order in question was appealable, it cannot be the subject of revision under s. 622 of the Code of Civil Procedure. The application for revision is dismissed with costs.

Application rejected.

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RAHIMA v. NEPAL RAI.

EXTRAORDINARY ORIGINAL CRIMINAL.

1892 *June* 7.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* STANTON AND FLYNN.

Practice—Sessions trial—Witness for the Crown not called at Sessions trial though examined before the committing Magistrate—Duty of the prosecution with regard to the production of such witness.

At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness' testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the committing Magistrate present at the trial so as to give the Court or Counsel for the defence, as the case may be, an opportunity of examining them. *Dhunno Kazi* (1) and *Empress of India* v. *Kaliprosonno Doss* (2) approved. *The Empress* v. *Grish Chunder, Talukdar* (3) and *The Empress* v. *Ishan Dutt* (4) dissented from.

THIS was a trial before KNOX, J., and a jury at the Criminal Sessions of the High Court. The accused, Patrick Stanton and John Flynn, were charged with offences punishable under ss. 457, 380, 411 and 414 of the Indian Penal Code. At the close of the case for the prosecution, Counsel for the defence called the attention of the Court to the fact that one of the witnesses who had been examined by the committing Magistrate had not been called by the prosecution, and contended that such witness ought to be called by the prosecution or at least tendered for cross-examination, or should be examined by the Court. The arguments on both sides are stated in the ruling of Knox, J.

The Public Prosecutor (the Hon'ble Mr. *Spankie*), for the Crown.

(1) I. L. R., 8 Calc., 121.
(2) I. L. R., 14 Calc., 245.
(3) I. L. R., 5 Calc., 614.
(4) 15 W. R., Cr. R., 34.

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QUEEN-EMPRESS v. STANTON.

Mr. *J. E. Howard,* for the prisoners.

KNOX, J.—The prosecution in this case having concluded their case without calling a certain witness, one Michael Tyrrell, who had been examined by the committing Magistrate, Mr. *Howard,* who appeared for the defence, contended that it was the duty of the prosecution at any rate to place that witness in the witness-box so that Counsel for the defence might exercise his right of cross-examination. If this was not done, he contended further that the Court, in the interests of the defence and of justice, ought to send for that witness and examine him as a witness called by the Court. The learned Counsel referred the Court to the practice which, according to him, had prevailed for the first eight or nine years, if not further, from the institution of the Court, and observed that the principle for which he was arguing was a principle too well known to need the weight of authority. He was unable to refer the Court to any precedent save that of the *Empress* v. *Grish Chunder Talukdar* (1). That was a case tried before Jackson and Tottenham, J. J., and Mr. Justice Jackson there laid down that "the ordinary practice in properly constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly where the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination." For this view Mr. Justice Jackson has cited no authorty, and, with the exception of the case of *The Empress* v. *Ishan Dutt* (2), I have been unable to find any criminal case ruling to the same effect. On behalf of the Crown I have been referred to the case of *The Empress of India* v. *Kalliprosonno Doss* (3). That was a very strong case. In it Counsel for the Crown, after putting forward such number of witnesses as he thought sufficient to support the case for the Crown, tendered a number of others for cross-examination, but refrained from examin-

(1) I. L. R., 5 Calc., 614. (2) 15 W. R., Cr. R., 34.
(3) I. L. R., 14 Calc., 245.

ing or tendering for cross-examination a witness of whom the Crown considered that no reliance could be placed upon his evidence. Mr. Justice Trevelyan held that under the circumstances he was of opinion that the prosecution were not bound to tender such a witness for cross-examination or to do more than have him present in Court for the accused to call him or not as he might think fit. I was also referred to the case of *Dhunno Kazi* (1) in which the presiding Judges held that "the only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *primâ facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing which can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth." Mr. *Spankie* contended as to the principle which should govern the decision in this case that the Code of Criminal Procedure gives ample facilities to an accused person for placing before the Court and Jury every witness from whom he considers it likely that anything to his benefit may be elicited. Looking to the way in which cases are prepared in India, I am distinctly of opinion that the principle laid down in the later Calcutta cases, in *Dhunno Kazi* and in *Kaliprosonno Doss*, is the right principle. The Code of Criminal Procedure nowhere lays upon the prosecution the burden of putting forward as a witness in support of their case any person on whose evidence they cannot place reliance. The duty of a Public Prosecutor in India especially, is one attended with great difficulty, and he should be allowed the utmost freedom in marshalling his evidence, for in most cases he will find, so far as my experience goes, no proper attempt made to do so by the Court below. Looking to the old practice, I cannot find that any further duty was imposed on the prosecution in this country than that of having in attendance every witness who had been examined by the committing Magistrate. This the prosecution is

(1) I. L. R., 8 Calc., 121.

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bound to do, and this they have done in the present instance. It might perhaps be contended that if the committing Magistrate had stated in his order of commitment that he had been influenced by a certain witness in ordering an accused person to be committed, Counsel for the Crown was in common fairness bound either to examine such witness or to tender him for cross-examination. In the present case the witness Tyrrell was a witness called especially by the Court, and, for reasons which will presently appear, I will say nothing further than this—that after examining him the committing Magistrate placed on record that his evidence was not evidence which induced him to make or led him in any way up to his order of committal. I have said this much in order that Counsel may in future cases have a guide to what I believe ought to be the practice in criminal trials in this Court. As, however, many observations have been made respecting this witness to the jury, I will under the circumstances call him under the special powers given to me under s. 540.

APPELLATE CIVIL.

1892
June 13.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IMAM-UD-DIN AND ANOTHER (DEFENDANTS) *v.* LILADHAR (PLAINTIFF).*

Suit—Non-joinder of parties—Limitation—Act XV of 1877 *s.* 22—*Civil Procedure Code, s.* 32—*Partnership—Right of surviving partner to sue for debts due to firm.*

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand* v. *Balram Das* (1) and *Gobind Prasad* v. *Chandar Sekhar* (2) referred to.

A Court may, under s. 32 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. *Ramsebuk* v. *Ram Lall Koondoo* (3) *and Kalidas Keval Das* v. *Nathu Bhagvan* (4) referred to. *The Oriental Bank Corporation* v. *Charriol* (5) discussed.

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* First appeal No. 7 of 1892 from an order of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 18th December 1891.

(1) I. L. R., 1 All., 453.
(2) I. L. R., 9 All., 486.
(3) I. L. R., 6 Calc., 815.
(4) I. L. R., 7 Bom., 217.
(5) L L. R., 12 Calc., 642.