There is a clear analogy between the case now under our consideration and that of *Byng* v. *Lord Strafford* (1).

Mrs. Marten the testatrix created in clear words two life-estates in equal shares of the property bequeathed. After their determination she chose first the children or grandchildren of the deceased son; secondly the children or grandchildren of the surviving son, then the surviving son and, finally, the widows of both the sons. She, therefore, as in *Byng* v. *Lord Strafford*, (1) had in view a succession of legatees or interests after the first in the series.

In both cases the gift to the eldest son of George Byng and to Frederick William Marten was not limited as was the original bequest by the words "for life" or any equivalent words.

We are, therefore, of opinion that although the testatrix may have intended to create a succession of life-estates, she has nevertheless failed to use words imposing any restriction and, therefore, the ordinary rule in such cases must be implied and the share of the estate which came to Frederick William on the death of his brother, must be declared to be an absolute one.

We, therefore, affirm the decision of the lower court and dismiss the appeal with costs. From the costs incurred by the respondent in printing the paper book two-thirds should be disallowed on the ground that evidence irrelevant to this appeal was included.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

EMPEROR *v.* O. DUNN.*

1922 *February*, 17.

Criminal Procedure Code, section 423—Revision—Powers of High Court—Power to order expunction of remarks from judgments of lower courts when such judgments are not directly before the High Court by way of appeal or revision.

The High Court has no power to expunge from the judgments of lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses, in cases in which the effective orders of the courts are not before the High Court either in appeal or on revision. *Mehi Singh* v. *Mangal Khandu* (2)

* Criminal Reference, No 743 of 1921.

(1) (1843) 5 Beavan, 558. (2) (1911) I. L. R., 39 Calc., 157.

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Emperor v. *Ram Piyari* (1), *Abadi Begam* v. *Ali Husen* (2) and *Gopi Nath* v. *Emperor* (3) referred to. *Baroda Nath Bhattachariya* v. *Karait Sheikh* (4), *Ma Kaya* v. *Kin Lat Gyi* (5), *Emperor* v. *Thomas Pellako* (6) and *Lachchu* v. *Emperor* (7) distinguished.

THE facts of these cases sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor*, for the applicants in revision.

Babu *Satya Chandra Mukerji*, for the applicant in the reference.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the Crown.

GOKUL PRASAD and STUART, JJ. :—We have before us Criminal Reference No. 747 of 1921 from the Sessions Judge of Benares, and Criminal Revisions Nos. 16 and 17 of 1922. The same point arises in all: "Has the High Court authority to expunge from the judgments of lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses in cases in which the effective orders of the courts are not before the High Court either in appeal or on revision?" In the reference, the station-master of Benares Cantonment took exception to remarks reflecting upon himself made by a Magistrate at Benares in a judgment in a criminal case. In that case the accused persons were acquitted. The station-master appeared as a witness for the defence The Magistrate, while finding that the evidence did not justify a conviction, disbelieved the station-master in certain particulars. We have it that the learned Sessions Judge believed the station-master to be telling the truth —a circumstance which goes far to remove the sting of the remarks made by the Magistrate.

In the two applications in revision, a business man and a vakil gave evidence for the prosecution in a case under section 409 of the Indian Penal Code in the Gorakhpur district. The Magistrate found that no charge under section 409 could lie on the facts, and dismissed the case acquitting the accused persons. He commented severely upon the two applicants, holding that they had been disingenuous and acted with malice while giving their

(1) (1909) I. L. R., 32 All., 153
(2) Weekly Notes, 1897, p. 26.
(3) (1906) 3 A. L. J., 770.
(4) (1898) 2 C. W. N., p. cclvi (Journal).
(5) (1911) 11 Indian Cases, 1000.
(6) (1911) 14 Indian Cases, 643
(7) (1914) 24 Indian Cases, 156.

evidence. We are informed that the District Magistrate did not agree with the magistrate who tried the case upon these points and that he desired to appeal against the acquittal. The authorities, however, refused to appeal.

These applications have been made with the intention of removing the remarks from the record to which the applicants object.

We have first to consider whether we have any authority to give the applicants the relief which they desire. Our procedure in criminal cases is to be found, except in regard to cases brought before the High Court in the exercise of its ordinary original criminal jurisdiction, in the Code of Criminal Procedure (Act V of 1898). This is clear from section 29 of the Letters Patent of this Court. We have, therefore, to examine the Criminal Procedure Code in order to discover whether it gives any authority.

It has been brought to our notice that other High Courts and Chief Courts and Judicial Commissioners' Courts have ordered portions of a record to be expunged, and it is argued that the fact that they did so affords authority for us to do so.

We are referred, first, to the case of *Baroda Nath Bhattacharjya* v. *Karait Sheikh* (1). There the Registrar of the Court was directed to expunge from a judgment of the Sessions Judge remarks which reflected on the Local Government, the District Magistrate and the Deputy Magistrate.

In 1911 TWOMEY, J., of the Lower Burma Chief Court, in the case of *Ma Kaya* v. *Kin Lat Gyi* (2) held that he had the power to order passages to be expunged from a judgment, but refused to use it.

In another case of the same Chief Court, *Emperor* v. *Thomas Pellako* (3), the presiding Judge directed passages to be expunged from a judgment.

In *Lachchu* v. *Emperor* (4) the Judicial Commissioner of Oudh directed a passage, which reflected upon the conduct of a counsel, to be expunged from the judgment.

It will be seen that in none of these decisions did the Court direct itself to the question as to whether it had any authority to pass such an order or whence it derived that authority. The

(1) (1898) 2 C. W. N., p cclvi (Journal).
(2) (1911) 11 Indian Cases, 1000.
(3) (1911) 14 Indian Cases, 643.
(4) (1914) 24 Indian Cases, 156.

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cases are, however, not on all fours with the cases before us. There is no appeal before us. The circumstances in the cases before us are different from the circumstances in the cases to which we have referred, for in those cases the Courts were adjudicating on final orders in appeal. We sent for the records to satisfy ourselves as to the regularity of the proceedings of the courts in question. We may say *in limine* that the proceedings were perfectly regular. The matters having, however, come before us under section 435, we can exercise the powers given by section 439. Those are the powers conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428, or on a Court by section 338, subject to certain qualifications, one of which is that a finding of acquittal cannot be turned into one of conviction under section 439. None of these sections can be invoked except section 423, and we have to see whether section 423 has application. Section 423 lays down in respect of appeals that, in an appeal from an order of acquittal, the court may reverse that order. It may then take action towards further inquiry or towards a re-trial or may find the person acquitted guilty and sentence him. It lays down that in an appeal from a conviction the court may reverse the finding. If the finding is reversed, the sentence is necessarily set aside. Then the court may acquit or discharge the accused or direct his re-trial or commit him for trial. It may uphold the finding. In the latter case, there remains the sentence. When the finding is upheld, the sentence may be altered. The finding may be altered. If that is the case, the sentence may be maintained or altered, and if the finding be upheld, the nature of the sentence may be altered, but the alteration must not result in an enhancement. The section proceeds to lay down that in an appeal from any other order the court may alter or reverse such order. This exhausts sub-sections (*a*), (*b*) and (*c*). They have clearly no bearing upon the present matters. Then follows the sub-section (*d*). "The court may make any amendment or any consequential or incidental order that may be just or proper."

The nature of consequential or incidental orders under this sub-section was discussed by a Full Bench of the Calcutta High Court in *Mehi Singh* v. *Mangal Khanda* (1). That Full Bench

(1) (1911) I. L. R., 39 Calc., 157.

considered that the only consequential or incidental orders within the purview of the provision were orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective (such as directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under section 250) for which no separate authority is needed, and orders which, though ancillary in character, require more than the support of a criminal court's inherent jurisdiction and could not be passed without express authority. We agree generally with the view taken in the Calcutta decision, and, on that view, the order which we are asked to pass is not a consequential or incidental order. It cannot be said on this interpretation that the expunging of remarks from the record which reflect on certain witnesses is a consequential or incidental order. Such expunction would, in no sense, be consequent on or incident to the effective order of the court below, which in these cases is contained in the finding of acquittal. It remains to be considered whether, if we do what we are asked to do, we can bring our action within the scope of our authority by regarding such an alteration as an amendment which may be just or proper. It has been argued strenuously before us,—we have had the advantage of hearing the arguments of two of the most experienced counsel at the Bar,—that the word 'amendment' as used in this sub-section confers a very wide power upon the Court and that we can without scruple consider the provision, which allows us to make any amendment that may be just or proper, authority for expunging the remarks to which exception is taken. We are unable to accept that view. We can read the word 'amendment' only to mean in this connection amendment of an effective order of the court below. Here the effective order is the order of acquittal. It is impossible for us to amend that on these applications. We are debarred from interfering in any way with the effective order, for the reason that we are not asked to question the acquittals. Thus there is nothing which we can amend in the effective orders. In support of the view which we take to the effect that the word 'amendment' means amendment of an effective order, we refer to a decision of a Bench of this

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Court, *Emperor* v. *Ram Piyari* (1), where a woman was convicted under section 325 of the Indian Penal Code and sentenced to a month's imprisonment. The matter came before the Additional Sessions Judge in revision. The parties then applied to compound the case. The case could not be compounded under section 345 (5) of the Code of Criminal Procedure, but when the matter came up to the High Court, it was held that the High Court had authority under section 423 (*d*) of the Code of Criminal Procedure, to amend the order of conviction by substituting for it an order that the offence should be compromised. Such an order, it is to be noted, does not have the effect of an acquittal. There is no provision in sub-sections (*a*), (*b*) and (*c*) for converting an order of conviction into an order permitting a compromise. Sub-section (*d*) clearly covered the case and gave authority for the action taken by way of amendment. The amendment was an amendment of the effective order of the court below. Similarly, in *Abadi Begam* v. *Ali Husen* (2), a Bench of this Court altered an order of the Sessions Judge in which he had directed certain property to be handed over to the Magistrate as unclaimed property by directing that the Magistrate should dispose of the property according to law. At that time the clause in question had not come into existence, but the view taken in that application was accepted by the Bench in *Emperor* v. *Ram Piyari* (1). There is also a decision of STANLEY, C. J., in *Gopi Nath* v. *Emperor* (3), in which he upheld an order of the Sessions Judge directing a greater amount of property to be restored to the complainant than the amount restored by the trial court. He acted under the authority of section 423 (*d*). He appears to have considered that he was making a consequential or incidental order, but we should have considered that he was rather amending an effective order of the court below.

All these decisions go to support the view, which we should have held in the absence of authority, that the word 'amendment' in this connection can only mean amendment of an effective order of the court below, and that the existence of the provision cannot give us authority to amend the judgments of lower courts by expunging passages which do not commend themselves to us in

(1) (1909) I. L. R., 32 All., 153. (2) Weekly Notes, 1897, p. 26.
(3) (1906) 3 A. L. J., 770.

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cases in which we have no authority to interfere with the effective orders passed by the courts. We are unable to find that this Court has any authority in such circumstances. This view was taken by one of us in Criminal Reference *Chattara* v. *Basdeo Sahai and others*, decided on the 4th of October, 1920. If it be held that the grievances of persons who are unjustly criticized by courts of law in circumstances which obviate the effective orders of the courts coming before superior courts in appeal or revision, are so great as to require a special enactment for their protection, the matter is one for the consideration of the Legislature, but as the law stands, we are satisfied that we have no authority. We, therefore, dismiss these applications.

Applications dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

JIWA RAM (PLAINTIFF) *v.* NAND RAM (DEFENDANT).*

1922
February, 21.

Civil Procedure Code (1908), *sections* 141 *and* 144—*Proceedings for restitution of benefits derived from a decree reversed on appeal—Application dismissed for default but subsequently restored—Execution of decree.*

Held that, proceedings under section 144 of the Code of Civil Procedure not being proceedings in execution, the provisions of section 141 of the Code apply to them.

Somasundaram Pillai v. *Chokkalingam Pillai* (1) dissented from.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Panna Lal*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—This is an appeal against an order of the Subordinate Judge of Aligarh, passed in certain proceedings taken under section 144 of the Code of Civil Procedure for the purpose of obtaining restitution.

The facts are as follows :—One Gobardhan Das died in the month of August, 1900, leaving two widows, Musammat Rupo and Musammat Singhari.

* First Appeal No. 350 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 14th of June, 1919.

(1) (1916) I. L. R., 40 Mad., 780.