1902.
July 31 and August 1.

CADERSA *v.* MUTTAMMA.

P. C., Avissawella, 7,530.

Labour Ordinance, No. 11 of 1865—Substantial irregularities—Unsigned complaint—Form of plaint—Proper party to prosecute a cooly for quitting service, in breach of s. 11.

It is a fatal irregularity to issue a warrant for the apprehension of a cooly, upon a charge of quitting the service of his employer without notice or reasonable cause, if the complaint, reduced into writing by the Magistrate, is not signed by the complainant as required by section 150 of the Criminal Procedure Code.

A plaint in the following terms: "that you did on," &c., "quit the service of Mr. B without notice or reasonable cause, and thereby committed," &c.—is radically bad, for the essence of the offence constituted by section 11 of the Labour Ordinance is quitting service before the end of the term of service or previous warning.

A kankani's prosecution of a cooly for an offence under section 11 of the Ordinance is not legal without proof that such kankani had the authority of the employer of the cooly to prosecute him.

IN this case the accused, an Indian cooly woman, was charged by a kankani with having quitted the service of Mr. Bayley, the Superintendent of Elston estate, on the 25th February, 1901, without notice or reasonable cause, and thereby having committed an offence punishable under section 11 of Ordinance No. 11 of 1865. The facts in detail appear in the argument, given below, of the counsel for the accused.

The accused was convicted by Mr. M. S. Pinto and sentenced to three months' rigorous imprisonment.

She appealed.

Wadsworth, for appellant.—The proceedings are highly irregular. The accused was brought before the Court on the 17th June on a warrant issued at the instance of the kankani. The complaint made by him was not signed by him, as required by sections 148 (1) *a*, 149 (1), and 150 (1). After the accused was brought, Mr. Smith, the present superintendent of the estate, was called and examined. The Magistrate recorded: "Case postponed for to-morrow, as some questions have been raised which Mr. Marshall (complainant's proctor) is not prepared to meet". This is irregular in summary cases. The Magistrate does not state what the questions were, but from what follows it would seem that Mr. Marshall was not ready, or had not sufficient materials, and wanted further evidence. It has been held that a Police Magistrate has no power to adjourn a summary trial to enable the complainant to make inquiry and to find out further evidence against the accused. Such

an adjournment, Withers, J., says, is not only dangerous, but an illegal course to pursue (*Gomis v. Agoris, 2 N. L. R. 180*). The next day, after further examination of a witness, the Magistrate framed a charge " to save misconception ". It ran thus: " That you did on the 25th February last quit the service of Mr. Bayley, the superintendent of Elston estate, without notice or reasonable cause, and thereby committed an offence punishable under section 11 of Ordinance No. 11 of 1865. " The charge, if not vague, certainly does not disclose an offence. It does not state in what capacity accused was employed under Mr. Bayley; it gives a wrong date of quitting—the accused is said to have left the estate in February, 1901; it does not state that accused quitted " before the end of her term of service ", as provided in section 11 of Ordinance No. 11 of 1865. Merely quitting service without notice is no offence (*Periyannan v. Nagamuttu, 4 S. C. C. 35*). It must state that the accused quitted service before the end of her term of service. Where an offence is created by an Ordinance, the precise words of the Ordinance must be followed in describing it. (*Maclean v. Appan Kankani, 2 N. L. R. 59.*) The Supreme Court has no doubt, the power to correct or amend the charge; but in a case like this, where the offence is not a crime against the State, a general conviction on a bad charge should not be set aside. Browne, A.J., said that " the purport of the provisions contained in section 187 (1), (2), and (3), is to show that the accused was apprised by the statement in either the summons or warrant served on him, or the written charge read to him, of the precise accusation against him. This not having been done, the proceedings are entirely irregular ". (*Mendis v. Fernando, 4 N. L. R. 104*). Accused having pleaded not guilty, and there being no case for the prosecution, the Magistrate called witnesses. It is true that under the Criminal Procedure Code the Magistrate has the power to call witnesses. But this is when the offence is purely *malum in se*, not when the act is one made penal by statute. Phear, C.J., said: " Where the criminality of the charge by whichever party made involves nothing that is *malum in se*, but is the pure creature of the Ordinance limited to the object of furnishing a ready means for enforcing contractual rights between the parties, it need hardly be remarked, for it seems obvious, that it is especially incumbent on the criminal court before which such case comes to take care that the complainant who seeks the aid of the Criminal Law for his own advantage should by his plaint pledge himself to the precisely stated charge falling within the terms of the Ordinance, and should clearly establish this charge by his evidence. It is in no degree the duty of the Court to go out of

1902. *July 31 and August 1.*

its way to help the prosecution. The prosecutor is in the position of a plaintiff in a civil action." (Lewis and Crawford on the Master and Servants' Ordinance, Preface.) The remarks of Phear, C.J., though made before the Criminal Procedure Code, show clearly the nature of such offences. Quitting service is only an offence in relation to the employer. If the employer does not come forward, if he does not call any witnesses to prove the offence, the Magistrate should not go out of his way to call conductors, kankanis, cooks, and servants of the employer himself. It is not an offence which the criminal court can take cognizance of. This principle is followed in *Kandasamy v. Muttamma* (*2 N. L. R. 71*). After the Court had finished examining the witnesses it called, the counsel for the accused cited authorities to show that even if all the evidence were accepted, there was no offence committed. The Magistrate then recorded, "Judgment for tomorrow". When "to-morrow" came, he called evidence to meet the points of law raised by the counsel. This is unfair and, as Bonser, C.J., remarked in another case, it is a "most lamentable miscarriage of justice." The legislators must have had in view the loose ways of these Magistrates. As well might a Judge presiding at the sessions adjourn a trial after the defending counsel had addressed the jury and shown that there was no case to go to the jury, and then call evidence to supply the proof which the law requires. By section 190 the Magistrate was bound to forthwith record a verdict of acquittal or conviction. Withers, J., held it was important that a Magistrate should observe the requirements of section 190 of the Criminal Procedure Code as to the duty of recording his verdict of acquittal or guilty forthwith after hearing the evidence for the prosecution and defence (*Rodrigo v. Fernando, 4 N. L. R. 177*). In a prosecution under the Labour Ordinance it is necessary that the Magistrate should, in the event of a conviction, state in his judgment the capacity in which the accused was employed in the complainant's service, so as to show that his quitting it without leave or reasonable cause constituted an offence under the Labour Ordinance (*1 N. L. R. 323*); but the judgment does not disclose this fact. It is therefore bad. So far, as to irregularities of procedure. As regards the facts of the case, it is alleged the accused quitted the service of Mr. Bayley, superintendent of Elston estate, on the 25th February, 1901. Mr. Bayley left the Island in January, 1902, and was succeeded by Mr. Smith. Mr. Bayley did not take any steps when he was on the estate. In April, 1902, fourteen months after the accused had left the estate, the kankani of the estate brings the charge against the accused that she quitted the service of his former master Mr. Bayley. On these

1902.
July 31 and August 1.

facts important questions of law arise. In the first place, the kankani cannot be the complainant, nor can he prosecute the accused. The offence is really a breach of a contract between two parties. The party injured is the only one who could prosecute. Bonser, C.J., said: "In my opinion the employer is the only person who can properly prosecute for offences under the Labour Ordinance, because he is the only person injured. It is not like an assault or breach of the Queen's peace, nor is it an offence which concerns any one but the parties themselves. It would be intolerable that if A's cook leaves him without notice, B, a complete stranger to both, should be allowed to institute a legal prosecution. No doubt a kankani is not a complete stranger, and if he stated and proved that he was instructed by the joint employer to set the law in motion, possibly a Magistrate might be justified in issuing process on this complaint; but in that case the employer should be described as the complainant, and thus made responsible for the proceedings" (*Kandasamy v. Muttamma, 2 N. L. R. 71*). Another important question which arises is whether Mr. Smith, the successor of Mr. Bayley, could authorize the prosecution of a cooly who quitted the service of Mr. Bayley. Though there is no proof of a contract between Mr. Bayley and the accused, let us assume that the contract was one of monthly service. Section 25 of Ordinance No. 11 of 1865 deals with the transfer of contract of service to a new proprietor or manager or superintendent of an estate: "If the estate upon which any agricultural servant is employed under any contract to serve for a period exceeding one month shall, during the pendency of such contract, become vested in or be transferred under the superintendence or management of any other person,.....such contract and all the rights and liabilities shall be transferred to the person to whom the management of the said estate shall become transferred". The Magistrate lost sight of this section when he said that Mr. Smith, having as much interest in the estate as Mr. Bayley, could set the law in motion. There is no dispute about the interest Mr. Smith has in the estate, because he does not know it himself, or who the proprietor is. But so far as the accused is concerned, Mr. Smith had nothing to do with her. Her contract with Mr. Bayley was a monthly one, and this section only transfers the right when the contract is a period exceeding one month. When the contract is a monthly one, the successor cannot exercise the contractual rights of his predecessor. The accused quitted the service of Mr. Bayley when he was the superintendent. Mr. Smith came ten months afterwards. There was no contract pending between Mr. Bayley and the accused, and therefore Mr. Smith can in no

1902. *July 31 and August 1.*

way be said to have, nor could he exercise, the contractual rights which ceased during the time of his predecessor. Under the English Law, the old Act (*20 Geo. 2, ch. 19, § 2*) requiring the complaint to justices to be made by "any master, mistress, or employer" was afterwards amended, when the inconvenience of requiring the master himself to prosecute was felt, by the addition of the words "or by his, her, or their steward, manager, or agent", by *6 Geo.* A, *ch. 25, § 4*, and *4, Geo. 4 ch. 34, § 3*, and of the words "or by his counsel or attorney or other person authorized in that behalf" by *11 and 12 Vict., ch. 43, § 10*. But our Labour Ordinance No. 11 of 1865 does not permit the intervention of any agent. Therefore, the prosecution must be by the employer himself. He must be the complainant. Mr. Smith has no power to authorize a prosecution. On these points the prosecution entirely fails. There is no contract proved between Mr. Bayley and the accused. The complainant charged the accused under a verbal contract of hire and service for a month with a third person and with having quitted his service. As Burnside, C.J., says; "It wouuld seem self-evident that, before a person could be said to have broken even a verbal contract, it must be proved that there was a contract" (*8 S. C. C. 91*). It is not stated or proved when the contract began or for how long. There is no evidence whatever that there was a contract.

Van Langenberg, for respondent.—All the irregularities of procedure complained of are cured by section 425 of the Criminal Procedure Code. In *Kandasamy v. Muttamma* (*2 N. L. R. 71*) Bonser, C.J., simply held that the Court should be satisfied that the case instituted by the kankani was not for his own purposes, but on the authority of his employer. This authority was proved in the present case to come from Mr. Smith. [GRENIER, A.J.—Who is the proprietor of the estate?] Mr. Smith was not sure. [GRENIER, A.J.—We do not know who the proprietor is; Mr. Bayley is gone, and Mr. Smith has taken his place. Has Mr. Bayley authorized Mr. Smith to empower the kankani to prosecute?] There is no evidence on that point. [GRENIER, A.J.—Has Mr. Bayley authorized the kankani to prosecute?] There is no evidence on that point also. There is nothing in the Criminal Procedure Code to prevent the kankani from prosecuting [The counsel argued on the facts also.]

Cur. adv. vult.

1st August, 1902. GRENIER, A.J.—

The proceedings against the accused appear to have been initiated by one Cadersa, head kankani of Elston, on the 17th April, 1902. On that day Cadersa was affirmed, and his evidence was reduced

to writing, and was to the effect that the accused, a female of thirty years, had left his master's service on the 25th February, 1901, without notice or reasonable cause; that she was a monthly paid servant, and had been paid up to 31st December, 1900. The Magistrate, thereupon, issued a warrant returnable on the 19th May. It would be remarked at once that Cadersa made no mention of who his master was, or that his master, whoever he was, had authorized him to institute this prosecution. Objection was taken to this information, which was reduced into writing by the Magistrate, on the ground that it was not signed by Cadersa, as required by section 150 of the Criminal Procedure Code. The objection was sought to be met by the learned counsel for the respondent by reference to section 425. But, as I pointed out at the time, that section must not be made so elastic as to embrace a case of this kind, where the objection raised is not merely a technical one, but one essentially of substance. I sustain the objection. This, therefore, was the first irregularity committed by the Magistrate, and afforded sufficient ground for quashing these proceedings.

On the 16th June, 1902—we are not directly concerned with what transpired in the interval—we find this entry: " Complainant, accused, and surety present; charge explained. She states: ' I am not guilty. I have no witnesses ' ". What the charge was that was explained to the appellant does not appear, because so far we have had only the depositions of Cadersa, which I have already referred to. At this stage, however, the surety who had gone bail for the appellant abandoned her, and the appellant, being unable to find bail, was remanded until the 17th June, 1902. On that day Mr. Marshall represented the complainant, and Mr. de Mel the appellant. A witness, Edgar Smith, was affirmed, and gave the following evidence: " I produce the check-roll, from which it appears that the accused was a cooly on the estate, and left the estate on the 25th February, 1901. I am superintendent of the estate now, namely, Elston. I assumed duties on or about the 12th January last. Mr. Bayley was the superintendent at the time the accused quitted service. He is now in England. He is now on leave ". Now, it is manifest on reading this evidence that Mr. Smith knew personally nothing as to the terms on which the accused was a cooly on the estate, because the accused was on the estate nearly twelve months before he assumed duties as superintendent, and had left it on the 25th February, 1901. There is not a word in the whole of this evidence to show that Mr. Smith had ever authorized Cadersa—assuming that he was to be regarded as the appellant's or Cadersa's master—to institute this prosecution. Possibly the omission may be due to inadvertence on the part of

1902.
July 31 and August 1.
GRENIER, A.J.

those responsible for the prosecution, but, for some reason which does not appear quite clear, the Magistrate after hearing Mr. Smith's evidence postponed the case for the next day, on the ground, as he puts it, " that some questions have been raised which Mr. Marshall is not prepared to argue to-day ". What those questions were are not stated, nor does it appear from the subsequent proceedings that any legal argument was addressed to the Magistrate on any point whatever, or that any questions were discussed which were relevant or irrelevant to this prosecution. This was the second irregularity.

On the next day Mr. Smith was again sworn, and deposed that the accused was paid up to the 31st December, 1900, and that this payment was made before the end of the third week in January, 1901. Thereafter, the Magistrate records as follows: " To save misconception as regards the charge, I now frame charge against accused as follows: ' That she did on the 25th February last quit the service of Mr. Bayley, the superintendent of Elston estate, without notice or reasonable cause, and thereby committed an offence punishable under section 11 of Ordinance No. 11 of 1865 ' ".

Now, I do not quite understand what the misconception was that the Magistrate alludes to, unless it be that the charge that he explained to the appellant on the 16th June, 1902, was different from the charge which he framed two days subsequently. However that may be, it is perfectly plain that the charge upon which the Magistrate has convicted the appellant is radically bad, and a conviction on such a charge would necessarily be illegal. In a case reported in 4 S. C. C. 35, Chief Justice Cayley said, with reference to a plaint couched in almost the same terms: " What the Ordinance makes an offence is quitting the service of an employer without leave or reasonable cause *before the end of the term of service or previous warning* ", and he added the following: " The ingenuity which framers of plaints in Police Court cases display in finding terms and expressions differing from those used by the enactments upon which the charges are based is very remarkable ". The essence of the offence, therefore, is the quitting the service of an employer (without leave or reasonable cause) before the end of the term of service or previous warning.

I shall presently deal with this charge on another ground, but I pass on for the present to what transpired after this charge had been read to the appellant and the appellant had pleaded not guilty. On the appellant's proctor calling no defence, as it seems to me, for obvious reasons, the Magistrate proceeded to call certain witnesses, apparently at his own instance. Now, the evidence of Arthur Jayasinha only served to establish the fact that he kept a

pocket check-roll; that he knew the appellant; that her name was Muttamma; and that she did not give notice, so far as he was aware; and that she left about the middle of February, 1901. The next witness examined by the Magistrate was Cadersa Kankani, the same man who had instituted this prosecution, and this is the additional evidence that he gave: "The accused was in my gang. I do not know if she gave notice; she did not give notice; if she had given verbal notice she would have informed me; the superintendent would have informed me if she had given written notice. I do not know for certain who the proprietor of the estate is". Anything more indefinite and vague than the evidence of this witness I cannot conceive. I take it that the superintendent Cadersa refers to in his evidence is Mr. Bayley, and not Mr. Smith; but this much is certain, that we are unable to test the accuracy of such statements as this witness has made by any information that Mr. Bayley would have been able to afford us on the question of notice. After the examination of this witness, the appellant's proctor appears to have quoted some authorities, and judgment was reserved for the next day. Before delivering judgment the next day, Mr. Smith was sworn again, and, with what object I do not know, it was elicited that he was not sure who the proprietors of the estate were. He mentioned the names of Mr. Haines and Mrs. Hayes in a dubious way, but appeared certain that Messrs. George Steuart & Co. were the agents, and it is remarkable that it was only now for the first time that the authority of Cadersa to prosecute was disclosed by Mr. Smith, for he says at the end of his examination: "I authorized Cadersa Kankani to prosecute the accused". Then the Magistrate proceeded to deliver judgment. In this judgment he does not specify, as he ought to have done, what was the precise nature of the offence that he convicted the appellant of. A day after delivering this judgment he added a rider to it, setting forth his reasons for thinking that the "burden of proving the giving of notice or reasonable cause was shifted to the accused".

It is unnecessary for me on this appeal to deal with any of the points discussed in the judgment, save that which relates to the prosecution by Cadersa of the appellant. Presumably the appellant's employer was Mr. Bayley. Mr. Smith now holds the office of superintendent, and it cannot be said with any reason that there was any contract of service entered into by the appellant with Mr. Smith. On the other hand, the very existence of Muttamma, the appellant, must have been unknown to Mr. Smith until Cadersa Kankani either revealed it to Mr. Smith, or Mr. Jayasinha, the field conductor, produced his pocket check-roll and

1902.
July 31 and August 1.

GRENIER, A.J.

told Mr. Smith that there was a woman by the name of Muttamma who had worked in Mohamado Kankani's gang, and had left about the middle of February, 1901. Mr. Smith's participation, therefore, in this prosecution was clearly an involuntary one, and any part he took in it was probably due to the representation made to him by Cadersa. In the course of the argument before me it was candidly admitted by the counsel for the respondent that there was absolutely no evidence that Mr. Bayley had authorized Mr. Smith to empower Cadersa to institute this prosecution. It would be a most dangerous precedent to allow men in the position of kankanies to charge labourers on the estate with offences under the Labour Ordinance, without authority from the persons who directly engaged their services. I can understand cases where there can be no question as to the *bonâ fides* of a prosecution by a kankani at the instance of his master, but in this case I am far from satisfied that Cadersa was acting either in the interests of his master or in the interests of the proprietors of the estate, whoever he or they may be, in the action he took in this matter, especially in view of the fact that his authority to prosecute only appeared just before the Magistrate proceeded to deliver judgment. In a case to which I was referred by the counsel for the appellant, Chief Justice Bonser was strongly of opinion that the employer is the only person who can properly prosecute for offences under the Labour Ordinance because he is the only person injured. In the course of his judgment the Chief Justice says " that it would be intolerable that if A's cook leaves him without notice, B, a complete stranger to both, should be allowed to institute a prosecution. No doubt a kankani is not a complete stranger, and if he stated and proved that he was instructed by the joint employer to set the law in motion, possibly a Magistrate might be justified in issuing process on his complaint ", and he adds these significant words: " but in that case the employer should be described as the complainant and thus made responsible for the proceedings ". It is difficult to say in this case who is responsible for the proceedings in it, as they were initiated on the 17th May, 1902. It was certainly not Mr. Bayley.

The conviction must be set aside and the appellant acquitted.