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separate suit is barred. The real meaning of s. 244 would seem to be that the decree must be enforced by execution, and that the decree-holder may not bring an action upon the decree itself.

OLDFIELD, J.—I am of the same opinion; but I wish to distinguish the present case from *Partab Singh* v. *Beni Ram* (1) which has been referred to. In that case the decree was for mesne profits, which were therefore properly recoverable in the execution-department, but here the decree was silent as to mesne profits.

BRODHURST, J.—I also am of opinion that the suit is maintainable.

MAHMOOD, J.—I concur in the conclusion arrived at by the learned Chief Justice, on the ground that the mesne profits collected by the respondent were not realized by him in execution of the decree which was reversed on appeal.

DUTHOIT, J.—I also concur with the Chief Justice; but I wish to add that the words in cl. (*c*) of s. 244, "any other questions arising," &c., should be read as "any other questions *directly* arising:" otherwise the most remote inquiries would be possible in the execution department.

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November 22.

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

QUEEN-EMPRESS *v.* JUALA PRASAD.

Criminal Procedure Code, ss. 233, 234—Joinder of charges—Offences of the same kind committed in respect of different persons.

Where a post-master was accused of having, on three different occasions, within a year, dishonestly misappropriated moneys paid to him by different persons for money orders, *held* that, the offences of which such person was accused being the dishonest misappropriations by a public servant of public moneys, (for as soon as they were paid they ceased to be the property of the remitters), such offences were "of the same kind," within the meaning of s. 234 of the Criminal Procedure Code, and such person might, therefore, under that section, be charged with and tried at one trial for all three offences.

Empress v. *Murari* (2) observed on.

THIS was an application to the High Court to exercise its powers of revision under s. 439 of the Criminal Procedure Code. The applicant was the post-master of the city or branch post-office at Budaun. He was tried by Mr. C. F. Hall, Magistrate of

(1) I. L. R., 2 All. 61. (2) I. L. R., 4 All 147.

the Budaun District, under s. 409 of the Penal Code, for criminal breach of trust in regard to three sums of money paid to him by different persons for money-orders. All three offences were committed in the year 1883. The Magistrate, by an order dated the 3rd May, 1884, convicted the applicant of each offence, and sentenced him to one year's rigorous imprisonment under each conviction,—in all, to three years' rigorous imprisonment. On appeal to the Sessions Judge of the Bijnor-Budaun Division, Mr. J. C. Leupolt, it was contended on behalf of the applicant that, with reference to the case of *Empress* v. *Murari* (1), the joinder of charges was improper. The Sessions Judge, in an order dated the 5th July, 1884, disposed of the contention thus:—"With reference to the High Court ruling, I believe the Calcutta Court (2) have more recently decided that the law does not require the three offences to be against the same person."

The same contention was raised on behalf of the applicant on the present application, which came before Duthoit, J., who referred it to a Divisional Bench, observing as follows:—

"The Session Judge ought not to have followed the authority of another High Court so long as the authority of this Court, to which he is subordinate, was against the views he wished to take of the point raised before him. But there can, I think, be no doubt that the view of the law stated in *Murari's Case* is erroneous; and the Junior Government Pleader informs me that Mr. Justice Straight, who was a party to that decision, recently expressed from the Bench an opinion to this effect. The difference between the terms of s. 453 of Act X of 1872 and those of s. 234 of the present Code of Criminal Procedure, is not sufficient to enable me to get over the difficulty by ruling that the limitation presented in *Murari's Case*, whatever it may have been under the old law, is inapplicable under s. 234 of the present Code. Could I hold myself competent to do so, I should refer to a Full Bench the following question:—With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person? But with reference to the

(1) I. L. R., 4 All. 147. (2) Manu Miya v. The Empress, I. L. R., 9 Calc. 871.

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terms of Rule of Practice No. 2 of 1870, I do not find myself competent to do more than order the case to be heard by a Division Court of two Judges."

The case was accordingly laid before Petheram, C. J., and Duthoit, J., who referred the following question to the Full Bench, namely:—

"With reference to the terms of s. 234 of the Code of Criminal Procedure, is it, or is it not, necessary that the three offences contemplated by that section should have been committed against the same person?"

Mr. *C. Dillon* and Pandit *Nand Lal*, for the applicant.

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

Pandit *Nand Lal*, for the applicant.—The prisoner in this case objected to the single trial, and the objection was disallowed by the Sessions Judge. We rely on the case of *Empress* v. *Murari* (1) in which it was laid down by Straight and Tyrrell, JJ., that "the combination of three offences of the same kind, for the purpose of one trial, can only be where they have been committed in respect of one and the same person, and not against different prosecutors, within the period of twelve months, as provided by the Criminal Procedure Code." This case was no doubt dissented from by the Calcutta High Court (Field and Norris, JJ.) in *Manu Miya* v. *The Empress* (2). In that case, however, Norris, J., showed that the practice in England, in cases of felony, is to allow an objection by the prisoner to the joint trial. [PETHERAM, C. J.—The practice in England has nothing to do with the question referred to us. That can only be decided with reference to the construction to be placed on ss. 233 and 234 of the Criminal Procedure Code.] In India, where the distinction between felonies and misdemeanours does not exist, the practice of allowing the prisoner's objection to joint trial should, as a matter of expediency, be applied to all offences. The Calcutta High Court admit that it may be the better course for charges not to be joined, and that "the Court should at all times be anxious to lend a willing ear to any application" for separation of charges, and for separate trials.

(1) I. L. R., 4 All. 147. (2) I. L. R., 9 Calc 371

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[DUTHOIT, J.—We have not to consider the expediency, but only the legality of the course pursued by the Magistrate and Judge. PETHERAM, C.J.—The reason of the practice in England is that the jury, who in England are judges of the facts, may not be prejudiced against the prisoner when he is being tried upon one charge, and evidence has just been given against him upon the other charges. In this country, the whole case is generally tried by a Judge, who is supposed to be less accessible to prejudice, and who, under s. 234, "*may*" separate the charges, if the joint trial would be unfair to the accused.]

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

The following judgment was delivered by the Full Bench:—

PETHERAM, C.J. (OLDFIELD, BRODHURST, MAHMOOD, and DUTHOIT, JJ., concurring). I have no doubt that this case was properly decided, and that three charges of this kind may be joined under s. 234 of the Criminal Procedure Code. The question is of the simplest possible kind, being one merely of the proper construction to be placed upon the two ss. 233 and 234 of the Code. S. 233 provides that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 234, 235, 236, and 239." This section contains the general law, and the reason of it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges.

The Legislature has, however, made certain exceptions. One of these is contained in s. 234 of the Code, which provides that when a person is accused of more offences than one of the same kind, committed within the space of twelve months from the first to the last of such offences, he *may* be charged with and tried at one trial for, at all events, as many as three of them. In this case we have a public servant accused of having, on three occasions, embezzled moneys which were public property, for, as soon as they were paid to him, they ceased to be the property of the persons

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who paid them. All three acts of embezzlement were committed within one year, and each was committed in the same circumstances as the others. How can it be said that these offences were not "of the same kind?" They did not merely resemble each other, but were the same offence. I see no reason why they should not be joined in the same trial; and I am of opinion that the Magistrate was right in joining them. As regards the case of *Empress* v. *Murari* (1), to which reference has been made, that was decided by Mr. Justice Straight under a different statute, and his decision in that case will be unaffected by ours in this.

1884
November 29

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

JAWAHRA AND OTHERS (DEFENDANTS) *v.* AKBAR HUSAIN (PLAINTIFF.)*

Religious endowment—Mosque—Form of suit—Right to sue—Civil Procedure Code, ss. 30, 539.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Civil Procedure Code.

S. 30 of the Civil Procedure Code applies only to cases in which many persons are *jointly* interested in obtaining relief, and not to cases in which an individual right has been violated.

Zafaryab Ali v. *Bakhtawar Singh* (2) referred to. *Jan Ali* v. *Ram Nath Mundul* (3) dissented from.

THE plaint in this case stated that in a village belonging to the plaintiff there was an "old dilapidated mosque intended for Muhammadan worship," which "was protected and looked after" by him and other Muhammadans of the village; that in consequence of the mosque and its appurtenances being "*wakf*," it had been excluded from the partition of the village, and the plaintiff intended to repair the mosque; that the defendants had enclosed a part of the land, and had also erected a mill on a part of it; that they had, by means of certain erections of thatch and mud, con-

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* Second Appeal No. 1499 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 13th August, 1883, affirming a decree of Maulvi Muhammad Sayid Khan, Munsif of Muzaffarnagar, dated the 16th February, 1883.

(1) I. L. R., 4 All. 147. (2) I. L. R., 5 All. 497.
(3) I. L. R., 8 Calc. 32.