1898.
*August 1.*

## WACE *v.* LEWISHAMY *et al.*

*P. C., Balapitiya, 17,954.*

*Plumbago mining—Ordinance No. 2 of 1896, s. 3—Declaration to Government Agent, by whom to be made—Disobedience to summons —Proof necessary for conviction under s. 172 of the Penal Code.*

The person who should make the declaration under section 3 of the Ordinance No. 2 of 1896 is the owner of a plumbago mine, and no one else.

It is irregular to convict an accused under section 172 of the Penal Code for not attending Court in obedience to a summons alleged to have been served on him, unless the summons be produced in evidence.

ON a charge laid under Ordiance No. 2 of 1896, section 6, for digging plumbago without furnishing the Government Agent with the declaration required by section 3, the accused was found guilty and sentenced.

He was also found guilty under section 172 of the Penal Code for improperly omitting to attend Court after summons duly served on him. His defence was that he did not receive the summons, but the Magistrate, after examining the process server, who deposed that summons was served on him on the 26th May, believed the process server, and sentenced the accused to pay a fine of Rs. 25, or in default to a month's imprisonment. He appealed.

*Walter Pereira*, for appellant.

*A. Drieberg*, for respondent.

1st August, 1898. BONSER, C.J.—

In this case the appellant Lewishamy, who, according to the evidence of the headman who was responsible for the prosecution, had previously been a cooly in a plumbago pit, was convicted of having worked a plumbago mine without furnishing the Government Agent of the Southern Province with the declaration required by section 3 of Ordinance No. 2 of 1896.

Now, it is obvious, on reading that section, that the person who should make the declaration is the owner of the mine and no one else. It would be absurd to hold that a cooly, before he worked in a plumbago pit, must furnish the Government Agent of the Province with a declaration such as is prescribed by the Ordinance. The only evidence against the appellant is that he was seen working in the mine. He swears that he was working only as a cooly. It has not been shown that he has any interest in the land or in the mine; and that being so, I am of opinion that he was wrongly convicted.

Then, in the course of the same proceedings, he was found guilty of another offence—an offence under section 172 of the Penal Code—in not attending Court in accordance with the summons served on him. The only evidence in support of the charge was the evidence of the process server, who says that he served a summons on him. The summons was not produced. Without the production of the summons it is impossible to say that the appellant was legally bound to obey it. It may have been such a summons as I have seen in this Court, one signed by somebody for the chief clerk, in which case the appellant would not have been bound to obey it.

The case should, therefore, be remitted to be further dealt with on that charge.