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proceedings the accused has got to make a claim that owing to certain facts the trial shall be under Chapter 33. If the Court allows the claim after investigation, then the trial is under Chapter 33. It is admitted in the present case that no such claim was ever made. There was no investigation and no finding that for any reasons Chapter 33 should apply. This being the case, the trial was, like all ordinary trials, under Chapter 23 and under Chapter 23 there is no right of appeal under section 449.

This appeal under section 449 must therefore be rejected.

CRIMINAL REFERENCE.

Before Mr. Justice Ba U, and Mr. Justice Mackney.

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Aug. 27.

Whipping—Offence punishable with imprisonment and fine—Addition of whipping—Whipping in lieu of imprisonment—Penal Code (Act XLV of 1860), s. 325—Whipping (Burma Amendment) Act (Burma Act VIII of 1927), s. 3.

Under the provisions of s. 3 of the Whipping (Burma Amendment) Act, 1927, it is lawful to add whipping to a sentence of imprisonment alone, or to a sentence of imprisonment and fine for an offence under s. 325 of the Penal Code. Imprisonment is imperative under the section, whilst fine, in addition to imprisonment, is optional. Fine alone cannot be imposed, and whipping added in lieu of imprisonment.

Emperor v. *Kishen Singh*, I.L.R. 46 All. 174; *King-Emperor* v. *Tha Kin*, 5 L.B.R. 22; *Nassir* v. *Chunder*, 9 W.R. (Cr.) 41; *Queen* v. *Peshagur*, 2 W.R. (Cr.) 32; *Queen-Empress* v. *Da'gadu*, I.L.R. 16 Bom. 357; *Varadarajulu* v. *Emperor*, A.I.R. (1925) Mad. 183—*referred to.*

The following order of reference was made by

MOSELY, J.—The respondent was convicted of causing grievous hurt, an offence under section 325, Indian Penal Code, and

* Criminal Reference No. 61 of 1934 arising out of Criminal Revision No. 104A of 1934 of this Court.

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was sentenced to receive 20 lashes and to a fine of Rs. 30 or in default one month's rigorous imprisonment.

The legality of the sentence is in question. It was passed under section 3 of the Whipping (Burma Amendment) Act of 1927, which makes such an offence punishable with whipping in lieu of or in addition to any other punishment to which the offender may be liable under the Indian Penal Code.

Offences under section 325, Indian Penal Code, are punishable with imprisonment, and the offender is also liable to fine. Imprisonment is imperative under the Code. The respondent here was sentenced to whipping in lieu of imprisonment and in addition to fine.

I have heard the learned Government Advocate on this reference.

It is argued that a sentence of whipping in such a case cannot be passed in lieu of a sentence of imprisonment alone, but must be passed in lieu of the whole punishment to which the offender was liable, while if a sentence of whipping is passed "in addition" it must be in addition to a sentence of imprisonment. Several authorities are quoted on the meaning of the expression "in lieu of". *Queen-Empress* v. *Da'gadu* (1) and *King-Emperor* v. *Tha Kin* (2) deal with offences punishable under sections 2 and 5 of the Indian Whipping Act VI of 1864 (sections 3 and 5 of Act IV of 1909) with whipping *in lieu of* any punishment (section 5 says "any other punishment") to which the offender might be liable. *Emperor* v. *Kishen Singh* (3) is on section 5 of Act IV of 1909. It was held in those cases that though the offender might be liable under the Code to two several punishments,—imprisonment and fine,—yet the obvious interpretation of the Whipping Act was that whipping was to be inflicted in lieu of the whole of the punishment to which the offender was liable, and that no other punishment as prescribed by the Penal Code was allowable.

It might seem at first sight, if the wording of section 3 of the Whipping Act were loosely construed, that the term "in lieu of or in addition to any other punishment to which the offender is liable" could mean that the punishment of whipping could be imposed in lieu of the punishment of imprison-

(1) (1891) I.L.R. 16 Bom. 357. (2) (1909) 5 L.B.R. 22.
(3) (1923) I.L.R. 46 All. 165.

ment, and in addition to the punishment of fine, as the offence is punishable with fine. But this is in my opinion not so, for the offender is only liable to the punishment of fine if the fine be imposed *in conjunction with* imprisonment.

A sentence of whipping plus fine or rather of fine plus whipping is legal in the case of an offence under section 324, Indian Penal Code, which is punishable with imprisonment *or* fine, to which whipping may be added. An offence under section 325, Indian Penal Code, is punishable with imprisonment or with imprisonment and fine, and whipping may be added either to a sentence of imprisonment alone, or to a sentence of imprisonment plus fine. But in the case of an offence under section 325, Indian Penal Code, whipping cannot be added to a sentence of fine alone, as imprisonment is imperative under this section. To put it in another way a sentence of whipping cannot be imposed in lieu of part of the sentence allowable, and in addition to another part of the sentence which is only permissible in conjunction with the first part of the sentence.

I consider that the sentence in question is an illegal one. As the matter is of some importance however, and the practice of passing such sentences has not been hitherto questioned, I would refer to a Full Bench or Bench as the Chief Justice may direct the question whether a sentence of whipping plus fine is legal in the case of an offence where imprisonment is imperative under the Indian Penal Code.

A. Eggar (Government Advocate) for the Crown. Act VI of 1864 added whipping to the punishments for certain offences under the Indian Penal Code, and it was followed by Acts III of 1895 and IV of 1900. The effect of these Acts was that a sentence of whipping could be inflicted in lieu of all the punishments prescribed by the Code. A sentence of whipping can be inflicted in substitution of all the punishments to which the accused is liable under s. 325. Under that section a sentence of imprisonment is imperative, and it would be illegal to pass a sentence of fine plus whipping. But it would have been legal to pass a sentence of imprisonment

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and whipping or a sentence of imprisonment and fine plus whipping, or whipping alone. The result is absurd, but one has to take the law as it stands. The law on the subject was recodified in 1909 by Act IV of 1909, but the Legislature chose to leave the law in the state in which the earlier decisions on the subject found it, and therefore it should be assumed that the Legislature had no desire to alter the law in this respect.

Nassir v. *Chunder* (1) ; *The Queen* v. *Bunda Ali* (2) ; *Queen-Empress* v. *Da'gadu* (3) ; *King-Emperor* v. *Tha Kin* (4) ; *Emperor* v. *Kishen Singh* (5) ; *King-Emperor* v. *Chit Pon* (6) ; *King-Emperor* v. *Nga Aung Myat* (7).

BA U, J.—As the facts of the case have been fully set out in the order of reference made by my brother Mosely J., I do not propose to recapitulate them.

The question referred is—whether a sentence of whipping plus fine is legal in the case of an offence where imprisonment is imperative under the Penal Code.

Whipping is not one of the punishments prescribed in section 53 of the Indian Penal Code, but by the Whipping (Burma Amendment) Act, 1927, certain offences have been made punishable with whipping as either an additional or alternative punishment to the one prescribed therefor by the Indian Penal Code.

An offence under section 325 of the Indian Penal Code of which the respondent in the present case

(1) 8 W.R. (Cr.) 41.
(2) 15 W.R. (Cr.) 7.
(3) I.L.R. 16 Bom. 357.
(4) 5 L.B.R. 22.
(5) I.L.R. 46 All. 174.
(6) I.L.R. 7 Ran. 319.
(7) I.L.R. 10 Ran. 317.

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was found guilty by the trial Court is one of the offences mentioned in section 3 of the said Act, which is in these terms :

"In addition to the persons punishable under section 4 of the Whipping Act, 1909, with whipping in lieu of, or in addition to, any other punishment to which they may be liable under the Indian Penal Code, any person shall be so punishable who commits any offence under sections 324, 325, etc., of the said Code."

Now, what do the words "in lieu of any other punishment" mean ?

Although the point did not directly arise for decision, yet it came in for discussion by a Full Bench of the Calcutta High Court in the case of *Nassir* v. *Chunder and others* (1). In that case Peacock C.J. said :

"Section 2 of Act VI of 1864 says that 'whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Penal Code.' It does not say, and it could not say, that by the Penal Code he was liable to be whipped, but it might say that by the Penal Code as amended by this Act he shall be liable to be whipped. Take the case of theft. Section 2 of the Act does not say that by the Penal Code a man who commits theft is liable to be whipped, but it says that in lieu of giving him the punishment inflicted by the Penal Code, namely, three years' imprisonment and fine, he may be punished with whipping. Sections 3 and 4 render offenders liable to whipping in lieu of or in addition to the punishments imposed by the Penal Code."

Macpherson J., one of the members of the Bench, expressed his view to the same effect. He said at page 41 :

"The second section specifies the offences for which whipping may be awarded in lieu of any other punishment. It is as follows : 'Whoever commits any of the following offences

(1) (1868) 9 W.R. (Cr.) 41 at p. 48.

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may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code, that is to say,' etc. The effect of these words I understand to be that the sections mentioned in this second section are to be read respectively as if words to this effect had been added to each 'or in lieu of such punishment (or punishments), the offender may be punished with whipping'."

Seton-Karr J., another member of the Bench, said at page 45, after quoting the judgment of Campbell J., that he generally agreed with the conclusions arrived at by that learned Judge ; and Campbell J., in the course of his judgment, said :

"When flogging is inflicted in lieu of any other punishment, no other punishment can be inflicted for that offence."

The opinion thus expressed was quoted with approval by the Bombay High Court in *Queen-Empress* v. *Da'gadu* (1). Subsequent to the decision of these two cases the Whipping Act, Act VI of 1864, which was the first Act to deal with whipping, was amended first by Act III of 1895 ; secondly by Act V of 1900 and lastly by Act IV of 1909. In all these amending Acts the words "in lieu of any other punishment" were retained. It must therefore, in my opinion, be assumed that the Legislature approved of the interpretation put by the Calcutta and Bombay High Courts on the aforesaid expression. The Allahabad and Madras High Courts and the late Chief Court of Lower Burma have also taken the same view [see *Emperor* v. *Kishen Singh* (2) ; *S.B. Varadarajulu* v. *Emperor* (3) ; *King-Emperor* v. *Tha Kin* (4)].

Therefore what is now clear is that the view expressed by the High Courts of Calcutta, Madras,

(1) (1891) I.L.R. 16 Bom. 357.
(2) (1923) I.L.R. 46 All. 174.
(3) A.I.R. (1925) Mad. 183.
(4) (1909) 5 L.B.R. 22.

Bombay and Allahabad and the late Chief Court of Lower Burma is that if whipping is inflicted as an alternative punishment in a case where the offence charged is punishable with imprisonment and fine, no other punishment is to be added.

This view, if I may say so with respect, is, in my opinion, the correct view. In Murray's Dictionary "in lieu of" is defined as "in the place, room or stead of". Section 13 of the General Clauses Act says :

> "In all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context—
>
> (1) words importing the masculine gender shall be taken to include females ;
>
> (2) words in the singular shall include the plural, and *vice versa*.

Section 12 of the Burma General Clauses Act (I of 1898) is also to the same effect. Therefore if we use the phrase "in the place of" instead of "in lieu of" and the word "punishment" in the plural instead of in the singular we get section 3 of the Burma Whipping Act running as follows :

> "In addition to the persons punishable . . . with whipping in the place of . . . any other punishments to which they may be liable under the Indian Penal Code, any person shall be so punishable who commits any offence under sections 324, 325 (etc.), of the said Code."

If whipping, given as an alternative punishment, can only be given instead of all the punishments, prescribed by the Penal Code, then the question that arises now is—how is it to be given as an additional punishment in a case such as the present where the offence charged is punishable with imprisonment and fine also. In my opinion in such a case as the

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present one imprisonment is imperative and fine is optional. [*Queen* v. *Sharoda Peshagur and Prosunno Peshagur* (1).]

As imprisonment is imperative, whipping, if given as an additional punishment, must in my opinion be added to it. It cannot be given only in addition to the optional part of the punishment. If the optional part of the punishment is added to the imperative part of the punishment and whipping, it will, in my opinion, be still legal. If the offence charged is punishable with imprisonment or fine and, if whipping is given as an additional punishment, it can in my opinion be added either to imprisonment or fine.

For these reasons I would answer the question propounded in the negative and set aside the sentence of fine. The fine, if paid, will be refunded.

MACKNEY, J.—I agree with the opinion expressed by my learned brother Ba U, J.

The question is whether in section 3 of the Whipping (Burma Amendment) Act, 1927, under reference the word "punishment" in the phrase "any other punishment" is used in a general sense or means the particular punishment or punishments to which a person is liable who commits any of the offences mentioned in the section: that is to say, do the words mean "any other *kind*" of punishment or "any other of *the*" punishments? It seems to me having regard to section 4, Whipping Act, 1909, that the word cannot be used in a general sense when it is so particularly qualified, that is to say, when reference is especially made to that punishment to which a person may be liable "under the Indian Penal Code" (*scilicet* for the particular offence which he has com-

(1) (1865) 2 W.R. (Cr.) 32.

mitted). Now, the punishment under section 325 of the Indian Penal Code is either "imprisonment" or imprisonment and fine". Therefore a person committing an offence thereunder may be punished with whipping in lieu of or in addition to "imprisonment" or in lieu of or in addition to "imprisonment and fine" : but, as fine alone is not one of the punishments to which a person is liable under this section of the Indian Penal Code, for an offence under this section whipping cannot be awarded in lieu of or in addition to fine alone.

The history of the law relating to the infliction of whipping as a punishment, as also the decisions of the other High Courts to which my learned brother has referred, make it clear that this view is the correct one.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

U BA OH *v.* M. A. RAZAK AND OTHERS.*

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Dec. 5.

Appeal to His Majesty in Council—Loss or detriment to applicant—"Fit case for appeal"—"Nursapuri" Mahomedan—Question affecting rights and privileges of a large body—Concurrent findings—Questions of law and fact—Civil Procedure Code (Act V of 1908), ss. 109 (c), 110.

In a suit to amend a scheme for the management of the Nursapuri mosque in Rangoon the trial Judge, Ormiston J., construed the term "Nursapuri" to mean all sunni mahomedans who came to Rangoon from the taluk and the town of Nursapur situate on the Godavari river in South India and their descendants. On appeal the High Court remanded the case with a direction that the issue as to the meaning of the term "Nursapuri" should be retried upon oral evidence in addition to the evidence already on the record, and the finding reported to the appellate Court before it finally determined the appeal. Sen J. who retried the issue after remand gave the term a wider meaning, *viz.*, all Telugu speaking sunni mahomedans who came from the Andhra districts of South India. The appellate Court

* Civil Misc. Applications Nos. 62 and 63 of 1934 arising out of Civil First Appeal No. 47 of 1930 of this Court.