not place much reliance on these later documents, which are only an expression of the opinion or aspiration of Gir Prasad himself. The documents of 1862 and 1863 are no doubt evidence in favour of the respondent, but their Lordships do not think that they are sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate and other evidence in favour of the appellant to which they have already adverted.

Their Lordships are fully sensible of the importance of requiring that a special family custom involving a departure from the ordinary Hindu law should be properly proved, but they think that in this case the appellant has satisfied the burden of proof. They will therefore humbly advise Her Majesty that the decree of the High Court be reversed and instead thereof the respondent's appeal to that Court be dismissed with costs. The respondent will also pay the costs of this appeal.

Appeal allowed.

Solicitors for appellant:—Messrs. *Barrow* and *Rogers*.

APPELLATE CRIMINAL.

Before Mr. Justice Henderson.

QUEEN-EMPRESS *v.* PALTUA AND OTHERS.*

Act No I of 1872 *(Indian Evidence Act), section* 30—*Confession—Joint trial—Plea of guilty by some of the accused—Plea not accepted in order that their confessions might be considered against the other accused.*

Where several accused persons are being tried jointly for the same offence, and some of them plead guilty, it is unfair to defer convicting those who have pleaded guilty merely in order that their confessions may be considered against the other accused.

Queen-Empress v. *Paluji* (1), *Queen-Empress* v. *Lakhshmayya Pandaram* (2), *Queen-Empress* v. *Pirbhu* (3) and *Queen-Empress* v. *Chinna Pavuchi* (4) referred to.

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

The *Government Pleader*, for the Crown.

* Criminal Appeal No. 560 of 1900.

(1) (1894) I. L. R., 19 Bom., 195.
(2) (1899) I. L. R., 22 Mad., 491.
(3) (1895) I. L. R., 17 All., 525.
(4) (1899) I. L. R., 23 Mad., 151.

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QUEEN-EMPRESS v. PALTUA.

HENDERSON, J.—In this case the first appellant Paltua has been convicted under section 395 of the Indian Penal Code, and sentenced to seven years' rigorous imprisonment. The other appellants have been convicted under section 397, Indian Penal Code, and sentenced to ten years' rigorous imprisonment each. Paltua and Bhure, one of the other appellants, pleaded guilty at the commencement of the trial before the Sessions Court, but notwithstanding their plea of guilty, they were not thereupon convicted, as they might have been under section 271 of the Code of Criminal Procedure. With regard to this matter the Sessions Judge in his judgment says:—"Paltua and Bhure Singh plead guilty. To avoid complications and to allow their statements to be considered under section 30 of the Evidence Act as against the other accused, I did not convict them on their pleas." It has been held in more than one case that after a prisoner has pleaded guilty he cannot be treated as being jointly tried with his co-accused—see *Queen-Empress* v. *Pahuji* (1), *Queen-Empress* v. *Lakhshmayya Pandaram* (2), *Queen-Empress* v. *Pirbhu* (3). In these cases it was held that confessions made by the accused who pleaded guilty could not, under section 30 of the Indian Evidence Act, be taken into consideration against the other accused. Section 271 of the Code of Criminal Procedure provides that if the accused pleads guilty the plea shall be recorded, and he may be convicted thereon. It does not say that he shall thereon be convicted, and it seems to me, therefore, that it is open to the Court in certain circumstances to continue the trial without convicting the person who pleads guilty on his plea, as, for example, when it is thought necessary for the purpose of fixing the amount of punishment to know the actual part taken by him in the matter out of which the trial has arisen. In *Queen-Empress* v. *Chinna Pavuchi* (4) it was pointed out that where such a procedure was adopted the trial of the confessing accused did not terminate with the plea of guilty, and therefore a confession by him might be taken into consideration under section 30 of the Indian Evidence Act as against any other person who had been jointly tried with him for the same offence, and that the trial did not strictly end unless the accused had been

(1) (1894) I. L. R., 19 Bom., 195.
(2) (1899) I. L. R., 22 Mad., 491.
(3) (1895) I. L. R., 17 All., 525.
(4) (1899) I. L. R., 23 Mad., 151.

either convicted, or acquitted or discharged. In that case the following remarks, which seem to have a special application to the case before us, were made by the Court:—"The only case in which there may be a doubt is where neither of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case we should be inclined to hold that it would not be fair to allow his confession to be considered as against his co-accused, for that would be in effect to comply with the forms of justice while violating it in substance." In the present case it is clear from the judgment of the Sessions Judge that he merely deferred conviction of the accused who pleaded guilty in order that he might use their confessions against their co-accused. According to the decisions in the three cases to which I first referred, one of them being a decision by a Bench of this Court, these confessions cannot be taken into consideration against the two appellants who did not plead guilty. According to the decision in 23 Madras in strictness the confessions of the appellants who pleaded guilty might be considered against the other appellants. As I have said, I consider, as the Madras Court has held, that it is open to the Court, under certain circumstances, to continue the trial without convicting an accused upon his plea of guilty. But I agree entirely with the observations, which I have quoted, made by the learned Judges who decided the case in Madras, and in my opinion it is unfair to defer convicting accused persons who plead guilty merely in order that their confessions may be considered against other accused who are being tried with them. This entails no hardship upon the prosecution, as it is open to the prosecution where a prisoner is convicted on his plea of guilty, to call him as a witness in the trial against his co-accused who has not pleaded guilty. Having regard to the decisions to which I have referred, I think that it would be safer under the circumstances to exclude consideration of the confessions of Paltua and Bhure altogether. I am not prepared to say that in point of law they must necessarily be excluded. I have gone through the whole evidence in this case very carefully in order to see whether, apart from the consideration of the confessions

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of Paltua and Bhure, there is sufficient evidence to support the convictions of the other appellants. I think that the Sessions Judge has very rightly discarded the evidence of the informer Behari, whom he has described as "an excellent specimen of a sneaking, contemptible liar, on whose words I cannot place any reliance." But I find as against both of the appellants Ganga Singh and Jhallia that there is the evidence of Mullu, Kamod and Devi, which has been accepted by the Sessions Judge. I have very carefully considered the evidence of these witnesses, and it seems to me that the Sessions Judge is right in the view which he took of it. If the evidence be true, and I see no reason to doubt it, there can be no question as to the guilt of all the appellants. The sentences that have been passed do not appear to me too severe. I therefore dismiss the appeals.

APPELLATE CIVIL.

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August 8.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

DEBI PRASAD AND OTHERS (OPPOSITE PARTIES) *v.* JAMNA DAS AND ANOTHER (APPLICANTS).*

Civil Procedure Code, sections 2, 351, 589—*Insolvency—Order in insolvency made by Subordinate Judge—Appeal.*

An appeal against an order in insolvency passed under section 351 of the Code of Civil Procedure by a Court of Small Causes exercising the powers of a Subordinate Judge will lie to the District Judge and not to the High Court, and this appellate jurisdiction is not dependent upon either the value of the decree in respect of which the order in insolvency was obtained or the amount of the debts entered in the schedule of debts filed by the applicant for a declaration of insolvency.

Venkatrayer v. *Jamboo Ayyan* (1), dissented from. *Sitharama* v. *Vythilinga* (2), *Vaikunta Prabhu* v. *Moidin Saheb* (3) and *Shankar* v. *Vithal* (4) referred to.

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

Pandit *Madan Mohan Malaviya*, for the appellants.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the respondents.

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* First Appeal No. 87 of 1899 from an order of Maulvi Syed Sirajuddin, Judge of the Small Cause Court of Agra, dated the 29th June 1899.

(1) (1892) I. L. R., 17 Mad., 377.
(2) (1889) I. L. R., 12 Mad., 472.
(3) (1891) I. L. R., 15 Mad., 89.
(4) (1895) I. L. R., 21 Bom., 45.