

to apply to this case. The defendants have not lost or parted with their proprietary rights, attached to which is a certain proportion of sir-land, of which they might claim, under s. 7 of Act XVIII of 1873, a right of occupancy as ex-proprietary tenants. The section not only contemplates something more than a mere temporary transfer of proprietary rights, but in the particular case before us the lands in the occupation of the share-holders are the measure of each man's share, and the lands of the defendants are the subject of the mortgage. The plaintiffs are entitled to a decree as claimed.

*Appeal allowed.*

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### FULL BENCH.

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*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.*

THE EMPRESS OF INDIA *v.* DARBA AND OTHERS.

*Act VIII of 1873 (Northern Indian Canal and Drainage Act), s. 70—Act XLV of 1860 (Indian Penal Code), s. 65—Act X of 1872 (Criminal Procedure Code), s. 309,—Act I of 1868 (General Clauses Act) s. 5.*

S. 309 of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65 of the Indian Penal Code, it only regulates the proceedings of Magistrates whose powers are limited (1).

THIS was a reference to the High Court by Mr. H. M. Chase, District Judge of Sahāranpur, under s. 296 of Act X of 1872, of the cases of nine persons convicted under s. 70 of Act VIII of 1873 of various offences under that section. These persons were only fined. The sentences of imprisonment awarded in default of payment of the fines inflicted were all in excess of one-fourth of the maximum period of imprisonment allowed by s. 70. The reference was made on the ground that these sentences were illegal in view of s. 65 of the Indian Penal Code. Turner, J., having held on a former occasion that such sentences were illegal in view of that section, Spankie, J., before whom the reference was laid, referred to a Full Bench the question whether the sentences in the cases referred were legal or illegal, thinking that s. 309 of Act X of 1872 left the matter in some doubt.

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(1) Contrast *Reg. v. Muhammad Saib*, I. L. R., 1 Mad. 277.

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The following judgments were delivered by the Full Bench :

STUART, C. J.—The question referred to us relates to the legality or illegality of sentences passed by two canal deputy magistrates on conviction before them in nine cases for offences under s. 70 of the Northern Indian Canal and Drainage Act VIII of 1873, in respect of the sentences of imprisonment awarded in default of the fines imposed, for there is no question as to the legality of the fines themselves. (The learned Chief Justice then stated the convictions and sentences and continued :) S. 70 of Act VIII of 1873 provides that for such offences as these convicted persons “shall be liable on conviction before a Magistrate of such class as the local Government directs in this behalf to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, or to both.” There can therefore be no doubt of the legality of the fines imposed in the cases mentioned, but the sentences of imprisonment awarded respectively in default of payment of the fines are clearly illegal, as will presently appear. The Canal Act VIII of 1873 does not appear to contain any other provision for convictions under s. 70 than that I have just quoted, and it must be interpreted by reference to the general law relating to sentences in criminal cases.

That law will be found in the first place in s. 309 of the Criminal Procedure Code, the last clause of which provides that “when a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine *as is allowed by law*, provided the amount does not exceed the Magistrate’s powers under this Act.” Then by the General Clauses Act I of 1868, s. 5, it is enacted that “the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such shall contain an express provision to the contrary.” Act VIII of 1873 contains no express provision to the contrary of the section of the Act last quoted, and we are therefore to find the law relating to sentences of imprisonment in default of fines within the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, and of these 64 and 65 appear to be the sections applicable to the sentences under consideration. I do not see that s. 67 has anything to do with the question, for that section deals

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solely with offences "punishable with fine only," whereas the offences contemplated by s. 70 of Act VIII of 1873 involve liability "to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, *or to both*," or, as it is otherwise put in s. 65 of the Indian Penal Code, offences "punishable with imprisonment *as well as fine*." S. 64 provides: "In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence:" and by s. 65 "the term for which the Court directs the offender to be imprisoned in default of payment of a fine *shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence*, if the offence be punishable with imprisonment *as well as fine*."

Thus, at last we arrive at the rule to be applied to sentences such as are now before us, and under which the imprisonment to be awarded in default of a fine, when the offence is punishable by both penalties, is one-fourth of the term of imprisonment which is the maximum fixed for the offence. In all these canal convictions the maximum imprisonment is one month, and, therefore, the deputy magistrates here were not competent to award more than one-fourth of the month, or say one week, and this of course, under the General Clauses Act I of 1868, s. 2, cl. 18, applies to either description of imprisonment, simple or rigorous.

From all this it is very clear that the sentences of imprisonment in default of the fines passed by these canal deputy magistrates were illegal, and to that extent they ought to be quashed. It is otherwise, as I have already remarked, as to the fines, which, however, we are informed have all been paid.

PEARSON, TURNER, and SPANKIE, JJ. concurring: Offences under the Canal Act may be punished by fine not exceeding Rs. 50, or imprisonment not exceeding one month, or both. The 64th section of the Indian Penal Code enables the Court, in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment. The 65th and

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67th sections of the Indian Penal Code declare what shall be the limit of this imprisonment. When an offence is punishable with imprisonment as well as fine the imprisonment which can be awarded in default of payment of fine is limited by s. 65, Indian Penal Code, to one-fourth the maximum fixed for the offence, but if the offence be punishable with fine only, it was necessary to set up another standard, and accordingly by s. 67, Indian Penal Code, a scale was fixed varying with the amount of fine which could be imposed.

It may be admitted that in some few instances these sections work an anomaly in that when fine alone is imposed as the punishment for an offence punishable with fine, or imprisonment, or both, the term of imprisonment to which an offender may be sentenced in default of payment of the fine is less than could be awarded in default of payment of a fine of equal amount imposed for an offence punishable with fine only. Thus, if for affray, an offence punishable with imprisonment, or fine, or both, an offender be sentenced under s. 160 of the Indian Penal Code to a fine of Rs. 50, the imprisonment which can be awarded in default is limited to one-fourth of a month, while if an owner of land be convicted under s. 154 of the Indian Penal Code for omitting to give information of a riot, an offence punishable with fine only, and be sentenced to pay a fine of Rs. 50, he can be sentenced in default of payment of the fine to imprisonment for two months. This anomaly can occur but in few instances, and it is not very important, because the Court is not confined, in sentencing an offender for an offence punishable by fine, or imprisonment, or both, to inflict a fine only, but may also impose a substantive sentence of imprisonment. Moreover, the imprisonment imposed in default of payment of fine does not if suffered satisfy the fine, but the fine may, nevertheless, be levied on the property of the offender if any can be found.

The 309th section of the Code of Criminal Procedure make ss. 64 and 65 of the Indian Penal Code applicable not only to offences punishable under the Penal Code, but to offences punishable under any law in force for the time being, and therefore applicable to offences punishable under the Canal Act. The provisos to that section do not extend the period of imprisonment which may be awarded under the provisions of s. 65 of the Indian Penal Code,

otherwise they would not be confined to Magistrates but would be extended to all Criminal Courts. They were enacted then to regulate the proceedings of Magistrates whose powers are limited. Thus, although a Court of Session, in sentencing an offender for criminal breach of trust, may, in addition to imprisonment and fine, sentence the offender, in default of payment of the fine, to undergo imprisonment for nine months, or one-fourth the maximum of imprisonment which may be awarded for the offence, a Magistrate of the second class, whose powers are limited to six months, convicting an offender of the same offence, and punishing him with fine and imprisonment, can only sentence him, in default of payment of fine, to undergo imprisonment for one-fourth of six months, although if he punishes the offender with fine only, he may, under the second proviso to s. 309 of the Code of Criminal Procedure, award six months as the period of imprisonment to be undergone in default of payment of fine, the term allowed by law being nine months. These observations may serve to explain the object of the provisos, which it has been suggested may extend the powers of Magistrates so as to authorise the imposition of a longer term of imprisonment than could be awarded under s. 65 of the Indian Penal Code.

In the case of a canal offence, which is punishable with fine and imprisonment, the maximum period of imprisonment in default of payment of fine allowed by law is one-fourth of one month, and if the Magistrate punishes an offender for such an offence with fine only, he can award, in default of payment of the fine, no longer term.

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## PRIVY COUNCIL.

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PRESENT :

*Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.*

MUHAMMAD EWAZ AND OTHERS (PLAINTIFFS) *v.* BIRJ LAL AND ANOTHER (DEPENDANTS).

On appeal from the High Court of Judicature, North-Western Provinces.

*The Indian Registration Act VIII of 1871.—Construction of s. 35—Non-compliance with provisions of.*

The words of s. 35 of the Indian Registration Act, VIII of 1871, which provide that "If all or any of the persons by whom the document [*i. e.*, the document pre-