lease granted to the defendants, who are Archakas in possession of the property, is maintainable under Order 1, rule 8 of the Code of Civil Procedure.

The objection urged by the appellants is, that a suit for a declaration must conform to the terms of section 42 of the Specific Relief Act; and since the worshippers as a body or their representatives under Order 1, rule 8, cannot be said to have any right as to property within the meaning of section 42 of the Specific Relief Act, the suit is not maintainable. No authority has been cited for the appellants in support of this proposition: on the other hand the ruling of the Privy Council in *Robert Fisher* v. *The Secretary of State for India in Council*(1) suggests that section 42 of the Specific Relief Act is not exhaustive of cases in which declaratory suits may be maintained, and it was held by a Full Bench of this Court, in *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar*(2), that such a suit as this is maintainable, though the question whether it came within the provision of section 42, Specific Relief Act, not was raised then. There is also a ruling of this Court—*Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*(3)—where a suit by the disciples of a mutt was held to be maintainable under Order 1, rule 8, for a declaration as to the invalidity of an alienation of the mutt property. We hold that the suit was maintainable.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

W. H. LOCKLEY, PRISONER, APPELLANT.*

v.

KING-EMPEROR.

1919 November, 27 and December, 3.

Criminal Procedure Code (Act V of 1898), ss. 256 and 257—Right of accused after charge to recall prosecution witness for further cross-examination—Absolute or qualified right—Applicability of section 256 to witnesses not present before Court—Waiver by counsel, whether binding on accused—Entering upon defence, meaning of—Evidence Act (I of 1872), sec. 33—Deposition of

(1) (1899) I.L.R., 22 Mad., 270 (P.C.).
(2) (1917) I.L.R., 40 Mad., 212 (F.B.). (3) (1918) I.L.R., 41 Mad., 124.
* Criminal Appeal No. 554 of 1919.

LOCKLEY v. KING-EMPEROR.

prosecution witness cross-examined before charge—No opportunity for further cross-examination after charge—Deposition whether admissible at the trial.

Section 256, Criminal Procedure Code, confers an absolute and unqualified right on the accused to recall for further cross-examination only such of the witness as are still before the Court and have not been discharged from further attendance. After the charge had been framed the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine ; *held* that he had entered upon his defence and an application for further cross-examination of a witness discharged from attendance must be deemed to have been made under section 257. Waiver by Counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under sections 256 and 257, Criminal Procedure Code.

A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge.

Appeal against the conviction and sentence of S. N. V. RAJACHAR, the Senior Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 1780 of 1919.

T. Richmond (instructed by *Grant* and *Greatorex*) for the appellant.

The Crown Prosecutor on behalf of the Crown.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The accused has been convicted of the offence of cheating. He was employed in Messrs. Oakes & Co. as Works Manager. Mr. Wilson was employed in the same firm in a slightly higher capacity. The case for the prosecution is that the accused received Rs. 3,000 from Mr. Wilson, on the representation that the money was required for paying for certain articles purchased for the firm from the Chief Engineer of S. S. Ural, but that he only paid Rs. 2,000 to the Chief Engineer and misappropriated the balance.

The arguments in appeal were mainly devoted to attacking the procedure followed by the Magistrate. Mr. Richmond's first complaint was that there was a misjoinder of charges. The facts on which this contention was based are these :—

The original charge against the accused was that he received stolen property from the Chief Engineer. After the prosecution evidence was closed, an alternative charge under section 420, Indian Penal Code, was added. The learned counsel contended that a charge for receiving stolen property should not have been joined with a charge for cheating. I fail to see the force of this objection. The request to Mr. Wilson for the payment of

Rs. 3,000 was in furtherance of the purpose of concluding the purchase from the Chief Engineer. It was said that as the articles were handed over to the accused, the negotiations for the purchase had terminated, and that the subsequent receipt of money which was misappropriated had therefore no connection with receipt of the articles.

Section 235, Criminal Procedure Code, speaks of a series of acts forming part of the same transaction. There can be little doubt, that in arranging with the Chief Engineer for the purchase, the accused intended that the purchase should be effectuated by inducing Mr. Wilson to give him money for it. The true test of a series of acts forming the same transaction is that there should be a continuous operation of acts leading to the same end, and a common purpose should run through all the acts; see *Emperor* v. *Sherufalli*(1). For misappropriating Rs. 1,000, the first act was to arrange for the bargain, and the second act was to obtain the money. Both these are connected together and have the same community of purpose. I must therefore reject the contention that there has been a misjoinder of charges.

The next contention related to the refusal of the Presidency Magistrate to adjourn the case to enable the accused to further examine Mr. Wilson. The facts relating to this part of the case are these: Mr. Wilson was examined for the prosecution and was cross-examined at some length by the counsel for the defence. The witness had made arrangements for leaving India. Thereupon the Magistrate asked counsel for the defence whether he would insist upon the presence of Mr. Wilson any further. We find this note made by him:

"Mr. Grant has given up the re-cross-examination of Mr. Wilson, even in case a charge is framed."

After this statement by counsel, Mr. Wilson left India. It is argued that this waiver by counsel does not disentitle the accused from claiming that, on the framing of a charge, the witness should be recalled. It was first contended that the waiver, if any, was only with reference to the charges originally framed and not to the alternative charge added. The counsel who conducted the case before the Presidency Magistrate must have known that evidence as to cheating was being tendered by

(1) (1903) I.L.R., 27 Bom., 135.

LOCKLEY v. KING-EMPEROR.

SESHAGIRI AYYAR, J.

the prosecution. Mr. Wilson himself gave that evidence and he was subjected to cross-examination upon that matter. Therefore this suggestion cannot be accepted. I however agree that a waiver like this cannot prejudice the right of the accused under sections 256 and 257 of the Code of Criminal Procedure—vide *Kokil Ghose* v. *Kasimuddi Malita*(1).

I shall now see whether in the circumstances of this case, the right claimed is an absolute one. There has been some conflict of views upon the interpretation of sections 256 and 257 of the Code of Criminal Procedure. Therefore, I shall first of all deal with the language of the sections before dealing with the decided cases.

The procedure prescribed for trial is this: Where an accused is not discharged, a charge is to be framed. Section 255 lays down that the charge shall be read to the accused and that he shall be asked whether he is guilty or has any defence to make. Section 256 says that, if the accused claims to be tried,

'he shall be required to state whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be *recalled* and after cross-examination and re-examination, if any, they shall be *discharged*.'

This language seems to indicate that the witnesses are still in Court, because when we come to section 257, there we find mention of processes being issued for compelling the attendance of witnesses to be further examined; there is no such mention in section 256. And the further provision that the witnesses shall be *discharged* has reference to the ordinary practice in Criminal Courts, of witnesses being bound over to attend Court *de die in diem*; it is on the framing of the charge and after ascertaining the wishes of the accused, that they are ordinarily discharged. There is no injustice done to the accused by such a procedure, because a further right is given him of summoning the witnesses for the prosecution who might have been discharged. Therefore, in my opinion, the right referred to in section 256, which is absolute and unqualified, is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. In my opinion, in the present case, the

(1) (1902) 6 C.W.N., 424.

application to further examine Mr. Wilson is not covered by section 256, but comes under section 257. The Calcutta High Court in *Iswar Chunder Raut* v. *Kali Kumar Dass*(1) appears to have taken the view that even in cases where the witnesses are not before the Court, the accused has the absolute privilege of demanding that they should be summoned. *Zamunia* v. *Ram Tahal*(2) takes the same view. Vide also *Inder Rai* v. *Brown*(3). The view taken in Allahabad is different. See *Mulua* v. *Sheoraj Singh*(4). In this conflict of authorities I am free to express my opinion upon an examination of the language of the sections, and my conclusion is that in the present instance the privilege claimed by the accused is not an absolute one. I am clear that this will not prejudice the accused. If his legal advisers keep their eyes open, he is not likely to suffer by holding that section 256 only applies to cases of witnesses actually before the Court when the charge is read out. An accused has the right to cross-examine the witnesses before the charge is framed; he has a right of re-cross-examining the witnesses present in Court after the charge is framed; he has a further right subject to certain conditions of re-summoning the prosecution witnesses after entering upon his defence. These are ample safeguards, and I do not think that to confine section 256 to the category of cases mentioned by me is likely to affect the accused in his defence.

The next question relates to the construction of section 257. In the first portion of that section, it is stated:

"if the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for purpose of examination, etc., the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing."

Some arguments were addressed to us as to whether the stage of entering upon the defence was reached when the Magistrate refused to adjourn the case for further examination of Mr. Wilson. From the record it is clear that after the charge was framed, a list of witnesses was given by the accused and the

(1) (1900) 4 C.W.N., 351.
(2) (1900) I.L.R., 27 Calc., 370.
(3) (1910) I.L.R., 37 Calc., 286.
(4) (1911) 11 I.C., 1007.

LOCKLEY KING EMPEROR. SESHAGIRI AYYAR, J.

case was adjourned for the examination of the defence witnesses. No doubt the proper procedure to have adopted was to have asked the accused whether he insisted upon the cross-examination of any of the witnesses for the prosecution, who may have been present in Court; but it does not appear that any such witnesses were present, or that any such right was claimed. Therefore, I must hold that the accused entered upon his defence by pleading not guilty and by mentioning that he had witnesses to examine. It is true that the application for re-summoning Mr. Wilson was made at once, but that would not show that the stage of entering upon the defence had not been reached when the accused, through his counsel, informed the Magistrate that he had witnesses to examine.

I have now to see whether the Magistrate has recorded his reasons in writing for refusing to re-summon Mr. Wilson. He has mentioned them in his judgment; the matter itself came before the High Court on an application made to postpone the hearing pending the arrival of Mr. Wilson. The Magistrate should no doubt have put on paper his reasons for the refusal. However, that is an irregularity which does not vitiate the case, having regard specially to the fact that he has given full reasons in his judgment, and the matter has been fully gone into in this Court on a previous occasion.

Another question is whether the refusal to adjourn was justifiable. If I understood Mr. Richmond aright, the facts which were expected to be elicited from the further examination of Mr. Wilson were intended to show that that witness himself was a party to the misappropriation. Mr. Richmond said that it could be elicited from the witness that it is the custom among merchants, at least among the employees of Oakes & Co., to take money from the firm, with a view to profiting personally from the bargain that may be concluded in the name of the firm. The disingenuousness of such a plea is apparent on the face of it. Moreover, when Mr. Wilson was in the witness box no such question was put to him and no witness was summoned from Oakes & Co., or from any other firm to prove such a pernicious practice. It seems to me therefore that the object in asking for an adjournment was not really to advance justice but to delay it. I am therefore of opinion that the refusal to adjourn the case was justifiable under section 257 of the Code of Criminal Procedure.

The last question to be considered is whether the evidence already given by Mr. Wilson is inadmissible because a further oppportunity was not given to cross-examine him. I agree with the contention of the learned Crown Prosecutor that the evidence is admissible. Under section 33 of the Evidence Act, evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same proceeding the truth of the fact which it states, when the presence of the witness cannot be obtained without an amount of delay or expense which the Court considers unreasonable, provided the adverse party in the first proceeding had a right and opportunity to cross-examine. The evidence of Mr. Wilson was given at the earlier stage of the present proceedings. From the statement of the learned Crown Prosecutor as well as of Mr. Richmond, it is not known when and whether Mr. Wilson will come to India. It is also clear that the accused had the opportunity to cross-examine, and exercised that right at the first stage. Mr. Richmond suggested that the accused had a further right under section 257, and that until that right was exercised, the evidence could not be admitted. Whatever may be the value to be attached to the evidence, I agree with the contention of the learned Crown Prosecutor that once the opportunity to cross-examine had been exercised, the evidence then taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of the further right is not a ground for holding the evidence to be inadmissible. I am therefore of opinion that Mr. Wilson's evidence, given before the charge was framed, is admissible in the case.

On the merits, Mr. Richmond argued that no criminal intention was proved, as the accused admitted the receipt of money and pleaded that he applied a portion of it for his own use in what he considered to be the usual practice in such matters. I am wholly unable to accept this argument as sound. The Magistrate is right in holding that a clear case of misappropriation has been made out. I confirm the conviction and sentence.

PHILLIPS, J.—As this case raises a question of some importance which has not been decided before in this Court, I think it advisable to deliver a separate though concurring judgment.

PHILLIPS, J.

LOCKLEY v. KING-EMPEROR.

PHILLIPS, J.

The accused has been convicted under section 420, Indian Penal Code, by the Georgetown Presidency Magistrate. The case is that he purchased certain machinery for Messrs. Oakes & Co. for Rs. 2,000, but represented to the Managing Director Mr. Wilson, that the amount was Rs. 3,000, and consequently obtained a cheque from Mr. Wilson for the latter amount. No doubt, the accused was not originally charged under section 420. The charge sheet was laid under section 411 or 414, Indian Penal Code, but it is clear from the examination and cross-examination of Mr. Wilson, and other witnesses, that the possibility of the charge under section 420 was before the mind not only of the Court, but also of the accused, and it cannot be said that the accused was in any way taken by surprise by such a charge being framed on the facts laid before the Court. After Mr. Wilson's examination was concluded, the accused's counsel stated that Mr. Wilson would not be required for re-cross-examination, and apparently on the strength of that, Mr. Wilson was allowed to proceed to England whence he has not yet returned, and it is unknown when he will return. Very soon after the charge was framed, an application was made for re-cross-examining Mr. Wilson and the case was adjourned with a view to secure his attendance. After several adjournments, the Magistrate refused to adjourn the case any further, as the attendance of the witness could not be secured, and apparently acting under section 257, Criminal Procedure Code, he proceeded to dispose of the case without hearing any further examination of Mr. Wilson. He has recorded his reasons for doing so in his judgment and the question we have to decide is whether he was right in acting under section 257, or whether the accused had not an absolute right under section 256 to recall Mr. Wilson before the case was closed.

Under section 256, the accused is given the right of recalling any of the prosecution witnesses as soon as the charge is framed, and after such re-examination, the accused is to be called upon to enter on his defence. It has been held in Allahabad by KNOX, J., in *Mulua* v. *Sheoraj Singh*(1), that this absolute right of the accused extends only to the recalling of such witnesses as are present in Court. No doubt, it is ordinarily the duty of the

(1) (1911) 11 I.C., 1007.

Magistrate to retain the prosecution witnesses in Court until the accused has had an opportunity of exercising his right. The Calcutta view is somewhat different. In *Iswar Chunder Raut* v. *Kali Kumar Dass*(1) the accused was held to be entitled as a matter of right to re-summon one of the prosecution witnesses. The question as to whether there is any difference between the provisions of sections 256 and 257, or what that difference is, was not discussed. The other Calcutta cases cited, namely, *Zamunia* v. *Ram Tahal*(2) and *Inder Rai* v. *Brown*(3), take the same view, but in the former case it is further laid down that when an accused has entered upon his defence his right to re-cross-examine witnesses is governed by section 257, Criminal Procedure Code. I however think it significant that the word 'recall' alone is used in section 256, and that it means a mere calling in of the witnesses who may be present in or about the Court precincts, for, if it also includes the re-summoning of witnesses, the procedure in all cases would be most cumbersome. First of all, a charge will have to be framed, then the prosecution witnesses will have to be re-summoned and further cross-examined, and then the accused will have to be called upon to enter on his defence, and yet another adjournment will be necessary for the defence witnesses. This appears to me to be an undue prolongation of the trial, and as another interpretation of the section is possible and has been adopted in the Allahabad High Court, I think that that interpretation is correct. If the Court has allowed the witnesses to depart without re-cross-examination, then no doubt the Magistrate would not refuse to re-summon under section 257 unless there were some special circumstances to justify the refusal. But if, as in this case, a witness has been allowed to depart on the representation of the accused that he was not required, I think that any further application to re-cross-examine him must be deemed to be one under section 257. Under that section, the Magistrate is empowered to refuse the application for grounds given in the section, one of which is that it would defeat the ends of justice. The Magistrate in this case framed a charge, and admittedly the prosecution witnesses were not then present, and the accused had

(1) (1900) 4 C.W.N., 351. (2) (1900) I.L.R., 27 Calc., 370.
(3) (1910) I.L.R., 37 Calc., 236.

LOCKLEY v. KING-EMPEROR. PHILLIPS, J.

therefore no opportunity of re-calling them. He was, therefore, called upon to enter on his defence, and stated that he had witnesses to examine and promised to put in a written statement of his case. That being so, he had entered upon his defence and I think the Magistrate was justified in asking him to do so. The subsequent application to recall Mr. Wilson must therefore be deemed to have been under section 257, which gives the Magistrate discretion in the matter. I cannot therefore hold that he has acted with any illegality in refusing to adjourn the case for the re-examination of Mr. Wilson.

The second question then arises as to whether the Magistrate properly exercised his discretion. It is suggested for the defence that Mr. Wilson, when he gave a cheque for Rs. 3,000, was perfectly aware of the fact that the accused was only going to pay Rs. 2,000 for the goods purchased, and acquiesced in his retaining the additional Rs. 1,000, as a sort of '*secret commission*,' as it is called. What the so-called secret commission really amounts to is a sum obtained from the company, who employed the accused and Mr. Wilson, by fraud. The company was made to pay more than the proper price for the goods, the balance going into the pocket of the accused. If, therefore, Mr. Wilson were to admit that he was aware of this secret commission, he would be declaring himself a party to this fraud; and apart from the unlikelihood of his making any such admission, it is very strange that no such question was put to him in his cross-examination which was fairly detailed and made at a time when the accused must have known that this was one of his defences. In view of the fact that this defence was put forward afterwards, it is impossible to say that the ends of justice require the attendance of Mr. Wilson for further examination. The fraud was not that the accused obtained this money from Mr. Wilson personally, but as Directing Manager of Messrs. Oakes & Co's. Engineering works. I therefore think that the Presidency Magistrate exercised his discretion properly, and I reject this ground of appeal. As regards the plea of misjoinder, it seems to me that the case is clearly governed by section 235, Criminal Procedure Code. On the evidence on record, the charge under section 420 is clearly made out, and therefore the accused's appeal must be dismissed and his conviction and sentence confirmed.

K.R.