

decree were taken up to 1872, and then on the 9th October, 1874, an application to amend the decree was made. We consider that the proceedings under this application were substantially of the nature of a review of judgment, and will, under art. 167, sch. ii of Act IX of 1871, at the time in force, give a period from which limitation will run in respect of the subsequent application for execution which will therefore be within time. In execution of the decree we are not in a position to go behind the proceedings in review so as to question their validity: the decree as amended is binding on the appellant. So far then the appellant's objections fail, nor is the objection to the future mesne profits valid, as we consider that the decree which is in execution awards them. The decree is, however, silent as to interest on mesne profits, and we so far amend the Judge's order that we direct him to take a fresh account excluding interest on mesne profits and pass orders accordingly. Costs of the parties will be borne proportionately in both Courts to amount awarded.

Cause remanded.

APPELLATE CRIMINAL.

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

EMPRESS OF INDIA *v.* BERRILL.

European British subject—Jurisdiction—Act X of 1872 (Criminal Procedure Code), ss. 74, 83.

B, who was charged before a Magistrate, who was competent to inquire into a complaint against a European British subject, with an offence triable by him, claimed to be dealt with as a European British subject. *B* did not state the grounds of such claim. The Magistrate did not decide whether *B* was or was not a European British subject, but proceeded with the case, dealing with him as if he were not a European British subject, and sentencing him to rigorous imprisonment for one year and to a fine. On appeal by *B* the High Court remanded the case to the Magistrate in order that he might decide, in the manner directed by s. 83 of the Criminal Procedure Code, whether *B* was or was not a European British subject.

The Magistrate having decided that *B* was a European British subject, held that, this being so, and it appearing that the Magistrate had dealt with *B* as other than a European British subject, *B*'s trial was void for want of jurisdiction. Also that, the Magistrate having tried the case without jurisdiction, the High Court could not proceed with *B*'s appeal on the merits, with a view, in the event

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of its deciding that the offence of which *B* was charged had been established, to the reduction of the sentence passed upon him by the Magistrate to one which he was competent to pass under s. 74 of the Criminal Procedure Code.

ROBERT BERRILL was on the 19th March, 1879, convicted by Lieutenant-Colonel W. Tweedie, Political Agent at Gwalior, of an offence under s. 163 of the Indian Penal Code, and sentenced to rigorous imprisonment for one year, and to a fine of Rs 1,000, or in default to rigorous imprisonment for a further term of six months. He appealed to the High Court from such conviction and sentence. The grounds of appeal were (i) that, the appellant having pleaded during the course of his trial that he was a European British subject, the Political Agent was bound to take evidence and come to some decision on the point of his nationality, and his judgment and order were, in default of such a finding, defective and illegal; (ii) that the Political Agent acted wrongly in not allowing the appellant time in which to establish his plea that he was a European British subject; (iii) that the finding of the Political Agent was against the weight of evidence and opposed to all the facts and circumstances proved in the case; and (iv) that in any event the sentence passed by the Political Agent was illegal, as he was not competent to pass a sentence of one year's rigorous imprisonment on a European British subject. In support of his contention that he was a European British subject, the appellant filed affidavits by persons acquainted with him and his family.

Messrs. *Colvin and Spankie*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarika Nath Banarji*), for the Crown.

The High Court (STUART, C. J., and OLDFIELD, J.), by an order dated the 21st May, 1879, remanded the case to the Political Agent, in order that he might determine the question whether the appellant was or was not a European British subject in the manner directed by s. 83 of the Criminal Procedure Code. That order was as follows:—

STUART, C. J.—In this case it is pleaded, among other things, that the appellant, Robert Berrill, is a European British subject. The record, however, is not in such a state as to enable us at present to

determines the course it is proper for us to adopt, and we must remand the case for a proper inquiry and finding on the subject as directed by s. 83 of the Criminal Procedure Code, Act X of 1872. Neither the appellant nor the Political Agent, who as Magistrate tried the accused, appear to have complied with the provisions of the law on this point. By s. 83 it is provided that, "when any person claims to be dealt with as a European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial, and such Magistrate shall on such statement decide whether he is or is not a European British subject, and shall deal with him accordingly." The directions here are very precise; the person claiming to be a European British subject shall state the grounds of his claim, and on such statement and grounds the Magistrate is to decide the question. In the present case there is a memorandum by the Magistrate that the "accused pleads through his counsel that he is a European British subject and claims to be tried as such," and the plea is repeated now before us, and several affidavits in support of it have been filed, which, however, we cannot at present consider. But there is no statement of the grounds on which he made that claim, nor does the omission appear to have attracted the notice of the Magistrate, for he has recorded no order or finding on the subject, and he appears to have proceeded with and concluded the trial without regard to the plea. We, therefore, remand the case to the Magistrate with directions to consider and decide this question in the manner directed by s. 83 of the Criminal Procedure Code, and to return the record to this Court with his finding on that question with all convenient speed. It is alleged before us that the accused has been prejudiced as to procuring evidence to support his plea that he is a European British subject by the order of the 24th February last, whereby he was directed not to leave Morar, although he had been duly admitted to bail. We in consequence direct that the accused be allowed all legal facilities for obtaining evidence, and that he remain on the same bail till the further orders of the Court.

The Political Agent found upon evidence adduced that the appellant was a European British subject within the meaning of s. 71

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of the Criminal Procedure Code, and returned the case to the High Court.

Messrs. *Colvin and Spankie*, for the appellant.

Mr. *Ross* and the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Crown.

The Court (STUART, C. J., and OLDFIELD, J.), delivered the following judgment:—

STUART, C. J.—The Magistrate has now made a return to our order dated the 21st May last, and has found that the accused, Robert Berrill, is entitled to be considered and dealt with as a European British subject. This being so, we must hold that the trial held and the conviction and sentence passed by the Magistrate, Lieutenant-Colonel Tweedie, Political Agent of Gwalior, are void for want of jurisdiction. It appears from the record, and it is not disputed, that the Magistrate tried the accused as being other than a European British subject. Indeed the record shows that the Magistrate's attention was directed to this question, but without determining it he proceeded with and concluded the trial by convicting Berrill and sentencing him to a punishment which, as Berrill being a European British subject, he had no right to award. We notice this sentence, however, as affording the measure in the Magistrate's mind of Berrill's guilt; and it is therefore evident on the showing of the Magistrate himself that he had no jurisdiction to try the accused as a European British subject, but that he should have at once proceeded under s. 75 of the Criminal Procedure Code and committed Berrill for trial to the Court of Session or to the Court with the powers of a Court of Session in Gwalior.

We are asked by the counsel for the prosecution to hear and determine the appeal on the merits of the case, at least so far as these affect the sentence, with the suggestion that the prosecutor would be satisfied with imprisonment of the accused for a period not exceeding three months or a fine up to Rs. 1,000 or both, a sentence which would in effect cover the jurisdiction of the Magistrate and *pro tanto* legalize his proceedings. But we cannot adopt that view. The Magistrate in our opinion has tried the case without jurisdiction, and we must, therefore, set aside what he has done

and remit the record to him for disposal of the case according to law. And in doing so he must proceed *de novo* and not make any use of or reference to the proceedings which we set aside.

We must therefore quash, and we hereby quash, the conviction and sentence by the Magistrate, and direct that he on the accused being brought before him do proceed according to the law laid down in the Criminal Procedure Code respecting the trial of European British subjects, and on this subject the Magistrate's attention is directed to ss. 74 and 75. We order that the accused Robert Berrill do within eight days from the date of this judgment appear before the Magistrate at Gwalior and surrender to his bail.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HABIB-UL-LAH AND ANOTHER (DEFENDANTS) v. ACHAIBAR PANDEY
(PLAINTIFF).*

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August 31.

Pre-emption—Joint purchase—Suit against one of the purchasers—Addition of other purchaser as defendant—Effect of suit as regards the latter being barred by limitation—Act XV. of 1877 (Limitation Act), s. 22.

P, on the 12th April, 1880, instituted a suit against *Z* claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother *A* jointly, under an instrument dated the 12th April, 1879. On the 3rd May, 1880, *A* was made a defendant to such suit, *Z* being appointed guardian for the suit for him.

Held that, inasmuch as such suit, as regards *A*, was beyond time, and as the only relief which could be granted therein to *P* was the invalidation of the joint sale to *Z* and *A*, such suit, even admitting it was within time as regards *Z*, was not maintainable.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of the sale of a three-pie share of an undivided village called Pipri Buzurg. This share had been purchased, as appeared from the instrument of sale, which was registered on the 12th April, 1879, by the defendant Zaka-ul-lah jointly for himself and as guardian of his minor brother, Ata-ul-lah. The suit was

* Second Appeal, No. 123 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 20th November, 1880, affirming a decree of Rai Izzat Rai, Munsif of Bansi, dated the 10th June, 1880.