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the peace, etc., and they are so desperate and dangerous as to render their being at large without security hazardous to the community, they are called upon to show cause why they should not be bound over for their good behaviour."

The Magistrate therefore has proceeded in some measure, if not mainly, on his own knowledge of the character of the petitioner, and he was in our opinion therefore not a proper person to proceed with this trial by, to use the words of s. 117, inquiring "into the truth of the information upon which action has been taken." The case therefore must be transferred to some other Magistrate. We accordingly direct that the proceedings be transferred to the District Magistrate to be dealt with by himself or to be transferred to some other competent Magistrate in the district.

*Rule made absolute.*

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

KINOO SHEIKH *v.* DARASTULLAH MOLLAH.* [5th February, 1902.]

*Security for keeping the peace—Order—Omission of express finding as to commission of offence within the section—Illegality—Jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 106 and 423—Penal Code (Act XLV of 1860) s. 379.*

Where a Subordinate Magistrate convicted the prisoner under s. 379 of the Penal Code of theft and the District Magistrate on appeal merely [394] affirmed the conviction and added to his judgment an order under s. 106 of the Criminal Procedure Code binding over the petitioner to keep the peace—

*Held*, that he was not competent to pass such an order except on an express finding that the petitioner had committed an offence within the terms of s. 106.

THE petitioner Kinoo Sheikh obtained a Rule calling upon the District Magistrate of Jessore to show cause why the order passed on the 30th July 1901 binding over the petitioner to keep the peace should not be set aside on the ground that it was made without jurisdiction.

The accused was convicted by a Subordinate Magistrate of theft under s. 379 of the Penal Code for having cut and carried away certain crops belonging to the complainant.

On appeal to the District Magistrate the conviction was affirmed in the following words :—

"The Lower Court decides rightly on the oral evidence that the complainant was in possession. I agree with his finding and support the conviction. The appeal is dismissed."

And the District Magistrate added to his judgment an order under s. 106 of the Criminal Procedure Code binding over the petitioner to keep the peace.

Mr. *K. N. Sen Gupta* and Babu *Monmotho Nath Mukerjee* for the petitioner.

PRINSEP and STEPHEN, JJ. The Subordinate Magistrate convicted the petitioner of theft in cutting and carrying away crops belonging to the complainant. The District Magistrate, on appeal, expresses himself thus—

"The Lower Court decides rightly on the oral evidence that the complainant was in possession. I agree with his finding and support the conviction. The appeal is dismissed."

* Criminal Revision No. 864 of 1901, made against the order passed by A. G. Hallifax, Esq., District Magistrate of Jessore, dated the 30th of July 1901.

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From this we understand that the Appellate Court considers that the petitioner has been properly convicted and sentenced for theft. But the Magistrate on appeal thought proper to add to his judgment an order under s. 106 of the Code of Criminal Procedure, binding over the petitioner to keep the peace. He is not competent to do so except on an express finding that the petitioner has committed an offence within the terms of s. 106 ; and inasmuch as there is no such express finding by him, but he merely affirms the conviction of theft passed by the Court of first instance, his order under s. 106 is in our opinion without jurisdiction. It must **[395]** therefore be set aside. We observe that in his explanation the District Magistrate attempts to justify his order on the ground that the record of the case shows that there was an unlawful assembly and a danger of a breach of the peace. There may be evidence on this point, but that evidence has not been accepted by either of the Courts, and therefore there is no justification for an order under s. 106.

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## PRIVY COUNCIL.

PRESENT :

*Lord Davey, Lord Robertson, and Sir Andrew Scoble.*

KHAGENDRA NATH MAHATA *v.* PRAN NATH ROY.

[13th February and 1st March, 1902.]

[*On appeal from the High Court at Fort William in Bengal.*]

*Decree, ex parte—Sale in execution of ex parte decree—Rejection of applications to set aside decree and sale in execution—Civil Procedure Code (Act XIV of* 1882), *ss.* 108, 311—*Subsequent suit to set aside decree and sale on ground of fraud—Omission to appeal from orders of rejection.*

**In a suit to set aside an *ex parte* decree and a sale in execution of such decree as illegal, fraudulent, and collusive, the allegations made in the plaint were clearly an attack not on the regularity or sufficiency of the service of summons or the proceedings, but on the whole suit in which the *ex-parte* decree was obtained as being a fraud from beginning to end :—**

***Held*, the suit was maintainable notwithstanding that the plaintiff had been unsuccessful in applications under s. 108 and s. 311 respectively of the Civil Procedure Code to set aside the *ex parte* decree and the sale in execution, and had not appealed from the orders rejecting such applications ; the questions in the suit as a whole being such as could not have been determined on applications under those sections.**

APPEAL from a decree (11th August 1897) of the High Court at Calcutta reversing a decree (4th September 1895) of the Subordinate Judge of Pabna by which the respondents' suit was dismissed.

The defendants Khagendra Nath Mahata and others appealed to His Majesty in Council.

This is one of two similar cases which have come on appeal before the Judicial Committee. The appeal in the former case has been reported as *Radha Raman Saha* v. *Pran Nath Roy* (1).

**[396]** The suit out of which the present appeal arose was brought, like the former suit, to set aside an *ex parte* decree and a sale in execution of such decree as being fraudulent and void. It was brought against defendants, some of whom were the same defendants as in the former

(1) (1901) I. L. R. 28 Cal. 475.