

Act, Chapter VIII, dealing with the subject of such claims, thereby placing it beyond doubt that a claim such as this is a transferable claim, and therefore capable of being attached and sold in execution within the meaning of s. 266 of the Code of Civil Procedure.

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Moreover the remedy sought in this suit is a proper one. It is really a suit for specific performance of the condition in the agreement about 150 bighas. Section 23 of the Specific Relief Act says: "Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by (a) any party thereto; (b), the representative in interest, or the principal, of any party thereto." The plaintiff is the representative in interest of the original holder of the interest in 150 bighas. Therefore this suit was a proper suit. The appeal is dismissed with costs.

K. M. C.

Appeal dismissed.

ORIGINAL CRIMINAL.

Before Mr. Justice Trevelyan.

EMPRESS OF INDIA *v.* KALIPROSONNO DOSS AND OTHERS.

Practice—Evidence—Prosecutors' right of reply—Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X of 1882), ss. 289, 540.

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 January 28,
 February 2.

The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. *The Queen Empress v. Grees Chunder Banerjee* (1) followed.

In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court would not call a witness on whose evidence it could not put implicit reliance.

THE prisoners in this case were charged with cheating and abetment of cheating under ss. 420, and 109 and 420 of the Indian Penal Code.

The charges were brought at the instance of one Shoshee Bhusan Bose upon the allegation that he had been induced to pay the prisoners a sum of Rs. 3,850, and to give them two

(1) I. L. R., 10 Cal., 1024.

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promissory notes for Rs. 1,150 and a cheque for Rs. 300, upon the statement that he would be employed as the manager of their jute business at Naraingunge and Serajgunge.

The Standing Counsel (Mr. Phillips) and Mr. Dunne for the prosecution.

Mr. M. P. Gasper and Mr. K. N. Mitter for Kaliprosunno Doss and another.

Mr. Henderson, Mr. A. F. M. Abdur Rahman, and Mr. Panioty for the other prisoners.

During the cross-examination of the complainant Shoshee Bhusan Bose by Mr. Henderson, counsel put into the witness's hands a Thanna book, containing an entry of the charge against some of the accused, which had been made at the Thanna by the complainant, and which entry purported to be signed by the complainant, and sought to prove the signature of the complainant and to put in the entry as evidence for the defence. Before doing so, however, Mr. Henderson asked for a ruling of the Court as to whether by putting in documentary evidence during the cross-examination of the witnesses for the Crown, the prosecution thereby would be entitled to the right of reply after he had addressed the jury. He referred to the decision in the case of *The Queen Empress v. Grees Chunder Banerjee* (1) as an authority that the prosecution would not be entitled to reply, and relied on the provisions of s. 289 of the Criminal Procedure Code.

Mr. Dunne contended that the prosecution would be entitled to reply, and stated that the decision of Mr. Justice Field relied on by Mr. Henderson had not been invariably followed, and referred to an unreported case in which Mr. Justice Norris had ruled the other way.

TREVELYAN, J.—It seems to me that, having regard to the provisions of s. 289 of the Criminal Procedure Code, the putting in of documentary evidence by an accused during the hearing of the evidence for the prosecution, before he is asked whether he intends to call any evidence, does not give a right of reply to the Crown. I am referred to the decisions of Mr. Justice

(1) I. L. R., 10 Calc., 1024.

Field in the case of *The Queen Empress v. Grees Chunder Banerjee* (1), and of Mr. Justice Norris in a case which has not been reported. The reasons for the latter decision do not appear, and I prefer to follow the decision of Mr. Justice Field above referred to, and I therefore hold that by putting in this document the accused does not give the Crown the right of reply.

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After Mr. Phillips had examined a number of witnesses for the prosecution, and tendered others for cross-examination, who had been called before the Magistrate, he closed the case for the prosecution without calling Brahma Pershad Singh, an Inspector of Police, or tendering him for cross-examination. Brahma Pershad Singh was the Inspector of the Sukhea Street Thanna, where the original charge had been laid by the complainant, and he had been called as a witness for the prosecution before the Magistrate.

Mr. *Gasper* thereupon contended that the prosecution were bound to tender Brahma Pershad Singh for cross-examination, or that the Court should call him so as to give the prisoners an opportunity of cross-examining him, and he referred to the case of *In the matter of The Empress v. Grish Chunder Talukdar* (2) as an authority in support of his contention, and also to Roscoe's Criminal Evidence, 9th Ed., p. 138. He submitted that at all events the witness should be called by the Court.

Mr. *Henderson* referred to s. 540 of the Criminal Procedure Code, and contended that it was clear that he was a witness of the class referred to in that section, as his evidence was essential to the just decision of the case. He also referred to the cases of *R. v. Simmonds* (3) and *R. v. Bodle* (4).

Mr. *Phillips contra.*—The prosecution are not bound to call any witness or to tender a witness called before the Magistrate for cross-examination. All that they are bound to do is to have such witnesses in attendance, so that the defence can call them if they like. The prosecution cannot be forced to put forward a witness on whose evidence no reliance can be placed.

(1) I. L. R., 10 Calc., 1024.

(2) I. L. R., 5 Calc., 614.

(3) 1 O. & P., 84.

(4) 6 O. & P., 186.

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TREVELYAN, J. (after taking time to consider the question)—
 I have been asked by Mr. Casper to call Brahma Pershad Singh as a witness so as to give the defence an opportunity of cross-examining him. Brahma Pershad Singh was the Inspector of the Sukhea Street Thanna and was called as a witness at the Police Court. I have been referred by Mr. Henderson to the provisions of s. 540 of the Criminal Procedure Code and to two English decisions on the subject. In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, I think I should call him, but I certainly should not call any witness on whose evidence I could not place reliance, at any rate in a case in which the prisoner is defended by counsel.

I have again read over the deposition of Brahma Pershad Singh before the Police Magistrate, and I do not think I could put implicit reliance on his evidence. I therefore decline to call him. I do not think that the prosecution is bound to tender him for cross-examination or do more than have him present in Court for the accused to call him or not as they may think fit.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

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 December 11.

BAIJ NATH SINGH (PLAINTIFF) v. SHAH ALI HOSAIN (DEFENDANT.) *

Interest—Penal Clause in Contract—Enhanced rate of interest on default of payment of principal on due date—Penalty—Contract Act (IX of 1872) s. 74—Act XXVIII of 1855, s. 2.

In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. *per mensem*, but that if the loan were not repaid on the date named the principal was to bear interest at the rate of 4 per cent. *per mensem* from the date of the loan:

* Appeal from Appellate Decree No. 1101 of 1886, against the decree of T. M. Kirkwood, Esq., Judge of Patna, dated the 20th of February, 1886, modifying the decree of Moulvi Mahomed Nural Hosain, Khan Bahadur, Subordinate Judge of that District, dated the 27th of June, 1884.