

and does not in any way diminish the liability of the sons if there had been no consideration. It is thus obvious that the text of the Mayukha cannot be cited in support of the contention urged on behalf of the appellant.

As a matter of fact, the law as laid down in the Mayukha appears to be somewhat different from that laid down in the Mitakshara and accordingly we are bound to accept the interpretation of the law as laid down in the latter book. Under the Mitakshara the liability of the surety himself exists for the payment of the debt where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment, but the liability of the grandsons for the payment of the debt incurred as surety does not exist. But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge.

The case before us is that of the liability of the son of the surety and not of his grandson. We have accordingly no hesitation in holding that the liability can be enforced against the defendant appellant.

In our opinion, therefore, the decree of the court below was correct. The appeal fails and is dismissed with costs.

### APPELLATE CRIMINAL

*Before Mr. Justice Thom and Mr. Justice Bennet*

EMPEROR *v.* YASHPAL\*

*Criminal Procedure Code, sections 236, 237(1) and 307(3)—  
Trial by Jury—Reference by Sessions Judge against verdict  
of jury—Power to convict, on such reference, on a charge  
which was not framed but could have been framed—Arms  
Act (XI of 1878), sections 19(f) and 20.*

In a trial by jury on a charge under section 19(f) of the Arms Act the jury, by a majority of four to one, gave a verdict

\*Criminal Appeal No. 358 of 1932, from an order of Tej Narain Mulla, Sessions Judge of Allahabad, dated the 7th of March, 1932.

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of acquittal. The Sessions Judge, disagreeing with the verdict, referred the case to the High Court. The High Court came to the conclusion that the accused was guilty not only of an offence under section 19(j) of the Arms Act but also of an offence under section 20 of that Act. *Held* that the High Court had power, under section 307(3) read with sections 236 and 237(1) of the Criminal Procedure Code, to convict the accused also of an offence under section 20 of the Arms Act, although no charge under that section had been framed at the trial.

Messrs. *Kumuda Prasad, Binod Behari Lal, Vishwa Mitra* and Miss *S. K. Nehru*, for the appellant.

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

THOM and BENNET, JJ. :—This is a reference by the learned Sessions Judge of Allahabad in a case in which the jury by a majority of four to one acquitted one Yashpal of a charge under section 19(f) of the Indian Arms Act, and the learned Sessions Judge has recommended that the accused should be convicted as in his opinion the verdict of the majority of the jury is perverse. There is also before us an appeal by Yashpal of a conviction by the learned Sessions Judge under section 307 of the Indian Penal Code and a sentence of seven years' rigorous imprisonment. The two proceedings relate to the same transaction and there was one trial in which the jury were assessors in the charge under section 307 of the Indian Penal Code.

[A portion of the judgment, not material for the purpose of this report, is here omitted.]

With regard to the reference by the learned Sessions Judge the facts which we have set forth convince us that the finding of the jury was perverse. The evidence of Mr. Pilditch shows that the accused was in possession of a revolver and he has further stated that that revolver is a Government revolver and has marks on it which show that the revolver and the barrel were condemned by the Arsenal. The procedure is that such condemned

weapons should be broken up, but by some improper acts this revolver was not broken up, and has passed into the possession of the accused. The accused has not pleaded that the revolver was not in his possession and clearly, therefore, the accused was guilty of the offence of illegal possession of this revolver as he has not pleaded that he has a license. One further point remains. The Magistrate, Mr. Crofts, framed a charge only under section 19(f) of the Indian Arms Act for possession of the revolver and did not add to the charge that the possession was in such a manner as to indicate an intention that the possession might not be known to public servants and thus bring the charge within the further provisions of section 20 of the Indian Arms Act. The learned Sessions Judge, Mr. Mulla, also failed to amend the charge in that respect. We would invite the attention of these two officers to the fact that the charge should have been framed under section 19(f) and under section 20 of the Indian Arms Act. Under these circumstances the question is what action we should take in the matter. Section 307(3) of the Criminal Procedure Code lays down that the High Court when dealing with a reference by a Sessions Judge from the verdict of a jury may convict the accused person of any offence of which the jury could have convicted him upon the charge framed and placed before it. Section 236 of the Code of Criminal Procedure lays down that "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged . . . in the alternative." Section 237(1) lays down that "If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." We consider that the jury might have convicted the accused on the present charge

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under section 19(f) read with section 20 of the Indian Arms Act. We consider that, as a matter of fact, the ingredients of section 20 are proved in the present case. The accused person had this revolver in his possession and when the police appeared he attempted to run away with his revolver and he also attempted to shoot Mr. Pilditch with his revolver. His intention therefore was that his possession of the revolver might not be known to the police, that is, that he might make his escape with the revolver. Accordingly we convict the accused Yashpal under section 19(f) read with section 20 of the Indian Arms Act and sentence him to seven years' rigorous imprisonment. This sentence will be consecutive with the sentence passed under section 307 of the Indian Penal Code.

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## REVISIONAL CIVIL

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*Before Mr. Justice Young*

MOOL CHAND (DEFENDANT) v. GANGA SAHAI  
(PLAINTIFF)\*

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*Civil Procedure Code, order IX, rules 3, 4—Suit restored after dismissal for default—Notice of date of hearing of restored suit not given to defendant—Ex parte decree set aside for want of notice.*

A suit was dismissed for default of appearance of both parties. Notice of the plaintiff's application for restoration was served on the defendant but he did not appear at the hearing of the application. The application was granted and a date was fixed for hearing of the suit. The defendant had no knowledge of this date and did not appear, and the suit was decreed *ex parte*. *Held*, setting aside the *ex parte* decree, that the defendant was of right entitled to notice of the date of hearing of the suit after restoration, and the necessity to serve such notice was not obviated by the fact that the defendant had knowledge of the original hearing and of the application for restoration.

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\*Civil Revision No. 498 of 1932.