to us to be peculiarly appropriate. To hold otherwise, that is to say, to hold in cases of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and to destroy the liability if such evidence is not forthcoming, would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.

We are prepared to hold in this and similar cases that, in the absence of evidence tending to shake confidence in the transactions themselves, or in the conduct and care of the manager or of the creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. We might add to the observations of LORD BUCKMASTER that to hold otherwise is to hold out to litigants the deliberate invitation, one might use the word temptation, to attempt to conform to an impossible standard of evidence by calling direct testimony which must of necessity be valueless and frequently deliberately perjured. There is enough of this sort of thing in the trial courts, as it is, without any further encouragement being given to it by us. Taking a broad view, although there are exceptions to every rule, we ourselves are not prepared to call upon the creditor to trace every rupee in a transaction which, broadly speaking, is obviously honest and properly entered into. We think that the creditor has done all that he was required to do by the decisions of the Privy Council in this matter, that the learned Judge has come to a right conclusion, and that this appeal must be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Piggott.

EMPEROR *v.* KHIALI AND ANOTHER.*

1922
June, 16.

Criminal Procedure Code, section 421—Appeal—Petition from jail rejected—Petition presented thereafter through counsel not entertainable.

Where a petition of appeal submitted through the Superintendent of the jail in which the appellant is confined has been considered and rejected by a Judge of the High Court, it is not open to the appellant thereafter to present through counsel a second petition of appeal. *Queen-Empress* v. *Bhimappa* (1) referred to. *Hulai* v. *Emperor* (2) not followed.

* Criminal Appeal No. 303 of 1922, from an order of Pratap Singh, Additional Sessions Judge of Aligarh, dated the 4th of April, 1922.

(1) (1894) I. L. R., 19 Bom., 732.

(2) (1915) 36 Indian Cases, 133.

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THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellants.

The Government Pleader (Munshi *Sankar Saran*), for the Crown.

MEARS, C. J. and PIGGOTT, J. :—On the 4th of April, 1922, the court of the Additional Sessions Judge at Aligarh, sitting at Etah, convicted two men, Khiali and Hulasi, on a charge under section 395 of the Indian Penal Code, and passed upon them substantial sentences of imprisonment and fines. On the 12th of April, 1922, both Khiali and Hulasi caused to be prepared in the jail in which they were confined petitions of appeal against their convictions and the sentences passed upon them. Those petitions of appeal reached this Court on the 15th of April, 1922. Having been examined and reported upon by a ministerial officer of this Court, they were laid before a Judge of this Court on the 20th of April, 1922. On the day following, the Judge in question, dealing with the petitions of appeal under section 421 of the Code of Criminal Procedure, dismissed both the appeals of Khiali and Hulasi summarily.

On the 1st of May, 1922, counsel having been instructed on behalf of Khiali and Hulasi, brought for presentation to this Court a petition of appeal, which was submitted to a ministerial officer of this Court for report. In the report thereupon prepared, attention was drawn to the fact that petitions of appeal from Khiali and Hulasi had been received through the Superintendent of the Jail, and summarily dismissed by a Judge of this Court. Counsel for Khiali and Hulasi seems to have taken a little time to consider his position, but finally presented a fresh petition of appeal on the 8th of May, 1922. The Judge, before whom this petition was presented, passed an order, dated the 10th of May, 1922, in which he referred to a previous decision of this Court and directed that the petition of appeal should be laid before a Bench of two Judges for consideration.

We are asked expressly to determine the question whether this second petition of appeal, on behalf of Khiali and Hulasi, is entertainable in view of the order of the 21st of April, 1922, summarily dismissing the petitions of appeal received through the Superintendent of the Jail.

The earlier case of this Court is that of *Emperor* v. *Bhawani Dihal* (1). The facts of that case are clearly distinguishable from those now before us. A petition of appeal had been received by a Sessions Judge, through the Superintendent of the Jail in which the appellant was confined, and while that petition was still pending and undisposed of in the Sessions Court, the same appellant presented a second petition of appeal through counsel. Apparently, overlooking this fact, the Sessions Judge, first of all, summarily dismissed the petition which had been received through the Superintendent of the Jail, and then proceeded further, on the strength of this order, to dismiss the petition filed through counsel, without having even offered the counsel concerned an opportunity of arguing the same. A learned Judge of this Court held that this procedure was illegal and, setting aside the order of dismissal, directed the Sessions Judge to readmit the appeal of that particular convict and to dispose of it according to law after hearing counsel. The point of that decision obviously is that, when once a petition of appeal has been filed through counsel under section 419 of the Code of Criminal Procedure, it is improper to dismiss the appeal summarily at all, and an order summarily dismissing an appeal while there is a petition presented through counsel pending and undisposed of on the file of the Court, would be nonetheless an improper order, because it happened that another petition of appeal in the same matter from the same convict had been received through the Superintendent of the Jail. In the case now before us, the order summarily dismissing the petitions of appeal presented on behalf of Khiali and Hulasi through the Superintendent of the Jail in which they were confined was a valid and proper order, there being on the file of this Court on that day no petition of appeal other than the two petitions received through the Superintendent of the Jail. The right of appeal allowed to Khiali and Hulasi against their conviction by the Sessions Judge and sentences passed upon them has, therefore, been fully exercised according to law, and their appeals have been disposed of by a proper and valid order of this Court, before the petition of appeal with which we are now dealing was ever presented to the Court at all. The objection is not to the presentation of more than one petition of appeal by or on

(1) Weekly Notes, 1906, p. 303.

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behalf of the same convict, but to the obtaining from this Court of more than one judicial determination upon the question raised by the appeal. In our opinion this application is not entertainable.

We have been referred in argument to one case, which has not found its way into any of the authorized reports, but which certainly is an authority in favour of these appellants. The case is that of *Hulai* v. *Emperor* (1). In that case Mr. Justice LINDSAY, then Judicial Commissioner of Oudh, had before him the order of a Sessions Judge dismissing an appeal which had been presented through counsel, on the ground that a previous petition of appeal in the same matter received through the Superintendent of the Jail had been summarily dismissed. Mr. LINDSAY set aside the order of the Sessions Judge for reasons stated in the report. He there refers to the case of *Emperor* v. *Bhawani Dihal* (2), but does not note the distinction in the facts to which we have referred. As regards the reference which Mr. LINDSAY makes to his recollection of a previous decision of the same Court, we believe the facts to be that the learned Judge of the Oudh Court, who had previously summarily dismissed an appeal, found it possible under the circumstances to review and set aside his own order, before the appeal presented through counsel was heard or permitted to be argued. There is no such question arising in the present case and we need not consider under what circumstances, if any, it would be possible for a Judge of this Court to reconsider a final judgment of his own, delivered in a criminal matter. There is one case in the authorized Law Reports which is entirely in accordance with the view which we ourselves are disposed to take, and that is the case of *Queen-Empress* v. *Bhimappa* (3). It was there distinctly held that an order dismissing an appeal, under section 421 of the Code of Criminal Procedure, was a final order, not open to review by the Court which passed the same, and that a Sessions Judge had acted without jurisdiction when, having reconsidered a question of limitation he proceeded to hear and decide in a different sense an appeal which he had previously dismissed. In our opinion the appellants, Khiali and Hulasi, are not entitled to be heard upon a petition of appeal presented after their original petitions of

(1) (1915) 36 Indian Cases, 133.
(2) Weekly Notes, 1906, p. 303.
(3) (1894) I. L. R., 19 Bom., 732.

appeal, received through the Superintendent of the Jail, had been finally disposed of according to law by the order of a Judge of this Court. We reject this petition of appeal accordingly.

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Appeal rejected.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1922 *June*, 21.

SRI GANGAJI COTTON MILLS COMPANY LD. (PLAINTIFFS) *v.* EAST INDIAN RAILWAY COMPANY (DEFENDANTS).*

Railway—Suit for compensation in respect of goods damaged in transit—Suit brought against one company only out of several over whose lines the goods passed—Offer of compensation made unconditionally by one of the railway companies concerned—Refusal to take delivery on refusal of railway to record damaged condition—Right of sale of goods thereafter.

Certain bales of cotton were despatched from Jaipur to Mirzapur, where they arrived in a more or less damaged condition. In the course of transit the goods passed over parts of four separate railway systems. On the arrival of the goods at Mirzapur, the consignees demanded that the local railway (East Indian Railway) officials should make a record of their condition, and on these officials refusing to do so, declined to take delivery. The question of the amount of damage was inquired into by certain of the higher railway officials and the consignees were offered compensation, first at the rate of Rs. 10 and afterwards at the rate of Rs. 20 per bale. The consignees refused to accept either offer and refused to remove the goods, and these were ultimately sold by the Railway authorities. The consignees then sued the East Indian Railway Company alone, claiming heavy damages on account of the alleged illegal sale of their property and also on account of injury to the same as above described.

Held (1) that the defendants were acting within their rights in selling the goods when the consignees would not take delivery, and (2) that, although the plaintiffs would not ordinarily be entitled to a decree against the defendants, who were not the railway company to whom the goods were delivered by the consignor, unless they could show that the goods suffered damage whilst in their custody, on the other hand the defendants had not, in offering to compensate the plaintiffs, protected themselves by making their offers "without prejudice," and they must therefore be held liable to the extent of the higher offer made.

But, in view of their conduct throughout, the plaintiffs were directed to pay the whole costs of the defendants.

The facts of this case fully appear from the judgment of LINDSAY, J.

LINDSAY, J. :—The suit which has given rise to this appeal was brought against the East Indian Railway Company by the Sri Gangaji Cotton Mills Company Limited, carrying on business at Mirzapur, and the claim was for Rs. 23,980-8-6 plus interest at Rs. 6 per cent. per annum, making a total of Rs. 25,363-6-6.

* First Appeal No. 111 of 1920, from a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 31st of January, 1920.