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It seems to me that the rest of the judgment of the lower appellate Court has been misunderstood. The Judge refers to the original location on the *land* of the persons who constructed the houses which formed the *sarai*, and in his view, only so far as the land is concerned is there any connection between the plaintiff and defendant as landlord and ryot. "Probably," observes the Judge, "the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end." But the Judge holds the right to take rent or eject the defendants not proved, and that defendants have acquired a good title by long tenure to hold without payment of rent.

When then the first plea before us in second appeal referred to the lease of 1828, and the second to the payment of rent and the admission made by defendant that he was a tenant and paid rent, it appeared to me that the Judge had disposed practically of both these pleas in the finding at which he arrived, and that after such a finding no claim brought under the lease could be enforced. The plaintiff's allegation and averment that he had received rent under the lease up to 1875 had broken down, and the lease had never been in operation, certainly for twelve years prior to the institution of the suit. The Judge and Court below him also found that the defendants had acquired a title against plaintiffs by continuous occupation for a very long period without payment of rent, asserting their own proprietary possession as regards the house. Under these circumstances the lease, having never been enforced within twelve years prior to the institution of the suit, could not be enforced now, and I thought that the suit as brought failed and was therefore properly dismissed, and I think so now and would dismiss the appeal.

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CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA *v.* FOX.

Culpable Homicide not amounting to murder—Voluntarily causing Hurt—Spleen disease—Act XLV of 1860 *(Penal Code), ss.* 299, 304, 321, 323,

Where a person hurt another, who was suffering from spleen disease, intentionally, but without the intention of causing death, or causing such bodily injury as was

likely to cause death, or the knowledge that he was likely by his act to cause death, and by his act caused the death of such other person, *held* that he was properly convicted under s. 323 of the Indian Penal Code of voluntarily causing hurt.

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This was a case called for by the High Court under s. 294 of Act X of 1872. The facts of the case are sufficiently stated in the order of the High Court.

Mr. *Chatterji*, for the accused.

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

STUART, C. J.—This case was first brought to the notice of the Court by a letter from the Government of these Provinces, dated the 11th November last, in which letter it was inquired "whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable." On reading this letter it occurred to me that, instead of returning an answer to it in the same form, it would be better for the Court to take judicial cognizance of it and to dispose of it under s. 297 of the Criminal Procedure Code. That course was adopted and the record sent for. I should state that I adopted this course of action in order to avoid the discussion and inconvenience experienced by the Government and by this Court in the well-known *Fuller's Case*, and also in order to avoid the suggestion that was made in that case that the Court, although consulted by the Government in its judicial capacity, had not heard and determined the matter in the usual way, but simply by letter in reply to the Government.

The case has now according to the course of the Court come on for hearing and disposal by myself, both prosecutor and accused being professionally represented, the Government by Babu Dwarka Nath Banarji, the Junior Government Pleader, and the accused by Mr. Chatterji, barrister and advocate of this Court. Both these gentlemen submitted their arguments very fairly, although it did not appear that there was any serious difference between them as to the legal aspect of the case. I have very carefully considered all that they advanced, and I have also very anxiously perused and examined the evidence, and I have arrived very clearly at the conclusion that, in the first place, the conviction of Fox under s. 323 of the Indian Penal Code was right, and that the sentence of a

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fine of Rs. 200, or, in default, one month's rigorous imprisonment, was one which it was within the discretion of the Magistrate to order, although I myself would have been satisfied with a penalty of less severity. But the fine has I believe been paid, and under all the circumstances of the case I am not disposed to interfere with the sentence by reducing it now.

I observe it is suggested in the police report that the offence was one under s. 304 of the Indian Penal Code, *viz.*, culpable homicide not amounting to murder, that is, homicide committed without premeditation. But in order to a conviction under such a charge, it is incumbent on the prosecutor to prove that the assault or blow which caused death was committed or inflicted so recklessly as to show that the offender was utterly regardless of the consequences of his act. But in the present case the evidence falls considerably short of such a degree of criminality: it simply amounts to this, that very early on the morning of the 30th August last Fox, dissatisfied and irritated by the lazy and inefficient manner in which the punkha cooly Tulsia was managing the punkha, pulling it slowly and nodding in a sleepy manner while doing so, went up to him and struck him one or more blows, on what part of his person does not very clearly appear, whether on the head or on the side, or other part. One thing however is clear, and is not disputed, that Tulsia's death was the result of the injuries he had so received. But on a fair view of the evidence it would in my view be unreasonable to hold that Fox was actuated by the reckless vindictiveness contemplated by s. 304. He simply under a feeling of annoyance at the inefficient manner the punkha was being pulled by Tulsia, and under what may be called a sudden impulse, struck him in the way described. The blows were not heavy or severe, and if Tulsia had been in a healthy condition of body, it is probable that he would not have materially suffered from them, But he was not in a healthy state. The evidence of Doctor Hilson shows that his spleen was in a very diseased condition, more than double the natural size, and thus the weakness of the poor man and his so quickly succumbing is explained. And I observe that the police report which states Fox's offence as one falling under s. 304, Indian Penal Code (culpable homicide not amounting to murder), yet strangely admits that Fox "had only seen the deceased for the first time on the morning he struck him (30th

August), as before that he was serving with Sergeant Justice of the Government Railway Police". Doubtless the blow or blows accelerated Tulsia's death, but that such a result was contemplated or was carelessly disregarded by Fox as possible, it is in my opinion on the evidence impossible to believe. Fox appears merely to have acted from a sudden feeling of annoyance, and to have vented that feeling by an assault, which on a healthy person would have been attended with no injurious consequences

I cannot conclude this judgment without noticing the allusion the Magistrate makes to the recorded opinion of the Court in *Fuller's Case*. He refers to paragraphs 17 and 18 of the Court's letter in that case, which deal with the procedure which it is the duty of a Magistrate to follow. But I may be permitted to refer to other portions of that same letter and of my own minute which appear to me very clearly to expound the law to be applied to the present case. In paragraph 24 of the Court's letter in *Fuller's Case* it is stated that "By the law of India, as by the law of England, a person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby *accelerating* the death of that other, is deemed to have 'caused his death'. Nevertheless, every causing of death does not amount to the offence of culpable homicide. Unless it be proved that a person who has caused the death of another caused death with the intention—(i) to cause death; (ii) to cause bodily injury likely to cause death; (iii) to cause bodily injury as he knew to be likely to cause death to the person to whom the harm is done; or (iv) to cause bodily injury to any person sufficient in the ordinary course of nature to cause death with the knowledge (v) that he was likely by his act to cause death; or (vi) that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death—the person who has caused death cannot by the law of India be convicted of culpable homicide of either description". And in paragraph 25 of the letter it is explained:—"Nor can a person be convicted of the offence of *voluntarily* causing grievous hurt, unless it be proved that he caused one of the descriptions of hurt defined in the Code as grievous hurt, either by means whereby he intended to cause such hurt, or by means which at the time of employing those means he knew or had reason to believe to be likely to

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cause it (Indian Penal Code, section 39)." And the Court then goes on to remark in paragraph 26 that "in Fuller's case there was no evidence that he had committed any of the kinds of hurt defined in the Code as grievous hurt; and although a person is by law presumed to know and to intend the ordinary and probable result of his acts, the result could hardly be declared ordinary or probable; while the circumstances rebutted the presumption of intention or knowledge to commit either culpable homicide or grievous hurt." The same principle as to motive and intention is also explained in my own minute in *Fuller's Case*. In paragraph 23 of that paper I say, "It would appear from the medical evidence that the spleen of the deceased was in such a deceased state that very slight violence, either from a blow or fall, would have been sufficient to have caused death. Indeed, it is plain that a mere accident to the man, such as his tripping while walking or running, might have had this fatal result; but that there is nothing in the case to show that such extreme and perilous sensibility of body was known to, or could have been reasonably suspected by, Mr. Fuller; and *his guilt or criminal responsibility would have been the same, and neither more nor less, if Kathwaru had not died.* The letter of the Government of India goes on to state that 'the death of Kathwaru was the direct result of the violence used towards him by Mr. Fuller', and His Excellency in Council observes that 'the High Court assumes the connection between the two events as being clear', but adding 'yet, on reading Mr. Leeds' judgment, he does not find that gentleman ever considered the effect, or even the evidence of this connection'. The portion of the Court's letter (*i.e.* the Court's first letter to the Local Government) thus referred to is in these terms:—'The medical evidence shows that the spleen was in a diseased condition; that death was caused by the rupture of the spleen; that this injury might have been caused by moderate violence or by a fall; and that there were no external marks of injury on the body. Under these circumstances, it appears that no great violence was used, and that the accused neither contemplated nor could have foreseen that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death'. It will be observed that Mr. Fuller's not very violent blow and Kathwaru's death are here stated as connected facts,

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but not in such a way as to show Mr. Fuller's culpability in regard to the death. In fact, it is unnecessary to dwell on the mere fact of the connection between the two circumstances, *the material and vital question being, not whether the death did in fact result from the blow, but whether Mr. Fuller had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence.* But there is nothing in the record to show any such guilty knowledge on his part or that he intended to occasion a hurt which would ordinarily or probably cause death, and every circumstance ought to have been distinctly proved, and not left to any kind of inference or suspicion." And with respect to Mr. Leeds' judgment I observed "that it distinctly states the fact of the blow or assault, as it may be called, and also Kathwaru's ultimate death, but it does not state, and, with great respect and deference, I submit it very properly does not state, these as necessarily connected facts against Mr. Fuller in the way of measuring his culpability."

The law thus laid down appears to me exactly to apply to the present case. It is impossible to conclude that Fox could have had in view the cooly's death as a probable or even possible consequence of his acts, and the measure of his culpability is therefore not that fatal result, but only the blows themselves, inflicted, as these were, suddenly, under an impulse momentarily excited and not arising from any actual malice against the man.

APPELLATE CIVIL.

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December

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

PHUL KUAR (PLAINTIFF) *v.* MURLI DHAR AND ANOTHER (DEFENDANTS)*

Mortgage—Usufructuary mortgage—Hypothecation—Suit for money charged on immovable property.

M and *S* executed an instrument in favour of *K* and *G* in the following terms: "We, *M* and *S*, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to *K* and *G*, for two years: that we have received the mortgage-money, and nothing is due to us: that we have put the mortgagees in possession of the mortgaged property: that eight annas has been

* Second Appeal, No. 1260 of 1878, from a decree of R. M. King, Esq., Judge of Meerut, dated the 6th September, 1878, affirming a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 16th May, 1878.