without access to the accounts, would have been placed at a great disadvantage in contesting the debt; indeed it is doubtful if he, a mere claimant as he then was, could have effectually resisted a suit on a settlement of accounts by the recognized trustee. The decree was given expressly against the mutt, though as represented by Vijayendra. Now that the appellant has succeeded in establishing his preferential title, he takes Vijayendra's place as representative of the mutt against which the decree was passed. I think the Judge has rightly held that he ought to be substituted for Vijayendra on the record as guardian and representative of the mutt.

But I also agree with Mr. Justice Parker that in execution the appellant cannot dispute the correctness of the decree. Under s. 244 the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. Such a question can only be raised by a separate suit.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Muttusámi Ayyar.

1885.
Sept. 18, 23.
October 2.

SUBBA

against

THE QUEEN-EMPRESS.*

Criminal Procedure Code, ss. 286, 288—Witnesses, Examination of—Irregularity.

At a trial before a Sessions Court, the Attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented.

Held, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted.

THIS was an appeal from the sentence of J. W. Reid, Sessions Judge of Coimbatore, in case No. 33 of 1885.

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* Criminal Appeal 404 of 1885.

Mr. *Grant* for the prisoner.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan, Offg. C.J., and Muttusámi Ayyar, J.)

KERNAN, Offg. C.J.—When this case was called on for hearing on the 18th of September, Mr. Grant, Counsel for the prisoner, called the attention of the Court to the unusual course adopted at the trial in reference to the direct evidence of some witnesses for the prosecution, but which course, he admitted, was adopted by the Sessions Judge on the suggestion of the Attorney who acted for the prisoner and conducted his defence. The course adopted is specified at page 23 of the printed paper after the cross-examination of the sixth witness for the prosecution.

"Arrangement regarding the examination of witnesses:—The Attorney for the defence suggests that, to expedite the trial, the deposition of each witness called by the prosecution given by the witness before the Magistrate should be read in evidence and he be permitted to cross-examine. The Government Prosecutor consents to this procedure. The Court consents to this procedure if, on each witness being called, there be nothing which appears to render this procedure unadvisable."

Accordingly the rest of the prosecution witnesses, eleven in number, when called, were affirmed. The deposition by each witness before the committing Magistrate in the presence of the prisoner was read. The witness stated he had made that deposition which was then marked, and the witness was cross-examined on it.

The Sessions Judge does not refer to any section of the Code authorizing him to assent to the arrangement. Section 286 provides that after jurors or assessors are chosen, and after the prosecutor opens his case as thereby directed, "the prosecutor shall then examine his witnesses." This examination of witnesses present clearly means oral examination (except in cases where evidence is taken by commission or in any case where a witness is deaf or dumb). Such oral examination is therefore the general rule and has always been so.

It will be admitted that it is of the utmost importance that the rule should be followed in all cases where the witness is present

to be examined. If a witness before the Magistrate gave a true statement, he will probably, if intending to tell the truth, repeat the same statement without substantial difference at the trial. If, on the contrary, his statement before the Magistrate was not true in important particulars, he may not be able to repeat the same statement and may omit something important mentioned in his former evidence, or may deny on oral examination that he did make a particular statement before the Magistrate. The demeanour of the witness may be important for the assessors or Judge towards forming an opinion of his truth. It is not necessary to go into the many reasons why this rule should be followed. It is sufficient to say it is the rule, and is founded on reason and justice.

Is there then any legal ground in this case for departure from that rule?

Section 288 provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case. Section 288 is not an exception to the rule in s. 286, for it contemplates that the evidence taken in the presence of the Magistrate may, in the discretion of the Judge, if the witness is produced and *examined*, be treated as evidence. Section 288 does not dispense with the examination of the witness as directed by s. 286. The examination contemplated in s. 288 is examination of a witness in the ordinary way, viz., orally, in reference to the case. The provision is *not* that the evidence before the Magistrate may be put in as the evidence of the witness *if* he is tendered for cross-examination, but it is that such evidence before the Magistrate may be treated as evidence in the case if the witness is *examined;* that is, examined as a witness, not if he is cross-examined or tendered for cross-examination.

The rule appears to contemplate that the witness shall first have been examined, and that after that his evidence before the Magistrate may be *treated* as evidence. It cannot be said that the mere examination of the witness as to his making the deposition before the Magistrate is "examination" within the meaning of s. 288. Section 288 provides for the exercise by the Session Judge of a discretion whether he will treat the evidence of a witness before the Magistrate as evidence in the case.

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Section 288 does not provide that the Judge may treat the evidence before the Magistrate of *all* the witnesses for the prosecution as evidence, if all the witnesses are produced and examined.

If such was the intention of the Legislature, different language would have been used. The language is " the evidence of a witness," and no doubt this language would justify a Judge in a proper case in exercising his discretion in respect of any witness or witnesses. But it does not appear to contemplate (by admitting the evidence before the Magistrate of all witnesses or a number of them together) a complete change of the course and practice of law especially laid down in s. 286.

Discretion is to be exercised by the Judge. Apparently this is discretion in respect of some circumstances affecting the evidence of the witness under the consideration of the Judge.

It appears to apply very usefully when, upon hearing the oral evidence of a witness and looking at his deposition before the Magistrate, the Judge may think that a witness has told the truth before the Magistrate, and has not, either through design, mistake, or forgetfulness, told the real facts at the trial. Without this s. 288 a witness might be cross-examined as to his prior evidence before the trial, and such prior evidence might be relied on to discredit the witness; but his evidence before the Magistrate could not be treated as evidence in the case except under proper circumstances governed by s. 288.

In my judgment s. 288 applies to the evidence of cases of individual witnesses, each case treated by itself and under the circumstances of which the Judge in his discretion thinks it advisable for the ends of justice that the prior evidence should be treated as evidence, and I think it does not justify the order made by the Session Judge.

In this case I do not see that there were any circumstances on which the Judge had to exercise discretion as to any witness. The reason for the proposal of the Attorney is recorded, " to expedite the trial." The meaning of this proposal was that the course which the law required to be taken should not be taken because such course would take time. To yield to the proposal on that ground the Judge would not exercise a discretion, because he was bound to take the time required by law, but he would be acting contrary to law. To yield to the proposal because the Attorney

for the defence requested, and for the prosecution assented, would not be exercising discretion. He had no discretion to exercise on either of these grounds.

The District Judge says: "The Court consents to the procedure if, on each witness being called, there be nothing which renders the procedure unadvisable." That is to say, the Judge adopts as the general rule that the evidence *before the Magistrate* of each witness is treated as evidence, unless, in the case of any witness called, it appears advisable to examine the witness orally. In adopting that as the general rule, he reverses or *primâ facie* refuses to act on the rule laid down in s. 286, and adopts as the general rule a procedure which can only be adopted when circumstances calling for exercise of discretion appear.

There is nothing on the record to show that any discretion was exercised by the District Judge in respect of admission of the evidence of any witness, or that any circumstances calling for exercise of discretion arose.

If the course adopted by the Judge had been taken on his own motion, or on the motion of the prosecutor, speaking for myself, I should feel it my duty to set aside the trial and conviction and direct a re-trial.

The question is whether we should take that course when the procedure by the Session Judge was adopted on the suggestion of the Attorney for the prisoner. We must assume that the Attorney acted in the interest of his client in making the application, though he put forward an inappropriate reason for it. Some of the most important witnesses against the prisoner were not examined orally on direct examination at the trial; their evidence before the Magistrate was put in; however, these witnesses were cross-examined for the prisoner. Considerng the part taken by the prisoner's Attorney for his benefit, we are unable to say that the course pursued was an error which occasioned a failure of justice, s. 537, and we proceed with the appeal.

MUTTUSÁMI AYYAR, J.—In this case the prisoner was arraigned on a charge of murder. The trial was held before the Judge aided by two assessors. The Public Prosecutor called seventeen witnesses for the prosecution. The first six witnesses gave their evidence *vivâ voce* in the regular way, and, at the conclusion of the examination of the sixth witness, the Attorney for the defence suggested that,

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to expedite the trial, the deposition of each witness called for the prosecution, given by him before the Magistrate, should be read in evidence, and that he should be permitted to cross-examine. The Government Prosecutor consented to this procedure. The Judge agreed to adopt the procedure if, on each witness being called, there was nothing which appeared to render the procedure unadvisable. It was followed with reference to the other witnesses for the prosecution—7 to 17. The witnesses for the defence were examined in the ordinary mode. At the conclusion of the trial the assessors found the prisoner not guilty. The Judge, differing from them, found him guilty and sentenced him to death. The Judge has referred the sentence for confirmation to this Court, and the prisoner has also appealed. At the hearing before us Mr. Grant, Counsel for the prisoner, called our attention to the special procedure which was adopted in the Court below, but did not object to it.

The question which we have to consider is whether the evidence recorded in the mode indicated above is such as we might act upon in deciding whether the sentence of death should be confirmed.

Section 286 directs that after the assessors are chosen, the prosecutor shall open his case and shall then examine his witnesses. In the absence of a special direction, the examination contemplated must be taken to be an examination in the ordinary mode.

Section 288 confirms this view. It provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the Judge, *if such witness is produced and examined*, be treated as evidence in the case. This shows that the evidence recorded by the committing Magistrate is not ordinarily evidence in the case, and that the Judge may treat it as such subject to the condition that the witness is produced and first examined by the Judge.

The intention was to confer a power on the Judge when he considers that the evidence given before the Magistrate is true and that the evidence given before him is not true, to treat the former as evidence in the cause, that is to say, as evidence on which he may found the conviction or acquittal of the prisoner. Unless the witness was first examined in the ordinary way there was no room for exercising any discretion. It follows then that the procedure adopted in this case is contrary to the Code of Criminal Procedure

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The next question which requires to be considered is whether the depositions may be treated as evidence because the Attorney for the prisoner suggested that they might be so treated. The fact that the suggestion came from the prisoner's solicitor warrants the presumption that the prisoner was not prejudiced by their adoption. It is provided by s. 537 that no sentence passed by a Court of competent jurisdiction shall be reversed or altered on account of any irregularity in any inquiry under this Code, unless such irregularity has occasioned a failure of justice. It has been held in cases in which evidence which is legally inadmissible has been received at the trial without objection, that the opposite party is not entitled to ask for a new trial on the ground that the Judge did not warn the Jury to place no reliance upon it. In the case before us the prisoner's Attorney suggested the course that has been taken. I also think, therefore, that the appeal may be proceeded with, and that the irregularity in the procedure followed at the trial may be treated as one by which the prisoner has not been prejudiced.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

1885. August 5, 12.

GAJAPATHI (PLAINTIFF), APPELLANT,

and

ALAGIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Vendor and purchaser—Fraudulent concealment by vendor of defect of title—Damages.

In 1881 a Hindú executed a sale-deed of a house in the Mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Múnsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree.

On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks.

Held, that if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimháyyar, District Múnsif of Tiruvellúr, in suit 709 of 1882.

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* Second Appeal 243 of 1885.