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distinguished from the present one; but with great respect to the learned Judge who decided it, I think the decision of a divisional Bench in *Annamalai* v. *Subramanyan* (1) must be followed in preference. The latter is moreover in accordance with my own view of the true meaning of article 31. (*Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve* (2) has no bearing on the present question.

The Subordinate Judge will be directed to receive the plaint on the Small Cause side and dispose of it according to law. The costs' will abide the result.

ORIGINAL CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911. April 11, 12 and 19.

A. RANGANAIKI AMMA (PLAINTIFF),

v.

A. RAMANUJA AIYANGAR AND FIVE OTHERS (DEFENDANTS).*

Hindu Law—Marriage of a daughter of deceased Hindu may be performed by his widow—Reasonable marriage expenses recoverable from joint-family property.

The widow of a deceased member of an undivided Hindu family is entitled to perform the marriage of a daughter of the deceased even when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage and she is entitled to recover the reasonable expenses of such marriage out of the joint-family property.

CASE stated under section 69 of the Presidency Small Cause Courts Act (XV of 1882), by J. H. BAKEWELL, the Chief Judge of the Small Cause Court, Madras, in suit No. 401 of 1909.

The facts of this case, as set out in the letter of reference, appear in the judgment.

T. R. Venkatarama Sastriar and *T. S. Rajagopala Ayyar* for the plaintiff.

T. Ethiraja Mudaliyar for the first and third defendants.

JUDGMENT.—This is a reference by the Presidency Small Cause Court in a suit instituted by the mother of a minor

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* Referred Case No. 4 of 1910.

(1) (1892) I.L.R., 15 Mad., 293. (2) (1893) I.L.R., 17 Bom., 42.

Hindu girl against the undivided coparceners of her father to recover the expenses of the girl's marriage defrayed by the mother. The question referred to this Court is: "Is the widow of a deceased member of an undivided Hindu family entitled to perform the marriage of a daughter of the deceased, when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage and to recover the reasonable expenses of such marriage out of the joint family property. The letter of reference sets out the facts as follows :—

"The plaintiff is the widow of one Sudarsna Aiyangar, deceased, who was the son of the first defendant and brother of the other defendants and undivided from them. Plaintiff had a daughter Lakshmi by the deceased, aged 10, who was asked in marriage for one Sundara Ramanuja Aiyangar. The marriage was agreed upon by all the parties and the *nischithartham* or betrothal ceremony was performed by the first defendant at his own expense and a day was fixed for the marriage. Before the marriage day arrived, the father of the bridegroom wrote to the first defendant demanding that certain properties should be given by him to the boy. The first defendant did not wish to comply with his demand and proposed to give the girl to another bridegroom to whom plaintiff objected on the ground that he was a widower of 34 years of age.

Thereupon the plaintiff herself entered into negotiations with the family of Sundara Ramanuja Aiyangar, the bridegroom first proposed, and carried out the marriage of her daughter with him, without calling upon the defendants to perform it, and without proper notice to them of her intention. The plaintiff seeks in this suit to recover the expenses incurred by her in performing this marriage. The learned Judge found that the defendants did not improperly or wrongfully refuse to perform the marriage of the plaintiff's daughter and held that the plaintiff was not therefore entitled to perform the marriage herself, and to demand the costs of so doing from the defendants, and he accordingly dismissed the suit with costs."

The learned first and second Judges of the Small Cause Court are of opinion that the plaintiff is not entitled to recover the expenses from the defendants, while the learned third Judge is of a contrary opinion. The ground on which the former opinion is based is that the first defendant, the father of

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the deceased, had a preferable right to select a bridegroom for the girl and to dispose of her in marriage and as he did not wrongly or improperly refuse to perform the marriage the widow acted wrongly in performing it herself.

The first question we have to decide is, whether the plaintiff was entitled to perform the marriage of her daughter in the circumstances set out in the letter of reference. The rules of Hindu Law, on which the answer to this question must depend, are by no means clear. Ordinarily, it would be regarded as the function of the guardian of a minor girl whoever that person might be to arrange for her marriage and to select the bridegroom. The Hindu Law, however, contains very little authority on the question of guardianship (Mayne's Hindu Law, section 211). There are some texts relating to the persons who are to give a girl in marriage which have often been referred to in deciding who is entitled to select a bridegroom and which have to be considered in this case. We shall first refer to the state of the authorities on the question of guardianship. The texts of the Hindu Law refer only to the property and not to the person of the minor. According to Manu, it is the duty of the Sovereign to protect the property of minors [see chapter VIII, section 27]. The same rule is laid down by Vishnu, Sankha and Likhita, Bondhayana and Katyayana [see Colebrook's Digest, volume II (1874 edition), pages 575-76]. According to these texts, none of the relations of the minor has a right to be the guardian ; but the king is to appoint a proper person to protect the minor's property. Jagannatha says "but it should be here remarked that the property of a minor should be entrusted to heirs and the rest appointed with his concurrence, or, if the infant be absolutely incapable of discretion, with the consent of a near unimpeachable friend, such as his mother and the rest." And again, commenting on the text of Katyayana enjoining the undivided kinsman of an infant son not to divide the common estate until the minor attains majority he says "in practice, the mother is the guardian of the minor and all his property . . . . If the widow be old and incapable of governing her own conduct, there is no harm in permitting the estate to be guarded by kinsman selected by her, for it is only directed that a widow and the rest shall guard the property by any possible means." Thus it is observable that the mother's right of guardianship was recognized very early. W. H. Macnaghten in his "Principles of Hindu Law," Vol. I, page 103, observes :—

"A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship. But where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen, according to the degree of proximity but the appointment of guardians universally rests with the ruling power." Sir Thomas Strange, in his book on Hindu Law published in 1830, volume I, page 71, says that the king is, "to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendent of those who cannot take care of themselves. In this capacity, it rests with him, *i.e.*, with the judicial power, exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor, or female. It is stated that, in practice, the mother is the guardian; but, as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper, if capable, to be consulted on the appointment of one;—and, if of competent understanding, the concurrence of minor himself is not to be disregarded; all which only shows how much the choice is a matter of sound discretion." Mr. Mayne says—see section 211—

"The father, and next to him the mother, is his natural guardian. In default of her, or if she is unfit to exercise that trust, his nearest male kinsmen should be appointed." Mr. Trevelyan also observes: "The Hindu Law does not seem to prescribe any positive rules with respect to the rights of guardianship, but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law. For instance, the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable" (page 64).

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In *Mooddoo Krishna Naik* v. *Tandavaray Naik* (1) the Śuddar Court held that the mother may act as guardian at partition. On these authorities it may be taken as clearly established that the mother is entitled to the guardianship of a minor boy or girl after the father and that the paternal kindred are postponed to her. Where the family is undivided the surviving coparceners of the father would, no doubt, be entitled to hold possession of the family estate until partition, but this does not affect her right of guardianship in other respects; (see *Namasevayam Pillay* v. *Annammai Ummal* (2) and *Muni Reddi* v. *Venkata Reddi* (3)). The right to give a girl in marriage should ordinarily be regarded as part of the general right of guardianship unless it be expressly vested by law in a different person. See *Shridhār* v. *Hirālal Vithal* (4) and the mother's right to select a bridegroom would be prior to that of any of the paternal *Dayadis* of the deceased father.

We have therefore next to examine the texts relating to the marriage of a girl. These are collected in the Vyavastha Chandrika of Shyam Charan Sircar, vol. II, pp. 445 to 447. The principal text is that of *Yagnavalkya*, slokas 63 and 64. "A father, paternal grandfather, brother, *sakulya*, the mother likewise are the givers of a girl in marriage. The right to do so devolves on them successively, so that on the failure of the first, the next in order is entitled to perform the ceremony if of sound mind." The expression translated "on failure" is *Nasay* which means literally "on the death," but it is explained that the same rule applies to absence in a distant place. The verse occurs in a context relating to the ceremonies to be performed at the marriage. The text goes on to say "If they do not give (her in marriage), they become guilty of destroying an embryo at every menstruation of the damsel." The prescription of a spiritual penalty often indicates in the Hindu Law that the obligation is not a legally binding one. Vignaneswara observes "This, however, must be understood in the case of a bridegroom endowed with the qualities as mentioned being procurable. The word translated into 'procurable' by Shyama Charan Sarcar is 'Sambhave' which literally means 'on the happening.' This shows that the obligation is not to seek out a bridegroom but only to make the gift of the bride to a

(1) (1852) Madras Decisions 105.
(2) (1869) 4 M.H.C.R., 339 at p. 342. (3) (1866) 3 M.H.C.R., 241 at p. 244.
(4) (1888) I.L.R., 12 Bom., 480 at p. 484.

bridegroom when he is available." If the relations mentioned in the text neglect their duty, the girl is, after the lapse of a certain time, entitled to give herself in marriage to a bridegroom. Having regard to the language and the context, it is certainly doubtful whether on its proper construction the text does not relate merely to the ceremonial act of giving so as to make the religious rite most efficacious, although it is true that it has been assumed in several reported cases and in the writings of some modern authors on Hindu Law to include the right of disposing of the girl by selecting a bridegroom for her. Kamalakara in his "*Nirnaya Sindhu*" in commenting on the text says, that "where the father is dead, if the brother of the girl be *asamskritha*, that is, 'uninitiated,' the mother should make the gift," which indicates that in the author's view ceremonial competency is what the text deals with. It will be noticed that the author prefers the mother to the other *sapindas* of the girl's father. Narada and Vishnu have also got texts similar to Yagnavalkaya's though Narada places the maternal grandfather and the maternal uncle before the *sakulyas* and the mother and Vishnu also places the maternal grandfather before the mother. The language of all these texts is moreover that of an obligation laid on the relations and not of a right conferred on them. This was the view taken in *Venkatacharyulu* v. *Rangacharyulu* (1) where the obligation is one enforceable in law, it would no doubt follow that the person under obligation has also a corresponding right to perform the act which he is bound to do, but it can hardly be held that any of the persons mentioned in the texts can be legally compelled to give the girl in marriage or be cast in damages for failure to do so. (See *Namasevayam Pillay* v. *Annammai Ummal* (2).) The consequence attached to the failure according to the Hindu law-givers is as already observed that the person failing would be guilty of a heinous sin—a pronouncement which would indicate that the obligation is only a moral and not a legal one. It has also been held that the provision as to the proper person to be the giver of the girl is only directory in its character. See *Khushālchānd Lālchānd* v. *Bāi Māni* (3) and *Venkatcharyulu* v. *Rangacharyulu* (1) both of which cases related to the invalidity of the

(1) (1891) I.L.R., 14 Mad., 316.

(2) (1869) 4 M.H.C.R., 339 at p. 344. (3) (1887) I L.R., 11 Bom., 247.

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marriage in consequence of the gift having been made by the mother without the consent of the father. A contrary interpretation of the texts by holding them to be obligatory with reference to the proper person to make a gift of the bride would work serious inconvenience in practice. In practice, as a matter of fact, the mother is the person who exercises the right of choice of a bridegroom when the father is dead. That such is the case when the family is divided or when she is not living with the undivided *dayadis* of her husband there can be no doubt, although the texts of Yagnavalkya and other Smrithi writers do not make any distinction between a divided and an undivided family. We are inclined to hold that the texts really deal only with the religious right of making the gift or *danam* of the bride (*Namasevayam Pillay* v. *Annammai Ummal* (1) that they are only directory and not obligatory even from a religious point of view, that they create no legal right or obligation, that they do not prescribe any special rule with respect to selecting a bridegroom or of disposing of a girl in marriage (as opposed to the ceremonial act of giving) and that the right to select a bridegroom must therefore be taken to vest in the guardian of the girl as part of the general rights of guardianship. In *Maharanee Ram Bunsee Koonwaree* v *Maharanee Soobh Koonwaree* (2) where the question was whether the step-mother was entitled to the custody of her step-daughter with a view to giving her in marriage in preference to the paternal grandmother of the girl, LOCH and MACPHERSON, JJ., no doubt observe:—"We are inclined to think that the texts already referred to, lay down a special rule with respect to the right to dispose of a girl in marriage, different from the right of guardianship." The learned Judges, however, abstained from deciding the point as they held that the paternal grandmother had the preferable right of guardianship, as she was more nearly related to the girl than her step-mother. The *dictum* in the above case was adopted by FARRAN, J., in *Nānābhāi Ganpatrāv Dhairyavan* v. *Janārdhan Vāsudev* (3), but the learned Judge was dealing with the right of the father of a girl as against the mother, and the question arose before him moreover in an application by the father for *ad interim* injunction restraining his wife from performing the daughter's

(1) (1869) 4 M.H.C.R., 339 at pp. 343 and 344. (2) (1867) 7 W.R., 321.
(3) (1888) I.L.R., 12 Bom., 110 at p. 120.

marriage, pending the suit for a declaration of his right of guardianship. It is further not clear from his judgment that he did not intend to decide the question on the ground of the father's superior right of guardianship, for he observed "in the absence of authority, I am unable, on a rule of this kind, to hold that the plaintiff has forfeited his parental right to give his daughter in marriage, or that the defendants are justified in marrying her without her father's consent, and against his wish. That important question must be determined when the case comes to a hearing." For the reasons already mentioned, we doubt the correctness of the dictum of the Calcutta High Court in *Maharanee Ram Bunsee Koonwaree* v. *Maharanee Soobh Koonwaree* (1). But assuming that the above-mentioned texts propound a special rule with respect to the right to give a girl in marriage, we agree with the view expressed in *Namasivayam Pillay* v. *Annamai Ummal* (2) that they are obsolete so far, at any rate, as the mother's right is concerned. In that case the divided brother of a deceased Hindu sued the widow for a declaration of his independent legal right to give in marriage her infant daughter to a person of his own choice without her intervention. It was enough for the purpose of the case to decide that he had no such unqualified right, and the Court consisting of SCOTLAND, C.J., and INNES, J., abstained from deciding more. But their observations show that in their opinion the mother's right to select a bridegroom is superior to the brother's. They observe "the strictly legal position and rights of the defendant (that is, the mother) as the guardian of her daughters and the possessor of her husband's property presents still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognised a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his kinsmen. Such a recognition is very inconsistent with the disposal of her daughters in marriage by her husband's brother or other relation without reference to her and tends forcibly to support the view we have expressed with respect to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law ever having given

(1) (1867) 7 W.R., 321. (2) (1869) 4 M.H.C.R., 339 at pp. 343 and 344.

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the exclusive right contended for. But now that the texts declaring such a state of dependency have become, as did the Roman law relating to the *Iatela Muliebris* obsolete and a woman acts independently as guardian and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that, although competent and capable to be guardian, a mother has no right to be consulted in the choice of a husband for her daughter." In *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (1) and *Shridhār* v. *Hirālāl Vithāl* (2) the right of both parents to bestow a girl in marriage was regarded as being stronger than, and of a different character from, that of other persons. In *Tulsha* v. *Gopal Rai* (3) it was held that the mother is the "most natural and proper person" to arrange for the marriage of a girl and in *Kaulesra* v. *Jorai Kasaundhan* (4) even an outcasted mother was held not to have forfeited her right of guardianship.

We are, therefore, of opinion that the plaintiff as the proper personal guardian of her minor daughter was entitled to select a bridegroom for her and to give her in marriage and that in order to entitle her to do so it is not neces ary for her to show that the father of the deceased wrongly and improperly refused to perform the marriage. In the present case, on the facts stated in the letter of reference, her act must, in any event, be regarded as proper, as the choice of the bridegroom had been approved by the first defendant. This view is in accordance with the decision of this Court in Second Appeal No. 566 of 1889, where COLLINS, C.J., and PARKER, J., held that the mother could not be held to be acting in fraud of the rights of the father where the latter had approved of the bridegroom, and the only difference between him and his wife was regarding the amount of money that should be received as 'bride-price.'

We now proceed to deal with the second question, namely, "whether the mother is entitled to recover the reasonable expenses of such marriage out of the joint-family property." The decision of this question has been made by the learned Judges of the Small Cause Court to rest on the applicability or otherwise of section 69 of the Indian Contract Act. That section lays down that "a person who is interested in the payment of the money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other." It is undoubted law that where a

(1) (1878) 2 C.L.R., 583.
(2) (1888) I.L.R., 12 Bom., 480.
(3) (1884) I.L.R., 6 All., 632.
(4) (1906) I.L.R., 28 All., 233.

Hindu coparcener dies, leaving an unmarried daughter, his survivors are bound, out of the joint-family property, to defray the expenses of the marriage. This does not at all involve the conclusion that they are entitled to select a bridegroom for her though they are of course bound to pay only the reasonable expenses of the marriage, according to the circumstances of the family, and not any amount which might have been actually spent for it. In *Vaikuntam Ammangar* v. *Kallipiran Ayyangar* (1) a decree was passed in favour of the mother of a minor girl for the expenses of her marriage, it being held, that where the mother had lawfully performed the marriage of her daughter and had in consequence incurred expense, she was entitled to recover it from her husband's undivided brother. The judgment is not expressly based on section 69 of the Contract Act though it was referred to in argument. In *Vaikuntam Ammangar* v. *Kallipiran Ayyangar* (2) in which the parties were the same as in *Vaikuntam Ammangar* v. *Kallipiran Ayyangar* (1) the decision is based on section 69. In our opinion it is doubtful whether that section is applicable to such a case, as it apparently contemplates cases where one person is bound by law to pay money and another is interested in the payment of it. It apparently has relation to payment to a third person and it is difficult to apply it to a case where the person is bound under the law to make a payment directly to the person who has incurred the expense. Moreover, as observed in *Subramania Iyer* v. *Rangappa Reddi* (3) to which one of us was a party, the interest referred to in the section is apparently a pecuniary interest. See also Pollock and Mullah on "Contracts," page 287. It is immaterial, however, in our opinion, whether section 69 of the Indian Contract Act is applicable or not. Under the Hindu Law the defendants are bound to provide the expenses of the plaintiff's daughter's marriage out of the joint family property in their hands, and if, as we hold, the plaintiff was entitled to perform the marriage, she has under the law a right of action against them to recover the expenses of the marriage. There is no reason for holding that the provisions of the Contract Act are exhaustive of all cases in which a person under the English Law would be taken to have a right of action against another as for money paid to

(1) (1900) I.L.R., 23 Mad., 512. (2) (1903) I.L.R., 26 Mad., 497.
(3) (1910) I.L.R., 33 Mad. 232.

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his use. It has been held that the Contract Act is not an exhaustive Code as the preamble to the Act itself shows. See the *Irrawaddy Flotilla Company* v. *Bugwandas* (1), *Narayanasami Reddi* v. *Osuru Reddi* (2), *Goverdhandas Gokuldas Tejpal* v. *The Bank of Bengal* (3), *Chandra Sekhar Kar* v. *Nafar Chandra Kundu* (4). In *Bradshaw* v. *Beard* (5) where the brother of a lady who had separated from her husband on account of a quarrel, performed her burial without communicating with the husband, it was held that he was entitled to recover the cost of the burial from the husband as money paid to his use. WILLES, J., observed :—" Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the law of nature and society make a moral duty. And upon his default, the law obliges him to recoup the reasonable expenses of the person who performs it for him. . . . I am not, therefore, surprised to find that there are two authorities in this court - *Jenkins* v. *Tucker* (6) and *Ambrose* v. *Kerrison* (7)—which support this view ; and I feel no alarm that this doctrine may induce a stranger to thrust himself in between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking parties are not allowed to claim in respect of moneys expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud, in concealing from the husband the fact of his wife's death, and so preventing him from performing the last duty to her remains, the case would have presented a very different aspect. But I see no reason for imputing any such misconduct to the plaintiff. Therefore, I think the plaintiff is entitled to recover the reasonable expense incurred by him in the performance of that duty which the defendant ought to have discharged, but has failed to discharge." See also *Dalal Kunwar* v. *Ambika Partap Singh* (8), *Vrijbhukandas* v. *Bai Paravati* (9) ; Keener on Qasi-contract, pp. 341 to 344. The present case is much stronger than *Bradshaw* v. *Beard* (5) as in this case according to our view the law gave the plaintiff the right to perform the

(1) (1891) I.L.R., 18 Calc., 620 [P.C.]
(2) (1902) I.L.R., 25 Mad., 548.
(3) (1891) I.L.R., 15 Bom., 48 at p. 60.
(4) (1906) 4 C.L.J., 555.
(5) (1862) 12 C.B.R. (N.S.), 344 at p 348.
(6) 1, H. Bl. 91.
(7) (1851) 10 C.B., 776.
(8) (1903) I.L.R., 25 All., 268.
(9) (1908) I.L.R., 32 Bom., 26.

marriage and threw on the defendants the obligation to pay for it. We hold, therefore, that the plaintiff is entitled to recover the expenses of the marriage out of the joint-family property of the defendants.

We answer both parts of the question referred to in the affirmative. The Small Cause Court will provide for the costs of this reference.

ORIGINAL CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

In re VENKATESWARA SASTRI (ACCUSED), PETITIONER.*

1911 July 24, 25, August 2.

Presidency Magistrates' Courts, jurisdiction of, inter se—*Transfer, High Court has power of, from court of Chief Presidency Magistrate to court of another Presidency Magistrate—Criminal Procedure Code (Act V of 1898), ss.* 21, *cl.* (2); 526, *cl. (ii)—Charter Act, s.* 15.

The Court of the Chief Presidency Magistrate and those of the other Presidency Magistrates are "courts of equal jurisdiction" within the meaning of section 526 clause (ii), Criminal Procedure Code (Act V of 1898).

The High Court has power to transfer a case from the file of the Chief Presidency, Magistrate to that of another Presidency Magistrate.

APPLICATION praying the High Court to order the transfer of Calendar Case No. 11453 of 1911 from the file of the Chief Presidency Magistrate's Court, Madras, to that of the Fourth Presidency Magistrate.

The facts of this case are set out in the order.

P. Narayanamurti for the petitioner.

The Crown Prosecutor on behalf of the Crown.

ORDER.—This is a petition for the transfer of Calendar Case No. 11453 of 1911 (a charge under section 293, Indian Penal Code) from the file of the Chief Presidency Magistrate to that of the Fourth Presidency Magistrate.

The learned Crown Prosecutor raises the preliminary objection that the Court of the Fourth Presidency Magistrate is not one of "Equal or Superior Jurisdiction" to that of the Chief Presidency Magistrate as contemplated in section 526, Criminal Procedure Code, and hence this court had no power to order the transfer prayed for.

* Criminal Miscellaneous petition No. 201 of 1911.