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all fours with that of *Empress v. Kallu* (1), in which Straight, J. expressed himself in the following terms :—

“ I do not think that the circumstances of his (the husband's) appearing as a witness in the prosecution of that offence can be regarded as amounting to the institution of a complaint for adultery in the sense of s. 478 (now s. 199 of the Code of 1898). The expression ‘ complaint ’ is a perfectly well-understood one, and s. 142 of the Criminal Procedure Code (of 1872) in terms prohibits a Magistrate from taking cognizance of a case *without complaint* when it falls under Chapter XX of the Penal Code within which is included s. 497. It by no means follows, as a necessary consequence, that because a husband may wish to punish a person, who has committed a rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out she has been a willing and consenting party to the Act. At any rate, if a criminal charge of adultery is to be preferred, a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, s. 478 (s. 199 of the Code of 1898) will not have been satisfied. I may mention here that s. 238 of the new Criminal Procedure Code leaves no doubt as to the course the Courts should adopt in cases of the kind now before me.”

We entirely agree with and adopt the view of the law thus expressed, and on these grounds we set aside the conviction and sentence as without jurisdiction. The appellant must be released.

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## [417] CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Stephen.*

BHAI LAL CHOWDHRY *v.* EMPEROR.\* [5th and 6th February, 1902.]

*Defence—Right of private defence—Public servant—Unlawful assembly—Public servant acting in good faith under colour of his office—Institution of proceedings—Criminal Procedure Code (Act V of 1898) ss. 87, 88 and 190—Penal Code (Act XLV of 1860) ss. 99, 143 and 183.*

A Magistrate issued a proclamation under s. 87 of the Criminal Procedure Code, and an order of attachment under s. 88 of the property of certain absconding accused persons. During the attachment an objection was raised that the property being attached did not belong to the absconders. The Police Officer, on being informed by the Patwari that it was their property, continued the attachment. A mob, among whom were the accused, assembled, and by assuming a threatening attitude prevented the police officer from further attaching the property.

*Held*, the conviction of accused under ss. 143, 183 of the Penal Code was right.

*Held*, further, that even supposing the property attached was not the property of the absconders, the rightful owner had no right of private defence of his property, inasmuch as the evidence showed that the police officer was acting in good faith under colour of his office; and even supposing the order of attachment might not have been properly made, that would in itself be no sufficient ground for such a defence.

*Held*, also, that where the attaching police officer sent a person to inform the Magistrate of what had taken place, and the Magistrate thereupon sent

\* Criminal Revision No. 923 of 1901, made against the order passed by H. Coupland, Esq., District Magistrate of Darbhanga, dated the 28 of August 1901.

(1) (1882) I. L. R. 5 All. 233.

the Senior Inspector to the spot to take up the case, instructing him to take the statement of the attaching police officer as the first information of the occurrence and to send it in to him (the Magistrate), so that proceedings might be taken, it could not be said that the proceedings in the case had not been properly instituted.

THE petitioners, Bhai Lal Chowdhry and others, obtained a Rule calling upon the District Magistrate to show cause why their conviction and the sentences passed on them should not be set aside on the ground (1) that the proceedings in the case had not been properly instituted; (2) that the evidence did not disclose the offence charged.

In this case a Subordinate Magistrate, having reason to believe that certain persons accused of an offence had absconded, [418] and being unable to arrest them, issued a proclamation under s. 87 of the Criminal Procedure Code and at the same time, an order of attachment of their property under s. 88. Whilst the attachment was being made, an objection was raised by another person that the property, which the police officer was attaching, did not belong to the absconders.

The police officer referred to the patwari, who was present, and on being assured that it was the property of the absconders, he proceeded to make the attachment. In the meanwhile a mob, amongst whom were the petitioners, had assembled, and they by assuming a threatening attitude prevented the police officer from making further attachment.

The attaching police officer sent a person to inform the Magistrate of what had taken place. The Magistrate thereupon sent the Senior Inspector to the spot to take up the case, instructing him to take the statement of the attaching police officer as the first information of the occurrence and send it in to him (the Magistrate), so that proceedings might be taken. This was done, and proceedings were instituted against the petitioners, who were tried, convicted, and sentenced under ss. 143 and 183 of the Penal Code.

The petitioners appealed to the District Magistrate of Darbhanga, who, on the 28th August 1901, dismissed their appeal.

Babu *Dasarathi Sanyal* for the petitioners.

*Cur. adv. vult.*

PRINSEP AND STEPHEN, JJ. There is no ground for our interference in this matter in revision. Undoubtedly there was an occurrence. This has been found by the Sub-divisional Magistrate and by the District Magistrate on appeal. It appears that, having reason to believe that certain persons accused of an offence had absconded, the Sub-divisional Magistrate, after being unable to arrest them, issued a proclamation under s. 87 of the Code of Criminal Procedure and, at the same time, an order of attachment of their property under s. 88. In this respect the Sub-divisional Magistrate's order was in accordance with law. In the [419] course of the attachment an objection was raised by another person that the property which the police officer was attaching did not belong to the absconders. The police officer very properly referred to the *Patwari*, who was present, and being assured that it was the property of the absconders, he proceeded to make the attachment. At this time a mob had assembled, and it has been found that these men by threatening language and also by threatening attitude combined to overawe the police officer in execution of his duty. The police officer then wished Mr. Edwards, an indigo-planter, who was the complainant in the case against the absconders, and others, to leave for the purpose of giving information to the Sub-divisional Magistrate of what had taken place,

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and the police officer says himself that he abstained from making any further attachment. There can be no doubt that on these facts the Sub-divisional Magistrate and the District Magistrate on appeal have rightly convicted the accused, who were present, of being members of an unlawful assembly. They have also been convicted under s. 183 of the Indian Penal Code, and this raises the question whether the order which the police officer was executing was a lawful order. It has been argued before us that, inasmuch as no proclamation had been made, the attachment was not a lawful attachment. We observe that both the Courts have found facts which unmistakeably show that a proclamation was made at the place an hour before the police proceeded to attach the property. This disposes of the objection. The Rule, however, has been granted on two grounds: first, that the proceedings in this case have not been properly instituted, and secondly, that the evidence does not disclose the offence charged. On the second point we have already expressed our opinion. In regard to the first point, it appears that Mr. Edwards was sent by the Inspector to inform the Magistrate of what had taken place. The Magistrate thereupon sent the Senior Inspector to the spot to take up the case, instructing him, in order to comply with the law, as he read it, that he should take the statement of the Sub-Inspector as the first information of the occurrence and send it in to him (the Magistrate), so that proceedings might be taken. We do not see that on such a foundation it can be [420] properly said that the proceedings in this case have not been properly instituted.

We may add, with reference to the facts found in this case, that even supposing that the property attached was not the property of the absconders, the rightful owner had no right of private defence of his property, inasmuch as the evidence shows that the police officer was acting in good faith under colour of his office; and even supposing that the order of attachment might not have been properly made, that would in itself be no sufficient ground. The law, as expressed in s. 99, explanation 2, of the Indian Penal Code, is clear on this point. The Rule is therefore discharged.

*Rule discharged.*

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### APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and  
Mr. Justice Prinsep and Mr. Justice Hill.*

ADMINISTRATOR-GENERAL OF BENGAL v. AGHORE NATH  
MOOKERJEE.\* [28th February, 1902.]

*Registrar's sale—Sale notification—Misdescription of property—Remedy of purchaser—  
Compensation—Annulment of sale.*

Where the misdescription of property in the sale notification does not go to the essence of the contract, the remedy which the purchaser can claim is compensation and not annulment of the sale.

THE judgment-creditor (the Administrator-General of Bengal) appealed.

In pursuance of a mortgage decree and order made in the suit of the Administrator-General of Bengal and Annoda Prosad Das and others, bearing dates, respectively, the 9th day of December

\* Appeal from Original Civil No. 3 of 1901 in Suit No. 652 of 1894.