1895.
September 18.

CORNELIS *v.* ULUWITIKE.

P. C., Galle, 16,679.

Irregularity in recording evidence—Ordinance No. 22 of 1890, s. 12—Criminal Procedure Code, s. 472—Conviction in the alternative—Warrant issued in the Sinhalese language.

Evidence recorded in a proceeding against A, which disclosed an offence on the part of B, who was not present, cannot be made use of against B on a subsequent day when arrested and brought up by reading over to the witnesses in the presence of B the evidence already recorded, and examining them further and allowing B an opportunity to cross-examine the witnesses on the whole evidence. The proper course is to record their evidence afresh.

The Penal Code does not provide for a conviction in the alternative, and therefore a conviction for "dishonestly receiving or retaining "stolen property" is irregular.

Per BONSER, C.J.—There is no authority in our law for the issue of process in a foreign language. The language of the Ceylon Courts being the English language, serious doubts might arise as to the legality of an arrest upon a warrant issued in such form.

THE facts of the case are sufficiently stated in the judgment of his Lordship the Chief Justice.

Dornhorst, for the appellant.

18th September, 1895. BONSER, C.J.—

In this case the appellant, one Robert Uluwitike, was convicted of "dishonestly receiving or retaining a gold hairpin worth Rs. 25, "the property of L. W. Cornelis, knowing the same to be stolen "property," and sentenced to undergo six months' rigorous imprisonment. There appears to have been some irregularity in the

proceedings in this case. In the first instance, a man called Urudihami was charged and brought up by the Vidáné Arachchi. Mr. Moor, who was then Acting Police Magistrate of Galle, took evidence on the charge against Urudihami. On the evidence given on this charge it appeared that the appellant was the person from whom Urudihami had got the property, and the evidence pointed to Urudihami as having been innocently in possession of it. At that stage of the proceedings the Police Magistrate issued a warrant for the arrest of the appellant. He did not deal with Urudihami's case, and the proceedings against him would appear to have dropped, for nothing more was done.

Then Robert, the appellant, was arrested upon that warrant and brought up before the Police Court of Galle, where Mr. Hellings was at the time presiding. The witnesses who had been heard before Mr. Moor on the charge against Urudihami were called as witnesses for the prosecution on the charge against the appellant. But they did not give their evidence afresh, as they ought to have done. The course pursued was that the Magistrate read out to the witnesses the evidence given by them on the previous charge against Urudihami, and then examined them further. It is said that this course was justified by section 12 of Ordinance No. 22 of 1890. But in my opinion that section has nothing to do with a case like the present one. It seems to me that that section refers to a case under section 472 of the Criminal Procedure Code, which provides that where an accused person has absconded, the Court competent to try or commit for trial may examine witnesses in his absence and record their depositions, and then when the accused is arrested and brought up those depositions may be given in evidence, if the witnesses are dead or incapable of giving evidence, or their attendance cannot reasonably be secured. It seems to me that the 12th section of Ordinance No. 22 of 1890 went a step further, and provided in such a case that the proceedings might be shortened by reading over the depositions in the presence of the accused. But before section 12 can apply, it appears to be necessary that there must be a person accused, and that that accused must be one and the same person. It could never have been intended that that section was to apply to a case where the evidence was given on the trial of a different person, and therefore what was done in this case was irregular. I observe that the witnesses did not even swear that what they said on the previous occasion was true.

Then the question arises, is this irregularity such an irregularity as to afford sufficient reason for setting aside the

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conviction? Did it in any way prejudice the accused? As to this, I fail to see that it did prejudice him, and therefore I do not think that this irregularity is sufficient ground for setting aside the proceedings.

There appears to be a further irregularity in the conviction.

The appellant is found guilty of dishonestly receiving or retaining a gold hairpin. Under our Code it seems that a conviction in this form is irregular. Under the Indian Penal Code such a conviction is allowed. Section 72 of the Indian Penal Code expressly provides for a conviction in the alternative, but by some slip that section was not included in our Penal Code, although when our Criminal Procedure Code was borrowed from India the clause which gave effect to section 72 of the Penal Code was left standing. I refer to the last clause of section 210 of the Criminal Procedure Code. But this is a defect which can be amended, and therefore I order that the conviction be amended by striking out "or retaining."

Then, on the merits, it was urged that the evidence was insufficient to support the conviction of dishonest receipt of stolen property. But, if the evidence is to be believed, there was sufficient evidence. The conduct of the accused in running away when some difficulty arose about its disposal, and the Vidáné Arachchi was called in, points to a consciousness of guilt, and therefore I see no reason to interfere with the conviction or sentence.

I notice that there is put up in the paper-book what purports to be a warrant of arrest, in what seems to be the Sinhalese language.

I do not understand under what authority process is issued in a foreign language, and the Solicitor-General who was in Court at the argument professed himself unable to explain how this process came to be issued. The language of our Courts is the English language, and it appears to me that serious doubts might arise as to the legality of an arrest upon a warrant in such form.