Bhadra (1), which latter case has been followed by this Court in *Akbar Husain* v. *Abdul Jalil* (2), and in a recent case *Abbasi Begam* v. *Afzal Husen* (3). That these latter rulings are correct is, in my opinion, clear from the definition of *talab-i-ishtishhad* given on p. 489 of Baillie's Digest of Moohnmmudan Law (2nd edition). By *talab-i-ishtishhad*," says that learned author," is meant a person calling upon witnesses to attest his *talab-i-mawasibat* or immediate demand." It appears to me impossible to invoke witnesses to attest the fact that an immediate demand has been made without making some reference to that immediate demand.

The learned counsel for the respondent argues that the *talab-i-ishtishhad* is merely a rule of evidence according to the Muhammadan law and is no longer of any validity. Be that as it may, I am bound to follow the decisions of this Court to which I have referred.

For the above reasons I allow this appeal, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance. The appellant will have his costs of this appeal.

Appeal decreed.

REVISIONAL CRIMINAL.

1898
July 5.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS *v.* JASODA NAND.*

Criminal Procedure Code, sections 133, 135 *and* 136—*Act No. XLV of* 1860 *(Indian Penal Code), section* 188—*Power of Magistrate to order repair of a house not adjoining a public road.*

Section 133 of the Code of Criminal Procedure does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house. By "persons living or carrying on business in the neighbourhood," injury to whom the power to pass orders under section 133 is intended to prevent, are meant, not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous

* Criminal Reference No. 311 of 1898.

(1) I. L. R., 17 Calc., 543. (2) I. L. R., 16 All., 383.
(3) I. L. R., 20 All., 457.

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condition, but unascertained members of public whose ordinary avocations may take them to the neighbourhood of such building. *Queen-Empress* v. *Narayana* (1) and *Queen-Empress* v. *Bishambar Lal* (2) distinguished.

THIS was a reference made by the Sessions Judge of Allahabad under section 438 of the Code of Criminal Procedure and arising out of the following circumstances. One Jasoda Nand was the owner of a house in Allahabad, No. 15, Cawnpore Road. This house stood in a compound of its own at some little distance from the public road, and was inhabited by several families, and the servant's houses in the compound were also inhabited by a number of persons. An order was made by a Magistrate under section 133 of the Code of Criminal Procedure requiring Jasoda Nand to make certain repairs to the said house. The order was served on Jasoda Nand, but he did not take either of the courses open to him under section 135 of the Code. He did not perform the act directed by the Magistrate, nor did he either appear to show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under section 136 of the Code of Criminal Procedure, and, as Jasoda Nand still did not comply with the order, he was put upon his trial under section 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge, who, being of opinion that the conviction could not be maintained, referred the case to the High Court.

Mr. *Sorabji*, in support of the reference.

The Officiating Government Advocate (Mr. *A. E. Ryves*) for the Crown.

BLAIR and AIKMAN, JJ.—Jasoda Nand has been convicted of an offence made punishable under section 188 of the Indian Penal Code. That section is couched in the following words :—"Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management,

(1) I. L. R., 12 Mad., 475. (2) I. L. R., 13 All., 577.

disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, be punished" under the latter portion of the section. Jasoda Nand is the occupant of the house No. 15, Cawnpore Road. The house, it appears, stands in its own compound some little distance from the public road and is inhabited by a number of families, and the servants' houses in the compound are also inhabited by a number of persons. An order was made under section 133 of of Act No. X of 1882, upon information, by a Magistrate, called in that section a conditional order, requiring Jasoda Nand to effect certain repairs in the house No. 15, Cawnpore Road. The order was served upon Jasoda Nand, and he did not adopt either of the courses admissible under section 135 of the Act. He did not perform the act directed by the Magistrate: he did not appear in accordance with the order to show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under section 136. Jasoda Nand was then put upon his trial for the offence specified in section 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge of Allahabad, who, being of opinion that the conviction could not be maintained, reported the case to this Court.

Mr. *Ryves*, the Government Advocate, has appeared to support the conviction, and Mr. *Sorabji* to dispute its propriety. Mr. *Ryves* in his first contention submitted to the Court that it cannot go behind the order absolute made under section 136 of Act No. X of 1882. In support of his contention he has cited to us the case of *Queen-Empress* v. *Narayana* (1) and the case of *Queen- Empress* v. *Bishambar Lal* (2). In the case reported in the Madras High Court the subject of the order was an open tank or well. The well or tank was in a public street, and the safety of the public required that it should be fenced. The subject-matter of that order then fell well within the jurisdiction of the Magistrate, and within

(1) I. L. R., 12 Mad., 475. (2) I. L. R., 13 All., 577.

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the powers conferred upon him by section 133 of the Criminal Procedure Code and the succeeding sections. The ground upon which the conviction was impeached in that case was not that the order made was one of such a nature that the Magistrate was not empowered by the section of the Criminal Procedure Code to make it: the only ground of contention was that the person upon whom the order was served was not the person who was responsible for the existing state of things, or who ought to have been made the subject of such order. The Court held, that the person convicted could not go behind that order: it held so having expressly noted that the order was one well within the power of the Magistrate who made it. That finding appears to us not inconsistent with the provisions of section 136 of the Code of Criminal Procedure. The case cited in 13 Allahabad is in substance identical with the Madras case. There is no doubt that the order was an order made in respect of one of the invasions of the public right set forth in section 133. The contention was that such order was made against the wrong person. Following the ruling reported in 12 Madras, it was held that it was not competent for the person convicted to question the order made against him.

We cannot, however, acquiesce in the expressions, needlessly large for the decision of the case then before the Court which find place in the judgment. It appears to us, applying to section 188 of the Indian Penal Code that strict construction applicable to penal provisions, that it is essential in order to justify a conviction to show that the order has been promulgated by a public servant lawfully empowered to promulgate such order. Now in this case and from that point of view we have to consider whether the public servant making the order in question was lawfully empowered to promulgate that order. Chapter X of the Code of Criminal Procedure, in which appear the provisions relating to such orders, is headed "Public Nuisances," and it enumerates certain forms of invasions of public rights which would be regarded by the law of England

as falling under the definition of *commune nocumentum*. It provides, first, for the removal of any unlawful obstruction from any way, river or channel which may be lawfully used by the public; secondly, for the prohibition of any trade or of the keeping of any goods or merchandize by reason of their being injurious to the health or physical comfort of the community; thirdly, for the prevention of the construction of any building or the disposal of any substance as likely to occasion conflagration or explosion. The fourth clause is the one under which the order in question purports to have been made. It deals with the case in which "any building is in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by," in consequence of which its removal, repair or support is necessary. The last case provided for is where any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public. It appears manifest to us that, apart from the heading, which may possibly form no part of the enactment, the scope of this section is plainly limited to injuries arising or likely to arise to members of the general unascertained mass of the public. The persons who under the clause require protection are "persons living or carrying on business in the neighbourhood, or passing by." It appears to us that it would be straining the meaning of the words to hold that the clause applies to persons living actually in the alleged dangerous building or in the servants' houses in the compound belonging to it. It seems also to us, that it would be an unnatural use of the words "passing by" to include in it persons going to or from the house or about it for their private business or pleasure, or in the exercise of their private and not of their public rights. In our opinion the words used are not sufficiently comprehensive to include the case of the person who has been convicted, or to justify or make legal the order of the Magistrate in relation to the building in Jasoda's occupation. It may well be, as the

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Magistrate in his explanation argues, that section 44 would have justified some such order as the order made in this case; but the scope of that section is different from, and far larger than, that of section 133.

We hold then that the order made in this case by the Magistrate was not an order which the Magistrate was lawfully empowered to promulgate within the meaning of section 188. We therefore set aside this conviction and order the fine, if paid to be refunded.

APPELLATE CIVIL.

1898
July 7.

Before Mr. Justice Blair and Mr. Justice Burkitt.

HAR PRASAD AND ANOTHER (OPPOSITE PARTIES) v. SHEO RAM AND ANOTHER (APPLICANTS).*

Civil Procedure Code, section 244—Execution of decree—Mortgage—Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution.

Certain mortgagees held a mortgage which, in its inception was a simple mortgage, but which was to become a usufructuary mortgage upon non-payment of the mortgage debt by a certain date. The mortgage debt was not paid within the time limited. The mortgagees sued on the covenant in their bond and obtained a decree for possession, declaring them entitled to remain in possession until the mortgage debt was satisfied from the usufruct. Some time after the mortgagees had got possession under this decree, the mortgagors applied, ostensibly under section 244 of the Code of Civil Procedure, for recovery of possession of the mortgaged property and for payment of a large sum of money, which they alleged the mortgagees had collected as profits in excess of what was due under the mortgage.

Held, that such an application would not lie. If the allegations of the mortgagors were true, their proper remedy was by suit for redemption and not by application in the execution department. *Ravji Shivram* v. *Kaluram* (1), *Ram Chandra Ballal* v. *Baba Esgonda* (2), and *Narsinha Manohar* v. *Bhagvantrav* (3), referred to.

THE facts of this case are fully stated in the judgment of the Court.

* First Appeal No. 52 of 1898 from an order of F. W. Fox, Esq., District Judge of Jhansi, dated the 24th December 1897.

(1) 12 Bom., H. C. Rep., 160. (2) 12 Bom., H. C. Rep., 163.
(3) I. L. R., 14 Bom., 327.