1903.
May 18.

ELSTONE *v.* MARTELIS APPU.

M. C., Colombo, 28.

Unlawful gaming—Ordinance No. 17 of 1889, s. 4—Playing in any place to which the public have access whether of right or not—Private land.

An open cocoanut plantation crossed by several paths which did not appear to lead from one house to another in it, nor from the adjoining roads to any of the houses in the plantation, and in which a game for a stake was carried on by divers persons, is a place to which the public have access whether of right or not.

The fact that such plantation is private land does not exclude it from the purview of section 4 of the Ordinance No. 17 of 1889.

Perera v. Perera (2 C. L. R. 6) overruled.

THIS case of unlawful gaming, in which the Magistrate of the Municipal Court of Colombo (Mr. E. Ondatje) acquitted the accused, was heard in appeal by Mr. Justice Middleton on 7th May, 1903, when His Lordship, being doubtful of the soundness of the decision of Burnside, C.J., in *Perera v. Perera* (*2 C. L. R. 6*), on which the Magistrate had based his judgment of acquittal, directed the case to be listed before the Collective Court.

On the 18th May the case was argued before Layard, C.J., Middleton, J., and Grenier, A.J.

The place where the unlawful gaming was alleged to have occurred was proved to be an open plantation of cocoanut palms with several paths running across it. The grounds were not enclosed, but was bordered by four lanes or roads. There were about six houses in the plantation. The majority of the players were seated in circles,and spectators were standing round them.

Rámanáthan, S.-G., appeared for the Attorney-General, appellant

H. J. C. Pereira and *F. Saram*, for the accused, respondents.

18th May, 1903. LAYARD, C.J.—

This is a charge under section 4 of Ordinance No. 17 of 1889. The Magistrate has amongst other things decided that, as the place in which the unlawful gaming is alleged to have taken place was a private land, the accused ought to be acquitted.

Now, the provisions of section 3 (2*a*) of that Ordinance provide that unlawful gaming includes the act of betting and playing a game for a stake when practised in any place to which the public have access whether of right or not. Those words certainly do not exclude a place which is private property merely because it is private property. It includes a place which is private property where the public have generally access, though not of right.

The Magistrate supports his decision by reference to the judgment of Burnside, C.J., in *Perera v. Perera* reported in *2 C. L. R. 6.* Burnside, C.J., there held that the word "access" must be presumed to mean "legal access," and the word "place" must be construed to mean either public place (to which of course the public have access as of right) or a private place to which they may have legal access, whether as of right or by the tacit consent or express license of the owner.

It appears to me that in so limiting the provisions of sub-section 2 (*a*) of section 3, Burnside, C.J., has altogether omitted putting any interpretation on "a place to which the public have access not of right," because where a person has access by tacit consent or express license of the owner he has access as of right. I cannot see my way to leave out altogether in interpreting sub-section 2 (*a*) of section 3 the reference the Legislature has made to a place to which the public may have access not of right. That appears to me to particularly refer to a place which may be private property, but to which the public have generally a right of access.

The evidence of the complainant discloses that the place where the unlawful gaming took place was an open plantation, with a few scattered palms, two or three rubbish heaps, and several paths across it. It is further in evidence that this unenclosed garden was surrounded by four roads, and that there were some houses on it. It is suggested by respondent's counsel that the paths which the Assistant Superintendent speaks of were merely used by the inhabitants of the houses. There is nothing, however, to support the suggestion or to show that the paths across ran merely from house to house or from any particular road to any particular house. When a person speaks of paths across a land, the ordinary meaning would be that the paths went right across the land quite independent of the houses on the land, and if we find on a land paths running across it without any gates or obstructions, the presumption is that those paths are open to any one to walk across the land.

I think, therefore, that with respect to this particular land the evidence shows that the public have generally access to it, though there is nothing to show whether they have such access of right or not.

In my opinion the Police Magistrate was wrong, and I would now leave my brother Middleton to decide as to whether the Police Magistrate was right or wrong on the merits.

MIDDLETON, J., and GRENIER, A.J., concurred.