specified part. For these reasons I accept the application, set aside the order of the court below, and direct MUHAMMADI that the applicant be acquitted and that the fine if paid MCNICIPAL be remitted.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice.

EMPEROR v. PUTTU LAL.*

Excise Act (Local Act IV of 1910), section 64 (c)—Breach of condition of licence—Closing shop during selling hours.

Where a general condition in the licence for a liquor shop fixed the hours for opening and closing of the shop and enjoined that the shop should not be kept open at any other hour, it was *held* that the object of the condition was to prevent the sale of liquor outside the fixed hours, and that it could not be interpreted as meaning that at no time between the two specified limits the shop should be closed, even temporarily.

The applicant was not represented.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

SULAIMAN, A. C. J.:—This is a reference against an order convicting the accused under section 64(c) of the Excise Act (Act IV of 1910), for having broken one of the conditions of his licence.

When the Excise Inspector went to inspect his shop, he found it closed. When questioned later, the accused alleged that he had gone to a warehouse to bring four gallons of liquor which were entered in his register. The learned Magistrate infers that it was not a case of temporary absence, but of the closing of the shop on account of picketing. He accordingly convicted the accused and sentenced him to pay a fine of Rs. 50. The Sessions Judge has recommended that either the conviction be set aside or the fine be reduced to Rs. 5.

The fourth general condition in the licence applicable to all licences is in the following terms: "The orders for the opening and closing of the shops have

1981 May, 26. 1931 been fixed as follows. It is necessary that shops should Exercises not be kept open at any other hour.'' It is noteworthy form for that the condition does not say that the shop should

not, on any account, be closed during these hours.

It seems to me that the object of this condition is to prevent the sale of liquor outside the fixed hours. This condition cannot be interpreted as meaning that at no time between these two limits the shop should be closed, even temporarily. If that be the intention of the authorities, they ought to lay down the condition in more express terms.

In my opinion there was no breach of the condition in the licence. I accordingly accept this reference and setting aside the conviction and sentence, acquit the accused and direct that the fine, if paid, be refunded.

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Young and Mr. Justice King.

1931 June, 5. MUNICIPAL BOARD, BENARES (PLAINTIFF) v. KANHAIYA LAL and others (Defendants).*

Custom—Whether question of fact or of mixed law and fact-Second appeal—Civil Procedure Code, section 100—Substantial error or defect in procedure—Misreading or ignoring of important documentary evidence—Haq-ichaharum—Custom in Benares city.

A finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law.

A finding that it is not proved that owners of houses in a certain locality have usually, upon occasions of the sale of their houses, paid zar-i-chaharum to the owner of the site is a finding of fact, binding upon the High Court in second

^{*} Second Appeal No. 1812 of 1926, from a decree of K. A. H. Sams District Judge of Benares, dated the 5th of May, 1926, confirming a decrec of Ninaj Nath Mukerji, City Munsif of Benares. dated the 1st of June. 1925.