p. 357.
7. Section 146 Cr. Pr. Code.
8. Halliday *vs.* Kandaswamy (1911) 14 N.L.R. 492.

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a Court of Petty Sessions or a Provincial Stipendiary or a London Police Magistrate has the same powers of imprisonment[1] as a Police Magistrate in Ceylon.

In India, Magistrates are divided into three classes[2] :

(1) Presidency Magistrates or Magistrates of the First Class with powers of imprisonment for a term of two years (sometimes with solitary confinement) and of a fine of Rs. 1,000 and whipping ;

(2) Magistrates of the Second Class with powers of imprisonment for six months and of a fine of Rs. 200 ; and

(3) Magistrates of the Third Class with powers of imprisonment for one month and of a fine of Rs. 50.

Further, in India, a First Class or a District Magistrate who is "invested" with special powers in that behalf by the local Government can try "all offences not punishable with death ;" and no Magistrate unless he is a Magistrate of the First Class can try or inquire into any charge punishable with a greater fine than fifty rupees, against any European British subject who claims to be tried as such.[3] In Ceylon, we have no such restrictions. Any Magistrate, European or otherwise, can try or inquire into any case against offenders of any nationality.

The normal powers of a Ceylon Magistrate are :

(1) Imprisonment of either description, simple or rigorous, for a term not exceeding six months ;

(2) Fine not exceeding one hundred rupees ;

(3) Whipping ;

(4) Any lawful combination of the above.

These are his ordinary powers : so that in all cases within his summary jurisdiction he can impose any sentence up to that limit, unless (*a*) he is trying an indictable offence by consent, under section 166 (1), in which case, he can sentence to imprisonment of either description for a term not exceeding twelve months and a fine not exceeding two hundred rupees, or—

(*b*) unless he himself is a District Judge but takes summary proceedings in a non-summary case under section 152 (1), in which case he can impose any sentence which a District Court may lawfully impose, or

(*c*) unless the particular offence is punishable with a lesser sentence, or

(*d*) unless the Magistrate is given special powers under special enactments.

The above sentences can be imposed separately for each count in the conviction, though if they are offences arising from the same transaction, imprisonment on the different counts cannot run consecutively but should run concurrently. Where an accused person was charged in the Police Court with two offences at one trial, *viz.*, with voluntarily causing hurt to the complainant under section 314 of the Penal Code

1. Under the Criminal Justice Administration Act of 1914, he has in certain cases powers to impose a fine of up to £50/- and by 8 Ed. VII c. 15, section 6, he can also order the convicted defendant to pay the costs of the prosecution.

2. Section 32 of the Indian Criminal Procedure Code of 1898.

3. Criminal Law Amendment Act, 12 of 1923, section 6.

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and with assaulting the complainant with intent to dishonour him under section 346 of the Penal Code, it was held that the sentences on each count must run concurrently and not consecutively, the Magistrate having no power to inflict a more severe sentence than that which the Court could inflict for one of the offences.[1] There is a distinct injunction to this effect under section 67 of the Penal Code which enjoins 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 is not to be punished with a more severe punishment than the Court which tries him could award for any one of such offences. If the enormity of the offence calls for a very heavy sentence, the Magistrate has the option of taking non-summary proceedings and committing the offender to a higher court.

Under the Re-convicted Criminals' Ordinance, when a person is convicted of a crime and a previous conviction of a crime is proved against him, the Court may in addition to his other sentence direct that he shall be subject to the supervision of the Police for a period not exceeding two years commencing immediately after his discharge from jail.[2]

Certain Ordinances give special powers to Magistrates ; thus, under the Excise Ordinance of 1912 or the Rubber Restriction Ordinance of 1922, a Police Court can impose a fine of Rs. 1,000/- ; under certain sections of the Opium Ordinance, it can impose a fine of Rs. 2,000/-.[3] There are Ordinances, on the other hand, which seem to curtail a Magistrate's powers, *e.g.* under the Nuisance Ordinance[4] and under almost all bye-laws, he can only impose a fine of Rs. 50/-; under certain sections of the Vagrants' Ordinance[5] a fine of Rs. 5/- ; and for carrying a prohibited knife for the first time[6], a fine of Re. 1/-. For this variation in the amount of fine which a Police Court can lawfully impose, the reader must refer to the Ordinances concerned.

If any Ordinance does not expressly state the amount of fine to which an offender can be sentenced but merely says that he "shall be liable to a fine," it is presumed that the amount though unlimited cannot be excessive.[7] This would imply that in all summary proceedings the amount cannot exceed that which a Magistrate can lawfully impose : *viz.*, Rs. 100/-.

Whenever a person is sentenced to pay a fine, the Magistrate may in his discretion direct that in default of payment of the fine the offender should suffer imprisonment for a certain term, this imprisonment being in excess of any other imprisonment to which he may have been sentenced. The imprisonment in default of fine does not extinguish completely the convict's liability for payment of the fine money ; and a Magistrate may issue a distress warrant for the recovery of the fine. But if the offender has undergone this additional term of imprison-

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1. Inspector of Police *vs.* De Zoysa (1929) 31 N.L.R. 127.
2. Section 8 of Ordinance No. 2 of 1926.
3. Section 7 of Ordinance No. 5 of 1910 was originally triable by a District Court ; but see the effect of the amendment by Ordinance No. 17 of 1911. Vol. III, p. 17. It is not clear whether a Magistrate could impose a fine of more than Rs. 2,000 under this Ordinance. The effect of the clause "five hundred rupees for every ounce" if properly construed would be that a Magistrate could impose, say, for selling 10 lbs. of opium, a fine of $16 \times 10 \times 2000 =$ Rs. 320,000. This could not be the intention of the Legislature. If it was meant to provide for quantities less than a lb., the provision is redundant.
4. Ordinance No. 15 of 1862, Vol. I, p. 450.
5. Ordinance No. 4 of 1841, section 2, Vol. I, p. 136.
6. Section 5 of Ordinance No. 28 of 1906, Vol. II, p. 711.
7. Section 312 Cr. Pr. Code.

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ment, it is not competent for a Police Magistrate to issue a warrant for the levy of the fine as well, the levying of the fine and the carrying out of the sentence of imprisonment being alternatives.[1] Further, our Code says that a distress warrant should not issue if in the opinion of the Court the levy of the distress would be more injurious to the offender or his family than imprisonment. Under a distress of this nature, only the movables belonging to the offender exclusive of the wearing apparel of himself and his family and tools and implements of his trade (including seed corn) to the value of Rs. 25/-, can be seized and sold.

When a fine is imposed by a Police Court, time is usually given on sufficient security for its payment within a prescribed period. Not more than 15 days can be ordinarily given. The security that is demanded is double the amount of fine, with one or more sureties. The granting of time is a matter of discretion and therefore of favour and cannot be demanded as a matter of right.

If the offence is punishable with both imprisonment and fine, the term of imprisonment ordered in default of fine may not exceed one-fourth of the maximum imprisonment fixed for the offence. Thus, for ordinary thefts, or hurt with a knife, the maximum imprisonment being three years' rigorous, a Police Magistrate can inflict any term up to six months in default of fine ; but not so, for affray where the maximum is only one month. In Excise cases, the default imprisonment, however great the fine may be, can never exceed six weeks, as the maximum provided is but six months ; but the imprisonment may be either simple or rigorous.

If the offence is not punishable with imprisonment at all, the imprisonment ordered in default of fine can only be simple and cannot exceed two months when the fine is Rs. 50/- and under, or four months when it is Rs. 100/- and under ; and can under no circumstances exceed six months.

If during the serving of this additional imprisonment but before its expiration the fine is paid, the imprisonment *ipso facto* terminates and the convict gets a proportionate rebate from his fine. Thus, if a man is sentenced to six months' rigorous imprisonment in default of a fine of Rs. 100/- and if after he has served three months in the jail, the fine is paid by him or on his behalf, the amount that is due from him is only Rs. 50/- and not the whole amount.

All Police Court fines are prescribed after six years ; but the death of the offender does not extinguish the liability to pay the fine which can be recovered from any property which, after his death, is legally liable for his debts. The amount ordered as maintenance is not prescribed apparently.[2]

(III) The Measure of Punishment.

The quantum of sentence is within the discretion of the Magistrate : it depends mostly on the gravity or otherwise of the offence, the character and social status of the accused, the extenuating or aggravating features of the case, the frequency of the particular type of offences in the district and possibly also on the tender mercies of the complainant.

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1. Schokman *vs.* Balaya (1916) 19 N.L.R. 312.
2. See Velupillai *vs.* Sanmugam (1928) 30 N.L.R. 50.

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A Police Officer would naturally wish to see the offender visited with the utmost rigour of the law ; a private individual would seldom seek his pound of flesh. It is the Magistrate and he alone who can strike the happy medium and see that the quality of mercy is not strained. It should not be forgotten that the primary object of punishment is the deterrence of other potential offenders who may be ready to follow an evil example.[1]

Evidence of a previous conviction or of the bad character or antecedents of the accused is only relevant after the accused is convicted and just before sentence is pronounced.[2] But the fact that a man is previously convicted of theft should not weigh in increasing the sentence for causing hurt.[3] Circumstances of the particular case play a great part in the determination of sentence ; and it may be necessary to impose a nominal fine, even if the accused has had a previous conviction, if, for instance, an injury is caused in a free fight on a sudden quarrel.[4] Unless there are special circumstances, deterrent punishment is not approved.[5] The persistent prevalence of a certain species of crime which deserves to be put down by exemplary punishment may be a special circumstance ; but it has been held that frequency of an offence of obstruction in the discharge of one's duties (under section 183 C.P.C.) is not a sufficient reason for imposing the maximum sentence.[6]

The idea of dealing lightly with those of the accused who plead guilty and of imposing a heavier sentence on others who contest the case is not approved of by our Supreme Court. The Police Magistrate of Matara in one of his judgments[7] adduced the following reasons : " A frank and open plea of guilt (when not made boastfully) is a justification for treating the accused with somewhat less severity. A man who aggravates his offence by putting forward a vexatious and frivolous defence cannot, I think, claim as a right from the Court the same sentence as has been imposed on those who admitted their guilt." The Supreme Court, following two previous decisions,[8] while admitting that there was a great deal of truth in what the learned Magistrate said, condemned this practice on the footing that it held out a strong temptation to innocent persons to plead guilty.[9] In this instance, the particular offender who was fined heavily was a co-accused with others in the same case. But, if there are different similar cases against different persons, the discretion of the Magistrate is unlimited ; and a contesting accused in one of them cannot claim, as a matter of right, that he may be dealt with equally as the accused in other cases who may have pleaded guilty. In such cases, however, the decision in one may settle the rest.

As regards imprisonment, some parts of a judgment of a former Chief Justice may be quoted *in extenso*. " The learned Police Magistrate has sentenced the accused to imprisonment. I feel the force of what he says. Nevertheless, it is brought to my notice that these offenders are young men and that this is their first conviction. It is

1. " The Office of Magistrate " by Frederick Mead (Butterworth & Co.), p. 42.
2. Nikapota *vs.* Gunasekara (1911) 14 N.L.R. 213.
3. Warusvitarne *vs.* Abeywira (1910) 3 Weer. 89.
4. R. *vs.* David Sinno (1894) 7 Tamb. 3.
5. R. *vs.* Noor Hamin (1905) 2 Leader 40.
6. Appu Singho *vs.* Uduma Lebbe (1913) 1 Bal. Notes 33.
7. P.C. Matara 28011 of 1923.
8. Seyatuva *vs.* Appuva (1896) 2 N.L.R. 212 and Belliate *vs.* Don Lewis (1907) 1 Aserwatham's Reports 2.
9. 25 N.L.R. 157. The Police Officer, Dondra *vs.* Baban.

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most undesirable to familiarise young men of this description with the inside of a prison. Their act (*viz.*, theft) is no doubt reprehensible ; but there are other ways of dealing with the act than imprisonment. I am informed that they are of a respectable class. The policy of the law is that the first offenders should so far as possible not be sent to jail and I think that in this case it would be best that I should extend leniency to the accused. I propose, therefore, to send the case back to the learned Magistrate so that he may bind over the convicted persons under section 325 (2) of the Criminal Procedure Code. If action is taken under that section, they may be required to come up for judgment when called upon, and if this case does not prove a sufficient warning, they will be punished for the offence if necessary by being sent to prison . . . ."[1] It was the same Judge who recommended that persons of the chauffeur class when convicted of reckless driving should be sentenced to simple rather than to rigorous imprisonment.

(IV) First Offenders.

Besides the sentences mentioned above which a Police Magistrate can lawfully impose, the amendment of our Criminal Procedure Code in 1919[2] introduced some radical innovations on the lines outlined by the Probation of Offenders' Act of 1907[3] in England. By this, if, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence is committed, the Court is of opinion that it is inexpedient to inflict any punishment or any other than a nominal punishment, a Police Court has the power in all offences punishable by it

(i) either to discharge the accused with a warning, or

(ii) to discharge him conditionally on his giving bail to appear for conviction and sentence at any time within three years when called upon to do so and in the meanwhile to be of good behaviour, and

(iii) in addition, to pay compensation to the complainant not exceeding Rs. 150/- and also reasonable costs of the proceedings.

The period of three years may be reduced to any term which the Court thinks reasonable. The compensation and costs, in the case of juvenile offenders, may be ordered to be paid by their parents or guardians. In *Weeraratne* vs. *Ediris*,[4] which was a case decided under the old provisions, it was held that if an accused person is unable to find the bail which he is ordered to do, a Police Court is not competent to sentence him to imprisonment for default of bail but should proceed to sentence him for the original offence itself. This principle is now reiterated in *King* vs. *Ratnam*.[5] It is therefore advisable, though not necessary, while sentencing an offender in this fashion, to mention the alternative punishment to which he would be liable, if he were to be unable to find security. The same case also decided that compensation ordered under this section could only be recovered as a fine by means of a distress

1. Gunasekara *vs.* Solomon *et al* (1923) 25 N.L.R. 476.
2. By Ordinance No. 31 of 1919 which materially alters the old section 325 *et seq.* Vol. IV, p. 260.
3. 7 Edw VII c. 17.
4. (1900) 1 Br. 173.
5. (1928) 6 Times L.R. 81.

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warrant; the accused cannot therefore be sentenced to imprisonment, if he is unable to pay the compensation and costs ordered. It is not clear whether an order under this section is appealable or not; but the better opinion is that no appeal would lie.[1] For, though an order under this section is tantamount to a conviction[2] for all ordinary purposes, the Court has the power to make this order before proceeding to conviction. Some evidence would, of course, be necessary to enable the Court to make such an order; but a verdict of guilty need not necessarily be recorded. It is plain, nevertheless, that no order under this section can be made, if the accused does not admit his guilt, or if there is no evidence which would otherwise justify a conviction.

While ordering any offender to find bail, the Court may attach a condition to the bond that the accused may be, during the period, under the supervision of what are known as Probation Officers, and may require that he should comply with additional conditions which would have the object of generally securing that the offender should lead an honest and industrious life. Probation Officers are persons of high social standing, appointed from time to time by His Excellency the Governor for each district; it is their duty to see that the offenders in their charge do not go astray and to advise, assist and befriend them, and when necessary to endeavour to find them suitable employment. A breach of any conditions of the recognisance by the accused would not merely render the bond liable to confiscation but would lay him open to conviction and sentence for his original offence. In practice very few culprits are sent before Probation Officers; the system, being exotic, has not yet found favour in this Island.

When an accused is asked to give bail to appear for judgment within a stated period, he is really suffering a double punishment. Once a person liberated on such a bond commits an offence during the subsistence of the bond, his original offence, which is regarded as lying dormant till then, becomes revived; and he can be sentenced simultaneously for both the offences—the original and the subsequent one; and his bail as well as the bail of his surety are liable to forfeiture.

When a Magistrate makes an order under section 325 (*b*) of the Procedure Code discharging an accused conditionally on his entering into a recognisance for his good behaviour, he has no power to commit him to prison, pending the furnishing of security. In making such order the Magistrate may specify the date before which the security should be furnished and if the accused makes default, the Magistrate is entitled to enter a conviction and pass sentence according to law.[3]

(V) Security after Conviction.

Whenever any person is convicted of any offence involving a breach of the peace, or of committing criminal intimidation by threatening injury to persons or property, or of being member of an unlawful assembly, a Police Magistrate may order him to furnish security in any reasonable sum, with or without sureties, to keep the peace for any period not exceeding six months.[4]

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1. Sanders *vs.* Parry (1904) 1 Bal. 22.
2. Section 125 (4) Cr. Pr. Code.
3. King *vs.* Ratnam (1928) 30 N.L.R. 242.
4. Section 80 Cr. Pr. Code.

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Three things must be remembered in this connection.

(1) The person must be convicted. An accused person acquitted of a charge of voluntarily causing hurt cannot be ordered to enter into a bond to keep the peace.[1] Nor can he be so ordered, if he is convicted but not sentenced.[2] Where certain persons were found guilty of being members of an unlawful assembly, but were not sentenced and were merely asked to furnish bail under this section, it was held that the Magistrate had no power to do so, unless and until he had punished them for the offence already committed[3] : for, the object of this section is preventive and not merely punitive. But although the object is preventive, the section is only of effect after conviction. So that, where persons who claim title to a land are acquitted of criminal trespass, a Magistrate has no powers[4] to bind them over in order to prevent them from further entering the land till such time as they seek redress by a civil remedy. Such an order would be tantamount to calling upon an innocent person to find bail without his being given an opportunity of shewing cause to the contrary.[5] If, however, a conviction is had, there is no necessity to call upon the accused to shew cause why he should not be bound over[6] and the Court can proceed at the time of passing sentence to require him to find bail.

(2) And the conviction should be either for

(*a*) any offence involving a breach of the peace.[7] This does not include offences where there is a probability of a breach of the peace. Thus, intentional insult when the person insulted would be provoked to a breach of the peace,[8] or using obscene words on the public road to the annoyance of the public,[9] or inciting coolies not to attend muster,[10] or attending a public place in a state of intoxication to the annoyance of others,[11] or being drunk and disorderly in a public place,[12] are not valid grounds for calling upon the accused to furnish bail. But if he has been convicted of "knifing"[13] or of affray[14] or of any similar offence which would involve a breach of the peace, the order would be justified and binding. The section[15] of the Indian Procedure Code specifies more clearly the nature of the offence by including "rioting, assault or other offence involving a breach of the peace or of abetting the same."

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1. Phillippu *vs.* Rodrigo (1900) 1 Br. 372.
2. Samuel *vs.* Brito *et al* (1913) 17 N.L.R. 158.
3. Eragunather *vs.* Nagar Kantan (1895) 2 N.L.R. 248.
4. Kanakasabey *vs.* Velupillai *et al* (1904) 1 Bal. 128.
5. Anley *vs.* Rudd (1907) Aser. 8.
6. Perera *vs.* Benedict (1915) C.W.R. 217.
7. The King *vs.* Jayawardene (1907) 2 A.C.R. 97.
8. Graham *vs.* Alagie (1908) 1 Weer. 86 and Silva *vs.* Fernando (1917) 4 C.W.R. 260. See the rather conflicting decision in Allegaiah *vs.* Allegaratnam (1919) 6 C.W.R. 184. The point is settled now by Lucyhamy *vs.* Rodrigo (1930) 32 N.L.R. 221.
9. Rahim *vs.* Nonnohamy (1916) 19 N.L.R. 169 and Ukku Banda *vs.* Gregoris (1917) 4 C.W.R. 299.
10. Hatuorn *vs.* Nalla Kangany (1914) 1 C.A.R. 36.
11. Wijeysuriya *vs.* Obeyesekara (1919) 21 N.L.R. 159 and Pieris *vs.* Joakino Appu (1919) 6 C.W.R. 175.
12. Daniel *vs.* Fernando (1921) 22 N.L.R. 346. But behaving in a riotous manner on the public road in contravention of section 2 of the Vagrants' Ordinance is held to be an offence involving a breach of the peace. Charles Appu *vs.* Mohamadu (1917) 4 C.W.R. 40.
13. Bastian *vs.* Perera (1919) 7 C.W.R. 75.
14. Velupillai *vs.* Arunachalam (1911) 5 Weer. 80.
15. Section 106.

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(*b*) Or, criminal intimidation by threatening injury to person or property. This would include all convictions for criminal trespass,[1] or criminal intimidation by threats of violence, or mischief,[2] or arson. For though the offences in themselves do not involve a breach of the peace, they are such as would incite others to break the peace. But a conviction for maiming would not be a proper offence under this section.

(*c*) Or, being a member of an unlawful assembly. This includes rioting and all kindred offences.

(3) The Magistrate may specify the period for which the security should be given. The period cannot exceed six months and the imprisonment in default can only be simple. If within the period the accused commits a crime or does any act which amounts to the breaking of the peace, the bond is liable to be forfeited, even though the actual conviction for the subsequent offence were to take place at a later date and not within the period prescribed in the bond.[3]

(VI) Security to keep the Peace.

If a Police Magistrate receives information that there is a person likely to commit a breach of the peace or to do any wrongful act which is likely to commit a breach of the peace, he can call upon him to shew cause why he should not be bound over for any period not exceeding six months.[4] The breach of the peace contemplated may be within or outside his jurisdiction.

(1) The Magistrate must have information, that is to say, satisfactory evidence of intention or preparation to break the peace[5]; and the information may be from any source. The information need not be on oath or affirmation.[6] Thus, he can act on his own information disclosed during the course of investigation into a crime.[7] But in an application to bind over a defendant to keep the peace, the Court cannot act *ex proprio motu* and proceed to bind over the applicant himself.[8]

Nor even where a Magistrate convicts an accused of a crime of violence can he order the complainant in the case to find bail to keep the peace.[9]

(2) The information must be that a person is likely to commit, or do, any act which is likely to constitute a breach of the peace. It must be of a clear and definite kind directly affecting the respondent and should disclose tangible details, so that it may afford notice to that person[10] enabling him to come ready to disprove the information. It should not be merely of a general nature, but should include definite and particular facts which, it is apprehended, would constitute a likelihood of a breach of the peace. A breach of the peace may be merely by an assault on another or it may be a disturbance of the public tranquillity.[11]

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1. Alwis *vs.* Kumara Singho (1912) 16 N.L.R. 45.
2. Santiago *vs.* Santiago Pedro (1912) 6 Weer. 80.
3. Abdul Cader *vs.* Perera (1908) 2 Weer. 26.
4. Section 81 Cr. Pr. Code.
5. Senodin Marikar *vs.* Siddik Lebbe (1899) 1 Tamb. 4.
6. Inspector of Police, Beliatta *vs.* Kostan Appuhamy (1917) 4 C.W.R. 70.
7. Kolondavelu *vs.* Kadiratamby (1904) 4 Tamb. 8.
8. Gooneratne *vs.* Gooneratne (1916) 2 C.W.R. 25.
9. Kiri Banda *vs.* Punchirala (1923) 1 Times L.R. 197.
10. Nathu I. L.R. 6 Allahabad 214.
11. See section 107 (1) Indian Cr. Pr. Code.

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But the act complained of must be one known to be under contemplation and not merely an apprehension that a repetition of the misconduct is likely. The fact that certain persons were constantly creating disturbances in certain bazaars was held by the Indian Courts not to be sufficient ground for an order under this section.[1] For the proper remedy in such a case is to prosecute them for their past acts and not merely to anticipate that they would repeat their offences. The evidence must show that the accused contemplates a breach of the peace as against a definite person.[2] The breach of the peace need not be on the part of the accused ; the act complained of may be such as would occasion a breach of the peace on the part of another person.[3] Where certain persons were brought before a Magistrate on the ground that a land dispute amongst them was likely to create a breach of the peace, it was held that the section did not apply.[4] But, where two rival factions were preparing to assert their rights to a coconut estate with show of force, it was held that this would occasion a breach of the peace[5] and the ringleaders could be bound over. A Magistrate is, however, not authorized to prevent a person from exercising his rights of property, because another person is likely to commit a breach of the peace by his so doing. The word "wrongful" means "wrongful in law" and not "open to criticism," or "deserving of reprehension."[6] Anything which a person may lawfully do cannot therefore be a wrongful act. A breach of the peace contemplated under sections 80 and 81 is not merely "a disturbance of public tranquillity" by noisy or quarrelsome language, or shouting or singing ; the peace referred to is the King's peace. Any person who subjects to violence either the person or property of one of the King's subjects commits a breach of the King's peace.[7]

(3) The respondent must be given an opportunity of showing cause why he should not be bound over,[8] for he is entitled to disprove the information which the Magistrate may have received against him.[9] The enquiry resolves itself into a summary trial.[10]

(4) There are ample decisions to show that members of two rival factions cannot be proceeded against in the same proceedings,[11] for their defences would be different[12] and a common trial would be prejudicial to both.

(5) Summons must ordinarily issue in the first instance against the person complained of. A warrant can be issued, not where there is merely reason to fear the commission of a breach of the peace, but where such a breach of the peace cannot be prevented otherwise than by the immediate arrest of such person.[13]

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1. Weir 720.
2. Banda *vs.* Kalu Banda (1887) 1 S.C.R. 93 and Inspector of Police, Beliatta *vs.* Kostan Appuhamy (1917) 4 C.W.R. 70.
3. Pietersz *vs.* De Silva (1916) 3 C.W.R. 361.
4. Police Officer, Duwe Modera *vs.* Wijesinghe (1909) 5 A.C.R. 101.
5. Maniagar Pachchilapalai *vs.* Ramen Chetty (1909) 1 Cur. L.R. 64.
6. Langram *vs.* Nilame (1920) 22 N.L.R. 445.
7. Abeywardena *vs.* Fernando *et al* (1924) 27 N.L.R. 97.
8. Siriya *vs.* Fernando (1908) 1 Leader 87 and De Silva *vs.* Kaluva (1915) 1 C.W.R. 193.
9. Perera *vs.* Fernando (1910) 4 Weer. 27.
10. Fernando *vs.* Tambi Singho (1897) 3 N.L.R. 54.
11. Velayden *vs.* Soysa 14 N.L.R. 140 ; R. *vs.* Baronchi 17 N.L.R. 144. Wickramasuriya *vs.* Lewis (1915) 1 C.W.R. 192 and Abeywardena *vs.* Fernando (1924) 3 Times L.R. 4.
12. The Police Officer *vs.* Dineshamy *et al* (1919) 21 N.L.R. 127.
13. Pietersz *vs.* De Silva (1916) 3 C.W.R. 361.

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(6) The amount of the bond is within the discretion of the Magistrate ; it should be reasonable but not excessive, and should be specified in the summons. Imprisonment in default is simple.[1]

(VII) Security for Good Behaviour.

A Police Magistrate can order the following persons to show cause why they should not be bound over to be of good behaviour[2] :

(*a*) any person taking precautions to conceal himself with a view to committing an offence ;

(*b*) any person without ostensible means of subsistence or who cannot give a satisfactory account of himself ;

(*c*) a habitual robber, house-breaker, thief, or receiver of stolen property ;

(*d*) any person who habitually commits extortion, or frightens or threatens persons with a view to committing extortion ;

(*e*) a habitual protector or harbourer of thieves ;

(*f*) any person who habitually aids in concealing or disposing of stolen property ;

(*g*) any person who is a notorious bad liver ; and

(*h*) any person who is a dangerous character.

The bail that is required is not for keeping the peace but for being of good behaviour, the object being to protect the public against a repetition of the crimes by which the safety of property is menaced and not merely where the security of persons is jeopardised. Evidence of general repute is admissible to prove that a person is a habitual offender but it ought not to be acted upon unless convincing. Where the Police asserted in general terms that the Respondent was known to be a "go-between" between cattle-thieves and owners of stolen cattle, it was held that the evidence was insufficient as there was nothing to show that the appellant had so acted in any particular instance or that he was convicted of any such offence.[3] Mere statements that a person walks about the bazaar doing nothing but making a nuisance of himself, that he is a notorious bad liver and a bully and that he has been committing breaches of the peace, unsupported by specific proof of particular instances of such conduct, are held to be insufficient to justify an order under this section.[4] Nor is the mere fact that a person has been previously convicted of offences against property in itself sufficient to justify proceedings under this section, unless there is evidence to show that the Respondent has done some act indicative of an intention to return to his former course of life and to pursue a course of preying upon the community.[5] Habituality is of the essence of this enquiry. A man charged only with "being of bad repute and having no regular occupation" cannot be called upon to give security. He should be without any ostensible means of support whatsoever. The burden of proof that he has such means or that he is not a notorious bad liver is on the accused. But before he is called upon to show cause, there

1. Section 94 Cr. Pr. Code.
2. Sections 82 and 83 Cr. Pr. Code.
3. Jusoop *vs.* Poddappu (1890) 9 S.C.C. 82.
4. Sproule *vs.* Nannayakkara (1933) 2 C.L.W. 156.
5. Haider Ali I.L.R. 12 Calcutta 520.

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should be evidence on oath[1] that he has no ostensible means of subsistence.[2] This evidence may consist even largely of hearsay[3]; for evidence of general repute is permitted under section 87 of the Criminal Procedure Code. But where the accused is called upon to meet specific instances of his misbehaviour, general evidence of bad repute should not be admitted.[4] A "notorious bad liver" is a person so dangerous as to render his being at large, without security, hazardous to the community.[5]

It is improper to join more than one person in an enquiry of this nature,[6] for the enquiry is really directed against the antecedents and present status of the person involved. It is also improper to convert an enquiry under these sections into a summary trial. Where the Magistrate so enquiring framed charges against the accused for mischief, trespass and hurt and proceeded to try him, the conviction was quashed as being highly irregular.[7]

The amount of security is within the discretion of the Magistrate: it cannot be excessive; it must be specified in the summons, which should also contain a brief and definite statement of the substance of the information on which the summons is issued.[8] Imprisonment in default may be either simple or rigorous.[9]

(VIII) Frivolous and Vexatious Cases.

In addition to the normal powers above defined of a Magistrate, he has further additional powers of awarding costs and compensation in certain cases.

If, in any private plaint of a summary nature, the Magistrate declares that the complaint was frivolous or vexatious, he can call upon the complainant to show cause why he should not be ordered to pay compensation not exceeding Rs. 10/- to each of the accused and Crown costs not exceeding Rs. 5/-[10] There are various points to consider about this order.

(1) The plaint should be a private one.[11] A Magistrate has no power to order payment of Crown costs or compensation, when the proceedings are instituted by a written report[12] made to the Magistrate by a Peace Officer,[13] that is to say, when either the Police[14] or the Headmen[15] are prosecuting, or when plaints are filed by, or in the name of, heads of Government or quasi-Government Departments, like Sanitary

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1. Banda *vs.* Kalu Banda (1887) 1 S.C.R. 95 and Jayatilleke *vs.* Udiya (1925) 26 N.L.R. 496.
2. Rodrigo *vs.* Appuhamy (1913) 1 Bal. Notes 26.
3. Wenbanya *vs.* Fernando (1916) 3 C.W.R. 370.
4. Kanagasingham *vs.* Tampiah (1923) 1 Times L.R. 209.
5. Inspector of Police, Baddegama *vs.* Hendrick (1929) 31 N.L.R. 208 7 Times L.R. 55.
6. Mudaliyar Giruva Pattu *vs.* Andrisa (1890) 9 S.C.C. 129. Sub-Inspector of Police, Galle *vs.* Titus *et al* (1930) 3 C.A.R. (Gratiaen's) 15.
7. Inspector of Police, Kalutara *vs.* Silva (1925) 6 C.L.R. 73.
8. Inspector of Police Baddegama *vs.* Hendrick (1929) 31 N.L.R. 208.
9. Section 95 Cr. Pr. Code.
10. Section 253 B (I) Cr. Pr. Code which is practically the same as the old section (197) now repealed by Ordinance No. 40 of 1921.
11. Darling Appu *vs.* Yahan Singho (1930) 3 C.A.R. (Gratiaen's) 97.
12. Weerasinghe *vs.* Sinni Appu (1923) 1 Times L.R. 217.
13. The King *vs.* Cornelis (1921) 22 N.L.R. 501.
14. Kuttalam Chetty *vs.* Ina Muttu (1896) 1 N.L.R. 326; Don Davith *vs.* Udenis (1927) 5 Times L.R. 82.
15. Perera *vs.* Ukkuva Veda (1920) 1 C.L.R. 177,

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Boards. Under the Indian Code,[1] plaints filed by the Police on information received come under this category but not so in Ceylon. Where the Police, not satisfied with the information received, refuse to file a plaint but merely report the circumstances to Court under section 131 of the Procedure Code, a complainant who, nevertheless, persists in proceeding on with his case can, if the case is afterwards found to be vexatious or frivolous, be dealt with under this section.[2] For it is presumed that the Police have made all the necessary investigations; and unless and until they have found that there are not enough grounds for proceeding on with the case, they would normally have prosecuted. If in a Police institution, the Magistrate finds that the case is false, it is open to the Police to prosecute the complainant for giving false information.[3]

(2) The case should be of a summary nature[4]; that is to say, such as a Magistrate is competent to try. Previous decisions of the Supreme Court on this point were conflicting : for in *Jayatilleke* vs. *Davith Appu*,[5] which is a Full Bench decision, the Court held that, although compensation could only be ordered in cases summarily triable, a Police Magistrate could order Crown costs in all cases, whether summary or non-summary. But after the amendment in 1890, it was made clear that a Magistrate could only order Crown costs in summary cases.[6] Our present enactment makes it more clear by adding the words "which a Police Court has power to try."[7] Where the complainant charged the accused with arson, which is a non-summary offence, and the Magistrate after enquiry came to the conclusion that the case was false, it was held that he could not direct the complainant to pay Crown costs.[8] Nor can he separate the summary elements from the otherwise non-summary inquiry and make the former a ground for ordering Crown costs. Thus, in an inquiry for house-breaking and theft, a Magistrate found that the alleged assault was false and fined the complainant on that account; it was held that the order was irregular.[9] But if in a summary trial on many counts, *e.g.* assault and confinement, he holds that one of them is frivolous or vexatious, he can order compensation or costs, though he should specifically say which particular count he ranks in that category.[10]

(3) The complaint should be frivolous or vexatious. A false case need not necessarily be frivolous or vexatious, though it often is.[11] A frivolous charge is one complaining of a very slight injury which no sensible man would resent[12]; it would be the sort of a case which we do not expect ordinary human beings to prosecute in a Court of law. A vexatious case is one intended solely to vex—brought without cause—and with an intention of harassing the person complained of.[13] It

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1. Section 250 In. Cr. Pr. Code.
2. Mendis *vs.* Carlinahamy (1900) 4 N.L.R. 341.
3. Peries *vs.* Valentine (1912) 2 C.A.R. 173.
4. Letchimanapillai *vs.* Alwis (1923), 1 Times L.R. 215, also page 226.
5. (1889) 8 S.C.C. 196.
6. Fernando *vs.* Fernando (1893) 3 C.L.R. 13.
7. Kandappa *vs.* Suppiah (1930) 8 Times L.R. 66.
8. De Livera *vs.* Sellan Kangany (1916).
9. Hendrick Appuhamy *vs.* James (1890) 1 C.L.R. 21.
10. Anthony *vs.* Johanes (1895) 2 N.L.R. 64.
11. Per Ennis, J., Searinno *vs.* Muttusamy (1917) 20 N.L.R. 111.
12. Haronis Appu *vs.* Singho Appu (1899) 1 Tamb. 58.
13. De Silva *vs.* Mammadu (1897) 3 N.L.R. 3.

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therefore connotes that the case should be primarily false; but there should be a definite finding not that the case is false but that it is vexatious. For in false cases, the law provides greater punishment by other methods of prosecution. If the facts deposed to by the complainant are based on his own personal knowledge, he puts himself within the pale of this section; but if he has been acting merely on information received by him, the Magistrate must find that he did not in fact receive such information or did not believe it to be true.[1]

(4) The Magistrate must declare that the complaint is frivolous or vexatious.[2] If he finds that the charge is grossly exaggerated and the complainant has rushed into Court without proper evidence, the finding is not a declaration that the case is frivolous or vexatious.[3] The mere fact that the Magistrate disbelieves the evidence for the prosecution is not sufficient to justify an order under this section.[4] It is not necessary that he should hear the case to a finish before so declaring; nor does the fact that a Magistrate has called upon the accused for his defence show that a *prima facie* case having been made out by the complainant, his case could not have been vexatious.[5] There is nothing in the section which expressly or by necessary implication requires a Magistrate to hear every witness whom a complainant may desire to call,[6] though an order made prematurely without examining all the witnesses whom the complainant undertakes to produce is held to be bad.[7] This would only hold good of material witnesses who, in fairness to the complainant, should all be heard; but a Magistrate may acquit the accused after hearing only one witness, though this evidence may not justify him in holding that the case is false or vexatious.

(5) The Magistrate can only call upon the complainant in summary cases of a regular nature. Thus, it is held that maintenance cases being of a semi-civil nature are exempt from the provisions of this section.[8] Neither the applicant for maintenance could be fined for bringing a vexatious case nor the husband punished for laying a false and frivolous charge of adultery against his wife.[9] Such seemingly simple cases, like an application for the abetment of a nuisance,[10] or a charge of quitting service,[11] or an application to bind over, would not fall within the meaning of this section.

(6) The complainant must show cause,[12] that is to say, he must be afforded an opportunity of urging any objections[13] which he may have, before he is condemned.[14] A formal charge is not necessary but there should be an entry on the record that he has been called upon to show cause why he should not be condemned. Hence an order of this nature

1. Perera *vs.* Perera (1894) 3 C.L.R. 91.
2. Ponniah *vs.* Suppiah (1922) 1 Times L.R. 24.
3. Perera *vs.* James Singho (1913) 1 Bal. Notes 34.
4. Marthelis Appu *vs.* Fernando (1930) 3 C.A.R. (Gratiaen's) 71.
5. Number *vs.* Ambu I.L.R. 5 Madras 381.
6. Velupillai *vs.* Casipillai (1912) 15 N.L.R. 332.
7. Suppa Nayaka *vs.* Kawwa (1899) 2 Tamb. 110 and Gunasekara *vs.* Baba Singho (1892) 1 S.C.R. 165.
8. Sivakamipillai *vs.* Subramaniam (1896) 2 N.L.R. 60.
9. Isabel *vs.* Pedro Pillai (1902) 6 N.L.R. 85.
10. Janse *vs.* Costa (1897) 2 N.L.R. 299.
11. Searinno *vs.* Muttusamy 20 N.L.R. 111.
12. De Silva *vs.* Mammadu (1897) 3 N.L.R. 3.
13. Segu *vs.* Perumal (1924) 2 Times L.R. 127.
14. De Silva *vs.* Perera (1919) 6 C.W.R. 293.

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cannot be made in the absence of the complainant[1]; though if the complainant, being present in Court in the earlier part of the day, runs away later, a Magistrate may enter an order, *in absentia*; for his absence is then tantamount to a failure to shew cause.[2] But a complainant cannot lead more evidence to prove that his original complaint was a true one.[3]

(7) The complainant can be ordered to pay no more than Rs. 5/- as Crown costs and not more than Rs. 10/- as compensation to each of the accused. The aggregate amount of the compensation where there is more than one accused may be unlimited,[4] provided each accused does not get more than Rs. 10/-. The imprisonment ordered in default can only be simple and cannot exceed 14 days in default of Crown costs and 30 days in default of compensation. There is no appeal from an order of Crown costs[5] though the order awarding compensation is appealable[6]; but an appeal would lie even from an order of Crown costs if that order is made *ultra vires*,[7] *e.g.* in a non-summary case, or is illegal,[8] *e.g.* when made without the complainant being given an opportunity of showing cause against it.

(IX) Wrongful Arrest.

There is another way of dealing summarily with false cases. Whenever a person causes a Peace Officer to arrest another and if it appears to the Magistrate that there are not sufficient grounds for making such an arrest, in fact that the arrest was unwarranted and therefore wrongful or malicious, he may order the complainant to pay any sum not exceeding Rs. 25/- as compensation to each of the persons so arrested and in default may sentence him to simple imprisonment for 30 days.[9] This order can be made in summary as well as in non-summary cases.[10] And the case must appear to the Magistrate to be false or concocted; in order to determine this he must hear all the witnesses who are in a position to strengthen the case.[11] It must be clearly established that there was no sufficient ground for causing the arrest; thus, for instance, the fact that only the medical evidence is incompatible with the story of the complainant and his witnesses would hardly suffice.[12] If after hearing the prosecution a Magistrate calls upon the accused for his defence, the complainant cannot be said to have had no grounds for getting the accused arrested.[13] Nor can he be ordered to pay compensation, if the accused is acquitted on a conflict of testimony between the complainant and a medical witness.[14] For, the Magistrate is then deciding the case only on the balance of probabilities.

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1. Silva *vs.* Joana (1905) 2 Bal. 60.
2. Rowlands *vs.* Roberts (1916) 2 C.W.R. 99.
3. Fernando *vs.* Sennanayake (1923) 1 Times L.R. 177.
4. Arnolis *vs.* Babunhamy (1894) 3 C.L.R. 49.
5. Silva *vs.* Cader (1913) 1 Bal. Notes 102.
6. De Silva *vs.* Grigoris (1906) 1 A.C.R. 29.
7. Hendrick *vs.* Northway (1912) 7 Weer. 41.
8. Suppramaniam Patter *vs.* Muttiah Patter (1911) 6 Leader 34.
9. Section 253 (c) Cr. Pr. Code.
10. Sinnetamby *vs.* Weerakutty (1901) 5 N.L.R. 14.
11. Mohamadu *vs.* Sinniah (1915) 18 N.L.R. 254.
12. Silva *vs.* Nonis (1929) 31 N.L.R. 252.
13. Tidoris *vs.* Carolis (1900) 4 N.L.R. 324.
14. King *vs.* Appuhamy (1914) 1 Bal. Notes 8.

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And no complainant can be ordered to pay compensation without his being called upon to show cause to the contrary.[1]

There must be an arrest by a Peace Officer before an order can be made under this section.[2] It is not necessary that the complainant should personally be present at, or aid in, the arrest. Even if he were to make a complaint at the Police Station and the Police thereupon go and arrest the accused, it is held to be an unlawful arrest within the meaning of this section ; but it is fancied that it would not be such an arrest if the complainant were to apply for a warrant and get the accused arrested on it, or even if the accused were to surrender in Court after a warrant has been issued against him. For a Magistrate is supposed to exercise his discretion, after hearing evidence, that there are *prima facie* grounds for getting the person arrested on a warrant. There should be clear evidence on the record, therefore, that the complainant had got the accused arrested otherwise than on a warrant.

(X) Complainant's Costs.

Besides the power of applying the whole or any part of a fine which a Magistrate imposes on an accused person in defraying the expenses of the complainant or in compensating him for the injury or damage caused to him under section 253 (*d*),[3] the amendment of our Code on the lines existing in England has now made it possible for a Magistrate to order that any person convicted by him should pay to the aggrieved party any sum not exceeding fifty rupees.[4] The punishment is in addition to any other punishment which the Court may have lawfully imposed. As the accused is already convicted before such an order is made, he need not be called upon to show cause against the order. Inability to pay does not render the convict liable to imprisonment. The compensation, if unpaid, can only be recovered by means of a distress warrant.

(XI) Confiscation.

In addition to the punishment mentioned above, a Magistrate has powers to order confiscation[5] or restoration of property regarding which any offence appears to have been committed or which has been used for the commission of any offence.[6] With regard to stolen property, it is immaterial whether the accused is convicted or acquitted.[7] The Magistrate must come to the conclusion that it is in fact stolen,[8] or that the person from whose possession it is alleged to have been taken has been dispossessed of it.[9] In other cases, a conviction would be necessary

1. Kiri Banda *vs.* Tiruambalam (1915) 18 N.L.R. 213. See an earlier decision in Gunasekara *vs.* Dines Appu (1905) 2 Bal. 69, where it is held that it is not necessary to call upon the complainant to show cause. But Schneider, J., is of the contrary opinion in Sandanamma *vs.* Kadiravel (1925) 3 Times L.R. 40. The latest decision is P.S., Hatton *vs.* Muniandy *et al* (1930) 3 C.A.R. (Gratiaen's) 45.

2. Marthelis Appu *vs.* Antony Fernando (1930) 31 N.L.R. 455.

3. Where Rs. 375 out of a fine of Rs. 425 for criminal breach of trust of kerosine oil was ordered to be paid to the complainant, the S.C. held that the order was justifiable. Robo *vs.* James (1930) 32 N.L.R. 91.

4. Section 253 E. Cr. Pr. Code.

5. Section 413 *et seq.* Cr. Pr. Code.

6. William *vs.* Silva (1921) 22 N.L.R. 403. See also Cassim *vs.* Pitche (1916) 3 C.W.R. 204.

7. Gomez *vs.* Muttulingam *et al* S.C. 434. P.C. Kayts 2118.

8. Silva *vs.* Hamid (1918) 20 N.L.R. 414.

9. Allis Appu *vs.* Silva (1921) 3 C.L.R. 53.

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before an accused person is divested of the property.[1] Where an accused was charged with having offered an illegal gratification to the Police and the Magistrate acquitted the accused but confiscated the amount paid, it was held that the order as to forfeiture was wrong.[2] It is doubtful whether any statutory offence other than an offence under the Penal Code would, in the absence of any special provision, justify an order of forfeiture. Thus, in *Govinden* vs. *Nagoor Pitche*,[3] where a person was convicted of obstructing a public road with his sherbet cart exposing sherbet and aerated waters for sale, and the Magistrate, in fining the accused, ordered that the whole cart should be confiscated, it was held that the order was wrong, as " if the value of the goods forfeited be regarded as coming within the term " pecuniary forfeiture " in section 3 of the Criminal Procedure Code, it would seem that the punishment exceeded the amount of the fine awardable under section 53 of the Police Ordinance." If the property were used for obstructing passengers as such, an order for confiscation could be made, but not where by being carried along the road it incidentally obstructs passengers. The offence is the consequence of an unlawful user of the property on the one hand, and is incidental to a lawful use of the property on the other. An order for confiscation cannot be made where an accused acquitted of theft does not claim the property, but where it is claimed by the complainant : the proper order would be one of restoration to the latter.[4]

Special statutory provisions are sometimes made, conferring upon a Magistrate this power of confiscation. Thus, under the Forest Ordinance, a Magistrate can confiscate the timber which an accused person is convicted of felling illicitly. Or, under the Excise Ordinance, a Magistrate may order that any vessel used for the purpose of, say, transporting ganja, should be forfeited (though the owner of the vessel must be given an option of paying a fine instead). Forfeiture cannot be ordered under the Lotteries Ordinance.[5]

When a person is convicted of an offence attended by criminal force which has resulted in the dispossession of the complainant from immovable property, a Police Court may order a restoration of possession.[6] A Magistrate cannot make such an order pending the trial,[7] but only after conviction. And the dispossession should be by the commission of an offence attended by criminal force as defined in the Penal Code.[8] The criminal force should be to the person with the object of dispossessing that person of his property.[9]

All property found by the Police under circumstances creating suspicion of the commission of an offence and all property found under any circumstances whatsoever, *e.g.* stray cattle, must be taken before the nearest Police Magistrate so that he may publish the necessary notices and make due enquiries with a view to restoration.

No order of confiscation or restoration can take effect till after the appeal, if any, is decided, provided however that perishable articles or

1. Thampipillai *vs.* Ramasamy (1909) 4 Bal. 89.
2. The Sub-Inspector of Police *vs.* Horatala (1921) 22 N.L.R. 350.
3. (1917) 20 N.L.R. 115.
4. Gomez *vs.* Mutlingam *et al* (1926) 4 Times L.R. 101.
5. Sub-Inspector of Police, Kurunegalla *vs.* Ranmenika (1927) 4 Times L.R. 163.
6. Section 418 Cr. Pr. Code.
7. Goonewardene *vs.* Wijesinghe *et al* (1917) 4 C.W.R. 354.
8. Sheriff *vs.* Pitche Umma (1924) 26 N.L.R. 353.
9. Henry de Silva *vs.* Seneviratne *et al* (1925) 3 Times L.R. 126.

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other articles which a Magistrate considers unsafe or unfit to keep for a long time may be sold, and the proceeds kept in deposit pending final disposal. And no order of restoration can be made without notice to the other side, even if the property is seized under a search warrant and even if the property is beyond what is mentioned in the search warrant.[1]

(XII) Juvenile Offenders and Whipping.

When any boy or girl, above the age of seven[2] and under sixteen, is convicted by a Magistrate of any offence punishable with fine or imprisonment, he can sentence the offender to any of the following forms of punishment[3] :

(1) due admonition or warning ;

(2) recognisance from the parent or guardian or nearest adult relative as to the good behaviour of the offender for one year ;

(3) six strokes with a rattan, if under the age of twelve, and ten strokes[4] if over, provided the offender is of the male sex[5] ;

(4) preventive detention in a reformatory or a certified industrial school, *e.g.* the Reformatory at Maggona, for not less than two and not more than five years ; but in no case longer than until he or she has attained the age of 18 years ;

(5) a combination of 3 and 4 above ;

(6) a fine not exceeding Rs. 20/- on the parent or guardian, provided—

(*a*) that after enquiry it is found that he is responsible, through bad education or otherwise, for the misconduct of his ward, and

(*b*) that he had an opportunity of being heard and of showing cause against the order ;

(7) an order as to the costs of maintenance of the youthful offender at the reformatory or the industrial school, if the Magistrate is satisfied that the parent or guardian has the means to pay either the whole or a part of the rate fixed by His Excellency the Governor in Executive Council.

The sentence of whipping in the case of juvenile offenders is not appealable and must be carried out then and there, in the presence of the Court.

A Police Magistrate has no jurisdiction except where the offender is a person under sixteen years of age or except in convictions for knifing, to inflict a sentence of whipping or lashes,[6] even though the particular section under which he convicts may sanction that mode of punishment. A theft of praedial produce would make the thief liable to be whipped under Ordinance No. 4 of 1891,[7] but every Magistrate has not this

1. Costa *vs.* Peries (1933) 2 C.L.W. 248.

2. Under section 75 of the Penal Code, " nothing is an offence which is done by a child under seven years of age." See also King *vs.* Christina (1914). 4 Bal. Notes 11.

3. See the Youthful Offenders' Ordinance No. 1 of 1886, Vol. I, p. 899.

4. The Flogging Ordinance of 1904 makes it possible to inflict twelve strokes, but this would not apparently apply to offences punishable with fine or imprisonment. See Ordinance No. 3 of 1904 Vol. II, p. 608.

5. Section 2, Ordinance No. 16 of 1909, Vol. I, p. 903.

6. Gunawardena *vs.* Punchirala *et al* (1921) 22 N.L.R. 411.

7. Vol. IV, p. 149.

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power; the district in which this Ordinance applies must first be proclaimed before a Magistrate can exercise this power. The Governor has authority to appoint a special Magistrate for Kurunegala with special powers of whipping.[1] It follows that every Magistrate cannot inflict whipping as a sentence in a case of cattle theft.[2] But when a person is convicted under secsion 315 C.P.C. of voluntarily causing hurt with a knife, a Magistrate has the power to order him to be whipped[3]; though if the injuries are not severe or are inflicted in the course of a struggle, the Supreme Court will not uphold a sentence of lashes.[4]

The employment of Young Persons and Children's Ordinance No. 6 of 1925 prohibits the employment of juveniles in industrial undertakings. A boy employed to attract passengers for a 'bus is held to be employed in an industrial undertaking.[5]

(XIII) Public Nuisances.

A Magistrate has the power of making a conditional order for the removal, suppression, prevention, or stoppage of all public nuisances. The kinds of nuisances in which he can make such an order are detailed in Chapter IX of the Criminal Procedure Code: they may be unlawful obstruction of any highway or water-way, the carrying on of any trade or occupation injurious to the health or physical comfort of the community, the construction of any building or disposal of any substance likely to occasion conflagration or explosion, or the existence of ruinous buildings, dangerous trees, and unfenced wells, tanks or excavations near any public place.

Section 261 of the Penal Code enacts: "A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or 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. A public nuisance is not excused on the ground that it causes some convenience or advantage." This section is important in considering the question of the suppression of a public nuisance.

Where the accused was the proprietor of an oil-store where coopering was carried on, and the noise created by constant hammering on barrels affected the whole neighbourhood, it was held that a nuisance which affects only those living in the neighbourhood and not necessarily the public in general may be the subject of proceedings under this chapter.[6] Where the accused carried on the trade of curing arecanuts by a process which involved the burning of sulphur, and suffocating fumes at times penetrated the adjoining house and went over the road, it was held that as the trade was not necessarily injurious to health, the order suppressing the trade was not justifiable, though the Magistrate could have made a conditional order directing the accused not to repeat the nuisance from suffocating fumes.[7]

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1. Ordinance No. 18 of 1887, Vol. I, p. 957.
2. Jayasinghe *vs.* Graciano (1897) 2 N.L.R. 336.
3. Ordinance No. 28 of 1906. Section 12, Vol. IV, p. 153.
4. The King *vs.* Nagappah *et al* (1925) P.C. Jaffna 4892. S.C. No. 336.
5. Ratemahatmaya *vs.* Perera (1928) 29 N.L.R. 156.
6. De Saram *vs.* Seneviratna (1918) 21 N.L.R. 190.
7. Abdul Azeez *vs.* Arunasalam Pillai (1917) 4 C.W.R. 4.

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"It is not the intention of the Legislature to give Magistrates power to restrain altogether a party from using his property in a particular way, on the mere anticipation that a nuisance might result from his using it in an improper way." So that the erection of a wire shoot at a high altitude athwart a public road does not become a public nuisance.[1] A person, however, who obstructs the drawing of water from a public well commits a public nuisance under certain circumstances.[2] A public nuisance takes place where the annoyance is to the public or to the people in general, which means a body or considerable number of persons —and not merely to the complainant alone. This point was referred to by Dalton, J., in the famous dog case where the Magistrate of Matale was disturbed at night by the continuous barking of a brown pup[3]: in acquitting the accused, the Judge held that the nuisance was only private and that even if the prosecution was entered under the Nuisance Ordinance of 1865[4] proof would be required that the nuisance was permanent or of a frequently recurring nature. Thus, a Magistrate has no power to make an order prohibiting parties from building on a common land till it is partitioned.[5]

The doctrine that a man who "goes to" a nuisance has no legal right to have it abated is not now accepted ; so that a person cannot by long user acquire a prescriptive right to carry on his business in a particular manner ; he cannot, by injurious noises or smells for a long time, deprive the public of the right to live peaceably and comfortably on the land near him—even though, when he first started his business, there was no one living in the neighbourhood.[6]

Where a complaint was made that nuts and branches of a coconut tree overhanging the complainant's house fell on the roof, and that the tree was likely to cause injury to the occupants of the house, it was held that the Magistrate had no power to order the removal of the tree, as the tree itself was not likely to fall, and the nuisance, if any, was of a private and not of a public character.[7] A Magistrate has even no power to order that coconut trees be cut down, simply because falling nuts are likely to damage the roof of a school-room.[8] Only if the trees themselves are tottering or dangerous, can he order their removal.

A person who manages a brothel does not come within this chapter which has in view only obstructions and nuisances of a physical kind.[9] And even in the case of obstruction to a public path, there must be evidence to show that the path is public either by user as of right from time immemorial[10] or by dedication, or grant.[11] If the respondent claims the path as his private property, he should be given an opportunity of establishing his title in a civil Court.[12]

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1. Ratwatte *vs.* Owen (1892) 1 S.C.R. 172.
2. Muttiah *vs.* Meera Meydeen (1891) 1 S.C.R. 85.
3. Nair *vs.* Costa (1927) 4 Times L.R. 164.
4. Snowden *vs.* Rodrigo 2 C.L.R. 113.
5. Louisa *vs.* William *et al* (1925) 6 C.L.R. 175.
6. Forest *vs.* Leeff (1910) 13 N.L.R. 119.
7. De Silva *vs.* De Silva (1915) 1 C.W.R. 98. See Vandersmagt *vs.* Jayawardena (1927) 5 Times L.R. 118 for applicability of this principle to the Municipal bye-laws.
8. De Alwis *vs.* Abdul Cader *et al* (1924) 2 Times L.R. 160.
9. Perera *vs.* Sophia (1919) 7 C.W.R. 34.
10. Inspector of Police *vs.* Don Charles (1930) 3 C.A.R. (Gratiaen's) 52.
11. Don Andris *vs.* Don Manuel (1909) 2 Leader 143.
12. Hendrick Mendis *vs.* Sri Chandrasekara Mudaliyar (1908) 12 N.L.R. 33.

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When the complainant has made out a *prima facie* case, a Magistrate must make a conditional order and serve it on the respondent; the latter may comply with the order and abate the nuisance or show cause against it. Till he shows cause, the order cannot be vacated.[1] If the Magistrate after hearing him is not satisfied with the objections urged by him, he can make the order absolute. Failure to obey an absolute order not merely renders the respondent liable to be convicted for a summary offence under section 185 C.P.C., punishable with imprisonment for a month or a fine of Rs. 50 or both,[2] but will also entitle the Court to get the order carried out and to recover the costs of such abatement from the movable property and effects of the respondent. Failure to obey is not tantamount to a contempt of Court.[3] The death of the respondent abates the action; his legal representative cannot be substituted[4] unless the nuisance is a continuing one, in which case the party responsible should be proceeded against afresh.

In urgent cases, a Magistrate can also issue an interim injunction or make an immediate temporary order.[5]

(XIV) Sundry.

It remains only to mention that a Magistrate often performs semi-ministerial functions, *e.g.*—

(1) in recovering taxes for revenue officers. Various Ordinances provide that if a tax remains unpaid, the local authority may report the fact to a Magistrate who will proceed to recover the same as if it were a fine imposed by him. Thus, non-payment of motor car taxes or of conservancy fees, or of income tax, etc., comes under this category. A Magistrate has the power to issue a distress warrant forthwith for the recovery of arrears; he may, however, notice the defaulter and afford him an opportunity of paying through the Court-house before ordering a distress of his movable property. It is not the function of a Magistrate to determine whether the tax is justly due or not; a certificate from the proper revenue officer is a sufficient warrant for the distress.[6]

Or (ii) in issuing licenses

(*a*) for the shooting of stray and unidentified cattle.[7] Usually an affidavit is necessary to show that the cattle cannot be identified or seized, that the property is properly fenced and that it is therefore necessary to shoot them;

(*b*) for the beating of tom-toms and the conducting of processions. This is usually the duty of the Police, but under the new Ordinance,[8] a Magistrate sits in appeal over the decision of the local head of Police. Only the original applicant and not the objector has a right of appeal to the Supreme Court from the Magistrate's finding.[9]

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1. De Silva *vs.* De Silva (1924) 2 Times L.R. 180.

2. Unless there is danger to life when the punishment is imprisonment for 6 months or a fine of Rs. 100 or both, or unless the respondent is a corporate body when the punishment is only a fine of Rs. 100.

3. Amarasekara *vs.* Gunewardena (1914) 1 Bal. Notes 52.

4. Mendis *vs.* Fernando (1909) 3 Leader 3.

5. Sections 112 and 114 Cr. Pr. Code.

6. See however, the A. G. A., Puttalam *vs.* Pieris (1932) I C.L.W. 232. There the question of recovery of costs of survey by the Crown is discussed.

7. Section 14 of Ordinance No. 9 of 1876, Vol. 1, p. 827.

8. Ordinance No 14 of . 1924

9. Sinnadurai *vs.* Rajadurai (1930) 3 C.A.R.. (Gratiaen's) 126.

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CHAPTER XII.

APPEALS.

(I) The Right to Appeal.

Every person dissatisfied with any judgment or final order of any Police Court may prefer an appeal to the Supreme Court for any error in law or fact within ten days from the time of the passing of such judgment or order. The appeal may be taken by a petition of appeal addressed to the Supreme Court or by a statement made to the Secretary of the Police Court (or to the jailer of his prison) and supplying a stamp of Rs. 5. The stamp may be allowed to stand over at the discretion of the Magistrate till such time as the appeal is decided ; and if paid is refunded to the appellant on his succeeding in his appeal in whole or in part. If an unstamped petition of appeal is submitted without special leave from the Magistrate, it is liable to be rejected and the fact that a Magistrate has forwarded an appeal to the Supreme Court without "applying his mind to the question of stamps" will not cure the irregularity.[1] The petition of appeal may be signed by Proctors on behalf of the appellants and no proxy is required in a criminal case.[2] But the Code does not contemplate the drafting of petitions of appeal by petition-drawers.[3]

The time-limit for appeals is ten days ; but if an appeal is preferred by the Attorney-General or under his sanction, *e.g.*, in acquittals, the petition of appeal may be presented within 28 days.[4] Where a complainant has a right of appeal without the sanction of the Attorney-General, *e.g.*, under a discharge under section 191, he cannot by obtaining that sanction, file the appeal within the longer period of 28 days.[5] In computing the time the day on which the judgment or order is pronounced is included[6] but all Sundays or public holidays are excluded ; and if the time expires on a day on which the Court is closed, the appeal petition must be presented on the first day next thereafter on which the Court opens. "The general rule of law with regard to the interpretation of the language creating this time-limit is clear : the first of the two terminals is excluded and the second included."[7] In all acquittals the verdict of "not guilty" being in itself the judgment, the computation of time commences from the day of pronouncement of that verdict, even though the reasons for that acquittal may have been written some days later and are not even pronounced.[8] And in convictions, though a judgment must necessarily follow the verdict, the computation of time commences

1. Perera *vs.* Jayasekara (1918) 5 C.W.R. 120.
2. Singer Manufacturing Co. *vs.* Paul Perera (1908) 11 N.L.R. 291.
3. Excise Inspector *vs.* James Appu (1927) 5 Times L.R. 72.
4. See the amended section 338 (2) of the Criminal Pr. Code by Ordinance No. 19 of 1930.
5. Banda *vs.* Dalpadado (1931) 33 N.L.R. 113.
6. Wickramasuriya *vs.* Appu Singho (1895) 1 N.L.R. 178 is now redundant in view of Ordinance 19 of 1930.
7. The King *vs.* Perera (1915) 4 Bal. Notes 58.
8. Kershaw *vs.* Rodrigo (1916) 3 C.W.R. 44.

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from the date on which the conviction and sentence are recorded and not from the date on which the reasons for the decision are given.[1]

A District Judge or a Magistrate cannot refuse to forward a petition of appeal presented after the appealable time,[2] though no appeal which has been lodged after the prescribed time can be allowed[3]; for there is no provision for "lapsed appeals" from Police Courts[4]; and where a trial has proceeded "by bits" and the accused are convicted on separate days, the date of conviction of each is the date from which the period has to be computed.

There was no time-limit till recently to the right of appeal in an appeal under the Maintenance Ordinance,[5] but an amending Ordinance has cured the omission; and the same time-limit is fixed as in the case of any final order pronounced by a Police Court in any other criminal case or matter.[6]

The party appellant must be dissatisfied with any final judgment or order of a Police Magistrate. Whether he is dissatisfied or not, there is no appeal, except on a matter of law,[7]—

(1) Where the accused has made an unqualified admission of his guilt and has been convicted thereupon, or

(2) Where the accused has been sentenced either to one month's imprisonment or to a fine not exceeding twenty-five rupees without any other punishment.

And there is no appeal even on a matter of law,—

(3) Where a juvenile offender has been sentenced to whipping alone.

(4) There is no appeal absolutely from any acquittal except at the instance or with the written sanction of the Attorney-General. There is no appeal from an order of discharge made by a Magistrate on a direction by the Attorney-General under section 158 Cr. Pr. Code.[8] There is no appeal from an order referring the complainant to civil remedy[9] or from a refusal to issue process,[10] except with the previous sanction of the Attorney-General. The accused has, however, a right of appeal where on being found guilty he is ordered to give security for good behaviour though otherwise discharged.[11] Where, in a summary trial, the Magistrate after hearing the complainant discharges the accused on a legal objection, the order is tantamount to an acquittal under section 190 and there is no appeal without the Attorney-General's sanction.[12]

(5) Finally, there is no appeal from an order to pay Crown costs made by a Magistrate against a complainant whose complaint he has

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1. The King *vs.* De Silva (1916) 3 C.W.R. 235.
2. The King *vs.* Abeyratne (1929) 31 N.L.R. 224.
3. Coorey *vs.* Dias (1880) 3 S.C.C. 123.
4. Ram. (1877) 62.
5. Fernando *vs.* Fernando (1921) 23 N.L.R. 31 and Ranmenika *vs.* Mudalihamy (1923) 25 N.L.R. 254.
6. See Ordinance No. 13 of 1925 commencing from 27th October, 1925.
7. Perera *vs.* Dingiri Mahatya (1929) 6 Times L.R. 150.
8. Kannangara *vs.* Kannangara (1928) 30 N.L.R. 149 6 Times L.R. 78.
9. Baby Nona *vs.* Mohideen (1928) 30 N.L.R. 381 6 Times L.R. 64.
10. Pillai *vs.* Dewanarayane (1932) 2 C.L.W. 115.
11. Anchapullai *vs.* Baker *et al* (1929) 31 N.L.R. 149.
12. Gabriel *vs.* Soysa *et al* (1930) 31 N.L.R. 314.

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found to be frivolous or vexatious, unless it is not an order duly made under section 197 of the Criminal Procedure Code.[1]

It will thus be clear that if an accused is sentenced to imprisonment under a month, or to a fine of Rs. 25 or under, without any other punishment, there could be no appeal except on a matter of law. But, if he has been fined and imprisoned, although this fine and imprisonment are less than the required minima, he has a right of appeal. Similarly, he has a right of appeal if the fine or imprisonment is combined with any other form of punishment. The word "punishment" here does not mean a punishment mentioned in section 52 of the Penal Code,[2] but includes every form of punishment which the Court may lawfully impose, *e.g.*, Police supervision. Thus, an appeal lies as of right from a sentence by a Police Court of one month's imprisonment and an order to give security to be of good behaviour for six months.[3] But where an accused was sentenced to one month's imprisonment and was prohibited from carrying a knife without a license, it was held that no appeal lay, as the latter order was not a "punishment."[4] If an accused is sentenced to imprisonment for one month on each of two or several counts, an appeal may lie,[5] though concurrent sentences cannot be taken collectively.[6] In such cases if the highest sentence on any of several counts is below the required minimum, the convict has no privilege of appeal.[7] Again, where an accused is merely convicted but no sentence is imposed, *e.g.*, where he is warned and discharged, there is no appeal on facts.

In all these cases except in the case of a juvenile, the person dissatisfied may appeal on a question of law: but the petition of appeal must contain a statement of the matter of law to be argued and must also bear a certificate by an Advocate or Proctor that such matter of law is a fit question for adjudication by the Supreme Court.[8] This certificate is not necessary in the case of appeals from those Police Courts where there is not more than one Advocate or Proctor practising. The phrase "point of law" is very elastic and is frequently made use of for the purpose of appealing on pure questions of fact. It is the duty, however, of the certifying pleader to see that the question involved is a pure question of law. "The Proctor or Advocate pledges his professional reputation to the propriety of the appeal and if the petition be found frivolous, the Supreme Court will consider that he is either incompetent to discharge the duties of his profession or that he is trifling with the Court."[9] Any petition of appeal on a point of law without this certificate is inadmissible, even though it may have been countersigned or settled by Counsel.[10] The privilege vested in Advocates and Proctors is the result of the confidence placed in them by the Legislature, and it is necessary that this privilege should be exercised with the utmost care and caution.[11]

Frivolous points or pure questions of fact cannot be certified as points of law. Thus, error in point of opinion of a Judge as to the degree

1. 17 N.L.R. 265, Nonis *vs.* Tamel (1914).
2. The King *vs.* Baronchi (1914) 17 N.L.R. 444 (Full Bench).
3. Broome *vs.* Carolis *et al* (1916) 19 N.L.R. 276.
4. Daniel *vs.* Elaris (1900) 2 Br. 191.
5. Punchi Banda *vs.* Fernando (1900) 4 N.L.R. 103.
6. The King *vs.* Mutalif *et al* (1931) 33 N.L.R. 287 9 Times L.R. 18.
7. The King *vs.* Samaranayake (1923) 1 Times L.R. 265.
8. Bruin *vs.* Wijesinghe (1927) 5 Times L.R. 71.
9. Gunewardene *vs.* Alexander (1900) 4 N.L.R. 98.
10. Miskin *vs.* Ponniah (1902) 6 N.L.R. 132.
11. Sinnetamby *vs.* Selliah (1913) 1 Bal. Notes 27.

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of injury to the complainant or the degree of criminality of the accused, or as to the nature or amount of punishment inflicted, does not amount to an error in law; insufficiency of punishment can only be an error in law when a minimum amount of penalty has been prescribed, but has not been imposed.[1] That the sentence passed is excessive is no point of law unless a statutory provision regarding the sentence has been violated.[2] Nor does the fact that a judgment omits to state the points for determination, the decision thereon and the reasons for that decision, amount to a point of law.[3] Where, however, an order is made by a Magistrate without jurisdiction,[4] or where a point of law is raised in the lower Court on which he himself has given a ruling, or where there is a question of admissibility or relevancy of evidence, or where the question arises whether taking the whole of the prosecution at its best there is any offence in law committed by the accused, or finally where the decision of a Magistrate runs counter to recognized rules of law or rulings of the Supreme Court, the aggrieved party has certainly a right of appeal on law. There may, however, be questions of mixed facts and law, or the law may depend upon the totality of facts proved; in such cases, although no appeal lies on the fact, there is an appeal on law. Where an appeal lies on a matter of law only, the Court will not review the findings of fact in order to develop the point of law.[5] And as arguments in the Supreme Court in appeal can be adduced only on matters of law stated in the petition of appeal,[6] a point of law that is not contained in the petition will not be allowed to be adduced for the first time in the Appeal Court.[7] The pleader who settles the petition of appeal must therefore see that all points of law that are worthy of being urged in appeal are included in the petition.

Where an accused has been sentenced to imprisonment for a month or a fine of Rs. 25 or less, he may appeal even on facts with the leave previously obtained of the convicting Magistrate. This leave ought to be sparingly given and only in exceptional cases; for, if a Magistrate allows leave to appeal on facts, he could not have been sure of his conclusions in convicting. Per Schneider, J., in a recent case, "It is not a mere matter of routine the granting of leave, but there must be some reason moving the Magistrate in granting it. There is nothing on the record (in this particular case) to show why the Magistrate granted this leave. His own judgment contains no indication whatever of any doubt in his mind as to the facts which he has considered to be proved. If he had no such doubt, then I fail to see what reason it was that induced him to grant leave to appeal. I make these remarks because it seems to me that Magistrates in granting leave to appeal should proceed upon some principle." It may, however, happen that the facts involve special features or technical details on which a ruling of a higher Court is necessary. Where leave is granted it is not necessary that the order granting the same should be actually made. Where special application for leave to appeal and a petition of appeal were submitted to the Magistrate who read and forwarded it to the Supreme Court, it was

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1. Queen *vs.* Daniel (1895) 1 N.L.R. 87.
2. King *vs.* Karuppen (1929) 31 N.L.R. 67 7 Times L.R. 11.
3. Clara *vs.* Pedrick (1900) 1 Br. 211.
4. Fernando *vs.* Mathes Pulle (1909) 12 N.L.R. 159.
5. Veerasingam *vs.* Kadiresu (1902) 3 Br. 99.
6. Solicitor-General *vs.* Perera (1914) 17 N.L.R. 413.
7. Lienard *vs.* Abdul Rahim (1899) 4 N.L.R. 25.

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held that the Magistrate had impliedly given leave.[1] In all cases where a Magistrate gives leave or refuses to do so, it would be advisable for him specifically to mention his reasons for the particular order. The order refusing to grant leave to appeal is not appealable, though the case may be brought up in revision before the Supreme Court.

We have seen that no appeal lies from an acquittal except at the instance of the Attorney-General or with his sanction. An appeal countersigned by the Crown Counsel of the Province is not an appeal at the instance of the Attorney-General.[2] It is irregular for the Solicitor-General to sign a petition filed in the name of the Attorney-General.[3] An amending Ordinance includes an Acting Attorney or Solicitor-General and a Deputy Solicitor-General.[4]

An appeal against an acquittal by or with the sanction of the Attorney-General must fail unless it is established that the Magistrate has acted under a misapprehension of the effect of the evidence given before him, or unless there is some fact not dependent upon the credibility of witnesses that shows that his finding of the facts is incorrect.[5] For, as pointed out by the Privy Council in a recent civil case,[6] " immense importance attaches not only to the demeanour of the witnesses but also to the course of the trial, and the general impression left on the mind of the Judge of first instance who saw and noted everything that took place in regard to what was said by one or other of the witnesses: it is rare that a decision of a Judge of first instance upon a point of fact purely is over-ruled by a Court of Appeal." An acquittal, unless it is an acquittal on law, is certainly a " decision on a pure point of fact " ; and an appeal thereon cannot succeed unless it is perfectly clear to the appeal tribunal that the finding of the inferior Court is erroneous,[7] or that the Magistrate did not apply his mind to the whole evidence in the case.[8]

There is no appeal from an order of discharge[9] (or even of committal) in a non-summary case; but as the Attorney-General has a right to direct that proceedings be re-opened and forwarded to him in a non-summary case, any petition by a person aggrieved at such a discharge should be forwarded to that officer. An appeal lies from an order of discharge under section 191 of the Procedure Code.[10]

Where proceedings are instituted in the Police Court on a written report by a Police Officer, the aggrieved party, if he is the complainant, has no right of appeal.[11] Nor has the Solicitor-General a right of appeal in a case to which he is not a party, *e.g.*, an excise prosecution.[12]

The person appealing must be dissatisfied with any judgment or final order: thus there are no " interlocutory appeals " in criminal cases. If any party during the course of a trial is dissatisfied with any rulings

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1. Coorey *vs.* Cooray (1903) 7 Tamb. 41.
2. Soysa *vs.* Yasaneris (1885) 7 S.C.C. 105.
3. Attorney-General *vs.* Silva (1914) 17 N.L.R. 193.
4. Ordinance No. 19 of 1930.
5. The Solicitor-General *vs.* Fernando (1915) 1 C.W.R. 207.
6. Fradd *vs.* Brown & Co., Ltd. (1918) 20 N.L.R. 282.
7. King *vs.* Kumarasamy (1916) 3 C.W.R. 184.
8. Fernando *vs.* Pieris (1931) 33 N.L.R. 71.
9. Sawariamma *vs.* Arumugam (1929) 1 C.L.W. 231. Fernando *vs.* Fernando (1932) 1 C.L.W. 403.
10. Guneratne *vs.* Barnardo (1904) 2 Bal. 32.
11. Babi Nona *vs.* Wijeysinghe (1928) 29 N.L.R. 43.
12. Nonis *vs.* Appuhamy 4 Times L.R. 71

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of the Court, he can only get his objections noted on the record together with the order of the Court; but the trial should nevertheless proceed. An appeal can only be taken after the whole case is decided so far as a particular accused is concerned. What is a final order depends upon the circumstances of each case. An order referring the complainant to a civil remedy[1] or to the Village Tribunal,[2] is a final order; though an order that the plaint discloses no offence is not.[3] An order awarding compensation[4] is an appealable order, though there is no appeal from any order as to Crown costs. An appeal lies against an order absolute to abate a nuisance,[5] or against an order of confiscation of any property.[6] The order must be a judgment or final order in any criminal case or matter: thus, where the appellant, a pawn-broker, appealed from an order confiscating a jewel found in his possession, but which was stolen from the complainant by another person, it was held that no appeal lay as the pawn-broker was not a party to the proceedings and it was not a final order so far as he was concerned.[7] There is no appeal from an order made on an application to recover hire under the Vehicles Ordinance, as this order does not arise from a criminal cause or matter.[8]

(II) **Procedure.**

As soon as a petition of appeal is presented, the accused, if he is convicted and sentenced to imprisonment, must be released on bail: the section is imperative. A Magistrate has no discretion. "The Court is bound to make an order for the release on bail of every convicted person who prefers an appeal: habitual criminals are not excluded from the privilege granted by this section."[9] So that, while signing a committal to jail, a Magistrate should mention on the warrant of committal the amount of bail to which the prisoner might be admitted in the event of his preferring an appeal. This bail can be given even before the Superintendent or Jailer of the prison. If the accused is undergoing a sentence of rigorous imprisonment and on appealing is unable to give the required recognisance, he can be detained in custody without hard labour, as on remand, till such time as his appeal is decided. On the conviction being affirmed he will get credit for the term he has already served with hard labour and, if the Supreme Court so directs, may be given a proportionate reduction for the days that he was detained in jail pending the hearing of his appeal. In the case of a sentence of fine, the accused may be allowed time on sufficient security to pay the fine till after his appeal, if any, is decided. And no order regarding confiscation or revesting of property, or destruction or sale of productions can be allowed to take effect till such time as an appeal is heard, or, if there is no appeal, till the appealable time is over. In the case of acquittals when a petition of appeal is filed, the Supreme Court may order that the accused may be arrested and detained in custody.

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1. Alagappa Chetty *vs.* Walker (1885) 7 S.C.C. 18.
2. 16 N.L.R. 57, Silva *vs.* Silva (1912)
3. Baba Singho *vs.* Patabendirala (1886) 7 S.C.C. 201.
4. John Appu *vs.* Kathonis Appu (1905) Lem. 2. Compensation need not exceed twenty-five rupees—in spite of the decision in this case.
5. Forrest *vs.* Leeff (1910) 13 N.L.R. 119.
6. Juse Perera *vs.* Fernando (1912) 6 Weer. 82.
7. Thuriar *vs.* Sinnetamby (191) 3 C.W.R. 9.
8. De Jong *vs.* Kandappa 4 Times L.R. 106.
9. Per Jayawardena, J., i (1923) 25 N.L.R. 173.

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The amount of bail demanded must be reasonable and there must be an entry, on record, of the amount of bail asked and of the fact that an offer to release on bail was made.[1]

The next step is the notice to the respondent. By "respondent" is meant the person in whose favour the judgment or order appealed against is pronounced or made, or adversely to whom the appeal is preferred. This notice is all-important; for the Supreme Court seldom causes notices to issue and appeals are merely listed from time to time. If no notice is issued to the respondent, he might fail to be represented and the appeal might be heard *ex parte*. An order to the prejudice of a respondent cannot be made in appeal in his absence. It has been held that an order acquitting an accused in appeal is not an order to the prejudice of the respondent.[2] In the case of Police plaints, the real complainant should be noticed as well as the local Head of the Police Force. It is not enough to issue a formal notice on the particular constable in whose name the plaint happens to be filed. In Excise cases, the local Assistant Superintendent may be informed by letter and a formal notice issued on the prosecuting Inspector. Similarly, in the case of plaints by revenue officers, the Government Agent may be informed. A Magistrate who wants to put forward his view-point before the Supreme Court at the hearing of an appeal may address himself to the Attorney-General.

After these formalities are complied with, the petition of appeal must be forwarded to the Supreme Court together with the record. Before so forwarding, a Magistrate should see that the record is in perfect order, *e.g.*, that the judgment sheet is duly filled up or that the various forms are properly signed and dated. But "the practice of Magistrates of appending notes to their judgments after a petition of appeal has been filed is irregular. An appellant is entitled, in his petition of appeal, to the last word, and may criticise the reasons given by a Judge for his judgment. A Judge may not reply by reiterating or expanding or supplementing the reasons for his decree."[3] If a Magistrate has anything more to say by way of explanation or comment on the facts mentioned in the petition of appeal, *e.g.*, where it contains personal remarks or criticism tantamount to a contempt of Court, he can always do so in his letter forwarding the petition of appeal to the Registrar of the Supreme Court.

No Magistrate can refuse to forward a petition of appeal presented to his Court.[4] In *Fernando vs. Costa*,[5] Bertram, C.J., wrote: "I have very grave doubts as to whether a Police Magistrate has any right to interpose his own opinion as to the admissibility of the appeal between the appellant and this Court," and the same Judge, in an application made on behalf of the complainant to cause the Magistrate of Hambantota to forward the petition of appeal preferred against his order, while granting the application, wrote: "There is no provision in chapter XXX entitling a Magistrate to reject a petition of appeal. It is for the Court of Appeal to decide whether an appeal lies to it or not."[6]

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1. The Queen *vs.* Baron (1896) 2 N.L.R. 192.
2. Fernando *vs.* De Jong (1932) 10 Times L.R. 13.
3. Telasinha *vs.* Gabriel (1893) 3 C.L.R. 43.
4. The King *vs.* Abeyratne (1929) 31 N.L.R. 224 7 Times L.R. 54.
5. (1918) 5 C.W.R. 224.
6. (1920) 22 N.L.R. 187.

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Where a record was lost before its transmission in appeal the Supreme Court on an application by the Magistrate quashed all previous proceedings with liberty to the complainant to bring a fresh charge.[1]

(III) Order in Appeal.

In appeal, the Supreme Court may make any order it thinks fit and may even award costs.[2] It may enhance or reduce the sentence ; it may convert an acquittal into a conviction or *vice versa* ; it may order a new trial ; it may order even a committal to a higher Court ; it may alter or reverse any order made by the Magistrate ; and lastly, it may order the Magistrate to record further evidence and remit it to the Supreme Court with his comments. Whatever the order may be, a Magistrate is bound to give such directions as are conformable to the order certified by the Supreme Court and to take such measures as are necessary to give effect to the decision of that Court. A Magistrate has no power to defer the date of the commencement of the sentence awarded in appeal.[3] Where a re-trial is ordered, the Magistrate must either try the case himself, or, if it is so directed, arrange for its trial by an Additional Magistrate—this re-trial must take place *ab initio*.[4]

If an accused has paid the fine and his conviction is thereafter set aside, he is entitled to a refund of the fine already paid. In the event of an appeal being decided in whole or in part in favour of the appellant, he is also entitled to a refund of the stamp fees. For these refunds, proper application should be made to the lower Court where due steps will be taken to get the monies refunded.

If there are several accused in a case, each of them must file a separate petition of appeal.

(IV) Revision.

Besides the ordinary appeal, the Supreme Court has what are known its powers of revision. The Supreme Court may purport to revise any and every case if it is brought to its notice that it is a case worth revising. It may be so brought to its notice by an affidavit from the aggrieved party : this affidavit should be stamped.[5] While acting in revision the Supreme Court may make any order that it can make in the case of ordinary appeals ; but no acquittal can be converted into a conviction in revision, nor can any order prejudicial to the accused, *e.g.*, an enhancement of the sentence,[6] be made unless the accused has had an opportunity of being heard, either personally or by Advocate, in his own defence. An order made by the Supreme Court in revision to the prejudice of the accused without notice to him is ineffective in law.[7] Saving this clause, no party has a right to be heard before the Supreme Court while it is exercising its powers of revision.

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1. (1929) 7 Times L.R. 43.

2. Macdonell, C.J., in Nesadurai *vs.* Tiagarajah (1932) 10 Times L.R. 107 states that "the fact that in the past little or no use has been made of section 352 Cr. Pr. Code is no possible argument why use should not be made of it in the future."

3. The King *vs.* Perera and another (1926) 4 Times L.R. 143.

4. Murgesu *vs.* Charles (1922) 1 Times L.R. 66.

5. Arumugam *vs.* Vaithialingam 2 A.C.R. 79.

6. Corea *vs.* Grigoris Appu (1908) 11 N.L.R. 331.

7. Rex *vs.* Marthelis Perera (1925) 27 N.L.R. 163.

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The Supreme Court does not usually exercise its powers of revision when it is open to the appellant to have appealed,[1] save in exceptional circumstances,[2] but this would not debar the Supreme Court from dealing with the case on its merits if it is clearly of opinion that the conviction is bad.[3] And the Supreme Court will only deal with a matter in revision if there is anything improper or illegal in the order complained of, or if the proceedings in the lower Court are irregular.[4] Maartensz, A.J. wrote in a recent case: "I cannot set aside (in revision) the conviction only because I disagree with the view taken by the learned Magistrate. There is in this case evidence to support the conviction, and although I may have taken a different view of the evidence, I cannot interfere in revision."[5] When a matter has been heard and disposed of in appeal, it cannot be dealt with in revision.[6] Nor is an accused person entitled to have a conviction revised on the ground that he had neglected to bring forward a defence which would have been a complete answer to the charge.[7]

The powers of the Supreme Court in revision are very far-reaching—thus, where a few out of several accused appeal, the Supreme Court may consider and review the case as against all[8] and even set aside the convictions of all, even though some of the accused not having appealed have completed their terms in jail. Or, the Supreme Court may review cases where ordinarily no appeal would lie. The power of revision extends to all criminal cases—"extends even as a matter of law to cases in which the Attorney-General has refused to sanction an appeal from an acquittal, provided proper materials have been laid before the Court to call for its exercise."[9] The Supreme Court has inherent power even to alter its own judgment entered per incuriam.[10]

Along with the powers of revision must be mentioned the power of the Supreme Court to call for and examine the record of any case at any time, whether already tried or pending, for the purpose of satisfying itself as to the regularity of the proceedings or the propriety of the sentence.

(V) Case Stated.

Whenever any person has been convicted and sentenced to any penalty or punishment, the Magistrate may reserve for the consideration of the Supreme Court any question of law arising in the proceedings.[11] This is called 'stating a case.' In order to enable a Magistrate to state a case, the accused must be convicted and sentenced; if the accused is acquitted no case can be stated; nor can a case be stated in quasi-civil matters where there is no conviction, *e.g.*, where a Municipal Magistrate decides questions as to the eligibility of electors or voters for a Municipal Council.

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1. Bogaars *vs.* Karunaratne (1891) 1 C.L.R. 80.
2. Inspector of Police, Avisawella *vs.* Fernando (1929) 6 Times L.R. 142.
3. Fernando *vs.* Selestina (1914) 1 C.A.R. 13.
4. (1913) 1 Wije. 38.
5. Jayasuriya *vs.* Wijeywardena (1925) P.C. Colombo, 1242, reported in the "Times of Ceylon" of 29th September, 1925.
6. Rex *vs.* Daniel 6 Tam. 116.
7. De Saram *vs.* Waas (1930) 32 N.L.R. 109 8 Times L.R. 34.
8. Soysa *vs.* Punchirala (1885) 1 S.C.R. 199.
9. The King *vs.* Noordeen (1910) 13 N.L.R. 115.
10. The King *vs.* Baron Silva 4 Times L.R. 3.
11. Cf. Weraratna *vs.* Ediris (1900) 1 Br. 178.

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The statement of case should be made in the prescribed form given at the end of the Criminal Procedure Code. It must contain a summary of facts and the question of law involved. Before it is set down for argument, the Registrar of the Supreme Court will cause notices to issue to the parties and to the Magistrate.[1]

During the pendancy of the special case in appeal, the accused may be remanded or admitted to bail.

(VI) **Mandamus.**

Where a Magistrate refuses to issue process, a mandamus lies to compel him to do so[2] ; but in such a case, there is no appeal except at the instance or with the sanction of the Attorney-General. Mandamus and appeal are co-extensive remedies and apply to two different classes of cases. Mandamus may issue where a Magistrate has refused to exercise jurisdiction ; but where he has exercised jurisdiction and decided that he ought not to grant summons, the proper remedy is an appeal with the sanction of the Attorney-General.[3] Thus, where a Police Magistrate had entertained a plaint, recorded the evidence of the complainant, inspected the scene of the alleged offence and had then made order declining to issue process, it was held that in the circumstances, though an appeal lay from the order, a mandamus could not issue to compel the Magistrate to issue process.[4] Again, where a Magistrate, after hearing complainant, declined to hear any further witnesses, and, holding from the facts disclosed by the complainant that no offence had been committed by the person against whom process was sought, referred the complainant to his civil remedy, it was held that the remedy by mandamus only accrued where a Magistrate had actually refused to exercise jurisdiction ; in this case, it could not be said that he had refused to do so, inasmuch as he had actually heard the complainant and decided the case upon his evidence.[5] A writ of prohibition does not lie against a Magistrate from holding a non-summary inquiry.[6]

(VII) **Habeas Corpus.**

The remedy by a writ of Habeas Corpus is available in all cases where any person has been wrongfully confined or wrongfully detained. For obtaining this writ, application should be made by ' petition and affidavit ' to the Supreme Court. The preliminary inquiry is generally entrusted to the local Police Court whose duty it is to summon all the parties and their witnesses, to record their evidence and to forward the proceedings to the Supreme Court through its Registrar, with his recommendation, for a proper order in the matter.

This remedy, in practice, is mostly sought for in maintenance cases where one of the spouses demands custody of his or her children from the other. A Magistrate cannot assume the functions of the Supreme Court by ordering a transfer of custody.[7] A Magistrate has, however, the

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1. Kalugammana *vs.* Baba Singho (1900) 4 N.L.R. 221.
2. Baba Singho *vs.* Wijesuriya (1886) 7 S.C.C. 201.
3. Norman *vs.* Perera (1900) 4 N.L.R. 85.
4. Wilson *vs.* Gault. (1897) 1 Tamb. 13.
5. Ratnaweera *vs.* Gunasekara (1918) 5 C.W.R. 225.
6. Emmanuel *vs.* Fernando (1932) 2 C.L.W. 33.
7. Josline Nona *vs.* Silva (1924) 26 N.L.R. 288.

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power under section 438 of the Criminal Procedure Code, to compel restoration of abducted females or female children,[1] if it is made to appear to him by evidence on oath that they have been detained for any unlawful purpose ; and he may, where necessary, issue search warrants for their production before him.

SPECIMEN FORM

for

Petition of Appeal.

(For a conviction).

In the Supreme Court of the Island of Ceylon.

P. C. Colombo
Case No...........

SUDU BANDA of III Division, Maradana,
Complainant—Respondent.

vs.

KALU BANDA of First Cross Street, Pettah,
Accused—Appellant.

On this........day of.......................

To

The Honourable the Chief Justice and other Justices of the said Court.

The Petition of Appeal of the above-named accused—appellant showeth as follows :—

1. Your petitioner was charged in the Police Court of Colombo under No....... with [*Here describe the charge shortly.*]

2. Your petitioner was tried and convicted on............ and sentenced [*Here state the punishment*] and the following judgment was passed thereon.

[*Here state, shortly if possible, the substance of the judgment.*]

3 Your petitioner is dissatisfied with the said judgment and sentence on the following among other grounds that may be urged by counsel at the hearing of this appeal.

(*a*) The said judgment is contrary to law and against the weight of evidence adduced in the case.

(*b*), (*c*), etc. [*Here state the grounds of appeal, both of law and facts, on which the petitioner relies, numbering them consecutively.*]

Wherefore, your petitioner prays that the said judgment and sentence be reversed and your petitioner acquitted and such other and further relief be granted as to your Lordships' Court may seem meet.

(Signed) KALU BANDA,
Accused—Appellant.

Drawn by
A.B.C.
Proctor for Appellant.

Note.—If the appeal is on a point of law only, the following certificate by a Proctor or Advocate has to be added :

" I certify that the matter of law stated in the petition of appeal is a fit question for adjudication by the Supreme Court.

(Signed) A.B C.
(*Proctor, S. C., or Advocate*).

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1. See also Ordinance No. 3 of 1939.

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CHAPTER XIII.

THEFTS.

In England, till 1916, the offence of theft was known by the name of larceny; but this offence had received no definition at the hands of the Legislature and was therefore variable; the numerous decisions of the English Courts and the various ways in which jurists expounded their views on the subject helped in the confusion. Happily, an Act[1] was passed in 1916 which defined the offence of stealing as follows:—

"A person 'steals' when he, without the consent of the owner, fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen, with intent at the time of such taking, permanently to deprive the owner thereof."

This definition differs in very many particulars from the definition given in the Penal Codes of India and Ceylon. It will not be worth our while to discuss these points of difference. Besides, as stated by the late Chief Justice, "despite the refined expositions which one may discover in text-books on the subject, I do not think that there is any substantial difference between the English law of larceny and the Ceylon law of theft."[2]

Under our Code, whoever (i) intending to take dishonestly, (ii) any movable property, (iii) out of the possession of any person, (iv) without that person's consent, (v) moves that property in order to such taking, is said to commit theft. There are thus five elements in our definition of theft, and these we must consider in detail.

(I) Intention.

The intention must be to take dishonestly: the word "dishonestly" is defined by our Code[3] as follows: "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Thus, there must be an intention to cause wrongful loss to another. A person who gives his watch to a watchmaker for repairs does not commit theft by snatching it from the latter's hands, as there is no wrongful loss to the watchmaker. But if the watchmaker had kept the watch lawfully as security for his bill for repairs, then the snatching of the watch would be tantamount to theft, as there would be a loss to the watchmaker by the snatching. Thus, we come to the paradoxical proposition, *viz.*, that a man may commit theft by stealing his own property. He can, however, do so only in those cases "where the bail-

1. 6 and 7, George V c. 50.
2. Per Bertram, C.J., Gunasekara *vs.* Solomon *et al.*
3. Section 22 of the Penal Code.

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ment entitles the bailee to exclude the owner from possession,"[1] and where there is an intention to defraud. Thus, a person who pawns his watch with a pawn-broker but takes it out of the latter's possession without redeeming the same commits theft.

"Where the owner is kept out of possession temporarily, not with any intention of depriving him from the benefit arising from the possession but only with the object of causing him trouble in the sense of moral anxiety and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense."[2] Where the Magistrate was of opinion that there could be no doubt that the accused were not bent so much on stealing the bull and half-cart as on causing annoyance or injury to the complainant, it was held that this was an act of trespass of a malicious nature done with the object of causing annoyance and could not be considered as theft.[3] Where an accused charged with murder took a boat from a place where it was secured by the owner in order to escape pursuit and after going some distance abandoned it, it was held that as he had no intention of converting it to his own use or of causing wrongful loss to the owner, he could not be convicted of theft.[4] Where the accused refused to give over to the Police Vidane or to the Excise Inspector a bicycle left at his house by two decoys who had been sent there by the Excise Inspector and whom he had met with a volley of stones, the Supreme Court held that the accused had done what any prudent man would have done and was justified in not handing over the bicycle to anyone but the rightful owner and had thus no intention of keeping the latter out of possession even temporarily.[5]

It is not necessary, to constitute the offence of theft, that the accused should have the intention of permanently depriving the owner of his property.[6] Thus, where two persons indicted for theft took a bull belonging to the complainant and used it in a cart belonging to the first accused to go to another village, it was held that the accused committed theft, even though they intended to return the bull and had no intention of depriving the owner of it permanently.[7]

There must, therefore, be dishonest intention or *animus furandi*. Where the accused who was the complainant's servant kept his Savings Bank book with his master for safe-keeping and the latter kept it in an almirah and the servant took it away without his master's knowledge or permission, it was held that there was no dishonest intention.[8] Again, where the accused had entrusted a cloth to a dhoby who refused to give it up and the accused thereupon seized some clothes which the dhoby was drying and carried them off in the hope of thereby compelling the dhoby to restore his own cloth, it was held that the accused could not be convicted of theft under the circumstances.[9] An accused was charged with the theft of certain jewels and a sum of Rs. 17/- ; the

1. William's Personal Property Part I, Chap. 1, section 2.
2. Nabi Baksh *vs.* Queen Empress I.L.R. Calcutta XXV 416.
3. Gunasekara *vs.* Solomon *et al* (1923) 25 N.L.R. 474, *supra*.
4. Adu Shikdar *vs.* Emp. I.L.R. 11 Calcutta 635.
5. Thambirasa *vs.* Maniphan (1928) 5 Times L.R. 133.
6. Ponnusamy *vs.* Muttu Velu (1900) 1 Br. 57.
7. The King *vs.* Leon *et al* (1923) 25 N.L.R. but see the Queen *vs.* Kanagaseby (1892) 2 C.L.R. 14.
8. Pieris *vs.* Appu (1905) Lem. 6.
9. Sinnan Nakundy Sultan (1880) 3 S.C.C. 131.

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evidence showed that the property had been taken from the dead body of a woman who at the time of her death was the debtor of the accused on a promissory note; the accused had taken the jewels in the presence of the neighbours, informing them that he was taking them as security till his debt was paid: it was held that the evidence disclosed an absence of *animus furandi*, and that the accused was entitled to an acquittal.[1] So that where there is a mistaken idea of a right to enforce payment, the act would hardly amount to theft. Where the accused, who were renters of a grazing ground, removed some goats belonging to the complainant (from whom money was due for animals tied in the pasture ground) in the mistaken belief that they had a right to do so to enforce payment, it was held that the accused were not guilty of theft.[2]

Whether theft is committed when property is taken under a claim of right is not quite clear. There could be no doubt that if the accused is under the *bona fide* belief[3] that he has a right to the property or that the property is his and under that belief purports to take it, he cannot commit theft: nor can others who act under his orders or at his instigation. Thus, where the ownership of land is in dispute, the disputing owner commits no theft by taking the produce. Where the accused plucked coconut and jak fruits at the instance of a Notary who claimed the land in dispute under deeds dating from 1884, Schneider, A.J., held: "I am inclined to take the view that the accused cannot be convicted of theft because it cannot be said that they intended by the act of plucking these nuts to cause wrongful gain to the Notary or wrongful loss to the estate. It may be that in the case of the first accused he was aware that if the Notary took the nuts, the estate would suffer the loss of the nuts; but I do not think the circumstances under which he committed the act justifies me in saying that he intended to cause wrongful loss to the estate in plucking those nuts." In setting aside the conviction the learned Judge was of opinion "that people should not be allowed to take the law into their own hands and invade the property of third parties, although they may have a good claim to such property," and ordered the accused to be bound over for six months under section 81 of the Criminal Procedure Code.[4] Probably the learned Judge had in mind the dictum of the Bombay High Court: "The law is that against even a colour of right a person aggrieved shall not take the law into his own hands."[5] In the case reviewed by them the prisoner was indebted to the prosecutor and, in his absence, the prisoner's wife handed over some of the tools to the prosecutor in part payment of the debt. When the prisoner learnt what had been done, he at once went to the prosecutor's house and, in his absence and against the wish of his wife, took back all the tools. He was charged with theft and convicted. Probably this decision goes to the other extreme, for, as pointed out by Starling,[6] it is difficult to see how the taking was dishonest as the prisoner had repudiated the act of his wife and claimed the tools as still being his own. In any case where the *bona fides* of the claim disappear, the claimant will certainly be guilty of theft.[7] This is especially so if the

1. Kadiravelu *vs.* Kader Meedin (1882) Wendt 103.
2. Ponnu *vs.* Sinnatamby *et al* (1922) 24 N.L.R. 248.
3. Saminathanpulle *vs.* Cornelis Appu (1892) 2 C.L.R. 22.
4. Broome *vs.* Carolis *et al* (1916) 19 N.L.R. 276.
5. Cape *vs.* Scott L.R. 9. Q.B. 277.
6. Starling's Indian Criminal Law, p. 451.
7. Wijeyasinghe *vs.* Saram (1908) 2 Leader 40.

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claimant knows that he has been legally divested of his pretended rights. Thus, a claimant whose claim has been dismissed by a proper Court of Law, nevertheless persisting in taking the produce of the land in respect of which his claim was dismissed, commits theft. It is, therefore, theft for a debtor's sons to cut and remove standing crops which have been sequestered and taken charge of by the writ-holder.[1] Where the accused was charged with the theft of a ten-rupee note and pleaded that he took back the note in the *bona fide* belief that it was his property which he had by mistake given to the complainant, it was held that if the property was in the possession of the prosecutor in such a way that he had a right to hold it against the prisoner, that is, that the prisoner could not get it without the consent of the prosecutor, then it would be theft if the prisoner dishonestly possessed himself of it with the intention of appropriating it.[2]

If, again, a man sets up a claim to a property or disputes title to a land and removes produce from the possession of the complainant with the knowledge that whatever ultimate right he might be declared by a Court of Law to have in the land in question, he has no immediate right to the particular produce which he appropriates, he commits theft.[3] This is a very subtle distinction but essential: for cases come up where the accused who have once been referred to their civil remedies do not seek the intervention of the proper Courts, but persist in taking the law into their own hands and in establishing their title by themselves; in such cases, their *bona fides* becomes *pro tanto* lessened and any furtive act on their part could be, *caeteris paribus*, regarded as theft.

To repeat, then, there must be an intention of causing wrongful gain to one person or wrongful loss to another. Thus, if a licensed cattle-seizer unties a bull from the complainant's garden and takes it to the Police Station alleging that he has found it straying on the road, he commits theft, as the removal of the bull for the purpose of causing the owner to pay something which he was not legally bound to pay constitutes wrongful loss to the owner.[4] The dishonest intention in most cases is apparent from the act itself. The criminal act is itself sufficient *prima facie* proof of the *mens rea*: for every sane adult is presumed to intend the natural consequences of his conduct.[5] So that it is not necessary to lead independent evidence of the dishonest intention or of facts constituting the same. Thus, where a thief steals a handkerchief from another's pocket, it is not necessary to shew that he intended thereby to cause wrongful loss: his act bespeaks his intention. But there are cases where the accused pleads either colour of a right or a mistaken apprehension of the law or facts: in these cases, evidence would be necessary to disprove the *bona fides* of the accused. As we have seen above theft is not committed when property is taken under colour of a right.[6] Where the accused puts forward a claim to the property stolen or where he is in doubt as to the rightful claimant (as between the complainant and himself) he should lead evidence to support his statements. A mere plea that the property is his is not sufficient unless substantiated by other evidence.

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1. Karuppan Chetty *vs.* Chinnappah (1898) 4 Tam. 12.
2. Jansz *vs.* Cader (1907) 3 Bal. 169.
3. Wijeyasinghe *vs.* De Saram (1908) 2 Weer. 10.
4. Abdul *vs.* Dias (1910) 14 N.L.R. 23.
5. Kenny's Criminal Law, p. 41.
6. Emp. *vs.* Nagappu I.L.R. 15 Bombay 344.

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The intention that is apparent or which is presumed from the facts becomes modified, of course, according to circumstances. Thus the fact that the accused was drunk may be taken into consideration in deciding the question whether he had the intention necessary to constitute the crime.[1] Similarly insanity, extreme youth, duress, etc., would be determining circumstances.

There is a class of cases from which the law has, in a sense, taken away the element of *animus furandi* : for the illustration under section 114 of the Evidence Ordinance says : The Court may presume that a man who is in possession of stolen property soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for their being in his possession. This aspect of the question we shall examine in another chapter.

(II) Property.

The thing stolen must be movable property. The words " movable property " are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.[2] A thing so long as it is attached to the earth, not being movable property, is not the subject of theft, but it becomes capable of being stolen as soon as it is severed from the earth. Under the Larceny Act of England, however, " anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty unless after severance he has abandoned possession thereof."

Thus, a bungalow being immovable property cannot be stolen—though there may be a theft of its materials[3] ; nor can a coconut tree be stolen, but if it is severed with the intention of dishonestly removing it, then the very act which effects the severance makes the tree to move and thus constitutes theft. So that, though the earth itself is immovable, there would be instances when even the carting of earth would be punishable,[4] for it becomes severed from the mother-earth by the carting. So stones, sand, water, even gas and electricity could be subjects of theft. So long as a thing has value and is " ownable " it can be stolen. But a human corpse, unlike a skeleton, has no value and is not ownable and cannot be the subject of larceny in England[5] ; and, even in India, the same rule was applied when the accused was charged with theft of a human body stolen by him in order to obliterate evidence of assault.[6] The subject-matter of theft must have some value, howsoever little. It may be valuable to the owner only, though valueless to others. If it has no value, the maxim " *de minimis non curat lex* " applies. The legislators intended to exempt such worthless things from the operation of this section lest the law be " abused for the purpose of punishing those venial violations of the right of property which the commonsense of mankind readily distinguishes from crimes such as the act of a traveller who tears a twig from a hedge, of a boy who takes stones from another's

1. Andris *vs.* Don Charles (1913) 17 N.L.R. 95.
2. Section 20 C.P.C.
3. Nawtara Singh (1904) 10 Burma L.R. 356.
4. Emp. *vs.* Shivram I.L.R. 15 Bomb. 702.
5. Hayne's case 12 Coke's Reports 113.
6. Ramadhin I.L.R. 25 Allahabad 129. The accused could have been charged for causing disappearance of evidence of an offence committed, under section 198.

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ground to throw at birds, of a servant who dips his pen in his master's ink."[1]

(III) Possession.

The thing stolen must be taken out of the possession of some person. It must be noted that the definition does not say "belonging to some person," but "out of his possession." A distinction is, therefore, drawn between ownership and possession. A thing to be stolen need not necessarily be owned by the person from whom it is stolen. It is enough if it was in his possession. It is thus that a man, as we have seen, may sometimes be charged with the theft of his own property, for, if he has parted with it, possession changes and circumstances may arise by which this shifting of possession may give the actual possessor temporary claim over the property, thus rendering the virtual owner a trespasser in respect of the same. What is or is not possession is difficult to define. This difficulty was realized even by the draftsmen of our Code who wrote: "We believe it to be impossible to mark with precision by any words the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists and about which the language of the lawyers and of the multitude would be the same. It will hardly be doubted that a gentleman's watch, for example, lying on a table in his room is in his possession though it is not in his hand and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch a gentleman lost a year ago on a journey and which he has never heard of since is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession." Hence arises the necessity for the presiding Judge or Magistrate to take into consideration all the facts of the case and decide whether they constitute possession or not. Possession here implies legal custody or control which a person may lawfully exercise over property.[2] Even if possession is wholly illegal, *e.g.*, that of a thief, it would be theft to steal from such a possessor, except perhaps by the real owner or lawful claimant.

As property to be stolen must be taken out of somebody's possession, it follows that theft cannot be committed of property that cannot be possessed or is in nobody's possession. Thus, it cannot be committed in respect of wild animals *ferae naturae* and straying at large; nor of fish[3] in a running stream, unless a power of control has been created over them either *per industriam* by being killed, caught, or tamed, or *propter impotentiam* by being too young to be able to escape. Nor can theft be committed in respect of things of which the complainant has given up both possession and property. So that it is no theft to steal a bull which has been set free at the time of funeral ceremonies as is the custom among some Hindus.[4] The thing to consider is whether possession has been permanently given up or only temporarily: for there may be an intention of retaking as in the case of wrecks. Where bulls stray and cannot be found the owner gives them up as lost, but does not give up ownership though he parts with possession: in such cases the guilty receiver would be at least guilty of dishonest misappropriation if not of theft.[5] It

1. Note N. Macaulay's Indian Penal Code : Indian Law Commissioner's Report.
2. Dr. Gour's Indian Penal Code, section 3743.
3. Reg. *vs.* Revu Pothadu I.L.R. 5 Madras 390.
4. Emp. *vs.* Bandhu, I.L.R. 8 Allahabad 51.
5. Emp. *vs.* Nga Shewe Fan, 38 Indian cases, Burma 332.

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follows, therefore, that things which have been abandoned with no intention of repossessing cannot be the subject of theft. It is not necessary that the subject should be, in fact, a derelict : it is sufficient if the person charged *bona fide* believed it to be so. Thus, when a lady asked her servant boy to bring for ironing baby linen some coke which is usually found scattered about the railway yard and which, she genuinely believed, was thrown away entirely as useless, De Sampayo, J.,[1] held that she could not be convicted of an abetment of theft inasmuch as abandoned things may be taken away by any one without committing an offence. Koch, A.J., has recently held that a wreath placed on a war memorial is *res nullius* and cannot be the subject of theft.

The possession may be that of the complainant or of his wife or of any member of his family or of his clerk or servant ; Government may possess either by itself or by its servants ; but as joint owners of a property possess it both jointly and severally, the removal by one from the other would not be theft—unless it is a dishonest removal.[2] A husband, who in anger snatches a " thali " from his wife, is not guilty of theft.[3] A husband or a wife is not even a competent witness against each other in a case of theft even if it be theft of their own private property, but an amending Ordinance is now being introduced by which he or she would be competent in such cases. Where a woman runs away with another person with her husband's property and the adulterer knowingly carries it away or helps in the carrying, the adulterer would be guilty of theft,[4] though the woman is protected. A person who removes coral from the bed of a public stream commits theft, as the bed of such a stream is the property of the Crown and the coral is therefore in the possession of the Crown.[5]

(IV) Consent.

If property has been taken with the owner's consent, it certainly cannot be theft. But this consent must be voluntarily given. If consent has afterwards been withdrawn, the original taking will not be theftuous. If consent has been obtained by force or duress, the crime would be a more serious one of robbery : thus, where a thief on a threat of strangling a person removes his purse, he commits robbery and not merely theft. Again, where consent has been obtained by deception, the offence would probably be one of cheating, or as it is called in England, " larceny by a trick," or even of misappropriation. Thus, where the accused borrowed a gun and afterwards ran way with it, it was held that he was not guilty of theft but of dishonest misappropriation.[6] If consent is given by mistake, it will depend upon the circumstances of each case whether the facts amount to theft or not. Thus, in the famous English case[7] where a Post Office clerk paid out excess money to a savings bank depositor after consulting the wrong letter of advice and the accused took the money away knowing very well that he was not entitled to it, he was held by eleven judges against four to be guilty of larceny.

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1. Gnanapragasam *vs.* Bulner (1916) 19 N.L.R. 190.
2. Weeracutty *vs.* Chiyamann, I.L.R. 7 Madras 557.
3. Suse *vs.* Suse (1900) 2 Tam. 27.
4. R. *vs.* Tolfree 1 Moody's Crown cases 243.
5. Wanigatunga *vs.* Sinno Appu *et al* (1925) 27 N.L.R. 50.
6. Stickney *vs.* Sinnatamby (1886) 5 Tam. 112.
7. Reg. *vs.* Middleton L.R. 2 Crown Cases Reserved 38.

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The consent may be implied or expressed and may be given either by the person himself or by someone on his behalf. Thus, where a person takes a book from another's library without his express consent with the intention of reading and returning it, he commits no theft.[1] And the consent may not be for the mere purpose of enabling the thief to steal or for setting a trap against him. Thus, where the accused had approached the storekeeper of an estate and asked him to join with him in taking away rubber from the estate, suggesting that they should share the proceeds ; and the storekeeper reported the matter to the Superintendent who authorized him to let the accused have the rubber, and directed him to cause the accused to be followed to ascertain to whom he would sell, it was held by Ennis, J., that although the Superintendent had in fact consented to the removal of the rubber, the accused was guilty of theft, for the intention of the accused seemed to be the predominant feature, rather than the consent of the person from whom the property was taken.[2]

(V) Removal.

The property must be moved in order to be taken away. If it is not moved it is no theft. Simply touching a thing even with a dishonest intention does not constitute theft though it may amount to an attempt to commit theft. Even the smallest moving would suffice. Thus, partly drawing a book from the pocket of another and letting it drop back into the pocket when detected would be sufficient asportation.[3] The plucking of coconuts and leaving them behind on the same estate on being found out would still constitute theft. It is not necessary that the thief should remove or take the property away.

(VI) Procedure.

Thefts are of various kinds and punishable accordingly. Ordinarily, a Police Court can only impose any lawful sentence which it has powers to impose up to the maximum. Where the value of the thing stolen is over Rs. 100/-, the offence is a non-summary one ; and where in the committing of theft preparations have been made for the causing of death or hurt or restraint or the fear of same, *e.g.*, where a thief provides himself with a loaded pistol for the purpose of using it if necessary, the offence falls under section 371 and is triable by the Supreme Court alone. Section 368 provides for whipping in case of thefts of cattle or praedial products ; but a Magistrate has no power to inflict whipping or lashes for theft of a bull[4] except where the offender is under sixteen years of age. In prosecutions, however, for thefts of cattle or praedial products, both this section and the preceding penal section should always be mentioned. It is not enough to say that the accused has committed an offence punishable under section 368 only, for this section gives the additional punishment and not the substantial one.

Section 369 deals with thefts from a tent, vessel, or building, used as a human dwelling or for the custody of property : the idea is that the property is under the protection of the house as distinct from the protec-

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1. Illustration (m) section 366 C.P.C.

2. Packeer Ally *vs.* Saverimuttu (1916) 2 C.W.R. 216. In England, this decision would be challenged : for, if the owner desires that a thief should remove his goods or employ some one to suggest to the thief the perpetration of thefts, his action would constitute a sufficient consent to render the taking no larceny.

3. Reg. *vs.* Thomson 1 Moody's Crown cases 78.

4. Gunewardena *vs.* Punchi Rala *et al* (1921) 22 N.L.R. 411.

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tion of the person. The building may be an ordinary cadjan hut or even a cattle-shed : in order to be a building it must have a roof : thus, the top of a house is not a building nor is an enclosure.

Section 370 deals with thefts by a servant or clerk. The position of clerk or servant implies control.[1] An agent, therefore, is not a clerk or servant. But a person employed temporarily or on a particular occasion as a clerk or servant is nevertheless a clerk or servant.[2]

The maximum punishment for the last two offences is seven years' imprisonment, but they are still triable by a Magistrate if the value of the property stolen does not exceed Rs. 100/-. The maximum punishment for simple theft is three years.

All thefts are crimes so that the theft of even a hen valued at seventy-five cents by a "registered criminal" would make the offence a non-summary one.

Where theft is proved and the accused is committed, a Magistrate may order that the property stolen be returned to its rightful owner[3] ; and, if the property is not forthcoming, he may order that a part or the whole of the fine imposed, if at all, be paid over to the complainant. Where an accused is acquitted or discharged, the property should be returned to him if he claims it ; if he does not claim it and if the complainant claims it, the property should be returned to the claimant : the Court cannot make an order for confiscation thereof.[4]

Under section 451 of the Penal Code, any reputed thief who loiters or lurks about any public place with an intention of committing theft or any other unlawful act is liable to imprisonment for three months or a fine of Rs. 50/- or both. The accused must have the reputation of being a thief and the intention of committing any unlawful act.

(VII) Special Thefts.

The commonest kind of theft in Ceylon is theft of cattle. It is as easy to concoct as difficult to prove. If the evidence led by the complainant is of what the late Chief Justice called the "stereo-typed" variety, *e.g.*, where a witness while on his way to the Vedarala's, or when going out to buy some Jaffna cigars, or while returning from the temple, sees the removal, the probabilities are against the prosecution. For, in the ordinary course of human conduct one does not expect a thief to steal so as to be seen by others ; and if perchance he is accosted and identified, he would rather leave the animal behind and "bolt for his life" than be seen by others and "face the music." False cases of cattle theft when fully analysed will reveal some ill-feeling, either proximate or remote, which has been the foundation for the charge. This ill-feeling may not necessarily be between the complainant and the accused. So long as it subsists between the two factions, it is enough. It is immaterial to either as to who becomes the scapegoat. Not that every case of cattle-theft is false. Indeed there is actually more theft of cattle in the Island than of anything else[5] ; but a true case like a true coin could readily be

1. Per Cockburn, C.J., in Reg. *vs.* May, Law Journal Reports, Magistrate's cases 81.
2. Explanation to section 25 C.P.C.
3. Silva *vs.* Hamidu (1918) 20 N.L.R. 414 and William *vs.* Silva (1921) 22 N.L.R. 403.
4. Gomez *vs.* Mutulingam *et al* (1926) 4 Times L.R. 101.
5. "Cattle stealing in Ceylon has always been a common form of crime owing to the number of cattle, the similarity in appearance, and the unconfined manner in which they graze at large, all of which help to make theft simple and detection difficult." I. G. Police's Administration Report, 1925. Cattle stealing is, however, steadily falling off. Whereas there were 1,325 cases in 1919—there were but 810 in 1922 and but 472 in 1924. It has again increased recently. The respective figures for 1929, 1930, 1931 and 1932 are 479, 670, 854 and 847.

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distinguished from a false one. And even where a false case has been instituted against a particular person, it does not follow that no theft of cattle has ever taken place. The complainant's cow or bull may have been stolen ; but the prisoner at the bar is probably not the person who stole it.

A person who is charged with theft of a cow or a bull cannot be charged at the same time with possession of beef which he is unable to satisfactorily account for under the Butchers' Ordinance, as there would be nothing to connect the beef with the stolen cow or bull.[1]

With regard to thefts of coconuts which are not infrequent, the only point to remember is that coconuts cannot be identified, and even though the complainant may be prepared to swear that the nuts are his, this evidence would not preclude the possibility of other similar nuts being found in Ceylon. So that the coconut thief must be actually caught in the act, or there must be strong evidence of reliable witnesses who have seen him plucking or running away. All thefts of coconuts from estates which are over five acres in extent may be prosecuted in a Police Court, even though the estates are outside the limits of a Local Board and even though the value of the stolen nuts is under twenty rupees.

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1. Keerala *vs.* Appuhamy (1919) 6 C.W.R. 338.

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CHAPTER XIV.

OTHER KINDRED OFFENCES.

(I) Extortion.

"Whoever intentionally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion."

"Injury" denotes any harm whatever illegally caused to any person in body, mind, reputation, or property.[1] The essense of this offence is intentional intimidation by threat of an illegal harm and consequent dishonest inducement to deliver property. There must be evidence that the accused put another in reasonable fear and that this other, while under the influence of fear which deprived him for the time being of his own will, was induced thereby to part with his own property.[2] If there is no threat or intimidation, there could be no extortion; thus, where the accused, an officer of the Local Board of Matale, stopped the complainant who was bringing some cattle and asked him for vouchers which the complainant gave him, and the accused thereupon demanded money and refused to allow the cattle to be taken away till the money was paid, it was held that the facts constituted the offence of cheating but not of extortion or robbery.[3] The illegal harm may be threatened in respect of body, mind, reputation, or property, and may be either to complainant himself or to any other in whom he is interested (or a harm to whom would induce him to part with property). Even a threat to prosecute is sufficient. Thus, where a boy's father was threatened that the boy would be charged with an abominable crime upon a mare unless he were to buy the mare himself at a certain price, it was held that the accused committed extortion.[4]

And where a Village Magistrate threatened to prosecute the complainant if she did not pay Rs. 10 as compensation for injuring his goat worth two and a half rupees, the Indian High Court held: "Though to threaten to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of more than is due is illegal and such a threat used with such object must be held to be a threat of injury sufficient to constitute the offence of extortion. The fact that the offence with which the complainant is liable to be charged is compoundable can make no difference."[5] The threat may be either in person or by letter— either expressed or implied.

So, a corrupt Police Officer intending to extort money may take a person into custody and even threaten to prosecute him for an imaginary

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1. Section 43 C.P.C.
2. Queen *vs.* Charles Fernando (1898) 3 Tam. 79.
3. The Queen *vs.* Gabriel Appu (1896) 2 N.L.R. 170.
4. Reg. *vs.* Redman 1 Crown cases L.R. 12.
5. Emp. *vs.* Appulusamy (1892) 1 Weir. 441.

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offence ; or a public servant may threaten to carry out his public duties, even though he is not legally entitled to do so in the particular case, with the hope of extorting a ransom. These would be instances of extortion. But a Proctor demanding a higher fee to conduct a case when a postponement is not granted would not commit extortion, for he is entitled to the honorarium and may lawfully demand it[1] ; but his conduct would, of course, be a very reprehensible breach of professional etiquette.

Unlike as in theft, the definition does not say "movable property," but only property : so that both movables and immovables are included ; so are also valuable securities or documents which would be converted into such.

Under our Code, various kinds of extortion are penalized depending upon the degree of fear used in extorting. All these offences are non-summary except section 374 by which where no delivery of property has actually taken place but where as an inducement to deliver the same ordinary intimidation has been used or attempted, a Police Court is empowered to try.

(II) Criminal Misappropriation.

Whoever dishonestly misappropriates or converts to his own use any movable property commits an offence punishable with two years' imprisonment ; and, if he knows that such property was in the possession of a deceased person at the time of his death and has not since been lawfully possessed by any other, the punishment is imprisonment for three years. This offence is triable by a Police Court as well as a District Court (unless the offender is a clerk or a servant of the deceased person and was such at the time of his death). The offence is non-compoundable. It may not be necessary to designate in the indictment the owner of the property misappropriated.[2]

There must be a dishonest misappropriation or dishonest conversion to one's own use ; in order to be dishonest, the property must be appropriated or converted with the intention of causing wrongful gain to one person or wrongful loss to another. Where the accused borrowed a gun from the complainant and afterwards ran away with it, it was held that he was guilty of dishonestly misappropriating the gun.[3] There must be first an honest possession of property and then a subsequent change of intention.[4] So that there could be no criminal misappropriation unless the possession of the thing alleged to have been appropriated was come by innocently and retained by a subsequent change of intention.[5] A boutique-keeper who concealed a 25-cent coin given to him for the purchase of a cigarette was held to have been rightly convicted of criminal misappropriation.[6] If the accused receives the thing dishonestly from the start, the offence would be either theft or cheating; and if he converts it after he has been specifically entrusted with it, he commits criminal breach of trust. The property must belong to a person other than the accused. If it belongs to the accused himself, he cannot misappropriate

1. 5 Madras High Court Rulings (Appendix) 14.
2. Per Macdonell, C.J. (1931) 32 N.L.R. 361.
3. Stickney *vs.* Sinnatamby (1886) 5 Tam. 112.
4. Georgesz *vs.* Seyadu Saibo (1902) 3 Br. 88.
5. Kanavadipillai *vs.* Koswatta (1914) 4 Bal. Notes 74.
6. Peries *vs.* Anderson (1928) 6 Times L.R. 49.

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it : if it belongs to him jointly with others, he would be committing this offence, if he were to proceed to convert the whole of it to his own use. Where the accused sold a bull without a cattle-voucher to another, who sold it to a third party, and the accused again purported to sell the bull to a stranger on a cattle-voucher duly executed, it was held that as the gist of the offence is taking or converting to one's use some movable property belonging to another person, the accused had not committed this offence, although his act was a fraudulent attempt to claim property which he had already transferred to another person.[1] In order, therefore, to maintain a charge of criminal misappropriation, the prosecution must show that the property which the accused is alleged to have misappropriated belonged to some person other than the accused. "The offence of criminal misappropriation consists in the dishonest conversion to the use of the party charged of the property of another." But a person can be convicted of criminal misappropriation of property which has been entrusted to him.[2] It is not absolutely necessary that the actual owner should be disclosed in all cases. It may be sufficient, if there is some person entitled to the possession of the goods misappropriated.[3] It follows that if there is no person entitled to such possession, the accused cannot be convicted under this section : hence in the case of *res nullius*, derelicts, or abandoned things, there could be no conversion. Thus, where the accused, a servant of the complainant, was ordered to take several bags of waste paper to be burnt and destroyed, but he instead of burning sold them in the market, it was held that the accused had committed no offence.[4]

Where the accused puts forward a claim to the property, it will be a question of fact in each case whether his claim is made in good or bad faith and whether it can be upheld in point of law. Such a claim, for instance, would be raised by a lien ; and the retention of property in assertion of the right of lien is both legal and justifiable : but there are cases where no lien arises or where it is difficult to say where lien ends and dishonesty begins. Thus, a servant who collects a debt for his master but misappropriates it on the footing that the master owes him an equal or a greater amount, would nevertheless commit criminal misappropriation,[5] for a servant has no lien on his master's money. Where a servant is "placed in funds" by his master to carry on the concern of a shop and makes wrong entries in the ledger and afterwards fails to account for a portion of the funds, his fraudulant failure to account would be dishonest misappropriation.[6]

The offence is committed even though the dishonest misappropriation is for a time only and even though there is an intention to restore the property to the owner in future. Thus, where a Government servant who receives money in his official capacity takes a few rupees for a private emergency, he is guilty of misappropriation even if he has an intention of refunding the amount when he draws his salary at the end of the month. There must be something to shew this temporary conversion. Thus, where the accused picked up a purse containing valuables in a temple and concealed it in his verti-cloth, but was detected

1. Silva *vs.* Banda (1919) 21 N.L.R. 207.
2. King *vs.* Godamune. Full Bench (1931) 32 N.L.R. 361.
3. Per Sampayo, J., Barber *vs.* Abdulla (1920) 7 C.W.R. 144
4. Emp. *vs.* Preo Nath Chawdhary 29 Calcutta 489.
5. Emp. *vs.* Bissesur Roy 11 Calcutta Weekly Reporter 51,
6. Fernando *vs.* Charles (1900) 4 N.L.R. 215.

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soon after and it was proved that he had not opened the purse before arrest, it was held that the temporary possession of the purse did not amount to its criminal conversion. "The mere possession of the properry is not sufficient for proving the charge without something to indicate the appropriation or conversion, though long possession without any attempt to find the owner may amount to evidence of intention to do so."[1]

As regards the finding of property, the explanation to our section may well be quoted : a person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly and is not guilty of an offence ; but he is guilty of the offence of criminal misappropriation if he appropriates it to his own use when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it. What are reasonable means, or what is reasonable time in such a case, is a question of fact. It is not necessary that the finder should know who is the owner of the property or that any particular person is the owner of it ; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property or in good faith believes that the real owner cannot be found.

Thus, where a person picks up a rupee on the high road and does not know to whom it belongs, he commits no offence even if he converts it to his own use ; but instead, if he picks up a cheque or a bank note enclosed in a letter, the case is different ; as, here, he has the means of discovering the owner. The criterion is whether the owner of the article found is ascertainable or not. If he is identifiable, he should be found and the article restored to him ; if the owner is not identifiable, then a duty is cast on the finder to keep the property for a reasonable time so as to enable the owner to come for and claim it. A person who finds a valuable ring and not knowing to whom it belongs sells it immediately without attempting to discover the owner is guilty of criminal misappropriation. The best thing that a man who finds such property in Ceylon could do would be to deliver it to the nearest Police Station or the nearest Headman, leaving it to them to take the proper and necessary steps. If such property is "treasure trove," a duty[2] is indeed cast upon the finder, on pain of being sentenced to two years' imprisonment or a fine of Rs. 1,000, to report the fact of such finding and to surrender the trove to the nearest Police Magistrate, and if there is no Magistrate within ten miles, to the nearest chief Headman or the nearest Police Officer not under the rank of a Sergeant. Treasure trove means any money, coin, gold, silver plate, bullion, precious stones, antiquities or anything of any value found hidden in, or in anything affixed to, the earth and the owner of which is unknown or cannot be found. Such treasure trove is the absolute property of His Majesty, but the finder will be entitled to receive the value of the material together with an additional one-fifth of the value.

Where a person lost a coat near a store and the accused a cooly employed on a neighbouring estate found it and converted it to his own use and told no one that he had found it, it was held that the accused was rightly convicted under this section, as by not informing his master

1. Per Chatterji, J., Emp. vs. Rheman (1908) Punjab Record 11.
2. Ordinance No. 17 of 1887, section 3 (1), Vol. 1, p. 950.

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of the finding of the coat, he had not used such reasonable means to discover the owner as lay within his reach. Where property has been cast away or abandoned any one finding it and taking it acquires a right to it which would be good even against the former owner if the latter should be minded to resume it ; but when a thing has been accidentally lost the ownership is not divested but remains in the owner who has lost it.[1] This principle was applied in an Indian case where the accused was convicted in the lower Court of having picked up a gold mohar (sovereign) in an open plain in a village and appropriating it to her own use. The High Court quashed the conviction, holding that " it cannot fairly be said that when the accused sold the mohar, she knew or had the means of discovering the owner or that she omitted to use reasonable means to discover the owner and give notice to the owner and did not keep the property a reasonable time to enable the owner to claim it. It might have been different, had the mohar been found on a thoroughfare, in which case the finder would naturally believe that the property had been recently lost, and that the owner would be discoverable. But in this case the mohar may have been lying undiscovered in the plain for weeks. It is a fair inference that the owner had given up all hope of recovering it and had abandoned his right of ownership.[2] So that when from the luggage carrier of a motor cycle a portmanteau drops on the high road and the finder converts it to his own use after making a futile attempt to stop the cyclist, he would be guilty of dishonest misappropriation, for the owner has not yet abandoned his right of ownership in the article.

Where property found by any one has been delivered to the nearest Police Station or to a Headman, a duty is cast on the latter to surrender it to the nearest Police Court and the Magistrate may take such steps as are necessary for finding the owner and restoring the same to him. In the event of its being unclaimed, the Magistrate may order it to be sold and may direct that the proceeds be credited to Revenue. He may also award a finder's share.

(III) Criminal Breach of Trust.

" Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he had made touching the discnarge of such trust or wilfully suffers any other person so to do, commits criminal breach of trust." The analogous offence in England is embezzlement, but it is much narrower and therefore not so exhaustive. The two main requirements of this section are, firstly, the creation of a trust, and secondly, a dishonest misappropriation, conversion, user, or disposal. The trust may not necessarily be the relationship between a trustee and a cestui-que-trust. It must be such a trust as would require the accused to apply the property in a certain way indicated by the trust or by any direction of the law or by any contract between him and the complainant.

Thus, where the accused, a jail guard, was entrusted with a Railway warrant and was asked to accompany a prisoner who had served his

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1. Per Cockburn, C.J., in Rex vs. Glyde 1 Crown cases 139.
2. Emp. vs. Sita 18 Bombay Reports 212.

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sentence, to the Railway station and to give him a Railway ticket, and the accused obtained the ticket in exchange for the warrant but sold it to another, it was held that he was not guilty of criminal breach of trust in respect of the Railway warrant, though he may have committed criminal misappropriation.[1] A servant who receives money on behalf of his masters and enters the amount received in his master's book, but afterwards denies the receipt of this money, is guilty under this section.[2] Where the accused, who was an employee of the firm of Messrs. Henry and Manuel, was permitted to negotiate the sale of fibre and to receive cheques in payment in his own name and where instead of endorsing a certain cheque in the name of the firm as he was bound to do, appropriated for himself the proceeds, it was held that, though the cheque was in his own name, he was entrusted with dominion over property belonging to the firm and that the accused acting in violation of his legal contract had committed a breach of trust.[3] But mere failure to pay over sums received by a clerk or servant for his employer, does not itself constitute the offence of criminal brecch of trust; and it is not sufficient to prove a general deficiency in accounts ; there must be evidence of some specific sums having been misappropriated or converted to the defendant's use.[4] Nor is mere deficiency in the quantity of goods entrusted to a servant sufficient proof of criminal breach of trust. It must be shown that the accused disposed of the property in some other way than that in which he was bound to apply it and that, in so disposing of it, he acted dishonestly.[5] Thus, where a dhoby who is entrusted with clothes to wash, wears them himself or gives them to another to wear does not commit criminal breach of trust as there is no dishonest intention,[6] *i.e.* an intention to cause wrongful gain or wrongful loss, and, besides, a dhoby is not *prima facie* a servant or employed as such.[7] But an insurance agent who receives premia from the insured and does not forward them to the head office commits criminal breach of trust even though he gives informal receipts and forwards the premia after the institution of the case.[8]

Where a master asks his servant to pay a bill which has not been checked by him and the tradesman makes a present to the servant—this present goes in the reduction of the bill and is held by the servant in trust for his master : wrongful conversion of this money would make him liable under this section ; but if the master has already checked the bill and the servant has instructions to pay a definite sum, a present given, nevertheless, by the tradesman to the servant, goes to his benefit and he can appropriate it with impunity.[9] Where the accused was a club peon, and as such was entrusted with empty soda water bottles : on stock being taken there was a deficiency of thirty-six dozen bottles : it was held that this was not criminal breach of trust, as mere deficiency in the quantity of goods entrusted to a servant is no proof of breach of trust.[10] Even where there is a breach of trust it must be proved to be a criminal

1. The King *vs.* Kabeer (1920) 22 N.L.R. 105.
2. King *vs.* Suppaiya (1901) 5 N.L.R. 119.
3. The King *vs.* Perera (1923) 2 Times L.R. 72.
4. Buchanan *vs.* Conrad (1892) 2 C.L.R. 135.
5. Koch *vs.* Nicholas Pulle (1898) 3 N.L.R. 198.
6. Anon's Case (1880) Weir 269.
7. Burrah *vs.* Suvaris (1905) 4 Tam. 71.
8. Kandasamy *vs.* Coomaraswamy (1925) P. C. Pt. Pedro 2077, S. C. 631.
9. Emp. *vs.* Imdad Khan. I.L.R. 8 Allahabad 120.
10. Laxana *vs.* Muhandiram (1922) 24 N.L.R. 251.

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breach. A kangany was in charge of a rice store and the rice was for distribution among the coolies under the orders of the Superintendent; the Superintendent had ordered him not to issue rice to coolies who did not work, but the kangany issued rice merely to keep the coolies on the estate; it was customary in the estate that, whenver rice was short, the kangany made good the shortage, and in this instance the shortage was sought to be made good at the time of verification. It was held that the kangany, though he had committed a breach of trust, had not committed a criminal breach of trust in view of the circumstances, the custom of the estate, open dealings, and absence of dishonest intention.[1]

Where a person collected certain sums of money from a number of persons on the understanding that a syndicate was to be formed for purchasing tickets in a lottery and where he failed to divide the full amount won among all the members of the syndicate and appropriated a portion to himself, it was held that the contract to divide and hand over the proceeds was a legal contract and that the omission to do so was a criminal breach of trust.[2] Where a motor car is purchased on the hire-purchase system, there is a definite undertaking by the purchaser not to assign or underlet or part with its possession till such time as the instalments are not fully paid up; a trust is created between the purchaser and the seller and if the purchaser were to proceed to mortgage the car to other persons, he would commit a criminal breach of trust, in that he would cause wrongful gain to himself and wrongful loss to the seller who would have to fight the mortgagee for his priority.[3] The trust created may even be much slenderer than this, as in the case of a man who was convicted for having sold a pony to a hackney driver after having received it as an incurable animal and tacitly undertaken not to put it to harness.[4]

The dishonest disposal contemplated under the section may not be such as to convey good title: thus the accused, who was entrusted by the complainant with two bulls to be trained, sold one of them to a third party: he received a part of the price, but did not execute a cattle voucher: it was contended that as he had executed no voucher, he had not "disposed" of the animal; it was held that the absence of a cattle voucher, which is no more than a defect in the purchaser's title, could not alter the fact of the conversion and that the accused was rightly convicted of criminal breach of trust.[5] But a temporary retention of property may not amount to conversion required under this section. Where the accused was a sawyer employed by the complainant and was charged with criminal breach of trust in respect of certain tools entrusted to him; and where two of the articles were found in his possession and he said that he had retained them temporarily as complainant had failed to pay his wages, it was held that the accused was not guilty as the accused thought, though mistakenly, that he had a right to retain the complainant's property as security for his wages and had not yet dishonestly misappropriated it.[6] But a right of retention is not the same as a claim put forward to the property itself. The claim must be reasonable and *bona fide*. If a person is entrusted with property with certain directions as to the manner of its disposal, he acquires a temporary

1. The King *vs.* Arwandy Kangany (1910) 7 Tamb. 134.
2. Rex *vs.* Rowlands (1906) 1 A.C.R. 34.
3. Emp. *vs.* Silas Moses I.L.R. 17 Bombay L.R. 670.
4. Emp. *vs.* Gawri Shanker (1894) Allahabad Weekly Notes 197.
5. S. I. Police, Anuradhapura, *vs.* Charles Appuhamy (1919) 6 C. W. R. 181.
6. Siriwardena *vs.* Ukkuwa (1916) 2 C. W. R. 157.

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dominium over the property only in so far as the disposal is concerned but could have no claim to the property itself as against the rightful owner. Thus, where a salesman is entrusted with opium for sale at a definite price, a misappropriation of the opium amounts to a criminal breach of trust, and it is no defence to say that the opium is his own property and that the complainant is only entitled to its value.[1] A contractor, however, is not in the same position as a servant and even if he were dishonestly to misappropriate a sum of money received for a specific purpose in pursuance of the contract, would not be guilty under this section.[2] The word "property" in this section includes immovable property. Where the accused verbally agreed to purchase a piece of land for and to convey it to the complainant at a Kachcheri sale and the Crown grant being made in his name, he neglected to convey it to the complainant, but conveyed a part thereof to a third party, it was held that he was guilty under this section, even though the contract being not in writing was challenged as illegal.[3]

The offence of ordinary criminal breach of trust is punishable with three years' imprisonment; but the same offence committed by a carrier, wharfinger, or warehousekeeper, or by a clerk or servant, is punishable with seven years' imprisonment; and if the property is entrusted to the accused in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, it is punishable with imprisonment for ten years. Thus, misappropriation by a Proctor of his client's monies comes under this last section.

The offence described in the last category is not committed by a public servant in respect of monies received by him on account of his employer and misappropriated by him unless it is his duty in his capacity as such public servant to receive such monies; but where money is actually received by him, there is an implied obligation on his part to pay it, and misappropriation thereof would become criminal malversation under the section.[4] The following Indian case is interesting. The accused was a subordinate in the Salt Department: he was empowered to sell salt, at a reduced rate, to fish-curers who held tickets entitling them to the concession. He purchased salt himself at the reduced rate charging it to the account of the ticket holders, thus defrauding Government of the difference in the two rates. It was held that inasmuch as he was entrusted with *dominium* over the salt with a view to sell it at reduced rates only to those who cured fish, his converting the salt to his own use would be both a dishonest act and a violation of trust.[5]

In order to make further provision for the protection of Government against breaches of trust by public servants, a new Ordinance[6] was enacted making it an offence to fail forthwith to pay over, when required to do so by his proper superior, any money or balance shown in the public books kept by him or to fail to duly account therefor. The essence of this Ordinance is dishonesty. It does not intend to make a person criminal who has no guilty or criminal intent. Its object is to facilitate proof of dishonesty by deeming that public servant to be dishonest who, on being required to account for the money shown by his

1. The King *vs.* Vina Thambo (1907) 2 Matara cases 195.
2. London *vs.* Endoris Silva (1916) 3 C.W.R. 245.
3. The King *vs.* Walter Don (1902) 3 Br. 16.
4. The Queen *vs.* Costa (1893) 2 C.L.R. 205.
5. Emp. *vs.* Balayya (1894) 1 Weir 467.
6. No. 22 of 1889, Vol. IV, p. 148.

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accounts to be due from him, cannot, within a reasonable time, pay or produce it or account for the shortage (by showing, for instance, that thieves had broken into the safe). Failure to "produce forthwith" means within a reasonable time. To justify a conviction there must be direct evidence of dishonesty or such conduct on the part of the accused as would lead to the interference of dishonesty or dishonest intent. The mere failure on the part of a Postmaster to produce a small balance of Rs. 1·38, shown in the cash book kept by him, cannot be treated as a criminal breach of trust. In law, shortage of a small sum of money is not in itself evidence of dishonesty. It is evidence of dishonesty if a public servant entrusted with money, being called upon to produce it, says, "I had the money—I cannot explain what has become of it." And it is a sum which he cannot replace.[1] Thus, where the accused had to collect taxes for a Sanitary Board and pay them to the Chairman before February in each year; he paid a portion and, on March 4th, the Chairman wanted him to pay the balance and he tendered a further instalment which was refused as the whole balance was not tendered; a warrant was applied for on March 10th and on the 14th he paid the whole balance; it was held that the accused was not guilty of criminal breach of trust as he had offered to pay the balance within a reasonable time and had therefore no dishonest intention.[2]

The offence of ordinary breach of trust as well as breach of trust by a clerk or servant is both summary and non-summary, according as the value of the property in respect of which the offence is committed does not or does exceed one hundred rupees[3]: the other offences are all non-summary. None of them is compoundable. Ordinarily a separate charge is necessary in respect of each item that is alleged to have been misappropriated: if so, no more than three items could be included in one charge. But where a person collects a sum of money from various persons to pay the total sum so collected to a particular person and misappropriates the sum so collected, it is competent to prefer a single charge in respect of the total amount so misappropriated: it is not necessary to treat the misappropriation of each single subscription as a separate offence and to lay separate charges in respect of each of them.[4] The Court can order compensation out of the fine, if any.[5]

In connection with criminal breach of trust by a clerk or servant, it is necessary to mention the new section[6] (466A) with regard to falsification of accounts: by this, "whoever, being a clerk, officer, or servant, or being employed or acting as such, wilfully and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security, or account which belongs to or is in possession of his employer, or has been received by him for or on behalf of his employer, or makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in any such book," etc., is liable to be punished with imprisonment for seven years. This offence is triable by the Supreme Court only. Wilfulness and intention to defraud must necessarily be present; mistakes due to inexperience or bad arithmetic are, of course, not penalised. It is sufficient to allege a general intention to defraud without naming any

1. King *vs.* Ragal (1901) 5 N.L.R. 314.
2. Somanader *vs.* Uduma Lebbe (1922) 24 N.L.R. 146.
3. Ordinance No. 6 of 1924.
4. The King *vs.* Vallayar Sittambalam (1918) 20 N.L.R. 257 (Full Bench).
5. Robo *vs.* James (1930) 8 Times L.R. 46.
6. Ordinance No. 10 of 1903, section 2, embodied in the Penal Code, Vol. IV, p. 138.

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particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed. This offence was introduced on the lines of Lope's Act[1] in England, but is more extensive and applies as well to Government servants as to private employees. Preparation or maintenance of false books of account or other records or falsification of them or authorisation of such fraud is now a summary offence under the Income Tax Ordinance[2] punishable with a fine of Rs. 500, including the penalty.

(IV) Robbery.

" In all robbery there is either theft or extortion. Theft is robbery, if in order to the committing of the theft or in committing the theft, or in carrying away or attempting to carry away property obtained by theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.

" Extortion is robbery if the offender at the time of committing the extortion is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person and by so putting in fear induces the person, so put in fear then and there to deliver up the thing extorted."

Robbery then is either theft or extortion, coupled with hurt or death or restraint or fear of the same. If either of these elements is absent, there is no robbery : the hurt or restraint must be voluntarily caused and may be however little. Thus, if a creditor seeks to enforce his debt by wrestling from the debtor his umbrella and seizing his shawl in such a manner as to take money from or to cause it to fall from a knot in it, he is liable to be committed for robbery.[3] And though " open and violent larceny from the person, or robbery, the rapine of the civilians is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him into fear "[4]—the mere act of taking being forcible does not constitute robbery. " The force used must be either before or at the time of the taking and must be of such a nature as to shew that it was intended to overpower the party robbed and prevent his resisting and not merely to get possession of the property stolen."[5] So, the mere snatching of a bundle from a boy who was carrying it along a street in hand was held to be no robbery as the amount of force or violence used was not sufficient to constitute that offence.[6] But if in the snatching, pain is caused, howsoever little, to the person who is robbed, the offence becomes aggravated, into robbery. Thus, snatching a thali from the neck would cause pain to the wearer and would amount to robbery : and the violence may be used even after the actual robbery is committed, *e.g.* in attempting to run away with the spoils : or there may be merely an attempt to stab. Where

1. 38 Victoria c. 24.
2. No. 2 of 1932, section 87 (*f*).
3. Sinnatamby *vs.* Veerakaty (1901) 5 N.L.R. 14.
4. Blackstone 243.
5. Per Garrow, B., Rex *vs.* Gnosil 1 Carrington & Payn 304.
6. Macaulay's case 1 Leach 287.

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a robber who stole a purse was seized by another man and attempted to stab him, it was held that he had committed robbery.[1]

The wrongful restraint may be even temporary and slight, may be actual or constructive. Thus, where the complainant demanded money due to him from the accused who refused to pay and held his hands and then deprived him of a shawl which he was wearing, it was held that such wrongful restraint amounted to robbery.[2] Where several persons stopped a boat saying that it was required by the Magistrate and then plundered it without any opposition from the boatmen, it was held that they were guilty of robbery as theft was committed while the boatmen were under fear of restraint.[3] And wrongful confinement being the same as wrongful restraint but of a higher degree, theft or extortion preceded or followed by such confinement would still be robbery.

In order to constitute the offence of robbery, the intent to commit theft must be antecedent to the assault [4]; but this does not mean that the intent may not supervene the assault or may not be engendered during the course of the assault. Thus, where a person attempted to rape a woman who thereupon offered him a sum of money which he received as the price of his forbearance, though he still ravished her, it was held to be robbery even though his original intention was to commit a rape only.[5]

The offence of simple robbery and of attempt to commit the same, *viz.*, sections 380 and 381 are triable summarily as well as non-summarily, and if the hurt caused is simple hurt, then even a Police Court has jurisdiction under section 382. But if simple robbery is committed on a highway between sunset and sunrise, the Police Court jurisdiction is ousted. All other serious forms of robbery are triable only on an indictment. Robbery is non-compoundable. Sections 382, 383 and 384 ordinarily cannot stand alone ; they must be coupled with sections 380 or 381.

Where the evidence shows that an offence of robbery has been committed, a Police Magistrate has no power to split it up into two charges of theft and assault and then to proceed to try the accused as for theft[6]; for where the evidence discloses an offence beyond his jurisdiction, he cannot overlook material portions and assume jurisdiction himself.[7] If on a complaint of robbery with hurt a Magistrate disbelieves the robbery, it is not open to him to try the accused summarily for causing hurt without discharging the accused of robbery.[8] This is so only when process had been already issued for both the offences ; but a Magistrate cannot refuse to proceed on with the case even if he disbelieves robbery on the ground that he would have no confidence under the circumstances in acting on the evidence of the complainant. Where a Magistrate refused to do so, the Supreme Court sent back the case and said *inter alia* : " Nevertheless, one of the fundamental rights of the individual has been violated—somebody had assaulted him and there was at the time

1. Saviel *vs.* Juan Appu (1910) 2 Cur. L.R. 114.
2. Ponnusamy *vs.* Muttuvelu (1900) 1 Br. 57.
3. Reg. *vs.* Duleeloodeen Sheik 5 Calcutta Weekly Reporter 19.
4. Perera *vs.* Fernando (1915) 1 C.W.R. 88.
5. R. *vs.* Blackham 2 East's Pleas of the Crown 711.
6. Abdul Caffoor *vs.* Carolis (1900) 1 Br. 107.
7. Mathia *vs.* Migel Appu (1914) 1 Bal. Notes 55.
8. Sirineris *vs.* James (1901) 5 N.L.R. 93.

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adequate material for an investigation of the assault. Peaceable citizens must be protected from such assaults. We know, it often happens that where there is a disturbance, the complainants seek to embellish their case by introducing a charge of robbery. In such cases, the Courts very often, where they consider the evidence of robbery unsatisfactory, deal with the case simply as an assault case. It would not be a safe rule simply because a Magistrate suspects that a case has been so embellished to decline to go into the question of assault. Where a person claims protection of the law, he is entitled to receive it even though his conduct may excite suspicion, if it does appear that some substantial harm has been done to him."[1] As there is a likelihood of such embellishment in very many cases, perhaps the best course would be to view every suspicious case with caution and to refrain from issuing process for robbery without hearing all the evidence which the complainant can get together ; if the evidence of robbery is found unsatisfactory, process may be issued for simple assault only.

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1. Per Bertram, C.J., Gunewardana *vs.* Samarakoon (1920) 21 N.L.R. 411.

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CHAPTER XV.

CHEATING.

(I) Elements of Cheating.

"Whoever, by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to cheat."[1]

This definition is practically the same as in the Indian Penal Code, save that the words "damage or loss to the Government" are added. There must be two essential elements present: *viz.* deception and consequent inducement which may be fraudulent, dishonest, or intentional. The deception may either be by a false representation or by a dishonest concealment of facts.[2] The false representation must be made with a knowledge of its falsehood or without an honest belief in its truth: it should be made with an intention to deceive. There must be evidence to show that this intention was present at the time that the representation was made. Thus, obtaining goods on credit by misrepresenting one's status, or counterfeiting marks on an article so as to pass them off as of higher or better quality, or selling goods by showing different samples, or drawing a cheque without funds, or obtaining loans by false representation with no intention of repayment, or obtaining advances in kind or money on a false promise of rendering service or delivering goods, or obtaining hire-money by falsely asserting that the particular work for which the hire was had is completed, would all be illustrations of cheating. Or, there may be a dishonest concealment of facts; and the fact that the complainant had means of knowledge or could have, if he chose, ascertained the truth would not of itself exonerate the accused. Thus, where the accused knowingly cashed a one-pound Irish note as a five-pound note, he was held to be guilty, even though the complainant was able to read and could have detected the fraud.[3] Ordinarily, however, non-disclosure where there is no duty to disclose would not amount to fraud unless, by one's conduct, one has intentionally deceived another. For a person is said to do a thing fraudulently only if he does that thing with intent to defraud.[4] To constitute cheating, it is not necessary that the deception should be by express words or visible representations. It may equally be practised by conduct employed in the transaction itself. Thus, where an accused knew that a cheque drawn in his favour was drawn without funds and nevertheless endorsed it and

1. Section 398 C.P.C.
2. Veluppillai *vs.* Carthigesu (1898) 2 Tam. 87.
3. Reg. *vs.* Joseph 1. Dearsley & Bell's Crown cases 442.
4. Section 23 C.P.C.

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sent it to be cashed at a boutique through an emissary whom he did not accompany, it was held that the accused was guilty of cheating ; for by endorsing, and giving it to be cashed, he had made a representation that it was a good cheque : and this would be so, even if the emissary had guaranteed payment to the cashier in the event of the cheque being dishonoured.[1]

When a false representation is made, the complainant must be deceived by it and induced to part with property.[2] There must be proof that the person deceived suffered damage or harm in body, mind, reputation or property.[3] The accused must be aware of the falsity or should not have had an honest belief in its truth. Where the accused mortgages a land representing that it is free from encumbrances, he is guilty of cheating if the land is subject to a lease, for a lease is an encumbrance ; but the accused may show that he had no dishonest or criminal intention.[4] Where the accused sold and conveyed a five-tenth share of a certain land to the complainant's intestates and another, upon the express representation that the land was free from encumbrances other than those specified, whereas there were, in fact, other encumbrances created by the vendors, and where the Magistrate refused to issue process on the ground that, notwithstanding such representation, it was the duty of the purchasers to satisfy themselves that there were no other encumbrances, it was held that the Magistrate was wrong ; for the purchasers were entitled to rely upon the good faith of their vendor's representation, and if, in so doing, they were deceived and cheated, the criminal offence contemplated by the Penal Code was committed.[5] Where a person obtained money on a mortgage of property which at the date of the mortgage was under seizure, without disclosing the fact that it was under seizure, he was held guilty of cheating as the accused had expressly stated that there was no encumbrance.[6] A man buying, however, is not bound to tell all his affairs to those with whom he deals, though he must not say anything which amounts to a misrepresentation,[7] nor should he misrepresent by conduct. Thus, " if a man goes into a restaurant and orders a dinner or takes his place in a tram-car or stage-coach and is given the dinner or is conveyed a part of his journey, his conduct is in effect a representation that he has with him money to pay the bill or pay his fare and if he has not the money with him and knows it, he may be guilty of cheating." Where the accused borrowed a sum of money from a money-lender without disclosing to him that he was at the time an uncertified insolvent, and where the certificate of insolvency had not at the time been refused to him but was refused subsequently to the loan, the accused was held not to be guilty of cheating ; for, it could not be said that when the borrower applied for the loan, his application was in effect a representation of anything except, perhaps, a representation of an intention to repay the loan in due course, and there was nothing to show that he did not so intend. Thus, where the complainant asked the accused if he had Blackstone tea and on his saying that he had, he purchased a quantity well knowing that it was not Blackstone

1. The King *vs.* Chandrasekara (1921) 23 N.L.R. 286.
2. (1899) Koch 42.
3. Silva *vs.* Kangany and another (1929) 6 Times L.R. 97.
4. The King *vs.* Appu (1916) 19 N.L.R.
5. Ramanathan Pulle *vs.* Ramanathan Pulle (1909) 3 Weer. 10.
6. The King *vs.* Lavena Marikar (1907) 10 N.L.R. 369.
7. Per James, L.J., in *ex parte* Whittaker *in re* Shackleton (1875) 10 Chancery Appeals 446.

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tea, it was held that this was not cheating as the complainant was not deceived by the description of the tea as Blackstone tea. Once a decep- tion is practised, it is immaterial whether the complainant is cheated or his agent or servant. An accused used to sell green tea leaf to a person whose tea-maker used to weigh the tea with the bags and deduct four pounds for the weight of the bags : the accused had sewn into the bags shots weighing six pounds : the accused was charged with cheating the tea-maker and the Judge acquitted him on the ground that the person cheated was not the tea-maker but his master ; it was held that the Judge was wrong.[1]

A person who receives money from another for giving him a girl in marriage and falsely represents her caste would be guilty of cheating, if he knows the real caste of the girl and dishonestly conceals it for the sake of the money[2], or if the girl's true parentage is concealed and she is described as of a good family which she is not.[3] A person who pretends to pawn a brass jewel as one made of gold is guilty of cheating in attempt- ing to palm it off as a golden article.[4] But if he makes no representation at all and leaves it to the discretion of the pawn-broker to lend what money he likes on it, he would not be guilty of cheating even though the pawn-broker believes it to be gold and lends more on it than he would have done, had he known that it was an inferior article. Adulterated milk sold as genuine milk would make the vendor liable to punishment under this section[5]; and there are many cases of swindling by advertise- ments where fraudulent misrepresentations of material facts play an important part. Where the accused advertised a Book of Idioms for sale and invited intending purchasers to pay in advance and collected money and where it was proved that the advertisement related to a fictitious book by a fictitious author, it was held that the accused was clearly guilty of cheating.[6] A collection of subscriptions for fictitious objects would similarly be an act of cheating.

The giving of false names when there is no statutory duty to give them correctly would not amount to cheating. Thus, the accused was asked his name and address by a Sanitary Inspector in order to enable him to prosecute him for committing a nuisance and the accused there- upon gave a false name and address which resulted in a prosecution of a person of that name who was innocent of the offence. The Magis- trate convicted him on the footing that this prosecution of another was likeiy to cause the Sanitary Inspector harm in his mind and reputation. But the conviction was quashed as the fact did not comply with the definition of cheating.[7] The playing of a practical joke does not come necessarily within the purview of this section. Where the accused left the service of his master and went into that of his master's brother in another village and where the latter asked him about his brother's health and the accused replied that he was dangerously ill but the complainant found him to be hale and hearty, it was held that this was not cheating.[8]

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1. The King vs. Loku-Banda (1910) 5 Bal. 93.
2. Emp. vs. Puddomonee 5 Calcutta Weekly Reporter 98.
3. Emp. vs. Dhunput 7 Calcutta Weekly Reporter 98.
4. Veluppillai vs. Carthigesu (1898) 2 Tam. 87 *supra.*
5. Emperor vs. Nana (1888) Bombay unreported cases 145.
6. Emp. vs. Pera Raju 13 Madras Reports 27.
7. Emp. vs. Ladka (1898) Bombay unreported cases 635.
8. Emp. vs. Punjea (1888) Bombay unreported cases 423.

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If no delivery of property has taken place, there must be an intentional inducement to do or omit to do an act which is likely to cause damage or harm to body, mind, or reputation. Thus, where in counter cases, the accused and the complainant undertook to withdraw each other's cases and the complainant withdrew his case, but the accused did not, it was held that the accused was not guilty of cheating as the object of a criminal complaint being punishment of the offender, his not being punished could not injure the accuser.[1] Travelling in a railway carriage of a higher class than paid for is not cheating[2]; nor the entering secretly in an exhibition ground without a ticket[3]; nor an attempt to obtain admission to the Police by making false statements[4]; nor the breach of a contract to make a coffin after receiving an advance and materials[5]; nor the borrowing of an article and afterwards running away with it[6]. But each of these cases may become punishable as an offence under other Ordinances or different sections of the Penal Code.

In most offences of cheating, the false pretence plays a predominant part. As Alderson, B. told the jury : " If a man represents as an existing fact that which is not an existing fact and so gets your money, that is a false pretence ; for instance, that a certain church had been built and that there was a debt still due for the building, when there was no debt due : that would be a false pretence ; yet the fact might easily be enquired into and ascertained."[7] Where the accused deceived his master by producing some forged certificates of character and thereby induced him to employ him and to pay him a salary and where the master regarded the accused as an incompetent person and said that he would not have employed him, had he not been deceived, it was held that the accused was rightly convicted of cheating.[8] But innocent misrepresentation being a mis-statement of fact made without knowledge of its untruth and without intention to deceive would not be cheating. The accused who was a cloth merchant had dealings with the complainant and in his bill erroneously included the price of a cloth alleged to have been supplied to the complainant who had returned the same : he was acquitted of cheating.[9]

The cases of cheating by cheques may here be considered. A person who draws a cheque on a bank where he has no funds would be guilty of cheating if he is aware that he has no such funds,[10] but he would not be guilty if he reasonably expects funds to be placed to his credit in the meanwhile, even though the funds are delayed and the cheque is consequently dishonoured. The burden of proof that he expected funds to be credited to his account would be on the accused. In the case of post-dated cheques which are dishonoured, the accused would be guilty, if he had no funds at the time of drawing the cheque and had no expectation of any during the intervening days.[11] But where the accused

1. Emp. *vs.* Durgia (1892) 1 Weir 477.
2. Reg. *vs.* Dayabhoy 1 Bombay H.C. Reports 140.
3. Reg. *vs.* Meherwanji 6 Bombay High Court Reports 6.
4. Emp. *vs.* Dwarka Prasad I.L.R. 6 Allahabad 97.
5. Perera *vs.* Fernando Baas (1910) 4 Weer. 89.
6. Stickney *vs.* Sinnatamby (1886) 5 Tam. 112.
7. Rex. *vs.* Wooley 1 Denison's Crown cases 559.
8. The King *vs.* Van Cuylenberg (1908) 11 N.L.R. 240.
9. Baijnath Ram *vs.* Burgess 5 Calcutta Weekly Notes 255.
10. Rex *vs.* Martin 5 Q.B.D. 34.
11. Rex. *vs.* Parker 7 Carrington & Payn 825.

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purchased a horse and paid for it by a post-dated cheque, telling the prosecutor not to present it for two days but the prosecutor presented it on that very day and the cheque was dishonoured, it was held that the accused who expected a remittance which he intended to deposit in the bank to pay for the cheque was consequently not guilty.[1] Generally, an innocent endorsee of a cheque for valuable consideration cannot be guilty of aiding and abetting in the cheating : but cases may arise where an endorsee has merely endorsed in order to guarantee the *bona fides* of the drawer and where he is afterwards unable to make good ; he would then be guilty.

Although the definition of cheating is very comprehensive it does not include mere "puffing" for the purposes of trade. Exaggerations of value are mere matters of opinion like differences in taste : this was recognized by the framers of the Code who wrote : "The practice of intentional deceit for purposes of gain ought not always to be punished. It would hardly be disputed that a person who defrauds a banker by presenting a forged cheque or who sells ornaments of paste as diamonds may with propriety be made liable to severe penalties. On the other hand, to punish every defendant who obtains pecuniary favours by false professions of attachment to a patron, every legacy-hunter who obtains a bequest by cajoling a testator, every debtor who moves the compassion of his creditors by overcharged pictures of his misery, every practitioner who in his appeals to the charitable represents his distress as wholly unmerited when he knows that he has brought them on himself by intemperance and profusion, would be highly inexpedient. In fact, if all the misrepresentations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees and declares that to be his last word ; the buyer rises to nine and says that he will go no further, the seller falsely pretends that the article is unusually good of its kind ; the buyer that it is unusually bad of its kind ; the seller that the price is likely to rise soon, the buyer that it is likely soon to fall. Here we have deceptions practised for the sake of gain : yet no judicious legislators would punish these deceptions. A very large part of the ordinary business of life is conducted all over the world and nowhere more than in India (and Ceylon) by means of a conflict of skill in the course of which deception to a certain extent perpetually takes place."

We have seen that the words "damage or loss to the Government" are peculiar to the Ceylon Code : these are meant to include that class of cases which, though apparently acts of cheating, would not however be so punishable in India. Thus, a person who travels by the railway with a season-ticket which has been issued to another, or which has time-expired would come within the meaning of this section ; but the damage or loss must be something appreciable or measurable and it may be caused to Government through any of its servants. In the nature of things it cannot be caused to the body, mind, or reputation of Government. It must, therefore, be of a pecuniary nature. Thus, a witness who sends a false report of sickness to Court does not commit

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1. Rex. vs. Walve 11 Cox 647.

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cheating, though, by so doing, he makes the Magistrate do what he would not have otherwise done, *viz.*, postpone the case. The witness would, however, be guilty of contempt.

(II) Cheating by Personation.

"A person is said to cheat by personation if he cheats by pretending to be some other person or by knowingly substituting one person for another or representing that he or any other person is a person other than he or such other person really is." The offence is committed whether the individual personated is a real or imaginary person.[1] Thus, a man who cheats by pretending to be a certain rich merchant of the same name or by pretending to be a person deceased would be guilty under this section. What is essential is personation as well as cheating. Mere impersonation where the deception induces nobody to part with property, etc., would not be cheating by personation. Otherwise, all persons who practise mimicry either on the stage or outside would be guilty. But if there is concomitant cheating as defined in the last section, the impersonator would be convicted and this so, even if he had merely dishonestly concealed facts relating to his own personality or had by conduct induced the complainant to believe that he was what he did not profess to be. Thus, a person who puts on a cap and a gown in a University town and orders goods, makes the tradesman believe by his conduct that he is an undergraduate, and if he is not a member of the University but a rank outsider, he is clearly guilty of cheating by impersonation.[2] A person who produces another person in place of the real one before a Notary and gets a deed executed is equally guilty. Thus, where the accused produced one Isa before a Notary and falsely represented that Isa was one Ligona and endeavoured to get a deed of mortgage executed by the Notary in favour of one Arumugam Chetty with the object of obtaining a loan from him, he was held to be guilty of attempting to cheat the Chetty by false personation.[3]

(III) Attempt.

Attempts to cheat may be here discussed, being not uncommon in Ceylon. "The act of deceitful inducement forms part of the series of acts which would constitute the offence of cheating, and an inducing by deceit to the end that the offence may be committed is an attempt to cheat." But attempts have to be distinguished from mere preparations and, though the latter are not punishable, the former are. The question whether an act is a preparation or an attempt to commit an offence is, in the main, a question of fact and must depend entirely on the circumstances of each case. The offence of attempting an offence is complete where the act that has been proved to be done can be said to be an act which has been proved to be done towards the commission of the offence. Thus, attempting to get a false deed executed by a Notary would be an attempt to cheat.[4] Where the accused was indicted that she attempted to cheat by personation by pretending to a Notary that she was one Dingihamy and thereby deceived the Notary and induced him to execute a deed of transfer in favour of the first accused :

1. Section 399 C.P.C.
2. Reg. *vs.* Barnard 7 Carrington & Payn 784.
3. The King *vs.* Fernando (1912) 15 N.L.R. 106.
4. The King *vs.* Perera (1914) 2 Bal. Notes 58.

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it was held that the accused would be guilty of attempting to cheat by personation if the accused had given instructions to him to draw up the deed ; for, had the Notary gone on to prepare and attest it, the act of the accused would have been likely to cause him damage or harm in mind or reputation.[1]

An accused proposed to the shroff of the Kandy Kachcheri that he should circulate counterfeit notes which he said the second accused would make. The shroff informed the Police and the accused were led on. The first accused brought the second accused to the shroff and an exhibition of the method was given. Finally, the accused proposed to the shroff to bring six hundred ten-rupee notes from the Kachcheri and the shroff agreed. Next day, the accused again saw the shroff and enquired whether the notes would be ready. Later, the accused again went to him and fixed a day ; but before that day the Police arrested the accused. It was held that there were not merely several acts of preparation, but also an act of attempt towards the commission of the crime, *viz.*, the demand for the six hundred notes.[2]

In another recent case, the first accused, with the object of playing a confidence trick on one Mr. Hermon, told him that the second accused was a very wealthy Chetty and that he was fond of gambling and that a lot of money could be made by playing a game of cards with him. He demonstrated to Mr. Hermon that by a certain manipulation of the cards as they were put back in the pack, after they had been dealt out, on the tenth deal and subsequent deals the dealer would get all the picture cards. He was asked to take Rs. 20,000. Mr. Hermon learnt subsequently that by extracting one card from the pack all the picture cards would have gone to the other player. The second accused was not a rich man. Mr. Hermon informed the Police and went to the place indicated by the first accused. Before the play commenced, the Police arrived and arrested the first and second accused. The bags brought by the second accused did not contain money but only pieces of paper. On an indictment of the two accused for attempting to cheat, it was held that the acts done by the first accused amounted only to a preparation to commit the act of cheating and not to an attempt, but that he had conspired with the second accused to cheat and was consequently guilty of abetment of cheating : the second accused was acquitted as the offence of cheating had not been completed.[3] " It is most difficult if not impossible to form any satisfactory and exhaustive definition which would lay down for all cases when a preparation to commit an offence ends and when an attempt to commit that offence begins." It is, however, a question of fact in each case. A man who attempts to raise money by way of pawn on a brass ornament alleging that it is made of gold commits an attempt to cheat even if the pawn-broker has refused to give any money thereon—and even if he has been " fore-warned and therefore fore-armed." But a man who carries such an ornament in his hand and even says that it is made of gold and that he wants to raise money on it commits no offence so long as he does not offer it to anyone in particular, for he does not induce or attempt to induce any one to part with money.

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1. Rex *vs.* Bastian and others (1902) 2 Bal. 93.
2. The King *vs.* Jeeris Appu (1918) 5 C.W.R. 271.
2. The King *vs.* Silva *et al* (1923) 24 N.L.R. 493.

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(IV) Procedure.

Ordinary cheating is punishable with one year's imprisonment and is triable by a Police Court if the consequential damage or loss does not exceed a hundred rupees. But cheating by personation is a non-summary offence, so are the offences described in sections 401 and 403, unless, under the latter section, the value of the property in respect of which the offence is committed does not exceed one hundred rupees.[1] All cases of cheating, though not compoundable, are not cognisable : so that a Police Officer cannot undertake an inquiry into the same, nor can he prosecute, without previous sanction of the Magistrate.[2] Cheating is not a crime, so that even habituals who cheat in respect of any sums under a hundred rupees could be tried by a Magistrate.

Section 401 appears to contemplate the existence of what is known as a fiduciary relation between the deceiver and the deceived, such as that between guardian and ward, solicitor and client, principal and agent, etc. A mortgagee is not a person whose interest in the transaction relating to the mortgage, the mortgagor is bound by law to protect.[3]

Where a person is dishonestly induced to deliver property as the result of cheating, the offence committed falls under section 403, and was till recently not summarily triable by a Magistrate. Thus, where the Magistrate convicted the accused of having cheated one Ramasamy Nadar and thereby induced him to deliver to him three gold sovereigns by false representation, it was held that the offence for which the accused was convicted fell within the meaning of section 403 and was not within the jurisdiction of the Magistrate.[4] Ordinance No. 6 of 1924 has, however, conferred jurisdiction on the Police Courts if the value is under one hundred rupees. So that where property of higher value has passed and the accused is charged in respect of this passing of property, the offence would be non-summary[5] ; if the accused were merely charged with cheating, it would be triable in the Police Court.

A charge of cheating which simply states that A did cheat B is insufficient : the manner of cheating set out in the charge should disclose the offence of cheating.[6] The means by which the cheating has been accomplished should therefore be set out both in the charge[7] and in the summons to the accused.

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1. Ordinance No. 6 of 1924.
2. Section (129) Cri. Pr. Code.
3. Kadiramatamby *vs.* Vinasitamby (1908) 3 Bal. 278.
4. Ramasamy Nadar *vs.* Assari (1916) 2 C.W.R. 104.
5. Samarasinghe *vs.* Arumugam (1923) 2 Times L.R. 52.
6. Welakka *vs.* Diyonis (1887) 8 S.C.C. 56.
7. Carey *vs.* De Silva (1887) 1 C.L.R. 49.

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CHAPTER XVI.

RECEIVING STOLEN PROPERTY.

Section 393 of the Penal Code defines stolen property as follows :—

"Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, or by forgery, or by cheating, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as stolen property, whether the transfer has been made or the misappropriation or breach of trust has been committed within or without this colony. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."

It is an offence under section 394 dishonestly to receive or retain any stolen property, knowing or having reason to believe the same to be stolen property. Three things are necessary: (i) The property should be stolen property, (ii) there should be a dishonest receipt or retention, (iii) the offender should have known or should have had reason to believe that it was stolen property. So that the first and the most essential element to prove is that the property in respect of which the accused is charged is stolen property[1] as defined above : the theft, extortion, etc., must therefore be proved. Evidence of a conviction of the thief would be admissible and even the thief himself would be a competent witness against the receiver ; but the fact that the thief has been convicted is not of itself sufficient proof of the receiver's guilt, just as his acquittal does not imply that the receiver is innocent. The thief may have been a child under seven years of age and may have been acquitted, but the receiver would nevertheless be guilty.[2] And if a thief and receiver are jointly charged and if the thief pleads guilty and the receiver does not, the fact of the theft must be independently established.[3] And it should further be proved that the property in respect of which the accused is charged belongs to the complainant or was in his possession at the time of the theft : in other words, that he is able to identify the property. But it is quite settled law that neither in the case of theft nor of unlawful possession is it necessary for the owner to be able to swear positively to the identity of the property, if the circumstances are such as to satisfy the Court of the fact.[4] Thus, on a charge of receiving orange peokoe tea stolen from the complainant, the Superintendent and the teamaker of the estate, where the tea was made, being experts, may be called to prove that the tea found with the accused was of their manufacture : their opinions as to the identity of the tea should carry weight.[5] But where the articles are not of an unusual kind or bear no marks of identification and are such as pass easily from hand to hand

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1. Kekula *vs.* Kapuruhamy (1915) 1 C.W.R. 104.
2. Reg. *vs.* Begarvi I.L.R. 6 Madras 373.
3. Emp. *vs.* Bala Patel I.L.R. 5 Bombay 63.
4. Brantha *vs.* Kalimuttu (1915) 1 C.W.R. 230.
5. Reid *vs.* Kiriwanti (1903) 7 N.L.R. 383.

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or are easily procurable in the Island, *e.g.* pots and pans,[1] the question of identity becomes difficult and, unless there are very strong grounds to the contrary, the accused should be acquitted. If the owner of a stolen article be not known, the possession of the receiver cannot be dishonest, as there can be no intention to cause wrongful loss to any known person.[2]

Where a thief is charged simultaneously with the receiver but in a separate proceeding, the case against the receiver should ordinarily abide the result of the case against the thief ; for if no theft is proved to have taken place at all, the receiver could not be guilty. If, however, the two cases are taken up simultaneously, the theft will have to be individually proved in both. In any case the evidence of the thief against the receiver and of the latter against the thief should be recorded at the earliest possible opportunity : for they are both accomplices in a sense, and therefore liable to change their stories without compunction. If the case against the thief being non-summary has been or is being committed, the receiver may be asked to give sufficient bail to appear for trial when noticed, unless there are good grounds for proceeding immediately with his case.

The receipt or retention of property must be dishonest, that is, there must be an intention to cause wrongful gain to one person or wrongful loss to another. Thus, buying an article in " market overt " at its face value would not render the purchaser liable, even if the article turns out to be stolen property, unless the accused had previously known or had reason to believe that it was stolen property. It is only when an unlikely vendor offers an unlikely article for an unlikely price at an unlikely hour,[3] that the purchaser becomes guilty under this section ; for then, he can be presumed to have an intention of causing wrongful gain to himself.

To receive is to reduce it into possession, actual or constructive. To handle a thing merely, to take it into one's hand without the mental operation of intending to reduce it into one's possession, is hardly tantamount to the act of receiving.[4] Conversely, the actual manual touch is not necessary in order to receive ; it is sufficient if the property is found to be under the conscious control of the accused ; it may, therefore, even be in the possession of a person on behalf of the accused who has a control over him and can command it when he likes.[5] Thus, where the accused ordered her servant girl to take the goods brought by the thief and pawn them for him and the servant did so, it was held that the accused was guilty even though she had never handled the goods.[6] What is necessary, therefore, is that the receiver must have exercised some sort of dominion over the property : thus, it is not enough when he is caught in the act of bargaining. The position of the receiver as a person negotiating for the purchase excludes the idea of his having had any possession : there may still be a *locus poenitentiae*.[7] He may, however, be liable for assisting in concealing or disposing of or making away with stolen property under section 396. Where the accused pointed out a spot in another's field where, on digging up, certain stolen property was found, it was held

1. Emp. *vs.* Ina Sheikh 11 Calcutta 160.
2. 1899 Koch 28.
3. Will's Circumstantial Evidence, p. 76.
4. Pedric *vs.* Nadar (1915) 3 Bal. Notes 52.
5. Reg. *vs.* Smith 24 Magistrate's cases 135.
6. Reg. *vs.* Miller 6 Cox's Crown cases 353.
7. Reg. *vs.* Viley 4 Cox's Crown cases 412.

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that this evidence was insufficient to warrant a conviction—as there was no evidence to prove that the accused had himself concealed the article at that spot ; in other words, there was no evidence of receipt or possession.[1]

There is some difficulty about receipts by husband and wife. A husband can certainly receive from his wife ; but "under the English law the presumption almost amounting to a conclusion of law, is that the wife is not a free agent and is therefore exempt from liability ; whereas under the system of the Penal Code, the wife, like any other person, is responsible for her acts." The criminal law of India and Ceylon does not recognize the existence of a presumption in the same way ; but the principle of marital compulsion is not wholly absent. It may be that such a defence cannot be set up as a pure matter of law ; but, where a wife who is, generally speaking, under the control of the husband is charged with such an offence as the receipt or retention of stolen property, the circumstances under which she acted may be shown in order to negative the element of dishonesty or even the personal act of receipt or retention itself.[2]

The section contemplates two kinds of possession : receipt and retention. The receipt may be ephemeral or temporary : retention connotes possession for a length of time—at least, possession at the time of the finding of the property with perhaps an intention of continuing to keep it for some time more. The guilty receiver when he receives the property knows it to be stolen. What must be proved, on the other hand, on a charge of dishonest retention is not only knowledge or reasonable belief that the property in his possession was stolen, but that he having acquired that knowledge dishonestly kept such property.[3] While the earlier decisions[4] of the Supreme Court laid down that dishonest retention implied an innocent receipt in the first instance, Middleton, J., said that he could not agree with that view and held that a dishonest retention may be complete without any guilty knowledge at the time of the receipt. Where it was proved that the goods seized in the possession of the accused were the property of Messrs. Whiteaway, Laidlaw & Co., that they were quite new, that they were not sold to the accused, that the accused was an employee of the firm and admitted that the goods came from that shop, that he could not make good his statement that he had bought them, and that he was in possession of other new goods claimed by another shopkeeper, the same Judge held that it was reasonable to conclude that the accused dishonestly retained these goods as stolen goods.[5] The same view is now being applied by the Supreme Court.[6] So that the offence of dishonest retention does not necessarily imply an innocent receipt in the first instance.[7]

A person who commits dishonest misappropriation of property cannot be convicted of dishonest retention of the property misappropriated where there is no appreciable interval of time between the com-

1. Emp. *vs.* Gobindu 17 Allahabad 576.
2. Rex. *vs.* Assia Umma (1919) 6 C.W.R. 154.
3. Banda *vs.* Henaya (1896) 2 N.L.R. 4.
4. *e.g.* Muhamudu Hanifa *vs.* Bandirala.
5. Perera *vs.* Silva (1914) 7 N.L.R.
6. Brantha *vs.* Kaliamuttu (1915) 1 C.W.R. 230.
7. The King *vs.* Abdul Cader (1921) 23 N.L.R. 190.

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mission of the dishonest misappropriation and the manifestation of his intent to retain dishonestly the property which he so misappropriated.[1]

The offender should have known or should have had reason to believe that the property was stolen property. The word "believe" involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property.[2] The word "knowledge" means mental cognition and not visual perception : it merely implies that the receiver had such facts brought to his notice as could not but have led him to believe that the property was stolen and could not have been honestly obtained.[3] The prosecution must, therefore, prove that the accused knew or had reason to believe that it was stolen property : it is not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired : mere suspicion is not enough, and there must be belief or knowledge, so that even a dishonest retention without this *mens rea* would not make a person liable for receiving stolen property. And it would even be possible for a thief to be convicted of retaining stolen property which he has himself stolen when there has been sufficient time for him to develop the requisite intention.[4]

The first illustration to section 114 of the Evidence Ordinance says : The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. This presumption forms an important exception to the presumption of ownership arising from the mere fact of possession.[5] The possession must be "soon after" the theft : what is "soon after" is in each case a question of fact : it is a question which "depends largely on the nature of the property stolen, the facility with which it would pass from hand to hand, and the likelihood of its possessor for the moment forgetting how he had come by it." Where the accused was found in possession in January, 1909, of a typewriter of a special class bearing a particular number and worth over three hundred rupees, which was stolen in December, 1907, it was held that the accused's possession was so soon after the theft as to give rise to the presumption of theft or dishonest receipt.[6] On the other hand, the possession of clothes eighteen months after,[7] of a buffalo three years after,[8] of a cheque five months after,[9] of a billhook seven months after,[10] or of a watch eight months after,[11] can hardly be called "soon after" the theft. But a watch-chain stolen in March and found in June of the same year,[12] cutlery and clothes belonging to a resthouse found some four months after the theft,[13] a silver

1. Pieris *vs.* Anderson (1928) 30 N.L.R. 118.
2. Spurway *vs.* Wickramaratna (1906) Lem. & Ascr. 1.
3. Dr. Gour, section 4171.
4. Peris *vs.* Anderson (1928) 6 Times L.R. 40.
5. Dias' Ceylon Evidence Ordinance, p. 167.
6. Meedin *vs.* Kiri Appu (1918) 5 C.W.R. 236. See also Hodson *vs.* George (1909) 12 N.L.R. 273.
7. Hanifa *vs.* Bandirala (1899) 3 N.L.R. 217.
8. Don Pabilis *vs.* Gunatillake (1902) 3 Br. 138.
9. *Ibid* 3 Br. 141.
10. (1899) Koch 63.
11. Coorey *vs.* Lucas Appu (1909) 1 Cur. L.R. 127.
12. 3 Bal. 204.
13. Gunasekara *vs.* Andris (1919) 7 C.W.R. 114.

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tea service stolen in July, but discovered in November of the same year,[1] two head of cattle stolen in March and found in November of the same year[2] were all held to be found so soon after the theft as to give rise to the presumption. In the case of cattle four months[3] is held to be sufficient to give rise to the presumption but not a year[4] or two.[5] In short, the question what is or is not such a recent possession of stolen property as to require the person, in whose possession it is, to give an account of how such possession was acquired, is to be considered with reference to the nature of the article stolen ; and, whereas one or two months might be too long with regard to some articles such as pass from hand to hand readily, even five months may not be too long in the case of an article such as an engine-belt which is seldom obtained except from a dealer and the possession of which can be easily explained and its innocent acquisition proved by a person who came by it honestly.[6] Thus, where an angle iron flange, a piece of steel piping and a motor car inflator, belonging to the Commercial Company at Badulla, was found with the accused in February, 1918, and where the date of theft was not known, the last stock-taking having taken place in August, 1917, De Sampayo, J., held that the burden was shifted on the accused to show that he came by these articles honestly.[7] Where a bicycle, stolen seven months previous to the prosecution, was found in the bedroom of the accused who having no means of livelihood was living with his father and was supported by him, and where the accused could not substantiate his statement that he had bought the machine, the accused was held to be guilty.[8]

While the possession, therefore, should be recent, it should also be actual and exclusive ; for, criminal liability does not attach to constructive possession.[9] So that where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them in particular unless there are facts pointing to the property being in the conscious control of that person.[10] Thus, where stolen bags of rice were found in a house, one room of which was let to the accused, it was held that the prosecution must prove that the accused had exclusive control over that room.[11] Where an accused is charged with theft of property, no definite presumption of guilt can be drawn against him, if the only evidence is that the property, alleged to have been stolen, was found lying in a house or room in which he lived jointly with others, or in an open box to which others had access : in order to make possession presumptive evidence of theft, such possession must be exclusive as well as recent.[12] So that where a certain article was found in a boat and the accused who was the tindal of the boat was not the only person on board at the time, it was held that the accused had no conscious control over and therefore no possession of the stolen goods. Where a stolen gold chain was found by a constable

1. Lem. and Asir. 1.
2. Siriwardana *vs.* Deonis (1925) 27 N.L.R. 358.
3. 2 Bal. 46.
4. Perera *vs.* Pemiyanu (1907) 1 Leader 54.
5. 2 C.W.R. 201.
6. 1 C.W.R. 130.
7. Meedin *vs.* Kiri Appu (1916) 5 C.W.R. 236.
8. Coore *vs.* Allis Appu (1904) 7 N.L.R. 327.
9. Banda *vs.* Harmanis *et al* (1919) 21 N.L.R. 441.
10. Sethukavelu *vs.* Kandiah (1920) 7 C.W.R. 141.
11. 2 Leader 107.
12 3 N.L.R. 170.

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hidden in a bag of paddy in the room of a house occupied by a third party in which the accused was a lodger, it was held that the accused not being in exclusive possession of the stolen chain could not be convicted, even though the accused had not protested at the time of the search that some one had introduced the stolen article into the house.[1] It must not be forgotten that the section does not penalize the possession of stolen property but the receiving or retaining of such property.[2]

Once possession is established to be recent and exclusive, then the burden is shifted on to the accused to account for his possession : "As a general proposition, where a person is in possession of property, it is reasonable to suppose that he is able to give an account of how he came by it ; and where the property in question has belonged to another, it is in general not unreasonable to call upon him to do so. If the charge of possession has been recent, he will not be likely to have forgotten, still less if it be an article of bulk or value. It cannot be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account, or is unable to give a probable reason why he cannot. Now, there is no reason in general why an honest person should be unwilling ; and therefore the law presumes that such person is not honest and that he is the thief."[3] The possession of recently stolen property, therefore, throws on the possessor the onus of showing that he got it honestly.[4] On a certain night, some 61 coconuts were plucked from 16 trees on an estate. Next morning, 60 freshly plucked nuts were found in a small cadjan enclosure situated at a distance of three to eight fathoms from the house of the accused which was about a quarter of a mile from the estate. The cadjan enclosure could have been opened and entered by any one. In the house of the accused there were 500 other nuts ready for sale. The sixty nuts said to be stolen poperty were found hidden and covered over with cassava sticks. The accused said that there were persons who were ill-disposed towards him and that it was possible that they had introduced these nuts into his enclosure in order to get him into trouble. It was held that the burden of proof of innocence had not been shifted on to the accused and that the Crown had not discharged the onus of proving beyond all reasonable doubt the guilt of the accused.[5] This case followed the decision of an English case where a bag was missed by its owner on Saturday night ; the accused passed the place where the bag was missed on his way home ; the bag was recovered from a disused hay-loft in some farm buildings near the accused's cottage ; there was no door to the hay-loft and passers-by had easy access to it : the prisoner was convicted but the Court of Criminal Appeal quashed the conviction.[6] The whole of this question came up for revision before the Supreme Court recently in Rawther's case,[7] where the Police Magistrate of Colombo acquitted the accused on the strength of these decisions and the Attorney-General appealed : the reader is referred to a full report of the case which, being a Full Bench decision, throws a good deal of light on the subject. In that case, a stolen pair of nail scissors was found within about fifteen days of the loss in a locked

1. Sivapragasam vs. Weragathy (1921) 23 N.L.R. 127.
2. Fonseka vs. Jamis (1909) 2 Weer. 79.
3. Cockin's case (1836) 2 Lewin's Crown cases 235.
4. Rex vs. Powell (1909) 3 Criminal A.R. 1.
5. Perera vs. Marthelis Appu (1919) 21 N.L.R. 312.
6. R. vs. Hughes (1878) 14 Cox's Crown cases 223.
7. The Attorney-General vs. Rawther (1924) 25 N.L.R. 385.

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drawer of a locked almirah of which the accused had the keys. The accused, when charged with dishonestly retaining stolen property, said that he did not put them there, but that his son had access to the almirah and that he frequently gave him the keys. He also said that his son had bought them from one Junaideen. He named Junaideen and his son as witnesses, but did not call them at the trial. The Magistrate said in his judgment: "It cannot be disputed that the explanation given by the accused may reasonably be true" and also "I am not satisfied with the explanation" and acting on the strength of previous decisions acquitted the accused. The Full Bench affirmed the order of acquittal. Bertram, C.J., discussing the various decisions[1] on the subject, says *inter alia* : "To say that an explanation is reasonable means that it is reasonable in all the known circumstances of the case. Whether an explanation in any particular case is a reasonable explanation will depend on all sorts of factors, such as the status, the manner, the demeanour of the accused ; the explicitness and fulness of the explanation, or on the contrary, its meagreness and reserve ; on the readiness or reluctance of the accused to support it by oral or documentary evidence where such evidence should be available. But if there is any circumstance which entitled the Court or the jury to say that the explanation is false and the Court or jury so finds, then such explanation cannot be considered reasonable." And the learned Judge goes on to hold that, where the accused mentions witnesses in support of his explanation, the question whether it is reasonable for the accused or for the prosecution to cite the witnesses must depend on the circumstances of the case. It is not likely that the thief from whom the accused received the property will give a frank account of the circumstances, and allowance must be made for any reluctance on the part of the accused to call him. Ennis, J., in the same case with the concurrence of De Sampayo, J., held that in considering whether an accused has accounted for his possession of stolen property, the strength of the presumption to be dispelled must first be ascertained. How "soon after" the theft was it found in the possession of the accused ? The presumption gets weaker as time goes by, till the point is reached where no presumption can be drawn. That point of time will vary according to the nature of the article. If it be a common thing readily passing from hand to hand in the every day business of human life without much thought, such as a pair of scissors, the point would soon be reached. Whether any particular person would be likely innocently to possess such a pair would depend on his status in life and once again, the point of time will vary with the status. To say that the accused has not satisfied the Court that he came by the property honestly is a vague ground for rejecting an explanation and it overlooks the main question which is always, "Does the evidence prove, beyond a reasonable doubt, the guilt of the accused ?" The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law. It follows, therefore, that if an accused gives an explanation which may reasonably be true, he is entitled to an acquittal.

Further, when a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that the account is

1. Especially th famous dictum of Lord Reading in R. *vs.* Abramovitch (1915) 84 Law Journal, King's Bench 398.

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false.[1] Thus, where the accused was charged with having retained stolen property, one only of which bore the letters C.G.R. and could therefore be identified as the property of the Ceylon Government Railway, and the accused, who was a boutique-keeper at Trincomalee, said that a man, named Appuhamy, lodged in his boutique and left the articles as security for a debt due on account of boarding charges, and the accused produced his account books showing the receipt of these articles as such security, it was held that the accused had given a reasonable account as to how he came by the articles and that the prosecution had failed to discharge the burden of proof to the contrary.[2] It follows, therefore, that the mere fact that a man has in his possession an article which has a Government stamp on it, is not sufficient proof that he had reason to believe that it was stolen.[3]

The real test is not that the accused's explanation is not a reasonable one because an ordinary prudent and reasonable man would have suspected that the property was stolen but whether the circumstances show that the accused was convinced in his own mind that the property was stolen.[4]

And even suspicion on the part of the accused that there is something wrong about the ownership of property when it was transferred to him will not be sufficient.[5]

The accused, a tailor, was charged with dishonestly retaining three rolls of cloth ; he was openly examining them when the Police arrived to search his house ; on being asked how he came by the stolen goods, he explained that a neighbour of his had left them there saying he would return for them ; this statement was corroborated by the statement of the neighbour who was arrested ; it was held[6] that the onus of proving guilty knowledge never shifted from the Crown and as the accused had given an explanation which might reasonably be true, he was entitled to an acquittal on the principle laid down in *R. vs. Abramovitch.*

To determine the guilt of an accused in all ordinary cases of receiving or retaining stolen property—once the possession is proved or is admitted—the following factors must necessarily be considered : (1) the nature of the article : if this is of an unusual kind, the accused would be expected to know that it must have been stolen : when it is an ordinary or an easily saleable article, the accused could hardly have had reason to disbelieve its genuineness ; (ii) the market value paid for the same ; if this is far below the usual face-value of the article, then a suspicion —if not a presumption—arises that it must have been stolen, *e.g.* a Swan fountain pen being sold for 75 cents. Where there is not much difference between the price paid and the actual value, the accused would get better consideration at the hands of the Magistrate ; for the tendency of everyday life shows that only stolen articles would be surreptitiously undersold and a reasonable man is expected to draw an inference from this underselling that the accused could not have come by them honestly ; (iii) the circumstances of the sale, *e.g.* a sale off an evening at a lonely spot, or a sale in the early hours of the morning compared

1. R. *vs.* Crowthurst I Garrington & Kirwan's Reports 370.
2. Kandiah *vs.* Podi Singho (1921) 23 N.L.R. 337.
3. (1890) Koch 63.
4. The King *vs.* Thomas Appuhamy (1929) 7 Times L.R. 9..
5. Inspector of Police *vs.* Podi Singho (1930) 3 C.A.R. (Gratiaen's) 40
6. The King *vs.* Perera (1925) S.C. 79 D.C. (Crl.) Colombo 7,688.

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to a public sale in an open market. Where goods are of such a nature as are peddled from house to house, the fact that the accused bought them at his door could create no suspicion against him ; it is only when an unusual article is being sold in an unusual manner at an unusual hour that the duty of the purchaser becomes doubly onerous ; (iv) the status of the person who sells the same, *e.g.* a villager attempting to dispose of a pair of trousers, or a mendicant trying to sell some gold ornaments.

Section 408 of the Criminal Procedure Code enacts : " Where proceedings are taken against any person for having received goods knowing them to be stolen or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceeding taken against him." Section 409 says that where evidence has been given that the stolen property has been found in the possession of the accused, then if such person has been convicted within five years immediately preceding of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings and may be taken into consideration for the purpose of proving that the accused knew the property which was proved to be in his possession to have been stolen, provided that seven days' notice in writing shall have been given to the accused that such proof is intended to be given. Besides these two sections which put the guilty receiver into a somewhat unenviable position, evidence of previous receipts of stolen property may also be given to prove knowledge or intention under section 15 of the Evidence Ordinance, when the defence put forward by the accused raises the issue of knowledge or intention.[1]

The proviso to the definition of stolen property states that where such property comes into the possession of a person legally entitled to the possession thereof, it ceases to be stolen property. This proviso has a curious result which will be evident from the facts of Dolan's case.[2] Here, the thief was caught red-handed by the owner with the goods in his pocket and the owner sent for a constable in order to entrap the guilty receiver ; all the three went up near the shop and there the owner returned the goods to the thief and asked him to sell them to the accused : the thief did so : the accused was convicted in the lower Court : but the conviction was quashed, Campbell, C.J., remarking : " If an article once stolen has been restored to the master of the article and he having had it fully in his possession bails it for any particular purpose, how can any person who receives the article from the bailee, be said to be guilty of receiving stolen goods within the meaning of the act ? " Where the owner intending to discover and arrest the receivers of tea stolen from his estate ordered the tea to be taken by the thieves who were in the custody of the Aratchy to the person who was expecting it and where the accused accepted the tea, the accused was held to be guilty of having dishonestly received stolen tea, inasmuch as the stolen property received remained in the possession of the thieves and had not passed to the possession of the owner at the time of the receiving by the accused.[3]

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1. The King *vs.* Wijayaratne (1919) 6 C.W.R. 314.
2. 6 Cox's Crown cases 449.
3. Wickramasinghe *vs.* Mohamado (1909) 2 Weer. 49.

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Where an accused is charged with theft, he may be convicted o. having received stolen property or *vice versa*, even though he has not been charged with it. Where the accused who had agreed with a timber merchant to sell him a certain quantity of timber, went with another person and opened a timber store belonging to Messrs. Darley Butler & Co. and loaded carts with timber and was promptly arrested and charged with receiving stolen timber, it was held that while the charge of dishonest retention was not appropriate, it was open to the Court to convict the accused of theft under section 182 of the Criminal Procedure Code ; and the Supreme Court in appeal reversed the acquittal and sentenced the accused to imprisonment.[1]

If a collection of stolen things belonging to one person are together found at one place and time in the possession of the person charged, there is but one act of retention, however he may have originally come by them and consequently but one offence.[2] So that separate charges cannot be framed in respect of each separate article ; nor can the accused be sentenced to separate punishments in respect of each of such receipts. Further, a charge of dishonestly receiving is merely alternative to a charge of theft and an accused can, therefore, be convicted of one only of the two alternative offences.[3] He must be acquitted of the other.

The offence of receiving or retaining stolen property (section 394), although punishable with three years' imprisonment, is both summary and non-summary. Where a person habitually receives or deals in property which he knows or has reason to believe to be stolen property, the offence becomes more heinous and is only triable by the Supreme Court (section 395). Where a person voluntarily assists in concealing or disposing of, or making away with property which he knows or has reason to believe to be stolen property (section 396), he may be tried by a Magistrate if the value of the property does not exceed Rs. 100 : all these offences are cognisable and not compoundable.

When an accused is convicted under any of these sections, the Magistrate may order the revesting of the property into the hands of the actual owner : he may, in so doing, even dispossess an intermediate *bona fide* purchaser for value. Where the accused is acquitted, the law is laid down by the Supreme Court as follows :—" The Magistrate may, if he comes to the conclusion that the property was actually stolen, order it to be delivered to the person from whom it was taken, even if he acquits the accused and disregard the possession of the receiver, or he may order the property to be detained in Court. But where it appears to the Magistrate that the offence which was the subject-matter of the trial was not committed, he cannot make an order for the disposal of property under section 413 of the Criminal Procedure Code, though it may appear to him incidentally that an offence was committed : the only proper course for the Magistrate to adopt is to return the property to the person in whose possession it was."

It only remains to mention that if an offence of dishonest receipt or retention is proved to the hilt, the accused ought to be more severely punished than in the case of theft : for the maxim, " the less the number of receivers, the lesser are the thefts " applies. Thefts cannot be so rampant if thieves cannot dispose of stolen goods : in a sense, therefore, receivers are worse criminals than thieves.

1. The King *vs.* Arnolis (1921) 23 N.L.R. 225.
2. The Police *vs.* Jamaldeen (1917) 4 C.W.R. 248.
3. (1899) Koch 10.

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CHAPTER XVII.

MISCHIEF.

"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously commits mischief."

It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the propery injured or destroyed : it is sufficient if he intends to cause or knows that he is likely to cause wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.[1]

The two essential elements of this offence are, intention to cause wrongful loss or damage, and the act of injuring property.

The act of injuring must be such as to cause destruction of the property or any such change in it or in its situation as destroys or diminishes its value or utility, or affects it injuriously. Thus, the burning of a valuable security, or the throwing of a ring into a river, or destroying one's effects in order to prevent them from being seized by a writ-holder, or damaging an insured article in order to claim money from the underwriters, would all be acts of mischief.[2] But the plucking of such fruits as coconuts or jak-fruit would not amount to mischief, inasmuch as such plucking does not cause the destruction of the trees or fruits, or any such change in them or in their situation as would destroy or diminish their value or utility, or affect them injuriously.[3] But it would be otherwise, if tender fruits were plucked, or if fruits were plucked in such a manner as to damage the trees. Where the accused was charged with having obstructed the mouth of a culvert so as to direct the course of water from the property of the accused over which it had passed for ten years and over, it was held that the effect of that change in the culvert was to diminish its value and utility as a culvert.[4] This case must be distinguished from the case where a dam is erected across a flowing stream or rivulet ; for, though the dam may affect adjoining property, it does not affect the owner injuriously.[5] Again, there can be no destruction when standing crops which are mature for harvesting are cut.[6] And the Indian High Court has held that where bamboos are cut, the cutting is no destruction or injury contemplated in the section, as bamboo is a thing which is grown to be cut.[7] This, perhaps, is an extreme view, but

1. Section 408 C.P.C.
2. See illustrations to the Penal Code.
3. Andree *vs.* Coorey (1893) C.L.R. 203.
4. Kirthisinghe *vs.* Fernando (1912) 7 Weer. 1.
5. 4 Madras High Court Rulings app. (15).
6. Emp. *vs.* Nga Si (1903) 10 Burma Law Reports 126.
7. Shakur Mohamed *vs.* Chander Mohan Sha 21 Weekly Reports 38.

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it shows forcibly that the destruction or change in property must be caused in the property itself. So that where the accused maliciously impounds another's cattle so as to cause him to be mulcted in a fine, he commits no mischief, as he has caused no destruction of or change in the cattle themselves.[1] The throwing of stones at another's house does not amount to mischief, unless the house is injured or the accused intends to cause, or knows that he is likely to cause, wrongful damage to the complainant by injuring his house.[2] And the pelting of stones at another's house by "mischief mongers" is not *per se* punishable even though it causes annoyance to the residents, unless the stone hits a tile or a wall and causes some damage, howsoever slight, to the building. The damage must, therefore, be measurable in pounds, shillings, and pence ; if there is no damage at all, or if there is an increase in value, it is apparently not mischief. Thus, the building of a house on a common property is not mischief.[3]

The wrongful loss or damage may be caused to any person—not necessarily to the owner of the property. Thus, one can commit mischief by destroying his own property if that destruction causes wrongful loss to someone else. The malicious shooting of a horse which belongs jointly to the complainant and the accused is punishable under the section like the destruction of one's own property so as to prevent its being taken into execution.[4] But a person who, whatever might be his motive, destroys his own property in which no one else has any legal interest and against which no one has any legal claim cannot be convicted of mischief under the Code. Where the complainant, who was caretaker of a coconut plantation, had been allowed by the owner of the land to cultivate with yams an enclosure in the land as a recompense for his services, and it appeared that the owners owing to a dispute turned out the complainant and proceeded to pull out and destroy the yams, it was held that the accused were not guilty of mischief, as the complainant was liable to be turned out of the land at any moment, and, as soon as this was done, the complainant had no legal right to anything growing upon the lands or to compensation for improvements.[5] A mere removal by the accused from his own garden of a well-sweep and well-posts standing thereon will not of itself constitute mischief in the absence of any prescriptive right in the complainant or others to the user of the well-sweep and posts.[6] But a person who casts his net for fishing inside the net of another commits mischief, as the latter has sufficient property in the fish to maintain a civil action.[7] And a co-owner who removes a fence in the assertion of a real or a fancied right to an enclosed portion of what is claimed as common property, does not thereby commit mischief unless he acts spitefully, maliciously, or wantonly.[8] But a co-owner cannot cut a fence when he is not satisfied with an informal divison of a land, for he has the civil remedies open to him.[9] But a co-owner may, with impunity, cut a fence with a view to protest against the assertion by the complainant of a right to a defined portion in order to prevent prescription

1. R. *vs.* Ramjeevan (1881) Allahabad Weekly Notes 158.
2. Balasuriya *vs.* Weerakoon (1911) 1 Bal. Notes 9.
3. Sirineris *vs.* Candrasena (1914) 1 Bal. Notes 51.
4. Illustrations to g. and d. to section 408 C.P.C.
5. Christogu Pulle *vs.* Nikolan-Pulle (1916) 3 C.W.R. 182.
6. Moses *vs.* Vallipillai (1887) 8 S.C.C. 52.
7. Perera *vs.* Perera *et al* (1920) 2 C.L.R. 46.
8. Porolis *vs.* Romanis (1903) 2 C.A.C. 163.
9. Kandiah *vs.* Selliah (1913) 1 Bal. Notes 30.

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from running.[1] This does not, however, give the co-owner the right to cause wanton damage, *e.g.*, by destroying fruit trees, the right to which is admittedly in the complainant.[2] So that cases could be distinguished where an act though wrongful in itself is not mischievous, having been done in vindication of a right which is the subject-matter of a dispute.[3]

The question of intention has been touched upon at length by Schneider, J., in *Saibo vs. Perera*,[4] where he reviews all the previous judgments on the point. There, he decides that whenever a charge of mischief is preferred, before a Court can convict, it must be satisfied not only that the injury had been inflicted, but that the facts and circumstances justify the inference of the presence of criminal intention or knowledge. "Such an inference would not be justified unless they negative a reasonable inference that the act could not be due to any other state of mind, such as accident, carelessness, or negligence, or *bona fide* belief in one's right. A carter who in his endeavour to get out of the way of a car drives his cart into it and damages the car, is not guilty of mischief. His act is due to stupidity. A person who neglects to take care of his cattle so that they trespass into a field under crop and damage the crop would not be guilty of mischief. His act is due to negligence." In the case under discussion, the accused was charged with mischief for destroying fowls belonging to the complainant and the evidence showed that the accused had suffered by the trespass of these fowls on many occasions and had actually posted up a warning. The conviction was quashed as the destruction of the fowls was done for the protection of property and not with the intention or knowledge of causing wrongful loss to the complainant. And though formerly it was held that shooting of trespassing animals, whatever be the motive, was not mischief,[5] it is now the law that wanton destruction of or the inflicting of wanton injuries on an animal which is the property of another would be mischief even if it had trespassed on the accused's land ; this wantonness would be deduced from the absence of any previous reasonable efforts to drive the animal away[6] ; as this may give rise to a presumption that the accused had the intention of causing, or the knowledge that he was likely to cause, wrongful loss or damage.

Where the intention is absent, there could be no offence. Where the accused's only object in cutting down overhanging trees is the protection of his house and there is no malice, spite, or ill-will towards the complainant, he cannot be charged for mischief.[7] An accused person who had no right to drive his master's horse and trap did so and the horse getting frightened injured itself and the trap ; it was held that the accused was not guilty, as it was quite clear that he did not intend to cause injury to the horse and trap and the destruction which ensued was not a necessary or even a probable result of his act.[8] In some cases, the intention is presumed, *e.g.* where a mortgagor damages mortgaged property and so reduces its value.[9] In others, the presumption of intention will be rebutted by the absence of *mala fides* on the part of the accused. Those

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1. Ibrahim Lebbe *vs.* Saibo (1916) 2 C.W.R. 99.
2. Hapuva *vs.* Paiya and another (1932) 1 C.L.W. 212.
3. Hendris Singho *vs.* Engo Nona (1914) 7 C.A.R. 21.
4. (1922) 24 N.L.R. 71.
5. Lowe *vs.* Vasilino (1890) 9 S.C.C. and Ranghamy *vs.* Bodin (1893) 2 C.L.R. 176.
6. D.C. Negombo (1905) Lemb. 91. See also P.C. Panadura (1901) 5 N.L.R. 23 and Queen *vs.* Sultan (1896) 1 N.L.R. 162.
7. Hendris Singho *vs.* Rituna (1914) 1 Bal. Notes 54.
8. John Fox *vs.* Weerasamy (1900) 1 Br. 332.
9. Mecrasaibo *vs.* Duraya (1905) 4 Tam. 89.

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who allege a *bona fide* claim of right made in good faith cannot be convicted of this section. Where a person acting as a *bona fide* purchaser of property cuts down trees in the property purchased, he cannot be convicted of mischief.[1] Thus, where a person who had cut down a wire fence in the *bona fide* exercise of a right was convicted of mischief, it was held that the conviction was bad.[2] It was similarly held to be bad where the accused in assertion of their rights lowered a barbed wire fence and emptied a well.[3] Again, where the accused really believing that they had a right of way over the complainant's land cut down a portion of a fence which he had put up, so as to prevent their entering his land in order to assert their supposed right of way, it was held that no person could be convicted of mischief when he dealt injuriously with property in the *bona fide* belief that it was his own.[4] Where the complainant bought one of two lots which corresponded to an undivided share, in a property of which there was an informal division, and the accused objected to the use by the complainant of a latrine on what he claimed to be his lot, and after giving six weeks' notice to the complainant demolished the same, it was held that the accused was not guilty in the circumstances, and the fact that the complainant himself asserted a *bona fide* claim did not affect the position of the accused. Bertram, C.J., said, " I should be very sorry to hold that a person cannot demolish a latrine on his own land which he claims to be a nuisance because it was erected by a person who wrongfully claims an interest in the land."[5] Where the accused acting under legal advice cut down the eaves of the complainant's roof which overhung the accused's premises, he was held not to have committed mischief, acting, as he did, under the belief which might have been a mistaken one that he had a legal right.[6]

But in these cases wantonness or spite will show malice on the part of the accused and he can be convicted even if he has a right to the property along with the complainant. Thus, where the accused destroys a building claimed by the complainant and also claimed by himself and there are civil disputes between the two with regard to the ownership of the land on which the building stands, the accused would be guilty of mischief.[7] So would the Manager of a temple who destroys a "Madam" built on the temple premises by the complainant and to which the latter has acquired a prescriptive right of performing " Pooja," even though the alleged loss which the complainant suffers is a loss of "Puniam" or merit in a future existence, for the very destruction causes a substantial loss to him in his present existence.[8] It is the *mala fide* destruction of property that the section penalises--so that where the accused does not act with the intention of causing wrongful loss to the complainant but under a *bona fide* claim of right, they cannot be convicted. The accused must act wantonly or maliciously and must intend to cause wrongful loss or damage.[9] Thus, the accused who, when charged with cutting

1. Balappu *vs.* Perera (1907) 1 Leader 42.
2. Kavasan *vs.* Omar Lebbe (1910) 4 Leader 46.
3. Perera *vs.* Fernando *et al* (1928) 6 Times L.R. 9.
4. Fernando *vs.* Bemappu (1893) 2 S.C.R. 66.
5. Fernando *vs.* Fonseka (1921) 23 N.L.R. 7.
6. Yoosoof *vs.* Haniffa (1921) 3 C.L.R. 18.
7. Saveri Atchi *vs.* Marisal Pillai (1906) 2 Leader 39.
8. Perumpalam *vs.* Ragunathar (1923) 2 Times L.R. 48.
9. Abeywardena *vs.* Rajapakse *et al* (1926) S.C. 100. P.C. Tangalle 16,704.

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down a barbed wire fence, set up a *bona fide* claim of right to the land were held to have committed no offence under this section.[1]

Mischief, when the loss or damage is under Rs. 50, is punishable with three months' imprisonment or a fine or both, and when it is Rs. 50 and over with imprisonment for two years or a fine or both.[2] They are both non-cognisable, compoundable and summary offences. There are other and more serious forms of mischief, *e.g.* mischief to irrigation works, roads, bridges, ships, wrecks, etc. ; for these the reader must refer to the particular sections of the Penal Code itself.

Malicious injury to property or boundaries when the damage does not exceed twenty rupees is also triable by Village Tribunals.[3]

(II) Maiming.

Section 411 of the Penal Code enacts : "Whoever commits mischief by killing, poisoning or maiming or rendering useless any animal or animals of the value of ten rupees or upwards shall be punishable with imprisonment for two years or fine or both." By section 412, "whoever commits mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, ass, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment" for five years or fine or both.

Under the former section, animals other than the domesticated animals mentioned in the latter could be dealt with, provided the value is not less than ten rupees nor more than fifty. It follows that such animals of less value than ten rupees cannot be dealt with under either of these sections, though malicious injury to them can be treated as ordinary cases of mischief under section 409 ; thus, the killing of another's parrot or "mina" may be ordinary mischief, but cannot come within the pale of these sections. The value must be the market value and not the special value which the animal may possess to its owner. The animals must be the property of somebody—and not merely *nullius proprietas*. Thus, the shooting of a stray dog would not be punishable.

Maiming denotes a permanent injury. It has practically the same meaning as "Mayhem" in English law. To constitute maiming, it is essential that permanent injury should be inflicted on the animal. Thus, where the accused finding two cows trespassing on his land on which paddy was growing lost his temper and slashed them with a knife, without attempting to secure them, and the animals were neither killed nor maimed nor rendered useless, it was held that though he might be convicted of section 409, he could not be convicted of maiming.[4] Where the animals that were cut had subsequently recovered, it was held that as "maiming" meant "permanently injuring," the facts did not sustain the charge.[5] The cutting of the teat of a cow,[6] or of the ears and tail of a cow,[7] or the chopping of about a foot off the end of a cow's tail,[8]

1. L. D. Paul *vs.* Bubbuva P.C. Galle 24,206 S.C. 215 reported in the "Ceylon Morning Leader" of 2nd June, 1925.
2. Sections 409 and 410 C.P.C.
3. Schedule to Ordinance No. 9 of 1924, section 55 (Bb.).
4. P. C. Panadura (1901) 5 N.L.R. 23.
5. Andris *vs.* Samel (1887) 1 C.L.R. 48.
6. Anthony *vs.* Samuel (1907) 11 N.L.R. 65.
7. Zoysa *vs.* Edoris Appu (1907) 11 N.L.R. 66.
8. Hudley *vs.* Appuhamy (1908) 1 Weer. 6.

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or the burning of a dog with kerosine oil[1] have been held to be not maiming; these decisions have, however, been upset by a later one[2] where the cutting off of the tail of a cow was held to be mischief. In any case, maiming means the prevention of the use of a limb or member and implies a permanent injury. So that where the accused is charged with maiming and the defence is that the injury is not permanent, the case will have to be postponed till such time as may be necessary to allow the injury to heal. If, after healing, the injury still leaves a permanent defect in the use of that particular limb, the offence will fall under this section; otherwise, it will be a case of simple mischief and if the damage caused is estimated at less than Rs. 20, the complainant may have to go to a Gansabhawa.

Similarly, "rendering useless" means permanently impairing the utility of the animal in question: when the animal becomes useless only for a short period, the accused is not liable. Thus, where the accused threw a stick to drive away a bullock from his cow-shed and the stick hit and blinded one of its eyes, it was held that as the injury caused was not shown to be permanent as the animal was still under treatment, the accused could not be convicted under this section.[3] The word "useless" connotes "not useful for the purpose for which it is ordinarily employed."

It is a debatable question whether animals could be destroyed in consequence of the right of private defence of one's property; it is held that wanton destruction of trespassing animals would amount to mischief.[4] In any event, the nature of the force used and the circumstances in which the destruction or wounding took place would be material points in such an enquiry. This is especially so because, under the Cattle Trespass Ordinance,[5] a Magistrate is empowered to grant licenses for the shooting of stray cattle which are in the act of trespassing upon any private land and which cannot be seized or identified: if, however, such stray cattle can be seized or identified, then the owner of the cattle in question should be proceeded against as provided for in that Ordinance. So that wanton destruction of trespassing animals tends to shew that the accused must have had the guilty intention, he having failed to take steps according to law. Thus, the shooting of cattle in broad daylight when trespassing on cultivated land over which people have been in the habit, until shortly before, of passing at will and which was not fenced would be mischief,[6] though the maiming of a cow in a dark night under the mistake and fear that it is a leopard would be excusable.[7] Where, however, the accused who obtained a license from the Government Agent to shoot trespassing cattle was charged with mischief on the ground that no steps were taken to seize or identify the cattle before they were shot, it was held that the fact that the accused acted in the *bona fide* exercise of a legal right negatived any intention to cause wrongful loss or damage and that therefore the accused could not be convicted.[8]

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1. (1899) Koch 1.
2. Sanchi Nona *vs.* Davit Singho (1914) 17 N.L.R. 252.
3. Emp. *vs.* Narain Singh (1905) 21 B.R. 25.
4. Saibo *vs.* Perera (1922) 24 N.L.R. 71.
5. No. 9 of 1876, section 14, Vol. I, p. 827.
6. Rosario *vs.* Ponsiano Dias (1898) 3 Br. 101.
7. Sittappu *vs.* Sinnappu (1899) 8 N.L.R. 345.
8. Thambyah *vs.* Vanderput (1929) 31 N.L.R. 420. 7 Times L.R. 67.

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These offences are cognisable but summary as well as non-summary and are compoundable with the permission of the Attorney-General.

It may be here mentioned that some cases which fall short of maiming may nevertheless be dealt with as cases of cruelty.[1]

(III) Arson.

Arson[2] means mischief by fire or by any explosive substance. There must be an intention to cause or a knowledge that one is likely to cause damage to property. Where the damage is to property other than a building, it must be to the amount of one hundred rupees or upwards ; if less, it is apparently a case of ordinary mischief. Where the fire results or is likely to result in destruction of a building used as a place of worship or as a human dwelling or for the custody of property, the value is immaterial ; so that the burning of a hut valued even at ten rupees would be arson. And if after the setting fire to the building, the fire is immediately got under control so that the resultant damage is slight or negligible, the offence would still fall under section 419, as it is the intention that has to be looked into rather than the result.[3] If the building is temporarily unoccupied, it would nevertheless be arson to burn it. And where arson is proved, a Magistrate cannot adjudicate upon it summarily by treating it as a minor offence of simple mischief[4] ; for these offences, punishable as they are with seven and fifteen years' imprisonment respectively, are grave offences and therefore non-summary. They are cognisable and non-compoundable.

If in the act of burning, injury is caused to any person resident in the building by the fire the accused would be also guilty of having voluntarily caused hurt by means of fire under sections 315 or 317, as the case may be.

Cases of arson are rather difficult to prove, as seldom are offenders caught in the very act of setting fire to a building. The evidence would mostly be circumstantial ; hence the Police should take proper and immediate steps as soon as such cases are reported.

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1. De Silva *vs.* De Silva (1922) 1 Times L.R. 22.
2. Sections 418 and 419 C.P.C.
3. (1899) Koch 11.
4. Perera *vs.* Perera (1886) 7 S.C.C. 147.

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CHAPTER XVIII.

TRESPASS AND BURGLARY.

(I) Criminal Trespass.

Under the English law, trespass could not be criminal and is not punishable as such. There is the offence of what is known as the "forcible entry" which presupposes an entry with such force as would constitute either a breach of the peace, or a riot, or an unlawful assembly. In India and Ceylon, force is not a necessary ingredient of the offence of criminal trespass: our definition[1] is: "Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult, or annoy any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass."

This offence is of two varieties—first, where the original entry is itself unlawful; secondly, where the original entry is lawful but becomes unlawful due to the subsequent conduct of the accused. In any case, the intention of the accused is the most essential element of the offence of criminal trespass.[2] It must, therefore, be clearly indicated[3] and proved.[4] The proof of mere entry is not sufficient to sustain a charge under this section; it must be proved that the entry was made (or continued) with the intention of intimidating, insulting, or annoying the person in occupation, or with the intention of committing an offence.[5] This intention must be substantially present in the mind[6] of the accused. In this respect, this offence differs from that of unlawful assembly.[7] A charge of criminal trespass which fails to specify with what intent the entry was made is defective,[8] and would entitle the accused to an acquittal or to a fresh trial according to the circumstances of each case,[9] unless it can be shown that the intention of the accused was apparent from the evidence, or unless the accused is not prejudiced. Thus, where the accused whose wife had certain interests in a land who also had the permission of some of the co-owners to possess their rights entered an enclosure and a house in it which had been exclusively possessed for some years by the complainant who was also a co-owner, and it appeared that his intention was to intimidate or annoy the complainant, it was held that the conviction was right and that the failure to set out the intention

1. Section 427 C.P.C.
2. Jayawickrama *vs.* Teris Appu (1911) 5 Leader 108.
3. Davit Hamy *vs.* Poronchi Hamy (1909) 4 Weer. 14.
4. Soysa *vs.* Soysa (1911) 1 A.C. 65.
5. Jandoris *vs.* Kanawadi Pulle (1905) Lem. 94.
6. King *vs.* Issanhamy (1918) 5 C.W.R. 196.
7. Meddumme Appu *vs.* Wegundahamy (1914) 18 N.L.R. 78.
8. Jayawickrama *vs.* Pieris (1911) 1 Bal. Notes 3.
9. Obeysekara Hamine *vs.* Gunasekara (1916) 3 C.W.R. 42.

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in the charge did not vitiate the conviction, as the evidence showed that the accused intended to intimidate or annoy the complainant, and he was not prejudiced by the omission.[1]

If the intention is to commit an offence, it is not sufficient to state in the charge that the accused intended to commit an offence.[2] The offence itself must be specified[3]; so that a conviction for criminal trespass which does not state what the offence was that the accused intended to commit when he entered the property (or when he subsequently remained there) or which is founded on a charge which does not specify the intent, even if the charge is read from the summons[4] is bad.[5]

The intention must be to commit an offence or to intimidate, insult, or annoy.[6] The word 'offence' is defined in the Code as a thing punishable under the Code or punishable under any law other than the Code with imprisonment for six months or more, whether with or without fine.[7] If the offence is not one under the Code but under any of the Ordinances, it must be punishable with six months' imprisonment or over.[8] Thus, as unlicensed gemming on lands other than Crown property is punishable under Ordinance No. 5 of 1890 with imprisonment only for three months, gemming without a license on the bank of a river flowing along the property of a private owner is not punishable as criminal trespass without proof that the entry was made with the further intention of intimidating, insulting, or annoying any person in occupation of such property.[9] The offence under the Code must be such as is capable of being committed; thus, one man cannot form an unlawful assembly. So that the conviction of a single person for criminal trespass with intent to commit the offence of taking forcible possession of a field by the use of criminal force is not legal, because the offence intended to be committed may be charged against the members of an unlawful assembly but not against a single person.[10] The offence must be a distinct criminal offence and not merely a transgression with a civil remedy. Thus, where the accused secretly enters an exhibition building without purchasing a ticket and is there apprehended, his entry does not amount to criminal trespass[11]; for the exhibition authorities have only a civil remedy against the accused for non-payment of the entrance fee. Similarly, an accused who enters a market otherwise than through a regular gate in order to avoid the payment of toll does not commit criminal trespass.[12] Where the accused with a view to establish a right of way had intentionally passed a road in an estate evading payment of a private toll imposed by the owners of the estate on persons using the road, it was held that the accused had not been guilty of this section.[13] A charge against the accused that he did at the Colombo Harbour on board a steamer commit criminal trespass

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1. Karthelishamy *vs.* Francis (1920) 7 C.W.R. 184.
2. Mendis *vs.* Silva (1915) 1 C.W.R. 124.
3. Andree *vs.* Coorey (1893) 2 C.L.R. 203, and Juan Appuhamy *vs.* Veronica (1900) 2 Weer. 55.
4. Henaya *vs.* Bandiya (1929) 30 N.L.R. 353.
5. Nolsa *vs.* Odanis (1910) 2 Cur. L.R. 91, and Korala *vs.* Ukkuwa (1916) 2 C.W.R. 66.
6. Suppiah *vs.* Ponniah 14 N.L.R. 475.
7. Section 38 (c) C.P.C.
8. Don Thomas *vs.* Girigoris (1912) 1 C.A.C. 76.
9. Malhami Muhandiram *vs.* Juwanisa (1895) 1 N.L.R. 86.
10. Dissanayake *vs.* Anthony Fernando (1902) 6 N.L.R. 144.
11. Reg. *vs.* Meherwanji Bejanji 6 Bombay H.C. Reports. Criminal Cases 6.
12. R. *vs.* Varthappal Nayallan I.L.R. 5 Madras 382.
13. Elikewela *vs.* Haramanis (1909) 5 A.C.R. 98.

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by unlawfully remaining there when ordered to leave the ship by the chief officer of the said ship was held to disclose no offence,[1] as disobedience of such an order entailed no legal consequences.

Not infrequently trespass is committed with an immoral purpose or intention; but adultery is not an offence in Ceylon; so that most of the interesting decisions of the Indian law-courts are not applicable. But in Ceylon, there is a tendency to read, in such immoral purposes, an intention to annoy or to insult. Thus, whereas in India the unauthorised entry of a woman into the house of a cavalry sepoy for committing adultery was held to be no trespass, even though she had annoyed the commanding officer by her unwarranted intrusion[2]; in Ceylon, the entry of a prostitute to commit fornication in view of and to the annoyance of the non-commissioned officers and soldiers who occupied the barracks in the vicinity was held to be criminal trespass.[3] But even in India, the Courts have presumed the intention to annoy where no other motive of committing an offence is proved. Thus, where a village Doctor was caught in the room occupied by two widows, the Court remarked: "What we have to deal with is the case of a man, a stranger, who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women-members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances, we think, a Court ought to presume that the entry was effected with an intent such as is provided in the section.[4]" Where a respectable and rich landlord was found at night in the bed-room of his tenant who was sleeping with his young wife, the Court rejected the suggestion that the intention was to commit theft, but presumed that it was of "insulting the modesty of the complainant's wife or of committing some offence, though it is not quite certain what the offence intended was.[5]" Similarly, a person who climbed up at about midnight into the sleeping apartment of a young lady with the object of carrying out some immoral purpose was held to have been guilty of criminal trespass; for, if in such circumstances the accused intended to make improper proposals in which he could not possibly have hoped to succeed and which he must have known would be rejected and resented by the young lady, then it is quite plain that he primarily intended to intimidate, insult and annoy the young lady by such proposals.[6]

If the intention is not one of committing an offence, it must be one of intimidating, insulting, or annoying the person in occupation. The words "intimidate" or "insult" are fairly intelligible. The word "annoy" is loose and vague. It is capable of conveying many meanings. "It is a matter of daily observance that what will annoy one man will not disturb an emotion in another; and in a vast community like the native population of this country (viz., India) the endless fancies, feelings and prejudices, religious or caste-born, necessarily are stronger and more sensitive with one set of persons than with another. It seems that the word "annoy" must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially

1. Smith *vs.* Ahamado (1890) 1 C.L.R. 17.
2. R. *vs.* Kusbee 1887 Bombay unreported cases 328.
3. Corporal Wilson *vs.* Gault (1898) 3 N.L.R. 211.
4. Kailash Chandira I.L.R. 16 Calcutta 657.
5. Balmukand Ram *vs.* Ghansham Ram I.L.R. 22 Calcutta 391.
6. De Vos *vs.* Ernst (1912) 15 N. L. R. 213.

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and exclusively annoy a particular individual."[1] So that the intimidation, insult, or annoyance should be such as would intimidate, insult, or annoy an ordinary person in ordinary circumstances. Whether the intention is too remote is, in each case, a question of fact. An unlawful act of trespass committed with an intention to intimidate or annoy is criminal trespass even if the trespasser had some ulterior object in committing it : intention to intimidate or annoy will be presumed from fore-knowledge that intimidation or annoyance will be the natural result of any act. As per Wood Renton, J., "When once an act of unlawful interference with the possession of property under circumstances disclosing a real intention to intimidate or annoy the possessor has been established, the offence of criminal trespass has been committed ; and, in such a case, I should not be disposed to whittle away the effect of the law by curious refinements as to whether an ulterior object that the trespasser may have had in view constituted his primary or only his secondary intention. Nor do I see why in regard to criminal trespass alone, the ordinary rule of law and of common sense that a man may fairly be held to have intended the natural consequences of his acts should be excluded."[2]

Nevertheless, our Supreme Court has gone on to hold that a person who secretly enters and places on premises in the occupation of another, the figure of a "Mahasona" (or the devil) cannot be convicted of criminal trespass : the *ratio decidendi* of this case probably was that a secret entry precluded the possibility of a face-to-face meeting and hence of any chance of insult or annoyance to the occupant.[3]

The ulterior object, very often in Ceylon, is the assertion of one's civil rights to a land of disputed ownership ; but the disputants can in no circumstances take the law into their own hands, and any entry made in pursuance of such an intention and with the sole object of disturbing the otherwise quiet and peaceful possession of the occupant or possessor would be liable to be construed as criminal trespass. It is, however, only the *mala fide* act of a disputing trespasser that is made punishable and not an entry made peaceably and in good faith, under colour of a colourable right. Where the Fiscal ejected the accused from a land in pursuance of a writ by which it was decreed in favour of the complainant who had temporarily put his agent in possession, and where during the agent's absence the accused re-entered, it was held that he was guilty of criminal trespass.[4] For, as he was ejected by a lawful authority all his rights in the property were extinguished and could not be revived by himself without the intervention of law. He must, however, be ejected by lawful authority : if a person is dispossessed of certain premises by an order of Court which is not authorized by law, *e.g.*, where a purchaser under a mortgage decree has obtained an order under section 287 of the Civil Procedure Code and the Fiscal has ejected by breaking open the front door, the subsequent entry of the person ejected is in the assertion of his *bona fide* claim to the premises and is therefore not illegal[5] ; nor is the re-entry of a sub-tenant who, being not a party in an action between the tenant and the landlord and being therefore not bound by the decree for ejectment, has erroneously suffered himself to

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1. Per Straight, J., in Emp. *vs.* Gobinda Prasad I.L.R. 2 Allahabad 465.
2. Suppaiya *vs.* Ponniah 14 N.L.R. 475.
3. De Silva *vs.* De Silva *et al* (1924) 2 Times L.R. 134.
4. Speldewinde *vs.* Ward (1903) 6 N.L.R. 317. See however Sheriff *vs.* Pitche Umma *etal* (1924) C.L.R. 64.
5. Mukaiyah *vs.* Asia Umma (1925) 3 Times L.R. 156.

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be ejected.[1] Where the mother of the accused being married in community of property transferred a house to the complainant after her husband's death and where the complainant was in possession ever since the date of the transfer, and the accused, claiming to be owners of an undivided one half-share of the house by inheritance from their father, entered into and remained in the house, with intent to annoy the complainant, it was held that, in the circumstances of this case, the accused were guilty of trespass.[2] Where the accused entered upon land which the complainant had possessed for fifty years and took possession of it and erected a shed on it and stayed there, it was held that the entry was not for the purpose of asserting any *bona fide* claim of right, but obviously for the purpose of annoyance and of putting the complainant to expense and trouble in bringing a civil suit.[3]

The offence of criminal trespass may be committed notwithstanding the fact that the entry is made in the assertion of a *bona fide* claim of right; it is a question depending on the circumstances of each case, whether such claim or right is sufficient justification for the entry.[4] As an essential element of the offence of criminal trespass is the intention to intimidate, insult, or annoy the persons in occupation of the land entered, where the object of a person in entering is the assertion of a right, the mere fact that the actual assertion of that right had the effect of intimidating, insulting, or annoying the occupant would not convert the original entry into one with the requisite intention.[5] Mere knowledge of the possibility of annoyance resulting from an act of trespass is not sufficient to bring a case within the definition of this offence.[6] Where the evidence disclosed that the accused had entered and remained on the property with intent to assert and exercise his right of ownership, it was held that his intention was not of the class specified in the section.[7] Where the object of the accused appeared to have been to drive the man who claimed adversely to him to bring a civil action for title, but where the accused acted in conformity with a *bona fide* claim of right, it was held that his act was not one of criminal trespass: the act is not an offence when it is done under a claim of right with the intention of asserting a claim, even though the natural consequence of that act is that somebody else is annoyed.[8] It is only when a person who enters upon land in the possession of another, with the sole object of molesting him and thus driving him to take legal proceedings for the purpose of having the trespasser's own rights to the land adjudicated upon, and remains on the land and in fact commits acts of annoyance on it, that he commits criminal trespass.[9] Where the accused seemed to have believed that he was entitled to a share of the land, and indeed it appeared that he could successfully contest the validity of the deed on which the complainant claimed, it was held that the accused had not committed criminal trespass.[10] Where the accused demanded a share of the paddy grown

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1. Mohamado Hanifa *vs.* Dissanayake (1922) 4 Times L.R. 94.
2. Davapuratna *vs.* Pedro (1903) 3 Bal. 1.
3. Suwaris *vs.* Soysa (1915) 1 C.W.R. 20.
4. Obeysekara Hamine *vs.* Gunasekara (1916) 3 C.W.R. 42.
5. Kanthappu *vs.* Arumugam (1913) 17 N.L.R. 152.
6. Sinnathurai *vs.* Mailvaganam (1911) 6 Weer. 23.
7. Pitche Bawa *vs.* Abdul Cader (1909) 3 Weer. 47.
8. Moss *vs.* Jayawardena (1909) 2 Leader 109.
9. Samuel *vs.* Senathiraja (1913) 17 N.L.R. 83.
10. Perera *vs.* Perera (1915) 3 Bal. Notes 53.

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on the land under a claim of right and the Magistrate held that the intention of the accused was neither intimidation nor insult, but that the accused must have known that annoyance would be the natural consequence of their belated act of ownership, Lascelles, C.J., held that this was carrying the doctrine of constructive annoyance rather too far.[1]

Either the intention to intimidate, insult, or annoy must be proved directly, *e.g.*, where the trespasser pulls out a pistol to threaten the complainant,[2] or it must be inferred from circumstances which leave no shadow of doubt. The fact, for instance, that the accused enters a house with intent to propose to a female inmate that she should allow him to have connection with her is sufficient to sustain a charge of criminal trespass : but if the complainant does not state that she has been insulted or annoyed, the accused would not be guilty.[3] And the intimidation, insult, or annoyance must be offered to the person in occupation. Thus, where the complainant who was Superintendent of an estate charged the accused with criminal trespass in that she remained on the estate as the mistress of the complainant's brother in spite of the complainant's order to her to quit the premises, and the evidence showed that the accused's presence caused annoyance to the complainant's father who was the proprietor of the estate, it was held that the accused was not guilty of criminal trespass with intention to annoy the complainant.

With regard to the phrase, "person in occupation," it must be mentioned that the definition in the Indian Code says, "person in possession." Our definition, therefore, is more extensive. It is not necessary to prove that the complainant had possession, as this word is known to the Roman-Dutch Law. Occupation implies the existence of a tenure entered upon either by owner or tenant, or under a *bona fide* claim of right, or as a caretaker through whom also an owner or tenant might be in constructive occupation.[4] The word "occupation" denotes something more than possession in the legal sense. It implies actual physical possession by oneself or through an agent.[5] Thus, the entry of a landlord into his own garden which is let to a tenant with intent to commit an offence or to annoy the tenant would amount to criminal trespass.[6] But a landlord who enters upon the rented premises after the termination of the period in the notice to quit at a time when the premises are unoccupied and without the use of force does not commit criminal trespass.[7] The word "occupation" does not necessarily connote residence.[8]

The occupation must be of some person other than the accused. Where the accused being a lessee of the Forest Department had erected a house and refused to relinquish the land after a legal notice to quit was served on him, he was said not to have committed criminal trespass, for it could not be shown that the property in respect of which the offence was alleged to have been committed was in the possession of some person other than the alleged trespasser.[9] A prosecution for criminal

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1. Livera *vs.* William (1912) 1 Bal. Notes 49.
2. Cornelis Appuhamy *vs.* Dissanayake (1900) 5 A.C.R. 56.
3. Veronica *vs.* Santia (1885) 7 S.C.C. 35.
4. Rowther *vs.* Mohideen (1911) 1 Bal. Notes 2.
5. Nallan Chetty *vs.* Mustafa (1916) 19 N.L.R. 262. See the conflicting decision in Gabriel Silva *vs.* Amaris Silva (1929) 7 Times L.R. 82.
6. Rodrigo *vs.* Fernando (1899) 4 N.L.R. 176.
7. Arlis Silva *vs.* Simon Silva (1930) 7 Times L.R. 4.
8. The Attorney-General *vs.* Deonis (1908) 1 Weer. 13.
9. Reg. *vs.* Foujdar (1878) Punjab Record 28.

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trespass on the part of one co-owner against another will not lie unless there had been an ouster[1] from possession or some destruction or waste of the common property[2] or unless the entry is into a divided portion in the exclusive possession of a co-owner.[3] When the property is such that it could not be in occupation of any one person in particular, but is public or common property, *e.g.*, *res communis*, it cannot be the subject of trespass. A complainant may have a right to fish in a particular part of the sea and may enclose it with his net, but this would not give him possession of that part of the sea as his property, and the accused by coming upon that part of the sea cannot be said to have entered upon the property in occupation of another.[4] A person cannot be convicted of this section for driving across an open green in violation of an order promulgated by a Municipality,[5] though he may be guilty of a breach of one of its bye-laws. Where the accused enclosed and cultivated a footpath, the High Court of Madras held that this was not a case of criminal trespass as the public were generally entitled to the use of the footpath, and it was impossible to say that there was an illegal entry into property in the possession of another, with intent to annoy the person in possession.[6] But where the accused furrowed and ploughed up a part of a burial ground, it was held that the person (corporate body) in possession of the burial ground was the portion of the public entitled to use it and that there was evidence of an intent to annoy such person.[7]

The notice "trespassers will be prosecuted" which one very often finds affixed to public as well as to private places serves no useful purpose, except perhaps to show that the trespasser who, after reading the notice, enters on the premises is presumed to foresee that his entry is likely to cause annoyance to the occupants. Simple trespass or unauthorized entry or admission without permission is not criminal trespass unless there is an intention to commit an offence or to intimidate, insult, or annoy the person in occupation.

The offence of criminal trespass is punishable with imprisonment for three months or a fine of Rs. 100 or both.[8] It is a cognisable but a compoundable offence: it is also a "crime"——hence the accused must be "finger-printed." It is an offence very often tacked on to cases of simple theft, assault or mischief[9] in order to oust the jurisdiction of a Village Tribunal (as the offence of criminal trespass is not triable by a Village Tribunal.[10]) Where the accused is acquitted of a connected charge of theft or mischief, he cannot lawfully be convicted of criminal trespass alone, unless his intention is otherwise established. Thus, where the accused was charged with theft of paddy plants and criminal trespass and acquitted of the former but convicted of the latter, it was held that the conviction for criminal trespass was inconsistent with his acquittal for theft, inasmuch as if the paddy plants were sown by the accused who

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1. See the Full Bench decision in Tillekeratna *et al vs.* Bastian *et al* (1918) 21 N.L.R. 12 on the question of ouster by co-owners.
2. De Silva *vs.* James (1910) 3 Weer. 80.
3. Hanifa *vs.* Deheregoda (1930) 32 N.L.R. 249.
4. Perera *vs.* Perera (1920) 21 N.L.R. 509.
5. 5 Madras High Court Reports 38 (appendix).
6. 6 Madras High Court Reports 26 (appendix).
7. *Ibid*, page 25.
8. Section 433 C.P.C.
9. Rayappu *vs.* Todd (1909) 12 N.L.R. 155.
10. Fernando *vs.* Fernando (1910) 4 Leader 63.

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was entitled to remove them, he could not properly be treated as a trespasser in so doing [1]

Section 418 of the Criminal Procedure Code enacts that whenever a person is convicted of an offence attended by criminal force and it appears to the Court that by such person, any other person has been dispossessed of any immovable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same, provided that no such order should prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit. This section, therefore, empowers a Magistrate, in the case of a conviction for criminal trespass which is attended with the use of criminal force, to direct that the complainanat may be put back in possession of the property. Where there is no evidence of criminal force, such an order cannot be made[2]; nor can it be made in the case of acquittals. Where the accused was charged with criminal trespass and the Magistrate thought that the case involved a civil dispute and in discharging the accused ordered that he should bring a civil action, it was held that this order, which meant that the complainant was to be restored to possession as a result of that order, was made *ultra vires*.[3] Such an order when made without jurisdiction could be subsequently vacated by the Magistrate himself.[4] When an obstinate litigant persists in committing criminal trespass after having been previously convicted of it, the Magistrate may call upon him to show cause why he should not be bound over; but an accused person cannot be bound over for an indefinite period, *e.g.*, till the matter is settled in a civil Court.[5]

It is an offence punishable with a year's imprisonment to commit trespass in any place of worship or sepulchre, etc., with the intention of wounding the religious feelings of any person or of insulting his religion.[6] "Trespass" in this section is not of the same degree as criminal trespass: it is to be taken in its original meaning of an injury or offence done in the sense in which it is used in the Lord's Prayer.[7] The specific intention must be present. Where the accused, a Buddhist, buried a corpse in a burial place set apart for the Wesleyans, it was held that the act of the accused was a mere invasion of a civil right.[8] It is an offence[9] punishable with a fine of Rs. 20 to trespass upon the Railway or upon premises appertaining thereto—and whoever refuses to leave such premises when ordered to do so by the Railway authorities, besides being liable to a fine of Rs. 50, will render himself open to arrest and detention[10] or bodily expulsion. The term "trespass" in this section has not the same meaning as criminal trespass,[11] but means entering or remaining without permission, authority or lawful business.[12] This meaning is made clear in the Telegraphs Ordinance[13] by which it is an offence punish-

1. Reg. *vs.* Oomerkhan (1865) Bombay unreported cases 4.
2. Sheriff *vs.* Pitche Umma (1924) 26 N.L.R. 353.
3. Thegis *vs.* Agonis (1920) 22 N.L.R. 376.
4. Rayappu *vs.* Todd (1909) 12 N.L.R. 155.
5. De Silva *vs.* Seneviratne *et al* P. C. Negombo (Itg.) 39,208 : S. C. 430 (1925).
6. Section 292 C.P.C. For other cognate offences see sections 290-2.
7. Silva *vs.* Fernando (1925) 6 C.L.R. 71.
8. Passmoore *vs.* Silva (1900) 1 Br. 93.
9. Section 32 of Ordinance No. 9 of 1902. Vol. II, p. 595.
10. Peduru *vs.* Perera (1909) 2 Leader 104.
11. Shaikali *vs.* Leisahamy (1911) 14 N.L.R. 349.
12. Rahim *vs.* Perera (1917) 4 C.W.R. 425.
13. Ordinance No. 35 of 1908, section 23, Vol. II, p. 862.

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able with a fine of Rs. 100 to enter any signal room or enclosure " without permission of competent authority " or to refuse to quit the same on being requested so to do.

(II) House-trespass.

Criminal trespass becomes house-trespass when the entry is made into (or the offender remains in) any building, tent, or vessel used as a human dwelling or in any building used as a place of worship or as a place for the custody of property.[1] The introduction of any part of the criminal trespasser's body is " entering " sufficient to constitute house-trespass ; so that whereas in criminal trespass a man must enter with the whole of his body, an entry of any part of his body will suffice for house-trespass, *e.g.*, a finger for unbolting a door. But a mere entry into another's house will not constitute the offence, unless there be some evidence to show the criminal intention on the part of the person entering.[2] This intention should be the same as is required in a case of criminal trespass. Where the accused went into the complainant's house with her grand-daughter's consent to have illicit intercourse with the latter and had taken every precaution to prevent the complainant from having any knowledge of his visit, it was held that the accidental discovery of the accused's visit did not involve any original intention to annoy her and that the doctrine as to a man intending the natural consequences of his acts did not apply.[3] A Police Vidane, who enters and searches a house for stolen property believing that he has the power to do so, cannot be convicted under this section.[4] But it would be otherwise if there were no *bona fides* on the part of the Vidane. Thus, entering a house with a forged warrant of arrest and by virtue thereof taking away one of the inmates amounts to house-trespass.[5] But entering a compound for the purpose of answering a call of nature[6], or entering a Police Station for supplying food to remand prisoners[7], would not be punishable under this section, as, though the former case is annoying, it shows no intention to annoy, and in the latter case, it is no offence to supply food to remand prisoners.

The building must be one that is used either as a human dwelling or as a place of worship or for the custody of property. Thus, a Railway carriage[8] is not within the meaning of this section. Where the accused entered a building which the complainant said was used as a kitchen to his house and refused to quit the same alleging a right thereto, it was held that he had not committed house-trespass as a kitchen was not a house.[9] And where the accused was found on the station premises at Alutgama, he was held, in the absence of evidence that such premises constituted a building, not to have committed this offence.[10] Though the definition of the word " building " in the Housing Ordinance[11] includes

1. Section 428 C.P.C.
2. Allis Pulle *vs*. Gunasekara (1886) 7 S.C. C. 206.
3. The King *vs*. William (1915) 1 C.W.R. 38.
4. Costa *vs*. Singho (1903) 7 N.L.R. 287.
5. Reg. *vs*. Nund Mohan 12 Weekly Reports, Criminal (Indian) 33.
6. Reg. *vs*. Suriya (1882) Allahabad Weekly Notes 224.
7. R. *vs*. Lalai I.L.R. 2 Allahabad 301.
8. R. *vs*. Sheik Saheb (1886) Bombay unreported cases 298.
9. Don Gordiano Appu *vs*. Pedro Appu (1900) 1 Br. 111.
10. Perera *vs*. Silva (1900) 1 Br. 210.
11. No. 19 of 1915, Vol. III, p. 288.

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outhouses or other appurtenances of a building, it is hardly likely that these out-houses or other appurtenances would come within the meaning of this section, unless they are used as a human dwelling-house or for the custody of property or as a place of worship. Where the accused had entered a cattle-pen to prosecute his intimacy with a young unmarried woman, he was held not to have committed house-trespass.[1] If the building is temporarily unoccupied, it nevertheless remains a building ; so that entry into such a building would constitute the offence. Thus, entry into premises which were used as " chambers " but which were unoccupied at the time of the offence was held to be entry in a human dwelling-house.[2]

The offence of house-trespass being punishable with one year's imprisonment is both summary as well as non-summary : it is cognisable but compoundable ; it is a crime. When house-trespass is committed in order to the committing of any other offence, or where preparations are made for causing hurt to or wrongfully restraining any person or putting any person in fear of the same, the offence becomes more serious, is not compoundable and is triable only on indictment.[3]

When preparations are taken to conceal the house-trespass from some person who has a right to exclude or eject the trespasser from the building which is the subject of the trespass, the offence is known as " lurking house-trespass " and is punishable with two years' imprisonment. It can be tried summarily, unless it is a more serious form of house-trespass as above defined, or unless it is committed between sunset and sunrise.

(III) **House-breaking.**

A person who commits house-trespass is said to commit house-breaking if he effects his entrance into the house or any part of it in any of the six ways mentioned below : or if being in the house or in any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways, viz. :—

(i) If he enters or quits through a passage made by himself or by any abettor of the house-trespass, in order to the committing of the house-trespass ;

(ii) If he enters or quits through any passage not intended by any person, other than himself or any abettor of the offence, for human entrance or through any passage to which he has obtained access by scaling or climbing over any wall or building ;

(iii) If he enters or quits through any passage which he or an abettor of the house-trespass has opened in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened ;

(iv) If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass ;

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1. R. vs. Ramjan (1905) Punjab Record 28.
2. Reg. vs. Abboyee 4th Madras Session, 1882.
3. Sections 434 to 438 C.P.C.

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(v) If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault ;

(vi) If he enters or quits by any passage which he knows to have been fastened against such entrance or departure and to have been unfastened by himself or by an abettor of the house-trespass. Any out-house or building occupied with a house and between which and such house there is an immediate internal communication is part of the house within the meaning of this section.[1]

This definition being pretty exhaustive hardly needs any explanation. The word "offence" in this section means anything punishable either under the Penal Code or under any law other than the Code.[2]

Recent possession of stolen property would in certain circumstances raise a presumption of house-breaking as well. Thus, where the doors of a schoolroom were found to have been forced open and a table and a chair were missing, Withers, J., held that if an inference was to be drawn from the possession of the stolen chair, it is that the possessor stole it in the commission of house-breaking.[3] Where a house was broken into and the goods removed therefrom were found, soon after, in the possession of the accused, and footsteps were traced, from behind the house broken into, to a place behind the accused's house, it was held that the accused's recent possession of stolen goods was presumptive evidence not only of theft, but also of house-breaking, and that a Magistrate could not deal with the case summarily for theft or dishonest receipt.[4]

Where the complainant's house was broken into at night and some bags of arecanut were missing and the accused were seen going along the road leading from that house carrying each a filled gunny bag, and later on they left the bags which the complainant identified in the house of a third party, it was held that the accused were guilty of house-breaking and theft and not merely of theft.[5]

Evidence that the accused at the time he entered the house, was in possession of other articles stolen from another house the same night, or other evidence to the like effect, is admissible to prove the intention with which the accused entered the house and to rebut the defence that he had come at the invitation of the wife of the owner, or of any other inmate of the house [6]

Where the only evidence against the accused was the finding of his finger-prints on a glass pane of a door inside the house broken into, it was held that this was sufficient evidence from which the Court may conclude that the accused was one of the burglars in the absence of any explanation by him as to how his finger-prints came to appear on the pane in question.[7]

Ordinary house-breaking by day[8] is punishable with two years' imprisonment, but can be tried summarily. It is cognisable and non-

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1. Section 431 C.P.C.
2. Section 38 (b) C.P.C.
3. Gunasekara *vs.* Thegis (1896) 2 N.L.R. (196).
4. Nagappa Chetty *vs.* Silva (1901) 5 N.L.R. 295.
5. Silva *vs.* Ranis (1897) 5 N.L.R. 297.
6. The King *vs.* Siyaris (1928) 30 N.L.R. 92. 5 Times L.R. 89.
7. The King *vs.* Logus (1932) 9 Times L.R. 145. 1 C.L.W. 250.
8. Section 439 C.P.C.

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compoundable ; but all the serious forms of house-breaking after sunset and before sunrise are non-summary. The cases most frequently occurring in Ceylon fall within sections 440 (when committed during day) or 443 (when committed during night) and 369. The section for theft is always joined as there is rarely a house-breaking without a theft. If there is no theft, however, or if the burglar is arrested before he could steal, the proper sections would be 439 or 442, respectively. "Gang-robbery," as it is commonly called in Ceylon, is house-breaking with violence by more than one person and is triable on indictment.

As burglary is much rampant in Ceylon it is punished deterrently when detected, and the accused are seldom let out on bail pending inquiry, unless facts disclose mitigating circumstances.

As the offence is of a serious nature, the accused should ordinarily be committed for trial. Thus, where the complaint against the accused was that they entered the complainant's house at night and removed some rice and on being disturbed, one of them cut him with a knife, and the Magistrate after having obtained consent tried the accused summarily, it was held that the offence, whether under sections 443 or 444, was of a very serious nature and ordinarily should not be tried by a Police Magistrate, even with the consent of the accused.[1] So that, though such trial may not by itself vitiate a conviction,[2] a Magistrate ought to take non-summary proceedings.

It must be remembered that house trespass or criminal trespass becomes merged into house-breaking and the accused may be convicted of one or the other of them, but not of both.[3]

(IV) House-breaking Implements.

Section 449[4] reads as follows :—"Whoever is found having in his custody or possession without lawful excuse, the proof of which lies on him, any instrument of house-breaking, or being armed with any dangerous or offensive weapon with intent to commit any unlawful act, shall be punished with imprisonment for two years or with a fine or with both and such instrument or weapon shall be forfeited to the Crown."

This section deals with two distinct classes of cases, viz., possession of house-breaking implements without lawful excuse, and the possession of dangerous or offensive weapons with intent to commit an unlawful act.

It is difficult to define "house-breaking implements." The phrase is wide and may embrace a number of articles. When an instrument commonly used for house-breaking is found in the possession of a person, it is not necessary for the prosecution to prove that the instrument was intended to be used for house-breaking. Such proof may be required in the case of a person who is found possessing any implements ordinarily used for a lawful purpose, but which may also be used for house-breaking. Thus a "jemmy" is not ordinarily used for any purpose other than house-breaking[5] and the possession of a "jemmy" would raise a *prima*

1. Ramasamy *vs.* Sinnochchi (1916) 2 C.W.R. 2.
2. Peneris Appu *vs.* Babun (1919) 6 C.W.R. 319.
3. Fernando *vs.* Kariya (1914) 4 Bal. Notes 71.
4. Penal Code as amended by section 2 of Ordinance No. 12 of 1906. This and the next two sections are not included in the Indian Penal Code.
5. Fernando *vs.* Fernando (1923) 25 N.L.R. 35.

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facie, though rebuttable, presumption against the accused. Whether an instrument commonly used for lawful purposes is also an instrument for house-breaking is a question of fact. Thus, the possession of a carpenter's gouge which is not an instrument of house-breaking, but is capable of being so used, would render the possessor liable from the mode in which it is carried or from the nature of the defence.[1] And the possession of a bunch of keys may in certain circumstances, *e.g.*, when it is found on an accused who is in the company of a man armed with a "jemmy," be sufficient to convict the accused.[2] Wood Renton, C.J., went so far as to say that dynamite may sometimes be an implement of house-breaking.[3] But the innocent possession of a carpenter's tools, *e.g.*, a gimlet or screw-driver, would not render the possessor liable, as they are not ordinarily used as implements of house-breaking.[4] The burden of proof, once it is proved that the instrument is one of house-breaking, is on the accused to show that he had a lawful excuse for possessing it.

Under the latter half of the section, when the accused is charged with being armed with a dangerous or offensive weapon, the prosecution must establish an intent on the part of the accused to commit an unlawful act,[5] the charge should allege what unlawful act the accused was intending to commit and the Magistrate must also find, when he convicts, what unlawful act the accused was about to commit.[6] What is or is not a dangerous or an offensive weapon is in each case a question of fact; thus, a sword is such a weapon.[7] This offence is cognisable and may be tried summarily.

(V) Being found in a Building.

Section 450[8] which is used sometimes to cover those cases which cannot be included in criminal trespass enacts: "Whoever is found in or upon any building or enclosure for any unlawful purpose, and whoever is found in or upon any building or enclosure and fails to give a satisfactory account of himself shall be punished with imprisonment for three months or a fine of Rs. 50 or both."

This section deals with two classes of offenders, viz., those who are found in a building or an enclosure for an unlawful purpose and those who being so found fail to give a satisfactory account of themselves. The unlawful purpose may be a crime or any purpose that is not lawful. The section does not say an illegal purpose, the word "illegal" being applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action.[9] The word "unlawful" would mean, perhaps, everything that is not warranted by law: anything which a man cannot lawfully do would be unlawful. The burden of proof that he was in the building or in the enclosure for a lawful purpose would be on the accused; but the prosecution must establish, by evidence,

1. Punchirale Korala *vs.* John (1909) 12 N.L.R. 198.
2. The King *vs.* Perera (1913) 16 N.L.R. 456.
3. Rex. *vs.* Marikar (1915) 4 Bal. Notes 64.
4. Police Sergeant *vs.* Abeyahamy (1921) 23 N.L.R. 156.
5. Rajendram *vs.* Enorishamy (1926) 4 Times L.R. 114.
6. Silva *vs.* Simon (1924) 22 N.L.R. 442.
7. The King *vs.* Perera (1913) 16 N.L.R. 456.
8. Penal Code as amended by Ordinance No. 16 of 1898. Section 6.
9. Section 41 C.P.C.

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circumstances which would prove or at least give rise to an inference that the accused was there for an unlawful purpose.

As regards the second half of the section, the case is covered by two recent decisions of the Supreme Court. The first of these was by Jayawardene, J., in a case[1] where the accused was charged with being found in an enclosure of another person and with failing to give a satisfactory account of himself. The evidence showed that the accused was well-known to the complainant and that he lived about a hundred yards away from the latter's house. The District Judge found that the accused had failed to account for his presence in the enclosure and convicted him. It was held that the conviction was bad. "The words of the section are not 'fails to give a satisfactory or lawful excuse for his presence,' but 'fails to give a satisfactory account of himself.' What the accused has to prove on a charge of this kind is who he is and what he is, where he resides and such other facts personal to himself. These words 'giving a satisfactory account of himself' would apply appropriately to persons wandering about the country without any visible means of subsistence and unknown in the places where they are found. This part of the section can have no application to persons having a fixed abode, visible means of subsistence, and well-known to the persons on whose premises they are found. Such persons should, if the fact justify it, be charged under the first part of the section of being found in a building or enclosure for an unlawful purpose."

This decision has now practically been superseded by a ruling from a Bench of three Judges,[2] who decided that the words "satisfactory account of himself" means, "satisfactory account of his presence at the place." An account of himself in order to be satisfactory should include some account of his presence at such a spot. The words in our section are intended to have the meaning "without being able to account to the satisfaction of the Court before whom he is brought for being found in such premises."

This offence is cognisable and not compoundable and may be tried summarily.

Persons who do not come within the provision of this section may be prosecuted under the Vagrancy Ordinance.[3] Thus, beggars and others who merely come and sleep in verandahs and have no visible means of subsistence should be charged under the latter provision.

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1. The King vs. Don Martin (1923) 25 N.L.R. 169.
2. Kuruppu vs. Banda (1923) 25 N.L.R. 402.
3. No. 4 of 1841, section 3 (4) Vol. I, p. 136.

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CHAPTER XIX.

UNLAWFUL ASSEMBLIES.

In England, whenever three or more persons meet for a purpose likely to involve violence or likely to cause a reasonable apprehension of violence, they form an unlawful assembly,[1] even though they ultimately depart without doing anything whatever towards carrying out their common purpose. An unlawful assembly further develops into a " rout " so soon as the assembled persons do anything towards the accomplishment of their illegal purpose ; and a rout becomes a " riot " so soon as this illegal purpose is put into effect forcibly.[2] An unlawful assembly of twelve persons or more becomes a " riotous assembly "—for the dispersal of which any Justice of the Peace may " read the Riot Act[3] " and call upon the assembly to disperse ; on their failure to do so within an hour, they become not merely guilty of a felony punishable with penal servitude for life, but are liable to be dispersed with force.

In Ceylon, the rout, the Riot Act, and the riotous assembly are unknown. With us, not three but at least five persons are necessary to form an unlawful assembly. Their common object should be one of the following :—

(i) To over-awe by criminal force, or show of criminal force, the Executive Government or the Legislative Council of Ceylon or any public servant in the exercise of his lawful powers.

(ii) To resist the execution of any law or of any legal process. Execution of law means the carrying out the provisions of the law or the enforcement of any act warranted by law. Execution of any legal process denotes that such execution must be legal and the powers should be valid. Thus, arrest on a defective warrant of attachment would justify opposition and would not render the obstructors guilty under this section.[4]

(iii) To commit mischief or criminal trespass or other offence. The words " other offence " are rather peculiar. Our Supreme Court had decided in *The King vs. Caruppiah at al*[5] that they meant an offence *ejusdem generis* with those expressly mentioned in the sub-section ; and, therefore, when the common object of an assembly was to commit an offence other than one in the nature of mischief or criminal trespass, the assembly could not be said to be an unlawful assembly, unless, of course, it would be such an assembly under the other sub-sections. This decision does not seem to have considered the amendment of the Penal Code in 1912 by which the word offence is given " the same meaning when the thing punishable under any law other than the Code is punishable under such law with imprisonment for a term of six months or

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1. 3 Coke Inst. 176.
2. Field *vs.* The Receiver for the Metropolitan Police District : Kenny's Select Cases 392.
3. 4 and 5 George V, Ch. 58.
4. Emp. *vs.* Umacharan Singh I.L.R. 29 Calcutta 244.
5. (1914) 17 N.L.R. 383.

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upwards whether with or without a fine."[1] And indeed, the law commissioners in their draft included assaults, insults, restraint, etc. Happily the Full Bench of our Supreme Court has now decided[2] that the words "other offence" do not mean an offence *ejusdem generis* with those immediately preceding, namely, mischief and criminal trespass; but include all offences both against persons or property.[3] But such offences as gambling would not render an assembly unlawful.[4] In any event, the offence which it was the common object of the unlawful assembly to commit must be specified in the charge.[5]

(iv) By means of criminal force or show of criminal force to any person

(*a*) to take or obtain possession of any property;

(*b*) or to deprive any person or the public of the enjoyment of a right of way or of the use of water or other incorporal right of which such person or public is in possession or enjoyment; or

(*c*) to enforce any right or supposed right. Where the accused was in possession of a land sold under a mortgage decree and no writ of possession was taken out, it was held that the accused and his seventeen coolies had not formed an unlawful assembly in reaping the harvest.[6] There is a distinction between persons actively attempting to enforce a supposed right and acting in defence of a right which they set up; it is not illegal for persons in possession of property even although their right to that property may on investigation be proved to be unsound to prevent other people from interfering with the right which they claim; and a person who prevents another from entering on property in his possession which he claims as his own is not guilty of criminal force in resisting such other person from going upon the property, and cannot, therefore, be said to be a member of an unlawful assembly.[7] Property in this section includes movables (*cf* theft)[8] or immovables, including crops.[9] Force and violence may be used to animate as well as inanimate objects.[10] The enforcement of any right or supposed right excludes the *bona fide* assertion of any right that is not existent. But every person has a right to defend his person and property and no man can be "convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act".[11] Where the appellants were charged with being members of an unlawful assembly and with criminal trespass in that they obtained possession of a land in the occupation of another by the use of force and it was urged that they had acted on behalf of the owner of an adjoining estate in the assertion of a *bona fide* claim of right, it was held that the circumstances did not justify such a plea. "No one has the right to vindicate his supposed right by the use of criminal force. Such a right is in fact no right at all. It is a mere pretension to a right which does not exist. If people were to set up

1. Section 38 (*c*) C.P.C.
2. The King *vs.* Suppar *et al* (1915) 18 N.L.R. 322.
3. The King *vs.* Perera (1914) 2 C.A.R. 11.
4. Silva *vs.* Jayasekara 6 Tam. 11.
5. Guneratne *vs.* Soysa *et al* (1928) 30 N.L.R. 241.
6. Canagaratna *vs.* Tiruchittampalam 6 Tam. 65.
7. The King *vs.* Mastan Lebbe (1920) 2 Law Recorder 219.
8. De Resario Udayar *vs.* Mana Wappu (1919) 6 C.W.R. 2.
9. Wijesingha *vs.* Babahamy (1901) 5 N.L.R. 126.
10. District Mudaliyar *vs.* Kulas 6 Tam. 118.
11. Beatty *vs.* Gillbanks 9 Queen's Benc hDivision 308.

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their own notions of what is right or wrong in vindication of armed force, it will be a plea available to everyone who cared to raise it.: such a plea would be subversive of all security and order."[1] But where two rival factions of the Muslim community were trying to set up a Lebbe of their own choice and where one faction in direct violation of the arrangement to sit on alternate days took charge of the Bimba by show of force in order to vindicate their supposed right, the Supreme Court set aside the conviction, although the direct result of such a clash was a real "riot" (in its popular sense) with much damage to mosque property and injury to persons.[2]

(v) By means of criminal force or show of criminal force to compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do. Thus, the use of force or show of force by five or more persons to compel the members of a profession to refrain from doing what they are legally entitled to do would be an offence: where a party of goldsmiths were going along the public road to perform a funeral ceremony in procession with music and under Police protection and a party of five or more Vellalas, thinking that the goldsmiths had, according to ancient usages and customs, no right to use music, compelled them by force and show of force to refrain from using music, it was held that the Vellalas were guilty under this section.[3] But where certain potters who attempted to take a procession through the court-yard of a Hindu Temple were repelled by certain Vellalas and where the potters had not been in the habit of doing of right what they attempted to do in this instance, it was held that they could not be said to have acted in the *bona fide* assertion of a legal right and that the Vellalas were therefore not guilty.[4]

(vi) That the persons assembled or any of them may train or drill themselves or be trained or drilled to the use of arms or practising military movements or evolutions without the consent of the Governor of the Colony. This sub-section is an innovation in our Code and is absent from the Indian Code.[5]

The accused should have any of the above as their common object: there would be criminal liability for acts which were not originally intended, but which occurred in the furtherance of the common object.[6] A mere superiority of numbers does not by itself constitute an unlawful assembly.[7] The object need not be present in the minds of the persons before they meet; it may occur to them afterwards.[8] So that an assembly which was not unlawful when it assembled may subsequently become an unlawful one. The subsequent taking part in an offence in which the others are engaged would denote an intention on the part of the accused to further the common object. For, whoever being aware of facts which render an assembly unlawful intentionally joins that assembly or continues in it is said to be a member of an unlawful assembly.[9]

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1. Per Jayawardena, J., in Wickremasinghe *vs.* Perera *et al* (1930) 7 Times L.R. 140.
2. The Negombo Mosque Riot Case, D.C. Negombo (1930).
3. Sivasithamparam Maniagar *vs.* Ponniah (1902) 5 Tam. 108.
4. The King *vs.* Thuraippah (1904) 8 N.L.R. 70.
5. Section 141 I.P.C.
6. King *vs.* Amaris 6 Tam. 108.
7. King *vs.* Punchi Mahatmaya (1913) 1 Wijc. 39.
8. Emp. *vs.* Khemee Singh 1 Calcutta Weekly Reporter 18.
9. Section 139 C.P.C.

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Being a member of an unlawful assembly is an offence summarily triable, cognisable and non-compoundable. The common object must be specified in the charge.[1] The maximum punishment is six months' imprisonment or fine or both. If the member is armed with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, he can only be tried on indictment (section 141). A "club" is a mere stick and therefore not a weapon likely to cause death.[2] But a cudgel or even a stick might be used as a formidable weapon in such a way as would be likely to cause death, and therefore each case should depend on its own merits.[3] The criterion is the manner in which the particular weapon is used or the intention with which the accused have armed themselves. Thus, the accused who are employed in digging plumbago with a crow-bar and a mammoty cannot rightly be said to be armed with these weapons unless they have the intention of using them on persons who happen to resist them.[4]

If one or a few of the members of an unlawful assembly are armed with deadly weapons which have to be used in realization of the common purpose, all the members thereof must be tried on indictment. For, the law says that if an offence is committed by any member of an unlawful assembly in prosecution of the common object (or such as the members of that assembly knew to be likely to be committed in prosecution of that object) every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence.[5] Thus, there is both joint and several liability. Further, the law imposes the same liability upon persons who may or may not be present at the assembly, but who have nevertheless hired, or connived at the hiring of persons for joining that assembly. Those who are hired for such a purpose and those who harbour them are, besides being liable to any other punishment, guilty of a summary offence.[6] Where a few out of several persons charged are acquitted, the remainder if less than five cannot be convicted of being members of an unlawful assembly, although many others not definitely known or identified might have been present with those persons.[7]

An unlawful assembly becomes a riot whenever force or violence is used by any members thereof in prosecution of the common object of such assembly.[8] It is not necessary that force should be used by all the members composing the same. It is enough even if one member uses it; a riot as popularly known is something more formidable, but under the law it can take place even when five persons begin to use violence in prosecution of a common illegal object. The offence of rioting either with or without deadly weapons is non-summary. The members would also be individually and severally liable for any other offence, *e.g.*, hurt or mischief, arising out of their individual misdeeds. Where two opposite factions commit a riot they cannot be jointly charged for constituting one unlawful assembly, for they do not have one common object[9]—(save perhaps that of breaking the peace).

1. Guneratne *vs.* Soyza *et al* (1928) 6 Times L.R. 70.
2. P.C. Colombo B 238 (1915) 1 C.W.R. 5.
3. The King *vs.* Ambalavanar (1892) 1 S. C. R. 271.
4. Suriyarachchi *vs.* Theralis (1916) 2 C.W.R. 61.
5. Section 146 C.P.C.
6. Sections 154 and 155 C.P.C.
7. Jayawardana *vs.* Perera *et al* (1899) 1 Tam. 15.
8. Section 143 C.P.C.
9. Surrosh Chundra Paul 12, Calcutta Weekly Reporter 75.

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The owner or occupier of the land in which an unlawful assembly or riot takes place is liable to a fine of a thousand rupees if he does not inform the Police at the earliest opportunity and if he does not use all lawful means in his power to prevent or suppress it. Similarly, the person for whose benefit the riot or unlawful assembly takes place and his agent or manager are punishable with a fine if they do not use all lawful means in their power to prevent or suppress the same.[1]

(II) Suppression and Dispersal.[2]

Whenever there is an unlawful assembly (which includes a riot) or an assembly of five or more persons likely to cause a disturbance of the public peace, any Police Magistrate including an Unofficial Police Magistrate and any Peace Officer not below the rank of Inspector, Korala, Mohandiram, or Udayar, may command the assembly to disperse. Whereupon, it becomes their duty to disperse. It is this command to disperse (being sometimes read from a printed form) that is mistaken by the newspapers[3] or the lay public for the "reading of the Riot Act." And whoever joins or continues in such an assembly knowing that it has been so commanded to disperse is guilty of a non-summary offence[4] punishable with two years' imprisonment, if the assembly is an unlawful one, and of a summary offence punishable with six months' imprisonment if the assembly is such as is likely to cause a disturbance of the public peace.[5]

If upon being commanded to disperse, the assembly does not disperse, or if even without being so commanded it shows a determination not to disperse, any Police Magistrate or any Peace Officer of the above description may proceed to disperse the same by force. For this purpose they may command the assistance of any male person[6] for generally helping in the suppression of the offence or the arrest of the offenders; and whoever intentionally omits to give such assistance becomes guilty of a summary offence punishable with simple imprisonment for six months or a fine of Rs. 100 or both.[7] Further, any Justice of the Peace may if necessary appoint, for the time being, certain members of the neighbourhood to act as special Police officers who would have the same powers and duties as members of the regular force. Any person so appointed who neglects or refuses to serve as such or is guilty of disobedience is liable to a fine of two hundred and fifty rupees.[8]

If any unlawful assembly or riot cannot be suppressed or dispersed in any other manner, the Government Agent of the Province or the Police Magistrate of the district or the Inspector-General of Police may cause it to be dispersed by military force. In that event, he may require the services of any commissioned or non-commissioned officers in charge of troops or volunteers for such dispersal. This does not derogate from the duty of every such officer (even when the Government Agent, Police Magistrate, or the Inspector-General of Police cannot be communi-

1. Sections 151, 152 or 153 C.P.C.
2. See Chapter VIII Cr. Pr. Code.
3. At the time of the Maradana Riots, some newspapers headlined that the Riot Act was read.
4. Section 142 C.P.C.
5. Section 148 C.P.C.
6. Not being an officer or soldier in the army or a volunteer duly enrolled.
7. Section 184 C.P.C.
8. Sections 28-30 of Ordinance No. 16 of 1865, Vol. I, p. 595.

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cated with) of dispersing such assemblies by military force or of arresting or confining the offenders to be dealt with according to law. But he should communicate with one or more of these public servants as soon as it is possible for him to do so. In any event, every commissioned or non-commissioned officer must obey the requisition of the Public servant concerned in such manner as he thinks fit; but in doing so, he should use as little force and do as little injury to person and property as may be consistent with dispersing the assembly and detaining the offenders. No prosecution can be entered against any Public servant or against any military officer, peace officer, soldier, or volunteer for any act done for the purpose of dispersing an unlawful assembly or suppressing a riot, without the previous sanction of the Governor in Executive Council; and no act under these circumstances done in good faith is regarded as an offence. Thus, an inferior officer or soldier who does any act in obedience to any order which under military law he is bound to obey commits no offence.

Ordinarily, Police officers may try and disperse an unlawful assembly by the use of batons. To quote from the Indian Police Manual,[1] "The closer a crowd is pressed, the less are the members of it capable of offering resistance by the use of lathis (clubs), stones, etc., and the baton is pre-eminently a weapon for use in close grapple with an adversary so that in large open spaces, flank attack with the object of closing up the mob and preventing their deriving advantage from superiority in numbers will sometimes be found expedient."

The Ceylon Constables' Manual[2] tells every Police officer "If you see a mob committing or attempting to commit any of the following crimes :—

(*a*) Murder or grievous hurt to the person;

(*b*) Robbery;

(*c*) Burning of houses, shops, or stores;

(*d*) Breaking into houses, shops, or stores, or places of worship by night;

(*e*) Attacking houses, shops, or stores, or places of worship at any time by night or day in such a way as may cause the death of or grievous hurt to any inmate; and there is no person in authority from whom you can get orders and there is no other way to stop the mob, you are entitled to fire upon them to protect the persons and property in danger."

The Bombay Police Manual[3] states: "When a Magistrate or an officer in charge of a Police Station engaged in dispersing an unlawful assembly is compelled in the last resort to direct the Police acting under him to use their fire-arms, he shall give the rioters the fullest warning of his intention, warning them beforehand that the fire will be effective, that the ball or buckshot will be used at the first round and that blank cartridges will not be used. Firing shall cease the instant it is no longer necessary. Care should be taken not to fire upon persons separated from the crowd, nor to fire over the heads of the crowds as thereby innocent persons may be injured. Blank cartridges should never be served out to Police employed to suppress a riot."

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1. P. 16.
2. Correction Slip No. 3, page 2.
3. Page 70.

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The Madras rules require the firing of a single shot in the air as a warning to rioters ; and if that is ineffective, the first round fired into a body of rioters should invariably consist of buckshot instead of ball.

It must not be forgotten that no more force can be used than is reasonably necessary in the particular circumstances of each case ; but if people's lives are in danger and cannot be saved in any other manner, firing should not be avoided merely because there is a risk of injuring innocent by-standers.

If any person assaults or threatens to assault or obstruct or attempts to obstruct or uses criminal force on any Public servant engaged in dispersing an unlawful assembly or suppressing a riot or affray, he becomes guilty of a non-summary offence.[1]

(III) Affray.

When two or more persons by fighting in a public place disturb the public peace, they are said to commit an affray.[2] All the persons who take part in the fight and not merely the party responsible for the commencement of the fighting are guilty under the section.[3] Where there is a simple one-sided assault and no fight, there is no affray.[4] It is sufficient to prove the fighting and no evidence need be led of "disturbing the public peace."[5] When one strikes, the other should have struck back.[6] A public place is any place to which the public have access,[7] no matter whether they have a right to go or not. Some places are public only at certain times : thus, a railway station and platform will only be public when a passenger train is expected.[8] It is an offence which one person cannot commit alone. Two persons who are therefore charged with committing an affray may be tried together in the same proceedings[9] ; similarly members of two opposing factions may be jointly tried as illustration (*d*) to section 184 of the Criminal Procedure Code does not apply to a case of affray.[10]

Affray is punishable with one month's imprisonment or a fine of Rs. 100 or both. It is cognisable and compoundable.

Persons who are convicted of affray cannot escape liability for separate punishment in a separate case for assault or hurt as the case may be, and *vice versa*.

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1. Section 149 C.P.C.
2. Sections 156 and 157 C.P.C.
3. Jayasuriya *vs.* Arnolis Appu (1919) 6 C.W.R. 307.
4. Toussaint *vs.* Silva 6 Tam. 31.
5. Packeer *vs.* Sheik Ali 6 Tam. 19.
6. Banda *vs.* Chelliah (1909) 2 Weer. 57.
7. Kandappa *vs.* Konamalai 6 Tam. 117.
8. Emp. *vs.* Madan Mohan (1883) 3 Allahabad Weekly Notes 197.
9. Hewavitarne *vs.* Appuhamy (1928) 30 N.L.R. 33. Full Bench 6 Times L.R. 18.
10. Weerasinghe *vs.* Mohamed Ismai (1931) 33 N.L.R. 245. Full Bench 9 Times L.R. 131.1 C.L.W. 218.

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CHAPTER XX.

INSULT AND INTIMIDATION.

(I) Insult.

"Whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence shall be punished with imprisonment for two years or a fine or both."[1]

Two things are essential for this offence—intentional insult and provocation. The insult must be intentional: that is to say, it must have been intended to be insulting. Mere verbal abuse is not by itself punishable under this section,[2] nor are angry words.[3] Where the evidence discloses only that the accused abused the complainant, it would be necessary to prove the particulars of the abuse before he can be punished for criminal insult.[4] For, mere verbal abuse, however, reprehensible it may be, is not punishable,[5] unless it appears from the circumstances—from the terms of the abuse itself, and having regard to the person to whom it was addressed—that the person who used it intended, or knew that it was likely, to cause the person to whom it was addressed to break the peace or to commit some offence.[6] There is a very old decision which says that calling a person a "pariah" is not a criminal offence of itself.[7] Where the appellant on his way home with some friends after a farewell-dinner-party in a fairly intoxicated condition met the local S.P.C.A. Inspector and called him a foul and obscene name, Porter, J. held that as there was no evidence of intention to create a breach of the peace, the accused could not be convicted.[8] Where a certain civic gentleman was addressed by his cousin in public as "a Shylock" and "16 per cent." referring to the high interest which he had charged from the latter on a loan, the Supreme Court held that these words did not constitute criminal insult.[9] Almost a similar decision was given in a case[10] from Galle where Ennis, J. reiterated that words of vulgar abuse by themselves were not sufficient for a conviction, for "between persons in the same walk of life, such abuse is the natural abuse between them."

The insult must be provoking: it must give provocation to commit a breach of the peace or to commit an offence. The section limits the character of the offence to such insults as are provocations and only to such provocations as are intended to cause the person provoked to break the public peace. The section is therefore intended to prevent

1. Section 484 C.P.C.
2. Matarégéwera *vs.* Yarataneri Unnanse (1914) 2 C.A.R. 49.
3. Waas *vs.* Samaranayake (1915) 6 Bal. Notes 43.
4. Sabaratnam *vs.* Perera (1916) 3 C.W.R. 120.
5. Balasuriya *vs.* Dharmasiri (1932) 1 C.L.W. 343.
6. Kader Batcha *vs.* Dunn (1910) 3 Weer. 80.
7. Martensz *vs.* Ossen Saibo (1856) 1 Lor. 162 (Full Bench).
8. Fernando *vs.* Van Rooyen (1922) 1 T.L.R. 47.
9. Gunawardena *vs.* Gunawardena P.C. Panadure, 924.
10. Vil Cassim, J.P. *vs.* Segu Mohideen P.C. Galle, 1925.

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breaches of the peace by preventing what is likely to cause them.[1] But it is not necessary that there should be affirmative evidence to the effect that the insult caused actual provocation : it is sufficient if the insult is clearly of a provocative character—of a character likely to produce a breach of the public peace on the part of the person towards whom it is directed, or if the Court is satisfied from all the circumstances of the case that the accused must have intended to produce or must have known that he would produce that result.[2] Thus, where the accused in a quarrel with the complainant's wife indirectly exposed his body and on her retiring to her house abused her, she keeping quiet all the time, it was held that the offence depended upon the provocation given and not upon the provocation felt, and that the acquittal therefore could not stand.[3] Where the accused, a constable, pushed and dragged the complainant and called him a pig, it was held that this was insult.[4] But even if the words complained of are provocative and indecent the accused cannot be convicted if he has not intended the person abused to break the peace or knows that he is likely to do so : thus, where the complainant said "I was not annoyed, I felt ashamed, I was not angry, I was not provoked to commit a breach of the peace" and the Magistrate convicted on the footing that the language was *ex facie* provocative and indecent, the Supreme Court quashed the conviction.[5]

As the insult must be provocative, it cannot provoke if offered in one's absence.[6] Where the accused's child had been hurt by the complainaint's child and the accused went near the complainant's house in his absence and used abusive language mentioning the complainant by name, it was held that the act of the accused, however reprehensible, was not calculated to provoke a breach of the peace.[7] Where a person secretly scribbled indecent and insulting words in charcoal on the outside wall of a mosque abutting on a public street, it was held that the accused could not come under this section, "which was directed to the case of an open and avowed insult which might lead the person insulted to assault the person who had insulted him."[8]

An insult need not be conveyed in words—it may be by signs, gestures or visible representations—in fact by anything by which human feelings are moved and hurt.[9]

The offence of insult is triable summarily, is non-cognisable and compoundable. It is a petty offence of every-day occurrence in Ceylon. "Abuse" *per se* is triable by a Gansabhawa. There are conflicting decisions of the Supreme Court as to whether, after conviction in a case of insult,the accused could be called upon to give security to keep the peace.[10] The better opinion is that he should not be so called upon, for the offence is but trivial. The Indian High Court has decided that where an apology

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1. Senanayake *vs.* Don John (1901) 5 N.L.R. 22.
2. Fraser *vs.* Sinniyah (1910) 14 N.L.R. 3.
3. Syed Mohamed (1900) 1 Weir. 622.
4. Goolab's Case 5 Bombay L.R. 597.
5. Rahaman *vs.* Perera (1929) 7 Times L.R. 66.
6. Sub-Inspector of Police, Kalutara *vs.* Silva (1928) 6 Times L.R. 74.
7. Corea Mudaliyar *vs.* Antonippillai (1906) 5 Tam. 88.
8. Sri Mudali *vs.* Sebastian (1898) 4 Bal. 133. The accused was convicted under section 4 of Ordinance No. 4 of 1841.
9. R. *vs.* Kuppusamy 28 Madras Law Journal 505.
10. Silva *vs.* Fernando (1917) 4 C.W.R. 260, and Arlinahamy *vs.* Jonis (1917) 4 C.W.R. 118 as against Allegiah *vs.* Allegaratnam (1919) 6 C.W.R. 184.

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is tendered soon after the insult, it should be taken as a sufficient atonement and the accused could not be punished again.[1]

The words of the abuse complained of should be specified in the summons[2] and, if necessary, in the charge and judgment sheet, for the essence of the offence is provocation and this can only be inferred from the nature of the words imputed to the accused. Failure to do so is a fatal irregularity.[3]

(II) Obscene Words.

"Whoever sings, recites, or utters in or near any public place any obscene song, ballad, or words, to the annoyance of others, shall be liable to imprisonment for three months or fine or both."[4] The uttering or recital must be in or near a public place: even if the offence takes place in a compound and not actually on the public road, it is near it within the meaning of this section.[5] A resthouse is a public place.[6] It is further necessary that others should be annoyed—though it is sufficient even if a single person is annoyed.[7] Thus, where a person is charged with singing obscene songs at midnight, it would be necessary to prove that thereby the repose of the inhabitants was disturbed or that they were annoyed.

The words alleged to be obscene ought to be set out in the charge,[8] in order that the accused may know what it is with which he is charged and that the Magistrate may decide whether in fact the words were obscene or not.[9] The omission would not vitiate a conviction if the words have appeared in the evidence of the complainant or his witnesses.[10] Obscenity is something which affects morals and not merely conventional manners.[11] In a charge of publishing an obscene book, it is not necessary to show that the obscenity lies in any particular words used. It is sufficient if the scenes depicted and the details in which the scenes of passion are represented are, in fact, obscene.[12] An article is obscene where the tendency of its contents would be to deprave and corrupt the minds of those who peruse it,[13] regardless of any good intentions the accused may plead.[14]

It is a cognisable and non-compoundable but a summary offence. This offence must be distinguished from cognate offences under the Police Ordinance, *e.g.*, of being drunk and disorderly, etc.[15]

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1. Moro Balwant Marathee 15 Bombay L.R. 1039.
2. P.C. Galle A 266. S.C. No. 397-8 of 6th October, 1933.
3. Pakeer *vs.* Warnakulasuriya (1930) 3 C.A.R. (Gratiaen's) 69.
4. Section 287 C.P.C.
5. Ukku Banda *vs.* Grigoris (1917) 4 C.W.R. 299.
6. Perkins *vs.* Don Samuel 4 Times L.R. 12.
7. Tissera *vs.* Fernando (1911) 14 N.L.R. 424.
8. Udayar, Point Pedro *vs.* Alfred (1929) 6 Times L.R 114.
9. Haniffa *vs.* Kenia Tula (1908) 1 Weer. 35. Fernando *vs.* Fernando (1911) 6 Weer. 33 and Mohamed *vs.* Bastian Appu (1920) 2 Law Recorder 24.
10. Ratnayake *vs.* Deonis Appu (1916) 2 C.W.R. 21 and Ukku Banda *vs.* Gregoris (1917) 4 C.W.R. 299.
11. Collette *vs.* Perera (1916) 3 C.W.R. 136.
12. De Bruin *vs.* Dharmabandu (1930) 32 N. L.R. 88 : 8 Times L.R. 13.
13. Sub-Inspector of Police, Tangalle *vs.* Dharmabandhu (1931) 33 N.L.R. 114.
14. Bandaranayake *vs.* Abu Backr (1932) 2 C.L.W. 120.
15. See Sections 53 (7), 60 and 90 (third clause) of Ordinance No. 16 of 1865. Vol. I, p. 608, *et seq*.

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It is a summary offence now,[1] punishable with a fine of Rs. 1,000 or imprisonment for three months or both, to make, distribute, exhibit, import, advertise or possess for that purpose obscene writings, drawings, pictures, objects, etc. The abettor is guilty like the principal offender and under the International Convention of Geneva of 12th September, 1923, any person who abets the commission of any corresponding law outside Ceylon is guilty of a like offence.

(III) Intimidation.

"Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do (or omit to do any act which that person is legally entitled to do) as the means of avoiding the execution of such threat, commits criminal intimidation."[2]

The two essentials of this crime are the threat and the intention. The threat may be a threat of injury to the person or reputation or property; thus, it may be a threat to burn the house of the complainant, or a threat to kill,[3] or cause grievous hurt, or a threat to get one dismissed from the Police Force.[4] The threat must be to cause some injury and possibly some concrete injury. Where the accused told the complainant that he would get him six months' rigorous imprisonment if he did not let his sister who was staying with him to go away, it was held that this was not intimidation.[5] But where the accused threatened to implicate both the parties who had given bail to keep the peace and have them imprisoned if they did not break their bonds and join him in riotous conduct, it was held that this threat was sufficient to constitute criminal intimidation.[6] The threat must be such as is practicable and can be put into effect or which the person threatened imagines to be possible to be put into effect. A threat to shoot where the person from whom the threat proceeds is not armed with a gun does not amount to a threat to cause death or grievous hurt[7]; though, if the accused had a revolver and threatened to shoot, he would come within the pale of this section, even if the revolver was afterwards found to be unloaded. It is sufficient if the person threatened imagines himself to be in imminent danger. But mere idle threats, like "I shall knock your teeth," uttered in an angry mood do not constitute this offence.

The essence of intimidation is the holding out of some threat directly to the person concerned or with the intention of its being communicated to him; so that burying a "Hooniam[8]" secretly in the complainant's garden would not amount to intimidation[9]; though the performance of "Hooniam" ceremonies, with the intention of putting persons in

1. Ordinance No. 4 of 1927.
2. Section 483 C.P.C.
3. Sabonalde *vs.* Baba (1915) 6 Bal. Notes 47.
4. Dada Hanmant Dain 20 Bombay 794.
5. Reg. *vs.* Moroba Bhaskerjee 8 Bombay High Court Reports 101.
6. Reg. *vs.* Ata Hussain Allahabad Weekly Notes 41.
7. Gunaratne *vs.* Allis Singho (1913) 1 C.A.R. 16.
8. *i.e.*, A charm.
9. Sinnapu *vs.* Vallipuram *et al* (1917) 4 C.W.R. 231.

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fear of personal safety and so preventing them from entering a field and reaping the crop, would constitute the offence.[1]

The threat may be either by words or in writing.[2] If the accused only holds up a knife in a threatening manner without uttering a verbal threat, he may be guilty of assault but not of intimidation.[3] And the threat may be of injury either to the complainant himself or to any person in whom he is interested. This interest must be a personal interest, so that the threat must have some influence upon his own feelings or conduct. Where a clerk threatened the Commissioner that if he did not transfer the Divisional Forest Officer (a Mr. Mac. Gregor) who was responsible for the dimissal of the clerk, the latter would be killed, the Indian High Court held that the Commissioner having had no personal interest in Mr. Mac. Gregor, but only an interest which one human being felt for another, the offence was not committed.[4] A threat to commit suicide if another person refuses to do a particular thing may amount to this offence if the latter is interested in the former (*e.g.*, a father and son) but not otherwise.[5]

The intention must be to cause harm or to cause another to do anything which he is not legally bound to do (or to omit to do what he is legally bound to do). If no alarm is caused or is likely to be caused, the threat is a vain one : thus, " words of braggadacio in which there is much stage thunder but in which the very extravagance of the language used is a sure sign of its hollowness "[6] can seldom be taken at more than their face value and can therefore but seldom intimidate.

Criminal intimidation is punishable with two years' imprisonment or a fine or both : it is a cognisable, compoundable, and summary offence. Where the threat is to cause death or grievous hurt, or to cause the destruction of property by fire, or to cause an offence punishable with death or imprisonment for seven years, or to impute unchastity to a woman, the offence is punishable with seven years' imprisonment or fine or both. When the threat is to cause death or grievous hurt, the offence is non-summary[7] and not compoundable.

The offence of criminal intimidation is often tacked on to cases of insult in order to prevent the latter from being referred to a Gan-sabhawa.

(IV) Defamation.

It would be outside the province of this book to deal at length with the subject of defamation. The offence is entirely a non-summary one and no Police Court can take cognisance of the offence unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved or by some other person with the like sanction. The Attorney-General before he sanctions the prosecution would naturally satisfy himself whether the particular defamation is criminal or not.

In order to be criminal, a defamation must be an imputation concerning any person made or published with an intention to harm or

1. Banda Korala *vs.* Pinhamy (1901) 5 N.L.R. 223.
2. (1899) Koch 66.
3. Murukesu *vs.* Karunakara (1923) 2 Times L.R. 64.
4. Emp. *vs.* Mangesh Jivanji I.L.R. 11 Bombay 376.
5. Nubi Baksh *vs.* Oomra (1866) Punjab Record 109.
6. Dr. Gour, II Vol., para 5429.
7. Sabonaide *vs.* Baba (1915) 6 Bal. Notes.

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knowing or having reason to believe that such imputation will harm the reputation of such person.[1] The imputation may be by words either spoken or intended to be read, or by signs or visible representations. No imputation is said to harm a peron's reputation unless that imputation directly or indirectly in the estimation of others lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state or in a state generally considered as disgraceful. An imputation to a person deceased or even to a body corporate may amount to defamation.

In the following cases, the publication of a criminal libel becomes privileged :—

(i) If it imputes anything which is true, provided that it is for the public benefit that the matter in question should be made public. This proviso is embodied from Lord Campbell's Act in England.[2]

(ii) If it is merely an opinion, respecting the conduct of a public servant in the discharge of his official duties or respecting his character, so far as it appears in that conduct and no further ; the opinion must be expressed in good faith and without malice.

(iii) If it is merely an opinion expressed in good faith respecting the conduct of any person touching any public question and respecting his character appearing in that conduct.

(iv) If it is a true report of the proceedings of a Court of justice or of the result of any such proceedings : it must be a substantially true report.

(v) If it is merely an opinion expressed in good faith respecting the merits of any decided case or the conduct of any party or witness in such a case.

(vi) If it is merely an opinion expressed in good faith respecting the merits of any performance (*e.g.*, a book or a speech) which its author has submitted to the judgment of the public or respecting the character of the author, so far as it appears in such performance.

(vii) If it is a censure passed in good faith by a person in authority in the conduct of those over whom he has such authority in matters relating to that authority.

(viii) If it is an accusation preferred in good faith against any person to those having lawful authority over him (with respect to the subject-matter of the accusation) *e.g.*, an accusation against a servant to his master.

(ix) If it is an imputation on the character of another made in good fatih for the protection of the person making it or of any other person or for the public good.

(x) Lastly, if it is a caution conveyed in good faith to one person against another and intended for the good of the person to whom it is conveyed or of some person in whom that person is interested or for the public good.

The essence of these exceptions is good faith. If the imputation is made maliciously or out of spite or ill-will, it will be deemed to be

1 Section 479 C.P.C. *et seq.*

2. 6 and 7 Vict. c. 96.

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criminal. As the reason for criminal prohibition against libels is their tendency to provoke the person defamed into committing a breach of the peace, a defamation need not, like a civil libel, be addressed to a third party : it may be addressed to the person defamed himself.[1] Both the person who makes the defamation and the person who publishes it or helps in its publication are guilty under this section.

1. Reg. *vs.* Adams 22 Q.B.D. Law Reports 66.

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CHAPTER XXI.

HURT.

Whoever causes bodily pain, disease, or infirmity to any person is said to "cause hurt." Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person and does thereby cause hurt to any person is said "voluntarily to cause hurt."[1]

This offence has to be distinguished from that of assault or of using criminal force and implies the causing of actual bodily pain, disease, or infirmity. It has also to be distinguished from the English offence of assault and battery. An assault in England is an unlawful attempt or offer with violence to do a corporal hurt to another and a battery is an injury done to the person of a man in an angry, revengeful, rude, or insolent manner.[2]

Bodily pain means pain to the body: thus, mental pain is excluded. Disease means any disease, but it must be communicated with a definite intention of doing so, or with a knowledge that one is, by his act, likely to do so. In England, the Court of Crown Cases Reserved has held that the communication of venereal disease by a husband, even though he knows of it, to his wife, even though she does not know of it, is no assault, inasmuch as there is consent to the contact.[3] And in India, too, it has been held[4] that the spreading of venereal disease by a prostitute may be cheating, but is not hurt nor a "negligent act likely to spread infection of any disease dangerous to life."[5] Infirmity connotes the inability of an organ to perform its normal function, whether permanent or temporary.

There must be an intention of causing hurt or knowledge that he is thereby likely to cause hurt: hence the word, "voluntarily"; mere belief that one is likely to cause hurt is not sufficient—there must be knowledge.[6] If hurt is caused accidentally, it is no offence. But if there is an intention to cause hurt to somebody and by accident or mistake hurt is caused to a third party, the accused would be guilty. Where a mother who has a child in arms is hit and the child accidentally receives the injury, the accused is guilty of having voluntarily caused hurt to the child.[7]

If the intention is merely to cause simple hurt and the act is not likely to cause anything more than simple hurt, the offender will not be guilty of murder if death supervenes. Thus, where a mere "dig" on the sides kills the injured person by reason of his having an enlarged spleen which gets ruptured, the accused is punishable for having caused

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1. Sections 310 and 312 C.P.C.
2. Hawkin's Pleas of the Crown C. 62, section 1.
3. Reg. *vs.* Clarence 22 Queen's Bench Division L.R. 23.
4. Emp. *vs.* Rakma I.L.R. 11 Bombay 59.
5. Section 262 C.P.C.
6. Compare the definition of the word "voluntarily" in section 37 of the Penal Code.
7. Emp. *vs.* Sahai Rai I L.R. 3 Calcutta 623.

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simple hurt and not for murder or manslaughter.[1] It may even be held that where grievous hurt results from a simple assault and where there is no intention of causing grievous hurt and where in ordinary individuals an assault of that nature is not likely to cause grievous hurt, the accused can only be liable for having caused simple hurt.[2] Thus, where a boy of 18 years of age kicked another of 13 years on the abdomen and caused an injury by reason of which the latter's life was in danger for some time, it was held that the accused was only guilty of having caused simple hurt inasmuch as there was no proof of knowledge on the part of the accused that the kick was likely to cause grievous hurt.[3] It is not necessary that the person to whom hurt is caused should bear visible marks of injury. The phrase, " no marks, no process " is redundant in Ceylon law. Where a Magistrate refused to issue process on the ground that the complainant had no marks on his face, Dias, A.J., wrote : " I do not think this Magistrate will agree that if he went into a shop and accidentally broke a jam pot and had his face smacked, leaving no marks, that he ought not to complain, because no harm had been caused to him or because a person of ordinary sense and temper would not resent such a liberty."[4] Where no marks are visible, process may be issued for having used criminal force.

The punishment for voluntarily causing hurt is imprisonment for a year or a fine of Rs. 1,000 or both. It is a summary and compoundable offence but is cognisable. Where hurt is caused on grave and sudden provocation, if the hurt was intended to be caused only to the person who gave the provocation, the punishment is one month's imprisonment or a fine of Rs. 50 or both.[5] Grave and sudden provocation will only mitigate sentence for assaults on persons giving the provocation, if the provocation is not sought or provoked voluntarily by the offender as an excuse for the offence, or if it is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of his powers, or if it is not given in the lawful exercise of the right of private defence. Whether the provocation is grave or sudden is in each case a question of fact. Thus, a " slap for a slap " will not completely absolve the offender, though his offence might become *pro tanto* mitigated. No amount of provocation will excuse an assault upon a person other than the provoker.

There are some forms of hurt where the punishment is enhanced because of aggravating circumstances. Thus, hurt to extort property or to constrain to an illegal act (that is, torture), or hurt by poison, or hurt to deter a public servant from his duty,[6] or hurt while committing robbery,[7] or hurt while committing burglary,[8] are all aggravated forms of hurt. Hurt by a rash and negligent act, we shall consider in the chapter on motoring.

Petty assaults are triable by Village Tribunals ; so that all offences under section 314 should ordinarily be referred to such tribunals in the first instance unless the jurisdiction of the Gansabhawa is ousted, or

1. Emp. *vs.* Fox I.L.R. 2 Allahabad 522.
2. Emp. *vs.* Budri Roy 23 Weekly Reporter, Calcutta 65.
3. The Queen *vs.* Allis (1898) 3 N.L.R. 109.
4. Silva *vs.* French (1920) 21 N.L.R. 498.
5. Section 325, C.P.C.
6. Sections 315 to 324, C.P.C.
7. Sections 382 and 383, C.P.C.
8. Sections 445 and 446, C.P.C.

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unless the offence is coupled with another offence which is within the exclusive jurisdiction of a Police Court ; but the Magistrate must exercise his discretion and determine whether it is a case of such a nature as can be adequately dealt with by a fine of Rs. 20.[1]

As hurt and the using of criminal force are alternative offences, a person cannot be convicted of both where they constitute one act.[2]

(II) Grievous Hurt.

Hurt is grievous in the following cases :—

(i) Emasculation. This means depriving a man of his "masculinity." The impotency caused must be permanent and not merely temporary or curable : thus, every injury to the scrotum will not necessarily result in emasculation.

(ii) Permanent privation of the sight of either eye. There must be a permanent deprivation of the sense of sight : where there is a permanent impairing of the eye but the injured person retains his normal vision, the injury cannot be called grievous.[3]

(iii) Permanent privation of the hearing of either ear. This again connotes a permanent deprivation of the auditory sense.

(iv) Privation of any member or joint : this and the next clause refer to the offence of Mayhem in England. The word "member" means an organ or limb, *e.g.*, the cutting off of a leg or hand. "Joint" means the junction of two bones : if the joints are made "permanently stiff," they will come within the pale of this section.

(v) Destruction or permanent impairing of the powers of any member or joint. This clause includes such cases like the cutting off of tendons by which a limb is permanently dismantled—or any act by which the particular member or joint ceases once and for all to perform its natural and normal functions.

(vi) Permanent disfiguration of the head or face. This means diminishing the beauty of a person's personal appearance. Thus, an injury which will leave a permanent scar on the face may cause disfigurement ; or the pulling of an ear-lobe of a Tamil woman who has her ears pierced may take away from her personal charms.

(vii) Fracture or dislocation of a tooth or bone. This does not include a cartilage : a bone which is raw and not yet completely ossified is not excluded. The cutting of the outer ear which is composed of cartilage does not amount to grievous hurt unless the cutting permanently disfigures the face. Fracture includes even the chipping off of a tip : dislocation means displacement from its normal position. A tooth which is shaky is not "dislocated," for a tooth has "a tendency to get back into position." A tooth must be fractured or completely dislocated from its socket. A blow with a wrist that fractures a rib would fall under this section.[4]

(viii) Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits. This is a criterion adopted from the

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1. Munasinghe *vs.* Solomon *et al* (1922) 1 Times L.R. 24.
2. James Appu *vs.* Francis (1913) 1 Bal. Notes 32.
3. Dissanayake *vs.* Bastian (1891) 1 C.L.R. 67.
4. (1899) Koch 2.

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French Code. The fact that the injured person remained in hospital for twenty days and over will not of itself be conclusive evidence of the grievousness of his injury. "An injured man may be quite capable of following his ordinary pursuits long before twenty days are over and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital especially when he is fed at the public expense."[1] On the other hand, a man may leave the hospital before the twenty days are over, but would still be unable to perform his normal functions for some time more. Where a man was so injured that he had to go to a hospital and left it on the twentieth day, it was held that this day should count as one of the twenty days during which he had been unable to follow his ordinary pursuits.[2] As was remarked by the framers of our Code, "An injury to the right hand may, in the case of a clerk, keep him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all." Each case, therefore, must be decided on its own merits. Hurt which endangers life is hurt by which the life is in danger. Where the Medical Officer requires a Magistrate to record the dying deposition of an injured person, the latter's injuries may be regarded as grievous even though he gets cured and leaves the hospital before twenty days are over. The doctor must depose, however, that the injury did actually endanger life—not that it might have.[3]

Whoever causes grievous hurt is liable to seven years' imprisonment and to a fine, unless it is caused on grave and sudden provocation when the punishment is 4 years or a fine of Rs. 200. A conviction for grievous hurt must be followed by imprisonment,[4] so that even where a fine is regarded as an adequate sentence in the circumstances of the case, there must be a nominal order of imprisonment, either for a day or till the rising of the Court.

It is the duty of the Judge to decide whether the hurt, proved as inflicted, is grievous or not: a medical witness can only describe the nature and the character of the injuries.[5] He may also give his opinion whether a particular injury is grievous or not; but the Court is not bound to follow that opinion. Thus, a Medical Officer might describe a shaky tooth as a grievous injury, but the Court would not be justified in holding it as such.

The offence of causing grievous hurt under section 316 is triable by a Police Court. A Magistrate must use his discretion in deciding whether a particular case should be tried by him summarily or should be committed. The seriousness of the injury, the vital part of the body on which it is inflicted, the amount of force used, the number of days that it takes to heal, the nature of the weapon used (*e.g.*, a heavy rice pounder)—these factors might be taken into consideration in coming to a conclusion. The real criterion is whether the offence is such as can be adequately dealt with in a Police Court.

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1. R. *vs.* Vasta Chela I.L.R., 19 Bombay 247.
2. Reg. *vs.* Sheikh Bahadoor 2nd Madras Sessions, 1862.
3. R. *vs.* David Sinno (1894) 7 Tamb. 3.
4. (1899) Koch 56.
5. (1899) Koch 41.

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The offence is cognisable and compoundable with the permission of the Attorney-General.

(III) Hurt by Dangerous Weapons or Means.

Where hurt is caused—

(i) by an instrument used for stabbing or cutting ;

(ii) or by an instrument which is likely to cause death ;

(iii) or by means of fire or any heated substance ;

(iv) or by means of any poison or any corrosive substance ;

(v) or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood ;

(vi) or by means of any animal, the offender is liable to imprisonment for three years or a fine or both,[1] and with whipping. This offence is summarily triable, but where the hurt is or becomes grievous, a Police Magistrate has no jurisdiction. It is cognisable and, if non-grievous compoundable with the permission of the Attorney-General only.

The crime that is most prevalent in Ceylon and which comes under this section is what is properly known as "knifing." This means the inflicting of an injury on another by means of a sharp-pointed or sharp-edged cutting or stabbing instrument, like a knife, scythe, sickle, katty, axe, pen-knife, tapping knife, table-knife, etc. It has been held that the use of the blunt side of the blade of a sickle in order to cause hurt falls under this section, especially where it is used with such force as would cause an incised wound.[2] Where the accused attempts to stab the complainant with a knife which the latter seizes and, in consequence, has his hand cut, the accused is not guilty of causing hurt with a knife but only of an attempt to cause hurt with a knife.[3] Every man is presumed to foresee the natural consequences of his acts : so that where the accused waves a knife about or brandishes it and thus injures the complainant, he is guilty under this section ; while brandishing the knife, he had the knowledge that he was likely to cause hurt.

Cases of shooting where the hurt is not grievous fall under section 315 and are triable by a Police Court only if there is no intention of taking the injured person's life. If there is such an intention, the proper charge would be attempt to murder.

A person who applies chillies to another's eyes cannot be said to have caused grievous hurt by means of "poison."[4]

Hurt by an instrument likely to cause death may include hurt by a heavy piece of wood : but a club is not a deadly weapon.[5] What is, or is not, a lethal weapon is in each case a question of fact.

In order to check the increasing number of cases of knifing in Ceylon an Ordinance[6] was passed in 1906 to prohibit the carrying of dangerous knives which are knives with blades longer than 3½ inches or swords and daggers. By it, in proclaimed areas, any person carrying or wearing

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1. Section 315 C.P.C.
2. Philippu Pillai *vs.* Naganathar (1907) 5 N.L.R. 90.
3. Charles *vs.* Viorishamy (1900) 1 Br. 171.
4. The King *vs.* Alahakoon (1924) 2 Times L.R. 138.
5. R. *vs.* Unga 6 Tam. 50.
6. No. 28 of 1906, Vol. II, p. 711.

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such a knife is made liable to a fine of one rupee and the knife is liable to confiscation. This Ordinance further empowers Magistrates in convictions under section 315 to inflict the sentence of whipping in addition to any other sentence; the number of strokes in no case to exceed twenty-four in the case of adults and twelve in the case of a boy under sixteen years of age and six in the case of a boy under twelve years.[1] This sentence of whipping cannot be carried out till after the appealable time is over.

The object of enacting this Ordinance shows the prime necessity of dealing with knife cases, when proved, with vigour. True cases, however, can readily be distinguished from false ones. Superficial self-inflicted wounds, wounds on the fleshy parts of the body, wounds running deep only under the skin, wounds inflicted parallel to one another, wounds on the left limbs or on the left side of the body or on the left shoulders, wounds tailing downwards, are points bound to throw a deal of suspicion on the prosecution story. It should not be forgotten that wounds which are not apparently self-inflicted may still have been inflicted " by a friendly hand."

(IV) Criminal Force.

"A person is said to use force[2] to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion or change of motion or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other person is wearing or carrying, or with anything so situated that such contact affects that other person's sense of feeling; provided that the person causing the motion or change of motion or cessation of motion, causes it either by his own bodily power or by disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part or on the part of any other person, or by inducing any animal to move, to change its motion or cease to move."

Whoever intentionally uses force to any person without that person's consent in order to the committing of any offence or intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

It is very difficult to distinguish between hurt and criminal force, but distinction there is. Hurt connotes bodily pain, disease, or infirmity: so that where by the use of criminal force pain is caused to the body, it is hurt. "A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horse-whip, who maliciously throws a stone at a person, squirts dirty water over a person or sets a dog at a person, may cause no hurt and no restraint: yet it is evident that such acts ought to be prevented."[3] It is these acts that constitute "assault" or use of criminal force. Thus, unfastening the moorings of a boat by which the complainant gets adrift, or lashing another's horse harnessed to a trap, or maliciously stopping the passage

1. Ordinance No. 3 of 1904, Vol. II, p. 608.
2. Sections 340 and 341 C.P.C.
3. Note M. to Commissioner's report, p. 155.

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of another's motor car, or throwing stones at another, or pulling a woman's veil, or pouring boiling water in another's bath tub are all illustrations of using criminal force.[1] There must be an intention of using such force ; and the person on whom it is used should not have consented. If there is no intention—if, for instance, force is used accidentally as in the rough and tumble of a crowded thoroughfare, the accused cannot be convicted. There must at least be a knowledge on the offender's part that he is likely thereby to cause illegal injury, fear, or annoyance. If a person throws a bottle into another's house, he is guilty of using criminal force, irrespective of consequences, for he thereby causes illegal fear and annoyance to the inmates and knows that he is likely to do so.[2]

The person on whom force is used should not have consented : thus, a patient may consent to a Doctor performing an operation, or a man may consent to a barber cropping his hair. Where a Mohammedan woman underwent certain indignities and punishment which were inflicted upon her at her own request as penance in order that she might be re-admitted to the rites and ceremonies of her religion, it was held that a charge under this section could not be sustained.[3] " Consent is not mere submission, it involves something more than mere submission. There can be no consent where there is no proper knowledge of the nature of the act. Consent cannot be implied unless the conscious mind has considered the nature and consequences of the act and had then submitted to it. Immaturity of understanding, due to youth, may render the person incapable of consenting " ; so that where a girl of seven or eight years consents to the use of " criminal force with an intention to outrage her modesty," consent on her part would afford no defence.[4]

The criminal force should not have been legally used. A husband has a right to chastise his wife, a teacher his pupils, a master his servants: the criminal force therefore should not be such as is justifiable in, or permitted by, law. Although a person is justified in protecting his property from seizure by a Headman acting under insufficient authority, he has no right to use more force than is absolutely necessary : accordingly, an assault on such a Headman would be punishable,[5] especially if an unjustifiable amount of violence is used.[6] And unjustifiable arrest by a private person, even though he may have valid suspicions, is tantamount to the using of criminal force.[7]

The use of criminal force is punishable with three months' imprisonment or a fine of Rs. 50 or both. Where there is grave and sudden provocation the imprisonment is reduced to one month. The offence is summary, compoundable and non-cognisable. There are more serious forms of this offence which are all triable by a Police Court except the offence of using criminal force on a woman with intent to outrage her modesty, and the offence of using criminal force on a public servant in the discharge of his duty.

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1. See illustrations to section 341.
2. Emp. vs. Nga San (1902) 1 Lower Burma Reports 259.
3. P.C. Badulla 14072 (1869) Vand. 38.
4. The King vs. Kalimuttu (1919) 6 C.W.R. 142.
5. P.C. Panvilla 12261 (1870) Van. 75.
6. Seneviratna vs. Singho (1882) Wendt 246 (Full Bench).
7. Pieris vs. Anderson (1928) 30 N.L.R. 118.

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(V) Assault.

Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person is said to commit an assault.[1]

An assault, therefore, precedes the use of criminal force and may be an attempt at it. The word is not used legally in the sense of a blow in which it is popularly employed in Ceylon. When we say "he assaulted me," we mean that "he hit me"; but in law an assault is an attempted battery. It is a threat of violence exhibiting an intention to use criminal force and the present ability of carrying it into execution. Mere words do not amount to an assault: though the words which a person uses may give to his gestures or preparations such a meaning as would convert them into an assault. The shaking of a fist at another or unlocking the muzzle of a dog may be cases of assault.[2] Kicking towards complainant with an intention to administer a kick, although no kick is actually administered, would amount to an assault.[3] Mere abuse or bluff when the accused has neither the means nor the intention of putting his threats into action cannot be assault. Thus, in an English case where a man put his hand on his sword and said, "If it were not the assize time, I would not take such language from you," it was held that these words did not constitute an assault.[4] Where a sergeant asked a passenger travelling in a train to vacate his seat and, on the passenger asking whether he was prepared to use force, he answered "yes" with a cane in hand, it was held that this was no assault, as it was merely a verbal threat to use force if the passenger did not vacate his seat.[5]

Assault is punishable in the same manner as criminal force.

1. Section 342 C.P.C.
2. Illustrations to the section.
3. P.C. Galle 75973 (1871) Vand. 159.
4. Tuberville *vs.* Savage 1 Modern Reports King's Bench 3.
5. Mathradas *vs.* Secretary of State 13 Indian cases 237.

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CHAPTER XXII.

SEXUAL AND SIMILAR OFFENCES.

(1) Rape.

A man commits rape[1] when he has sexual intercourse with a woman other than his wife (such wife being twelve years old and upwards) either—

(i) against her will. If the man and the woman are "of the same mind," there cannot be any rape. A woman who is asleep[2], or who is drunk and whose will is therefore overborne by intoxication[3], or who is under the influence of hypnotism, can have no will. Sexual intercourse with her would therefore be rape. The will of the woman implies conscious and deliberate mental determination on her part.

(ii) Or, without her consent. Volition and consent mean practically the same thing. The woman must give her consent of her own free will. This consent may be express or implied. There can be no consent when the woman is unable to exercise any separate judgment of her own : nor should the consent have been induced by fear, fraud, force, or delusion. There is a difference between consent and submission ; every consent involves a submission, but it by no means follows that a mere submission involves consent.[4] There can be no consent when there is no proper knowledge of the nature of the act : consent cannot be implied unless the conscious mind had considered the nature and consequences of the act and had then submitted to it.[5] Non-resistance may in some cases connote consent ; where the prisoner was indicted for rape on a girl aged thirteen and it was proved that he had connection with her before and that on this occasion he had connection with her while she was asleep, but when she woke up she did not resist until she saw the witness, when she pushed him off, it was held that there was no absence of consent.[6]

Our law regards consent as of no avail—

(*a*) When it has been obtained by putting the woman in fear of death or hurt. Under section 83, a consent is even inoperative if there is merely a fear of injury.

(*b*) When the man knows that he is not her husband and the consent is given because she believes that he is another man to whom she is (or believes herself to be) lawfully married. This happens where consent is given under a misconception of facts, which is no consent at all. If the woman believes that the ravisher is her husband, she would naturally give her consent ; but if the man knows that he is not her husband, he would be guilty of rape : thus, for instance, in bigamous marriages.

(*c*) When the girl is under twelve years of age.

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1. Section 363 C.P.C. as amended by Ordinance No. 13 of 1890.
2. R. *vs.* Mayers 12 Cox 311.
3. R. *vs.* Camplin 1 Cox 220.
4. Per Coleridge, J. R. *vs.* Beall 35, Law Journal Magistrate's cases 60.
5. The King *vs.* Kalimuttu (1919) 6 C.W.R. 142.
6. R. *vs.* Page 2 Cox 133.

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There must be penetration, though not necessarily a rupture of the hymen, or an emission of the seminal fluid. Without penetration, the act would only amount to an attempt (or using criminal force with the intent of outraging her modesty, section 345). Rape is a cognisable offence, only triable at the Assize Court. The clothes of the woman and of the accused, the mats, pillows, etc., should be all forwarded to the Government Analyst for detection of semen or blood ; and the woman as well as the man should be sent up for examination by a medical officer at the earliest possible opportunity.

By the amending Ordinance of 1919 embodied in the Penal Code as section 364 A, it is now an offence triable by a District Court to have or to attempt to have carnal intercourse with any girl between twelve and fourteen years of age, unless the offender proves that he had reasonable cause to believe that the girl was fourteen years old or over, or unless the offender is her husband, or is living with her as her husband with her parents' consent. No prosecution under this section can be entered after the lapse of three months. If the girl is under twelve years of age, the offence would be rape whether the ravisher is her husband or not.

Under section 360 (A) "procuration" or attempt at procuration with a view to illicit sexual intercourse or with the object of making the woman a common prostitute either within or without the Colony is made a non-summary offence. Offences arising out of indecency, immorality, or prostitution are dealt with under the Vagrants' Ordinance. The new Ordinance No. 3 of 1930, which penalises the encouragement of unlawful carnal knowledge, etc., of a girl under sixteen years of age by her parent or guardian is also described there.

(II) **Unnatural Offences.**

Carnal intercourse against the order of nature with any man, woman, or animal is an offence triable by a Jury alone. Penetration is necessary as in the case of rape ; an emission of the semen is not essential. Intercourse must be *per anum* (unless the subject is a woman) : so that where the accused forced open a child's mouth and introduced his private parts and proceeded to the completion of his lust, it was held that he could not be said to have committed sodomy.[1] Animals include birds. Carnal knowledge with an inanimate object (or masturbation) is not within the meaning of this section. Any male person committing any act of gross indecency with another male person is now guilty of an indictable offence.[2] So is he who procures or attempts to procure any male person to commit such an act. It is immaterial whether the act was done in public or private.

(III) **Bigamy.**

Bigamy is remarriage when a husband or wife is alive.[3] Where the remarriage takes place in such circumstances that this second marriage is *ipso facto* void by reason of its having taken place during the life of the former husband or wife, the person remarrying commits bigamy ; and as the second spouse will not have a legal *status qua* spouse, he or

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1. R. vs. Jacobs ; Russel and Refan 231.
2. Section 365 A (Ordinance No. 5 of 1924).
3. 362 B.C.P.C.

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she will be a competent witness against the husband. As the offence is mainly against the sanctity of the first marriage, the first spouse is now a competent witness against the accused.[1] The fact of that marriage could, however, be independently proved, *e.g.*, by the production of the register and the evidence of witnesses and relations who had attended the marriage ceremony or had signed the register.

It is not bigamy, however, (i) if the first marriage has been declared void by a Court of competent jurisdiction, or (ii) if the original husband or wife has been continually absent for the space of seven years at the time of the subsequent marriage and has not been heard of by the accused as being alive within that time.

In order that the accused may set up one of these defences, he should have at the time of the second marriage informed the person whom he marries of the true state of facts. Ordinarily, bigamy is triable by a District Court, but when the accused has concealed the fact of the former marriage from the second spouse, he is liable to be punished by the Supreme Court only, with imprisonment for ten years and a fine.[2]

It is not bigamy for those persons, whose religions permit it, to remarry in pursuance of their religion ; thus, Mohammedans can remarry and validly contract a bigamous marriage. There must be affirmative evidence to show that the accused is a Mohammedan. Where the accused bore a Sinhalese name and had not contracted his marriage in accordance with Mohammedan ceremonies, it was held that in the absence of proof on the part of the accused, the conviction must stand.[3] But a Mohammedan woman commits bigamy by remarrying unless she has been previously divorced by the husband himself or by a decree of Court.[4]

The fact of the first marriage having been proved, it is incumbent on the accused, if he relies upon the omission of any essential detail in that ceremony, to make good his point and show that the omission had in fact taken place.[5] Thus, where it was alleged that the first marriage solemnized by the Registrar was invalid for want of the issue of a certificate and want of authority on the part of the Registrar to solemnize the marriage at the house of the bride, it was held that the marriage was valid, unless both parties when they married knew that no certificate had been issued or that no authority had been given to celebrate the wedding at the bride's house, and that the burden of proving that they nevertheless married knowingly and wilfully was on the accused.[6]

Any person who dishonestly or with a fraudulent intention goes through the ceremony of marriage knowing that he is not thereby lawfully married, and any man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to co-habit or have sexual intercourse with him in that belief, commits offences triable by the jury alone.[7]

All these offences are non-cognisable and non-compoundable.

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1. Ordinance No. 16 of 1925 amending section 120 of the Evidence Act.
2. Section 362 C, C.P.C.
3. The Queen *vs.* Obeyesekara 9 S.C.C. 11 (Full Bench).
4. The King *vs.* Miskin Umma (1925) 26 N.L.R. 330.
5. The King *vs.* Perumal (1911) 14 N.L.R. 496.
6. The Queen *vs.* Sinnetamby (1884) 6 S.C.C. 121.
7. Sections 362 D and A, C.P.C.

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(III) Indecent Assaults on Women.

Section 345 enacts that whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment for two years or a fine or both. It is a cognisable and non-summary offence. It must be proved that the accused assaulted or used criminal force on a woman and that he did so with the intention of outraging her modesty. As mere words do not constitute an assault, the mere making of an indecent proposal does not come within the pale of this section. The woman must have been touched, pulled, embraced, etc., or some force must have been used upon her. A woman denotes a female human being of any age.[1] Where the accused took a girl of six years of age into his room, made her to lie down and then lay on her, whereupon the girl screamed and ran away, it was held that the accused had used criminal force on the girl with intent to outrage her modesty.[2] The intention may be apparent from the facts of the case itself. Thus, stripping a woman naked would imply this intention,[3] or even a woman may be merely pulled by the hand after the suggestion of an indecent proposal.[4] Consent on the part of the woman express or implied, or even submission, would take away the force of the accused's intention.

(IV) Kidnapping and Abduction.

Kidnapping literally means child-stealing. Kidnapping may either be from Ceylon or within Ceylon itself. The former takes place when any person regardless of his age is conveyed beyond the limits of Ceylon without his consent or without the consent of some person legally authorized to consent on his behalf. Kidnapping in Ceylon, or what is technically known as kidnapping from lawful guardianship, takes place when a minor under fourteen years of age, if a male, or under sixteen years of age if a female—or a person of unsound mind—is taken or enticed out of the keeping of his lawful guardian without the lawful guardian's consent. For this offence, the subject must be a minor or a person of unsound mind; and he should be taken or enticed from the custody of his lawful guardian without the guardian's consent. A guardian includes any person entrusted lawfully with the care or custody. He may be even temporarily so entrusted, *e.g.*, a friend of the guardian,[5] or a schoolmaster.[6] Where, however, the complainant found a little girl on the road and took her into his employ and where after she had been two years with him, the accused was said to have kidnapped her, it was held that in the circumstances of the case the child could not be said to be in the lawful guardianship of the complainant.[7] Whether a girl, who at the time of kidnapping, had been living at her father's house as mistress of a man could be said to have been removed from her father's guardianship would depend on what the relation of the parties was and whether the father had delegated his powers to that man.[8] A guardian cannot be

1. Section 7 C.P.C.
2. Emp. *vs.* Tatia Mahadar 14 Bombay Law Reports 961.
3. R. *vs.* Rosinski 1 Moody's Crown Cases Reserved 19.
4. Emp. *vs.* Sena Shetty 1 Weir. 347.
5. Emp. *vs.* Tekchand (1915) 31 Indian Cases 380.
6. 1 East Pleas of the Crown 457.
7. Nicholas Appu *vs.* Serasin Appu (1922) 1 Times L.R. 31.
8. King *vs.* Hendric (1913) 1 Bal. Notes 65.

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guilty of kidnapping his ward. Thus, where two wards were at Mount Leo Convent, Kandy, and the Mother Superior refused to allow them to spend their holidays at home and the guardian after an unsuccessful attempt at obtaining an order from a District Court to compel their return arranged by stratagem to remove the girls from the convent, it was held that he could not be said to have kidnapped.[1] It is not necessary that the person kidnapped should be at the time of the actual kidnapping in the actual custody of the guardian : thus, the subject may have gone out for her day's work and the accused may have met her on the road and enticed her away.[2] What is contemplated is loss of possession to the natural guardian, and this loss may be of whatsoever short a duration. So that, consent on the part of the person kidnapped would not render the act of the accused an innocent one. Where at the invitation of a girl under the age of sixteen years living with her parents, the accused agreed to elope with her and the girl met him by appointment not far from her father's house which she had left on the pretence of going to school and the accused took her away to his own house, it was held that the accused was guilty of having taken the girl out of her father's lawful guardianship.[3] The evidence of the girl on this point should be accepted with caution.[4] The consent of the guardian would, however, be a valid defence. Where there is no guardian, *e.g.*, in the case of runaways, there could be no taking from lawful guardianship. Where the act is done in good faith and for no immoral or unlawful purpose, the accused cannot be convicted, *e.g.*, a person may believe himself to be the putative father or entitled to lawful custody (*e.g.*, the husband of a bride of 15). Where there is a *bona fide* mistake as to the belief in the age, the defence must prove this *bona fide* mistake as justifying the act done under a mistake of fact. Schneider, J., in a recent case has held that it makes no difference that the accused were not aware of the actual age of the girl and that the mere fact that she is under the age of sixteen years is sufficient.[5]

Abduction takes place when any person, male or female, is compelled by force or induced by deceitful means or by abuse of authority or any other means of compulsion[6] to go from any place to another. Abduction by itself is not an offence unless it is committed with a certain intention, *e.g.*, of murdering the victim or of wrongfully confining him.

All these offences are non-summary, cognisable and not compoundable.

(V) Wrongful Restraint and Confinement.

A person is wrongfully restrained when he is voluntarily obstructed from proceeding in any direction in which he has a right to proceed. The meaning of the phrase, "right to proceed," was discussed by Wood Renton, C.J., who held that it was not necessary that there should be affirmative proof of the existence either of a public thoroughfare or of a right of way created by grant or prescription ; nor were mere tolerated acts of user enough to create a right to proceed within the meaning of

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1. The King *vs.* De Croos *et al* (1911) 14 N.L.R. 249.
2. Emp. *vs.* Jetha Nathan 6 Bombay Law Reports 785.
3. The Queen *vs.* Shaikh Adam (1888) 8 S.C.C. 161.
4. The King *vs.* Kiri Banda (1925) 3 Times L.R. 129.
5. The King *vs.* Don Stephen and another (1928) 6 Times L.R. 34.
6. Ordinance No. 21 of 1919, section 7.

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this section.[1] The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner, would be an offence under this section.[2] Thus, a Sub-Inspector of Police who detained a person on suspicion for having stolen his horse and who would not let him go till he had furnished bail was said to have restrained him from proceeding to his house where he had a right to go.[3] A toll-bar keeper who had unlawfully detained a person as he failed to pay the toll demanded of him was held to be guilty of wrongful restraint as he was not justified in detaining the complainant without ascertaining his identity.[4]

The obstruction must be a physical obstruction : it may be caused by the actual use of force or by means of menaces and threats : or it may be caused indirectly. Thus, removing a ladder when a man is on a roof would obstruct his descent.[5] Where the accused was seated in the middle of a road and as a motor lorry approached got up and walked backwards so that the driver of the lorry could not proceed without running over him, it was held that the accused was guilty of wrongful restraint.[6] Any act which prevents another person from proceeding in a direction along which he has a right to proceed except by committing a criminal act amounts to wrongful restraint. Where an Excise Inspector was acquitted for having thrown a framework of spikes so as to prevent passage of a motor car suspected to carry contraband, the Supreme Court in revision set aside the acquittal and remitted the case to the Magistrate to record a conviction.[7] But snatching away the license of a boatman so that the authorities would not permit the boat to proceed would hardly amount to obstruction.[8] Verbal remonstrance, persuasion, or entreaty does not become obstruction within the meaning of this section. Nor is it an offence to obstruct a private way over land or water in the *bona fide* belief of having a right to obstruct.

A person is said to be wrongfully confined when he is restrained in such a way that he is prevented from proceeding beyond certain circumscribing limits : in other words, when he is "imprisoned" (in the larger sense of the word). A person who is already undergoing a sentence of imprisonment could also be wrongfully confined. Where a sick convict on refusing to take the treatment prescribed for him by the Doctor was ordered by the Apothecary to be confined to a solitary cell, it was held that the Apothecary was guilty under this section as he had no powers to order confinement.[9] If Police[10] or Excise officers[11] were wrongfully and without authority or lawful powers to detain persons in confinement, they would be guilty under this section, unless there is a complete absence of malice on their part : a Police officer who arrests

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1. P. C. Jaffna 16527 (1915) 1 C.W.R. 6.
2. Saminanda Pillai (1889) 1 Weir. 340.
3. Sheo Saran Sahai 10 Calcutta Weekly Reporter 20.
4. Knatchbull *vs.* Fernando (1906) 9 N.L.R. In a similar case in India, the accused was acquitted on the ground that the act of the accused was *bona fide* and therefore excusable. Kanai Lal Gowala I.L.R. 24 Calcutta 885.
5. R. *vs.* Telupola (1884) 1 Weir 340.
6. Herath *vs.* William Silva (1928) 30 N.L.R. 376. 6 Times L.R. 58.
7. Ossen *vs.* Ponniah *et al* (1931) 9 Times L.R. 137.
8. Venkataramiah 5 Madras Law Times 207.
9. R. *vs.* Baista Charan Shah I.L.R. 30 Calcutta 95.
10. Emp. *vs.* Budrool Hussain 24 Calcutta Weekly Reporter 51.
11. Dhania *vs.* Clifford I.L.R. 13 Bombay 377.

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a person who has been discharged or whom he has no right to arrest would be guilty of confining him.[1]

Thus, while restraint means the keeping of a man out of a place where he wishes to be : confinement means the keeping of a man in a place where he does not wish to be. Both are summary offences and, though cognisable, are compoundable. Ordinary restraint is only punishable with imprisonment for a month or a fine of fifty rupees or both. The punishment for confinement is one year's imprisonment or a fine of Rs. 1,000. If confinement is for three days or more or if a person is confined for the purpose of extorting a confession or property or for an illegal act, the offence becomes non-summary and non-compoundable.

Section 76 of the Criminal Procedure Code enacts, " 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 if found shall be taken immediately before such Court which shall make such order as in the circumstances of the case seems proper." " This section is aimed at the discovery and release of people who have been confined against their own will. It is not intended to be a substitution for the power of the Supreme Court to direct the delivery up under a writ of *Habeas Corpus* of children or others who are in the custody of others who have not the right to them." Thus, where a girl of 15 was living with her uncle under an arrangement that she should marry his son and the mother of the girl having quarrelled with the uncle charged him with wrongful confinement in order to prevent the marriage from taking place, the Magistrate acquitted the accused, but purporting to act under this section directed him to give up the custody of the girl to the mother : the Supreme Court upheld the acquittal, but deleted the order of restitution as having being made *ultra vires*.[2]

Section 438 of the Criminal Procedure Code empowers a Magistrate to inquire into complaints of abduction or unlawful detention of a woman or of a female child under 14 years of age for an unlawful purpose, and to order her immediate restoration to her liberty or to her natural or lawful guardian. A Magistrate may compel compliance with such order using such force as may be necessary. There must be evidence that she has been abducted or detained for an unlawful purpose—not necessarily an immoral purpose (though an immoral purpose is, of course, an unlawful purpose). At such an inquiry the person complained against should be made the respondent, and should be given an opportunity of shewing cause to the contrary.

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1. Ramdas Sadhoo *vs.* Anund Chunder Ray 19. Calcutta Weekly Reporter 27.
2. Soosaipillai *vs.* Vallipuram (1920) 7 C.W.R. 287.

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CHAPTER XXIII.

MURDERS AND INQUESTS.

(I) Preliminary.

Ceylon is proverbially famous for its frequency of murders[1] : the proportion of murders to population which was one per 20,700 persons in 1924 is now so high as one to 14,649 persons in 1932[2] as against one per 600,000 in England and Wales. In the United States of America, the incidence is one for every twelve thousand of the population.

" In 52 of the 217 murders (in 1924) women were murdered, and it is a notable fact that in a very large number of cases the offender and the victim were related. The majority of murders were not premeditated and were the result of a family feud or squabble in which words led to blows and a knife was drawn and used without realization of the possible effect of a stab-wound."[3]

The Sinhalese are by nature a very easily excitable race : to them, the use of a knife as a weapon of revenge is as facile as was the duel in Mediaeval France. Their passions are easily aroused : they kill in cold blood on the slightest provocation. If the cases of murder are analysed as regards motives, it will be found that there were 294 murders in 1932 : out of these 147 were the result of sudden quarrels, 42 of jealousy over women, 29 of land feuds, 17 of long-standing enmity, 15 of a desire for revenge and 9 of a desire for plunder. In 156 cases, 40 per cent., the murderer and victim were related.[4] In 193 cases (*i.e.*, over 65 per centum) the weapon used was a knife.[5]

(II) Definition.

A murder, in England, is defined as " unlawfully killing a reasonable creature who is in being and under the King's peace, with malice aforethought, either express or implied—the death following within a year and a day." This definition is quite different from the one given in our Code. With us, whenever death of a person is caused by another with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, the death becomes " culpable homicide." Culpable homicide may amount to murder, or it may not. We have thus two distinct offences, viz., murder, and culpable homicide not amounting to murder. Both these offences are triable by a jury

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1. There were 202, 189 and 217 murders in the years 1922, 1923 and 1924, respectively. Of the 217 murders in 1924, the greatest number took place in the Western Province, viz., 69 and the least in Uva, Eastern and North-Central Provinces, viz., 4 each. There were 35 in the Southern, 32 in the North-Western, 23 in the Sabaragamuwa, 19 in the Central and 11 in the Northern Province. There were 16 murders in the city of Colombo. In 1931, and 1930, there were 277 and 334 murders respectively in the island—the greatest number being in Western Province, viz. 70 and 95 respectively.

2. The greatest incidence was in Avisawella District, there being one murder to every 6,778 persons.

3. Administration Report of the I. G., Police for 1924, p. B 12.

4. I. G. P.'s Administration Report for 1932 P. A. 14.

5. In 69 cases the weapon used was a club ; in 61 cases a firearm ; in 9 cases death was caused by strangulation and in 3 cases by poison.

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only, and it is a question of fact for the jury to determine whether, in a given state of facts, a particular death is a murder, pure and simple, or is only culpable homicide of the second class. Both in England and in Ceylon, the punishment of murder is death (*i.e.*, hanging) except for an offender under 16 years of age who can only be sentenced to be detained during the Governor's pleasure. In India, whoever commits murder is liable to be punished with death or transportation for life and also with fine, unless the murderer is already under sentence of transportation for life, in which case the only punishment is death.

Culpable homicide becomes murder if the accused had—

(i) the intention of causing death,

(ii) or had the intention of causing such bodily injury as is likely to cause death,

(iii) or had the intention of causing bodily injury to any person; such injury being sufficient in the ordinary course of nature to cause death, or

(iv) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death (or such bodily injury as is likely to cause death) and commits such act without any excuse for incurring the risk of causing death (or the bodily injury.)[1]

Thus, where a man shoots or stabs at another with the intention of causing his death and the latter dies in consequence, he commits murder. So does a man who shoots at random in a crowd of persons and kills one of them, although he may not have had a premeditated design to kill any particular individual. If a man knows that the person on whom the injury is to be inflicted is suffering from such a disease that the injury is likely to cause his death, though it may not cause the death of another, and knowingly inflicts that injury, he would be guilty of murder. The case would be different if he was not aware of the condition of the deceased person; in that event, his crime could only be judged by the standard of intention. A man who gives a kick to another who, having an enlarged spleen, dies in consequence does not commit murder and not even culpable homicide, if he did not know the condition of the deceased and did not know that this kick was likely to cause death.[2] A man who causes the death of another may not necessarily be guilty either of culpable homicide or of murder; it may be that though he intended only to cause hurt, such hurt may, from causes beyond his control or knowledge, become grievous and mortal. The extent of his guilt must be determined by his intention when he struck the blow and not by its subsequent and possibly unforeseen effects.[3] Where the accused is struck with such moderate force that the resulting death could not have been intended by the accused nor foreseen by him, *e.g.*, where a punkah puller is awakened from his slumbers by a kick,[4] or where a soldier strikes a coachman for not hiring out his carriage to him,[5] or where a Hindu priest stamps on the sides of a woman who is "possessed" in order to drive the devil away, he could only be convicted for intentionally causing such hurt as he did in fact inflict. When a man strikes another with a heavy club on his head when he is asleep and is

1. Section 294, C.P.C.
2. Emp. *vs.* Nidamarti 7 M. H.C.R. 119.
3. The King *vs.* Kolanda (1901) 5 N.L.R. 236 (Full Bench).
4. R. *vs.* Fox I.L.R. 2 Allahabad 522.
5. R. *vs.* O'Brien I.L.R. 2 Allahabad 766.

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consequently helpless and fractures his skull in two places, he clearly commits murder, for the act is done with the intention of causing such bodily injury as is likely in the course of nature to cause death.[1] If a person ties a mischievous boy to a horse's tail and begins to whip him on the back and the horse taking affright dashes forth and drags the boy along, severely wounding him in consequence of which the boy dies, he would be guilty of murder, for the accused would be presumed to know that his act was "intrinsically likely to kill."[2] On this basis, the conviction is justified of an accused who had stabbed the deceased on the back in a vital part: the injury was not severe and healed in a week, but lock-jaw setting in, the deceased died on the following day.[3] When a man stabs another in a vital part, he must be held to have intended to cause death, and if death ensues either directly from the wound or in consequence of the wound creating conditions which give occasion to the appearance of a fatal disease, the person inflicting the wound is guilty of murder. Where death is caused by bodily injury, the person who causes such bodily injury is deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been averted. Where a man having had one of his fingers cut refuses to be amputated and, tetanus supervening, dies, his assailant would be guilty of murder.[4] The case would be different if, of course, the assailant did not know that he was likely by the fatal cut to cause death at all. A prisoner and his brother, the deceased, were disputing about a fence and abusing and throwing stones at each other: the deceased finally shut himself in and pulled in the gate which was made of tats. The accused who was bent on passing through the gate poked his knife through a hole in the tats and intentionally cut the deceased in the wrist: proper surgical treatment not having been obtained, the deceased expired a few days later from loss of blood. It was held that the accused had no intention to cause death and did not know that his act was likely to cause death; so that he was only guilty of having caused grievous hurt.[5]

It has been held by the Indian Courts that if the accused believing a man to be dead and in order to conceal the murder which he supposes he has committed, sets fire to a hut in which the man is and so actually causes his death, he is not guilty of murder,[6] but only of an attempt. This case would be differently construed in Ceylon. Thus, where the accused struck the injured woman a blow on the head with a club and the latter fell senseless: the accused believing her to be dead ordered the body to be put into the sea where the body sustained certain wounds: according to medical evidence, it was possible that the woman was not dead when she was thrown into the sea and that death was caused by concussion of the brain from contact of the body with a rock in the sea; it was held by the Full Bench that the accused was guilty of murder, even if the deceased was not dead when thrown into the sea and even if death was caused by the body coming in contact with a rock in the sea.[7]

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1. Emp. *vs.* Sheikh Choolye 4 Weekly Recorder, Calcutta 35.
2. Rex. *vs.* Holloway (1628) Kenny's Select Cases 103.
3. Nga Dwe (1904) 10 Burma Law Reports 171.
4. Reg. *vs.* Holland 2 Moody and Robinson's Reports 351.
5. The Queen *vs.* Susai (1891) 9 S.C.C. 195.
6. Emp. *vs.* Khandu I.L.R. 15 Bombay 194.
7. The King *vs.* L[illegible] Nona (1907) 11 N.L.R. 4.

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If a person commits an act knowing that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, he would be guilty of murder if he had no excuse for incurring the risk. This clause covers extreme cases of rashness and negligence as well as cases where there is what is known as "universal malice." A man will be guilty of murder, who, in the words of Blackstone, "kills another in consequence of such a wilful act, as shows him to be an enemy of all mankind in general: as, going deliberately and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people."[1] But deaths as a result of furious driving can seldom be dealt with as murders, even though the driver might have known that his act was likely to cause death, unless it can be found as a fact that he knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death.[2]

Where in the course of a dispute and fight in regard to an encroachment of land, a person aimed a revolver at his opponent and pulled its trigger three or four times in vain and then snatched a gun from one of his party and, without bringing it to the shoulder, pulled its trigger when his opponent was standing by, and the gun discharged itself into his chest and killed him, it was held that the jury's verdict that the accused was guilty of culpable homicide not amounting to murder, as he had pulled the trigger with the intention of intimidating, was not bad.[3] If the accused instead of intimidating had the intention of causing death no matter of whom or of causing such bodily injury as was likely to cause death, he would have been guilty of murder.

The causing of the death of a child in its mother's womb is not homicide, but it would be homicide if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Whoever commits infanticide after the child is born commits murder: so does he who abets the commission of suicide.

(III) Culpable Homicide not Amounting to Murder.

As we have seen above, all cases of culpable homicide do not constitute murder: the following are especially regarded by our Code as crimes of the less heinous type. They would be known in England as "manslaughters."

(i) Culpable homicide does not amount to murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. If these conditions are not fulfilled, it would be murder. The accused who kills a child of the person who provokes, out of mere spite or passion, commits murder, as the child has given no provocation and the killing is not accidental. If, however, he intended to kill the father only and killed the child by misfortune, his act amounts to culpable homicide. Whether the provocation is grave or sudden is a question of fact. In England, it came to be held that no provocation of words would reduce the crime

1. Commentaries, p. 200.
2. Gorachand Gopi 5 Weekly Reporter, Calcutta 45 (Full Bench).
3. The King vs. Dias (1905) 8 N.L.R. 25 (Full Bench)

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of murder to that of manslaughter except in special cases.[1] But with us, gross insults by word or gesture may constitute the provocation necessary to mitigate the offence. "A person who should offer a gross insult to the Mohammedan religion in the presence of a zealous professor of that religion: who should deprive some high-born Rajput of his caste: who should rudely thrust his head into the covered palanquin of a woman of rank would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt."[2] But the provocation should be grave and sudden: there should be no "cooling time" between the provocation and the act. The suspension of reason arising from sudden passion should continue from the time of provocation up to the very instant of the mortal blow. Where the deceased had pestered the accused over a long series of years by various acts of violence and brigandage, either by encroaching on his lands or by seducing his cousin or by striking, abusing and insulting him on more than one occasion, it was held that the accused was guilty of murder, as there was no immediate provocation for the deed.[3] The accused who, finding his wife misbehaving with another man, assaults and kills her on her giving an unsatisfactory explanation can be regarded as having had sufficient grave and sudden provocation[4]; but his act would amount to murder if he were only acting on suspicion engendered by groundless jealousy,[5] or if he were to act on inadequate provocation. Where the accused finding his wife missing from his side followed her out of the house with an axe, and on accosting her while conversing with her paramour killed her on the spot—the learned Judges held, "The law does not sanction or approve a man taking into his own hands the duty of punishing his wife in the mode adopted by the prisoner, and it would be most dangerous to society if the Courts of this country were to adopt the doctrine that he might."[6] This decision can also be justified on the ground that the accused had courted the provocation which was therefore voluntarily provoked by the offender.

In considering the question whether a person charged with murder had grave provocation, the Court may take into account the intoxication of the person receiving it: but there must be provocation of some kind: provocation being something which a reasonable man is entitled to resent. In the second place, there should be definite evidence on which the jury would be justified in finding that the accused's faculties were in fact impaired by intoxication. In the third place, the provocation must be grave. It must have some element of gravity. The merest idle word or gesture even though it does deprive the drunkard of self-control is not enough. Where the accused being drunk told the deceased, "Are you a chandiya?" and the deceased rejoined "Are you a worse chandiya, son of a whore"—it was held that as the accused was drunk, these words were sufficient provocation to him and his act was only culpable homicide not amounting to murder.[7]

"The question whether an intoxicated person is guilty of murder depends upon whether he has formed what may be described as a murder-

1. R. *vs*. Rothwell 12 Cox 145.
2. Note M. to Law Commissioner's Report, p. 144.
3. Emp. *vs*. Mani Prudhano (1882) 1 Weir 306.
4. Emp. *vs*. Venkatesan (1882) 1 Weir 307.
5. R. *vs*. Kelly 2 Carrington and Kirwan 814.
6. Emp. *vs*. Mohan I.L.R. 8 Allahabad 622.
7. The King *vs*. Punchirala (1924) 25 N.L.R. 458.

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ous intention. That is a question of fact. For the purpose of determining that question of fact, the jury must attribute to him knowledge of the nature and consequence of his act that would be attributed to a sober man. If they consider that the degree of intoxication was such that he could not have formed a murderous intention or any intention at all, they must acquit him of murder and consider the question of culpable homicide. For the purpose of that question, they must attribute to the accused the knowledge of a sober man. The law will not allow the accused to disclaim that knowledge, and if they come to the conclusion that a sober man in the prisoner's position would have known that he was likely by his act to cause death, they must convict him of culpable homicide." Thus, where the accused who was drunk after killing the deceased said, "I have killed one—I will kill another," he was held to have had a murderous intention, and was accordingly convicted of murder.[1]

Where grave and sudden provocation is a defence, it should be proved that it was not sought or voluntarily provoked as an excuse for killing or doing harm to any person. Nor should it be given by anything done in obedience to the law or by a public servant in the lawful discharge of his powers. Nor should it be given by anything done in the lawful exercise of the right of private defence. Thus, a person who stabs a constable who has arrested him on a lawful warrant, or who kills a Magistrate who has called him a liar and a perjurer cannot plead provocation: nor can the person who beats the deceased and the latter in consequence of his right of self-defence lays hold of the accused in order to prevent a further beating.[2]

(ii) Culpable homicide does not amount to murder if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence. What are the powers of private right of defence have been considered in another chapter. Suffice it to say that if the offender exceeds his rights intentionally, he commits murder by killing. Where a man greatly annoyed by trespassers gave notice that he would shoot any one who trespassed again and on seeing a man entering fetched a pistol and shot him dead, he was found guilty of murder and hanged[3]: for a civil trespass is no apology for the firing of a pistol at a trespasser in sudden resentment or anger. Where the accused against whom a false cry of "thief" was raised shot dead one of his pursuers who had no right of arresting him, it was held that though the accused had a right of private defence in resisting arrest, he had exceeded that right and was therefore guilty under this section.[4] Where the deceased broke into the house of the accused who arrested him and on the deceased trying to escape, the accused struggled and getting enraged called for an axe for the express purpose of killing the burglar and with the axe did actually kill the deceased, it was held that the attempt on the part of the thief to escape justified the use of force necessary to prevent his escape: but that was not the object of the force used, which was used expressly for killing: there was thus neither good

1. The King *vs.* Rangasamy (1924) 25 N.L.R. 438.
2. See illustrations to section 294 C.P.C. Exceptions.
3. R. *vs.* Moir 7 Carrington and Payn 178.
4. Emp. *vs.* Sher Baz (1880) Punjab Record 1.

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faith nor the want of intention to do more harm than was absolutely necessary : nor was it a case of grave and sudden provocation. The accused was, therefore, convicted of murder.[1] The accused's intention of killing was perhaps based on a mistaken apprehension of the law that he could kill a burglar who should attempt to escape and a mistaken apprehension of the fact that the burglar would have escaped, had he not used force on him.

(iii). Culpable homicide does not amount to murder if the offender is a Public servant (or one who helps him in the advancement of public justice) and who exceeding the powers given to him by law causes death by doing an act which he in good faith believes to be lawful and necessary for the due discharge of his duties and without ill-will towards the deceased person. This section safeguards those Public servants who err from excess of zeal or from undue devotion to duty and assume powers which they lawfully cannot and do not possess. There should be a complete absence of malice so that "private vengeance cannot be wreaked under the cloak of authority." An executioner, who was ordered to hang a person but who beheaded him instead, was held to have committed murder.[2] Police officers are often apt to employ more force than is reasonably necessary and unless they can show that they have exceeded their authority through a *bona fide* mistake on their part as to their legitimate powers, they would be convicted of murder for any resulting deaths. Where in a land dispute, one of the parties called in the Police who, on arriving, ordered the assailants to desist : and on their persisting in unlawfully reaping the harvest, the officer-in-charge gave orders to his men to shoot without making any arrests or without warning the opponents of the consequences : one of the crowd got mortally wounded : it was held that the officer-in-charge as well as the constable who fired the fatal shot were both guilty of murder, as they did not believe in good faith that it was necessary for the public safety to disperse the reapers by force.[3] But the case would have been different, had the arresting officer exceeded his powers either through a *bona fide* mistake or through an exaggerated fear of personal violence—as in the case of an Excise Inspector who arrested the deceased for smuggling excisable articles and who, on the latter starting to assault him, fired the first shot in his legs and the accused persisting shot him dead after giving him a preliminary warning.[4]

Utmost care and caution are therefore necessary as well in arresting persons either with or without a warrant, as in dispersing an unruly crowd. Our law says, " that if the person to be arrested forcibly resists a *bona fide* endeavour to arrest or attempts to evade arrest, the person making the arrest may use all necessary means to effect the arrest—provided that the person arrested shall not be subjected to more restraint than is necessary for the purpose of preventing his escape and provided further that in arresting with force the arresting officer does not cause the death of any person who is not accused of any offence punishable with death."[5] The offences that are punishable with death are in Ceylon the following :—

(1) Murder, section 296.

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1. Emp. *vs.* Durwan Geer 5 Weekly Recorder, Calcutta 73.
2. 1 Hales' Pleas of the Crown 501.
3. Emp. *vs.* Subba Naik I.L.R. 21 Madras 249.
4. Forster's Case 1 Lewin's Crown cases 187.
5. Sections 23 and 28 Criminal Procedure Code

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(2) Abetment of suicide, section 299.

(3) Fabricating of evidence by which an innocent person is convicted of a capital offence and is executed, section 191.

(4) Waging or attempting to wage or abetting the waging of war against His Majesty the King, section 114. So that only in these four cases, can death of the person to be arrested be justified in the event of his "showing fight" or attempting to run away, and even then, death cannot be caused if moderate force is sufficient effectively to arrest him in any other manner. In all other cases, the arresting officer exceeds his powers in causing death and would therefore be guilty of culpable homicide not amounting to murder, with a protection as to sentence provided he has acted in good faith. Where, however, the arresting officer knows or ought to know that he has no powers at all, he could not be said to have exceeded them in good faith. Thus, arrest by a Police Officer of persons likely to give evidence in criminal cases without a warrant and without any apparent reason of any kind amounts to assault of the worst and most mischievous form[1] and if death ensues in so endeavouring to arrest, the officer responsible would be guilty of murder: he would be equally guilty if he had malice, express or implied, towards the person whom he arrests.

(iv) Culpable homicide does not amount to murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel and unusual manner.

It is immaterial in such cases which party offers the provocation or commits the first assault. What is required is (i) there should be no premeditation; (ii) the fight should be sudden; (iii) there should be heat of passion upon a sudden quarrel; (iv) and there should neither be undue advantage nor cruelty on the part of the assailant. The famous case of Lord Byron[2] who fatally slew one Chaworth at a club after an altercation over the best means of procuring game and who was consequently convicted only of manslaughter is well-known. In Taylor's case, he caned one of the servants of an alehouse for abusing the Scotchmen, whereupon the innkeeper ejected him bodily out of the alehouse: Taylor lost control and drawing his sword killed the innkeeper; he was found guilty only of manslaughter.[3] The principle underlying these cases is that "when sudden encounters are begun, the blood previously too much heated kindles afresh at each stroke and in the tumult of passions in which the instinct of self-preservation has no inconsiderable share, the voice of reason is not heard: therefore the law in condescension to the infirmities of human nature has extenuated the offence."[4] So that, "if a person receives a blow and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will only be manslaughter provided the blow is to be attributed to the passion of anger arising from that previous provocation."[5] Thus, where at a common feast some persons refused to dine with others on social grounds and an altercation ensued in which the deceased struck the accused who returned the fatal blow with a knife, it was held that the accused could

1. Gunaratna *vs.* Abeyaratne (1879) 2 S.C.C. 89.
2. Lord Byron's Case 11 Havell's State Trials 1117.
3. R. *vs.* Taylor 1 Hawkin's Pleas of the Crown 31.
4. Foster 138.
5. R. *vs.* Thomas 7 Carrington and Payne 817.

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only be convicted of culpable homicide not amounting to murder.[1] If the quarrel is premeditated, as in a duel, the exception does not apply.

(v) Culpable homicide does not amount to murder if the offender being the mother of a newly-born child causes its death whilst the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to such child.[2] This new exception does not speak of lunacy or insanity and in fact falls far short of it. Instances are not wanting in Ceylon where an accouchée strangles her new-born babe out of frenzy or fright immediately after delivery and this section safeguards such cases.

These five exceptions then provide extenuating circumstances and render the offender liable to be punished for the less heinous offence of culpable homicide not amounting to murder. In the Indian Code, a sixth exception is added, viz., death by consent: this would include the abettors of suicide; but in Ceylon abetment of suicide is, like murder, punishable with death. The sentence of culpable homicide not amounting to murder is imprisonment up to twenty years and fine. It should not be understood that cases that do not fall within any of these five exceptions would be regarded as murders; on the contrary murders are only those that fall within the scope of the definition given in the earlier section.

(IV) Murder Inquiries.

For the purpose of inquiry, a murder or a mansalughter is treated alike. Whenever a homicidal death takes place, it is the bounden duty of a Magistrate to proceed to the spot as soon as practicable and to hold an inquiry there.[3] All the available evidence must be recorded on the spot; the rest of the inquiry may be adjourned to the Court-house. The Magistrate must go to the spot in all cases, even where the injured party dies after a number of days, provided death takes place as a direct result of the injuries received. The accused persons should not ordinarily be released on bail by a Magistrate either in a case of murder or in that of culpable homicide,[4] unless specially directed thereto by an order of the Supreme Court or by the Attorney-General. The impressions received by a Magistrate after his visit to the scene must be recorded by him in the case-book and all the material facts pertinent to the inquiry must be noted. In all cases of homicide, a post-mortem examination of the body must be ordered—and it should be ordered even in those cases where the injured person has died after admission into a hospital: for there must be clear evidence on record to show that death has resulted from the injuries received and from no other cause. The post-mortem examination should be complete and exhaustive, dealing with each organ and limb separately and fully. A Magistrate has full powers of ordering bodies that have been buried to be exhumed for the purpose of a post-mortem report, or for identification, or for any other cause. All productions that are blood-stained, especially the knives and other weapons and the blood-stained garments of the accused, if any, should be forwarded, whenever necessary, to the Government Analyst for a

1. Emp. *vs.* Somiruddin 24 Calcutta Weekly Reporter 48.

2. Ordinance No. 19 of 1926, section 2, amendment of Penal Code.

3. Section 153, C.P. Code.

4. Section 395 (3) Cr. Pr. Code. A Magistrate has the power, pending inquiry, to enlarge on bail any and every offender, including murderers: he cannot, however, do so *after committing*.

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report. This necessity would be felt in cases of slender or meagre evidence or where the accused deny having taken any part in the struggle. A Magistrate can call in the aid of an expert witness in all cases of doubt, so that poisonous substances or organs of the body may be forwarded to experts for a thorough examination. A map of the scene in quadruplicate is invariably necessary in all murder cases.

It is the duty[1] of every person who is aware of a murder having taken place to inform the nearest Police Magistrate, Police Officer or Headman ; failure to do so would render him liable to imprisonment for six months or a fine or both.[2]

(V) Inquests.

In various parts of Ceylon, persons of status are appointed " Inquirers into sudden deaths : " these as well as Magistrates and Unofficial Police Magistrates possess the power of holding inquests. Justices of the Peace have no such power, unless they hold special appointments as Inquirers. In Colombo, inquests are held by the City Coroner who is generally an Unofficial Police Magistrate as well. In some parts of the Island, *e.g.*, Jaffna Peninsula, Inquirers are assisted by assessors ; but the Inquirer is not bound to follow their finding and whenever he dissents the Magistrate should send a copy of the proceedings to the Attorney-General. Persons who refuse to serve as assessors would be liable to a fine of twenty-five rupees.[3] Ordinary inquests are seldom held by a Magistrate though the first reports are often sent to him : he usually delegates the powers to an Inquirer ; but a Magistrate must hold an inquest personally if the case is doubtful or suspicious, or involves technical or intricate details, or shows the commission of a crime.

Inquests must be held or must be ordered to be held—

(i) in all cases of suicide ;

(ii) or where the deceased has been killed by an animal (*e.g.* snake bite) or by machinery (*e.g.* steam-roller) or by accident (*e.g.* by motor car or by drowning) ; or

(iii) where he has died suddenly (*e.g.* from heart failure) or from a cause which is not known (*e.g.* by poisoning) ;

(iv) or where he has died while in the custody of the Police or in an asylum or prison ;

(v) or where a person sentenced to be hanged has been duly executed.

In all such cases, the Inquirer, like the Magistrate in a murder inquiry, must repair to the spot, examine the body and injuries, and after examination of witnesses must proceed to record his verdict. An Inquirer may order the Medical Officer of the district to hold a post-mortem examination, but all Inquirers do not possess this power ; so that in case of necessity an order from a Magistrate on the proper Medical Officer should be applied for. An Inquirer may also order a body that has been buried to be disinterred for the purpose of examination.

All inquest proceedings together with the productions, if any, should be forwarded by the Inquirer to the Police Court of the district. If the

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1. Section 21 Cr. Pr. Code.
2. Section 199 C.P.C.
3. Section 366 Cr. Pr. Code.

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Magistrate is not satisfied with the verdict or if the verdict is an "open" one, he may himself hold an inquest again. And where from the Inquirer's finding it is apparent that a crime has been committed, a Magistrate may take the ncessary steps to bring the offenders to justice. After the inquest is over, the Inquirer may allow the body to be buried or cremated and in the case of paupers or beggars may hand over the same to the Police Headman of the division for disposal. In the latter event, any documents or other things found on their persons should be sent to the Police Court along with the inquest proceedings.

The Inquirer should give his verdict as nearly as possible in the language of the Medical Officer's report, if this is available: otherwise he should be guided by the strength of the evidence, oral, documentary and circumstantial: if he suspects foul play, he should communicate at once with the Police. An Inquirer has the power to summon before him any person whom he considers competent to give evidence, and in the case of disobedience to summons may compel attendance by a warrant. An Inquirer holding an inquest would be a Public Servant presiding over a judicial proceeding; so that any contempt offered to him could be dealt with by a Police Court under section 223 of the Penal Code. An Inquirer in Ceylon, unlike a Coroner in England, has no powers of committing an accused person to a higher Court: so that where a crime is disclosed, a Magistrate must hold the preliminary inquiry again: in such an event, the Inquirer will be a witness and can produce his inquest proceedings as a production in the case.

An Inquirer may if he likes add a rider to his verdict calling attention to particular facts and the Magistrate thereupon may take such steps as are necessary for giving effect to the rider. Soon after the inquest, the Inquirer must send to the Registrar of the district full particulars about the death so as to enable him to register the death. A Magistrate has to do likewise in all cases of murder.

Inquest proceedings of 1884 and subsequent years which are five years old may be destroyed unless the finding was that death was caused by some person who has not been found.[1]

(VI) Suicides.

In England, suicide was considered till recently to be a very heinous felony and rendered the felon liable to a forfeiture of all his goods: hence arose the practice of recording a verdict of "suicide while temporarily insane." This practice has also grown in Ceylon, so that invariably a verdict of suicide imputes insanity to the deceased.

We have seen that anyone who aids and abets another in the commission of suicide is liable to be hanged.[2] There must be evidence to show that he successfully instigated the deceased to take his life. This is, of course, very difficult to prove. A mere existence of circumstances which have rendered the suicide possible is not enough. So that, though a father morally instigates his daughter to commit suicide by proposing her in marriage to a person whom she does not approve of, he does not come within the pale of this section. In India, the abetment of suicide is punishable with ten years' imprisonment, and it has been held that all persons who take part, for instance, in the lighting of the funeral pyre

1. Ordinance No. 24 of 1930.
2. Section 299 C.P.C.

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on which a "sati" immolates herself and sacrifices her life are guilty under this section.[1]

Whoever attempts to commit suicide and does any act towards the commission of such offence is liable to imprisonment for a year or a fine or both.[2] This offence is triable by a Police Court, is cognizable and non-compoundable. It is very difficult to say where attempt begins and preparation ends. If it is a mere preparation, it cannot be punished. The accused must have done some act towards the commission of his self-destruction. Running towards a well with a view to drown himself is not an attempt though the actual falling in is.[3] The act must be an unequivocal act which leaves no possibility of inducing a change of intention. And the *felo de se* must have had an intention of committing suicide, that is, of taking his own life. To put a rope round one's neck merely to frighten others cannot rightly be regarded as denoting any suicidal intention. Where the accused jumped into a well to avoid the Police and came out of it of his own accord, he was held not to have had any intention of committing suicide.[4]

In all cases of attempted suicide, it is usual for a Magistrate after conviction to deal with the accused as first offenders, calling upon them to give bail to appear for judgment within a fixed period. This treatment of the accused is preferable to the other normal forms of punishment.

(VII) Abortion.

Criminal abortion or aborticide is a non-summary offence.[5] The woman who causes herself to miscarry, the midwife who gives her some medicines and brings about a miscarriage, the Doctor who performs an operation and destroys the fœtus, are all guilty, unless the miscarriage is caused in good faith for the purpose of saving the life of the woman. The fact that the woman has consented makes no difference to the guilt of the accused and whether the woman is quick with child or not, the offence is committed just the same. "Quickness" means the perception by the mother of the movements of the fœtus inside the womb. The causing of miscarriage may take place either by mechanical means, *e.g.* by the introduction of an "Irandu" stick, or by medicines, *e.g.* ergot. croton oil, papaw seeds, etc. It is very difficult to lay home a charge of this nature and even where medical substances known on analysis to possess aborting powers are found in the possession of the woman, it would not be easy to establish that she was caused to miscarry by the aid of these substances. An examination by a Medical Officer would be very useful and therefore necessary ; but a woman who is charged with aborticide cannot be examined by the Medical Officer without her consent.[6] So that where she refuses to be examined, the facts must be proved by independent evidence.

Where the accused with an intention of causing miscarriage does any act which causes her death, he would be liable to imprisonment for twenty years even though she gave her consent and even though she was

1. Emp. *vs.* Ramdial I.L.R. 36 Allahabad 26.
2. Section 302 C.P.C.
3. Emp. *vs.* Ramakka I.L.R. 8 Madras 5.
4. Emp. *vs.* Dwarka Punja 14 Bombay Law Reports 146.
5. Section 303 and seq. C.P.C.
6. Section (149) 6 Cr. Pr. Code does not include miscarriage.

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not pregnant at all.[1] A person commits an "attempt" to procure abortion even if it is shown that the woman is not really pregnant, provided that the accused believes her to be in that condition.[2]

Whoever before child-birth does any act which prevents a child from being born alive or causes it to die after birth, unless the act is done in good faith for the purpose of saving the life of the mother, is liable to imprisonment for ten years. This section penalises especially those cases where, through either shame or fear of scandal, illegitimate children are prevented from being born alive by the administration of drugs, etc. And whoever intentionally conceals or endeavours to conceal the birth of a child by secretly disposing of the dead body is liable to imprisonment for two years; he would also be liable to punishment for non-registration of the birth and death of the child.[3] The word child is not defined in our Code: but the general opinion is that a child under seven months would be designated a fœtus and not a child.[4] If the child whose body is disposed of has not yet died, the accused would be guilty of infanticide or illegal exposure. It is penal to expose or leave a child in any place with the intention of wholly abandoning it. There should be no intention of re-taking.

A still-birth means a child born after the twenty-eighth week of gestation as dead or apparently dead and not called back to life. It is incumbent on every father or mother to register such a still-birth.

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1. R. *vs.* Whitchurch 24 Queen's Bench Division 42.

2. Rex. *vs.* Fernando (1925) 27 N.L.R. 181.

3. Under the Registration Ordinance No. 1 of 1895, where the maximum punishment that a Police Court can impose is six months' imprisonment or a fine of Rs. 100. Vol. II, p. 262.

4. See the Chapter on Medical Jurisprudence.

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CHAPTER XXIV.

PERJURY AND FALSE CASES.

(I) Perjury.

Perjury consists either of the giving of false evidence or the fabricating of false evidence.[1] A person gives false evidence when being legally bound to state the truth he makes any statement which is false and which he knows or believes to be false or which he does not believe to be true. A person may be "legally bound" to state the truth either by an oath or affirmation, or by any express provision of the law; or he may be bound by law to make a declaration upon any subject. If in such circumstances he knowingly makes a false statement, he commits perjury: such a statement may have been made by him verbally, *e.g.* from the witness-box, or in writing, *e.g.* in an affidavit. A witness, who is sworn or affirmed, is bound to state the truth.[2] So is an Interpreter Mudaliyar, or a sworn translator, or a person who swears an affidavit, or one who signs a Customs' declaration: if such persons make false statements, knowing or believing that they are false or not believing that they are true, they may be said to have given false evidence. Under the English Perjury Act,[3] the false statement "must be material to the proceeding": under the Penal Code, though there is no express provision to that effect, the Supreme Court has ruled that the statement must be one which has a material bearing upon the case.[4] For, though the materiality of the statement is not an essential part of the offence of intentionally giving false evidence, it is relevant to the question whether the witness had the intention to swear falsely.[5] If a person is not "legally bound" to state the truth, he cannot be convicted: thus, a witness who is not sworn or affirmed is not legally bound; an accused person who makes an unsworn statement in answer to a charge is not legally bound; a witness when examined by a Police Officer preliminary to the filing of a prosecution is not legally bound; and so on. A conviction for perjury cannot stand where the onus has been wrongly placed and explanations demanded from the accused, when there was no occasion to give any.[6]

The person giving false evidence must know that it is false or should not believe that it is true; a false statement as to the belief of the person attesting is within the meaning of the section, *e.g.* when he says that he believes a thing which he does not believe. If a statement is innocently made, the accused would not be guilty. A person who knows nothing about a particular subject but, nevertheless, purports to give answers on the footing that he does, would be guilty of perjury. If he, however,

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1. Sections 188 and 189 *et seq.* C.P.C.
2. Section 11 of the Oaths' Ordinance No. 9 of 1895, Vol. I. p. 675.
3. (1911) 1 and 2 George V c. 6.
4. Ananthan *vs.* Mohideen (1920) 1 Law Recorder, 195.
5. The Queen *vs.* Habibu Mohamadu (1894) 3 C.L.R. 57.
6. King vs. Dharm s'Tiwardene (1931) 33 N.L.R. 185 9 Times L.R. 58

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gives answers recklessly, not caring whether his answers are true or false, it would be a question of fact in each case whether he had guilty intention of making persons believe that his statements were true. Though formerly it was held that for two contradictory statements a witness might be charged with perjury of both,[1] it is now the law that a charge setting forth two contradictory statements and averring that one of them is false is bad. The prosecution must commit itself to one statement which it alleges to be false and prove that it is false to the knowledge of the person making it.[2] It has, however, been held that in a charge of intentionally giving false evidence under section 190, the rule of English law that a man should not be convicted on the uncorroborated testimony of a prosecutor should be followed.[3]

A person is said to "fabricate false evidence" when he manufactures false evidence with regard to a case. "Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to fabricate false evidence." Thus, a person who puts jewels into another's box with the intention of causing that other to be convicted of theft fabricates false evidence. A person who causes a receipt for a bogus letter issued for a certain amount to be issued by the Postal Department with the intention of having that receipt used in a civil case in proof of payment of rent fabricates false evidence.[4]

The various offences of perjury are non-cognisable, non-compoundable and non-summary ; and no Police Court can take cognisance of the same without the previous sanction of the Attorney-General or unless at the instance of the Court in whose proceedings the perjury has been committed. Perjury may be summarily dealt with only in the following manner :

(II) Perjury in Police Court.

When a Police Magistrate detects perjury committed in his presence by a witness in a case, he may deal with him summarily either under section 12 of the Oaths Ordinance,[5] or under section 440 of the Criminal Procedure Code. This power to punish summarily is no doubt wholesome, but can only be exercised in such cases of simple perjury where a prosecution under the Penal Code is not advisable. A person so convicted cannot be again prosecuted for perjury under the Penal Code.

(1) It has been laid down by the Supreme Court that before a Court deals with a witness under section 12 of the Oaths Ordinance, it should see that the witness has made in unambiguous language some statement which is false in fact and has made it wilfully and with know-

1. Rex *vs.* Thomas (1898) 7 Tamb. 5 and the Queen *vs.* Jasikappu (1900). N.L.R. 18.
2. Ananthan *vs.* Mohideen (1920) 1 Law Record 195 *supra.*
3. The King *vs.* Sirimane (1925) 3 Times L.R. 132.
4. The King *vs.* Ranaweer (1927) 4 Times L.R. 192.
5. No. 7 of 1869, Vol. I, p. 674.

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ledge of its falsity and with the intention to mislead the Court.[1] For, the section says that the evidence should be false within the meaning of section 188 of the Penal Code. Before a witness is summarily punished in this way, the reason why the Magistrate holds the evidence to be false must be stated to him and he should be asked to show if possible by explanation that his evidence is not false.[2] A witness can only be punished when he "gives false evidence" and not where there is a conflict of testimony.[3] The particular statement that is held to be false must be specifically pointed out. A Police Magistrate can sentence summarily under this section to a fine of Rs. 50 only, in default to rigorous imprisonment for two months.

(2) By far the commonest section used in a Police Court for a summary punishment of perjury is section 440 of the Criminal Procedure Code; this section enables a Magistrate to deal with persons who give false evidence within the meaning of section 188 of the Penal Code as for contempt of Court and to sentence them to a fine of Rs. 50. Section 440 does not give a Magistrate jurisdiction to try a witness summarily for the offence of perjury: it gives him power to punish a witness who perjures himself as for contempt of Court.[4] The aid of this section is not to be invoked for the summary punishment of every witness, whose evidence in the course of a trial is not accepted as true; there must be a glaring case of perjury.[5] Nor can the section be invoked when a witness merely makes contradictory or inconsistent statements in the course of his evidence,[6] (unless the falsity of one of such statements is obvious even though such statement may not be material to the case under investigation)[7] nor where there is a conflict arising from the testimony of two witnesses[8]; nor where a witness makes a second statement which is meant to be a correction of the first[9]; nor where there is merely "evading and shuffling" on the part of a witness[10]; nor where a witness makes foolish and incoherent utterances[11]; nor where there is uncorroborated testimony of a single witness against him.[12] The summary procedure is intended to meet cases where perjury on the part of a witness is apparent and palpable on the record and is not applicable to cases where it is possible on a balance of evidence to find that a witness has given false testimony.[13] There must be a manifest case of an attempt to mislead the Court by giving deliberately false evidence.[14] It would not be safe, however, or desirable to bring in the machinery of this section when the conflict is between a complainant on one side and his witness on the other.[15] Nor was it intended by the legislature to dispose of cases of

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1. Mendisappu *vs.* Palaniappa Chetty (1902) 2 Matara cases 76.
2. Balthazaar *vs.* Babappu (1897) 3 N.L.R. 63.
3. Andris *vs.* Juvanis (1896) 2 N.L.R. 74 (Full Bench).
4. The Police Magistrate of Galle *vs.* Theme (1915) 1 C.W.R. 100.
5. Sinnatamby *vs.* Fernando (1913) 1 Bal. Notes 25.
6. Haniffa *vs.* Salwan (1913) 2 Bal. Notes 12. Sivakolonthu *vs.* Chelliah (1910) 13 N.L.R. 289 and Perera *vs.* Menikrala (1910) 5 Bal. 77, etc.
7. Murugesu *vs.* Sevagam (1926) S.C. 486 P.C. Mallakam.
8. Ahamath *vs.* Silva (1920) 22 N.L.R. 444.
9. Selestina *vs.* Inchohamy (1918) 5 C.W.R. 64.
10. Pulle *vs.* Gunasekera (1886) 1 S.C.R. 76.
11. Silva *vs.* Carolis (1918) 20 N.L.R. 445.
12. Mohamadu *vs.* Porlentina (1926) 4 Times L.R. 73.
13. Bandara *vs.* Ukkuwa (1914) 4 Bal. Notes 18.
14. Duraya *vs.* Tissera (1914) 3 Bal. Notes 60.
15. Sanitary Inspector *vs.* Fernando (1914) 2 C.A.R. 55.

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giving false evidence[1] summarily where such evidence involved the concoction of a false charge and the subornation of false testiomny.[2] The proper procedure in such cases would be to forward the record to the Attorney-General or to institute a prosecution for perjury.[3]

A Magistrate cannot summarily punish as for contempt under this section without first giving the witness information of the facts constituting the offence and an opportunity of explanation.[4] That is to say, a Magistrate must select one or more of the statements which he has found to be false,[5] record his reasons why he has found them so, and then call upon the accused to show cause why he should not be dealt with under this section ; on his failure to show cause or on his showing cause in a manner which is not satisfactory to the Magistrate, he may be convicted under this section. A Magistrate cannot pick out every false statement made by a witness in the course of his evidence and convict him separately on the various statements.[6] Nor can he punish a witness for every verbal contradiction.[7] Nor is it permissible to call further evidence with the express object of proving the falsity of a particular statement made by a witness.[8] It is irregular to exercise the powers under this section where the knowledge and proof of the alleged false evidence is obtained from some source exterior to the case in which the evidence was given,[9] *e.g.*, after reference to the Police Information Book.[10] It is not irregular, however, to try several witnesses *en masse* under this section for giving false evidence.[11] An accused person who does not give evidence on oath but merely makes a statement cannot be dealt with under this section,[12] and the Magistrate should take care to assure himself that the case is one in which he believes the evidence to be deliberately false and not merely one in which he does not feel justified in acting on the evidence.[13] Nor is it necessary that the false statement should be material to the case under investigation.[14]

This section, therefore, empowers a Magistrate to deal with witnesses as for contempt when they deliberately and knowingly make false statements : if their offence is a more serious one, *e.g.* where they have conspired to bring a false case, they should be proceeded against under the Penal Code. The power given to the Magistrate is only a summary one and cannot aptly meet cases of subornation or fabrication of false evidence.

A Police Magistrate inquiring into a non-summary offence can also summarily punish a witness under this section.[15] The proper time for dealing with a witness under this section is after the conclusion of

1. King *vs.* Podi Appuhamy (1927) 29 N.L.R. 102.
2. Teywânai *vs.* Nathaniel (1902) 6 N.L.R. 141.
3. The King *vs.* Cornelis (1921) 3 C.L.R. 153, 22 N.L.R. 501.
4. (1899) Koch 50.
5. Dewaya *vs.* Bilinda (1929) 6 Times L.R. 122.
6. Veluppillai *vs.* Vallipuram (1919) 6 C.W.R. 8.
7. Sub-Inspector of Police, Gampaha, *vs.* Kaithan Perera (1931) 1 C.L.W. 33.
8. Mariampillai Lecnappu *vs.* Mariampillai *et al* (1911) 6 Weer. 23 and Steven *vs.* Banda (1916) 1 C.W.R. 115.
9. Achchai Kannu *vs.* Ago Appu (1901) 5 N.L.R. 87.
10. Meera Saibo *vs.* Appuwa (1927) 5 Times L.R. 96.
11. Banda *vs.* Sada *et al* (1914) 17 N.L.R. 510. See the contrary decision in Silva *vs.* Jonna (1899) 4 N.L.R. 26 .
12. Reimers *vs.* Sevena (1908) 1. Weer. 47.
13. Dissanayaka *vs.* Bandiya (1918) 5 C.W.R. 200.
14. Murugesu *vs.* Sevagam (1926) 4 Times L.R. 100.
15. Ambalam *vs.* Mailu (1900) 4 N.L.R. 49.

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his own evidence and after the close of the case of the party who calls him, or of the whole case if the completion of the trial is likely to render more apparent the false trend of any statement; but in no case when the witness is still under examination.[1]

(3) There are Ordinances which require certain persons to make declarations and provide penalties for the making of false declarations.

Thus, the Registration of Births and Deaths Ordinance enacts that if any person wilfully makes any false answer to any question put to him by a Registrar relating to the particulars of any birth or death or wilfully makes any false statement with intent to have the same registered, he shall be liable on conviction by a Police Court to a fine of Rs. 100 or to imprisonment for six months or to both.[2] The Rubber Restriction Ordinance[3] requires certain declarations to be made by proprietors of rubber estates—any false statement therein would be an offence. Under the Customs Ordinance,[4] a false declaration is an offence, and so on. Where no penalty is expressly provided by the particular Ordinance, the offender would be liable under the Penal Code. Under the Tea (Control of Export) Ordinance, the making of a false declaration or return is punishable with a fine of one thousand rupees, but no prosecution can be entered without the written sanction of the Attorney-General.[5] Under the Income Tax Ordinance[6] the making of incorrect returns or false declarations and failure to comply with notices served, etc., are summary offences punishable with a fine of five hundred rupees (which should include the penalty). Prosecutions get barred within three years after the year of assessment.

(4) A witness who prevaricates or refuses to answer questions put to him where he is legally bound to answer them can be dealt with under section 177 of the Penal Code or under section 383 of the Criminal Procedure Code. Certain witnesses, even though on oath or affirmation, are not bound to answer certain questions; thus, the name of the informant need not be disclosed by a Police or an Excise Officer; a Proctor need not answer questions relating to professional confidences, and so on.

A witness who refuses to be sworn or a person who refuses to sign a statement, when it is incumbent on him to do so, may be similarly dealt with under the Code (sections 176 and 178). Late attendance at or departure from a Court-house without permission is also punishable under section 172.

Any person dissatisfied with the order of the Magistrate made under these sections may appeal to the Supreme Court.

(III) False Information and False Cases.

1. The institution of a false case is such a common feature in Ceylon that the Penal Code sections concerning the same may well be considered at length. We have already considered in an earlier chapter the summary effect of bringing a false or frivolous case. Apart from the power which a Magistrate has of summarily dealing with such cases, a person who brings a false case or gives false information renders himself

1. Cooray *vs.* The Ceylon Para Rubber Co. (1922) 23 N.L.R. 321.
2. Section 48 of Ordinance No. 1 of 1895. Vol. II, p. 262. This offence may also be non-summary.
3. No. 24 of 1922. Vol. III, p. 1001.
4. No. 17 of 1869 and the amending Ordinances. Vol. I, p. 679.
5. Section 36 of Ordinance No. 11 of 1933.
6. No. 2 of 1932. Sections 85-87.

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liable to be prosecuted under either of the two sections, 208 and 180, of the Penal Code. The latter section deals with false information, the former with false cases. Justice Jayawardana has in a recent case[1] dealt exhaustively with the effect of these two provisions and has come to the conclusion that the offence under section 208 includes an offence under section 180. It is, therefore, open to a Magistrate to proceed under either section, although in cases of a more serious nature section 208 would be more appropriate.

Section 180 reads thus : " Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known to him, shall be punished " with imprisonment for six months or a fine of Rs. 100 or both.

Section 208 enacts that " whoever with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful grounds for such proceeding or charge against that person," commits a non-summary offence.

In the case above cited, it was opined by the learned Judge that there were some subtle distinctions between the two sections. " Under section 180, the prosecution must prove that the person who gave the information knew or believed it to be false, that he had a positive knowledge or belief of the falsity of the information given ; while under section 208, the prosecution need only prove that the accused knew that there was no just or lawful ground for the criminal proceeding or the false charge. A prosecution under section 180 cannot be instituted except with the sanction of the Attorney-General, or on the complaint of the public servant concerned. An offence under section 180 is triable summarily, while an offence under section 208 is an indictable offence. But there is no essential difference between the two sections ; and offences punishable under section 208 are also punishable under section 180, provided it can be proved that the information given is false to the knowledge or belief of the informant . . . Section 180 only applies to information voluntarily given to a public servant. It does not apply to cases where the information is disclosed in the course of the examination of a person by a public officer or other public servant, especially when the person examined is bound by law to answer truly all questions put to him.

2. Section 180, then, penalises the giving of false information to a public servant with a knowledge or belief in its falsehood and with the intention of causing the public servant to use his lawful powers to the injury or annoyance of any person.

(i). The information must be given voluntarily : thus, answers to questions do not constitute information.[2] Where Kathiran, who was stabbed, stated to the Headman that Velu stabbed him and one Nagan saw the stabbing ; whereupon the Headman questioned Nagan who said that it was Velu who stabbed Kathiran ; but Nagan afterwards with-

1. Sub-Inspector of Police *vs.* Babbi (1923) 25 N.L.R. 117.
2. (1899) Koch 28.

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drew his statement and was charged under this section, the Supreme Court held—even though the accused had pleaded guilty—that the giving of information under this section implied the volunteering of a statement and did not cover a case where answers are given to questions put by some authority at the happening of some event.[1] A statement in order to form the basis of a charge under this section must, therefore, be voluntarily made.[2] The term "information" denotes the communication of any intelligence or knowledge of facts whether it is or it is not in the nature of an accusation, but it does not mean the suggestion of a possible clue to the discovery of a fact unknown.[3] A complaint made by an estate labourer to his superintendent who communicates it to the Police could be made the foundation of a prosecution if in the subsequent examination resulting from such complaint false statements have been made.[4] The information may be given either in person or by writing. Where it is by petition, the petition-drawer may be guilty of abetment, even though he is not aware of the falsity of the statements contained in the petition.[5]

(ii). The information must be false and false to the knowledge or belief of the person giving. The falsity of the information must be proved, in the first instance, by the prosecution.[6] It must clearly and beyond reasonable doubt be shown by fair inference from facts or circumstances or otherwise that the accused knew of the falsity of the information that he gave.[7] It is not necessary that the acts of which information is given should amount to a criminal offence.[8] Nor is it necessary that the accused should be given an opportunity of bringing a criminal case against the person informed against (*e.g.* where he falsely complains of bribery against a Police Officer).[9] But if the accused has already instituted a criminal case against the person against whom he gave the information, all criminal proceedings against the informant should be stayed until the final disposal of such case.[10] The essence of the offence under this section is knowledge of falsity of the information.[11] Where the Proctor for the complainant in a case applied for postponement on the ground of complainant's illness upon a certificate by the Vidane Aratchy who, being present in Court, substantiated that the complainant was ill as certified, and where in fact the complainant was found not to be ill, it was held that the Vidane Aratchy was guilty of having knowingly given false information.[12] Where the accused entrusted with the service of summons reported falsely that summons was served, he was found guilty under this section.[13] It would be a good defence,

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1. Thampu *vs.* Nagan (1923) 25 N.L.R. 69. See a contrary decision in Kindersley *vs.* Bandaranayake (1900) 2 Weer. 62.
2. Bromley *vs.* Pamen (1931) 8 Times L.R. 112.
3. Dyson *vs.* Kanagammah (1930) 31 N.L.R. 473 7 Times L.R. 141; also Jamaldeen *vs.* Karuppen (1928) 28 N.L.R. 458.
4. Jamaldeen *vs.* Karuppen (1927) 4 Times L.R. 193.
5. Marshall *vs.* Sinno (1887) 8 S.C.C. 101. This case may not be followed now for the petition-drawer can hardly be held to have the necessary *mens rea*.
6. Ranghamy *vs.* Rajapakse Mudalihamy 6 Tam. 47.
7. Kitchel *vs.* Pieris (1890) 9 S.C.C. 53.
8. Brace *vs.* Silva (1889) 9 S.C.C. 42.
9. A.S.P., Matara *vs.* Gunasekara (1913) 3 C.A.C. 26.
10. The King *vs.* Dissanayake (1913) 2 C.A.R. 45.
11. Eaton *vs.* Noris Appu 6 Tam. 46.
12. Carbery *vs.* Perera 6 Tamb. 74.
13. Hurulle *vs* Appuwa 6 Tam. 124.

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however, that the accused had reasonable grounds for believing the information to be true.[1]

(iii). The false information must be given to a public officer. It would be necessary to ascertain the lawful powers of such public officer,[2] for he must be empowered by virtue of his office to do something to the direct and immediate injury of the person informed against.[3] The information, though false, to a Police constable of an offence in respect of which he has no lawful power to act directly, but only a duty to pass on the information to another is not an offence under this section.[4] The public servant must be capable of using a power vested in him by virtue of his office.[5] Thus, His Excellency the Governor is such a public servant.[6] If the public servant, like the Chairman of a Local Board, is not competent to use his lawful powers to the injury of the person complained against, *e.g.* an Inspector of the Local Board, the information though false would not constitute an offence.[7] But if the Chairman is himself the Government Agent with powers of dismissing the officer against whom the information is given, *e.g.*. a Headman, the elements of the case would be complete.[8] The case would be different if the public servant were merely a subordinate officer and could not therefore himself exercise any powers injuriously.[9] False information given, however, to an Assistant Government Agent about a Headman was held to be an offence under this section, even though it was the Government Agent and not his Assistant who could have dismissed the Headman ; for an Assistant has the power of suspending or fining a Headman or of reporting him to the Government Agent for dismissal.[10] An Inquirer into deaths is not a public servant within the meaning of this section.[11]

(iv). The information must be given with the intention to cause the public servant to use his lawful powers to the injury or annoyance of any person (or to cause him to do or omit to do anything which he would not have otherwise done or omitted). If there is no such direct intention, the accused must at least have known that such a result was likely. It follows that no offence is committed where the information is given to some one who is under no legal obligation to take any action thereon.[12] But whether any action is actually taken, the gist of the offence is the intention or knowledge of the person supplying the information.[13] This intention or knowledge may be apparent from the nature of the information and other circumstances. Where information is given to an Inspector of Police about a non-cognisable offence, the Inspector has no powers to arrest without a warrant and so the informant could not be said to have had the intention of getting any one arrested.[14] The furnishing of false statistics for use in a Blue Book by a Headman is not punish-

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1. King *vs.* Nerenchia (1930) 31 N.L.R. 423.
2. Eknelligoda *vs.* Kiri Banda 6 Tamb. 110.
3. Banda *vs.* Mohotti Hamy 6 Tamb. 40.
4. Appuhamy *vs.* Keerala 6 Tamb. 45.
5. Plant *vs.* Harmanis (1911) 5 Leader 111.
6. The King *vs.* Arnolis (1908) 11 N.L.R. 265.
7. Kindersley *vs.* David (1908) 11 N.L.R. 371.
8. Horsburgh *vs.* Nagamany (1917) 4 C.W.R. 270.
9. Perera *vs.* Silva (1905) 4 A.C.R. 33.
10. Murphy *vs.* Punchappu (1921) 23 N.L.R. 274.
11. Banda *vs.* Mohotty Hamy (1894) 4 A.C.R. 46.
12. Perera *vs.* Silva (1905) 4 A.C.R. 33.
13. Pinhamy Aratchy *vs.* Dingira (1906) 6 N.L.R. 291.
14. Pieris *vs.* Muttuswamy 6 Tamb. 41.

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able under this section as there is no intention to injure any one.[1] Where the accused informed a public servant that he overheard another saying that the Moors were not sufficiently punished and that the Sinhalese would be able to teach them a lesson, it was held that the accused was not guilty as the public servant could not justly use his lawful powers to the injury or annoyance of that other.[2] A person who prefers false information amounting to a criminal charge to a Government Agent can well be convicted under this section, if the Government Agent is vested with special powers enabling him to take independent action on the information supplied.[3] But the Supreme Court has laid down, per Shaw, J.,[4] that "the provisions of section 180 should be exercised very sparingly and with great caution in the case of petitions against the Police to their superior officers, for it is much better that a Police Superintendent's time should be occasionally wasted in inquiring into an unfounded charge against one of his subordinates than that villagers should be deterred by criminal prosecutions from laying their complaints against the Police (which are necessarily somewhat difficult to prove in a Court of law) before the superior officers for departmental inquiry."

Hence, where there is no intention to cause injury or annoyance to any particular person, the offence is not committed[5]; nor is it committed where there is an intention to cause injury to the informant himself; so that where a person attempted to obtain recruitment in the Police Force by giving certain false information about himself to the Superintendent of the District, it was held that the accused could not be punished under this section.[6]

(v). The prosecution must be sanctioned by the Attorney-General or must be at the instance of the public officer to whom the information is given. The want of the Attorney-General's sanction would not be fatal to a conviction if it has not occasioned a failure of justice.[7] A mere authorization of the complaint by a Government Agent or his Assistant to whom the information is given is not enough : he must himself make the complaint.[8] But the irregularity would be cured by section 425 of the Criminal Procedure Code if there is no failure of justice.

3. Section 208 makes it an offence when one, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person. Under this section, the accused should have either instituted (or caused to be instituted) criminal proceedings or should have laid a false charge. The laying of a charge is not necessarily the same as the institution of criminal proceedings. The latter implies the setting of the criminal law in motion ; so that the very incipient stage of setting it into motion would be enough. Thus, a man who makes a false charge of a cognisable offence, *e.g.*, theft,[9] to the Police sets the criminal law in motion and thereby institutes

1. A.G.A., Kalutara, *vs.* Lebbe Marikkar 6 Tam. 102.
2. Browning *vs.* Ibrahim (1915) 1 C.W.R. 89.
3. Cookson *vs.* Appuhamy (1911) 15 N.L.R. 120.
4. Gunatilleke *vs.* Elisa (1917) 20 N.L.R. 140.
5. In *re* Goolam Ahmed Kaza I.L.R. 14 Calcutta 314.
6. Emperor *vs.* Dwarka Prasad I.L.R. 6 Allahabad 97.
7. D.C., Kalutara (1906) Lem. and Aser. 43.
8. Insp. of Police *vs.* Meera Saibo (1916) 3 C.W.R. 149.
9. Jayasinghe *vs.* Siyadoris Appu (1909) 13 N.L.R. 9.

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criminal proceedings.[1] Similarly, the giving of information to a Headman would constitute the institution of criminal proceedings.[2] Where the accused gave information to the Superintendent of Police that certain persons had set fire to his house and where such information was found to be false, he was held to be guilty of both sections 208 and 180.[3] The principle involved is clear. Where information is given against specific persons of a cognisable offence which the Police have powers to enquire into and also for which they can file a plaint, the machinery of the law is set in motion at the instance of the informant; where, however, a statement is made to the Police of a suspicion that a particular person has or may have committed an offence, it does not amount to the institution of criminal proceedings, for the informant merely provides the Police with a possible clue for investigating the matter which they might or might not follow up as they considered fit.[4] But where the accused gave false information to a Korala that another person had caused hurt to him, knowing such information to be false and intending to cause the Korala to use his lawful power to the injury or annoyance of such other person and the Magistrate convicted him under section 180, the Supreme Court set aside the conviction and sent back the case for non-summary proceedings under section 208, on the footing that the Korala being a Peace Officer had powers to present a complaint to Court in a cognisable case.[5] So that a person falsely charging another before a Police Officer with having committed an offence is punishable under section 208 and not under section 180.[6] A recent decision sets out the differences between the two sections thus, " where a false charge is carefully prepared, elaborated and then placed before a Court, the proper course would be to charge the offender under section 208; but where the charge is made without preparation, without witnesses to support it, in a reckless manner, it is sufficient if the offender is charged under section 180.[7]" Again, where a false charge is made to a Police Officer of the commission of a non-summary offence (*e.g.* burglary), the proper section would be 208.[8] If there is no intention falsely to charge anybody or to set in motion the criminal law, the accused cannot be convicted. Where the accused petitioned to the Magistrate that the Police were tutoring certain persons to be witnesses against his brother, it was held that the petitioner's object being merely to prevent further tutoring, his petition could not be treated as a charge.[9]

Apart from laying information with the Police, the accused may have instituted the criminal proceedings himself. This happens in all those cases where after trial the Magistrate acquits the accused and stamps the case as a false one.[10] Every acquittal does not necessarily connote that the case was designedly false; and even if it was, it would be difficult to prove that the accused had knowingly instituted it without just or lawful grounds. For, it must be proved affirmatively that the accused had instituted the case without reasonable or probable cause—

1. Karim Buksh *vs.* Emp. I.L.R. 17 Calcutta 574.
2. Francis Percra *vs.* Don Simon Appu (1909) 3 Leader III 3.
3. The King *vs.* Girihagama (1909) 12 N.L.R. 137.
4. Emp. *vs.* Bromanund 8 Calcutta L.R. 233.
5. Appuhamy *vs.* Siddappu (1922) 24 N.L.R. 394.
6. Seraph *vs.* Kandiah (1905) 13 N.L.R. 10.
7. Kandiah *vs.* Thambipillai (1932) 1 C.L.W. 334.
8. Tillekeratne *vs.* Appadurai (1932) 1 C.L.W. 381.
9. Emp. *vs.* Rayan Kutty I.L.R. 26 Madras 640.
10. Such cases are lettered B 3. Vide Appendix B.

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without "an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accused to the conclusion that the person charged was probably guilty of the crime imputed."[1] Where the accused had charged the complainant with arson and deposed to having seen him near the house and the complainant had proved an alibi, it was held that there being no evidence establishing that the accused knew of the falsity of the charge or negativing an honest belief on his part that he had seen the complainant at the spot, the conviction could not be supported.[2]

While the criminal proceedings must be before a person competent to entertain the same, the false charge may be before any person.[3] The charge, however, must have been made in order to the institution of criminal proceedings.[4] The word "charge" does not connote that an actual "charge" should have been framed against the accused in the terms of the Procedure Code. So that, even where a Magistrate refers the complainant after hearing his evidence to his civil remedy, the complainant, if his complaint was designedly false, would come within the pale of this section.[5]

How far the fact that the accused merely acted on the information given to him by others would constitute a valid defence is a debatable question. Where the accused addressed a letter to the Police in which, on the authority of information supplied to him by others, he stated that a certain person had murdered a woman, it was held that as the accused merely stated what he had heard and as he had no motive for preferring a false charge against the person informed against, he could not be said to have made a false charge with knowledge of its falsehood.[6] If the accused knows or would have had reason to believe that the information received by him is false and nevertheless communicates it to the Police with a view to getting the person complained against implicated in a case, he would clearly come within the definition of this section. Between these two extremes there would be cases where the main questions to determine would be (1) whether the accused knew that the information was false, and (2) whether he had just or reasonable grounds for proceeding against that person. "The actual falsity of the charge, recklessness in acting upon information without testing it or scrutinising its sources, natural malice towards the person charged—these are all relevant evidence, more or less cogent, but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful ground for proceeding."[7]

The fact that a person has given evidence in support of a false charge is not sufficient to convict him for abetting the offence of instituting a false charge ; there must be evidence to show that prior to the giving of evidence, there was a conspiracy to give false evidence in support of that charge.[8]

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1. Per Hawkins, J., in Hicks *vs.* Faulkner 8 Queen's Bench Division 167.
2. The Queen *vs.* Menikrala (1889) 9 S.C.C. 10.
3. Ashraf Ali *vs.* Emp. I.L.R. 5 Calcutta 281.
4. Emp. *vs.* Ghulam Hussain (1879) Punjab Recorder 14.
5. The Queen *vs.* Kiri Banda.
6. Emp. *vs.* Karim (1905) Punjab Recorder 12.
7. Per Plowden, J., in Murad's case (1894) Punjab Recorder No. 29.
8. Dias *vs.* Dano (1916) 19 N.L.R. 52.

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The offence under section 208 is, as we have seen, a non-summary one : so that a Magistrate cannot assume jurisdiction by attempting to dispose of the case as under section 180.[1] He may, however, try the case with consent. A person who has been ordered to pay Crown costs and compensation cannot meet a subsequent prosecution under this section with a plea of "*Autrefois convict.*"[2]

4. The institution of a false civil suit, or the making of a false claim in any Court of justice, or the fraudulent obtaining of an unjust decree, is made punishable by the sections next preceding the last one and need not detain us here.

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1. Appuhamy *vs.* Siddappu (1922) 24 N.L.R. 394 *supra.*
2. The King *vs.* Selbi Singho (1916) 2 C.W.R. 30.

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CHAPTER XXV.

FORGERY AND COGNATE OFFENCES.

(1) Forgery.

Under the English Forgery Act[1] of 1913, forgery is defined as "the making of a false document in order that it may be used as genuine." Under the Code, the intent is material : there must be "an intention to cause damage or injury to the public or to any person or to the Government, or to support any claim or title, or to cause any person to part with property or to enter into any express or implied contract—or there must be an intention to commit fraud or an intention that fraud may be committed."[2]

"A person is said to make a false document—

(i) who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document or makes any mark denoting the execution of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time which he knows that it was not made, signed, sealed, or executed ; or

(ii) who, without lawful authority, dishonestly or fraudulently by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

(iii) who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration."

Thus, a false document is made in either of three ways, either by fabricating it (or a part of it) entirely, or by altering it in a material particular, or by inducing the rightful person to make it when that person's consent has been obtained while in a state of intoxication or insanity, or while he is under the influence of deception and whose consent is consequently inoperative in law.

The mere fraudulent making of a false document does not amount to forgery, unless there is the necessary fraudulent intention. Thus, where the accused bought a cart from the complainant and paid the price but did not obtain delivery as the cart was in the custody of a third party, and where the accused forged the signature of the complainant to a letter purporting to be an authority to deliver the cart to the accused, it was held that the letter was not a forged document.[3]

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1. 3 and 4 George V Ch. (1).
2. Sections 452 and 453 C.P.C.
3. Rex *vs.* Periyatamby (1902) 5 N.L.R. 338.

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Where a son who was authorized by his father to open letters, reply to them, pay money and generally to act for him, wrote on a postal order his father's name as payee and received money, he was held not to be guilty as he had no dishonest or fraudulent intention in signing his father's name.[1] Forgery involves the representation that the thing written is the hand-work of some one other than the actual writer, or that it purports to be written as the act of another and so by his authority: where a person who has authority to make entries in the account-book of another person subject to a certain procedure makes an unwarranted entry in the books, he does not intend it to be believed that it was an entry made by any person other than himself or as representing on the face of it as an authority given by any other person ; so that the accused under such circumstances cannot be convicted.[2] There must be a specific intention on the part of the accused to defraud some one. Where a man forged a diploma of the College of Surgeons with no specific intention but with an intention of making people believe that he was a member of that College, he was held not to be guilty of forgery at common law.[3] The accused bought a certain plot of land numbered ten in the registered sale-deed and altered it to 272 which was the correct number: it was held that he was not guilty as he had substituted the right number for the wrong one.[4] Where the accused took back his plaint without permission after it was filed in Court and inserted therein the number of the field from which he wanted to eject the defendant, it was held that his act did not amount to a crime.[5] An accused purchased a cart from the complainant and paid him partly in cash and goods and partly in labour; the complainant alleging that the cart had not been fully paid for took it away from the accused and deposited it with another person from whose wife the accused obtained the cart on the production of a delivery order purporting to have been signed by the complainant ; the accused admitted having forged this order: it was held that though his act amounted to deceit, he could not be said to have defrauded nor to have caused wrongful loss to any one, inasmuch as he was the owner of the cart himself.[6] Again, where the sole intention of the accused is to screen himself from detection and not to defraud, he cannot be said to have intended to make a false document dishonestly or fraudulently. Thus, the accused who had altered an office report with a view to screen his own negligence having mislaid a portion of a record,[7] and the accused who, being a record-keeper and having failed to find two orders, forged them and produced them as originals[8] were both held to have forged in order to screen their own negligence and not with any fraudulent or dishonest intent. But in order to constitute an act fraudulent the advantage gained by the person committing the fraud need not necessarily be one assessable in terms of money. Thus, where a police constable produced at an inquiry into a complaint for non-payment of house-rent by him for a particular month, a forged receipt in support of his statement that he

1. Queen *vs.* Karunaratne (1900) 2 Tam. 12.
2. The King *vs.* Kanjumanadan (1903) 7 N.L.R. 52 The accused would now be guilty of section 466 A.
3. R. *vs.* Hodgson 1 Dearsley and Bell's Crown Cases 3.
4. Emp. *vs.* Fateh. I.L.R. 5 Allahabad 217.
5. R. *vs.* Bisheshar Dayal (1905) 25 Allahabad Weekly Notes 93.
6. The King *vs.* Kandappar Periyatamby (1902) 3 Br. 21.
7. R. *vs.* Lal Gumal 2 North West Province High Court Reports 11.
8. R. *vs.* Mazhar Husain I.L.R. 5 Allahabad 553.

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had paid the rent and thereby induced his superior to stay further inquiry and action against him, the constable was held to be guilty of forgery.[1]

The making of a false document may take various shapes. Sometimes a man's signature of his own name may amount to a forgery, *e.g.*, when he signs a bill of exchange purporting to have been drawn by another person of the same name. The making of a false document in the name of a fictitious person intending it to be believed that the document was made by a real person, or in the name of a deceased person intending it to be believed that it was made by the deceased person in his life-time, may amount to forgery. The prisoner, one G. W. Silva, being indebted to a Tamil chetty on a pronote, agreed to pay off the sum due on the note by fixed instalments: in payment of one of these instalments he gave a cheque on a Bank at which he had no account, in the name of B. J. Perera: it was held that the prisoner had intentionally signed the cheque with a fictitious name with intent to defraud and was consequently guilty of forgery.[2] Where the accused who was entrusted with a letter in which was enclosed a sum of money, misappropriated the money and forged the initials of a peon of the addressee in the delivery book, he was held to be guilty.[3] Where the accused obtained service as a subordinate in the Indian Public Works Department on the strength of a certificate in which he altered the name, it was held that his altering his name to suit himself was fraudulent in the sense of its being intended and calculated to deceive those who gave him employment believing in the genuineness of his certificate.[4] Where a person falsely represents himself to be another at a University examination and gets a Hall ticket in his name and heads and signs papers in answer to questions in that man's name, he commits forgery.[5] The giving of instructions to a Notary with the object of forging a deed of transfer is an attempt to commit the act of forgery.[6] But attempts must be distinguished from mere preparations which are not punishable. A witness who attests a document knowing that the signature of the maker of the document is a forgery is not himself guilty of forgery but only of abetment of forgery.[7] Where the accused issued for service a summons signing himself as President of a Village Tribunal, which he was not, he was held not to have committed an offence of pretending to be a public servant (under section 168, C.P.C.), but was found guilty of forgery of a document purporting to be a proceeding of a Court of Justice. Where the accused signed three different documents with a view to obtaining payment by the Post Office of a sum of money from the Savings Bank's account of another, viz., the withdrawal application, warrant and letter of consent, he was held to have committed three distinct forgeries.[8]

All forgeries are non-cognisable, non-compoundable, and non-summary. Simple forgery is punishable with five years' imprisonment or with fine or both. There are aggravated forms of forgery, *e.g.*, of a will, of a certificate of birth, baptism, marriage, or burial, or of a proceeding

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1. The King *vs.* Perera (1933) 2 C.L.W. 160.
2. Queen *vs.* Silva (1886) 7 S.C.C. 161.
3. The King *vs.* Pieris (1912) 16 N.L.R. 11.
4. Emp. *vs.* Abdul Razak (1895) Punjab Recorder 2.
5. Emp. *vs.* Appasamy I.L.R. 12 Madras 151.
6. Rex *vs.* Bastian *et al* (1902) 2 Bal. 93.
7. The Queen *vs.* Kapurala (1897) 2 N.L.R. 330 (Full Bench).
8. The King *vs.* Abdul (1913) 1 Wije. 33.

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of a Court of Justice, or of a document purporting to be made to a public servant in his official capacity. These are triable by the Supreme Court alone. So are the offences of making or possessing counterfeit seals, etc., with the intention of committing forgery, or of possessing forged documents intending them to be used as genuine, or of fraudulent cancellation, destruction, etc., of a will or valuable security of any official document. The offence of falsification of accounts which is also triable only by a jury has been elsewhere described. A forged document is a document made wholly or in part by forgery and the offence of dishonestly or fraudulently using a forged document as a genuine one may also be tried by a District Court: so also, simple forgery and forgery for the purpose of cheating.

When forgery has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, no Police Court can take cognisance of the offence except with the previous sanction of the Attorney-General or on the complaint of such Court.[1] Where a Police Vidane added the name of a witness to a crime-report which he had duly sent in, it was held that he was no party to the proceedings and that therefore the sanction of the Attorney-General was not necessary.[2] A person by offering himself as surety for an accused person does not constitute himself a party to the case and if he commits forgery, he can be prosecuted without the necessary sanction.[3]

(II) Handwriting.

In cases of forgery, the evidence of a handwriting expert is admissible[4] and would sometimes be necessary, but a warning note must be sounded in the words of Hutchinson, C. J.: "I have known too many instances in which experts' opinions as to identity of handwriting have been proved to be mistaken, to accept them as anything more than a slight corroboration of a conclusion arrived at independently, never strong enough to turn the scale against a person charged with forgery if the other evidence is not conclusive."[5] This decision and similar conclusions in various Indian and English cases have been recently reiterated by Jayawardena, A.J., who held that it was not safe to base a conviction solely on the evidence of an expert in handwriting, as "conclusions drawn by the comparison of disputed and authentic specimens of handwriting, whether by reason of similitude or dissimilitude, are deceptive and may be dangerous."[6]

Apart from the opinion of an expert, the opinion of a person acquainted with the handwriting of the person by whom it is supposed to have been written or signed that it was or was not written or signed by that person, is also relevant against the accused. A person is "acquainted with the handwriting of another when he has seen that person write or when he has received documents purporting to have been written by that person, in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person

1. Section 147 (c) Cr. Pr. Code.
2. Wijeyasinghe vs. Ekanayake (1906) 3 Bal. 168.
3. The King vs. Harmanis (1903) 8 N.L.R. 140.
4. Section 45 of the Evidence Ordinance, Vol. IV, p. 739.
5. Soysa vs. Sanmugam (1907) 10 N.L.R. 355.
6. King vs. Perera (1930) 31 N.L.R. 449; 7 Times L.R. 158.

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have been habitually submitted to him.[1] In order to ascertain whether a signature or writing is that of the person by whom it purports to have been written, any signature or writing admitted or proved to have been written by that person may be compared with the one which is to be proved, and the Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare such words and figures with any words or figures alleged to have been written by him.[2] But in a case of forgery a Judge sitting without a jury should not arrive at a decision on the comparison of handwriting without some proof that the handwriting of the disputed document is the handwriting of the accused. Per Bonser, C. J. : " I am not satisfied that it was intended to allow a jury to find a man guilty of forgery when no qualified witness could be found willing to state his belief that the alleged forgery was in the handwriting of the accused.[3] Where such opinion is forthcoming, due weight must be given to it, and even if there is external evidence to rebut the presumption of forgery, the opinion of the expert should go a great way.[4]

The accused who were in Police custody charged with the forgery of a cheque wrote certain words on a paper at the request of the Inspector of Police. At the trial, this paper was tendered in evidence by the prosecution, but was objected to by the defence on the ground that the words on the paper amounted to a confession. It was held by the Full Bench that the words did not amount to a confession and that the paper was properly received in evidence.[5] So that not merely the writing by the accused in open Court, but his writing previous to trial if proved may be admitted in evidence for the purposes of comparison.

There are separate handwriting experts in Ceylon for the English, Sinhalese and Tamil languages and the opinions of these could be obtained by forwarding the necessary documents to them. Their evidence should afterwards be recorded.

(III) Property Marks.[6]

A property mark is a mark used for denoting that movable property belongs to a particular person. A false property mark is a mark which is intended to mislead one into the belief that the property belongs to a person to whom it does not belong. The using of a false property mark or the counterfeiting of a property mark with intent to cause damage or injury, are made punishable under the Code. The branding of stolen cattle by a person to whom they do not belong is an offence against property marks and is accordingly punishable.[7] The fraudulent making or having possession of any die, plate, or other instrument for counterfeiting any public or private property or trade mark, and the knowingly selling of goods marked with a counterfeit or forged property or trade mark, or the defacing of any property mark with intent to injure are offences against the Penal Code.

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1. Section 47 of the Evidence Ordinance.
2. Section 73 of the Evidence Ordinance.
3. Cave *vs.* Kreltszheim (1895) 1 N.L.R. 46.
4. Herat Singho *vs.* Appuhami (1920) 22 N.L.R. 363.
5. The King *vs.* Francis Perera (1906) 9 N.L.R. 122.
6. Sections 468 to 478 C.P.C.
7. (1899) Koch 54.

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Trade marks or marks on merchandise are also protected by a special Ordinance,[1] and the forging, counterfeiting, or using of false or forged trade marks are punishable thereunder. These offences are both summary as well as non-summary: they are not common and need no explanation. Where a person uses in Ceylon the word "registered" in connection with a trade mark which is not registered in terms of the Ordinance, he is guilty of an offence under section 64 (1).[2]

To establish that a trade mark is calculated to deceive, it is not necessary to prove that there was any intent on the part of the person using the trade mark to deceive anyone. What is necessary is that there must be something objective in the mark itself which is likely to deceive buyers or users of the article on which it is placed. Similarly, to prove "forgery" of a trade mark, it is not necessary to prove that the person charged had in his mind the mark of the other person which he is charged with having forged.[3]

(IV) Stamps.

The Penal Code[4] penalises the counterfeiting of stamps as well as their possession and use, provided they are possessed with an intention of using or disposing of the same as genuine stamps, or are used knowingly; but the Post Office Ordinance[5] makes mere possession of fictitious stamps unlawful unless the accused can show a lawful excuse. No prosecution can, however, be entered under the latter enactment except at the instance of the Postmaster-General. The possession, making, or selling of instruments or materials for counterfeiting Government stamps and the sale of fictitious stamps are offences under the Code: so also are the fraudulent removal from a document of a stamp used for it with intent to cause loss to Government, or the fraudulent erasure of any mark denoting that a stamp has once been used. All these offences are non-summary, cognisable and non-compoundable.

The only summary offence[6] triable by a Police Court and one which is not of infrequent occurrence is the using of a Government stamp which has been used before. Four things must be proved by the prosecution before the accused can be convicted:

(i) That the accused used the stamp in question or that it was used or affixed under his direction.

(ii) That the stamp had been once used previously or was defaced.

(iii) That the accused knew, when he used the stamp or caused it to be used, that it had been so used or defaced previously.

(iv) That in using it again, he acted fraudulently or intended to cause loss to Government.

If any of these four elements is wanting, the accused cannot be convicted. The officers of the Post Office usually detect defaced stamps in transit and prosecute at random the writers of letters on which such stamps are found: unless there is *prima facie* evidence connecting the accused with the posting of the particular letter, he cannot be said to

1. No. 13 of 1888, Vol. 1, p. 959.
2. Sahib *vs.* Mudaliyar (1929) 31 N.L.R. 288.
3. Sahib *vs.* Mutalif (1932) 10 Times L.R. 75; 2 C.L.W. 17.
4. Sections 248-256 C.P.C.
5. No. 11 of 1908, Vol. II. p. 813.
6. Section 255 C.P.C.

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have used a defaced stamp, for he may well say that he wrote the letter and gave it to another to post. The burden of proof in such cases should, however, be allowed to rest on the accused, for a *prima facie* though rebuttable presumption of user arises from the writing and posting of the letter with a defaced stamp.

The punishment for this offence is two years' imprisonment or fine or both.

(V) Currency.

Offences against coins are punishable under the Code[1]; those against paper currency under a special Ordinance.[2] A coin is metal used as money and stamped and issued under the authority of Government in order to be used as money. The counterfeiting of or performing any part of the process of counterfeiting coin is an offence. A genuine coin may be "palmed off" as a different coin or a person may scoop out a part of a genuine coin and may put anything else into the cavity—he would then be guilty. The fraudulent performing of any operation which diminishes the weight or alters the composition of any coin is an offence; so it is to possess, make, or sell instruments or material for counterfeiting coin, or to import and export counterfeit coins, or knowingly to use or deliver counterfeit coins, and so forth. All these offences are cognisable and non-compoundable. They are triable on indictment except the offence of delivery to another of coin as genuine which when first possessed the deliverer did not know to be altered. This offence may be tried by a Police Court.

Under the Currency Ordinance, the forging, counterfeiting, or altering of any currency note or of any word, figure, mark, etc., on any currency note is an offence triable by the Supreme Court and punishable with imprisonment alone for twenty years. So is the offering or uttering or using of such a note knowing that it is counterfeit or forged. And the mere possession, without lawful authority or excuse the burden of which is on the accused, of any such forged note or of any unfinished or incomplete note is punishable with imprisonment alone for five years; a like punishment is prescribed for the possession or use, without lawful authority or excuse the burden of which is on the accused, of "any paper with any word, figure, device, or distinction, peculiar to and appearing in the substance of the paper used for currency notes, or any frame, mould, or instrument for making such paper, or any material upon which the whole or any part of any note purporting to resemble a currency note shall have been engraved or made, or any facsimile of the signature of any of the Commissioners. It must be remembered that the accused is here presumed to have the necessary guilty knowledge unless he satisfies the Court to the contrary. The offences are all non-summary. A Magistrate may issue a search warrant in order to search any premises for any of these articles for forging coins or currency.

(VI) False Weights and Measures.

Under the Penal Code,[3] the fraudulent use of false weights and measures is an offence summarily triable by a Police Court and so is the offence of possession of false weights and measures with the intent

1. Chapt. XII, Sections 226 to 247 C.P.C.
2. No. 32 of 1884, sections 21, 22 and 23, Vol. I, p. 888.
3. Sections 257-9 C.P.C.

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fraudulently to use them. It is not an offence to possess a false weight unless such possession be with the intention of using it fraudulently.[1] The mere possession of a weight which does not conform to the standard and even the use of it is not presumptive evidence of an intention to use it fraudulently.[2] The fraudulent intention must be proved before an accused can be convicted.[3] A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.[4]

The Court should also be satisfied by evidence that any impeached weights or measures are tested ; and the bare word of the prosecutor that they are not in conformity with the standards established under the Ordinance,[5] which is the very gist of the offence, is insufficient.

The making or selling of false weights and measures is a non-summary offence.[6]

Under Ordinance No. 4 of 1919,[7] any person dealing in goods by weight or measure who uses or in whose premises are found any weights or measures which are represented or intended to be represented or used as standard weights or measures and which are not in conformity with the standards is guilty of an offence punishable with a fine of Rs. 50 for a first conviction (and with double that penalty or with imprisonment for three months for a second or subsequent conviction).[8] The same penalty is imposed for a similar use of a false or unequal balance or a false striker, etc. The standards are the standards established under Ordinance No. 8 of 1876. Whereas under the Penal Code a fraudulent intention is necessary, under the present enactment it is sufficient if the prosecution establishes a mere intention to use (or even to represent) them as standard weights and measures. Thus, the finding of false weights in a boutique where sundries are sold by weight would raise a *prima facie* presumption of an intention to use them for the purpose of weighing. In order to secure a conviction under this Ordinance there must be proof that the false weight or measure was found by a person authorized under the Ordinance.[9] A Police Sergeant has the power to enter any place without a warrant for the purpose of inspecting or searching weights or measures and to initiate a prosecution therefor.[10]

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1. Mendis *vs.* Kuppe (1911) 5 Weir 95. Modder *vs.* Sinnetamby (1891) 1 C.L.R. 68.
2. Ossen *vs.* Siyadoris (1895) 1 N.L.R. 223.
3. The Police *vs.* Kalu Banda (1912) 6 Weer. 83. Modder *vs.* Silvestry Peiris (1909) 2 Leader 115.
4. Section 23 C.P.C.
5. Nos. 8 of 1876 and 14 of 1878 as amended by No. 4 of 1919, Vol. 1, pp. 819 to 827.
6. Section 260 C.P.C.
7. Vol. I, p. 826.
8. See section 7 of Ordinance No. 14 of 1878 wherein the provisions of the new Ordinance are embodied.
9. S. I. Police Moratuwa *vs.* Naina Mohamed (1928) 29 N.L.R. 351.
10. Daniel *vs.* Sardris Appu (1929) 31 N.L.R. 255.

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CHAPTER XXVI.

OFFENCES AGAINST PUBLIC SERVANTS.

(I) Obstruction.

Section 183 of the Penal Code provides that "whoever voluntarily obstructs any public servant or any person acting under the lawful orders of such public servant in the discharge of his public functions shall be punished with imprisonment for three months or a fine of hundred rupees or both."

Three things are necessary: firstly, there should be a voluntary obstruction; secondly, the obstruction should be to a public servant, or to any person acting under his lawful orders; and lastly, such servant or person should be discharging public functions.

(I) The word "obstruction" is nowhere defined in the Code. It means "actual hindrance, resistance, or obstacle put in the way of a public servant by the doing of some overt act, and not merely the offer of passive resistance, opposition, or evasion not accompanied by the use of criminal force."[1]

To constitute obstruction, it is not necessary that force should be used or hurt should be caused. It is enough "if there is not a mere protest but an opposition to be overcome only by force."[2] A mere verbal refusal to allow a public servant to perform his duties does not constitute voluntary obstruction within the meaning of this section,[3] nor speaking familiarly or laughing,[4] nor a mere warning not to search a house,[5] nor a verbal protest that he would not allow a placard to be affixed to his house.[6] Where there is a mere verbal refusal, with an absence of physical resistance on the part of the accused, he cannot be convicted.[7] There must be something more than mere words or mere passive resistance: in other words, the accused should have actually and voluntarily obstructed. An act which can reasonably be regarded as hindering or being likely to deter an officer from the discharge of his duty may amount to an offence under this section[8]; but the trend of decisions on the subject shows that there should be some form of physical obstruction or some overt act likely to lead to physical obstruction.[9] The public servant may have been pushed, held, touched, assaulted, or otherwise physically impeded. There is an old decision where the accused, in an excited state and in anger, said to the Deputy Fiscal who had come to deliver possession on the orders of the Court, "It would be either

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1. Dr. Gour para 1644 following Gajadhar's case 7 Allahabad Law Journal 1174.
2. Jansz *vs.* Simon 6 Tam. 114.
3. Lawrensz *vs.* Jayasinghe (1913) 16 N.L.R. 505.
4. Fernando *vs.* Manuel Appu 6 Tam. 67.
5. Samoradira *vs.* Netorissa 6 Tamb. 51.
6. Rahim *vs.* Salgado 6 Tam. 28.
7. Fernando *vs.* Alia Marikkar (1912) 1 C.A.C. 173.
8. Davidson *vs.* Lebbe (1901) 2 Br. 281.
9. Fernando, Sub-Inspector of Police *vs.* Wickremasinghe (1931) 1 C.L.W. 62.

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my life or yours : you will have to cut my throat before I am sent out ; " the Supreme Court held that the conduct of the accused though devoid of physical resistance amounted to criminal intimidation and therefore to voluntary obstruction.[1] It is doubtful if this decision would now be followed ; for physical resistance seems to be the *sine qua non*. It would be difficult to reconcile the facts of the following case with the theory of physical obstruction. Where the Police were timing the speed of cars along a measured road called a motor car control, in order to ascertain whether the cars were exceeding the speed-limit, and the accused from within the control warned the drivers of the speed trap and prevented the Police from obtaining evidence of the commission of the offences by the drivers, it was held that the accused had voluntarily obstructed the Police in the execution of their duty.[2] In a recent case, where the accused by words incited others to obstruct a Police officer empowered to execute an order under section 114 of the Criminal Procedure Code, he was held to be guilty of obstructing a public servant.[3] Mere refusal to take part in an inquiry, especially of a non-cognisable nature is no obstruction.[4] But where an Inquirer was holding an inquest and the accused came and beat his son who was giving evidence and took him away, thereby interrupting the proceedings for nearly an hour, it was held that this was obstruction within the meaning of the section.[5]

(II) The obstruction should be to a public servant or to a person acting under the lawful orders of a public servant. The word " Public Servant " is defined in section 19 of the Penal Code and includes a variety of officers ranging from a Civil Servant down to a Police Vidane, a Municipal Inspector or a Division Officer. That section further enacts that by " public servant " is understood every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.[6] Where the public servant states that he holds the appointment in question and the statement is not contradicted, it would not be necessary to produce his act of appointment.[7] The following have been held by the Supreme Court to be public servants : a Deputy Fiscal,[8] or a Fiscal's Officer executing judicial process,[9] a Deputy Riegistrar of Births and Deaths,[10] the Chairman of a Local Board,[11] a Local Board Constable,[12] a licensed Surveyor making Crown surveys,[13] tide waiters or preventive officers of the Customs,[14] an Excise Peon,[15] an Irrigation Sub-Inspector,[16] a person appointed as

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1. Abeyakoon *vs.* Sodallayandi Achari (1900) 4 N.L.R. 151.
2. De Silva *vs.* De Silva (1930) 32 N.L.R. 94. 8 Times L.R. 62.
3. Fernando *vs.* Wickremasinghe (1931) 33 N.L.R. 304.
4. Sydeen *vs.* Heen Baba (1925) 6 C.L.R. 177.
5. Punchi Banda Korala *vs.* Marthelis (1926) S.C. 187. P.C. Matale 25622.
6. Inspector of Police *vs.* Lebbe (923) 25 N.L.R. 281.
7. King *vs.* Dingiri Menika (1929) 31 N.L.R. 301. 7 Times L.R. 80.
8. D. F., Kalutara *vs.* Halowitage Eronika (1900) 1 Br. 14.
9. Karunaratne *vs.* Ismail Lebbe Marikkar 6 Tam. 8.
10. Davidson *vs.* Lebbe (1901) 2 Br. 281.
11. Kindersley *vs.* David (1908) 11 N.L.R. 371. See the King *vs.* Selliah (1922) 24 N.L.R. 18 for a discussion of the question how far a Local Board Secretary is a public servant.
12. Van Haught *vs.* Seraphim 6 Tam. 100.
13. Jansz *vs.* Simon 6 Tam. 114.
14. Ferdinands *vs.* Silva (1914) 1 Bal. Notes 54.
15. The Attorney-General *vs.* Silva (1914) 17 N.L.R. 193.
16. King *vs.* Kapurala Vel-Vidane (1917) 4 C.W.R. 351.

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Examiner of weights and measures by a Government Agent,[1] a Commissioner appointed under the Partition Ordinance.[2] The following have been held not to be public servants : a person holding a license from a Municipality to seize stray cattle,[3] a surveyor licensed by a Deputy Fiscal,[4] a Municipal dog-seizer,[5] a Sanitary Inspector employed by a local authority,[6] a peon employed by the Society for the Prevention of Cruelty to Aniamls,[7] or a Vel Vidane delegated by an Aratchy.[8]

The person obstructed may be one acting under the lawful orders of a public servant ; he mu.t be proved to be so acting[9] ; and the lawful orders must be those which it was competent to the public servant to make.[10] Thus, a Medical Officer may order the removal of a small-pox patient to an Infectious Diseases Hospital through a Constable.[11] Or, a person may be acting in pursuance of a commission issued to him by a competent Court under the provisions of the Partition Ordinance.[12] A Division Officer executing a proper warrant issued by a Chairman of the Road Committee is a person acting under the lawful orders of a public servant.[13] A Police Constable helping an Excise Inspector to search for excisable articles becomes a public servant only by delegation and obstruction to him is virtually obstruction to the Excise Inspector.[14] It would be in each case necessary to examine whether the person obstructed was a public servant or a person lawfully appointed to act on his behalf or lawfully ordered by him so to act ; it would be material even to go into the question of the legality of appointment or delegation. When an Aratchy acting under the orders of a Ratemahatmaya seized a wild buffalo, captured by the accused, for the purpose of an inquiry, and the accused rescued the animal by force, it was held that the offence being a non-cognisable one, the Aratchy was not acting under lawful orders (without an order from the Magistrate). "It is not enough that the public servant when he acts under any order believes that the order is lawful—the order must be in fact lawful."[15] Where the Government Agent delegated his authority to a renter to place locks on distillery doors, and the latter in turn delegated the same authority to his Manager, it was held that the subsequent delegation was illegal.[16] A Fiscal can lawfully endorse a writ to any Headman and thereby constitute him a Fiscal's Officer for the whole of the Fiscal's district irrespective of his own local limits—within the meaning of the Fiscal's Ordinance.[17]

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1. The Inspector of Police *vs.* Lebbe (1923) 25 N.L.R. 281 (Full Bench).
2. Rajapakse *vs.* John and another (1926) 4 Times L.R. 95.
3. Zilva *vs.* Grigoris (1908) 11. N.L.R. 67.
4. D. F., Kalutara *vs.* Maya Nona (1906) 8 N.L.R. 348. The Code of 1889 was amended after this decision by Ordinance No. 14 of 1907 and the words "Deputy Fiscal" added after the word Fiscal. Now, therefore, a surveyor licensed even by an additional D. F. would be a public servant. See Misso *vs.* Sellapah (1930) 32. N.L.R. 66.
5. Zilva *vs.* Grigoris (1908) 11. N.L.R. 67.
6. Jamal *vs.* Haniffa (1933) 10 Times L.R. 119. 2 C.L.W. 163.
7. The Police *vs.* Rajapaksa (1932) 1 C.L.W. 282.
8. Cornelis *vs.* Dineshamy 6 Tam. 86.
9. Nawagattegama Udayar *vs.* Madar 6 Tam. 88.
10. Telesinghe *vs.* Anthony (1893) 2. S.C.R. 129.
11. Van Rooyen *vs.* Bastiampillai (1885) 7. S.C.C. 19.
12. Bowes *vs.* Meeratamby (1905) 8 N.L.R. 311.
13. Bana *vs.* Perera 6 Tam. 13.
14. Zilva *vs.* Sinno (1914) 17. N.L.R. 473.
15. Mudalihamy *vs.* Isma (1916) 19 N.L.R. 286.
16. Peris *vs.* Munasinghe (1906) 9. N.L.R. 323.
17. Ukkurala Korale *vs.* Punchi Appuhamy *et al* (1926) 4 Times L.R 89.

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(III) The public servant or the person delegated by him should be discharging public functions. Public functions are functions which they are empowered to discharge by virtue of their office. A Police Magistrate when disturbed in his bungalow by a nuisance from a neighbouring house is not discharging public functions in going to that house and asking them to stop the nuisance.[1] A Police Constable inquiring into a petition with regard to a civil dispute[2]: a public servant executing a process *ex facie defective*,[3] *e.g.*, where a warrant is endorsed by means of a rubber stamp instead of by a signature[4] or where a writ bears no endorsement as required by the Civil Procedure Code,[5] though not where section 347 of the Civil Procedure Code has not been complied with,[6] (*e.g.*, where notice of re-issue of writ after the lapse of one year has not been given to the other side): a Peace Officer entering another's house to inquire into offences where he has no right or power to inquire, *e.g.*, in non-cognisable cases like abuse[7] or mischief[8] or offences under the Game Protection Ordinance of 1909[9] or a complaint about thorns,[10] etc.: a Constable in civil dress purporting to arrest another on the authority of a warrant, but without the warrant on him[11]: a Police Vidane entering with some 20 persons for the alleged purpose of an inquiry into the house of a person against whom he has not received any complaint of a cognisable offence[12]: a Government Surveyor acting under the Land Acquisition Ordinance without the authority of the Surveyor-General[13]: a process-server executing a warrant under section 219 of the Civil Procedure Code after sunset[14]: a Fiscal's Officer seizing property of the accused under writ issued against the property of a third party[15]: a process-server executing process outside his division[16]: these and many such have been held to be officers not employed in the discharge of public functions. It would, therefore, be necessary in each case to inquire and determine whether the public servant has purported to perform lawful duties—duties which he by law is competent to perform. A Police Constable who hears a great noise of tom-toming in a house close to a public road is in the lawful exercise of his public functions when he goes to that house and asks the occupant to stop the nuisance.[17] An Excise Officer executing a search warrant, a Peace Officer arresting a person in a cognisable offence or searching a house where he suspects the custody of stolen property, an S.P.C.A. Inspector seizing bulls and animals which are being cruelly treated, a Fiscal's Officer executing a duly legal process of a Civil Court would be public servants in the lawful discharge of their duties. The questions to be determined would be, firstly, the status

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1. Sanders *vs.* Tillekaratna 6 Tam. 3.
2. Obeysekara *vs.* William (1916) 3 C.W.R. 308.
3. Menikrala *vs.* Kiri Banda 6 Tam. 91.
4. Hendrick *vs.* Fonseka 4 C.W.R. 122.
5. Veluppillai Odayar *vs.* Veluppillai 6 Tam. 57.
6. Kannangara *vs.* Pieris (1928) 30 N.L.R. 78.
7. Senevaratne *vs.* Arumutan 6 Tam. 26.
8. Baron Soysa *vs.* Aron Singho (1912) 6 Weer. 87.
9. Banda *vs.* Tikka (1917) 4 C.W.R. 242.
10. Police Vidane *vs.* Gunawardana (1922) 1 Times L.R. 55.
11. Munasinghe *vs.* Sinnappu (1908) 3 A.C.R. 153.
12. Police Vidane *vs.* Gunawardena (1922) 1 Times L.R. 55.
13. Rodriguesz *vs.* Kiri Menika (1928) 29 N.L.R. 355.
14. Badoordeen *vs.* Dingiri Banda (1931) 33 N.L.R. 289.
15. Fernando *vs.* Andris Silva (1930) 3 C.A.R. (Gratiaen's) 110.
16. De Zoysa *vs.* Wimalasuriya (1931) 1 C.L.W. 40.
17. Rajah *vs.* Sabar 6 Tam. 30.

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of the servant, and secondly, the duties connected with that status. If the public servant exceeds the powers given to him by law, the law will not protect him, *e.g.*, where he has a warrant of arrest for Punchi Banda but purports to arrest Loku Banda. Even if he acts under a mistaken but *bona fide* apprehension of the extent of his powers, he will not be protected—for "his intentions may have been perfectly honest; but if in fact and law, the functions in the discharge of which he was obstructed were not public functions, then no offence can be committed under this section. It is plain that the functions would not be public functions, if they fell wholly outside the jurisdiction of authority which he as a public servant possessed."[1]

It is immaterial whether the person obstructing acts in a *bona fide* belief in his own lawful rights or powers. Thus, where a Headman was obstructed while executing a warrant against a woman for non-attendance at a Gansabhawa and where the defence pleaded exemption under section 48 of the Village Communities' Ordinance which allows wives to be represented by husbands, the Supreme Court upheld the conviction on the ground that every accused person, if so required, must personally attend Court.[2] Where, on a writ against the accused-debtor's property, furniture which was in the house where the accused resided but which did not belong to him was seized in sequestration, it was held that the accused in obstructing was guilty under this section, and that such obstruction would be punishable even if offered by the rightful claimant, for the latter has the proper civil remedy open to him.[3] Where the defendant in an action admits the jurisdiction of a Court by consenting to judgment, he cannot thereafter question the legality of the decree in resisting execution.[4]

(IV) The offence is triable summarily, is not compoundable and non-cognisable. No Police Court can take cognisance of it 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. Thus, for instance, a plaint may be filed by the Fiscal when one of his officers has been obstructed, or by an Inspector or Superintendent of Police when a Constable has been obstructed, and so forth. Where criminal force is used at the time of obstruction, the accused may also be charged under section 344; and where hurt is caused voluntarily the offence becomes indictable under section 323 and in the case of grievous hurt (section 324) is triable by a jury alone. Even if the officer assaulted does not fall within the definition of public servant as defined by section 19 of the Penal Code, the accused can be convicted of simple assault and the convicting judge can take into consideration the relative positions of the complainant and the accused and the circumstances under which the assault was committed in imposing sentence.[5] When the public servant is engaged in suppressing a riot or affray, or dispersing an unlawful assembly, whoever assaults or threatens to assault him or obstructs or attempts to obstruct him or uses or threatens or attempts to use criminal force on him, becomes liable to be convicted under section 149 which is triable summarily. And, whoever holds out any threat of injury to any public servant or to any person in whom

1. Emp. *vs.* Abdul Gafur I.L.R. 23 Calcutta 896.
2. Kanapathipillai *vs.* Sanmugam (1930) 3 C.A.R. (Gratiaen's) 8.
3. Gunatilleke *vs.* Atapattu (1924) 6 C.L.R. 63.
4. Banda *vs.* Siyatu (1931) 32 N.L.R. 270.
5. Jamal *vs.* Haniffa (1933) 10 Times L.R. 119.

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that public servant is interested for the purpose of inducing him to do any act or to forbear or delay to do any act connected with the exercise of his public functions, commits an indictable offence under section 186. A threat of injury under this section must be of coming injury such as is likely to operate on the mind of the public servant and to cause him to do or forbear or delay doing any act connected with the exercise of his public functions. A mere effusion of passion, unattended with any fixed purpose of doing harm, is not sufficient: the public officer concerned must be threatened into action. Thus, words like "you, rascal wait and see what I would do to you" addressed to a Sub-Inspector of Police were held to be insufficient to constitute "a threat of injury."[1] Intentional insult or interruption to a public servant sitting in any stage of judicial proceeding is summarily punishable as contempt under section 223. There are, besides, special Ordinances whereby special classes of public servants are protected. Thus section 6 (1) of Ordinance No. 8 of 1866 protects Inspectors appointed under the Contagious Disease Ordinance.[2] And section (2) of Ordinance No. 11 of 1887 makes it unlawful to obstruct or resist the lawful apprehension of one-self or of any other person on any civil process. It also makes it unlawful to escape or attempt to escape from lawful custody when arrested or detained on such process, or to rescue or attempt to rescue any other person from such custody. This offence is triable summarily. Under the Tea (Control of Export) Ordinance[3] resistance or obstruction is punishable with a fine of one thousand rupees but no prosecution can be entered without the written sanction of the Attorney-General.

(II) Resistance and Escape.

There are three sections of the Penal Code governing this subject. Section 219 enacts: Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for an offence with which he is charged or for which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment for two years or fine or both.

Section 220 makes it an offence, punishable with varying terms of imprisonment or fine or both (according to the nature of the original offence), intentionally to offer any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or to rescue or attempt to rescue any other person from any custody in which that person is lawfully detained for an offence.

Section 220 A provides for similar offences of offering resistance or escaping or rescuing from lawful custody for which no provision is made in sections 219 and 220.

All the offences are summarily triable if the offence with which the person who escapes or is rescued, etc., is charged, is triable by a Police Court: otherwise, they are non-summary. Thus, a person who, when charged with and arrested for theft of property worth Rs. 100 or under, escapes from custody may be tried by a Police Court both for the original

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1. Herath *vs.* Rajapakse (1932) 10 Times L.R. 5; 1 C.L.W. 326.

2. Rasavasagaram *vs.* Siwandi (1906) 9 N.L.R. 88; it was held that a mere refusal to allow the proper officer to execute an order under this Ordinance amounted to obstruction within the meaning of this section, although no actual physical resistance was employed.

3. Section 36 (1 *c*) of Ordinance No. 11 of 1933

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offence of theft and for the subsequent one of escaping from custody. The word "offence" in these sections means a thing punishable under the Ceylon Penal Code or under any law other than the Code.[1] Section 220A does not say that the person concerned should have been charged with an offence: it could therefore only be necessary to prove that he was being lawfully apprehended or was detained in lawful custody—it being immaterial whether he was charged with an offence or not. This section therefore gives a wider scope to the original sections: it was enacted in 1909[2] as a result of Supreme Court decisions which ruled that it was only where an accused person had been either charged or convicted of an offence that he came within the purview of section 219;—a person, for instance, arrested on suspicion as having been concerned in a theft could have escaped without rendering himself liable to punishment under section 219.[3] Where an accused was charged with having intentionally offered resistance to the arrest of his wife by the Police Vidane on a warrant issued by a Village Tribunal and the evidence did not show that she had been charged with any offence, it was held that the accused could not be convicted.[4] And, where the Police arrested three persons on a complaint made to them of stabbing and two of them escaped from the Police custody, it was held that since it was of the essence of the section that the resistance should be in respect of an offence with which an accused person was charged or for which he had been convicted, the accused in the present case had committed no offence under section 219.[5] It follows that the accused should have been lawfully apprehended for an offence with which he is charged or of which he has been convicted: thus, a constable cannot lawfully apprehend persons engaged in an affray without a warrant and a resistance would in the circumstances be justifiable.[6] This view of the law has, however, recently been upset by a decision of Maartensz, A. J., who has over-ruled the previous decisions and agrees with the view taken in India that the word "charged" has been used in section 219 as implying imputation of the alleged offence as distinguished from the judicial charge formulated after the recording of evidence in Court. Holding, therefore, that it was not essential under the section that the person escaping from custody should be charged with an offence at the time of his arrest, the learned judge affirmed the conviction of an accused person who had escaped from the custody of a Police Officer who had arrested him for committing unlawful gaming in his presence.[7] Macdonell, C. J., has gone a step further and upheld the conviction of a toddy seller for escaping from custody where the evidence showed that the toddy seller was not even told what the offence was with which he was charged.[8]

Similarly, the custody from which the accused escapes must be a custody in which he is lawfully detained for any offence with which

1. Section 38 (b) C.P.C.
2. Ordinance No. 10 of 1909, section 4.
3. Nawana *vs.* Fernando (1908) 11. N.L.R. 276.
4. Wadduwa Police *vs.* Silva (1916) 2 C.W.R.57.
5. The King *vs.* Abubacker *et al* (1923) 1 Times L.R. 168.

See, however, the decision of the late C.J. in Obeyasekara *vs.* Perera (1920) 7 C.W.R. 140 where he says that the word "charge" in these sections does not mean a charge before a Magistrate, but that it is used in the same broad sense in which it is used in section 208. This decision would give a very wide meaning to the two sections.

6. Jayen *vs.* Alloe Sinno (1893) 2 S.C.R. 78.
7. Johoran *vs.* Sarnelis (1929) 31 N.L.R. 146. 7 Times L.R. 39.
8. Karunaratne *vs.* Siyatu (1931) 33. N.L.R. 299.

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he is charged or of which he has been convicted. A person when arrested on a warrant *ex facie defective* commits no offence if he escapes from custody thereafter,[1] *e.g.*, where a warrant under section 219 Civil Procedure Code is signed by the Secretary and not by the Judge.[2]

A person who escapes from lawful custody may be pursued and re-arrested even without a warrant. The offences under these sections are non-cognisable and non-compoundable. Section 220 A being a very wide enactment is generally made use of in all ordinary cases ; the only technical detail that one need prove is that the apprehension or the custody was lawful. Apprehension would be lawful in all cases where the person apprehending has the power to apprehend under the law. Detention by the officer concerned after such lawful apprehension would be detention in lawful custody.

When a person escapes from lawful custody where he is detained for failing to give security for good behaviour, he may be charged under section 221.

All convicted prisoners who escape or attempt to escape from the custody of a prison-house may also render themselves liable to punishment under these sections.

Any person who harbours or conceals a person or convict who has escaped as above, unless it is the wife or husband of such person, becomes liable to punishment under section 213. This section must be distinguished from section 209 which makes it an offence to harbour or conceal a person whom one knows or believes to be an offender, with the intention of screening him from legal punishment.

(III) Illegal Gratification.

The giving or offering of illegal gratification is punishable under section 211 and the accepting of or the attempt to obtain such gratification is punishable under section 210. The word "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money.[3] It includes a restoration of property for some illegal consideration. Gratification under these sections becomes illegal when the consideration is either to conceal an offence, or to screen any person from legal punishment for any offence, or to prevent the proceeding against any person for the purpose of bringing him to legal punishment. The sections penalise the offer or acceptance of gratifications made for the purpose of preventing the legal consequences of offences actually committed. So that where the accused offered gratification to a Police Officer and asked him to allow the tavern to be kept open for some time after hours and where there was no proof that the tavern was kept open after hours on any date up to the payment of money, it was held that no offence was committed.[4] And the actual commission of the offence in respect of which the bribe is offered must be proved before a person can be convicted.[5] But it is not necessary that the person in respect of whom the bribe is offered should be convicted : for the question whether the offeror of a gratification is punishable by law does not depend on whether he is or is not guilty. It is sufficient to show that the offender had reason to

1. Wijeyasekara *vs.* Semera Lebbe (1905) 8 N.L.R. 136.
2. Hetuhamy *vs.* Tikiri Banda (1928) 6 Times L.R. 7.
3. See Section 158 (Explanation) C.P.C.
4. Notley *vs.* Antonis (1921) 22 N.L.R. 335.
5. Mudiense *vs.* Nona (1914) 2 C.A.R. 8.

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believe facts which were relevant to the issue of the guilt, irrespective of an actual conviction or acquittal.[1] For, even in the case of acquittals after trial, it is open to the prosecution in the subsequent case to prove that he had actually committed the offence.[2]

The provisions of these two sections do not apply to those offences which may lawfully be compounded—nor till recently, to offences which are not punishable with imprisonment.[3] Thus, where the accused offered Rs. 5 to a Constable to screen his servant from legal punishment for driving a motor 'bus without proper lights, it was held that the accused could not be convicted as the original offence was not punishable with imprisonment.[4] This law is, however, obsolete, for section 8 of Ordinance No. 5 of 1924 empowers a Magistrate to sentence an offender to a fine in all these cases where the original offence is punishable with a fine alone.

Both these offences are summarily triable if the original offender is triable by a Police Court.

Taking an illegal gratification to help to recover stolen property is an indictable offence (section 212). The burden of proof is on the accused to show that he had used all means in his power to cause the offender to be apprehended and convicted,[5] for this fact could especially be within his knowledge only.[6] Where the accused steal and then demand a ransom for the restoration of stolen property, they come within the purview of this section, even though there may be no evidence to justify a conviction for theft.[7]

A public servant taking a gratification other than legal remuneration in respect of an official act is liable to punishment under section 158; and any person taking a gratification in order by corrupt or illegal means to influence a public servant or for the purpose of exercising personal influence with him becomes punishable under sections 159 and 160 respectively. The last two are indictable offences: section 158 is summarily triable. They are non-cognisable—and not compoundable.

Bribery in connection with elections is punishable summarily with a fine of five hundred rupees unless it is bribery by treating when the maximum fine is two hundred rupees.[8] Bribery is defined as the giving of a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right or the accepting either for himself or for any other person any such gratification. Treating is that form of bribery where the gratification consists in food, drink, entertainment or provision.

(IV) Personation.

Personation is only punishable when one impersonates a public servant. The accused must pretend to hold any particular office as a

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1. The Queen vs. Ramalingam (1886) 2 N.L.R. 48.
2. Suppiah vs. Kadirgamer (1905) 8 N.L.R. 114.
3. Don Peter vs. Alagamuttu (1917) 4 C.W.R. 223.
4. Badulla Police vs. Chelliah (1923) 11 Times L.R. 4.
5. The King vs. Kirineris (1916) 18 N.L.R. 474.
6. The King vs. Naidappu (1906) 1 A.C.R. 48.
7. Ranhami Dingiri vs. Banda (1906) 5 Tamb. 137.
8. Sections 169 A to F, C.P.C. Ordinance No. 5 of 1924.

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public servant knowing that he does not hold it and must purport to do any act under colour of such office in such assumed character.[1]

Wearing a garb or token used by a particular class of public servants, *e.g.*, a Constable's uniform, with the intention that it may be believed or with the knowledge that it is likely to be believed that he belongs to the class of public servants to whom he does not belong, is also a non-summary offence[2]; but wearing the dress of a soldier when one is not is an offence which a Police Magistrate has power to try summarily.[3] Personating a juror or an assessor[4] is non-summary. Personation at an election is punishable summarily with a fine of three hundred rupees.[5]

(V) Contempt.

Section 223 enacts: "Whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished with imprisonment for six months or a fine of Rs. 1,000, or both."

This section requires firstly, that there should be an insult or interruption, secondly, that such insult or interruption should be intentional, and thirdly, that it should be offered to any public servant sitting in any stage of a judicial proceeding. Thus, a Magistrate, whenever and wherever he is holding Court, is a public servant sitting in judicial proceeding; and any contempt offered to him by intentional insult or interruption could be dealt with under this section. The insult or interruption must have been intentional. The fact that the Court feels insulted is no reason for holding that it was intentional. Cases of "constructive" contempt cannot be dealt with summarily. The contempt must have been committed *in facie curiae*; otherwise, this section does not apply.

A person who makes a disturbance in Court and interrupts a Magistrate's proceedings commits contempt[6]; but every slight disturbance, *e.g.*, coughing or sneezing, which cannot be avoided, can hardly be treated as intentional interruption. Where a man was convicted for contempt arising from his spitting in Court while being examined in the witness-box, the Supreme Court set aside the conviction and observed that it was very unlikely that the accused meant any disrespect to the Court and his spitting was due to nervousness probably and that it was beneath the dignity of a Court to take notice of such trifles.[7] A Tamil trader entering a Court with a shawl over his shoulders and an umbrella under his arm does not thereby commit contempt.[8] As said by the Supreme Court in a very old case, "the observance of all such customary usages in respect of dress, although they may still be regarded and adhered to by the natives as a becoming and usual mark of respect towards superiors, should not be enforced by a Court of Justice by treating their omission as a contempt of Court and punishing any person failing to comply therewith by fine or imprisonment.[9]" "A Ceylon Court of Justice is a British Court of Justice and therefore when a person enters a Court here, clad

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1. Section 168, C.P.C.
2. Section 169, C.P.C.
3. Section 137, C.P.C.
4. Section 224 C.P.C.
5. Section 169 F, C.P.C. Ordinance No. 5 of 1924.
6. P.C. Jaffna (1919) 7 C.W.R. 21.
7. (1877) Ram. 310.
8. *In re* Appasamy (1859) 3 Lor. 171.
9. C.R. Matale 3784 (1854) Nele 234.

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in a manner agreeable to British ideas and conceptions of respectful attire, he commits no offence : it is only where the attire offends against such ideas and conceptions that a question can arise as to whether a contempt was intended."[1] But the customary mark of respect may be abused, *e.g.*, where a villager enters a witness box with slippers from a spirit of intentional bravado,[2] in which case he commits contempt. A witness who comes before the Court in a state of intoxication and gives evidence commits an act of contempt which, however, a Magistrate cannot deal with summarily but which he should report to the Supreme Court.[3] A witness who chews betel from the box commits contempt[4] ; but as ignorant villagers do this as an innocent habit, they should rather be directed to spit it out than fined.

A complainant who is absent on the day of trial and in consequence of whose absence the accused has been acquitted cannot be dealt with as for an interruption of the proceedings of the Court. "This section contemplates a case where any person causes interruption by a positive and intentional act and not by mere absence from the Court when his presence is required.[5]" But where a person, *e.g.*, a witness, attends Court and then temporarily leaves the Court and therefore cannot answer when his name is called commits contempt ; for, having attended, he has no right to depart without the leave of the Court.[6] Non-appearance on summons,[7] failure to get ready for trial,[8] neglect to support a criminal charge,[9] giving of false evidence,[10] a discrepancy between the several statements of a witness,[11] a refusal to answer questions in cross-examination till pressed by a Magistrate,[12] a tendency to give sharp replies in answer to sharp cross-examination,[13] a refusal to abate a nuisance as ordered by a Magistrate[14]—these and similar lapses can hardly be treated as cases of intentional insult or interruption committed in the presence of the Court. Nor can every interruption from a Proctor or Advocate be treated as contempt. As was said by the Bombay High Court : "Some latitude should be allowed to a member of the Bar, insisting, in the conduct of his case, upon his question being taken down or his objection noted. Where the Court thinks the question inadmissible or the objection untenable, there ought to be a spirit of give and take between the Bench and the Bar in such matters, and every little persistence on the part of a pleader should not be turned into an occasion for criminal trial, unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the Court."[15] A Proctor who, however, uses impertinent language in a petition of appeal commits contempt,[16] though not contempt *in facie curiae*.

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1. In *re* Vanny Aiyar (1915) 18 N.L.R. 180.
2. (1877) Ram. 276.
3. Silva *vs.* Carolis (1918) 20 N.L.R. 445.
4. Babappu *vs.* Lendira. Ram. (1863-8) 308.
5. P. C. Kandy 16,800 (1917) 4 C.W.R. 174.
6. The King *vs.* Nonis (1912) 2 Matara cases 84.
7. 1 Bel. and Vand. 152.
8. 4 Ram. 227.
9. (1870) Vand. 43.
10. Charles *vs.* Solomon Ram. (1872-5) 238.
11. 1 Bel. and Vand. 152.
12. Senanayake *vs.* Kirihamy (1916) 2 C.W.R. 65.
13. Sowinathalai *vs.* Chelladurai (1927) 5 Times L.R. 110.
14. Amarasekara *vs.* Gunawardena (1914) 1 Bal. Notes 52.
15. Duttatraya's case 6 Bombay Law Reports 541.
16. In *re* a Proctor (1914) 18 N.L.R. 51.

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Where a petition is sent by post, it may amount to contempt but is not contempt committed in the presence of the Court.[1] Similarly, a false report sent to Court to the effect, for instance, that a party or witness is ill is contempt, but not committed *in facie curiae*.[2] The deliberate and wilful publication in a newspaper of false and fabricated material concerning a trial held in Court, calculated to hold the Court or the Judge thereof up to odium and ridicule, amounts to an undue interference with the administration of, and an obstruction to, public justice and is hence a contempt of Court: and so is the publication of a charge attributing to the Judge conduct akin to bullying the jury.[3] And, commenting on the facts or evidence of a pending case by the Editor of a Newspaper,[4] and presenting petitions to the Court in connection with and discussing the merits of a case *sub judice*, are also contempts.

Having discussed the law, we can now study the procedure for contempt. This is conferred on the Police Court by section 59 of the Courts' Ordinance which empowers it " to take cognisance of and to punish by the procedure and with the penalties in that behalf by law provided, every offence of contempt of Court committed in the presence of the Court istelf." Thus, offences committed only in the presence of the Court can be tried summarily by a Magistrate, following the procedure laid down in chapter 34 of the Criminal Procedure Code. Under this chapter, a Police Magistrate can either summarily deal with the offender and sentence him to a maximum punishment of a fine of Rs. 25, and in default to a month's simple imprisonment, or may send him for trial before another Magistrate, or may take non-summary proceedings with a view to committal to a District Court. When the Magistrate exercises summary jurisdiction, he cannot deal with the accused unless the specific charge against him is distinctly stated and an opportunity given to him of answering it.[5] In every case, the Court must record, in the proceedings, the facts constituting the offence with the statement (if any) made by the offender as well as the finding and sentence and must forward a copy of the record to the Supreme Court who may exercise its powers of revision, if it thinks fit. The record must also show the nature and stage of the judicial proceeding in which the Court was sitting and the nature of the interruption or insult. The Magistrate has also the power of remitting the punishment on the submission by the accused to the order of the Court, or on his tendering an adequate apology.[6] If any person refuses to answer questions put to him or to produce documents demanded of him without reasonable excuse, a Magistrate may remand him as a civil prisoner for seven days unless in the meantime he purges his default. On his persisting in his refusal even after the seven days, the Court may deal with him as for contempt of Court. All the steps taken in this connection should be recorded and a copy forwarded to the Supreme Court. Where contempts are not committed in the presence of the Court, *e.g.*, where false excuses of, or certificates for, absence are sent to Court, the Magistrate should report the circumstances to the Supreme Court[7] through the Registrar. The Supreme Court will then issue a rule on the offender and deal with him on the merits.

1. The King *vs.* Chandradasa (1923) 1 Times L.R. 666.
2. The King *vs.* James Appu *et al* (1921) 23 N.L.R. 16.
3. In the matter of the rule on De Souza, Editor, " Ceylon Morning Leader " (1914) 18 N.L.R. 41
4. The Kallar Will Case (1905) 4 Tam. 183.
5. In *re* Pollard L.R. 2 P.C. 106.
6. Section 381 Cr. Pr. Code.
7. Section 51 of the Courts Ordinance No. 1 of 1889, Vol. IV, p. 373.

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CHAPTER XXVII.

ATTEMPT AND ABETMENT.

(I). Attempts.

Under the English law, every attempt to commit a felony or a misdemeanour is a misdemeanour at common law ; but with us, the distinction between felonies and misdemeanours does not exist ; so that all attempted offences are not necessarily punishable. Some attempts are specifically dealt with by the Code or by other enactments ; for the rest, a general provision is made in section 490 of the Penal Code which penalises attempts to commit offences punishable with imprisonment under the Code. So that an attempt to commit an offence not punishable under the Ceylon Penal Code is itself not an offence except when the particular enactment creating the offence makes such attempt punishable.[1] In other words, this section is limited to the Code only and is not applicable to other Ordinances. Where the accused, in attempting to remove paddy out of the district without a permit in breach of the Food Controller's order under the Defence of the Colony regulations, took a cart towards the boundary, but was seized before he reached the boundary, it was held that the attempt to remove the paddy was not an offence under the regulations.[2]

Section 490 runs thus : " Whoever attempts to commit an offence punishable by this Code with imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of either description provided for the offence for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or with both."

This section provides for offences which are punishable with imprisonment only : thus, offences punishable with death are excluded, for there is separate provision in the Code for attempting them. Nor can attempts to commit offences punishable with a fine only be punished under this section. Although almost every offence under the Code is punishable with imprisonment as well as fine, there are a few exceptions, *e.g* in the case of offences affecting the public health or safety.[3] Further, even in the case of offences punishable with imprisonment, this section cannot be availed of, if there is express provision made elsewhere in the Code.[4]

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1. Kachcheri Mudaliyar *vs.* Mohamado (1920) 21 N.L.R. 369.
2. Sub-Inspector of Police, Tangalle *vs.* Dionis Appuhamy (1919) 6 C.W.R. 379.
3. See Sections 271, 276 and 289, C.P.C.
4. Such express provision is made in the following sections :—
   - 114. Attempting to wage war.
   - 118. Attempting to bring the Queen into contempt by contumacious or insulting words.
   - 119. Attempting to wrongfully restrain or overawe the Governor or a member of the Executive and the Legislative Councils.
   - 120. Attempting to excite disaffection.

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In all other cases, an attempt to commit an offence may be dealt with under this section: thus, an attempt to commit theft would be punishable under sections 367 and 490.

Under the Code, the person who attempts to commit an offence must do some act towards the commission of the offence. It is immaterial whether he could have succeeded or not in the attempt. Thus, a person who thrusts his hand in another's pocket is said to attempt to steal, although the latter may have had nothing stealable in his pocket.[1] An attempt is an inchoate crime where the whole of the *actus reus* has not yet been consummated. It is the third stage in the series beginning with (i) intention, and (ii) preparation, and ending in (iii) attempt, and (iv) the consummated crime. Mere intention or the bare *mens rea* is nowhere punishable; nor is mere preparation, unless there is express provision to the contrary. The question whether an act is a preparation or an attempt to commit an offence is in the main a question of fact and must depend entirely upon the circumstances proved in each case. It is most difficult, if not impossible, to form any satisfactory and exhaustive definition which would lay down for all cases where preparation to commit an offence ends and when an attempt to commit that offence begins.[2] The offence of attempting an offence is complete where the act that has been proved to be done can be said to be an act which has been proved to be done towards the commission of the offence.[3] Thus, the giving of instructions to a Notary with the object of forging a deed of transfer is an attempt to commit the act of forgery. But the having a ball of rags with a piece of lighted charcoal in one's possession is insufficient

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121. Attempting to wage war against a friendly Power.
126. Attempt to rescue State Prisoners.
128. Attempting to seduce a soldier or sailor from his duty.
149. Attempting to obstruct Public Servants when suppressing riots.
158. Public Servant attempting to take a bribe.
159., 160. } Attempting to take a bribe to influence a Public Servant.
193. Attempting to use false evidence.
195. Attempting to use a false certificate.
197. Attempting to use a false declaration.
210. Attempting to take a bribe to screen offenders from punishment.
219., 220., 220.A, 221. } Attempted resistance, obstruction and escape from custody.
234., 235., 236., 244. } Attempt to deliver false coins.
300. Attempted murder.
301. Attempted culpable homicide.
302. Attempt to commit suicide.
374., 376., 377., 378. } Attempt to intimidate with a view to extortion.
381. Attempted robbery.
384. Attempted robbery with deadly weapons.

1. See illustrations a and b.
2. The King *vs.* Silva *et al* (1923) 24 N.L.R. 493.
3. Rex *vs.* Bastian *et al* (1902) 2 Bal. 93.

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to support a conviction for attempted arson,[1] for "it is not only necessary that the prisoner should have done an overt act towards the commission of the offence, but that the act itself should have been done in the attempt to commit it." It is not every act indicative of a desire to commit an offence which is an attempt to commit that offence.[2] The mere act of running to a well after threatening to commit suicide can barely be regarded as attempted suicide, for, although it was a preparation, there still may have been the *locus poenitentiae*.[3] "In order, therefore, to distinguish between an act of preparation before the attempt and an act done towards the commission of the offence in an attempt to commit it, the definition of the offence must be looked to. Some offences consist of a single act criminally intended, others of a series of such acts. The offence of cheating comes in the latter category. The offence begins with inducement by deception. The act of deceitful inducement forms part of the series of acts which would constitute the offence and an inducing by deceipt to the end that the offence of cheating may be committed is an attempt to 'cheat,' even though the person sought to be cheated is not in fact deceived or induced to do anything by the deception."[4] The accused who writes a letter to the Currency office enclosing the halves of two currency notes and stating that the other halves are lost and enquiring what steps should be taken for the recovery of their value is guilty of an attempt to cheat, even though the Currency office knowingly lays a trap and asks him to fill in the proper form after the other halves have been duly paid for.[5] But a person who carries a Police uniform under his arms can hardly be convicted for attempting to wear the garb of a public servant[6]; for his act is merely a preparation. The accused who asks a Vedarala for medicines to poison his son-in-law[7] or who brings out a sword in his hand,[8] cannot be said to have attempted to commit murder, for these are mere preparations. But a person may be convicted of an attempt to procure an abortion, even if it is shown that the woman is not really pregnant provided that the accused believes her to be in that condition.[9]

An act may be merely preparatory to the commission of one offence, though it may amount to another distinct but completed offence. Thus indecent assaults are often magnified into attempts at rape and even into rape itself: a conviction for attempted rape ought not to be arrived at unless the Court is satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance: so that where the accused desists before he is interrupted, he may be guilty of a criminal assault with attempt to outrage modesty, though not of an attempt at rape.[10] Or again, the act may not amount to an attempt, yet it may amount to an instigation to commit and thus to an abetment of an offence. Where the accused writes a letter to another asking the latter to commit sodomy with him, he commits abet-

1. Reg. *vs.* Doyal Bowri 3 Bengal Law Reports 55.
2. Mellowney *vs.* Kalu Appu 6 Tam. 24.
3. Emp. *vs.* Ramakka I.L.R. 8 Madras 5.
4. The King *vs.* Jeeris Appu (1918) 5 C.W.R. 271.
5. Bengal Government *vs.* Umesh Chander Mitter I.L.R. 16 (Calcutta) 310.
6. Emp. *vs.* Nga Po Kyaw (1904) 1 Upper Burma Reports P.C. 3.
7. Emp. *vs.* Bakhtawar (1882) Punjab Recorder 24.
8. Emp. *vs.* Data Ram (1882) Punjab Recorder 45.
9. Rex *vs.* Fernando (1925) 27 N.L.R. 181.
10. Emp. *vs.* Shankar I.L.R. 5 Bombay 403.

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ment, though his act hardly amounts to an attempt.[1] Hence, preparations have to be distinguished from acts which are done in the attempt to consummate the offence complained of. The difference is one of degree and there would be many cases on the border line ; but the only question to be decided is whether the act complained of was done towards the commission of the offence, that is, whether it was "conducive to its commission."

For all attempts, not otherwise provided for, the term of imprisonment can but be half the term provided for the principal offence, though the full amount of fine may be imposed. All attempts are cognisable or non-cognisable, bailable or non-bailable, and compoundable or non-compoundable according to the nature of the offences attempted. An attempt to commit a "crime" is itself a crime : so that an attempted theft by a habitual can only be tried on indictment.

(II). Abetment.[2]

In England, there are four kinds of *participes criminis* :

(i) Principals in the first degree, or the actual offenders ;

(ii) Principals in the second degree, or those who aid and abet the actual offenders at the very time the offence is committed ;

(iii) Accessories before the fact, or those who procure, advise, or command others to commit a felony, they themselves being absent from the scene of the offence ; and

(iv) Accessories after the fact, or those who, knowing that a felony has been committed, subsequently shelter, relieve, comfort, or assist the felon in order to hinder his apprehension, trial or punishment. These possible parties to a crime are only recognised in the case of felonies. In Ceylon, though this nomenclature is absent, we have practically the same classes of offenders, *viz.* culprits, abettors present, abettors absent, and harbourers.

A person is said to "aid and abet" an offence if he either instigates the offender to commit the offence, or if he engages in any conspiracy for the commission thereof, or if he intentionally aids therein by any act or illegal omission. Thus, abetment may arise in any one of three ways : (i) by instigation, (ii) by conspiracy, or (iii) by intentional assistance. Instigation may be direct or may arise even by wilful misrepresentation or wilful concealment of material facts. A conspiracy takes place when two or more persons agree to do a thing or cause or procure that thing to be done. A person intentionally aids another when he facilitates the commission of any act by the latter either directly or indirectly.

Every assistance rendered to a culprit does not necessarily connote abetment. The mere presence of a person at the time an offence is committed by his wife does not amount to abetment : there must be a participation of some sort in the crime.[3] Even "the supplying of necessary food to a person known to be engaged in a crime is not *per se* criminal ; but if the food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself

1. Emp. *vs.* Doyal Bowri 3 Bengal Law Reports 55.
2. Sections 100 to 113, C.P.C.
3. P.C. Jaffna (15091) 2 C.A.R. 43.

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while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of a crime and might facilitate it."[1] In order to convict a person of abetting the offence of instituting a false charge, the bare fact that he gave evidence in support of a false charge would be insufficient : it must be shown that prior to this evidence being given by him there was a conspiracy to give false evidence in support of the charge.[2] Where more than one person join in a conspiracy to do a thing and acts are done in pursuance of such a conspiracy, the conspirators would be guilty of abetment, even though the acts done are mere acts of preparation which have not yet reached the stage of an attempt.[3] So that, though the accused would not be guilty of attempt, they would still be guilty of abetment.

A person may be guilty of abetment, even though the person abetted is not proceeded against, or is acquitted. An accused may be guilty of abetting another in accepting an illegal gratification for not proceeding with an alleged offender, even though the charge against the latter may be found to be completely false.[4] A petition-drawer who writes a defamatory petition for hire, even though he is not aware of the falsity of the statements made in the petition, would, nevertheless, be guilty of abetment.[5] A witness who attests a document knowing that the signature of the maker of the document is a forgery is guilty of abetment of forgery.[6] A priest who knowingly officiates to solemnise a bigamous marriage is guilty of abetment.[7] An officer who orders a confession to be extracted abets his subordinates in murder if the latter cause death in coercing the deceased to confess.[8] A constable who stands by and does not prevent a person from being tortured by another is guilty of abetment on account of his wilful omission to perform his statutory duty.[9]

It is not necessary that the act abetted should be committed or the effect requisite to constitute the offence should be caused. A person who instigates another to commit a murder is guilty of abetment even though the latter refuses to kill—or even though he merely injures and does not kill. The conviction of the abettor is, therefore, in no way dependent upon the conviction of the principal. A prisoner who believes at the time of administering a drug that it is capable of causing abortion is guilty of abetment, even though the drug is harmless, or even though the woman is not big with child.[10] A man, however, who has counselled a crime does not become liable as accessory if instead of any form of the crime suggested an entirely different crime is committed.[11] An accused person who, however, is charged with abetting another in the commission of theft cannot be convicted as a principal offender of the offence of retaining stolen property, if the person abetted is himself acquitted of theft.[12]

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1. Emp. *vs.* Lingama Ramanna I.L.R. 2 Madras 137.
2. Dias *vs.* Dano (1916) 19 N.L.R. 52.
3. The King *vs.* Silva (1923) 24 N.L.R. 500.
4. Banda *vs.* Perera (1891) 1 S.C.R. 99.
5. Marshall *vs.* Sinno (1887) 8 S.C.C. 101.
6. Queen *vs.* Kapurala (1897) 2 N.L.R. 330 (Full Bench).
7. Emp. *vs.* Umi I.L.R. 5 Bombay 126.
8. Emp. *vs.* Durgeswar 7 Calcutta Weekly Recorder 97.
9. Emp. *vs.* Latif Khan I.L.R. 20 Bombay 394.
10. R. *vs.* Phillips 3 Campbell's Reports 73. Nair *vs.* Cassim (1925) 3 Times L.R. 7[illegible].
11. Saunder's case, Kenny's Select Cases 81.
12. King *vs.* Amith (1930) 31 N.L.R. 457.

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A person may abet an act which would normally be an offence, were it not for the incapacity of the offender. It is not necessary that the person abetted should be capable in law of committing an offence or that he should have the same guilty intention or knowledge as the abettor, or any guilty intention or knowledge at all. A person who abets a child or a lunatic to commit a crime would be guilty of abetment. Further, it is not necessary that the abettor should concert the offence with the person who commits it: it is sufficient if he, for instance, engages in a conspiracy in pursuance of which the offence is committed. Where a person concerts with another to murder the deceased and the accomplice engages a third person to do the deed, the original conspirators would be equally guilty of abetment.

The liability of the abettor is determined according as the act abetted is committed in consequence of the abetment or not. If the act is committed, the abettor is liable under section 102 C.P.C. to the same punishment as is provided for the offence unless there is express provision in the Code in that behalf. But if the person abetted does the act from a different intention, then the abettor is liable only to that punishment which is provided for the offence intended by him.

If the person abetted does a different act from the one intended, the abettor would be liable for the act done if it is a probable consequence of the abetment or is committed in pursuance of the abetment. He may be liable, however, both for the act committed and the act intended. He may also be liable for any probable and natural consequences of the act: thus, if he instigates another to cause grievous hurt and if this hurt results in death, he would be liable to be hanged as for murder. An abettor who is present at the scene of the offence is deemed in law to have committed the offence himself.[1] The abetment of an offence being an offence, the abetment of such an abetment is also an offence and punishable as such.

If the offence abetted is not committed in consequence of the abetment, then if that offence is punishable with death, the abettor is liable to imprisonment for seven years and also to a fine; and if the offence is punishable with imprisonment, he is liable to imprisonment for a term which may extend to one-fourth part of the longest term provided for the offence or with such fine as is provided for the offence or with both.[2] Where the complainant did not accept a bribe for concealing an offence but at once came to Court and charged the accused, it was held that the case fell under this section.[3] If the original offence is not one punishable with imprisonment, *e.g.*, driving a motor 'bus without lights, the accused cannot be convicted for abetting the offering of a bribe in consideration of screening an offender.[4]

The abetment of an offence to be committed by the public generally or by any number of persons exceeding ten is punishable with three years' imprisonment or with fine or both. And the concealing of designs to commit various offences either by public servants or by members of the public is punishable with various terms of imprisonment or with fine or both.

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1. The Crown *vs.* Sinnatamby (1901) 3 Br. 36.
2. Unless the abettor or the person abetted is a public servant, in which case the term of imprisonments is one-half of the longest term provided for the offence. See section 109, C.P.C.
3. Silva *vs.* Fernando (1912) 7 Weer. 27.
4. Badulla Police *vs.* Chelliah (1923) 2 Times Law Reports 4.

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An offence under this chapter includes not merely offences punishable under the Penal Code, but all offences punishable under other Ordinances as well. So that sections 102 or 109 of the Penal Code may be coupled with punitive sections of the various Ordinances. A person who, although aware of the fact that his servants are disturbing the repose of his neighbours by packing and coopering plumbago barrels for his benefit, does not forbid or prevent it, would be guilty of abetment of an offence under section 90 of the Police Ordinance.[1] The Manager of a Company who allows coaches to ply for hire without a license would be guilty of abetment.[2] An unlicensed sale of liquor by an agent is equally a sale by the owner.[3]

Section 184 of the Criminal Procedure Code allows a joint charge and trial of all the *participes criminis* in the same case.[4]

An abetment is cognisable, bailable, or compoundable according to the nature of the offence abetted, unless the act abetted has caused a different effect from that intended by the abettor, in which event it is not bailable nor compoundable. An abetment is triable by any Court by which the abetted offence is triable.

In 1924, a new section (113A) was added to our Penal Code[5] for providing against criminal conspiracies. A conspiracy takes place " when two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation." This definition is narrower than the English one where a mere agreement to effect any unlawful purpose suffices—and narrower than the Indian one where there should be an agreement to do or to cause to be done an illegal act, or a legal act by illegal means. With us, there should be an agreement to commit an offence—an offence being anything punishable in Ceylon under any enactment.

In India, if the agreement is to commit any illegal or other act which is not an " offence," there must be some overt act done in pursuance of the conspiracy. With us as in England, no overt act is necessary. But a bare intention on the part of each individual forming the conspiracy is no offence. The etymology of " conspiracy " is *con* : " together " and *spiro* : " I breathe." There must be a breathing together, in other words, an " agreement." " Agreement is an act in advancement of the intention which each person has conceived in his mind."[6] The offence is complete as soon as the parties have agreed as to their common purpose of committing or abetting an offence, even though they have done nothing towards achievement of their common object. Previous concert or deliberation is not necessary : it is sufficient if they act together with a common purpose. A husband and wife cannot conspire together. Any person in Ceylon can conspire with another outside the Colony to do an unlawful act ; but the act must be such as, if committed in Ceylon, would be punishable under one or other of the enactments.

Persons who are found guilty of conspiracy can be punished in the same manner as if they had abetted the offence for which they had conspired.

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1. Weerasuriya *vs.* Marianno Bass (1906) 10 N.L.R. 127.
2. Ellis *vs.* Stephens (1901) 5 N.L.R. 52.
3. Attorney-General *vs.* Miranda (1911) 14 N.L.R. 257.
4. The King *vs.* Careem *et al* (1920) 7 C.W.R. 300.
5. By Ordinance No. 5 of 1924. In India, the section was added so early as in 1913.
6. Mulcahy *vs.* The Queen L.R. 3 H. L. 328.

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CHAPTER XXVIII.

MEDICAL JURISPRUDENCE.

(I) Preliminary.

The subject of Medical Jurisprudence is so vast and requires such a deal of technical knowledge that an attempt to describe it in a few pages by a layman is bound to appear to be puerile, if not imprudent ; but the subject is so intimately connected with the law and practice of Police Courts that a book like the present one would be incomplete if it did not deal with its salient features.[1]

The foundation for Medical Jurisprudence in the criminal law of this Colony seems to depend upon the following two sections of the Procedure Code :

(1) "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."[2]

(2) In all inquests, "the Police Magistrate shall, if he considers it expedient, call upon the Government Medical Officer of the district or any other medical practitioner, to hold a post-mortem examination of the dead body and to report to such Police Magistrate regarding the cause of death. When a Police Magistrate or Inquirer inquiring into the cause of death considers it expedient to make an examination of the dead body of any person who has been actually buried in order to discover the cause of death, he may cause the body to be disinterred and examined."[3]

It follows that an injured person can only be examined in all cases of homicide, hurt, rape and unnatural offence; and an accused only in cases of rape and unnatural offence. In all other cases, the examination being not compulsory, a medical practitioner cannot examine without express consent on the part of the person examined, or in some cases without an order from a Police Magistrate. The rule about consent is so strict in India that under instructions from the Punjab Government, Police Officers are informed that "no examination by a Medical Officer of a living woman's person, whether she be a complainant or accused, can be made without her consent and a written order from a Magistrate addressed to a Medical Officer directing him to make such an examination."[4]

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1. For a fuller study, the reader may refer to treatises on the subject by Taylor or Dixon Mann. An excellent book called "Lyon's Medical Jurisprudence for India" is published by Waddell through Messrs. Thacker Spink & Co. of Calcutta and may be useful to Ceylon readers.

2. Section 149 (6).

3. Section 365.

4. Rules and Orders. Punjab, p. 390.

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"The law holds a woman's person to be inviolable : an examination made without consent constitutes an indecent assault. No authority can overrule this privilege : consequently, a medical practitioner who errs with regard to it cannot shield himself behind an order received from a Magistrate, Police authority, or other person."[1] Thus, in all cases of miscarriage or criminal abortion, a Doctor cannot examine the woman without her free and voluntary consent. And in all other cases where the subject is a male, the Doctor will be exceeding his powers if he were to proceed to examine without a Magistrate's order or without the subject's consent, even though the Police may have required him to examine and furnish a report ; thus, in burglaries, an examination of the accused, who may have received injuries in creeping through a breach made in the wall, without a Magistrate's order, is irregular ; and even in murders, a Medical Officer should not of his own accord proceed to examine the accused until directed to do so by the inquiring Magistrate.

(II) Hurt.

(1) In all cases of hurt, a Medical Officer must report the number and nature of injuries, their dimensions and situation, the weapons by which they appear to have been caused and whether they are simple or grievous ; in making this report, he should use the simplest language and avoid technical terms as far as possible.

The following species of injuries may be noted :

Contusions are injuries produced by blows, kicks, or pressure, where the skin is not divided. There is more or less extravasation of blood into the tissues under the skin and a dark, dull, reddish blue discoloration of the skin, lasting for about 5 or 6 days and depending upon the violence of the injury. A good example is a "black eye." *A bruise* is a simple contusion on the surface of the body. The weapon in all contusions is usually a blunt or rounded one, *e.g.*, a stick or a club.

A *contused wound* is one where there is a contusion but where the surface is divided and consequently blood flows out. This kind of wound can be caused by a blow with a blunt instrument like a club, or by a fall on the ground or any other hard object. This is a fairly common injury and is usually seen as a result of blows with clubs on the head.

A *lacerated wound* is produced by a "tearing of the tissues :" the edges are irregular, jagged and swollen.

An *abrasion* is a rubbing off or "grating" of the skin.

Contused or lacerated wounds are often caused otherwise than by a weapon, *e.g.*, by falls on some projecting sharp objects, or by broken glass, or by injuries from wild animals, or in machinery, railway and motoring accidents. In other words, such wounds are produced by objects that tear the tissues in place of cutting them. They may also be caused by biting or by finger-nails or in attempting to tear out ornaments.

Incised wounds are caused by the use of sharp-edged cutting or pointed weapons and show sharp, clean cut, uninverted edges on examination with a lens. The knife and the katty account, by far the most, for the incised wounds in Ceylon. Pieces of broken glass or crockery sometimes produce incised wounds ; but in such a case the margins of

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1. Dixon Mann. Forensic Medicine 1922 edition, p. 87.

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the wound may have, though not necessarily, a more or less contused appearance. The dimensions of the wounds and their situs also help in determining this question : thus, a linear incised wound on the chest is more likely to be caused by a weapon than by a fall on a broken bottle. A blow with a blunt weapon on a part of the body where the skin is not separated by soft tissues from the underlying bone may simulate an incised wound, if not examined carefully with a lens : thus, a hard sharp blow on the head or the cheek-bone may give rise to such an injury : but such wounds are generally vertical to the ridge of the bone, and there is no contusion in a cut injury.

Punctured wounds are made by piercing and therefore sharp-pointed instruments and have a greater depth than length : they may also be caused accidentally by projecting nails, thorns, fragments of china, and so forth. If the edges of the puncture are free from lacerations or contusions, the probabilities are in favour of a weapon. As human skin is elastic, a punctured wound may be of less diameter than the breadth of the weapon ; and it is therefore not easy to determine the depth of a stab-wound from the size of the suspected weapon.

Gunshot wounds resemble contused and lacerated wounds but are caused by a firearm. If the wound is single, it may have been caused by a firearm loaded with powder and wadding only (if it has been discharged near the body) : multiple wounds denote the use of a shot gun. Shots or pellets may be discovered inside the wounds ; and the depth at which they are found may help to determine the distance at which the firearm has been discharged. If a firearm is discharged at close range, signs of the skin being blackened and scorched and of the adjacent hair being singed may be noticed, unless smokeless powder has been used.

Burns are injuries produced by the application of flame or heated substances to the body ; while *scalds* result from the application of steam or hot liquid at or near its boiling point : these injuries differ in degree from those causing mere redness or vesication to those causing the death of the parts injured. The shape of the burn may help in determining its origin. Burns are also caused by the application of corrosive substances or by chloroform ; but these seldom extend deeper than the true skin, and there is no scorching of the hair in the neighbourhood of the burns. Injuries by burns are usually accidental but in rare cases may be inflicted by others.

(2) The question whether wounds are self-inflicted depends upon

(i) The appearance and position of the wounds. Incised wounds are self-inflicted if they are all slight and superficial : or being severe tail off at one end into superficial scratches ; and are in an accessible part of the body, *e.g.*, on the left side in the case of a right-handed individual. The fact that a wound is deeper than one-fourth of an inch is no proof against self-infliction ; for the depth may be sub-cutaneous and the flesh may not have been affected at all. Contrariwise, some self-inflicted wounds may be serious enough to cause the death of the person.[1] Deep incised wounds on inaccessible parts of the body, *e.g.*, on the back, can hardly be self-inflicted except in rare cases. They may, however, have been inflicted by a friendly hand.

(ii) The direction of the wounds : self-inflicted wounds have usually one direction : they end on the same side as the hand employed and

1. Cf. the wounds on Krishnan at the Attidiya Inquiry. P.C. Colombo (1925).

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begin from below if on the lower part, or from above if on the upper part of the body: (except in the throat when they may be transverse or take any direction). It would be necessary to notice whether the injured person is right or left-handed.

(iii) The number of wounds or injuries: several small incised wounds are sometimes self-inflicted; especially, if they are located all in one place, or are parallel to one another, or are in the fleshy parts of the body.

(iv) And lastly, the position and surroundings of the injured individual; in other words, the circumstances of the case. These can only be gauged by hearing the evidence of witnesses; they may describe the manner in which, or the instrument with which, the injury is supposed to have been inflicted: it may not be possible to inflict that injury in that manner or by that instrument at all. A stab-wound of the chest can hardly be caused by a man falling from a wall three feet high on an erect knife lying below. It may here be mentioned that artificial bruises comparable to blows by a cane can be caused after four days by the mere touching of a kind of weed (*Plumbago Zeylanica* or Lal Chitra) and artificial cane marks can be produced by applying tender drum-sticks, previously heated, to the skin.

(3) Hurt becomes "grievous" in the following cases: (1) emasculation, (2) permanent privation of the sight of either eye, (3) permanent privation of the hearing of either ear, (4) privation of any member or joint, (5) destruction or permanent impairing of the powers of any member or joint, (6) permanent disfiguration of the head or face, (7) fracture or dislocation of a bone or tooth, and (8) any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits. It is the Judge's duty to decide whether the hurt proved is grievous or not: a medical witness can only describe the nature and character of the injuries.[1] Thus, a medical witness may designate a shaky tooth as a grievous injury but the Magistrate must decide whether it is tantamount to a "dislocation" or not. Dislocation connotes displacement from its old position in the socket, and shaky teeth soon become firm by process of nature. Temporary deafness or loss of vision does not make an injury grievous: there must be permanent deprivation of the faculty of hearing or of sight. Where a doctor deposes that an injury might endanger life, it cannot be called grievous: there must be evidence that it did.[2] Sometimes, the healing of a simple wound is deliberately delayed or the patient knowingly lingers in a Hospital, so as to make his injury seem more serious: a doctor should be able to say not merely that a patient was over twenty days in the Hospital, but that because of the injury, he could not have followed his ordinary vocation. The day of discharge from the Hospital is counted as a day on which he could not have done so. Fracture includes even the chipping off of a tip of the bone. Permanent disfiguration of the head or face may be brought about in a variety of ways, *e.g.* by a permanent scar, or by tearing off of an ear-lobe, or by singeing of the hair, and so forth. The privation of any member or joint connotes its inability to perform its normal and natural functions and can be caused even by the cutting of a nerve or a tendon: any permanent decrease in the utility of a particular limb or joint would render the injury a grievous one. Emasculation means the

1. (1899) Koch 41.
2. R. *vs.* David Sinno (1894) 7 Tamb. 3.

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un-sexing of a man : the impotency caused must be permanent and not merely temporary or curable. Even if there is no permanent impotency an injury to the private parts may endanger a man's life : it is a form of an assault which is extremely liable to prove fatal.[1] For a further discussion of this subject, the reader is referred to the chapter on hurt.

(III) Rape and Unnatural Offences.

In all rapes, there must be penetration. Though the rupture of the hymen is by no means necessary in law, the Court will be reluctant to believe that there could have been penetration when that which is so very near the entrance has not been ruptured.[2] If there is no penetration, the offence is merely an attempt. An ejection of the seminal fluid is not necessary. Consent is inoperative if the girl is under twelve years of age ; and if she is over that age, she should have been ravished against her will. So that, rape by an adult, involving as it does a considerable amount of violence, is bound to cause local injury to the "parts" of the woman : there may be bruising and laceration or redness, inflammation, or sloughing of the parts, or bruises, scratches and marks of violence on other parts of the body, *e.g.* on the buttocks, or finger-nail impressions, or injuries on the mouth and throat due to gagging, etc. In adult females used to sexual intercourse, laceration or inflammation of the genitals is not likely to result, but there may be other injuries.

In England, it is an irrebuttable presumption of law that a boy under the age of fourteen is incapable of committing rape : in Ceylon, there is no such presumption ; but a boy under the age of twelve can only be held responsible for his crimes if he has attained sufficient maturity of understanding, and a boy under seven is incapable of committing any crime at all. Penetration necessary for rape can only be possible if the male organ of the accused is capable of erection ; in other words, if the man is potent.[3] So that a person proved to be impotent can only be convicted of an attempt : hence arises the necessity of examining both the accused and the subject of the rape.

The Medical Officer must submit all stained clothes, both of the accused and of the woman to the Court, to be forwarded to the Government Analyst for identification of blood or semen.

It may be mentioned that as impregnation is independent of volition on the part of the female, it is not necessary that rape which connotes absence of consent should not have been attended by pregnancy. Rupture or laceration of hymen is also not necessary for impregnation.

The medical examiner must take the woman's consent before examining her.

In unnatural offences penetration must be *per anum* ; a person who forces his private parts into the mouth does not commit this offence.[4] The penetration will be attended by inflammation and other injuries, with or without bleeding, from the parts affected.

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1. Emp. *vs.* Kaliyani I.L.R. 19 Madras 356.
2. R. *vs.* Jordan 9. Carrington and Payn 118.
3. Emp. *vs.* Gopala (1896) Bombay Unreported Cases 865.
4. Emp. *vs.* Govinda Rajulu (1886) 1 Weir 383.

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(IV) Deaths.

In all murders, a post-mortem examination is absolutely necessary; it should be held even when the injured person dies after staying for a number of days in the Hospital and where the cause of death is apparently well-known. In the case of inquests, a post-mortem should be held in those cases only where the Medical Officer has been specially directed thereto by an Inquirer or by a Magistrate. A Doctor has no right to order the disinterring of a body that has already been buried: so that he should arm himself with the necessary authority before he proceeds to exhume. In some cases, an Inquirer or a Magistrate may consider it unnecessary to cut open a body and may direct a merely superficial examination. In the case of Muslim women, Government desires that the aid of a Muslim Doctor, wherever practicable, should be obtained for the purpose of autopsy.

As the object of a post-mortem examination is to determine the cause of death, it should be made as thorough as possible. The following extracts[1] from the rules framed in this connection by the Bombay Government for the guidance of every Medical Officer may be of interest:

"In every case he should describe the condition in which he found the body, noting the degree of coldness, warmth, rigidity, and putrefaction and the amount and nature of the clothing and covering on it.

"Commencing at the skull and terminating at the feet, he should examine the bones to determine whether any of them are fractured or dislocated and inspect the vertebral column throughout; also the teeth, hair, orifices of the body, and general surface, and also note the state of the pupils, whether contracted or otherwise, and whether any substances are grasped in the hands.

"If there be any wound or contusion on the body, he should describe its position, length and breadth: he should note the depth and direction of all wounds, whether there are cuts in the clothes corresponding to them and examine the wounds carefully for the presence of foreign bodies, preserving such as are found. He should also state whether in his opinion the wound was mortal, giving his reasons for such opinion, and he should be specially careful to examine the neck for marks of compression. He should state his opinion as to whether the wounds, if any, could have been self-inflicted or whether they might have been the result of accident, giving his reasons for his opinion."

He should examine every organ and limb minutely and describe its state and condition fully. He should be able to say whether any of them appeared to be diseased, mal-formed, or abnormal; and whether any wounds on the outside of the body communicated with the contents of the chest or the abdominal cavity or any other vital parts of the internal viscera. He should be able to state the nature of the stomach-contents and, if he found any food, whether it was fully or partially digested. This is very important in determining the actual hour at which death took place. Many authorities like Foster, Carpenter, and others, are of opinion that it takes from 2½ to 5 hours for the stomach to become empty after an ordinary meal. By an ordinary meal, they mean an ordinary European meal, consisting of meat, vegetables, bread, etc. It is a proved medical fact that meat and other highly nitrogenous foods take longer to undergo gastric digestion than such starchy foods as wheat, rice, etc. And, indeed, Dr. Beaumont has found, after considerable

1. Bombay Government Gazette of 20th November, 1873.

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experiments, that rice can be digested in one hour : barley, milk and fish in two hours ; in any case, a Ceylon plate of curry and rice can be digested in under three or four hours at the most ; and this may help considerably in determining the hour of death.

Like the hour of death, a Doctor should be able to state the number of hours after death at which he is holding a post-mortem examination. The muscles of all dead bodies, after they are cold, become relaxed and remain so for about one to three hours. Then *rigor mortis* sets in. In this condition, the muscles become rigid and are non-contractile : in the tropics, this condition lasts for about twenty hours or less on an average, after which putrefaction sets in. The incipient stages of putrefaction begin when *rigor mortis* ends and commences by the decomposition of the nitrogenous elements of the tissues by bacteria, with colour changes and the evolution of foul-smelling gases. The greater the lapse of time, the more pronounced becomes the decomposition. Features may puff up : eyeballs and tongue may protrude : the tissues of the neck become greatly swollen : the abdomen becomes distended : blood-stained fluid, froth and air bubbles exude from the mouth : the weight of the lungs gradually increases, and so forth. The manner in which the body has remained after death will help or retard putrefaction. A body submerged in water may become saponified and thus retard decomposition, though a body floating in water with a part exposed to the air decomposes quickly ; a body suspended in the air may become dry and parched, desiccated, or shrivelled up ; but this condition is very uncommon.[1]

The chief signs of death are :—

(1) Complete and continuous cessation of circulation or heart beats ; but care should be taken to provide against suspended animation.

(2) Complete and continuous cessation of respiration : this was even recognized by Shakespeare who wrote in King Lear :

> " Lend me a looking glass : if that her breath will moist
> Or stain the stone : why then, she lives ! "

(3) Loss of sensibility of the pupil, of transparency of the cornea, of tension of the eyeball.

(4) Cooling of the body.

(5) Post-mortem staining of the skin or " suggilation."

(6) Presence of *rigor mortis* or putrefaction in any stage.

In some cases, especially in the case of newly-born infants, it would be necessary to determine whether the subject had breathed after birth. This question is a very technical one. Even though there may have been evidence of the infant having cried, there have been reported cases where infants have cried while their heads are still in the uterus or vagina. The surest test is the hydrostatic one : cut pieces of a lung that has not breathed sink in water : those that contain air after breathing float. The weight of newly-born children is variable and cannot be depended upon. The fact that a child has breathed after birth would alter the state of his lungs : (i) they change in appearance and feel : becoming mottled red or pink and gray, expanded and crepitate, (ii) they increase in weight owing to the increased amount of blood they contain, and (iii) their specific gravity is lowered, becoming distended with air and therefore lighter than water.

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1. The body of S. C. Senathirajah which remained suspended in the air for about twenty-four days had become almost mummified in the famous Iranamadu Murder Case of 1926.

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As death may have taken place in a number of ways, a medical officer should not rest content with merely a superficial examination of the body ; thus a ligature mark on the neck may denote a suspension of the body, but death may have yet been due to a cause other than hanging and the suspension of the body effected after death. Unless a medical officer is absolutely convinced of the cause of death and can adduce irrebuttable evidence in support of his opinion, he should not pronounce a definite view. Thus, a person strangled to death and then thrown in water will present all the features of asphyxia, but the Doctor should be able to say whether asphyxia was due to drowning or not. This he can do by noticing the presence of froth in the mouth and nostrils, or of goose skin, or of sand, mud, etc. under the nails, or of water in the stomach, lungs, or windpipe : the presence of fine sand in the stomach without any signs of water was held by Dr. Paul in a recent case[1] to be possibly due to the surgical instruments being not properly taken care of, during the holding of a post-mortem examination.

With the advent of decomposition, many of the external as well as the internal symptoms denoting a particular cause of death disappear : so that in all cases of doubt, a Doctor should not chain himself down to a definite opinion, but should rest himself content by recording that "the cause of the death cannot be determined due to advanced decomposition of the body." It is not a Doctor's duty to say that death is due to natural causes. He must state the exact medical cause of death, *e.g.*, haemorrhage, asphyxia, pneumonia, tetanus, and so forth. It is thereupon the function of the Inquirer to determine whether this cause would be a natural cause or wehther the death is homicidal, suicidal, or accidental. A Doctor may, however, state his opinion, if required, whether a particular cause of death is natural or otherwise.

It remains to be mentioned that no post-mortem should be held unless the body has been identified by two witnesses. Identification in all cases is absolutely indispensable : and the persons who have identified the body must be later called as witnesses in the case. If the body is unidentifiable, the Doctor must proceed to record the nature of all scars and other morphological peculiarities of the body including the state of teeth, the colour and length of hair, height, etc. If possible, a photograph of the body should be taken.

In all suspected cases, a medical officer may forward portions of the internal organs to the Government Analyst for a chemical or microscopic examination. This is especially necessary in all cases of poisoning. A specimen of the food or drug partaken of, or of the vomit or other matter emitted, should be forwarded at the same time.

(V) Age.

In some cases, a medical officer's opinion may be sought as to the age of a particular person. This is especially so in rapes or abductions and in cases against juveniles. It is rape to ravish a girl under 12 years of age whether she has consented or not ; on the other hand, it is no kidnapping to take or entice any girl over sixteen or a boy over fourteen years of age from the custody of their lawful guardians. In the absence of a proper certificate of birth or a genuine horoscope, the opinion of a medical man may go a great way, though it does not establish age to

1. Beatty's case, Kalutara Assizes, 1925.

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any degree of certainty. In the case of young people, however, a Doctor may be more precise than in the case of adults.

Age may be reckoned except in the case of "ricketty" or syphilitic children or in the case of "cretins" (*i.e.*, those with undeveloped thyroid glands), by means of—

(1) Teeth : the lower central incisors are the first to erupt and they begin from the sixth or the seventh month : then appear the rest of the temporary teeth of the milk dentition up to the age of two years and beyond. The first permanent molar appears at the age of six and the first canine between the tenth and the thirteenth year. Generally speaking, a child of nine should have 12 permanent teeth ; of ten or eleven, 24 : of thirteen or fourteen, 28. The wisdom teeth appear much later in life.

(2) Height and weight : these are variable and, therefore, afford no sure criterion of age : besides, girls are usually shorter and lighter than boys (except between the ages of ten to fifteen, when girls grow more rapidly).

(3) Hair on pubes and armpits : this growth begins at the age of about ten or eleven years.

(4) Deepening of the voice, especially in the case of boys after the age of fifteen, when they also begin to show traces of a moustache : the beard usually appears later.

(5) Breast development in girls : the average age of puberty for Ceylon may be taken as between 12 and 14 : breasts develop in proportion to advancing age.

(6) Ossification : this can only be tested by means of X-rays. It is a surer sign of determining age than the presence of hair ; for certain bones do not ossify till after a certain age : thus, the pissiform bone ossifies only after the child is twelve ; the knee-joint unites at the age of sixteen, and so on.

It may here be mentioned that the "quickening" of a child takes place as soon as the mother perceives the movements of the foetus. The embryo assumes a foetal form between the fourth and the fifth month of gestation. But it is difficult to say when a foetus becomes a child. "No specific limit can be assigned to the period when the chance of life begins ; but it may perhaps be safely assumed that under seven months, the great probability is that the child will not be born alive."[1] It is thus that the word "still-birth" is defined in the Registration Ordinance as a child born after the twenty-eighth week of gestation as dead or apparently dead and not called back to life.[2] The following remarks by Swift, J.[3] with regard to a full-time still-born child may be of interest in considering whether such a child can be regarded as a human being in forensic practice : "I am of opinion that there was no such 'child.' On the 1st January, 1924, the respondent was delivered of the form or body of a child. It never lived : it never breathed : it never had a separate existence : it never was a reasonable creature in being and under the King's peace : it never had any civil rights : it could never pass rights to others : it could not be the subject of an order under the bastardy acts ; and for all the purposes of the law, it was as though it had never been produced."

1. Per Erle, J. in R. *vs.* Berriman, 6 Cox 388.
2. Section 3 of Ordinance No. 1 of 1895. Vol. II, p. 262.
3. Holland *vs.* Holland (1925) The Law Times, Vol. 133, p. 319.

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In Ceylon, the causing of the death of a child in the mother's womb is no homicide, though it is an offence triable by the Supreme Court knowingly to prevent, before birth, any child from being born alive or to cause it to die after birth unless such act is done in good faith for the purpose of saving the mother's life.[1] And to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born, may amount even to culpable homicide.[2]

(VI) Lunacy.

So far as a Police Court is concerned, a medical officer may be called upon to certify whether a particular person accused of an offence is or is not capable of making his defence. If he finds him incapable, all further trial of the case automatically stops till such time as the lunatic regains sanity. A Doctor has not to determine whether the accused was a lunatic at the time of his offence or what was the degree of his lunacy : this may be a side-issue, but is not pertinent to the main inquiry. A Doctor has to direct his attention to the question whether the prisoner at the bar is or is not capable of defending himself, for the law requires that every person standing his trial should be able to understand the nature of the proceedings that are being taken against him. A Doctor should, therefore, proceed to keep the insane under his observation and note the various symptoms : these *inter alia* are insomnia, restlessness, excitement, depression, defect or incoherency of speech, boisterousness, impulsiveness, morose or gloomy appearance, tendency to do or speak irrational things, the state of digestion, the state of pulse, etc. The history of the patient may also be considered and he may be tested as to his mental capacity by various questions.[3] If the Doctor is of opinion that the patient is of unsound mind, he should certify him as being incapable of making his defence. The fact that a pleader has been retained on behalf of the insane accused does not make him the more capable of defending himself.

(VII) Miscellaneous.

Although the law allows a Magistrate to have the opinion of a competent medical officer in certain cases, there is no provision entitling a Magistrate to act upon a mere written report of a medical officer.[4] He must call and examine him as an ordinary witness unless, in summary cases, his report has been accepted by the other side and his evidence and cross-examination expressly dispensed with. If he is called as a witness, it is highly irregular to restrict his evidence to the production of a mere report regarding the injuries he has found on the person sent to him for examination ; there is no special provision, as in the case of a Government Analyst,[5] extending special privileges to the reports of a Doctor and for him to swear to the truth of certain statements contained in his report is therefore no evidence at all.[6] A medical witness, in a Police Court, is, like an ordinary witness, liable to penalties for contempt or perjury : but a mistaken opinion or the fact that a Magistrate

1. Section 306, C.P.C.
2. Section 293 C.P.C. Explanation 3.
3. " The Psychology of the Criminal " by Dr. Hamblin Smith. Messrs. Methuen & Co., 1922.
4. Silva *vs.* Challo Singho (1909) 2 Weer. 64.
5. Section 406, Cr.P.C.
6. The King *vs.* Sellammai (1931) 32 N.L.R. 351. 8 Times L.R. 143.

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fails to agree with the views propounded by him cannot be regarded as a case of deliberate perjury deserving of condemnation or punishment. Medical men, like all human beings, are not infallible, but their opinion, when backed up by scientific data and cogent proof, should help a great deal in deciding a case.

Medical officers are entitled to a fee of Rs. 21 (in India, of Rs. 16) plus travelling expenses and batta, for every post-mortem examination, unless the deceased has died after admission into a hospital, or unless a report is given after a superficial examination. In the latter event, they get Rs. 10·50. For examining a lunatic or for giving expert opinion after scientific examination (*e.g.*, for sampling milk), they get the same fee. In all other cases, where a report is submitted at the instance of a Magistrate or where the Police prosecute, they get Rs. 5.[1] In private plaints, they are expected to be "feed" by the parties concerned. When parties wish to compound a case (*e.g.*, of hurt) filed by the Police, the Doctor's fee of Rs. 5 should be deposited in Court before sanction of the Attorney-General is applied for.

The deposition of a medical witness, taken and attested by a Magistrate in the presence of the accused, may be given in evidence in any inquiry, trial, or other proceeding, although the deponent is not called as a witness.[2] Thus, a medical witness who has given evidence before a Magistrate in a non-summary inquiry need not be called when the case is committed for trial before a District Court; but a Magistrate may certify that in his opinion it would be necessary or expedient to call him or either party to the case may request the Magistrate to call him[3]: in which event, he must be called. The Advocate in so certifying need not give his reasons for the necessity.[4]

A medical officer may sometimes be called upon to examine specimens of milk, water and other substances, to report whether any article of food or drink is unfit for human consumption, or to examine and report on the nature of injuries on animals. In all such cases, his evidence may be treated as that of an "expert witness." He may, however, be questioned whether "he is specially skilled"[5] in these matters; and his opinion will carry weight in proportion to his experience and skill.

Although there is no special provision in that behalf, a medical witness will be excused from answering questions relating to matters disclosed to him "in professional confidence," though he can be compelled to answer them in case of necessity. Saving this, he is bound to answer all questions put to him in cross-examination or otherwise. Where an injured party is brought to a hospital, the Doctor in charge should proceed to record in writing any statement which he may wish to make. This statement is relevant in evidence and admissible.

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1. They get Rs. 5 for every case irrespective of the number of persons examined for that case. In murders, they may draw Rs. 21 for every post-mortem and another Rs. 5 for examining the person of the accused. Financial Regulations 936-8 and General Orders 1221 to 1224 require that all Medical vouchers should be certified by a Police Magistrate and that Medical Officers will be paid this fee only when they have been cited to give evidence in a case instituted by the Police. In cases of simple hurt (section 314) Medical officers get no fee even if the Police prosecute. Police officers, inquirers and others are entitled to send cases for special examinations under F.R. 936 but even then the vouchers must bear a certificate of a Magistrate that the examination and report were necessary (*vide* note to F.R. 936 and G.O .1221 (i)).

2. Section 406, Cr. Pr. Code as amen ded by Ordinance No. 19 of 1930.

3. Section 5 of the amending Ordinance No. 19 of 1930.

4. The King *vs.* Bandirala (1902) 6 N.L.R. 242.

5. Section 45 of the Evidence Ordinance.

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Every medical witness should be able to substantiate his opinion: in other words, to "quote authority" for his views, if need be. He should, however, be "open to correction," and should not tie himself down to vague hypotheses, biassed generalizations, or preconceived theories. If a counter theory is suggested by the other side, he should be able to say whether in the facts of the case, it is "possible," "probable," or "unlikely." In the case of injuries inflicted by weapons which are produced at the hearing, he should be able to say whether those injuries could, or could not, have been caused by the weapons produced. As the majority of hurt cases depend for a conviction in a large measure upon the opinion of a medical witness, he should realize the enormity of his responsibility before answering questions or giving evidence.

A Doctor should avoid the use of all technical or scientific words and of Latin phrases both in his reports and from the witness-box; for the persons with whom he has to deal are mostly "unscientific" men and know but "English as she is spoke." A medical witness who does not use simple Anglo-Saxon may have to remain longer in the box in trying to explain his meaning.

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CHAPTER XXIX.

MAINTENANCE.

(1) Preliminary

It is somewhat of an anomaly that maintenance cases are tried in a Police Court : it is not our province to discuss the merits and demerits of such a procedure. Suffice it to say that all maintenance cases must, as a rule, be instituted in a Police Court (except in Colombo, where they are instituted before the Commissioner of Requests who is gazetted as an Additional Police Magistrate for the purpose).

Though filed in a Criminal Court, maintenance cases are quite unlike ordinary criminal cases, the rules of criminal procedure being greatly relaxed and sometimes superseded. The foundation for the jurisdiction of a Police Court in matters of maintenance is a civil liability of the father already existing under the Roman-Dutch law, wherein the mother can on behalf of the child compel the performance of this duty by a civil action. Our Maintenance Ordinance[1] provides a simpler, speedier and less costly remedy.[2] The Ordinance is not one dealing with criminal matter, but provides an easier method of enforcing a civil obligation, resting on the father, of maintaining his child.[3] Maintenance cases are, therefore, sometimes regarded as quasi-civil, sometimes as quasi-criminal.

They have the following distinguishing features :—

(i) Only those sections of the Criminal Procedure Code which are expressly incorporated in the Ordinance are applicable to proceedings for maintenance ; thus, the use of the terms, " complainant," "accused," " discharge " and " acquittal " in maintenance proceedings is unwarranted by the Ordinance, and should be abandoned.[4] The corresponding terms used are " applicant," "respondent " or " defendant," and " application dismissed."

(ii) No " charge " is necessary, nor need the " plea " of the accused be recorded as in a criminal case. The first essential question to be put, instead, to a respondent is whether or not he admits the marriage or paternity, as the case may be, and whether he has any cause to show why an order of maintenance should not be made against him.

(iii) The failure to maintain a wife or children is not an " offence " under the law of Ceylon and no plea of *autrefois acquit* can be set up by a defendant who has successfully resisted proceedings once ; except where the subsequent application is made on the same facts and is for the same relief, in which event, the original order operates as *res judicata*.[5]

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1. No. 19 of 1889, Vol. II, p. 24.
2. Subaliya *vs.* Kannangara (1899) 4 N.L.R. 121.
3. Elina *vs.* Eraneris (1900) 4 N.L.R. 4.
4. Anna Perera *vs.* Emaliano Nonis (1908) 12 N.L.R. 263.
5. Benno Nona *vs.* Dineris Perera (1908) 11 N.L.R. 307.

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(iv) A Police Magistrate has no power to order a complainant[1] or her husband to pay Crown costs for bringing a false and frivolous charge[2]; though this does not exonerate the applicant from all responsibility of being prosecuted for fraudulently making a false claim under section 206, C.P.C.[3]

(v) Maintenance proceedings being of a semi-civil nature, the provisions of the Oaths' Ordinance apply and the matter could be settled by a decisory oath. In *Eliza* vs. *Jokino*,[4] Shaw, J., held that a person who challenged his opponent to take an oath could not withdraw from the undertaking if the opponent consented to take the oath, and, setting aside the order of maintenance, directed that the case be remitted to the lower Court for the purpose of administering the oath. But in *Sayalee* vs. *Setuwa*,[5] Jayawardena, A.J., sent a case back to be re-tried on evidence although the challenge to abide by the oath was accepted by the respondent and the oath was duly taken—on the footing that in a previous case,[6] it was decided that an illegitimate child was not bound by any compromise entered into between the parents. The principle in *Sayalee* vs. *Setuwa* only implies that a decisory oath may be allowed if the Magistrate is satisfied that it is in the interests of the children that such an oath should be taken.[7] Although the legal decisions with regard to this point are therefore in a state of uncertainty, it is fairly clear that a woman who claims maintenance for herself as a wife could, and ought to be, bound by the oath to which she were to challenge her husband.

(vi) A wife or a husband is a competent witness against each other

(vii) Statements to Police or Headmen or to persons in authority are not confessions and therefore not inadmissible in evidence, even though inculpatory.[8]

(viii) There was no time-limit to the right of appeal in an appeal under the Maintenance Ordinance,[9] and appeals till recently had to be preferred within a reasonable time. This time-limit is now fixed by a special Ordinance as the same in all Police Court cases (viz., ten days.)[10]

(ix) Although of a civil nature, a Magistrate has no powers to proceed to trial *ex parte* in a case of maintenance, even though notice may appear to have been served on the respondent who may fail to appear on the day appointed.[11]

(x) Maintenance cases being of a civil nature have to be decided according to the balance of evidence and not on the footing that innocence of the accused is to be presumed until the contrary is proved.[12]

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1. Chivakamipillai *vs.* Chupramaniam (1896) 2 N.L.R. 60.
2. Isabel *vs.* Pedru Pillai (1902) 6 N.L.R. 85.
3. The King *vs.* Catherittamby (1916) 2 C.W.R. 101.
4. 20 N.L.R., p. 157 (1917).
5. (1923) 25 N.L.R. 216.
6. Janehamy *vs.* Darlis Zoysa (1909) 12 N.L.R. 70.
7. Podihamy *vs.* Wickremasinghe (1924) 27 N.L.R. 93.
8. Bebi *vs.* Tidiyas Appu (1914) 18 N.L.R. 81.
9. Fernando *vs.* Fernando (1921) 23 N.L.R. 31 (Full Bench). Eighteen months was not held to be a reasonable time. See Ran Menika *vs.* Mudalihamy (1923) 25 N.L.R. 254.
10. See Ordinance No. 13 of 1925.
11. Elizabeth *vs.* Daniel (1920) 7 C.W.R. 224.
12. Eina *vs.* Eraneris (1900) 4 N.L.R. 4.

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(xi) A respondent in a maintenance case cannot be dealt with as a person of unsound mind and remanded to the Lunatic Asylum under the provisions of the Criminal Procednre Code.[1]

(xii) Even where a maintenance case is struck off because of the absence of the applicant on the day of trial, she has a right to return to Court and make a fresh application.[2]

(xiii) A Magistrate may order either party to pay all or any part of the costs of the other and in default of payment may sentence them to simple or rigorous imprisonment for one month. The order for costs in other respects is subject to the provisions of the Civil Procedure Code and the bill may be taxed according to the lowest rates specified therein.[3]

(xiv) These cases being of a civil nature, the appropriate test of jurisdiction is not section 3 of the Criminal Procedure Code but section 9 of the Civil Procedure Code.[4]

(xv) And they are governed by section 163 of the Civil Procedure Code so that evidence in rebuttal may be led in the circumstances narrated in that section.[5]

(II) Maintenance of Wife.

" If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the Police Magistrate may upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate not exceeding one hundred rupees[6] as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."

This section takes note of maintenance of three kinds :—

(i) For wife.

(ii) For legitimate children, and

(iii) For illegitimate children.

Maintenance for a wife can only be ordered if it is proved that she was legally married to her husband. Thus, in bigamous marriages the second wife is not entitled to maintenance. Marriage can be proved either by the production of the marriage register or of external evidence. Marriage, according to Hindu custom,[7] sometimes takes place by the tying of a " Thali," and this must be proved. Cohabitation gives rise in some cases to a presumption of marriage,[8] especially when it is attended with ceremonials peculiar to the customary law of Ceylon,[9] but the presumption arising from cohabitation with habit and repute is rebutted where either party is alive and denies actual marriage or avers and fails

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1. Esanda *vs.* Siyatu (1919) 6 C.W.R. 125.
2. Beebee *vs.* Mahomed (1921) 3 C.L.R. 85.
3. See section 9A newly enacted by Ordinance No. 13 of 1925 commencing from 27th October, 1925.
4. Jane Nona *vs.* Van Twest (1929) 6 Times L.R. 140.
5. Ajax Umma *vs.* Hamidu (1929) 7 Times L.R. 35.
6. In India also the amount is Rs. 100 See section 488 Indian Criminal Procedure Code. In Ceylon till 1925, the amount was but Rs. 50.
7. Sinnaval *vs.* Nagappu (1916) 6 Bal. Notes 26.
8. Dinohamy *et al vs.* Balhamy *et al* (1927) 29 N.L.R. 114.· 3 Times L.R. 186.
9. Same authority as above decided by Privy Council 5 Times L.R. 43.

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to prove it.[1] Where a person is guilty of bigamy, the question whether the first marriage was valid or not cannot be reserved till the prosecution after bigamy is decided but must be adjudicated upon in the maintenance case itself.[2]

No maintenance is payable to a wife if—

(i) she is living in adultery,

(ii) or if, without sufficient reason, she refuses to live with her husband, unless—

(*a*) the husband himself is living in adultery,

(*b*) or, has habitually treated his wife with cruelty,

(iii) or, if they are living separately by mutual consent,

(iv) or, if a husband has not sufficient means.

(i) There must be proof that the wife had not only lived but continues to live in adultery. The fact that the wife had at one time anterior to the application been living in adultery is insufficient to disentitle her to an order under the Maintenance Ordinance[3]—especially if she is ready and willing to live with her husband again.[4] To establish adultery, it is not necessary to prove the direct fact of adultery nor is it necessary to prove a fact of adultery in time and place.[5] The fact may be inferred from circumstances which lead to it by fair inference as a necessary conclusion. If it were otherwise, in the words of Sir William Scott, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. Under this section, an act of adultery even if proved is not sufficient apparently to disentitle the wife. What is contemplated is that she should be "living" in adultery.[6] It has been held that a husband can move to set aside an order of maintenance on the ground of adultery at the time of his application; it is not necessary that the acts of adultery should be continued up to the date of hearing of the application.[7]

(ii) Where the wife refuses to live with her husband, she is not entitled to maintenance; she may, however, show sufficient reasons why she refuses to do so; and the fact that the husband himself is living in adultery or that he habitually ill-treats his wife is regarded as sufficient reason. So that, where a husband offers to maintain his wife on condition that she should live with him, the Magistrate before making an order must satisfy himself that the wife's refusal to live with her husband is justified by "sufficient reasons."[8] If it is not, a wife is not entitled to claim maintenance.[9] The mere fact that the applicant's husband's parents are living in the house of her husband is not sufficient reason for her refusing to live with him.[10]

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1. Sellamma *vs.* Tillayampalam 2 C.A.R. 10.
2. Letchiman Pillai *vs.* Kandiah (1928) 30 N.L.R. 280.
3. Reginahamy *vs.* Johna (1914) 17 N.L.R. 376.
4. Sinno Nona *vs.* Melias Singho (1923) 2 Times L.R. 27.
5. The principle of Lopes, L.J. in Allen *vs.* Allen and Bell approved in Ebert *vs.* Ebert (1920) 22 N.L.R., p. 312.
6. Kirel *vs.* Naida (1910) 5 Weer. 28.
7. Allen Nona *vs.* Silva (1926), S.C. 156, P.C. Badulla 5773.
8. Anohamy *vs.* Anthony Annavirala (1908) 3 A.C.R. 19.
9. Menika *vs.* Mudiense (1906) 3 Bal. 253.
10. Rosa *vs.* Adonisa (1924) 6 C.L.R. 17.

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What we have said above with regard to the adultery of the wife applies with equal force to the adultery of the husband. But a Mohammedan wife who refuses to live with her husband on the ground that he is living with another wife is not entitled to claim maintenance, as he is not guilty of adultery by so doing.[1] A Mohammedan is entitled, under the provisions of the Muslim law which has been incorporated into the laws of this Colony in reference to persons of that community, to have more than one wife. It is not adultery on the part of a Mohammedan even to keep a concubine. So that the mere fact of a Mohammedan keeping an unmarried Mohammedan woman as his mistress is not good reason in law for his wife's refusing to live with him and claiming separate maintenance.[2] But a husband has no right to ask the wife to come and live in the concubine's house.

Adultery could be proved either by the evidence of neighbours, confessions, or circumstances. Where a Court has ordered that a wife is entitled to maintenance on the ground of adultery on the part of her husband, the latter cannot be allowed to revive the question of the wife's refusal to live with him. "The stain of adultery cannot be obliterated by reform nor can a wife be expected to overlook the fact in regulating her own life. Adultery strikes at the root of the marriage relation; and its consequences both legal and social continue," till the wife condones voluntarily.[3]

Continuous ill-treatment affords a reasonable ground for the refusal of a wife to live with her husband.[4] It should be a "habitual treatment with cruelty." Mere chastisement by husband on rare or deserving occasions is not enough. The ill-treatment should be continuous and cruel. Nor does incompatibility of temperament prove a valid reason, unless the husband considers it impossible for them to get on together.[5] Ill-treatment may not necessarily be beating "by a kick or a cane": it may take various forms, *e.g.*, refusal to give adequate food or clothing from day to day, or the husband getting habitually drunk, and so on. Each case depends on its merits and the Magistrate must be satisfied that the ill-treatment complained of justified a disruption of the family tie.

Where a husband undertakes to maintain his wife on condition that she should live with him, he is bound to find an abode fitted for his wife's status and occupation. If he does not, her refusal to stay with him will not debar her from claiming maintenance.[6] He must provide a place of residence for her.[7] The offer must be to maintain her with the dignity and consideration which befits a wife, *e.g.*, not in the house of a mistress.[8] The offer must be *bona fide,* made by a person who realizes the full responsibilities of a father or a husband.[9] It may be made with due regard to the husband's financial status.[10] Where the husband offered to maintain his wife if she lived with him at the house of his uncle who had seven or eight children himself, it was held that

1. Patunsana *vs.* Seeni Mohamado (1921) 23 N.L.R. 277.
2. Mammadu Natchi *vs.* Mammadu Kassim (1908) 11 N.L.R. 297.
3. Per De Sampayo, J. Ebert *vs.* Ebert (1925) 6 C.L.R. 117. 26 N.L.R. 438.
4. Ponnamah *vs.* Renganathan (1913) 1 C.A.R. 15.
5. Wickramaratna *vs.* Wijeyasinghe (1914) 2 Bal. Notes 39.
6. Diwarnehamy *vs.* Weerasinghe (1919) 1 Cur. L. R. 98.
7. Punchi Nonahamy *vs.* Perera Appuhamy (1905) Lem. 81.
8. Gimarahamy *vs.* Don Dines (1927) 5 Times L.R. 71.
9. Thangachchi *vs.* Mohamadu Lebbe (1930) 3 C.A.R. (Gratiaen's) 43.
10. Valiammai *vs.* Eliyatamby (1932) 1 C.L.W. 372.

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this was not a reasonable offer on the part of the husband, and the wife was entitled to refuse such an offer and yet sue for maintenance, in spite of her statement that she would not live with the husband even if he rented out a house.[1]

It is a common occurrence in Ceylon that the tranquillity of a household is often ruffled by the presence of the proverbial mother-in-law; and many applicants for maintenance, though they have no reasons to urge against their husbands, refuse to go and live with them on account of these "disturbing elements." In such cases a Magistrate could either try persuasion, a homily, or a warning; and, failing in either, could suggest to the husband the advisability of living with his wife in a separate house.

(iii) No wife is entitled to maintenance if she is living separately from her husband by mutual consent. There is nothing contrary to public policy in a husband and wife agreeing to live separately where they find that it is impossible for them to live together; but the wife thereafter cannot compel the respondent to pay her maintenance.[2] If, however, she undertakes to return to her husband and live with him as his wife, she may claim maintenance from her husband[3] on the latter's unwillingness to take her back. An original order of maintenance lies dormant during the period of resumption of marital relations and can be revived on fresh separation.[4] Separation by mutual consent extinguishes, for the time being, all rights of relief under the Maintenance Ordinance. But such separation must be one entered into under circumstances which would justify a judicial separation.[5]

(iv) A husband must have sufficient means. Evidently, therefore, a pauper cannot be made to pay; nor a cripple; nor a deaf or dumb person; nor a lunatic. But physical infirmity alone will not exonerate the husband from liability, if he has other means, *e.g.*, immovable property giving a fixed annual income. It is fancied that a pauper's responsibility will not cease on his merely refusing to work, if he is otherwise able-bodied and therefore has the "earning capacity."

A married woman, who is living apart from her husband through no fault of her own, is not debarred from claiming maintenance by the fact that she has a personal income sufficient for her maintenance.[6] This dictum was apparently not pressed before Macdonell, C.J., when he recently decided[7] that a married woman who is possessed of sufficient means for her support is not entitled to claim maintenance. The question is therefore still open. But, under the newly enacted Married Women's Property Act, a married woman who, having sufficient separate property, neglects or refuses to maintain her husband who, through illness or otherwise, is unable to maintain himself can be ordered by a Magistrate to pay maintenance to him out of her separate property in the same fashion as he can make order against the husband; and a woman with such separate property is liable for the maintenance of her children in the same way as a widow.[8] Where the husband of a married woman was

1. Arnolinahamy *vs.* James Appu (1913) 1 Wije. 19.
2. Micho Hamine *vs.* Gregoris Appu (1912) 15 N.L.R. 191.
3. Goonewardena *vs.* Abeywickrama (1914) 18 N.L.R. 19.
4. Kadiravel Wadivelu *vs.* Sandanem (1929) 30 N.L.R. 351.
5. Maliappa Chetty *vs.* Maliappa (1927) 29 N.L.R. 78.
6. Gunewardena *vs.* Abeywickrama (1914) 17 N.L.R. 450.
7. Silva *vs.* Seneratne (1931) 33 N.L.R. 90. 9 Times L.R. 10.
8. Sections 26 and 27 of Ordinance No. 18 of 1923, Vol. III, p. 1,040.

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unable to secure employment owing to a suspension of his certificate of conformity as an insolvent, Akbar, J., held that he was not entitled to apply for maintenance from his wife under this section. "Unlike the corresponding section in the Maintenance Ordinance relating to deserted wives, the applicant cannot succeed in such an application unless he proves that he is unable to maintain himself through illness or otherwise."[1] The meaning of the words "or otherwise" will depend upon the peculiar circumstances of each case but clearly will not apply where a husband through sheer laziness or determined rancour elects to "sponge upon" the wife's money.

All applications for maintenance for a wife should be made by the wife herself except in exceptional cases where her guardian could be substituted, *e.g.*, a brother on behalf of an insane sister.[2]

A wife may apply for maintenance in a Court in whose jurisdiction she lives in a deserted condition, although desertion may have taken place elsewhere.[3] Dalton, J., who propounded this dictum has subsequently laid down that maintenance cases being of a civil nature, the appropriate tests of jurisdiction provided in section 9 of the Civil Procedure Code have to be applied.[4]

(III) Legitimate Children.

A father, having sufficient means, must maintain his legitimate children unable to maintain themselves.

(i) A legitimate child is a child born in lawful wedlock.[5]

In this connection we must quote section 112 of the Evidence Ordinance :

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shewn that that man had no access to the mother at any time when such person could have been begotten, or that he was impotent."

This enactment has far-reaching consequences as regards the status of a legitimate child ; for not infrequently a woman after being deserted by her lawful husband lives a "butterfly-life" with many another ; and the question naturally arises, whether in such cases a child born to the mother is presumed to be born by the real husband or not. It has been held that evidence that a child was born thirty-one weeks after marriage was not sufficient to displace the presumption of legitimacy arising under the above section,[6] Dalton, J. quoting with approval the dictum from Luff's *Forensic Medicine*[7] that "it would be unjust to brand a child with illegitimacy or its mother with want of chastity, merely because a six months' child is born alive and viable." In *Sopi-*

1. Fernando *vs.* Fernando (1929) 31 N.L.R. 113.
2. Grigoris *vs.* Jacobis (1914) 1 C.A.R. 4.
3. Herft *vs.* Herft (1928) 29 N.L.R. 324.
4. Jane Nona *vs.* Van Twest (1929) 6 Times L.R. 140.
5. Pavistina *vs.* Aron (1897) 3 N.L.R. 13.
6. Amina Umma *vs.* Nuhu Lebbe (1926) 30 N.L.R. 220.
7. P. 233. See Taylori's *Medical Jurisprudence*, 7th Edition, p. 44 *et seq.*

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nona vs. *Marsiyan*,[1] it was decided that if a woman seeks to charge her husband with the maintenance of her children born during the continuance of their marriage, she should prove a valid marriage and the birth of her children during its continuance. To evade responsibility for such maintenance, the husband, if he admits the marriage, must prove that he is either impotent or that he had no possibility of access to his wife : the words " no access to the mother " in the above section meant impossibility of access.

As pointed out by Shaw, J., in the later case of *Rosalinahamy* vs. *Suvaris*,[2] " the Court there, following more some English decisions than the wording of our statue, appear to have held that it is necessary to show impossibility of access of the husband to the wife at the time the child may have been begotten. The wordings of the judgments are somewhat different, but Layard, C.J., goes so far as to express an opinion that it must be shewn to be 'physically impossible.' That case is, of course, binding on the Courts of this Colony until it is in any way changed by legislation or by the decision of the Privy Council. In several later cases, it has been pointed out by Judges that the case does not go really so far as the wording of it would seem to indicate. The case was considered in a later Full Court case of *Rabot* vs. *Silva*[3] and in that case Hutchinson, C.J., expressed his opinion of what the Court meant. He said : " I think that all that the Court meant in that case was that it must have been shown to have been impossible consistently with the facts proved. It must be proved affirmatively and not merely inferred as a probability that the man had no access." In *Ango vs. Podisingho*,[4] it was queried by Wood Renton, C.J., whether " no access " meant " absolute impossibility of access." In *Kalo Nona* vs. *Silva*,[5] the applicant, a married woman, claimed maintenance for her illegitimate child from the respondent with whom she alleged she lived in adultery. It was proved that during the last four years the applicant's husband never came to the applicant's house which was twenty or twenty-five miles from the place where the applicant lived. The Magistrate held that in all human probability the respondent was the father of the child, but he dismissed the application on the ground that it was not proved that access between applicant and the husband was impossible. Pereira, J., in upholding the appeal, allowed the application for maintenance on the footing that, consistently with the facts sworn to, access was impossible. " It is clear that under the English law the presumption of legitimacy may be rebutted not only by proof of non-access but by proof of such circumstances as may have the effect of raising a presumption that the child is not the issue of the said husband. I do not think that the expression non-access or rather 'no access' in our law should be given an artificial interpretation." Thus, where a respondent seduced the applicant who became pregnant to him and arranged a marriage for her with another man on discovering the pregnancy, and where she gave birth to a child within three months of this formal marriage, Shaw, J.,[6] acting on the strength of these decisions, held that the fact of the marriage was not conclusive proof that the husband, and not the respon-

1. (1903) 6 N.L.R. 379 (Full Bench).
2. (1921) 23 N.L.R. 169.
3. (1909) A. C. 276.
4. (1911) 15 N.L.R. 511.
5. (1912) 15 N.L.R. 508.
6. Rosalinahamy *vs.* Suwaris (1921) 23 N.L.R.p.169,Supra.

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dent, was the real father. "If as the evidence shows, he did not even know the girl at the time when this child was begotten, it is impossible that he can be the father of this child which was born three months after the marriage." A review of all the previous decisions on the subject will be found in the recent Full Bench decision in *Jane Nona* vs. *Leo*[1] where it is held that the paternity of a child may be disputed by evidence of non-access. Such evidence need not be limited to evidence of physical impossibility. Thus, where the husband and wife were living in separation by a deed for twelve years and where the wife was living in open adultery with the respondent, it was held that the husband could have had no access to her and that the presumption was amply rebutted.[2]

Where a married woman seeks to affiliate her child to a person other than her husband, the evidence of the wife[3] is inadmissible to prove the non-access of her husband even though she is a competent witness. Neither the husband nor the wife is a competent witness as to their having or not having had sexual intercourse with each other, when the legitimacy of the wife's child is in question.[4] But the complainant, a married woman, may give evidence as to the person by whom the child was begotten, provided non-access to her by her husband has first been proved by other evidence.[5] Evidence of the moral impossibility of access on the part of the spouses is not admissible.[6]

(ii) The child must be unable to maintain itself. This part of the provision was originally given a literal meaning by our Supreme Court. Thus, in *Sethu* vs. *Janis*,[7] it was held by Bonser, C.J., that where a child needed no maintenance other than the sustenance afforded by the mother, no order should be made against the father. This decision apparently imagined a society in the state of nature and ignored the necessity of clothing the child. Happily, the decision was reversed; and in *Luciya* vs. *Ukku Kira*,[8] it was decided that the father of a child was bound to pay for its maintenance, even where such child was being nursed by the mother and required no food other than that which it derived from her.

But the case would be different if a child were to have means of his own. In that event, the father is not bound to provide for its maintenance. Nor is he bound to do so when the child is "able to stand on its own legs." The duty of a parent to provide maintenance ceases when the children are earning their own livelihood and are capable of maintaining themselves, and when the children are possessed of property of their own from which they may maintain themselves, in which latter case, the parents may claim a reasonable proportion of such income for their maintence.[9] It is a rule both of the Roman-Dutch and of the English law that where minor children are possessed of property upon the income derived from which they may maintain themselves, the parents generally, and a *fortiori* the mother, may claim a reasonable proportion of such income for their maintenance.[10]

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1. (1923) 25 N.L.R. 241.
2. Karunawathi *vs.* Gunewardena (1923) 2 Times L.R. 70.
3. Lucihamy *vs.* Fonseka (1890) 9 S.C.C. 96.
4. Sopinona *vs.* Marsiyan (1903) 6 N.L.R. 379 Supra.
5. Babatcho *vs.* Daniel (1890) 1 S.C.R. 25.
6. Perera *vs.* Podisingho (1901) 5 N.L.R. 243.
7. (1896) 2 N.L.R. 103.
8. 10 N.L.R. 225 (1907).
9. In *re* the Estate of Illangakoon (1911) 15 N.L.R. 104.
10. De Silva *vs.* Wijeyanayake (1912) 2 Matara Cases 118.

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(iii) We have seen above that a wife refusing to live with her husband without sufficient cause is not entitled to claim maintenance for herself. But the husband is, nevertheless, bound to maintain his legitimate children; and if they are in the lawful custody of the wife,[1] she would be entitled to an allowance for their maintenance.[2] Usually, the custody of the children remains with the mother. Sometimes, a father comes and asks for their custody. A Magistrate can only refer him to the Supreme Court for a writ of *Habeas Corpus*, ordering at the same time maintenance for the children till such time as an order is made by the Supreme Court under this writ. A Magistrate cannot assume the functions of the Supreme Court by ordering that the children be given over to the father, even where the mother is living in adultery. Such an order is an illegal order; but once it is made, the mother must again apply to the Supreme Court for a writ of *Habeas Corpus* against the father.[3] When the custody of the children is with some one else other than the father, the Magistrate may order that the maintenance should be paid by the father to the person in whose custody they are, and who is therefore more fitted to take care of them.[4]

Even under the Thesawalamai which speaks of a suitable guardian when the father remarries, the Magistrate will have first to decide whether the real father is a person unfit to retain custody: if that is proved, then the Magistrate may order him to pay maintenance to the suitable guardian who takes care of his children.[5]

Where a Muslim child was in the custody of her maternal aunt from her infancy till the ninth year, the Supreme Court refused to restore her to the father's custody, on the ground that such a change was detrimental to the child's welfare.[6] There is no inflexible rule in Muslim law as to whom the custody of minor children may be entrusted: so that a mother, even if entrusted with the custody of her children by a Court can be deprived of that custody if her moral conduct is such that it will have a bad influence on her children.[7] But the mother and maternal relatives of a Muslim child are entitled to custody in preference to the father.[8]

(iv) Cases occur where a mother prefers to "compound" her claims for maintenance against her husband for a lump sum. The Supreme Court has intervened and denounced this procedure. In *Nagamuttu* vs. *Kandan*,[9] that Court held that the obligation on the part of the husband to maintain his wife and children is a continuing one, and he cannot relieve himself of the liability by entering into an unconscionable bargain with the mother by paying her, say Rs. 50, as maintenance on account of both mother and child during their lifetime. The case would be different if the husband invested some money for his wife and allowed

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1. Perera *vs.* Perera (1903) 7 N.L.R. 166.
2. Menika *vs.* Mudianse (1906) 3 Bal. 253.
3. Josline Nona *vs.* Silva (1924) 26 N.L.R. 288.
4. Eina *vs.* Eranerls (1900) 4 N.L.R. 4 Supra.
5. Thevanaipillai *vs.* Ponniah (1914) 17 N.L.R. 437.

Provided that there is not sufficient property (inherited by the child through its deceased mother) from which it can maintain itself.

6. Mohamadu Cassim *vs.* Casie Lebbe 29 N.L.R. 136. 5 Times L.R. 24.
7. Fernando *vs.* Fernando (1932) 1 C.L.W. 405.
8. Junaid *vs.* Mohideen and others (1932) 2 C.L.W. 83.
9. (1908) 1 Weer 48.

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her to take the interest for her maintenance.[1] In an earlier case,[2] under the old Ordinance, it was held that an agreement entered into between a husband and a wife that the wife shall relieve him of the burden of maintaining her and their children was invalid. The same principle has been enunciated by the Supreme Court ever since.[3] It follows, therefore, that a wife cannot compound with her husband. So long as the wife does not return to Court or is "incited" to appeal, the scheme might work smoothly; otherwise, the respondent will only get credit for as many months as the lump sum would last at a fixed monthly rate.

The principle underlying the Supreme Court decisions though sometimes not appreciated has to be judged from the standards of equity; a person cannot certainly bind her children by her acts which may not be acceptable to them and which are perhaps injurious to their interests. Possibly, a wife claiming maintenance from the husband for herself alone could give up her claims by compounding and she would have little or less sympathy from the Courts, were she to make a fresh application; but the composition, if she has children, would be far from beneficial to the minors and would therefore be condemned as illegal and of no effect.

(v) No order for maintenance of any child is of any force or validity after the child has attained the age of sixteen[4] years or after the death of such child: provided that the Magistrate may in the order or subsequently direct that the payments shall continue until the child has attained the age of eighteen years.[5]

Ordinarily, therefore, maintenance is payable till the child is sixteen years old. The Ordinance does not say till the child attains majority. Sixteen years is supposed by law to be the age after which the child will require no maintenance. "In proportion as a child's age increases, the probability increases that it supports itself or that it could do so, if proper means were taken to obtain employment. And if a child, whether girl or boy, works indoors or outdoors for its mother at home and renders services commensurate with the cost of its keep, it should be considered that the child earned its keep and was self-supporting. In determining the question as to the ability of a child to support itself, regard must be paid to age, sex, health, strength, locality, etc."[6] Hence, all maintenance for a child ceases at the age of sixteen—

(*a*) unless the child dies earlier, or

(*b*) unless the order is made for a shorter duration, in which case it will cease at the expiration of that period, if not renewed; and the renewal must be made on a fresh application supported by fresh evidence that the child still needs to be maintained and that the defendant is able to maintain it,[7] or

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1. Even then the liability to maintain may remain. See Punchi Nona *vs.* William Appuhamy (1917) 4 C.W.R. 422.

2. Madummahami *vs.* Kalu Appu (1880) 3 S.C.C. 132.

3. Punchihamy *vs.* Agoris Appu (1924) 2 Times L.R. 133.
And Heenihamy *vs.* Gunawardena (1921) 3 C.L.R. 161.

4. Till recently the age-limit was fourteen years; but the amending Ordinance of 1925 has extended it to sixteen.

5. Section 8 of Ordinance No. 10 of 1889 as amended by No. 13 of 1925.

6. (1872) Gren. P.C. 5.

7. Fernando *vs.* Fernando (1900) 1 Br. 342.

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(*c*) unless the Supreme Court has directed that the custody be given over to the father whose liability to pay "maintenance-money" ceases from that day, though not his liability to maintain, or

(*d*) unless the Court orders that it should be paid till the child attains the age of eighteen years. In *Este* vs. *Silva*[1] which appears to be the only case decided by the Supreme Court on this subject, Withers, J., held that if a Magistrate thought that a child should be maintained until it attained the age of eighteen years, such time must be specified in the order : if an order was silent as to the time, it had no force after the subject of the order had attained the age of fourteen years ; and a subsequent order extending the allowance for the maintenance until the child attained the age of eighteen years was *ultra vires*.

This decision was certainly in keeping with the original language of the enactment ; but the legislature has intervened and added the words "or subsequently" in this section[2] : so that an extension of time can now be granted in any subsequent application made at any time before the child has become sixteen years old ; for such an order, if at all, can only be made at a later date, after an enquiry into the question whether the child requires additional maintenance for a longer period than the specified legal term.

In any event, no order for maintenance can be enforced after the child has attained the age of eighteen years.

(vi) What we have said above with regard to a husband's capacity to earn for paying maintenance to his wife applies *mutatis mutandis* to the father in respect of his children ; for, no father who has not sufficient means is expected in law to maintain them.

(IV) Illegitimate Children.

(i) Not only has a father the duty of supporting his legitimate children, but he must maintain his illegitimate ones as well. By illegitimate children are meant children begotten by spouses when there is no valid marriage subsisting between them. The commonest kind of a maintenance case in Ceylon is a case of this nature. As some form of legal marriage is not often resorted to by parents, and as fathers may find "fresh fields and pastures new," mothers would, *in rerum naturâ*, stand by their offsprings and seek redress in a Court of Law. When putative fathers deny paternity, the applicant will have to prove[3]—

(*a*) That the respondent is the father of the child.

(*b*) That the child is of tender years and unable to maintain itself.

(*c*) That the respondent is refusing or neglecting to maintain it.

(*d*) That he has sufficient means to enable him to do so.

(*e*) And that application is made within twelve months of the birth of the child, or that, within the twelve months preceding the date of the application, the respondent had in fact maintained the child. If any or all of these ingredients are absent, the application must fail.

(ii) The first and foremost fact to be proved is that the respondent is the father of the child ; and this is one of the most difficult things to prove. For, proof of paternity or of conception is not very easy to

1. (1895) 1 N.L.R. 22.
2. Ordinance No. 13 of 1925, section 3.
3. Lucia *vs.* Baba (1907) 2 C.A.R. 14.

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obtain. Intimacy begins but frequently in some secret corner of a village hut where "two is company, three is crowd"; and the difficulty of finding evidence later, when it is most needed, is proportionate to the difficulty of keeping the preliminary dalliances as secret as possible.

The matter becomes all the more complicated because the Maintenance Ordinance plainly enacts that no order should be made "unless the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the Police Magistrate." The object of the legislature in requiring corroboration of the story of the mother as to paternity is to see that her story is supported on some point material to her case, by evidence other than her own, which tends to raise the probability not merely that she has borne an illegitimate child, but that the respondent is the father of that child.[1] In other words, the corroboration required is *mutatis mutandis* of the same kind which is required by law for the evidence of accomplices. It should consist of some evidence, oral or written, entirely independent of that of the applicant, which renders it probable that her story as to the paternity of the child, in respect of whom she claims maintenance, is true.[2] The corroboration is to be looked for in the entire body of the evidence led and the applicant may rely on any points favourable to her in the evidence of, or adduced on behalf of, the putative father.[3]

What form this corroboration should take depends upon the circumstances of each case. It is necessary to show that the defendant and no other is the father of the child[4]—"it is necessary not merely by the Ordinance, but for the safeguarding of society"; for else, every woman will have the liberty of accusing innocent and independent persons of criminal intimacy with her. Hence, the law requires that the mother's evidence should be corroborated, *i.e.*, substantiated by other evidence to the satisfaction of the Magistrate. This other evidence must be rationally consonant with the facts of the case. It must be evidence that tends to prove that the respondent is the father of the child, evidence implicating the man, and making it more probable than not that the respondent to the summons is the father.[5] Where an applicant alleged that the respondent lived with her for eight years in her parents' house and called two villagers to depose to the fact of having seen the respondent living in that house, but failed to call her parents or other inmates of the house, it was held that the applicant's allegation that the respondent was the father of her children was not sufficiently corroborated.[6] But evidence which shows, by a process of elimination, that the defendant had exclusive opportunities of intercourse with the mother of an illegitimate child would be sufficient corroboration.[7]

Formerly on the strength of *Angohamy vs. Kirinelis Appu*,[8] previous statements as to paternity made by the mother of an illegitimate child to third persons and proved by such persons were held to constitute sufficient corroboration,[9] though Shaw, J. added, "I think there should

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1. Podihamy *vs.* Rajappu (1911) 5 Weer. 93.
2. Angohamy *vs.* Babasingho (1910) 4 Weer. 60.
3. Mangohamy *vs.* Abraham (1909) 1 Cur. L.R. 153.
4. Sinchohamy *vs.* Gunarathamy (1901) 5 N.L.R. 123.
5. Per E. W. Jayawardena in Valiammai *vs.* Arasaratnam (1928) 5 Times L.R. 156.
6. Ukku *vs.* Menika (1909) 1 Cur. L.R. 99.
7. Tikiri Menika *vs.* Dingiri (1930) 3 C.A.R. (Gratiaen's). 98
8. (1911) 15 N.L.R. 232.
9. Avale Umma *vs.* Adam Levvaipodi (1915) 1 C.W.R. 109.

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be some very strong circumstances connected with these statements before such statements should satisfy the Magistrate sufficiently in corroboration of the applicant's story."[1] Where it appeared that shortly after the birth of the child, the mother went to the Police Vidane to have its birth registered and stated to him that the respondent was the father of the child but was unwilling to sign the Register, and where another witness deposed to having seen the respondent living in the applicant's house, these facts were held to be sufficient corroboration of the evidence of the mother as regards paternity of the child.[2] But it was soon discovered that this was very slender corroboration indeed. In *Porlentina vs. Perera,*[3] a statement made by the applicant to her mother and reported by the latter to the Police Vidane who substantiated it, was held by itself not " sufficient corroboration " under the Ordinance. And in *Ponnammah vs. Seenitamby*[4] Shaw, J., " having had serious doubts " as to the sufficiency of statements to third parties for the purpose of corroboration referred the case to the Full Bench who decided that such statements when made months after conception were not " sufficient corroboration." Bertram, C.J., in the course of his judgment, wrote :—" In this case the learned Magistrate accepts as corroboration, statements made by the mother of the child to her mother and subsequently to a Police Vidane and a rural constable some months after the child was conceived. The learned Magistrate has followed a previous decision of this Court, namely, a judgment of Wood Renton, J., in *Angohamy vs. Kirinelis Appu.*[5] In that case, Wood Renton, J., first considered the bearing of section 157 of the Evidence Ordinance upon the section of the Maintenance Ordinance. He expressed the opinion that when the section speaks of corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognised by law at the time that her evidence is given. In other words, the learned Judge held that section 157 of the Evidence Ordinance applied to section 7 of the Maintenance Ordinance and that, I take it, must be accepted as the law.

" We have to ask ourselves, therefore, looking at section 157 of the Evidence Ordinance, whether the statements accepted as corroboration were made at or about the time when the fact spoken to by the principal witness took place. That fact seems to me to be the sexual intimacy between the appellant and the respondent. I would not narrow it to the actual act of connection which produced the conception. But if a statement is made at or about the time when sexual intimacy is continuing between the parties, then it seems to me that under section 157 of the Evidence Ordinance a statement by the woman to another person alleging that intimacy is corroboration within the meaning of the section. There is indeed a case precisely in point, namely, the case referred to in the judgment of my brother De Sampayo, J., in *Avalo Umma vs. Adam Levvaipodi.*[6] There, a complaint was made at the time when the intimacy was actually going on. But that case did not go the same length as the previous case, *Angohamy vs. Kirinelis Appu*[7] to which I had referred. In that case, the evidence showed that within

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1. Gimara *vs.* Bastian (1915) 1 C.W.R. 208.
2. Paruvathy *vs.* Chellapah (1916) 3 C.W.R. 87.
3. (1917) 5 C.W.R. 30.
4. (1921) 22 N.L.R. 395.
5. (1911) 15 N.L.R. 232.
6. (1915) 1 C.W.R. 169 Supra.
7. (1911) 15 N.L.R. 232 Supra.

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a few months of the conception and when her condition was discovered, the woman made a statement to her parents. Wood Renton, J., observes that the words 'at or about' were relative terms. Of course, in any case, it must be a question of fact whether one event is at or about the time of another. Personally, I feel a difficulty in following this pronouncement that a statement made by a person within a few months after conception is made 'at or about the time' of the material fact under consideration, namely, the alleged sexual intimacy between the parties, unless of course if it were shown that the sexual intimacy continued after conception and down to about the time of the complaint.

"In the present case, I am not able to agree with the Magistrate that the statement made by the girl to her mother and afterwards the the local Headman can be considered as being made at or about the time of the intimacy."

In this connection it is best to quote section 157 of the Evidence Ordinance: "In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, relating to the same fact, at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved."

Where it was sought to corroborate the evidence of an applicant by an alleged statement made by her to the Inspector of Police who was inquiring into a charge against her of attempting to cause abortion, it was held that inasmuch as it was not material in such inquiry to ascertain whether the respondent was the father of the child, such statement was not admissible under section 157 and did not, therefore, afford sufficient corroboration.[1] A petition presented to the Magistrate by the applicant when she was seven months with child and after the respondent had repudiated his alleged obligation was held not to be corroboration of the nature required.[2] "A girl cannot corroborate herself; otherwise it is only necessary for her to repeat her story some twenty-five times in order to get twenty-five corroborations of it.[3]

Garvin, S.P.J., in a recent case[4] from the Colombo Police Court has gone a step forward and held that a statement made by the mother of an illegitimate child as regards its paternity *after the cessation of sexual relations with the alleged father*, is not corroboration of her evidence: nor is the conduct of the mother with reference to scenes created in the presence of the respondent after the cessation of such relations; for "any designing woman may create scenes at the house of the man she desires to accuse as the person responsible for her condition and it is manifestly unsafe to treat such conduct as sufficient corroboration of her own evidence as to her paternity." The case would be otherwise if the applicant were to state in the presence of the respondent, her parents and relatives, that the respondent was the father of the child in her womb, without any denial or protest on his part: or if he agrees to register the birth of the child on certain conditions being fulfilled:[5] or if he admits that he has registered the birth of the child:[6] or if he admits the paternity even in an inculpatory statement before the Police.[7]

1. Sinatangam *vs.* de Silva (1926) 4 Times L. R. 102 and 9 Times L.R. 53.
2. Dona Bella Nona *vs.* Deonis Perera (1927) 5 Times L.R. 83.
3. Quoted in Bisso Menika *vs.* Danby (1932) 10 Times L.R. 22. This judgment is worth perusing.
4. Dona Carolina *vs.* Jayakkody (1931) 33 N.L.R. 165.
5. Meenachipillai *vs.* Sanmugam (1916) 3 C.W.R. 366.
6. Angohamy *vs.* Babasingho (1910) 4 Weer. 60 Supra.
7. Bebi *vs.* Tidiyas Appu (1914) 18 N.L.R. 81 Supra.

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These facts would be sufficient corroboration ; so would the conduct, previous and subsequent, of the respondent with regard to both the applicant and her child and any circumstances[1] which would lead to prove conclusively, along with the evidence of the applicant, the identity of the person charged. Thus, even the physiognomy of the child may sometimes mirror its parentage,[2] though evidence of this nature is not a safe guide and cannot be relied upon.

(iii) Section 7 of the Maintenance Ordinance says that no application for maintenance of an illegitimate child shall be entertained

(*a*) unless made within twelve months from the birth of such child, or

(*b*) unless the reputed father has within these twelve months maintained it or paid money for its maintenance, or

(*c*) if he has left the Island within these twelve months, unless the application is made within twelve months of his return to the Island.

This enactment is very important. If a mother delays coming to Court till the child is able "to walk and talk," she would be too late. If the child is more than twelve months old, the respondent is not bound to pay.[3] Nor could a Magistrate antedate his order so that the payments may commence from a date antecedent to the date of the order, thus bringing the application within the twelve months' rule. If, however, an application is duly filed within the prescribed time and the respondent evades service of summons, prescription does not run even though the Court strikes off the case ; and the applicant could bring a separate action later : for, the mere ministerial act of a Court in striking off its list an application for maintenance is not an adjudication upon the application on its merits or a final disposal of the case,[4] though the dismissal of an application for insufficiency of evidence,[5] or upon any other defect in the case is a decision upon the merits and bars a second application.[6] But a dismissal on the ground that the applicant was absent[7] or that she was not ready with her evidence[8] is no bar to a fresh application. Nor does a settlement of the original case, whether the terms of the settlement are complied with or not, *per se* act as *res judicata* between the parties.[9]

Saving these exceptions, every application for maintenance of an illegitimate child must be made before the child has become a year old, unless the mother (or guardian) is able to show that the alleged father had maintained it during that period. This fact of maintenance may be proved by the testimony of the mother alone.[10] The evidence of the mother that the respondent maintained the child within twelve months

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1. Bandara Menika *vs.* Dingiri Banda (1926) 27 N.L.R. 282.

2. In a case before me where a Sinhalese woman was " kept by " a Moorman, I remember that though the other evidence was fickle, the child bore such strikingly prominent Moorish features that I allowed the application which the Supreme Court later confirmed in Appeal. P.C. Panadura No. 78751—S.C. No. 491 of 29th August, 1923. This would be what is known as "evidence on the *voire-dire*."

3. Podihamy *vs.* Subchamy (1890) 1 S.C.R. 81.

4. Sedanahamy *vs.* Seneviratne (1907) 2 A.C.R. 137.

5. Benno Nona *vs.* Dineris Perera (1908) 11 N.L.R. 307.

6. Rankiri *vs.* Kiri Etana (1891) 1 C.L.R. 86.

7. Jeerishamy *vs.* Davith Singho (1921) 23 N.L.R. 466.

8. Bee Bee *vs.* Mohamed (1921) 23 N.L.R. 123.

9. Franciscus *vs.* Franciscus (1917) 5 C.W.R. 22.

10. Perera *vs.* Fernando (1911) 15 N.L.R. 309.

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after its birth need not be corroborated.[1] The evidence that the respondent gave money even on one occasion only or that he sent clothes or ordered ornaments would be sufficient evidence, not merely of having so maintained the child (but also of the fact that he had acknowledged paternity thereby). What is required is some sort of evidence to show that the respondent had maintained and therefore taken an interest in the child within the first year of its existence. Even if a mother sues a respondent for maintenance of an eight-year old child, what she need prove is that maintenance was paid within the first year of the child's birth.[2]

(iv) What we have said in an earlier section with regard to the inability of legitimate children to maintain themselves or with regard to the ability of the father to pay applies with equal force to illegitimate issues as well. And the proper person to keep custody of illegitimate children is, of course, the mother; unless she is dead, in which case the father may keep them with him and maintain them; and anybody refusing to give them up to the father, *e.g.*, a grandmother, forfeits all right to claim maintenance for them.[3]

(V) General.

There are a few general points which we may cursorily inquire into.

(i) When a person neglects to comply with a maintenance order, a Magistrate—

(*a*) may issue a distress warrant, and

(*b*) if the amount is still unrealised may sentence the defaulter to a term of simple or rigorous imprisonment not exceeding one month. So that, before a person ordered to pay maintenance is sentenced to imprisonment for default of payment, a warrant of execution must issue, even though the defendant admits that he is not possessed of any immovable property.[4] If a person against whom an order for maintenance is made has immovable property from which he derives any rent, profit, or income, sufficient to make the payments as they fall due, he is considered as having sufficient means to pay them; and the fact that the defendant denies having any such property or that a Police Vidane says orally that he has no such property[5] is not considered sufficient testimony of the inability of the respondent to pay.

A Magistrate may sentence a defaulter only in respect of the amount remaining unpaid after the execution of the warrant issued to levy the amount due.[6] So that, where the Magistrate gave the respondent one month's time to pay up the arrears of ten months on sufficient security and ordered that in default of such payment he should undergo rigorous imprisonment for fifteen days for each month, it was held that the order was wrong, as a Magistrate could only pass a sentence of imprisonment after the distress warrant had been returned executed.[7]

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1. Kusalhamy *vs.* Dionis Appu (1912) 15 N.L.R. 325. See also Welminahamy *vs.* Perera (1 14) 2 Bal. Notes 34. Emaliyanu *vs.* Jayasinghe (1930) 7 Times L.R. 144.
2. Fernando *vs.* Appu 1900, 1 Br. 12.
3. Meenachi *vs.* Subramaniam Chetty (1898) 3 N.L.R. 181.
4. Kaluhamy *vs.* Mudiense (1922) 24 N.L.R. 204.
5. Kadya Umma *vs.* Assena Lebbe (1896) 2 N.L.R. 202.
6. Vallipillai *vs.* Supramaniam (1910) 5 Weer. 38.
7. Cornelia *vs.* Sawaris 11 N.L.R. 289.

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A Magistrate has the right to sentence *caeteris paribus* every defaulter to imprisonment for one month for each month of default. There is no Supreme Court decision on this point, but the recent *obiter dictum* of Macdonell, C.J. seems to limit the maximum sentence to six months.[1] If it were otherwise, a person could go to jail for a month once in every three years or so and thus evade the law. Where payment has not been made for a number of years a long sentence proportionate to the number of months in default has often a salutary effect (and somehow brings in the money.)[2]

A respondent is not bound to pay for the period that he is in jail on account of default of maintenance ; and the fact that a person has suffered imprisonment extinguishes his liability to pay for those months in respect of which the imprisonment was imposed,[3] for, the payment of the allowance and the imprisonment for default are but alternatives. A Court has no power to cancel the order for maintenance retrospectively so as to affect the arrears due under it, even though the wife has been living in adultery during that period.[4]

A respondent can be committed to jail for non-payment of the applicant's costs in the same manner that he can be committed for arrears of maintenance.[5]

Where an order for maintenance is made there is no limit either to the amount of arrears recoverable or to the time within which they can be recovered.[6] Nor can a child be prevented from obtaining an order for maintenance from its father or from obtaining arrears under a subsisting order, merely because it was maintained by the charity of a third person after the death of its mother.[7]

(ii) The rate of maintenance may be enhanced on proof that the husband's circumstances have improved or that the wife's circumstances have become worse or that the children's circumstances are such as would require more allowance. The Court can act on finding that the husband's circumstances have improved and is not bound to consider the circumstances of the wife,[8] or of the children. The Court may similarly reduce the monthly rate or cancel it altogether after due enquiry. Children, as they grow older, require more food and better clothing and more funds for education suitable to the status in life of the parties.

(iii) The rate of maintenance depends not merely on the ability of the husband to pay, *i.e.*, his monthly income, but on the status of the parties, the age of the children, and the fact whether the persons for whom maintenance has been ordered have a separate income of their own or not. The fact that a respondent has a married wife to support and has children by her should be taken into consideration in determining his capacity to pay ; conversely, the fact that a respondent who has deserted his wife has kept a mistress is hardly a circumstance worthy of consideration. The highest rate that a Magistrate can order

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1. Sivakamam *vs.* Velapillai (1931) 1 C.L.W. 97.

2. Up in the North, women have a holy respect for their husbands, even though the latter have deserted them, and sooner compound the arrears for a smaller amount that see them in jail.

3. Katherina *vs.* Davith (1917) 19 N.L.R. 500.

4. De Silva *vs.* Fernando (1931) 32 N.L.R. 71.

5. Till recently he could not : *vide* Pinchohamy *vs.* Agoris Appu (1924) 26 N.L.R. 429 ; but the law is since amended.

6. Velupillai *vs.* Sanmugam (1928) 30 N.L.R. 50. 6 Times L.R. 25.

7. Gunasekara *vs.* Abamath (1931) 33 N.L.R. 241.

8. Thankachi Ammah *vs.* Sampanther (1922) 24 N.L.R. 250.

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is Rs. 100 per month. Each child is entitled to a separate allowance. Maintenance includes the cost of education :[1] so that a Magistrate is within his rights in ordering an ascending scale of maintenance in proportion to the increasing needs for education, and so forth.

(iv) All applications against a husband or father for the maintenance of his wife or children must be made under the provisions of the Ordinance : thus, where an action was brought in the District Court against the administratrix of the estate of a deceased father for the maintenance of his illegitimate child, it was held that no action lay.[2] The policy of modern legislation is to prevent one's wife and children becoming chargeable to others by allowing the wife and children a remedy against the husband or the father, as the case may be, in the Criminal Courts, and it is for a married woman to resort to that remedy unless she is content to maintain herself at her own expense.[3] The Roman-Dutch civil remedy is not available in Ceylon, it being superseded by the statutory remedy under the Maintenance Ordinance.

Nor could the administrator of a deceased person be made respondent to an application for maintenance, as the section only gives a right *in personam* to proceed against a person for the maintenance of "his" wife or "his" children ; and the words of this section cannot be interpreted so as to include the legal representative of the person so made liable.[4]

Nor can a suit lie in a District Court by a putative father for declaration against the mother that a particular child of hers was not born to him.[5] Nor has a District Judge powers to order maintenance in a civil suit instituted for the purpose of having a marriage dissolved.[6]

(v) In the case of Kandyan marriages which were dissolvable by a certificate of dissolution under the amended Kandyan Marriages Ordinance,[7] the compensation which the parties have agreed upon at the time of the dissolution is compensation to the spouse to whom it is made for the loss of the conjugal society, and it does not interfere with the rights of a child entitled to maintenance for whom the compensation does not make express provision.[8] So that even where such provision is made for one child, the father is liable to pay maintenance for others, if any.[9] And where a Provincial Registrar dissolves a Kandyan marriage but makes no order for the support of children by that marriage, even though there be an agreement between the parties as to the custody of the children, the mother is entitled to apply to a Magistrate for an order of maintenance under the Ordinance.[10] If, however, a Provincial Registrar has made an order for the maintenance of the wife and children, such order will bar any fresh application for their maintenance in a Police Court.

(vi) As maintenance cases are, in their nature, private plaints, they should be "stamped ;" but the Ordinance empowers Magistrates

1. Rodrigo *vs.* Rodrigo (1931) 33 N.L.R. 383.
2. Lamahamy *vs.* Karunaratna (1921) 22 N.L.R. 289.
3. Per Pereira, J. in Jane Ranasingha *vs.* Pieris (1898) 1 Bal. 161.
4. Dingitto *vs.* Singho Appuhamy (1916) 3 C.W.R. 64.
5. Miwonis *vs.* Menika (1915) 4 Bal. Notes 48.
6. Abdul Rahiman Lebbe *vs.* Pathumma Natchie (1918) 5 C.W.R. 145.
7. No. 3 of 1870, Vol. I, p. 751.
8. Menika *vs.* Naide (1916) 19 N.L.R. 351.
9. Punchimenika Nachchire *vs.* Kiri Naide (1916) 3 C.W.R. 236.
10. Punchi Amma *vs.* Mudiense (1920) 21 N.L.R. 478.

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to dispense with stamps, if the applicants are in their opinion too poor and therefore unable to defray the cost of stamps. The fact that stamps are excused should be noted on the record.

(vii) By Ordinance No. 15 of 1921, facilities have been afforded for the enforcement of Maintenance Orders in or from Great Britain and Ireland; and the same facilities were extended by Ordinance No. 24 of 1929 to those countries which are proclaimed by His Excellency the Governor to have made reciprocal provisions.

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CHAPTER XXX.

EXCISE.

(I) Preliminary.

The Excise laws of the Colony are comprised in the Excise Ordinance No. 8 of 1921[1] which supersedes all previous Ordinances on the subject except the Opium Ordinance. It would be an impossible task to discuss in detail the bearing and purport of each individual section : the reader is referred to the Excise Manual published by Government, for this purpose. Only a few general and important points are discussed in this Chapter.

Under the Excise Ordinance, a certain procedure is laid down for the guidance of those who deal with excisable articles, and the Governor in Executive Council is empowered by section 31 to make further rules, when found necessary. These rules are embodied in Excise Notifications published in the " Government Gazette " from time to time and have the force of law ; that is to say, anybody contravening any such rules is liable to punishment just as much as an offender under the principal Ordinance.

Under section 43, " whoever, in contravention of this Ordinance, or of any rule or order made under this Ordinance, or of any license, permit, or pass obtained under this Ordinance,

(*a*) imports, exports, transports, or possesses any excisable article; or

(*b*) manufactures any excisable article ; or

(*c*) cultivates or collects the hemp plant (*cannabis sativa* or *indica*) or coca plant ; or

(*d*) taps any toddy-producing tree ; or

(*e*) draws toddy from any tree ; or

(*f*) establishes or works any distillery, brewery, or warehouse ; or

(*g*) uses, keeps, or has in his possession any materials, still, utensil, implement, or apparatus whatsoever for the purpose of manufacturing any excisable article other than toddy ; or

(*h*) sells or keeps or exposes for sale any excisable article ; or

(*i*) bottles any liquor for purposes of sale "—

is guilty of an offence and liable on conviction to imprisonment for six months or a fine of Rs. 1,000 or both.

" Excisable article " means—

(1) any liquor, which includes spirits of wine, spirit, wine, toddy, beer and all liquid consisting of or containing alcohol ; or

(2) any intoxicating drug, which includes cocaine, ganja, bhang, and every preparation or admixture of the same and every intoxicating drink or substance prepared from any part of the hemp plant, from grain, or from other material but excludes opium as defined in the Opium Ordinance ; or

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1. As amended by Ordinance No. 25 of 1914, Vol. III, p. 197 and by No. 4 of 1931.

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(3) any liquor or intoxicating drug declared to be so by the Governor for the purposes of this Ordinance ; *e.g.*, the Governor has declared that "ganja" and "bhang" shall be deemed to include every part of the hemp plant (*cannabis sativa* or *indica*).[1]

Thus, the prohibitions against "any excisable article" are meant not merely to penalise the ordinary arrack or toddy ; but the prohibition is equally effective against selling or possessing any "spirit which is so strong that it cannot be drunk or a spirit which is unpalatable or which can be drunk only in small quantities as a medicine."[2] Preparations of opium are excluded as they are provided for in a separate Ordinance.

The principal offences that are usually committed are (i) possessing and transporting of arrack, toddy, or ganja, (ii) manufacturing of fermented toddy, (iii) tapping or drawing of toddy, and (iv) sale of arrack or toddy. We shall examine these in detail.

(II) Possession and Transport.

Usually "transport" also connotes possession, for a thing can hardly be transported without being possessed. As the offences are cognate, we shall not examine them separately.

Under section 16, no person, not being a licensed manufacturer or vendor of any excisable article, can have in his possession any quantity of arrack or toddy in excess of such quantity as is declared to be the limit of sale by retail, except under a permit by the Government Agent of the Province. Permits for private consumption or use are issued without any fee. Limit of sale by retail in the case of arrack is one-third of a gallon[3] (that is, two bottles) and in the case of fermented toddy, one imperial gallon[4] (that is, six bottles). This is being restricted to one-sixth gallon in the case of arrack and one-third in the case of toddy (*i.e.*, one and two bottles, respectively) from October, 1934.[5] So that no person can be convicted for possessing or transporting two bottles of toddy or one bottle of arrack, even if such possession or transport took place in what are known as the Dry Areas ; except that, in the case of toddy, where "off-sales" are prohibited in any area, the possessor might be liable to be dealt with as for possession of toddy illicitly transported or manufactured, under section 44. But if the quantity is in excess of the statutory limit, it is proscribed and penalised, even though the possession or transport is not intentional and is merely passive, and even though the transport is on behalf of some third party. Thus, where three persons each bought two bottles of arrack and gave the six bottles to the accused, who was a cooly, to carry, and where the accused had no removal permit, it was held that the accused was guilty.[6] Where, however, a man engages a rickshaw and asks the cooly to carry a parcel, the cooly cannot be expected to know the contents of the parcel, is a mere carrier and cannot rightly be convicted under

1. Excise Notification No. 24. Gazette No. 6606 of 13 February, 1914. Inspector of Excise *vs.* Lebbe (1929) 31 N.L.R. 211. 7 Times L.R. 53. See Bartholomeusz *vs.* Sinnatamby (1931) 1 C.L.W. 116 for the force of various Excise Notifications.

2. (1899) Koch 60.

3. Excise Notification No. 5. Gazette No. 6545 of 31 January, 1913.

4. Excise Notification No. 1. Gazette No. 6536 of 13 December, 1912, and also No. 7, Gazette No. 6548 of 14 February, 1913.

5. See Government Gazette No. 8001 of 25 August, 1933. Excise Notification No. 250.

6. Aspin *vs.* Samsudeen (1915) 18 N.L.R. 286.

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the section. The burden of proving that he is a mere ignorant carrier is on the accused. Further, there is nothing in the Excise Ordinance to prevent several men joining together and buying one-third of a gallon of arrack each and conveying the aggregate quantity together. Where the accused and four others were going in a hired cart to Trincomalee where each of them bought a bottle or two of arrack and brought the bottles in the cart, the driver of the cart was held not to be guilty, for the hirers could bring their bottles in the most convenient manner and the question which the Magistrate had to decide was whether the explanation given by the accused was true or not.[1] If the explanation given, or the claim made by the accused persons, be accepted as true, it is obvious that none of them is guilty of being in possession of or transporting a quantity of arrack in excess of that permitted by law, because the notification relating to the matter permits the possession and transport without a license at one time by a single person of sixteen drams which is equivalent to two empty "D.C.L." bottles.[2] Possession of ganja is absolutely prohibited (except in the form of a tincture, with a license) and the possession of even the smallest quantity either by itself or in admixture with some other substance or medicine is *per se* sufficient for a conviction.

It is very difficult to say, in the absence of any express provision in that behalf, what "possession" actually means. It does not necessarily mean "keeping on or near oneself:" it has a much wider meaning than that. "Generally speaking, the finding of prohibited quantities of arrack or toddy in a man's dwelling-house is by itself sufficient and cogent evidence for a conviction; for, a man may, as a general rule, be fairly presumed to know what things are which he has in his house in which he is living at the time; but it is quite open to him to show that the possession was innocent or unconscious."[3] But the question becomes complicated when there are more than one person living in the same house. In that event, the person against whom the Ordinance is aimed is the "person who has the control over the substance in question."[4] This person will, in most cases, be the *paterfamilias*; for, it is he who is presumed to be responsible for the presence of the substance in that house and it is he who is expected to "explain away" its presence. And it may not be necessary to "leash" all the inmates of the house into Court, charging them individually with possession of the excisable article. It may, however, be shown that a person other than the *paterfamilias* had "control over the substance," in which case that other person would be guilty. Thus, where four gallons and thirty-two drams of fermented toddy were found in a house in which the accused, her two associated husbands and another woman lived, and where the accused who was alone in the house, on the approach of the Excise Inspector threw away a pot smelling of toddy, it was held that this accused was rightly convicted of being in possession of the toddy[5]; for, no doubt, it was the accused who showed by her conduct that she had "control" over the toddy. What is important to note is that where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them and particularly unless there are facts pointing to the property being in the

1. Lawrencepillai *vs.* Kirihamy (1920) 22 N.L.R. 145.
2. Siriwardena *vs.* Fernando (1921) 22 N.L.R. 351.
3. Fernando *vs.* Fernando, Ram. (1860-2) 98.
4. Fernando *vs.* Banda (1914) 1 C.A.R. 23.
5. Guneratna *vs.* Ukku (1915) 1 C.W.R. 216

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conscious control of that person.[1] So that it would not be an offence to keep in a house occupied by more than one person, say husband and wife, toddy (or any other excisable article) greater than the maximum which one person may legally hold.[2]

Where a person who was licensed to sell foreign liquor on the ground floor of certain premises, stored liquor in the upper floor, it was held that he was in possession of liquor in breach of General Condition No. 27 applicable to Excise licenses[3] which prohibits the possession (save under and in accordance with the law applicable to unlicensed persons) or sale by any licensee of any excisable article elsewhere than at the premises to which the license refers.

It will be apparent that possession and ownership are two different things. What is penalised is possession, pure and simple: so that a person may not necessarily be guilty of possession, even if he were the owner of the house in which the article is found, for he may not be the occupier; and even the occupier may not necessarily be the possessor if he has no control over the substance. By control is meant power to dispose of and to do anything one likes with the substance: it is not exactly the same as *dominium*; for, the latter implies ownership which is certainly absent where, for instance, a servant possesses on behalf of his master. The question of such possession differs from that of possession of stolen property in that, whereas the possession of stolen property gives rise to an inference that an offence has been committed by the person in whose possession the stolen property has been found, in cases of possession of excisable articles it is the possession itself which constitutes the offence.[4] And mere passive possession is enough, unless it can be shown to be innocent and unconscious. For, section 50 of the Ordinance enacts that it shall be presumed, until the contrary is proved, that the accused person has committed an offence in respect of any excisable article for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily. This enactment is in direct conflict with one of the main *praesumptiones jures*, viz., that in the absence of evidence, innocence of crime is presumed by law. The principle that applies is this: "Where the law says that a certain act must not be done and you consciously do it, the law presumes intention or knowledge on your part and you have committed an offence."[5] In such cases, the onus gets shifted on to the accused to disprove *mens rea* and thus to show that his possession was innocent and unconscious. To enable the presumption created by section 50 of the Excise Ordinance to be drawn from the conduct of an accused person in connection with an excisable article, e.g., where the accused is seen pouring toddy from a pot into a tin[6], or throwing away a pot of toddy and threatening the Excise officers, such conduct must amount to a breach of section 43 of the Ordinance.[7] For the presumption only arises after the prosecution has first proved possession in the legal sense as required by the section under which the accused is charged.[8]

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1. Silva *vs.* Kandiah (1931) 32 N.L.R. 253.
2. Excise Inspector Holsinger *vs.* Francis Fonseka (1932) 1 C.L.W. 225.
3. Inspector of Excise, Colombo, *vs.* Peter (1930) 31 N.L.R. 324.
4. P.C. Trincomalee 7391 (S.C. No. 717) of 1913.
5. Shaikali *vs.* Leisahamy (1911) 14 N.L.R. 349.
6. Lockhart *vs.* Fernando (1925) 27 N.L.R. 229.
7. Silva *vs.* Silva (1931) 32 N.L.R. 230. 8 Times L.R. 111.
8. Excise Inspector *vs.* Marikkar (1930) 8 Times L.R. 65.

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The doctrine that possession to be criminal must be conscious and exclusive should be regarded to be in each case a question of fact, the question being of whether, from the facts proved, a reasonable inference may be drawn that all the persons occupying the premises where the article said to have been possessed was found, were cognisant of its presence and the common object for which it was brought.[1] A person travelling in a rickshaw cannot be said to be in the conscious possession necessarily of what is in the box under the seat.[2] The consciousness or deliberateness of possession may, however, be presumed from the evidence led on behalf of the prosecution.[3] If one out of several persons travelling by a motor car which transports contraband, pleads guilty and thus takes the responsibility on himself, there must be very strong evidence connecting the other accused with the contraband, before they can be rightly convicted.[4] Possession, for instance, of one gallon of toddy by each of several passengers travelling in a 'bus does not amount to constructive possession of the whole of the toddy by the driver of that 'bus.[5]

The defence may set up a plea of " introduction ; " for, there could be nothing easier than to introduce excisable articles, e.g., ganja, in the house of one's enemies. And where there is the remotest possibility that excisable articles could have been introduced either by one's enemies or by the raiding party, the benefit of the doubt must go to the accused. It is for this purpose that the prosecution witnesses are often tested on the whetstone of a searching cross-examination. Our Supreme Court has approved of this procedure. In a case of this nature and in which, moreover, in the event of conviction, ample rewards are paid by the Department to members of the raiding party, " the evidence should be looked on with suspicion and subjected to the most stringent scrutiny."[6] Where an Inspector, finding the suspected house locked, sent up an Excise Sergeant to the roof without examining his person and directed him to open the door from inside and on search found ganja and opium in an open box in the house, the Supreme Court directed an acquittal on the ground that the Sergeant's person not having been searched, the possibility suggested by the defence, viz., introduction, created an element of doubt the benefit of which should go to the accused.[7] And where excisable articles are found buried in an open land which is not properly fenced, the accused cannot rightly be convicted unless it can be shown that he had control over the substance, or unless it can be proved that they could not have been buried there without his knowledge or connivance. If three or four big jars or carboys of arrack are found buried only 4 or 5 feet away from his house, the accused's plea of innocence and ignorance cannot be accepted ; for, these certainly could not have been hidden there without his knowledge. But in the case of a cadjan-roofed house with low walls where excisable articles are found in a loft near the eaves, a reasonable suspicion is bound to arise that they may have been introduced by an outside agency. Where excisable articles are found in an open garden to which the public have a right of access or on which there are public footpaths, the person resi-

1. Excise Inspector, Ambalangoda *vs.* Podi Singho (1923) 2 Times L.R. 143.
2. Dissanayake *vs.* Nicholas Perera (1928) 5 Times L.R. 174. 29 N.L.R. 490.
3. Cassim *vs.* Senerat Yapa 1 Times L.R. 122.
4. Saunders *vs.* Thambirajah *et al* (1925) P.C. Chavakachcheri 14090 S.C. 396 A to D.
5. Wijesinghe *vs.* Abeyasinghe and another (1927) 5 Times L.R. 57.
6. Suppiah *vs.* Sellan (1880) 3 S.C.C. 57.
7. Excise Inspector, Point Pedro *vs.* Thangamma (1925) 26 N.L.R. 307.

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dent in that garden cannot rightly be held responsible unless and until there is something to show his guilty knowledge: thus, where on the approach of an Excise Inspector the wife of the accused throws away an empty box of matches and the Inspector on picking it up finds it to contain a small slab of ganja, and where after further search some 4 or 5 lbs. of ganja are found buried in an open garden near the house, a reasonable inference may be drawn that the accused held custody over the latter. Where excisable articles are found buried in the house itself, or hidden away among the personal belongings of the accused, or are in his private box, or are found in such a way in the house that there could be only one conclusion as to their presence, the conviction would be justified and upheld. But the possession of an excisable article raises only a presumption that an offence has been committed and the accused should be given an opportunity of calling evidence to account for his possession.[1]

In order to avoid any suspicion or even doubt of introduction on the party of the raiding officers themselves, it is recommended that the excisable articles found on the premises should be seized and wherever possible sealed by them in the presence of the persons concerned. In *Kalpage vs. Cassim*,[2] Jayawardena, J., held that an objection that certain tins taken from the possession of the accused were not seized in his presence was a good one. The accused there asserted that the medicine found in the tins was not the medicine in them at the time the tins were removed from the premises. This decision was followed by Lyall Grant, J. in *Holsinger vs. Joseph*.[3] In neither of these cases were the packages sealed in the accused's presence and there was a reasonable possibility that they might have been tampered with. But in *Bandaranayake vs. Segu Ismail*[4] where it was shown that the Inspector had possession of the ganja till he produced it in Court and where the accused did not rely on the defence of substitution but asserted that the ganja had been introduced into his house at an earlier stage of the proceedings, the Supreme Court refused to interfere with the conviction. Similarly, where the Magistrate acquitted the accused on the grounds that the ganja found by the Excise Inspector was not sealed by him in the presence of the accused and that there was no report from the Government Analyst to the effect that the stuff produced was in fact ganja, the Supreme Court set aside the acquittal holding that there was no substance in these objections and directed a new trial before another Magistrate.[5] Where the Excise Inspector failed to have the tin of lagium sealed in the presence of the accused immediately after seizure, the Supreme Court set aside the conviction and acquitted the accused.[6]

The possession or sale of any *bonâ fide* medicated article for medicinal purposes by medical practitioners, chemists, druggists, apothecaries, or keepers of dispensaries is expressly excluded by section 55; but no medicated article containing more than 42 per cent. of proof spirit can be possessed by anybody; nor can any medicated article containing more than 20 and less than 42 per cent. be possessed without a license.[7] The mere fact that the accused is a medical practitioner is no defence. There

1. Hart *vs.* Mohamadu (1920) 2 C.L.R. 188.
2. 580, P.C. Colombo No. 22098. S.C. Minutes of 14 September, 1926.
3. 553, P.C. Colombo No. 3249. S.C. Minutes of 27 September, 1929.
4. 735, P.C. Kurunegala No. 11996. S.C. Minutes of 22 January, 1930. 7 Times L.R. 91.
5. 838, P.C. Negombo No. 66631. S.C. Minutes of 10 February, 1930.
6. Holsinger *vs.* Joseph (1929) 31 N.L.R. 250.
7. Excise Notifications Nos. 3 and 4, Government Gazette No. 6537 of 20 December, 1912.

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must be proof and the burden is on the accused to prove it—that the article is a *bonâ fide* medicated article for medicinal purposes.[1] A Vedarala or a Pariari is not a medical practitioner within the meaning of this section: hence, the possession of "lagium" by a native physician is criminal.[2] He can, however, possess certain excisable articles on a permit granted by a Government Agent.

It is not illegal to possess any quantity of unfermented (sweet) kitul or palmyrah toddy[3] in certain villages proclaimed under section 56, e.g., in Ratnapura, Kegalle, Galle and Jaffna districts.

It is an offence to transport toddy from taverns where off-sales are prohibited, and where therefore it must be consumed on the premises. So that in areas that are dry, possession of toddy by the accused in his house would be presumed to be illegal until the accused dispels that presumption, *e.g.*, by proving that the transport under a permit.

A previous conviction for possession does not empower a Magistrate to 'double' the default imprisonment of six weeks.[4]

(III) **Manufacture.**

Under the Ordinance, manufacture includes "every process whether natural or artificial by which any excisable article is produced or prepared." This is a very wide definition; for, the ordinary meaning of "manufacture" denotes human agency, whereas the legal definition includes even the work of nature. Toddy when tapped is sweet; by process of nature, fermentation sets in, unless proper precautions are taken immediately. This natural fermentation is tantamount in law to manufacture. A person who allows toddy to ferment on a tree "draws" fermented toddy from that tree.[5] It is not necessary, therefore, for the prosecution to prove that the accused did actually manufacture, e.g., by adding yeast or other fermenting medium. The addition of *Hal* bark, the liming of the tapping pots or coating them with *chunam*, the emptying of sediments from and subsequent washing of the pots, prevents, or at any rate postpones, fermentation. The fact that some of these precautions which the Department insists upon were not taken would show that the accused had no intention of tapping for sweet toddy, but really intended to "manufacture" fermented toddy. If, however, the accused can show that he had taken the necessary precautions which were not really effective, his guilt would be proportionately less. Sweet toddy is generally tapped for the purpose of converting it into jaggery or treacle; and the absence of any jaggery or treacle in the house, or of any signs of preparations for converting the toddy into the same would be points against the tapper; for, it is a general opinion that jaggery would be spoilt in the boiling, if the toddy were fermented howsoever little.

The right of manufacturing fermented toddy for sale is sold by auction by Government annually and licenses are issued to tap for fermented toddy for this purpose. To others no license can be issued to tap for fermented toddy, but only for sweet toddy. It is for this reason that the manufacturing of fermented toddy is prohibited.

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1. P.C. Batticaloa 36274 S.C. Minutes of June 19, 1914.
2. Amarasekara *vs.* Lebbe.
3. Sinhalese, *Mira* or *Tejja*: Tamil, *Karuppani*.
4. P.C. Tangalle 34049 in Revision 1934.
5. Excise Inspector, Hatton *vs.* Appuhamy (1931) 8 Times L.R. 147.

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It may happen that a person's enemies may climb up the trees in the night, remove the bark, etc., and get the toddy seized afterwards by the Excise authorities. In order to prevent this eventuality, surprise visits unknown to the informant are recommended.

(IV) Illicit Tapping.

We have already referred to this subject in the last section. Only in certain areas is no license required for the tapping or drawing of sweet toddy. Elsewhere, a license is necessary. We are here speaking of licenses to ordinary villagers as opposed to licenses to the Renters. Licenses are issued to villagers only for the purpose of tapping for and drawing of sweet toddy. Even the trees which are to be tapped have to be specified and marked. The name of the tapper is necessary on the license —though the tapper's work can be assigned to another. Only those trees which are covered by the license can be tapped and no others. Where there is no license, or where the license is time-expired, or where there is a breach of any of the conditions of the license, *e.g.*, where fermented toddy is drawn instead of sweet toddy, the offender is liable under the section. Even a master is held to be liable for acts done by his servant in contravention of this section ; but in the absence of evidence that the tapper is really a servant of the accused, the master cannot be fixed with liability merely because the tapper's offence has been committed on a land of which he is the owner.[1] But the owner, as such, is liable for not having given information of the manufacture of an excisable article. For, section 40 enacts that "all proprietors, tenants, under tenants and cultivators who own or hold land on which any excisable article is manufactured illegally shall be bound to give information," and failure to do so is punishable as an intentional omission under section 47 of the Ordinance.[2] It is submitted that promiscuous prosecutions of all co-owners for an alleged illicit tapping by a third party resident on the land would not be justifiable and should end in an acquittal if the defence can show satisfactorily that they neither knew, or suspected that illicit tapping was being carried on their land and that they had nothing to do with it : nor had connived at it. What the law penalises is an intentional omission and not every omission whether intentional or innocent.

Tapping for sweet toddy is not prohibited under the Ordinance ; but a license is necessary except in the proclaimed areas. No fee is required for a license. The term "tapping for fermented toddy" is misapplied as pointed out by Dalton, J.,[3] for one taps only for sweet toddy which becomes fermented in course of time. The term, therefore, includes tapping as well as manufacture. In a charge of drawing toddy from a coconut tree, it is sufficient to prove that the accused removed toddy from the top of the tree to the bottom.[4]

(V) Sale of Arrack or Toddy.

These cases are very frequent in a Police Court. It is seldom that an actual sale to outsiders is witnessed by Excise Officers. What they

1. P.C. Galle 4192 of 1913 (S.C. Decision of February 27, 1913).

2. Failure to give information of the commission of an Excise offence is also punishable under sections 174 and 199 of the Ceylon Penal Code.

3. Lockhart *vs.* Learis (1925) 6 C.W.R. 133.

4. Jansz *vs.* Jothia (1927) 5 Times L.R. 90.

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usually do therefore is to send a decoy, often one of their henchmen, with a marked coin or note to the house of the suspected person, allow him to buy and drink the liquor, then follow immediately in his footsteps and arrest the seller, only to find the coin or note on his person. This evidence, if believed, is sufficient to prove a sale. The Supreme Court, though ruling that the evidence of an emissary in such circumstances is no doubt admissible,[1] has pointed out that his evidence instead of being wholly thrown out should be viewed with suspicion.[2] For, really, the procedure on the part of Excise Officers to send forward a man to tempt a person to sell a prohibited article is worthy of condemnation.[3] There can hardly be a villager " with soul so dead " who would not care to snatch a few cents whenever the opportunity offered itself. Even if he is not a habitual seller, the idea of converting his apparently " useless stuff " into ready currency would be a temptation too strong to resist. Conversely, the decoys are usually persons of no great worth, paupers and idlers who gloat over the idea of helping "persons in authority" and who expect real " *pour-boires* " for their troubles. They might not hesitate in stooping to mean tricks, and might make the temptation doubly tempting by offering a sum far in excess of the real value of the article sold.[4] They are but " accomplices " in a sense ; and if our law presumes that an accomplice is unworthy of credit unless he is corroborated in material particulars,[5] the evidence of a decoy should be viewed with the greatest of caution and subjected to the most stringent scrutiny. In fact, the Supreme Court has held in a recent case that in a charge of selling arrack without a license, it would be unsafe to convict on the uncorroborated testimony of a decoy ;[6] there must be other evidence which eliminates the possibility of any fraud on the part of the decoy,[7] as, otherwise, interested parties may on little inducement give the necessary touch to their evidence in order to secure a conviction.[8]

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There must be ample corroboration from the evidence of the Inspector and other witnesses[9] ; and " the battery of cross-examination should have produced no breach in their armour." In order to prove a real sale, money must pass to the seller ; so that if an Inspector, through overhaste, has rushed in before the accused has accepted the money, the sale is incomplete and the accused is entitled to an acquittal. If no money is found on the accused but on the floor, the evidence of sale would be meagre ; for the accused may have refused to accept, and the decoy may have thrown down the money. On the other hand, where money is found on the accused, but the decoy is not yet served with a drink, the sale is equally imperfect, even though there is toddy or arrack in the house ; for the decoy may have asked the accused to sell him something else, *e.g.*, cigarettes. If the decoy has been bought over or does not support the prosecution, the fact even of finding the marked coin or note on the accused and of witnessing the decoy holding a shell of toddy or glass of arrack deposed to by the Inspectors cannot be held to

1. Appuhamy *vs.* Lane Singho (1912) 15 N.L.R. 173.
2. Livara *vs.* Menika (1913) 1 Bal. Notes 59.
3. Excise Inspector *vs.* Perera (1913) 1 Bal. Notes 24.
4. The Attorney-General *vs.* Pitche Muttu (1913) 1 Bal. Notes 21.
5. Section 114 (*b*) Evidence Ordinance No. 14 of 1895.
6. Fernando *vs.* Andryas (1930) 31 N.L.R. 444.
7. Caldera *vs.* Pedrick (1927) 5 Times L.R. 70.
8. Almeida *vs.* Adirian (1929) 6 Times L.R. 123 per Akbar, J.
9. Caldera *vs.* Pedrick (19 7) 5 T.L.R. 70.

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be sufficient evidence of a sale,[1] unless other circumstances strongly point to a sale. Thus, where a decoy who had made a statement before a J.P. admitting sale afterwards denied even having gone to the accused's house and where the Inspectors deposed to having seen a bottle of Brandy in his hands and found another bottle and a pint in a box and the marked notes in another box in the accused's house, the Supreme Court affirmed the conviction on the ground that the previous confession by the decoy was relevant to show that the decoy was unworthy of credit and that therefore what the Inspectors said was true and pointed to a sale.[2]

The identical coin or note that was handed to the decoy must be found on the accused. The marking of the note must be accurately and precisely done and, if possible, the number of the note must be noted down in the Inspector's diary. The decoy should be searched in person before being sent out, so as to avoid all suspicion of introduction. The Inspector and other members of the raiding party should try and see from their hiding place what the decoy and the accused are doing, so as to be able to lead evidence of corroboration. They should also be prepared to answer questions about the details of the house, as these are sometimes very important, *e.g.*, to satisfy the Court that they could have seen the sale from where they were hiding. All the money that is found on the person of the accused and all the excisable articles found in the house, together with all the vessels smelling of arrack or toddy, should be produced in Court. These will help to show habituality on the part of the seller. As Excise Officers are not Police Officers within the meaning of the Criminal Procedure Code, confessions made to them by accused persons were till recently admissible in evidence[3]; but the law has now been amended[4] and all confessions in respect of any act made punishable under the Excise Ordinance made by an accused to an Excise Officer or while he is in his custody are inadmissible; so that, if the accused confesses or admits his guilt, the Inspector should, besides recording the same if possible in his own language and getting his signature, produce him at once before Court or the nearest Magistrate; for any confession made in the immediate presence of a Magistrate is relevant, even though it is made by an accused who is in the custody of the Excise Officer. This will help the Court materially in arriving at the truth: for, no person will make a confession of guilt except under very strong pressure or duress; and this, a Magistrate will never use. All offences under the Excise Ordinance being bailable,[5] the accused should be bailed out forthwith by the Inspector instead of being marched triumphantly through the streets to his own office or to a Police Station. Only in default of bail, should they be handed over to the custody of a Police Officer to be produced in Court on a stated day. No force of any kind should be used either at the time of the raid or after: this will only incite the mob who may make things unpleasant for the raiding party. All productions should be sealed in the presence of the accused. If precautions on these lines are taken by Excise Officers, they will stand greater chances of securing convictions.

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1. Excise Inspector Rodrigo *vs.* Karunaratne (1932) 1 C.L.W. 222.
2. Rex *vs.* Valley and Anjalingam (1932) 1 C.L.W. 227. The decoy in this case was summarily dealt with for perjury.
3. P.C. Trincomalee 7391 S. C. No. 717. Rose *vs.* Fernando (1927) 29 N.L.R. 45. 5 Times L.R. 51.
4. By Ordinance No. 18 of 1928.
5. Section 38.

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It is absolutely necessary and therefore advisable that Inspectors should select, as their emissaries, persons of some standing and not merely idlers and habituals. It is realised that it is not possible in all cases to obtain the services of respectable persons to perform such missions, but the best endeavours should be made and undesirable persons avoided as far as possible. Although there is no rule of law that evidence of decoys must always be corroborated, such evidence will certainly be received with caution.[1] If the decoy continues to be absent from Court and the Magistrate thereupon discharges the accused, the discharge will not be a bar to a further prosecution of the accused for the same offence.[2]

If a raid fails, Inspectors should never attempt to "work up" the case; for, besides committing perjury, they would only go down in the estimation of the Court who would naturally view with suspicion their future prosecutions. If the sale is incomplete and the Inspector has nevertheless found a quantity of arrack or toddy in the house more than the prescribed quantity, a charge of possession will lie; but the question may arise whether the raid was made on a search warrant or in accordance with section 36. We shall examine this point presently. Where however a decoy is employed, absence of independant corroborative evidence will be insufficient to prove possession.[3] The person to whom an excisable article is sold is guilty of an abetment of sale under section 102 of the Penal Code.[4]

(VI) Illegal Transport or Import.

Section 44 enacts: "Whoever without lawful authority possesses any excisable article unlawfully imported, transported, or manufactured, or on which proper duty has not been paid, shall be guilty of an offence" punishable like the offences under the previous section. The gist of this section is "without lawful authority" and the burden of proof of such lawful authority is on the defence.[5] This section is not much used in practice and is meant to provide for such cases as do not fall within the meaning of the earlier section. Thus, where an "unapproved" brand of a bottle of Brandy is found in the house of a person, he will come within the pale of this section if no duty has been paid for its importation. Or, a sub-agent in Colombo of a person in Jaffna dealing with an Indian Firm and importing patent medicines which are said to contain a percentage of ganja would also be liable to punishment under this section.

All what we have said above with regard to possession applies with equal force to possession under this section; but the presumption that the person possessing has committed an offence does not arise; and therefore the prosecution must prove beyond doubt that an offence has been committed by the accused. But, *caeteris paribus*, a person may be convicted of the offences of unlawful possession and transport in respect of the same act.[6]

It would be pertinent to enquire whether the possession of less than the prescribed quantity of toddy in areas where "off-sales" are

1. Jayawardena *vs.* Don Paulu 3 Times L.R. 36.
2. Ekanayake *vs.* Fonseka (1932) 10 Times L.R. 1 1 C.L.W. 310.
3. Lawrencepullai *vs.* Kattalingam (1931) 1 C.L.W. 56.
4. Ponnadurai *vs.* Vyramuttu (1924) P.C. Chavakachcheri 12881 S.C. No. 115.
5. Attapattu *vs.* Anthonypillai (1932) 10 Times L.R. 14.
6. Excise Inspector *vs.* Ponnadurai (1930) 31 N.L.R. 508.

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prohibited can be regarded as possession of toddy illegally transported. If the prosecution establishes that there are no taverns where off-sales are permitted within a raidus of, say, 50 or 100 miles, the burden will certainly be shifted on the defence to account for this possession : for a moral, if not a legal, presumption arises that the toddy could not have been legally transported from that distance. But as the presumption created by section 50 does not apply to section 44, the prosecution must prove its own case ; thus where an accused in the Point Pedro dry area alleged that the toddy for the illegal possession of which he was charged was bought by him at Mullaittivu (where off-sales are not prohibited), the Supreme Court, while strongly suspecting that the statement of the accused was untrue, directed an acquittal in the absence of any positive proof that the toddy was illicitly manufactured or illegally transported.[1]

(VII) **Permit-Holders.**

Section 45 penalises :

(1) the holder of a license, permit, or pass under the Ordinance, if he fails to produce the same when lawfully demanded ;—

(2) the holder of any such license, permit, or pass, or any other person in his employ and acting on his behalf—

(*a*) if he wilfully contravenes any rules made under section 31 which empowers the Governor in Executive Council to make rules under the Ordinance ; or

(*b*) if he wilfully does or omits to do anything in breach of any of the conditions of his license, permit, or pass, not otherwise provided for in the Ordinance.

The maximum punishment is only a fine of Rs. 200 or imprisonment for three months or both.

This section is directed against licensees and permit-holders, and therefore differs materially from the former two. The essence of this differentia is brought out by Justice Schneider, in one of his recent judgments :[2] " It should not be overlooked that while section 43 refers to acts in contravention of that Ordinance or of any rule or order, it also refers to contraventions of any license, permit, or pass obtained under the Ordinance. Section 45 (*c*) refers also to acts wilfully done or omitted in breach of any conditions of a license, permit, or pass, but the presence of the words ' license, permit, or pass ' in both the sections does not justify 43 (*h*) and 45 (*c*) being regarded as identical. The important words in 45 (*c*) are ' not otherwise provided for in this Ordinance.' These words indicate that where there is a provision in the Ordinance elsewhere than in section 45, in regard to the breach of the conditions of the license, permit, or pass, section 45 will not apply. The difference in the penalties provided in sections 45 and 43 appears to indicate that section 45 (*c*) was intended to catch up such minor acts of misconduct by a licensee or holder of a pass or permit as would not be punishable under section 43 or any other provision in the Ordinance." It follows, therefore, that while a licensee will be open to punishment under either of the two sections for contravening any of the terms or conditions of his license, section 43 can only be availed of where any express offence as defined therein has been committed ; whereas section

1. Excise Inspector, Point Pedro *vs.* Vairavan Vally (1926) P.C. Point Pedro 3358, S.C. 479.
2. A.S.E. *vs.* Velupillai (1923) 25 N.L.R. 63.

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45 is more general and applies not merely to licensees, but also to their recognised employees acting on their behalf. Thus, the Galle Face Hotel Company was held liable for the act of their servant in selling liquor within prohibited hours unless the Company were able to establish that all due and reasonable precautions were taken against the commission of the offence.[1] Furthermore, the breach of the conditions of a license should be wilful. Thus, when the act complained of is done during the accused's absence and without his knowledge and authority, he cannot be said to have wilfully contravened a rule.[2] Where the accused, a licensed distiller, locked up his distillery, put the key in a drawer of a table in his house and left his village, and where a registered servant of his got the keys from the accused's mother and contravened a rule made under the Ordinance by admitting an outsider into the distillery, it was held that the accused was not responsible for the act of his servant. Where, again, the accused was charged under section 45 (c) for having kept his tavern open a few minutes after the closing time, viz., 7 p.m., and where it appeared that the accused had taken all reasonable precautions to prevent a breach of the rules by shutting all doors but one, and by preventing outsiders from getting into the tavern the open door being kept ajar in order to let out persons who had entered before the closing time, it was held that the act of the accused cannot be held to be wilful, "for these matters should be looked at not according to strict observations of the shadows on the dial, but with some degree of practical good sense. Any space of time like five minutes should not be made the basis of a serious criminal charge unless there are other circumstances which justify such proceedings."[3] The burden of proving that a tavern was kept open not wilfully but for a lawful purpose would clearly lie on the defence. The mere keeping open of a tavern within the prohibited hours *per se* constitutes a breach of the rules and is therefore an offence.[4] It is not necessary to prove that a sale in fact took place in addition to proving that the tavern was kept open during the prohibited hours.[5]

The various rules made under sections 24 and 31 are published from time to time in the *Government Gazette*. The scope of this book prevents us from discussing them in detail: the following are a few of the important general conditions[6] applicable to all Excise licenses :—

(1) No tavern shall be used as a place of residence.

(2) A sign-board shall be affixed to the front of every tavern, giving particulars of the license and the current rate of sale.

(3) No liquor shall be sold at a price higher than the current rate, neither below the minimum nor above the maximum price fixed.

(4) No person under sixteen shall serve or be served with liquor.

(5) Toddy and arrack taverns shall be kept open between 8 a.m. and 6.30 p.m. only, unless the closing and opening hours are otherwise altered by the Government Agent in consultation with his Excise Advisory Committee.

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1. Ward *vs.* G. F. Hotel Co., Ltd. (1928) 29 N.L.R. 353.
2. Jayawardena *vs.* Fernando (1919) 21 N.L.R. 476.
3. Gunasekara *vs.* Perera (1920) 7 C.W.R. 298.
4. P.C. Chilaw 36717 S.C. judgment of 28th March, 1913.
5. De Silva *vs.* Gunewardena (1926) 4 Times L.R. 113.
6. The latest are published in Gazette No. 7941 of 26th August, 1932.

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(6) No drunkenness, disorder, or gaming shall be permitted on the premises.

(7) No drunken, disorderly, or riotous persons, nor thieves, nor habituals, nor prostitutes shall be harboured on the premises, nor constables on duty.

(8) Such supply of liquor as the Government Agent considers sufficient to meet local requirements should be maintained in the taverns.

(9) No liquor shall be sold in taverns except for cash: where a tavern-keeper supplied arrack on "chits" against deposits of money, it was held that it was not a credit-sale.[1]

(10) No liquor in excess of the quantity prescribed for possession without a license shall be permitted to be removed by any one person at any one time, and, where off-sales are prohibited, no liquor shall be sold for removal at all.

(11) True accounts of the transactions shall be kept on the licensed premises.

(12) No adulterated liquor shall be sold and all tavern premises shall be kept scrupulously clean.

These are some of the most important of the general conditions applicable to all Excise licenses; besides these, there are special conditions applicable to Arrack Rent Sales or to Toddy Rent Sales. A breach of any of these conditions is punishable under the section.

The most common offences in a Police Court are "short-measures" and "off-sales." By "short-measures" is meant the selling of a quantity than than what the buyer is entitled to, for a certain amount. At the taverns, measuring glasses for various amounts, *e.g.*, 10 cts., 25 cts., 50 cts., etc., are provided and when a person orders a drink, say, for 50 cts., the bar-keeper measures the liquor in the particular glass and doles it out to the buyer. If he habitually sells a few minims (*i.e.*, drops) less, the collective shortage, is in the long run, very profitable to him: such short sales are often intentional and seldom accidental. Excise Officers carry out raids through agents to detect such cheating. The defence that a portion of the liquor got spilled, or had evaporated, or had stuck to the sides, does not help materially, for an experiment will convince that only a negligible quantity thus gets accounted for. The raiding party should avoid ordering liquor for an unmeasurable value, lest the tavern-keeper might have to do a problem in arithmetic before he could successfully measure out the required quantity. In a charge of selling at a higher price, the strength of the liquor is immaterial.[2]

By "off-sales" is meant that no tavern-keeper can sell except for consumption on the premises. There are, however, license-holders, *e.g.*, tobacco-dealers in the North, who require arrack for their trade: these can remove a prescribed quantity from a tavern on a permit.

Whether there is a breach of the conditions of the license will, in each case, be a question of fact and of construction of the terms of the license. Thus, a hotel licensee who is authorised to supply liquor to customers along with their meals is not bound to see that the customers also consumed the meals supplied.[3] A licensee author-

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1. Kretzer *vs.* Fernando (1917) 19 N.L.R. 440.
2. Beven *vs.* Perera (1924) 2 Times L.R. 127, and Misso *vs.* Perera (1924) 2 Times L.R. 152.
3. Excise Superintendent *vs.* Wijetunge *et al* (1929) 6 Times L.R. 133.

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ised to sell liquor on the ground floor cannot sell on the first floor.[1] If a license is unlawfully issued, or if there is any defect in the issue of a license, the better opinion is that a prosecution would fail. Thus, if an Office Assistant, without any express delegation of authority in his favour,[2] were to sign an Excise license on behalf of a Government Agent, the license is bad and the licensee cannot be punished for any breach of its terms.

Where there is no provision for punishment under any of the foregoing sections, a prosecution may lie under section 47 for being guilty of any act or intentional omission in contravention of the provisions of the Excise Ordinance or of any rules or orders made under the same. The maximum punishment under this section is a fine of Rs. 100.

Any offence under either of these two sections is compoundable by a Government Agent or by an Excise Officer not below the rank of an Assistant Commissioner ; this power to compound is merely discretionary ; but once the discretion is exercised, the licensee or permit-holder cannot be prosecuted again for a breach of the same condition, unless he fails to pay the composition-fee demanded from him.

Section 50 enacts that in any case where the actual offender is not the same as the licensee or the permit-holder but a person in his employ and acting on his behalf, the licensee or the permit-holder shall be liable to punishment as well as the actual offender, unless he shall establish that all due and reasonable precautions were exercised by him to prevent the commission of such offence. We have already considered the force of this enactment. It must be proved, however, that the offender was a person in his employ and acting on his behalf. The accused, a distiller, was charged with having permitted the removal of ninety-five drams of arrack from his licensed premises without a pass ; the actual removal was effected not by the accused but by one Hendrick who was not one of the registered distillery servants nor in the employ of the accused ; it was held that the accused was not responsible for the act of Hendrick.[3] This section deals with cases in which an offence has been committed, without any connivance or collusion on the part of the licensee or permit-holder, by some one who is his servant and who is acting on his behalf in committing the offence. It is meant to provide for cases where the servant is acting in the ordinary course of his duty and, while doing so, has transgressed some provision of the Ordinance owing to the licensee not having taken proper precautions to prevent it. The fact that a servant of a licensee of an arrack distillery removes some arrack without a pass is not sufficient to convict the licensee.[4] If a licensed person delegates his authority to another and places him in complete charge of the premises, he substitutes that person for himself and is liable for any breach of the licensing laws committed by the person on the premises.[5] But a renter of a tavern is not liable if his salesmen were to sell arrack on credit, or to have pecuniary dealings with an Inspector of Excise in contravention of the regulations framed under the Ordinance.[6]

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1. Excise Inspector, Colombo, *vs.* Peter (1930) 3 C.A.R. (Gratiaen's) 32.
2. De Kretser *vs.* Perera (1925) 26 N.L.R. 415.
3. Jayawardena *vs.* Perera (1916) 2 C.W.R. 23.
4. Jayawardena *vs.* de Silva (1916) 19 N.L.R. 218.
5. Samarakoon *vs.* Groos (1897) 2 N.L.R. 337.
6. A.S.E. Jaffna *vs.* Ponniah (1924) 2 Times L.R. 164.

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(VIII) Search-Warrants.

As search-warrants play an important part in all Excise offences, it will be necessary to consider them in detail. When an Excise offence is being committed in any place other than a dwelling-house, all Excise and Police Officers are empowered to arrest without a warrant all such offenders within their local jurisdictions and also to seize and detain all excisable articles ; but when an offence is being committed in a private dwelling-house, no entry or search can be made—

(1) unless a search-warrant is issued by a Government Agent or by the local Magistrate, or

(2) unless the officer, before proceeding to make a raid, records that a warrant could not have been obtained without affording the offender an opportunity of escape or of concealing evidence of the offence.

If an entry or search is made without either of these two elements, the Supreme Court has now held that a prosecution otherwise properly constituted is not vitiated by the mere fact that the discovery was made by a person who entered otherwise than in accordance with the provisions of the Excise Ordinance.[1] Jayawardene, J., discussed this point and considered all the Indian authorities and came to the conclusion that such an irregularity did not bar a conviction upon facts which are found to be true.[2] For the fact that an Excise Inspector has entered upon and searched private premises without a search-warrant does not render his evidence so obtained inadmissible.[3] If an offence is committed, the illegality of the entry and search is no bar to a conviction.[4] The only effect of not complying with the regulations provided or required by law would be that the entry of the raiding party would not be deemed lawful and the accused would be justified in pleading justification for escape from custody, or for resistance, or even for a charge of causing hurt and obstruction to a public servant in the discharge of his duties. It is thus practically essential and recommended that the Excise Officers should never fail to comply with the provisions of section 36. The power of an Excise Inspector, not fortified by a search-warrant, is dependent upon his having made a record of the grounds of his belief as to the necessity of a search.[5] These grounds must specifically state that the delay in obtaining a warrant would defeat its object by affording the offender an opportunity to escape. If information is received by an Excise Inspector, say, at midday and, without obtaining a search-warrant, he proceeds to make the raid after dark, even though he has made the necessary entry as required by the Ordinance, he has not made an instantaneous search but has himself allowed the offender ample time to escape. It is questionable whether this provision applies to the case of inhabited dwellings only.[6] At any rate, when a raid is made on an inhabited dwelling without a search-warrant, an entry in the Inspector's diary, borne out by other circumstances of the case, would be necessary.

An entry to the following effect was held to be sufficient : "I have credible information that illicit distillation of arrack is going on in the house of . . . I decide to search the house under section 36.

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1. Sub Inspector of Police, Mirigama *vs.* John Singho *et al* (1926) 4 Times L.R. 71.
2. Bandaravella *vs.* Carolis Appu (1926) 27 N.L.R. 401.
3. Almeida *vs.* Mudalihamy (1929) 7 Times L.R. 54.
4. A.G. *vs.* Horthewyck (1932) 1 C.L.W. 280.
5. Zilva *vs.* Sinno (1914) 17 N.L.R. 473.
6. Silva *vs.* Hendrick Appu (1917) 4 C.W.R. 232.

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of the Ordinance as there is no time to obtain a search-warrant."[1] But an entry to say that " one William states to me that he has been drinking toddy from one James Silva of Etagama " would hardly be a compliance with the provisions of the section as it does not disclose that an offence has been committed or contain a record of the grounds of belief[2]. These two decisions were, however, on an appeal from a conviction for escape from custody and obstruction and will not vitiate a conviction under the Excise Ordinance for possession or sale of excisable articles, for the recent decisions quoted above make it clear that the raid is lawful so far as Excise offences are concerned even though this section may not have been properly complied with.[3]

The Ordinance provides that both the Government Agent and the Police Magistrate may issue search-warrants : in practice, the former seldom does. A search-warrant can only be issued " upon information received and after such enquiry as they think necessary." The issue of search-warrants merely on an affidavit by an Excise Inspector to the effect that he has received credible information of the commission of an offence is, it is submitted, highly irregular ; for what the Ordinance requires is not merely information but also such enquiry as is considered necessary. Our Supreme Court has now ruled that the affidavit of an Excise Inspector, based on hearsay evidence is insufficient material upon which a Magistrate would be justified in issuing a search-warrant under section 35 of the Excise Ordinance.[4] Thus, the informant when available should be called in order to substantiate the statements in the affidavit, or there must be an entry on the record to the effect that further enquiry is not considered necessary. Merely because a Magistrate has issued a search-warrant, the fact of the issue will not validate proceedings which may have been vitiated by an irregular warrant. As in gambling cases, so in Excise offences, an irregular or illegal search-warrant may be prejudicial to the prosecution.

A search-warrant merely empowers the officer, in whose name it is issued, to search the particular house or premises for, and to seize, any excisable articles found therein (or materials used for the manufacture of the same and any documents relating thereto), and to arrest all persons concerned in the commission of an Excise offence : these powers are limited and subject further to the proviso that all Excise offences are bailable. The incidental powers possessed by an Excise Officer under a search-warrant are the same as those possessed by a Police Officer under an ordinary search-warrant. Whenever any place liable to search is closed, any persons residing in it or in charge of the same are bound to allow free ingress to the searching officer on his producing the warrant. If such persons are not available, a watch might be kept on the premises and their return awaited. If ingress is not possible under these circumstances, then and only then can an Excise Officer effect an entrance by breaking open any outer or inner door. This does not authorise an Excise Inspector to make a burglarious entry by sending a peon up the roof, even though, by so doing, damage to an outer door is avoided.[5] If the persons present in the house so desire, a copy of a list of articles seized and detained must be given to them. The failure of on Excise Officer to make a list of articles found while searching under a

1. King *vs.* Fernando (1930) 32 N.L.R. 156. 8 Times L.R. 24.
2. De Silva *vs.* de Silva (1931) 32 N.L.R. 223. 8 Times L.R. 97.
3. See also Bastiansz *vs.* Punchirala (1931) 1 C.L.W. 281.
4. Dewasundera *vs.* Sinnathane *et al* (1930) 31 N.L.R. 493.
5. Excise Inspector, Pt. Pedro *vs.* Thankamma (1925) 26 N.L.R. 307.

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warrant in accordance with section 75 of the Criminal Procedure Code is not a fatal irregularity provided oral evidence of what was found is satisfactory.[1] Nor is such failure fatal where search is made without a search-warrant.[2] No restraint or force can be used in pursuance of a search-warrant more than is reasonably necessary for the purpose of preventing the escape of offenders. Where resistance to search is offered by the inmates of a house, the advice of the Magistrate who issued the search-warrant might be sought as to the probable course of action.

Neither a search-warrant nor an entry in the diary is necessary if an Excise offence is not committed in a dwelling-house or is being committed in one's presence. What is "actual commission" of an offence depends upon the circumstances of each case. Where an Inspector found an offender descending from a tree with a pot of toddy and the accused admitted that he had drawn it for his consumption, it was held that the accused was caught while actually committing the offence of tapping for and drawing fermented toddy and that consequently the arrest was lawful.[3]

All articles whatsoever seized on the authority of a search-warrant and all persons who are not able to give bail must be produced forthwith before a Magistrate.[4] Where no offence is committed, it would be futile to seize anything. Excise Officers may deliver articles to local Police Stations pending their production in Court. All articles seized and produced must be entered on the plaint as productions. It has now been held that the substance found in possession of the accused should, if a charge is to be framed in connection with it, be sealed immediately in the presence of the accused,[5] so as to prevent the suggestion that a substitution has taken place after the seizure. Failure to seal will not be a fatal irregularity only in those cases where the accused does not suggest substitution.[6] But there is no imperative or inflexible rule that the articles should be sealed immediately after seizure and before they are moved to the Police Station.[7] In a case of unlawful possession of ganja or opium, the production of a report by the Public Analyst is not the only method of proving the nature of the substance. Evidence of a person who has some knowledge of the substance may be sufficient.[8]

Under the Excise Ordinance, plaints must be filed by an "Excise Officer." Any officer appointed or invested with powers under section 7 of the Excise Ordinance is an Excise Officer and therefore is competent to prosecute.[9] Thus, Village Headmen or Mudaliyars[10] and Police Sergeants[11] are Excise Officers[12] and can prosecute, but a constable may not.[13] A constable can, however, prosecute in a case of keeping the licensed premises open after hours, being invested with special powers in that

1. Nicholas *vs.* Fernando *et al* (1931) 33 N.L.R. 34. 8 Times L.R. 149.
2. Perera *vs.* Paulu (1932) 1 C.L.W. 399.
3. Jayatilleke *vs.* Rodrigo (1920) 7 C.W.R. 286.
4. Nicholas *vs.* Fernando *et al* (1931) 33 N.L.R. 34.
5. Ferdinando *vs.* Mudalihamy (1932) 1 C.L.W. 297.
6. Bandaranayake *vs.* Ismail (1930) 3 C.A.R. (Gratiaen's) 1. 7 Times L.R. 91.
7. Prins *vs.* Sabaratnam (1932) 1 C.L.W. 373.
8. Almeida *vs.* Fernando (1930) 31 N.L.R. 331. 7 Times L.R. 98.
9. (1913) 16 N.L.R. 510.
10. Wickramaratna *vs.* Pathmaperuma (1914) 2 C.A.R. 13.
11. Perera *vs.* Nagoor Pitche (1929) 6 Times L.R. 98.
12. Excise Notification No. 1, Gazette No. 6536 of 13th December, 1912.
13. Miskin *vs.* Fernando (1914) 2 C.R. 34.

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behalf.[1] Thus, though it is competent for "Police Officers in charge of Stations" to prosecute in Excise cases, a better course would be to get a prosecution entered in the name of the local Excise Inspector.

An Excise Inspector may legitimately enlist the services of a Police Constable to help him in searching a house for excisable articles in any case in which the Inspector himself has a right to search; but an Excise Inspector cannot issue an order to a Police Constable to search a house. So that, where a constable is obstructed in searching while so helping an Excise Inspector, the plaint must state that the obstruction was not to the constable (who has no authority to search) but to the Excise Inspector himself.[2]

The omission on the part of an Excise Officer to sign the report on which a prosecution under this Ordinance is initiated is a fatal irregularity,[3] for the Ordinance enacts that no Magistrate can take cognisance of any offence thereunder, except on the report of an Excise Officer; and the identity of the prosecuting officer cannot be established if he has failed to sign.

(IX) Confiscation.

Punishment in all Excise offences is usually more severe than in the case of other offences; this is due not merely to the fact that the maximum fine prescribed is ten-fold the amount that a Magistrate can lawfully impose, but also to the fact that Excise offences are mostly offences against Revenue. The measure of punishment is therefore materially different. The fact that a particular area is dry has to be taken into consideration in imposing sentence. Illicit traffic in prohibited articles is a source of immense profit and, unless deterrent sentences are imposed, the evil cannot be checked and the traffic is bound to continue. All offences under the Excise Ordinance being summary, a Magistrate has the power to impose maximum fines.

When an Excise offence is committed, the excisable article, materials, still, utensil, implement, or apparatus in respect of which the particular offence is committed together with all receptacles, packages and coverings, and also the animals, carts, vessels, or other conveyance used in carrying the same are liable to confiscation. Thus, if ganja is carried in a cart, not merely the ganja and the tin in which it is contained, but also the cart and the bulls are liable to confiscation. Or, when arrack is being illicitly distilled, both the arrack and the still and all the pots and pans can be confiscated. But a subtle distinction must be drawn: nothing which belongs to an innocent third party, even though an Excise offence has been committed, can be forfeited. Where a tavern-keeper was convicted of selling arrack to a barber after hours, the Supreme Court held that the barber being the lawful owner of the arrack by purchase cannot be said to have committed an offence[4] by buying arrack after hours and that, therefore, the Magistrate cannot order the arrack to be destroyed but should have returned it to the barber.[5]

Instead of ordering confiscation, a Magistrate has the option of giving the owner of the thing liable to confiscation an option to pay such fine as he thinks fit. And the Supreme Court has ruled that this

1. Excise Notification No. 10, Gazette No. 6564 of 30th May, 1913.
2. Zilva *vs.* Sinno (1914) 17 N.L.R. 473.
3. Spar *vs.* Kadiri (1914) 1 C.A.R. 38.
4. Quaere: is he not guilty of abetment?
5. Anthonipillai *vs.* Subramaniam (1922) 24 N.L.R. 60.

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option should always be exercised in the first instance : thus, where ganja was transported from India to Ceylon in a sailing-vessel and, on the accused pleading guilty, the Magistrate sentenced him to a fine of Rs. 1,000 and ordered the vessel to be confiscated, the Supreme Court in revision affirmed the fine but set aside the order of confiscation ; firstly, because there was no evidence on the record to show that the vessel was used for the purpose of importing the ganja in question, and secondly, because no option to pay a fine was given to the owner who was a person other than the accused. The amount of fine under this section is apparently unlimited but should not be excessive. Thus, if any excisable article is being removed in a motor car which itself is not worth more than Rs. 1,500, a Magistrate cannot ask the owner of the car to pay, in lieu of the forfeiture, a greater fine than the value of the car. An order of confiscation of a vehicle used for the illegal conveyance of an excisable article should be made with notice to, or in the presence of, its owner.[1] Before an order of confiscation is made, the owner should be given an opportunity of being heard, and an order of confiscation cannot be made unless the owner is in some way implicated in the offence which renders the thing liable to confiscation,[2] or unless the owner is aware that the vehicle was to be used for transporting excisable articles illicitly, or that it had been used for such a purpose previously.[3] This statement of law was reiterated recently in a case where the Supreme Court held that a motor car taken on a hire-purchase agreement which is used for the commission of an excisable offence to which the owner is not a party is not liable to confiscation.[4]

The Supreme Court recently condemned the practice of the Excise Department in empowering its Inspectors to stop motor cars on suspicion of carrying contraband by throwing obstructions, like a framework of spikes across the road.[5] The legislature has, therefore, since invested Excise Officers[6] with powers to stop any person, vessel or animal for the purpose of search. Failure to stop when directed or signalled thereto by an Excise Inspector or by any superior officer acting in the execution of his duty renders the driver of the vehicle liable to a fine of fifty rupees or in default to simple imprisonment for six weeks. The word "vehicle" includes any carriage, coach, cart, motor car, motor cycle, omnibus, lorry, bicycle, or other mechanically propelled vehicle ; "driver" includes the rider of a motor cycle or of a bicycle ; "signal" includes one or more blasts of a whistle.

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1. Sinnetamby *vs.* Ramalingam *et al* (1924) 2 Times L.R. 185.

2. The above case of Sinnetamby *vs.* Ramalingam was remitted by the Supreme Court to the Magistrate to make an order of confiscation after giving notice to the owner. The Magistrate thereupon noticed him and gave him an option to pay a fine of Rs. 200. The Supreme Court quashed the order for want of complicity on the part of the owner. The original proceedings are reported in 2 Times L.R. 185—the later ones in 26 N.L.R. 371.

3. Sanders *vs.* Thambirajah *et al* P.C. Chavakachcheri 14090 S.C. 396 A to D.

4. Fernando *vs.* Mather and Sons (1932) 9 Times L.R. 148 1 C.L.W. 249.

5. Ossen *vs.* Ponniah (1932) 9 Times L.R. 137 1 C.L.W. 246.

6. By Ordinance No. 3 of 1933.

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CHAPTER XXXI.

OPIUM.

The history of opium legislation in the country and the language and scope of our present Ordinance[1] show conclusively that the legislature intended not merely or chiefly to protect the Revenue, but to prohibit the sale of, and all traffic in, opium except under conditions prescribed by itself.[2] Hence the Ordinance, like the Excise Ordinance, is very stringent in its enactments and lays down, with the utmost precision, the method and manner in which opium should be possessed, prescribed, consumed, or sold.

No person can consume opium unless he is a registered consumer and has a consumer's certificate. By this certificate, he is entitled to receive the quantity for which he is registered, from an authorised vendor whose name should appear on the license ; but he cannot receive more than thirty days' supply at any one time, the possession of any excess being prohibited. Where a registered consumer of opium possesses a quantity in excess of the certified amount the onus of proving lawful possession is upon him.[3] If he can satisfy that the opium detected was supplied to him in accordance with the provision of the Ordinance, his possession cannot be held to be illegal.[4]

No person can possess opium in any quantity whatsoever

(1) unless he is a registered consumer : in which case, he can possess any quantity up to thirty days' supply ; or

(2) unless he is registered Vedarala : in which case, he can only possess the quantity for which he is registered ; or

(3) unless he is a Medical Practitioner or a Veterinary Surgeon : in which case he can only possess the quantity issued to him by the Director of Medical and Sanitary Services for dispensing for *bonâ fide* medicinal purposes ; or

(4) unless he is an authorised vendor ; or

(5) unless he is a planter with more than 50 immigrant coolies and has no estate dispensary : in which case, he can supply his coolies, for medicinal purposes, opium in medicinal form for not more than three days[5] ; or

(6) lastly, unless it is possessed for and on behalf of the Government, *e.g.*, in Government Hospitals.

Save and except these, whoever keeps in his possession, or in or upon any premises in his occupation or under his control, any opium is liable to a fine of Rs. 1,000 (or to Rs. 250 for every ounce or part of an ounce), or imprisonment for one year or both.

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1. No. 5 of 1910, Vol. III, p. 2.
2. Per Wood Renton, C.J., in Fernando *vs.* Ramanathan (1913) 16 N.L.R. 337.
3. Menon *vs.* Abdul Rahman (1929) 31 N.L.R. 95.
4. Lawrensz *vs.* Ranasinghe (1932) 10 Times L.R. 63.
5. Section 3 of Ordinance No. 17 of 1911 embodied in the principal Ordinance.

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"Opium" means and includes every class and character of opium whether crude, prepared, or refuse, and all narcotic preparations thereof or therefrom, and all morphine or alkaloids of opium, and all preparations in which opium or its alkaloids enter as ingredients, together with all opium leaves and wrappings ; but excludes the medicinal preparations like Ammoniated Tincture of Opium, or Chlorodyne, a list of which is given in the schedule. The Public Analyst is not the only authority on establishing the identity of the substance : evidence of a person who has some knowledge of the substance is also sufficient.[1]

The section does not say "has in his possession," but "keeps in his possession." "The use of the single word 'keep' in this section indicates that it was not intended to draw a distinction between having and keeping. The distinction, if there is one, is perhaps that the word 'have' emphasises the fact of possession, while 'keep' more particularly conveys the idea of continuance of such possession. It is one and the same act that is aimed at, namely, possession, though under two aspects."[2] As we have already spoken at great length in the last chapter about possession, we need not recapitulate the points here. It need only be mentioned that, in addition to possession on one's own person or near one's self, the Ordinance penalises the keeping of opium in any premises in one's occupation or under one's control. So that, whether the occupier or owner knows of its presence or not, he is liable under the section, unless he can satisfactorily establish his ignorance and innocence. The possession of opium in any the smallest quantity—even of the size of a pin's head—is prohibited and punishable : the fact that the quantity is negligible can only be taken into consideration in imposing sentence.

The section empowers a Magistrate to impose a fine of Rs. 1,000 or of Rs. 250 for every ounce or part of an ounce. The force of this alternative provision is not easily understood : in the absence of any legal decision on the subject, a question may arise whether one thousand Rupees is the maximum fine that a Magistrate can impose, or whether he can overstep the limit and fine at the rate of Rs. 250 for every ounce illegally possessed.

The licenses of registered consumers, Vedaralas, or vendors are not transferable and nobody else can possess on their behalf. No medical practitioner or registered Vedarala can prescribe or dispense opium other than for *bonâ fide* medicinal purposes or in larger quantities than are reasonably necessary for a period of three days : nor can they prescribe or dispense opium in order to satisfy a craving for the drug under a penalty of a fine of one thousand rupees or imprisonment for a year or both. If a Doctor prescribes opium with other medicines and recommends that it should be taken for a certain length of time, the prescription must be "repeated" every third day before it can be dispensed again. The burden of proving that opium has been prescribed by a medical man or that the quantity in his possession does not exceed the prescribed quantity for three days lies on the accused.[3] Similarly the onus of proof of lawful possession where a registered consumer possesses a quantity beyond the certified amount is on him.[4]

Whoever imports or attempts to import opium into Ceylon, or sells, barters, or offers for sale or barter, or in any way disposes of, to any

1. Almeida *vs.* Fernando (1930) 31 N.L.R. 331.
2. Mohamed *vs.* Chelliah (1916) 3 C.W.R. 152.
3. Somasunderam *vs.* Hamidu (1930) 32 N.L.R. 274.
4. Menon *vs.* Abdul Rahman (1929) 6 Times L.R. 135.

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person whomsoever, any opium except when specially allowed thereto by the Ordinance, is liable to a fine of Rs. 2,000 (or to Rs. 500 for every ounce or part of an ounce) or to imprisonment for 2 years or both. Not merely sales but attempted sales, *i.e.*, offers, are also prohibited; and this is so, even where no money has passed. Thus, where the accused sent, by a Steamer, opium concealed in bundles of tobacco from Point Pedro to Batticaloa and where both were doing business in common, it was held that the accused had "disposed of" the opium within the meaning of this section.[1] The mere landing of an article which is brought by ship from overseas amounts to "importation" within the meaning of this section.[2]

There are other penal sections under the Ordinance which are seldom or never made use of and for which the reader should refer to the Ordinance itself.

The Governor in Executive Council is empowered to make rules for regulating the importation, storage, distribution, consumption and sale of opium; but the Ordinance does not provide for a breach of any of these rules: where the accused had kept an "opium divan" in breach of rule 52 made by the Governor in Executive Council, it was decided that the accused was entitled to an acquittal, as there was no provision making the breach of any of the rules an offence or imposing a penalty for such breach.[3] This is not so under the Excise Ordinance. Under the latter, a Magistrate has very wide powers of ordering confiscations: under the Opium Ordinance, an order for confiscation must be restricted to the opium itself.[4] Thus, where opium is being transported by a car from one place to another, neither the car nor the box in which it is contained can be confiscated; but the case would be different if both ganja and opium were transported together.

Under the Opium Ordinance (but not so in the Excise Ordinance), half-fines can be awarded to the Informer. Excise Officers, though they have an ordinary individual's powers in connection with arrest and search for opium have no authority to file cases for the possession, etc., of opium even if the detections are made by themselves: in the latter event, they should prosecute through the local Police Officers. There is no special provision under this Ordinance for the issue of search-warrants. All Police Sergeants and superior Officers, all Udayars, Vidane Aratchies, Koralas and Chief Headmen are empowered indiscriminately to enter and search any premises whether they are used as a dwelling-house or not, without a search-warrant, on reasonable suspicion that opium is being unlawfully possessed, kept, or sold on those premises. Such search can only be made between sunrise and sunset. The powers of search conferred under this Ordinance must be regarded as limiting the powers conferred by section 59 of the Police Ordinance.[5] The principles that apply to the Excise Ordinance regarding sealing of seized articles apply also to the Opium Ordinance.[6]

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1. Seenitamby *vs.* Vallipuram (1916) 19 N.L.R. 186.
2. Ashton *vs.* Croos *et al* (1929) 30 N.L.R. 369 6 Times L.R. 98.
3. Hart *vs.* Martinus Appu (1916) 3 C.W.R. 168.
4. Coomaraswamy *vs.* Ramalingam (1916) 2 C.W.R. 70.
5. King *vs.* Manikam *et al* (1931) 33 N.L.R. 152.
6. Prins *vs.* Sabaratnam (1932) 1 C.L.W. 373.

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All offences under the Opium Ordinance are triable by a Police Magistrate who can inflict all punishments prescribed therein, even though they are beyond his ordinary jurisdiction.[1]

Where large quantities of opium and ganja were being transported together in a motor car and the Magistrate imposed a fine of Rs. 1,000 for opium and of Rs. 500 for ganja in two separate prosecutions, Justice Schneider affirmed the sentence for ganja but reduced the fine for opium to one Rupee, remarking, " It seems to me a distinct hardship on these accused persons that they should have had to face two prosecutions."[2] Nevertheless, traffic in opium is bound to be very profitable and should be visited with deterrent punishment.

[The new Opium Ordinance No. 17 of 1929 enacted in pursuance of International Opium Conventions has not yet been proclaimed, as it needs certain amendments. It is very comprehensive and consolidates the law relating to poisons, opium and dangerous drugs. Any offence under this Ordinance is punishable on summary conviction with a fine of five hundred rupees or by a District Judge with a fine of five thousand and by the Supreme Court with ten thousand rupees with or without imprisonment. No non-summary proceedings can be commenced without the sanction of the Attorney-General.]

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1. Section 7 of Ordinance No. 17 of 1911—" provided that nothing in this section shall derogate from the jurisdiction of any other Court to try any such offence."

2. S.I. Polic , Jaffna *vs.* Tambirajah (1925) P.C. Chavakachcheri 14089. S.C. judgment 397.

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CHAPTER XXXII.

MOTORING.[1]

(I) General.

Till the new Motor Car Ordinance No. 20 of 1927 was introduced, there were three different enactments under which motoring offences could be dealt with : (i) the Vehicles' Ordinance,[2] (ii) the bye-laws for Motor Vehicles,[3] (iii) certain sections of the Penal Code. The Vehicles' Ordinance provided for the regulation of traffic of all sorts and empowered the Governor in Executive Council, by section 22, to make bye-laws for regulating and controlling the use of all motor vehicles. These bye-laws were framed and promulgated from time to time and related not merely to the regulation of traffic, but the proper registration, control and care of motor vehicles. As motor transport in the Island continued to develop, the bye-laws were found inadequate and a necessity was felt for consolidating the law relating to motor cars and for amending the Vehicles' Ordinance. This was done by the enactment of Ordinance No. 20 of 1927, which provides by section 88 (2) that all bye-laws, orders, rules, and regulations relating to motor cars made under the Vehicles' Ordinance No. 4 of 1916, are hereby revoked except as mentioned in sections 6, 58 and 70. Section 6 of the new Ordinance only speaks of "Gazette" notifications declaring any particular roads to be suitable for use by lorries or trailers before the Commencement of the new Ordinance ; but sections 58 and 70 appear to be a little ambiguous and are therefore quoted *in extenso* :

Section 58 (2). Any bye-law made under the Vehicles' Ordinance No. 4 of 1916, prohibiting, restricting or regulating the use of motor omnibuses or lorries and in force at the commencement of this Ordinance shall be deemed to be a regulation made under this section (58).

Section 70 (2). Any bye-laws made before the commencement of this Ordinance prohibiting or restricting the use of omnibuses on any highway shall be deemed to have been made under this section (70).

It would have been better if the legislature had prescribed which of these original bye-laws were valid and which not as otherwise a conflict is likely to arise between some of them and the new Ordinance. This Ordinance deals with motor cars, motor cycles, trailers, hiring cars, motor cabs, omnibuses, lorries and tractors—each of which has a special meaning and is specially defined by section 2 : the Vehicles' Ordinance, on the other hand, is more general in its application and refers not merely to motor vehicles but to vehicles of all descriptions, including in this term "all carriages, carts, coaches, tram cars and mechanically-propelled vehicles and every artificial contrivance used, or capable of being used, as a means of transportation on land." Some sections of the

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1. For further information, a Motor Manual by Mr. Perera, Proctor, Kurunegala, published by the Times of Ceylon Co., Ltd. might prove useful.

2. No. 4 of 1916, Vol. III, p. 363.

3. Notification in Gazette of March 3rd, 1922.

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Vehicles' Ordinance had in the nature of things to be amended or repealed after the promulgation of the Motoring Ordinance and these are detailed in the fifth schedule (Section 89).

A few motoring offences can also be specifically dealt with under certain sections of the Penal Code. While, therefore, a person committing an offence in respect of a motor vehicle renders himself liable to prosecution under any of these provisions, the better opinion is that his liability in the first instance must be considered under the new Motor Car Ordinance; and only in the event of this being found inapplicable or inadequate, a question would arise as to his guilt under the other enactments.

Besides these provisions, the various local bodies may frame their own special bye-laws. If no such special bye-laws are framed and promulgated, the main Ordinance will apply to every locality. Thus, a notice within certain Local Board areas to the effect that speed within these limits is not to exceed twelve miles per hour is useless and of no avail so long as there is no special bye-law enforcing its observance, and the main law fixing the speed-limit at 20 miles per hour within Local Board areas will apply.[1] In this chapter, we shall deal with the provisions of the Vehicles' Ordinance only in so far as they relate to motor vehicles.

There is a difference in the nature of penalties under the different provisions. A breach of a motor bye-law renders the offender liable in the case of a first offence, to a fine not exceeding Rs. 50 (and an additional fine of Rs. 5 a day for a continuing offence), and, in default, to imprisonment for a month, and in the case of a second or subsequent offence to a fine not exceeding Rs. 100 (and an additional fine of Rs. 10 per day for a continuing offence) or to a term of imprisonment not exceeding three months. Under the Vehicles' Ordinance, the maximum punishment varies for different offences, but is usually a fine of Rs. 100 except in the case of reckless or negligent driving, or driving in a state of intoxication, when imprisonment for three months can be ordered, but the fine is reduced to Rs. 50. Under the Penal Code, the amount of punishment is variable and differs for different offences. Under the Motor Car Ordinance the general penalty is Rs. 100 for the first conviction and Rs. 200 for a second and subsequent conviction for any offence; and the word "offence" is defined as contravention of any provision of this Ordinance or any regulation or failure to comply with any order, demand, requirement, or direction lawfully issued, made or given under this Ordinance or any regulation.[2] Driving in a state of intoxication or under the influence of liquor is punishable summarily by a fine of Rs. 1,000, or imprisonment for one year or non-summarily by double that punishment. Driving recklessly or in a dangerous manner or at a dangerous speed is punishable by an initial fine of Rs. 500, and on a second or subsequent conviction by imprisonment as well. Negligent driving entails a fine of Rs. 200.[3]

(II) Motor Car Ordinance.

The following are some of the most important provisions of this Ordinance, the infringement of each of which would render the offender liable to be prosecuted in a Police or Municipal Court.

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1. Section 59 of Ordinance No. 20 of 1927.
2. Section 82.
3. Section 57 (2) and (3).

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(1) *Registration.*—Every motor car, motor cycle, or motor lorry must be registered and must bear rectangular identification plates[1] both in the front and behind, with white letters and figures painted on a black surface[2] except in the case of hiring vehicles, when the ground of the plates should be white and the letters red. Dealers in motor cars may apply for and receive a general identification plate which must be used on all cars plying on the roads on trial. The ground of each such plate should be red and the numbers white. All letters and figures on every plate should be not less than 3½ inches high; every part of every letter and figure should be at least five-eighth of an inch broad and the total width of every letter or figure should be at least 2½ inches.[3] All letters and figures should be of uniform size—with an interspace of half an inch. In the case of motor cycles, the dimensions may be reduced by half. No part of any identification plate should in any manner be obscured. Thus, mud-bespattered plates or plates invisible because of luggage tied on the carrier or through a dim tail-light would constitute an offence. If the ownership of a motor vehicle or the address of its owner is changed, due notice must be given to the Registrar. If a motor vehicle is destroyed, or broken up, or is unfit for further use on the roads, or is permanently removed from the Island, the owner may request the Registrar to cancel the registration: the latter may require proof to be adduced on this behalf; and until the registration is cancelled, the person in whose favour the vehicle was originally registered is deemed responsible as *de facto* owner. By an amending Ordinance,[4] the Registrar of Motor Vehicles is empowered to hold summary inquiries into the claims of rival claimants to any motor vehicle and has the power to enter or delete the name of any person as owner in the register after such inquiry.

The registered owner of every motor car is bound to inform forthwith the Registrar in writing of any circumstance or event which is likely to affect the accuracy of any entry in the register affecting the motor car, *e.g.*, his change of address, and must forward the certificate of registration for necessary amendment and return. In the case of change of possession by sale or gift or by seizure under the hire-purchase system, the registered owner must inform the Registrar within seven days, during which period the new owner may apply for fresh registration in his own name. In the case of death of the original owner, this duty is cast on "person into whose custody the motor car shall come" and the Registrar is empowered to give directions as to the use of the car pending fresh registration. If a registered owner leaves the Island for more than one month, his car cannot be used after that month without its being freshly registered.

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1. A design similar to a plate may be painted or delineated instead of a plate.
2. The following index-marks are used for identification-plates in the different districts:—

District	Mark	District	Mark
Colombo District ..	A	Hambantota District ..	M
Kalutara District ..	B	Galle Municipality ..	N
Colombo Municipality ..	C	Batticaloa District ..	O
Kandy District ..	D	Trincomalee District ..	P
Matale District ..	E	Kurunegala District ..	Q
N'Eliya District ..	F	Puttalam	R
Kandy Municipality ..	G	Chilaw District ..	S
Jaffna District ..	H	Anuradhapura District ..	T
Mullaittivu District ..	I	Badulla District ..	U
Mannar District ..	J	Ratnapura District ..	V
Galle District	K	Kegalle District ..	W
Matara District ..	L		

3. Except figure 1.
4. No. 22 of 1929: section 9 incorporated in the principal Ordinance as section 18 (3).

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The registered owner is regarded as *de facto* owner for all the offences under the Ordinance unless the defence can show that an absolute owner has been registered by the Registrar in opposition to his claims. A registered owner is held in law to be the person entitled to possession and consequently liable to pay the license duty, unless there has been a transfer of possession as required by the Ordinance or unless the registration is cancelled.[1] Registration can be effected by the payment of Rs. 10 in the case of a motor car or lorry and of Rs. 2·50 in the case of a motor cycle : when ownership changes, re-registration can be obtained by the payment of Rs. 5 and 2·50 respectively. The fee for registering the nominee of an owner leaving the Island is Rs. 2·50. Every number for a dealer's license costs Rs. 2.

(2) *License.*—This registration must be distinguished from the annual tax[2] which an owner is liable to pay, dependent on the weight of his car, to the local bodies. On the payment of this tax, a license is issued which is circular in form, differs in colour in different years and has to be carried on the front of the car on the left side in a weather-proof holder. A motor car cannot be used without this license or for a purpose nor authorized by the license or in contravention of any conditions of the license. Thus, a 'bus licensed to carry goods as well as passengers must conform to the bye-laws for omnibuses licensed for passengers alone : it cannot be one and the other at the same time : it cannot, for instance, load and unload goods at any place which is not a 'bus halting place or a stand.[3] Again a motor car licensed to carry wholly or mainly passengers cannot be habitually used for the purpose of conveying goods : such a user would deprive the local authority of additional revenue as the annual tax differs in the case of cars licensed for goods or for passengers.

No license is issued for any car which is not registered : conversely, the registered owner of a motor car, who claims to be exempt from liability to obtain a license on the ground that it is unserviceable must procure a cancellation of the registration.[4] But it was held that actual possession or use must be proved before its registered owner can be convicted for possessing or using without a license, the mere appearance of the name of the accused in the list of registered owners and his failure

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1. Government Agent, C.P. *vs.* Beeham (1932) 9 Times L.R. 142 ; 2 C.L.W. 223.

2. The following tax must be paid annually on all motor vehicles—except motor bicycles, tricycles or side-car combinations which pay annually a tax of Rs. 10.

	For Cars (not Hiring) Rs.	For Lorries and Tractors. Rs.
For vehicles (unloaded) under 5 cwts. in weight	10	30
Between 5 cwts. and 10 cwts.	20	30
,, 10 ,, 15 ,,	30	30
,, 15 ,, 20 ,,	35	40
,, 20 ,, 25 ,,	40	50
,, 25 ,, 30 ,,	50	60
,, 30 ,, 35 ,,	75	70
,, 35 ,, 40 ,,	100	80
,, 40 ,, 45 ,,	150	100
,, 45 ,, 50 ,,	200	120

Cars exceeding 50 cwts. in weight must pay Rs. 250 and lorries exceeding 50 cwts. (unloaded) must pay an extra 20 rupees for each additional half-ton unless it is over 5 tons in weight when it pays Rs. 300. Each trailer pays 3/5 of the rates prescribed for motor lorries. This tax must be paid annually to the local authority on or before the first of February in each year. (Section 53 of the Vehicles' Ordinance.)

Any vehicle registered for the first time after the 30th of June may pay half the tax or half the amount of stamp fees.

Hiring cars pay Rs. 20 per passenger under seven passengers and Rs. 10 per passenger for over (with a minimum fee of Rs. 160). The driver and conductor are not counted as passengers.

3. Amath *vs.* Silva, P.C. Badulla 6650, S.C. No. 522 of 1930. 10 Times L.R. 84.

4. G.A., C.P. *vs.* Beeman (1932) 33 N.L.R. 343. 9 Times L.R. 142, 2 C.L.W. 223.

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to take out a license were not enough.[1] This decision was followed by the Municipal Magistrate of Colombo who acquitted an accused as the Prosecution was unable to say where the car was for three years past. MacDonell, C.J. set aside the acquittal holding that every registered owner remained liable to pay the license duty.[2]

Special regulations apply to dealers' motor car licenses issued to recognized dealers or manufacturers.[3]

(3) *Certificate of Competence*.—No person can drive a motor vehicle unless he is in possession of what is now called the Certificate of Competence[4]; or unless he is under examination for issue of a certificate, or is, for the purpose of being taught to drive, accompanied by a certificated driver seated next to him; in the last-named event, he is not entitled to drive a hiring car carrying passengers. No certificate of competence is issued to persons under eighteen years of age[5] or to persons having any physical or mental disability which prevent their driving in a safe and proper manner. Such persons may be required to produce medical reports. Certificates of Competence are issued after an authorized examiner has certified that the applicant is a fit and competent person to drive the particular type of motor vehicles. Applications have therefore to be made to him in the first instance on proper form to which a stamp of Rs. 5 has to be affixed, together with two copies of the applicant's unmounted photographs; on passing the examiner's test, the application has to be forwarded with a stamp of Rs. 10 to the Registrar who issues the necessary certificate. A certificate so issued is now valid during the lifetime of its owner and has not to be renewed as was required formerly. A duplicate certificate, when the original is lost or destroyed, costs Rs. 15. But a certificate is only valid for the particular type of car for which it is issued—there being five different types requiring five different classes of certificates, viz. (*a*) motor cycles, (*b*) cars other than omnibuses, lorries, or steam-driven motor cars, (*c*) omnibuses, (*d*) lorries, (*e*) steam-driven motor cars. There is yet another class, viz., cars not driven by sliding gears. A certificate issued for any one of these classes could be extended to any other class on the payment of five rupees. But this would entail a fresh examination. A certificate to drive a hiring car is not issued to a person under 21 years of age or to a person who has not been driving for at least 12 months. A Certificate of Competence obtained abroad is valid in this Island for not more than a year[6]; and for facilitating overland journey to and from India the Sub-Collector of Customs at Talaimannar and the Assistant Government Agent at Mannar are authorized to issue temporary certificates for a period not exceeding three months.

Under the new Ordinance, the law relating to endorsement and cancellation of certificates is made much more stringent. Whenever a person is convicted of any offence under the Ordinance or under any law in connection with the driving of motor cars, the convicting Judge

1. G.A., W.P. *vs.* Bilindu 3 C.A.R. (Gratiaen's) 38.

2. De Silva *vs.* Rosen (1933) 2 C.L.W. 98.

3. Section 35.

4. This was known till now as the driving license. The reason for change of nomenclature is not obvious and is not understood. If the word "Certificate" is used in some countries, the word "license" is used in others.

5. Formerly the age limit was seventeen.

6. The Imperial Motor Car (International Circulation) Act of 1909 is made applicable to Ceylon. Rules under the Motor Car Convention Ordinance No. 25 of 1932 (by which the Executive Committee for Local Administration is empowered to make rules) for International Certificates and Driving Licenses are published in Government Gazette No. 7959 of 23rd December, 1932, p. 2027.

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or Magistrate must endorse the particulars of the conviction on the certificate, whether local or foreign, and may also either suspend the certificate for a stated period or cancel it altogether[1]: the driver is thereupon disqualified from handling any motor vehicles during the period of such suspension or cancellation. The amending Ordinance has made it obligatory on every person prosecuted in a motoring case to take the certificate with him to Court and to surrender it for the purposes of endorsement. This question is further discussed in sub-section IX below.

It is incumbent on every motor car driver to carry while driving[2] the Certificate of Competence always on his person or in the motor car, and to produce it for inspection on demand by a Police Officer or Headman.

(4) *Constructional Requirements.*—(I) No motor vehicle can be used on the roads of Ceylon :—

(i) if it is not capable of being driven backwards or forwards, unless its tare does not exceed seven hundred weights.[3]

(ii) if it is more than seven feet two inches in width (unless it is not an omnibus and is plying in Colombo, in which case it may be seven feet six inches) and twelve feet high (including load), and if the wheel-base is not greater than fourteen feet outside Colombo and sixteen feet in Colombo. The total weight when loaded should not exceed thirteen tons. The overhang[4] behind the back axle should not be more than two-fifths of the wheel-base in the case of omnibuses and one-half in the case of other motor cars or six feet six inches, whichever is less.[5]

(iii) if it is used outside Colombo and if the tare exceeds two and one quarter tons in the case of motor cars and one and a half tons in case of omnibuses and the particular road is not declared suitable for such traffic.[6] Tare is defined as actual weight of the vehicle fully equipped but unladen and excluding the weight of any water or fuel but including the weight of accumulators.[7] The Director of Public Works is empowered to grant permits for transport on any specified road for Government purposes. The tare of an omnibus, lorry or trailer and the maximum load which a lorry is licensed to carry, and the number of passengers which a hiring car and the weight of goods which an omnibus is licensed to carry shall each be painted on the right side in white on black or *vice versa*. In the case of an omnibus, the number of passengers which it is licensed to carry must also be painted inside.

(iv) if its general condition causes or is likely to cause, danger to any passengers or persons using the highway, or to any pro-

1. Any order made by Court with regard to cancellation or suspension is by itself an appealable order, irrespective of the nature of other penalty. Section 42A, being section 22 of the amending Ordinance No. 22 of 1929.

2. The section 41 does not expressly state "while driving" but this intention may be presumed.

3. This could therefore not include motor cycles. The old bye-laws expressly excluded motor cycles.

4. Overhang is measured by passing a vertical line from the centre of the back axle to a vertical line drawn at the extreme end of the body.

5. Section 5 describes in detail regulations governing the use of trailers.

6. Any notification in the Gazette before the commencement of this Ordinance declaring a road suitable for use by lorries or trailers is deemed to be valid under this Ordinance. The section is not quite clear as regards Colombo. There was an old bye-law (see Gazette No. 7503 of 11th December, 1925) prohibiting buses along certain streets of Colombo. *Vide* Section 58 however.

7. This definition now embodies the principle of Sub-Inspector of Police, Chilaw, *vs.* Gunetilleke S.C. 192 Leader Law Reports, 12th May, 1925, which decided that in reckoning the weight of a motor bus for the purpose of ascertaining whether such bus can ply for hire on roads on which a restricted load is permitted, the actual and not the potential load should be taken into account.

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perty on or adjoining the highway. The fact that a license has been issued for the year to the vehicle is no defence to a charge under this section; for the vehicle may have become dangerous after the issue of the license. A certificate from a recognized examiner to the effect that a motor vehicle is not dangerous is sufficient *prima facie* evidence of its soundness for the roads, unless the circumstances of the case and evidence by inspection disclose its dangerous nature.

(v) if it is not fitted with—

(*a*) Wheels which do not cause avoidable damage to the surface of the roads. It follows that the tyres should be of rubber (not necessarily pneumatic) or some other soft and elastic material.

(*b*) Right hand control,[1] unless the vehicle was imported before the commencement of this Ordinance.

(*c*) An efficient instrument for sounding warning of its approach.[2] This instrument must be capable of sounding audible and sufficient warning of the approach or position of the vehicle and must be used whenever necessary for safety.[3] No whistle or horn other than a horn sounding a single note can be used within the limits of any urban area. Thus, such horns as Lucas' mechanical horn or Gabriel's horn cannot be used in any town.

(*d*) An efficient silencer. The sound of the exhaust must be deafened by the silencer and the exhaust gases must escape through it. Smoke, grease, oil, ashes, water, steam or visible vapour must not be allowed to be emitted from a car in such quantities as to be a nuisance or to cause damage to the road or to any person.

(*e*) Lamps. Every car must have head-lights or side-lights or both, and a tail-lamp: every lorry or 'bus must have both head and side-lights and a tail-lamp. It is not permitted to have one light only in the centre of the car. The idea is that the extreme width of the vehicle should be made visible to approaching vehicles. The lamps should not be capable of independent movement and when unobstructed from behind should show a red light towards the back. A "Solo" motor cycle may have one head-lamp and no side-lights; but a side-car combination is regarded as a car for the purposes of lighting. Lights cannot be obstructed in any way except by the ordinary contrivances for obscuring. The definition of the word head-lights includes gas and electric lamps only: so that oil or petrol lamps cannot be used as head-lights.

All lamps must be kept brightly lit whether the car is in motion or stationary, so that lamps are even required when a car is parked. The Ordinance is silent with regard to lighting time but the old bye-law about quarter of an hour after sunset and quarter of an hour before sunrise is incorporated in the definition of "at night"[4] when lamps have to be kept a-lit. The old bye-laws also required that a tail-lamp must always be kept burning so as to render the back name plate easily distinguishable from a distance of at least 30 feet[5]: but the Ordinance says it should "show a red light visible from behind the car." Section 27 requires the number plates to be clearly discernible. A plate is

1. It is not understood how in view of the International Motor Car Convention Ordinance, this requirement could be enforced. Left hand control is universal in France, for instance, and a tourist motoring round the world would be open to prosecution in Ceylon.

2. The old bye-laws said "horn"!

3. Excessive sounding of the horn does not seem to be prohibited now.

4. Gazette No. 7395 of 23rd May, 1924.

5. Section 2 (i).

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clearly discernible if it can be read by a person of normal vision at night from a distance of 20 yards and at day from 50. Obstruction of plates by luggage, etc., is thus not permitted. Formerly dimming of lamps was compulsory; now the Governor is empowered by section 14 (7 and 8) to make regulations for dimmed head-lights either where a road is properly lit or when a proper device for dimming can be obtained in Ceylon at a reasonable price.

Neither an act of God, *e.g.*, cyclonic winds or rains, nor the fact that proper and reasonable precautions were taken, nor even the fact that jets had got temporarily choked or fuses had got accidentally burnt on the way, is a valid defence—though these acts may be taken into consideration in imposing a fine. It would be a good point to argue, however, whether such a defence is valid in view of the exemption from culpability granted in section 80 when the act, default, etc., are not due to the fault of the driver or the owner. Unless the non-lighting was deliberate or has resulted in serious consequences, the fine imposed would be usually nominal.

(*f*) Brakes. Every motor vehicle must have two independent brakes in good working order. They should both be so efficient as to prevent the wheels from rotating on their own individual axles. Even if a car has "four-wheel brakes," it should be fitted with another independent brake. As both the brakes should be efficient, it is no defence to a charge under this section that one brake by itself could have stopped the car in its own distance while going at a moderate speed. A certificate of the Government Factory Engineer or of any recognized examiner of motor vehicles is *prima facie* evidence as to the efficiency or otherwise of the brakes. When the prosecution produces this certificate, the burden of challenging the truth thereof is on the defence. Ordinarily, a charge under this bye-law is not preferred unless the condition of the brakes comes into question immediately after a motoring accident. But the Police have a right to stop any and every vehicle for the purpose of examining the soundness of its brakes. The amending Ordinance[1] requires that a car fitted with hydraulic brakes must also be fitted with an independant emergency brake.

(*g*) Looking Glass. This is not necessary in the case of motor cars unless they are used as 'buses for the conveyance of passengers. A looking glass is absolutely essential for a motor lorry. It should be fixed in such a way that the driver can by reflection see any vehicles coming from behind him, or overtaking him. The mirror is now required on every vehicle the tare of which exceeds 1½ tons.

(5) *Regulations for Hiring Cars and Lorries.*—Chapter IX of the Ordinance deals with special regulations applicable to hiring cars and lorries. Hiring cars are also governed by regulations[2] provided for in the fourth schedule to the Ordinance. A summary of the main provisions only can be noted here. Thus, every omnibus used for the purpose of carrying passengers must have the driver's seat separated from other seats by an arm or division and no passengers can be carried in this seat nor on the right of the driver. The driver's seat must be at least two feet wide or must have one foot of space on each side of the steering column. Not more than one passenger can be carried in the front seat unless there is more than thirty inches of space on the driver's left in which

1. Section 6 of 22 of 1929.
2. For further regulations, see Gazette No. 7902 of 22nd January, 1932.

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case two passengers only are allowed to sit in front. The seating space required for each passenger seated inside is fifteen inches and the weight of each passenger is regarded as one hundred and twenty pounds. The number of passengers which an omnibus is entitled to carry should be painted on the 'bus itself and no passengers in excess of the number which it is licensed to carry can be carried in the 'bus. This number excludes the driver and the conductor. A child under five years of age and not occupying a seat is not counted and children between the ages of five and ten count half. In the case of a hiring car the driver, and in the case of an omnibus the conductor, are held responsible for overloading. Every omnibus is required to carry a conductor who must either wear a badge or have the word "conductor" marked conspicuously on his clothing. Every omnibus is compelled to carry (a) a "destination indicator" showing the destination to which it is proceeding, (ii) a table of fares in Sinhalese, Tamil and English, (iii) an interior lamp, (iv) a signalling bell, and (v) a spare wheel or rim with an inflated tyre. No omnibus can carry goods unless permitted by the license ; nor can a lorry licensed to carry goods carry passengers. An omnibus licensed to carry goods as well must conform to the special bye-laws governing hiring cars and cannot for instance stop[1] at any place other than a halting place.[2] The conductor of an omnibus is held responsible if goods are found in the 'bus in excess of the weight which it is licensed to carry, having regard to the number of passengers. No goods are permitted on the roof other than those specified in the license. No omnibus can overtake another in motion unless permitted thereto by a signal. The driver of an omnibus is not permitted to smoke. No 'bus can pick up passengers at any and every place on the roadside in an urban area but only at the recognized stopping places—nor can it stop at any place on the public roads except for emergency repairs or for taking and setting down passengers in a non-urban area. No omnibus can ply for hire except on routes approved by the licensing authority and endorsed on the license. So that where a driver halts his 'bus in a private garden adjoining the highway for the purpose of picking up passengers, he violates rules 1 and 4 in the fourth schedule.[3] Touting for passengers is expressly prohibited, and touting is defined as "to speak, make any noise, or sound any instrument in order to attract the attention of the public or of a possible passenger or to act so as to cause annoyance or inconvenience to any person." Conversely it is an offence on the part of any passengers to be in a state of intoxication or to use obscene, indecent, offensive or quarrelsome language or to spit on the floor or to wilfully interfere with the comfort of passengers or with the work of the driver or the conductor or to damage the 'bus. In the case of using obscene language, it has been held that the omission to state the exact words is not a fatal irregularity if the accused had understood the nature and particulars of the charge.[4]

A license for hiring cars is not issued unless the various regulations which are now very strict are complied with. The same regulations which apply to omnibuses apply to hiring cars as well. Thus, it is now compulsory to take out an insurance policy against third party risks or

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1. P.C. Badulla 6650, S.C. No. 522 of 1930.
2. For rules regarding halting places, etc., see Gazette of No. 7902 of 22nd January, 1932.
3. Jayasundera *vs.* Silva (1930) 32 N.L.R. 23.
4. Horan *vs.* James Silva (1930) 31 N.L.R. 428 7 Times L.R. 136.

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to deposit a prescribed sum which is Rs. 2,500 for the first car and Rs. 500 for every other car belonging to the same licensee.

The regulations about omnibuses apply to lorries as well, *mutatis mutandis*, except that a person carried in the lorry weighs 112 lbs. as against 120, for the purpose of calculating the maximum load. No person other than the owner or hirer of the lorry or of the goods or his servant or agent is allowed to be carried in a lorry except under special license. No lorries can go along roads or on bridges which are not regarded suitable for their loads.[1] or which are not prescribed in the license.[2] In reckoning the weight of a vehicle for the purpose of ascertaining whether such vehicles can ply on roads on which only a restricted load is permitted, the actual and not the potential weight should be taken into account.[3] An offence is committed whenever a vehicle is used which when it is fully loaded and equipped exceeds the permissible weight.[4]

(6) *Driving Rules.*—Chapter VII of the Ordinance deals with driving rules of which the following are the most important :—

No motor vehicle can be driven backwards for any greater length than is reasonably necessary : nor can any vehicle be left on the public roads so as to cause or be likely to cause any unnecessary obstruction. The law says that it cannot be left "unattended without stopping the engine." What is required is that it should be left in an unobstructive manner. Nor can it be left without due precautions having been taken against its being started *in absentia*. In the Colombo shopping centre, cars should only be halted on the left-hand side : a car not so halted is regarded as likely to cause obstruction. Every motor vehicle must be driven on the left-hand side of the road, unless it is overtaking another vehicle proceeding in the same direction, in which case it must be driven on the offside. The section really requires that a motor car meeting or being overtaken by other traffic should be kept to the left or near side of the road : so that it is not obligatory on a single vehicle to be driven on any particular side of the road. The rule of the road enjoins that when two motor cars are proceeding in opposite directions and have to pass another vehicle, the motor car which is going in a direction opposite to that of the vehicle has the right of the road and should be allowed precedence over the other. All vehicles whatsoever travelling on a main thoroughfare have precedence over motor cars coming out of a side road or from any private road or place on to that thoroughfare. No driver of any vehicle can negligently or wilfully prevent, hinder, or interrupt the free passage of any other person or vehicle : thus, no driver can block the passage of a car that is following even though the latter is committing a breach of the law by going at an excessive speed. No driver can overtake another motor vehicle in motion and preceding in the same direction unless the driver of the latter has by a proper signal allowed him his consent to pass. So long as this signal is not given, one cannot overtake ; and if in so doing an accident has occurred, his responsibility *pro tanto* increases. For not allowing him to overtake, the driver of the second car can charge the preceding driver for obstruct-

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1. The high roads suitable for lorries of various types outside the Municipal limits of Colombo are listed in the Government Gazette No. 7932 of 8th July, 1932 and Gazette No. 4173 of 30th August, 1933.

2. S.I. Police, Chilaw, *vs.* Gunetilleke S.C. 192 Leader Law Reports 12th May, 1925.

3. Brantha *vs.* Perera (1927) 29 N.L.R. 38.

4. Van Der Straaten *vs.* Velaithen (1932) 1 C.L.W. 252.

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ing his free passage, just as much as the latter can charge the former for exceeding speed-limit. It is the duty of every person in charge of a motor vehicle to give proper signals to approaching vehicles, of his intention to stop, slow down, turn, or pass. The signals which one has to give to the Police are now compulsory for the safety of the general public and are indicated by appropriate drawings both in the Ordinance and in the Certificate of Competence. Mechanical signals are permitted instead. Every motor vehicle must be stopped at the request of, or on a signal from, any Police Officer or Headman or of any person in command of a body of troops or having charge of any animal. Formerly only a Police Officer in uniform or a person in charge of a horse could alone stop a passing vehicle, now the section is widened. At important junctions in Colombo, the stoppage should be behind the white lines where such exist. It must also be stopped in the event of any accident happening to any person, animal, or vehicle on the road causing injury thereto. If the accident involves serious injury to any person, the driver must proceed to the nearest Police Station and report the fact of the accident as soon as circumstances permit. He must also give his name, address and other particulars when so required by a Police Officer in uniform; and must produce his Certificate of Competence whenever demanded. In the case of bodily injury to any person, the Ordinance requires the driver to take the injured person to a hospital or to a medical practitioner, especially if the injured person requests him to do so or is unconscious. It is incumbent not merely on the driver but on every person present in the car at the time of the accident to give his name and address even at the request of the injured party; and it is the duty of every owner whether present or not to give detailed information of the driver and occupants who were in the car at the time of the accident. The accident has to be reported forthwith to the nearest Police Station, whether serious or not, but the occupants are allowed 24 hours within which to give their names and addresses.

Though every motorist has to obey signals, it is now laid down that he need not obey the verbal directions of a Police Officer, other than signals for the control of traffic: thus, he need not on the orders of a Police Officer, proceed to a place some distance away and there await the arrival of the officer concerned.[1] It has also been held that a Police Constable has no right to require the driver of a 'bus who has committed an offence to drive him to the Police Station.[2]

The additions to the new Ordinance include a prohibition of distribution of leaflets, etc., from a car in motion, a prohibition of riding on the footboard, engine, etc., or of pinion-riding by more than one person, and a prohibition of permitting any one to sit or stand on the right side of the driver or in such a way as to obstruct his view or hinder him in steering. There is provision also for obedience to all notices exhibited by the licensing authorities or by the Public Works Department. Pouring of petrol or oil when the engine is running or when a non-electric light is a-lit in or on the car is prohibited. and so is smoking or lighting of a match during any such operation.

"Obstruction" takes place when a motor car causes risk of accident to traffic. The word "traffic" is defined so as to include bicycles,

1. S. I. Police, Badulla *vs.* Kamuruddin (1930) 31 N.L.R. 359.
2. Van Cuylenberg *vs.* Fernando (1930) 32 N.L.R. 45.

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tricycles, motor cars, tram cars, vehicles of every description, processions, and bodies of troops, and all animals being ridden, driven or led.[1] The word "overtaking" includes an attempt even to pass a vehicle proceeding in the same direction.

(7) *Speed-limit.*—No motor car can be driven at a greater speed than 20 miles an hour in any town, nor at a greater speed than 30 miles an hour outside the limits of any town, provided that in certain areas the speed-limit may be reduced to 12 miles per hour or less by special notification.[2] No omnibus used for the conveyance of passengers or goods can be driven at a greater speed than 20 miles an hour, which rate of speed must be reduced to 15 miles per hour when crossing an urban area. No motor car exceeding 1½ tons in weight when fully laden can cross any bridge except at 8 miles per hour: nor can any motor vehicle whatsoever attempt to pass any other vehicle on any bridge of a less width than 18 feet.[3] No lorry can in any circumstances be driven at a speed exceeding 15 miles an hour. The speed-limit is also dependent upon the nature of the traffic, etc., on the road on a particular occasion: so that by driving even under 10 miles an hour one may be guilty of a breach of the law if the speed is such as to endanger human life.

It is no defence to a charge of speeding that one was proceeding on an urgent and important business where the delay would have been dangerous to himself; the delay should be such as, if not avoided, would cause greater danger to the society in general or to a section of the public in particular, *e.g.*, in summoning the fire brigade. Even then the accused would be technically guilty, and his fine would be nominal. The fact that a motorist is exceeding the speed-limit is detected by the Police by means of occasional checks: under these, two officers stand at each end of a measured distance, usually a furlong apart, and signal to each other the moment that a car passes in and out of the measured distance. The times are simultaneously recorded on their individual stop-watches. These are compared and the speed worked out arithmetically. Usually, a mile or so is allowed for correction. The motorist who alleges that the method of detection was erroneous in his case should prove that fact.[4] Another method of testing the speed would be to regulate by telephone the clocks of two roadside public stations situated over a measured distance and then inform each other the time when a particular vehicle passes the station: the time taken to cover the distance would show the speed; but the clocks must be regulated by superior officers who should personally control the trap. Fines when the speed-limit is exceeded are usually

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1. The legislature has forgotten to include "pedestrians," unless the word "animals" covers them, as it does zoologically!

2. The speed-limit for Kandy Municipality is 12 miles an hour for omnibus and 8 miles for lorries. Gazette No. 7380 of 7th March, 1924.

The speed-limit for Colombo Municipality is 12 miles an hour for motor cars and cycles within the following boundaries:—

The south side of Ward Place from Union Place to Kynsey Road, the east side of Kynsey Road, the south and south-east side of Norris Canal Road, the north-east side of Kynsey Road and the north-west side of Regent Street. Bye-law No. 32.

The speed-limit is also 12 miles per hour on the Galle road starting from the Turret Road junction up to the Dehiwala Station road, Gazette No. 7432 of 28th November, 1924.

The speed-limit for the Jaffna Urban District Council area is 12 miles per hour. Gazette *ibid.*

3. There is no express provision to that effect in the Ordinance but the old bye-law would seem to apply under section 58 (2).

4. When I was Municipal Magistrate in 1918, the then Manager of the Eastern Garage and Taxicab Company challenged the accuracy of this system: a test was accordingly arranged on the Galle Face in the presence of many respectable persons and the system was demonstrated experimentally to be erliabl'e if accurately worked out.

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heavy and depend upon the number of miles per hour that a particular offender is found to be running ; for the principle is " the lesser the speed the lesser the danger." Ordinarily the driver alone would be liable for exceeding the speed-limit[1] unless the owner too was present or had not taken proper precautions against the driver committing the offence.

It may be interesting to note in this connection that any person who interferes with the working of a speed-trap, *e.g.*, by giving information or warning to passing motorists is in law guilty of obstruction to a Police Officer in the discharge of his duties.[2]

The question of reckless or dangerous driving will be referred to in a later section.

(8) *Hiring of Private Cars.*—On the question of private cars being used for hiring purposes, the law states : " no person shall use a motor car for a purpose not authorized by the motor car license in force for the use thereof." A hiring car license differs from that of a private car and the latter cannot therefore be hired out without a special license for hiring. What is " hiring " is a question of fact dependent upon the circumstances of each case. Thus, where a person had merely supplied petrol for a journey and had also given the driver a gratuity it was held that there was no hiring.[3] The following facts of another case are interesting. The accused, who were the owner and driver of a motor car licensed for private use, were charged with employing it for carrying passengers for hire. It was established by the prosecution that the car was seen on several days driven by the chauffeur with several persons of different nationalities as passengers, the owner himself being present on one occasion. It was held[4] that in the absence of an explanation by the accused the Court was entitled to draw the presumption that the car was not being used for the purpose for which it was licensed. It has been held, however, that a single act of letting out a private car for reward is insufficient to justify the conviction of an owner for permitting to ply for hire without a license.[5] Where a person employs a car (which is licensed to carry passengers other than for hire) for the purpose of carrying mails for hire, he would still be guilty under section 30 (1).[6] Where mail bags were carried in a private car, a Bench of two Judges affirmed the conviction of the driver for contravening the terms of his license.[7] Recently the conviction was affirmed of a driver who was proved to have carried fish in his hiring car on three different dates.[8] Where the evidence showed that passengers were only carried when there was no fish to carry in a car licensed wholly or mainly for passengers the accused was held to be guilty.[9] A hiring car is defined in the Ordinance as a motor car used for the conveyance of passengers for fee or reward. As per Drieberg, J., a " tip " may be within the meaning of the " fee or reward," but is certainly not within the spirit of the enactment. " Plying for hire " is defined as plying or standing for hire by passengers

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1. Wickremasinghe *vs.* Don Abraham (1924) 2 Times L.R. 158.
2. De Silva *vs.* Simon de Costa (1930) 3 Cr. A.R. 143.
3. Meaden *vs.* Perera (1931) 33 N.L.R. 88 ; 8 Times L.R. 164.
4. S. I. Police *vs.* Rajalingam *et al* (1929) 31 N.L.R. 157 (in revision).
5. This is a Negombo decision which seems to be under the old law ; but the spirit of it would still prevail. S. I. Police *vs.* Perera (1926) P. C. Negombo 32881, S.C. No. 720 Leader Law Reports.
6. Pillai *vs.* Moss (1929) 31 N.L.R. 240.
7. Vander Straaten *vs.* Narayanaswamy (1932) 10 Times L.R. 45.
8. S. I. Police *vs.* Fernando 2 C.L.W. 265. This follows the decision in 34 N.L.R. 103.
9. Assiz *vs.* Fonseka (1932) 1 C.L.W. 392.

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but exclusive use of the car hired by any person at any place which is not a highway is not tantamount to plying for hire.

(9) *Endorsement or Cancellation.*—Apart from the penalties already described, the Court which convicts an accused person either under this Ordinance or under any other written law in connection with the driving of a motor car has the further power of endorsing, cancelling, or suspending a Certificate of Competence. If it is a foreign certificate, the Court may not merely suspend its validity in the Island and declare the holder disqualified from obtaining a local certificate but must also endorse the particulars of the conviction on the license. If the convicted person holds no certificate at all, the Court may declare him incompetent to receive a certificate for a stated period. The section with regard to endorsement, etc., runs, thus: "the Court . . . may, if the person convicted holds a Certificate of Competence, suspend the certificate for such time as the Court thinks fit, or cancel the certificate and declare the person convicted disqualified for obtaining another certificate for a stated period, and, unless otherwise provided, shall endorse upon the certificate particulars of any order of the Court made under this section and also whether such an order is made or not, particulars of the conviction." This section 39 (1) is interpreted at great length in Rajapakse *vs.* Mahamadu.[1] It is clear in reading the section that suspension or cancellation is only discretionary but endorsement of a license is obligatory.[2] And this endorsement is obligatory in conviction for any offence,[3] howsoever trivial, under the Motor Car Ordinance or under any other law governing motor cars. In order to give effect to this provision, it is the statutory duty of every person prosecuted for any motoring offence not merely to take his certificate to Court but to produce it for endorsement immediately upon conviction: failure to do so would be an offence under the Ordinance. It is likewise the duty of the Court in the event of suspending or cancelling a certificate not merely to notify the Registrar of such fact but to forward the certificate to him, to be detained by the latter till the expiration of the period of suspension. In the case of convictions of persons who do not hold a Certificate of Competence at all, the Court may declare that they are disqualified for obtaining a certificate for a stated period and may notify such fact to the Registrar. Any fraudulent application for a certificate, *e.g.*, by persons who have been disqualified from obtaining or have been refused certificates or whose certificates have been cancelled or endorsed, is an offence under the Ordinance punishable with a fine of one hundred rupees. It is a similar offence if a person to whom a driving license had been refused or whose driving license had been endorsed or cancelled applies for a Certificate of Competence without disclosing this information.

It is not clear from the Ordinance whether there is an appeal from a Registrar's refusal to grant a Certificate of Competence. There is provision for an appeal to the Governor in Executive Council from a

1. (1928) 30 N.L.R. 125.
2. S. I. Police, Tangalle *vs.* Wickremasuriya (1928) 30 N.L.R. 168.
3. Formerly the driving licences liable to be endorsed, suspended, or cancelled only for—

(i) reckless or negligent driving;

(ii) exceeding the speed-limit;

(iii) failing to sound the horn;

(iv) failing to stop when requested to do so by a uniformed Police officer, or to give his name and address, or to produce his license;

(v) obstruction; and

(vi) failure to observe the rule of the road

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Registrar's refusal to endorse a Certificate of Competence for authority to drive a hiring car on the ground that the applicant is a person of bad character ; there is provision also for appeals to the Supreme Court from a Magistrate's decisions with regard to suspension, cancellation or endorsement of certificates. But there is no provision in Chapter VI with regard to any appeals from a Registrar's refusal. The proper remedy, therefore, would be an appeal to the Governor in Executive Council followed later by a writ of *mandamus*, if need be.

(10) *Liability of Owner.*—Section 80 plainly enacts that "whenever an offence[1] under the Ordinance is committed"—

(*a*) the driver of the motor car at the time of the offence shall be guilty of an offence unless the offence was not due to any act, omission, neglect, or default on his part ; and

(*b*) the owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or, if absent, unless the offence was committed without his consent and was not due to any act or omission on his part, and he had taken all reasonable precautions to prevent the offence.

Thus, the law makes both the driver and the owner guilty under certain circumstances. Till the enactment of the new Ordinance, an owner could not be convicted for having permitted or suffered a thing to be done in the absence of knowledge or connivance or carelessness on his part ;[2] nor even where, being physically present in the car, he was not in a position to control effectively the action of the driver.[3] If he was not present, he could not be convicted for a rash or negligent act of the chauffeur nor for speeding[4] though he could for overloading.[5] But the law has now been materially altered and though Drieberg, J., in *Meedin* vs. *Perera*.[6] states emphatically that "a master is not criminally liable for the act of his servant unless he is made so by statute expressly or by implication or unless he has authorized or connived at it," it is submitted that in deciding this case under section 30 (1) for permitting a private car to be used for hiring, the provisions of section 80 (3) (*b*) above quoted do not seem to have been considered. This section expressly makes every owner liable if he is present and makes him even liable if he is absent unless the offence was committed without his consent and was not due to any act or omission on his part and unless he had taken all reasonable precautions to prevent the offence. There is certainly some difficulty in constructing this section : the commas before and after "if absent" make it ambiguous whether the exemption from liability due to non-consent and so forth applies also to cases where the owner is present. The ambiguity can be better appreciated if one remembers that no driver is now guilty under the preceding sub-section if he can prove that the offence was not due to any act, omission, neglect, or default on his part. If a driver is allowed to prove this, why not an owner who is present in the car at the same time ?

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1. The King *vs.* Ratnasingham (1927) 5 Times L.R. 12.

2. This is *my* interpretation of the sub-sections 1, 2 and 3 of section 80 : hence the inverted commas. Although the sub-sections speak of motor cars contravening provisions of the Ordinance, the Marginalia speaks of offences and what is really intended is to fix the liability of every owner for any and every motoring offence.

3. Moomim *vs.* Cooray (1927) 5 Times L.R. 73.

4. Stewart *vs.* Packir Saibo (1925) 27 N.L.R. 25.

5. Amath *vs.* James Appuhamy (1924) 6 C.L.R. 35.

6. (1931) 33 N.L.R. 88, 8 Times L.R. 164.

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With regard to an absent owner Macdonell, C.J., has held recently[1] that once it is established that anything is done or omitted in connection with a motor car in contravention of any provision of the Ordinance, the onus is on the owner, if he was absent at the time of the something done or omitted, to satisfy the Court that the offence was committed without his consent or was not due to any act or omission on his part and he had taken all reasonable precautions to prevent the offence. This case was one for defective brakes and the conviction of the absent owner was upheld in appeal.

(III) Offences Under the Ordinance.

Besides the regulations above mentioned some of which are incorporated from the principal Ordinance, the Vehicles' Ordinance provides certain penalties which, being distinct from, and additional to, the penalties under the bye-laws, might be considered here. It must not be forgotten that the fifth schedule to the new Ordinance details various repeals and amendments to the Vehicles' Ordinance so far as the latter relates to motor cars and 'buses.[2] Saving this, wilfully making a false declaration of ownership, or giving a false notice of transfer, or failure to give notice of a change of ownership,[3] or using a motor vehicle without a license or with a time-expired license, or failing to return the original and duplicate license at the time of renewal (—this applies only to hiring cars and 'buses), is each punishable with a fine of Rs. 100.

Any owner or person having the charge or care of any licensed vehicle is liable to a fine of Rs. 100, if he permits or suffers more passengers to enter or a greater weight to be carried than is authorized by the license to carry, or employs or suffers or permits to be employed any incompetent person to drive a licensed vehicle. Under this section, both the owner and the driver are clearly held responsible, probably on the principle of *qui facit per alium facit per se*. They are also responsible to the same extent if they refuse without reasonable cause, the proof of which rests on them, to let such vehicle to any person desirous of hiring the same for the legal fare. Once a car is licensed for hiring purposes, the owner cannot refuse to let it out on hire on flimsy pretexts—and, it is fancied, cannot do so even on the ground that the hirer is unable or refuses to pay the hire here and now, or is prepared to pay less than his usual charge. In the latter event, the owner has the remedy open to him of suing the hirer for his legal hire.

(*a*) *Table of Fares.*—No owner or driver can exact or demand as hire more than the proper legal fare. What is legal fare depends upon the circumstances of each case. Usually, a standard fare is fixed by Municipalities or other local bodies, and the owner can hope to get no more, except by special contract on that behalf. If no such standard is fixed, the Court will determine a reasonable and proper fare.

Section 67 of the Motor Car Ordinance requires "an easily legible table of fares" to be posted in English, Sinhalese, and Tamil inside the hiring car or 'bus and makes it illegal to demand a fare higher than this prescribed fare. Any overpaid sum can be recovered by the hirer; similarly any hire paid for a journey can be recovered in full if "the

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1. P.C. Chilaw, case No. 30,880, S.C. No. 307, published in Ceylon Police Gazette No. 4177 of 11th October, 1933, p. 218.

2. Thus, chappers II, III, VII and IX of the Vehicles Ordinance do not apply now to "mechanically propelled vehicles other than tram cars" Chapter VI is also similarly excluded.

3. Baris *vs.* Subramaniam Chetty (1918) 5 C.W.R. 240.

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omnibus fails to reach its destination within a reasonable time owing to a breakdown or any fault or neglect of the owner or his servant." Such recovery can be made through a Police Court.

(*b*) *Recovery of Hire*.—If any person refuses or omits to pay the sum justly due for the hire of a vehicle, or defaces or damages any vehicle, the owner may sue him in a Police Court ; and a Police Magistrate has jurisdiction to award him not merely the legal hire but also reasonable compensation for the damage complained of, as well as for the loss of time incurred in making and prosecuting the plaint. When a Magistrate's order is not complied with, a distress warrant may be issued for the recovery of the sum ordered. But a distress warrant cannot be issued without hearing the other side, for, the section only seeks to provide a speedy means of enforcing a purely civil right.[1] It is for the Court to find what " the sum justly due " is : this depends upon the circumstances of each case. Thus, where the accused contracted with the owner of a motor car for a stipulated sum to proceed from Jaffna to Mullaittivu and bring back a patient to Jaffna, and on the return jonrney after the car had proceeded only about 20 miles it broke down, the accused having had to take his patient by a carriage to a Railway Station, 5 miles off and to proceed by train to Jaffna, it was held that the ruling in the famous English case of *Cutter* vs. *Powell*[2] applied to Ceylon, and the accused was not liable to pay any portion of the stipulated sum by way of hire.[3] It follows that where a car is engaged for a long journey and breaks down on the way, the hirer is not liable to pay any hire on the basis of *quantum meruit*. He may perhaps himself have a civil claim for damages against the owner, apart from an action to recover the hire actually paid as explained before.

Under the Motor Car Ordinance the maximum hire or damages recoverable in a Police Court is only one hundred rupees.[4] Jurisdiction is conferred on the Court either where the journey commenced or where it ended or where the injury has occurred. A Magistrate is also empowered to award, over and above the damage claimed or proved, reasonable compensation for the loss of time incurred by the owner, driver or conductor in attending Court. Any order under this section is appealable to the Supreme Court.

A distress warrant to recover hire under section 49 of the Vehicles' Ordinance can issue only upon the refusal or neglect of the defaulter to pay after the amount has been awarded by Court.[5] A Court can recall its own warrant.

(*c*) *Intoxication*.—Any person, being in a state of intoxication while driving a vehicle or while in charge of it on a public road, is liable to a fine of Rs. 50 or imprisonment for three months. The section does not merely relate to driving in a state of intoxication : the fact that an intoxicated person is in charge of a vehicle, even though it is stationary, is sufficient for a conviction. What constitutes a state of intoxication is a question of fact. Ordinarily, intoxication would mean " so drunk that you do not know what you are about." This is the meaning attached to the word in our Penal Code which speaks of " incapability of knowing the nature of an act." The person should become incapable of inde-

1. Silva *vs.* Pieris (1925) P.C. Gampola 11954 S.C. 522.
2. Smith's Leading Cases, Vol. II.
3. Ramalingam *vs.* Mohideen (1921) 23 N.L.R. 409.
4. Section 69.
5. Silva *vs.* Appuhamy *et al* (1925) 27 N.L.R. 215.

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pendent judgment and therefore incapable of driving a motor vehicle: such a driver would be a danger to society; but every act of drinking does not come within the meaning of this section. The mere fact that a driver smells of liquor is not conclusive evidence of intoxication, though it is a point in its favour. A lesser offence is enacted in the Police Ordinance where, by section 60 (2), any person who is drunk while in charge of any vehicle on any thoroughfare or any public place is liable to a fine of Rs. 20 or imprisonment for one month, and is liable to be detained at a Police Station till he is sober. Taking a drink is not the same as being drunk; but a lesser degree of drunkenness than intoxication is certainly contemplated. Drunkenness is opposed to sobriety; and inability to know the nature of one's acts is a primary test of being drunk. "The offence of driving in a state of intoxication is more culpable than one of ordinary reckless driving, as the driver in that case has sufficient control over himself to rectify the errors he has committed, but where he drives when intoxicated, he would not be able to exercise powers which he might exercise while sober."[1] No prosecution under the Vehicles' Ordinance can be commenced after the expiration of three months from the date of the commission of the offence. Half fines may be awarded to the informer.

Under the Motor Car Ordinance the offence of driving under intoxication is two-fold according as it is, or is not, attended with reckless negligent or dangerous driving or driving at a dangerous speed. Though the latter would make the offence more serious and would be *per se* evidence of intoxication, it is an offence merely to "drive when intoxicated by alcohol or any drug." The two offences are either summary (punishable by a Magistrate with a fine of one thousand rupees or imprisonment for one year or both) or non-summary (punishable with twice the summary punishment).[2]

(IV) Rash Driving.

Any person guilty of rash, reckless, dangerous or negligent driving is liable to be prosecuted either under the Vehicles' Ordinance or under the Motoring Ordinance or under the Penal Code. Under the first mentioned Ordinance, the law says:

"If any person drives a motor vehicle on any public thoroughfare, street, or road, recklessly or negligently, or at a speed or in a manner which is likely to endanger human life, or to cause hurt or injury to any person or animal or damage to any vehicle or to goods or persons carried therein, or which would be otherwise than reasonable and proper having regard to all the circumstances of the case including the nature and use of the public thoroughfare, street, or road, and to the amount of traffic which is actually on it at the time or which may reasonably be expected on it, shall be guilty of an offence."

As pointed out by Jayawardena, A.J., in *Police Sergeant, Lindula*, vs. *Stewart*,[3] this section consists of six different offences:

1. Driving recklessly.
2. Driving negligently.

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1. Falil *vs.* Nagalingam (1925) M.C. Colombo 586.
2. Section 57.
3. (1923) 25 N.L.R. 166.

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3. Driving at a speed or 4. Driving in a manner	which is likely to endanger human life, or to cause hurt or injury to any person or animal or damage to any vehicle or to goods or persons carried therein.
5. Driving at a speed or 6. Driving in a manner	which would be otherwise than reasonable and proper, having regard to all the circumstances of the case including the nature and use of the public thoroughfare, street, or road and to the amount of traffic which is actually on it at the time or which may reasonably be expected on it.

In this case, the charge against the accused was that he did "rashly and negligently drive his motor car in a manner which was likely to endanger human life and damaged the motor car of Mr. S." The Magistrate in his judgment did not convict the accused of the offence with which he was charged, but of having driven his car "unreasonably fast in view of the dangerous nature of the corner, the surface of the road, and the possibility of meeting motor traffic at the spot." It was held that the charge was bad. The offence under the section was to drive recklessly and not rashly ; driving negligently is an offence, and driving in a manner which is likely to endager human life is a separate or distinct offence and should not have been combined in the way it was in the charge.

While rashness in driving is not punishable under the above enactments, it is penalised by the Code : the following sections speak for themselves :—

Section 272 : Whoever drives any vehicle or rides on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with a fine of Rs. 100 or imprisonment for six months or both.

Section 276 : Whoever by doing any act or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way shall be punished with a fine of Rs. 100.

Section 327 : Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others shall be punished with a fine of Rs. 100 or imprisonment for three months or with both.

Section 328 : Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others shall be punished with imprisonment for six months or a fine of Rs. 100 or both.

Section 329 : Whoever causes grievous hurt under similar circumstances shall be punished with imprisonment for two years or a fine of Rs. 1,000 or both.

Section 298 : Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for five years or fine or both.

The last two sections are non-summary : the rest are triable by a Police Court ; the last three only deal with such cases of rash or negligent driving when any hurt, simple, grievous, or fatal, is caused to any

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person by the driving ; where no hurt is caused to anybody, the rash and negligent act of driving *per se* is punishable either under section 272 or 327. The former being more particular is preferable, though the rashness or negligence must be proved to be of that degree as is likely to endanger human life or is likely to cause hurt or injury to any other person—and not merely likely to endanger the personal safety of others. Thus, the presence, on the road at the time of the accident, of others or of human life that is endangered must be proved : if there was nobody on the road whose life or personal safety could have been endangered, however great the rashness or negligence may be, a charge cannot lie under the Penal Code. The essence of these enactments is the likelihood of causing hurt to others or of endangering their lives. This then is the difference between a charge under the Code and a charge under the Ordinance. Under the latter, reckless or negligent driving in itself constitutes an offence. It follows that rash driving is no offence, unless the rashness becomes recklessness or unless it endangers human life.

The gist of the offence under section 276 is not the act or omission but the causing of danger, obstruction, or injury to persons in a public way. In the case of obstructions to persons, the mere likelihood or even certainty is not enough—the persons must be proved to have been actually obstructed. It is not enough to prove that the accused obstructed a public way with the result that the people generally were prevented from passing along it.[1]

There is one more enactment, viz., section 83 of the Police Ordinance, which deals with reckless driving : "all persons who shall drive or conduct any carriage or other vehicle in a careless, reckless, or violent manner to the danger and terror of passengers[2] shall be liable to a fine of Rs. 50 or imprisonment for three months." This section is now seldom or never employed in the case of motor vehicles.

Under the Motor Car Ordinance under which all plaints should ordinarily be filed Section 57 (2) states : "If any person drives a motor car recklessly or in a dangerous manner or at a dangerous speed, he shall on summary conviction be liable to a fine not exceeding five hundred rupees, and on a second or subsequent conviction under this sub-section to a like fine or to rigorous imprisonment for any term not exceeding six months or to both such fine and imprisonment." This sub-section therefore penalises only three kinds of driving, viz. (1) reckless driving, (ii) driving in a dangerous manner, and (iii) driving at a dangerous speed. A first conviction entails no imprisonment but only a fine of five hundred rupees. Negligent driving is penalised by the next sub-section and the maximum fine is only two hundred rupees and there is no provision for imprisonment for a second conviction. It has been held[3] that in arriving at a decision under this section the Court will not merely take into account the facts enumerated in section 48 of the Vehicles' Ordinance but even other factors.

Negligence is defined by Alderson, B.,[4] as the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or the doing something which a prudent and reasonable man would not do. Negligence becomes culpable when one neglects to take reasonable and

1. Subramaniam *vs.* Aiyampillai (1918) 5 C.W.R. 165.
2. Bayley *vs.* Ibrahim Sa (1878) 1 S.C.C. 10.
3. S.I. Van Cuylenberg *vs.* Fernando (1929) 7 Times L.R. 15.
4. Blyth *vs.* Birmingham Waterworks 11 Exchequer 784.

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ordinary precautions to ensure against the happening of an accident. When one is driving in a busy thoroughfare but, on seeing a congestion of traffic, fails or neglects to slow down or to apply his brakes, he is guilty of criminal negligence. Rashness is the doing of an act with a knowledge that mischievous consequences may ensue, but with a hope that they will not. Thus, taking a sharp bend at more than a moderate speed connotes on the part of the driver a knowledge that such driving is dangerous, coupled with a hope that no danger would ensue. Recklessness is a higher form of rashness and implies a dare-devil spirit and a thorough disregard of all the probable consequences.[1] "Come what might, I shall overtake that car which is doing 30 miles an hour"—this is recklessness.

It is no defence to a charge of reckless driving that the accused did not exceed the speed-limit prescribed by the regulations. The duty to drive with care and not to drive faster than is safe under the circumstances in which the car is placed is paramount and independent of the arbitrary speed-limit[2]: though the fact that the accused was driving at a very moderate speed at the time of the accident would no doubt be a point in his favour. The fact that the streets are unusually crowded because of a public procession or of any other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious and may tend to render him criminally responsible for any accident ensuing from driving at an ordinary rate and with ordinary precautions.[3] Where the driver of a 'bus deliberately prevented a motor cyclist from overtaking him by persistently swerving to the right in such a manner as to endanger the safety of the 'bus and the cycle, it was held that the driver was guilty of driving recklessly and in a dangerous manner.[4]

Whether ordinary or reasonable precautions are taken or sufficient care or circumspection is exercised depends upon the circumstances of each case. It is therefore difficult to say where negligence begins and misadventure ends. If the accused admits having lost his presence of mind, he is clearly guilty of negligence: if he admits having taken a risk, he is clearly guilty of recklessness or rashness. But such admissions are seldom made; and the question must be decided on the balance of evidence tendered on either side. If one has exercised common skill and forethought and has been particularly cautious, he can hardly be held responsible for any accident occurring through misfortune or mischance. To quote an Indian case[5] about another type of vehicle, the accused was being driven in a carriage to her house through the town between 7 and 8 p.m. at the ordinary rate and in the middle of the road: the night was dark and the carriage had no lamps although the accused had specifically asked her servants to light the lamps: when she discovered that lamps could not be lit, she ordered careful driving, and directed the syce and the coachman to keep on shouting in order to warn foot-passengers. The complaintant's father, who was an old deaf man, came violently in contact with the carriage, was knocked down and killed. It was held that there was no evidence of negligence.

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1. Herat *vs.* Pieris (1930) 31 N.L.R. 453.
2. Peter de Mel *vs.* Appasamy (1909) 2 Leader 125.
3. Reg. *vs.* Murray 5 Cox's Criminal cases 509.
4. S.I. Police, Badulla *vs.* Kamuruddin (1930) 31 N.L.R. 359.
5. 6 Madras High Court Reports 31.

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The mere happening of an accident is not sufficient evidence of recklessness or negligence; though recklessness or negligence may be presumed if the accident is such as could have been easily avoided. It is necessary for the prosecution to establish, besides the fact of the accident happening, some fact or facts which would show negligence or recklessness on the part of the accused. If this is not possible, the prosecution must fail. Even if there is no oral testimony of a person who has witnessed the accident, the Police may prove ancillary details; for instance, that the road at the particular spot was very wide, or that the wheel-marks showed that the accused was not able to stop his car for a certain length, thus suggesting excessive speed, or that he had defective brakes or that the 'bus was badly overloaded and was swaying to and fro and an accident was inevitable,[1] and so on. The Police should, therefore, take measurements immediately of the various land marks at the time of the accident in relation to the car: the person who meets with an accident may also do so—this will help him in his defence. A proper sketch or map (or even photograph) of the place will enable the Magistrate to judge of the circumstances of the case and of the contour of the land and therefore to understand better the view-point of the motorist.

Contributory negligence on the part of the person against whom the accident has happened is not a valid defence to a charge of reckless or negligent driving. It is, however, a circumstance in favour of the accused. If a child suddenly crosses the road in front of a car in motion and gets killed, a question would arise whether the motorist had exercised reasonable care or had taken proper precautions to avert the fatality: if it is a straight, open road and the accused could have seen the child on the road from a distance but had failed to take into consideration the probability of the child so crossing the road, he is guilty of negligence; but if at a bend in the road, or on the child's mother emerging from a boutique on the other side, the child, not being on the road, suddenly crosses, the motorist can hardly be held to be guilty, especially if by applying his brakes or swerving his car he has tried his best to avoid the accident.

"So far as pedestrians are concerned, driving a vehicle on the right-hand side of the road cannot be said to be calculated to endanger human life any more than driving it on the left. It is clearly the duty of the pedestrian to watch the vehicular traffic on the road and to regulate his course accordingly. The driver of a vehicle is bound to give notice of the approach of his vehicle to pedestrians and to stop it when danger to life or limb is imminent. But the mere fact of the omission on the part of the driver to get out of the way of every pedestrian can hardly be said to amount to an act of negligence calculated to endanger human life."[2] The fact that certain regulations are not observed would be a point against the accused: thus, the fact that a car is driven with faulty brakes and with a knowledge on the part of the driver that his brakes are faulty would connote that the driver knew of the probable danger and took the risk. Similarly, exceeding the speed-limit or driving without proper regulation lights shows a callousness on the part of the driver as to the probable consequences and would render him liable

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1. S.I. Van Cuylenberg *vs.* Fernando (1929) 7 Times L.R. 15.
2. Wettewe *vs.* Wolff (1913) 1 Bal. Notes 39.

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to punishment for recklessness. So that, where the driver of a motor car was taking a junction at 15 to 20 miles an hour and collided with a motor lorry which was going on the wrong side, it was held that the negligence of the lorry driver did not exonerate the accused from the duty imposed upon him of reducing his speed at junctions.[1]

The fact that immediately after the accident a motorist had stopped the car and rendered first-aid to the persons injured or had removed them to the hospital or to their homes would be a point in his favour : but the fact that he himself has suffered an injury by the accident, howsoever serious that injury may be, is no defence to a charge under these sections. If death occurs as a result of an accident, the driver should immediately report the circumstances either to the Police or to a Magistrate or Coroner. To render first-aid is not merely the humane duty of every motorist, not merely a benevolent act of a passer-by, but an act calculated both to invoke the sympathies of the judge and to show that the accused was not callous or reckless of the consequences, but was genuinely sorry that an accident had happened at all. Failure to stop a car when an accident has happened is in itself punishable as a breach of section 48 ; and so is failure to report an accident to the nearest Police Station.

Indeed at the happening of any accident which causes injury to any person, animal or property it is a four-fold statutory duty of the driver (i) to stop the car, (ii) to give his name and address if so required or requested, (iii) to report the accident to the nearest Police Station, and (iv) to convey the injured person to the nearest hospital or medical practitioner if so requested thereto by the injured person or if the latter is unconscious or in danger of his life. It is also a statutory duty of every other occupant of the car to furnish his name and address to a Police Station within twenty-four hours and a similar duty of the owner of the vehicle to give all information in his possession about the driver and occupants on demand by any Police Officer or Headman. Failure to comply with this statutory duty would be an offence against the Ordinance. Merely stopping, then looking back and immediately driving away is not stopping within the meaning of this section.[2]

After a serious accident and till the case is decided, a Magistrate has the power to detain the vehicle, especially if it shows any damage that could be taken into consideration in coming to a correct decision. A Magistrate may also impound the license, thus preventing the motorist from driving any more till the final adjudication of the case.

All prosecutions under the Motoring or the Vehicles' Ordinance for reckless or negligent driving may be compounded by the party concerned by paying adequate compensation to the person injured ; but prosecutions under the Penal Code cannot be so compounded except under sections 328 and 329 when the Attorney-General may allow a compromise. When a case is not compounded, the fact that ample monetary compensation has been paid to the injured persons or their relatives will always be taken into consideration by the Court in imposing sentence.

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1. Attygalle *vs.* Sabapathy (1930) 33 N.L.R. 83.
2. S.I. Police, Badulla *vs.* Kamuruddin 3 C.A.R. (Gratiaen's) 4.

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A Magistrate may remand the accused if death has resulted from an accident; bail may, however, be ordered in all cases indiscriminately.

An owner of a motor vehicle, as we have seen above, is not criminally liable for the rash and negligent driving on the part of his chauffeur,[1] unless the owner was in a position effectively to control the action of his driver.[2]

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1. Moomim *vs.* Cooray (1927) 5 Times L.R. 73.
2. Moorman *vs.* Sugathadasa (1928) 29 N.L.R. 145.

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CHAPTER XXXIII.

UNLAWFUL GAMING

(I) Common Gaming Place.

Under the Gaming Ordinance,[1] whoever commits unlawful gaming is liable to a fine of Rs. 100 or to rigorous imprisonment for six months or to both. Unlawful gaming consists of (i) cock-fighting whether with or without stakes at any place whatsoever, and (ii) betting or playing games for stakes at any of the three following places :

(*a*) either on a public road or in a public place,

(*b*) or in a tavern or " bar " or arrack or toddy " godown,"

(*c*) or, what is most important, in or at a " common gaming place."

We need say nothing about any of the other places. A common gaming place is defined by our Ordinance as including any place kept or used for betting or the playing of games for stakes and to which the public may have access with or without payment. A place is deemed to be so kept or used, if it is so used even on one occasion.

In offences of unlawful gaming a search-warrant plays a most important part. A search-warrant can be issued by a Magistrate under certain circumstances which we shall examine presently. It enables a Police Officer to make a raid on a " gambling den." Prosecutions under the Ordinance, therefore, fall under two categories : those where there is, and those where there is not, a search-warrant. In the former, the burden of proof is shifted to the accused who is presumed to be guilty : in the latter, the prosecution must prove that the place was a common gaming place. The following factors must be considered in determining whether a particular place is a common gaming place or not, especially when it is entered without a search-warrant.

(i) A common gaming place must be a place kept or used for betting or for playing games for stakes ; and though the Ordinance adds a proviso to the effect that even if it is once used as such it shall be regarded as so kept or used, there are two essential elements involved in the definition of a common gaming place, viz., publicity and habituality.[2] By habituality is meant the frequency with which a place is used for unlawful gaming. It need not be continuous. Habituality is not destroyed because there is a hiatus in the series of evenings on which gaming is carried on,[3] for the Ordinance itself considers even one evening sufficient. " The use of a place on one occasion only would under certain circumstances entitle a Court to hold that it is a common gaming place ; but there must be some evidence, apart from the fact that it was once used for playing games for stakes, which shows that it was in fact a common gaming place."[4]

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1. No. 17 of 1889, Vol. II, p. 17.
2. Gunawardene *vs.* Telenis (1910) 5 Bal. 64.
3. Manukulasuriya *vs.* Merasha (1922) 24 N.L.R. 35.
4. Tamby *vs.* Ukku Banda (1910) 13 N.L.R. 286.

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(ii) It must be a place to which the public may have access with or without payment. There must be publicity and accessibility. Whether a particular place is such a place or not depends upon the circumstances of each case. It is open to people to play games of chance for money at their own houses provided they do not convert their houses into common gaming houses and allow access to the public, whether as of right or not. "For it is not illegal for persons to play with friends and relations, in a private house, cards, either for money or not."[1] A private house becomes a common gaming house as soon as outsiders and strangers are freely admitted, with or without payment, for the purpose of betting or playing games for stakes. Where twenty or thirty persons belonging to different nationalities assembled in a house day after day for the purpose of gambling and the proprietor of the house collected commission from such persons every time the dice were thrown, it was held that it was a common gaming house.[2] There should be no restriction as to admission. A place, although a charge is made for admission to it, is nevertheless a public place, provided members of the public have access to it.[3] The public,[4] meaning "the general body of people in the country," should have access: "the very essence of the word public is its generality and indeterminateness." Thus, where four persons were found playing cards in the verandah of a set of cooly lines on an estate where some 500 coolies worked, and where persons not employed on the estate had no right of access, it was held that the coolies themselves, though no doubt a part of the public, cannot by themselves form a "public" and that therefore, though they as individuals had access, the public had not.[5] Where the accused were found gambling on an open ground in front of the cooly lines on an estate, it was held that the fact that public roads passed through the estate did not make the place a public one, for, the public had a right to pass along the roads, but had no access to the particular spot in the neighbourhood of the cooly lines at which the gambling took place.[6] Nor was an empty room in the Railway lines where several persons were gambling with cards held to be a place to which the public had access.[7]

The verandah of a boutique is not a public place.[8] A certain Police Inspector found the doors of an alleged gaming house closed and barred: he got them open on the pretext that he had come from the Grand Hotel for gambling. It was held that the inference was that only persons from the Grand Hotel were admitted and hence the public had no access.[9] But an uninhabited house on an estate to which any one can obtain access and where certain persons are found at 10 p.m. taking part in an unlawful gaming may well be presumed to be a common gaming place.[10] Similarly, a threshing-floor common to several paddy fields and accessible to the public (though not of right) is a place within the meaning of this section.[11] An open coconut plantation crossed by

1. Hamidu Aratchi *vs.* Junus (1916) 3 C.W.R. 309.
2. Ludovici *vs.* Nicholas Appu (1900) 4 N.L.R. 12.
3. Inspector of Police, Maradana *vs.* Stanton (1924) 26 N.L.R. 214.
4. See a cognate definition of public in "Public Performance"—Abeyratne *vs.* Migel Perera (1932) 10 Times L.R. 44.
5. Per De Sampayo, J., Burmester *vs.* Muttusamy (1916) 19 N.L.R. 153.
6. Perera *vs.* Singho (1921) 23 N.L.R. 144.
7. Nair *vs.* Israel *et al* (1923) 25 N.L.R. 96.
8. S.I. Police, Dandagamuwa *vs.* Gan-Aratchi (1922) 1 Times L.R. 106.
9. Weerakoon *vs.* Appuhamy *et al* (1921) 23 N.L.R. 5.
10. Attorney-General *vs.* Asan Ali (1912) 1 Bal. Notes 33.
11. Serahamy *vs.* Rankira (1904) 8 N.L.R. 40.

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several paths which do not appear to lead from one house to another on it, nor from the adjoining roads to any of the houses in the plantation and in which a game for a stake is carried on by diverse persons is a place to which the public have access whether of right or not, even though the plantation itself be on a private land.[1] The essential requirement is whether or not any and every body could repair to the spot and indulge in gaming.[2] It follows, therefore, that unless and until there is publicity and accessibility, the place does not become a common gaming house.

By section 23, any resthouse or proprietary club, so long as no promiscuous gaming takes place therein, and any licensed hotel, so long as the license continues in force, are exempt from the operation of the Gaming Ordinance.

(iii) And the game should be essentially for stakes.[3] The Ordinance does not prohibit an assemblage of people from playing games of chance provided there is no stake,[4] except it be cock-fighting alone.[5] But the games of bagatelle or billiards or any other games of athletic exercise, even though they are for stakes, are excluded by the Ordinance. Games of skill, if they are for stakes, are not necessarily excluded, chance being not a necessary element of unlawful gaming.[6] It was held recently by our Supreme Court,[7] that mechanical contrivances like Fortune's Wheel, Submarine Dive, Dart Throwing, etc., which are largely used for betting at Public Fairs, are not exempt from our Ordinance unless they are merely lotteries with an element of skill alone. It may be questioned why such games as Bridge (for stakes) are not classified as unlawful gaming. Here the stakes are fixed before-hand and the "luck" does not depend on the turn of a particular card, but on one's own individual skill and intelligence. It is only "when two persons professing to hold opposite views touching

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1. Elstone *vs.* Marthelis Appu (1903) 6 N.L.R. 256.
2. Banda *vs.* Marimuttu (1915) 3 Bal. Notes 51.
3. Perera *vs.* Sadirappu (1893) 3 C.L.R. 2.
4. Puthaitamby *vs.* Karolis (1893) 2 S.C.R. 62.
5. Dissanayake *vs.* Fernando (1913) 17 N.L.R. 114.
6. Modder *vs.* Silva (1912) 15 N.L.R. 189.
7. In Inspector of Police, Maradana *vs.* Stanton (1924) 26 N.L.R. 214 the latter was the manager of Stanton's Midway Shows and had various "attractions," among which was "The Submarine Dive" and the public were admitted on payment of an admission fee of ten cents. "The Submarine Dive is played in this way. There is a miniature Submarine in a tank almost full of water. It is worked by electricity. There are 48 numbers marked on the inside of the upper edge of the tank. There are twelve tickets each containing four numbers. The price of each ticket varies from one Rupee to ten Rupees. The holder of the ticket containing the number against which the submarine has stopped is given a movable switch and asked to switch on, then the submarine dives and keeps going round and round under the water. When it is switched off this may be done at the will of the person who works the switch, the submarine mounts to the surface and comes to a standstill. There is a point on the submarine which points to the number against which it has stopped. This is the winning number and the holder of the ticket containing this number wins the prize, which if the tickets have been sold for one Rupee would be ten Rupees. The price is ten times the value of the ticket. Two Rupees on every twelve Rupees goes to the management. There is a certain amount of skill involved. For if the person who has to manipulate the switch knows exactly when to switch off, he can get the 'Submarine' to stop opposite to his number. This can be done by practice and observation, as the position of the 'Submarine' can be located by the movement of the water. Mr. Hayley contends that there is no 'stake' in the game, but that the money received from the players is collected in the hands of the man in charge who pays ten out of the twelve Rupees collected to the winner, retaining two for the accused. There would be a great deal in this contention if the facts support it. But Mr. De Silva contends that although there is a collection, and the winner is paid out this collection, yet the management invites the public to play the game, promising to pay ten Rupees for every one that is paid for a ticket. The players are not concerned with one another. They look to the management for the payment of the prize, and it is immaterial to them whether all the twelve tickets are sold or not. It may often happen that all the tickets are not sold. The management does not say that the game would not be played unless all the tickets are sold or that the prize would come out of the money contributed by the players. The management assures the players that if the game is played, the winner would get ten times the amount he paid for his ticket."

The Supreme Court held that this was "unlawful gaming."

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the issue of a future uncertain event mutually agree that, dependent on the determination of that event, one shall win from the other and that the other shall pay or hand over to him a sum of money or other stake, neither of the parties having any other interest in that contract than the sum or stake he will so win or lose "[1]—it is only then that a bet arises.

(iv) The prosecution must prove particular acts of betting or gaming on the part of the accused.[2] It is absolutely necessary to prove some specific acts,[3] which would lead to an inference that there was betting in fact. Where there was no evidence that the accused had indulged in gambling but general evidence that betting had gone on in the group where the accused were subsequently discovered, it was held that the conviction for unlawful gaming was bad.[4] "Before a person can be found guilty of unlawful gaming, it is not enough to prove that unlawful gaming took place on the day in question, or that the accused took part as a spectator, but that the accused took part in that gaming. It is no doubt difficult in a crowd of men to prove specific acts of betting or playing against each gamester."[5] But it must be done. Thus, in the game of "Baby," which is by far the most frequent in Ceylon, it is essential to prove either that A had the pack of cards and was shuffling and the others were betting, or that B had asked for a Jack of Clubs for five cents when A held the pack, and so on. It would be certainly difficult to say—and not necessary—what each and every individual in the group was doing. But to say merely "I saw accused and about fifteen others playing 'Baby' and we arrested three accused: this accused ran away and escaped" is not enough proof of a specific act of gambling and would entitle the accused to an acquittal."[6]

(v) Lastly, all persons whosoever, found in a common gaming place, whether they are actually engaged in gambling or not, are liable to be punished in just the same manner as the actual gamblers—even though they are mere spectators and may have taken no part in the actual gaming.

(II) Search-Warrants.

Unless the foregoing ingredients of the offence of unlawful gaming are present, that is to say, unless and until the prosecution is prepared to prove habituality, publicity, accessibility, and betting or the specific acts of betting, the Supreme Court has decided that a person cannot be convicted of gaming. Our law has, however, enacted a special provision in the shape of the Search-warrant which dispenses with most or all of these elements: for the Ordinance says[7] that a Police Magistrate, "on being satisfied upon written information on oath, and after any further inquiry which he may think necessary, that there is good reason to believe that any place is kept or used as a common gaming place," may issue a search-warrant to search such place, and to seize the persons found therein, together with all instruments or appliances of gaming; and "a person found in a common gaming place or found escaping there-

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1. Per Hawkins, J. in Carlill *vs.* Carbolic Smoke Ball Company (1892) 2 Queen's Bench Reports p. 490.
2. Siman *vs.* Sinno Appu (1893) 2 C.L.R. 193.
3. Banda Aratchi *vs.* Seyatu (1916) 2 C.W.R. 292.
4. Weerakoon *vs.* Appuhamy *et al* (1921) 23 N.L.R. 5.
5. Seneviratne *vs.* Avulu Marikkar (1909) 2 Leader 121.
6. Nambiar *vs.* Wijewardena (1924) 27 N.L.R. 30.
7. Section 7 (1).

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from on the occasion of this search shall be presumed to be guilty of unlawful gaming, and the place shall be presumed to be a common gaming house."[1]

Now, the language of this enactment is as plain as it could be; but it has proved a stumbling block in many a prosecution; it would, therefore, be advisable to consider the question in detail.

(i) A warrant can be granted by a Magistrate only when he is satisfied by written information on oath and after any further enquiry which he may think necessary that there is good reason to believe (*i.e.*, for him to believe) that a place is used as a common gaming place. The provisions of this Ordinance are clearly intended to prevent private houses being rashly entered, *i.e.*, in cases where access to the public does not exist in fact.[2] It follows that the presumptions as to guilt and to a place being a common gaming place arise only when the place is entered under the Ordinance,[3] that is to say, entered with a legally valid search-warrant, lawfully issued by a competent Magistrate. In order to obtain a legally valid search-warrant, "the Police or the Headman should satisfy the Magistrate by direct evidence. It will not do for them merely to tender hearsay evidence. They must either produce their informant or they must accompany the informant to the spot which he had disclosed, and then observe what goes on and give direct evidence themselves."[4] If a search-warrant is issued without adequate proof that the premises in question are being used as a common gaming place, the presumptions of guilt do not arise.[5] "Mere hearsay evidence in an affidavit is not sufficient to enable a Magistrate to issue a warrant which has such a far-reaching effect on the proof of the case as a warrant under the Gaming Act has. The Ordinance makes provision for the Magistrate, when he has not the entire proof before him that is necessary for the purpose, to hold a further enquiry, after the information on oath has been given, before he issues a warrant so that he may be satisfied that the place is a common gaming place."[6] When a constable swears that he is "credibly informed" or when a Headman affirms that he "has good reason to believe"[7] that the place is used as a common gaming place and no further enquiry is made by a Magistrate, it is now the known law that the warrant is bad. Where a Police Sergeant swore an affidavit to the effect that he had credible information and had reason to believe that the offence of public gaming was being carried on and that he had watched the house for the past seven days and had found people habitually congregating there for the purpose of gaming for stakes, but did not explain why he formed the inference that they were gaming unlawfully, it was held that the issue of the search-warrant was irregular, even though the Magistrate wrote in the record, "In this affidavit, he gave grounds for believing that unlawful gaming was carried on and I fail to see what further evidence could have been adduced."[8] The Gaming Ordinance prescribes no particular class of evidence for the issue of a search-warrant.[9] What is generally required is an affidavit plus oral testimony either of

1. Sections 9 and 10.
2. Koch 32 (1899).
3. Keegel *vs.* James Appu (1897) 3 N.L.R. 76.
4. Per Bertram, C.J., in Manukulasuriya *vs.* Merasha *et al* (1922) 24 N.L.R. 34.
5. Weerakoon *vs.* Oumaru *et al* (1922) 24 N.L.R. 29.
6. Per Shaw, J. in Silva *vs.* Silva (1920) 22 N.L.R., 27.
7. Nugawela *vs.* Sardina (1898) 3 N.L.R. 121.
8. Police Sergeant, Tangalle *vs.* Porthenis *et al* (1920) 22 N.L.R. 163.
9. Meedin *vs.* Gauder (1913) 1 Bal. Notes 60.

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the informant or of some person who has directly seen the very act of gaming. What the law requires is that the Magistrate and not the constables should be satisfied that the information is credible, and that it reasonably shows that a place is being kept or used as a common gaming place.[1] The information must be of an eye-witness who is able to vouch for the material facts and must not be merely based on hearsay evidence of a Vidane or of a Police Officer.[2] The informant must sign, if the information is reduced to writing by the Magistrate[3]; and there must be a certificate to the effect that his evidence has been read over and explained to him.[4] Otherwise, the information upon which the search-warrant is issued will not be regarded as "written information" within the meaning of section 7 of the Gaming Ordinance. The mere signatures of the informant and the Interpreter Mudaliyar countersigned by the Magistrate (without the certificate) are not enough.[5] The presumption under section 14 of the Gaming Ordinance does not arise where a search-warrant has been irregularly issued, *e.g.*, on evidence not on oath or on evidence irregularly admitted, even though the place is proved to be a common gaming-place by evidence led in the case.[6]

(ii) The proceedings for the issue of a warrant ought to be available at the trial so that the defence may raise questions as to their validity. Though the informant may have been called as a witness in connection with the issue of the search-warrant, the Police are not bound to call him at the trial any more than they are bound to call any other witness. Their failure to do so may be a point for comment, but cannot affect the validity of the warrant.[7] Where, however, the Magistrate made an entry on the record to the effect that the search-warrant was issued after due enquiry and that he was satisfied that there was just cause for issuing a search-warrant, De Sampayo, J., held that the requirements of the Ordinance were substantially complied with, even though the particulars of information on which the Magistrate had acted were not stated on the record.[8] But if no warrant is produced at the trial and no evidence is led as to the information on which the warrant is issued, the conviction would be bad, as there would be no evidence that the warrant was issued on testimony which there was good reason to believe.[9] As the presumptions created by the Ordinance arise only where the provisions of the Ordinance with regard to the form, issue and execution of the warrant have been strictly observed,[10] and as the information on which the search-warrant is issued forms part of the record, all this evidence should be available to the defence; for, it is open to them to refer to the information on which the warrant was issued and contend that the information did not justify the issue of a warrant and that the case against them should be treated as if the presumptions created by the entry under the warrant did not exist. The prosecuting Inspector further cannot refuse to disclose the name of the informant, as that name

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1. Doole *vs.* Fernando *et al* (1923) 5 C.L.R. 125.
2. Insp. of Police, Gampaha *vs.* Guneratne *et al* (1925) P.C. Colombo Itg. 40508 S.C. 635.
3. Parson *vs.* Kandiah (1927) 29 N.L.R. 94; 5 Times L.R. 26.
4. Bartholomeusz *vs.* Mendis (1930) 8 Times L.R. 55.
5. P.C. Galle (1933).
6. S.I. Puttalam *vs.* Mizpah *et al* (1926) S.C. 789, P.C. Puttalam 7639. Leader Law Reports.
7. Manukulasuriya *vs.* Merasha *et al* (1922) 24 N.L.R., 33 Supra.
8. Kathir *vs.* Mohideen *et al* (1918) 5 C.W.R. 159.
9. S. I. Police, Panadure *vs.* Charles (1916) 2 C.W.R. 98.
10. Ladispillai *vs.* Chelliah (1915) 2 C.A.R. 37; 3 Bal. Notes 54.

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has already been disclosed before the Magistrate at the time of the original enquiry.[1]

(iii) The search-warrant must describe the house in a properly identifiable manner. It is not necessary that the number of the premises must be referred to in the warrant.[2] But the premises must be described properly and unmistakably. Where a search-warrant was issued to search " the house and premises of William Perera, the bungalow-keeper of Queen's Cottage "—and where 14 persons were arrested on the Queen's Cottage grounds in a room next but one to Perera's, it was held that the entry of the Queen's Cottage grounds was not under the search-warrant which only authorised an entry into Perera's rooms.[3] And where a warrant was issued authorising the search of a certain house marked B in a certain plan and where the Police found persons gambling with cards in a compound which was common to the said house and others, the entry into the compound was regarded as not an entry under the search-warrant.[4]

(iv) If the warrant is found to be defective, irregular, or invalid the presumptions under the Ordinance do not arise. The case proceeds on the footing that there was no search-warrant and the burden rests on the prosecution to prove the four ingredients mentioned above. It would be apparent, therefore, that a trial with a warrant is quite different from a trial without one. The Police should try and apply for warrants in as many cases as possible ; if they do not, their task would certainly be onerous. The Ordinance, no doubt, gives a Police Officer the power to arrest a person found committing unlawful gaming,[5] and to take him before a Magistrate ; but arrest and proof are different things.

It must be remembered that a search-warrant once executed by an unsuccessful search becomes exhausted and a re-issue of the same warrant by an endorsement is bad, even though the re-issue is based upon fresh evidence that gaming is continuing in the same place.[6]

A search-warrant issued under this Ordinance must be executed forthwith, *i.e.*, within a period reasonable under the circumstances and without any delay that can reasonably be avoided. A Magistrate cannot attach a special meaning to the word " forthwith " by means of an endorsement making the warrant returnable on a particular day.[7]

(III) " Keeping."

Having understood the legal definition of, and the indicia of guilt for a conviction under, the offence of unlawful gaming, we can proceed to examine the kindred offence of " keeping a common gaming place."

" Whoever, being the owner or occupier or having the use temporarily or otherwise thereof,

(i) keeps or uses a place as a common gaming place, or

(ii) permits it to be kept or used as such by another person, or

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1. Inspector of Police, Kalutara *vs.* Arasakuleratna *et al* (1923) 25 N.L.R. 161.
2. Manukulasuriya *vs.* Merasha *et al* (1922) 24 N.L.R. 33 Supra.
3. Weerakoon *vs.* Cumaria *et al* (1922) 24 N.L.R. 29 Supra.
4. Hole *vs.* Carolis Silva (1901) 2 Br. 317.
5. Krisnaratna *vs.* Siyan Appu (1914) 17 N.L.R. 276.
6. Rex. *vs.* Pareed *et al* (1928) 29 N.L.R. 204 ; 5 Times L.R. 91.
7. Weerakoon *vs.* Fernando (1931) 30 N.L.R. 342. (See contra in Gunasekara *vs.* Arasculeratne 26 N.L.R. 67).

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(iii) whoever has the care or management of, or in any manner assists in the management of, a place kept or used as a common gaming place shall be punished with a fine of Rs. 500 or with rigorous imprisonment for a term which may extend to one year or both."[1]

Under this section, three kinds of offences are lumped together.

When persons are convicted of unlawful gaming, the Police simultaneously charge the owner or occupier of the premises with keeping a common gaming house (or for permitting it to be so kept). Not infrequently a charge is preferred under the last-named sub-section; but to warrant a conviction thereunder, it is not sufficient to prove that the accused took a commission from the gamblers; there must be proof that he exercised some kind of control over the place or the persons frequenting the place.[2] The mere fact of a man's collecting *Thon*[3] from the gamblers in a place of which he is not the owner or occupier is not enough; there should be some additional evidence that he invited gamblers to enter the place or that he exercised some authority therein.[4] A mere collection of commission from gamblers does not render a person liable for assisting in the management of or for managing a common gaming place.[5]

If persons are convicted of unlawful gaming, then the owner or occupier is liable for using or permitting the place to be used as a common gaming place. If a man chooses to allow the public access to his house, with or without payment, to play cards for money, he uses it as a common gaming place[6] and is clearly guilty; but any number of his friends or acquaintances may play in his house every day with cards for money without committing any offence. A man's house is his castle and he can even resist with force the unwelcome intrusion of a raiding party unless the latter are armed with a search-warrant.[7] But one cannot gather together a number of persons of different nationalities and indulge in promiscuous gambling, say, under the blind pretext of a circumcision ceremony.[8]

(IV) Procedure.

An acquittal of a person for unlawful gaming is no bar to a prosecution for keeping a common gaming place, as the two offences are quite distinct,[9] though the acquittal would weaken the case for the prosecution. Nor is the conviction of Sudu Banda for keeping a common gaming place proof that Kalu Banda was unlawfully gaming in that house.[10] Kalu Banda and Sudu Banda can, however, be charged together in the same plaint, one for unlawful gaming and the other for keeping a common gaming place, as the offences with which the accused are charged are committed in the course of the same transaction.[11]

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1. Section 5 of Ordinance No. 17 of 1889.
2. The Queen *vs.* Seyn (1895) 1 Weer. 25.
3. Betting Commission.
4. Weerakoon *vs.* Gabriel Appuhamy (1909) 3 Leader II 14.
5. Hart *vs.* Warnasuriya (1911) 5 Leader 109, 6 Weer. 52.
6. Jayawardena *vs.* Don Thomas (1895) 1 N.L.R. 216.
7. Hamidu Aratchi *vs.* Junus (1916) 3 C.W.R. 309.
8. Sansoni *vs.* Samson (1904) 7 N.L.R. 376.
9. Ratwatte *vs.* Kadonis (1909) 12 N.L.R. 245.
10. Bellatte *vs.* Don Lewis (1907) Aser. 2.
11. Alwis *vs.* Tillekaratne (1910) 4 Weer. 95 and Abeykoon *vs.* Philip (1909) 12 N.L.R. 145, though in Jayawardena *vs.* Don Thomas (1895) 1 N.L.R. 216 it was held to be a misjoinder.

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All instruments or appliances of gaming found on the persons convicted of any of the above sections are liable to confiscation. These include cards, dice, balls, counters, tables, boards, mats and even money.

Punishment for keeping a gaming house in much more severe than that for gaming: the real test of punishment is the amount of "ground money" found on the spot, the intensity of the gambling and the number and status of the persons collected. A fine of Re. 1 was considered too little by the Supreme Court for gaming, and a fine of Rs. 500 and three months' imprisonment too severe for keeping a commong gaming house.[1]

A Magistrate can himself do what he may authorise a Police Officer to do, viz., search. No search-warrant is necessary in that case. He may also issue a certificate of indemnity to some of the accused in order to "turn them into King's evidence."

A Magistrate has no jurisdiction to try a case of "gambling" punishable under the Village Committee rules, as distinct from unlawful gaming; so that in cases for "gambling" transferred from a V.T. under fiat of a Government Agent, the prosecution must make out a case for unlawful gaming under the Ordinance.[2]

The Ordinance provides special forms of "charges" in respect of unlawful gaming and of keeping a common gaming place—but there is no ruling of the Supreme Court whether these forms are optional or compulsory, although the language of sections 11 and 12 appears to be peremptory.

(V) Betting on Horse Racing.

By Ordinance No. 9 of 1930, no person shall receive or negotiate any bet on a horse race other than a taxable bet. A taxable bet is a bet "of not less than one rupee on any horse race which is run or proposed to be run at a race meeting held on a registered race course, made otherwise than on credit by a person acting on his own behalf, on the day on which the race is run, at a totalizator worked by the certificate holder for the race-course, within an enclosure, room or place set apart for the purpose under section 6 of the Ordinance." It has been held now that a person who receives money merely for the purpose of making a bet on behalf of another at a totalizator on a race-course, does not negotiate a bet other than a taxable bet within the meaning of this section.[3] Where two decoys were sent out to make bets with the accused and corroborated each other in material particulars the Supreme Court quashed the conviction on the ground that both these decoys were accomplices and could not corroborate each other in the absence of any other corroborative evidence in material particulars.[4]

There are other offences with regard to registration, etc., under this Ordinance. The breach of any provision is punishable summarily with a fine of one thousand rupees for first offence and with similar fine or imprisonment for six months or both for a second or subsequent offence. The exemption conferred in the case of Resthouses, Clubs, and Hotels under the Gaming Ordinance is

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1. 1899 (Koch) 18.
2. Ibrahim Saibo *vs.* Abaran Appu (1931) 9 Times L.R. 75.
3. Wijesuriya *vs.* Lye (1931) 33 N.L.R. 148, 9 Times L.R. 55.
4. Pieris *vs.* Seneviratne (1931) 33 N.L.R. 157.

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withdrawn in connection with betting on horse-racing. A Magistrate is entitled to issue search-warrants as under the Gaming Ordinance; but a "prescribed officer" is empowered as under the Excise Ordinance to enter premises without a search-warrant if the same cannot be obtained without affording the offender an opportunity of escape, or of concealing evidence of the offence, provided that he had recorded the grounds of his suspicion: he can then even depute his powers to another in writing.

(VI) Lotteries.

Under the Lotteries Ordinance No. 8 of 1844[1] it is an offence punishable with a fine of fifty rupees to draw or cause to be drawn any tickets in any lottery or to sell or dispose of or purchase any such tickets or even to endeavour to win or obtain any prize in any lottery. Any Justice of the Peace is empowered to issue search-warrants under this Ordinance, but any peace officer on reasonable suspicion is empowered to enter any premises for a search without a warrant. No prosecution can be entered without the previous sanction of the Attorney-General.

1. Vol. I, p. 156.

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CHAPTER XXXIV.

FORESTS

The Forest Ordinance[1] creates certain offences itself and empowers the Governor to make rules, a breach of each of which is also an offence. It deals with "reserved forests," "village forests" and "other forests," and generally provides for the protection of forests and forest produce and the felling and transport of timber.

A reserved forest is a forest declared to be so by proclamation in the "Gazette" and also includes stream reservations and reservations on the banks of rivers, road reservations and plantations, forest depôts, and chenas planted with forest trees. But land which being originally forest has been subjected to chena cultivation for a series of years is chena and not forest.[2] Any person who in a reserved forest—

(*a*) trespasses, or pastures cattle, or permits cattle to trespass ;

(*b*) causes any damage by negligence in felling any tree or cutting or dragging any timber ;

(*c*) wilfully strips off the bark or leaves from, or otherwise damages, any tree ;

(*d*) in contravention of any rules made by the Governor in Executive Council in that behalf, hunts, shoots, fishes, poisons water, or sets traps or snares or guns, or constructs or uses ambushes, or uses any explosive substance, is liable to a fine of Rs. 50 or double the amount of damage resulting from the offence.[3]

And any person who—

(*a*) makes any forest clearing in a reserved forest ; or

(*b*) sets fire to a reserved forest ; or

(*c*) kindles or leaves or carries any fire in such a manner as to endanger the forest ; or

(*d*) who fells, girdles, lops, tops, or burns any tree ; or

(*e*) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest produce ;

(*f*) clears or breaks up any land for cultivation or any other purpose ;

(*g*) damages, alters, or removes any wall, ditch, embankment, fence, hedge, or railing, is liable to imprisonment for six months or to a fine of Rs. 500 or to both and also to compensation for damage not exceeding the amount of the fine which the Court has power to impose.[4]

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1. No. 16 of 1907 ; this Ordinance repeals the previous Ordinances, *e.g.*, No. 10 of 1885, No. 1 of 1892 and No. 20 of 1906. Vol. II, p. 753.

2. Government Agent *vs.* Maduwanwela (1920) 7 C.W.R. 260.

3. Section 8.

4. Section 9.

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The rules mentioned above are framed by the Governor[1] and have the force of law. One of the rules, for instance, is that in a reserved forest no person can drive any fish or use any net for fishing of which the mesh is less than one and a half inch square. And no person can set fire to any forest growth, grass, etc., outside a reserved forest within one-quarter mile from the boundary unless he has given a week's notice to the nearest Forest Officer and has taken sufficient precuations to keep it under control.

A village forest is a forest set apart for the benefit of any village community or group of communities by proclamation in the *Gazette*. All scheduled[2] trees in such a forest are the property of the Crown and no person can cut, mark, lop, girdle, or injure by fire or otherwise any such trees without special permission from a Forest Officer or pain of being sentenced to a fine of Rs. 100 or to imprisonment for six months.[3] From other trees, dead or fallen timber for firewood, grass for litter and thatching, canes and creepers, may be taken by villagers without permit. Any other produce can only be removed from (or cattle can only be pastured in) such a forest with a permit from the chief Headman of the District.

Reserved trees are trees enumerated in Schedule III of the Ordinance and include trees in all stages of their growth.[4] No person can, or can cause any person to, cut, mark, lop, girdle, top, or injure by fire or otherwise any such trees in any forest except in accordance with rules made by the Governor in Executive Council or unless with the permission in writing of a Forest Officer.[5] The punishment for this offence is a fine of Rs. 100 or imprisonment for six months.[6] Where the accused was charged under this section with having in or about the years 1908 to 1913 unlawfully cut and caused to be cut 8 *Palai* trees and 153 Satinwood trees, being reserved trees from the Crown forest situate in the village Walpoluwewa, without the permission of a Forest Officer, and it appeared that the timber was cut at different times during those years and up to at least the year 1910 under the *bona fide* belief that the land from which such timber was cut formed part of the lands belonging to the temple of which the accused was the incumbent, it was held that the accused had committed no offence in cutting any timber without the requisite permit prior to 1910, as section 72 of the Penal Code provided that nothing was an offence which was done by any person who by reason of a mistake of fact in good faith believed himself to be justified in law in doing it.[7] Where the prosecution proved and the accused admitted having cut a *Milla* tree from a *mukalana* or forest which was at least 50 years old, and the Magistrate, being not in a position to judge whether the land was really Crown land or private property, acquitted the accused, the Supreme Court held that the Magistrate was wrong as, by

1. See Gazette No. 6306 of 23rd April, 1909.
2. See Schedule II attached to the Ordinance.
3. Section 18.
4. The Governor is now empowered by Notification in the Gazette to add to or delete from this number. *Vide* section 4 of Ordinance No. 23 of 1931.
5. Section 20.
6. Section 22.
7. Cumberland *vs.* Dewarakkita Unanse (1916) 3 C.W.R. 102.

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section 6[1] of Ordinance No. 12 of 1840, all forest lands were presumed to be Crown property.[2]

Under section 21, no person can clear, set fire to, or break up the soil of, or make use of the pasturage or the forest produce of, any forest not included in a reserved or village forest except in accordance with rules to be made by the Governor in Executive Council, on pain of being sentenced to a fine of Rs. 100 or imprisonment for six months. These rules are framed by Government from time to time and published in the " Gazette."[3] Among the most important rules are the following :—

(i) No land at the disposal of the Crown can be cleared for chena without a permit from a Government Agent or his Assistant ; and no chena can be cleared within 100 yards of any high road or within 50 feet of any stream or ridge. In this connection, it is necessary to mention that under section 4 of the principal Ordinance, " if in any prosecution or proceeding under this Ordinance any question shall arise as to the title to the land in respect of which any such prosecution or proceeding shall be taken, the Court or Officer having jurisdiction to entertain and adjudicate thereon shall, for the purposes of such prosecution or proceeding, have jurisdiction to try and determine any such question of title ; provided that such judgment shall not be received as evidence of title or pleaded in bar in any civil suit in which the title to the land in question may be put in issue." So that even a Police Magistrate may decide, within these limitations, a question as to title between the accused and the Crown. If an accused who is charged with clearing chenas without permission proves that he had acted under a *bona fide* impression that he was entitled to the land in question, he would furnish a good defence.[4] How far the provisions of this section are intended to over-ride the general principle that the criminal jurisdiction of a Magistrate is ousted by a *bona fide* claim of right is not clear ; the language of the section suggests the view that the questions of title contemplated by the section are such as may occur incidentally in the course of prosecutions under the Ordinance and that the section is not intended to authorise the Crown to proceed criminally in cases where there is from the beginning a *bona fide* question of title between the Crown and the accused.[5] In other words, the section does not furnish a short cut for disposing of disputes which are essentially of a civil nature, by means of a criminal prosecution. In cases where a village community *bona fide* claims against the Crown under an ancient grant, it is not a fair course of procedure to prosecute the claimants individually for breaches of the Forest Ordinance.[6] So that, although under the Ordinance a Police Magistrate is empowered to investigate

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1. This section provides : all forest, waste, unoccupied or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved and all chenas and other lands which can only be cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan provinces (wherein no *thombo* registers have been heretofore established) be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a *Sannas* or grant for the same, together with satisfactory evidence as to the limits or boundaries thereof, or of such customary taxes, dues or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts ; and in all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause. Vol. I, p. 122.

2. Muttettuwagama *vs.* Grigoris (1909) 2 Leader 109.

3. See Gazette No. 6306 of 23rd April, 1909, No. 6488 of 9th February, 1912, No. 6788 of 18th February, 1916, and No. 6941 of 10th May, 1918.

4. Obeyesekara *vs.* Menik Naide (1917) 4 C.W.R. 126.

5. A.G.A., Kegalle *vs.* Siyadoris Mudalali (1916) 3 C.W.R. 53.

6. Chena Muhandiram *vs.* Rawapper (1914) 17 N.L.R. 225.

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title for the purpose of deciding the guilt of a person, yet when the point is purely a question of title or the possession of a land, it is undesirable that the conviction should turn upon the finding of a Magistrate with regard to title.[1] Thus, where two coolies and a Superintendent of an estate were charged under the Forest Ordinance with felling timber from Crown land without a permit and the proprietor of the estate claimed the land on a title dating from 1837, it was held that the claim of title was a *bona fide* one and the prosecution under the Forest Ordinance was not proper.[2] But, under this Ordinance, an accused person cannot rebut the presumption in favour of the Crown on the strength of a *Sannas* unless it is registered in accordance with the law.[3] And prescriptive title cannot be established against the Crown in the case of chena lands situated within the Kandyan Provinces;[4] nor could title be pleaded except as provided for in Ordinance No. 12 of 1840. Thus, where the accused was charged with having cleared and broken up the soil of a piece of chena land, which was at the disposal of the Crown in the Kandyan Provinces, without a permit, and where he pleaded in defence that he was acting under a *bona fide* claim of right, though he had no *Sannas* or grant nor did he prove payment of the customary dues or taxes, but had a Notarial deed, it was held that as the accused's right, if any, did not exist in law, he could not be said to have acted under a *bona fide* claim of right. "Before a person can be said to have a *bona fide* belief that the property is his, it must be a belief of the existence of a right which could exist in law."[5]

The whole question has now been finally decided by the Full Bench in the case of *Weerakoon vs. Ranhamy*.[6] This is an interesting judgment well worthy of perusal. It settles once for all that the jurisdiction of a Police Court in a prosecution under the Forest Ordinance to determine a question of title in pursuance of section 4 is not ousted merely by the circumstance that the claim of title set up is a *bona fide* claim. This judgment reviews all the previous decisions and especially deals with the question of *mens rea* as applied to Forest offences : "the doctrine of the English Criminal law, known as the doctrine of *mens rea*, only exists in Ceylon in so far as it is embodied in the express terms of sections 69 and 72 of the Penal Code." Where the mistake as to a man's private rights is based upon a misconception of some general principle of law or the ignorance of some statutory enactment, then his mistake is a mistake in law and therefore does not excuse him. Where the accused was charged with having cleared Crown land without a permit under a mistaken belief that it was possible for him to have acquired a good title to chena lands in the Kandyan Provinces merely by Notarial deeds and possession, he was held, by three Judges to one, to be acting under a mistake of law and was accordingly convicted, though his sentence was reduced to a nominal fine of one Rupee.

The Supreme Court also *inter alia* decided what prosecutions under the Forest Ordinance should be referred to a civil court. "Where the

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1. Pahalaganhaya *vs.* Andris (1914) 3 Bal. Notes 62.
2. Soysa *vs.* Podisingho *et al* (1919) 21 N.L.R. 252.
3. Silva *vs.* Banda (1914) C.A.R. 76.
4. Attorney-General *vs.* Punchirala (1915) 18 N.L.R. 152.
5. Obeyasekara *vs.* Banda (1918) 20 N.L.R. 447.
6. (1921) 23 N.L.R. 33.

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prosecution appears to be an abuse of the process of the Court, and in particular in the following classes of cases :—

(1) Where the claim does not arise incidentally, but has already been the subject of dispute between the claimant and the Crown and it appears to the Magistrate that the real object of the proceeding is not to protect Crown lands but to obtain an expeditious decision of the claim ;

(2) Where the questions involved appear to him to be of such intricacy and magnitude that he cannot effectually adjudicate upon them in ordinary summary proceedings, and

(3) Where the circumstances are such that it would be essentially unfair that the rights of the parties interested should be determined by such proceedings ; the Magistrate ought to refer the prosecution to a civil court."[1]

If in a prosecution for illicitly clearing Crown land, the accused is able to prove his possession of the land for over 10 years, there would be sufficient evidence of good faith on his part and a conviction would not be justified.[2] But good faith does not exist where the title is untenable in law. Thus, it was held recently that the fact that the vendor himself considered the title doubtful and was not prepared to guarantee it negatived the assertion that the accused was acting under a *bona fide* claim of right.[3] Similarly where a claim was subsequently put forward under a *Sannas* but nothing was done to prosecute the claim or to establish the genuineness of the *Sannas*, it was held that the rule in *Weerakoon vs. Ranhamy* did not apply.[4]

It has been recently enacted[5] that in respect of lands which are not declared to be the property of the Crown under the Waste Lands Ordinance, where the Crown fails to prove that the trees in the particular forest are more than twenty years' growth, it would be a good defence if the accused satisfies the Court that he claims the said forest by inheritance or upon deed based upon inheritance and that he or his predecessors in title have on at least two occasions cultivated it according to the customary cycle of cultivation after intervals of several years of similar lands in the same locality.

Where the accused was charged with clearing Crown lands in breach of section 21 of the Forest Ordinance, it was held that the charge did not disclose an offence as it is a breach of the rules framed under the section that constitutes the offence.[6] It is absolutely necessary that there should be evidence of the framing of such rules[7] which must therefore be produced. In a charge of clearing Crown land without a permit, there must be satisfactory evidence that the land is Crown land : a bare statement by a Revenue Officer that the land belongs to the Crown is not enough.[8]

An Aratchy, who is aware that larger extents are cleared than are covered by the permits (viz., 3 acres), is not guilty of aiding and abetting the illicit cultivation.[9]

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1. Per Bertram, C.J. *Ibid.*
2. Perera *vs.* Wijesinghe (1928) 30 N.L.R. 366. 6 Times L.R. 65.
3. Lushington *vs.* Sudu Banda (1930) 7 Times L.R. 146.
4. Wijesundere *vs.* Karmanis Appu (1932) 10 Times L.R. 96. 2 C.L.W. 86.
5. By Ordinance No. 23 of 1931.
6. De Silva *vs.* Odris (1914) 1 C.A.R. 27.
7. Sam Lovell *vs.* Dondiya (1910) 4 Leader 124.
8. Keppitipola *vs.* James *et al* (1925) P.C. Gampola 11445. S. C. 443.
9. R. M. Bintenne *vs.* Muttu Banda (1917) 4 C.W.R. 236.

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(ii) No person can set fire to any grass, trees, or timber, or kindle any fire or leave any fire burning in any chena unless he has given one week's notice to the nearest Forest Officer, has cleared of inflammable matter a belt of ground not less than 20 yards in breadth around the place on which he proposes to kindle such fire, and kindles it when no high wind is blowing.

(iii) No person can fell, cut, girdle, lop, top, or injure by fire or otherwise, saw or convert any tree or the timber of any tree, or cut bamboos, canes, or rattans for local use or otherwise, nor can any person who is not the owner of land within a forest or who has not resided in any village within any forest for two years, collect or appropriate plants, flowers, fruits, seeds, roots, juice, catechu, bark, gum, resin, varnish lac, or honey, except under a permit issued by a duly empowered Forest Officer.[1] For local trade, as well as for the supply of a town or a manufactory or for any manufacturing purposes, timber for firewood may be collected and removed on permits issued by a Forest Officer ; but where the Forest Department establishes or has established fuel depôts for this purpose, such permits are not issued.

The word "timber" is defined in section 3 as including all wood whether cut up or fashioned or hollowed out for any purpose or not ; when it has already been used in building a house, it ceases to be timber. The word "fashioned," followed as it is by the words "hollowed out," seems to contemplate timber in the condition which that word bears in ordinary use, that is to say, wood detached from any permanent structure.[2]

An accused was charged with having illicitly cut and collected from Crown land some 85 bags of *avarum* bark without a permit under this rule. There was no evidence that the accused did actually remove the bark from the Crown land. When applying for a permit to remove the same, he had stated that he had removed it from private lands. The evidence for the prosecution was to the effect that the accused could not have collected therefrom more than 32 bags. The Magistrate held that the accused had failed to repel the presumption arising under section 52 (which says that in any case when any question arises as to whether any timber or forest produce is the property of the Crown, it shall be presumed to be so until the contrary is proved), as he had not proved that the bark in the remaining 53 bags was not the property of the Crown. It was held in appeal that this presumption did not arise as there was no evidence that these 53 bags contained bark "found in or brought from a forest."[3]

Where the accused was in possession of a piece of land for several years and planted it with coconut, jak, etc., and the Government Agent investigated the title to this land and rejected the claim of the accused who subsequently bought it from the Crown on the instalment system but having failed to pay some instalments was charged with cutting down some trees under the Forest Ordinance, it was held that the charge was wrong. In this case, the Crown Counsel urged that the accused had admitted the Crown's title by becoming the purchaser and as he had not completed his instalments, the land still remained Crown land ; being Crown land, it was land at the disposal of the Crown and conse-

1. See Gazette No. 6941 of 10th May, 1918, rule 1.
2. The King *vs.* Saibo (1913) 1 Bal. Notes 35.
3. Wambeek *vs.* Mohideen (1921) 22 N.L.R. 400.

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quently "forest." The Supreme Court held that the word "forest" must be read in connection with the title to the Ordinance and its general object, this being not the kind of cases in which the Forest Ordinance was intended to apply.[1]

(iv) No person can build a house or a hut on any land at the disposal of the Crown without special permit from the Government Agent or his assistant.

(v) No persons other than those resident in any village surrounded by forest can dig, collect, or remove stone, clay, gravel, or earth, in or from any forest without a permit from a Forest Officer. Residents are governed by the rules framed under section 21 (*g*).[2] A very humorous judgment[3] by De Sampayo, J., to the effect that sea sand is not forest produce is worthy of perusal. He decided also that the sea-shore is not land at the disposal of the Crown within the meaning of this Ordinance; it is *res communis*, the use of which is open to all the members of the community, the Crown having only the right of control on behalf of the public.

(vi) No persons can dig or remove coral, or dig for plumbago or gems, or make charcoal from the trees, or burn lime in any forest except under a permit. The prohibition as to plumbago is withdrawn now.[4] The bed of a public stream or river is the property of the Crown and removal of coral therefrom would be theftuous.[5] The bed of an old abandoned tank is presumed to be the property of the Crown.[6] Nor can any person not being a resident collect or remove grass, thorns, creepers, or leaves, from any forest, or pasture cattle without a permit.

(vii) The use of explosives for the destruction of animals in land or in water in any forest is strictly prohibited; nor can snares, pitfalls, traps, or spring-guns be laid in any forest without special permission.[7] In a prosecution under section 21 of the rules in force under the section,

1. Mudaliyar, Raigam Korale *vs.* Sinnappu (1922) 24 N.L.R. 219.
2. See Gazette 6306 of 23rd April, 1909, rules 1 to 16.
3. Forest Ranger, Chilaw *vs.* Fernando (1921) 23 N.L.R. 213.
4. See Gazette Notification dated 3rd February, 1912, in Gazette No. 6488 of 1912.
5. Wanigasinghe *vs.* Sinno Appu *et al* (1925) 3 Times L.R. 74.
6. Attorney-General *vs.* Sardiel Appuhamy *et al* (1925) 3 Times L.R. 91.
7. The following rules about hunting may be of interest and useful (see Notification of 3rd May, 1909):—

(1) In these rules "deer" includes Sambur (elk), spotted deer, and red deer; "up-country forest" means any forest situated at an elevation of 4,000 ft. or upwards above sea-level; "hunting season" means the period between November 1st and May 31st inclusive; "Country" means the area allotted on registration to the master of a registered pack of hounds.

(2) No person shall set or lay any trap, snare, pitfall, or spring gun for deer in any up-country forest.

(3) No person shall kill or take or pursue or attempt to kill or take any deer, in any up-country forest in any other manner than by hunting with a pack of hounds which has been duly registered in accordance with those rules.

(4) Any master of a pack of hounds who desires to have his pack registered in respect of any country must apply in writing to the Government Agent specifying the country for which he desires his pack registered.

(5) The registration of a pack of hounds shall remain in force for only one hunting season.

(6) A fee of Rs. 100 shall be payable annually on the registration of any pack of hounds for any hunting season.

(7) No more than one pack of hounds will be registered for any country.

(8) In deciding whether a pack of hounds should be registered for any country, the G. A. will have regard to the custom which has previously prevailed and will not register a pack of hounds for a country which has been regularly hunted by another pack without special reasons; but where the master of a registered pack ceases to hunt the country assigned to him, the G.A. may cause the pack to be registered in the name of another master without any further registration fee.

(9) An appeal lies to the Governor in Executive Council from any order of the G.A.

It must be noted further that no person can act as a tracker or shikari in Badulla without special permit from the G.A. (Gazette No. 6490 of 23rd February, 1912).

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the burden of proving that the forest in which the offence is alleged to have been committed is not included in a reserved or village forest lies on the accused.[1]

Besides the foregoing rules, the Governor in Executive Council is empowered to make rules under section 24 for the removal of timber or the transit of all forest produce by land and water. The most important[2] among them provide that no person can remove or cause to be removed any forest produce or timber from Crown land in any part of the Colony except under a permit from the Forest Officer in the prescribed form ; and in specified areas no timber or forest produce can even be removed from private lands without a permit ; where a permit is granted the timber or produce must be removed in accordance with the conditions of such permit : and the permit must be produced for inspection whenever demanded. When a person is charged with removing timber without a permit, the burden is on the prosecution to prove that the locality is one in which a permit is necessary. An admission by the person charged that he has no permit is not an unqualified admission that he is guilty of an offence.[3] Where trees standing on a road reservation are cut by a District Engineer and sold to a third party, the latter cannot remove the same without a permit from a Forest Officer, even though he has the implied permission of the District Engineer.[4]

The breach of any rules made under this section is punishable with a fine of Rs. 100 or imprisonment for six months, unless the rules themselves have provided for a greater or less punishment; the maximum punishment is doubled if the offence is committed after sunset and before sunrise, or if the offender has made preparations for resistance to lawful authority, or if he has been previously convicted of any offence under this Ordinance.

The Forest Ordinance prescribes the steps that should be taken when illicit forest produce has been seized : a report should be made to the Government Agent of the Province who will report the same to the nearest Police Court.[5] But the Supreme Court has held that this report from a Government Agent is not a condition precedent to the institution of criminal proceedings for an offence under section 22. It would be open to a person entitled to prosecute, to do so in the ordinary way as a public officer under section 148 (1) of the Criminal Procedure Code.[6] Vexatious or unnecessary seizing of any property by any Forest Officer is a summary offence under the Ordinance.

Formerly, a Police Court had no jurisdiction to try all offences[7] under the Forest Ordinance ; but now,[8] all offences, except that under section 47, can be tried by a Police Court ; and if the Magistrate is also a District Judge he can inflict the full penalty prescribed for the offence : ordinarily, Magistrates can only inflict the penalty that they are lawfully competent to impose in summary cases. A Magistrate may take non-summary proceedings if he so desires ; *e.g.*, where the timber seized is very valuable. Failure to specify in a charge of breach of rules under

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1. Mudaliyar Pitigal Korale North *vs.* Kiri Banda (1909) 12 N.L.R. 304 (Full Bench).
2. See Gazette No. 6941 of 10th May, 1918.
3. Katchy *vs.* Cooray (1909) 1 Cur. L.R. 47.
4. Fernando *vs.* Samarawickrama (1922) 24 N.L.R. 136.
5. Section 39.
6. Mahavalatenne *vs.* Mohitihamy (1910) 5 Bal. 85.
7. Jayasekara *vs.* Dissanayake (1929) N.L.R. 408.
8. By Ordinance No. 11 of 1912, section 2.

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the Forest Ordinance the "Gazette" in which these rules appear is fatal to a conviction thereunder.[1] Section 47 makes it an offence to counterfeit. marks used by Forest Officers or to alter or deface them, or to alter, move or deface any boundary mark of any forest: this offence is non-summary.

Till recently confessions made to Forest Officers were relevant in evidence; but now the law has been changed[2]—and any confession made by an accused to a Forest Officer or while he is in his custody in respect of any act made punishable under the Forest Ordinance is inadmissible: so that, if an accused confesses, Forest Officers may produce him before the nearest Magistrate and get his confession recorded.

When any person is convicted of any forest offence, all timber or forest produce which is not the property of the Crown in respect of which such offence has been committed, and all tools, boats, carts and cattle used in committing such offence are liable, by order of the convicting Magistrate, to confiscation.[3]

One Mrs. Muttucumaru and two of her employees were charged with having felled and removed Crown timber without a permit: the case against her was withdrawn, but the other two accused were convicted, though acquitted later in appeal. The Appellate Court made no order as to the disposal of the timber. On the application of Mrs. Muttucumaru, the Magistrate ordered the timber to be delivered over to her; the Solicitor-General appealed. It was held that the order of the Magistrate was right. Under the Forest Ordinance, it was not open to the Supreme Court to order a confiscation of the timber to be maintained in spite of the acquittal of the accused.[4]

1. Marambe vs. Kiriappu (1932) 2 C.L.W. 122.
2. By Ordinance No. 18 of 1928.
3. Section 40.
4. Fyers vs. Muttucumaru and others (1917) 4 C.W.R. 882.

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CHAPTER XXXV.

POLICE ORDINANCE.

This Ordinance,[1] together with its amending Ordinances, were enacted for the purpose of establishing in the Island a regular Police Force "for the effectual protection of person and property." They, therefore, contain provisions for such establishment and for the maintenance of the Police Force, enabling the Inspector-General to make proper rules and regulations for the guidance and conduct of all Police Officers. They also provide for the establishment of Punitive Police in parts of the Island which are found to be "in a disturbed or dangerous state" or for the "quartering" of Police in any particular area and for the levy of a Police rate from the inhabitants for the general upkeep and maintenance of the same. With these, we are not concerned. Nor are we concerned with the general duties and liabilities of Police Officers except in so far as they come in conflict with the law.

Under the Police Ordinance a number of petty offences have been created; and it would be outside the scope of this small book to deal systematically with them all. We shall have to rest content with taking note of those few offences which are most frequently dealt with in a Police Court.

It is not essential that only the Police should prosecute for offences under this Ordinance. "Anybody may, as a general rule, give a Police Court information of an offence and it is open to the Court to commence proceedings on information so given. The Court may, however, in its discretion refuse to entertain a plaint where it appears that the complainant has no interest whatever in the prosecution, especially where the alleged offence is against a law passed for the benefit or protection of a certain class of persons." Thus, where an Inspector of a Local Board prosecuted a person for obstruction of a public thoroughfare under the Police Ordinance, and the Magistrate discharged the accused on the ground that the Inspector could not prosecute under this Ordinance, it was held that the prosecution was in order.[2] So that even a private individual who has been wronged, *e.g.*, who has been obstructed or who resents "an indecent exposure" of another's person, may also prosecute. Indeed, the Ordinance goes further and enacts in section 86 that any person in whose view any of the offences enumerated therein[3] has been committed may even seize and take the offending party to the nearest Police Station if he fails to give him due information about his name and address. It has also been held that a village Headman has as much a right of prosecuting for all offences under this Ordinance as a Police Officer has.[4]

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1. No. 16 of 1865, Vol. I, p. 595.
2. Inspector, Local Board, Chilaw, *vs.* Sollamuttu (1914) 17 N.L.R. 449.
3. *Viz.* obstruction by carts, furious or careless driving, conducting of elephants on public thoroughfares and offences against "the rule of the road"; sections 81 to 85.
4. Police Headman *vs.* Joseph (1923) 1 Times L.R. 238.

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Many of the offences created by this Ordinance have since become obsolete, owing either to repeal or to re-enactment in another form in later Ordinances. Thus, most of the offences about the regulation of traffic have been superseded by the motoring bye-laws or by the Vehicles' Ordinance : the sanitary regulations are now governed by sanitary bye-laws ; and cruelty to animals is penalised under the provisions of the S.P.C.A. Ordinance. So that, though there is no bar to a prosecution under any section of the Police Ordinance, the substituted enactments, being more specific, should always be preferred. As we are dealing with such provisions in other chapters, we can only refer here to those offences for which, there being no other provision, prosecutions are usually entered under the Police Ordinance.

(1) Every person found drunk and incapable of taking care of himself in any thoroughfare, or public place, whether a building or not, or on any licensed premises or tavern (and every person who is guilty of violent, quarrelsome, noisy, disorderly, or riotous conduct in or about such premises or tavern) is liable to a fine of Rs. 5 and on second conviction within a year to a fine of Rs. 10 and on a third conviction within a year to a fine of Rs. 20.[1]

Two things are worth remembering. The person must not merely be drunk, but should also be incapable of taking care of himself. Ordinary intoxication does not bring him within the pale of this section. And the offence should be committed on any road or public place : a public place is a place to which the public have access as of right : thus, a park is a public place, but not a Police Station,[2] nor a circus,[3] nor a Buddhist temple.[4] Or, the offence may be committed on any licensed premises, *e.g.*, a resthouse[5] or in a tavern; and in the case of these, noisy or quarrelsome conduct at or near such licensed premises is equally punishable under this section.

Any person who is guilty while drunk of riotous or disorderly behaviour or who is drunk while in charge of a vehicle or animal, may be detained in custody till sober and may also be liable to a fine of Rs. 20 or imprisonment for one month. Two persons cannot jointly be charged for being drunk and disorderly, as the act of each is distinct for which he alone is responsible.[6]

(2) No person can beat drums or tom-toms within or without his house in any town-limits without a license.[7] This license is usually issued by the Police, but may also be issued by a Magistrate. If the Police refuse to issue a license, application must be made to a Magistrate "in appeal."[8]

It will be presumed in the absence of evidence to the contrary that the tom-toming was had at the instance of the person in whose house the tom-tom was being beaten,[9] though the offence is of beating tom-toms and not of causing them to be beaten.[10] It is not necessary to prove

1. Section 60. Compare section 488 C.P.C. and see 7 Times L.R. 29.
2. Pietersz *vs.* Wiggin (1892) 2 C.L.R. 111.
3. Wijesuriya *vs.* Abeysekara (1919) 21 N.L.R. 159.
4. S.I. Police, Dehiowita, *vs.* Boteju (1926) S.C. 380, P.C., Avisawella 11,362.
5. A.S.P. *vs.* Abeysekara (1914) 2 Bal. Notes 37.
6. James Appu *vs.* Manuel Silva (1926) S.C. 437. P.C. Panadure 6,351. Leader L.R. of 1.9.26.
7. Section 90.
8. See Ordinance No. 14 of 1924.
9. Armot *vs.* Odiris Appu (1880) 3 S.C.C. 167.
10. Jansz *vs.* Endoris (1891) 9 S.C.C. 204. Full Bench.

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that the beating of tom-toms without a license disturbed the repose of the inhabitants of the locality,[1] or was calculated to frighten horses.[2] And the fact that the tom-toming was for the purpose of a religious ceremony,[3] or was carried out by a religious body,[4] is no defence to a prosecution under this section. The tom-toming in towns only is prohibited : but the word " town " includes villages " set out for the purposes of this Ordinance " up to their well-known and well-defined boundaries,[5] and now applies to all villages.[6]

A " dola," " raban," or " tabla " is not a drum : the Ordinance contemplates the aggravating and ear-splitting noise caused by the beating of tom-toms and drums.[7]

(3) No person can without a license make any noise in the night so as to disturb the repose of the inhabitants. " Inhabitants " means the inhabitants of the quarter in which the noise is made and not one individual of them only.[8] It is the persons who make the noise are guilty and no others. Thus, a lessee of a plumbago store whose workmen disturb the repose of the neighbours by coopering barrels during the night is not liable unless he is present at the place where his workmen are working.[9]

(4) No person can play at any games, (*e.g.*, flying of kites), or do anything on or near any road so as to frighten horses or injure passengers, or fire crackers or fireworks without a license. The Ordinance fully describes the various acts prescribed. It is not necessary in the case of fireworks that the peace of the inhabitants was likely to be disturbed or that any horses were likely to be frightened.[10] The manufacturing of fireworks (or carrying on any process of manufacture) without a license is punishable, under the Accidents by Explosives Ordinance,[11] with a fine of Rs. 1,000 for every day during which the manufacture is carried on, unless it is done in small quantities for *bona fide* chemical experiments. Every Sub-Inspector of Police and every officer superior to him is an *ex-officio* Inspector of Explosives. The maximum punishment for each of the last three offences under the Police Ordinance is a fine of Rs. 50 or imprisonment for three months.

(5) Every well within a town or village must be surrounded by a wall two feet in height and such wall should be kept in good and sufficient repair. Both the owner and the occupier, whether tenant or lessee, are liable under this section[12] to a fine of Rs. 20. If the well is not provided with a wall, it must be fenced or duly protected.[13]

(6) No cart can be left in any street " within any town and limits " for a longer time than is necessary for the purpose of loading or unloading ; nor can any vehicle be left so as to obstruct the passage of any

1. Karunaratne *vs.* Raphiel (1903) 7 N.L.R. 380 and Isaac Rodrigo *vs.* Henry Fernando (1910) 4 Weer. 17.
2. Insp. of Police, Balapitiya, *vs.* De Soysa (1916) 3 C.W.R. 172.
3. (1871) Vand 138.
4. Marshall *vs.* Guneratne Unanse (1895) 1 N.L.R. 179.
5. Tillainather *vs.* Vadivelu (1905) 8 N.L.R. 164 (Full Bench).
6. Nayakker *vs.* Appuhamy (1916) 2 C.W.R. 228.
7. Ratnayake *vs.* Weeraratne (1915) 18 N.L.R. 415.
8. Holland *vs.* Ratnapala Unanse (1879) 2 S.C.C. 165.
9. Bell *vs.* Senanayake (1904) 7 N.L.R. 126.
10. Gooneratne *vs.* Silva (1922) 23 N.L.R. 254.
11. No. 8 of 1902, section 15, Vol. II, p. 579, as amended by Ordinance No. 18 of 1931.
12. Section 80.
13. Section 53 (8).

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street ; nor can two or more carriages of any description be left abreast ; and in all such cases, either the owner or the person in charge of the vehicle is liable to a fine of Rs. 20.[1] There must be affirmative evidence that the vehicle was left so as to cause either inconvenience or danger to the public.[2]

(7) No elephant can be driven or ridden along any streets without a special license from the Government Agent except between the hours of two and eight in the morning.[3] It is an offence to conduct them even outside the Municipal limits.[4] The penalty for this offence is a fine of Rs. 50.

(8) Every inhabitant of any town or village must keep the frontage of his house abutting on the public road clean, and must surround the same with a wall or a good fence within six weeks of the issue of a Proclamation on that behalf by the Governor, and must also clear his house and garden of all brush and underwood. Non-compliance with the provisions of these sections renders the offender liable to a fine of Rs. 20.[5]

(9) No person can expose any article on the public road which may obstruct passengers or frighten horses. This section does not say "expose for sale" but merely expose.[6] Where a temporary shed was constructed by the roadside in which sweetmeats were exposed for sale and which obstructed the passage of traffic, the Supreme Court held that there was no "exposure" of sweetmeats under this section and that the proper penal section was section 91 (8) of the Public Thoroughfares Ordinance No. 10 of 1861.[7]

(10) Any person who wilfully and indecently exposes his person or any offensive deformity or disease on a public road or who eases himself on or by the side of a public road and any person who throws filth or dirt on any public road is liable to a fine of Rs. 50.[8]

(11) Any person who is granted a license to have music on the public streets or to conduct a procession thereon and violates any condition of such license is liable to a fine of Rs. 200.[9]

(12) The Police have a right to seize all animals straying on the public roads or which are tied or tethered thereon : they may either seize themselves, or get them seized by licensed cattle-seizers. The Police must report every such seizure to a Police Court, whereupon the Magistrate will cause notice to issue on the owner if he is known : or will, if he is unknown, cause notices of seizure to be affixed at the Police Court, or to be published by tom-tom. If the owner does not come forward, the animal is liable to be sold by public auction and the proceeds may be appropriated towards poundage, seizure fees, etc. (the balance, if any, being credited to revenue). If the owner comes forward, his animal may be delivered to him if he pays the dues. For all sales of cattle under this section, a Magistrate may issue vouchers to the purchasers. This section (53*a*) does not create an offence at all : it only provides a

1. Sections 81 and 82.
2. Sarangapany *vs.* Cornelis Appu (1921) 23 N.L.R. 464.
3. Section 84.
4. The Attorney-General *vs.* Banda (1911) 15 N.L.R. 170.
5. Sections 94 and 97.
6. Section 53 (4).
7. Insp. of Police, Hatton, *vs.* Hadjee (1927) 5 Times L.R. 94.
8. Section 53 (5) and (7).
9. Section 69.

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procedure for the purpose of enabling the Police to seize and deal with stray cattle ; and the charges recoverable from the owner of such cattle, if he comes forward, are in the nature of fees and not of fines.[1]

(13) Section 70 of the Police Ordinance is very important in that it deals with the offence of neglect of duty by Police Officers : this neglect of duty may take various forms and may under certain circumstances include such venial lapses as temporary absence from duty or even prevarication at a trial. If a Police Officer handcuffs a prisoner without any necessity, he may be charged under this section.[2] What is essential, however, is to prove malice or corrupt motive. There must be evil intent or absence of probable or reasonable cause for a Police Officer to be convicted of neglect of duty. A constable may out of spite prosecute a villager for a trivial offence, just to harass him : he will then come within the pale of this section. But if he acts *bona fide* and in the lawful discharge of his duties, even though in so doing he exceeds his authority, he cannot be said to have misused his powers or to have neglected his duty. Any Police Officer convicted under this section is liable to a fine not exceeding his three months' salary or to imprisonment for three months ; and any Police Officer guilty of cowardice is liable to a fine not exceeding his twelve months' salary or to imprisonment for a year. Section 79 of the Police Ordinance extends protection to Police Officers only if they act in the reasonable and *bona fide* belief that they are acting within the scope of their authority and are not actuated by malice or any ulterior motives.[3]

(14) Any person who refuses to serve as a special Police Officer when called upon to do so by any Justice of the Peace during a riot is liable to a fine of Rs. 250.[4]

(15) Any person who refuses to help in the extinguishing of any fire (or in the suppressing of any similar calamity) when called upon to do so by any Police Officer is liable to a fine of Rs. 100.[5]

(16) Any person who helps any Police Officer in the disposal of any Government property is liable to a fine of Rs. 100.[6]

1. Ramen *vs.* Ismail (1913) 16 N.L.R. 148.
2. (1870) Vand. 51.
3. Punchi Banda *vs.* Ibrahim *et al* (1927) 29 N.L.R. 139. 5 Times L.R. 79.
4. Section 30.
5. Section 65.
6. Section 73 (A).

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CHAPTER XXXVI.

CATTLE TRESPASS.

Under the Cattle Trespass Ordinance,[1] any animals found trespassing upon any land may be seized by the proprietor or occupier of the land or by any other person under his direction. Animals include cattle, sheep, goats, and swine ; and " cattle " includes bulls, cows, oxen, heifers, calves and buffaloes. Formerly, it was necessary that the land on which the trespass is committed should have been " properly fenced according to local custom ;" but now after the amending Ordinance,[2] animals trespassing on any land, whether it is fenced or not, may be seized. The owner or person in charge of such animals can pay the full amount of damage to the proprietor of the land and remove them ; otherwise, the person seizing is required to give notice of seizure at once to the local Headman or to a constable. It is the duty of the latter officers to repair to the spot and assess the damage, either with or without the help of three or more assessors, to ascertain the names of the owners and to give the party seizing, a " report." If the owners of animals pay the damages assessed by such Headman, the animals may be delivered to them ; otherwise the Headman is empowered to take charge of the same and to produce them before a Gansabhawa having jurisdiction or before the nearest Police Court. On receipt of the Headman's report, the Court will issue the necessary notices on the owners of the animals and proceed to enquire into the complaint. The Court has power to award such damage as is proved to have been sustained together with the poundage incurred in detaining the animals and to impose a fine of an amount equal to such damage. If no damage is proved, the Court may, nevertheless, impose a penalty not exceeding Rs. 5 for each such animal. Even if the animals are not seized and could not have been seized, the owner or person in charge is nevertheless liable for all the damage proved. Animals trespassing on any irrigation works or railway lines may also be similarly seized and the damage ordered is payable to a Government Agent or his Assistant ; but such animals can only be seized by duly authorized persons.

Where a number of cattle belonging to different owners trespass on an estate, the damage to be paid by the owner of any particular animal may be fixed by dividing the gross amount of the damage by the number of the cattle.[3]

It will be observed that a Headman's report is the foundation of the Magistrate's jurisdiction : without such a report, a Police Court cannot act.[4] For, a criminal prosecution for cattle trespass must pursue the special procedure prescribed by section 7 of the Ordinance [5] and this section gives equal jurisdiction to a Village Tribunal as well as

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1. No. 9 of 1876, Vol. I, p. 827.
2. Section 2 of Ordinance No. 8 of 1909, Vol. I, p. 833.
3. Silva *vs.* Silva ; Ram. (1863-8) 62. Balasuriya *vs.* Thomis (1907) Matara Cases 258.
4. Treyon *vs.* Dharmaratna (1880) 3 S.C.C. 25.
5. Edwards *vs.* Carolis (1878) 1 S.C.C. 24.

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to a Police Court: so that ordinarily, cases of trespass must go to the former Tribunal.[1] Further, the Ordinance expressly provides that the remedy sought thereunder does not affect any right which any person may have at common law for redress in respect of any damage sustained through trespassing animals. So that an owner of land who seizes any animals, damage feasant, is not obliged to take steps under the Cattle Trespass Ordinance in order to recover the amount of damage[2]; for he may proceed against the owners in the ordinary civil Courts.[3] So that the failure on the part of a proprietor or occupier of land to give notice of seizure is not an offence which can very well be punished under section 289 of the Penal Code[4] as for wilful omission of a statutory duty.

The amount ordered by the Court as reasonable damage and poundage may be, if not paid within 24 hours, levied by the sale of the animals seized and, if necessary, by distress on the other property of the persons liable to pay. If the owners of the animals are not known or are not forthcoming, the Court may order, after due publication by tom-tom or otherwise, that the animals may be sold and the proceeds appropriated towards the damage and costs.

If animals are lawfully seized and detained as for trespass, any person who removes or attempts[5] to remove or take away from the custody of the persons entitled to detain the same is guilty of an offence punishable with a fine of Rs. 50 and in default to rigorous imprisonment for three months. This offence is triable both by a Village Tribunal and by a Police Court. The prosecution must prove the legality of the seizure of the animals, that is, must prove that the animals were in fact found trespassing,[6] or were otherwise detained under the provisions of this Ordinance.[7]

Under section 13, any person who without lawful right drives any animals upon any land in the occupation of or cultivated by others with intent that such animals should feed upon or otherwise injure the crops—and any person who drives any animals upon any irrigation works or railway lines—and any person who drives the animals of others upon his own land or connives at such animals being so driven with intent to take proceedings under this Ordinance for cattle trespass, are alike liable on conviction to such punishment as a Police Court has jurisdiction to award. This section provides for knowingly driving animals on another's land or knowingly driving other's animals on one's own land. A Village Tribunal has no jurisdiction to try the offences under this section.[8] When other's animals are driven on the accused's land, the prosecution must establish that the accused intended to claim damages under this Ordinance: this could be done by proving the steps taken by the accused in order to have the damages assessed, etc.

If stray cattle are in the habit of trespassing upon any private lands or irrigation works and cannot be seized or identified, a Police

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1. Under Ordinance No. 9 of 1924, a Village Tribunal has exclusive jurisdiction in cases of cattle trespass. See also Wickramaratna *vs.* Baba (1910) 4 Weer. 77.

2. Welikala *vs.* Jayawardena (1917) 4 C.W.R. 261.

3. Silva *vs.* Rodrigo (1919) 21 N.L.R. 153.

4. Meedin *vs.* Jayawardena (1917) 19 N.L.R. 397.

5. Andris *vs.* Salman (1889) 9 S.C.C. 20.

6. Fernando *vs.* Silva (1911) 5 Weer. 53.

7. Don Thomas *vs.* Don Grigoris (1912) 1 C.A.C. 76.

8. Kirthisinghe *vs.* Siriniwasa Unanse (1919) 6 C.W.R. 22. The new Village Communities Ordinance of 1924 gives a Village Tribunal jurisdiction over the whole of the Cattle Trespass Ordinance. This enactment will have, therefore, to be considered in any future decisions.

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Magistrate or a Government Agent may either issue a license to shoot the same or may direct some person to proceed to the land and to try to seize or identify the animals, and if this is not practicable may empower him to shoot them. This section, therefore, creates an alternative procedure. When permission to shoot is given to an owner of a land, the latter may delegate his authority to his employees.[1] Without a license, trespassing animals cannot be shot indiscriminately. It would amount to mischief to inflict wanton injury upon any animal which is the property of another, merely because it is trespassing upon one's premises.[2] But the Ordinance empowers proprietors of cultivated fields or gardens to shoot or destroy pigs found straying therein ; and it also empowers authorized persons to shoot pigs straying on irrigation works or public recreation grounds and to destroy elephants and wild buffaloes trespassing on irrigation works. The carcases of such animals must be delivered to the owners thereof or sold by public auction if no owners are forthcoming. The General Manager of the Ceylon Government Railway is empowered to authorize the shooting of cattle trespassing on the Railway lines.[3] By the amending Ordinance of 1930, a Magistrate or Government Agent can issue a permit to shoot trespassing cattle without stamp fees in deserving cases for a period of three months.[4]

The case of cattle trespassing on public roads is regarded as a "nuisance on a thoroughfare" and punishable under the Thoroughfares Ordinance[5] with a fine of Rs. 50. Section 94 of that Ordinance makes it an offence to turn or suffer to be turned loose any ox, horse, sheep, or goat on any road or canal, or to tie or tether any ox, or horse, or other animal of any description, so that it can make its way into any road or canal.[6] Such animals are liable to be seized by licensed cattle-seizers who are required to deliver them to the nearest Police Station and who are entitled to a fee of one rupee for every head of animal seized. The Police must report the seizure to the nearest Magistrate who will order the animals to be sold if no claimants come forward after the usual publication of notices ; the Magistrate may also direct that the proceeds be appropriated towards the seizer's fees and poundage and that the balance, if any, be credited to revenue. Any owner of a pig found tied, straying, burrowing, or wallowing on any road or canal is liable to a fine of Re. 1·50 and such pig is liable to be shot or destroyed by any person whatsoever.

Ordinance No. 5 of 1915 has extended the purview of the above section by recognizing the difficulties of licensed cattle-seizers. It is an offence now punishable with a fine of Rs. 50 to remove any animal from the lawful custody of any person authorized to seize the same under the Thoroughfares Ordinance, or, in any way, to molest or obstruct such person in the discharge of his duties. It must be proved under this section that the cattle-seizer is lawfully authorized or licensed to seize cattle. Where a license was signed by an Office Assistant and not by the Chairman himself, the license was held to be invalid, as the issue of a license is not a mere ministerial matter, but the discretion of the Chairman has to be exercised in the choice of suitable persons as cattle-seizers.[7] Any person who wilfully rides, leads, or drives upon or across

1. Weerakoon *vs.* Kassim (1884) 6 S.C.C. 142.
2. Saibo *vs.* Karim (1922) 24 N.L.R. 65. See "Maiming."
3. Ordinance No. 24 of 1865, Vol. II, p. 601.
4. Ordinance No. 16 of 1930.
5. No. 10 of 1861, Vol. I, p. 378.
6. It is surprising that cows are omitted from the first part of this section.
7. Poosari *vs.* Perera (1923) 25 N.L.R. 255.

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the Railway any animal except for the purpose of crossing is liable to a fine of Rs. 50.[1]

Cattle-branding.

Under the Cattle-branding Ordinance,[2] the Governor in Executive Council is empowered to make rules[3] for sale, removal, registration, or branding of cattle in Ceylon ; under these rules, no cattle either neat or black cattle, or buffaloes[4] can be sold without a voucher, or removed from one district to another without a removal permit,[5] or possessed, if 18 months old or over, unless they are branded.[6] Any person having in his possession, without a voucher or permit for removal, cattle for the possession of which a voucher or permit is rendered necessary by the regulations above mentioned is, unless he satisfies the Magistrate that he is lawfully entitled to the possession of such cattle (the burden of proving which lies upon him), liable on conviction to a fine of Rs. 50, and in default to imprisonment for three months ; and any person contravening any other regulations made under this Ordinance or obstructing any officer appointed to brand or register cattle or to carry out the provisions of this Ordinance is liable to a fine of Rs. 20. The last named offence is also triable by a Village Tribunal. No offence is committed if a person has in his possession, without a voucher, cattle which he has borrowed for a temporary purpose, *e.g.*, for ploughing, or for manuring, or for draught purposes.[7]

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1. Ordinance No. 9 of 1902, section 36 (1).

2. No. 10 of 1898 as amended by No. 25 of 1917, Vol. II, p. 440.

3. These rules are published in the Government " Gazette " No. 6,913 of 30 Nov., 1917. Some have since been amended by Notification in " Gazette " No. 7,470 of 26 June, 1925. All these rules should be produced and proved. See Fonseka *vs.* Jamis (1909) 2 Weer. 79.

4. Rule 20, " Gazette " of 26 June, 1925.

5. Such permits are required for " acquired " animals and not for animals born in the owner's pinfold or obtained by inheritance.

6. Section 11 of the Cattle Trespass Ordinance imposing a penalty of 25 cents on every unbranded head of cattle applies only to those areas where the Village Communities Ordinance is not in force.

7. Slayman *vs.* Carolis Singho (1909) 2 Leader 136.

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CHAPTER XXXVII.

S. P. C. A.

The Society for the Prevention of Cruelty to Animals prosecutes through its Inspectors or Peons in cases of cruelty. There is usually an S.P.C.A. officer attached to every Police Court area, and it is his duty to detect instances of cruelty and to bring the offenders to justice. This does not derogate from the inherent powers of the Police to file plaints under this Ordinance.[1] The accused, in most cases, plead guilty ; and rarely is a case contested. The animals in question are often produced before Court, so that the Magistrate may see for himself whether they have been cruelly or kindly treated. Gross cases of cruelty are happily rare, but when detected, are severely dealt with.

The Ordinance[2] enacts that any person who shall—

(*a*) cruelly beat, ill-treat, over-drive, over-ride, abuse, or torture any animal, or cause or procure it to be done ;

(*b*) by any act or omission, cause unnecessary pain or suffering to any animal ; or

(*c*) convey, or carry, or cause to be conveyed or carried, in any ship, boat, canoe, or in any vehicle, basket, box, or cage, or otherwise, any animal in such manner or position as to subject such animal to unnecessary pain or suffering—

shall be guilty of an offence punishable with a fine of Rs. 100 or imprisonment for three months or both.

The word "animal" means any domestic or captured animal and includes any bird, fish, or reptile in captivity. Thus, a wild elk which has not been captured is not an animal—within the meaning of this word.[3] But a dugong is an animal.[4] In fact, all animals that are in captivity, *e.g.*, a tamed leopard, or a captured crow, and all domestic animals like horses, oxen, dogs, etc., would be included within the meaning of this section.

The degree of cruelty that is necessary for a conviction is not specified : apparently each case depends on its own merits and on the nature of the animal. A sore on the neck of draught animals might constitute ill-treatment, though it may not in the case of others. The real test is whether, by the act of the accused, there has been unnecessary pain or suffering to the animal—which could well-nigh have been avoided. The mere fact of there being a boil on the neck of a bull would not expose its owner to any liability, unless he were to attempt to yoke it to a cart. There is culpable ill-treatment when more pain or suffering is caused than is necessary. Thus, cutting and wounding with a knife a trespassing animal—where an infliction of such pain is not necessary for the

1. But the fines will still be payable to the funds of the Society.

2. No. 13 of 1907 as amended by No. 15 of 1909, No. 19 of 1912, No. 43 of 1917 and No. 9 of 1919, Vol. II, p. 749. The last-named gives the section quoted. These Ordinances are published together in the annual report of the Society.

3. Insp. S.P.C.A., Nawalapitiya, *vs.* Punchirala *et al* (1922) 24 N.L.R. 202.

4. Madawells *vs.* Rawther (1914) 17 N.L.R. 302.

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protection of property—would be cruelty.[1] The shooting at a trespassing cow which does not die in consequence is punishable under this Ordinance.[2] The burning of a dog with kerosine oil,[3] the bursting of a cow's eye with a mammotty,[4] the removing the shell of a turtle when it is alive, the carrying of a live pig pent up in a gunny bag, would all be instances of brutal cruelty.

As regards bulls, the most frequent cases are for sore necks, lameness, emaciation, fresh brand-marks, goading and overloading. Other forms of ill-treatment occur but rarely. It is a debatable question whether the use of unshod bulls on metal roads can be regarded as a form of cruelty : but it certainly stands to reason that bulls which are usually shod would find it difficult and painful to walk without their customary shoes.

The killing of any animal in an unnecessary cruel manner or the using of animals which are unfit for labour by reason of disease, infirmity, or other cause, and the permitting of diseased or disabled animals to die in any street, are made distinct and separate offences.[5]

The Ordinance penalises as well the person who ill-treats as anyone who causes or procures it to be ill-treated, and also the owner of the animal or his superintendent or manager. In the case of the owner or his superintendent or manager, there is no alternative imprisonment in the first instance, though in the case of a second or subsequent offence, he may be sentenced to a fine of Rs. 200 or to imprisonment for three months or both. It is a good defence, however, for him to prove to the satisfaction of the Court, that the condition of the animal was not due to any act, omission, neglect, or default on his part.[6] Mere ignorance, or a general order to the carters not to use animals in an unfit state, would be no defence. Where the accused who was a cart contractor owning several carts and bulls was charged with having permitted his carters to use animals with sore necks and which were unfit for use, and the accused pleaded that he had given general orders to his carters not to use bulls with injuries, it was held that this was not a valid defence to the charge.[7] But where an animal is used contrary to the express orders of the owner, the latter can hardly be said to have permitted the use of the animal.[8]

Besides the power given to the Magistrate or the Superintendent or Assistant Superintendent of Police, or the Chief Headman of a district, or the President of a Village Tribunal, to order immediate destruction of any animal which has been or is being cruelly treated, a Magistrate has also the power to order that the animal in question may be sent to an infirmary for treatment until such time as it is again fit for work or labour. The cost of treatment is payable by the owner ; and on his refusing to pay, the animal may be ordered to be sold. Such infirmaries are now established at Colombo, Kandy, Gampola, Matale, Badulla and Kalutara, and are known as "Refuges for Animals." Each such Refuge is in charge of an Honorary Secretary.

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1. Opalangu *vs.* Mudiense (1893) 3 C.L.R. 48.
2. Mendis *vs.* Hunucumbura 29 N.L.R. 380 (1928).
3. (1899) Koch 1.
4. De Silva *vs.* De Silva (1922) 1 Times L.R. 22.
5. Sections 5, 6 and 7 of Ordinance No. 13 of 1907.
6. Section 4 A of Ordinance No. 9 of 1919 embodied in the principal Ordinance.
7. Jayasinghe *vs.* Silva (1921) 23 N.L.R. 29.
8. Fernando *vs.* Pedru Appuhamy (1916) 3 C.W.R. 61.

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All offences under this Ordinance are cognisable and any Peace Officer has power to detain an animal, which is cruelly treated, pending trial, the cost of its maintenance being payable by the accused. A Village Tribunal is given concurrent jurisdiction with a Police Court, but its powers of punishment are limited. All offences under this Ordinance are barred after the lapse of three months.

The Vehicles' Ordinance makes it an offence[1] punishable with a fine of Rs. 100 to permit or suffer a greater weight to be carried than such vehicle is authorized by its license to carry. This section, therefore, covers any cases of overloading which do not ordinarily come within the purview of the Cruelty Ordinance. The license issued by a Government Agent for a cart shows the weight which a particular cart is authorized to carry. For the calculation of load, the following bye-law[2] substituted for the bye-laws previously subsisting applies to the whole of the Island :—[3]

Limitation of Loads.— No double-bullock cart or other wheeled vehicle shall be laden with a greater load than 1½ tons, and the combined weight of any such vehicle and its load shall in no case exceed 2 tons 5 cwt.

Provided that single-bullock carts shall not be laden with a greater load than half ton.

For the purpose of this bye-law a double-bullock cart load of 1½ tons shall be taken to be the equivalent of the following :—

Rice : 20 bags, each bag containing 2½ bushels.

Tea : 28 chests, each chest weighing 120 lb.

Tea : 42 chests, each chest weighing 80 lb.

Tea : 51 chests, each chest weighing 65 lb.

Rubber : 15 chests, each chest weighing 225 lb.

Rubber : 18 chests, each chest weighing 185 lb.

Rubber : 20 chests, each chest weighing 155 lb.

Firewood : 4½ cubic yards, or a quantity piled 4 ft. above the platform of a double-bullock cart of standard dimensions.

Cement : 7 barrels.

Plumbago : 4 barrels.

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1. Section 45 of Ordinance No. 4 of 1916, Vol. III. p. 378.

2. "Gazette" No. 7,767 of 14 Mar., 1930. I am given to understand that the Ministry for Home Affairs has under consideration the refixing of the number of coconuts transportable in S.B. and D.B. carts. An S.B. cart can easily carry more than 180 nuts without overstepping the half-ton limit and after an experiment in the Galle Police Court I used to allow 333 nuts and under for a single bull.

3. The following bye-law was made by the Governor in Executive Council for the Municipality of Colombo :

"The maximum load allowed to be drawn in any bullock cart shall be 35 lbs. for every inch in height for each bull, the height being given by the perpendicular distance between the horizontal plane in which the bull is standing and the horizontal plane at the back of the hump of the bull.

No double bullock cart or other wheeled vehicle shall be laden with a greater load than 1½ tons, and the combined weight of any such vehicle and its load shall in no case exceed 2 tons 5 cwts., provided that single bullock carts shall not be laden with a greater load than ½ ton.

For the purpose of this bye-law a load of 1½ tons shall be taken to be the equivalent of the following :—

Rice : 25 bags, each containing 2½ bushels.

Tea : 30 chests, each weighing 100 lbs.

Rubber : 22 chests, each weighing 150 lbs. or 16 chests, each weighing 200 lbs.

Plumbago : 4 barrels.

Sand, gravel, metal, salt, or loose plumbago...... ..a quantity piled 1½ feet above the platform of the cart."

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Salt : 30 bags.

Sand : A quantity piled 1 ft. 2 in. above platform of the cart.

Gravel : A quantity piled 1 ft. 2 in. above the platform of the cart.

Metal : (Broken 1½ in.) A quantity piled 1 ft. 1 in. above the platform of the cart.

Cabook : A quantity piled 1 ft. 3 in. above the platform of the cart.

Bricks : A quantity piled 1 ft. 4 in. above the platform of the cart (600 bricks).

Coconuts in husk : 550.

Coconuts husked : 2,000.

Copra : 6 candies.

Desiccated Coconuts : 21 chests, each of 5 cu. ft.

Mattress fibre, cadjans, and straw : Quantity piled 8 ft. above the platform of the cart.

For the purpose of this bye-law a single-bullock cart load of half ton shall be taken to be the equivalent of the following :—

Rice : 7 bags, each containing 2½ bushels.

Tea : 9 chests, each chest weighing 120 lb.

Tea : 14 chests, each chest weighing 80 lb.

Tea : 17 chests, each chest weighing 65 lb.

Rubber : 5 chests, each chest weighing 225 lb.

Rubber : 6 chests, each chest weighing 185 lb.

Rubber : 7 chests, each chest weighing 155 lb.

Cement : 2 barrels.

Plumbago : 1 barrel.

Salt : 10 bags.

Sand : A quantity piled 9 in. above the platform of the cart.

Gravel : A quantity piled 11 in. above the platform of the cart.

Metal (Broken 1½ in.) : A quantity piled 8 in. above the platform of the cart.

Cabook : A quantity piled 10 in. above the platform of the cart.

Bricks : A quantity piled 10 in. above the platform of the cart (200 bricks).

Firewood : 1½ cu. yards, or a quantity piled 2 ft. 6 in. above the platform of a single-bullock cart of standard dimensions.

Coconuts in husks : 180.

Coconuts husked : 660.

Copra : 2 candies.

Desiccated Coconuts : 7 chests, each of 5 cu. ft.

Mattress fibre, cadjans, and straw : Quantity piled 4 ft. 6 in. above the platform of the cart.

The whole of the fines imposed under the Cruelty to Animals Ordinance is payable to the funds of the Society.

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CHAPTER XXXVIII.

LOCAL BODIES.

To attempt to give a rough outline of the laws and bye-laws of all the local bodies in Ceylon would be a Herculean task, and quite outside the scope and purpose of this book. Whenever any such question arises in any Police Court, the reader must consult the original Ordinances and the regulations made thereunder.

There are various kinds of local bodies in Ceylon—which may be graded into four distinct groups : Sanitary Boards, Local Boards, Urban District Councils, and Municipal Councils. The Board of Improvement of Nuwara Eliya is a fifth and distinct body, but may be regarded as a Sanitary Board of a higher order.

The Sanitary Board Ordinance No. 18 of 1892[1] empowers various Sanitary Boards by section 9 (*e*) to make and unmake bye-laws with the approval of the Governor in Executive Council for any of the purposes mentioned in that section. For breaches of these bye-laws, cases may be filed (in the case of natives only, in a Village Tribunal but more usually) in a Police Court. The maximum penalty that can be imposed is a fine of Rs. 50 or in default, imprisonment for a month.[2] The schedule to the Ordinance gives the names of the villages to which the Ordinance may be proclaimed to apply.

The Nuwara Eliya Board of Improvement constituted by Ordinance No. 20 of 1896[3] has similar powers of making bye-laws,[4] a breach of each of which is punishable with a fine of Rs. 20, and in the case of a continuing offence with a further fine of Rs. 5 per day.[5] All offences must be prosecuted in a Police Court within one month of their occurring.[6]

Local Boards of Health and Improvement are governed by Ordinance No. 13 of 1898[7] which confers the powers to make bye-laws,[8] in addition to such powers possessed by them under the Nuisance Ordinance of 1862. Every breach of the bye-laws can be visited with a fine of Rs. 20 and in the case of a continuing offence with a further fine of Rs. 5 per day.[9] The offender is also liable to make good any damage to the property of the Board occasioned by his delict.[10] No person is liable to any fine or penalty unless complaint has been made before a competent Court within a month of the commission of such offence.[11] The competent Court is the Police Court of the district ; and no complaint can

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1. Vol. II, p. 207.
2. Section 9 K of 18 of 1892 as amended by 11 of 1900.
3. Vol. II, p. 356.
4. Section 30.
5. Section 87.
6. Section 84.
7. Vol. II, p. 447.
8. Section 56.
9. Section 107.
10. Section 104.
11. Pereira *vs.* Carolis (1915) 1 C.W.R. 182.

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be preferred before it except with the previous sanction of the Chairman.[1] If no special bye-laws are made by any particular Board, the bye-laws printed in the schedule attached to the principal Ordinance must be deemed to be the bye-laws in force for that Board.[2]

Urban District Councils are of comparatively modern origin. They are governed by Ordinance No. 11 of 1920[3] which provides for the extension of local Government in Ceylon. This Ordinance empowers the District Councils to make bye-laws with the approval of the Local Government Board and also empowers the latter to make bye-laws for any particular Council. A breach of each of these bye-laws is punishable with a fine of Rs. 50 and with a further fine of Rs. 25 per day in the case of a continuing offence,[4] and must be proceeded against in a Police Court within three months next after the commission of the offence.[5] Penal provisions of other Ordinances, *e.g.*, the Thoroughfares Ordinance, are embodied in this enactment.

There are only three Municipal Councils in Ceylon—those of Colombo, Kandy and Galle—all governed by Ordinance No. 6 of 1910.[6] Each of these towns has a Municipal Court, which in the case of the last two is the same as the ordinary Police Court. Every Council has the power to make bye-laws and to provide penalties for their contravention not exceeding a fine of Rs. 100 for a first offence and Rs. 200 for a second or subsequent offence, and in the case of a continuing offence a further fine of Rs. 25 per day.[7] The offender is also liable to make good the damage, if any, to the property of the Council.[8] Offences under this Ordinance are barred after the lapse of three months.[9]

The various Ordinances above mentioned create certain offences and provide penalties for them ; but as these offences are only of local importance, they cannot be dealt with in this volume.

It remains to be mentioned that in all prosecutions for breaches of bye-laws, the essential point to consider is the language of the particular bye-law and the section of the Ordinance under which it purports to have been made. Bye-laws cannot contradict the express terms of an Ordinance which they purport to carry out. One of the objects of bye-laws is to be explanatory of the more general terms of the Ordinance under which they are authorized and to lay down in greater detail how the more general provisions of such an Ordinance are to be observed.[10] Hence, a right interpretation of a particular bye-law would show whether the local body had the authority to make it or whether it is made *ultra vires*. A Sanitary Board, for instance, has no power to declare any particular trade, *e.g.*, manufacture of desiccated coconut, an offensive trade, unless the trade is offensive from its very nature.[11] If a bye-law is *ultra vires*, the accused commits no offence in breaking it.[12] Thus, it was

1. Section 107.
2. Section 58.
3. Vol. III, p. 717.
4. Sections 164 and 165
5. Section 229.
6. Vol. III, p. 18.
7. Section 109, as amended by Ordinance No. 32 of 1930.
8. Section 238.
9. Section 236.
10. De Soysa *vs.* The Municipal Council, Kandy (1885) 7 S.C.C. 45
11. Caldera *vs.* Perera (1924) 6 C.L.R. 41.
12. See, however, Sourjah *vs.* Hadjiar (1914) 18. N.L.R. 31, where the Supreme Court held that it was not competent to a Court to entertain the question of the validity of a bye-law after it had been passed with the formalities required by section 109 of the Municipal Council's Ordinance,

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held to be *ultra vires* of a Sanitary Board to make regulations requiring vendors of fish at places other than a public market established by the Board, to take out licenses for the sale of fish.[1] Section 11 of the Interpretation Ordinance[2] provides for procedure to be followed in the case of any regulations made under any Ordinance: but this does not validate a bye-law that is *ultra vires*.[3] Further, a bye-law to be valid must be promulgated in the proper form and by the proper procedure. It must be confirmed by the Governor in Executive Council or by the Local Government Board as the case may be, and duly published in the "Government Gazette."[4] Once it is found to be valid and *intra vires*, the only question that will remain to be decided is whether the accused, on the facts proved, may be said to have committed a breach thereof. Thus, exposure, for sale, of betel-leaf outside a market is held not to be in contravention of a bye-law prohibiting the sale of vegetables.[5] A person who quarries for cabook on his own land for his own use cannot be convicted for carrying on a dangerous or offensive trade, for "trade" implies a business or manufacture carried on for profit.[6] A bye-law prohibiting the keeping of a dairy without a license is *intra vires* as it does not contemplate the absolute prohibition of dairying.[7]

Generally speaking, offences against bye-laws are not visited with severe punishments, and as the maximum penalty is but a fine, no imprisonment can be imposed in the first instance, nor can rigorous imprisonment be ordered in default of a fine except in the case of bye-laws framed by Sanitary Boards. If the offence happens to be non-performance of any statutory duty imposed on the accused by the regulations of a local body, a better course would be to defer sentence after conviction till such time as the duty is performed by the accused. Thus, if an accused is charged with "not keeping a dust-bin," he may be asked in the event of his pleading (or his being found) guilty, to provide himself with a dust-bin within such time as is fixed by the Court, and then to appear in Court on a stated day to receive sentence. Such a procedure would prevent a multiplication of cases, (as the accused becomes liable for each day that he does not have dust-bin)—and would also add materially to the effective sanitation of a town or a village.

Where a person has once been convicted for breach of a bye-law it is not open to the Court to convict him again on the same charge as for continuing offence.[8]

The following bye-laws made by the Sanitary Board of the Western Province[9] may be regarded as the type: other Boards[10] have framed similar bye-laws :—

1. Sanitary Inspector *vs.* Haimanis (1917) 19 N.L.R. 339.
2. No. 21 of 1901, Vol. II, p. 553.
3. Perera *vs.* Fernando (1914) 17 N.L.R. 494.
4. Foenander *vs.* Fernando (1881) 4 S.C.C. 113. This case is under the old Local Boards Ordinance since repealed, but the principle is the same.
5. Sanitary Board Inspector, Ambalangoda, *vs.* Lawaris (1913) 17 N.L.R. 275.
6. Jayasuriya *vs.* Rupesinghe (1924) 26 N.L.R. 321.
7. Anderson *vs.* Sinnetamby 1926. 4 Times L.R. 4.
8. See Gazette No. 6,893 of 17th August, 1917.
9. Duckworth *vs.* Abdul Assiz, 30 N.L.R. 271.
10. See Gazette No. 7,314 of 2nd March, 1923, for the Province of Uva.
    Gazette No. 7,232 of 9th Dec., 1921, for the district of Matale.
    Gazette No. 7,461 of 8th May, 1925, for the district of Matara Dondra.
    Gazette No. 7,461 of 8th May, 1925, for the district of Matara Weligama.
    Gazette No. 6,887 of 13th July, 1917, for the district of Hambantota and Gazette No. 7,177 of 27th May, 1921, for the district of Nuwara Eliya.

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CHAPTER III.

[*Section* 9 E (2) (*c*).]

1. The flour, water, and other materials used in the manufacture of bread shall be good and wholesome, and it shall be lawful for any person thereto authorized in writing by the Chairman from time to time to demand and obtain samples thereof.

2. Each loaf of bread shall bear on its upper surface a mark distinctly indicating its weight, and any person selling bread that falls short of the full weight so indicated shall be guilty of an offence.

CHAPTER IV.

A.—Markets.

Establishment and Regulation of Public Markets and Regulations dealing with Unwholesome Food.

1. Whenever it shall be determined by the Board to establish a public market, the Chairman shall give not less than ten days' notice of the time when the same will be opened, and such notice shall be published by beat of tom-tom.

2. All public markets shall be open daily from 6 a.m. to 9 p.m., and it shall be the duty of the Board or its lessee to make provision for the proper lighting of the market.

3. A table of rents and fees leviable at each market by the servants of the Board or by its lessee shall be printed in English, Sinhalese, and Tamil and placed in a conspicuous place at each market, and it shall be unlawful for any person to demand or receive higher sums than those authorized by such notice.

The rents and fees leviable at the markets established by the Board shall be as follows :—

Meat Market.

For every carcase other than a goat or sheep exposed for sale, 50 cents a day.
For every carcase of a goat or sheep exposed for sale, 25 cents a day.

Fish Market.

For each square yard of floor space occupied, 10 cents a day.

Fruit and Vegetable Market.

For each square yard of floor space occupied, 3 cents a day.

4. The several rents and fees payable in respect of a public market shall be paid in advance from time to time on demand to the Chairman of the Board or the lessee, or other persons authorized by the Board or their lessees to receive the same.

5. If any person liable to the payment of any rent or fee authorized as aforesaid does not pay the same when demanded, the Board or any person authorized by the Chairman of the Board to collect the same may levy the same by seizure and sale of all or any of the articles in the market belonging to, or in the possession or custody of, the person liable to pay such rent or fee.

6. No person shall hold, use, or occupy any portion of a public market without a license, which license shall be in the form in Schedule A annexed, nor shall he contravene any of the conditions of such license, and no person shall keep or expose for sale in any stall any article, the keeping or sale of which therein shall have been prohibited by the Board by notice posted in the market.[1]

7. No person shall sell or expose for sale in any fish market or stall any provisions or things other than fresh or salt fish.

8. No person shall sell or expose for sale in any vegetable or fruit market or stall any meat or fish, whether fresh or salted, or any cooked food, or any articles of food other than fresh fruit and vegetables.

9. No occupant of a stall shall enclose in any way any portion of a market, or erect any awning or screen or fixture of any kind, nor shall he leave any goods in any market between the hours of 9 p.m. and 6 a.m. without having first obtained the sanction of the Chairman.

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1. In Abeywardena *vs.* Wijesekara (1931) 9 Times L.R. 76, it has been held that the holder of a vegetable stall is not entitled to make use of the space above the ceiling of the stall for purposes of storage.

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10. Every occupant of a stall, space, or seat in any market shall keep such stall, space, or seat clean and free from filth or rubbish. No person suffering, or who to the knowledge of any person in charge of a public market has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall occupy any stall, seat, or place in such public market or expose for sale thereat any provisions whatsoever.

11. No person using or occupying any portion of a public market shall—

(*a*) Behave in a disorderly manner or commit any nuisance in or about such market.

(*b*) Carry on any cooking in any such market.

(*c*) Remain in or loiter about such market after the place is closed for business at 9 p.m. without being able to give a satisfactory account of himself.

(*d*) Damage or in anywise deface any portion of the buildings, stalls, lamps, or any property of the Board in or about such market, or defile or pollute in any way the water provided for uses in such market.

12. It shall be lawful for the Inspector or Supervisor of the Board, upon the seizure by him as unwholesome or unfit for human food of any meat, poultry, fish, game, flesh, vegetable, fruit, or other article of food introduced into or exposed for sale within the limits of the Sanitary Board, to convey the same to the Medical Officer of the station, or in his absence, or if there is no such officer, to the Magistrate, or in case where there is no Police Court, to the President of a Village Tribunal; and if it appear to such Medical Officer, Magistrate, or President that such meat, poultry, fish, vegetable, fruit, or other provisions are unfit for human food, he shall order the same to be destroyed or to be disposed of so as to prevent their being exposed for sale or used as food.

13. It shall be the duty of the market-keeper or of the lessee of a market to maintain order within the limits of the market, and every person who shall obstruct or resist any person appointed by the Board to superintend any public market, or to collect the rents or fees, or to enforce order or cleanliness therein whilst in the execution of his duty, shall be guilty of an offence.

14. Whenever it shall appear to the Board that the use or consumption by the public of any particular kind of fish is injurious, or that during the prevalence of any epidemic the use or consumption of any particular kind of fruit or vegetable is hurtful, it shall be lawful for the Board, on the recommendation of the Medical officer, by beat of tom-tom or other sufficient notice, to prohibit for such time as to the Board shall appear necessary the sale of any such fish, fruit, or vegetable in any market or other place within the limit of the Board, and after such notice to cause the same, whether exposed for sale or not, to be seized and destroyed in such manner as the Board or Chairman may direct.

15. No cart or vehicle shall remain within any market premises for a longer period than is necessary for loading or unloading.

16. No rubbish, refuse, bones, skins of animals, or other articles likely to be offensive or injurious to the public health shall be deposited in or upon any public market or its premises otherwise than within a covered receptacle provided for such purpose by the Board.

17. When a slaughter-house has been provided by the Board, no carcase of any animal (or any portion thereof) which has not been slaughtered at the public slaughter-house provided by the Board shall be brought into a public or private market, or sold or exposed for sale in any public or private market. The provisions of this by-law shall not apply to frozen meat, game, or fish imported into the Island.

18. If any person having a license to hold or occupy a stall in any public market shall wilfully neglect or refuse to serve the public, without being able to assign a satisfactory reason, during two consecutive days, it shall be lawful for the Chairman to suspend or revoke any such license.

B.—General.

(*a*) No person shall, within the limits of any Sanitary Board town, keep any bakery, eating-house, tea or coffee boutique, butcher's stall, fish stall, cattle gala, dairy, laundry, or common lodging-house without an annual license from the Chairman of the Sanitary Board, which license the Chairman is hereby empowered to refuse to any person failing to comply with any of the following rules or any existing Sanitary Board rule providing for the regulation and control of the places aforesaid. Every such license shall remain in force until December 31 of the year in respect of which such license is issued or until such license is cancelled.

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Such license shall further be subject to such fees as the Sanitary Board shall from time to time determine with the sanction of the Governor in Council.

(*b*) If any person shall have been convicted twice or oftener by any Court of the breach of any of the following rules or any existing Sanitary Board rule providing for the control of the places aforesaid, it shall be lawful for the Court recording such second or subsequent conviction to cancel the license issued to such person under this chapter by the Chairman of the Sanitary Board. Upon such cancellation of a license by a Court the Chairman of the Sanitary Board is empowered in his discretion to refuse to issue any fresh license to such person.

Provided that these rules shall not apply to stalls in markets established by or vested in any public body.

C.—Bakeries.

1. Bakery shall mean any premises on which bread, biscuits, or confectionery are baked for sale as food for man, and also includes any premises on which such food is prepared for baking or on which the materials for the preparation of such food are stored.

2. The room in which kneading takes place shall have a minimum superficial area of 12 feet by 15 feet. There shall be a free external air space on at least two sides not less than 7 feet wide to permit of through ventilation. The door of the oven shall not open directly into the kneading room. Every kneading room shall be provided with a ceiling.

3. Every bakery shall be well ventilated and well lighted, and the walls in every part shall not be less than 7 feet in height and be built of brick, stone, or cabook, the inside thereof to be lime-plastered and whitewashed every six months. The roof shall be of some permanent material. The ceiling shall be plastered and limewashed four times yearly, or may be made of closely fitting boards varnished or painted. The floor shall be cemented throughout and adequate drainage provided. Every room shall be provided with windows capable of being opened and having a superficial area of not less than one-sixteenth of the superficial floor space.

4. The troughs and all the utensils used in the making of bread and pastry shall be kept scrupulously clean, and must be capable of being moved about for the purpose of cleaning the floor.

5. The floor shall be carefully scraped and swept at least once every twenty-four hours, and the sweepings shall be immediately placed in an impervious, covered receptacle and removed from the bakery daily.

6. Every bakery shall be kept in a cleanly state and free from effluvia arising from any drain, privy, cesspit, or other nuisance.

7. No bakery shall be within 50 feet of any cesspit, manure heap, open sewer, or privy.

8. No furniture or other articles are to be stored in the bakery other than those used in the manufacture of bread and pastry.

9. The tops of the tables are to be made of well-seasoned closely-fitting planks, or some non-harmful impervious material, and are to be scraped and cleaned daily.

10. No animal shall be kept in the bakery on any pretence whatever.

11. No person suffering, or who to the knowledge of any person in charge of the bakery has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the bakery to enter the bakery or take part in the manufacture or sale, on the premises, of bread, biscuits, or confectionery.

12. All persons employed in the preparation and baking of bread shall wash their hands before engaging in the process of breadmaking, and shall wear clean white aprons covering the chest and body, and also a white cap or turban.

13. Clean water and soap shall be provided for the use of those engaged in the manufacture of bread, biscuits, and confectionery.

14. All bread, biscuits, confectionery, and sweetmeats exposed for sale shall be kept in properly constructed glass cases free from flies. The cases shall be kept scrupulously clean.

15. The flour, water, and other materials used in the manufacture of bread shall be good and wholesome, and the flour shall be kept on a platform raised 3 feet above the ground.

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16. All refuse around the premises of a bakery shall be removed daily and drains well flushed.

17. No place on the same level with the bakery and forming part of the same building shall be used as a sleeping place, unless it is effectually separated from the bakery by a partition extending from the floor to the ceiling; no water-closet, earth-closet, privy, or ashpit shall be within, or communicate directly with, the bakery.

18. It shall be lawful for a Sanitary Board Inspector or other person authorized in writing by the Chairman at all reasonable times and at any time when the process of baking is being carried on to enter and inspect any bakery or place used for the sale of bread.

19. A copy of these by-laws shall be framed and hung up in a prominent place in every bakery.

D.—Eating-houses and Tea and Coffee Boutiques.

1. All eating-houses and tea and coffee boutiques shall be kept clean and sanitary to the satisfaction of the Chairman.

2. All utensils, furniture, and other requisites used in or belonging to any eating-house or tea or coffee boutique shall always be kept clean.

3. The walls of all eating-houses and tea or coffee boutiques shall be plastered and limewashed, and the rooms shall be well ventilated and lighted.

4. All refuse and dirt in or about the premises of any eating-house or tea or coffee boutique shall be removed twice daily.

5. No person suffering, or who to the knowledge of any person in charge of an eating-house or tea or coffee boutique has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the eating-house or tea or coffee boutique to be employed in or about any such eating-house or tea or coffee boutique.

6. The sugar used in such place shall be kept in glass-stoppered wide-mouthed bottles.

7. All cakes, sweetmeats, etc., exposed for sale shall be kept in properly constructed glass cases free from flies. No food stuffs shall be exposed to the contamination of flies. The glass cases used shall be kept scrupulously clean.

8. No waste tea, coffee, or milk, or remnants of food or cooking waste, shall be thrown on the ground, but shall be collected in a proper respectacle and removed daily.

9. No adulterated milk shall be sold or offered or exposed for sale or kept on the premises of any eating-house or tea or coffee boutique.

For the purposes of this rule adulterated milk shall mean milk to which water or any other foreign liquid or substance has been added for the purpose of augmenting its quantity or enhancing its apparent quality and not for the purpose of preparing tea or coffee or any other beverage for the immediate consumption of customers.[1]

10. These by-laws shall be framed and hung up in a prominent place in every such eating-house or tea or coffee boutique.

E.—Butchers' Stalls.

1. Every butcher's stall shall be well ventilated and well lighted, the walls thereof shall be plastered and whitewashed at least four times a year, and the floor cemented and sufficient drainage provided.

2. Every room in which meat is kept shall be scrupulously clean.

3. Every table used in a butcher's stall shall be covered with zinc or other impermeable substance approved by the Chairman. Such tables and the chopping block and all implements shall be kept scrupulously clean. They shall be washed with water and scrubbed with a hard clean brush immediately after use. All hooks for hanging meat shall be polished and free from rust.

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1. For a conviction under this bye-law, there must be affirmative proof that the milk was adulterated for the purpose of augmenting its quantity. Wijeyratna *vs.* Abdulla (1919) 31 N.L.R. 310.

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4. Refuse and unsaleable material, offal, etc., if not immediately removed, shall be kept in a zinc lined box, with a perforated zinc cover, the perforation to be of such size as to prevent flies entering.

5. All refuse and dirt in and about the premises of a butcher's stall shall be removed at least once a day and the drains well flushed.

6. No person suffering, or who to the knowledge of any person in charge of a butcher's stall has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the butcher's stall to be employed in such butcher's stall.

7. Every butcher shall provide himself with a movable bin or receptacle of metal for waste material.

8. Every butcher's stall and the management and conduct of the business shall be at all times open and subject to inspection by the Chairman of the Sanitary Board or by any person duly authorized by the Chairman.

9. These by-laws shall be framed and hung up in a prominent place in every butcher's stall.

F.—Fish Stalls.

1. Every fish stall shall be well ventilated and well lighted, and the walls thereof shall be plastered and whitewashed. The floor shall be of smooth cement, having a proper fall leading to a masonry drain built in cement and cement rendered, emptying into a bucket. The drain and bucket shall be washed with disinfectant at least twice a day, and the bucket shall not be allowed to overflow. The stall shall always be kept clean and free from stains of blood and dust, and the walls and floor kept in a state of repair.

2. Instead of the drain referred to in the last preceding rule, a fishmonger may use a large zinc sheet or concrete counter having a fall towards its centre and so arranged that the washing shall fall into the bucket.

3. Every table used in a fish stall shall be covered with zinc or other impermeable substance approved by the Chairman. Such tables and the chopping block and all implements shall be kept scrupulously clean. They shall be washed with water and scrubbed with a hard clean brush immediately after use. All hooks for hanging fish shall be polished and free from rust.

4. Fish baskets shall be washed daily and kept exposed to sun and air on a shelf and are not to be kept inside the fish shop.

5. Every fish stall holder shall provide himself with a movable receptacle of metal for waste material.

6. All refuse and dirt in or about the premises of a fish stall shall be removed at least once a day and the drains well flushed.

7. No person suffering, or who to the knowledge of any person in charge of a fish stall has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the fish stall to be employed in such fish stall.

8. Every fish stall and the management and conduct of the business shall at all times be open and subject to inspection by the Chairman or by any person duly authorized by the Chairman.

9. These by-laws shall be framed and hung up in a prominent place in every fish stall.

G.—Galas.

1. Every licensed gala shall be registered by the Chairman, and a notice board shall be hung up by the licensee at the entrance to every such gala with the word " Registered Gala No.— " and the name of the owner painted thereon.

2. Every gala or halting place for carts or cattle shall be properly levelled and drained to the satisfaction of the Chairman, and the ground shall either be paved or properly consolidated with broken metal, so that it keeps a hard and level surface. All buildings in such gala or halting place used for keeping the bulls or other animals must be so constructed and kept as to comply with rule 3. Such gala or halting place shall be kept in a clean and sanitary state, being thoroughly cleansed daily, and all dung and refuse removed daily to such place at a distance from any dwelling houses as the Chairman shall approve. No goods, materials, or substance of any kind shall be deposited upon such gala or halting place in such a manner as to obstruct such daily cleansing.

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3. The owner, tenant, or occupier of every building or shed used as a stable, cattle stall, or cattle halting place shall provide the same to the satisfaction of the Chairman with suitable cemented drains to carry off washings, urine, or rain water. Provided that the Chairman, if he considers it necessary, may require such drain to be so constructed as to convey the urine or washings into one or more covered receptacles constructed in such a manner as the Chairman shall direct, the contents of which shall be daily removed at the expense of such owner, tenant, or occupier and disposed of so that no nuisance is caused thereby. The floor of such building or shed shall be paved with brick rendered in cement, stone, cement concrete, asphalt, or other hard material which can readily be kept clean, and shall be kept even and in good repair. If such building or shed is so constructed that it can be whitewashed, this shall be done at least once in six months or oftener if the Chairman shall so direct. (Provided that the Chairman may relax any of the above regulations if, owing to the distance of the building or shed from human dwellings or for any other reason, he shall consider the same unnecessary). Provided also that the Chairman may, if he considers it necessary, require any building to be used as a stable, cattle stall, or cattle halting place to be constructed of stone, brick, or other permanent materials, and to have a tiled or iron roof.

4. Every stable, cattle stall, or cattle halting place shall be kept in a clean and sanitary state being thoroughly cleansed daily, and dung and refuse removed daily to such a place at a distance from any dwelling houses as the Chairman shall approve.

5. Every gala shall be open for inspection at any time by the officers of the Board or by any other person thereto authorized in writing by the Chairman. All orders which the Chairman is empowered to make under these by-laws shall be in writing.

H.—Dairies.

1. For the purpose of rules under section 9 E (2) *(d)* a dairy shall mean and include any farm, farmhouse, cow-shed, milk-store, milk shop, or other place from which milk is supplied or in which milk is stored or kept for the purposes of sale.

"Dairyman" shall include any cow keeper, purveyor of milk, or occupier of a dairy, and in cases where a dairy is owned by more than one person, the manager or other person actually managing such dairy.

2. No dairy shall be located in any compound within 100 feet of an open cesspit or surface latrine or in a position where bad odours will reach it, and no open cesspit or surface latrine shall be erected within 100 feet of any dairy.

3. Every dairy compound shall be sufficiently provided with proper drainage to the satisfaction of the Chairman, and the drains shall be kept flushed. No foul water shall be allowed to stagnate in any dairy compound.

4. All refuse and dirt in and around the dairy premises shall be removed without delay. Cowdung shall be removed daily.

5. A pure and protected supply of water must be provided at convenient distance for the use of every dairy. No bathing or washing of clothes shall take place at or near this water supply.

6. The milch cows and buffaloes shall be free from disease, and no dairyman suffering from, or who to the knowledge of any person in charge of a dairy has recently suffered from, any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the dairy to be employed in such dairy.

7. All dairymen shall see that their cattle are washed as to udders and teats before milking, and the milker is to wash his hands thoroughly with soap and water before milking. Every precaution shall be taken to prevent contamination of milk by dung or urine.

8. No dairyman or owner of a dairy shall adulterate milk by the addition of any water or any other foreign liquid or substance thereto, nor shall he sell or offer or expose for sale milk so adulterated.

9. All utensils, furniture, and other requisite used in or belonging to a dairy shall be kept clean.

10. All vessels sent out containing milk shall be scrupulously clean, and shall be properly covered, stoppered, or corked with clean materials, and shall not be carried under the armpit, nor shall the mouths of the bottles be fingered.

11. The sheds and yards where cattle are kept shall be subject to and satisfy the requirements of the rule 3 of the Sanitary Board regulations regarding galas.

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12. Every licensee of a dairy shall have a milk room, erected in such a position and at such a distance from the cow sheds as the Chairman of the Sanitary Board shall approve, for the storing and preparation of milk, and in which all vessels used in his trade are to be stored after cleansing. The floor shall be cemented with rounded corners at its junction with the walls, the walls shall be of plastered masonry, smooth boards, or ironwork, to be limewashed or painted periodically as directed by the Chairman or the Senior Sanitary Officer. At least two opposite walls of the milk room shall abut on the open air. The roofs shall be ceiled with grooved boards to prevent the ingress of dust. There shall be at least one window and one door. The window shall be 3 feet by 2 feet without glass or shutters and be fitted with flyproof netting. The door shall be opposite the window, be close fitting and fitted with flyproof netting, and shall be kept closed. A table with a covering of marble, slate, or zinc or other approved impermeable substance shall be placed in the milk room. This room shall be used for no other purpose than that of storing and preparing milk.

13. Every licensee of a dairy shall keep a list of his customers, which shall be open at all times for inspection by the Chairman of the Sanitary Board, the Senior Sanitary Officer, or his assistants.

14. The number of cows for which each dairy is licensed shall be stated in such license.

15. No licensee of a dairy shall change the location of his dairy without having first obtained the permission of the Chairman, nor shall milking take place at any place other than that at the licensed premises.

16. Every licensee of a dairy shall keep a report book in his milk room, in which Inspecting Officers may make their report each time they visit the dairy.

17. Every dairy situated within the limits of a Sanitary Board town, as well as those situated outside such limits, provided these latter supply milk to residents within Board limits, shall be registered by the Chairman, who shall issue to each applicant a card of registration bearing his name and number. These cards are to be shown to authorized officers of the Board or to Sanitary Inspectors when required by them to do so.

18. The Chairman of the Sanitary Board, the Senior Sanitary Officer or his Assistants, the Chief Headman of the district, or any Sanitary Inspector appointed by the Chairman of the Sanitary Board, or the Senior Sanitary Officer to do sanitary inspection in any Sanitary Board town, shall be at all times empowered to take a sample of milk for analysis from any licensed dairy or from any person selling milk or exposing milk for sale within Sanitary Board limits.

19. A copy of these by-laws shall be hung in the milk room of every dairy.

I.—Laundries.

1. For the purpose of rules under section 9 E (2) (*d*) "laundry" means the premises occupied by any person carrying on the trade of washing other peoples' clothes for hire, and "laundryman" signifies any such person or an employee or assistant of such person in such work.

2. Every laundryman shall, when so required by the Chairman, provide a separate room for soiled linen, which must be well ventilated and clean at all times and whitewashed twice annually.

3. A laundryman shall not store soiled linen in any room used as a living apartment.

4. The Chairman shall, when he considers it necessary in the interests and for the good of the public health, allocate special sites for the washing of clothes; such sites will be indicated by a notice board.

5. When any laundryman or any member of his family or household shall contract any infectious or contagious disease, he shall within 24 hours report the same to the Chairman of the Sanitary Board either through the Sanitary Inspector or the Police Headman.

6. When any laundryman or any member of his family or household shall contract any infectious or contagious disease, all work in the laundry shall immediately cease, nor shall any clothes be taken into the laundry or sent out of it after the outbreak and during the prevalence of such disease, save by special permission of the Chairman.

7. No laundryman shall, without the permission of the Chairman of the Sanitary Board or the Senior Sanitary Officer, receive soiled linen from any house in which there is reason to believe that a member thereof is suffering from any infectious disease.

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8. Every laundryman shall when called upon by the Chairman of the Sanitary Board or the Senior Sanitary Officer or his Assistant give a list of the persons for whom he washes.

J.—Common Lodging Houses.

1. For the purpose of rules under section 9 E (2) (*d*) common lodging houses shall mean any house or any part of a house in which four or more persons not being members of the same family are housed for hire.

2. A common lodging house shall be substantially built and kept in a good state of repair, and the sleeping rooms shall be well ventilated and lighted to the satisfaction of the Chairman and the walls thereof whitewashed thrice annually.

3. The keeper of a common lodging house shall at all times keep the place clean and in a sanitary condition. He shall cause all filth and offensive matter to be removed from the premises.

4. When any person in a common lodging house becomes ill with any infectious or contagious disease, the keeper or such person shall immediately inform the proper authority either through the Sanitary Inspector or the Police Headman, and shall obey the directions of the proper authority with regard to the vacation of the lodging house, disinfection or destruction of bedding, clothing, and other articles, and fumigation, disinfection, and limewashing of the house.

5. The keeper of a common lodging house shall be responsible for the provision of sufficient latrine accommodation for the inmates and for the keeping of the same in a sanitary condition.

6. The Chairman of the Sanitary Board is hereby empowered to decide the maximum number of persons that may be accommodated in any common lodging house and such number shall be endorsed upon the license. Any common lodging house-keeper allowing the number to be exceeded shall be guilty of an offence. For the purposes of this rule two children under twelve years of age shall count as one person.

7. The premises of any common lodging house shall at all times be open to inspection by the Chairman of the Sanitary Board, the Senior Sanitary Officer or his Assistant, the Chief Headman of the District, and any Sanitary Inspector appointed by the Chairman of the Sanitary Board or the Senior Sanitary Officer to do sanitary inspection in the Sanitary Board town in which such common lodging house is situated.

K.—Washing Places.

1. It shall be lawful for the Board by resolution from time to time to set apart for the washing of horses and cattle such places as it may deem proper, and the hours during which they may be used.

2. A list of the places so set apart shall be published in the *Government Gazette* in English, Sinhalese, and Tamil, and proclaimed within the limits of the Board by beat of tom-tom, and copies of the list in the said three languages shall be kept affixed at the office.

3. No person shall wash horses, cattle, clothes, or mats at any public place within the town, except at such places so set apart by the Board.

4. No person suffering, or who to the knowledge of any person in charge of a washing place set apart as hereinbefore provided has recently suffered, from any contagious or infectious disease, or has been recently in attendance on any person suffering from such disease, shall be permitted by any such person in charge of the washing place to wash clothes or any other article in such washing place.

CHAPTER V.

[Section 9 E (2) (*i*).]

Care of Waste or Public Lands.

1. No person shall remove any sand, earth, stone, or growing plants or trees from, or in any way alter or deface the surface of, any waste or public land without the authority of the Chairman.

2. No horse, cattle, sheep, goats, or swine shall be tethered or grazed upon any public ground vested in the Board without a license from the Chairman. Such license may be granted for a year or any shorter period at the discretion of the Chairman, and shall be subject to such fee as the Board shall from time to time by resolution determine.

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3. Any person thereto authorised in writing by the Chairman may seize any horse, sheep, goat, or other animal which he may find tethered or grazing without such license as aforesaid on any public ground within the town.

4. The Board may farm or let out the public grazing grounds or any part thereof for any period not exceeding twelve months on such conditions as to the Board may seem fit.

CHAPTER VI.

[Section 9 E (2) (*j*).]

For the putting up and preservation of Boundaries.

1. Every owner or occupier of any house, garden, building, or land within the town shall keep such house, garden, building, or land surrounded with a wall or good fence of not less than 4 feet in height from the level of the ground.

2. No live fence shall in future be erected within 3 feet from any public masonry drain.

CHAPTER VII.

[Section 9 E (2) (*k*).]

Public Bathing Places.

1. For the purpose of rules under section 9 E (2) (*k*), a public bathing place shall mean any place where the public or any particular class of persons bathe, whether on payment of money or not, or any place thereto specially set apart by order of the Sanitary Board under rule 2.

2. The Sanitary Board may by resolution set apart any public place over which it has control or any portion thereof for the purpose of being used as a public bathing place, and may define the limits and bounds of such public bathing place.

3. In every case in which a charge is made by the owner or occupier of any public bathing place for the use thereof, such owner or occupier shall not keep such bathing place without a license from the Chairman of the Sanitary Board, which license the Chairman is hereby empowered to refuse to any persons failing to comply with any of these rules or any existing Sanitary Board rule.

Such license shall further be subject to such fees as the Sanitary Board shall from time to time determine with the sanction of the Governor in Council.

4. If any person shall have been convicted twice or oftener by any Court of the breach of any of these rules, it shall be lawful for the Court recording such second or subsequent conviction to cancel the license issued to such person under this chapter by the Chairman of the Sanitary Board. Upon such cancellation of a license by a Court, the Chairman of the Sanitary Board is empowered in his discretion to refuse to issue any fresh license to such persons.

5. The owner or occupier of any public bathing place shall be bound to see that the requirements of these rules are carried out.

6. Wherever a public bathing place is served by a well, such well shall have a protecting wall at least 2 feet high all round or, if there is no wall, must be constructed on a plan approved by the Chairman of the Sanitary Board, and in such a way that none of the water drawn for washing can find its way back into the well, and the ground immediately surrounding such well shall be sloped, paved, or concreted so as to allow the water to run into a leadaway drain of sufficient length to prevent, to the satisfaction of the Chairman, any percolation of dirty water into the well.

7. If tubs are used, they shall be cleaned daily and painted twice annually. If a large tank or bath is used, the water thereof shall be frequently changed, so that it does not become stagnant or offensive or unfit for use for human bathing.

8. No person suffering, or who to the knowledge of any person in charge of a public bathing place has recently suffered, from any contagious or infectious disease, shall bathe, wash in, or in any way use the water of any such public bathing place unless such water shall be drawn for such person by some healthy person and carried for use to a safe distance from such bathing place.

9. Whenever a public bathing place is served by a well, no person shall use such well for washing cattle or any other animals, or mats, or any other things, or any clothes except those he is wearing, and if such clothes be slapped upon a stone or otherwise beaten, this shall be done at such distance from the well that the splash therefrom cannot fall into the well.

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The provision of rule 9 shall also *mutatis mutandis* apply to tanks or baths, the water of which is artificially changed at intervals, and to public bathing places specially set apart by order of the Sanitary Board or the Chairman.

10. No person shall commit a nuisance by obeying a call of nature at or near any public bathing place.

CHAPTER VIII.

[Section 9 E (2) (*m*) and (*n*).]

Charges for occupation of Pounds, etc.

1. All cattle, sheep, and goats straying on the public roads or paths within the town shall when seized be placed in the Pound established by the Board for the purpose where such have been provided, and the following charges shall be paid before the removal of any animal so impounded :—

For occupation, 25 cents per head for a day or part of a day.

For food if supplied, 15 cents per head for a day or part of a day.

Dogs.

2. All stray dogs shall be seized, and, if diseased, or suspected of disease, destroyed ; otherwise they shall be impounded in a Pound provided by the Board, and a sum of 40 cents for the first day of detention and 15 cents for each succeeding day to meet the expenses incurred by the Sanitary Board shall be levied from the owner of the dog if he claims it and desires to remove it. Impounded dogs if not claimed within three days shall be destroyed.

CHAPTER IX.

[Section 9 E (2) (*o*).]

1. It shall not be lawful for any person or persons to erect, re-erect, repair, add to, or enlarge any building, whether permanent or temporary, or to renew or repair or alter or add to the frontage of any such building in any way, or to build any drain or bridge, platform, or structure over a drain, or any privy or cesspool, without twenty-one days' previous notice in writing to the Chairman accompanied by details and plans of the work sufficient to show the arrangements proposed in respect of ventilation, drainage, and sanitation. No such building operations shall be commenced without the written permission of the Chairman, or until after the expiry of the twenty-one days' notice.

2. It shall not be lawful for any person to erect a house or hut for the purposes of a dwelling-place, or permit the same to be occupied as a dwelling-place, within the limits of the Board, except after twenty-one days' previous notice in writing to the Chairman, and under the following conditions :—

(*a*) The walls shall in no case be built of cadjan, but of stone, brick, cabook, mud and wattle, or other suitable material which allows of its being properly plastered and whitewashed.

(*b*) Every such house or hut or any room therein to be used for human habitation shall not be less than 120 superficial feet in area, and not less than 10 feet in height, and with eaves at least 6 feet from the ground. All houses or huts are to have tiled roofs, except where the Chairman may see fit to relax the operation of this rule by written permit setting out the period for which such exemption is to hold good.

(*c*) Every room to be used for human habitation shall have at least one door not less than 6 feet by 3 feet, and at least one window not less than 3 feet by 2 feet.

(*d*) The floor shall always be higher than 1 foot from the ground, provided the Chairman shall be at liberty to require a higher level according to situation.

(*e*) It shall be lawful for the Chairman to cause any house or hut erected contrary to the provisions of this by-law to be taken down at the expense of the owner, if within one month after written notice to him to alter or take down the same he shall fail or neglect to do so.

3. It shall not be lawful for any person to erect, re-erect, or add to any hut or house within the limits of any Sanitary Board town, except under the following conditions :—

The following clear air space shall be left around any hut or house which is erected or re-erected, or around any hut or house which is added to with respect to

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such addition, and no portion of the walls of such building, and not more than 2 feet 6 inches of the projecting eaves of such building, shall come within such space :—

(1) On the side of any road or street, 25 feet to the centre of such road or street.

(2) Behind, such space up to 50 feet to any other hut or house, except a kitchen, bathing place, or latrine as the Chairman may require, of which prescribed space at least half shall be land belonging to the same owner as the land upon which the house stands, which is erected, re-erected, or added to.

(3) To the side, such space up to 15 feet to the nearest building as the Chairman may require, of which prescribed space at least half shall be land belonging to the same owner as the land upon which the house stands, which is erected, re-erected, or added to.

Provided that the Chairman may in his discretion relax the operation of this rule in any special case, but he shall not do so unless he is satisfied that (1) no detriment is caused thereby to the sanitary condition or amenities of the house or hut to be erected, re-erected, or added to, or of any other neighbouring house or hut used or intended to be used as a human dwelling place ; and (2) that the future alignment, widening, or development of any road or street, or the convenience of the public using such road or street, will not be interfered with by such relaxation of the rule.

Provided, further that the Chairman may allow the erection of kitchen, bathing place, or latrine upon the portion thus reserved for air space on the side of any house furthest from the road or street in such place as the Chairman shall approve.

Provided, further, that where a conservancy lane shall have been provided, or laid out, or projected by the Board, such latrine shall adjoin such lane or projected lane.

CHAPTER X.

[Section 9 E (2) (*s*).]

Kraals in Lakes and Rivers for Soaking of Husks.

1. No person shall within the limits of any Sanitary Board erect or use any kraal in any lake or river for the purposes of soaking coir husks without a license from the Chairman of the Sanitary Board, which license the Chairman is hereby empowered to refuse to any person failing to comply with these rules.

Such license shall further be subject to such fees as the Sanitary Board shall from time to time determine with the sanction of the Governor in Council.

2. If any person shall have been convicted twice or oftener by any Court of a breach of these rules, it shall be lawful for the Court recording such second or subsequent conviction to cancel the license issued to such person under this chapter by the Chairman of the Sanitary Board. Upon such cancellation of a license by a Court, the Chairman of the Sanitary Board is empowered in his discretion to refuse to issue any fresh license to such person.

3. The Chairman of the Sanitary Board is hereby empowered to regulate the dimensions and position of such kraals and to indicate the same upon the license issued. Any person erecting or using any kraal of different dimensions or in a different position to that indicated in his license shall be guilty of an offence.

CHAPTER XI.

[Section 9 E (2) (*t*).]

Prevention of Malaria.

1. Hollow places in compounds or close to dwelling-houses shall be filled up or drained so that water may not stagnate in them, and all unnecessary vessels or receptacles of any description lying about the said premises and which are liable to hold or contain water likely to become stagnant shall be removed.

2. The owner or occupant of any garden or compound in which it is desired to cut down a bamboo clump or any portion thereof shall dig and remove the roots thereof, or cause the roots thereof to be dug and removed, or shall cut down or cause the same to be cut down to a point below the level of the surrounding ground in such a manner, and so cover or cause to be covered the roots, as to prevent any water collecting in the hollow of the severed portions of bamboos still left in the earth.

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CHAPTER XII.

[Section 9 E (2) (*t*).]

General Conservancy.

1. All owners, tenants, or occupiers of lands within the limits of the Sanitary Board shall keep the same clean and free from all weeds or rank and noisome vegetation as well as from all refuse and rubbish.

2. All or any part of any house, dwelling, church, place of business, or other building shall be provided with sufficient light or ventilation, and shall, whenever so ordered by the Chairman or any officer acting under his authority, be forthwith externally or internally limewashed, disinfected, or otherwise cleaned.

3. Privies shall be constructed where in the opinion of the Chairman it is desirable that they should exist.

4. Every owner or occupier of any place within the limits of the Sanitary Board used for a tannery, brick factory, lime kiln, and every owner or occupier of a cart stand, cattle yard, bakery, coach building yard, or manufactory, shall remove or cause to be removed daily from such premises all filth, dirt, and rubbish, and deposit it in such places as the Chairman may approve.

5. Every cart stand, cattle yard, and sheep pen shall be paved and drained to the satisfaction of the Chairman.

6. All householders or other persons who are desirous that the dust, ashes, sweepings, rubbish, and other refuse from their premises should be removed by the scavengers of the Board shall deposit the same in proper boxes or other receptacles with covers on the edge of the road outside their respective dwellings or shops daily between the hours of 6 a.m. and 8 a.m., and it shall not be lawful for any person to place or cause to be placed such dust, ashes, sweepings, rubbish, or refuse in any street unless the same shall be contained in boxes or other receptacles as aforesaid, nor after the hours specified ; and every such person shall remove such boxes or other like receptacles within the space of half an hour after the same shall have been emptied by the scavengers.

7. It shall be lawful for the Chairman at any time to require the owner or occupier of any house, building, enclosure, or premises within the limits of the Sanitary Board, by notice in writing, to remove or cause to be removed the contents in any privy, pit, or water-closet in or belonging to such house, building, enclosure or premises to such place or places, and within such time as shall be set forth in the said notice. Should such owner or occupier fail to comply with the requirements of such notice within seven days from the time when such notice shall have been served on him, the Chairman may cause the necessary work to be done, and for that purpose shall have power to enter into and upon any such house, outhouse, building, enclosure, or premises with such labourers, implements, and things as may be required, and the expenses incurred shall be recoverable as a debt due by the owner to the Board.

8. Any person who shall bury or cause to be buried, or deposit or cause to be deposited, the contents of any latrine, privy, pit, or water-closet within any house, building, or premises, or in or any land within 100 feet of any dwelling-house, well, stream, or water-course, shall be guilty of an offence. Upon receiving notice he shall at once remove the same to such place and within such time as the Chairman shall direct. In default of compliance with such notice within the time appointed, the Chairman and any officers or workmen authorized by him may enter upon such house, building, or premises and cause the necessary work to be done, and the expenses incurred thereby shall be paid by the person in default, and shall be ascertained and determined and recoverable as a debt due by the owner to the Board.

9. The occupier of any house or premises within or upon which any cattle, horse, sheep, goat, or pig may die shall within four hours after its death, or if death occurs at night within four hours after daylight, either remove the carcase at his own expense to such place as may be appointed by the Chairman for that purpose, or report its death to the Supervisor or Inspector of the Board, and in such latter case shall pay to the Board the expense of removing or burying the carcase at such rate as the Chairman shall determine.

10. Whenever any tree or branch or fruit of a tree within the limits of the Sanitary Board shall be deemed by the Chairman, after inspection by himself or some person authorized by him, to be likely to fall upon any house or building and injure the occupier thereof, or whenever the same shall overhang any street,

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it shall be lawful for the Chairman to cause notice in writing to be given to the owner or to the occupier of the ground upon which such tree stands to cut down or remove the said tree or branch or fruit ; and if such owner or occupier shall not cut down or remove the same within twenty-four hours after such notice, the Chairman and any officers or workmen authorized by him in writing may enter upon such ground and cause the work to be done, and the expenses thereby incurred shall be paid by such owner or occupier, and shall be ascertained and determined and recoverable as a debt due by the owner to the Board.

11. It shall be lawful for any Inspector or any officer authorized in writing by the Chairman, between the hours of 7 a.m. and 5 p.m., to enter upon any building or premises within the limits of the Board and do all things necessary for the purpose of ascertaining whether such building or premises are kept in a sanitary condition.

12. No person shall deposit any dirt, manure, filth, sweepings, or rubbish of any kind, nor any old bottles, tins, chatties, coconut shells, or other receptacles of any kind capable of holding rain water, on any street, road, or public place, or in any drain of such street, road, or public place, or on any land or premises in proximity to any dwelling-house. Such dirt, manure, filth, sweepings, rubbish of any kind, and any old bottles, tins, chatties, coconut shells, or receptacles of any kind capable of holding rain water shall be burnt or buried or carried away to a suitable place approved of by the Chairman.

13. Whenever it shall appear to the Chairman that any ground or premises in the vicinity of dwelling-houses is in an insanitary condition by reason of the growth of weeds or rank or noisome vegetation upon it, or by reason of accumulation of manure, filth, or rubbish, or of stagnant water, or of receptacles likely to contain rain water and stagnate lying about, the Chairman may require the owner or occupier of such ground, by a notice in writing, to do, within a reasonable time to be specified in such notice, such work as is necessary to put the said ground into a sanitary condition. If the owner or occupier shall fail to carry out the said work within the time specified, or if at any subsequent time he shall again allow the said land to get into such insanitary condition as aforesaid, the Chairman may cause the necessary work to be done, and for that purpose shall have power to enter into and upon such land with such labourers, implements, and things as may be required, and the expenses incurred shall be recoverable as a debt due by the owner to the Board. Provided that nothing in this rule contained shall prevent the Chairman from at any time entering any prosecution under these rules, should he consider such prosecution advisable.

14. It shall be the duty of the owner of every house or hut used for human habitation to keep the same in a state of good repair, unless he proves to the satisfaction of the Chairman that a tenant or occupier has agreed to undertake this duty, in which case the said duty shall fall on such tenant or occupier, as the case may be.

15. Whenever it shall appear to the Chairman that any such house or hut is in such a state of repair that it is in an insanitary condition and prejudicial to the health of the inmates or the neighbours, he may cause a notice in writing to be served upon the owner, tenant, or occupier, as the case may be, whose duty it is to keep such house in good repair, requiring him, within a reasonable time to be fixed in such notice, to do such work as may be necessary to put the said house or hut into a sanitary state. If such owner, tenant, or occupier shall neglect to do the necessary work within the time fixed, the Chairman may cause the work to be done, and the expenses incurred shall be recoverable as a debt due to the Board by such owner, tenant, or occupier. Provided that no action taken by the Chairman under this rule shall prevent such owner, tenant, or occupier being at any time punished for a breach of rule 14 of this chapter.

CHAPTER XIII.

[Section 9 E (2) (*f*).]

Dangerous and Offensive Trades.[1]

1. Dangerous and offensive trades shall for the purpose of these rules mean and include any of the following :—

Storage or manufacture of artificial manure, boiling of blood or offal, drying blood or offal, tanning, fat melting, fat extracting, soap making, soaking of coconut husks, fibre dyeing, coconut oil manufacture (where machinery is employed),

1. See Misso *vs.* Fonseka (1928) 30 N.L.R. 25.

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manufacture or storing of fibre, storing of hides, bones, artificial manures, or any materials for the manufacture of artificial manure, storing of Maldive fish in quantity over 5 cwt. in weight, quarrying for metal, cabook, or gravel, the manufacture of bricks and tiles, the burning of lime, the manufacture of aerated waters, storing or curing of plumbago.

2. No owner or occupier of any land or premises within the limits of any Sanitary Board or other person shall carry on or suffer to be carried on, upon such land or premises, any offensive or dangerous trade or manufacture without a license from the Chairman of the Sanitary Board, who is further empowered to refuse such license to any person failing to comply with any of these or other already existing Sanitary Board rules.

Such license shall be subject to such fees as the Sanitary Board from time to time may determine with the sanction of the Governor in Council.[1]

3. If any person shall have been convicted twice or oftener by any Court of the breach of any of these rules, it shall be lawful for the Court recording such second or subsequent conviction to cancel the license issued to such person under this chapter by the Chairman of the Sanitary Board. Upon such cancellation of a license by a Court, the Chairman of the Sanitary Board is empowered in his discretion to refuse to issue any fresh license to such person.

4. All materials required for the purpose of carrying on any of the aforesaid trades, businesses, or manufactures shall be stored so as to prevent effluvium or nuisance, and all such materials which have to be brought along any public thoroughfare, and which are likely to be offensive and give off effluvia shall be transported in non-absorbent covered receptacles or in such other manner as the Chairman shall direct, so as to obviate the creation of any nuisance.

5. Effective means shall be adopted for rendering innocuous any offensive vapours or gases emitted during any process or manufacture. Such vapours and gases shall either be discharged into the external air in such manner and at such a height as to admit of their diffusion without injurious or offensive effects, or they shall be passed directly through a fire or into a condensing apparatus. All premises shall be adequately drained, and the drains kept in efficient order and washed daily.

6. Floors shall be maintained in a proper state of repair and cleansed daily, and when so ordered by the Chairman shall be constructed of such impermeable material as he may direct.

7. Walls shall be kept in good order so as to prevent the absorption of filth, and whitewashed twice annually or oftener if so ordered by the Chairman of the Sanitary Board or the Senior Sanitary Officer.

8. All apparatus, including implements and vessels, shall be kept clean and where possible they shall be cleaned daily. All refuse, sweepings, scrapings, together with waste and bye products shall be removed daily from the premises in covered receptacles, unless intended to be forthwith subjected to further trade purposes on the premises.

9. Tanks used for washing or soaking skins or any other materials must be emptied and cleansed as often as may be necessary to prevent effluvia.

10. No person carrying on any offensive trade or manufacture, nor any owner or occupier of any land or premises upon which such offensive trade or manufacture is carried on shall pollute any river, stream, canal, channel, well, tank, or open piece of water by discharging thereinto or suffering to flow thereinto any foul, ill-smelling, or offensive water or other fluid, or by throwing thereinto or suffering to be washed thereinto any offensive substance, nor shall he in any other way pollute or contaminate such river, stream, canal, channel, well, tank, or open piece of water.

11. The premises of all the aforementioned trades shall be open for inspection at all reasonable hours by the Chairman of the Sanitary Board or by any person duly authorized by the Chairman.

12. The owner or occupier of any land from which clay, earth, stone, gravel, cabook, or other material is cut for the manufacture of bricks or tiles, or for building, or for any other purpose shall be responsible for seeing that proper drainage is provided, and that the pits or trenches cut are afterwards filled, so that water cannot stagnate therein.

1. " The object of this provision is not to tax a particular occupation for the purpose of revenue but to bring within the control of the local authority something which is offensive or dangerous to the public—in this case, the storing of copra—and a person must take a license if his trade necessitates the storing of copra whether it be the primary object of his trade, or merely incidental to it." Per Drieberg, J. in Tennakoon vs. Muthuwappu (1932) 1 C.L.W. 229.

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CHAPTER XIV.

[Section 9 E (*f*).]

Manufacture of Aerated Waters.

1. No person shall commence the manufacture of aerated waters within the limits of the Sanitary Board for the purposes of sale without giving one month's previous notice in writing to the Chairman of the Board.

2. No aerated water factory shall be situated within less than 150 feet from any gala, stable, or other building used for keeping animals by day and night, or of any latrine or cesspit. No part of the factory shall be used as a dwelling house.

3. All premises used for manufacture of aerated waters must be well lighted and ventilated, must have cemented floors, must be provided with suitably built drains to carry off waste material, and must be kept clean and free from dirt and dust. The preparation of the syrups must be carried out in a separate fly-proof room. All chemicals and other materials used in the manufacture of the waters must be of good quality. All utensils and machinery employed in the manufacture must be kept scrupulously clean.

4. The water used in the manufacture shall be obtained from a source adequately protected from contamination and approved of by the Chairman of the Board. It shall be transported to the factory by means which shall ensure that no pollution occurs in transit. It shall be stored at the factory in properly constructed tanks or reservoirs connecting with the aerating apparatus.

5. All water used in the manufacture of aerated waters shall be passed through a Jewell or other filter approved by the Chairman and connected with the plant, provided that the Chairman shall have power to exempt from the operation of this rule water derived from an approved public supply.

6. Whenever the Supervisor or Inspector of the Board is satisfied that any aerated water, either manufactured within the limits of the Board or introduced into such limits from outside, is of such bad quality as to be unfit for human consumption, he may seize such waters and produce them before the Health Officer or Police Magistrate, and if it appears to such Health Officer or Police Magistrate that such waters are unfit for human consumption, he may order the same to be destroyed. Any person manufacturing any aerated water which shall be proved to the satisfaction of the Court to be unfit for human consumption shall be guilty of an offence.

7. All bottles used in the manufacture of aerated waters shall be washed with filtered water and shall be kept scrupulously clean.

8. Every bottle containing aerated water shall bear a label setting out the description of the water and the place of manufacture, the name of the person or firm owning the factory, and the number assigned to the factory by the Chairman of the Board.

9. No person under twelve years of age shall be employed in any aerated water factory, nor any person suffering from any cutaneous or contagious disease.

10. All employers engaged in the filling of bottles with gas shall wear fine-meshed, wire, face-and neck-shields and leather gloves.

11. It shall be lawful for the Chairman of the Sanitary Board or any Inspector or Supervisor or any person thereto authorized by the Chairman in writing to enter any place used for the manufacture or sale of aerated waters at any time when such place is open and to take a sample bottle of any kind of aerated water which is there manufactured or kept for sale, and any proprietor or person in charge of such place who shall refuse to permit such sample to be taken shall be guilty of an offence. Such sample shall be forthwith forwarded to a competent analyst, and the certificate of such analyst if it states that such sample is unfit for human consumption shall be evidence that it is so unfit until the contrary is proved, and the proprietor or manager of any place used for the manufacture or sale of aerated waters from which place any such sample was taken which is proved to be unfit for human consumption shall be guilty of an offence.

12. Wells from which water for the manufacture of aerated waters is drawn shall be set apart solely for this purpose, and shall not be used for bathing.

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CHAPTER XV.

[Section 9 E (2) (*t*).]

Wells.

1. No person shall sink a well or cause a well to be sunk within the limits of any Sanitary Board town, unless he shall have given to the Chairman one month's notice of such his intention, or shall have obtained a permit from the Chairman to sink such well or cause it to be sunk.

2. No well shall be sunk less than 50 feet from any cesspit, cesspool, pig-sty, gala, cattle shed, manure heap, leaking drain, neglected privy, heap of decaying vegetable or animal matter, or any manured land.

3. No cesspit, cesspool, privy, pig-sty, gala, or cattle shed shall be constructed within a distance of 50 feet from any well used for drinking or domestic purposes, nor shall any manure or decaying animal or vegetable matter be deposited, nor any land be cultivated with manure, nor any drain suffered to remain in a leaking condition within such distance.

4. All wells shall be lined as far as water level either with bricks set in cement with a backing of puddled clay or with cylinders of iron, cement, or clay, or shall be otherwise so constructed as to prevent the entrance of water except from the bottom.

5. A platform upon which to stand and draw water may be constructed over the top of a portion of the mouth of the well. This platform shall be so constructed as to be absolutely water-tight, so that no water therefrom can trickle back into the well, but all flow on to the apron or pavement referred to in rule 6. The said platform shall have a slope downwards from the centre of the mouth of the well outwards so as to throw off water, and a water-tight ledge at least 6 inches high along its inner edge connected at both ends with the parapet wall. The remainder of the well mouth shall be surrounded by a parapet wall at least 2 feet 6 inches high.

6. The well shall be surrounded for a distance of 5 feet by a cement apron or pavement of stone or brick set in cement sloping away from the well.

7. The outer edge of such apron or pavement shall be surrounded by a cement gutter emptying into a leadaway drain not less than 10 feet long, so as to prevent the stagnation of water in the vicinity of the well.

8. No planks shall be placed across the mouth of the well to stand on when drawing water or for any other purpose.

9. Water from wells shall be drawn in clean receptacles.

10. No one shall wash clothes within 20 feet of the mouth of a well used for drinking or domestic purposes.

11. Every owner or lessee of a well used as a public bathing place shall supply bathing tubs, and shall not allow persons who bathe to draw water, and no person shall draw water from such well while bathing.

12. Whenever any tree or branch of any tree overhangs a well, and is deemed after inspection by the Chairman or any Sanitary officer of the Board to be injurious to the water, owing to the dropping of the leaves or fruit into the water or by otherwise rendering the water unfit for use, it shall be lawful for the Chairman of the Sanitary Board to cause notice in writing to be given to the owner, lessee, or occupier of the ground on which such tree stands to cut down or remove such tree or branch, and if such notice is not complied with within 14 days, such person shall be guilty of an offence.

13. The Chairman may, whenever he deems such a course to be necessary, cause notice to be given in writing to the owner or lessee or occupant of any compound in which there is a well used for drinking or domestic purposes to bale out the water and clean the well and execute such repairs as the Chairman may consider to be necessary, and if such notice is not complied with within fourteen days, such person shall be guilty of an offence.

14. Whenever it shall be decided by a resolution of the Sanitary Board that such a course is expedient in the interests of health, it may give notice to the owner, lessee, or occupant of any land to fill up or disinfect any well on such land, and the owner, lessee, or occupier shall thereupon be bound to comply with such order within eight days' time. Should such owner, lessee, or occupier fail within such time to comply with such order, such person shall be guilty of an offence.

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15. It shall be lawful for the Supervisor or Inspector of the Board or other person empowered in writing by the Chairman of the Board to inspect wells, or enter upon any land or premises for the purpose of inspecting proposed sites or wells or existing wells and their surroundings.

SCHEDULE A.

Market Licenses.

Fees Rs.———

The bearer———, of———, has permission to hold the stall——— No.——, in the ———market, for———subject to the by-laws.

———

Chairman, Sanitary Board.

Subject to the sanction of His Excellency the Governor in Council, the Sanitary Board of the Colombo District, as empowered by section 5 (*a*) of Ordinance No. 30 of 1914, hereby resolves to charge the following fees for licenses :—

	Annual Fee. Rs.	Cts.
Bakeries	6	00
Eating houses	6	00
Tea and coffee boutiques	3	00
Fish stalls	6	00
Cattle galas, 5 stalls or under	10	00
Each additional 5 stalls Rs. 10 up to	100	00
Dairies, up to 3 cows or under	3	00
Dairies, over 3 cows	6	00
Laundries	3	00
Common lodging houses	6	00
Manure manufactory	100	00
Boiling or drying blood or offal	100	00
Tannery	100	00
Fat melting or extracting	50	00
Soap making	50	00
Kraals for soaking coconut husks	3	00
Fibre dyeing	2	50
Coconut oil manufactory where machinery is employed	100	00
Manufacture and storing of fibre	25	00
Storing of Maldive fish, over 5 cwt.	5	00
Storing of hides, bones, artificial manures or materials for manufacture of artificial manure, in quantity over one gunny bag	10	00
Metal or cabook quarry	50	00
Gravel quarry	25	00
Brick or tile manufactory	15	00
Lime kilns	12	00
Aerated water manufactory	100	00
Public bathing places	6	00
Plumbago store or curing yard	50	00

Note.—The fees in respect of eating houses, tea and coffee boutiques, common lodging houses, and public bathing places may be paid half yearly in advance.

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CHAPTER XXXIX.

HOUSING AND TOWN IMPROVEMENT.

This Ordinance[1] provides for the " dwelling of the people and the streets on which such dwellings are situated " and is applicable only to the administrative limits of any Municipality, Local Board, Board of Improvement, or Sanitary Board and to any other proclaimed limits. Under it, no person can erect or re-erect any building within such limits except in accordance with the plans, etc., approved in writing by the Chairman. Nor can he make any alterations in any building without the written consent of the Chairman. The word " building " includes the outhouses or other appurtenances of a building. The word " alteration " means any of the following :—

(*a*) The construction of a roof or any part thereof or an external or part wall ;

(*b*) The closing or construction of any door or window in an external wall ;

(*c*) The construction of an inner wall or partition ;

(*d*) Any other alteration of the internal arrangements of a building which affect any change in the open space attached to such building, or its drainage, ventilation, or sanitary arrangements ;

(*e*) The addition of any building, room, outhouse, or other structure ;

(*f*) The roofing of any space between one or more walls and buildings ;

(*g*) The conversion into a dwelling-house of any building not originally constructed for human habitation ;

(*h*) The conversion into more than one place for human habitation of a building originally constructed as one such place ;

(*i*) The conversion of two or more places of human habitation into a greater number of such places ;

(*j*) The alteration of a building for the purpose of effecting a partition among joint owners ; and

(*k*) The re-erection of any part of the building demolished for the purpose of such re-erection or otherwise destroyed.

This definition being very comprehensive includes all kinds of alterations. Thus, re-roofing or replacing a cadjan roof by a tiled roof is an alteration within the meaning of this section.[2] Even the necessary improvements, *e.g.*, where a wall comes down by an " act of God " and needs re-building forthwith, require the previous sanction of the Chairman. But the following are excluded by an amending Ordinance[3] :

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1. No. 19 of 1915, Vol. III, p. 288.
2. De Silva *vs.* Abdul Careem (1919) 6 C.W.R. 320.
3. No. 32 of 1917 embodied in the principal Ordinance.

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(*a*) The re-roofing in whole or in part with cadjan or any substance of similar character of any building or part of a building ;

(*b*) The re-erection in whole or in part of any wall of any thatched mud-and-wattle building or any part thereof, rendered unfit for habitation by stress of weather or other similar cause ; and

(*c*) Any repair or minor alteration as to which it has been declared by public notice on the order of the Chairman that the consent of the Chairman will not be required.

These exceptions, it would seem, apply only to a limited class of buildings. So that the erection of two new walls supporting the roof of a house, unless the walls are of mud-and-wattle and have accidentally come down, cannot be effected without the Chairman's permission.[1] The periodically recurrent minor repairs, such as whitewashing or painting a wall, cementing a floor, or re-fixing iron bars to a window, do not come within the pale of this section. It has been held recently[2] that the replacement of the tiles and zinc sheets of a roof does not amount to construction of the roof within the meaning of section 6 (2*a*) : the word "construction" meant the construction of the framework of the roof so that the relaxation provided by Ordinance No. 32 of 1917 was meant to apply where the re-roofing involved the reconstruction of the framework of the roof. But where the wooden partition of a room was altered by fixing asbestos sheets to the existing framework, Drieberg, J., held that there was an "alteration" of a building within the meaning of this section.[3] Where building operations have lawfully commenced before the date of this Ordinance, the act of continuing them after that date is not within the enactment.[4] This does not, however, permit of repairs and alterations to all old buildings existing before 1915, without the necessary sanction.

The Chairman may require the submission to him of plans, etc., before granting his consent. He will not consent or approve of a building or of any alterations in it, if they conflict with the requirements of this Ordinance. His permission cannot be withheld except as provided by section 7 of the Ordinance.[5] He may require that the whole of the building may be brought into conformity with the Ordinance before approving of any proposed alterations. Further, no person can commence any building operations involving the erection, re-erection, or alteration of a building, or, in the case of any operations the progress whereof has been suspended for a period exceeding three months, resume any such building operations—unless he has given to the Chairman seven days' notice of his intention to commence or resume such operations with particulars of the intended works ; and unless the approval or consent of the Chairman has been given within one year before the date of the notice. Rebuilding of a boutique along a thoroughfare on the old foundations, after it has been damaged by floods, without notice to the Chairman has been held to constitute "commencing" of a building.[6] A Chairman can cancel a permit issued by him for building a house.[7]

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1. Kasturia Ratne *vs.* Senanayake (1920) 22 N.L.R. 372.
2. Silva *vs.* Thabrew (1929) 31 N.L.R. 1. 6 Times L.R. 127.
3. Abeygunasekara *vs.* Suriyadasa (1929) 31 N.L.R. 187.
4. Wickramasuriya *vs.* Perera (1917) 20 N.L.R. 156.
5. Yalawara *vs.* Nagoor Meera Saibo (1925) 674 3 Times L.R. 118 ; 27 N.L.R. 83.
6. Solicitor-General *vs.* de Silva (1925) S.C. 674 P.C. Ratnapura 30307. Leader Law Reports.
7. Inspector S.B., Wadduwa, *vs.* Podinona (1926) 7 C.L.R. 103.

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The following are among the main requirements for the erection of a building :—

(1) Where a building (not being a place of religious worship) is situated upon a street, no portion of the front of the building should intersect any of a series of imaginary lines drawn across the street at an angle of 45° with the plane of the lowest floor of the building, such lines being drawn from the street alignment on the side of the street which is the more remote from the building in question ; except in the case of re-erections, or except where the street is not less than 60 feet in width when the building may not be more than 80 feet high.

(2) The area occupied by a building should not exceed two-thirds of the total area of the site ; and no building other than latrines, bathing or cooking places, can be erected on the remainder.

(3) Every habitable room (which means a room constructed or adapted to be inhabited) in a domestic building should comply with the following conditions :—

(*a*) It must have an average height of at least 10 feet.

(*b*) It must have a clear superficial area of not less than 120 square feet.

(*c*) At least one side must be an external wall abutting on the open air.

(*d*) It must be provided, for the purposes of ventilation, with doors or windows opening either directly or through an open verandah into an external open space having an aggregate opening of not less than one-seventh of the superficial floor area of the room, the aggregate opening of the windows not being less than one-fifteenth of such floor area where there are both doors and windows. A window includes an opening for ventilation which is so placed as to admit both light and air without obstruction.[1]

(*e*) Every window must open on to a standard light plane which is a plane drawn upwards and outwards from the exterior face of the building at the floor level of the room at an angle of 63½° to the horizontal and the whole space above such plane must be open to the sky and free from any obstruction other than eaves or sunshades projecting to an extent of not more than one and a half feet from the face of the building.

(*f*) The external open space for any window situated on the side or interior face of a building must in no case be less than 7½ feet in width.

(4) There must be in the rear of every domestic building an open space of not less than 10 feet in depth throughout, extending along the entire width of the building and belonging exclusively to it—unless the rear abuts on a public street or public lane not less than 20 feet wide.

(5) No tenements or ranges of buildings can exceed four storeys in height and cannot be built unless they abut upon a street ; if less than 100 feet in length they may be built away from a street, but must have adequate direct access."

Under section 13 (1), any person who—

(*a*) Commences,[2] continues or resumes building operations in contravention of any provisions of Chapter I of the Housing Ordinance ;

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1. See the amending Ordinance No. 13 of 1931.
2. See Perera *vs.* Silva (1930) 8 Times L.R. 1 to ascertain what operations would amount to "commencing a building."

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(*b*) Deviates from any plan or specification approved by the Chairman without his written permission ;

(*c*) Executes any building operation in contravention of any of the provisions of this Ordinance or of any local bye-law ;

(*d*) Fails to comply with any lawful order or written direction of the Chairman ; or

(*e*) Causes any other person to do any of the acts above enumerated—

Or, if such person cannot be found, the owner of the building in question is liable on summary conviction to a fine not exceeding Rs. 300 and to a daily fine of Rs. 25 for every day on which the offence is continued after conviction.

(2) In any case in which any person is convicted under this section, the Police Magistrate may, on the application of the Chairman, make a " mandatory order " requiring such person or the owner of the building or both, within a time limited in the order, to demolish the building in question, or to alter it in such a way as to bring it into accordance with law, and in the event of such mandatory order not being complied with, may authorise the Chairman to demolish, alter, or otherwise deal with the building in such a manner as to secure compliance with the order and to recover the expenses thereby incurred in the same manner and by the same process as a rate.

Under this section then, a person who infringes the provisions of this Ordinance not merely becomes liable to a fine of Rs. 300—not merely may be called upon to pay a continuing fine of Rs. 25 per day—but has the further punishment of a mandatory order being issued against him. The " may " in this section, however, has not the force of " shall " and is therefore merely permissive.[1] A Magistrate is not compelled to make such an order ; he can use his discretion. A mandatory order can only be made after conviction on a separate application by the Chairman : the proceedings cannot be taken as part of the prosecution for the offence. The accused must first be convicted : conviction includes even a plea of guilty where the accused has been warned and discharged.[2] The Chairman is not entitled to a mandatory order as a necessary consequence of the conviction.[3] When an application is made the party concerned should be called upon to show cause against it,[4] and any order made thereon should be made on a judicial finding as to the necessity or expediency of demolition or otherwise.[5] The fact that a Municipal Council is satisfied as to the necessity of demolition does not affect the discretion of a Magistrate. Thus, where it appeared that the desire on the part of a Chairman to have a building demolished was not due to considerations of sanitation or public convenience, but was in the pecuniary interests of the Council (viz., to escape the payment of compensation at the time of acquisition for a future widening of the street), it was held that the application should have been refused.[6] Further, an order for the demolition of a building can be justified only if such building contravenes in any way

1. Bartholomeusz *vs.* Fernando (1919) 7 C.W.R. 27.
2. Vander Smaght *vs.* Pompeus 4 Times L.R. 61.
3. Vandersmaght *vs.* Gunasekara (1932) 2 C.L.W. 192. This case also decides that a mandatory order can but refer only to that portion of the building which offends against the law.
4. Bartholomeusz *vs.* Deen (1931) 1 C.L.W. 77.
5. Anthonisz *vs.* Fernando (1919) 21 N.L.R. 473.
6. Bartholomeusz *vs.* Perera (1919) 7 C.W.R. 109

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the express provisions of the Ordinance. Per Dalton, J.[1] "I cannot conceive of an order of demolition being made even if some provision of the Ordinance was contravened, if by some alteration it could be brought into accordance with the law. It would be unreasonable to interpret this section otherwise. The discretion vested in the Magistrate must be reasonably and judicially exercised." For, the section empowers a Magistrate to issue a mandatory order either to demolish the building or to alter it and bring it into conformity with the law. A Municipal Magistrate had no jurisdiction to entertain a charge under section 13 (1) of this Ordinance ;[2] but a recent proclamation has removed this disability.[3]

No person can occupy any building constructed after 1915 without obtaining a "certificate of conformity," on pain of being liable to a daily fine of Rs. 25 as long as the occupation continues.

If any dwelling-house is found by a Chairman to be unfit for human habitation, he may apply to the Magistrate of the District for "a closing order."[4] This is a mandatory order prohibiting the use for human habitation of such dwelling-house until it is rendered fit for that purpose. The Magistrate may make such an order after issuing notice on the respondent. Any person who leases or lets or allows such a building to be occupied while a closing order is operative is liable to a daily fine of Rs. 50, and any person who inhabits or continues to inhabit the same after the time in the order has expired is liable to a daily fine of Rs. 5. But a lessor who leases before the making of a closing order is not guilty.[5] After a closing order has remained operative for three months, the Chairman may apply to the Magistrate for a mandatory order authorising the Chairman to demolish the building. This order can only be made after notice to the owner and may be postponed for six months by the Magistrate, if the owner undertakes to render the dwelling-house fit for human habitation. No mandatory order for demolition can issue where the building does not contravene some provision of the law, or even where by some alteration it can be brought into conformity with the law.[6] Any room which does not comply with the standard requirements as to size, ventilation, etc., is regarded under the Ordinance as a room unfit for human habitation.[7] Where a closing order is issued, the Municipal authorities cannot apply to buildings erected before 1915 the rule requiring standard size windows given in the schedule to the Ordinance.[8] Nor does the rule about abutting upon a street apply to tenements for which special provision is made under rule 7 (*a*) of the schedule to the Ordinance. A mandatory order should not be asked for unless the Chairman or some superior officer of the Municipality to whom his powers have been delegated is satisfied that the order for demolition is justified in the particular circumstances of the case.[9] An appeal lies to the Supreme Court from a closing order.[10]

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1. Yatawara *vs.* Nagoor Meera Saibo (1925) Times L.R., Vol. III, 117.
2. VanderSmaght *vs.* Sangarapillai (1930) 31 N.E.K. 367
3. See Gazette No. 7,786 of 20th June, 1930, regarding Municipal Magistrate, Colombo.
4. Section 74, *et seq.*
5. Horan *vs.* Narayan Chetty (1928) 29 N.L.R. 198. 5 Times L.R. 69.
6. Chairman, Local Board, Kurunegala *vs.* Meera Saibo (1925) 27 N.L.R. 83. 3 Times L.R. 117.
7. Section 96.
8. Horan *vs.* Adamjee (1928) 29 N.L.R., p. 1.
9. Bartholomeusz *vs.* Deen (1931) 33 N.L.R. 235. 9 Times L.R. 50.
10. The Chairman, S.B., Matale *vs.* Kanagaratnam (1922) 24 N.L.R. 185.

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"Overcrowding" arises when, for each adult residing in the room, there is not a floor space of 36 square feet and a free air space of 360 cubic feet, and for each child under 10 years of age, a floor space of 18 square feet and a free air space of 180 cubic feet.

"Obstructive buildings" may be acquired by the local authority or may be ordered to be demolished by the owner.

No person can erect any masonry boundary wall or gateway on any street within 20 feet of the centre of the street or within any street lines where such lines have been defined, without the permission of the Chairman—except under a penalty of a fine of Rs. 100 and a forfeiture to all claims for future compensation in the event of acquisition.

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CHAPTER XL.

PLANTING OFFENCES.

As regards offences which refer to plantations, there are three Ordinances which deserve special consideration. So early as in 1904, it was realised that thefts of cacao in certain areas should be specially prevented and an Ordinance[1] was enacted and made applicable to certain portions of the Matale, Kandy, Kegalle and Kurunegala Districts. Under it, all dealing in cacaŏ must be by license ; and no sale or offer for sale can take place except to licensed dealers ; and no licensed dealers can purchase except between sunrise and sunset, or except at their licensed premises. A sale is complete even if preparations are made for weighing the cacao.[2] The Ordinance seeks to prevent theft by measures which would make transactions in cocoa traceable, rather than by insisting that every licensed purchaser should make his own purchases ; so that a servant of a licensee can purchase on behalf of his master.[3] A far-reaching section was introduced which enacts : "Any person who is found or is proved to have been in possession or charge of any cacao which is suspected to have been stolen may be charged with being or having been in possession of cacao which is generally suspected of having been stolen, and if such person does not give an account to the satisfaction of the Police Magistrate as to how he came by such cacao, and the Police Magistrate is satisfied that having regard to all the circumstances of the case there are reasonable grounds for suspecting such cacao to have been stolen, such person may be convicted of an offence under this section." This section also empowers Peace Officers to seize such cacao and to arrest the offenders. The burden of proof that the cacao is legitimately possessed and is not stolen is on the defence.

The Ordinance also provides against the giving of false information and the making of false declarations.

A similar Ordinance[4] was enacted in 1908 for the prevention of rubber[5] thefts. All sale or offer for sale—except to licensed rubber dealers between sunset and sunrise and at licensed premises—is made an offence ; and the vendor must be personally known to the dealer. Knowledge of the vendor by sight is not sufficient personal knowledge : a knowledge by name is also necessary.[6] A servant or carrier to whom rubber had been entrusted for conveyance to a shop cannot be said to have "taken delivery of rubber for sale" within the meaning of section 3 of this Ordinance.[7] The "sale" or "purchase" proper could

1. No. 8 of 1904 as amended by later Ordinances.
2. Sangaralingam *vs.* Mohamed Ally (1915) 19 N.L.R. 114.
3. Packir Ally *vs.* Mohideen (1915) 18 N.L.R. 452.
4. No. 21 of 1908 as amended by later Ordinances, Vol. III, p. 536.
5. "Rubber plant" means—
   Hevea Brasiliensis (Para), *Manihot Glajiovii* (Ceara),
   Castilloa elastica, *Ficus elastica* (Rambong), and any other proclaimed plant.
6. Goonetilleke *vs.* Dias (1919) 21 N.L.R. 211.
7. Albert *vs.* Baptist (1930) 32 N.L.R. 73.

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be easily distinguished from an attempt, *e.g.*, where the vendor is weighing and the vendee has both money and the necessary documents in his pocket.[1]

Possession of any rubber or wet rubber which is suspected to have been stolen is, as in the case of cacao, regarded as criminal possession; and the burden of proof is on the accused to show how he came by it. Formerly, it was held that such possession meant present possession;[2] but an amending Ordinance[3] made a person liable to be charged not only for having been in possession of rubber which he suspected to have been stolen, but also for having been in possession of such rubber though he may not be in possession of it at the time of the offence.[4] Where there is an actual case of theft and not merely a suspicion of theft, the Rubber Thefts Ordinance does not apply,[5] for the offender is liable to be dealt with under the Penal Code.

The Ordinance provides against the giving of false information and the making of false declarations; it also makes it penal to declare as having produced from a particular land more rubber than could reasonably have been derived from it, unless the declarant accounts for such excess to the satisfaction of the Court. To determine this excess, an average of production before or after the period in question may be taken as a standard.[6] An agent of the owner of rubber is not entitled to sign a declaration in the form C under this Ordinance.[7]

Under the Protection of Produce Ordinance,[8] any person found in possession of any tea plant, tea stump, tea seed, or tea leaf (whether in a natural or manufactured state), any rubber plant, rubber stump, or rubber seed, and the fruit of the coffee or the cardamom plant, under such circumstances that there is reason to suspect that the same is not honestly in his possession and he is unable to give to the Court, before whom he is tried, a satisfactory account of his possession thereof, he is guilty of a summary offence punishable with imprisonment for six months or a fine of Rs. 200 or both (and on second or subsequent conviction with imprisonment for a year or a fine of Rs. 500 or both). Where two bags of tea were sent by the accused through his servant to a boutique to be weighed and delivered to an intending purchaser and were seized by the Police, they were held to be in the possession of the accused within the meaning of this section.[9] But where tea is found in a box under the seat of a rickshaw, the person travelling in the rickshaw cannot be said to be in possession of the tea.[10]

Every person found loitering or lurking about a plantation is guilty of an offence punishable with imprisonment for six weeks or a fine of Rs. 25, unless he can give a satisfactory reason for being there; and no person can purchase or receive any produce from any labourer employed, whether temporarily or permanently, in any plantation, except

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1. Nair *vs.* Cassim (1926) 3 Times L.R. 73.
2. Weerabanda *vs.* Casie Chetty (1916) 3 C.W.R. 126.
3. Section 4 of Ordinance No. 39 of 1917 incorporated in the original Ordinance.
4. S. I. Police, Matale *vs.* Dissanayake (1919) 6 C.W.R. 251.
5. David Singho *vs.* Mohamado (1918) 5 C.W.R. 192 and Gunasekera *vs.* Pieris (1920) 2 Law Recorder 122.
6. S.I. Police, Matale *vs.* Dewaya (1919) 6 C.W.R. 308.
7. Inspector of Police, Alutgama, *vs.* Paul Silva (1926) 4 Times L.R. 93.
8. No. 38 of 1917, Vol. III, p. 527.
9. Soysa *vs.* Davith Singho (1928) 29 N.L.R. 118.
10. Dissanayake *vs.* Perera (1928) 29 N.L.R. 490; 5 Times L.R. 174.

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under the written authority of the owner or person in charge of the plantation. Plantation means any land of not less than 10 acres in extent grown with coffee, tea, cacao, cardamoms, rubber, or coconut; and produce means the produce of any of these trees (including the trees or plants themselves or any parts or derivations thereof).

Where an accused is charged with theft of any produce from any such plantation either under the Penal Code or under any other enactment, the jurisdiction of the Village Tribunal is ousted in certain areas.[1]

The Rubber Restriction Ordinance[2] came into force in 1922 and provides for the restriction of production and export. Any person committing a breach of any of the provisions of the Ordinance or of any of the rules made thereunder, or making default in complying with a requirement of the Rubber Controller made under the Ordinance, or resisting or obstructing him or his authorised agents in the performance of duties imposed upon them by the Ordinance, or who makes a false statement in any document or return which is required by the Ordinance to be verified by a declaration, is liable to a fine of Rs. 1,000 or imprisonment for six months or both on summary conviction and the rubber is liable to forfeiture. The false statement must be made in any document or return which is required to be verified by a declaration.[3] And the declaration should be in the prescribed form.[4]

After the amendment of the Labour Ordinance in 1921, the only offences that have remained punishable under the old Ordinance[5] are the giving of a false character to a servant or labourer, punishable with a fine of Rs. 100; the making of a false statement or the denial of previous employment or the altering of character by a servant or labourer punishable with a fine of Rs. 30, and the fraudulent disposal of advances by a kangany which is an indictable offence. Any person who gives, issues, or accepts any *tundu* in respect of Indian cooly labourers is now liable to a fine of twenty thousand Rupees.[6] The word *tundu* is to be given its ordinary significance which is current among estate labourers. The Indian Labour Ordinance No. 27 of 1927 prescribes the minimum rates of wages and the duties and liabilities of employers thereto. "Employer" in section 2 includes the owner of an estate although he may have taken no part in the engagement of labourers.[7] "Labourer" is a labourer defined by section 3 of Ordinance No. 13 of 1889.

Under the recently enacted Tea (Control of Export) Ordinance,[8] any breach of the provisions of the Ordinance or of rules made thereunder is punishable with a fine of one thousand rupees: so is resistance or obstruction of any person in the performance of duties under the Ordinance, and the making of a false declaration or return. But no prosecution can be entered for any of these offences without the written sanction of the Attorney-General.

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1. The Police Courts of Colombo, Kalutara, Negombo, Henaratgoda, Avisawella, Matugama, Panadure, Badulla, Haldumulla, Kurunegala, Dandegamuwa, Chilaw (and Marawila) must try all cases of thefts of any produce whatever; and the Police Courts of Galle, Balapitiya, or Matara, only thefts of produce from rubber and tea trees. See Gazette No. 6,959 of 2nd August, 1918.

2. No. 24 of 1922, Vol. III, p. 1001.

3. The rules made under the Rubber Restriction Ordinance providing for assessment and production are published in Ceylon Government Gazette Extraordinary No. 7,422 of 4th October, 1924. Also see notifications in Gazettes Nos. 7,436 of 19th December, 1924; 7,441 of 16th January, 1925 and 7,461 of 8th May, 1925.

4. Thaine *vs.* Appuhamy (1925) 3 Times L.R. 69.

5. No. 11 of 1865, Vol. I, p. 564.

6. No. 43 of 1921, Section 5, Vol. I, p. 589.

7. Ibrahim *vs.* Edirisinghe (1931) 32 N.L.R. 214; 8 Times L.R. 88.

8. No. 11 of 1933.

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CHAPTER XLI.

MISCELLANEOUS ORDINANCES.

(1) Nuisances Ordinance.

This Ordinance,[1] providing as it does for the better preservation of public health and the suppression of nuisances, creates certain offences and empowers the Board of Health for various Provinces to make bye-laws and to take steps for the abatement of nuisances. A breach of any of such bye-laws is punishable with a fine of Rs. 20, and with a further fine of Rs. 5 per day in the case of a continuing offence. These bye-laws may be regarded as subsidiary to any other bye-laws made by a local body under the authority of the Ordinance which has created that body, *e.g.*, Municipal bye-laws or bye-laws of a Sanitary Board.

The following offenders are under this Ordinance liable to a fine of Rs. 50, and to a further penalty of Rs. 10 per day in the case of a continuing offence.

(i) Whoever, being the owner or occupier of any house, building or land in or near any road, street, or public thoroughfare, whether tenantable or otherwise, keeps or suffers the same to be in a filthy and unwholesome state, or overgrown with rank and noisome vegetation so as to be a nuisance to or injurious to the health of any person.

This section casts the liability both on the owner as well as the occupier ; but where a tenant is in occupation, the tenant and not the owner is liable primarily.[2] The accused should have had such a control over the premises as is involved in the allegation that he kept or suffered the same to be in the state complained of.[3] The owner of premises which are kept in a filthy and unwholesome state is liable even though the premises have been leased for a term of years and sublet by the lessee[4]—unless the indenture of lease provides that the lessee should be responsible for their cleanliness.[5] But the lessee is liable, all the same, after proper notice[6] ; and an owner who has by his lease parted with all practical control over the premises can hardly he held responsible, unless it is shown that he has actual or constructive knowledge of the unwholesome condition in which the premises are.[7] It follows, therefore, that to justify a conviction under this section, there must be evidence that the accused is either a proprietor or a person having control over the premises in question.[8] There must also be evidence that such premises are in or near any road or public thoroughfare.[9]

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1. No. 15 of 1862, Vol. I, p. 450.
2. Lembruggen *vs.* Rajapakse, Ram. (1872-75) 252.
3. Thomas *vs.* Perera (1878) 1 S.C.C. 45.
4. Samadin *vs.* Kurukkal (1910) 2 Cur. L.R. 68.
5. Jayasinghe *vs.* Sheriff (1916) 2 C.W.R. 67.
6. De Silva *vs.* Idroos (1910) 4 Weer. 62.
7. Blacker *vs.* Aserappa (1911) 5 Weer. 94.
8. Toussaint *vs.* Maha Nayaka Unnanse (1900) 4 N.L.R. 63.
9. P. C., Matara 72795 Gren. (1873) P.C. 109.

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The border of a footpath used by the public, though to a limited extent, would seem to suffice.[1] There must also be proof that the state of the premises is a nuisance to or is injurious to the health of any person—though not necessarily of the public at large.

(2) Whosoever has in or upon any house, building, or land occupied by him any foul or offensive ditch, gutter, drain, privy, cesspool, or other receptacle.

This section limits the liability to the occupier alone. Receptacle means a receptacle containing water or matter from which foul or offensive smells arise.

(3) Whosoever, being the occupier of a house, building, or land, in or near any road, street, or public thoroughfare, keeps or allows to be kept for more than twenty-four hours, otherwise than in some proper receptacle, any accumulation of dung, offal, filth, refuse, or other noxious or offensive matter, or suffers such receptacle to be in a filthy or noxious state, or neglects to employ proper means to remove the filth therefrom and to cleanse and purify the same.

The liability is limited to the occupier alone. Noxious means injurious to health. The premises must be in or near a public road.

(4) Whosoever keeps in or upon any house, building, or land occupied by him any cattle, goat, swine, or other animal so as to be a nuisance to or injurious to the health of any person.

The generic term " other animal " includes a dog ; and permanent interference with comfort, such as is occasioned by dogs which, being tied and kept in a neighbour's compound, bark with little or no intermission during the night, is a nuisance within the purview of this section.[2]

(5) Whosoever, being the owner of a house, building, or wall, allows the same to be in a ruinous state or in any way dangerous to the inhabitants of such house or building, or to the neighbouring houses or buildings, or to the occupiers thereof, or to passengers.

Under this section, the actual owner and not an agent or representative of the owner is liable.[3] The question whether a building is in a ruinous or dangerous state is a question of fact. The Court has the power to order that the building should be pulled down.

(6) Whosoever suffers any waste or stagnant water to remain in any place within the premises occupied by him, or allows the contents of any privy or cesspool to overflow or soak therefrom.

All the persons who live on the same premises but use a separate kitchen from which all the filth has been allowed to accumulate would be liable.[4]

(7) Whosoever throws, puts, or casts, or causes to enter in any stream, tank, reservoir, well, cistern, conduit, or aqueduct, any dead animal or any dirt, rubbish, filth, or other noisome or offensive matter or thing, or causes or suffers to run, drain, or be brought thereinto, any unwholesome or offensive liquid, matter, or thing, or flowing from any house or building or from any ground occupied by him, or does anything whereby any such water is in any degree fouled or corrupted.

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1. P. C., Kalutara 56981 Ram. (1877) 59.
2. Snowden *vs.* Rodrigo (1892) 2 C.L.R. 113.
3. Gunatilleke *vs.* Philip (1890) 1 C.L.R. 21.
4. Tambi *vs.* Valayanappa Chetty Ram. (1863-8) 211.

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Thus, the burial of a corpse in the vicinity of a tank so that the tank is actually or is likely to be corrupted,[1] or the washing of dirty linen in a public tank used only for bathing purposes,[2] would come within the ambit of this penal clause. Where the accused set dynamite in the bed of a river and after exploding it removed the larger fish but left the smaller dead ones to rot in the stream, by which the stream was rendered so foul as to be unfit for either drinking or bathing purposes, it was held that the accused was guilty under this section.[3]

(8) Whosoever keeps in any market, shop, building, stall, or place used for the sale of butcher's meat, poultry, fish, fruit, or vegetable, or exposes or allows to be exposed for sale in any place or way any animal, carcase, meat, poultry, game, flesh, fish, fruit, or vegetable which is unfit for the food of man.

This section and the following section should be compared with section 266 of the Penal Code. A person cannot be convicted under the latter section except upon proof that he knew or had reason to believe that the food that he sold was unsound or unfit for human consumption.[4] The article must be unfit for the food of man : even the mere keeping of it in a stall is made punishable. It is not necessary, therefore, to prove that it was exposed for sale.

(9) Whosoever sells or exposes for sale as food or drink for man any article which has been rendered or has become noxious or unfit for such use, knowing or having reason to believe the same to be noxious or unfit for such use.

The article must be sold, exposed, or offered as food or drink for man : it must be an article of food or drink as such : thus, baking powder being merely an ingredient is not such an article,[5] though raw grains are. The article must be noxious or unfit for human consumption. Noxious means injurious to health : mere adulteration does not necessarily render an article noxious : thus, the adding of water to milk does not render it unfit for human consumption[6] ; nor does the admixture of a large quantity of dirt, wood, matches, charcoal, etc., to wheat render it noxious or unfit.[7] There must be on the part of the accused a knowledge or reason to believe that the article was noxious or unfit for human consumption.

(10) Whosoever keeps any manufactory or place of business from which offensive or unwholesome smells arise, without a license for that purpose as provided in the fourth section of this Ordinance.

This section should be differentiated from the bye-law against "dangerous and offensive trades." For both, a license is necessary from the proper authority.

(11) Whosoever keeps or deposits any coconut husks, coir, or any other substance at or near such places or in such a manner as to be a nuisance to or injurious to the health of any person.

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1. Ram. (1877) 231.
2. Gren. (1873) P.C. 20.
3. Kiri Banda *vs.* Atta (1880) 3 S.C.C. 23.
4. Nair *vs.* Mathew Fernando *et al* (1924) 27 N.L.R. 56.
5. James *vs.* Jones (1894) 1 Q.B. 304.
6. Sanitary Inspector, Point Pedro *vs.* Manuel Pillai, P.C. Pt. Pedro, 1530. S.C. Judg. of 19th June, 1925.
7. Baishtab Charan Das *vs.* Upendra Nath Maitra 3, Calcutta W.N. 66.

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Where the accused being present was directing his coolies to deposit husks, he was held to be guilty.[1]

(12) Whosoever throws or puts or permits his servants to throw or put, any earth, dirt, ashes, filth, refuse from any garden, kitchen, or stable, or any broken glass or earthenware, or other rubbish, on any street, road, or public place or passage, or into any sewer or drain.

All offences under this Ordinance abate after three months from the date of the commission of the offence.

These nuisances must be distinguished from "public nuisances," for the prevention of which a special procedure is laid down in the Criminal Procedure Code and about which we have already spoken in an earlier chapter.

(2) Vagrants.

Under the Vagrancy Ordinance,[2] every person behaving in a riotous or disorderly manner in any public street is liable to a fine of Rs. 5. Even the mere use of abusive language may amount to disorderly conduct.[3] After the fourth conviction, the offender becomes "an idle and disorderly person." An "idle and disorderly person" is (1) any person who being able-bodied wanders about and begs for alms, (2) or any common prostitute who wanders about in public places and behaves in a riotous or indecent manner, (3) or every person who lodges in another's verandah, shed, etc., without leave of the owner and has no visible means of subsistence and cannot or does not give a good account of himself, (4) or every person who defaces other's walls or buildings, (5) or every person who without lawful excuse follows and accosts any person against his will or to his annoyance.[4] The fact that the accosting caused annoyance must be proved by the evidence of those actually annoyed.[5] Each such person is liable to a fine of Rs. 10 or imprisonment for two weeks. A second conviction doubles the penalty and alters his sobriquet to a "rogue and vagabond." Any person who wilfully exposes his person or exhibits obscene pictures, etc., to the annoyance and disgust of others, or who exposes any wounds, deformities, or diseases to gather alms, or who gathers alms under false pretences, is also regarded as a "rogue and vagabond" liable to the same penalties. Every second conviction of a rogue and vagabond makes him an "incorrigible rogue" liable to imprisonment for four months and to corporal punishment of 24 lashes ; such person may be further called upon to give security for good behaviour (in default of which he may be sentenced to hard labour for another four months.) No prosecution can be entered against any vagrant after the lapse of one month. Every vagrant can be arrested by a Peace Officer without a warrant.

Every person convicted as a vagrant for begging for alms or for having no visible means of subsistence, except priests or pilgrims, may be ordered to be detained in the House of Detention.[6] Such an order can only be made by Magistrates of those districts where the local bodies

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1. Ram. (1868-8) 115 Regina *vs.* Santia Adial.
2. No. 4 of 1841, Vol. I, p. 136.
3. Ram. (1877) 61.
4. Ordinance No. 7 of 1889, Vol. I, p. 145. See Rapu *vs.* Abraham (1918) 21 N.L.R. 188 for a discussion of the phrase "lawful excuse."
5. Govindan *vs.* Silva (1929) 30 N.L.R. 350. 6 Times L.R. 95.
6. Ordinance No. 5 of 1907, Vol. I, p. 146.

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contribute their quota to the upkeep of the House in Colombo. Any vagrant ordered to be so detained is either found work or allowed to leave the Colony.

Any person who keeps or manages or assists in the managing of a brothel, or who permits his premises to be used as such, is liable to a fine of Rs. 500 or to imprisonment for six months for a first offence, and to double that penalty for a second offence.[1] A brothel may be defined as a house run by a brothel-keeper to which men resort for purposes of prostitution with women who are found in the house.[2] It may even be a place resorted to by persons of both sexes.[3] Evidence of a single act of fornication is however insufficient to support a charge under this section.[4] A person who manages a brothel cannot be dealt with under section 105 of the Criminal Procedure Code as for a public nuisance, but must be proceeded against under this Ordinance.[5]

The operation of this Vagrancy Ordinance was considerably extended in 1919[6] by further provision against acts of indecency. It was made a summary offence, punishable with a fine of Rs. 100 or imprisonment for six months, to be soliciting any person for illicit sexual intercourse or for any act of indecency, or to be found committing any act of gross indecency in or about a public place. The word "illicit" in this section means irregular and improper according to the ordinary standards of morals and not merely "illegal" or "prohibited by law." The word is defined in the Oxford Dictionary as "not authorised or allowed, improper, irregular, especially not sanctioned by law or custom, unlawful, forbidden."[7] Any person found in any public or Crown enclosure or on any private enclosure attached to a dwelling house (except at the invitation of the inmates) under such circumstances that it is reasonable to infer that he is there for immoral purposes is liable to the same penalty, unless he can explain his presence on the premises to the satisfaction of the Court. It would be no offence if the place where the accused is found is not an "enclosure" at all.

Any person who knowingly lives wholly or in part on the earnings of prostitution and any person who systematically procures persons for illicit or unnatural intercourse is guilty of a summary (and also of an indictable) offence. A prostitute herself is held not to be living on the earnings of her own prostitution.[8] Every male person who lives with a prostitute or is habitually in her company and every person whether male or female who exercises control over a prostitute in such a manner as to show that he or she is aiding or abetting in the prostitution are deemed to be knowingly living on the earnings of prostitution.[9]

By Ordinance No. 3 of 1930 every person who having the custody, charge or care of a girl under sixteen years of age—causes or encourages

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1. Ordinance No. 5 of 1889 as amended by section 4 of 21 of 1919, Vol. I, p. 143.
2. De Silva *vs.* Suppa (1919) 21 N.L.R. 119.
3. Morris *vs.* Cornelis (1914) 3 Bal. Notes 48.
4. Abeysinghe *vs.* Pitanalegedera (1929) 6 Times L.R. 124.
5. Perera *vs.* Sophia (1919) 7 C.W.R. 34.
6. Ordinance No. 21 of 1919 embodied in No. 4 of 1841.
7. Lembruggen *vs.* Hendrick Silva (1932) 1 C.L.W. 262.
8. Rahiman Saibo *vs.* Chellan (1923) 1 Times L.R. 280. Edwards *vs.* Siripali (1932) 1 C.L.W. 380.
9. When any male youth between the ages of 12 and 21 is convicted of any of the foregoing two sections or is guilty of "procuring" in the city of Colombo, he may be ordered by the Magistrate to find security of good behaviour for 12 months or to be detained in a Reformatory or Industrial School; in the latter event, the proceedings are liable to compulsory revision by the Supreme Court. See section 10 and proclamation in Gazette No. 7060 of 24th October, 1919.

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her seduction or prostitution or unlawful carnal knowledge is guilty of a non-cognisable summary offence punishable with a fine of one hundred rupees or with imprisonment or with both. No prosecution can be entered without the sanction of the Attorney-General. After conviction the Magistrate may demand security from parent or guardian and may even order removal of the girl from his custody and direct that she be detained in a place of safety. Inducing her to escape from such a place of safety or harbouring or concealing her is also a similar offence. Any probation officer can lay information before a Magistrate and obtain a search-warrant for the purpose of ascertaining whether any offence is being committed under this Ordinance in respect of any girl.

(3) Firearms Ordinance.

This Ordinance[1] provides for the licensing of all "guns." A "gun" includes every gun, rifle, revolver and pistol—also an air-gun, but not a toy-gun where a missile is discharged by the force of a spring alone. No person can manufacture or expose or keep for sale any gun in Ceylon without a license from a Government Agent: and no person can purchase one without a permit to purchase; no person can transfer any gun by way of sale, pledge, or gift, without a license. No person can repair any gun for reward unless he is a licensed repairer; and no such repairer can undertaken to repair unless a license for the gun is deposited with him.

No person can have in his custody or possess or use any gun unless he holds a gun-license for the same issued to him by the proper licensing authority, or unless he is a licensed repairer, manufacturer, dealer, or a person employed under him. That person is said to be the possessor of a gun who has the actual control of it.[2] Temporary custody entrusted by a duly licensed person and custody within one month by a member of the family of a deceased person who held a license at the date of his death are excluded from the operation of this section. A watcher of an estate may possess his master's gun if the employer has taken out or issued a watcher's permit. Such a permit must be taken out for every watcher, so that in the event of a watcher being dismissed or replaced, a new permit is necessary.

Ten days' grace is allowed for time-expired licenses or for guns recently imported or purchased under a permit. That is to say, when a person purchases a fire-arm he is permitted by law to possess the same for ten days without a license provided that he makes no use of such gun during the interval. The "use" contemplated here is the conscious application of the gun to the purpose for which it is designed. A mere handling of the mechanism does not constitute such an application, even if the gun gets discharged by careless handling.[3] Antique or obsolete guns kept as a curiosity or ornament are also excluded by express provision.

Any occupier of any house or premises in which any gun is found is deemed to be the possessor of such gun—unless he proves that such gun was in such house or premises without his knowledge or privy, or that some other person is the possessor of the gun. In other words,

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1. No. 33 of 1916, Vol. III, p. 435.

2. Ranasinghe *vs.* Brampy (1918) 5 C.W.R. 250. See also De Silva *vs.* Davith Appuhamy (1919) 7 C.W.R. 19.

3. Abdulia *vs.* Samuel (1926) P.C. Point Pedro 2820. S.C. No. 210.

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the burden of establishing his innocence is cast on the accused : and in any prosecution under this Ordinance, the proof that the accused holds a license must be furnished by him. Whenever a person is convicted of possessing or having in his custody or using or carrying any gun without a license therefor, and the gun is proved to be the property of some person other than the person in whose custody it is found, such other person is also guilty of an offence, unless he proves that such first mentioned person had such gun in his custody or carried or used it without his knowledge or against his will. But the conviction of the first named person is a condition precedent to the criminal liability of the owner.[1]

No cartridges can be sold to any person unless the latter produces a gun license authorizing him to possess a gun of the type for which the cartridges sought are adapted. Loss or destruction of any gun licensed under this Ordinance should be reported at once to the licensing authority.

Every offence under this Ordinance is punishable with a fine of Rs. 100 and in the case of a second or subsequent conviction, imprisonment for six months may be imposed in lieu of or in addition to a fine. The offence of illicitly importing guns is indictable before a District Court and punishable with a fine of one thousand Rupees or imprisonment for six months or both.

The Court has also the power to order that the gun in respect of which any offence is committed may be confiscated. Confiscated guns or barrels are transmitted by the Court to the nearest Police Station for forwarding to the local Kachcheri, for destruction or sale as the case may be.

No prosecution can be entered after the lapse of three months from the time at which the offence is alleged to have been committed. Thus, for the non-renewal of a gun license, a man may be prosecuted only up to the 31st of March following ; but the possession of a gun without a license becomes an offence on each day that the gun is so possessed and therefore does not become barred till after the lapse of three months from the date of last possession.

The licensing fees payable annually are as follows :—

	Rs.	Cts.	
For every muzzle-loading gun	1	00	per barrel
For every breach-loading gun and for every pistol other than a revolver or an automatic pistol ..	2	50	,,
For every rifle	5	00	
For every revolver or automatic pistol	10	00	

In proclaimed areas, the licensing fees for every single-barrelled muzzle-loading gun may be reduced by the Government Agent with the approval of the Governor.

(4) Vehicles Ordinance.

We have already considered the general provisions of this Ordinance[2] in the chapter on motoring. Among the other offences most frequent in a Police Court are :—

(1) Failing to return the original and duplicate of the license and plate within seven days of the expiration of the period in the license.

1. Mohandiram G.P. *vs.* Nandoris Silva, 3 Times L.R. 47.
2. Ordinance No. 4 of 1916, Vol. III, p. 363.

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This being not a continuing offence[1] is, like all other offences under this Ordinance, prescribed within three months and cannot be prosecuted for after the expiration of that period. No plate is necessary for mechanically propelled vehicles; but the hirer's license must, nevertheless, be returned. (Section 15.)

(2) Failing to affix a proper name-board or the number plate. A proper name-board is one which should have white letters on a black back-ground. The number plate must be fixed on the off or the right side of the frame of the cart and the number and the year thereon should be plainly and distinctly visible. It is an offence to allow an old plate to remain fixed on any vehicle.

(3) Employing or suffering an incompetent person to drive a licensed vehicle. A person under the age of seventeen is an incompetent person.

(4) Driving[2] without two lighted lanterns; these must throw a white light in front and a red light behind. A hurricane lantern suspended from the tent or the platform of a cart is not enough. A bicycle, tricycle, or wheel-barrow may have one lamp; all other vehicles must have two, placed on either side so as to show their width. A tail lamp for vehicles other than mechanically propelled ones is not essential.

(5) Failing to give notice of transfer to the proper authority. Where in a prosecution for failing to return the number plate and license, the accused pleads that he has sold the cart, he may be convicted under this section for transferring without informing the licensing authorities. The fact that a vehicle has been destroyed or has been rendered unfit for use must also be notified.

(6) Using or permitting or suffering to be used any unlicensed vehicle or any vehicle for which a license is time-expired. Though non-renewal of a license is barred after three months from the date of expiration of the license, every user of a vehicle without such a license is a distinct offence and therefore becomes barred only after three months from the date of use.

(7) Refusing to let a licensed vehicle for hire without reasonable cause. The proof of reasonable cause is on the accused. This section is important in a town like Colombo where rickshaw coolies refuse indiscriminately to pull their rickshaws for persons from whom they do not expect more than the legal fare. Anticipation that the legal fare or a portion of it will not be paid is not a reasonable cause; for, the Ordinance provides a summary way of recovering the legal hire due. The legal hire may be the hire fixed for the particular town or district by its local body; and if there is no such scale of charges, it means a reasonable hire.

In all these offences, the accused usually plead guilty: so that a detailed consideration of each is not required. For a second or subsequent conviction for failing to produce a license when lawfully demanded, the vehicles and the animals are liable to confiscation (section 47). The burden of proof that a particular vehicle is licensed is on the accused (section 50).

The "rule of the road" applies to all vehicles including carts and bicycles; and the latter must sound bells or whistles.

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1. Anderson *vs.* Carrim (1913) 1 Wije. 34.
2. Riding a push bicycle means driving it: Weragama *vs.* Dingiri Banda (1932) 1 C.L.W. 418.

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Carters may render themselves liable also under the Thoroughfares Ordinance[1] for leaving their carts on the public road without the animals being yoked thereto, or for leaving on the road stones, etc., used for the purpose of blocking the wheels, or for carting goods (*e.g.* timber) —which project beyond the wheels or sides of the cart. The penalty under this Ordinance is a fine of Rs. 50 ; that under the Vehicles Ordinance is usually Rs. 100. The liability of carters under the Police Ordinance has been considered elsewhere.

(5) Butchers' Ordinance.

This Ordinance[2] provides for the licensing of "butchers" who are defined as "persons who slaughter animals or expose for sale the meat of animals slaughtered in the Colony." Every person who carries on the trade of a butcher without an annual license is liable to a fine of Rs. 100. An isolated act of slaughtering a goat and selling its flesh does not make a man responsible for carrying on the trade of a butcher without a license.[3] The intention of the Ordinance is to prevent habitual trading. A servant employed by a licensed butcher need not hold a license himself for slaughtering animals for his master.[4] A butcher who had a license to sell meat can sell offal, for the word "meat"—though not the word "mutton"—includes offal.[5]

The Ordinance imposes certain obligations on the licensee as regards exposure of animals prior to slaughter and the mode of slaughter: it also provides for notice to be given to the proper authorities prior to the slaughter of cattle and for a register to be kept of every slaughtered animal. Any infringement of the conditions imposed in the license either by the principal Ordinance or by any rules or regulations framed thereunder is punishable with a fine. A person who is not a licensed butcher and who wants to slaughter cattle must obtain a special license.

The only important section in this Ordinance that has far-reaching consequences, because of the frequency of cattle thefts in this Island, is section 21 which reads as follows :—

"Any person who is found in possession of any beef or of any fresh hides for which he shall not be able to account to the satisfaction of the Police Magistrate shall be guilty of an offence, notwithstanding that no owner shall appear to prosecute or claim the same as his property, and shall be liable to a fine of Rs. 100 or imprisonment for six months."

The word "beef" includes the flesh—and the word "hide" includes the hide or part of a hide—of any cattle which include oxen, bulls, cows, calves, and tame buffaloes. "Bones" are not "beef," when there is no flesh attached to them.[6]

"The Legislature has purposely enacted this section in a form which casts a wide net for the express purpose of dealing with a class of cases which are serious in themselves and more serious still because of their tendency to provoke crimes of violence, by throwing on persons who are found in the possession of flesh of slaughtered cattle, under any

1. No. 10 of 1861, Vol. I, p. 378.
2. No. 9 of 1893 as amended by No. 14 of 1907, Vol. II, p. 243.
3. Fernando *vs.* Abdul Carim (1908) 3 A.C.R. 28.
4. Ellepola *vs.* Nadar (1919) 21 N.L.R. 184.
5. Abeyasekera *vs.* Mohamado (1919) 21 N.L.R. 69.
6. P.C. Matara 37,467. S.C. 90 of 1926.

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circumstance of suspicion, the burden of showing how they came by it."[1] A Magistrate may charge the accused under this section without first calling upon him to account for his possession—as the explanation of the charge is a direct invitation to him to make any explanation which he can of the circumstances by which he came into possession.[2] The wording of the section does not alter the procedure, but shifts the burden on the accused of proving his innocence. What the prosecution has to establish is that the accused was found in "unusual" possession of beef; it becomes the duty thereupon of the accused to satisfy the Magistrate by giving an account of this possession.

The prosecution must establish that the accused was in actual and exclusive possession. Where it is shown that the beef is found in the accused's room, the requirement as to "actual" possession is satisfied; and where the evidence is such as to exclude all reasonable possibility of the beef having been in the possession of some person other than the accused, the requirement as to "exclusive" possession is satisfied. Thus, where beef is found in a room in the occupation of a man and his wife, the man must be taken to be in actual and exclusive possession of the beef and he is definitely put in the position of having to explain his possession.[3] But where a father and son who were occupying the same house were charged with being in possession of beef which they were unable satisfactorily to account for, it was held that their possession was not so exclusive as to justify a conviction under this section.[4] What should be proved is that the accused was in sole and exclusive possession of the beef. Where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them in particular, unless there are facts pointing to the property being in the conscious control of the possessor.[5] It should also be shown, if necessary, that the beef could not have been introduced from outside by the enemies of the accused.

A person who is charged under this section cannot in the same case be also charged with theft of a cow—nor can he be tried with others who are charged with cattle theft—for the beef alleged to have been found cannot be connected with the animal alleged to have been stolen;[6] and if it can, then the possessor would be equally guilty of theft of that animal.

(6) Pawn-brokers' Ordinance.

This Ordinance[7] is intended for the regulation of the business of pawn-brokers and provides for their being licensed. It only applies to those areas for which it is proclaimed. It casts certain obligations on the pawnees as well as the pawnors, and creates various minor offences, with which we are not concerned. Any person who acts as a pawn-broker without a license is liable for every such act to a fine of Rs. 100, or to imprisonment for six months.[8] A pawn-broker is a person who

1. Dissanayake *vs.* Charles (1909) 3 Leader 1, 3 and 4.
2. Police Sergeant, Tangalle *vs.* Latiff (1914) 17 N.L.R. 411.
3. Keerala *vs.* Appuhamy (1919) 7 C.W.R. 87.
4. Banda *vs.* Harmanis (1919) 1 Law Recorder 49.
5. Police Inspector, Galagedara, *vs.* Punchiala (1924) 6 C.L.R. 70.
6. William *vs.* Dinorissa (1919) 6 C.W.R. 365.
7. No. 8 of 1893, Vol. II, p. 232.
8. Section 24.

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carries on the business of taking goods on pawn : such is a person who receives or purchases goods and lends or pays money thereon not exceeding Rs. 500, with or under an agreement or understanding, express or implied or to be inferred from the nature and character of the dealing, that these goods may be redeemed or re-purchased afterwards on any terms. A boutique-keeper who, without a license, takes pawns from his customers as securities for goods sold by him cannot be convicted under this section[1]—not even if there were express stipulations that the pawns would be redeemed afterwards on the payment of the price,[2] for the section expressly provides that "money" should have been paid, advanced, or lent. If the pawnees' regular occupation is not that of a pawn-broker, a single instance of having lent money on one occasion only on the security of a pledge does not bring him under the pale of this section.[3]

Any person who offers to a pawn-broker an article by way of pawn but refuses or is unable to give a satisfactory account of the means by which he became possessed of it, or who wilfully gives false information to a pawn-broker as to the ownership of the article, or who attempts or endeavours to redeem a pledge not being entitled to redeem, is liable to a fine of Rs. 100. A pawn-broker who suspects that any pledge offered to him is stolen property or is otherwise illegally obtained, has powers both to detain the pawn and the pawnor.

Any pawn-broker who takes on pawn any articles of apparel or linen from a dhoby given to him for washing is guilty of an offence : so is every pawn-broker who commits a breach of any of the conditions of his license or of any of the obligations cast upon him by the Ordinance, *e.g.* who takes an article in pawn from a person under the age of sixteen years, or who acts as an auctioneer, etc. The employees of a licensed pawn-broker if they are not themselves licensed would not be liable for any breach of the Ordinance though the pawn-broker himself would be guilty under section 7 for any acts of his servants committed in the course of his business.[4]

Under section 23 (3) persons under the age of twenty-one cannot be employed as servants to take articles in pawn, but it must be proved that such servant had the authority to take articles in pawn ; if he has no such authority but has to refer to his master or other person, he can only be regarded as assisting his master by attending to his customers.[5]

The "possession" spoken of in section 22 of this Ordinance is an unlawful possession.[6]

(7) Game Protection

Under this Ordinance,[7] various penalties ranging from a fine of a thousand rupees to a fine of one hundred are prescribed for the shooting at, killing, or capturing without a license of tuskers, elephants, wild

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1. Attygalle *vs.* Mohideen Madar (1904) 8 N.L.R. 134.
2. Gunatillekc *vs.* Mam Neina (1908) 2 Weer. 19.
3. Marcus *vs.* Muttuvelu (1905) 2 Bal. 30.
4. Middleton *vs.* Krishnan Pulle *et al.* (1925) 3 Times L.R. 68.
5. Peries *vs.* de Silva (1928) 5 Times L.R. 150.
6. Elaiman *vs.* Palaniappa Chettiar (1932) 1 C.L.W. 395.
7. No. 1 of 1909, Vol. II, p. 873.

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buffaloes and game. A tusker is any wild elephant having a tusk or tusks. A tusk must be distinguished from tushes. Game includes sambur, spotted deer, red or barking deer, paddy field deer, pea-fowl, gray or painted partridge, and Ceylon spur fowl. These animals must be *res nullius* and should not have become the property of some person by domestication. "Elk" does not come within the definition of game.[1]

A license to shoot or capture can be obtained from the Government Agent of the Province by paying the necessary stamp fees.[2] No game license can be issued for the close season, *i.e.* between the first of June and the thirty-first of October in each year. A Government Agent may issue free of stamp duty a license for the destruction of "rogue" elephants. Any tusker, elephant, or buffalo which trespasses upon any cultivated land and any game so trespassing either during the close or the open season may be killed or captured without a license; information of the same must, however, be given forthwith to the nearest Headman, even when the game is killed during night.[3]

An appeal lies to the Governor in Executive Council from the refusal of a Government Agent to issue a license.[4]

It is an offence punishable with a fine of Rs. 100 to shoot at any game between sunset and sunrise unless it is trespassing on cultivated lands, or to lay traps at any time for capturing game or jungle fowl except on cultivated lands; and an offence punishable with a fine of Rs. 50 or imprisonment for three months to shoot at or capture game during the close season. Any person who is found in possession of any fresh meat of game or any fresh hides or horns of game or of any freshly taken skin, feathers, or eggs of any game bird of which he is not able to give a satisfactory account, is liable to a similar penalty.

Birds like pheasants, partridges, francolins and grouse, beasts like roe and fallow deer and English hare, and fish like trout, perch, tench and gourami, are specially protected and cannot be killed or taken without a proper license. Such a license may be issued by the Government Agent or by any recognized Fishing Club.[5] Taking or killing such game without a license or during the close season or in contravention of regulations made for such taking or killing is alike punishable with a fine of Rs. 100, or imprisonment for six months. Any person found during the close season in possession of any of this game not indigenous to Ceylon[6] either alive or dead, or its flesh, and unable to account for it satisfactorily is guilty of an offence punishable with a fine of Rs. 100.

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1. Ahmath *vs.* Appuhamy (1919) 21 N.L.R. 154. *Quaere*: Is not Elk the same as Sambur?
2. The following is the scale of stamp fees:—

For	For Residents	For Non-Residents
Shooting an elephant	Rs. 100 ..	Rs. 300
Capturing a tusker	,, 500 ..	,, 500
Capturing an elephant	,, 200 ..	,, 200
Shooting a buffalo	,, 20 ..	,, 75
Capturing a buffalo	,, 2 ..	,, 2
Shooting or capturing game	,, 5 ..	,, 45

3. S.I. Police *vs.* Wijesinha (1922) 24 N.L.R. 325.
4. Apparently, therefore, no *mandamus* can issue from the Supreme Court.
5. Vidane *vs.* Panditharatne (1913) 17 N.L.R. 115.
6. Police Sergeant *vs.* Muttiah (1922) 24 N.L.R. 350.

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Certain indigenous wild birds[1] are protected absolutely ; they cannot be killed, shot at, trapped, or taken except for keeping alive in a cage ; nor can their eggs or even feathers be possessed—on pain of being sentenced to a fine of Rs. 10.

It is an offence punishable with a fine of ten rupees to kill, shoot at, trap, or take any teal[2] during the close season.

Where nets or particular kinds of nets for fishing are prohibited by proclamation in the "Government Gazette," any one using or attempting to use them is liable on a first conviction to a fine of Rs. 50, or imprisonment for three months, and on a second or subsequent conviction to double that penalty. The nets are liable to confiscation. And any person who uses dynamite or other explosives, or poisonous, stupefying, nor noxious substances for catchng fish either within the Island or within one marine league of the coast of Ceylon is liable on conviction to a fine of Rs. 100 or imprisonment for six months.

All offences under this Ordinance are triable by a Police Court even though the maximum penalty be outside its jurisdiction.

Offences against game or indigenous wild birds and the offence of using prohibited nets are also triable by a Village Tribunal. But this jurisdiction is only concurrent and therefore not exclusive.

(8) Contagious Diseases.

Information with regard to the occurrence of small-pox, cholera or other infectious or contagious disease must be given with the least possible delay to the nearest Headman or Police Station on pain of being sentenced to a fine of Rs. 20.[3] Persons afflicted with such diseases are liable to be removed to the Infectious Diseases Hospital and cannot wilfully "go abroad."

Under the Quarantine and Prevention of Diseases Ordinance, the Governor in Executive Council is empowered to make rules[4] for the purpose of preventing the introduction or spread of any disease, even within the limits of the area of an Urban District Council[5] (in which latter event, a prosecution for a breach of the rules may be entered at the instance of the Chairman, U.D.C.).[6] These rules provide, *inter alia*, for the disinfection and quarantine of ships, for the isolation of diseased

1. Namely :—

	Sinhalese Name	Tamil Name
King-fishers	*Pilikuduva*	*Vichuli, minkotti* or *Kalavaik-kuruvi*
Large Egret	*Badadel Koka*	*Vellai Kokku*
Little Egret	*Sudu Koka*	*Sinna Vellai Kokku*
Plumed Egret	do.	*Peru Vellai Kokku*
Oriole	*Kaha Kurulla*	*Mampala* or *Manchal Kuruvi* or *Mankoil*
Wood-pecker	*Kérala*	*Thachchan Kuruvi* or *Maran-kottai*
Orange Minevet and Trogen	*Gini Kurulla*	—
Paradise Fly Catcher	*Redihora*	*Valkuruvi* or *Erruttuvalen*
Painted Thrush	*Avichchiya*	*Vannack Kuruvi* or *Sarikai*
Indian Roller (Blue Jay)	*Dunkauluva*	*Panang Kadai* or *Kodduk-killi*
Hill Myna	*Hela-lihiniya*	*Malai-nakkanam pachchi* or *Maina*
Hornbill	*Kendetta*	*Iruvaik Kuruvi* or *Iruvaichcho*

2. Sinhalese *Sera*. Tamil *Chembatara*, or *Siraku*.
3. Ordinance No. 8 of 1866, Vol. I, p. 637.
4. These rules are published in a Supplement to Gazette No. 7,481 of 28th August, 1925.
5. See the Proclamation in Gazette of 17th Feb., 1928, for the U.D.C. of Matale.
6. Wijesinghe *vs*. Mohamed (1930) 31 N.L.R. 417.

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persons or "contacts," for the cleansing and disinfection of houses, for the regulation of construction of grain-shops and stores, and for the destruction of rats, etc. It is incumbent on every occupant of a building and on every medical practitioner to report the occurrences of "any disease of a contagious, infectious or epidemic nature or of acute or choleraic diarrhoea or fever of seven days' duration or over" to the proper authority.

Every person in charge of such a diseased person is presumed to have known the existence of such disease in that person, unless and until he proves to the contrary to the satisfaction of the Magistrate before whom he is charged. Where a Vederala proved that he did not know and could not have with reasonable diligence known that his patient was suffering from enteric, it was held that he was not bound to report the case and hence not liable to punishment.[1]

Under the regulations relating to Anchylostomiasis "the owner, occupier or lessee of every building shall, when notified in writing by the proper authority, provide latrine accommodation sufficient for the use of the occupants of the said building to the satisfaction of such proper authority, within a period of two months from the date of such notification"; and "every householder or owner of premises who shall permit his premises to be faecally polluted shall be guilty of an offence" As regards the building of latrines, the local authorities have prepared type-plans of latrines and do not tolerate the construction of any latrines which fall short of the required standard. Thus, pit-latrines are not now permitted in Sanitary Board areas; nor are cadjan structures. Fly-proof lids must be provided. The latrine room and the platform must be of the standard size and height, and so forth.

In areas declared infected with Anchylostomiasis, (that is, in districts where the Anchylostomiasis Campaign is afoot), Superintendents of estates are required to permit labourers and employees to be properly examined and treated; and every person is required to furnish specimens of his faeces in the receptacles provided for the purpose to the proper authority.

Any breach of any of these regulations or any act of obstruction or impeding of any Inspector or other officer acting under the provisions of these regulations is punishable by a Magistrate with imprisonment for six months or a fine of Rs. 1,000 or both. Where a certificate for the removal of a patient to the Infectious Diseases Hospital was lawfully issued, obstruction to the removal by the Police Officer was held to be illegal, notwithstanding the fact that it subsequently transpired that the patient was not suffering from small-pox.[2] It would be necessary, however, for the prosecution to show that the order of removal was lawfully made.[3]

(9) Births and Deaths.

By the Registration of Births and Deaths Ordinance,[4] it is the duty of all parents to report the birth of every child within 42 days of its birth. If the parents are incapacitated by illness, death, absence, or inability, the duty devolves on every occupier or inmate of the house where the child is born. It is sufficient if information is given to the

1. John Sinno vs. The Municipal Council (1907) Aser. 54.
2. Van Roon vs. Bastiampulle (1885) 7 S.C.C. 19.
3. Drieberg vs. Goorkel (1890) 9 S.C.C. 86.
4. No. 1 of 1895, Vol. II, p. 262.

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Registrar of the division. It is not necessary to attend in person: the declaration form may be filled up and sent to the Registrar. As regards births on estates, information must be given within 24 hours to the Superintendent whose duty it is to report the same within 48 hours to the Medical Officer of the district. In the case of illegitimate children, no person as father of the child is required to give information nor can any person's name be entered in the register as father without his consent or request and without his signing the register. Where a new born child is found by any one, it is his duty to report the find to the Registrar within seven days.

After the expiration of 42 days from the birth of any child, if such birth has still not been registered, the Registrar may call upon any person required to give information under the Ordinance to attend his office within seven days (but not later than three months from the date of birth) and to furnish the necessary particulars. After the expiration of three months, births can only be registered at the Provincial Registry and, if a year has elapsed, not without the written authority of the Registrar-General. Even where such application for belated registration is made, the parent who fails to register the birth within 42 days is liable to pay the statutory penalty.[1] It is the duty of every Headman and Police Officer to inform himself of every birth and death in his district and to report the same to the Registrar within seven days of his receiving the information.[2]

Every death must be registered within five days next following the day of such death. The first duty to register is cast on the relatives present at the death or in attendance at the last illness of the deceased, and in default of such relatives on every relative dwelling in the same division as the deceased, or on every other person present at the death or who causes the body to be buried or cremated. If such death has not been registered within 14 days, the Registrar of the division may call upon any of these persons to furnish the information within three months. After the expiration of this period, no death can be registered without the written authority of the Registrar-General. Every death in an estate must be reported within 24 hours to the Superintendent who will report the same within 48 hours to the Medical Officer. In the case of inquests (and murders), it is the duty of the Inquirer (or the Magistrate, as the case may be) to register the death within five days after the conclusion of the inquiry. In proclaimed areas, no body can be buried or cremated unless a Registrar's certificate or a certificate from the medical practitioner (or an Inquirer's certificate) has been obtained beforehand. No still-born child can be buried or otherwise disposed of, unless the occurrence of the still-birth has been reported to a Registrar, Headman, or a Police Officer, or to the Superintendent of the estate, or unless a certificate is obtained from a medical practitioner that the child was not born alive. Every still-birth must be registered within 36 hours. A still-birth means "a child born after the twenty-eighth week of gestation as dead or apparently dead and not called back to life."

No dead body in proclaimed areas can be buried or cremated except in a duly authorized cemetery or burial ground,[3] and no dead body can be removed for burial outside the town or district without permission

1. The Solicitor-General *vs.* Elisahamy (1920) 2 Law Recorder 18.
2. Cader Lebbe *vs.* Don Isan (1900) 4 N.L.R. 98.
3. See the General Cemeteries Ordinance No. 9 of 1899, Vol. II, p. 501.

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from the "proper authority" or from the Magistrate of the district. Failure to comply with the provisions of this section would entail a penalty of a fine of Rs. 300, or imprisonment for one month.

Failure to perform any act, or to give any information or notice required by this Ordinance regarding any birth or death, renders the offender liable to a fine of Rs. 100, or imprisonment for six months or both if he is summarily tried ; a similar penalty is imposed on every person who wilfully makes any false answer to any question put to him by a Registrar or other competent authority, or wilfully gives false information, or wilfully makes any false certificate or declaration, etc. A person cannot be convicted for making a false certificate of death unless the certificate is not merely false but false to his knowledge.[1] Every such offender renders himself liable to be indicted before a District Court or the Assizes if the Magistrate is of opinion that the punishment that he can inflict will not be adequate in the circumstances of the case.

When a person is convicted of failing to give information about any birth or death, it is the duty of the Magistrate to send a Magistrate's certificate, in the case of births, to the Provincial or Assistant Provincial Registrar and in the case of deaths to the Registrar-General. This certificate must be sent immediately upon the conclusion of the trial and on the proper form. A Magistrate's certificate is also necessary where a person has been convicted of having given false information to a Registrar.

(10) Schools.

Education in Ceylon being compulsory is governed by Ordinance No. 1 of 1920[2] and by two earlier Ordinances, one for towns[3] and the other for rural areas.[4] The last two enactments are somewhat parallel, except that in the case of the latter, prosecutions must be entered in a Village Tribunal and the penalty cannot exceed a fine of Rs. 20 with a continuing fine of Rs. 10 per day.

Education is compulsory for all children in District Committee areas, between the ages of six and fourteen years, and elsewhere between the ages of six and twelve, save in the case of Muslim and Tamil girls where the compulsory limit is between the ages of six and ten years ; that is to say, every such child must attend school, unless the parent has made other suitable or adequate provision for his education. Such provision can be made, for instance, by providing attendance in a grant-in-aid or a certified school or by imparting education in other proper and satisfactory manner. A child need not attend school if there is reasonable excuse, *e.g.*, illness or other unavoidable cause. But in such an event the parent must inform the teacher beforehand, for a parent is liable to punishment for the irregular attendance of his child.

If any child habitually neglects to attend school, or wanders about and cannot be kept under proper control or mixes up with undesirables, a Magistrate may order him to be whipped,[5] or may send him to a Reformatory for not less than three months and more than six. The parent of such child is liable to pay the cost of maintenance at the Reformatory.

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1. Wijeyesekera *vs.* Ratnayake (1919) C.W.R. 281.
2. Vol. III, p. 628.
3. No. 5 of 1906, Vol. III, p. 643.
4. No. 8 of 1907, Vol. III, p. 648.
5. The number of strokes cannot exceed six : Ordinance No. 3 o f1904, section 3, Vol. II, p. 808.

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The burden of proof that the child is not of the proper age is on the accused.

A Magistrate has, so it appears, an inherent power to exempt certain children from attending schools for stated reasons.

The word "parent" includes a guardian having the actual custody of the child: every occupier of the premises in which a child usually resides is presumed to have the custody of the child until the contrary is proved.[1]

(11) Ceylon Railways Ordinance.

We have already considered the offence of Trespass on Railway premises in the chapter on criminal trespass. Among the offences created by this Ordinance,[2] the commonest one is that of travelling without a ticket. The section makes it an offence to travel or attempt to travel without having previously paid one's fare, or with a ticket out of date, or to over-ride without paying the additional fare or without obtaining the sanction of a Station Master, or wilfully to refuse or neglect to quit the train and railway premises on arriving at one's destination. So that it is not incumbent on the railway authorities to accept a penalty in the shape of double fare or fare from the place where the train originally started, though they may demand this: and on non-payment the passenger's goods would be liable to be distrained. The station authorities can prosecute, apart from this penalty, every person found travelling without a ticket. The maximum fine for this offence is Rs. 50. "Where the law says a certain act must not be done and you consciously do it, the law presumes intention or knowledge on your part and you have committed an offence."[3]

It is an offence punishable with a fine of Rs. 20 to enter or quit any carriage in motion, or to ride on the steps, or to smoke or chew to the annoyance of any other passenger or official, or to expectorate; and an offence punishable with a fine of Rs. 50 to travel by the railway when afflicted with any contagious disease, or to be in a state of intoxication, or to commit acts of indeceny upon the railway, or to interefre without lawful excuse with the comforts of passengers. Numerous other offences are made punishable with various penalties under this Ordinance: thus, wilful damage to any carriage or railway premises or things and wilful placing of things across the railway lines are punishable with corporal punishment of 24 lashes or a fine of Rs. 1,000, or imprisonment for twenty years.

Although rash or negligent driving of a railway train is punishable under the Penal Code as a rash and negligent act, the Ordinance makes it an offence punishable with a fine of Rs. 100 or imprisonment for six months or both to do rashly or negligently and without lawful excuse any act which is likely to endanger one's own safety or the safety of persons travelling on the railway.

Every offender under the Ordinance is liable to apprehension without a warrant by any railway official or by any private person whom the latter has called to his aid or by any Police Officer. The Police Magistrates of Colombo, Kandy, Matale, Gampola, N'Eliya, Hatton, Badulla, Haldumulla, Panadura, Kalutara, Balapitiya, Galle and

1. See section 5 of Ordinance No. 5 of 1906.
2. No. 9 of 1902, Vol. II, p. 585.
3. Shaikali vs. Leisahamy (1911) 14 N.L.R. 349.

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Matara have jurisdiction to try any railway offence cognizable by a Police Court, no matter wheresoever committed. And every Police Court receiving a fiat from the Attorney-General may take cognizance of any railway offence which would otherwise be non-summary; but in that event, it can impose only so much of the punishment as it is empowered by law to inflict.

(12) Post Office and Telegraphs.

The Post Office Ordinance[1] provides penalties for offences and even venial lapses on the part of officers of the Postal Department, *e.g.*, theft or unlawful opening or detention of postal articles, making of false entries or destruction of documents, withdrawal from duties, being intoxicated or being careless or loitering or delaying while employed to carry or deliver postal articles, fraudulent removal or alteration of Postal marks, or defrauding Government of postage, etc. The penalties vary from a fine of Rs. 50 to imprisonment for two years.

It is an offence punishable with a fine of Rs. 50 for an unauthorized person to convey or deliver Postal articles; a similar penalty is prescribed for disfiguring Post Offices or letter boxes.

It is an offence punishable with imprisonment for one year or a fine or both to place any fire or explosive, dangerous, or filthy substances or any fluid in or upon any letter box, or to commit a nuisance in or against it.

The making of a false declaration (that is, a declaration which the maker knows or has reason to believe to be false or which he does not believe to be true), in respect of any Postal article sent by post or its contents or value is punishable with a fine of Rs. 200, and if the declaration is made for the purpose of defrauding the Government—to a fine of Rs. 500.

The opening of other's letters, if done wilfully and maliciously and with intent to injure any person—unless it is done by a parent or guardian—is punishable with imprisonment for six months or fine or both.

The manufacture and possession of fictitious and the use of defaced postage stamps have been dealt with in the chapter on forgeries.

All offences under this Ordinance punishable under a fine of Rs.200 are compoundable by the Postmaster-General. The Postmaster-General's sanction is necessary for prosecuting in certain offences.

Under the Telegraphs Ordinance,[2] various penalties are prescribed for various offences, among which the following two are the most important: wilful transmission or tendering for transmission of false or fabricated messages punishable with imprisonment for three years or a fine of Rs. 500 or both; and fraudulent retention of messages meant for another and delivered by mistake, punishable with imprisonment for two years or a fine of Rs. 500 or both. The sending of indecent, obscene, seditious, scurrilous, threatening, or grossly offensive messages is also penalised.

Attempts are punishable like the principal offences.

Under both these enactments, Police Courts have normal summary jurisdiction, the graver offences being all triable by a District Court, unless the Attorney-General issues a fiat for summary trial.

1. No. 11 of 1908, Vol. II, p. 813.
2. No. 35 of 1908.

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CHAPTER XLII.

PRISON RULES.

A book like this would be incomplete if some idea were not given of the treatment, dietary and labour of the prisoners in jail.[1] Prisoners are of two kinds : those who are convicted and those who are not. The former are persons sentenced to a longer or shorter term of imprisonment, either simple or rigorous : the latter are persons who are either on remand or are awaiting trial before a higher Court.

A convicted prisoner as soon as he reaches a jail house is searched and "finger-printed." Prohibited articles, if any, on his person are taken away—cash and other valuables found on him are kept with the Jailer to be returned to him on discharge ;[2] his clothing is washed, cleaned and stored ;[3] he is given a bath ; he is dressed in the prison clothing which is of white cloth with the broad arrow stamped on it in black ; if he is convicted for three months and upwards his weight is taken and recorded ; he undergoes a medical examination ; and if he is convicted for six months or more (or if he is committed a second or subsequent time for three months or more) his hair is cut close. The hair continues to be cut short till within three months of his discharge, or till he has served for six months at least in the first class. Every prisoner on admission is explained a general summary of the prison rules and the nature of penalties for their breach.

The prisoner thus enters the penal stage. This stage lasts for one month. During this period, he is only employed within the prison walls at stone-breaking or husk-beating. He gets the Penal diet unless he is under the age of 17. Penal European diet consists of (1) 8 oz. bread, 2 oz. plantains, 1½ oz. sugar and ½ oz. tea for the morning meal at about 5.30 a.m., (2) 6 oz. bread, 8 oz. of beef, 8 oz. potatoes, and 6 oz. vegetables for the midday meal at about 11.30 a.m., and (3) 6 oz. bread, 4 oz. oatmeal, and 1½ oz. sugar, for the evening meal at 5 p.m. The Penal native diet for the day divided in three meals consists of 4 oz. bread, 18 oz. rice, 4 oz. vegetables, ¼ coconut, ¼ lime, 1/10 oz. pepper and ½ oz. salt. For refractory prisoners who are put on Penal diet No. 1—the only thing allowed being 4 oz. bread, 18 oz. rice, 1/10 oz. pepper and ½ oz. salt for the whole day.

After the prisoner has completed one full month in the Penal stage, he is promoted to class IV where he serves for eleven months. He is henceforth eligible for employment outside the prison walls. The figure of his class is printed on his left breast. In this class he receives ordinary diet No. 1. The ordinary native diet consists of three meals,

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1. See Ordinance No. 16 of 1877 as amended by Ordinance No. 24 of 1890, Vol. I, p. 845 and the prison rules made thereunder ; these rules are published in the Manual of Rules for the Management of Prisons published by the Government Printer and have the force of law. See Ordinance No. 17 of 1916, Vol. I, p. 863. See Gazettes No. 7,520 of 9th April, 1926, and No. 7,530 of 11th June, 1926.

2. Other property found on him, if not delivered to his friends at his instance, is sold if the prisoner is serving imprisonment for over twelve months. The proceeds, if under five rupees, are credited to revenue ; if over, are deposited to the prisoner's credit.

3. If he is sentenced to imprisonment under a year ; otherwise, it is sold and the proceeds credited to revenue to meet the cost of clothing to be supplied to him on his discharge

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for which the materials allowed are: 4 oz. bread, 18 oz. rice, $2\frac{1}{2}$ oz. fish, 2 oz. plantains, 2 oz. vegetables, 2 oz. dhall, $\frac{1}{2}$ oz. jaggery, $\frac{1}{2}$ coconut, $\frac{1}{2}$ lime, $\frac{1}{2}$ oz. onion, 2 ripe chillies, 1/10 oz. pepper, $\frac{3}{4}$ oz. salt and a few ingredients for curry powder. The ordinary European diet, which is the same for all classes, consists of three meals (I) morning: 12 oz. bread, 3 oz. plantains, 2 oz. sugar, 1/6 oz. tea; (II) midday: 6 oz. bread, 8 oz. beef, 8 oz. potatoes, 8 oz. vegetables; (III) evening: 8 oz. bread, 4 oz. oatmeal, 6 oz. milk and $1\frac{1}{2}$ oz. sugar (plus currystuffs if necessary).

Prisoners after one year in jail are promoted to class III. Henceforward till their discharge they get the ordinary diet No. 2 which consists of 6 oz. bread, 16 oz. rice, 2 oz. beef, 2 oz. fish, 2 oz. plantains, 2 oz. vegetables, 2 oz. dhall, $\frac{1}{2}$ oz. jaggery, $\frac{1}{2}$ coconut, $\frac{1}{2}$ lime, $\frac{1}{2}$ oz. onion, 2 chillies, 1/10 oz. pepper and $\frac{3}{4}$ oz. salt for all the three meals, together with the necessary currystuffs. The ordinary European diet is the same as in class IV. At the end of each year, the prisoner gets promoted till he reaches the first class. When he has served in this class for six months, he may obtain permission to grow his hair. Every prisoner in class III and onwards begins to earn eight remission marks per day, which means that if he gets this full number of marks by good conduct and industry every day, he earns a remission of one-fourth of the period of imprisonment during which he is allowed to earn marks. This is the longest remission that a prisoner can get. If his marks are less, his remission is reduced proportionately.

Every prisoner wears a tin badge showing his full history. Prisoners in class II are paid at the rate of 50 cents a month if employed as artisans, sledgers, or miners—those in class I at the rate of one rupee a month if employed as prison or hospital orderlies inside the jail house: otherwise, they earn one cent for each day for which they have earned full marks. This money is paid to them on release after making proper deductions for wanton loss of or damage to Government property. Prisoners who know English may be transferred to the Government Printing house for work at the Press. Those who know cooking will be found work in the jail kitchens.

The hours of work on a week day are generally:

5 to 6 a.m.: washing, cleaning, and morning meals.
6 to 10.30 a.m.: hard labour.
10.30 a.m. to 12 noon: washing and breakfast.
12 noon to 4.30 p.m.: hard labour.
4.30 p.m. to 5.30 p.m.: bathing, washing, and evening meal.
6 p.m.: closing cells.

Wherever possible, each prisoner is kept in a separate cell: but if they are kept in association, a light is always kept burning in the ward for the night, and an officer keeps guard; not less than three prisoners are ever locked up together in such a ward. Female prisoners are always kept separate, but receive the above meals, though in a separate place, Only children at breast are allowed with such prisoners.

Prisoners who are sick may receive treatment in the Hospital (in the jail itself) and may have a change of diet according to the directions of the Medical Officer. The latter can also order prisoners to be put on light labour, when they receive a correspondingly lower diet. Prisoners who are guilty of breach of prison rules. besides being sentenced to Penal diet No. 1, may be ordered Refractory diet which consists in the case of "Europeans" of 24 oz. of bread alone and for the rest of

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only 14 oz. of rice with ½ oz. of salt. They may also be sentenced to be confined to solitary cells, to be flogged or stripped, or to be put into irons, or to a forfeiture of marks. They can, in bad cases, be sentenced by "Visitors" to further imprisonment for six months or can be prosecuted in the proper Police Court.

Juvenile offenders are kept separately from adults and habituals. No prisoner under the age of seventeen can be subjected to penal diet. All prisoners between the ages of 15 and 17 receive Ordinary No. 1 diet. All prisoners below the age of 15 receive three-fourths of the Ordinary No. 1 diet allowed for adults.[1]

Within one month of conviction, prisoners may be permitted to write special letters or to see their friends or legal advisers for the purpose of making family arrangements: and within two months, they may petition once to His Excellency the Governor.[2] Barring this and except in the case of serious illness, no prisoner can communicate with the outside world till after the first six months of their imprisonment are over: then they become entitled to receive one visit from their friends once in every three months and to write and receive one letter in that period. No more than three persons are allowed to visit a prisoner at one time and the interview which must take place in the presence of a jail officer, cannot last for more than ten minutes, unless the prisoners are in class I, when it may extend to half an hour. The right to visit and the right to write a letter may, with the permission of the Superintendent, be interchanged. No letters written or received by prisoners are allowed to pass till they have been properly scrutinized or censored by jail officers. No convicted prisoner can have tobacco, betel, arecanut, etc., in his possession without medical advice; unauthorized books cannot be allowed in a jail house. Religious instructors may visit a jail for the purpose of giving religious instruction or of attending on prisoners who are seriously ill or who are condemned to death.

Prisoners sentenced to simple imprisonment are treated exactly as those condemned to rigorous imprisonment, save that they do not perform hard labour but employ their time as they please in any harmless occupation approved of by the Superintendent. They are allowed their own implements for this purpose: they are also allowed the use of books and writing material of their own. They must take the prescribed amount of exercise every day and can remain in the open for four hours a day. Buddhist monks sentenced to simple imprisonment may be allowed to wear their own robes.

Every prisoner is supplied with a mat, and a blanket or "cumbly": he receives on Sundays one-third of an ounce of gingelly or coconut oil for his hair. For any other necessary articles of food or clothing, special permission must be obtained from the Superintendent. Prisoners within one month of their discharge are transferred to the jail nearest their home. On discharge, they get a railway ticket to the railway station nearest to their homes and one day's batta (of 25 cents) for the first ten miles that they have to travel and an additional 25 cents for every additional fifteen miles. In addition they are paid the gratuity, if any, earned by them. They receive also one suit of clothes and, if of native costume, 4 yards of chintz and one coloured handkerchief.[3]

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1. Gazette of 25th April, 1930.

2. Prisoners may be permitted to petition again to His Excellency the Governor only after the lapse of one year or with regard to some new matter in the same year.

3. If they have served over a year; otherwise they dress their old clothes.

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Ordinarily, prisoners are released after the morning meal. The days of admission and of discharge are reckoned as part of the sentence.

Remand prisoners or those who are unconvicted are treated differently.[1] They wear their own clothing which, if insufficient, is supplemented from the prison-store. They are, if possible, locked up in separate cells, but beyond this are not subjected to any other restraint. They are allowed to provide for their own food if they like, and can even have a pint of malt or fermented liquor at their own expense, but no spirits. They may have two chews of betel, arecanut, tobacco and lime or two pipes-full of smoking tobacco ; but, in the event of their attempting to pass these on to the convicted prisoners, their privilege is liable to be stopped on the orders of the Superintendent. They may have at their own cost the use of private furniture and utensils suitable to their ordinary habits to be approved of by the Superintendent and they may have the assistance of one servant on payment of a sum to be fixed by the Superintendent. They can have the services of their own medical attendant : they can receive one or two visitors for quarter of an hour on every week-day ; and they may interview their Proctors or Advocates every week-day at a reasonable hour in the view of a Prison Officer.[2] They may be supplied with paper and writing materials. If they have not arranged for their own meals, they will be supplied with the full prison diet which is similar to the Ordinary No. 2 diet. They are entitled to take any exercise they like, and may follow their usual professions, their earnings being paid to them on discharge. It is not compulsory for them to shave or to have their hair cut.

Bodies of all prisoners who die in the jail—otherwise than by execution—may on application be given to their relatives or friends ; if unclaimed, they are buried in the public burial ground. A *post mortem* examination whenever necessary and an inquest are usually held on all such bodies. When a prisoner's life is in danger, he may be allowed by the Superintendent to see his releatives and friends.

Any respectable persons may be allowed to inspect a jail house with the permission of the Superintendents, but not to communicate with the prisoners. All complaints and requests should be addressed to that officer.

Convicts undergoing rigorous imprisonment or preventive detention can be released on license by His Excellency the Governor. If after such release they are convicted of a crime. they forfeit all the privileges under the license. Failure to observe the conditions of the license is a summary offence punishable with imprisonment for six months.[3] Every Magistrate must report such conditions to the Attorney-General through the Inspector-General of Police.[4]

A sentence of preventive detention cannot be awarded unless the accused person is arraigned on an indictment and unless there is proof that he was leading persistently a dishonest or criminal life or that on any previous conviction he had been found to be a person habitually addicted to crime and was sentenced to preventive detention[5].

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1. Civil prisoners are regarded as remand prisoners for this purpose.
2. Prisoners remanded for want of bail may see or communicate in writing with any of their friends for the purpose of furnishing bail.
3. Ordinance No. 2 of 1926, section 16.
4. G. O., 926.
5. King *vs.* Marthelis Fernando (1930) 31 N.L.R. 303.

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APPENDIX A.

A list of Ordinances under which *Informer's share of Fines* (or what is generally known as " **HALF FINES** ") may be ordered.

Ordinance	Subject	Section
15 of 1900	Antiquities	Section 23
4 of 1900	Boats	,, 32
5 of 1889*	Brothels	
9 of 1893*	Butchers	,,
18 of 1856	Carts on Colombo and Kandy Road	,, 6
9 of 1876	Cattle Trespass	,, 11
18 of 1890	Chanks	,, 12
3 of 1886*	Coastwise Passenger Trade	,,
8 of 1904*	Cacao Thefts	
3 of 1896	Collection of Tolls	,, 27
8 of 1866*	Contagious Diseases	
25 of 1909	Contagious Diseases of Animals	,, 14A
13 of 1907*	Cruelty to Animals	
19 of 1912	Cruelty to Animals	,, 10
17 of 1869	Customs	,, 119
21 of 1905	Dealers in Old Metal	,, 11 (2)
12 of 1907*	Destitute Immigrants	
25 of 1901*	Dog Registration	
28 of 1871	Domestic Servants	,, 22
19 of 1908	Dried Meat	,, 8
4 of 1882*	Emigration	
8 of 1902*	Explosives	
1 of 1874*	Foreign Recruiting	
33 of 1916	Firearms	,, 39
16 of 1907	Forests, Section 62 (*b*) and rules under the Ordinance published on April 21, 1909	
1 of 1909	Game, Birds, Fishes	,, 33
7 of 1889	Gaming	,, 19
15 of 1890	Gemming	,, 16
9 of 1899	General Cemeteries	,, 44
27 of 1906*	Guides	
11 of 1894*	Intermeddling with Suitors	
45 of 1917	Irrigation	,, 37
15 of 1866*	Liquor, taking on Board H.M.S. Ships	
8 of 1844	Lotteries	,, 8
6 of 1865*	Masters-Attendant	
2 of 1905*	Medical Registration	
2 of 1896	Mines and Machinery	,, 8
5 of 1890	Mines	,, 16
6 of 1910	Municipalities	,, 240
32 of 1908*	Natives, Foreign Employment	
5 of 1894*	Native Passenger Ships	
18 of 1843*	Nets, prohibited	
15 of 1862	Nuisance	,, 17
5 of 1910	Opium	,, 27
4 of 1906*	Overcrowding of Vessels	
8 of 1893*	Pawn-brokers	
3 of 1811	Pearl Banks Regulation	
17 of 1906	Pearl Fishery	,, 7
2 of 1883*	Penal Code	,, 257-260
6 of 1887*	Petroleum	
11 of 1901*	Poisons	
16 of 1865*	Police	
11 of 1908	Postal	,, 85
15 of 1823	Property, Found Regulation	,, 2
7 of 1912*	Public Performances	
3 of 1897*	Quarantine	

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7 of 1893	..	Rabies	Section	14
21 of 1908*	..	Rubber Thefts		
12 of 1911*	..	Removal of Stones, etc., from Seashore ..		
6 of 1890	..	Salt Revenue	,,	18 (2)
22 of 1909*	..	Stamps		
4 of 1840	..	Supply of Bullock Carts and other means of transport required for His Majesty's Forces ..	,,	11
10 of 1861	..	Thoroughfares	,,	94
17 of 1887	..	Treasure Trove	,,	7
4 of 1841	..	Vagrants	,,	21
4 of 1916	..	Vehicles	,,	51
24 of 1889	..	Village Communities (since repealed) ..	,,	33
4 of 1909*	..	Water Hyacinth		
8 of 1876*	..	Weights and Measures		
27 of 1884*	..	Wells and Pits		

Note.—With regard to Ordinances marked with an asterisk, provision is made in Ordinance No. 1 of 1914 for award of a share of the fine.

Sanitary Boards are entitled to full fines in cases instituted under the Provisions of Nuisance Ordinance of 1862, or under the Sanitary Boards Ordinance of 1892, or under the Housing and Town Improvements Ordinance of 1915.

(See section 5 (2) *d, e, f*, of Ordinance No. 18 of 1892.)

All fines levied by a Municipal Magistrate in offences properly cognizable by him are payable to the Municipal funds. Section 73 of Ordinance No. 6 of 1910.

The Society for Prevention of Cruelty to Animals is entitled to full fines under Ordinance No. 13 of 1907 or 19 of 1912.

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APPENDIX B.

Lettering.

In order to obtain correct criminal statistics of the Island, all important cases of grave crime are classified into distinct groups : this is called "lettering." For the purpose of these returns, only cognizable offences under the Penal Code are lettered, excluding assaults under section 314 and thefts of property worth Rs. 20 or less, but including all cattle thefts, irrespective of the value of cattle.

Each case, whether it comes to trial or not and whether the offender is known or unknown, is lettered soon after its final disposal. Cases committed to a higher Court are lettered after the completion of trial in that Court. Cases that are laid by cannot be lettered, but if the accused are absconding the cases are treated as cases finally disposed of. Cases which terminate differently as regards different accused persons are shown by a number placed under the letter and representing the number of the accused persons : thus, C^{1}_{2}, C^{2}_{1}, etc.

All cases are classified into three groups :—

(A) Cases in which investigation is refused by the Police are lettered A^1—those in which a Magistrate refuses process on the accused, A^2. This class, therefore, includes those cases where investigation has been refused either by the Police or by a Magistrate.

(B) The second class includes cases in which it is proved that no cognizable offence has taken place. Thus, cases where the complaint is due to a mistake of fact or law, or where it is of a civil nature, are lettered B^1 ; those where the evidence discloses that only a non-cognizable offence has been committed (*e.g.* where in a case of robbery, the Magistrate convicts only of simple hurt, disbelieving the robbery), are lettered B^2 ; and those where a Magistrate finds that the complaint was designedly false are lettered B^3. The fact that certain persons are falsely implicated is no criterion to show that the offence was not committed at all.

(C) The third class includes all true cognizable cases and are lettered as follows :—

1. Cases ending in a conviction .. .. .. C^1
2. Cases ending in a discharge or acquittal .. .. C^2
3. Cases where the offenders are unknown or where the evidence is not sufficient to charge anyone, although an offence has been committed .. .. C^3
4. Cases where the offenders are absconding .. C^4
5. Cases where the offenders have died or are insane .. C^5
6. Cases which are compounded .. .. C^6
7. Cases otherwise disposed of (*e.g.* under the Probation rules) .. .. C^7

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APPENDIX C.

Jurors.

Every criminal trial before the Supreme Court takes place on indictment before a Jury composed of seven persons. The accused, when they are committed, have the right of electing the particular kind of Jury before whom they wish to be arraigned. There are three kinds of Juries—(1) English-speaking, (2) Sinhalese-speaking, and (3) Tamil-speaking. What is known as a Special Jury is but a higher form of the first-named and can only be requisitioned on a special application to be made to the Supreme Court, either by the prosecuting Counsel or by the accused.

An English-speaking juror must be able to speak, read, and write the English language and must possess either in his own or in his wife's right an income of not less than Rs. 1,000 a year, or a monthly salary of not less than Rs. 100.

A Sinhalese or Tamil-speaking juror must be able to speak, read, and write his respective language (Sinhalese or Tamil) and must possess, either in his own or in his wife's name, movable or immovable property not less than Rs. 1,000 in value, or an annual income of Rs. 500.

A Special Juror must be an English-speaking juror who possesses either (1) an income of not less than Rs. 3,000 a year, or (2) Rs. 20,000 worth of movable or immovable property, either in his own or in his wife's name, or (3) a monthly income of not less than Rs. 500.

The lists of jurors, in each circuit, are prepared by the Fiscal of the Province, to whom all applications for inclusion or otherwise should be made in the first instance. The lists are revised biannually and are published in the "Government Gazette." From these lists, panels of fifteen jurors apiece are selected by lot and from these panels again, the seven jurors required to serve on a particular occasion are picked out by lot.

Some persons, by reason of their vocation, cannot serve as jurors: *e.g.*, the Governor, Judges of all Courts (including Presidents of Village Tribunals) and all persons employed under them, or employed in the Legal, Police, Prisons, Fiscal's and Customs Departments, members and clerks of the Legislative and Executive Councils, Officiating Priests or Ministers, Advocates and Proctors in actual practice, Inquirers and Petition Drawers. Persons who have been sentenced to rigorous imprisonment for over a month anywhere in the British Empire are disqualified from becoming jurors: so are persons mentally defective or bodily incapacitated.

Some persons have a partial exemption: their own consent is necessary before they can be included in a list; thus, Practising Doctors or Apothecaries and Dispensers, persons over sixty years of age, Municipal Councillors and members of Local Boards, persons serving in the Army, or the Navy, or in the Postal, Telegraph, Survey or Railway Departments cannot be made to serve as jurors except with their own

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consent. Persons who profess peculiar religious tenets are regarded as unfit to discharge the duties of jurors.

Exemptions from serving on the Jury can be granted on any of the following grounds :—

(1) On account of vocation, as defined in the last paragraph.

(2) By reason of the applicant's having attended a Camp of Exercise prescribed for members of a Defence Force in the year immediately preceding.

(3) If another person engaged in the same mercantile or business establishment has been selected for the same panel.

(4) If the applicant has already served as a juror on the same sessions for the space of fifteen days.

(5) With the leave, previously obtained, of the presiding Judge on account of sickness, infirmity, urgent private business, etc.

Any person summoned to attend as a juror, who fails to attend without lawful excuse at the appointed time and place, or who departs without permission, is liable to such fine as the presiding Judge may impose, and in default of fine to imprisonment till the fine is paid. Such fine must be paid within seven days. The presiding Judge has the right to remit the whole or any part of such fine.

The seven jurors, after they are empanelled, must elect their own Foreman. It is the Foreman's duty to preside at the Jury's deliberations, to ask questions, to return and sign their verdict. The verdict returned must be unanimous or by a majority of not less than five to two. If the Jury are unable to come to this unanimity, the Judge may discharge them and proceed to trial *de novo* before another Jury. It is not necessary to "keep the Jury together" during the whole of the trial, unless the Judge otherwise directs; and if the trial is adjourned, the jurors, when separating, take special oaths not to communicate with persons other than fellow-jurors upon the subject of the trial; if they break the terms of their oath, they are liable to be dealt with as for contempt of Court.

When the jurors' names are being called, the accused persons have the right of challenging any two of them without mentioning grounds; the Crown has the right of challenging any number—but if it is not possible to make up a Jury of seven after the challenging, the prosecuting Counsel may be required to state his grounds for scrutiny by the Judge. The grounds, *inter alia*, may be presumed partiality, inability to understand the proceedings, employment on Police duties, previous conviction, and so forth. If it is not possible to make up the requisite Jury after the challenges, any by-standers, with the necessary qualifications, can be called upon to serve.

While it is the duty of the presiding Judge at any "Sessions trial" to decide all questions of law and questions as to the relevancy or admissibility of evidence, or to decide upon the meaning and construction of all documents given in evidence, or to decide upon all matters of fact necessary to be proved in order to lead evidence of particular facts, or finally, to decide whether any question which arises is for himself or for the Jury, it is the duty of the Jury—

(1) 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;

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(2) to determine the meaning of all technical terms (other than legal terms) and words used in an unusual sense ;

(3) to decide all " questions of facts ";

(4) to decide whether general indefinite expressions do or do not apply to particular cases, unless they refer to legal procedure or unless their meaning is ascertained by law.

The Jury may, if necessary, visit the spot or the scene of the alleged crime by arrangement with the presiding Judge. The cost of their conveyance, like the cost of feeding them when " kept together " will be borne by the Fiscal.

All jurors, summoned at any Criminal Sessions, are entitlted to train-fare or mileage, as the case may be, to and from their homes and batta on the following scales :—

Class of Jurors	Batta per Day Rs. c.	Mileage per Mile Rs. c.	Class of Fare on Public Conveyance
I. Special Jurors ..	7 50 ..	0 30 ..	First
II. English-speaking Jurors ..	5 00 ..	0 30 ..	Second
III. Sinhalese or Tamil-speaking Jurors	2 50 ..	0 20 ..	Second

This travelling allowance and batta are payable by the Fiscal on production of a " certificate of attendance " from the Registrar of the Supreme Court. Railway warrants can be obtained by prior application from the Fiscal. Government servants summoned to serve as jurors are entitled to batta, etc., according to their service scales. On any question of doubt, the person cited may apply himself to and get information from the Fiscal of his Province.

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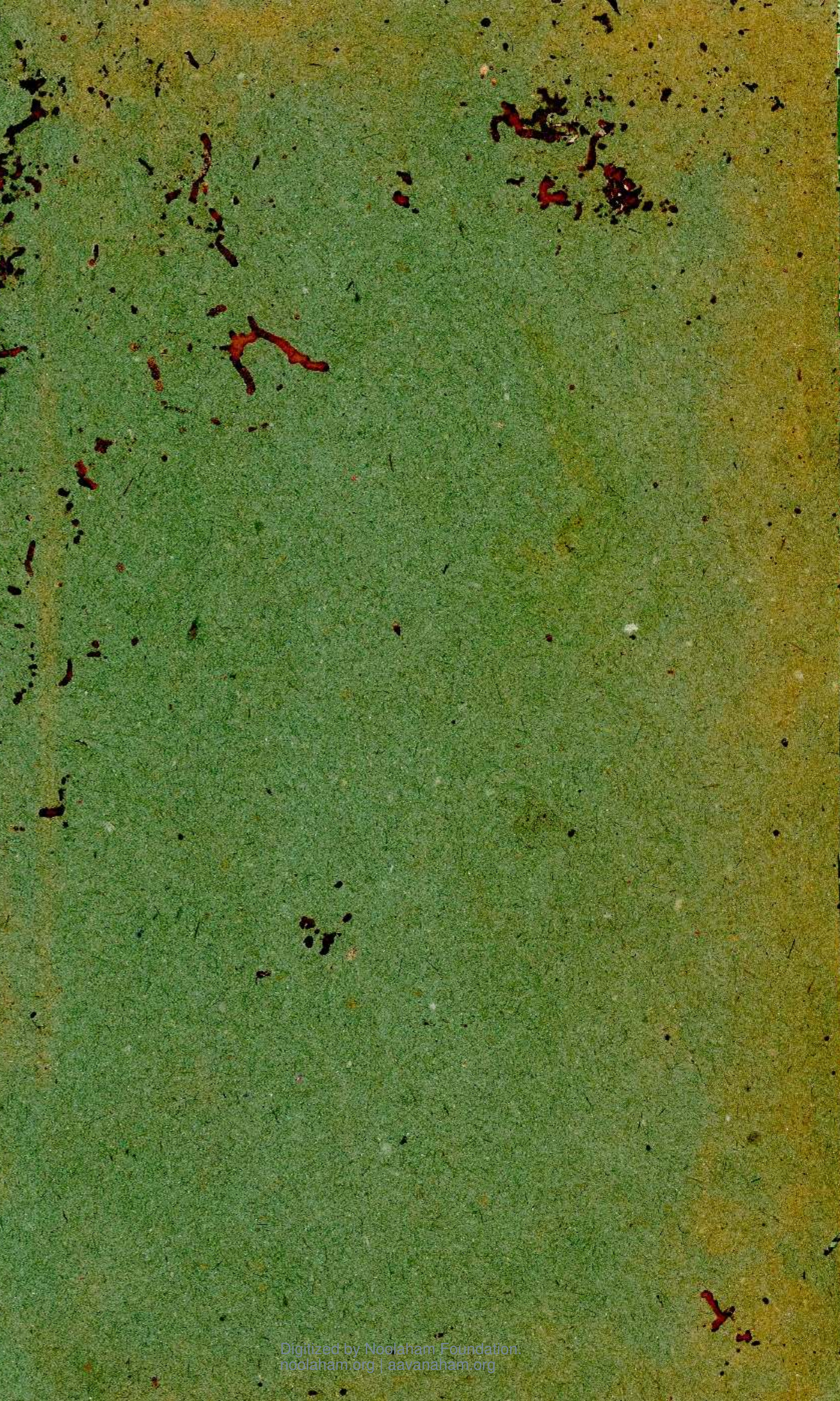
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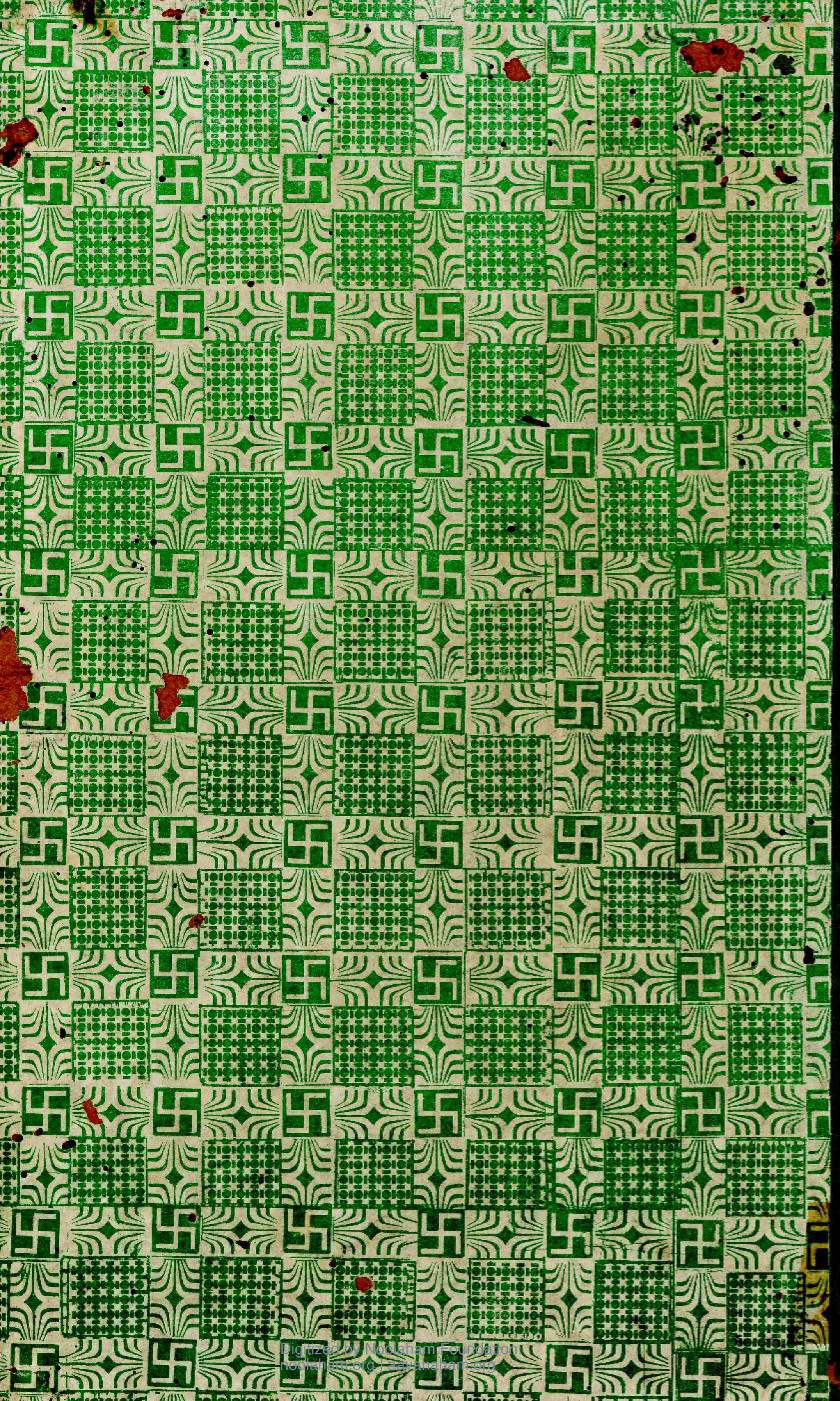

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