money has been paid into Court, and no effort on part of the mortgagor has been made to satisfy his gations under the deed. Their Lordships, therefore, k that the appellant must fail upon that part of his eal.

Lord BUCKMASTER.

t follows, therefore, that the appeal succeeds, but eds only to a very limited extent; but though it is in relation to the part in respect of which he he does obtain some substantial relief which could ave been obtained without coming before this and their Lordships therefore think, having ered all the circumstances, that he ought to have f of the taxed costs of the appeal, and they will advise His Majesty accordingly.

citor for appellants: *E. Dalgado.*

itor for respondents: *Douglas Grant.*

A.M.T.

APPELLATE CRIMINAL.

e Mr. Justice Oldfield and Mr. Justice Ramesam.

L KALATHINGAL UMAR HAJEE (PRISONER), APPELLANT

v.

KING-EMPEROR.*

1922, September 5.

*Evidence of witnesses taken by a predecessor ore the successor—Irregularity—Consent of the h procedure—Whether cures irregularity—*Viva ion at trial—*If obligatory.*

e given before a Judge in a criminal trial ial *de novo* before a succeeding Judge, it was edure was irregular and the consent of the the irregularity.

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* No. 581 of 1922 and R.T. No. 64 of 1922.

UMAR HAJEE v. KING EMPEROR.

Except in certain cases covered by an explicit provisi of law, the evidence of witnesses in criminal trials must taken *viva voce* in the course of the trial in the presence of accused.

Reg. v. *Bertrand* (1867) L.R., I.P.C., 520, followed. *I Annavi Muthiriyan* (1916) I.L.R., 39 Mad., 449, consid *Jainab Bibi Saheba* v. *Hyderally Sahib* (1920) I.L.R., 43 M 609 (F.B.) referred to.

APPEAL against the order of G. H. B. JACKSON, Sp Judge, Malabar at Calicut, in case No. 25-A of 192

Facts necessary for this report appear suffic from the judgment.

V. L. Ethiraj and *T. Krishna Kurup*, C *P. Markandeyulu* and *M. C. Sridharan*, Vak appellant.

Public Prosecutor for the Crown.

The JUDGMENT of the Court was delivere

OLDFIELD, J.

OLDFIELD, J.—These two appeals can be de the same preliminary point. To take firs No. 581 of 1922, the accused (appellant) convicted of various offences in connexion Mappilla rebellion. In the first instance l father were placed on trial together before Judge, Mr. EDGINGTON. But, after the trial ha for sometime, it was decided to hold two se Mr. EDGINGTON then began the trial of accused and, rather unnecessarily so far a exhibited the evidence already given at instead of treating it as given for the pur of accused, whether alone or jointly. T not the point, with which we are concer are concerned with is that Mr. EDGIN the Judge, before the trial of the accus being succeeded by Mr. JACKSON. Mr. J on his own initiative, decided to hold He did not apparently notice tha

No
pted, the exhibition of the witnesses' depositions in
revious trial without actually examining them *de*
deprived the accused and himself of any advantage
the *de novo* proceedings would have secured.
We, however, have to decide whether there was an
irregularity, which makes it our duty to order a
new trial.

The general rule, as stated in 2 Hawkins' Pleas of
the Crown, chapter 46, is that "in cases of life no
evidence is to be given against a prisoner, but in his
presence." That rule is followed in this country and has
been extended under our Code to all criminal trials. It is
assumed in the directions regarding different kinds of
trials in the Criminal Procedure Code that the witnesses
are examined *viva voce* in the course of the trial; and
this has been recognized frequently in judicial decisions,
for instance, in *The Queen* v. *Bishonath Pal*(1) and more
ent cases to be referred to. No doubt departures
it are permitted, but only (so far as we have been
h) under some explicit provision of law, for instance,
es in which it is difficult or impossible to secure
resence of a witness or under section 145 to contra-
he witness's evidence at the trial or under section
to corroborate it; and there is also the class of
ases covered by section 288, Criminal Procedure Code.
But none of these provisions has any application to what
happened in the case befcre us, in which, to anticipate
he reference to a statement of the accused's vakil to be
nd in the record, one witness's previous deposition
filed "in order to save cross-examination." We
st therefore hold that there has been a deviation from
normal course of procedure, which would ordinarily
ate the proceedings.

(1) (1869) 12 W.R. (Cri. R.), 3.

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The question is, however, whether that deviatio[n] cured by the consent of the accused. There is no do[ubt] nothing in the record to show that the accused or t[he] three vakils, by whom he was represented, consen[ted] explicitly to it. We find, however, in the record of [the] short examination of the third prosecution witness at [the] conclusion of Exhibit D, his previous statement, tha[t a] copy of that previous statement was filed "at the requ[est] of the vakil for the accused to save cross-examinatio[n] again." There is further the omission to take any ob[-] jection to the procedure at the trial or as a ground o[f] appeal in this Court; and such omission, although we d[o] not allow it to stand in the way of the accused raisi[ng] the point, is significant with reference to his attitu[de] and the attitude of his advisers in the lower Co[urt]. We therefore hold that there was an implied consen[t] the accused to the admission of the copies of the pre[-] depositions of the prosecution witnesses instead of being examined in full at the trial.

Next we have to consider whether the acc[used's] consent cures the irregularity. It has lately bee[n] in *Jainab Bibi Saheba* v. *Hyderally Sahib*(1), that s[uch] consent would cure a similar irregularity in a civil [case]. But that is not the rule in criminal matters. As re[gards] them we have a clear decision of the Privy Coun[cil] *Reg* v. *Bertrand*(2), in which the common understandin[g] in the profession, that a prisoner can consent to nothing is referred to in connexion with consent to an irregu[-] larity, very similar to that now under consideration; a[nd] it may be added that very comprehensive reasons [are] given by the Judicial Committee in support of its in[-] tence on the evidence in criminal trials being taken *voce*. This decision was followed, the principle of it h[as]

(1) (1920) I.L.R., 43 Mad., 609 (F.B.). (2) (1867) L.R., I.P.C.

fully adopted in *The Queen* v. *Bishonath Pal*(1) already referred to, in *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose*(2) and *In re Annavi Muthiriyan*(3). It may therefore be taken that, although the Indian Law of Evidence was enacted in 1872, the judgment of the Privy Council has been accepted as stating the law applicable in this country, although it was pronounced in 1867. *In re Annavi Muthiriyan*(3) SESHAGIRI AYYAR, J., no doubt held that there was nothing in *Reg* v. *Bertrand*(4) or in the principle therein enunciated precluding the judge hearing the case on appeal from deciding whether, notwithstanding the consent of the accused, his case has been prejudiced by the irregularity. We can say only that the Privy Council restricted the discretion of the Appellate Court in such circumstances within very narrow limits, since their Lordships said that they would (if necessary) have interfered in the case before them, although they were not able to affirm or deny the inconveniences apprehended to have in fact happened in the trial then in question, "because it was one of the evils, incident to the cause that made such affirmation and denial equally impossible" and excluded only from their decision cases in which part of the previous deposition accepted in lieu of oral evidence was "so equivocably formal or very short" as to make their remarks inapplicable. With all respect, it is therefore impossible to recognize the existence of any such general discretion as was contemplated by SESHAGIRI AYYAR, J.

Reference has also been made before us to section 167 of the Indian Evidence Act. But that section can-not affect the considerations on which the Privy Council proceeded. Its application would only require us to

(1) (1869) 12 W.R. (Cr. R.), 3.
(2) (1907) 12 C.W.N., 140.
(3) (1916) I.L.R., 39 Mad., 449.
(4) (1886) L.R., I.P.C., 520.

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decide whether, if all the depositions in the previous trial, which were irregularly admitted, were expugned from the record, there would remain independently of those depositions sufficient evidence to justify the conviction. We have considered whether we can come to any such conclusion; and we find that we cannot, because the exclusion of those previous depositions, consisting, as they do, both of cross-examination and examination in chief, would leave us with a record, which represents no inquiry conducted fairly or with full appreciation at the time on the part of either side of what had been or remained to be proved. We cannot deal judicially with a record compiled after such a process of elimination, when it is clear that we have no security for accused having foreseen this effect of his consent on the trial as a whole.

In these circumstances the only course is to set aside the conviction of the accused appellant and direct that he be retried, the evidence of all the witnesses being taken *viva voce* and their previous depositions being admitted, only if their admission is justified by law.

In Referred Trial No. 64 of 1922 corresponding with Criminal Appeals Nos. 585 and 769 of 1922 the same objection has been taken and our order must be the same.

K.U.L.