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and, holding that she had a lien he held that it did not survive. We agree with our brother Banerji that such a lien does not survive, but is purely personal, and we dismiss the appeal with costs.

Appeal dismissed.

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February 1.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox.

QUEEN-EMPRESS *v.* AHMADI.*

Criminal Procedure Code, section 208—Evidence—Procedure—Duty of Magistrate inquiring into a case triable by the Court of Session to take the evidence of the witnesses produced by the accused.

A Magistrate inquiring into a case under Chapter XVIII of the Code of Criminal Procedure is not empowered to frame a charge or make out an order for commitment until and after he has taken all such evidence as the accused may produce before him for hearing.

THE facts of this case sufficiently appear from the order of the Court.

Alston and *Madan Mohan Malaviya*, for the appellant.

KNOX J.—Musammat Ahmadi Begam was suspected of having committed the offence of murder. The case was under inquiry with a view to commitment, if necessary, to the Court of Sessions. The evidence produced in support of the prosecution had apparently been put forward up to the 4th of December. On that date a petition was put in by Musammat Ahmadi Begam asking the Court to take the evidence of her witnesses under section 208 of the Criminal Procedure Code before taking her statement. Upon that petition the first order passed is dated the 4th of December, and was as follows:—"It is too late to pass an order now, as it is about 5 p. m." With this order apparently the proceedings of the 4th of December came to a close. I understand that the accused had witnesses present in Court on that day who could have been then and there produced and examined. In that case I do not understand what difficulty the learned

* Criminal Revision No. 684 of 1897.

Magistrate could have had in passing the only proper order under the circumstances, namely,—"those witnesses shall be heard either to-day or as soon as the Court re-opens tomorrow." This would have been in accord with what appear to me to be the very clear words of the Code, and would have obviated all the difficulties which arose from the way in which the Magistrate subsequently dealt with the case.

On the 5th December, the accused put in another petition to the effect that, in the event of the Court deciding that her case must be committed to the Sessions, she wished to reserve her defence, and that she would in that Court make her replies to any questions that might be put to her for the purpose of enabling her to explain any circumstance appearing in the evidence against her. It was optional and entirely within the power of the accused to put in an application of this kind. The fact that she did do so would not absolve the Magistrate from his duty in carrying out the provisions of the law and from examining her, whether she answered or refused to answer. I mention this because of the order subsequently made by the learned Magistrate, from which it would appear that he thought that as soon as the accused reserved her defence he was not absolved from the duty of asking her for her statement, but he was absolved from the equally imperative duty of taking all such evidence as was produced on her behalf.

On the petition of the 5th of December the Magistrate writes that he must ask the accused herself what statement she has to make, in spite of what he terms an attempt on the part of the barrister for the accused to waive its right to examine the accused vested in it by section 342 of the Code of Criminal Procedure. But he declined to hear the evidence tendered on her behalf, and then and there committed the accused for trial before the Court of Sessions. The Magistrate was not empowered to frame a charge or make out an order for commitment until and after he had taken all such evidence as the accused produced before him for hearing. I accordingly set aside the order of

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commitment and return the case to the Deputy Magistrate of Gorakhpur with directions to give notice to the prosecution and to the accused of a convenient day, and on that day to hear all and such evidence as may be produced on behalf of the accused and after that to complete the inquiry according to law. Let the record be returned.

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February 2.

APPELLATE CIVIL.

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

MUZAFFAR ALI KHAN (DEFENDANT) *v.* KEDAR NATH (PLAINTIFF).*

Civil Procedure Code, sections 556, 558—*Application to restore an appeal dismissed ex parte—Evidence—Practice.*

When an application is made to restore an appeal which has been dismissed *ex parte* for default of appearance the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of appeal on appeal from the order dismissing his application. *Hari Das Mukerji* v. *Radha Kishen Das* (1) followed.

IN this case an appeal was dismissed by the Additional District Judge of Moradabad for default of appearance, the pleader for the appellant being absent when the appeal was called on for hearing. An application for the restoration of the appeal to the list of pending appeals was made, but no affidavit in support of such application was filed therewith. The Additional District Judge dismissed the application on two grounds, first, that it was not accompanied by an affidavit, and, secondly, that it disclosed no sufficient cause for the failure of the appellant or his pleader to appear. Against this order of dismissal the applicant appealed to the High Court, tendering an affidavit in support of his petition for restoration of the appeal.

Maulvi *Abdul Majid*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

* First Appeal No. 87 of 1897, from an order of F. E. Taylor, Esq., Additional District Judge of Moradabad, dated the 9th August 1897.

(1) Weekly Notes 1890, p. 166.