

to take his honour in his hands as well as the Ganges water. In taking the oath which he took, he undertook on his honour to swear truthfully and having the Ganges water in his hands it appears to us that he fully satisfied all that his opponent required. He swore that nothing was due inasmuch as the debt had been set off; and in view of this evidence, which under section 11 of the Oaths Act the court was bound to accept as conclusive proof, the claim should have been dismissed. We accordingly allow the appeal, and setting aside the decree of the courts below, we dismiss the plaintiff's suit with costs including fees, in his court, on the higher scale.

1903

CHEDI LAL

v.
JWALA
PRASAD.*Appeal decreed.*

REVISIONAL CRIMINAL.

1909

February 15.*Before Mr. Justice Aikman.*

EMPEROR v. UMER-UD-DIN *

*Criminal Procedure Code (Act No. V of 1898), section 403 (1)—No complaint—**Order of Acquittal—Whether bar to a new trial.*

A soldier from Burma sent an intimation to the District Magistrate that he had authorised his brother to file a complaint against the accused for enticing away his wife. When the case came on for hearing, it appeared that the brother had no such authority and the Magistrate acquitted the accused. The complainant then filed a complaint personally. *Held* that the previous acquittal was no bar to the trial of the present complaint inasmuch as the finding of the Magistrate amounted to this that there was no complaint before him, *Queen Empress v. Balwant*, (1) referred to.

Mr. C. Ross Alston, for the accused.

The Assistant Government Advocate, (for whom Mr. E. Malcomson) for the Crown.

AIKMAN, J.—In my opinion no sufficient ground exists for interfering in this case. Mohammad Farookh, a soldier serving with his regiment in Burma, sent an intimation to the District Magistrate of Bijnor that he had authorised his brother to bring a complaint against the applicant, Umer-ud-din, for enticing away his (Mohammad Farookh's) wife. This charge against the

*Criminal Revision No. 842 of 1903, against an order of A. B. Florie, District Magistrate of Bijnor, dated the 19th November 1903.

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accused was heard by a Magistrate. When evidence for both sides had been recorded, it struck the Magistrate that the husband's brother held no authority to institute the case and he ended his judgment with the words "I therefore acquit the accused." Thereupon the husband, having obtained leave, came from Burma and instituted a fresh complaint. In answer to this the applicant set up the previous acquittal. In my opinion the so-called acquittal is, under the circumstances, no bar to the trial of the present charge. The Magistrate's previous finding amounted to this that there was no complaint before him of which he could take cognizance. If it were necessary I should have no hesitation in setting aside the previous so-called acquittal and directing the present trial to proceed. Vide *Queen-Empress v. Balwant* (1). But I do not think this is necessary and content myself with dismissing the application.

Application dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.
KHUNNI LAL (PLAINTIFF) v. MADAN MOHAN LAL AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), sections 67, 111, 116—Lease by mortgagee in favour of mortgagor—Mortgagor holding over without payment of rent—Lease when determined—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 139—Suit by mortgagee for possession.

A usufructuary mortgagee executed a lease of the mortgaged property in favour of his mortgagors for five years but after the expiry of the term of the lease neither claimed nor received rent from his mortgagors for more than 12 years and then sued them for possession of the property, *held* that the suit was barred by limitation. *Held* also that the lease determined on the expiration of five years and a tenancy from year to year did not come into existence as there was nothing to show that the landlord assented to the tenant's continuing in possession. *Prem Sukh v. Baupia*, (2) distinguished.

Held also that no suit for sale could be brought upon the mortgage, as the mere fact that it provided for redemption upon payment of the principal did not make it a simple mortgage.

* Second Appeal No. 728 of 1907 from a decree of E. O. E. Leggatt, District Judge of Bareilly, dated the 12th of March 1907, confirming a decree of Pitamber Joshi, Subordinate Judge of Bareilly, dated the 30th of June 1905.