1892

KASHI RAM v. MANI RAM.

Subordinate Judge, but there is a provision in s. 295 allowing a party a right of suit in a case of this kind. For these reasons we are of opinion that the appeal below did not lie. We accordingly allow this appeal with costs here and in the lower appellate Court, and, setting aside the order of remand, we reinstate the order of the Subordinate Judge with costs.

*Appeal decreed.*

# EXTRAORDINARY ORIGINAL CRIMINAL.

1892
*April* 18.

*Before Mr. Justice Knox.*

QUEEN-EMPRESS *v.* G. W. HAYFIELD AND ANOTHER.

*Practice—Sessions trial—Adducing evidence for the defence—Documents produced for cross-examination of Crown witness—Right of reply—Criminal Procedure Code, ss.* 289, 292—*Witness for Crown tendered at Sessions trial who had not been examined by the committing Magistrate.*

In a trial before a High Court or a Court of Session evidence for the defence cannot be adduced until the close of the case for the prosecution; but counsel for the defence may, while a witness for the Crown is under cross-examination, put documents to him, and if in so doing counsel reads or causes to be read to the Court such documents, he thereby impliedly undertakes to put those documents in as evidence at the proper time. When such documents as aforesaid are filed in Court as evidence, or any other documentary evidence is put in by the defence, the defence has "adduced evidence" within the meaning of ss. 289 *et seq.* of the Code of Criminal Procedure, so as to give the prosecution a right of reply, though no witnesses may be called for the defence.

In a trial at the Criminal Sessions of the High Court, during the cross-examination of one of the witnesses for the Crown, counsel for the defence put certain documents to the witness, and these were read to the Court and jury and marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply, in the event of the accused not calling witnesses.

*Held* that although, as a matter of order, such a question would be better raised either when the first document intended to be used in this way was put to a witness, or when the accused was asked if he meant to adduce evidence, yet there was nothing

1892

QUEEN-EMPRESS. v. G. W. HAYFIELD.

in the Code of Criminal Procedure to prevent the Court from deciding the question at any other stage, and that, under the special circumstances of the case, it might be considered then.

*Held* also that the use of the documents in the manner above stated gave the prosecution a right of reply. *Queen-Empress* v. *Grees Chunder Banerji* (1); *Empress of India* v. *Kaliprosonno Doss* (2); *Queen-Empress* v. *Solomon* (3), and *Queen-Empress* v. *Krishnaji Babu Rav Bulell* (4), dissented from.

At a trial before the High Court or the Court of Session, the Crown cannot demand as of right that any witness who was not examined by the committing Magistrate either before commitment or, under s. 219 of the Code, after it, should be called and examined. The Court may call and examine such a witness if it considers it necessary in the interests of justice.

THIS was a trial before KNOX, J., and a jury at the Criminal Sessions of the High Court. The accused, George William Hayfield, was charged with offences punishable under ss. 420, 420 read with 511, and 436 read with 107 of the Indian Penal Code. During the course of the case for the prosecution an application was made to the Court by the Public Prosecutor that a certain Mr. Garstin might be examined as a witness for the Crown. Mr. Garstin was not examined as a witness by the committing Magistrate either at the time of the inquiry in the Magistrate's Court or subsequently under s. 219 of the Code of Criminal Procedure. The defence objected to the proposed examination of Mr. Garstin.

The Public Prosecutor (The Hon. *G. T. Spankie*), for the prosecution.

Mr. *W. M. Colvin*, Mr. *A. Strachey* and Mr. *T. E. Strachey*, for the prisoner.

KNOX, J.—With reference to the application of yesterday that Mr. Garstin might be examined as a witness for the Crown, my ruling is as follows:—

Mr. Garstin was not examined as a witness by the committing Magistrate: he was not examined by the Crown under the supplementary provisions of s. 219 of the Code of Criminal Procedure, and up to the present the accused have no knowledge of the nature

(1) I. L. R., 10 Calc., 1024.
(2) I. L. R., 14 Calc., 245.
(3) I. L. R., 17 Calc., 930.
(4) I. L. R., 14 Bom., 430.

1892

QUEEN-EMPRESS. v. G. W. HAYFIELD.

of the evidence which he may give, how it may affect them, and therefore cannot say whether or not, if it had been given at the preliminary inquiry, they would have cited evidence to rebut it.

It was the intention of the law, so far as can be gathered from the provisions of the Code, that an accused should not be put on his trial until all the evidence that was forthcoming, and of the existence of which the Crown might reasonably be supposed to be aware, had been put on record and in his presence, if possible; and further, it is provided that if the accused so require a copy of all such evidence so recorded be given to him before his trial commenced.

There was, in my opinion, no intention, and therefore no provision made for the purpose, that the Crown could demand of right that any witness not examined by them in the preliminary inquiry should be called and examined at the trial. It is true that in the present instance certain witnesses, among them Mr. Garstin, have been summoned by order of the Court, but no notice was given to the accused, and I therefore regard their being summoned as a purely ministerial act and in no way binding upon myself in the sense that the witness so summoned is, as a matter of course, to be examined.

I therefore rule that Mr. Garstin cannot give evidence on the part of the Crown to-day. This will not preclude the Court, if it considers it necessary in the interests of justice, from calling and examining him as a witness cited by the Court; and to prevent any hardship to the accused, I direct that the papers to which his evidence and that of Kamta Prasad are supposed to refer be placed to-day at the disposal of the counsel for the accused.

[The case for the prosecution then proceeded. During the cross-examination of one of the witnesses, counsel for the defence put certain letters and other documents to the witness, some for the purpose of contradicting his testimony and others for the purpose of proving that he was an accomplice in the commission of the offences charged against the accused, so as to lay the foundation for argument that his evidence should not be acted upon without corroboration. These documents were read to the Court and jury and

marked as exhibits as evidence for the defence, and were filed with the record in the same way as the evidence for the prosecution had been marked and filed. During the cross-examination of the next witness a similar course was pursued, and, after the cross-examination had continued for some time, counsel for the defence applied to the Court for a ruling as to whether the fact of documents having been used during cross-examination in the manner above stated would, under s. 292 of the Code of Criminal Procedure, entitle the Crown to a reply in the event of the defence not calling witnesses. The Public Prosecutor objected that the point was prematurely raised at the present stage of the trial.]

KNOX J.—Upon the conclusion of the examination-in-chief of one of the witnesses for the Crown, Mr. *Strachey*, on the part of the defence, raised the question whether, if certain documents were tendered to witnesses for the Crown with the intention of using those documents as evidence hereafter, the Crown would be entitled to the right of reply. The Public Prosecutor questioned the right of the counsel for the defence to raise this question at the present stage of the trial. Counsel for the defence referred me to the cases *Queen-Empress* v. *Solomon* (1), *Empress of India* v. *Kaliprosonno Doss* (2), and *Queen-Empress* v. *Krishnaji Baburav Bulell* (3), and contended that this question might be raised at any point during the progress of the trial. The Public Prosecutor suggests that those cases established nothing further than that there were two stages at which this question might be raised. First, when the first document intended to be used in this way was put to a witness, and secondly, when the accused is asked if he means to adduce evidence. I am clearly of opinion that these two stages would be the preferable ones in which as a point of order such a question should be raised, but there are special circumstances in this case, one being that the trial will probably have to be adjourned, and the counsel for the defence assures me that my ruling on the point will probably determine whether the witnesses are to be put to the inconvenience of staying

(1) I. L. R., 17 Calc., 930. (2) I. L. R., 14 Calc., 245.
(3) I. L. R., 14 Bom., 430.

1892

QUEEN-EMPRESS v. G. W. HAYFIELD.

over such adjournment. On this ground, therefore, and seeing nothing in the Code of Criminal Procedure which would prevent me from deciding the question at any other stage beyond those named, I rule that the question may be considered now.

[The question was then argued.]

KNOX, J.—The question on which I am asked to rule is as follows:—"Can counsel for the accused during the cross-examination of a witness called for the prosecution at a Sessions trial and before the close of the evidence for the prosecution, read or cause to be read to the Court and Jury a letter or other document written by the witness which has not been put in evidence by the prosecution or by the Judge presiding, without giving a right of reply to counsel for the prosecution." As this was a question involving procedure, I thought it best to take counsel with my brother Judges in the matter before ruling. It was contended for the prisoner that the tendering of such documents does not entitle counsel for the prosecution to a right of reply, and in support of that contention I was referred to the following cases:—*Queen-Empress* v. *Grees Chunder Banerji* (1), *Empress of India* v. *Kaliprosonno Doss* (2), *Queen-Empress* v. *Solomon* (3), and *Queen-Empress* v. *Krishnaji Baburav Bulell* (4). In *Queen-Empress* v. *Grees Chunder Banerji* (1), in which an accused during the cross-examination of a witness used certain documents and those documents were tendered in evidence and marked as exhibits; at the same time it was intimated by counsel for the defence that he would contend that by so doing he did not give counsel for the prosecution a right of reply on the case in the event of no witnesses for the defence being called, Mr. Justice Field held that the prosecution was not entitled to a reply. In *Empress of India* v. *Kaliprosonno Doss* (2), Mr. Justice Trevelyan gave a similar ruling, following the ruling already quoted. In *Queen-Empress* v. *Solomon* (3), Mr. Justice Wilson also held to the same effect after it had been pointed out to him that the Madras High Court had decided to a

(1) I. L. R., 10 Calc., 1024.
(2) I. L. R., 14 Calc., 245.
(3) I. L. R., 17 Calc., 930.
(4) I. L. R., 14 Bom., 430.

contrary effect. This case is of some importance, as therein it was pointed out to Mr. Justice Wilson by Mr. Pugh, who appeared for the prosecution, that he had been informed that it was the practice of the North-Western Provinces High Court under such circumstances to allow a reply. In *Queen-Empress* v. *Krishnaji Baburav Bulell* (1), Mr. Justice Farran followed the rulings of the Calcutta Court. No precedent of this Court has been pointed out, but an allusion has been made to the procedure which is said to have taken place during the trial of *Queen-Empress* v. *Trotter* (2); but it it admitted that in that case the question was not argued, and that when the point was raised the documents were put on the record by the presiding Judge and not by counsel for the defence. Upon these authorities it was contended by counsel for the defence that he was entitled to read or have read to the Court and jury before the prosecution had concluded their case a letter or other documents, which a witness for the prosecution admitted in cross-examination had been written by him and which contained statements on relevant matters, without giving the prosecution a right of reply. That contention involves the assumption that a letter or other document may be read to the jury in evidence in a trial without such document having been put in evidence and without any obligation being incurred to put such document in evidence. This is an assumption which cannot be supported. The fact that a witness for the prosecution has admitted in cross-examination that a document was written by him does not make it incumbent on the prosecution to put that document in as part of the evidence for the prosecution, although that document may contain a statement relevant as contradicting, explaining, or raising a doubt as to the value of the oral evidence of the witness. Thus the prosecution might be satisfied that the oral evidence was true and that the document had been prepared in collusion with the accused or fabricated as a trap or might have other good reasons for declining to put in a document of which up to that moment it had had no notice as evidence for the prosecution. Nor is it incumbent on the presiding Judge to exercise his right of putting the document

(1) I. L. R., 14 Bom., 430. (2) Not reported.

1892

QUEEN-EMPRESS v. G. W. HAYFIELD.

in as evidence. If the accused desires to have the benefit of such document as evidence, and he cannot have the benefit of it as evidence unless it is put in as evidence, he must put it in as evidence, if neither the prosecution nor the presiding Judge will put it in as evidence. The difficulty arises from the fact that it may be convenient and desirable that the document should be read to the jury whilst the witness is under cross-examination; and from the fact that s. 289 of the Code of Criminal Procedure does not apparently authorize the accused to adduce evidence until the examination of the witnesses for the prosecution and the prisoner's own examination have been concluded. Ss. 286 to 296 of the Code prescribe the procedure to be followed in Sessions trials from the opening of the case for the prosecution to the close of the case for the prosecution and defence. I can find nothing in any of those sections to suggest that an accused person or his pleader can, before the examination of the witnesses for the prosecution has been concluded, adduce evidence for the defence: indeed, the language of s. 289 strongly indicates that evidence for the defence can only be adduced at a Sessions trial after the examination of the witnesses for the prosecution and the examination of the accused are concluded; for then, and not till then, is the accused to be asked whether he means to adduce evidence, a procedure which is inconsistent with a right or the exercise of a right by or on behalf of an accused to adduce evidence at an earlier stage of the trial. There is, however, nothing in any of those sections to show that an accused person is precluded from stating for his own benefit, or intimating at any time whilst the witnesses for the prosecution are being examined, that he intends to adduce evidence for his defence. It has been contended that the reading to the jury in Court by counsel for the accused, or the causing a witness called for the prosecution, to read a letter or other document written by the witness, which has not otherwise been put in evidence, is not an adducing evidence by or on behalf of the accused and does not amount to an intimation on behalf of the accused that such document will at the proper time be put in evidence by the accused, and that in that respect such docu-

ment stands on a footing different from that of other documentary evidence. It appears to me that the fact that the letter or document was admitted by the witness to have been written by him is immaterial, and the position would be the same if the letter or document was one which the witness had sworn he had not written and had no previous knowledge of, and had stated in his evidence to be in the writing of some one else, as, *e.g.* of another witness for the prosecution. In either case neither the prosecution nor the defence could read or have the letter read to the Court and jury, that is, use it as evidence, until it was put in as evidence, or, to use the language of the Code, until it had been adduced as evidence, or unless upon an undertaking that the party desiring to use it as evidence would at the proper time put it in formally as evidence. Such an undertaking should be carried out; with the result that the prosecution would be entitled to a reply. Such an undertaking is, as a general rule, I understand, implied and not expressed. A similar undertaking is implied when counsel in opening the case for the prosecution, or the accused or his pleader in opening the case for the defence, reads to the Court a letter or other document not at that time put in as evidence. If the reading of the letter or document at that stage of the trial is not objected to, the party reading it impliedly undertakes to put it in as evidence at the proper time as part of the evidence adduced by him. If the opposite party objects to the letter or document being read to the jury until it is proved and put in as evidence, it cannot be read to the jury until it is proved and put in as evidence in the case. It is obvious that a letter or document cannot be read to the jury unless it has been put in as evidence at the trial, or unless the party using it as evidence expressly or impliedly undertakes to put it in as evidence at the proper time.

If a fact has to be proved at a criminal trial, the evidence which proves that fact must be adduced. If such fact is to be proved by oral evidence, the oral evidence must be adduced. Similarly if the fact is to be proved by documentary evidence, the documentary evidence must be adduced. The only essential difference is that the

1892

QUEEN-EMPRESS. v. G. W. HAYFIELD.

oral evidence of the fact may be obtained from the cross-examination of a witness of the opposite party without that witness being made a witness for the party who in cross-examination has extracted the evidence of the fact which he wishes to prove. When a document has been put in evidence by either side its contents are before the jury, and its contents may or may not afford evidence, or may be the sole admissible evidence, of a particular fact. The document so put in evidence is, no matter for what purpose it may be used by either party, evidence adduced by the party who put it in as evidence. An example of how a document in the writing of a witness may be used without involving the necessity of putting the document in as evidence is afforded by s. 145 of the Indian Evidence Act. Under that section:—"a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved." In such cross-examination the exact words used in the writing as to which it is desired to obtain an admission should be put to the witness. If the witness admits that he did write those words, that admission is evidence of the fact that on a previous occasion he made the statement which those words convey. If the witness denies that he ever made that statement, the person who is cross-examining can put the document into the hands of the witness and tell him to look at it, or at a portion of it, and ask him if he still denies having made that particular statement. The witness may either admit or deny that he made the statement. So far the person cross-examining the witness has incurred no obligation to put the document in as evidence. If the witness admits that he made the statement, the person cross-examining has obtained all that is necessary and is under no obligation to put the document in as evidence. If the witness denies that he made the statement, the person cross-examining has two courses open to him. He may decide not to put the document in as evidence; in which case he must accept the denial of the witness as conclusive, and lay himself open to the observation that he put to the witness a question suggesting that the document contained a statement which in fact it did not. On the other

hand, he may decide to put the document in as evidence showing that the witness had on a previous occasion made a particular statement and then contradicted it. In the latter case the document when proved should be put in formally as evidence when the party who intends to use it as evidence is adducing his evidence. Similarly, if a witness in cross-examination denies that on a previous occasion he made on a relevant matter an oral statement inconsistent with, or which would give a different complexion to, his evidence at the trial, the person cross-examining the witness must accept the denial as conclusive, unless he can, by the cross-examination of the person to whom the oral statement was made, in case such witness happens to be a witness for the other side, or by calling such person as a witness for his own side when he is adducing his evidence, prove that the statement was in fact made.

## APPELLATE CIVIL.

1892
*April* 20.

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

SANT LAL AND OTHERS (JUDGMENT-DEBTORS), *v.* SRI KISHEN AND ANOTHER (DECREE-HOLDERS).*

*Rules of Court of the 30th November 1889—Practice—Memorandum of appeal—Appeal described as "first appeal from order" instead of first appeal from decree.*

It is not a fatal objection to an appeal that the same is described in the memorandum as "First appeal from Order" being in reality a First appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. *Kedar Nath* v. *Lalji Sahai* (1) *quoad* this point distinguished.

This was a reference made at the instance of Mahmood, J., to a Bench of three Judges. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *Abdul Majid* and Mr. *Malcomson*, for the appellants.

* First Appeal No. 239 of 1890 from a decree of Rai Pyare Lall, Subordinate Judge of Meerut, dated the 8th February 1890.

(1) I. L. R. 12 All., 61.