CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Trevelyan.

JAGAT KISHORE ACHARJYA CHOWDHURI (1ST PARTY) *v.* KHAJAH ASHANULLAH KHAN BAHADUR (2ND PARTY).* 1889 *February* 18.

Criminal Procedure Code (Act X of 1882), s. 145—Possession, Inquiry into —Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.

In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour.

Held, that having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted.

Held, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately proceeding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced.

THIS was a reference made by the Sessions Judge of Mymensingh for the purpose of having an order made by the Joint Magistrate of that District, under s. 145 of the Criminal Procedure Code, set aside, the Sessions Judge being of opinion that the order was not justified upon the findings of fact by the Magistrate. The circumstances which gave rise to the proceedings being

* Criminal Reference No. 17 of 1889, made by H. P. Peterson, Esq., Sessions Judge of Mymensingh, dated the 11th of January 1889, against the order passed by C. W. E. Pittar, Esq., Officiating Joint Magistrate of Mymensingh, dated the 24th of September 1888.

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taken under that section and the order being passed were as follows:—

The subject-matter of the dispute was a tract of forest land claimed by the first party as a part of Rangamatia-gur, and by the second party as a part of Atia-gur.

In the month of March 1888, a number of trees had been cut in the forest by labourers, having authority to do so from one or other of the parties, and a dispute arose between the parties with reference to the right to remove the timber and a police enquiry was held. On the 3rd April, the head constable submitted a report stating that the dispute was regarding a plot of land extending over two-and-a-half miles and that there was a likelihood of a breach of the peace, as both parties were endeavouring to remove the timber.

On that, proceedings were taken under s. 107 of the Criminal Procedure Code, which resulted in an order being passed on the 7th June, binding down Tarini Prosad Chuckerbuty, who was a lessee of the second party, to keep the peace.

That enquiry and the police report formed the basis of these proceedings, which were instituted on the 9th June. Both parties appeared, and numerous witnesses were examined on behalf of both sides.

On the 24th September 1888, the Joint Magistrate passed the order complained of. The material portion of his judgment was as follows:—

"The subject-matter of dispute between the two parties to these proceedings is a tract of forest land claimed by the first party as the Rangamatia-gur, and by the second party as part of the Atia-gur. The Eastern and Western boundaries are in dispute. . . . . In March last a number of trees were cut in this forest by labourers having authority from one or other of the parties. A dispute arose in consequence of these acts and a police enquiry was held. A report was submitted by the Head Constable on the 3rd April. On that, proceedings under s. 107, Civil Procedure Code, were taken and decided on the 7th June. That enquiry and the report of the police officer formed the basis of these proceedings, which were initiated on the 9th June. It is necessary to decide which party was in possession on that date.

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Possession of property of this nature is exercised whether by the landlord or by his lessee by allowing the public to cut the timber, who are assessed proportionately to the amount of timber which they cut. As a rule no written authority is given to individuals to cut timber, in which case the arrangements described are made by the person who acquires such a right. In this case, however, it is asserted that that licences were given on the last and previous occasions of cutting timber. Each party has given evidence of possession having been exercised on previous occasions, and evidence of title has been given as corroboration and explanatory of the evidence of possession. In deciding the fact of actual possession, I dismiss from my mind all considerations of the legal title of either party. In *Ambler* v. *Pushong* (1) it has been laid down that the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is enquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in possession. It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was out, with the exception of a few trees, which were cut, as is alleged, by a man who has since died. Neither party can bring that timber away now, as the cut timber in the forest is under attachment; but it does not appear that the first party brought away a single tree. It is, therefore, perfectly clear that the second party has retained the possession which it had at the commencement of these proceedings. This being so, it is unnecessary to go into any of the circumstances previous to the institution of this case, and it also becomes unnecessary to deal

(1) I. L. R., 11 Calc., 365.

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with the objection raised by the second party as prejudicial to them."

The Joint Magistrate then went into the question as to whether the lessees should have been made parties to the proceeding, and, deciding that question in the negative, declared the second party to be entitled to retain possession until evicted therefrom in due course of law. The first party thereupon petitioned the Sessions Judge, who referred the case to the High Court. In his order of reference, the Judge stated his reasons for disagreeing with the Magistrate's order as follows:—

"In submitting the case for the inspection of the Court, I beg to report that, in my opinion, the order was not justified on the limited finding of the Lower Court. The finding on the question of possession, refers to a period commencing with the entry by the men of the second party and forcible exclusion of the first party from the disputed forest. There is no finding regarding any earlier period, and as the Officiating Joint Magistrate, on the commencement of the quarrel, bound down, under s. 107, Criminal Procedure Code, a lessee of the second party, yet on the authority of *Ambler* v. *Pushong* (1), he has restricted his enquiry on the point of possession to the interval between the receipt of the police report regarding a probable breach of the peace, and the proceeding drawn up in June under s. 145, Criminal Procedure Code, on disposal of the inquiry under s. 107, Criminal Procedure Code. It will be further noticed that there is no decision regarding the persons who cut the wood; and this being the initial proceeding in the dispute, the enquiry appears to me defective and judgment thereon incomplete.

An additional enquiry, under the circumstances disclosed of one party cutting the timber, and the second removing it, as to possession *before* the actual cutting of the trees and opposition against entry or re-entry as the case may be, and order thereon, would appear to me more conformable to the law on this section of the Criminal Procedure Code as set forth in rulings subsequent to that relied on by the Joint Magistrate."

The case now came on for hearing before the High Court.

(1) I. L. R., 11 Calc., 865.

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Mr. *Woodroffe*, Mr. *Gasper*, Baboo *Grish Chunder Chowdhry* and Baboo *Pramatha Nath Sen* for the first party.

Mr. *Garth* and Baboo *Basanta Kumar Ghose* for the second party.

The judgment of the High Court (MITTER and TREVELYAN, JJ.) was as follows:—

The Magistrate in this case, following the decision in *Ambler* v. *Pushong* (1), has maintained the second party in possession of a piece of forest land. It appears not to be disputed that the right of possession upon the forest lands in question is exercised by cutting timber from time to time, and removing that timber, upon a certain price being paid therefor. It further appears that in Falgun last year (or March 1888), a number of trees was cut in the forest by labourers who had authority to do so either from the first party or the second party. It also appears that there was a disturbance of the peace consequent upon attempts being made by the parties respectively to remove the timber. The result was that on the 7th of June last, a lessee of the second party was bound down to keep the peace, and, on the 9th June, the present proceedings were instituted between the parties, the lessee not being made a party to these proceedings. All that the Magistrate finds in this case is this. He says: "It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died." Upon these two facts being found, the Magistrate came to the conclusion that the possession of the second party was established when these proceedings were instituted. Having regard to the nature of the property in dispute, these two facts, found in favour of the second party, could not constitute legal possession of the second party at the time the proceedings were instituted. The first

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party is entitled to assume that on the occasion preceding the one in which the dispute arose, his men were allowed to cut and remove timber in the forest without any disturbance of peace. There is evidence adduced by him on this point which has not been disbelieved by the Deputy Magistrate. He is, therefore, entitled to say that for the purposes of the question of law which has been raised before us, and for that purpose only, this fact should be assumed in his favour. If this contention be conceded, it seems to us to follow that what happened in March last could not have the effect of putting the first party out of possession; they would only be acts disturbing the possession of the first party. Having regard to the nature of the property in dispute, and the mode in which possession may be exercised over the property, we think that in order to find which party was in possession when the proceedings were instituted, it is necessary to enquire which party was in the undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one in which the dispute arose; and whichever party be found to have been in possession on that occasion, should be presumed to have possession at the time when the proceedings in this case commenced.

We desire to guard ourselves from being understood to express any opinion on the question of possession—that question is left to be decided by the Joint Magistrate. We simply make the assumption of fact, which the first party contended should be made, in order to decide whether the finding of the Joint Magistrate is sufficient *in law* to dispose of the case.

We set aside the order of the Joint Magistrate, and remit the record of the case to him, in order that it may be decided, on the evidence now on the record, with reference to the observations made above.

Order set aside and case remanded.

H. T. H.