REVISIONAL CRIMINAL.

Before Courtney Terrell, C. J. and Kulwant Sahay, J.

1933.

November, 10.

RAMROOP MAHTON

v.

MANO MIAN.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 145 and 147—difference in scope—subject-matter of proceedings under the two sections, difference in the nature of—claim of first party to catch fish in waters upon the land of second party—initiation of proceeding under section 147, whether bad—admission of documents after close of arguments—no opportunity offered to other side to adduce rebutting evidence—order, whether illegal—record-of-rights prepared thirty years ago—presumption, whether still attaches to the entry.

In a proceeding under section 145, Code of Criminal Procedure, 1898, the magistrate has, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, to decide whether any and which of the parties was at the date of the order initiating the proceeding in possession of the said subject. In a proceeding under section 147 of the Code the magistrate has to come to a finding whether the right claimed by the parties of user of any land or water does or does not exist and after coming to a finding that such a right does exist he has to find, further, whether any of the parties had been exercising that right during the particular period mentioned in the section.

The subject-matter of a proceeding under section 147 may also be fisheries to which one of the parties may have a right apart from any right to the land upon which the fishery stands; whereas the subject-matter of a proceeding under section 145, if it relates to fisheries, must relate to the particular local area where the fishery extends.

Where, therefore, the right claimed by the second party was the right to catch fish in waters upon the land of the

* Criminal Revision no. 429 of 1933, against an order of Babu Hardin Singh, Deputy Magistrate, 1st class, of Monghyr, dated the 7th June, 1933, a motion against which was rejected by W. W. Dalziel, Esq., I.C.S., Sessions Judge of Monghyr by his order, dated the 18th July, 1933.

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first party, and the magistrate initiated a proceeding under section 147 of the Code.

Held, that the proceeding clearly came within the ambit of section 147 and, therefore, that the order of the magistrate was right.

Andrew Yule and Co. v. *A. H. Skone*(1), distinguished.

Kali Kissen Tagore v. *Anund Chunder Roy*(2), referred to.

Where the magistrate admitted certain documents in evidence on behalf of the second party after the proceedings were served upon the parties and they had filed their written statements and evidence had been gone into and after the close of the arguments.

Held, that the action of the magistrate in admitting the documents after the close of the case without notice to the first party and without giving them an opportunity to adduce rebutting evidence was illegal.

The fact that the record-of-rights is over thirty years old does not in any way affect the presumption attaching to it in law.

Application in revision by the first party.

The facts of the case material to this report are set out in the following judgment of Macpherson, J. who referred the case to the Division Bench.

MACPHERSON, J.—In a proceeding under section 147 of the Code of Criminal Procedure the Deputy Magistrate of Monghyr has passed an order on the petitioners who were the first party, directing them not to interfere with the exercise by the second party of the right of fishery over five jalkars of the Bagmati river named Kudrakund or Galaria Bari, Rajajan, Dhimki, Kamalsarikund and Argala Chaur which were in dispute. The petitioners claim the jalkars as being, the first four, within their village Bishunpur Santokh and, the fifth, as within their village Amba-Icharua. The opposite party claim them as part of their jalkar Maniar, a distinct revenue-paying mahal with tauzi number 534.

On behalf of the first party who obtained the present rule, Mr. Yunus has urged three points:—

(*1*) that the magistrate has used against the petitioners three documents, Exhibits M-6, M-7 and M-8, which were filed after the close of the hearing;

(1) (1919) 49 Ind. Cas. 647.
(2) (1896) I. L. R. 23 Cal. 557.

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(2) that the record-of-rights and the village note were not considered; and

(3) that the proceeding was without jurisdiction as section 145 of the Code of Criminal Procedure was the appropriate provision of the law for such proceedings.

The learned Deputy Magistrate found that the weight of both oral and documentary evidence was in favour of the second party. As regards the oral evidence, he found that the evidence of the first party was too weak to be considered. As regards the effect of the oral evidence of possession there can be no controversy that it establishes the case of the second party.

As regards the documentary evidence, it is a fact that the three documents mentioned were called for by the Magistrate after the close of the hearing. He found that they were mentioned in the important judgments, Exhibits L-3 and L-4 (the latter is the appellate judgment delivered by Sir William Vincent in 1902) relating to jalkar Maniar in adjoining villages and he asked that they be produced for his perusal. Mr. Yunus urges that use has been made of them prejudicial to the petitioners and that he would have been able to adduce other documentary evidence to controvert the view taken by the Magistrate. On this last point the document which has been shown to me by Mr. Yunus makes me believe that he is much too optimistic. In point of fact the documents admitted do nothing more than elucidate the judgments which have been referred to and which are of great evidentiary value (though not, as the Deputy Magistrate put it, res judicata) as showing the existence of the second party's revenue-paying jalkar Maniar, not only in 1809 when the suits which were determined in those judgments were brought but as far back as 1813 when in a partition this jalkar certainly existed as a separate entity unconnected with the villages wherein it is situated. To my mind the admission of those documents is of no importance and the first point should fail.

As regards the second point, the Magistrate did state on a preliminary objection that no presumption as to possession arose from the entry in the record-of-rights because it was over thirty years old. This is somewhat strongly stated because the presumption did arise for what it was worth that the first party was in possession at the date of the final publication of the record-of-rights thirty years before. But apparently the suits mentioned were then proceeding.

As regards these two points, the utmost that the petitioners could possibly secure would be a remand of the case to the Court below with a direction to give the entry in the record-of-rights such presumption as is due and to admit Exhibits M-6 to M-8 formally giving an opportunity to petitioners to give rebutting evidence. It cannot, however, be believed that in such circumstances there could be any difference in the result, and, in my opinion, these two points would not justify interference in revision with the order of the Magistrate.

The third point is one of some difficulty and some importance and I have come to the conclusion that I ought to send the case to a

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Division bench with a view to an authoritative decision on the question whether in circumstances like the present it is section 145 or section 147 that is applicable or whether both are applicable, and if it is decided that section 145 alone is applicable whether the present proceedings must be vacated or whether they should be allowed to stand on the ground that there was (as I am satisfied there was, in spite of their initial objection that the proceeding should be under section 145), no prejudice to the petitioners.

The mahal of the second party is Jalkar Maniar *mai* (with) *makana*. *Makana* is an annual crop which grows in North Bihar in such sheets of water. Jalkar includes at least the right to take the fish in the named sheets of water although those sheets are within the ambit of the zamindari of the petitioners. Section 145 applies when a dispute likely to cause a breach of the peace exists concerning any land or water and the expression "land or water" is defined as including "buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property". In *Andrew Yule & Co.* v. *A. H. Skone*(1) Roe, J. held that a mining right must be regarded as within the term "land" in section 145. He pointed out that the decisions based upon the Code of Criminal Procedure operative from 1878 to 1898 are not in point and that the Code of 1898 is intended to cover all profits derivable from land or water, and in particular fisheries as providing profits taken from water. Mr. S. P. Varma is inclined to suggest that section 145 is restricted to the case where the right of fishing depends on the possession of the water itself and that accordingly section 147 is here applicable. He would argue that as proprietor of the jalkar mahal he is not concerned with the sub-soil but only to a user of "land or water" for the purposes of fishing. It is, however, for consideration how far the fact that his mahal is jalkar Maniar *mai makana*, makes a difference. On the other side Mr. Yunus is content to say that by special provision "land or water" in section 145 includes fisheries and that section 147 in this connection will have to be read as 'right of user of fisheries'.

The "inquiry" in section 147 is to be carried out in the manner provided under section 145 and no prejudice to the petitioners is discernible in that connection.

Let the case be referred to a Bench of two judges under proviso (*a*) to rule 1 of Chapter II of the Rules of this Court.

On this reference

P. R. Das (with him *M. Yunus*, *N. C. Ghosh*, *P. N. Gour* and *N. Prasad*), for the petitioners.

S. P. Varma and *S. N. Bose*, for the opposite party.

KULWANT SAHAY, J.—This is an application in revision by the first party in a proceeding under

(1) (1919) 49 Ind. Cas. 647.

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section 147 of the Code of Criminal Procedure in the court of a Deputy Magistrate of the 1st class at Monghyr. The first party are admittedly the owners of two revenue paying villages Bishanpur Santokh and Amba Icharda. The second party claim a jalkar right in certain sheets of water in those two villages. The case of the second party is that there is a fishery known as Jalkar Maniar which extends over a large number of villages including the two villages of the first party, that they have a right of fishing in these waters and they have been exercising such right and that the first party were now disputing the right of the second party to fish in those waters. The magistrate at first drew up a proceeding under section 144 of the Code of Criminal Procedure but subsequently that proceeding was converted into a proceeding under section 147. This proceeding was drawn up on the 31st January, 1933, and the next day, the 1st February, the first party filed an application before the magistrate objecting to the proceeding being drawn up under section 147, their case being that the proceeding ought to have been under section 145. They further referred in that application to certain entries in the finally published record-of-rights. The learned Magistrate held that the proper proceeding was one under section 147 and he refused to consider the record-of-rights on the ground that it was published more than thirty years ago. After the proceedings were served upon the parties and they had filed their written statements and evidence had been gone into and after the close of the arguments the learned Magistrate took in evidence three documents which were marked by him as Exhibits M—6, M—7 and M—8. The final order made by him was in favour of the second party prohibiting the first party from interfering with the exercise of the right by the second party.

Against the order of the magistrate the first party came up in revision to this court and the revision case was heard in the first instance by Macpherson, J. who

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has referred it to a Division Bench in order that there may be an authoritative decision whether the proceeding should have been under section 147 or under section 145. The first question, therefore, for consideration is which is the proper section under which the proceeding ought to have been drawn up. The next point for consideration is whether there has been any illegality in admitting the three documents, Exhibits M—6 to M—8, after the close of the case. The last point is whether the magistrate was right in entirely excluding from consideration the finally published record-of-rights.

As regards the first question the difference between a proceeding under section 145 and one under section 147 appears to be clear enough. Section 145 deals with disputes concerning any land or water or the boundaries thereof and "land or water" have been defined in sub-section (2) of section 145 as including amongst other things fisheries. Section 147 also deals with disputes regarding land or water but limits the dispute to a right or alleged right of user of any land or water. In a proceeding under section 145 the magistrate has, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, to decide whether any and which of the parties was at the date of the order initiating the proceeding in possession of the said subject. In a proceeding under section 147 the magistrate has to come to a finding whether the right claimed by the parties of user of any land or water does or does not exist and after coming to a finding that such a right does exist he has to find further whether any of the parties had been exercising that right within three months of the date of the proceeding or, where the right was exercisable only at particular seasons or on particular occasions, whether such right had been exercised during the last of such seasons or the last of such occasions before the institution of the proceedings. It is clear, therefore, that the subject-matter of a proceeding under section 147

may also be fisheries to which one of the parties may have a right apart from any right to the land upon which the fishery stands. The subject-matter of the proceeding under section 145, if it relates to fisheries, must relate to the particular local area where the fishery extends. The difference therefore is that in the one case, that is, in the case of section 147, the right may be a prescriptive right or right of easement to use water or land not belonging to the parties but belonging to somebody else which has to be considered. In the present case the right claimed by the second party is the right to catch fish in waters upon the land of the first party. It is, therefore, in the nature of an easement or profits a prendre and, therefore, the proceeding clearly came within the ambit of section 147 of the Code of Criminal Procedure. In *Kali Kissen Tagore* v. *Anund Chunder Roy*(1) it was held that jalkar rights were included within the words

" right to do anything in or upon tangible immoveable property "

which occurred in the old section 147. The present section makes the matter clearer when it uses the words right of user of any land or water whether such right be claimed as an easement or otherwise. The case of *Andrew Yule and Co.* v. *A. H. Skone*(2) was a case relating to mining rights. There are no doubt some observations occurring in that case as regards jalkar rights also but the distinction between jalkar rights as contemplated by section 145 and that contemplated by section 147 was not considered and dealt with. I am, therefore, clearly of opinion that the proceeding under section 147 was correctly initiated and there is no defect in that respect.

As regards the other two points I am of opinion that the petitioners ought to succeed. The three

(1) (1896) I. L. R. 23 Cal. 557.
(2) (1919) 49 Ind. Cas. 647.

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documents admitted by the learned magistrate after the close of the hearing of the case have been referred to in the judgment and mainly relied on as a substantial piece of evidence for a finding as regards the existence of the right in favour of the second party. The first party complain that they had not an opportunity to meet these documents and to adduce rebutting evidence in respect thereof. In fact they produced before us certain documents which they say would have completely rebutted the evidence afforded by these three documents, namely, Exhibits M—6 to M—8. There is no doubt that the first party has a genuine grievance in this respect and the action of the magistrate in admitting documents after the close of the case without notice to the first party and without giving them an opportunity to adduce rebutting evidence was illegal.

There is also the question as regards the evidentiary value to be attached to the record-of-rights. It is contended on behalf of the first party that the finally published record-of-rights shews the possession of the first party in respect of the jalkar. Mr. S. P. Varma on behalf of the second party contends that the record-of-rights does not shew the possession of the first party in respect of the jalkars. But whether the record-of-rights does or does not support the first party is a question which has to be considered by the court below. That court has discarded this document simply on the ground that it was an old document prepared more than thirty years ago but the fact that it was prepared more than thirty years ago does not in any way affect the presumption attaching to it in law. The presumption is no doubt a rebuttable one and it was open to the magistrate to find upon the evidence adduced by the second party that the presumption raised by the document had been rebutted. But the learned magistrate was not justified in wholly excluding that document from consideration.

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For these reasons I am of opinion that the order of the learned magistrate cannot stand and must be set aside and the case sent back to him for re-consideration if he is still of opinion that there is a likelihood of a breach of the peace.

COURTNEY TERRELL, C.J.—I agree.

KULWANT SAHAY, J.

Rule made absolute.

REVISIONAL CRIMINAL.

Before Courtney Terrell, C. J., and Kulwant Sahay, J.

1933.

November, 14.

RAMNATH RAI

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 233, 234 and 235—"transaction", meaning of—several articles stolen on different dates—no evidence of separate acts of reception—retention of each article, whether part of a single transaction—single trial, whether bad.

If a quantity of stolen property is found in the possession of an individual in circumstances which lead to the conclusion that he was retaining the whole of such property knowing it to have been stolen, there cannot be separate trials in respect of separate portions of the stolen property.

It does not follow from the mere fact that the several articles were stolen on different dates and there is no evidence of separate acts of reception, that the retention of each article on a given date is not a part of a single "transaction".

The word "transaction" in its context in section 235, Code of Criminal Procedure, 1898, has a wider significance for which a synonym may be found in the word "affair".

Therefore, the simultaneous possession of a number of bullocks at a mela and the offer of them for sale is one "transaction" and any number of separately stolen bullocks may be the subject of a single trial.

* Criminal Revision no. 428 of 1933, against an order of R. C. Chaudhuri, Esq., Sessions Judge of Shahabad, dated the 2nd August, 1933, upholding an order of M. M. Philip, Esq., I.C.S., Subdivisional Magistrate of Sassaram, dated the 30th June, 1933.