1893

HEM CHUNDER GHOSE v. THAKO MONI DEBI.

up to Chait 1294, and to make it a charge on the property. The first Court allowed interest after due date at the rate of 12 per cent. per annum, considering that a reasonable rate. Even if any question had been raised in the lower Appellate Court, and no question was raised, there is no ground on which we could hold on second appeal that the interest allowed by the first Court after due date was unreasonable. That interest cannot, however, be made a charge on the property: it is not a charge by the terms of the deed.

The appeal must be decreed and the case remanded as above directed. The appellants are entitled to their costs in this Court.

Appeal allowed.

J. V. W.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep, Mr. Justice Pigot, and Mr. Justice Hill.

THE QUEEN-EMPRESS *v.* CHANDRA BHUIYA AND 12 OTHERS.*

1892
Dec. 22.

Criminal proceedings, irregularity in—Irregularity prejudicing the accused—Rioting, countercharges of—Cross cases tried together—Evidence in one case considered in the other—Criminal Procedure Code (Act X of 1882), ss. 233, 239, 309, 342, 344, 537—Illegality—Fight between two parties not "transaction."

Where two cross cases of rioting and grievous hurt were committed separately for trial before a Sessions Judge, who, having heard the evidence in the first case, heard the evidence in the second case, examined some of the accused in the one case as witnesses for the prosecution in the other and *vice versâ*, and subsequently heard the arguments in both the cases together, and the opinions of the assessors (who were the same in both the cases) were taken at one time, and both the cases were dealt with in one judgment:

Held, that this mode of trial, although irregular, did not prejudice the accused in their defence, and that under such circumstances a retrial was not made necessary by reason of such irregularity.

* Criminal Appeal No. 627 of 1892, against the order passed by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 2nd May 1892.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

Queen v. *Bazu* (1) and *Queen* v. *Surroop Chunder Paul* (2) approved. Nor did the examination of the accused who were on their trial in one case as witnesses for the prosecution in the other affect the validity of their conviction.

Observations in *Bachu Mullah* v. *Sia Ram Singh* (3) dissented from. *Hossein Buksh* v. *The Empress* (4) considered and distinguished.

Semble.—A fight between two parties cannot be treated as a 'transaction' within the meaning of section 239 of the Code of Criminal Procedure. On the law as contained in that section, the two parties cannot regularly be charged in the same trial.

IN this case one Chandra Bhuiya and twelve other persons were convicted by the Sessions Judge of Mymensingh of rioting armed with deadly weapons, and of causing grievous hurt. Chandra Bhuiya was sentenced to ten years' rigorous imprisonment under section 326 of the Penal Code, and the rest to three years' rigorous imprisonment under section 326 read with section 149. All the prisoners were further convicted under section 148, but without additional sentence.

This case was numbered 12 at the Mymensingh Sessions for March 1892, and was a counter case to one numbered 11. In case No. 11, which was the first instituted, the accused persons included four persons who were principal witnesses for the prosecution in case No. 12; and in case No. 12 among the accused were five persons who were principal witnesses for the prosecution in case No. 11. The hearing of case No. 11 began on the 11th April 1892, and the examination of the witnesses both for prosecution and defence was concluded on the 12th April, when it was "postponed for further hearing until after the trial of case No. 12." Case No. 12 was next taken up, and the examination of the witnesses similarly proceeded with and concluded on the 14th April, when both cases were adjourned till the 18th April for "argument." The nature of the proceedings on the 18th April appears from the order sheet of the Judge, which was as follows:—"To-day the Counsel for the defence summed up his case" (*i.e.*, in case No. 11). "Pleader for the defence in case No. 12 then summed up his case. The prosecutor then replied

(1) B. L. R. Sup. Vol., 750; 8 W. R. Cr., 47.
(2) 12 W. R. Cr., 75.
(3) I. L. R., 14 Calc., 358.
(4) I. L. R., 6 Calc., 96.

in both cases. The assessors were then required to state their opinions in both cases orally. Their opinions were recorded, and the case was then postponed to the 25th instant for delivery of judgment." On the 25th April, "judgment not being completed," the cases were again postponed, and judgment was finally delivered on the 2nd May 1892.

In case No. 11 the Judge, after stating the various charges against the accused, observed as follows:—"The facts of this case have been fully set out in my judgment in the record of trial No. 12 of this Sessions," and for the reasons therein specified he acquitted all the accused.

In his judgment in case No. 12, after giving a short sketch of each case, the Judge observed as follows:—"Such, briefly, are the facts of the two cases which this Court has had to try. The first case tried was that against the members of Panai's party, and then the other case was tried, with the help of the same assessors. The arguments were heard on the same day, the fifth of the double trial, and the assessors were invited to give their opinions in the two cases at one time, the cases being, as will have been seen from the above brief abstracts of each, inextricably connected." He then proceeded to analyse the evidence in each case, and, after stating his reasons, finally convicted all the accused but one.

Against the conviction and sentence the accused appealed to the High Court.

Mr. *W. R. Donogh*, Baboo *Kali Charn Banerji*, and Baboo *Hara Prosad Chatterji* for the appellants.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

Mr. *Donogh*.—The record of the proceedings shows that a grave irregularity has been committed. There were two cross cases of rioting and grievous hurt tried at the Sessions—one numbered 11 and the other 12. Before No. 11 was finished, No. 12 was taken up, and tried with the aid of the same assessors. The arguments in both cases were heard at the same time, the opinions of the assessors were also taken at the same time, and one judgment was delivered in both cases. This practice of trying cases piecemeal has been condemned as improper in the case of *Chakouri Lall* v. *Moti Kurmi* (1).

(1) 13 C. L. R., 275.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

The irregularity is still graver when persons who are accused in the first case are examined as witnesses in the next case for the prosecution, before judgment has been pronounced upon them in their own case. This has been laid down in the case of *Bachu Mullah* v. *Sia Ram Singh* (1), which is exactly in point. It is not incumbent on me to show prejudice, for that is a necessary consequence of such a procedure.

The Deputy Legal Remembrancer.—It has always been the practice from the earliest times to try cross cases of rioting together. There is nothing unfair or unjust in doing so. This was held by a Full Bench of this Court in the case of *The Queen* v. *Bazu* (2). The rule enunciated in the case of *Bachu Mullah* v. *Sia Ram Singh* (1) is known to have greatly embarrassed judicial officers. The question is one which might fitly be referred to a Full Bench.

The cases of *Queen* v. *Durzoolla* (3), *Queen* v. *Surroop Chunder Paul* (4), and *Hossein Buksh* v. *The Empress* (5) were also referred to.

The Court (PIGOT and HILL, JJ.) took time to consider whether a reference should be made to a Full Bench. After consideration they decided to hear Counsel further on the case generally without expressing any opinion as to a reference, and the matter came on for hearing again on the 3rd November 1892.

Mr. *Donogh* for the appellants.—Where there has been a substantial departure from the procedure laid down by the law, that is not merely an irregularity but an absolute illegality; it is sufficient to vitiate the whole proceedings. Here the Judge in the first place violated the provisions of section 309 of the Criminal Procedure Code, because instead of summing up the evidence in the first case, which means the evidence heard in that case, and taking and recording the opinions of the assessors thereon, he postponed doing so until he had heard the evidence in the second case; and, in the second case, instead of following the same procedure he also postponed that case, in order that he might have what he considered to be the benefit of considering the

(1) I. L. R., 14 Calc, 358.
(2) B. L. R. Sup. Vol., 750; 8 W. R. Cr., 47.
(3) 9 W. R. Cr., 33.
(4) 12 W. R. Cr., 75.
(5) I. L. R., 6 Calc., 96.

evidence taken in the first case. By so doing he imported evidence from the first case into the second, and from the second into the first, and thus decided the cases upon evidence which was improperly admitted in each case, and in fact not upon the record. This is also a violation of the provisions of section 233 of the Criminal Procedure Code, which directs that every charge shall be tried separately, whereas the Judge has mixed up the two cases, speaking of them himself as a "double trial." These are absolute illegalities. See the case of *Queen-Empress* v. *Chandi Singh* (1), where it is laid down that in such cases section 537 of the Criminal Procedure Code would have no application, and also *In the matter of Luchminarain* (2), where the same principle has been enunciated.

There has been, moreover, a violation of section 344 of the Criminal Procedure Code and the law as to adjournment of trials. Here there was no "reasonable cause" for postponing the cases; on the contrary, the cause was improper. See *Hossein Buksh* v. *The Empress* (3). Again, if the statement of an accused person, which has been made under cross-examination as a witness in another case, is made use of—say to contradict and discredit what he says as an accused person—the using of it amounts to subjecting him to cross-examination. This has been done in this case, and it is practically a violation of all the rules relating to the examination of an accused person. See section 342 of the Criminal Procedure Code and *Hossein Buksh* v. *The Empress* (3).

[PIGOT, J.—Can you point out any instance in which such evidence taken in the other case, or such statements, have been used to your prejudice?]

Yes, the statements made by Hukum, one of the accused in the present case, and also of other accused persons, while under examination as witnesses in the first case, have been compared with their statements made as accused persons in this case, and, by reason of a discrepancy between the two, their defence has been disbelieved upon a very material point, viz. the question of possession, of the land in dispute. The result has been that the opposite party, being held to have been in possession and to have acted in

(1) I. L. R., 14 Calc., 395. (2) I. L. R., 14 Calc., 128, see p. 131.
(3) I. L. R., 6 Calc., 96, see p. 99.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

self-defence, have been acquitted, while the accused persons in this case have been convicted.

It is not incumbent on me, however, to show prejudice, although I have been able to do so in this case, for these are not such irregularities as can be cured by section 537 of the Criminal Procedure Code. That section is only intended to apply to cases in which there has been a technical error, and to remedy defects of a formal character. See *Regina* v. *Deva Dayal* (1). Although that was a ruling on the corresponding section of the former Code, section 253 of the Code of 1872, still the two sections are substantially the same.

The examination of accused persons as witnesses for the prosecution in another case before judgment has been passed upon them is a practice which has been condemned in strong terms in *Bachu Mullah* v. *Sia Ram Singh* (2). It gives rise to an irresistible presumption of prejudice. The *onus* is upon the Crown to show that the trial has been fair, and that the appellants have not been prejudiced.

The case of *Bachu Mullah* v. *Sia Ram Singh* (2) is exactly in point, and the rule there laid down by his Lordship the Chief Justice is applicable to the present case. The hypothetical case upon which the rule was based is precisely similar to the present one, and, if the latter had been before their Lordships instead of the one which was decided, there can be no doubt as to what would have been the result.

The procedure adopted in this case of trying cross-cases of rioting together has been emphatically condemned as improper in *Chakowri Lall* v. *Moti Kurmi* (3), and also in *Hossein Buksh* v. *The Empress* (4). The latter case no doubt was tried by a jury, and there might be additional reasons for observing the rule laid down therein in such cases, but the principle is the same in all cases whether tried by Judges or juries. It cannot be predicated of a Judge, any more than of a jury, that he is not likely to be influenced by evidence improperly admitted. See the *dictum* of Lord Eldon in *Walker* v. *Fobisher* (5).

(1) 11 Bom. H. C. Rep., 237.
(2) I. L. R., 14 Calc., 358.
(3) 13 C. L. R., 275.
(4) I. L. R., 6 Calc., 96.
(5) 6 Ves., 70.

The Queen v. *Durzoolla* (1) and *The Queen* v. *Surroop Chunder Paul* (2) are authorities in favour of separate trials, and they were decided on the same principle.

The case of *Queen* v. *Bazu* (3) was altogether exceptional, for, as one of the Judges observed, the accused had, it appeared, been rather benefited than otherwise by the mode of trial adopted. Under such circumstances it would have been manifestly absurd to set aside his conviction. But no such exceptional circumstances can be shown in the present case.

Section 239 of the Criminal Procedure Code has no application in such a case. Each of the opposing parties has a distinct common object and acts under a distinct set of circumstances, so that the offences committed by each party must constitute separate, not the same, transaction, and therefore must be tried separately.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown—Before the Penal and Procedure Codes were enacted the practice, where there had been a fight between two bodies of men, was to try all the rioters together, treating the riot as a single breach of the peace, as one transaction and one offence. This practice continued, apparently without objection, for several years after the Codes had come into force.

In 1867 in *Queen* v. *Bazu* (3) a Full Bench declined to set aside the trial on this ground, though they considered the Magistrate was wrong in sending up joint charges against persons who took part in the riot on opposite sides, because the two parties had not a common object.

In 1870 in *Queen* v. *Surroop Chunder Paul* (2) the Court considered it would have been better to try each set of defendants separately, because the witnesses called by each party in defence might seek to exonerate their own party and try to lay the blame on the other, and they could not be cross-examined by any of the accused, as the right of a defendant extends only to cross-examining the witnesses of the Crown called against him. But the Court would not interfere even on this ground

In 1880 in *Hossein Buksh* v. *The Empress* (4), although following the opinions expressed in the two cases above mentioned,

(1) 9 W. R. Cr., 33.
(2) 12 W. R. Cr., 75.
(3) B. L. R. Sup. Vol., 750; 8 W. R. Cr., 47.
(4) I. L. R., 6 Calc., 96.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

the Magistrate had held separate proceedings against each party, keeping the evidence against them separate, and had committed them separately, and the Judge had recorded the evidence in each case separately; it was decided, so far as I can find for the first time by the High Court, that inasmuch as the two cases had been tried by one jury, and the Judge had summed up in both cases simultaneously, and notwithstanding that in his charge he had kept the evidence against each party distinct, the procedure was bad, and that the prisoners must have been prejudiced, and a new trial was ordered.

In 1886 in *Bachu Mullah* v. *Sia Ram Singh* (4) the Magistrate tried two cases, countercharges of riot. He first took the evidence in one case, and without giving his decision in that case, proceeded to take the evidence in the other case, in which some of the persons under trial in the first case were examined as witnesses. The Court, though declining to interfere with the order of the lower Court on the ground that the prisoners had not been prejudiced, yet objected to the method of trial, and called upon all Magistrates to discontinue the irregular and highly objectionable practice.

As to the case of *Hossein Buksh* v. *The Empress*, I submit it is not shown that the joint trial really prejudiced the accused in any single particular. The parties applied that the two cases might be tried together, thinking it would benefit them. The Full Bench held that such a method was not substantially bad, and therefore the wishes of the parties might fairly be taken into consideration. If a jury which hears all the evidence for and against all the parties in a fight before delivering its verdict is placed in an embarrassing position, if their minds must be influenced by all the evidence in both cases, and to be so influenced is injurious to the interests of justice, no Judge or Bench of Judges ought to be placed in such a position, and cross-cases ought to be tried by separate Judges. But I submit that in such a matter a satisfactory decision can only be come to by the hearing of the whole case by one tribunal, and that the verdict or judgment in either case is more likely to be correct after the whole evidence in both cases has been considered.

(4) I. L. R., 14 Calc., 358.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

The evidence against an accused person is to be found only in the record in which he is charged. If evidence in the other record is referred to, it is his own evidence given in his own favour. He cannot be prejudiced by a reference to the evidence he himself offers.

As to the other case of *Bachu Mullah* v. *Sia Ram Singh*. In these cross-cases usually the only persons who can or do give evidence are parties or partisans with the strongest personal interest in the case. It is hopeless to expect impartiality from such witnesses. If one set are to be tried first in the manner suggested in this judgment, the set first tried are placed at a great disadvantage, for their accusers, themselves participators in the fight and whose trial is to follow, are free to give evidence, while the mouths of the accused are shut. In any event one set of witnesses must remain liable to the objection which the judgment supposes separate trials to get rid of. It must further be remembered that the trial is only one of several stages. The case of each party is settled before the police have examined the witnesses. What the witnesses say to the police they repeat to the Magistrate on oath, and they cannot vary those statements at the Sessions trial. The interest of the witnesses does not cease with the result of the Sessions trial, but continues in full force till the final result—the decision of the High Court. Consequently having the trials jointly or separately would not affect the evidence of the witnesses in the least.

Judges and Magistrates in the mofussil, despairing of getting impartial evidence in these cases, or a fairly truthful account of the whole occurrence from any one side or set, are naturally reluctant to pronounce judgment till they have exhausted all the evidence on both sides, and are in a position to weigh one against the other and to test one by the other.

It is submitted that in this case the accused have suffered no prejudice by the method adopted.

The Court (PIGOT and HILL, JJ.), having differed in opinion, the appeal was referred to and re-argued before a Bench consisting of PRINSEP, PIGOT and HILL, JJ.

Mr. *W. R. Donogh* for the appellants.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

The arguments for the appellants were substantially the same as on the previous hearing.

The *Deputy Legal Remembrancer* was not called upon.

The judgment of the Court (PRINSEP, PIGOT and HILL, JJ.) was delivered by

PRINSEP, J.—This is an appeal from the Sessions Judge of Mymensingh, sitting with assessors. The appellant, Chandra Bhuiya, was convicted of the offence of voluntarily causing grievous hurt to Panai Sarkar by means of a dangerous weapon, namely, a gun, an offence punishable under section 326, Penal Code, and was sentenced to ten years' rigorous imprisonment. He was also convicted of the offence of rioting, being armed with a deadly weapon, under section 148, Penal Code, but no further sentence was passed upon him for this offence.

The other appellants were convicted under section 326 read with section 149 of the Penal Code, and each of them was sentenced to three years' rigorous imprisonment. They were also convicted of the offence of rioting, being armed with deadly weapons, under section 148, Penal Code, but no further sentence was passed for this offence.

The riot arose out of a dispute about some land which was alleged, on the one hand, to be the property of the first appellant, Chandra Bhuiya, and to be in the possession, under him, of the appellant, Hukum Garo; while, on the other, it was alleged that the land was the property of Panai Sarkar (the person mentioned in the charge against the first appellant) and was in the possession, under him, of one Panchu.

It was charged (and found as a fact at the trial) that Chandra Bhuiya and his party went to cut *dhan* on the land forcibly, and that the party of Panai went to prevent this.

Several persons belonging to the party of Panai were also charged with and tried for the offence of rioting, &c. The cross cases were tried by the Judge and by the same assessors: and the grounds of appeal urged before us related to the manner in which the trials of the cross cases were conducted, which it was argued was illegal, was irregular, and was calculated to prejudice the present appellants in their defence to the charges on which they were tried.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

The case was set down for hearing just before the vacation. But upon application on behalf of the appellants, it was postponed for the purpose of obtaining the record in the cross case, in order that that record might be referred to, when necessary, in support of the case for the appellants, which involved the contention that the trial of the appellants had been so mixed up with the trial of the cross case as to prejudice them. The hearing of the appeal was postponed for that reason. The appeal was heard in the vacation, but the Judges who sat during the vacation, and who are members of the present Bench, differing somewhat in opinion, the appeal was reheard before us. We intimated at the close of the argument for the appellants that we did not think it necessary to call upon the Deputy Legal Remembrancer to support the conviction, as we were then of opinion that the appeal must fail; but we reserved judgment in order that we should state our decision as to some of the matters discussed before us in a written judgment.

In the arguments for the appellants, no attempt was made to show, upon an examination of the evidence, that the conviction was not justified by the evidence in the present case. We need not, therefore, do more than say that there is no reason to doubt the substantial truth of the evidence in the case, and that there certainly is no doubt, that if true, it fully warrants the conviction.

It was contended, however, that the manner in which this case was tried was not merely irregular, but illegal: and that for this reason the conviction was bad, as being absolutely vitiated by the illegality of the procedure followed.

The Judge states in the following words the manner in which the trials in the two cases were held:—

"The first case tried was that against the members of Panai's party, and then the other case was tried with the help of the same assessors. The arguments were heard on the same day, the fifth of the double trial, and the assessors were invited to give their opinions in the two cases at one time, the cases being inextricably connected."

There can be no doubt that the proceeding thus followed was irregular: the question before us with respect to it is whether it has vitiated the conviction.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

The case of *Hossein Buksh* v. *The Empress* (1) was relied on by the appellant's Counsel on this point. That decision, however, was in a case in which a procedure of this kind was followed in a jury trial, and the distinction between a jury trial and a trial with assessors, in this respect, is pointed out at page 102 of the report. It is, we think, an essential distinction, arising from the nature of the two different tribunals, the verdict in a trial by jury being final on the facts, whereas the entire case in a trial with assessors is subject to appeal, the grounds for the conviction are set out, and the question whether any prejudice has been caused to the prisoner can usually, though not, no doubt, in all cases, be satisfactorily determined.

In the present case it can safely be affirmed that the mode of trial, although irregular, did not prejudice the appellants in their defence, and there is the high authority of the case of *Queen* v. *Bazu* (2) for holding that under such circumstances a re-trial is not made necessary by reason of such irregularity. We may observe that in that case it was said by Mr. Justice Phear that, in the peculiar circumstances of the case, the prisoner has perhaps been rather benefited than prejudiced by the particular course in question having been taken in his trial.

In the case *Queen* v. *Surroop Chunder Paul* (3) in a case in which the opposing parties who had been engaged in a riot were all tried together, although, as pointed out by this Court, the offences committed by the respective parties necessarily differed in respect of the common object to be attributed to each, the Court did not think it necessary to interpose, with respect to the ryots who had been convicted on the ground of this defect in the trial, although it did set aside the conviction under section 154, Penal Code, of two of the defendants in the case.

In the face of these decisions, we are unable to accept the conclusion which the learned Counsel for the appellants invited us to adopt. He asked us to presume that by reason of the irregularity of the trial, prejudice must have been caused. That we cannot do. We do not affirm that in a case in which there has

(1) I. L. R., 6 Calc., 96.
(2) B. L. R. Sup. Vol., 750; 8 W. R. Cr., 47.
(3) 12 W. R. Cr., 75.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

been such an irregularity as in the present case, this Court might not interfere, if there seemed reasonable ground to believe that the prisoner had been prejudiced by it; perhaps even the Court might do so, if there was reasonable ground to believe that he might have been prejudiced, but in the present case it may safely be affirmed that the appellants were not prejudiced: and to adopt the presumption urged upon us for the appellants would in effect be to hold that the convictions were absolutely void as having been illegally bad. But the decisions referred to show that this proposition cannot be sustained.

The appellant's Counsel further contended, upon the authority of the case of *Bachu Mullah* v. *Sia Ram Singh* (1) that we must make a somewhat similar presumption upon a ground other than that of the irregularity just discussed. In the present case witnesses were examined for the prosecution, who were themselves under trial in the cross case which was also pending, arising out of the riot: and it is argued that the observations made in the case of *Bachu Mullah* v. *Sia Ram Singh* (1) show that the reception of such evidence is so irregular as to affect the validity of the conviction obtained on it: in other words, that it must be presumed that the evidence was so affected by the circumstances under which the witnesses gave it, that the conviction must be set aside.

We cannot adopt that argument. It must be observed that the opinions expressed in that judgment, upon which reliance is placed by the appellant's Counsel, were not stated as forming the reasons for the decision of the Court, which in that case affirmed the conviction. If those observations had constituted the reason for the decision, and a conviction obtained on such evidence had been set aside on those grounds, it would have been necessary for us either to set aside the present conviction, or to refer the matter to a Full Bench. We should have felt bound to take the latter course, for we should feel unable to hold that the acceptance of evidence given under such circumstances goes in any degree to the validity of the conviction as a matter of law, although such circumstances constitute fair ground of comment as to the weight which should be given to evidence affected by them. But, as we

(1) I. L. R., 14 Calc., 358.

1892

THE QUEEN-EMPRESS v. CHANDRA BHUIYA.

have said, the decision in that case was not founded on those observations, and as a fact the conviction was in that case affirmed, the evidence objected to on the ground referred to having been evidence given in favour of the persons who objected to it.

We are unable to accept in favour of the appellants the argument founded on the case *Bachu Mullah* v. *Sia Ram Singh* (1).

It is right to notice an argument addressed to us by the Deputy Legal Remembrancer to the effect that section 239 of the Criminal Procedure Code authorises the trial, at one and the same trial, of the opposing parties in a riot. He argued that, notwithstanding that the common object of the rioters on one side must necessarily differ from that to be imputed to the other, a fight between the two parties must be treated as one transaction within this meaning of that section. We think it enough to say that we are unable to construe the word 'transaction' as susceptible of this meaning. Whether it might or might not be desirable that in such cases the members of both parties should be tried together, as may be done in the case of persons guilty of an affray, is a matter upon which we offer no opinion. It would involve in our judgment a change in the law, and not merely in the law of procedure at trials, but in the law of evidence, as it would hardly be possible to try cases of such a nature in this country satisfactorily without allowing the persons charged to give evidence, inasmuch as the well-known practice is to inculpate, on one side or the other, all the persons who were present, or can be possibly identified as having been present.

On the law, as it stands, contained in section 239, we do not think that the two parties can regularly be charged in the same trial.

For the reasons we have stated, we dismiss the appeal.

Appeal dismissed.

A. F. M. A. R.

(1) I. L. R., 14 Calc., 358.