[APPELLATE CRIMINAL JURISDICTIO

REG. *v.* SAMBHU RAGHU.

Indian Penal Code (Act XLV. of 1860, Section 494)—Bigamy—Aut caste to declare a marriage void.

Courts of law will not recognize the authority of a caste to declar d, or to give permission to a woman to re-marry.

Bond fide belief that the consent of the caste made the second ma not constitute a defence to a charge, under Section 494 of the In e, of marrying again during the lifetime of the first husband, or to etment of that offence under that section combined with Section 109

THIS was an appeal from the sentence of six weeks' imprisonment passed by H. Batty, Assistant Session Jr handesh, on the appellant Sambhu for abetting the re e of one Narbadá, a woman of the Teli caste, during the li her first husband. Narbadá herself was convicted and sent two months' simple imprisonment. The facts appear from th llowing extract from Mr. Batty's judgment :—"The facts of th se are not disputed, and are as follows: The complainan hrám was legally married to accused No. 1, Narbadá, about 1 ars ago. She lived with him till within 2 years of the present al. She then returned to her parents. The complainant, Ish- m, remained at Shirpur.

"On the 30th June 1875 accused No. 1 gave notice to the com- ainant Ishrám, that, having discovered that he was afflicted th leprosy, she had determined to re-marry. She called upon r husband, therefore, either to send a certificate of his cure, o consent to her re-marriage. He replied by post. His ans s not been put in evidence by the defence, having apparen en lost. No evidence has been given to refute his description its contents. According to Ishrám, the letter written at his tation stated that he was too ill to come; that Narbadá was to ing her ornaments to Shirpur, and that if a few were broken it s no matter. Ishrám denies that he gave any authority for a ond marriage. About three months after this notice, Narbadá l the whole of the Teli caste convened to decide whether she s justified in marrying again.

prosecution does not dispute the assertion of the accus
meeting was regularly summoned, that a quorum asse
that an unanimous vote was passed in favour of the
. It is only contended that the caste had no author
such a decision; that in the absence of a *sad chitti*
t, and in the absence of the husband also, it was contr
custom of the caste for such marriages to be allowed, a
rmer marriage was not, therefore, void at the time
rriage was contracted.

ccused do not deny the celebration of the *pât* marria
lainant, Ishrâm, objected, after solemnization of the ma
t he had not been repaid his marriage expenses.
his ground, he stated, he would make a complaint, unle
e delivered to him. During the progress of the case th
iant, Ishrâm, tendered a *razinámá* from which he appea
been willing to consent to the dissolution of his marria
arbadá on receipt of the expenses which had been incur
n. This *razinámá* was of no avail to stop the criminal pr
edings commenced, but is put in evidence, apparently, with th
bject of showing that Ishrâm had not previously made any form
brogation of his conjugal rights.

"The facts being in all essential points admitted, the questic
hat remains for decision is one purely of law.

"The provisions of Section 494 appear to be somewhat rigid a
difficult of application in the case of low-caste Hindus, among who
a considerable amount of laxity is allowed in the rules whic
regulate the dissolution of marriages. Section 494 does not a
mit as a valid plea the ignorance or belief of the contractir
ies as to the dissolution of the former marriage. It provid
s in any case in which such marriage is void by reason of i
aking place during the life of the husband or wife the contractin
parties are liable, unless the former marriage has been declar
void by a Court of competent jurisdiction. If, therefore, the ma
riage has been declared void by an authority not competent
make such a decision (as in the case of a *Pánch*), the accus
would not be entitled to plead that he or she believed it to ha
been so dissolved. In the case of the charge being made, howev
under Section 497 against the male offender, there will be

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ground for a conviction unless the offender knows or has reason to believe his partner in guilt to be the wife of another man. This distinction appears to have been observed in the case of *Karsan Ooja* and *Bai Rupá*[1]. For in that case, though the High Court called for a finding as to the belief of the male offender on the validity of the alleged dissolution of marriage (he having been charged under Section 497), it appears that this finding, even if favourable to him, was not to have affected the liability of the other accused who was charged under Section 494. It would thus appear that, if, under a mistaken belief that the former marriage had been dissolved, a man contracted a second marriage with a woman whose first husband was living, he would be unable, if charged under Sections 494 and 109, to plead such belief. If, however, he were charged, not only with having gone through the ceremony, but with having consummated it by sexual intercourse under Section 497, he would then be able to give evidence as to his *bona fides*, and if he could prove it, would be entitled to an acquittal. To charge the accessory contracting party under Sections 494 and 109 seems, therefore, in some cases to be a course calculated seriously to prejudice the accused, though it may be unavoidable where there is no evidence to show that the second offence (under 497) has been committed. The personal impression of the Court is, that a decision has been passed by the High Court to the effect that the man contracting a second marriage under such circumstances was not liable to be charged under Sections 494 and 109 as an abettor, and that he could only be charged under Section 497; but as, after some search, no such decision could be found, and the precise nature of the ruling could not be recalled, there seemed to be no authority for amending the charge as framed by the Magistrate.

"As the question of accused No. 2's knowledge or belief in the matter seems, therefore, to be irrelevant, the point which remains for decision is, whether the former marriage was void. The words of the Code are 'a Court of competent jurisdiction.' Whether a *Panchayat*, except as specified in the illustration to Section 20 of the Indian Penal Code, could be regarded as a Court at all, has not been

[1] 2 Bom. H. C. Rep. 117 (2nd edition), 124 (1st edition); see also *Reg.* v *Manor* (5 Bom. H. C. Rep. 17 Cr. Ca.); *Khemkor* v. *Umiáshankar* (10 Bom. H. C. Rep. 1); and *Ráhi* v. *Govind* (I. L. R. 1 Bom. 97, *per* Westropp, C.J., at p. 116).

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definitely ruled. From the illustration adverted to above, it seem as if it could not, on the maxim '*Expressio unius est exclusio a terius.*' Whether it could be regarded as a Court of competent juri diction to declare a marriage void, seems, from the case of *Reg. Manohar*(1) and the cases cited in the note to it, still more que tionable. However this may be, the Courts have always reco nized the rules laid down by established caste customs, unle positively opposed to morality, as entitled to consideration in d termining the question of the validity of a divorce. Among th lower castes of the Hindus it is a widespread, if not a correct, b lief, that where a *pharkhut, sod chitti,* or letter of divorce, h been given by the husband, and a *Panchayat* has decided that th marriage has been dissolved, the party so divorced is at libert to marry again on repayment of the marriage expenses incurr by the first husband. The right of divorce appears, howeve by custom to be purely marital, though, according to Grady' 'amongst some of the lower castes, divorce is obtainable b each, and the woman may marry again.' Strange's Hindu Law also contains the following remarks :—'Marriage having take place, it would seem as if the right of divorce was, in gen eral, by the Hindu Law, as it is by our own, marital only : nc competent the wife, unless by custom. * * * The excep on may be regarded as proving the rule, there bein castes (of the lowest kind indeed) in which not only is divorc attainable on either side, but where, having taken place, th woman may marry again ; such marriage is called *natra,* being i familiar use at Bombay.' From this it would appear that in som cases the *natra, mohotur* or *pât* marriage can, in some castes, b contracted during the lifetime of the husband, on the authority c the caste assembly, even though the woman take the initiative It is, however, limited apparently to the lowest castes, and whe ther the Teli caste (to which the accused belong) is to be regarde as one of these, seems extremely doubtful. In Steele's Law an Customs of Hindu Castes(3) the following report is given :— 'During the husband's life there can be no *pât* in our caste '— as the opinion of the Jeshwar and Batree Telis, but is not la

(1) 5 Bom. H. C. Rep. 17 Cr. Ca.

(2) Treatise on the Hindu Law of Inheritance, p. 15.

(3) P. 52, 3rd edition. (4) Appendix, p. 364.

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lown as the custom of the Marathi Teli. It was evidently the luty of the accused in the present case to show that such a re-mar- iage was, under the alleged circumstances, permissible by the ustom of their caste. They produced, however, no evidence; and hile it would hardly have been equitable to have called as wit- esses members of the caste in a different locality, to have taken he evidence of those living in the vicinity of the accused would ave been nugatory, as they had already, by their votes, as is ad- nitted, unanimously attested the existence of such a custom. To all for their evidence would have been to offer an opportunity for the gratification of private grudges or personal partiality. The burden of proof was on the accused, and they were bound to show that it was the custom of their caste to recognize, as wholly void, marriages declared by the caste assembly to be dissolved; that the caste assembly was competent to act upon the application of the wife, even without the presence or consent of the husband; and that the marriage could be dissolved without any *pharkhut* being given, and before the return of the marriage expenses to the former husband. They have failed to make out that such was the custom of the caste, though the mere fact of their having vot- ed for the dissolution of the marriage shows that a large number of persons believed it to be so. In the absence of proof of such custom the first issue must be decided in the negative. There is, indeed, some ground for believing that the caste in this instance did not act quite regularly, as no marriage expenses were paid. * * *"

The appeal was made to the High Court by Sambhu Rághu alone.

It was heard by MELVILL and NA'NA'BHA'I HARIDA'S, JJ.

Shántárám Náráyán for the appellant:—The Session Judge does not impugn the *bona fides* of the appellant or his fellow-pri- soners, and should not have found them guilty. There is no ques- tion that the husband of Narbadá was a leper, and that all he cared for was his expenses. He may, therefore, be taken to have given a consent to the second marriage. The caste of the Telis to which the parties belonged, regularly assembled and confirm- the dissolution of the first marriage. The second marriage therefore, no offence.

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Honourable R. S. Vishwanáth Náráyán Mandlik, Government Pleader, for the Crown:—The real question in the case is, had the caste authority to declare Narbadá's first marriage void? I say it had not. In absence, therefore, of a *pharkhut* from Narbadá's first husband, her second marriage was clearly an offence. The belief of the parties does not affect the legal question at all.

PER CURIAM:—The Acting Session Judge has considered this case very carefully, and the Court agrees in his conclusion. The Court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, because her husband is a leper, and without having obtained a release from him. The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry. The wife in this case, and the appellant, who performed the ceremony of re-marriage, probably acted in a *bonâ fide* belief that the consent of the caste made the second marriage valid; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under Section 494 of the Indian Penal Code, or under that section combined with Section 109 of the Code. The Court confirms the conviction; but, as the appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 185 *and* 244 *of* 1875.

No. 185.

September 26.

THE COLLECTOR OF THA'NA' (SPECIAL APPELLANT) *v.* DA'DA'BHA'I BOMANJI (SPECIAL RESPONDENT).

No. 244.

DA'DA'BHA'I BOMANJI (SPECIAL APPELLANT) *v.* THE COLLECTOR OF THA'NA, (SPECIAL RESPONDENT).

Court Fees Act VII. of 1870, *Sections* 5 *and* 7—"*Value*"—*Land in Salsette—Survey Act (Bombay) I. of* 1865, *Section* 35—*Ultra vires—Power of Government to frame rules under the Bombay Survey Act—Government Land—Building—Prescription—Title.*

The meaning of Clause viii, Section 7, of the Court Fees Act VII. of 1870 is person suing to set aside an attachment on land shall in no case be called