only voidable by the party affected by it, the effect of section 90, Indian Penal Code, is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence. The second accused must, therefore, be held to have removed the girl from the guardianship of prosecution witness No. 2 without her consent.

In the result, we confirm the conviction and sentence with respect to the second accused and reverse the conviction of the first accused and direct that he be set at liberty.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1911. Oct. 3, 4, 12 and Nov. 23.

G. G. JEREMIAH (ACCUSED) APPELLANT,

v.

F. S. VAS (COMPLAINANT), RESPONDENT.*

Evidence Act (I of 1872), ss. 21 and 81—Evidence of publication of a newspaper by a particular person, merely by production of the paper—Sufficiency of, Criminal Procedure Code (Act V of 1898), ss. 255, 256, 271, 272 and 428—'necessary' meaning of in - Mistake of Court, as to prima facie case—Retrial.

Per SUNDARA AYYAR and PHILLIPS, JJ.—

Merely exhibiting a copy of a private newspaper containing a libellous statement without any sort of proof such as the production of an authenticated copy of a declaration under section 7 of Act XXV of 1867 is no proof of publication of the libel by the person by whom the paper purports to have been published.

Evidence that a certain copy of the paper "*appears* to be printed and published by *A*" is no proof of publication, by him.

If there be proof of publication of a newspaper by *A* then section 81, Evidence Act, presumes that what purports to be a newspaper of a particular name is that paper and that every copy of it was issued by the publisher of that paper.

Gathercole v. *Miall* [(1846) 15 M. & W. 319], *Rex* v. *Forsyth*, [(1814) Russ and R. 274] and *Watts* v. *Fraser*, [(1837) 7 Ad. & E. 223], considered.

A statement in a complaint that the accused published the libel is no evidence against the accused as it was not made in the presence of the accused. The fact that the accused never denied publication by him of the libel does not relieve the prosecution from the necessity of proving affirmatively that the accused published the libel, an essential fact necessary to establish the guilt of the accused.

Additional evidence under section 428, Criminal Procedure Code, can be ordered to be taken only if the appellate court thinks it necessary.

Quære.—Whether if the admission by the accused of publication is contained in his written statement, that would relieve the prosecution from the defect in letting in evidence of publication.

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* Criminal Appeal No. 194 of 1911.

JEREMIAH v. PAS.

Difference between admissions in civil and criminal cases pointed out.

Quære.—Whether section 81 of the Evidence Act is not confined to public documents alone.

Per SUNDARA AYYAR, J.—Where the prosecution by its own negligence failed to produce evidence which it was its duty to do additional evidence cannot be considered '*necessary*' by the Appellate Court within the meaning of section 428. The language of that section seems to indicate cases where, there being already evidence on the record, the court considered it to be unsatisfactory or where the evidence on record leaves the court in such a state of doubt that it considers it necessary to enable it to decide the case, to have further evidence.

In such a case the accused should be ordered to be acquitted and not retried allowing further evidence to be taken.

Per PHILLIPS, J.—Where on the court itself taking a mistaken view that a *primâ facie* case of publication by the defendant had been made out (as was evident from its framing a charge) evidence to that effect was not let in by the complainant; it is a case where the Appellate Court ought to consider that additional evidence is *necessary* within the meaning of section 428, Criminal Procedure Code, and a retrial would be the proper order to be made under the circumstances, if taking additional evidence would not meet the requirements of the case.

'Necessity' under section 428, Criminal Procedure Code, is a matter to be determined on the particular facts of each case.

Per BENSON, J.—Where the prosecution wanted to let in evidence necessary to prove the offence, but the Magistrate intervened, stating that it was unnecessary in the circumstances of the case and so refused to take that evidence, the case is one in which a retrial may properly be ordered or in which the Court may properly call for the additional evidence under section 428, Criminal Procedure Code.

APPEAL against the judgment of F. J. RICHARDS, the District Magistrate and Justice of the Peace, Civil and Military Station, Bangalore, in Criminal case No. 20 J.P. of 1910.

The facts of this case appear fully in the judgment of SUNDARA AYYAR, J.

E. R. Osborne with *M. K. Narainaswami Ayyar* for the appellant.

The prosecution has failed to prove that appellant is the printer and publisher of the newspaper, without which a conviction cannot stand. See *Mohideen Abdul Kadir* v. *Emperor*(1), and *Emperor* v. *Chinnapayan*(2).

Gaps in the prosecution evidence should not now be allowed to be filled up: and the prosecution should not now be given an opportunity to prove that appellant is the printer and publisher. See *Basanta Kumar Ghattak* v. *Queen-Empress*(3).

(1) (1904) I.L.R., 27 Mad., 238. (2) (1906) I.L.R., 29 Mad., 372.
(3) (1899) I.L.R., 26 Calc., 49.

There is no doubt, the statement of the accused, under section 272, Criminal Procedure Code, that he is the printer and the publisher but that is of no value. Because, all that an accused is required to say is, whether he is or is not guilty: and anything said in addition, should be left out of consideration. Moreover, there are no pleadings in criminal cases as in a civil case.

Again, the fact that a name corresponding to that of the appellant is printed at the bottom of the paper is no evidence of the appellant printing the paper. *Vide The King* v. *Williams and another*(1). In that case the name printed at the bottom of a playbill was held not to be evidence of who printed it.

Dr. Swaminathan for complainant.

Section 3 of Act XXV of 1867, requires the name of a printer to be inserted in a book or newspaper. *Vide, Queen-Empress* v. *Hari Shenoy*(2).

The admission by the accused, in his statement, is conclusive. The name at the bottom of the paper is *primâ facie* proof and the court is bound to presume its genuineness. *Vide* section 81 of the Indian Evidence Act. "Genuineness" relates to the origin of the paper or book. *Vide* sections 79 and 80 of the Indian Evidence Act. If there is no evidence as to who the printer is, additional evidence ought to be permitted to be adduced under section 428.

E. R. Osborne in reply.

"Genuine" means that the paper is a "genuine copy" of the original and not that every bit of news in it is accurate. Such a presumption would be disastrous. Additional evidence is to be taken only if there is some evidence already on record, and the court is in doubt and seeks additional help. Where there is no evidence there can be no doubt whatever.

P. R. Grant for the Public Prosecutor was not called upon.

SUNDARA AYYAR, J.—This is an appeal by the accused in Criminal Case No. 20 of 1910 in the Court of the District Magistrate and Justice of the Peace, Bangalore. He was convicted of libelling the complainant by publishing in a journal named the "Army and Civil News" on the 28th September 1910 what purported to be a report of the proceedings in a civil suit in the Court of the District Judge of Bangalore. The defendant in

(1) (1824) 2 L.J. (O.S.) K.B., 30. (2) (1893) I.L.R., 16 Mad., 443.

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that suit was the uncle of the complainant, an Advocate of the Bangalore Court, who appeared for his uncle as counsel. The suit was for rent due by that defendant for a house. The report contained the following statement :—"His Honour facetiously remarked that the uncle, the Dental Surgeon, (that is, the defendant in the suit) and the lawyer's nephew, both combined, wanted to deprive the plaintiff of his rent by shifting the responsibility on to the shoulders of the other nephew, the Dental Surgeon, who is now in Goa and beyond the reach of the arms of the civil law." Two days after the publication of this report a correction appeared stating that it was not "His Honour" that made the remark but Mr. Saldanha, the counsel for the plaintiff in the suit.

At the trial in the Lower Court the accused maintained that, notwithstanding the mistake mentioned above, the report was substantially correct and that it was a privileged statement made without malice. The Lower Court held on various grounds that the report was not substantially correct, and further found that it was extremely improbable that the remark was made at all by Mr. Saldanha and that there was evidence of malice in the tone of the report and of the correction notice.

On appeal the contention that the report was substantially a correct one was repeated; but I have no doubt that no privilege can be claimed for a mistake so palpable as the one that was admitted in this case and the publisher published the statement attributed to the Civil Judge at his own risk. The main contention in the appeal is that there is no legal evidence in the case that the accused published the libel complained of, and that the prosecution altogether failed to adduce evidence that the accused published the issue of the 28th September 1910 of the "Army and Civil News" in which the libel appeared or that he was the publisher of the journal known by that name. This contention I find to be well founded. A copy of the issue of the paper containing the libellous statement was put in. Besides this the only evidence of publication by the accused given after the accused appeared before the court was the statement by the complainant in examination-in-chief, "I have complained about the article marked Exhibit A in the 'Army and Civil News' which appears to be printed and published by Mr. G. G. Jeremiah." This does not amount to a definite statement either

that the accused published the article in question or that he was the editor and publisher of the journal, whether the sentence, as contended by Mr. Osborne, means only that the particular issue of the journal put in bore the statement that it was printed and published by Mr. Jeremiah, or whether, as contended by Dr. Swaminathan, that the article or the journal appeared to the witness to be one printed and published by Jeremiah. In the petition of complaint put in by the complainant it is stated that the accused reported the case in the "Army and Civil News." The complaint was no doubt sworn to by Mr. Vas, the complainant. But the statement was not made in the presence of the accused and could not be taken as evidence against him. There is no explanation given why it was not repeated in the complainant's deposition at the trial. It is contended that the accused never denied that he was the printer and publisher of the "Army and Civil News", or that he published the issue of the 28th September 1910 containing the libellous statement, and that as a matter of fact he admitted the fact before the Lower Court in the written statement put in by him. But I am unable to find any such admission in that statement. Paragraph No. 3 thereof says "what was published was a substantially true report without any malicious intention." There is no admission here that it was the accused that published the statement. It is in all probability true that the accused did not deny that he published the libel. This is not sufficient. It is incumbent on the prosecution affirmatively to prove that the defendant published the libel complained of, as that was one of the essential facts necessary to establish the guilt of the accused. It is unnecessary to consider whether, if such admission were contained in the accused's written statement, that would relieve the prosecution from the defect in letting in evidence of publication. *Mohideen Abdul Kadir* v. *Emperor*(1), *Emperor* v. *Chinnapayan*(2) and *Basanta Kumar Ghattak* v. *Queen-Empress*(3), are authorities in support of the appellant's contention that such an admission by the accused made in answer to questions put by the court under section 342, Criminal Procedure Code, could not be utilized by the prosecution to fill up a gap in its own evidence. No doubt

(1) (1904) I.L.R., 27 Mad., 238. (2) (1906) I.L.R., 29 Mad., 372.
(3) (1899) I.L.R., 26 Calc., 49.

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an admission by the accused may be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act. But an admission under that section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. The accused in a criminal case may plead that he is guilty or not guilty. See sections 255, 256, 271 and 272, Criminal Procedure Code. But there are no pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove all the facts necessary to constitute the offence charged against the accused. If it fails to do so, no charge could be framed at all against the accused in a warrant case, and in sessions cases the court should, when the case for the prosecution has been closed, acquit the accused where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution. It is clear therefore that the appellant's omission in his written statement before the Lower Court to deny the publication, or any inference of his intention not to deny it, cannot be urged by the prosecution, in answer to the appellant's contention of no evidence of publication. It is contended that under section 81 of the Evidence Act, the Court is bound to presume the genuineness of every document purporting to be a newspaper or a journal, and that inasmuch as Exhibit A in the case bears the name of the accused as the printer and publisher, the presumption of its genuineness would include a presumption that the accused is the printer and publisher of Exhibit A, and that therefore it was unnecessary for the complainant to let in any evidence of the publication of Exhibit A by the accused. Mr. Osborne for the appellant contends that the section applies only to public documents, and that in any event it provides only that the court should presume that a document purporting to be a newspaper or journal is that it is the particular newspaper or journal, and not that it was printed or published by a particular person. His first contention appears to be supported by a note of Messrs. Ameer Ali and Woodroffe in their commentaries on the Evidence Act, fourth edition, page 425, that the section refers to public documents, but it is very doubtful whether the language of the section

supports it." If punctuation may be taken to throw any light on the question, the existence of a comma after the word 'journal' is against the appellant's contention. Even otherwise, the natural import of the words of the section does not appear to favour the view that the phrase "printed by the Queen's printer" not only qualifies the expression "private Act of Parliament," but also "newspaper or journal." It is however unnecessary in this case to discuss the question further, as I am of opinion that the presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be. Such apparently is not the English law. According to that law the proper way to prove the publication of a libel, where evidence is not given that a particular paper complained of was published by the accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question. In *Gathercole* v. *Miall*(1), the plaintiff sought to prove that the defendant published several copies of a newspaper called the "Nonconformist". That the defendant was the editor and publisher of the journal of that name appears to have been admitted. The plaintiff's object in proving the publication of many copies was to show the extent of damages sustained by him. A person of the name of Brookes was called, who stated that he was the president of literary association consisting of 80 members, that he saw at the institution office a copy of the issue in question, that he believed that the copy had been lost or destroyed, that he believed it to have been a copy of the paper produced in evidence and bore the same heading, namely, "Nonconformist" and that it contained the libellous article complained of. Objection was raised to the reception of secondary evidence of the contents of the paper that the witness had seen. PARKE, B., was of opinion that, as the defendant had been proved by the regular statutory evidence to be the printer and publisher of the paper, the witness's evidence that the copy he saw was similar to the one produced in court was sufficient to show that it was published by the defendant. The learned Judge observed: "There was general evidence that it was a paper called the Nonconformist, containing, according to the

(1) (1846) 15 M. & W., 319 at pp. 327, 330 and 336-337.

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best of the witness's recollection, the libel, the subject of this action. I thought that was ample evidence to show that one of the copies of the newspaper, of which the defendant was the publisher, and of which, of course, he did not print one copy, but many, had been sent by some person, not the defendant, to that room." POLLOCK, C. B., observed: "But then, it is said that this paper is not proved to have been issued by the defendant: that is a question entirely for the jury; and I think there is evidence to prove that this was one of the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware that many copies of a newspaper are issued at the same time; and they are issued for the purpose of publication and distribution. No doubt a suggestion may be made, that the plaintiff, in order to enhance the damages, may have procured some papers to be printed. The jury are to consider whether that is a reasonable suggestion or not. There was some evidence for the jury to consider: and, I think the reasonable conclusion is, that this paper was originally issued by the defendant." ALDERSON, B., said: "Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that, with respect to newspapers, not one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare the instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. . . . . So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the newspaper is printed from the same type as the paper which is produced; and if so it is printed by the defendant". It will be observed that in that case it was proved that the defendant was the publisher of the journal called the "Nonconformist." Proof was given that one copy of the issue in question produced before the court was in fact issued by the defendant. Some similarity between that copy and the copy seen by the witness (Mr. Brookes) was also proved by him. It was held that this was evidence sufficient to go to the jury that the copy seen by the witness was also published by the defendant. In my opinion the object of section 81 of the Evidence Act taking

it to refer to every newspaper is to dispense with evidence of two out of the three facts proved in that case provided the first fact is proved, viz., that the defendant is the publisher of the newspaper. The Court is then to presume that what purports to be a newspaper of a particular name is that paper, and that every copy of it was issued by the publisher of that paper. According to section 7 of Act XXV of 1867 the production of an authenticated copy of a declaration made under the Act is admissible to prove that the person mentioned in the declaration is the publisher of the journal to which the declaration relates. Section 81 would apparently authorise and require the court to presume that any document purporting to be a copy of the journal in question is in fact such and this would prove that the declarant under Act XXV of 1867 is the publisher of the paper produced in court. *Rex.* v. *Forsyth*(1), would seem to show that the presumption extends no further with regard to the *London Gazette*, which also is to be presumed to be genuine under section 81 of the Evidence Act. The reporters say "The Judges seem to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from". In an earlier case *Watts* v. *Fraser*(2), deposit of a copy of a newspaper at the stamp office as required by the statute is not sufficient evidence that others of that kind were circulated. This is not in accordance with the view taken in *Gathercole* v. *Miall*(3). In Wigmore on Evidence, volume III, section 2150, the learned author says with regard to the mode of proving the defendant's publication of a newspaper, "Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's or by some statutory method); then the identity between that copy and the one read by J.S. (the person to whom it is complained to have been communicated) will suffice as evidence that the two issued from the same press, *i.e.*, from the defendant's." Again the learned author says in section 2151. "The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be

(1) (1814) Russ & R., 274. (2) (1837) 7 Ad. & E., 223.
(3) (1846) 15 M. & W., 319.

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published by the Government has led to a general concession, by *judicial* decision or by statute, that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two principles, however, are in fact usually involved: first, the admissibility of a copy, proved to be printed by official authority, as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions or in statutes." The author points out in a note that the distinction was recognized in *Rex.* v. *Forsyth*(1), already referred to. The question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to the proof of documents but to the admissibility of secondary evidence. The other sections contained in the chapter headed "presumption as to documents" seem to support the same conclusion. Section 87 provides in this case of certain books produced in evidence that "the Court may presume that they were written and published by the person and at the time and place by whom or at which it purports to be written or published." Section 90 provides specifically that where a document purporting or proved to be 30 years old is produced from proper custody the Court may presume the signature and every other part of such a document, which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed or attested. Section 81 does not expressly lay down that the Court is to presume that a document purporting to be a newspaper was printed and published by the person by whom it purports to be. Section 7 provides for a presumption not only that certain certificates or certified copies are genuine but also that the officer purporting to sign or certify held that character when he signed or certified. Section 80 also makes a distinction between the genuineness of a document that the truth of the statements as to the circumstances under which the record or memorandum to which that section relates was made. Section 7 of Act XXV of 1867 expressly provides the mode of

(1) (1814) Russ & R., 274.

proving that a particular person is the printer and publisher of a newspaper. On the whole it appears to be clear that the complainant cannot ask the Court to presume that the appellant is the printer and publisher of the "Army and Civil News." He could easily have proved the fact by producing a copy of the appellant's declaration made under Act XXV of 1867. He failed to do so. The result is that the appellant's contention that there is no legal evidence to prove the publication of the libel must be upheld, and the conviction of the appellant cannot be sustained.

Dr. Swaminadhan who appears for the complainant asks us to direct additional evidence to be taken under section 428, Criminal Procedure Code. But in my opinion that section does not enable us to do so in this case. It provides that "the Appellate Court if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken, etc." It requires that the Appellate Court should consider additional evidence to be *necessary*. The language seems to indicate cases where, there being already evidence on the record, the Court considers it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. See *Woodoy Chand Mookhopadhya*(1). At any rate it does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so. No reason is given in this case why evidence of publication of the libel was not given. The prosecutor had no right to expect the accused to waive the proof of any fact, assuming that such waiver could be availed of by him. Moreover the case is not one in which I can say the interests of public justice would justify the use of the provisions of section 428, Criminal Procedure Code. I must therefore decline to accede to Dr. Swaminadhan's request.

It remains to consider what is the proper order to pass in the case. It appears to me that this is not a proper case for directing a retrial. Section 423, Criminal Procedure Code, provides that in an appeal from a conviction the Court may "reverse the finding and sentence and acquit or discharge the accused or

(1) (1872) 18 W.R. (Cr. R.), 31.

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order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial." An order for retrial would be proper where the trial was illegal, irregular or defective. I agree with the Calcutta High Court that the power to direct a retrial is not confined to cases where the trial was held by a Court having no jurisdiction. See *Kumudini Kanta Guha* v. *The Queen-Empress*(1) where it was held by PRINSEP and HANDLEY, JJ, that a retrial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges. A retrial would be proper also where evidence is improperly rejected by the Lower Court or where, though the accused was rightly acquitted of one offence, the Appellate Court comes to the conclusion that he ought to have been tried for another offence. Such an order may also be made in every case of irregularity in the trial, such as where persons who ought not to have been tried together have been so tried. It would seem to be necessary that the Court should come to the conclusion that the trial was not held properly for some reason or other. It appears not to be enough that the prosecution by its own negligence failed to produce evidence which it was its duty to do. In a case similar to this the learned Chief Justice no doubt ordered a retrial, but the question whether he could do so does not appear to have been considered.

In the result I would acquit the accused and direct that the fine, if paid, be refunded.

PHILLIPS, J.

PHILLIPS, J.—I agree with my learned brother that for the reasons given by him the conviction should be set aside, but I do not agree that the appellant should be acquitted. If publication of the libel can be proved, and in this case there is not likely to be any difficulty in proving publication, the appellant is certainly guilty of defamation, and I do not think that in this case he should be allowed to escape the consequences of his misconduct, if he is really guilty. No doubt the prosecution could have adduced additional evidence and we see that a witness had been summoned to prove that the accused published the newspaper in question, but was not examined. For what reason he was not examined there is nothing on record to show; but it does appear that the District Magistrate thought that a

(1) (1901) I.L.R., 28 Calc., 104.

primâ facie case of publication had been made out against the accused, for he framed a charge on the evidence on record. Whether the District Magistrate acted on the complaint or on Exhibit A one cannot say, but he was satisfied that a *primâ facie* case of publication had been made out. We have found that in that view he was mistaken, and therefore seeing that the court itself was mistaken as to the sufficiency of the evidence on record I think that additional evidence is necessary in this case in order that the accused's guilt or innocence may be determined. Section 428 of the Criminal Procedure Code merely says that evidence may be taken when "necessary," and in each case the necessity must be determined on the particular facts of the case. The evidence is, I think, necessary in this case. I can find no case in which this court has held a view contrary to the one I now hold, and in a case very similar to the present the learned Chief Justice ordered a retrial [*Mohideen Abdul Kadir* v. *Emperor*(1)]. I would adopt the same course unless I thought the taking of additional evidence would be a more convenient mode of disposing of the case. I would therefore ask the District Magistrate to record additional evidence on the question of publication and certify it to this court.

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SUNDARA AYYAR AND PHILLIPS, JJ.—As we do not agree as to the order that should be passed, the case must be laid before another Judge of this court.

SUNDARA AYYAR AND PHILLIPS, JJ

This appeal again coming on for hearing the court upon perusing the grounds of appeal and the records of the lower court and the affidavit of B.W.S. Lawrence, counsel for the complainant, delivered the following order for further evidence from the lower court.

ORDER.—Since this case was referred to me for decision under section 429, Criminal Procedure Code, it has been made clear by the affidavit of the complainant's counsel in the Magistrate's Court and by the report of the Magistrate that the prosecution was prepared to adduce evidence of the publication of the libel, but that when counsel proceeded to adduce his evidence the Magistrate intervened and stated that it was unnecessary, the matter being already proved by the production of the newspaper, and that to adduce the evidence of the clerk to prove the declaration by the accused under Act XXV of 1867 would only be wasting the time of the court.

BENSON, J.

(1) (1904) I.L.R., 27 Mad., 238.

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In these circumstances I think the case is one in which a retrial may properly be ordered, or in which the court may properly call for evidence under section 428, Criminal Procedure Code, on the question in regard to which the Magistrate, in effect improperly refused to take the evidence which the prosecution attempted to adduce. The accused's counsel deprecates a new trial owing to the delay and expense involved, and, of the two courses, prefers that additional evidence should be called for. I also think this will be the most convenient course. I will therefore direct the Magistrate to take such further evidence in regard to the alleged publication of the libel as either party may adduce and certify the same to this Court as soon as conveniently may be.

This case again came on for hearing and upon perusing the grounds of appeal and the record of the evidence and proceedings before the Lower Court, the court delivered the following:—

BENSON, J. JUDGMENT.—The additional evidence now recorded proves that the accused did publish the libel complained of. He is therefore clearly guilty of the offence charged. Looking to all the circumstances of the case as set forth in the Magistrate's judgment, I do not think the sentence of fine of Rs. 300 is excessive. I dismiss the appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

1911. November 23.

Re N. PONNUSAMY NADAN AND FIFTEEN OTHERS (ACCUSED IN CALENDAR CASE NO. 180 OF 1911 ON THE FILE OF THE SECOND CLASS STATIONARY SUB-MAGISTRATE OF KOILPATTI).*

Criminal Procedure Code (Act V of 1898), sec. 349,—'shall pass such order as he thinks fit', meaning of.

The words 'such order as he thinks fit' in section 349, Criminal Procedure Code, do not empower the Superior Magistrate to send the case back to the Sub-Magistrate for disposal but only empower him to pass such final order disposing of the case as he may think fit.

CASE referred for the orders of the High Court, under section 438 of Code of Criminal Procedure (Act V of 1898), by H. F. W. GILLMAN, the District Magistrate of Tinnevelly, in his letter, dated 14th September 1911.

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* Criminal Revision Case No. 557 of 1911 (and Referred Case No. 107 of 1911).