without any prejudice and I see no reason why the plaintiff should not be entitled to a refund of this deposit. Mr. *Pugh*, who appears for the defendant-respondent, frankly admits that he has no objection to a decree being made for a refund of this sum of money. Having regard to the fact that the money is lying in the hands of the manager under the Court of Wards since December 1916, I am of opinion that the plaintiff is entitled to a reasonable interest upon this sum.

The result is that I would vary the decree of the Court below in so far that I would make a decree in favour of the plaintiff entitling him to a refund of Rs. 2,000 from the defendant with interest thereon at 12 *per cent. per annum* from the 22nd December, 1916, up to realization. In other respects the decree of the Court below is affirmed and the appeal is dismissed with costs.

JWALA PRASAD, J.—I agree.

Decree varied.

REVISIONAL CRIMINAL.

Before Adami and Sen, J.J.

PRAYAG GOPE

v.

KING-EMPEROR.*

1924.

June, 13.

Criminal Procedure Code, 1898 (*Act V of* 1898), *sections* 342, 349 *and* 540—*Court witness, whether re-examination of accused is necessary after examination of—Trial and conviction by second class magistrate—sentence by superior magistrate—illegality of—Penal Code*, 1860 (*Act XLV of* 1860), *sections* 143, 144 *and* 379—*Charge of rioting with common*

* Criminal Revision no. 293 of 1924, from a decision of B. K. Ghosh, Esq., Officiating Sessions Judge of Muzaffarpur, dated the 7th May, 1924, affirming an order of A. B. Petter, Esq., Subdivisional Magistrate of Sitamarhi, dated the 7th April, 1924.

1924.

PRAYAG GOPE v. KING-EMPEROR.

object of committing theft—separate convictions and sentences for rioting and theft, illegality of.

Where an accused person has been examined under section 342, Criminal Procedure Code, after the close of the prosecution case, and subsequently the court examines a person under section 540 (whether such person be one of the prosecution witnesses or another person), it is not necessary to re-examine the accused person under section 342.

Section 349 of the Criminal Procedure Code does not empower a magistrate to forward an accused person to a superior magistrate to be sentenced when he has himself recorded a conviction.

Where a person is charged with rioting with the common object of committing theft he cannot be separately convicted and sentenced both for rioting and theft.

The facts of the case material to this report are stated in the judgment of Adami, J.

C. M. Agarwala (with him *A. K. Gupta*), for the petitioners.

S. P. Varma (Acting Assistant Government Advocate), for the Crown.

ADAMI, J.—This case comes before the Court in its revisional jurisdiction. The petitioners have been sentenced to various terms of rigorous imprisonment under sections 379 and 144 and 143, Penal Code. The first two petitioners have been sentenced to 18 months under section 379/75 and 6 months under section 144, the sentences running concurrently. The other three have been sentenced to three months under section 143 and a fine of Rs. 50 under section 379. The value of the properties stolen was Rs. 50.

Mr. *Agarwala* on behalf of the petitioners puts forward three points. The first is that after the defence had closed their case, the Court called the complainant as a court witness and examined him and failed thereafter to examine the accused under section 342, Criminal Procedure Code The second point is that the case was tried by a Deputy Magistrate of the 2nd Class who, after convicting the petitioners, forwarded the case to the Subdivisional Magistrate for

sentence because he held that the sentences which the petitioners should receive would be greater than he had power of inflicting. The third point is that though the common object of the unlawful assembly was the theft of crops, the petitioners have been sentenced separately under sections 379 and 143 or 144.

With regard to the first point, I do not think that this Court will be inclined to interfere since the petitioners seem to be in no way prejudiced. The complainant was called as a court witness and examined as such by the Court. The judgment of the Lower Appellate Court shows that the Court questioned this complainant not as to the occurrence but as to some matter in relation to the title of the lands. The petitioners had a chance of cross-examining him but refrained from doing so. If they were unwilling to cross-examine him as a court witness it would be unlikely that they would have been anxious to make any statement to explain away any evidence given by the complainant as a court witness. I do not think that section 342 can be brought into play where a court witness is examined, be he complainant or any other person.

With regard to the second point, section 349 clearly states that if the Magistrate considers a person to be guilty and to deserve a larger penalty than the Magistrate himself can impose, the Magistrate should send the case to a superior Court for imposing a fitting sentence. In the present case the Deputy Magistrate of the 2nd Class convicted the petitioners. This was wrong. After an expression of opinion as to the petitioner's guilt, the Magistrate should have forwarded the case without any record of conviction.

On the third point there is no doubt that the common object being such as it is described in the charge, the petitioners could not be separately convicted and sentenced under the two sections—section 379 and section 143 or section 144; and the conviction and the sentence under one of these two sections must be set

1924.

PRAYAG GOPE v. KING-EMPEROR.

AMAMI, J.

aside. The difficulty is to know which conviction and sentence should be set aside. If the conviction and sentences under section 379 are set aside, then, also, the first two petitioners, who have been subjected to a heavier punishment by reason of their previous conviction, will also escape the effects of the previous convictions. Ordinarily the case is one which should go back for retrial owing to the trial Court not carrying out the provisions of section 349; but as pointed out by Mr. *Agarwala* the case has a large element of the civil nature in it and also the petitioners have already served a considerable part of their sentence.

With regard to the previous convictions, it is to be remembered that those convictions were passed in 1898 and 1902 and there is nothing to show that these persons have since then led otherwise than a good life.

We set aside the convictions under section 379 and reduce the sentences to the period already undergone under sections 143 and 144. The fine under section 379, if paid, will be refunded.

SEN, J.—I agree.

Order modified.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Foster, J

BIBI WASHIHAN

v.

MIR NAWAB ALI.*

1924.

June, 13.

Religious Endowments Act, 1863 (*Act XX of* 1863), *section* 18—*rejection of application under, for leave to sue—appeal, whether lies—Bengal, Assam and Agra Civil Courts Act*, 1887 (*Act XII of* 1887), *section* 20.

* Appeal from Original Order no. 248 of 1923, from an order of J. N. Prashad, Esq., District Judge of Shahabad, dated the 20th July, 1923.