

[APPELLATE CRIMINAL.]

Before Mr. Justice Melville and Mr. Justice Pinhey;

IMPERATRIX v. PADMANABH PAI.*

1877.
October 4.

The Code of Criminal Procedure (Act X. of 1872), Section 468—Sanction to prosecute—Relative positions of a Magistrate of the First Class, the Magistrate of the District, and the Court of Session.

For the purposes of section 468 of the Code of Criminal Procedure (Act X. of 1872) a Magistrate of the First Class is subordinate to the Magistrate of the District: a sanction given by the latter to prosecute a person for intentionally giving false evidence before the former is, therefore, legal and sufficient, notwithstanding the refusal by the former to give such sanction himself.

Semble that the Sessions Court has not power to give such sanction.

PADMANABH was convicted by a First Class Magistrate on alternative charges of having given false evidence. The perjury was assigned upon two contradictory statements made by the accused before two other First Class Magistrates, Mr. Monteath and Mr. Thakur, the former of whom gave the sanction to a prosecution required by section 468 of Act X. of 1872, but the latter refused to give a similar sanction in respect of the statement made by the accused before him. The District Magistrate, however, upon application being made to him, granted a sanction in respect of the statement made before Mr. Thakur, and the trial proceeded with the result stated above.

Padmanabh appealed to the Session Court, which annulled the conviction and sentence of the First Class Magistrate, on the ground that there had been no legal sanction for a prosecution in respect of the evidence alleged to have been given by the accused before Mr. Thakur.

The High Court, on an examination of the First Class Magistrate's criminal calendar for March 1877, sent for the record and proceedings in this case, and the Government of Bombay appealed from the decision of the Session Court, reversing the conviction.

Nánabhái Haridás, Government Pleader, for the Crown:—The question for determination is whether, for the purposes of section 468 of the Code of Criminal Procedure, a Magistrate of the First Class is subordinate to the Magistrate of the District or the Court of Session. The Code by section 37 has distinctly provided that

* Criminal Review No. 103 of 1877. Appeal No. 174 of 1877.

al Magistrates of the First, Second, or Third Class in a district shall be subordinate to the Magistrate of the District. The Legislature is not content with doing this; it emphasizes the expression of its command by further directing that "neither the Magistrate of the District nor the Subordinate Magistrates shall be subordinate to the Session Judge, except to the extent and in the manner provided by this Act." The positive assertion of one status, coupled with an emphatic denial of a contrary status, should be considered as conclusive, especially when it is borne in mind that a different state of things existed under the old Code, and to remove all doubts the peremptory negation was newly enacted. Sections 44, 45, and 296 show that the subordination is not executive or departmental merely, but judicial. Section 44 speaks of a 'transfer,' and section 45 of a 'reference' of a criminal case, both judicial acts. Section 296 speaks of the 'dismissal of a complaint,' and the 'discharge of an accused person,' also judicial acts. [MELVILL, J.:—Section 328 gives the Magistrate of the District power to set aside a conviction, which certainly is a judicial act.]

1877.

IMPERATRIX
" .
PADMANABH
PAJ.

Shámrév Vithal, for the accused :—The Code contemplates two sorts of subordination, viz., executive and judicial. The former covers such acts as are spoken of in sections 44 and 45. The test of the latter is this—To whom does an appeal lie if there has been an error. And it is clear that, except in the trivial case of giving security for good behaviour, mentioned in section 267, the Court of Session is the tribunal to which appeals lie from the judicial acts of the Magistrates of the First Class.

Section 468 speaks of the sanction of the Court before or against which the offence was committed, or of some 'Court' to which such 'Court' is subordinate. The Code nowhere speaks of the Magistrate of the District as a 'Court.' His 'Court' is that of a Magistrate of the First Class. [See section 5.] In the exhaustive list which the Legislature gives of the powers of a Magistrate, it makes no mention whatever of the power of the District Magistrate to sanction prosecutions under sections 468 and 469 for offences committed before Magistrates of the First Class.

MELVILL, J., after reviewing the facts of the case stated above, proceeded :—Section 468 of the Code of Criminal Procedure re-

1877.

IMPERATRIX
v.
PADMANABH
PAL.

quires that the sanction to a prosecution should be given by "the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate."

The decision of the Session Court proceeded upon the ground that, although, in certain executive matters, all Magistrates are subordinate to the Magistrate of the District, yet that such subordination is not of a judicial character, and that, as a Court, a Magistrate of the First Class is not subordinate to the Court of the Magistrate of the District, but to the Court to which appeals from the decisions of a Magistrate of the First Class ordinarily lie, *i.e.*, to the Court of Session.

There is no doubt a good deal to be said in favour of the view adopted by the Session Judge. Section 5 of the Criminal Procedure Code divides the Criminal Courts in British India into four grades only, and one of these is the Court of the Magistrate of the First Class. The Court of the Magistrate of the District is only the Court of a Magistrate of the First Class, and *prima facie* the Courts of other Magistrates of the First Class would be co-ordinate with, and not subordinate to, another Court of the same grade. We have little doubt that when sections 468 and 469 of the present Code were first enacted in Act XXV. of 1861 (sections 169 and 170), it was intended that the sanction contemplated should be given by the Court before which the offence was committed, or by the Appellate Court, or the High Court. And it is probable that when section 23G was added to the old Code, and afterwards when section 37 of the present Code was enacted, it was not intended to introduce any change in the law upon this point. But these sections most distinctly provide that all Magistrates, of whatever class, shall be subordinate to the Magistrate of the District: and on a careful consideration of section 37 of the present Code and a comparison of its provisions with those of other sections, we are unable to come to the conclusion that such subordination was intended to be of a merely executive, and not of a judicial, character. On the contrary, there are many sections of the Code which clearly provide for the judicial subordination of the Court of a Magistrate of the First Class to the Magistrate of the District. For example, the Magistrate of the District may in certain cases

set aside a conviction by a Magistrate of the First Class (section 328) ; he may order a committal for trial in session cases, if he thinks that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Magistrate of the First Class (section 296) ; and in certain cases he may even hear an appeal against the order of such Magistrate (section 267). In all these instances the Magistrate of the District is acting judicially, and as a Criminal Court, within the definition of that term in section 4. In these instances, at all events, the Court of the Magistrate of the First Class is subordinate to the Court of the Magistrate of the District : and we can find no sufficient reason for saying that the same subordination does not exist for the purposes of section 468. We think that the sanction of the Magistrate of the District in this case must be regarded as a legal and sufficient sanction, and that the order of the Session Court must, therefore, be set aside, and the appeal of Padmanabh must be heard and disposed of by that Court on the merits.

1877.

 IMPERATRIX.
 2.
 PADMANABH
 PAT.

We should certainly have preferred to hold that, for the purposes of sections 468 and 469, a Magistrate of the First Class is subordinate, not to the Magistrate of the District, but to the Court of Session. It is very essential that the Court of Session either when sitting in appeal, or when trying a case committed to it by a Magistrate of the First Class, should have the power to sanction a prosecution for the offence of false evidence or of forgery, committed in the Court of the Magistrate. It is not necessary for us now to decide whether the Court of Session has or has not such power. But in the absence of any express provision to that effect in the Code, it is impossible not to see that it would be difficult to hold that the Court of Session has such power, in the face of the words of section 37—"neither the Magistrate of the District, nor the Subordinate Magistrates shall be subordinate to the Session Judge, except to the extent and in the manner provided by this Act." We think it well to suggest this difficulty, in order that the Legislature may remove it, should it see fit to do so, when the Code of Criminal Procedure is again revised.

It may also be observed that, although chapter IV. of the Code professes to give an exhaustive list of all the powers which may

1877.

IMPERATRIX
v.
PADMANABH
PAL.

be exercised by the Magistrates, no mention is made of any power of the District Magistrate to sanction a prosecution under sections 468 and 469. Padmanabh's pleader has argued from this that the Magistrate of the District has no such power in the case of offences committed before a Magistrate of the First Class. But the argument is deprived of weight by the circumstance that the list in question equally omits all mention of the District Magistrate's power, (which is unquestioned,) to sanction prosecutions in respect of offences committed before Magistrates of the lower grades. The list in question is useless, unless exhaustive : and it is for the Legislature to consider whether the omission here noticed, ought not to be supplied.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, and Mr. Justice West.

1876.
April 29.

LALLUBHA'I BA'PUBHA'I, KA'NDA'S MULCHAND, RA'MDA'S JAG-MOHANDA'S, AND MA'NIKJI DHANJIBHA'I (ORIGINAL PLAINTIFFS), APPELLANTS v. MA'NKUVARBA'I, WIDOW AND EXECUTRIX OF GANGA'DA'S VIZBHUKANDA'S, WHO WAS SURVIVING EXECUTOR OF MULJI NANDLA'L AND BHA'ISHET' TRIKAMLA'L AND JAIKISANDA'S GANGA'DA'S (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu executor, rights of—Limitation—Act XIV. of 1859, Section 1, clauses 12 and 16, and Section 2—Trustee—Adverse possession—Inheritance, Female right of—Sapinda-relationship what constitutes—Gotraja-sapinda.

1. The rule of English common law, that the undisposed of residue of personal estate vests in the executor beneficially, does not apply to the will of a Hindu testator in India.

2. In the exercise of the testamentary power amongst Hindus, the intention to disinherit must be clear and unambiguous. Mere bequests of special portions of the testator's estate to the heir, without language of disinheritance, do not exclude him from the undisposed of residue.

3. An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee, within the scope of section 2 of Act XIV. of 1859, for the heir or heirs of the testator.

* Suit No. 563 of 1870, Appeal No. 196 of 1872.