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by the defendant's counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

The Judge was not satisfied that the grounds were sufficient; nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

Under the circumstances, we must dismiss this appeal. The conviction and sentence will stand.

Appeal dismissed.

Before Mr. Justice Pontifex and Mr. Justice Field.

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IN THE MATTER OF THE PETITION OF KALI KRISTO THAKUR (PETITIONER) *v.* GOLAM ALI CHOWDHRY (OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1872), s. 530—Record of Grounds—Police Report, Incorporation of—Evidence of Possession—Evidence of Title.

In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words, "whereas from the police report a breach of the peace probable," and found that certain persons were in possession.

Held that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded, *viz.*, in the first place, that the Magistrate is satisfied that a dis-

* Criminal Motion, No. 65 of 1881, against the order of Baboo Ackoy Chowdhry, Deputy Magistrate of Madaripore, dated the 14th January 1881.

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pute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied, yet that, as the police report from which the grounds for apprehending a breach of the peace appeared was incorporated by reference, the final order was not defective.

In re Gobind Chunder Moitra (1) distinguished.

No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favor the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the *right* of possession.

Held that, although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, and his order was set aside.

IN this case an order had been made under s. 530 of the Criminal Procedure Code, declaring one Moonshi Golam Ali to be in possession of certain land. A rule was obtained calling upon him to show cause why the order should not be set aside upon the grounds, *first*, that the preliminary proceeding recorded by the Magistrate, *viz.*, "whereas from the police report a breach of the peace probable," was defective; *secondly*, that the order made by the Magistrate was bad, inasmuch as it did not contain a sufficient description of boundaries so as to enable the land in respect of which the order had been obtained to be identified; and *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order.

Mr. *M. Ghose*, Baboo *Doorga Mohun Doss*, Baboo *Kali Mohun Doss*, and Baboo *Ram Sukha Ghose* in support of the rule.

Mr. *H. Bell* and Baboo *Seetanath Roy* showed cause.

The judgments of the Court were as follows:—

FIELD, J.—This is a case under s. 530 of the Code of Criminal Procedure. The land in dispute is a piece of newly-formed chur land. It was claimed by one party as belonging to his estate Jahazmara, and by the other party as belonging

(1) I. L. R., 6 Calc., 835.

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to the Mehal Panchkati. This rule was obtained substantially on three grounds: *first*, that the preliminary proceeding of the Magistrate was defective; *secondly*, that the order made by the Magistrate is bad, inasmuch as it does not contain a sufficient description by boundaries so as to enable the land in respect of which the order has been made to be identified; and *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order. As to the first of these points, the learned Counsel for the petitioner relied on the case of *Sheikh Munglo* v. *Durga Narain Nag* (1). In that case no proceeding whatever was recorded by the Magistrate who initiated the proceedings under s. 530 of the Code of Criminal Procedure. There was merely an order endorsed on the back of the police report, which order was in these terms: "Serve a notice on Durga Churn to at once cease from building the hut under s. 516, Criminal Procedure Code, and call on both parties to appear before me this day week with their documents, that I may determine, under s. 530, Criminal Procedure Code, who is in possession of the disputed land."

Now, in the case at present before us, there is a proceeding. The Magistrate has recorded the following words: "whereas from the police report a breach of the peace probable." It would seem that some such word as "is" or "appears" has been omitted. In *In re Gobind Chunder Moitra* (2), which was before this Bench a few days ago, I expressed an opinion, that it is the duty of the Magistrate, before taking proceedings under s. 530, to record a proceeding stating, in the first place, that he is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied; and these observations have been now pressed upon me. I certainly think that it is the duty of a Magistrate to record distinctly, in cases under s. 530, that which the law requires to be recorded. But whether the omission on the part of a Magistrate to comply precisely with the requirements of the law will, in every case, afford a sufficient

(1) 25 W. R., Cr. Rul., 75. (2) I. L. R., 6 Calc., 835.

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ground for setting aside his order, is another matter. In the case *In re Gobind Chunder Moitra* (1), which was recently before this Bench, a reference was made, in the Magistrate's proceedings, to the police report, and I expressed an opinion that even if the police report were taken to be incorporated by reference in the initial proceeding, there would not be matter sufficient to satisfy the requirements of the law. In the present case, the Magistrate's proceeding by itself, is not a sufficient compliance with the requirements of the law; but if the police report, to which this proceeding refers, be taken to be incorporated, there is sufficient to show, *first*, that a dispute likely to induce a breach of the peace existed; and *secondly*, to show grounds upon which the Magistrate might reasonably be so satisfied. I am distinctly of opinion that a Magistrate who records a proceeding like that which has been recorded in the present case, performs his duty in a perfunctory and unsatisfactory manner, but I am not prepared to say that the final order in the present case is defective, on the ground that the initial proceeding did not contain within itself all which the law requires to be recorded, but that we have to look to the police report in order to find matter sufficient to satisfy the requirements of the section. On this *first* ground, then, it appears to me that the objection taken by the learned Counsel must fail. As to the *second* ground, that, namely, connected with the boundaries, there is, in all probability, a sufficient description, regard being had to the nature of the land which formed the subject of dispute and to the difficulty of giving precise boundaries of chur land; but it is not necessary to go farther into this question, because the order of the Magistrate ought, in my opinion, to be set aside on the remaining ground, which I am about to deal with. This ground is, that there was not evidence of possession before the Deputy Magistrate to justify his order; that he has allowed his mind to wander away from the question of possession, which it was his duty to adjudicate upon; and that his order is based entirely upon the view which he has taken with respect to title.

I have read through the evidence of the witnesses examined

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on behalf of the petitioner before the Magistrate, and it appears to me that this rule ought to be made absolute upon the ground so taken. Section 530 of the Code of Criminal Procedure enacts that the Magistrate shall, without reference to the merits of the claims of any party to the right of possession, proceed to enquire and decide which party is in possession of the subject of dispute. Now it has been contended before us, that the proper meaning to be placed upon these words is, that the Magistrate is entirely precluded from receiving any evidence whatever as to the title of the parties. In that argument I do not concur. That possession should follow title is a reasonable and natural presumption; and if a Magistrate, in a case of this kind, uses evidence of title merely in order to guide and assist his mind in coming to a decision upon the question of possession, it appears to me that he is not transgressing the provisions just quoted by using evidence of title for this limited purpose; but if, instead of proceeding to decide as to the actual possession, he virtually puts aside the consideration of this question and determines the question of title alone, then I think he is clearly doing that which the law has forbidden him to do. In the present case, the Deputy Magistrate, in the commencement of his judgment, says, that the parties were called upon to show their respective claims to it, *i.e.*, the chur. He does not say that they were called upon to show their respective claims to possession. He then proceeds to enter into the question of title, to consider the circumstances under which the chur came into existence, and to give reasons for thinking that this newly-formed chur is part of the estate of one party rather than of the estate of the other party. Having devoted a considerable portion of his judgment to the question of title, he then proceeds to deal with the question of possession. He commences this part of his judgment by saying, "Now to show possession, Baboo Kali Kristo Thakoor's men have examined several witnesses, one of whom is a munsif's peon." He then deals with the evidence of the witnesses called to prove the distraint proceedings, which he believes to be fictitious; and finally he says; "I lay not much stress on the deposition of such witnesses. As the circumstance and probability

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go in favor of Moonshi Golam Ali and as (to?) what I have stated in paragraph two of this decision, the disputed land lies beyond Jahazmara and is adjoined to Chur Panchkati; and as I believe it is in Golam Ali's possession, I direct that the disputed land should remain in Moonshi Golam Ali's possession till otherwise decided by competent Court." Here the Deputy Magistrate expressly states that he does not lay much stress upon the testimony of the witnesses; and if we put aside this oral evidence, the other evidence before him is concerned mainly, or indeed altogether, with the question of title. It is therefore clear that, apart from the oral evidence upon which he did not lay much stress, there was not evidence upon which the Deputy Magistrate could determine the question of actual possession, for evidence of title, though it may supplement and support direct evidence of possession, cannot, standing alone, be proof of possession. If the oral testimony of the witnesses went to show that the possession was with Golam Ali, and if the circumstances and probabilities of the case and the evidence of title had been used merely to corroborate this testimony, there would be sufficient on the record to support the order of the Deputy Magistrate; but on examining this oral evidence I find that it is mainly directed to the question of title, and contains little or nothing upon the question of possession.

On the whole it is clear from the matter upon which the witnesses were examined, and from the Deputy Magistrate's judgment, that he did not properly address his mind to the question which it was his duty to try,—that is, the fact of actual possession, but did that very thing which by the provisions of s. 530 he was precluded from doing,—namely, determined the case with reference to the merits of the claims of the parties to the *right* of possession. This being so, it appears to me that the Deputy Magistrate's order under s. 530 of the Code of Criminal Procedure must be set aside.

This rule will be made absolute.

PONTIFEX, J.—I also agree that the proceedings must be set aside, and after the judgment of my learned brother, it is only necessary for me to say that, in my opinion, there was a sufficient proceeding recorded for the purpose of initiating pro-

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ceedings under s. 530 of the Code of Criminal Procedure. I also wish to add that, if there had been substantial evidence of possession or a conflict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession. But as my learned brother has read the deposition of the witnesses, and it does not appear that there was sufficient evidence of possession, I agree that the case should not have been decided upon evidence of title alone.

Rule absolute.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

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GOBURDHON LALL (DEFENDANT) *v.* SINGESSUR DUTT KOER AND OTHERS (PLAINTIFFS).*

Hindu Law—Mitakshara — Mortgage of Ancestral Estate by Father for Family Purposes—Attachment of Property in Execution of Decree—Death of Judgment-Debtor prior to Sale.

Where a decree on a mortgage was obtained against the father of a joint Hindu family governed by the Mitakshara law, the debt having been incurred for joint family purposes, and in execution thereof the joint family property was attached, but prior to sale the judgment-debtor died: in a suit subsequently brought by the other members of the joint family, praying for a partition of their shares, and for a declaration that such shares were not liable to be sold in execution of the mortgage decree,—

Held, that there could not be a partition as between a person already dead and his sons, and that the whole of the ancestral property was liable for the mortgage-debt, the only declaration to which the plaintiffs could be entitled being, that they were not liable to pay the debt.

THIS was a suit brought by the plaintiffs, seven in number, for the purpose of obtaining a partition of a four-annas share of Mouza Nirpur, and seven-annas of Mouza Chuck Ibrahim,

* Appeal from Original Decree, No. 231 of 1879, against the decree of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Tirhoot, dated the 9th May 1879.