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In making an order for security for good behaviour I presume that the Magistrate holds the powers of a first class Magistrate and that he was acting under s. 505 of the Criminal Procedure Code. I have some doubt whether the Magistrate had adduced before him such *evidence as to general character* as to justify his dealing with the accused as a person known by repute to be a thief or receiver of stolen property. He had already sentenced the accused for the offence of which he was found guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out representing that the Magistrate from the evidence as to general character adduced before him in this case was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504).

FULL BENCH.

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May 27.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

THAKUR PRASAD (DECREE-HOLDER) v. AHSAN ALI AND ANOTHER
(JUDGMENT-DEBTORS).*

Execution of Decree—Appeal—Act VIII of 1859 (Civil Procedure Code)—Act X of 1877 (Civil Procedure Code)—Repeal—Pending Proceedings—Act I of 1868 (General Clauses Act), s. 6.

The holder of a decree for money applied for the attachment in the execution of the decree of certain moneys deposited in Court to the credit of the judgment-

* Miscellaneous Second Appeal, No. 27 of 1878, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 4th August, 1877, affirming an order of Maulvi Muhammad Husain Khan, Munsif of Azamgarh, dated the 4th June, 1877.

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debtor. On the 4th June, 1877, the Court of first instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August, 1877. Act X of 1877, repealing Act VIII of 1859 and Act XXIII of 1861, came into force on the 1st October, 1877. On the 13th November, 1877, the decree-holder applied to the High Court for the admission of a second appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued.

Held that an appeal was admissible under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

Held also that the order of the lower appellate Court was also appealable under Act X of 1877.

THIS was a reference to the Full Bench by Turner, J. The circumstances under which this reference was made and the questions referred are stated in the judgment of Turner, Spankie, and Oldfield, JJ., concurring.

Pandit *Anandi Lal*, for the petitioner.

Munshi *Kashi Prasad* and *Shah Asad Ali*, for the opposite parties.

TURNER, O. C. J., and SPANKIE, and OLDFIELD, JJ, concurring.—In the case in which this application is presented the decree-holder applied for execution of his decree by the attachment of moneys deposited in the Court to the credit of the judgment-debtor. On the 4th June, 1877, the Court of first instance refused attachment on the ground that the decree directed the sale of certain immoveable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August, 1877. The new Code of Civil Procedure came into operation on the 1st October, 1877. On the 13th November, 1877, the decree-holder applied for the admission of a special appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued. The Judge to whom the application was made referred it to the Full Bench. Two questions are raised in this reference: whether the application is governed by the provisions of the repealed Code of Civil Procedure or by those of the existing Code; and if by those of the existing Code, whether a second appeal lies from the order of the lower appellate Court.

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The 3rd section of the Code now in force, Act X of 1877, declares that the enactments mentioned in the second schedule in that Act (which includes so much of Acts VIII of 1859 and XXIII of 1861 as had not been theretofore repealed) were thereby repealed, subject to the proviso that nothing in that section contained should affect the procedure prior to decree in any suit instituted or any appeal presented before that Code came into force. The proviso does not go on to exclude in express terms the operation of the General Clauses Act, but by implication it does exclude the operation of the 6th section of that Act in respect of the procedure after decree in suits or appeals. While then it is not denied that proceedings in execution of decree initiated after the existing Code came into operation must be governed by the provisions of that Code, the question remains whether such proceedings initiated before the Act came into operation are affected by that law, so that thereafter they must be governed by it, or whether they are not to be prosecuted and brought to a conclusion as if the law under which they were instituted were still in force. By the 6th section of the General Clauses Act it was enacted that the repeal of any Act should not affect any proceedings commenced before the repealing Act shall have come into operation.

That the provisions of s. 6 of the General Clauses Act operate on proceedings in execution of decree has been already held by the High Court of Bombay (1), and we agree with the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with execution of decree is prospective and does not affect proceedings already commenced. We may refer to several sections in support of the view. S. 311 empowers the decree-holder or any person whose property has been sold *under that chapter* to take objection to the sale on the ground of a material irregularity in publishing or conducting it, but it makes no reference to sales which have taken place under the repealed Code, though the period allowed for such objections under that Code might not have expired when Act X of 1877 came into operation. S. 312 declares orders passed under the preceding section final, but it does not refer to similar orders

(1) *In the matter of the petition of Ratansi Katianji*, I. L. R., 2 Bom. 148.

passed under the repealed Code. S. 283 declares any party affected by an order passed under ss. 280, 281, 282 entitled to institute a suit to establish his right to the property in dispute, but it is silent as to similar orders passed under the provisions of the repealed Code. Lastly s. 588 declares that an appeal shall lie from certain orders "under this Code." Among the orders specified as appealable are some which would be passed after decree, and which, if passed under the repealed Code, would under that Code have been appealable. It is not unreasonable then to conclude that, in abstaining from making provision for cases arising under the repealed Code in the instances to which we have alluded, and in giving prospective effect to the chapter relating to execution of decrees, the Legislature had in view the provisions of the General Clauses Act.

However this may be, unless the 6th section of the General Clauses Act is excluded by the Code, and as we shall presently show it is not in our judgment excluded, in respect of proceedings in execution, it cannot be disregarded, and its effect is to leave such proceedings initiated before the repealing Act came into force to be dealt with under the provisions of the repealed Code. For the position that the saving of "proceedings commenced" from the operation of a repealing Act extends also to appeals from such proceedings we find authority in *Ratanchand Srichand v. Hanmantrav Shivbaks* (1). An appeal is in fact a stage of a proceeding, and if, as it might happen, the right of appeal was taken away by a repealing Act, and a proceeding theretofore appealable converted into a final proceeding, it cannot be doubted that the proceeding would be affected by the alteration of the law. If in such a case it be intended to deprive the parties of the right of appeal, the intention to exclude the operation of s. 6 of the General Clauses Act should appear clearly in the repealing Act.

For the reasons we have stated we arrive at the conclusion that proceedings in execution of decree instituted under Act VIII of 1859 are to be governed by the provisions of that Code, and that an appeal should be entertained from all orders passed in such proceedings which under the provisions of that Act were appealable.

(1) 6 Bom. H. C. Rep. A. C. J, 166.

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But it has been suggested that, inasmuch as by s. 647, Act X of 1877, the procedure in that Act prescribed is to be followed, so far as it can be made applicable, in all proceedings other than suits and appeals, the provisions of the last paragraph of s. 3 declaring that nothing in the Act contained shall affect the procedure prior to decree in any suit instituted, &c., apply also to proceedings in execution, so that the procedure in such proceedings (whether instituted before the passing of the Act or not) subsequently to the formal order of the Court wherein the result of the proceeding is embodied is governed by the provisions of Act X of 1877.

That proceedings in execution of decree are among the proceedings other than suits or appeals to which s. 647 applies may be admitted. The Code, following the usage in this country, does not treat appeals as mere stages in a suit; and similarly, under Act VIII of 1859, proceedings in execution of decree have in accordance with the same usage been treated, not as stages in a suit, but as miscellaneous proceedings. The provisions of the analogous section in the former law, s. 38, Act XXIII of 1861, were held by this Court applicable to proceedings in execution of decree (2), on the same ground on which it must be held that the provisions of s. 647 are applicable to such proceedings, namely, that otherwise no procedure is provided for such proceedings. It does not, however, follow from the admission that the provisions of s. 647 are applicable to proceedings in execution of decree, that we must be compelled to the conclusion that the last paragraph of s. 3 is also applicable to the proceedings, or to all the proceedings, to which s. 647 applies. While had such been the intention of the Legislature, it could have been made to appear clearly by the introduction of a few words in s. 3, we find cogent evidence to the contrary in the prospective character of the sections relating to execution of decree to which we have already adverted. We would then reply that the last paragraph of s. 3 is not to be extended to proceedings in execution of decree. Should, however, our opinion on this point be erroneous, it would be necessary to consider what are the orders passed in execution of decree referred to in s. 588, cl. (j), and whether other orders passed in execution of decree are appealable under the Code

(2) *In the matter of the petition of Harshankar Parshad*, I. L. R., 1 All. 178. See also *Gaya Parshad v. Bhup Singh*, I. L. R., 1 All. 190.

save such as are referred to in s. 588, cl. (j); and inasmuch as these questions are necessarily raised in a number of references which are now before the Court arising out of proceedings instituted after the Act came into operation, it will be convenient to dispose of them on the reference now before us. By the provisions of the first paragraph of s. 588 read with cl. (j) appeals are allowed from orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit. The first observation that arises on this section is that, if, as we have held, the provisions of s. 647 apply to proceedings in execution of decree, cl. (j) is unnecessary, unless it was intended to restrain the larger right of appeal that would be given by s. 647. Yet unless we import a limitation which the terms do not warrant, the clause declares no more than is implied in s. 647, for under s. 647 the procedure prescribed by the Act is to be followed in proceedings other than suits, and consequently the orders passed in such proceedings would be open to appeal when of the same nature as appealable orders made in the course of a suit. It is then argued that the term "orders" made in the course of a suit is to be restricted to orders passed in the course of a suit prior to decree, and that, inasmuch as the Code distinguishes between appeals from orders and appeals from decrees, the Court is constrained by the declaration that an appeal shall lie from those orders and no other such orders, to hold that no orders passed under s. 244 are open to appeal save such as are of the same nature with appealable orders passed in the course of a suit prior to decree.

On referring to s. 244 it will be seen that all the questions therein mentioned are to be determined by the "order" of the Court. They embrace not only the minor questions which may arise prior to determination of a proceeding, but the determination of a proceeding itself, which may be a matter of the utmost importance to the parties. It is scarcely to be supposed that no appeal would be provided from such orders, while an appeal is given from interlocutory orders of comparatively minor importance.

Again orders passed after decree as well as orders passed before decree may be properly termed orders passed in the course of a suit, and indeed the decree itself is in one sense an order,

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and is so defined in the Code. By adopting the construction which has been urged we import a limitation which, as we have said, the terms of the clause do not warrant. We are then compelled to the conclusion that the provisions of s. 588 do not embrace all the directions on the determination of proceedings which are termed in the Code "orders," and that, in declaring that an appeal should lie from the orders therein mentioned and from no other such orders, we must understand orders of a similar nature to those specified, and not to all "orders" that might be passed under the Code. The expression "orders" under s. 244 as to questions relating to execution of decree of a similar nature to appealable orders made in the course of a suit would be awkward if it were intended to apply to orders determining such questions; and again orders made in the course of a suit may fairly be understood as not embracing the order which is also the decree. While then the provisions of cl. (j) allow an appeal from the orders made in the course of execution-proceedings where an appeal is allowed from similar orders passed in the course of a suit, the provisions of s. 647 declare that the procedure prescribed by the Act shall be followed (so far as it is applicable) in all proceedings other than suits and appeals. It follows that an appeal will lie in such proceedings from the order which is analogous to a decree in a suit.

The definition of the term "decree" supports the conclusion at which we have arrived. "A 'decree' means the formal order of the Court in which the result of the decision of the suit or *other judicial proceeding* is embodied." Applying this definition to proceedings in execution of decree, we feel ourselves at liberty to hold that the formal order of the Court in which the result of the proceeding is embodied is a decree within the meaning of that term in the Code. It is therefore appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees.

It is true that the definition of the term "decree" is so large as to embrace some of the orders which are appealable under s. 588, but we are not on that account at liberty to reject it. It is also true, as we have shown, that cl. (j) is on our construction of s. 647 superfluous, but the clause does not appear in any draft of the

Code submitted to the Council save the last Bill No. 5, and it may be that the effect of s. 647 escaped attention.

We reply to this reference that the application is governed by the provisions of the repealed Code, but that, if it be governed by Act X of 1877, an appeal would lie from the order.

PEARSON, J.—The appealed order falling within the definition of a decree contained in s. 2 of Act X of 1877, is, in my opinion, appealable under s. 584 of that Act.

The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

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APPELLATE CRIMINAL.

1878
May 28.

Before Mr. Justice Pearson.

EMPRESS OF INDIA v. RAM CHAND.

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872 (Evidence Act), s. 30—Conviction on uncorroborated confession.

A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (1).

THIS case is not reported in detail, as Pearson, J., took in it the same view as Turner, J., in *Empress v. Bhawani* (1).

Conviction quashed.

APPELLATE CIVIL.

1878.
June 3.

Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

BEHARI LAL (DECREE-HOLDER) v. SALIK RAM (JUDGMENT-DEBTOR) *

Execution of Decree—Act VIII of 1859 (Civil Procedure Code), ss. 212, 216—Limitation—Application to Enforce or Keep in Force a Decree—Act IX of 1871 (Limitation Act), sch. ii, art 167.

On the 3rd March, 1875, an application was made by a decree-holder to the Court executing the decree which did not, as required by s. 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether

* Miscellaneous Second Appeal, No. 73 of 1877, from an order of R. Saunders, Esq., Judge of Farukhabad, dated the 14th July, 1877, reversing an order of Pandit Har Sahai, Subordinate Judge, dated the 5th June, 1877.

(1) See *Empress v. Bhawani*, ante p. 664 and note to that case.