*Present :* Schneider J. 1923.

## ASSISTANT SUPERINTENDENT OF EXCISE *v.* VELUPILLAI.

*289—P. C. Batticaloa, 12,733.*

*Proctor offering a plea of "not guilty"—No provision in Code—When proctor may be allowed to plead for an accused who is not present—Bail—Proctor as surety for his client—Condition that renter shall not sell in any month arrack exceeding by more than 25 per cent., the average monthly consumption for twelve months within the limits—Meaning of condition.*

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 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.

It is a practice open to the gravest objection for a proctor to stand surety for his client in a case in which he is acting in his professional capacity. If a proctor does offer himself as a surety, the Magistrate is bound to accept him if he possesses the necessary qualifications.

An arrack renter was given a licence to sell arrack subject to the condition that he shall not sell "within the limits of the grantees' exclusive privilege of selling arrack by retail in any one month arrack exceeding by more than 25 per cent., the average monthly consumption for the preceding twelve months within the said limits."

*Held*, that the grantee was prohibited not from selling over the prescribed limit in any particular tavern, but from selling in all the taverns within the limits of his monopoly.

What the condition was intended to mean was that when the figures in reference to the sales for a whole month are available at the completion of the month, and disclose that a quantity has been sold in excess of the limit, the renter would be guilty of a contravention of the condition.

THE facts are set out in the judgment.

*Hayley*, for the accused, appellant.

*Dias, C.C.*, for the respondent.

June 5, 1923. SCHNEIDER J.—

This appeal is connected with appeals Nos. 290 and 291, in all of which the same appellant, who was the purchaser of the exclusive privilege of selling arrack by retail in the Batticaloa District for the year October 1, 1921, to September 30, 1922, was charged with breaches on September 28, 29, and 30 of Condition 24 of the "Arrack

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Rent Sales Conditions, 1921-22," published in the *Ceylon Government Gazette* No. 7,175 of May 13, 1921. He was convicted under section 43 (*h*) of the Excise Ordinance, No. 8 of 1912, and was in each case sentenced to pay a fine of Rs. 1,000.

The procedure followed in all three cases is so grossly irregular that the proceedings must be set aside and the case remitted for procedure according to law. In none of the cases did the accused appear in obedience to the summons. The summons, which are in the usual form, directs that the accused should appear in person to answer to the charge. No charge was formulated or read. A proctor appeared for the accused and pleaded " not guilty." The only material evidence called for the prosecution as recorded hardly proves the charge. An Assistant Superintendent of Excise gave evidence to the effect that he produced a statement showing " consumption of arrack in the Batticaloa Revenue District for the twelve months finishing September, 1922." The statement itself shows figures for the twelve months immediately preceding September, 1922. The period given in his statement is the correct one for the charges. This witness stated that the Government Agent had granted permission to the accused in terms of Condition 24 to sell in excess of the limit as to quantity fixed by that condition, provided that accused sold at Rs. 12 a gallon. He also stated that the proviso stipulated by the Government Agent had not been observed by the accused from September 22. He does not explain why he fixed upon this date, because it is not a date material to the charges, nor does he explain how he is able to speak to the fact of the sales. It is inconceivable how he could have been present at the sales in ten taverns, which, according to the *Government Gazette* of May 13, 1921, is the number sanctioned for the Batticaloa District. He refers to some tavern account books, but does not say what those account books contained. The books themselves I find are in Tamil, and I am therefore unable to derive any information from them. This witness also stated that the accused had exceeded the limit as regards the quantity he might sell on September 28 by 46 gallons and 6 drams, and by the end of September by 1,011 gallons and 46 drams.

All the evidence which I have referred to was given in case No. 289. In cases Nos. 290 and 291 there is no evidence whatever. It should be also pointed out that although in case No. 290 the accused is charged with an offence committed on September 29, there is no evidence anywhere of sales on that day. The irregularities in the procedure, therefore, are of such a nature that they cannot be overlooked, and I am therefore obliged to set aside the conviction in all three cases, and remit them for procedure in due course.

At the close of each case the Magistrate has recorded that Mr. Kadramar, who is the proctor who appeared for the accused and pleaded " not guilty" on his behalf, would sign a bond as surety for the payment of the fine imposed on the accused. It seems to me a

practice open to the gravest objection for a proctor to stand surety for his client in a cause in which he is acting in his professional capacity. Of course, if a proctor does offer himself as a surety, the Magistrate is bound to accept him if he possesses the necessary qualifications. I would also remark that a Magistrate must follow the provisions of the Criminal Procedure Code strictly. The Code has 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. 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 this proctor. 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 where 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.

There were two points which were argued before me by Mr. Hayley who appeared for the accused-appellant. He desired that I should refer to these points in my judgment, and direct that the prosecution should be confined to one charge only, because according to his contention the accused could not be charged with the commission of more than one offence by sales made during the month of September. I shall refer to these points, but whatever I state must necessarily be in the nature of *obiter dicta*, as my orders on appeal are not founded upon these points. The opinion I express will have no binding effect. Mr. Hayley argued first that the prohibition in Condition 24 is against the selling of arrack in excess of a limit during the whole of a month and not upon any particular day of that month. "Month," he argued, must be regarded as a calendar month under the provisions of the Interpretation Ordinance, No. 21 of 1901, section 3 (12). I am inclined to agree with this argument. The words of the condition in question applicable to the facts of these appeals are "the grantee shall not sell or otherwise dispose of within *the limits of the grantees' exclusive privilege* of selling arrack by retail *in any one month* arrack exceeding by more than twenty-five per cent., the average monthly consumption for the preceding twelve months within the said limits." The word "consumption" is not the right word, for it by no means follows that all this sold from a tavern is consumed, or that what is consumed is only what is sold from taverns. There are illicit sales in fact. The word "sales" would seem to be more appropriate. The language of the condition seems to me to support Mr. Hayley's contention. The grantee is prohibited not from selling in any particular tavern, but from selling in all the taverns within the limits of this monopoly. As in this case there might be ten such taverns situated at wide distances apart. The sales in those taverns would fluctuate from day to day, and a renter, therefore, would not find it possible to ascertain whether

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the sales exceed the limits as regards quantity for some days after the sales have actually taken place. Considerations such as these favour the argument in support of the contention that what the condition was intended to mean was that when the figures in reference to the sales for a whole month are available at the completion of the month and disclose that a quantity had been sold in excess of the limit, the renter would be guilty of a contravention of the condition. If the condition be construed otherwise, and a renter be deemed to commit a breach of the condition from the moment his total sales show that he had exceeded the limit, it would lead to some extraordinary results. To be strictly logical, every single sale after the limit is reached would be a distinct offence, because each such sale would be contrary to the prohibition. The number of offences committed would therefore have to be reckoned not by the day, but by the number of glasses and of bottles of arrack sold. Taking the figures disclosed in this case, the accused could be charged over a thousand times for the sales of September 28, 29, and 30. It seems to me, therefore, that the language of the condition and the reason of the thing demand that the condition should be given the interpretation suggested by Mr. Hayley.

He next argued that the accused should not have been convicted under section 43 (*h*), but under section 45 (*c*). He argued that section 43 had a wider scope than section 45, inasmuch as it contemplated acts in contravention of the Ordinance or any rule or order made under the Ordinance, while section 45 contemplated acts or omissions by licensees or holders of passes or permits only. He also urged that, therefore, section 45 (*c*) is the appropriate section under which the accused should have been convicted. I am unable to accept this argument. If the charge against the accused had been proved, his conviction under section 43 (*h*) appears to me to be correct. It should not be overlooked that while section 43 refers to acts in contravention of that Ordinance or of any rule or order as argued by Mr. Hayley, 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 43 and 45 appear 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.

*Sent back.*