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directing partition of the houses and shops. Possibly this may not make much difference to them, because the plaintiff was obliged from the very nature of this suit to bring in the houses which the defendants say had been given to him upon his separation. Possibly as the result of our decision in the present case the parties may think that, notwithstanding the decree passed by the court below, it is more desirable that each party should retain the houses which they had before the institution of the suit. Objections have been filed on behalf of the defendants that the court below ought to have awarded them costs. We think that the probabilities are that the suit was really instituted for the purpose of getting a share in the business and would not have been instituted merely for partition of the houses and shops. As, however, the respondents have submitted to the decree in this respect, we think that we cannot now award to the defendants their costs in the court below, but we leave those costs to be dealt with as the court below shall deem just and equitable. The order of the Court is that we dismiss the appeal with costs. We allow the objection of the respondents to this extent that we direct that the costs in the court below, including the costs of the first hearing, shall be in the discretion of the court making the final decree for partition. When awarding costs the court may take into consideration whether or not it should allow the defendants the costs of the fee of Maulvi Shafi-ul-lab, pleader, provided that the fee was taxable according to the rules in force at the time of the decision of the case.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Lindsay.*

EMPEROR v. TULLA AND OTHERS\*

*Act No. III of 1867 (Public Gambling Act), sections 3, 4—Common gaming house—Order for confiscation of money found on the persons of accused.*

In the case of men convicted under section 3 or 4 of the Public Gambling Act, 1867, the law does not contemplate the confiscation of money found on the persons of the accused: *Emperor v. Malurwa* (1) referred to.

\* Criminal Reference No. 14 of 1919.

(1) (1918) I. L. R., 40 All., 517.

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THIS was a reference made by the Sessions Judge of Saharanpur in a case under sections 3 and 4 of the Public Gambling Act, 1867. The facts of the case appear from the following order.

The parties were not represented.

*Referring Order.*

" Ballu, the appellant here, and Tulla, Mahabir and Shankar, the applicants in revision No. 65, were convicted at the same trial. I therefore dispose of appeal and application together.

" Ballu has been sentenced to six months under section 3 and two months under section 4 of the Gambling Act; eight months in all. The other applicants have received non-appealable sentences under section 4.

" The facts found in the case, which are proved by the evidence of Sub-Inspector Khuda Nur Khan, Muhammad Bakhsh, Mara and Imam-ud-din are fully described in one of the opening paragraphs of the learned Magistrate's judgment. I concur in the learned Magistrate's finding.

" There is no doubt that a dozen men were found gambling at 10 in the morning in the house of the appellant, Ballu. The appellant was sitting with the gamblers and had beside him an earthen pot, in which were a quantity of pice aggregating Rs. 3-14-3 in value. Obviously, the odds are that this money represented the percentages so far accumulated for the benefit of the owner of the house. The assembly does not, on the face of it, appear to have been a mere friendly party of Ballu's assembled for a friendly gamble. The applicants' own pleader indeed pointed out that one of his clients Mahabir has reason to be rather ill disposed to Ballu than friendly with him. Had it been so, it was easy for any of the twelve accused persons to raise that plea. Not one, however, not even Ballu himself, made any such suggestion. Apart entirely, therefore, from the presumption which arises when a house is legally searched on a legal warrant issued under the Act, the circumstances leave in my opinion no reasonable doubt that the appellant's house was, under his own supervision, being used at the time when the police raided it as a common gaming house.

" The three applicants were obviously there for the purpose of gambling. No other possible reason for their presence appears

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and as gambling was going on in the room where they were found, I have no doubt that they were taking part in it.

“ There is no direct evidence that Ballu was gambling, but Rs. 40 which were found in a heap of fuel, having evidently been thrown there when the police rushed in are claimed by him, and are not likely to have formed part of his percentage. I have, therefore, no doubt that he was gambling with this money and he has been rightly convicted under both sections. Nor do I consider that there was any illegality in trying him under both sections in one trial.

“ The plea that there being a Police Inspector in Saharanpur the search would not legally be made by a Sub-Inspector is, if there would otherwise be force in it, disposed of by the amendment introduced into para. 295 of the New Police Regulations.

“ All the applicants have been previously convicted, and have therefore been properly sentenced to imprisonment. The appellant Ballu has many previous convictions, and is clearly an incorrigible nuisance to the community. The only matter which calls for interference is the order of the learned Magistrate that the money found on the spot and on the persons of the accused will be confiscated.

“ The case of *Emperor v. Malurwa* (1) reported from this district in March last and which followed *Emperor v. Tota* (2) is clear authority against such an order.

“ The case, therefore, after taking any explanation which the learned Magistrate may wish to submit will be reported to the Hon'ble High Court with the recommendation that the above order of confiscation be set aside. With this exception, I dismiss the appeal and the application.”

LINDSAY, J.:—This case has been referred by the Session Judge of Saharanpur for the purposes of having an order passed by a Magistrate set aside. The Magistrate was dealing with a case under the Gambling Act and after convicting the persons who were accused before him he made an order confiscating some of the money which was found in possession of the persons concerned. The Judge, I think, is right in saying that the law does not

contemplate the confiscation of the money found on the person of the accused. He refers to a ruling of this Court, *Emperor v. Maturwa* (1). I accept the recommendation of the learned Judge and direct that the order of confiscation be set aside.

*Recommendation accepted.*

[But Cf. *Emperor v. Kifayat*, I. L. R., 41 All., 272, where a distinction is drawn between a conviction under section 3 or 4 and conviction under section 13. Ed.]

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## APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir  
Prmada Charan Banerji.*

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January, 15.

SURAJ KUMAR (PLAINTIFF) v. CHET RAM AND OTHERS (DEFENDANTS\*).

*Act (Local) No. II of 1901 (Agra Tenancy Act), sections 142 and 199—  
Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—  
Distrain for arrears of rent—Suit to contest distrain—Subsequent suit  
by mortgagee for possession of property mortgaged—Res judicata.*

A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors. Subsequently the lessor distrained for rent due under the lease. The lessees instituted a suit under section 142 of the Agra Tenancy Act, disputing the validity of the distrain on the ground that the mortgage debt had been discharged and the lease had therefore come to an end. In this suit the Court of Revenue found that the mortgage had been discharged. Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted.

*Held* that the decision of the Court of Revenue could not operate as *res judicata*. Section 199 of the Agra Tenancy Act, 1901, did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by a landlord against a tenant.

THE facts of this case were as follows :—

The defendants made a usufructuary mortgage of their zamindari in favour of the plaintiff; and the plaintiff then leased the mortgaged property to the defendants. The rent due under the lease being in arrears, the plaintiff issued a distrain for it. The defendants replied by filing a suit under section 142 of the Agra Tenancy Act, in which they alleged that the mortgage debt had been paid off, and the lease had in consequence had come to an

\*First Appeal No. 278 of 1916, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 8th of May, 1916.