

*controversiarum pronuntiatione judicis accepti, quod vel condemnatione vel absolutione contingit* (Dig. XLII, Tit. I. Sect. I). The case of *Ganesh Rai v. Kalka Prasad* (1), already referred to, ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling; and we did so before in a case [*Salig Ram v. Tirbhawan* (2)], in which the point for determination was very similar to this case.

For these reasons my order in the case is that this appeal be decreed, that the decrees of both the lower Courts be set aside, and that the case be remanded to the Court of first instance under s. 562, Civil Procedure Code, for trial upon the merits. Costs to abide the result.

OLDFIELD, J.—I concur in the order of remand.

*Case remanded.*

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## FULL BENCH.

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1885  
May 3.

*Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. MADHO.

*Prosecution, withdrawal from—Government Pleader—Public Prosecutor—Criminal Procedure Code, s. 494.*

*Held by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.*

THIS was a reference to the Full Bench. The point of law referred is stated in the order of Brodhurst, J., by whom the reference was made.

BRODHURST, J.—I called for the record of this case on perusal of the Sessions statement of the District of Cawnpore for the month of December, 1885.

(1) I. L. R., 5 All. 595. (2) Weekly Notes. 1885. p. 171.

1886

QUEEN-  
EMPRESS  
v.  
MADHO.

Madho Brahman was committed for trial on a charge of murder. After the witnesses for the prosecution had been heard, the Sessions Judge recorded the following note and order :—"The Government Pleader, with the consent of the Court, withdraws from the prosecution, under s. 494, Criminal Procedure Code. Accordingly Madho is acquitted of murder under s. 302, Indian Penal Code." The Government Pleader had apparently been appointed by the Magistrate of the District, under the 2nd paragraph of s. 492 of the Criminal Procedure Code, to be Public Prosecutor merely for the purpose of this case, and as he had not been appointed to be a Public Prosecutor "by the Governor-General in Council or the Local Government," he was not, in my opinion, competent, even with the consent of the Court, to withdraw from the prosecution, and the acquittal of Madho Brahman was, I think, under the circumstances stated, illegal.

There is, however, a passage in a judgment of a Bench of this Court in the case of *Empress v. Ramanand* (1), which seems to support the order of the Sessions Judge. The observations referred to were probably made in the absence of any discussion on that particular point, and it may have been supposed that, as in Bengal, so in these Provinces, all Government Pleaders had been appointed to be *ex-officio* Public Prosecutors; but as the judgment has been reported, and as the matter is one of very considerable importance, I refer the case for orders to the Full Bench.

The following opinion was given by the Full Bench :—

STRAIGHT, Offg. C. J., and OLDFIELD, BRODHURST, and TYRELL, JJ.—We assume, for the purpose of answering this reference, that there was a withdrawal of the case; and we desire only to say that we are satisfied that the person charged with the prosecution had not the power of a Public Prosecutor, with regard to withdrawal, under s. 494 of the Criminal Procedure Code.

(1) Weekly Notes, 1883, p. 199.