CRIMINAL REVISION.

Before Mr. Justice Batty and Mr. Justice Heaton.

EMPEROR *v.* BHAGWANDAS KANJI.*

1907. *January* 11.

Aden Courts Act (II of 1864), sections 29, 30†—Court of Resident at Aden—Suits tried by Resident as a Court of Session—Appeals heard by Resident—Application for revision against both to the High Court of Bombay—Certificate of the Advocate-General—Indian Penal Code (Act XLV of 1860), section 161—Bribe—"In the exercise of his official functions"—"Motive or reward"—Essentials of the offence.

There is nothing in section 29 or 30 of the Aden Courts Act (II of 1864) which can operate either by express words or by necessary implication, to limit the application of those sections to cases tried by the Resident as a Court of Session or to exclude appeals from their purview.

Section 30 of the Aden Courts Act (II of 1864) empowers and requires the High Court of Bombay to review the case or such part of it as may be necessary, with reference only to the points of law specified in the certificate of the Advocate-General. The section does not contemplate that any decision by the Resident on a point of fact should be questioned in review, save in so far as such decision may be dependent for its validity on the determination of a point of law mentioned in the certificate.

Section 161 of the Indian Penal Code (Act XLV of 1860) requires proof that an official has obtained, as a motive or reward for official conduct, an illegal gratification for himself or another. That other may or may not be an official, and therefore may be wholly unconnected with the official conduct. The conduct which is contemplated as the consideration for the bribe must be

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* Criminal application for revision, No. 112 of 1906.

† An act to provide for the administration of Civil and Criminal Justice at Aden (Act II of 1864), sections 29 and 30 run as follows:—

29. No appeal shall lie from an order or sentence passed by the Resident in any criminal case. But it shall be at the discretion of the Resident to reserve any point or points of law for the opinion of the said High Court.

30. On such point or points of law being so reserved as in the last preceding section mentioned, or on its being certified by the Advocate-General at Bombay that in his judgment there is an error in the decision of a point or points of law decided by the Resident, or that a point of law decided by the said Resident should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point of law, and thereupon to pass such judgment and sentence as to the said High Court shall seem right.

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that of the official obtaining it. This is clear from the phrase "in the exercise of *his* official functions." To obtain a bribe as a motive or reward for another's conduct does not fall within the section though it may be an abetment of that offence or cheating. The performance of the act which is consideration for the bribe is not essential. But it is essential that the bribe should be obtained "as a motive or reward." That phrase evidently means on the understanding that the bribe is given in consideration of some official act or conduct. Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances.

THIS was an application against a conviction and sentence recorded by Lieutenant A. H. E. Mosse, Assistant Resident and Magistrate First Class, Aden, confirmed on appeal by Major-General H. M. Masson, Political Resident at Aden.

The accused Bhagwandas Kanji was an Accountant of the Aden Port Trust. The complaint was originally laid against two persons: Fernandes, Secretary to the Aden Port Trust Board, and Bhagwandas, who was subordinate to him. The charge against Bhagwandas was that he accepted an illegal gratification from one Mahomed Ali Shamsuddin in the form of a sum of Rs. 100 for showing favour to the said Mahomed Ali by endeavouring to assist him in obtaining the Port Trust contract for stores, such assistance having been given in the accused's official capacity as Accountant of the Aden Port Trust.

There was further an allegation that in March or April 1905 a sum of money (Rs. 400) had been given to Bhagwandas to be given to Fernandes, and a further sum of Rs. 100 to Bhagwandas himself for his help, both sums being illegal gratifications for obtaining the contract.

Fernandes was tried but was discharged under section 213 (2) of the Criminal Procedure Code.

The trial of the accused ended in his conviction and he was sentenced to suffer rigorous imprisonment for one year.

This conviction and sentence was on appeal confirmed by the Political Resident at Aden.

The accused then obtained a certificate from the Advocate-General under section 30 of the Aden Courts Act (II of 1864).

The material portions of the certificate are set out in the judgment of Batty, J.

On the strength of this certificate the accused applied to the High Court under its criminal revisional jurisdiction.

Branson with *K. N. Koyaji*, for the accused, argued the case on its merits.

M. B. Chaubal (Government Pleader) for the Crown:—The frame of sections 29 and 30 of the Aden Courts Act (II of 1864) shows that the Legislature intended a review by the High Court of only those cases which come up before the Resident as a Court of Session and not of those that come up before him by way of appeal, and even in those cases the High Court can consider only those points certified by the Advocate-General under section 30 of the Act. (The learned Government Pleader then argued the case on its merits.)

Branson was heard in reply.

BATTY, J.:—This case comes before us for review and for the determination of certain points of law, on a certificate by the Advocate-General in terms of section 30 of Act II of 1864 (an Act to provide for the administration of Civil and Criminal Justice at Aden).

The case was originally tried and decided by Lieutenant Mosse, First Class Magistrate, whose decision was confirmed on appeal by the Resident, Aden.

A preliminary objection was taken on behalf of the Crown by the Government Pleader that the enactment above cited (section 30 of Act II of 1864) relates only to cases tried in the first instance by the Resident himself and does not extend to cases which the Resident has only heard on appeal.

No authority has been cited in support of this position.

Section 30 evidently relates to cases in which the Resident might under section 29 reserve points of law for the opinion of this Court. And section 29 extends in terms to "any criminal case" in which "an order or sentence is passed by the Resident." There is nothing in section 29 or 30 which could operate either by express words or by necessary implication to limit the application of those sections to cases tried by the Resident as a Court of Session or to exclude appeals from their purview.

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We therefore proceed to review the case. In doing so we must premise that section 30 in the view which we take of it empowers and requires us to review the case or such part of it as may be necessary, with reference only to the points of law specified in the certificate of the Advocate-General and that the section does not contemplate that any decision by the Resident on a point of fact should be questioned in review, save in so far as such decision may be dependent for its validity on the determination of a point of law mentioned in the certificate. This view does not appear to have been controverted or displaced in any arguments addressed to us by either side.

The certificate of the Advocate-General runs as follows: —

1. "That in my judgment the Resident in declining to interefere with the decision of the lower Court committed an error in law, in that the lower Court, having acquitted Fernandes of receiving any money as an illegal gratification and being unable to decide whether Bhagwandas Kanji had received an illegal gratification for himself or for Fernandes, acted illegally in convicting the said Bhagwandas Kanji of an offence under section 161 of the Indian Penal Code.

2. "That in my judgment the Resident committed an error of law in upholding the conviction of the said Bhagwandas Kanji for receiving Rs. 400 as illegal gratification on the 17th of March 1905, whereas the only charge against the accused was of accepting Rs. 100 as an illegal gratification in the end of January 1905.

3. "That in my judgment the point of law decided by the Resident that the evidence of accomplice witnesses has been sufficiently corroborated should be further considered."

To make this intelligible a brief outline of the case is necessary.

The original complaint was against two persons, *viz.*, Fernandes, Secretary to the Aden Port Trust Board, and the appellant Bhagwandas, the Port Trust Accountant, subordinate to him. The complaint alleged that both these accused must have known that the decision of the Board as to tenders for a certain contract would chiefly depend on the probable requirements of the Board for articles offered at prices favourable to the Board, and that in order to give undue advantage to one firm known as Abdul Ali, the accused submitted to the Board statements grossly over-estimating the probable requirements for manila rope, an article which the said firm in their tender offered to supply at

the cheapest rate, and that Fernandes further aided that firm by suppressing certain facts which it was his duty to disclose to the Board and which would have told against that firm. The complaint went on to state that an entry appeared in the books of Abdul Ali's firm, dated 11th March 1905 (*i. e.*, the day after the Board accepted Abdul Ali's tender), showing Rs. 500 to have been paid for the contract having been given to Abdul Ali, the entry closing with certain letters indicating that the Rs. 500 had been paid to Fernandes, whose name and official title also appeared in full in the entry though in a different hand from that appearing in the rest of the entry.

Last, the complaint alleged that in March or April 1905 one sum of money had been given to Bhagwandas to be given to Fernandes, and a further sum of Rs. 100 to Bhagwandas himself for his help, both sums being illegal gratifications for obtaining the contract for Abdul Ali.

It may here be noted that the sum to be given to Fernandes was originally stated in the complaint as Rs. 500, but this stands scored through, Rs. 400 being substituted.

The evidence led for the prosecution contains many manifest and important contradictions. These it is unnecessary to discuss at this stage.

Every incident which is not inconsistent with the complaint is stated in the deposition of Abdul Kadir, the first witness examined. The effect of his evidence is as follows:—

Fernandes never appeared in person at any negotiation for the bribe, and never received any money from any of the witnesses for the prosecution, but he admitted to Abdul Kadir the receipt of the sum of Rs. 500. Bhagwandas was present when an arrangement was made between Abdul Kadir, Mahomed Ali the manager of Abdul Kadir's firm, and one Mulla Najimudin to secure payment of the bribe. Bhagwandas then said: "I have arranged with Mahomed Ali for Rs. 500 for the Sáheb and Rs. 100 for myself, but I do not trust Mahomed Ali, so Mulla Najimuddin has agreed to be surety for the payment."

Thereafter Mulla Najimuddin obtained a promissory note for Rs. 500 from Mahomed Ali, and on 17th March 1905, after

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Mahomed Ali had obtained the contract, gave Abdul Kadir Rs. 400 which Abdul Kadir then and there handed over to Bhagwandas.

Abdul Kadir was allowed also to depose that a further sum of Rs. 100 was sent to Bhagwandas by the hand of one Hassan Ali, who, the witness said, told him the Rs. 100 had been given to Bhagwandas.

Hassan Ali was not called for the prosecution to confirm this hearsay evidence. But before the charge was framed he was called for Bhagwandas, accused 2, and he then contradicted Abdul Kadir, to whom and not to Bhagwandas he swore he had handed the Rs. 100.

Such being the case presented by the evidence most favourable to the prosecution, the Magistrate, on 30th November 1905, framed charges under section 161, Indian Penal Code, against both accused, of having received in or about the end of January 1905 as illegal gratification—sums—in the case of Fernandes of Rs. 500, in the case of Bhagwandas Rs. 100—for showing favour in their official functions to Mahomed Ali.

The Magistrate proceeded to hear the witnesses for the defence. Those for Fernandes closed on 30th November 1905.

On 2nd December the Magistrate, holding the evidence for the prosecution insufficient to prove receipt of money by Fernandes, cancelled the charge against him and discharged him under section 213, Criminal Procedure Code, expressing, however, great doubt as to his innocence.

For Bhagwandas witnesses were examined up to 13th December.

On 12th January 1906 the Magistrate convicted Bhagwandas.

In a passage towards the end of his judgment the Magistrate recorded his conclusion as follows :—

"Accused (*i. e.*, Bhagwandas) did make some agreement to assist Mahomed Ali to obtain the Port Trust contract, and after the latter had obtained the contract accused did receive a sum of at least Rs. 400 from him through Mulla Najimudin. How far accused actually did assist Mahomed Ali to obtain the contract does not matter, nor whether the gratification received was for himself or for anyone else."

And in pronouncing sentence the Magistrate added :—"It has not been proved whether accused committed the offence entirely on his own account or partly on behalf of Mr. Fernandes." The Resident on appeal confirmed the Magistrate's decision. He held that "an arrangement was made by Mahomed Ali Shamsuddin with the appellant . . . . for the payment of Rs. 500 to Fernandes and Rs. 100 to himself," and that appellant on the night of 17th March received Rs. 400 from Mulla Najimudin.

In declining to interfere with the Magistrate's decision the Resident expressed no opinion on the question whether Bhagwandas received the Rs. 400 as for himself or for Fernandes.

The first paragraph of the Advocate-General's certificate questions whether in the circumstances the conviction of Bhagwandas can be sustained on the findings recorded. The objections implied are that there can be no conviction under section 161 without a finding that some official has obtained illegal gratification as a motive or reward for his official conduct : that in the present instance two officials were suggested as persons so illegally induced or rewarded, *viz.*, Fernandes and Bhagwandas : that if one of these alternative suggestions be rejected, the other must be accepted or an essential element of the offence would be wanting and no conviction could be sustained : that in this case the Magistrate in acquitting Fernandes decided that he was not the official induced or rewarded : and that the Magistrate had been unable to accept as established the only alternative suggested.

In considering this objection the first point that suggests itself is that the Magistrate did not acquit Fernandes as the certificate implies but merely cancelled the charge and discharged him under section 218, sub-section (2), Criminal Procedure Code. Such a discharge does not under section 403 of the Code amount to an acquittal. Indeed, the Magistrate distinctly expresses his belief that Bhagwandas did not receive the money entirely on his own account.

Thus, so far as the Magistrate's treatment of the charge against Fernandes affects the case against Bhagwandas, it implies a

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conclusion that Bhagwandas received the money partly on his own account and partly on that of Fernandes.

Next the certificate speaks of the Magistrate as *unable* to decide whether Bhagwandas received the gratification for himself or for Fernandes. This implies that the Magistrate was in doubt as to facts essential to constitute the offence of which he has convicted Bhagwandas.

It is necessary to consider therefore what were the essentials in this case to be proved to constitute an offence under section 161. That section requires proof that an official has obtained as a motive or reward for official conduct an illegal gratification for himself or another. That other may or may not be an official and therefore may be wholly unconnected with the official conduct. The conduct which is contemplated as the consideration for the bribe must be that of the official obtaining it. This is clear from the phrase "in the exercise of his official functions." And, no doubt, to obtain a bribe as a motive or reward for another's conduct, would not fall within section 161 though it might be an abetment of that offence or cheating. As the Magistrate observes, the performance of the act which is consideration for the bribe is not essential. But it is essential that the bribe should be obtained "as a motive or reward." That phrase evidently means "on the understanding that the bribe is given in consideration of some official act or conduct." Such an understanding need not be proved by explicit evidence of any precise agreement. It may be inferred from circumstances.

Thus, if official conduct unduly favouring an individual without assignable reason be established against a public servant, and a gratuitous payment by the individual favoured or by an intimate of his to the public servant shortly before or after the act done is also established, the inference might fairly be drawn that the payment was received on an implied understanding that it was in consideration of that act. This inference would be strengthened to the extent of reasonable certainty, if it were further established that the person favoured, the person making the payment and the official, had been seen conferring together at a time when the transaction involved was pending, if the

official could assign no innocent purpose for his taking part in such conferences. In such case the inference that the unexplained payment was in consideration of the unexplained favour received would be irresistible, and it would not be necessary to specify in the charges or in the findings the precise details of the understanding, expressed or implied, between the parties. With a conviction based on such findings of fact it would not be possible for us to interfere in review on the ground that the essentials of the offence had not been held proved.

In the present instance such findings of fact followed by a conviction under section 161 do appear in the Magistrate's judgment of 12th January 1906. He holds as a fact that the calculations in the over-estimate tell against accused Bhagwandas. That is the official act.

He also holds that accused 2 (Bhagwandas) did make *some* agreement to assist Mahomed Ali to obtain the contract, the accused offering no explanation but only a denial of the fact.

And lastly the Magistrate finds the accused did receive Rs. 400 shortly after Mahomed Ali obtained the contract.

The conviction purports to be based as an inference on these findings of fact. The only element of doubt in the Magisterial findings appears to be as to the details, not as to the essential character of the understanding. All that the Magistrate appears to have been unable to decide was the precise terms as to the proportion of the payment which the accused Bhagwandas was to retain as his share of the reward. But in passing sentence he indicates very clearly his finding that accused received the payment partly on his own account. For the Magistrate then observes: "It has not been proved whether the accused committed the offence *entirely* on his own account or partly on behalf of Mr. Fernandes." The existence of some understanding in pursuance of which accused received the payment on his undertaking to assist the person who made it, is distinctly found. This being the case, any further terms which may have been expressed or implied were immaterial. It is clearly in this sense that we must read the passage in which the Magistrate observes that it is immaterial "whether the gratification received was for himself or for another." For that passage must be read

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with the observation recorded in passing the sentence which implies no doubt that the accused received the gratification partly for himself. The appropriation or disposal of the money by accused himself was absolutely immaterial, provided that there was no doubt that some understanding existed for him to assist Mahomed Ali and that the payment was in pursuance of that understanding. And that no such doubt was entertained by the Magistrate is we think perfectly clear from the passages above cited. The essentials which we have already enumerated as necessary to constitute the offence under section 161 have all been found. The only complication is that when inferring the understanding between the parties, the Magistrate has deemed it possible and even probable that it contained more than was absolutely necessary to constitute the offence under section 161, in that it may have provided for a reward to Fernandes as well as to Bhagwandas. This was immaterial, and whether Bhagwandas made agreement for a lump sum to be apportioned by himself—or stipulated for a specific share for himself or undertook to secure Mahomed Ali's object by his own influence alone, it has been clearly found that he did make some agreement to assist Mahomed Ali in obtaining that object and received the payment in consequence—and there is no suggestion that the Magistrate held Bhagwandas to have intervened in the matter gratuitously without any reward to himself. We therefore think the objection in the first para of the certificate must fail.

The second paragraph in the Advocate General's certificate raises a question as to the propriety of a conviction on facts disclosing a variance from the charge framed.

As shown above the charge was framed at the conclusion of the case for the prosecution on 30th November 1905. The nature of that case had been fully disclosed not only when the charge was framed, but as soon as the first witness Abdul Kadir had been examined-in-chief, *i. e.* 23rd October 1905. The subsequent evidence added no further details to the incidents which the prosecution sought to prove.

Thus both prosecution and defence were apprised of the fact that Bhagwandas was accused of having claimed Rs. 100 for

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himself and Rs. 500 for Fernandes in January: of having then taken part in an arrangement for the payment of Rs. 500 and of having received Rs. 400 on 17th March and Rs. 100 later.

And it is manifest that Bhagwandas realised that this was the case of fact made against him. For even before the charge was framed he called evidence to disprove receipt of Rs. 100, and when called on for his defence, he led evidence of an alibi on the 17th March—to repel the case as to receipt by him of money on that date. He does not seem to have been misled or prejudiced by the variance which, *per incuriam* it would seem, existed between the charge and the case already then presented against him.

The error in stating the particulars required to be stated in the charge would be fatal to the conviction only if the accused were in fact misled thereby—and if the error had occasioned a failure of justice, section 225, Code of Criminal Procedure. The whole of the defence shows that he was not misled and that the case is of the nature described in illustrations (*b*) and (*d*) to section 225.

In framing the charge it may possibly have been in contemplation that the accused obtained an illegal gratification as soon as he secured an undertaking of the nature of a *havala* by Mullah Najimudin agreeing to pay on Mahomed Ali's account, *i. e.* in January 1905. And if the accused had been led to suppose that was the sum total of the case against him, there would no doubt have been a miscarriage of justice. But his own written statement and all the evidence he adduced, show that he fully appreciated the necessity of meeting the evidence as to his actual receipt of the money in March. It has been objected on his behalf in this review, that when the accused was examined, the case was never put to him in the aspect which it assumes in the Magistrate's judgment. He was however questioned as to the receipt of the Rs. 400 and to the visit to the Karim Ali's house during the Mohurrum, and responded with an absolute denial of the whole incident and that was his line of defence. Exception has been taken that the arrangement which Abdul Kadir says accused asserted, for Rs. 500 to be given to Fernandes and Rs. 100 to himself, has not been established. That is so. The

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Magistrate has not held it proved—but has, it seems, only inferred *some* agreement by accused to assist. But, as already observed, it was not indispensable in order to a conviction that the precise occasion or terms of the agreement should be established, provided the existence of some such understanding could be inferred as would show that the payment to accused included a reward for his own official conduct. The objection that there was much in the evidence for the prosecution on which the Magistrate did not or could not rely, is an objection which could only affect questions as to his appreciation of evidence with which we are unable to deal.

We now proceed to discuss the question raised in the third para. of the certificate, *viz.*, whether the evidence of accomplice witnesses has been sufficiently corroborated. With regard to the form in which this point is presented to us, we must observe that we are unable to enter into the question whether the evidence purporting to be corroborative is credible or not. That would be determining questions of fact when our authority is only to determine questions of law. We conceive that it is open to us only to consider whether the facts which the Magistrate has found appear in evidence only as statements made by uncorroborated accomplices. The Resident in dealing with this point refers to witnesses Nos. 5, 6, 7 and 9 with the remark that they are none of them accomplices. That is not disputed. The first of these deposes only that Najmudin delivered Rs. 400 to Abdul Kadir who was accompanied by Bhagwandas. He does not profess to have seen the money actually handed over by Abdul Kadir to Bhagwandas.

But the 2nd and 3rd of these witnesses depose that they saw Bhagwandas on that occasion leave the house with a bag which one of them says contained money and which the other says appeared to contain money.

These witnesses may be utterly unworthy of credence. We are not prepared to say whether we should have formed the same appreciation of their evidence as was formed by the Magistrate and the Resident. But we must accept the finding of those two Courts on the facts to which those witnesses depose. And it is impossible to say that their evidence, if true, does not sufficiently

corroborate Abdul Kadir's statement that Bhagwandas came with him on the night in question to Mullah Najmudin's and took away a sum of money. That is all they purport to prove. None of them say they saw the money given by Mullah Najmudin or Abdul Kadir to Bhagwandas. But the fact that Mullah Najmudin brought money that night and that Bhagwandas took money away would, we think, in the circumstances sufficiently support the inference that Abdul Kadir's statement was true, *viz.*, that Bhagwandas received money that night from Abdul Kadir in Mulla Najmudin's house. Counsel for Bhagwandas urges that there are discrepancies as to the date of the occasion, as one witness puts it at the end of the Mohurrum, the other at the end of the Id. But the Magistrate has found, and we cannot express dissent from his view, that the 17th March, corresponding with the end of the Mohurrum festival or Id, was the date meant so that the corroboration is not impaired. The question as to the credibility of Said Taba in deposing that he saw accused on the stairs we are unable to discuss. The last of the witnesses mentioned by the Resident as corroborative is the Somali girl Fatma Issa who deposes to having heard accused say in Hindustani that he would take Rs. 500 for the Saheb and Rs. 100 for himself. This evidence has also been impugned as manifestly incredible, the mother-tongue of the persons concerned being Gujaráti and unintelligible to a Somali. Here again we are unable to review the appreciation of evidence, nor can we judge how far a Somali girl in Aden might be able to understand Hindustani or Gujaráti or mistake the one for the other. But the Magistrate does not appear to have relied on her evidence or on that of the accomplices as proving the *terms* of any arrangement then made,—but only as establishing the arrival of Bhagwandas at night with Mahomed Ali and Mullah Najmudin and his presence as deposed to by Najmudin and Mahomed Ali during the discussion of business when the contract was awaiting the decision of the Board.

It is true that Mahomed Ali and Najmudin give a totally different version of the discussion from that which Abdul Kadir gives and are in many important details in conflict with him and each other. But the Magistrate has assigned reasons for sus-

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pecting their anxiety to represent the transaction then made as an innocent one—and having the witnesses before him, had an opportunity of estimating the respective value of their evidence and that of Abdul Kadir. We are not in the same position.

The fact of undue favour shown in preparation of the over-estimate is one into which we cannot enter, nor have arguments been addressed to us on that subject. We accept, as we conceive that we are bound to do, the finding that the official conduct of accused secured an undue preference in favour of Mahomed Ali, and was preceded by nocturnal conferences between accused, Mahomed Ali and a person from whom money was obtained by accused shortly after the result of that conduct was known. These are findings based on evidence which is not that of accomplices, and which appears to us sufficient corroboration of that which rests solely on the statements of an accomplice, *viz.*, that the money was received on an understanding that it was a reward for improper assistance given. For these reasons we are unable to say that the conviction is bad on the third ground stated by the Advocate General.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907.
January 16.

POMA DONGRA, PLAINTIFF, *v.* WILLIAM GILLESPIE, DEFENDANT.*

Contract Act (IX of 1872), sections 16, 19A—Contract induced by undue influence—Money lender—Exorbitant rate of interest—Undefended suit—Court's right to interfere—Reasonable rate of interest, what is—Civil Procedure Code (XIV of 1882), section 210—Power of High Court to make its money decrees payable by instalments.

Under sections 16 and 19A of the Indian Contract Act the Court has power to interfere and relieve a defendant against what may appear to the Court to be unconscionable transactions.

The circumstances in each case must be looked to in order to decide what would be a reasonable rate of interest to allow.

* Original Suit No. 613 of 1906.