

CHAKRAFANI
 v.
 VARAHA-
 LAMMA.

in the absence of a notification under section 5 of Act XIV of 1874. We find, however, that the Act VIII of 1890 extends to the whole of British India (see section 1, clause 2). Therefore no notification under Act XIV of 1874 is necessary.

It is urged, on the other hand, on behalf of counter-petitioner, that, under Act VIII of 1890, section 47, the appeal lies directly to this Court, and that, therefore, the petition was wrongly presented to Government in the first instance; but we observe that the order appealed from is not that of a 'District Court' but of the Governor's Agent, and therefore we derive our jurisdiction not directly from Act VIII of 1890, but by the reference made by Government under Rule XXXI of the Agency Rules passed under Act XXIV of 1839. We are also not prepared to attach weight to the objection that it was not competent to Government to refer to us a petition such as the present, which is an application to set aside an *ex-parte* order as to which no appeal is provided in the Act. Section 48 of the Act allows us to interfere under section 622 of the Code of Civil Procedure and we observe that, in the present case, the order in question was passed without hearing the petitioner's vakil. The vakil should have been heard before disposing of the petition.

We set aside the order and remand the case for disposal afresh in accordance with law after hearing the petitioner's vakil.

The costs hitherto incurred will abide and follow the result.

APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
 Mr. Justice Parker.*

QUEEN-EMPRESS,

v.

ANDI.*

**Railways Act—Act IX of 1890, s. 125—Permitting a Cattle to stray upon a railway—
 Discretion of Magistrate.*

When the owner of cattle which have been allowed to stray upon a railway, is prosecuted under Railway Act, 1890, section 125 (1), the Magistrate is bound to ascertain whether the person charged was himself guilty.

CASE referred for the orders of the High Court by H. Moberly, Acting District Magistrate of Malabar, under Criminal Procedure Code, section 438.

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The case was stated as follows:—

In calendar case No. 2063 of 1894, on the file of the Calicut Town Sub-Magistrate, one Mataparambath Andi was prosecuted under clause (1) of section 125 of the Indian Railway Act, because his cow trespassed on the Madras Railway, which is provided with fences suitable for the exclusion of cattle. Admittedly a cow belonging to the accused did stray on the railway. The Sub-Magistrate acquitted the accused on the ground that he had appointed a person to be in charge of the cow, and that it was owing to that person's negligence that the cow strayed on the line.

Clause (1) of section 125 of the Act runs thus:—"The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine." In the present case a cow strayed on a railway properly fenced, yet nobody was fined. I submit that the railway authorities prosecute the owner, the owner ~~must~~ be fined, no matter whether he had placed anybody in charge of the cattle or not. To support this view I would refer to clause (2) of the same section, which leaves it to the railway authorities to decide whether, in the case of cattle being wilfully driven on any railway, the person in charge or the owner shall be punished.

In my opinion section 125 of the Act leaves nothing to the discretion of the Magistrate. If an offence has been committed, the Magistrate must fine the person prosecuted, whether he be the owner or the person in charge of the cattle.

The *Government Pleader* and *Public Prosecutor* (Mr. Powell) for the Crown.

JUDGMENT.—Section 125, clause (1) of the Railway Act, makes punishable the negligence of the owner or person in charge of any cattle which stray upon the line. The section recognizes the obligation of the owner to prevent the cattle from straying while at the same time it provides that the negligence of the person in charge may be punished. There is nothing in the clause to restrict the discretion of the Court in ascertaining upon whom the fault really lies and awarding the punishment accordingly.

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The second clause of the same section makes punishable wilful acts of driving or knowingly permitting cattle to be upon a railway line, and provides that, at the option of the railway administration, the owner, instead of the person in charge shall be punishable. This provision is of a very penal character, and it removes the discretion as to the person to be held liable to punishment from the Court to the railway authorities. No such discretion is given to the railway administration when the straying of the cattle has been through negligence. There is nothing to restrict the power and duty of the Magistrate to ascertain in such cases whether the person charged has himself been guilty.

In the case referred we are of opinion that the acquittal of the owner was correct.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

the petitioⁿ QUEEN-EMPRESS

v.

VEERADU.*

Christian Marriage Act—Act XV of 1872, ss. 3, 68—Unauthorized marriage of a Christian child—Persons professing Christian religion.

The accused who was charged with having committed an offence under Indian Christian Marriage Act, section 68, was acquitted on its appearing that the Christian whose marriage he purported to solemnize was a child of the age of three years. The child had been baptized and her father was a Christian :

Held, that the child was a person professing the Christian religion within the meaning of section 3 of the Indian Christian Marriage Act, and that the acquittal was wrong.

Case of which the records were called for by the High Court on the exercise of its revisional jurisdiction being sessions case No. 2 of 1894 on the file of the Sessions Court of Masulipatam.

The facts of the case and the grounds of the judgment of acquittal were stated by E. C. Rawson, the Sessions Judge, as follows:—

The prisoner is charged under section 68 of the Indian Christian Marriage Act (Act XV of 1872) with having solemnized a

* Criminal Revision Case No. 398 of 1894.