Present : Akbar J.

1929.

VANCUYLENBERG *v.* MELDER.

243—M. C. Colombo, 2,109.

Disturb the repose—Making a noise at night—Inhabitants—Police Ordinance, 1865, s. 90.

Where a person is charged with making a noise so as to disturb the repose of the inhabitants of a place, there must be proof that the inhabitants of the quarter and not one household only was disturbed.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

De Jong, for the appellant.

May 27, 1929. AKBAR J.—

The accused in this case was charged with the offence of making a noise at night so as to disturb the repose of the inhabitants of a place named Colpetty lane. He was convicted and fined Rs. 50. The only evidence in this case is that of Mr. and Mrs. Collingwood Carrington. They said that the accused who lived in front of their house carried on the business of loading and unloading lorries, making up of tea cases, and other carpentry works at night. The charge is with reference to the night of February 25. The complainant and his wife say that the repairs are carried on from 11 at night till 2 in the morning, and that in consequence they and their three children are disturbed at night. The accused has given evidence and has called two neighbours to prove that they were not disturbed. I can quite understand Mr. and Mrs. Carrington's feelings and wish that the law would allow me to affirm the conviction. Unfortunately, however, the law is too clear. It was decided, so long ago as 1879, by Phear, Chief Justice, that the word " inhabitants " in section 90 of the Police Ordinance, 1865, under which the accused has been convicted, means the inhabitants of the quarter in which the noise is made and not one individual of it only. In that case a Mrs. Young and her baby were disturbed. As Phear C. J. said : " To construe it as the Magistrate has done in such a way as to give a particular householder a criminal remedy against his next neighbour for a grievance with which the other inhabitants within more or less proximity are not concerned, is to go beyond the scope and spirit as well as beyond the words of the law. Each

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occupier of a house or land is always civilly responsible to his adjacent neighbour for the use which he makes of his property to the latter's annoyance, if the use infringes the maxim *Sic utere tuo ut alienum non laedas* and this seems to be sufficient protection under ordinary circumstances for adjacent or conterminous proprietors."

The words of section 90 are too clear to admit of any doubt. It is not enough to call the inmates of one house only to prove the offence; the prosecution must call several representative inhabitants of the district. This is the same difference which exists between a public nuisance and a private nuisance and the reason why only the former is made penal under Chapter XIV. of the Penal Code. In view of the judgment of Phear C.J. which was quoted to the Municipal Magistrate, I cannot understand how he came to convict this accused. The fact that not only Mr. and Mrs. Carrington, but their children too, have been disturbed does not alter the fact that they do not represent the inhabitants of the quarter. The Police have made no effort to call evidence of residents in the vicinity, and I do not think they should have prosecuted in this case without getting proper legal advice, in view of the case I have quoted.

I set aside the conviction and acquit the accused and remit the fine.

Set aside.