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may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken.

I accordingly hold that the learned District Judge's finding on the question of 'wilful neglect' cannot be sustained. I would, therefore, accept the appeal and dismiss the plaintiff's suit, but in view of all the circumstances leave the parties to bear their costs.

ADDISON J.

ADDISON J.—I agree.

A. N. C.

*Appeal accepted.***APPELLATE CIVIL.***Before Mr. Justice Tek Chand and Mr. Justice Bhide.*

DEWA SINGH AND ANOTHER (DEFENDANTS)

Appellants

versus

FAZAL DAD (PLAINTIFF)

SECRETARY OF STATE AND

OTHERS (DEFENDANTS)

} Respondents.

Civil Appeal No. 1205 of 1925.

Civil Procedure Code, Act V of 1908, section 9—Jurisdiction of Civil Courts—Criminal Procedure Code, Act V 1898, sections 87, 88—"proclaimed" person—attachment and sale of property of—Civil suit for recovery—whether barred—remedies.

Held, that a "proclaimed" person whose immoveable property had been attached and sold by the Criminal Court under sections 87/88 of the Criminal Procedure Code, had no right to maintain an ordinary civil action against the auction-purchaser for its restoration, even though the procedure laid down for issuing the proclamation and attachment had not been strictly followed; the jurisdiction of the Civil Courts being impliedly barred under section 9 of the Civil Procedure Code 1908.

Once the attached property has been placed at the disposal of Government, the remedies of the "proclaimed" person are

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limited to those provided for in the Code of Criminal Procedure.

Mian Jan v. Abdul (1), dissented from and distinguished.

Bukhooree Singh v. The Government (2), *Secretary of State v. Lown Karan* (3), *Dattaji v. Narayanrao* (4), and *Kishori Mohan Roy v. Chunder Nath Pal* (5), distinguished.

Malli v. Crown (6), *Crown v. Multan Singh* (7), *Buta Singh v. Emperor* (8), *Winter v. Attorney General* (9), and Maxwell's Interpretation of Statutes, 6th edition, pages 708-09, referred to.

First appeal from the decree of Lala Kundan Lal, Senior Subordinate Judge, Gujrat, dated the 27th February, 1925, granting the plaintiff a declaration as prayed for.

JAGAN NATH AGGARWAL, RAM CHAND MANCHANDA, and V. N. SETHI, for Appellants.

ZAFRULLAH KHAN and BASHIR AHMAD, for Respondents.

JUDGMENT.

BHIDE J.—Fazal Dad along with nine other persons was prosecuted for the murder of one Amira. When the challan was sent up, Fazal Dad was reported to be absconding. Proceedings were taken under sections 87/88, Criminal Procedure Code and the land which is the subject matter of this appeal was sold by auction on the 20th of December 1918 to different persons for Rs. 6,650. The sale was confirmed on the 10th April 1919.

In October 1919, Fazal Dad was arrested. He was then tried for the murder but acquitted on the 7th of February 1920. On the 13th of March 1920

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- (1) (1905) I. L. R. 27 All. 572. (5) (1887) I. L. R. 14 Cal. 644.
 (2) (1867) 8 W. R. 207. (6) 39 P. R. (Cr.) 1917.
 (3) (1920) 5 Pat. L. J. 321. (7) 32 P. R. (Cr.) 1919.
 (4) 1923 A. I. R. (Bom.) 198. (8) (1926) 96 I. C. 977.
 (9) 6 P. C. 378, 380.

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Fazal Dad applied under section 89, Criminal Procedure Code, for restoration of the property which had been sold. The application was rejected by the Magistrate. The Sessions Judge on appeal ordered the restoration of the property to Fazal Dad. On the case coming up before this Court in revision it was pointed out by Campbell J. that under section 89, Criminal Procedure Code, only the net proceeds of the sale and not the property itself could be restored to the applicant. The order of the Sessions Judge was modified accordingly and it was directed that the applicant should be given the net proceeds of the sale.

Not satisfied with this order, Fazal Dad instituted the present suit on the 10th of May 1924 for "a declaration to the effect that the sale by auction of the land in dispute made on the 20th of December 1918 and confirmed on the 10th of April 1919, is invalid and void and shall not affect the plaintiff's rights." The pleas on the basis of which Fazal Dad sought this relief briefly were that he had not "absconded", that he was unaware of the proceedings under sections 87/88, Criminal Procedure Code, and lastly, that those proceedings were not in accordance with law. The Secretary of State as well as the vendee were impleaded as defendants. The defendants traversed the above pleas and the vendees also pleaded that a civil Court had no jurisdiction to entertain such a suit. The learned Senior Subordinate Judge decided the issues in favour of the plaintiff and decreed the suit. From this decision two of the vendees, namely, Dewa Singh and Bahawal Bakhsh have appealed.

The points at issue have been argued at length before us and after giving my careful consideration

to them I am of opinion that this appeal should succeed on the question of jurisdiction.

Before proceeding to discuss the law on the subject it may be stated at the outset that it was not denied on behalf of the respondent that the Magistrate had jurisdiction to take proceedings under sections 87/88, Criminal Procedure Code, and that a civil Court would have no jurisdiction to entertain a suit of this kind if the sale had been carried out according to the provisions of section 87 or 88 of the Criminal Procedure Code. It was, however, contended that in the present instance those provisions had not been complied with inasmuch as 30 days time was not given for the absconder's appearance on a specified date and no warrant of attachment was issued according to law in connection with the land in dispute. Assuming that the sale was irregular in these respects, the question for decision is whether a Civil Court has jurisdiction to declare it to be null and void.

The case law on the subject seems to be rather meagre. A number of rulings were cited on behalf of the appellants but none of them appears to be directly in point. The only rulings on which some stress was laid and which need be referred to are *Bukhooree Singh v. The Government* (1), *Secretary of State v. Lown Karan* (2), and *Dattaji v. Narayanrao* (3). In the first ruling it was laid down that a civil action will not lie to reverse a sale of property carried out under section 185 of the Code of Criminal Procedure (corresponding to sections 87/88 of the Criminal Procedure Code, 1898). But the sale in that case was apparently carried out 'legally' and the effect of irregularities in procedure was not considered.

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(1) (1867) 8 W. R. 207.

(2) (1920) 5 Pat. L. J. 321

(3) 1923 A. I. R. (Bom.) 198.

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In *Secretary of State v. Lown Karan* (1), the question for decision was whether a suit would lie to contest an order of disposal passed by a Magistrate under section 524, Criminal Procedure Code, with respect to property suspected to be stolen. It was pointed out that the question whether a civil action would or would not lie would depend upon the nature of the provisions of the Code in respect of the disposal of such property. The learned Judges were of opinion that a civil suit would lie in respect of an order passed under section 524, Criminal Procedure Code, as such order could not be taken to be conclusive as regards the owner's title. On the other hand, they expressed the opinion that sections 88/89, Criminal Procedure Code, would debar an absconder from suing for recovery of his property. These remarks are of course only 'obiter' and the effect of irregularities in the proceedings was not considered. In the last ruling, namely, *Dattaji v. Narayan-rao* (2), also the question of the effect of the irregularities in procedure on a sale conducted under sections 87/88, Criminal Procedure Code, was not raised.

On behalf of the respondent reliance was placed on *Mian Jan v. Abdul* (3). This ruling is certainly in his favour but with all respect I must say that I am unable to follow the reasoning underlying it. It appears that the proclamation in that case was irregular inasmuch as it failed to state the time within which and the place at which the absconder was to appear to save the sale of his property. It was held by Blair J., that the proclamation and, therefore, the sale also was a nullity. As regards section

(1) (1920) 5 Pat. L. J. 321. (2) 1923 A. I. R. (Bom.) 198.

(3) (1905) I. L. R. 27 All. 572.

89, Criminal Procedure Code, which enables a proclaimed offender to ask for the restoration of the attached property within two years of the attachment Blair J. observed as follows:—

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“ There is a provision in the Code of Criminal Procedure by which an absconder returning or being brought to the Court by which the attachment was made is entitled to prove that he did not abscond or conceal himself to avoid the execution of the warrant, and also that he had no such notice of the proclamation as to enable him to attend within the time specified therein. Under these circumstances he can claim some sort of restitution of his property. But that section has no bearing whatever in the case when the proclamation of sale is an absolute nullity in point of law. If then there is no provision in the Code of Criminal Procedure for restitution under the circumstances of this case, and no section except section 89 is suggested to me, then, if I were to follow the ruling of the Court below, I should be holding that there was no remedy left to the man whose property had been seized and sold under the thinnest and most indefensible colour of law. I have no hesitation in saying that the law is not so and the plaintiff had a right to maintain the suit.”

It appears from the above that the decision of Blair J. assumes (1) that a person aggrieved by sale proceedings under sections 87/88, Criminal Procedure Code, in which the “ proclamation is a nullity in point of law ” has no remedy under the Criminal Procedure Code, and (2) that when there is no remedy provided by the Criminal Procedure Code, a civil suit ought to be maintainable. As regards the first point, it is true that section 89, Criminal Procedure Code is somewhat limited in its scope. It

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enables the absconder to seek relief on two grounds only, namely, (1) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and (2) that he had not such notice of the proclamation as to enable him to attend within the time specified therein. He cannot *as of right* ask for restitution on any other ground. Probably this was done deliberately by the Legislature as it may not have thought it fit to give an absconder the right to ask for restitution of the property merely on the basis of irregularities where no substantial injustice was involved. At the same time, I do not see that there is no remedy at all under the Code of Criminal Procedure for cases not coming within the four corners of section 89. The revisional powers of the High Courts under section 439, Criminal Procedure Code, are very wide and I do not see why it should not be possible to find a remedy in a fit case in the provisions of that section. The High Court has besides 'inherent power' to pass such orders as may be necessary to prevent abuse of processes of Courts and to secure the ends of justice—which has been now expressly recognised by section 561-A, Criminal Procedure Code. In *Malli v. Crown* (1), it was held by a Division Bench of the Punjab Chief Court that the Chief Court could interfere in revision even in cases not falling within the scope of section 89, Criminal Procedure Code. A similar view was taken by another Division Bench of the Punjab Chief Court in *Crown v. Multan Singh* (2), in which it was held that the proclamation was not in accordance with law and it was directed that "so much of the property moveable or immoveable as has not been sold be restored to him (applicant) and the pro-

(1) 39 P. R. (Cr.) 1917.

(2) 32 P. R. (Cr.) 1919.

ceeds of the sale of any property which has taken place be refunded to him." In a more recent case (*Buta Singh v. Emperor (1)*), a Single Bench of this Court (Harrison J.) exercised its 'inherent power' to set aside an illegal attachment of land, as the case did not come directly within the scope of section 89, Criminal Procedure Code.

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It will thus appear that a person who is unable to apply on the ground specified in section 89, Criminal Procedure Code, is not altogether without a remedy. Secondly, the assumption of Blair J. that when the Code does not expressly provide a remedy except for certain cases falling within the scope of section 89, Criminal Procedure Code, the remedy for other cases must be found in a civil suit is also not easy to understand. It is true that all suits of civil nature are ordinarily cognizable by a civil Court, but section 9 of the Civil Procedure Code makes an important exception to this rule, namely, suits of which cognizance is either expressly or impliedly barred. It seems to me that the present case is one in which cognizance by Civil Courts is impliedly barred. It is an established principle of law that when an act of Legislature gives power to any person for a public purpose from which an individual may receive an injury,* if the mode of redress is also specified in the statute the jurisdiction of ordinary Courts will be ousted (*cf.* Maxwell's Interpretation of Statutes, 6th edition, pp. 708-09). In the present instance, the Criminal Procedure Code has vested criminal Courts with certain power for enforcing the attendance of persons and among these powers is that of attaching and selling their property. This power may cause injury to the person concerned

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and the Code itself specifies the remedy open to such persons, namely, that provided in section 89, Criminal Procedure Code. The Code further allows a right of appeal from an order passed under that section. These facts seem to point to the conclusion that the Legislature intended this to be the proper remedy open to persons aggrieved by an order under sections 87/88, Criminal Procedure Code, in ordinary cases. The Code, however, confers ample revisional powers on High Courts to rectify injustice in other cases also. I do not see any good ground in the circumstances for holding that in cases where the proclamation is a nullity a man aggrieved by the result of such proclamation would be without a remedy and therefore, a civil action must be maintainable.

I have so far dealt with the two grounds on which the decision of Blair J. is based and with which the Division Bench, which heard the Letters Patent Appeal from his judgment, apparently agreed. As regards the possible hardship on the vendees in such cases the learned Judges of the Letters Patent Bench remarked that the purchaser should have safeguarded his position by taking the ordinary precaution of ascertaining whether a Court had issued a statement in writing to the effect that the proclamation had been duly published (*vide* section 87 (3), Criminal Procedure Code). The Code, however, does not appear to impose any such duty on the auction-purchaser. In an ordinary criminal prosecution, the Crown is the prosecutor. The Code prescribes the procedure which is to be followed by Courts in selling the property of an absconder. The auction-purchaser is a stranger to these proceedings and it is difficult to understand why the auction-purchaser should be held liable for failure on the

part of the Court to follow the procedure prescribed by law.

I have tried to show above that the Criminal Procedure Code itself provides suitable remedies to a person aggrieved by proceedings under sections 87/88, Criminal Procedure Code. There is, however, one thing I would like to add. I am doubtful whether the Code contemplates that a sale once effected under sections 87/88, Criminal Procedure Code, should be set aside at all even by a Criminal Court. The provisions of section 89, Criminal Procedure Code, are noteworthy in this connection. Even when the applicant proves under that section that he was neither 'absconding' nor had any notice of the sale (the strongest case imaginable on grounds of equity) the Court can only give him the net proceeds of the sale. If the Legislature had intended any restoration of the property after the sale it is difficult to see why such restoration should not have been allowed under section 89 itself. I am, therefore, inclined to think that the Legislature intended the sale effected under sections 87/88, Criminal Procedure Code, to be final. This is in keeping with the general policy of the law which aims at making the title of a purchaser at a Court sale as safe as possible. The result in the present case is no doubt more drastic than in the case of sales by civil Courts but it must be remembered that the provisions of sections 87/88, Criminal Procedure Code, are of a penal character. According to these provisions, the property of an absconder is not sold for six months after attachment. If a person is not 'absconding' to evade justice, he can scarcely fail to learn about the attachment through his agent or relations in charge of the property during the period. On the

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other hand, if he is absconding to evade justice he must take the consequences of his own failure to comply with the processes of the Court.

However, whether a Criminal Court should or should not set aside a sale in the exercise of its powers in revision, I am of opinion that a civil suit for the purpose is impliedly barred by the provisions of the Code. To allow a civil suit in such cases would create an intolerable position. For there would be nothing to prevent a person from resorting to a civil Court at any stage to challenge the irregularity of proceedings of Criminal Courts and to obstruct or nullify their action. Of course there are instances in which the decision of Criminal Courts is intended to be only provisional and in such cases the Code itself has laid down that the decision will be subject to final adjudication in civil Courts. Such a provision occurs for instance in section 87 Criminal Procedure Code itself, in respect of claims by third persons to attached property. For other instances of the same type reference may be made to sections 145 to 147 and 522 of the Criminal Procedure Code. These exceptions have apparently been made only in cases where a Criminal Court has to pass orders summarily in the interests of peace, etc., without any elaborate enquiry into questions of title. Criminal Courts are of course not the proper forum for adjudication of questions of title to property ; but the question involved in the present case is not of title but that of the right of a Criminal Court to exact a penalty for an absconder's failure to attend in obedience to a warrant issued by that Court to answer a criminal charge. If a civil suit were maintainable in the present case a suit might as well lie for refund of fine or forfeited property on the ground

that the trial in which the order of fine or confiscation was passed was wholly illegal—a proposition which so far as I am aware is not supported by any authority.

The plaintiff has already got an order for the refund of the net proceeds of the sale of his property from the Criminal Courts. He has, in my judgment, no right to agitate the question in a civil Court. I would accordingly accept the appeal and dismiss the plaintiff's suit with respect to the property sold to the appellants. Parties should bear their own costs.

TEK CHAND J.—I agree with the conclusions arrived at by my learned brother and have very little to add.

After carefully considering the provisions of sections 87-89 of the Code of Criminal Procedure, I have no doubt that a "proclaimed" person, immovable property belonging to whom has been attached and sold by the Criminal Court, has no right to maintain an ordinary civil action against the auction-purchaser for its restoration, even though the procedure laid down for issuing the proclamation and attachment had not been strictly followed. It seems to me that sections 87-89 form a "complete Code" by themselves and the remedies provided therein to afford relief to a person, who considers himself aggrieved by orders passed under any of these sections, are exclusive, subject of course to the right of appeal (wherever expressly given) or any orders that the High Court may choose to pass, in the exercise of its revisional jurisdiction under section 439 or its inherent powers.

It is no doubt an elementary principle of law that every presumption shall be made in favour of

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the jurisdiction of civil Courts and that it shall not be taken away except by express words or by necessary implication (See section 9 of Civil Procedure Code and *Winter versus Attorney-General* (1). But it seems to me that the present case clearly falls within the exception and that once the attached property has been placed at the disposal of Government, the remedies open to the "proclaimed" person are limited to those provided for in the Code of Criminal Procedure. If he appears before the Court within two years of the attachment and satisfies it (1) that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and (2) that he had no notice of the proclamation, the attached property, *if it has not been sold already*, shall be returned to him. But if it had been sold, then the only relief to which he is entitled is that the net proceeds realised at the sale shall be made over to him. It is clear that the intention was to lay down that a sale, if once completed, cannot be set aside, even if the proclaimed offender appears within two years and satisfies the conditions laid down in section 89. In these circumstances, it will be absurd to suppose that the legislature intended to allow the same person to institute and maintain a civil action within twelve years for the restoration of the property from the auction-purchaser on grounds which would not have entitled him to claim even the sale proceeds within a period of two years. Any other interpretation would lead to serious anomalies and defeat the very object which the Legislature had in view in enacting sections 87-89 to the Code.

My learned brother has examined at length the reasoning of the decision in *Mian Jan v. Abdul* (2),

(1) 6 P. C. 378, 380. °

(2) (1905) I. L. R. 27 All. 573.

and has given good grounds for dissenting from it. It may also be mentioned that that case was decided in 1905 when the Civil Procedure Code (XIV of 1882) was in force. Under section 11 of that Code civil Courts had jurisdiction to try all suits of a Civil nature, excepting those of which the cognizance was barred "by any enactment for the time being in force", and in *Kishore Mohun Rai v. Chunder Nath Pal* (1), and other rulings, these words were held to mean "*expressly barred*." In the Code as amended in 1908 the exception has been enlarged by the substitution of the words "excepting suits of which their cognizance is expressly or *impliedly* barred". It is possible that the Allahabad case might have been differently decided if it had come before the Courts after 1908.

In my opinion the appeal should be accepted and the plaintiff's suit dismissed. But having regard to all the circumstances of the case I leave the parties to bear their own costs in both Courts.

N. F. E.

Appeal accepted.

(1) (1887) I. L. R. 14 Cal. 644.

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