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issue, which is the sole issue, and the trial of which is essential to a right decision of the suit upon the merits, must be tried by the Court or Courts below. The learned vakíl for the appellant moved us to set aside the decree of the lower appellate Court, and to have the case remanded for a second decision. In support of this he cited the cases of *Kanhai Lal* v. *Manorath Ram* (1), *Madho Singh* v. *Kashi Singh* (2) and *Durga Dihal Das* v. *Anoraji* (3). We have very carefully considered all these three decisions, and, as our judgment shows, have been met with the difficulties by which the learned Judges who decided those cases felt themselves pressed. While considering whether we could adopt the procedure laid down in those cases, we find ourselves in this case face to face with the difficulty created by the very positive and imperative provisions of s. 564 of the Code. By that section an appellate Court is expressly debarred from remanding a case for a second decision, except as provided in s. 562. Now in the case before us it is impossible to hold that the lower appellate Court disposed of the appeal before it upon a preliminary point. The case appears to us to fall within the provisions of s. 566. We have above declared that the lower appellate Court has not tried the issue essential to the right decision of the suit upon the merits. We therefore refer that issue for trial to that Court, and as that Court, not having tried, could not legally decide the issue, we direct the lower appellate Court to take all the evidence tendered by the parties, to try the issue before it and to return to this Court its finding thereon together with the evidence. Ten days will be allowed after return within which either party may present a memorandum of objections to the findings.

Issue referred.

Before Mr. Justice Banerji.

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January 10.

QUEEN-EMPRESS v. AJUDHIA.

Act No. XLV of 1860 (*Indian Penal Code*) *ss.* 75 457, 511—*Attempt to commit house-breaking by night after previous convictions—Sentence.*

Section 75 of Act No. XLV of 1860, does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions

(1) Weekly Notes 1894, p. 19. (2) I. L. R., 16 All., 342.
(3) Weekly Notes 1894, p. 190.

of offences falling within Chapter XII or Chapter XVII, such offence being punishable under s. 511. *Sheo Saran Tato* v. *The Empress* (1). *Empress of India* v. *Ram Dayal* (2). *Empress* v. *Nana Rahim* (3) and *Queen-Empress* v. *Sricharan Bauri* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Banerji, J.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

BANERJI, J.—The appellant Ajudhia was committed to the Court of the Sessions Judge of Gházipur charged with the offence of house-breaking by night in order to the committing of theft punishable under s. 457 of the Indian Penal Code. He had four previous convictions.

It has been proved by clear and unimpeachable evidence that Ajudhia was caught in the act of digging a hole through the wall of the house of Ram Lakhan, Sonar. There can be no doubt that his intention was to commit theft. As he did not enter the house he was guilty of an attempt to commit the offence punishable under the last clause of s. 457 of the Indian Penal Code, and was properly convicted by the then Officiating Sessions Judge.

On the question of sentence the learned Sessions Judge was of opinion that, as Ajudhia had previous convictions for offences punishable with rigorous imprisonment for three years and upwards under Chapter XVII of the Indian Penal Code, s. 75 of that Code applied to his case. He was further of opinion that the terms of s. 75 precluded him from passing a sentence of transportation which should be of less duration than for life. He also thought that—"whereas s. 457 prescribed a maximum term of fourteen years' imprisonment even for the first offence, s. 75 of the Indian Penal Code, which refers to second convictions, limits the maximum to ten years' rigorous imprisonment". And he held that, although under s. 511 he could have sentenced the accused to seven years' rigorous imprisonment, if he had no previous convictions, he was limited by the provisions of s. 75 to the power of sentencing the accused to five years' rigorous imprisonment only by reason of the

(1) I. L. R., 9 Calc., 877.
(2) I. L. R., 3 All., 773.
(3) I. L. R., 5 Bom., 140.
(4) I. L. R. 14 Calc., 357.

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accused having been repeatedly convicted on previous occasions. The learned Sessions Judge has accordingly sentenced Ajudhia to five years' rigorous imprisonment, that being, according to the learned Judge, "the utmost penalty permitted by the law."

On all the above points the views of the learned Sessions Judge are clearly erroneous. Section 75 empowers a Court to award in the case of certain offences mentioned in the section a more severe sentence on a second conviction than that which the offender would otherwise have been liable to. As was held in *Sheo Saran Tal* v. *The Empress* (1), the object of the section is "to provide for an additional sentence, not for a less severe sentence, on a second conviction," and "recourse should not be had to that section if the punishment for the offence committed is itself sufficient." It could never be the intention of the Legislature that the punishment for an offence on a second conviction should be less than what it would have been on a first conviction. If, therefore, s. 75 applied to the case, the learned Judge was not precluded by its provisions from passing a more severe sentence than that which was admissible under it, if the higher punishment could be awarded for the offence on a first conviction.

The learned Judge evidently overlooked the provisions of s. 59 of the Indian Penal Code in coming to the conclusion that he was precluded by the provisions of s. 75 from passing a sentence of transportation which should be of less duration than for life. Under s. 75, when it applies, an offender is liable to an alternative sentence of ten years' rigorous imprisonment. By s. 59, where the offender is punishable with imprisonment for seven years or upwards, the Court is competent to award the sentence of transportation instead of imprisonment, such transportation not being for a shorter period than seven years, and not exceeding the term of imprisonment which could be awarded for the offence.

In this case the learned Sessions Judge has erred in applying s. 75 of the Indian Penal Code. That section applies, in the case of a second conviction, to offences punishable under Chapter XII or

(1) I. L. R., 9 Calc., 877.

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Chapter XVII of the Code. An attempt to commit an offence is itself an offence within the definition of an offence as given in s. 40, and where no express provision is made in any other part of the Code for the punishment of such offence, it is punishable under s. 511. An attempt to commit house-breaking by night is punishable under s. 511 only. That section appears in Chapter XXIII of the Code. Although, therefore, the offence of house-breaking by night is punishable under s. 457, which appears in Chapter XVII, the offence of attempting to commit house-breaking by night is not punishable under that Chapter, but is punishable under Chapter XXIII only. As s. 75 does not apply to offences other than those punishable under Chapter XII or Chapter XVII, the learned Sessions Judge was wrong in applying it to the present case. I am fortified in this opinion by the rulings of this Court in *Empress of India* v. *Ram Dayal* (1), of the Bombay High Court in *Empress* v. *Nana Rahim* (2) and of the Calcutta High Court in *Queen-Empress* v. *Sricharan Bouri* (3).

The appellant, Ajudhia, has been properly convicted of an attempt at house-breaking by night with intent to commit theft. For this offence he was liable, under s. 511, to be sentenced to seven years' rigorous imprisonment, that being one-half of the largest term of imprisonment provided by the last portion of s. 457 for the offence of house-breaking by night with intent to commit theft. The sentence of five years' rigorous imprisonment passed on Ajudhia was therefore a legal sentence, and it was in my opinion a proper one. The appeal is dismissed.

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

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Section 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen-Empress* v. *Ajudhia* (1) approved.

(1) I. L. R., 3 All., 773. (2) I. L. R., 5 Bom., 140.
(3) I. L. R., 14 Calc., 357.