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dure Code, to strike out his defence, and disposed of the suit as if he had not appeared and answered.

The defendant appealed in the Subordinate Judge's Court, and the Subordinate Judge has set aside the decree, and remanded the suit for fresh trial.

The plea in appeal before us is that there is no appeal, inasmuch as the decree of the Munsif must be treated as an *ex-parte* decree. It is true that the majority of this Court (Oldfield and Brodhurst, JJ., dissenting) have held that no appeal will lie from an *ex-parte* decree—*Lal Singh* v. *Kunjan* (1). We are of opinion, however, that a decree made in a suit, where the provisions of s. 136 of the Civil Procedure Code have been put in force, cannot be treated as an *ex-parte* decree in respect of the remedy by appeal. In the first place, as a matter of fact, the defendant did appear to answer to the suit, and, therefore, there was no *ex-parte* decree in the strict sense of the word; and next, unless allowed an appeal, he would have no remedy, for the remedy by application to the Court that makes an *ex-parte* decree under s. 108 is inapplicable to a case dealt with under s. 136, as the terms of s. 108 show. Under that section, a defendant, in order to succeed, has to satisfy the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. It contemplates cases of *ex-parte* proceedings strictly and properly so, and not such as are made under s. 136. We dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1884
November 14.

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

QUEEN-EMPRESS *v.* KALLU AND ANOTHER.

Criminal Procedure Code, s. 338—Tender of pardon to accomplice who has pleaded guilty—Accomplice—Evidence—Corroboration—Practice Accused not defended—Court to test statements of witnesses for prosecution.

A Court of Session, under s. 338 of the Criminal Procedure Code, tendered a pardon to an accused person, charged jointly with two others for the same offence, who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible.

(1) I. L. R., 4 All., 387.

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Per DUTHOIT, J.—The word "supposed" in s. 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man, who, although admitted to be a party to the crime, is unconvicted.

Per PETHERAM, C.J.—Where an accused person is not defended, the Court should, in the interests of justice, test the statements of the witnesses for the prosecution, by questions in the nature of cross-examination.

THIS was an appeal from convictions by Mr. R. S. Aikman, Offg. Sessions Judge of Aligarh, dated the 2nd August, 1884. The appeal came for hearing before Duthoit, J., who directed that the case should be laid before a Divisional Bench. The case accordingly came for hearing before Petheram, C.J., and Duthoit, J. It appeared that the appellants, Kallu and Dungar, together with one Loka, were charged before the Sessions Judge, under s. 397 of the Penal Code, with dacoity with attempt to cause death or grievous hurt. The accused Loka was further charged, under s. 412, with dishonestly receiving property stolen in the commission of a dacoity. When the charges had been read, Loka pleaded guilty to the charge under s. 397, but claimed to be tried on the charge under s. 412. The other accused pleaded not guilty. At the beginning of the trial the Sessions Judge, on the application of the Government Pleader on behalf of the Crown, exercised the powers given to the Court by s. 338 of the Criminal Procedure Code, tendered a pardon to Loka, and admitted his evidence as that of an approver against the other accused. In the result the Sessions Judge was of opinion that the evidence given by Loka was sufficiently corroborated, and he accordingly convicted both Kallu and Dungar, and sentenced them to be rigorously imprisoned for seven and four years respectively.

In this appeal by Kallu and Dungar the first contention raised on their behalf had reference to the terms of s. 338 of the Criminal Procedure Code, and it was to the effect that no pardon should have been tendered to Loka, nor should he have been accepted as an approver, since he was not merely "supposed" to have been concerned in the offence, but known, on his own admission, to have been concerned in it. The second ground of appeal was, that the testimony of Loka was not sufficiently corroborated by independent evidence to justify the convictions.

Mr. *A. Carapiet*, for the appellants.

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

The Court delivered the following judgments :—

PETHERAM, C. J.—In this case I think that the convictions and the sentences must be affirmed. The question depends really upon the value of the evidence. The evidence which is material for the whole story was the evidence of the approver. Now the practice, no doubt, of the Courts is, where the evidence of an approver stands alone, to treat it as not of sufficient value to make it safe for the Courts to act upon it, because the man who gives the evidence comes before the Court, practically with the statement :—"I have so little sense of justice that I do not object to commit a crime;" and consequently his testimony cannot be taken as of sufficient value to subject a man to punishment. That, however, does not affect the fact that his evidence is admissible. The story told must be looked to, to see whether it hangs together or not. The story told here is a categorical story, which bears the semblance of truth on the face of it. I think that Magistrates who conduct these inquiries would be wise if they would test the accuracy of such statements by cross-examination themselves. Where the prisoner is not defended, the Magistrate and the Judge himself ought, in the interests of justice, to test the accuracy of the statements made by witnesses, by questions in the nature of cross-examination, and, if that were done with care, I think myself that the result of these inquiries would be more satisfactory. At all events, the evidence of the approver does not appear to have been shaken by cross-examination, and the question is whether independent evidence has been given in this case which corroborates his evidence.

[His Lordship then examined the other evidence in the case, and was of opinion that it sufficiently corroborated the evidence of the approver, and that the appeal should be dismissed.]

DUTHOIT, J.—The first point raised in this appeal is whether the Judge was right in tendering a pardon to Loka. The second point is whether the conviction of the appellants upon the evidence given by Loka is good and can be sustained or not. As regards the first point, I think that there was no irregularity in the tender of a pardon to Loka. It is urged with reference to s. 338 of the Cri-

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minal Procedure Code, that Loka should not have been made an approver, because he was not only "supposed" to have been concerned in the crime, but was, on his own showing, actually concerned in it, and liable to conviction upon his plea of guilty. But I think that the words in question must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man like Loka, who, although admitted to be a party to the crime, is unconvicted. I hold, therefore, that the evidence of the approver was rightly taken. Under s. 133 of the Evidence Act a conviction is not illegal simply because it proceeds upon the uncorroborated testimony of an accomplice. Of course, such evidence must be received with great caution, and it has been our practice to require corroboration of such evidence.

[The learned Judge then considered the corroboration in this case, and concurred with the Chief Justice in accepting it as sufficient.]

Convictions affirmed.

APPELLATE CIVIL.

1884
November 18.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst. *

KALIAN SINGH AND ANOTHER (DEFENDANTS) *v.* SANWAL SINGH (PLAINTIFF). *

Declaratory decree—Cause of action—Hindu widow—Testamentary declaration.

A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that *S*, the person entitled to succeed her, had no right to the property. *Held* that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave *S* a right to sue for a declaration that it should not have any effect as against him.

One Tondi Singh, a Hindu, governed by the law of the Mitakshara, died without leaving any issue, but leaving a widow named Jamna Kuar. The latter succeeded to certain zemindari shares comprising the separate property of her deceased husband. On the 6th January, 1883, at or about the time this succession was recorded in the revenue register, Jamna Kuar made the following deposition:—

* First Appeal No. 17 of 1884, from a decree of A. F. Millett Esq., District Judge of Shahjahanpur, dated the 17th September, 1883.