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 PITAM LAL
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obvious that there was nothing to prevent the applicant from withdrawing this application and filing a fresh application as soon as the new Act came into force. Having given the case our best consideration we think that the rule laid down in *Gokul Chand v. Mangal Sen* (1) should be followed.

Our answer to the first question is therefore in the affirmative.

In our opinion the fact that the substance of the oral will was taken down at the time the will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral will.

REVISIONAL CRIMINAL.

Before Mr. Justice Pullan.

RASHID AHMAD v. S. F. RICH.*

1931
 March, 3.

Criminal Procedure Code, sections 213(2) and 446—European British subject—Special proceedings under chapter XXXIII—Charge framed by Magistrate—Subsequent discharge by Magistrate illegal—Magistrate must commit to court of session.

When an order has been passed under section 443 of the Criminal Procedure Code that a case against an European British subject be tried under the provisions of chapter XXXIII of the Code, the powers of the Magistrate are limited by section 446. Section 446 takes away from the Magistrate, in cases tried under the special provisions of chapter XXXIII, the powers given him under section 213(2). So, if the Magistrate has framed a charge against the accused person, the Magistrate can not thereafter cancel the charge and discharge him, but must commit him to the court of session.

Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *P. L. Banerji*, for the opposite party.

The Assistant Government Advocate (*Dr. M. Wali-ullah*), for the Crown.

*Criminal Reference No. 892 of 1930.

(1) (1903) I.L.R., 25 All., 313.

PULLAN, J. :—This is a reference made by the learned Sessions Judge of Meerut, asking this Court to set aside the order of discharge passed by a Magistrate of the first class in the case of one Mr. S. F. Rich, who had been charged with offences under sections 409 and 420 of the Indian Penal Code. This Mr. Rich claimed to be tried as a European British subject under the special provisions of chapter XXXIII of the Code of Criminal Procedure. After he had made that claim and after an order had been passed under section 443 directing that he should be tried under those special provisions, a charge was framed against him by the Magistrate. The powers of a Magistrate when an order has been passed under section 443 of the Code are strictly limited by section 446. In that section it is laid down that the Magistrate inquiring into or trying a case shall, if he does not discharge the accused under section 209 or section 253 as the case may be, commit the case for trial to the court of session. This section appears to me to take away from the Magistrate the powers given him under section 213(2) of the Code of Criminal Procedure, in cases which are to be tried under the special provisions of chapter XXXIII of that Code. The same view was expressed by Mr. Justice DALAL in the case of *Emperon v. Banarsi Das* (1), but that case cannot be taken as an authority, because in so far as the observations of the learned Judge referred to a European British subject they were *obiter*. Thus, as far as I know, there is no authority to guide the Court in this matter. But the words of section 446 are, in my opinion, sufficiently clear. It has been argued before me that on this interpretation of the Code a person who has claimed a right to be tried as a European British subject has forfeited another valuable right, namely, a right to have a charge against him cancelled if in the opinion of the Magistrate there is not a sufficient case to justify a commitment. This may be so, but whatever may have been the intention of the

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(1) (1928) I.L.R., 51 All., 483.

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legislature in framing section 446, I am satisfied that the effect of that section is to debar a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried under the provisions of chapter XXXIII as a European British subject, and whose claim to be so tried has been upheld by a competent court under section 443 of the Code. I accept this reference, set aside the order of discharge made by the Magistrate and direct that the Magistrate or his successor in office shall commit this case to the sessions.

Before Mr. Justice King.

EMPEROR v. RAM GHULAM*

1931
March, 8.

Criminal Procedure Code, sections 231, 347—Alteration of charge—Right to recall witnesses—Original charge triable by Magistrate—Charge altered by Magistrate on conclusion of trial and accused committed to sessions—No opportunity given to accused for further cross-examination or for production of further witnesses—Legality of procedure.

A Magistrate tried a case started on a complaint under section 363 of the Indian Penal Code. A charge was framed under that section. After the witnesses for the prosecution as well as for the defence had been examined and cross-examined and the case was closed, the Magistrate was of opinion that a *prima facie* case under section 366 of the Indian Penal Code was made out; and acting under section 347 of the Criminal Procedure Code, he framed a charge under section 366 and committed the case to the sessions.

Held that there was no illegality in the procedure adopted. Under section 347 of the Code of Criminal Procedure the Magistrate could commit the accused "under the provisions hereinbefore contained", i.e., as if acting under the provisions contained in chapter XVIII.

Section 231 did not apply to the facts of this case. It only applied to the alteration of a charge after the commencement of a *trial*; but all the proceedings in the Magistrate's court must be held to be proceedings in an *inquiry* under chapter XVIII and not proceedings in a *trial*, as soon

*Criminal Reference No. 143 of 1931.