

1876
December 5.

APPELLATE CIVIL.

(*Mr. Justice Pearson and Mr. Justice Spankie.*)

JADU LAL (PLAINTIFF), v. RAM GHOLAM AND ANOTHER (DEFENDANTS).*

Act VIII of 1859, s. 2—Res judicata.

When a plaintiff claims an estate, and the defendant, being in possession, and knowing that he has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff.

Where, therefore, the defendants purchased an estate in the plaintiff's possession, and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that the sale to the defendants was fraudulent and without consideration, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit, held that he was debarred from suing to enforce such claim.

Baldeo Sahai v. Bateshar Singh (1) followed.

As this case merely follows the decision in *Baldeo Sahai v. Bateshar Singh*, it is not reported in detail (2).

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APPELLATE CRIMINAL.

(*Mr. Justice Pearson.*)

THE QUEEN v PETERSON.

Biqamy—Attempt—Publication of the Banns of Marriage.

The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry (3).

Where therefore a man, having a wife living, caused the banns of marriage between himself and a woman to be published, he could not be punished for an attempt to marry again during the lifetime of his wife.

Mr. C. Donovan, Magistrate of the first class, on the 7th June, 1876, committed Peter Peterson, a European, to the Court of Session for trial on the following charge amongst others, *viz.*, that he, in or about the end of December, 1875, and beginning

* Special Appeal, No. 819 of 1876, against a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th April, 1876, reversing a decree of Sultan Husain, Additional Subordinate Judge, dated the 17th May, 1875.

(1) I. L. R., 1 All. 75.

(2) *Baldeo Sahai v. Bateshar Singh* was again followed in S. A., No. 998 of 1876, decided the 16th December, 1876.

(3) For acts amounting only to a preparation to commit forgery, and not to an attempt to commit that offence. See *Queen v. Ramsarun Chowbey*, H. C. R., N.-W. P., 1872, p. 46.

of January, 1876, attempted to marry Ethel Amanda Guise, by causing the publication of the banns of marriage between them, when he, being a Christian, had a wife alive, and that he had thereby committed an offence under ss. 494, 511 of the Indian Penal Code. In a trial by jury held by Mr. H. G. Keene, the Sessions Judge of Agra, on the 27th July, 1876, he was convicted on that charge, and sentenced to three years' rigorous imprisonment.

Peterson appealed to the High Court.

Mr. Ross, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Crown.

PEARSON, J.—I proceed to consider whether the prisoner has been rightly convicted of an attempt to commit the offence defined in s. 494, Indian Penal Code. He was charged with and has been found guilty of "attempting to marry E. A. Guise by causing the publication of the banns of marriage between them when he, being a Christian, had a wife alive." The question shortly is whether the publication of the banns of marriage is an attempt to marry. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. "Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made"—Mayne's Commentaries on s. 511, Indian Penal Code. In one of the cases cited by Mr. Mayne in his Commentaries on the Indian Penal Code in illustration of the above doctrine, it was ruled that there could be no attempt to contract a marriage until the parties stood before the Magistrate about to begin the ceremony. It would follow in the present case that the publication of the banns was not an attempt on the prisoner's part to marry Miss Guise, but only a preparation for such an attempt. The publication of banns may or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony. If the rule laid down in America, that an attempt can only be manifested by acts which would end in the

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consummation of the offence but for the intervention of circumstances independent of the will of the party, be accepted, it is clear that the prisoner's act in causing the banns of marriage between himself and Miss Guise to be published was not, in the eye of the law, an attempt to marry her, inasmuch as he might, before any ceremony of marriage was commenced, have willed not to carry out his criminal intention of marrying her. For the reasons above stated the verdict of the jury by which the prisoner is convicted of an offence punishable under ss. 511, 494, Indian Penal Code, and the sentence passed on him under those sections by the Sessions Court must be and hereby are annulled.

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December 16.

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

IN THE MATTER OF THE PETITION OF BISH NATH.

*Act VIII of 1871 (Registration Act), s. 73—Refusal to Register—Petition to have Document registered—Person "claiming" under Document.**

A deed of sale, executed by the vendor alone, which recited that the vendor had received the purchase-money, and that the purchaser had been put into possession, was presented for registration by the vendor, the purchaser not being present. The Registrar refused to register the document on the ground that the deed had not been delivered, and no consideration had passed, the vendor having stated that he had not received the purchase-money. In refusing to register, the Registrar believed that the deed was of the vendor's own creation. The vendor applied by petition to the High Court to establish his right to have the document registered. The alleged purchaser repudiated the sale.

Held (by the majority of the Full Bench) that as it appeared on the face of the document itself that the petitioner was not a person "claiming" under it, the petition could not be entertained under the provisions of s. 73 of the Registration Act.

Per STUART, C. J.—That the mere fact that it did not appear on the face of the deed that the petitioner could claim under it did not preclude the Court from entertaining the petition, but that, under the circumstances of the case, the registration of the deed should not be ordered.

Per OLDFIELD, J.—That it was the duty of the Court to order the registration of the deed as it was duly executed and the requirements of the law fulfilled, without entering into the question whether or not the petitioner could claim under it.

* Miscellaneous Application, No. 71 B. of 1876.