1886.

IN RE THE PETITION OF E. J. S. SHREWSBURY.

Boldero v. *The East India Company*(1), *The East India Company* v. *Robertson*(2), and *The Secretary of State for India* v. *Underwood*(3). On the general question of assignability in the event of insolvency or bankruptcy they throw no light whatever. The case of *Ex parte Huggins*(4) cited by Mr. Vicáji, is not a direct authority on the point, but it comes the nearest to it. It was held there that pensions allowed by Government for past service are assignable, and are "property" within the meaning of the English Bankruptcy Act. In the present case I hold that the sums standing to the credit of the insolvent in respect of the two funds in question are part of his personal estate, and are vested in the Official Assignee under section 7 of the Indian Insolvency Act, and I order that they be inserted accordingly in the schedule, to enable the Official Assignee to take such steps for the recovery of them for the benefit of his creditors as he may deem proper.

Insolvent in person.

Mr. *Charles E. Milvain* for the opposing creditor.

Messrs. *Little, Smith, Frere and Nicholson* for the G. I. P. R. Company.

(1) 11 H. L., 85.
(2) 12 M. P. C., 400.
(3) L. R., 4 Eng. & Ir. App., 580.
(4) L. R., 21 Ch. Div., 85.

APPELLATE CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

QUEEN-EMPRESS *v.* KRISHNA'BHAT.*

1885.
December 1.

Criminal Procedure Code (Act X of 1882), Secs. 193, 436 and 537—Power of the Court of Session to commit a discharged person for trial without the intervention of a Magistrate—Evidence Act (I of 1872), Secs. 30 and 114—Evidence of an accomplice—Corroboration—Confession.

In cases exclusively triable by the Court of Session, section 436 of the Code of Criminal Procedure (Act X of 1882) empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by such Court. There is nothing in that section to show that, when such order is made, the commitment thereupon must necessarily be made by the Magistrate who has discharged him, whilst the first proviso to it shows that it may be made by the

* Criminal Appeal, No. 117 of 1885.

1885.

QUEEN-EMPRESS v. KRISHNÁ-BHAT.

Court of Session or by the District Magistrate according as the power under that section happens to be exercised by one or the other.

Meaning of the expression "a Court of competent jurisdiction" in section 537 of the Criminal Procedure Code (X of 1882) considered.

A Court of Session may try a prisoner so committed and charged by itself.

It is an established rule of practice that the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches.

Regina v. *Malápá*(1) and *Regina* v. *Budhu Nanku*(2) followed.

THIS was an appeal from the conviction and sentence recorded by A. H. Unwin, Sessions Judge of Kánara, under section 395 of the Indian Penal Code (XLV of 1860).

The accused Krishnábhat bin Narshivbhat and seven other persons were charged with dacoity.

On the 4th June, 1885, the First Class Magistrate of Kárwár, who held the preliminary inquiry, discharged the accused Krishnábhat under section 209 of the Criminal Procedure Code (X of 1882), and committed the rest for trial before the Court of Session. In the course of their trial the Sessions Judge, after taking some evidence and perusing the magisterial record, came to the conclusion that the accused Krishnábhat had been improperly discharged. He thereupon adjourned the trial, and under section 436 directed Krishnábhat to be re-arrested, and called upon him to show cause why he should not be committed for trial, upon the matter in respect of which he had been discharged. He was brought before the Court on the 12th of June 1885, and, on his failing to show sufficient cause against his committal, the Sessions Judge ordered him to be forthwith committed and to take his trial along with the other prisoners. The Sessions Judge then proceeded to frame the charge against him under section 395 of the Penal Code (Act XLV of 1860), which being read over and explained to him, he claimed to be tried. Thereupon the trial proceeded, and ended in his conviction on the 7th July, 1885.

The accused appealed to the High Court. The appeal came on for hearing before Nánábhái and Wedderburn, JJ.

Branson (with him *Shámráv Vithal*) for the accused:—The Sessions Court had no power to try the accused upon its own

(1) 11 Bom. H. C. Rep., 196. (2) I. L. R., 1 Bom., 475.

commitment. Section 193 of the Criminal Procedure Code (Act X of 1882) distinctly provides that the accused must be committed by a competent Magistrate to the Court of Session before the latter can try him. Without a regular committal by a Magistrate, the Sessions Court cannot take cognizance of an offence as a Court of original jurisdiction. This is the general rule, subject to certain specific exceptions. The present case is not one of those exceptions. Section 436, under which the Sessions Judge acted in this case, does not empower him to commit the accused himself. The words of the section are: "The Sessions Court may *order* him to be committed for trial," which can only mean that the Sessions Court should order some *other* Court or officer to commit him for trial—*Empress* v. *Khamir*[1]. The trial, therefore, by the Court of Session upon its own commitment was *ultra vires*.

Ráv Sáheb *V. N. Mandlik*, Government Pleader, for the Crown:—There is nothing in section 436 which prevents a Court of Session from committing a discharged person itself, and trying him on its own commitment and charge. The proviso to that section clearly empowers the Court itself to commit the accused. That proviso contemplates one of those exceptional cases in which under section 193 the Court of Sessions can hold a trial without the formality of a committal by a Magistrate—*Reg.* v. *Taraknáth Mookerji*[2].

The formality of a committal by a Magistrate is not necessary under section 436. Even if it were necessary, its omission in the present case is not shown to have prejudiced the accused. It is, therefore, not a valid ground under section 537 for setting aside the conviction.

Branson in reply:—Section 537 refers to the finding, sentence, or order passed by a "Court of competent jurisdiction." In the present case the Sessions Judge had no jurisdiction under section 193 to try the accused on his own commitment. Section 537, therefore, does not apply. The whole proceedings before the Sessions Judge were *ultra vires*.

(1) I. L. R., 7 Calc., 662. (2) 10 Beng. L. R., 285.

1885.

QUEEN-EMPRESS v. KRISHNÁ-BHAT.

NÁNÁBHÁI HARIDÁS, J. :—The only question that we are called upon to determine at this stage of the case is whether the Sessions Judge had jurisdiction to try Krishnábhat, prisoner No. 8, in the absence of a commitment by a Magistrate.

The facts of the case, so far as they bear upon this point, are as follows :—The First Class Magistrate, Kárwár, on the 4th June, 1885, committed seven persons for trial before the Court of Session on a charge of dacoity, discharging the accused Krishnábhat under section 209 of the Criminal Procedure Code (Act X of 1882). Their trial commenced on the 19th June, 1885. In the course of that trial, after taking some evidence, the Sessions Judge was of opinion, the magisterial record being before him, that Krishnábhat had been improperly discharged. He then postponed the trial, and under section 436 of the Criminal Procedure Code (Act X of 1882) called upon Krishnábhat to show cause why he should not be committed for trial upon the matter of which he had been so discharged, at the same time directing him to be re-arrested. He was, accordingly, brought before the Court on the 12th, and through his pleader showed cause "why he should not be committed to take his trial with the other prisoners in the case." The Court was of opinion that no sufficient cause was shown, and ordered him to be committed to the dock, and take his trial upon the same charge, along with the other prisoners, as prisoner No. 8. A charge was thereafter framed against him by the Court under section 395 of the Indian Penal Code (Act XLV of 1860), which being read and explained to him, he claimed to be tried. Thereupon the trial proceeded, and it ended in his conviction with four of the other prisoners on the 7th July, 1885.

The above order of the Sessions Judge, directing the commitment, is still in force, being unreversed. Between the date of it and the date of the conviction no attempt was made to get it set aside, and even the present petition of appeal omits to question its validity. As to the character and sufficiency of the evidence upon which the conviction is based, we at present express no opinion.

It is contended by Mr. Branson that the framing of the charge against Krishnábhat by the Court and the trial following it were

ultra vires, there being no commitment by a Magistrate as required by section 193 of the Criminal Procedure Code (Act X of 1882). That section lays down a general rule subject to exceptions. We have, therefore, to see whether under any other section of the Code the Court of Session had power to make the commitment. It purports to have acted under section 436, which expressly empowers it, in the case of an improper discharge where the case "is triable exclusively by the Court of Session," to order the accused person to be committed. This is such a case—a case of dacoity. But it is argued that still the intervention of a Magistrate was necessary, for he alone could make a commitment. According to this argument, the Court ought to have sent its order to the First Class Magistrate, for him to return it back with a charge framed in compliance with it. It is to be observed that if this course had been followed by the Court—if the order had been sent to the Magistrate, the result would had been precisely the same. The Magistrate having no option or discretion in the matter, would have immediately returned the order with an endorsement "committed" and a charge under section 395 of the Indian Penal Code (Act XLV of 1860). Still, if that formality was necessary to be observed, it ought to have been observed. We do not, however, think it was: section 436 of the Criminal Procedure Code (Act X of 1882) in such a case as this clearly empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by such Court. There is nothing in the section to show that, when such order is made, the commitment thereupon must necessarily be made by the Magistrate who has discharged him, while the first proviso to it shows that it may be made by such Court or by the District Magistrate according as the power under that section happens to be exercised by one or the other. The words "order him to be committed for trial" in section 436 of the present Criminal Procedure Code seem to us to mean "commit him for trial," and in this view we are fortified by the opinion of two learned Judges of the Calcutta High Court upon similar words used in the corresponding section (296) of the previous Code (Act X of 1872), though the precise point now before us was not being dealt with by them (see 10 Beng. L. R.,

1885.

QUEEN-EMPRESS v. KRISHNA-BHAT.

289). This view is also further strengthened to some extent by section 442, which provides for the High Court certifying its decision or order under Chapter XXXII to the inferior Court, whose order is revised, and requiring the latter to pass such fresh orders as may be conformable to the decision or order so certified, amending its own record if necessary, but which contains no similar provision for the Court of Session or the District Magistrate doing the same when ordering or making a commitment under section 436. And we see no reason to suppose the Legislature to have intended the observance of a formality—the intervention of a Magistrate—which could serve no purpose whatever, before the Court of Session could enforce its own order. For these reasons we are of opinion that it was competent to the Court of Session in this case to make the commitment itself, that section 436 does contain such an express provision as is contemplated in section 193, and that the trial by the Court of Session upon its own commitment and charge was not *ultra vires*.

Assuming, however, that it was necessary for the Court of Session to send its order to the First Class Magistrate, for the latter to frame a charge and direct the accused to be tried on it by such Court, the matter may be looked at from another point of view. The omission by the Court to observe that formality, then, was an irregularity on its part before the trial. It cannot, however, be said to have in any way affected the merits of the case, and section 537 of the Criminal Procedure Code (Act X of 1882) prohibits the reversal or alteration of a finding, sentence, or order passed by a Court of competent jurisdiction merely on account of such irregularity. But it is urged that, under section 193, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction in the absence of a commitment by a competent Magistrate, and that, therefore, the Court of Sessions in this case was not a Court of competent jurisdiction within the meaning of section 537. The language of section 193 is, no doubt, very strong, but that of section 195 in the same portion (B) of Chapter XV is no less strong. That section provides: "No Court shall take cognizance (*a*) of any offence

punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (Act XLV of 1860), except with the previous sanction of the public servant concerned....."; and yet, notwithstanding the absence of such sanction, section 537 regards a Court otherwise competent as "a Court of competent jurisdiction." The words "a Court of competent jurisdiction" in that section must, therefore, be taken to mean "a Court of competent jurisdiction in respect of the particular offence charged;" and taken in that sense the Court of Session was not only "a Court of competent jurisdiction"[1], the offence charged being dacoity (section 395 of the Indian Penal Code (Act XLV of 1860)), but the only Court of such jurisdiction[2].

We, accordingly, hold that the charge framed by the Court of Session in this case and the trial thereon were not *ultra vires*, and that counsel must be heard on the *merits*.

The appeal was heard on the merits by Birdwood and Jardine, JJ., on 14th January 1886.

Branson (with him *Shámráv Vithal*) for the accused:—There is no legal evidence to support the conviction. It rests entirely on the testimony of a co-prisoner. That testimony is of no value whatever, being uncorroborated by any independent evidence. Refers to *Reg.* v. *Málápá*[3]. The conviction, therefore, must be quashed.

Pándurang Balibhadra (Acting Government Pleader) for the Crown:—A conviction is not illegal merely because it is based on the sole uncorroborated evidence of an accomplice: see Evidence Act, I of 1872, sec. 133. In the present case the evidence of the co-prisoner is corroborated by the fact that part of the property was found concealed in a shed belonging to the appellant. That shows his complicity in the crime.

Branson in reply:—The shed is more than a mile distant from the appellant's house. It is not shown that other people had no access to it. The circumstance, therefore, that some property was found concealed in that shed, does not show that

(1) Section 28 of Act X of 1882. (2) Act X of 1882, Sch. II., col. 8.
(3) 11 Bom. H. C. Rep., 196.

1885.

QUEEN-EMPRESS v. KRISHNÁ-BHAT.

it was the accused who concealed it there. That fact proves nothing—see *Empress* v. *Malhári*[1].

JARDINE, J.:—The Sessions Judge based his conviction of the appellant on a statement of another prisoner, Narsinvha, under trial at the same trial, who had implicated himself as well as the appellant. To quote from the judgment: "The statements of the other co-accused and pardoned approver I look upon as merely subsidiary and corroborative, as I do the circumstance of the property found in the shed." Although Narsinvha's statement was contradicted by the testimony of the witness Bhági, who was on solemn affirmation and exposed to cross-examination, the Sessions Judge gave weight to the former, because it was self-inculpatory, whereas the testimony of Bhági was, he says, self-exculpatory.

We are of opinion that the learned Judge approached the evidence from a wrong point of view. The statement of the co-prisoner, Narsinvha, may, indeed, under section 30 of the Indian Evidence Act I of 1872 be taken into consideration; but as it was not made on solemn affirmation, and the other prisoners had no opportunity of cross-examining him, its probative force is of the very weakest kind. On this point the case of *Empress* v. *Ashoo-tosh Chuckerbutty*[2], which was quoted at the Sessions trial, might advantageously have been referred to by the Sessions Judge.

The finding of the property in a shed which belongs to appellant, but is situate above a mile from his house, is an ambiguous circumstance, as other people, besides the prisoner, had access to the place.

The remaining evidence against the appellant consists of the depositions of the pardoned accomplices who were examined as witnesses. They are evidently very pliable persons, and we see no reason to depart from the ordinary rule, adopted in section 114 of the Indian Evidence Act I of 1872, that an accomplice is unworthy of credit, unless he is corroborated in material particulars. They are called to prove the identity of the appellant with one of the dacoits. But there is no independent corroboration of their

(1) I. L. R., 6 Bom., 731.

(2) I. L. R., 4 Calc., 483.

1885.

QUEEN-EMPRESS v. KRISHNÁBHAT.

statements, which on this point of identity are contradicted by Bhági. Now, it is an established rule of practice that the accomplice must be corroborated by independent evidence as to the identity of every person whom he impeaches. In the present case there is no such corroboration. The accomplice may know every circumstance of the crime, and while relating all the other facts truly may, in order to save a friend or gratify an animosity, as is alleged in this case, name some person as one of the criminals who was innocent of the crime. Hence the value of the well-understood rule, which we think ought to have been applied to this case. Similar principles have been applied by this Court in *Reg.* v. *Málápá*(1) and *Reg.* v. *Budhu Nánku*(2). We now reverse the conviction and sentence.

Conviction and sentence reversed.

(1) 11 Bom. H. C. Rep., 196. (2) I. L. R., 1 Bom., 475.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *December* 14.

RA'MRA'O TRIMBAK DESHPA'NDE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* YESHVANTRA'O MA'DHAVRA'O DESHPA'NDE AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition of deshpánde vatan—Custom of primogeniture—Presumption as to impartibility of vatan—Cessation of duties attached to a vatan.

It had been the practice in a *deshpánde vatandár's* family, extending over a century and a half without interruption or dispute of any kind whatever, to leave the performance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, and to provide the younger branches with maintenance only.

Held, that such practice, being more probably due in its origin to a family or local usage than to a mere arrangement determinable at the will of any members of the family, ought to be recognised and acted upon as a legal and valid custom.

Discontinuance of services attached to an impartible *vatan* does not alter the nature of the estate, and make it partible(1).

*Cross Appeals, Nos. 77 and 91 of 1884.

(1) *Vide Sávitribái* v. *A'nandrão*, 12 Bom. H. C. Rep., 224; and *Rádhábhái* v. *A'nantrão*, I. L. R., 9 Bom., 198.