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entitled to a decree for the whole sum claimed, and being doubtful whether under Muhammadan law the defendants are liable at all, I refer the case for the decision of the Hon'ble High Court."

Munshi *Hanuman Prasad*, for the plaintiffs.

Munshi *Kashi Prasad*, for the defendants.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—Under the Muhammadan law the heirs of a deceased person are permitted to divide the estate notwithstanding the circumstance that a small debt is due, and creditors have a right to sue the heirs in possession for recovery of a debt, "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir."—*Hamir Singh v. Zakia* (1).

In this case it is admitted by plaintiffs that defendants are not the sole heirs and that they have only divided and obtained their proper share of the estate, and by Muhammadan law under the circumstances of this case they are permitted to do so; and they will not, we think, thereby incur a liability to a creditor, suing them for recovery of a debt, for the whole debt due to him by the deceased, and a creditor could not in a suit brought against them bind the other heirs. In this view of the law we consider that the creditor can recover individually from heirs in the position of defendants the share of the debt for which they are liable.

The answer to the first question will be in the negative, and the second question in the affirmative.

Order accordingly.

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March 7.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* KALLU.

Covenanted Magistrate of the third class on tour in Division of a District—Subordination to Magistrate of the Division—Act X of 1872 (Criminal Procedure Code), ss. 41, 44, 46, 284.

A Magistrate of a Division of a District made over, under s. 44 of Act X of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction,

(1) I. L. R., 1 All. 57.

found the accused person guilty, and considering that the accused person ought to receive more severe punishment than he was competent to inflict, under the provisions of s. 46 of Act X of 1872 submitted his proceedings to the former. The former thereupon, under the provisions of the same section, passed sentence on the accused person.

Held that the latter Magistrate was subordinate to the former, within the meaning of s. 41 of Act X of 1872, and the procedure of the Magistrates was therefore according to law.

Held also that, assuming that the latter Magistrate was not "subordinate" to the former, the provisions of s. 234 of Act X of 1872 would not have been applicable, as those provisions do not refer to the illegality of a sentence or to the case of a Magistrate transferring a case who has no power of transfer, but to the invalidity of a conviction for want of jurisdiction.

THIS was a reference to the High Court by Mr. C. J. Daniell, Sessions Judge of Moradabad. The facts which gave rise to the reference were as follows:—In December, 1881, Mr. Thornton, a Magistrate of the third class, appointed to the Moradabad District, was on tour in the Sambhal-Hasanpur Division of that District. While so employed the Magistrate of that division, Mr. E. Galbraith, made over a case of theft to him for trial. Finding the accused person, one Kallu, guilty, and considering that he ought to receive a more severe punishment than he could inflict, Mr. Thornton, under s. 46 of the Criminal Procedure Code, submitted his proceedings and forwarded the accused person to Mr. Galbraith. The latter passed a sentence on the accused person of one year's rigorous imprisonment. Kallu appealed to the Sessions Judge of Moradabad against this sentence. The Sessions Judge, Mr. C. J. Daniell, before passing a final order in the case, having regard to the concluding words of s. 46 of the Criminal Procedure, called on the Magistrate of the Moradabad District to forward a copy of his order appointing Mr. Thornton to be subordinate to Mr. Galbraith. In answer to this requisition the Magistrate of the Moradabad District stated that he had passed no special order directing Mr. Thornton to act as subordinate to the Magistrate of the Sambhal-Hasanpur Division, and that no such order was necessary, as Mr. Thornton at the time he referred the case to Mr. Galbraith was on tour in that division, and therefore, under s. 46 of the Criminal Procedure Code, was subordinate to Mr. Galbraith. The Sessions Judge, in disposing of Kallu's appeal, held that Mr. Thornton was not subordinate to Mr. Gal-

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braith for the purposes of s. 46 of the Criminal Procedure Code, as he had not been specially appointed to be so, and therefore was not a "Magistrate in a Division of a District" within the meaning of s. 41, and as such under that section subordinate to the Magistrate of the Division, and that the fact of his being corporeally present in the Sambhal-Hasanpur Division on a certain date did not make him subordinate to Mr. Galbraith. Holding therefore that Mr. Galbraith's order was illegal, as it was passed on a reference to him by a Magistrate not subordinate to him, the Sessions Judge, referring to the provisions of s. 284, Criminal Procedure Code, set aside the conviction of Kallu and the sentence passed on him, and directed his trial "by a Court having competent jurisdiction."

The Magistrate of the Moradabad District, Mr. T. B. Tracy, being of opinion that Mr. Thornton, while on tour in Mr. Galbraith's Division, and in the exercise of his functions as a Magistrate of the third class in respect of a case referred to him by Mr. Galbraith, was subordinate to the latter, under the terms of s. 41, and therefore that Mr. Galbraith had power to deal with the case under s. 46, requested the Sessions Judge to refer to the High Court the question whether Mr. Galbraith's order was made with or without jurisdiction, and the Sessions Judge accordingly referred such question to the High Court.

The High Court (STRAIGHT, J. and TYRRELL, J.) made the following order on the reference:—

TYRRELL, J.—Mr. Thornton is a covenanted Assistant Magistrate of the third class appointed to the District of Moradabad, and as such he is of course subordinate to the Magistrate of the District. In December, 1881, he was on duty making a winter tour in the parganas of Sambhal and Hasanpur of the Moradabad District. These two parganas have been constituted a Division of the District in the sense of s. 40 of the Criminal Procedure Code, and a Subordinate Magistrate, Mr. Galbraith, is the Magistrate of that division of the District. In this capacity he exercises the powers of s. 28 of the Code, including the power to make over cases for trial to a Subordinate Magistrate (s. 44), and to pass sentence on proceedings recorded by a Subordinate Magistrate

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(s. 46). Mr. Galbraith made over a case of theft for trial to Mr. Thornton, who convicted the accused and recorded a finding of guilty; but refraining from passing sentence submitted his proceedings and forwarded the convict under s. 46 to Mr. Galbraith for severer punishment than Mr. Thornton was competent to impose. The convict was sentenced by the Divisional Magistrate to one year's imprisonment. The Sessions Judge in appeal annulled this sentence as well as Mr. Thornton's conviction: and "directed the case to be tried by a Court having competent jurisdiction." The Judge recorded his opinion that "the order of Mr. Galbraith, Magistrate of the Sambhal-Hasanpur Division, was passed on a reference to him by an Assistant Magistrate who was *not* subordinate to him in the sense of s. 46 of the Code." If this were the only reason for the Judge's order he would have been undoubtedly wrong in applying to the case the mandatory provisions of s. 284 of the Procedure Code, which refer not to the illegality of a sentence but to the invalidity of a conviction by reason of want of competence in the Court to try the offence. But the conviction in the present case was not open to the objection contemplated in s. 284. The offence (s. 379, Indian Penal Code) of which Mr. Thornton convicted the accused was triable by Mr. Thornton, and the conviction was unimpeachable in respect of his competence to try the offence charged. It was the legality of the proceedings of Mr. Galbraith in treating Mr. Thornton as a Magistrate subordinate to him in the sense of s. 41 of the Criminal Procedure Code that was challenged before the Judge, and forms the question we are asked to determine. If Mr. Galbraith had no power to make over the case under s. 44 to Mr. Thornton, the trial would be open to objection on that score, but the conviction would not for that reason only be necessarily unsustainable under the provisions of s. 284. The point for determination then was whether the provisions of s. 41 of the Code were applicable to the relative positions of Messrs. Galbraith and Thornton *inter se*.

Was Mr. Thornton, who was admittedly a Magistrate officially employed for the time in the Sambhal-Hasanpur Division of the Moradabad District, "subordinate (as such) to the Magistrate of that Division of the District;" or was he subordinate to the Magistrate of the District alone, and therefore competent to hear such cases only

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as were made over for trial to him by that Magistrate, and bound to submit cases under s. 46 to that officer's Court exclusively? The Sessions Judge took the latter view, and regarded the circumstance of Mr. Thornton's presence and occupation in Mr. Galbraith's Division as a mere geographical accident, and immaterial to the question before him. This reading of the law of Chapter IV of the Criminal Procedure Code does not commend itself to us either on considerations of principle or of convenience. In the ordinary course of procedure the theft committed in the Sambhal-Hasanpur Division was triable in that division under the jurisdiction and general functions of its Magistrate. Mr. Thornton has no original criminal jurisdiction in any part of the Moradabad District. He can try such cases only as are referred to him for trial by competent Magistrates. The Magistrate of Moradabad may refer to him for trial any case, within the competence of a third class Magistrate, committed in any part of the Moradabad District. But in respect of offences of this class committed in the Sambhal-Hasanpur Division the Magistrate could only do so, after having first in the exercise of the control reserved to him by s. 40 removed the case from the jurisdiction of the Divisional Magistrate. The jurisdiction of the Magistrate of the District is of course not ousted or excluded by that of the Divisional Magistrate: their jurisdictions are co-ordinate. But the jurisdiction of the Divisional Magistrate is the ordinary original jurisdiction of his division; and whatever the Magistrate of the District might do in this connection with regard to offences committed outside the Division, the Divisional Magistrate is competent to do with regard to offences within his local jurisdiction. But was Mr. Thornton in December, 1881, "subordinate" to the Divisional Magistrate. By the terms of s. 41 of the Procedure Code "every Magistrate in a Division of a District shall be subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District." We have no doubt that the persons here referred to are ordinarily and in the first instance the more or less permanent local Magistrates of the parganas composing the division. In the case before us they would be the Tahsildars and "Special Magistrates" attached to the Sambhal and Hasanpur parganas. But if we are right in assuming that in

December, 1881, Mr. Thornton was officially located in that division, whether temporarily or otherwise, in the discharge of his public duties, and not as a mere visitor or casual resident, we see no sufficient reason for holding that he did not thereby come within the provisions of s. 41 as a Magistrate for the time being not only in but also of the Sambhal-Hasanpur Division of the Moradabad District. It seems to us that this is a legitimate and reasonable view of the question : and that the procedure of the Magistrates was not only recommended by obvious convenience, but was also justifiable on strict application of the terms of the law.

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 FULL BENCH.

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March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

NAIK RAM SINGH (DECREE-HOLDER) v. MURLI DHAR AND ANOTHER
(JUDGMENT-DEBTORS)*

Landholder and tenant—Sale of occupancy-right in execution of decree—Act XV. of 1873 (N.-W. P. Rent Act), s. 9—Act XII of 1881 (N.-W. P. Rent A. ss. 2, 9.

Held that a landholder, who had attached the occupancy-right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of a landholder to bring such a right to sale in execution of a decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

NAIK Ram Singh, the proprietor of certain land, on the 30th March, 1881, applied for, and obtained, in execution of a decree which he held against Murlidhar and a certain other person, the occupancy-tenants of such land, an order for the attachment of the occupancy-rights therein of his judgment-debtors, with a view to the sale of such rights. On the 1st April, 1881, Act XII of 1881, which repealed Act XVIII of 1873, came into force. After Act XII of 1881 came into force the judgment-debtors preferred an objection to the sale of their occupancy-rights on the ground that the transfer of such rights in execution of decree was prohibited by s. 9 of that Act. The Court executing the decree allowed this

* First Appeal, No. 101 of 1881, from an order of Maulvi Sultan Hasan, Sub-ordinate Judge of Agra, dated the 9th June, 1881.