

relief than that of a mere declaration. It is contended on their behalf that the land in suit was at the time of the institution of the suit lying waste and neither party was in possession of it, and therefore the plaintiffs need not have asked for possession. The only thing that stood in their way was an entry in the settlement of 1906, by which, owing to some mistake, the names of the defendants respondents had been entered in respect of the land in suit. The learned counsel in the course of his argument referred to the case of *Ramanuja v. Devanayaka* (1) in support of his contention. We do not think that the Madras case helps the plaintiffs at all. It is laid down there that under section 42 of the Specific Relief Act the Court should not make a declaration of title when the plaintiffs are able to seek further relief than a mere declaration and omit to do so. But it is said that if the plaintiffs had been in possession of the entire property and the defendants denied their title and required the plaintiffs to deliver possession to them, then the plaintiffs may claim a declaration of right to hold the property. In the present case the plaintiffs were admittedly out of possession and the defendants are obviously keeping them out of it. The plaintiffs, therefore, could have sued and ought to have sued for recovery of possession of the land in suit.

Our answer to the first question, therefore, is in the affirmative and to the second in the negative. As to costs we see no adequate reason why they should not follow the event.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.
EMPEROR v. NANHUA.*

*Criminal Procedure Code, sections 350 and 528—Transfer—Jurisdiction—
Power of court to which a case is transferred to act on evidence taken by
the court from which it came.*

Section 350 of the Code of Criminal Procedure is not limited to cases in which Magistrates succeed each other in office, but applies also to all cases transferred from the file of one Magistrate to that of another under section 528, Criminal Procedure Code. An order of commitment to the Court of Session passed by a Magistrate on evidence recorded by a bench of Magistrates from whose court it was transferred is not an illegal order.

* Criminal Reference No. 127 of 1914.

(1) (1885) I. L. R., 18 Mad., 361.

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ISHWARI
SINGH
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NARAIN DAT.

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EMPEROR
v.
NANHA.

Queen-Empress v. Bashir Khan (1) distinguished. *Emperor v. Angnu* (2) not followed. *Mohesh Chandra Saha v. Emperor* (3) and *Palaniandy Goundan v. Emperor* (4) followed.

THE facts of this case were as follows :—

A case was started against the accused in the court of a bench of magistrates exercising second class powers under section 324 of the Indian Penal Code. Evidence had been recorded by the bench, when the District Magistrate, acting under section 528 of the Code of Criminal Procedure, transferred the case to a magistrate having first class powers. The latter, acting on the evidence recorded by the bench, passed an order committing the accused to the Court of Session. The Sessions Judge, however, having doubts concerning the jurisdiction of the Magistrate who passed the order, referred the case to the High Court, recommending that the order of commitment should be quashed.

The Assistant Government Advocate (Mr. R. Malcomson) for the Crown.

The accused was not represented.

PIGGOTT, J.—This is a reference by the Sessions Judge of Budaun asking this Court to quash a commitment for trial to his court by a first class magistrate of that district. The learned Sessions Judge is of opinion that the order of commitment was made without jurisdiction and is consequently bad in law. It appears that the case was one in which action was first taken in respect of an alleged offence under section 324 of the Indian Penal Code. It was before a bench of magistrates exercising second class powers and not empowered to commit an accused person for trial to the Sessions. The District Magistrate, acting under section 528 of the Code of Criminal Procedure, transferred the case to a magistrate of the first class. The latter, acting on the evidence which had already been recorded by the bench of magistrates, framed a charge under section 326 of the Indian Penal Code and passed an order committing the accused for trial to the Court of Session. It does not appear that the accused demanded to have the witnesses, or any of them, resummoned and re-heard; the presumption is that they did not. The order complained of is an order of commitment,

(1) (1892) I. L. R., 14 All., 346. (3) (1908) I. L. R., 35 Calc., 457.

(2) Weekly Notes, 1889, p. 130. (4) (1908) I. L. R., 32 Mad., 218.

and it seems to me at least open to question whether the Sessions Judge had any concern with the nature of the evidence on the strength of which the committing magistrate had seen fit to pass the order. It certainly could not be said that the order was without jurisdiction after the committing magistrate had become duly seised of the case in consequence of the order under section 528 of the Code of Criminal Procedure. The Sessions Judge says that the provisions of section 350 would not override those of section 208 of the Criminal Procedure Code; but with this general proposition I am unable to agree. In any case section 350 of the Criminal Procedure Code undoubtedly applies to a magistrate "succeeding" within the meaning of that section, who may act upon the evidence recorded by his predecessor, and his action may take the form of framing a charge and committing the accused for trial. It has, however, been doubted whether section 350 of the Code of Criminal Procedure applies at all to cases which have been transferred from one court to another under section 528 of the Code of Criminal Procedure. In *Queen-Empress v. Bashir Khan* (1) a Judge of this Court seems to have assumed that for a magistrate to proceed after an order of transfer upon the evidence which he found already on the record was at least an irregularity. In that case, however, it was distinctly held that the accused had been prejudiced by the course adopted by the magistrate to whom the case had been transferred. In the present case, assuming that the evidence on the record, if true, does disclose the commission of an offence punishable under section 326 of the Indian Penal Code, it does not seem to me that the accused can be said to have been in any way prejudiced. The evidence will have to be taken before the Court of Session, and the accused will have every opportunity of cross-examining the witnesses for the prosecution before that court pronounces upon his guilt or innocence. There is one case of this Court which has been referred to by the learned Sessions Judge, namely, *Queen-Empress v. Angnu* (2), in which the view was taken that the provisions of section 350 of the Criminal Procedure Code would not apply at all to a case which came before another court under an order of transfer. This case, however, has recently been considered by a Bench of the Calcutta High Court in

(1) (1892) L. L. R., 14 All., 346.

(2) Weekly Notes, 1899, p. 130.

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Mohesh Chandra Saha v. Emperor (1), where the Allahabad ruling was dissented from, and it was expressly laid down that section 350 of the Criminal Procedure Code is not limited to cases in which magistrates succeed each other in their offices, but applies also to all cases transferred from the file of one magistrate to that of another under section 528 of the Criminal Procedure Code. This case has been followed in *Palaniandy Goundan v. Emperor* (2), where stress is laid upon the use of the word "therein" in section 350 aforesaid. I am content to follow these rulings, more particularly in a case like the present, where, as I have already pointed out, no possible question of prejudice to the accused person can be said to arise. I accordingly decline to accede to the reference of the learned Sessions Judge and order the record to be returned.

Commitment upheld.

APPELLATE CIVIL.

1914

March, 24.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

KANIZ FATIMA BEGAM (DECREE-HOLDER), v. SAQINA BIBI AND OTHERS
(JUDGEMENT-DEBTORS)*

Act No. XXIII of 1871 (Pensions Act), section 11—Pension—Grant of land by Government—Sanad—Construction of document—Execution of decree—Civil Procedure Code (1908), section 60 (g).

The Government "for political considerations" granted certain property to the original grantee for life and to his descendants as an absolute estate. *Held* that such grant did not constitute a political pension within the meaning of section 60 (g) of the Code of Civil Procedure, and that the land so granted was not exempt from attachment and sale in execution of a decree.

Held also that the rights of the parties to whom the grant had been made by the Government must be determined by reference to the original *sanad* conferring title on the grantee and his descendants, and the opinions expressed by certain Revenue Officers as to its meaning were irrelevant on a question of the construction of the document. *Lachmi Narain v. Makund Singh* (3) and *Anna Bibi v. Najm-un-nissa* (4) followed.

THE facts of the case are as follows :—

One Musammat Kaniz Fatima Begam obtained a decree against her husband Ghulam Mohiuddin Ashraf Khan in lieu of her dower.

* First Appeal No. 24 of 1913 from a decree of Hedayat Ali, Officiating Subordinate Judge of Gorakhpur, dated the 12th of October, 1912.

(1) (1908) I. L. R., 35 Cal., 457. (3) (1904) I. L. R., 26 All., 617.
(2) (1908) I. L. R., 32 Mad., 218. (4) (1909) I. L. R., 31 All., 392.