list of documents which he desires to have translated and printed. If the Court has no jurisdiction to deal with a memorandum of objections which has not been moved an appellant may have to pay out of his own pocket costs which he has incurred on account of the memorandum of objections, which the respondents, for his own purposes, refrains from moving. The practice as to the form of order when a memorandum of objections has not been stamped and has not been moved does not seem to be uniform, but orders dismissing the memorandum, in such circumstances, have been made, and we are of opinion there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing a memorandum of objections, there is of course jurisdiction to make an order dismissing it with costs. The memorandum of objections in the present case is dismissed with costs.

In Second Appeal No. 1432 of 1905.—This second appeal is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Pinhey.

KULLAN

v.

EMPEROR.*

1908. November 4, 5, 17.

Criminal Procedure Code of Act V of 1898, s. 339—Full and true disclosure by approver—No condition precedent to pardon—Procedure on trial of approver.

Under section 339 of the Code of Criminal Procedure of 1898 the making of a full and true disclosure by the approver is not a condition precedent to the pardon, but making an incomplete and false disclosure is a condition subsequent by which the pardon, which has become operative before such disclosure, is forfeited. There is no necessity for withdrawing the pardon and such withdrawal has no effect.

Queen-Empress v. *Ramasami* [(1901) I.L.R., 24 Mad., 321], considered.

Queen-Empress v. *Sudia* [(1892) I.L.R., 14 All., 336], followed.

Queen-Empress v. *Nattu* [(1900) I.L.R., 27 Calc., 137], followed.

Where a pardon is tendered and the approver is afterwards put on his trial, he ought to be asked if he relies on the pardon as a bar to his trial; and if he does so rely, the prosecution should first prove that the pardon

*Criminal Appeal No. 579 of 1908.

WALLIS AND PINHEY, JJ.

KULLAN v. EMPEROR.

has been forfeited by an incomplete or false disclosure. When this course is not adopted, the conviction is illegal and will be set aside.

King-Emperor v. *Bala* [(1901) I.L.R., 25 Bom., 675], followed.

King-Emperor v. *Kothia* [(1906) I.L.R., 30 Bom., 611], followed.

The transaction is one of the utmost good faith and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. The condition is broken if he withdraws before the Sessions Court or on cross-examination statements made before the Committing Magistrate or in his examination in chief, respectively.

CRIMINAL appeal presented against the conviction and sentence of A. Edgington, Sessions Judge of Salem Division, in Calendar Case No. 65 of 1908.

Four persons were tried for murder in the Sessions Court of Salem in Sessions Case No. 94 of 1907. The accused was taken as an approver and a pardon was tendered by the Sub Magistrate with the sanction of the District Magistrate. The approver having contradicted in the Sessions Court the statements made before the Magistrate, the District Magistrate withdrew the pardon and the accused was tried under section 339 of the Code of Criminal Procedure on the charge of murder and convicted by the Sessions Judge.

The prisoner appealed to the High Court.

The acting Public Prosecutor in support of the conviction.

JUDGMENT.—In this case a pardon was tendered to the appellant by the Committing Magistrate under the orders of the District Magistrate. The appellant was then examined as a witness before the Committing Magistrate and at the trial before the Sessions Judge when he retracted the evidence previously given by him in such a manner as to lead to the acquittal of some of the accused. Thereupon the District Magistrate under whose authority the pardon had been granted, acting apparently on the authority of *Queen-Empress* v. *Ramasami*(1) purported to withdraw the pardon and the appellant was subsequently tried and convicted of dacoity, the offence of which a pardon had been tendered. In the Sessions Court he appears to have pleaded his pardon, and to have relied mainly on the contention that the District Magistrate was not the person authorised to withdraw it. The learned Public Prosecutor has, however, on appeal, very rightly directed our attention to the Bombay decisions in

(1) (1901) I.L.R., 24 Mad., 321.

King-Emperor v. *Bala*(1) and *Emperor* v. *Kothia*(2) which, if they are correct, show that the pardon was still in force and that the trial was illegal.

The question depends upon the true construction of section 339 as in now stands in the Criminal Procedure Code of 1898, but with a view of arriving at a correct construction it seems desirable to trace the various changes by which the section came to assume its present form.

In England the practice has been and still is to allow an accomplice to turn King's evidence as it is called on a promise of pardon if he makes a full and true disclosure, and if he fails to do so no pardon is granted him, and until a pardon is granted him he cannot plead it in bar of the trial. *The King* v. *Garside*(3). It is there pointed out that the most the Court before which he is indicted could do, if he claimed to have earned his pardon by making a full and true disclosure, would be to adjourn the case to enable him to apply for a pardon. The difficulties which have arisen under the Code of Criminal Procedure could therefore never have arisen in England.

In India tender of pardon was dealt with by sections 209 and 211 of the Code of 1861. Act XXV of 1861, section 211, empowered the Court of Session at the time of trial and also the Sudder Court as a Court of reference, if of opinion that the person who had accepted an offer of pardon had not conformed to the conditions under which it was tendered to order his commitment. The amending Act VIII of 1869 substituted a new section 211 empowering the Magistrate before the committal or the Court of Session at the time of trial or the High Court as a Court of reference to order the committal. In the next Code Act X of 1872, section 349, conferred the like power on the Magistrate before the trial, the Sessions Judge before judgment has been passed and the High Court as a Court of reference or revision, and contained this further provision: "The statement made by a person under pardon which has been withdrawn under this section may be put in evidence against him." The words "withdrawn under this section" which make their appearance for the first time can only refer to the order of committal to

(1) (1901) I.L.R., 25 Bom., 675. (2) (1906) I.L.R., 30 Bom., 611.
(3) 2 A. & E., 266.

WALLIS AND PINHEY, JJ.

KULLAN v. EMPEROR.

be made by the Committing Magistrate, Court of Session or High Court under the section. In *the matter of the petition of Nobin Chundra Banikya*(1) decided on the 20th February 1882, Maclean, J., declined to be bound by an order of committal made by a Sessions Judge under the section and set aside the conviction which had ensued. Whether in consequence of this decision or not, the Code passed in that year Act X of 1882 no longer empowered Magistrates, Sessions Judges and High Courts to commit if it appeared to them that the conditions of the pardon had not been complied with but provided merely that "Where a pardon may be tendered under section 337 or section 338 and any person who has accepted such tender has not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered, etc." If the section had stopped there it would clearly have been open to the approver to plead the pardon in bar of trial and the Court would have been bound to adjudicate on it. The section, however, went on "statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section." This is in effect a reproduction of the similar provision in the Act of 1872, except that the expression "a person under pardon" is replaced by "a person who has accepted a tender of pardon," but whereas in the Act of of 1872 "withdrawn" clearly meant withdrawn by the Committing Magistrate, the Sessions Judge or the High Court as the case might be, in the Act of 1882 it was neither specified by whom the pardon was to be withdrawn nor was there any indication as to what the effect of such withdrawal should be. In this state of things Straight, J., as we understand him, held in *Queen-Empress* v. *Ganga Charan*(2) that making a full and true disclosure was a condition precedent to the right to pardon (p. 99), and that where a pardon has been tendered and accepted and not withdrawn it could be pleaded in bar of further proceedings, the fact that it had not been withdrawn being taken as proof that the condition had been complied with. In that case the pardon had not been withdrawn, but in *Queen-Empress* v. *Malua*(3) where the Sessions Judge had purported to withdraw the pardon

(1) (1882) I.L.R., 8 Calc., 560. (2) (1889) I.L.R., 11 All., 79.
(3) (1892) I.L.R., 14 All., 502.

and had wrongly put the approver back into the dock and tried him along with the other prisoners, Edge, C.J., and Blair, J., in directing him to be retried, observed at p. 508 that should he plead his pardon in answer to the first charge of robbery it would have to be carefully considered, thus indicating that in spite of the withdrawal it was open to plead the tender of pardon and the compliance with the condition in bar of further proceedings. In *Queen-Empress* v. *Sudra* (1) the subsequent trial of the approver was alluded to as a trial for the alleged breach of the conditions on which the pardon was tendered, which assumes that the approver had been pardoned and that it was for the prosecution to show that he had forfeited the pardon by committing a breach of the condition on which it was granted, in other words, that making a full and true disclosure was not a condition precedent to the pardon, but making an incomplete and false disclosure was a condition subsequent forfeiting the pardon. This is not the view we should have been disposed to take under the Act of 1882, but it must be borne in mind in considering the effect of the change introduced in 1898. The next case is *Queen-Empress* v. *Manick Chandra Sarkar* (2) in which the Court observed in answer to a reference from the Sessions Judge that it was for the authority which granted the conditional pardon to withdraw it, but had no occasion to consider what the effect of such withdrawal would be on the right of the approver to plead the pardon. This was in 1897. Next year, while the present Code was being passed, the Select Committee amended section 339 by substituting the words "forfeited under this section" for "withdrawn under this section." In *Queen-Empress* v. *Ramasami* (3) (December 1900) a case subsequent to the amendment, Benson, J., in a judgment in which Davies, J., concurred, followed. *Queen-Empress* v. *Manick Chandra Sarkar* (2) in holding that it was for the authority who granted the pardon to withdraw it, without adverting to the substitution of "forfeited" for "withdrawn," and held further that if the authority granting the pardon was satisfied that the condition had been broken, he had authority to withdraw it. Under the amended section, however, it does not appear that there is any necessity for withdrawal or that withdrawal has any effect. After the approver has given

(1) (1892)) I.L.R., 14 All., 336. (2) (1897) I.L.R., 24 Calc., 492.
(3) (1901) I.L.R., 24 Mad., 321.

WALLIS AND PINHEY, JJ.

KULLAN v. EMPEROR.

evidence the prosecution can proceed with the case against him if they choose and he can plead pardon in bar of the trial, and the only question appears to be, is making a full and true disclosure a condition precedent which the approver has to prove to establish his right to pardon according to the view taken in *Queen-Empress* v. *Ghanga Charan*(1) under the Code of 1882, or his failure to make such full and true disclosure a condition subsequent determining or forfeiting the pardon which was apparently the view taken in *Queen-Empress* v. *Sudan*(2) which is followed in *Queen-Empress* v. *Natu*(3) decided subsequently to 1898. Now the use of the word "forfeited" in the present section in our opinion shows that the latter is the construction now favoured by the legislature. Forfeiture originally meant fine or punishment and was applied to the loss of property which was one of the consequences of a conviction for felony. Then it was extended to any loss sustained by a grantee on breach of the condition of his grant, as where a lease is said to be forfeited by breach of the conditions thereof. Both in law and ordinary parlance the word denotes depriving a man of some thing he has already got. An approver cannot in our opinion be said to forfeit a pardon unless he has already been pardoned. If so, it is for the prosecution to prove that the pardon has been forfeited. This is the view taken in *King-Emperor* v. *Bala*(4) and *Emperor* v. *Kothia*(5) with which we agree on this point.

It may, in certain cases, be difficult for the prosecution to discharge the burden, but, on the other hand, it would be even harder for the approver if it were put upon him. In this connection, however, we desire to express our concurrence with the remarks of Benson, J., in *Queen-Empress* v. *Ramasami*(6) that the transaction is one of the utmost good faith, and that the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the Committing Magistrate if he withdraws it in the Sessions Court or to make it when examined in chief if he withdraws it in cross-examination. As regards the procedure to be followed, we think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he

(1) (1889) I.L.R., 11 All., 79.
(2) (1892) I.L.R., 14 All., 336.
(3) (1900) I.L.R., 27 Calc., 137.
(4) (1901) I.L.R., 25 Bom., 675.
(5) (1906) I.L.R., 30 Bom., 611.
(6) (1901) I.L.R., 24 Mad., 321.

relies on it and if he says "yes" which is a plea of pardon the issue as to the pardon should be tried first.

In the present case this has not been done, and we think that the conviction is illegal and that it must be set aside and a fresh trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

THE PUBLIC PROSECUTOR
v.
BONIGIRI POTTIGADU AND OTHERS.*

1908. November 26, 27. December 4.

Penal Code—Act XLV of 1860, s. 400—Criminal Procedure Code, Act V of 1892, s. 423(2)—When verdict of jury can be interfered with—Evidence necessary to prove offence under s. 400, Indian Penal Code—Evidence Act I of 1872, s. 54.

The Court will not, on appeal, interfere with the verdict of a jury, under section 423 (2) of the Criminal Procedure Code, unless it is satisfied that the verdict is erroneous, and that such error was caused by a misdirection by the Judge or misunderstanding on the part of the jury of the law as laid down by him

In a case under section 400, Indian Penal Code, the prosecution is bound to prove that the accused belonged to a gang, which was consciously associated for the purpose of habitually committing dacoity. The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred.

Evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Evidence Act.

Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by K. C. Manavedan Raja, Sessions Judge of North Arcot Division, in Sessions Case No. 55 of 1907.

The accused were tried before the Sessions Court of North Arcot for offence under section 400 of the Indian Penal Code. The jury unanimously returned a verdict of not guilty and the

* Criminal Appeal No. 542 of 1908.