1932 *Present :* **Dalton J.**

MACPHERSON *v.* PEIRIS.

72—P. C. Colombo, 29,648.

Public way—Driving in a manner so as to endanger human life—Galle Face green—Penal Code, s. 272.

The Galle Face green is not a public way within the meaning of section 272 of the Ceylon Penal Code.

APPEAL from a conviction by the Police Magistrate of Colombo.

Accused-appellant, in person.

H. L. Wendt, C.C., for Attorney-General.

August 4, 1932. DALTON J.—

The appellant has been convicted on charges, first of riding a motor cycle on a public way, namely, Galle Face green, in a manner so rashly or negligently as to endanger human life, or in a manner likely to cause hurt or injury to other persons, contrary to the provisions of section 272 of the Penal Code, and second, of failing to produce his certificate of competence on demand by a police officer. In view of his conviction on the first charge an alternative charge was not proceeded with.

On the evidence there is no doubt in my mind about the facts. The accused rode up and down the green from the Galle Face Hotel end to the Fort end about 7 P. M. on the evening of August 14 at a time when numerous pedestrians were walking there, and some small children were also playing and running about there. The evidence shows that he rode in a most dangerous way straight down the green, on the grass at a very fast pace with a rider on the pillion, apparently quite regardless of the people on the green. Mr. Tambiah, who obtained his number on his return down the green, and who saw the cycle until it was lost in darkness, stated from what he saw it was very fortunate no harm was done to the pedestrians and children. His evidence is supported by other witnesses. The front light on the cycle was very dim, and there is some evidence to lead one to conclude that appellant was under the influence of liquor.

The only matter that has given me any difficulty is whether the charge on the first count can be upheld, in other words whether the Galle Face green is a "public way" within the meaning of section 272. As the respondent is not represented, notice was given to the Attorney-General, and I now am indebted to Crown Counsel who has appeared on the other side for the assistance he has given me.

The appellant, who appeared in person, sought to show that the Galle Face green is not a "road" on the footing that a "public way" could only be a highway or road open to the public. If that was so, he argued he could not be convicted of committing any offence under section 272. The definition of the word "road" in the Roads Ordinance, 1861, is very wide indeed, but inasmuch as it was conceded that the Galle Face green is not vested in the Municipality of Colombo (the land is stated to be War Department land), it was argued that, in view of the provisions of section 4 (*a*) of that Ordinance, the place where he was riding was not a road.

That argument begins with the assumption that the term "public way" in section 272 has the same meaning as the word "road" as defined in the Roads Ordinance, 1861. It is not necessary for me to decide whether that assumption is correct for the reason that I have come to the conclusion that the Galle Face green is not a public way within the meaning of section 272. The term is not defined in the Penal Code, and Mr. Wendt has not been able to refer me to any local decision, in which the meaning of the term has been explained or defined. In *Gour's Indian Penal Code,* the learned author deals with the equivalent section of that code and points out what is included in the term. The first essential is, of course, to ascertain whether the place is a "way" at all, as opposed to an expanse of ground over which the public may be allowed to pass, or merely a place to which they resort for pleasure or amusement. According to Coke there are three kinds of ways, (1) a footway, (2) a footway and horseway, and (3) a cartway, which also contains the other two. Gour adopts this classification in his notes on the section in question, the chief characteristic of a public way being that over it all persons have an equal right to pass. The way must however have physical limits to its width, according as it is one or other of the three kinds of way set out. In practice one will see several footways worn from one end of the green to the other. Horses are frequently ridden all over the green, but for the purpose of pleasure and exercise and not for the purpose of using it as a way or road from one place to another. Carts or vehicles, I think I may safely assume, do not pass up and down the green or use it as a cartway or roadway at all. The portion of the green, with which I am concerned in this case, has a roadway on three sides of it, from which people can and do cross and pass on to the green in all directions.

In dealing with this subject Gour points out, referring to English cases, that a short cut through a common used by people for convenience, which they crossed whenever they liked, could not be described as a public way. In *Schwinge v. Dowell*[1] on a charge of trespass it was pleaded in defence that the land trespassed upon was a waste piece of

[1] *2 F. & F. 845.*

land of the manor, with a common public highway across it, used as a place of resort by the inhabitants of the manor. In his address to the jury, Wightman J. stated: "The question is whether there was a way over the spot . . . . In one sense there was a way there and everywhere, for it appears the green was part of the ancient forest, and the effect of the evidence is that everybody went wherever they pleased . . . . But that is not the sense in which the word is used in the plea; it must be taken in some more definite sense, or else the entire forest must be deemed to be a way. Was there any defined way in any particular direction? . . . . If you think there was no regular way there but that people merely went where they liked, find for the plaintiff." In *Sandgate Urban District Council v. County Council of Kent*[1] there was a finding of fact that a footway or esplanade intervening between the sea wall and a carriage way was part of the road. It was pointed out that the use of the esplanade for any *jus spatiandi* or purposes of amusement was not inconsistent with its being part of the road. That case might perhaps apply to the asphalt walk between the green and the sea, but not in my opinion on the facts here to the green itself.

In *Chapman v. Cripps and others*[2], also a case of trespass, it was held that the mere use by people of tracks in a wood, where they were free to wonder about as they pleased, is not necessarily enough to show a dedication of such tracts to the public as public footways. The reasoning underlying these two decisions seems to me to apply to the case before me. I am in fact asked to hold that the whole Galle Face green is a public way within the meaning of the Penal Code, but I am unable to do so. People can and do walk wherever they please over the green, but that in my opinion does not make the green a "public way" within the meaning of section 272.

I am indebted to Counsel for bringing to my notice the only existing regulations, Municipal or otherwise, that he has been able to find governing the use of the Galle Face green. Under the Municipal by-laws, Chapter VIII., section 37, no public ground or space within the Municipality or ground or place belonging to or in charge of the Municipal Council shall, without the written permission of the Chairman, be used for any purpose prohibited by the Chairman by public notice. There is, he states, a public notice of that nature exhibited on the green forbidding the parking of motor cars on the green except between the centre road and the white concrete line on the green. That appears to be the only public notice, Counsel states, that can be said to refer to the Galle Face green under the by-laws. There are, however, regulations under section 53 (1) of the Motor Car Ordinance, 1927, made by the Governor in Council to the same effect, but with the addition that no motor car shall cross the white concrete line or be parked in such a way that any car projects over the line. Parking on the Galle Face centre road is prohibited. There is nothing therefore in these regulations or notices to prohibit a car or any other vehicle being driven on the green if it can obtain access thereto without crossing the white line. The Magistrate has held the green is reserved for pedestrians and children, but there is no law, by-law, or regulation to support his conclusion on that point. Crown Counsel has had to concede that there

[1] *79 Law Times 425.*

[2] *2 F. & F. 863.*

is nothing to prevent appellant riding his motor cycle up and down the green, if he does so with due regard to the safety of others and without any rashness or negligence. Whether or not the use of the green should be further restricted or controlled in any way is a matter for the authorities.

In the result, the conviction of the appellant under section 272 cannot stand. There is, however, in the charge preferred against him, as was pointed out during the course of the argument before me, an alternative count under section 327 of the Penal Code, with which the Magistrate has not dealt in view of the conviction entered against appellant under section 272. Section 327 deals with rash or negligent acts as to endanger human life, or the personal safety of others without reference to any particular place. Whereas no offence has been committed under section 272, the facts clearly disclose an offence under section 327, under which the Magistrate should have convicted the appellant. The conviction under section 272 is therefore set aside, and appellant will be convicted under the alternative count in the charge against him, the sentence passed standing in respect of this offence of which he is now convicted.

On the further charge of failing to produce his certificate of competence, accused led no evidence in answer to the evidence for the prosecution, appearing to confine his defence to the first charge. I see no reason to disagree with the Magistrate in his conclusions on this charge. The conviction will therefore stand.

Affirmed.