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conclusion touching the nature of an undisclosed purpose or intention. The witnesses agree that, while the testator invited others to sign as attesting witnesses, he addressed no such invitation to the sons, but asked them explicitly to sign for the special purpose of expressing their consent, with the view of avoiding dissensions in the future. The evidence, once it is accepted, shows that the act of each of them was, openly and palpably, with the knowledge of all present, the act of expressing consent, and nothing else. Their Lordships concur in the view of all the courts below that in such circumstances the signers were not attesting witnesses within the meaning of section 54 of the Indian Succession Act.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for the appellant: *H. S. L. Polak.*

Solicitors for the respondent: *Barrow, Rogers, and Nevill.*

REVISIONAL CRIMINAL.

*Before Sir Louis Stuart, Knight, Chief Judge and
Mr. Justice Muhammad Raza.*

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July 15. DORE SAH (ACCUSED-APPLICANT) v. KING-EMPEROR
(OPPOSITE-PARTY-COMPLAINANT).*

Criminal Procedure Code (Act V of 1898), sections 195(1) (a), (b) and (c), 476 and 537—Civil court's jurisdiction to take action under section 476 of the Code of Criminal Procedure in the case of offences covered by section 195(1) (a) of the Code of Criminal Procedure—Irregularities, whether cured by section 537—Indian Penal Code sections 183 and 186—Attachment of the civil court, resistance to.

Where it was stated before a Munsif that certain persons had resisted a civil court attachment and it was alleged that

*Criminal Revision No. 42 of 1927, against the order, dated the 3rd of May, 1927, of Sham Manohar Nath Sharga, Additional Sessions Judge of Kheri, confirming the order, dated the 24th of March, 1927, of Prem Chandra Seth, Magistrate, First Class, Kheri, convicting the appellant under sections 183 and 186 of the Indian Penal Code.

they had committed offences punishable under sections 183 and 186 of the Indian Penal Code and the Munsif took action under the provisions of section 476 of the Code of Criminal Procedure, *held*, that under the provisions of section 476, as amended, a civil court has authority to make a preliminary inquiry and record a finding only in the case of an offence covered by present section 195(1), clauses (b) and (c), and as the offences in question are offences to which reference is made under section 195(1), clause (a), the Munsif had no jurisdiction under section 476 of the Code of Criminal Procedure to make a preliminary inquiry and record a finding and had no authority to take security for the appearance of the accused. He should have taken action under the provisions of section 195(1), clause (a), and made a complaint in writing to a Magistrate.

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There is distinct difference between the procedure to be adopted by the presiding officer of a civil court under the provisions of section 195(1) (a) and the provisions of section 195(1), (b) and (c). In the first case such an officer is in the position of an ordinary public servant. He exercises no *quasi* judicial function of any kind. In the second case he is in the position of a presiding officer of a court and exercises *quasi* judicial functions.

As the Code stood formerly, irregularities in proceedings taken under section 476 were condoned but that provision has since been omitted and it can only be taken that provisions under section 476 are not condoned as the law is now, and the provisions of present section 537 do not affect the matter. [*Indarjit Singh v. King-Emperor* (1) and *King-Emperor v. Ram Nath Bux Singh* (2), followed.]

THE case was originally heard by PULLAN, J., who referred it to a Bench. His order of reference is as follows :—

PULLAN, J.—This is an application in revision of an order of the Additional Sessions Judge of Kheri upholding the conviction and sentence passed upon the applicant for an offence under sections 183 and 186 of the Indian Penal Code.

The substantial ground for revision is that the trial was without jurisdiction because the prosecution was

(1) (1926) 3 O.W.N., 618.

(2) (1926) 3 O.W.N. 757.

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ordered by a civil court under section 476 of the Code of Criminal Procedure whereas no such action is possible in the case of an offence under these sections which are included in clause (1) of sub-section (a) of section 195. The lower courts have held that the order of the Munsif may be taken to be a complaint as required by section 195 (1) (a) and that the defect, if any, in the procedure is cured by section 537 of the Code. Were there no authority to the contrary I should myself be prepared to accept the view of the court below. It appears to me that sub-clause (a) of section 537 is wide enough to include any error or irregularity committed by the civil court in referring a case for prosecution to the Magistrate. It does not appear that in such cases the accused person is in any way prejudiced. If he pointed out the error in the first instance, it could easily have been corrected and the order of the Munsif altered to a complaint.

As it is it is far from clear what the Munsif intended. His order is headed "Application under section 476 of the Code of Criminal Procedure" and at the conclusion he orders the prosecution of the applicant, but he sent the order to the Deputy Commissioner meaning, no doubt, the District Magistrate, for necessary action, as though he had made a complaint and not ordered a prosecution.

I find that two such cases have been before single Judges of this Court previously and each of them independently has taken the view that the Munsif was acting without jurisdiction and consequently the proceedings of the Magistrate should be set aside—*Indarjit Singh v. King-Emperor* (1), and in the same volume, *King-Emperor v. Ram Nath Bux Singh* (2). As I am not prepared to agree with this view of the law unless it is established by a Bench of this Court, I direct that this application shall be laid before a Bench when the courts

(1) (1926) 3 O.W.N., 618.

(2) (1926) 3 O.W.N., 757.

reopen after the vacation. The applicant will be released meantime on furnishing bail for Rs. 250.

Mr. *Hyder Hussain*, for the applicant.

The Government Pleader (Mr. *H. K. Ghosh*), for the Crown.

STUART, C. J. :—This revision has been referred to a Bench by the Hon'ble Mr. Justice PULLAN in order that there may be a pronouncement in respect of principles laid down by two of the learned Judges of this Court in separate judgments. The facts are these. It was stated before Mr. PARTAB SHANKAR, Munsif of Kheri, that certain persons had resisted a civil court attachment and it was alleged that they had committed offences punishable under sections 183 and 186 of the Indian Penal Code. The learned Munsif took action under the provisions of section 476 of the Code of Criminal Procedure. He omitted to notice that under the provisions of that section, as amended, he had only authority to make a preliminary inquiry and record a finding in the case of an offence covered by present section 195, sub-section (1), clauses (b) and (c). As the offences in question are offences to which reference is made under section 195 (1), clause (a), the learned Munsif had no jurisdiction under the provisions of section 476 of the Code of Criminal Procedure to take the action which he took. He should have taken action under the provisions of section 195 (1), clause (a), and made a complaint in writing to the Magistrate in question. He had no authority to make a preliminary inquiry and record a finding and he had no authority to take security for the appearance of the accused. There is distinct difference between the procedure to be adopted by the presiding officer of a civil court under the provisions of section 195 (1) (a) and the provisions of section 195 (1) (b) and (c). In the first case such an officer is in the position of an ordinary public servant. He exercises no *quasi* judicial function of any kind. In the

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second case he is in the position of a presiding officer of a court and exercises *quasi* judicial functions. The point remains whether the complaint which he made before the Magistrate can be recognized as a complaint upon which action could be taken. I am of opinion that it cannot be so recognized, and I do not consider that the provisions of present section 537 affect the matter. As the Code stood formerly, irregularities in proceedings taken under section 476 were condoned but that provision has since been omitted and it can only be taken that provisions under section 476 are not condoned as the law is now. Thus we have it that these proceedings were started without jurisdiction. I am in complete accord with the view of the law stated by my learned brother the Hon'ble Mr. Justice RAZA in *Indarjit Singh v. King-Emperor* (1) and the Hon'ble Mr. Justice HASAN in *King-Emperor v. Ram Nath Bux Singh* (2). The result is that I would set aside the conviction and sentence and cancel the applicant's bail bond. I have, however, to note that in my opinion the question as to whether he did or did not resist the execution should be tried out on the merits. As the matter stands he has escaped with an acquittal on a technicality. It will be open to the learned Munsif now to make a written complaint under the provisions of section 195(1) (a) and refer the matter to be tried out on its merits. Any punishment undergone by the accused will, of course, be taken into account should it happen that the applicant is convicted.

RAZA, J. :—I concur.

BY THE COURT. :—The proceedings are quashed, the conviction and sentence are set aside and the bail bond is cancelled.

Conviction set aside.