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The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Tottenham, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Beverley.

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July 15.

QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT.*

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—Penal Code, s. 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

* Full Bench on Criminal Appeal No. 327 of 1889, against the decision of F. H. Harding, Esq., Officiating Sessions Judge of Chittagong, dated the 11th March 1889.

Madhub Chunder Mozumdar v. *Novodeep Chunder Pundit* (1) overruled; *Empress* v. *D'Silva* (2) referred to.

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THIS was a reference to a Full Bench by Mr. Justice Trevelyan and Mr. Justice Beverley; the referring order was as follows:—

"The appellant before us has been convicted under s. 196 of the Penal Code of using as genuine evidence which he knew to be false. He has also been convicted under s. 471, read with s. 467, of the Penal Code; but, in our opinion, the alleged offence falls under s. 196, and the conviction under s. 471 should be set aside. The conviction under the latter section has made no difference in the punishment.

"The sanction to prosecute was given by Mr. F. H. Harding acting as District Judge of Chittagong.

"The appellant has been tried and convicted of this offence by Mr. Harding acting as Sessions Judge of Chittagong.

"One of the grounds of appeal is as follows: 'While the Judge accorded a sanction to bring a case against me in the Criminal Court, it has been illegal on his part to convict and punish me against himself.'

"This question has been argued before us by the Deputy Legal Remembrancer, who cited the case *In the matter of Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (1), and we have had to consider the terms of ss. 477 and 487 of the Criminal Procedure Code. We have grave doubts as to the correctness of the above-mentioned decision, and as the matter is one of importance, we refer to a Full Bench the following question:—

"'Can a Sessions Judge try a person for an offence punishable under s. 196 of the Indian Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?'

"If this question is decided in the affirmative, the appeal should, in our opinion, be dismissed. If it be decided in the negative, the appellant will have to be re-tried by another Sessions Judge."

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown,—There being only one Court in each District, which can try

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Sessions cases, or hear most appeals, great inconvenience must be occasioned when such cases are transferred. In the present instance the nearest Sessions Court is at Tipperah; the most convenient perhaps at Alipore. In the one case witnesses would have to march 200 miles during the rains to Tipperah and back, or else recross the Bay of Bengal. A Bench of this Court has decided that if the Judge had jurisdiction to try, the conviction and sentence are right: upon a re-trial then either the same sentence will be repeated, or there will be a miscarriage of justice. The law could not have intended to prescribe a course entailing such consequences unless there exists an imperative reason for so doing. That reason can only be the fear that the Judge may have prejudged the case and condemned the prisoner before trial; but the District Judge in this case merely amended a sanction previously granted by an inferior Civil Court.

If an appeal admitted after hearing the judgment and argument, if a rule to show cause why an order could not be set aside, are not prejudged, how can it be said that a Judge granting a sanction to prosecute (where he merely has to consider whether he ought to remove an artificial obstruction put in the way of a man's ordinary right to complain of an offence) has condemned the accused before the hearing.

It would be more plausible to say that the Sessions Judge had prejudged the case, when, after reading the proceedings of the commitment, he alters or adds to the charge. The prisoner has been acquitted of all the charges framed by the Magistrate, but sentenced upon the one which the Judge has framed in this case. And as to this there is no objection, for the law prescribes it. Section 477 clearly shows that where the offence is committed in the presence of the Judge, and where he has himself committed the offender for trial, the Legislature does not consider that a sufficient reason to justify the removal of the case from his jurisdiction.

So under s. 487 the Sessions Judge may try offences which have been committed in his presence as District Judge, and where the preliminary enquiry and commitment have been made by himself. Clearly it was not contemplated that he should be debarred from trying a case like the present.

I submit that s. 487 does not debar him. The words "no Judge of a Criminal Court" in s. 487 apply to an Assistant Sessions Judge (s. 31) but not to a Sessions Judge. The Sessions Judge (ss. 477, 478) may try any case committed to his Court, whether by himself or by any Civil or Revenue Court that thinks he ought to try it; *à fortiori* he may try any case committed to his Court in the ordinary way by a Magistrate. If it be argued that s. 477 is restricted to cases in which the Sessions Judge himself makes the commitment, such a narrow construction is inconsistent with s. 478. I also submit that the words "judicial proceedings" in s. 487 do not include a sanction under s. 195 granted or revoked by a Superior Court. In dealing with such sanction, such Court has no authority to take evidence; and it cannot therefore be a judicial proceeding [see s. 4 (*d*)]. Whenever in any proceeding evidence may be legally taken the Code provides for it, as in appeals (Chap. XXXI, s. 428); but no such provision is to be found in Chap. XV, or as applicable to the Superior Courts mentioned in s. 195. The case of *Krishnanund Das* v. *Hari Bera* (1) decides that notice need not be given to the accused when sanction is granted for his prosecution. How then could evidence be taken in such a case? Again, an offence which is brought under the notice of the District Judge in a proceeding, as in this case, is not brought under the notice of the Sessions Judge "as such Judge." The Court of Sessions which tries the offence, whether with Assessors or Jury, is a different Court from that of the Civil Judge—*Empress* v. *D'Silva* (2).

I contend that s. 487 only applies to cases which can be tried by more than one Judge or Magistrate in the District: and that it does not apply to Sessions Judges or to appeals involving for trial a transfer to another district. The words in s. 487 "shall try" do not apply to appeals; trials and appeals are quite distinct under the Code. The word "try" is confined to trials; appeals are heard under s. 407, rejected under s. 409, and dealt with under s. 428.—See *Weir*, 1081.

No one appeared for the prisoner.

(1) I. L. R., 12 Calc., 58. (2) I. L. R., 6 Bom., 479.

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The order of the Court (PETHERAM C. J., TOTTENHAM, TREVELYAN, GHOSE and BEVERLEY, JJ.,) was as follows:—

The facts of this case are sufficiently set out in the order of reference. The question referred to us for our decision is the following:—

"Can a Sessions Judge try a person for an offence punishable under s. 196 of the Penal Code, when he has, as a District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?" The reference has been rendered necessary in consequence of the decision in *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (1).

Section 487 of the Code of Criminal Procedure now in force runs as follows:—

"Except as provided in ss. 477, 480 and 485, *no Judge of a Criminal Court or Magistrate*, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in s. 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice *as such Judge or Magistrate* in the course of a judicial proceeding."

WE are of opinion that in this section effect must be given to the words "*as such Judge or Magistrate*," and the meaning of the section, we think, must be taken to be that when an offence referred to in s. 195 has been committed before a Judge of a Criminal Court or Magistrate, or in contempt of his authority, or brought under his notice in the course of a judicial proceeding, he cannot himself try such offence. That this is so, we think, is clear from the exception made in regard to the provisions of s. 477, under which a Court of Session is empowered to charge and commit, or admit to bail and try, any person who has committed before it any offence of the kind referred to in s. 195. It appears to us that it would be inconsistent to hold that a Sessions Judge may try an offence committed before him as Sessions Judge, and that he may not try such an offence if committed before him as District Judge.

This view appears to have been taken by the Bombay High Court in the case of *Empress* v. *D'Silva* (2). That was a decision under s. 473 of the Code of 1872, which

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section ran as follows: "Except as provided in ss. 435, 436 and 472, no Court shall try any person for an offence committed in contempt of its own authority." Under that section it was held that a Sessions Judge was not debarred from trying a case of forgery in which he had sanctioned the prosecution as a District Judge. The *ratio decidendi* in that case was much the same as that which has been indicated above. The learned Judges who decided that case said:—

"The Legislature seems to have been impressed by the sense of this inconvenience, and, consequently, in enacting s. 472 of the Code, it gave jurisdiction to the Court of Sessions to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his Civil capacity, and certainly s. 473 is not so worded as to oblige us to hold that there was any other intention."

It will be seen that s. 487 of the present Code, which corresponds to s. 473 of the Code of 1872, is couched in more definite language. The prohibition is restricted to a "Judge of a Criminal Court," and that being so, we think we must place a strict construction on the words "as such Judge," and hold that they do not include a Judge of a Civil Court or District Judge.

For these reasons we are of opinion that the Sessions Judge was not debarred by this section from trying the case which was the subject of this reference.

T. A. P. *Appeal dismissed.*

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

Before Mr. Justice Norris.

JOTENDRONAUTH MITTER *v.* RAJ KRISTO MITTER AND ANOTHER.* 1889 *July* 8.

Transfer of suit—Practice—Minor defendant. Application by next friend of, for transfer of suit when no guardian ad litem *has been appointed—Civil Procedure Code (Act XIV of 1882), ss. 440, 441, 443, 449.*

A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* had been appointed for

* In the Matter of s. 13 of the Letters Patent of 1865, and in the Matter of a Suit No. 62 of 1889, in the Court of the Second Subordinate Judge of the 24-Pergunnahs.