

[4 Mad. 130.]

APPELLATE CRIMINAL.

*The 26th August, 1881.*

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND  
MR. JUSTICE TARRANT.

Talluri Venkayya  
*against*  
The Queen.\*

*Trial of warrant-case—Right of accused to recall witnesses of prosecution.*

In the trial of warrant-cases the accused may, after the charge is drawn up and the witnesses for the defence have been examined, recall and cross-examined, the witnesses for the prosecution.

DURING the trial of a warrant-case, after the case for the prosecution was heard, the charge drawn up and the evidence of accused's witnesses taken, the Pleader for the accused claimed the right to recall and cross-examine the witnesses for the prosecution. The Magistrate declined to allow this course to be adopted, and the Sessions Judge on appeal rejected the accused's appeal, remarking as follows :—

“The defendants had not claimed the right to recall the witnesses when they were called on for their defence, and the only reason why the application was made on their behalf was because they had changed their Pleader. It cannot have been the intention of the Legislature that a defendant should have the right practically to commence a new trial every time he thinks it advisable to change his Pleader.”

The accused accordingly presented this petition to the High Court under Section 297 of the *Code of Criminal Procedure*.

[131] No one appeared at the hearing. The Court TURNER, C.J., and TARRANT, J.) delivered the following

**Judgment** :—In the trial of cases under Chapter XVII of the *Code of Criminal Procedure*, the charge is not framed until the witnesses for the prosecution have been examined. The Code, therefore, not unreasonably provides that the accused may, after the charge has been framed, not only produce his witnesses but shall be allowed to recall and cross-examine the witnesses for the prosecution. See *Regina v. Lall Mahomed* (6 N. W. P., 284) and *Thakoor Dyal Sen's case* (17 W. R. 51) Of this right the petitioner has been deprived. He was in time if he claimed this right at the close of the examination of his own witnesses, unless he had previously expressly abandoned it. It is impossible to say he has not been prejudiced. We must set aside the conviction and direct the Magistrate to resummon and allow the petitioner or his Vakil to cross-examine such of the witnesses for the prosecution as the petitioner desires to cross-examine and, thereafter, to pass a decision.

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\* Petition 223 of 1881 against the sentence of J. P. Fiddian, Acting Head Assistant Magistrate of Kistna, dated 22nd November 1880.

[4 Mad. 131.]

APPELLATE CIVIL.

*The 2nd September, 1881.*

PRESENT :

SIR CHARLES A TURNER, KT. CHIEF JUSTICE, AND MR. JUSTICE MUTTUSAMI AYYAR.

Kolasherri Illath Narainan and another.....(Plaintiffs), Appellants  
*and*

Kolasherri Illath Nilakandan Nambudri  
and another.....(Defendants), Respondents.\*

*Suit for declaration that property is not liable to attachment—Frame of suit—Procedure.*

No Court, other than a Court of Appeal or a High Court acting under Section 622 of the Code of Civil Procedure, can discharge an order of attachment issued by another Court.

Where a claimant to property attached in execution of a decree intervenes, but fails to get the order of attachment set aside and is compelled to bring a suit to establish his rights, the discharge of the order of attachment cannot properly be asked for in such suit. The intervenor having established his title by declaratory decree or otherwise should then carry the decree to the Court by which the order of attach-[132]ment was issued, and such Court is bound to recognise the adjudication and govern itself accordingly.

*Narayanrav Damodar Dabholkar v. Balakrishna Mahadev Gadre* (I. L. R., 4 Bom., 529) followed.

THE facts and arguments in this case sufficiently appear, for the purpose of this report, in the Judgment of the Court TURNER, C.J., and MUTTUSAMI AYYAR, J).

*Ramachandrayyar* for Appellants.

*Mr. Shephard* for Respondents.

**Judgment.**—The respondent, *Ekote Vasudevam Nambudri*, obtained a decree for money against the respondent *Nilakandan Nambudri* in Original Suit 19 of 1878, and, in execution, attached by prohibitory order the mortgagee's interest in two mortgages of immoveable property standing in the name of the judgment-debtor.

The appellant, through his mother and guardian, applied to the Court executing the decree to set aside the attachment. He alleged that the moneys advanced on mortgage were the property of an *illom* (family), of which he and *Nilakandan Nambudri* were members, that the mortgages had been taken in the name of *Nilakandan* as the managing member of the family, and that the debt on which the decree had been obtained was not a debt which the *illom* was bound to discharge. His application was rejected, on the ground that it had been made at too late a period, without any decision on the merits. He then instituted the present suit to obtain a declaration that the mortgagee's interest in the mortgages is the property of the *illom* and is not liable to attachment in execution of the decree obtained against *Nilakandan Nambudri*.

\* Appeal No. 1135 of 1880 against the decree of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 20th July 1880.