

1876.
February 22.

Special Acts, and these special provisions cannot be taken out of the Acts and applied as a restriction to the ordinary operation of the criminal law. The District Magistrate will restore the complaint to his file, and will proceed to dispose of it on the merits.

[JURISDICTION AS COURT OF REVISION.]

CRIMINAL.

1876.
April 19.

PROCEEDINGS OF THE HIGH COURT,* DATED 19TH APRIL 1876.

Whipping Act, VI of 1864, Section 7.—Illegality of sentence of whipping, or its execution, on person who is under one or other of certain heavy sentences.

A sentence of whipping passed on a person who is already under sentence of death, or transportation, or penal servitude, or imprisonment for more than five years, is illegal. If the sentence of whipping precede, instead of follow, the other sentence, the passing of the latter sentence renders the inflection of the whipping illegal.

Read Calendar in Cases Nos. 90 and 91 of 1875 on the file of the Session Court of Bellary.

IN these two cases the prisoner has been convicted of the offence of house-breaking by night and of theft in a building committed on two different and distinct occasions.

In Case No. 91 the Session Judge has sentenced the prisoner to be transported for seven years. In Case No. 90 the prisoner has been sentenced to receive one hundred lashes with a cat-o'-nine tails under Act VI of 1864. In passing this latter sentence the Session Judge has remarked that "having transported him (the prisoner) for seven years in Case No. 91, I have thought it sufficient to add a sentence of whipping."

The High Court is of opinion that the sentence of whipping in Case No. 91 is an illegal sentence. Section 7, Act VI of 1864, is as follows:—"No female shall be punished with whipping, nor shall any person who may be sentenced to death or to transportation, or to penal servitude or to imprisonment for more than five years be punished with whipping." These words are perfectly general. They do not touch the legality of the sentence, but the legality of the punishment: they declare distinctly

* (Morgan, C. J., and Holloway, Innes, Kernan, and Kindersley, J. J.)

that the punishment of whipping shall not be inflicted upon females or upon persons sentenced to particular sorts of punishment. The words "may be" in the section clearly mean no more than "is." If, however, the words "may be" are to be taken in their literal sense, the argument against the legality of the sentence is strengthened, because the literal meaning would imply that the sentence which is to render the whipping illegal is to be in the future.

1876.
April 10.

If the words are taken to mean "may have been," the legality or illegality of the sentence depends upon whether the sentence precedes or follows the sentence of transportation. The language employed by the Sessions Judge already referred to above, "having transported him for seven years in Case No. 91, I have thought it sufficient to add a sentence of whipping," indicates with sufficient clearness that the sentence of whipping followed the sentence of transportation. If the sentence of whipping had been passed before the sentence of transportation, it might have been a legal sentence, but the subsequent sentence of transportation would have rendered the infliction of the punishment illegal.

The meaning of the law in Section 7 of the Whipping Act is simply this: The status of woman and that of persons under a particular sentence shall render it illegal to inflict the punishment of whipping.

Ordered accordingly.

[APPELLATE CIVIL JURISDICTION.]

Before HOLLOWAY and INNES, J. J.

Special Appeal No. 79 of 1876.

P. SHEKARI VARMA VALIA RAJAH, SPECIAL APPELLANT
(PLAINTIFF), *v.* MANGALOM AMUGAR AND 11 OTHERS,

1876.
July 10.

SPECIAL RESPONDENTS (DEFENDANTS).

Mortgage.—Local law in Malabar.

In the case of a mortgage of the kind prevailing in a certain part of Malabar called a "peruarthum" mortgage, when the mortgagor redeems, the mortgagee is entitled (before restoration of the mortgaged land) to be paid its market value at the time of redemption, not the amount for which the land was mortgaged.

THE plaintiff (special appellant) brought this suit to recover, on repayment by him of the amount for which they had been