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thing has since occurred by which the law has been altered. It was argued before us that ss. 43, 69 and 70 of the Contract Act (IX of 1872) have made a change in the law on this point, and that such a suit as the present has become one for "money due on bond or other contract, or for damages." We are unable to accede to this view. The sections referred to appear to us to do no more than state in written form what was the law before the Contract Act, and the consequences of a given rule of law must be the same whether it be written or remain unwritten.

A somewhat different view has been taken in a partially analogous case by the Allahabad High Court in *Nathprasad* v. *Baijnath* (1); but that view has not been followed in this Court. *Nobin Krishna Chukravati* v. *Ram Kumar Chakravati* (2) and Special Appeal No. 2,350 of 1879 (3). The appeal must, therefore, be heard on its merits.

The appeal will be dismissed with costs.

Appeal dismisssd.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF CHAROO CHUNDER MULLICK AND OTHERS.

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High Court's Criminal Procedure Act (X of 1875), ss. 14 and 147—Commitment, Application to quash—24 and 25 Vict. c. 104, ss. 13 and 15.

The words "or other proceeding" in s. 147 of Act X of 1875, do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of that section.

Applications under s. 14 of that Act should be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.

IN this case three persons, named Bunwari Lall, Charoo Chunder Mullick, and Chintamoney Doss, were charged before Mr. B. L.

* Criminal Motion against the order of B. L. Gupta, Esq., Presideney Magistrate of Calcutta, dated the 9th October 1882.

(1) I. L. R., 3 All., 66. (2) I. L. R., 7 Calc., 605. (3) Unreported.

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Gupta, one of the Presidency Magistrates, with certain offences under the Penal Code and Act XIV of 1866 (The Post Office Act.)

The first accused Bunwari Lall, who was a post office peon, was charged under s. 406 of the Penal Code, with criminal breach of trust in respect of a number of voting papers entrusted to him to deliver to the address of one Kedar Nauth Dutt. He was also charged under s. 409 of the same Act with criminal breach of trust as a public servant in his capacity of post office delivery peon in respect of the same voting papers; and he was further charged with having committed an offence punishable under s. 47 of Act XIV of 1866 (The Post Office Act.)

The other two accused, Charoo Chunder Mullick and Chintamoney Doss, were charged with having aided and abetted the first accused in committing the offences charged under ss. 406 and 409 of the Penal Code, and also with having abetted the offence charged under s. 47 of Act XIV of 1866; and thereby having committed an offence punishable under s. 52 of that Act; and they were further charged with having fraudulently retained or wilfully kept or obtained a voting paper, and thereby committed an offence punishable under s. 45 of Act XIV of 1866, while Bunwari Lall was also charged with having abetted the commission of that offence.

The case was heard and inquired into by Mr. B. L. Gupta, who committed all of them to the High Court for trial.

Thereupon the accused petitioned the High Court, and applied that the record might be sent for, and the order of commitment quashed and their discharge directed, on the ground that the said commitment was illegal, because the evidence given in the investigation before the Magistrate was not sufficient to justify the charges; and, even supposing it to be true, it was not sufficient in law to form a ground for the commitment, and consequently that the Magistrate should have either dismissed the charges or discharged the accused, and should not have committed them or any of them to stand their trial before the High Court.

Upon this application the record was sent for, and the case came on to be argued before a bench consisting of Mr. Justice Field and Mr. Justice Norris.

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Mr. *Branson* and Mr. *M. Ghose* appeared for Charoo Chunder Mullick.

Mr. *L. M. Ghose*, for Chintamoney Doss.

Mr. *M. P. Gasper*, appeared on behalf of the Crown.

The judgment of the Court (FIELD and NORRIS, JJ.) was delivered by

FIELD, J.—In this matter an application has been made asking us to call up the proceedings connected with the commitment of three persons, Baboo Charoo Chunder Mullick, Chintamoney Doss, and Bunwari Lall, with a view to such commitment being quashed, on the ground, *first*, that as regards one of these persons, Baboo Charoo Chunder Mullick, there is no evidence which can in any view of the case incriminate him; and, *secondly*, that as regards all three accused, even if the truth of the facts deposed to by the witnesses examined before the Magistrate be assumed, these facts do not constitute any offence punishable by the Criminal law.

The application at first purported to be made under s. 147 of the High Courts' Criminal Procedure Act X of 1875, but it comes before us to-day as an application under either this section *or* s. 14 of the same Act.

The first question with which we now propose to deal is whether an application of this nature, an application that is to quash a commitment made by a Presidency Magistrate, can be entertained, and an order quashing such commitment made under the provisions of s. 147.

This section is as follows: "Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only."

The proceeding which we are asked to quash on the present

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occasion is not a conviction but a commitment; and what we have to decide is whether a commitment is a proceeding within the meaning of the words "or other proceeding." We have considered this question since the application was first made to us the day before yesterday, and we are both of opinion that a commitment is not a proceeding within the meaning of these words. According to the usual construction, the words "or other proceeding" must be taken to mean other proceeding of the same nature, *ejusdem generis*, with a conviction. Now a conviction is a definitive decision of a Judge or Magistrate having jurisdiction to deal definitively with the matter before him, whereas a commitment is merely a preliminary proceeding by which a Magistrate, not himself having jurisdiction to deal definitively with the matter before him, sends that matter to be definitively disposed of by another tribunal. That this is a distinction well understood and indeed made by the Indian Legislature itself will appear from section 10 of the Penal Code and illustrations (*b*) and (*d*) to that section. It appears to us, therefore, that a commitment is not a proceeding *ejusdem generis* with a conviction. It was asked in the course of argument what proceedings can the Legislature be supposed to have intended by the words "or other proceeding," if these words do not include a commitment? The answer to this question is not difficult. There are numerous cases in which a Presidency Magistrate has jurisdiction to make a definitive order other than a conviction. For example, he can make an order punishing for contempt of Court (ss. 205 to 207, Chapter XV of the Presidency Magistrate's Act, IV of 1877). He can make an order requiring security to keep the peace (ss. 208 to 211 of Chapter XVI of the same Act). He can make an order requiring security for good behaviour (ss. 212 to 214 of the same Chapter). He can make an order putting a person in possession of immoveable property (s. 233 of the same Act). He can make an order for maintenance, (s. 234, 235, Chapter XVIII of the same Act). He can make an order giving compensation for a groundless charge or complaint (s. 242 of the same Act). All these orders are in their nature definitive, that is, unless brought before a superior tribunal for revision and thereupon revised, they are and remain final. It appears to us that in using the words "or other

proceeding" in s. 147 of the High Court Criminal Procedure Act, the Legislature contemplated proceedings and orders such as those which I have just mentioned.

But there are other considerations which have influenced us in arriving at a conclusion in this matter. When a proceeding is transferred to the High Court under s. 147, the High Court has power to "determine the case so transferred and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form but *on the merits only*."

In other words the High Court, in order to the exercise of the jurisdiction hereby conferred, must proceed to consider all the evidence in the case, must come to a finding upon questions of fact, for otherwise it could not quash or affirm on the merits. In so dealing with a case, which in the ordinary course would be tried by a jury, with whom rests the decision upon questions of fact, the High Court would be superseding the jury, by whom in the usual course the case would be tried. We think it extremely improbable that the Legislature contemplated any such result as this.

Then, again, if a commitment may be quashed upon the merits under s. 147, and an application to this effect may be made by or on behalf of any accused person who has been committed, it will, in practice, be made only in those doubtful cases in which there is reason to hope that the application to have the commitment quashed will prove successful. If that hope should be found to be a mistaken one, the result would be that a prisoner, committed upon evidence sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of a Division Bench of two Judges pronounced against him to the effect that the commitment ought not to be quashed. It may be said that the accused person could avoid this result by abstaining from making an application under s. 147, to have his commitment quashed; and that, as he can foresee this effect of an unsuccessful application, he cannot justly complain of a result brought about by his own action. Giving to this argument all the consideration which it deserves, we cannot think that the Legislature

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intended that a Bench of two Judges should pronounce their opinion publicly upon the merits of a case, which must afterwards come before a jury.

Then again when a Magistrate has committed a case, he becomes *functus officio*, and it may be said with some show of reason that there is no case before him which can be *transferred* to the High Court.

For all these reasons it appears to us that the words "or other proceeding" in s. 147 of the High Court's Criminal Procedure Act X of 1875, do not include a commitment; and that no application to have a commitment quashed can be entertained under the provisions of that section.

But there is another section in the Act under which it may be possible that the petitioners may obtain that which they seek. I say "may be possible" because upon this point speaking for myself, I desire to express no opinion, and this for the reasons which I shall presently state. The section to which I refer is s. 14, which provides that "when any charge or portion of a charge, recorded as aforesaid, appears to a Judge of the High Court at any time before the commencement of the trial of the person charged to be clearly unsustainable, such Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying proceedings upon the charge or portion of the charge," &c. Now the jurisdiction conferred by this section is a jurisdiction which may be exercised by a Judge, that is one Judge of the High Court.

Having regard to that which has been determined by the learned Chief Justice under s. 14 of the High Court Act, 24 and 25 Vic., cap. 104, we are agreed, and speaking for myself I am very strongly of opinion that, if this matter is to be heard by a single Judge, it should be heard by my brother Norris and that I ought not to sit to hear it.

The Chief Justice has determined, under the section just quoted, that Mr. Justice Norris and myself "may form a Division, Bench, and hear and determine any appeal, motion or other matter, in any civil or criminal case which may be brought before the High Court in its Appellate Jurisdiction, or which they shall order to be brought before them." Now, clearly a matter under s. 14

of the High Courts' Criminal Procedure Act is not a matter brought before the High Court in its Appellate Jurisdiction. I take it that the words, "or which they shall order to be brought before them" have reference only to the same Appellate Jurisdiction.

Then the Chief Justice has further determined that on and after the 18th September 1882, and until further order, the ordinary Original Civil and Criminal Jurisdiction of the High Court, shall be exercised by the Honorable Mr. Justice Cunningham, the Honorable Mr. Justice Norris, and the Honorable Mr. Justice Pigot sitting separately.

And the Officiating Chief Justice has determined on the 10th August 1882 that until further order the ordinary Original Criminal Jurisdiction of the Court shall be exercised by the Honorable Mr. Justice Norris. It is quite clear from this that I am not, and that my brother Norris is, a Judge, as to whom it has been determined by the Chief Justice under the provisions of s. 14 of 24 and 25 Victoria, cap. 104, that he shall sit alone for the exercise of the ordinary Original Criminal Jurisdiction of the Court; and this being so, it appears to me proper, that as this matter is one falling within that jurisdiction, it should be disposed of by Mr. Justice Norris.

I have further thought it right to consider whether this matter shall be heard by myself and my brother Norris sitting together; in other words whether I shall continue to sit with my learned brother for the hearing and determination of the matter, as a matter to be disposed of under s. 14 of the High Courts' Criminal Procedure Act, and I have decided not to do so. So long as we had not determined whether or not the matter could be dealt with under s. 147, I have continued to sit, because it has been the recent practice of this Court that matters under this section should be dealt with by the Division Bench for the time being exercising the Appellate Criminal Jurisdiction of the Court. During my experience several cases have been so disposed of. I may refer by way of example to the case of *The Empress* v. *Thompson* (1); *Wood* v. *The Corporation of the Town of Calcutta* (2); and *In re Poorna Churn Pal* (3). The

(1) I. L. R., 6 Calc., 523. (2) I. L. R., 7 Calc., 322.
(3) I. L. R., 7 Calc., 447.

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former practice was to bring applications under the section before a single Judge sitting on the Original Side of the Court. See for example the cases of *The Empress* v. *Gasper* (1), and the *Corporation of the Town of Calcutta* v. *Bheecunram Napit* (2). Whatever doubt there may be as to whether applications under s. 147 of Act X of 1875 should be heard by the Division Bench exercising the Appellate Criminal Jurisdiction of the Court, I think there can be no doubt that applications under s. 14 of the same Act must be disposed of in the exercise of the Court's Original Criminal Jurisdiction.

Section 36 of the Letters Patent of 1865 provides that any function which by these Letters Patent is directed to be performed by the High Court in the exercise of its Original or Appellate Jurisdiction, may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose under the provisions of the thirteenth section of the 24 and 25 Vict., cap. 104. This section is as follows: Subject to any laws or regulations which "may be made by the Governor-General in Council, the High Court may, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court of the Original and Appellate Jurisdiction, vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

So far as I am aware no rule has been made under this section since the date of the Letters Patent of 1865; but there was a rule made previously, and while the Letters Patent of 1862 were in force, *viz.*, "A Court for the exercise of the Ordinary Original Criminal Jurisdiction of this Court may be held before one Judge, and two or more Courts may sit at one time, in each of which there shall be one Judge,"—(See Rule 58, Belchambers, p. 87). As there is here an express provision, Rule 51 does not apply, which provides that all powers and functions vested in the Court by the Letters Patent, *which are not otherwise expressly provided for by the Rules of Court*, may be exercised by a single Judge, or by a Division Court consisting of two or more Judges.

(1) I. L. R., 2 Calc., 278. (2) I. L. R., 2 Calc., 290.

The operation of the rule above first quoted (No. 58) is saved by the second section of the Letters Patent of 1865, which provides that all rules and orders in force immediately before the publication of these Letters Patent, *shall continue in force*, except so far as the same are hereby altered until the same are altered by competent authority.

It would appear to follow that, while there is a single Judge there is no Division Court appointed or constituted under s. 13 of the 24 and 25 Vic., cap. 104, to exercise the Original Criminal Jurisdiction of the Court, and that, therefore, this jurisdiction should not be exercised in this or any case by a Division Court consisting of two Judges.

It may be that this result would be altered by reading the words "subject to any laws or regulations which may be made by the Governor-General in Council" in s. 13, 24 and 25 Vict., cap. 104, with sub-section 2, section 2 of the General Clauses Act I of 1868: "Words in the singular shall include the plural," and that "a Judge" in s. 14 of Act X of 1875 may thus be held to include two or more Judges. But as this may be arguable, and as my brother Norris is undoubtedly competent to act alone, I think it will be better that he alone should proceed to deal with the case, more especially as, if there should be a difference of opinion, my opinion as that of the Senior Judge would prevail, and there would be this result that a Judge, whose competency to exercise jurisdiction may be arguable, would overrule a Judge as to whose competency there can be no doubt.