ORIGINAL CIVIL.

Before Greaves J.

JNANENDRA NATH RAY (DECEASED), *In the Goods of.** 1922 *April* 26.

Letters of Administration—Brahmo—Indian Succession Act (X of 1865), s. 331.

In an application for grant of Letters of Administration of the estate of a deceased Brahmo :—

Held, that the grant should be under the Probate and Administration Act (V of 1881).

Bhagwan Koer v. *J. C. Bose* (1) referred to.

THE applicant, Mrs. Shailaja Ray, applied for a grant of Letters of Administration, under the Indian Succession Act, of the estate of her deceased husband, J. N. Ray, who was during his lifetime and at the time of his death a Brahmo. Evidence was adduced that the deceased, at the time of his marriage with the petitioner, made the necessary declaration under the Special Marriage Act (III of 1872). The other near relatives of the deceased were an infant son, the brothers of the deceased and his step-mother.

Mr. H. D. Bose, for the petitioner.

Mr. M. M. Chatterjee (solicitor), guardian *ad litem* for the infant son, Arjun Ray.

Cur. adv. vult.

GREAVES J. This is an application by the widow of the deceased for a grant to her out of this Court of Letters of Administration of her deceased husband's estate. There is no doubt that she is entitled to a

* Testamentary and Intestate Jurisdiction.

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grant but she asks for it under the Indian Succession Act (Act X of 1865) which (see section 331) does not apply to intestate succession to the property of any Hindu, Mahomedan, or Budhist and the question that falls for decision is whether, under the circumstances, the applicant is entitled to a grant under that Act or whether the grant should issue under the provisions of the Probate and Administration Act (Act V of 1881). The deceased left an infant son and if the grant issues under the former Act, the widow will be entitled to one-third of the estate, if under the latter Act she will only be entitled to the ordinary rights of a Hindu widow under Hindu Law. Under these circumstances I directed that the infant son should be represented, and a guardian *ad litem* was appointed and the matter was argued on his behalf.

The evidence is as follows. That the deceased was during his lifetime and at the time of his death a Brahmo by faith, that he was married under the Special Marriage Act (Act III of 1872), that the marriage was registered under that Act after he and his wife had made declarations under the Act, that the *namkaran* (naming) ceremony of the son of the deceased was performed under Brahmo rites, and that none of the ordinary rites and ceremonies usually observed in an ordinary Hindu family were observed by the deceased. The declaration made under Act III of 1872 is to the effect that the parties do not profess the Christian, Jewish, Hindu, Mahomedan, Parsi, Budhist, Sikh or Jaina religion. The preamble to the Act recites that it is expedient to provide a form of marriage for persons who do not profess (*inter alia*) the Hindu religion. Clause 2(4) (*inter alia*) provides that the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is

subject, render a marriage between them illegal. Clause 10 provides for the signature by the parties of the declaration already referred to. Clause 16 provides that either party who contracts any other marriage during the lifetime of the other shall be liable to be punished for bigamy. Clause 17 makes the Indian Divorce Act applicable to such marriages. Clause 18 provides that the issue of any marriage solemnized under the Act shall be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity. The short question which arises for decision is whether the deceased by becoming a Brahmo and remaining such until his death ceased to be a Hindu.

In *Bhagwan Koer* v. *J. C. Bose and Others* (1), a similar question arose with regard to a Sikh. The finding of the Chief Court of the Punjab was that the deceased in that case never renounced Hinduism, that he never became a professed Brahmo and that even if he did so he did not cease to be a Hindu thereby and that he was a Hindu within the meaning of section 2 of the Probate and Administration Act.

The Judicial Committee to whom the case went on appeal state at p. 33 as follows:—

"The second form in which the objection to the "grant of Probate was put was that, assuming the "testator as a Sikh to have been originally a Hindu "within the meaning of the Probate and Administra- "tion Act, he had ceased to be either a Sikh or a "Hindu by becoming a member of another religious "body, the Brahmo Samaj. The learned Judges "of the Chief Court examined the literature bear- "ing upon the Brahmo Society; they had before "them much important evidence with reference to the

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"Brahmos and the relation of their principles and "their organisation to the Hindu system and they "came to the conclusion that a Sikh or Hindu by "becoming a Brahmo did not necessarily cease to "belong to the community in which he was born. "They also found on the evidence that the testator "never became a professed Brahmo at all. In both "these conclusions their Lordships agree."

I am inclined to think that this probably disposes of the matter so far as I am concerned as it seems to me to lay down that a man by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say, that something further than the mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. And I think that the passage is all the more forceful from the fact that it was not necessary for the purposes of the case for the Judicial Committee to express themselves on the point as it would have been sufficient for them to have merely adopted the finding that the Sikh in question never became a professed Brahmo at all.

But it is suggested that this case differs from the present by reason of the declaration made in the present case under Act III of 1872. It becomes necessary therefore to consider this declaration and as a result of so doing I have come to the conclusion that it cannot be taken as an abjuration for all purposes of Hinduism but merely as a statement for the purposes of the Act itself. I understand that the object of the Act was to assist those who having adopted Brahmoism felt scruples at being married under Hindu rites, some of which were repugnant to them, and who therefore desired some means of going through a form of marriage which would be legal and binding other than that prescribed by orthodox Hinduism. Moreover, I think that the expression,

to which I have already referred, in clause 2 of the Act, has some significance, namely, "according to any law to which either of them is subject." Now what is the personal law to which the contracting parties are subject? Surely, it is Hindu Law and no other, at least if this is not so I find some difficulty in saying what was the personal law of the parties. Moreover, this is what the Judicial Committee's decision in *Bhagawan Koer* v. *J. C. Bose* (1) amounts to when they say that a Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born. And if this is so, I cannot think that the declaration under Act III of 1872 was any more than the affirming of something which had actually taken place and that it could not by itself amount to an abjuration of the status and law under which the parties were born.

It will perhaps not be out of place to refer to the passage in I. L. R. 31 Calcutta, at page 19, which deals with the position of a Brahmo: "The next question is whether Brahmos can be "said to be included within the term Hindu. We do "not think we need discuss this question in any "great detail. The founder of the sect was a Hindu "who never abjured his ancestral religion. In fact "he was a mere reformer and professed to restore the "ancient faith to its original purity. There are now "three sections of which the *Adi*, which professes to "follow the principles of the founder, has the fewest "points of difference from the old religion. They all "widely differ in their tenets from those of other "Hindus, but there are still many points in common "between them and the highest form of Vedantism or "Brahmanism. Brahmoism is a faith of Indian origin "and considering the extreme tolerance of Hinduism

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"in matters of mere belief we are disposed to think "that a mere profession of Brahmoism does not "necessarily make a man cease to be a Hindu unless "he also abjures the social rules of Hindus and declares "himself not to be a Hindu."

So far as the last line is concerned I have already dealt with the effect of the declaration under Act III of 1872.

I may add that I am told that, except in a single instance, *In the goods of Benoyendra Nath Sen* (1), when a grant issued under the Succession Act, the invariable practice of this Court has been to make such grants in the case of Brahmos under the Probate and Administration Act. Subject to the appointment of the applicant as guardian of her infant son for the purposes of applying for a grant, I direct a grant to issue to the applicant, under the Probate and Administration Act. She must give security. The costs will come out of the estate as between attorney and client. I certify for counsel. I understand, however, that this is not necessary as neither party asks for costs.

Attorney for the applicant : *S. C. Ghose.*

Guardian *ad litem* : *In person.*

N. G.

(1) Unreported.

CRIMINAL REVISION.

Before Sanderson C. J. and Panton J.

GULZARI LAL

v.

EMPEROR.*

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June 9.

Summons Case—Examination of the accused only after the examination-in-chief of some of the prosecution witnesses—Duty of the Magistrate to examine the accused after the examination and cross-examination of all the prosecution witnesses—Criminal Procedure Code (Act V of 1898), s. 342—Practice.

A Presidency Magistrate is bound to examine the accused under s. 342 of the Criminal Procedure Code after all the prosecution witnesses have been examined and cross-examined. Where, in a summons case, he examined the accused only after the examination-in-chief of some of the prosecution witnesses, and did not examine him again after another witness had been examined and after the cross-examination of the previous witness :—

Held, that he had not complied with the provisions of s. 342 of the Code, and that the omission to do so vitiated the conviction.

THE facts of the case were that, on the 17th March 1922, the accused, a servant of one Mrs. C. B. Singh, offered her for sale three bottles of French wine. She did not look at them at the time, but saw them the next day and found that they contained wine. She thereupon asked the accused where he had got them, and he stated that he had received them from one Kalkatti, a *mehter*. She then communicated with the police who arrested the accused and confronted him with Kalkutti. The latter denied having given the bottles, and the accused was placed on trial before Mr. Keays, the Second Presidency Magistrate, charged under s. 54A of the

* Criminal Revision No. 326 of 1922, against the order of Mr. Keays, Second Presidency Magistrate, dated March 31, 1922.

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Calcutta Police Act (Beng. IV of 1866). On the 31st March, after the examination-in-chief of the sub-inspector Misquita, the arresting police officer, and of Mrs. Singh, the Magistrate questioned the accused as to how he had come by the bottles of wine, and he replied—"A *mehter* gave me them to sell". Thereafter Kalkatti, the *mehter*, was examined and denied the accused's story, and then Misquita and Mrs. Singh were cross-examined, but the Magistrate did not examine the accused any further. He convicted and sentenced him to six weeks' rigorous imprisonment. The accused obtained the present Rule on the ground mentioned in the judgment of the High Court.

Mr. Monnier (with him *Babu Debendra Nath Kumar*), for the petitioner. The accused was convicted under s. 54A of the Calcutta Police Act, which relates to a summons case. Though the Rule was granted on the ground that he had not examined the accused, it now appears from the Explanation that he did so. But the examination is, nevertheless, not in compliance with section 342 of the Code. The words "shall question him generally after the witnesses for the prosecution have been examined, and before he is called on for his defence" require the examination to take place at the close of the prosecution evidence, and s. 245 supports this view. The Magistrate here examined the accused only after the examination-in-chief of the first two witnesses. Thereafter Kalkatti, the principal witness against the accused, was examined, and the two previous witnesses cross-examined, without any opportunity given him to explain their evidence. [Counsel was then stopped by the Court, and added later that the accused was about 18 years of age, and had already served about days of his sentence].

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SANDERSON C. J. This was a Rule granted by two of my learned brothers calling upon the Chief Presidency Magistrate to show cause why the conviction of, and the sentence passed upon, the petitioner should not be set aside on the third ground mentioned in the petition. The third ground is, "that the Magistrate did not apparently examine the accused under section 342 of the Criminal Procedure Code, and the omission to do so is an illegality vitiating the conviction".

The accused was charged under section 54A of the Police Act, and the property which he had in his possession, in respect of which this charge was made, was three bottles of French wine, which, the learned Magistrate in his Explanation says, was valuable.

The story of the prosecution apparently seems to be that the accused was arrested on information given by Mrs. Singh, whose servant he was. After Mrs. Singh and the Inspector of Police had been examined, the Magistrate, as appears from his Explanation, asked the accused "how he came by the bottles of wine," and the accused said that the *mehter* gave them to him to sell. It appears, however, that after this question had been put by the Magistrate to the accused, a further witness was called, and that was the *mehter* whose name was Kalkatti, and he said that he never gave these bottles to the accused. That being the state of the proceedings, the learned counsel for the accused lays stress upon the latter part of section 342 of the Code of Criminal Procedure which provides: "the Court shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined". Technically speaking, the learned counsel is right in the point he has taken that the Magistrate should have questioned the accused after all the witnesses for the prosecution had been examined. This he did not do. Ther

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on this ground, in my judgment, the Rule must be made absolute. I am unable to say whether the accused would have been able to throw any more light upon this question if the learned Magistrate had strictly followed the provisions of section 342. But it seems to me we have no option in this case except to say that the Rule should be made absolute. Having regard to the fact that the learned counsel has stated that the accused has already served a substantial part of his sentence and that he is a young man, we do not direct that he should be placed upon his trial again.

We, accordingly, make this Rule absolute, set aside the conviction and the remaining portion of the sentence, and direct that the bail bond be discharged.

PANTON J. I agree.

Rule absolute.

E. H. M.

[NOTE. See also *Emp.* v. *Fernandez* (1920) I. L. R. 45 Bom. 672, *Gulam Rasul* v. *K. E.* (1921) 6 P. L. J. 174, *Emp.* v. *Rustomji Mancherji* (1921) 23 Cr. L. J. 21, *Gulabjan* v. *Emp.* (1921) I. L. R. 46 Bom. 441, *Muhammad Bakhsh* v. *Emp* (1922) 23 Cr. L. J. 154 and *Mitarjit Singh* v. *K. E.* (1921) 6 P. L. J. 644.]