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tiffs cannot succeed without amending the plaint, and striking out the name of the other plaintiff. The facts upon which the judgment of the Judge is founded are as follows :—One of the plaintiffs, Musammat Lado, is the widow of one of the co-sharers of the village. Her husband at his death was a member of a joint Hindu family ; his widow, Musammat Lado, therefore, did not succeed to the estate of her husband, which was inherited by the other members of the family. She had only a right of maintenance out of the estate of her late husband; she was therefore not a co-sharer in the village, and therefore had no right to claim pre-emption. She must, for the purposes of this suit, be regarded as a stranger.

Now, in the plaint, both the plaintiffs allege themselves to be jointly interested in the village, and they jointly claimed pre-emption. One of them, Musammat Lado, is not entitled to claim pre-emption, and the other plaintiff therefore cannot claim pre-emption entirely on his own account without amending the plaint. Under a Full Bench ruling of this Court—*Damodar Das* v. *Gokal Chand* (1), the plaint cannot be amended at this time of day : with the petition of plaint as it now stands, the plaintiffs cannot succeed. The appeal is dismissed with costs.

BRODHURST, J.—I am of the same opinion.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* DAN SAHAI.

Criminal Procedure Code, s. 288—Trial before Court of Session—Evidence given before committing Magistrate used at trial to contradict witnesses.

S. 288 of the Criminal Procedure Code was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record, and to treat it as evidence before the Court itself. *Queen* v. *Amanulla* (2) referred to.

A Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth.

(1) *Ante*, p. 79. (2) 12 B. L. R., App. 15.

In a case in which the Sessions Court had neglected to apply the above rules, STRAIGHT, J. quashed the conviction.

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IN this case two persons named Hansi and Dan Sahai were tried by the Officiating Sessions Judge of Mainpuri on a charge, under s. 304 of the Penal Code, of culpable homicide not amounting to murder. Both the prisoners were convicted. In the course of his judgment, the Sessions Judge made the following observations :—

"The statements of the witnesses, Kanahia, Tejraj, and Aman Singh differ from those made before the committing Magistrate in omission of Dan Sahai and accused's name. They state that Hansi alone was the assailant of the deceased .....The witnesses have evidently come into this Court with the intention of screening Dan Sahai, accused. The statements implicating him, made before the committing Magistrate, differ on this point, as already mentioned ; but, under s. 288 of the Criminal Procedure Code, I can use the statements made in the Magistrate's Court, and thereby defeat this conspiracy to defeat justice. That Dan Sahai was there I have no doubt. His name has been mentioned all along from the very beginning in the magisterial proceedings, and he made the first report to the police."

The accused Dan Sahai appealed to the High Court. He was not represented.

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

STRAIGHT, J.—The Judge has quite misunderstood the provisions of s. 288 of the Criminal Procedure Code. That section was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Magistrate's record, as the Judge has done here, and to treat it as evidence before itself ; and I entirely concur in the remarks made on this head by Phear, J., in *Queen* v. *Amanulla* (1). At any rate, the Judge was bound to put to the witnesses he proposed to contradict by their former statements the whole or such portions of their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they

(1) 12 B. L. R., App. 15.

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had made any such statements, and so forth. The course adopted by the Judge was contrary to practice, and inconsistent with all the rules regulating the admissibility of evidence, and Phear, J., in the case mentioned above, has pointed out the mischief and dangers of such a mode of procedure.

Under the circumstances I cannot allow the conviction of Dan Sahai to stand, and, it being reversed, he is acquitted.

Conviction quashed.

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

RADHEY LAL AND OTHERS (PLAINTIFFS) *v.* MAHESH PRASAD AND ANOTHER (DEFENDANTS)*.

Extinguishment of charge—Equitable estoppel.

An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity, claiming under the terms of the grant.

Held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.

IN 1844, one Shaikh Haidar Ali sold certain zamindari property to Sheikh Abdullah, the brother of his wife Musammat Zainab Bibi. As Zainab Bibi's dower was due, Abdullah, on the 8th March, 1844, executed in her favour an instrument whereby he promised to pay to her and her heirs, out of the income of the property purchased by him from Haidar Ali, an annuity of Rs. 100 down to the year 1862, and, after that year, of Rs. 200. It was stipulated that, in the event of failure by the grantor or his heirs to pay the said annuity, the property, out of the income

* First Appeal No. 139 of 1884, from a decree of Babu Abinash Chander Banerji Subordinate Judge of Allahabad, dated the 24th June 1884.