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propounded the will. So the view taken by Greaves, J., cannot be extended in its application to a right of substitution in the appeal. As formulated in the case of *Schultz* v. *Schultz*(1), quoted with approval in *Ramani* v. *Kumud*(2), when a will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time; the sentence against the will must be regarded as a sentence against all claiming under it.

I, therefore, think that the petitioner should be substituted in the place of the original appellant. Even if it be conceded that the petitioner before us is not entitled to be substituted in the strict sense of the term, still we can under our inherent powers join her as party, for ends of justice, in order to continue the proceedings pending in this appeal. In any view it is quite proper, as stated by my learned brother, that she should be allowed to continue this appeal.

Application allowed.

REVISIONAL CRIMINAL.

SPECIAL BENCH.

Before Terrell C.J., James and Dhavle, JJ.

BHARAT KISHORE LAL SINGH DEO

v.

JUDHISTHIR MODAK.*

1929.

August, 14, 15.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 4(*h*), 190, 200 *and* 202—*complaint, what constitutes*

*Criminal Revision no. 426 of 1929, against an order of C. C. Mukharji, Esq., Deputy Commissioner of Manbhum, dated the 22nd May, 1929.

(1) (1853) 10 Gatlan 358; 60 Am. Dec. 335.

(2) (1910) 12 Cal. L. J. 185.

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—*section* 190, *alternatives upon which magistrate may take proceedings under, whether mutually exclusive—sections* 200 *and* 202, *scope of—complainant, duty of the magistrate to examine on oath, when arises—failure to examine complainant on oath, whether a mere irregularity.*

The mere fact that a document in writing contains an allegation that a specific offence has been committed does not necessarily constitute that document a complaint.

In order that a petition may constitute a complaint within the meaning of section 4(*h*), Code of Criminal Procedure, 1898, there must be first, an allegation of an offence and secondly, the allegation of the specific offence must be with a view to action being taken under the Code, that is to say, action being taken for the prosecution of the offender for having committed the specific offence, and it must be made to the magistrate in his judicial capacity so that he may exercise his power of taking cognizance of that offence and proceed in respect of it against the person accused.

The three alternatives upon which a magistrate may take proceedings under section 190 of the Code are not mutually exclusive, that is to say, a magistrate must not be held, in taking cognizance of an offence, to have taken cognizance under some one of the alternatives to the exclusion of the others.

Sections 200 and 202, Code of Criminal Procedure, 1898, which impose upon the magistrate the duty of examining the complainant on oath are applicable only where the magistrate proposes to take proceedings upon the information supplied by the complainant.

Jhuna Lal Sahu v. *King-Emperor*(1), not followed.

The omission to examine the complainant on oath is not an illegality but a mere irregularity.

The facts of the case material to this report will appear from the following order of James, J.:—

JAMES, J.—In this case Judhisthir Modak presented a petition to the Deputy Commissioner of Manbhum, stating that the local zamindar was extorting by show of criminal force a kind of "benevolence" from the villagers. The Deputy Commissioner directed the Divisional

(1) (1917) 2 Pat. L. J. 657.

Inspector of Police to enquire and report; and on receipt of his report he called upon the zamindar to show cause why he should not be prosecuted. The zamindar denied that the report was correct, whereupon the Deputy Commissioner directed the Superintendent of Police himself to hold an enquiry. On receipt of the report of the Superintendent of Police, the Deputy Commissioner directed that the zamindar should be prosecuted. The case was transferred for disposal to another Magistrate who is now holding the trial.

I am asked to quash the proceedings on the ground that the original petition of Judhisthir Modak amounted to a complaint, and that the proceedings are irregular since the complainant has not been examined on oath. The applicant relies on the decision of Sharfuddin and Roe, JJ., in *Jhuna Lal Saha* v. *King-Emperor*(1) which would certainly support his contention; but there is an earlier decision of this Court of Chamier, C.J., and Sharfuddin, J., to the effect that the failure to examine the complainant on oath is merely an irregularity [*Phagu Saha* v. *King-Emperor*(2)]. This is in accordance with the decisions of other High Courts [*Bhairab Chandra Barua* v. *Emperor*(3) and *Queen-Empress* v. *Mona*(4)]. The decision in *Jhuna Lal Saha's*(1) case was accepted by Das, J., in *Mangu Koiri* v. *King-Emperor*(5) as affording authority for the view that the failure to examine the complainant on oath under section 200 of the Criminal Procedure Code vitiated all subsequent proceedings. The matter was afterwards considered by Jwala Prasad, J., who took a different view in *King-Emperor* v. *Heman Gope*(6).

Mr. Gupta has cited several decisions in which it has been held that the failure to examine a complainant on oath before dismissing his complaint under section 203 of the Criminal Procedure Code amounts to an illegality such as may vitiate subsequent proceedings against him under section 476: but the question here is whether the failure to examine the complainant amounts to an illegality vitiating subsequent proceedings where process has actually issued. In my opinion the contention of Mr. Gupta in the present case is properly met by Sir Sultan Ahmad's answer that the Deputy Commissioner actually took cognizance of this case not under sub-section (*a*) but under sub-section (*b*) of section 190(*1*) of the Criminal Procedure Code. It appears to me to be clear that when the Deputy Commissioner took cognizance of the case on the report of the Superintendent of Police, he was taking cognizance under section 190(*1*)(*b*), and that it did not matter for practical purposes what may have happened to the original petition which led the Deputy Commissioner to direct the police to enquire; and further, that since the Depuy Commissioner had power to take cognizance on his own knowledge under section 190(*1*)(*c*), it does not matter whether or not there is any difficulty in the way of

(1) (1917) 2 Pat. L. J. 657.
(2) (1916) 1 Pat. L. J. 592.
(3) (1919) I. L. R. 46 Cal. 807.
(4) (1888) I. L. R. 11 Mad. 443.
(5) (1919) 1 Pat. L. T. 346.
(6) (1920) 1 Pat. L. T. 349.

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finding that cognizance was taken regularly under sub-section (*a*) or (*b*). This view, however, goes directly against the decision in *Jhuna Lal Sahu's*(1) case; and I think that it would be better if this application were disposed of by a Division Bench.

On this reference the case was placed before a Special Bench.

S. M. Gupta, for the petitioner.

P. K. Sen (with him the *Government Pleader* and *S. C. Mazumdar*), for the opposite party.

COURTNEY TERRELL, C.J.—This is a petition in revision for the quashing of proceedings before the Deputy Commissioner of Manbhum in a case in which one Bharat Kishore Lal Singh Deo has been charged under sections 506, 384 and 384/511 of the Indian Penal Code. The case has arrived at the stage at which the prosecution witnesses have been examined and cross-examined and it is submitted on behalf of the petitioner that an illegality in the proceedings has taken place which necessitates the setting aside of the proceedings and, if necessary, the re-starting of the case.

The circumstances under which this prosecution arises are as follows:—It appears that on the 16th April, 1929, one Judhisthir Modak of Purulia petitioned the Deputy Commissioner of Manbhum who is the District Magistrate and asked for his protection. It must be remembered that the Deputy Commissioner has executive as well as judicial functions. The petition set forth the following circumstances:—He said that one Babu Bharat Lal Singh Deo Bahadur who is the petitioner before us, had lately come to the village and was demanding illegal payments from the tenants and raiyats. He further said that the retainers of the said Bharat Lal Singh Deo were oppressing the village and demanding these illegal payments and that in particular they had demanded illegal payments

(1) (1917) 2 Pat. L. J. 657.

from Judhisthir's uncle. That the petitioner had information that all the villagers had combined with the person about whom he complained and had committed mischief and that recently the retainers had surrounded the house of his uncle armed with lathis and declared that they would assault whomever they would find out of the house and so the members of the family of Judhisthir's uncle were confined to the house and afraid to issue forth to lodge information at the thana, and furthermore, that it would be impossible for them to prove the facts alleged against Bharat Lal Singh Deo by reason of his oppressive conduct. Judhisthir goes on to say that he is afraid to go and lodge information at the thana in the state of affairs and the concluding paragraph was as follows:—

"Under the circumstances your petitioner's uncle's family and their properties are in great danger and a speedy remedy is required to save their lives and properties so it is earnestly prayed that your honour will be kind enough to enquire about the matter and save your petitioner's family from the difficulties they are put in."

The Deputy Commissioner made a note on this petition addressed to the Superintendent of Police of the sadr circle requesting him to ask the Divisional Inspector or a reliable officer to enquire into this matter and it was signed by him as Deputy Commissioner. On the 22nd the police furnished a report and the Deputy Commissioner opened an order-sheet and noted that he had read the police report, had noted also that the petitioner before us had been threatening the villagers with his gun and so he made an order suspending his license for arms and he issued a notice to inform him of these facts. Furthermore, he called upon the petitioner to show cause why proceedings should not be taken against him and why he should not be prosecuted under sections 342, 323 and 384 of the Indian Penal Code.

The petitioner before us appeared before the Deputy Commissioner and denied the allegations and

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said that the police report was false and thereupon the Deputy Commissioner directed the Superintendent of Police to hold a further enquiry and to inform the villagers of his arrival and that they should come with their complaints, if they had any, and noted further that, if necessary, he would depute a magistrate to take cognizance of complaints on the spot.

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On the 22nd May he records that he has perused the police report and the memorandum of evidence recorded by the Superintendent of Police and that he was satisfied that there was sufficient ground for prosecuting the petitioner under the sections mentioned, and he, therefore, directed a prosecution and issued a warrant with bail for his appearance on the following 6th of June and directed the Government Pleader to appear for the prosecution. Accordingly the petitioner was prosecuted and the matter has now arrived at the stage which I have mentioned at the beginning of my judgment.

This petition in revision is based on the following arguments. It is said that the original petition addressed to the Deputy Commissioner by Judhisthir Modak was a complaint. Further, it is said that the Deputy Commissioner must be taken to have taken cognizance of that complaint and to have sent the matter to the police for enquiry and, therefore, that the proceedings which have followed have been based upon the original petition as a complaint, and that inasmuch as Judhisthir was not examined on oath by the Deputy Commissioner as directed by section 202 of the Code of Criminal Procedure, the subsequent proceedings have been illegal. Further, it is pointed out that under section 202 the Magistrate when taking cognizance of a complaint must not direct a police enquiry unless he has first examined the complainant on oath.

The first point to be considered in this case is whether the original petition was a complaint or not

and in my view it was not a complaint. It is true that it does make a statement of the fact which strictly interpreted is a statement that the petitioner before us has committed a specific offence, that is to say, that with the aid of his retainers he has surrounded the house of Judhisthir's uncle and put him in fear of issuing forth but the mere fact that a document in writing contains an allegation that a specific offence has been committed does not necessarily constitute that document a complaint. The definition of a complaint is to be found in section 4 (*h*) of the Code of Criminal Procedure and is as follows:—

"Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer."

In my opinion these words mean this. First of all there must be an allegation of an offence, and it is true that the petition in this case does contain that requirement, but secondly, the allegation of the specific offence must be with a view to action being taken under the Code, that is to say, action being taken for the prosecution of the offender for having committed the specific offence, and it must be made to the magistrate in his judicial capacity so that he may exercise his power of taking cognizance of that specific offence and proceed in respect of it against the person accused. In this case an examination of the petition shews clearly that the object of the petition was not that the particular offence should be punished but rather the mention of the particular offence is put in with a view to illustrate the kind of conduct which the accused person is supposed to be following and against which kind of conduct the petitioner seeks protection. The whole tenor of the petition shews that what is uppermost in the mind of the petitioner is the anticipated conduct of the person whom he mentions and against that conduct he asks the Deputy Commissioner in his executive capacity to make enquiry and protect him against a repetition of such conduct. The

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Deputy Commissioner treated it in that way and forthwith sent the police to enquire into the matter and to see whether there was any basis for the anticipation of future trouble. When the police made the enquiry they reported apparently not only that there was an anticipation of future trouble but that certain specific offences had been committed and when that matter was brought to the notice of the magistrate then he assumed his judicial capacity and, acting under his powers under section 190 of the Code of Criminal Procedure, he took proceedings against the person against whom complaint had been made.

An argument has been raised before us that in considering section 190 of the Code of Criminal Procedure one should in fact treat the three alternatives upon which a magistrate may take proceedings as being mutually exclusive, that is to say, that a magistrate must be held, in taking cognizance of an offence, to have taken cognizance under some one of the alternatives to the exclusion of the others but that to my mind is not the construction at all.

Furthermore, it is said that under section 202 of the Code of Criminal Procedure in every case where a document in writing has been lodged it is the duty of the magistrate to treat that as a complaint and to take cognizance invariably upon that and not upon any other source of information permitted by section 190. To my mind that contention is also erroneous. Sections 200 and 202 which impose upon the magistrate the duty of examining the complainant on oath are only applicable where the magistrate proposes to take proceedings upon the information supplied by the complainant. And if he intends to issue process upon that basis then it is incumbent upon him to examine the complainant on oath, but not otherwise, and indeed if the opposite were the rule a paralysis of business might take place. A magistrate may well be visited from time to time by persons who simply put before him a document in writing alleging an

offence and it would bar the magistrate from ever proceeding upon, for example, a simultaneous police report which he had or information which had come to him from his own knowledge, and compel him to examine the complainant on oath. Mr. Gupta, who has most ably argued this case, was frankly constrained to admit that a ridiculous state of affairs might be brought about, because if an individual long known to the magistrate as a lodger of false complaints and a nuisance generally comes into his office and places before him a writing in which he asserts, for example, that a murder had just been committed, the magistrate would not be entitled to send out police to enquire and apprehend the accused person, but he would be forced, before he could do anything, to examine that complainant on oath and that if proceedings were taken subsequently, ignoring the original complainant, and if such proceedings were based upon a police report, they would be wholly invalid because the original person who had first brought the information in writing to the magistrate had not been examined on oath. I think that the result of the application of the argument is sufficient to demonstrate its unsoundness.

The first point, that is to say, as to whether the original petition was a complaint or not, having been decided that would appear to dispose of the whole case, but there is a further point. Every High Court in India has held that the omission to examine the complainant on oath is in fact not an illegality but is an irregularity, and being an irregularity the next question that arises is as to whether the petitioner has, by reason of the irregularity, been put to any substantial injustice. In this case Judhisthir Modak who lodged the original petition was in fact examined as a witness for the prosecution. He was examined in the presence of the present petitioner and he was cross-examined by the petitioner's legal adviser. Therefore, the petitioner cannot be said to have suffered any injustice. In fact his grievance seems

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to be that the complainant (if he be so called) was not examined in his absence on oath and that that defect is not cured by his having been examined in his presence on oath and having been cross-examined.

In my opinion, therefore, the three points, that is to say, whether there was a complaint, whether in the circumstances in which the magistrate took action it was necessary to examine the complainant on oath and thirdly, whether even if it had been a complaint there was an illegality if the magistrate had declined to examine the complainant on oath must all be decided against the petitioner.

In my view no very profound question of law arises in the case but I think it necessary to make some observations with regard to the case of *Jhuna Lal Sahu* v. *King-Emperor*(1). In that particular case it is stated that the person who put in the original written petition did not ask the magistrate to take any action in the way of summons or issue of warrants against the accused but desired only that a confidential enquiry be made by the Criminal Investigation Department. The learned Judges held there that the magistrate might have been right in ordering an enquiry by the Criminal Investigation Department but on receipt of the result of the enquiry the magistrate should either have called upon the petitioner to lodge a further complaint and examined him on oath or should have directed the officer of the Criminal Investigation Department to file a complaint. To my mind that view of the law is wrong. No further complaint was necessary. The magistrate might quite properly have proceeded upon the police report only and in my opinion the reasoning of that judgment is, with great respect to the learned Judges who decided it, erroneous.

For the reasons which I have stated the petition, in my opinion, fails and should be rejected and the

(1) (1917) 2 Pat. L. J. 657.

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trial of the petitioner should proceed from the point at which it has been left for the purposes of this petition.

JAMES, J.—I agree.

DHAVLE, J.—I agree.

Rule discharged.

COURTNEY TERRELL, C. J.

APPELLATE CIVIL.

Before Das and James, JJ.

MUSAMMAT BIBI KAZMI

v.

LACHHMAN LAL SAO.*

1929.

November, 5.

Negotiable Instruments Act, 1881 (*Act XXVI of* 1881), *sections* 5 *and* 13—*Bill of exchange—drawer and drawee, whether may be one and the same person—holder, if entitled to treat it as such—bill of exchange—expressed to be payable to particular person—prohibitory words restricting transfer, absence of—document, whether a negotiable instrument—suit against firm—members impleaded—suit, whether maintainable—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XXX.*

In order that an instrument may constitute a bill of exchange within the meaning of section 5 of the Negotiable Instruments Act, 1881, it is not necessary that the drawer and the drawee should be two different persons.

But where the drawer is the same person as the drawee that person is not entitled to treat the instrument as a bill of exchange; but the holder of the bill may treat it as such.

*Appeal from Appellate Decree no. 1111 of 1927, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Patna, dated the 15th August, 1927, reversing a decision of Babu Radha Krishna Prasad, Additional Munsif of Patna, dated the 25th December, 1926.