1908.
March 16.

Present: Mr. Justice Wendt.

LITTEN *v.* PERERA.

P. C., Matale, 29,789.

Master and servant—Sinhalese labourer—Presumption of monthly contract—Express agreement—Liability—Ordinance No. 13 of 1889, s. 5—Defective plaints—When warrant should be issued.

WENDT J.—The presumption created by section 5 of Ordinance No. 13 of 1889 from the fact of a "labourer's" name being entered in the check roll, coupled with the fact of receipt by him of an advance of rice or money from his employer, does not arise in the case of a Sinhalese, he not being a "labourer" within the meaning of the Ordinance.

But the presumption created by section 3 of Ordinance No. 11 of 1865 applies; and the complainant may prove, with the aid of such presumption, such a contract of service as, in case of breach, would render the servant liable to the penal provisions of the Ordinance.

A warrant of arrest should not be issued in the first instance unless the Court has reason to believe that the accused has absconded or will not obey summons.

APPEAL with the sanction of the Attorney-General from an acquittal.

The facts sufficiently appear in the judgment.

Van Langenberg, for the complainant, appellant.

Wadsworth, for the accused, respondent.

Cur. adv. vult.

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This is an appeal with the sanction of the Attorney-General against the acquittal of the accused on the charge that he, being an agricultural servant bound by a monthly contract of hire and service to serve the Superintendent of Madawela estate, did on November 25, 1907, quit the service of his employer without leave, reasonable cause, or notice, and thereby committed an offence punishable under section 11 of the Ordinance No. 11 of 1865. The ground of the acquittal as I gather it from the judgment, in which the Magistrate's reasons are not very clearly expressed, is that the accused had not been shown to be a servant within the meaning of the Ordinance under which he was charged.

The facts proved were as follows:—

The accused, who is a Sinhalese, was head kangany of Madawela estate, having fifteen sub-kanganies under him. His name, as such head kangany, appeared on the check roll from July, 1906, up to the date of his alleged offence. He had received rice and cash advances. In June, 1907, his wages up to the end of May were paid. June wages were set off against advances, and July and August wages were paid into accused's hands. Dr. Kuntze, a part proprietor of the estate, deposed that accused " worked as a monthly servant. " He added that in January or February, 1907, some Sinhalese coolies under accused having run away without notice, he was advised by his proctor to get his Sinhalese labourers to enter into a monthly contract, because the presumption created by section 5 of the Ordinance No. 13 of 1889 did not apply to them. That he informed accused of this, and then " entered into a monthly contract with the accused and the other Sinhalese labourers a monthly service. I made them to understand that they were to give me a month's notice if they wished to leave service. Since January, 1907, accused has been working as a monthly servant." In cross-examination the witness said that he could not give the date when he made the monthly contract, nor the exact words used by him, nor the names of the coolies present. He added that accused was to be paid so much a day like the Tamils. His wages were calculated at a certain rate per day, and at the end of the month witness found out the number of days he had worked and deducting rice paid the balance.

The presumption raised by section 5 of the Ordinance No. 13 of 1889 from the fact of a " labourer's " name being entered in the check roll, coupled with the fact of receipt by him of an advance of rice or money from his employer, not being applicable to the accused because he was not a " labourer " within the meaning of that Ordinance, the complainant had no doubt to prove without the aid of that section a monthly contract of hire and service such as would bring the accused under the Ordinance

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No. 11 of 1865. It was not necessary in the first instance that he should prove in full every term of such a contract, because he was entitled to call to his aid the presumption created by section 3 of the Ordinance No. 11 of 1865. That section enacts that " every verbal contract for the hire of any servant, except for work usually performed by the day, or by the job, or by the journey, shall (unless otherwise expressly stipulated, and notwithstanding that the wages under such contract shall be payable at a daily rate) be deemed and taken in law to be a contract for hire and service for the period of one month, and to be renewable from month to month. " That is just such a contract as in case of breach would render the servant liable to the penal provisions of the Ordinance. The accused being a " kangany " was by the interpretation clause of the Ordinance included in the term " servant "; the work upon which he was employed was agricultural work, and therefore not work usually performed by the day, or by the job, or by the journey (*Smith v. Muttoe*[1]). There is no proof, there is not even any suggestion, that the contract under which he worked was not a verbal contract. The foundation is therefore laid for the presumption, and the burden lies upon the accused to displace it if the presumed state of the contractual relations between himself and his employer is at variance with their true state. The Magistrate I think failed to appreciate the significance of section 3 of the Ordinance No. 11 of 1865. He does not mention it in his judgment. The case must go back for the hearing of the defence.

Before quitting the case I would call the attention of the Magistrate to the irregular manner in which a warrant appears to have been issued instead of the usual summons to secure the attendance of the accused. It is only when the Court sees reason to believe that the accused has absconded or will not obey summons that a warrant should issue in the first instance. Unless the Court has evidence before it, it will not " see reason to believe. " The complaint in the present instance was contained in one of those slovenly printed forms eked out with manuscript, which have time and again been condemned by this Court as leading to carelessness and neglect of the requirements of the law. At the foot of it is printed a form (now altered in manuscript) of affirmation by a non-Christian to the effect that " the attendance of the defendant cannot be secured by ordinary summons. " That is not a sufficient affidavit. Such as it is, however, the printed jurat is not dated nor signed. On the second page of this multifarious document is a print of what is intended for a compendious summary of evidence to be given by the Superintendent of the estate, presumably intended to supply the place of the examination of the complainant which section 149 of the Criminal Procedure Code requires the Magistrate to make as

[1] *Ram. (1863) 9.*

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a first step in taking cognizance of the case. The blanks in this printed form bear signs of having been filled up by the complainant's proctor before the complaint was presented to the Court. The only thing which the Magistrate appears to have written in the whole document is a word that looks like "wts," followed by his signature, perhaps intended to indicate that the Magistrate was satisfied that there were *primâ facie* grounds for charging the accused with a criminal offence and bringing him before the Court, and that accused had absconded or would not obey a summons. But all those are matters which ought clearly to have appeared on the record. The Magistrate would do well to discourage the use of such printed forms, and to record or cause to be recorded in his presence the examination of the complainant after and not before such examination takes place.

The acquittal of the accused is set aside, and the case sent back to the Police Court for the resumption and completion of the trial according to law.

Appeal allowed; case remitted.