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show that this objection was pressed before him. The defect was apparently regarded as of a formal nature. If the objection had been pressed before the District Judge it would have been very easy for that Court to have remedied the defect by calling the plaintiff and requiring him to testify formally whether the books which he produced in Court were those to which he referred in his deposition before the Munsif. We are, therefore, of opinion that this objection pressed in this Court for the first time is without substance and that it should not be upheld.

[978] The next objection taken to the judgment under appeal is that the District Judge was wrong in allowing the plaintiff to add to his mortgage debt the amount which he had paid to save the property from being sold in execution of a rent decree. It is clear that the payment was made under section 310A of the Code of Civil Procedure, and, therefore section 171 of the Bengal Tenancy Act has no application. The charge, too, cannot be supported by the provisions of section 72 of the Transfer of Property Act. These provisions of law, however, though they enumerate certain cases in which payments made to save property from sale for arrears of revenue or rent may be secured by a charge on the property, do not profess to be exhaustive. The point now before us was considered in *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (1), and it was there held that a mortgagee making payments to save a mortgaged property from being sold for arrears of revenue has, according to the general principles of justice, equity and good conscience, a lien on the property for the sums so paid by him. We think it right to follow the principle laid down in that case; and we are, therefore, of opinion that the District Judge was not in error in allowing the plaintiff to add to his mortgage-debt the amount which he had paid to save the property from being sold in execution of the rent decree.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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31 C. 979 (=9 C. W. N. 72.)

[979] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

MATUK DHARI TEWARI *v.* HARI MADHAB DAS.*

[June 1st and 2nd, 1904.]

Public Nuisance—Public way obstruction in—Bona fide claim of title—Reasonable and proper order—Jury—Verdict—Criminal Procedure Code (Act V of 1898), ss. 133, 139.

Where in a proceeding under s. 133 of the Criminal Procedure Code the opposite party, in showing cause why an obstruction should not be removed from a public way alleged that the way was the private property of his employer and asked for a jury to be appointed, and the Magistrate instead of first satisfying himself as to the *bona fides* of the claim referred the following question to the jury—

"Is there a public right-of-way at the points where stand the buildings whose removal has been ordered?"

Held that this was not a proper reference. What the jury had to try was whether the Magistrate's order was reasonable and proper.

[Ref. 10 C. W. N. 845=4 Cr. L. J. 42; 42 Cal. 158; Ref. 61 I. C. 175=22 Cr. L. J. 351.]

*Criminal Revision No. 512 of 1904, made against the order passed by A. Bentinck, Sub-divisional Magistrate of Sitamarhi, dated April 25, 1904.

(1) (1903) I. L. R. 30 Cal. 794.

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RULE granted to the petitioner, Matuk Dhari Tewari.

This was a Rule calling upon the District Magistrate of Mozufferpore to show cause why the order of the Subdivisional Magistrate of Sitamarhi, dated the 26th April, 1904, should not be set aside on the ground that the proceedings of the Magistrate as well as the final decision of the majority of the jurors were *ultra vires*.

The petitioner, who was the *karpardaz* of Rani Raj Bansi Koer, made an application on the 26th December 1903 to the Subdivisional Magistrate of Sitamarhi to the effect that there was a *hat*, which had existed for a long time, on the lands of the Rani, to the east of which lands were the lands of Mohunt Lakhan Narain Das. That the Mohunt in order to injure the Rani had caused a number of *golas* to be erected on his lands, and was attempting to induce the shopkeepers of the *hat* to [980] go there, in consequence of which there was a likelihood of a breach of the peace. The Subdivisional Magistrate thereupon passed the following order on the 26th December 1903 :—"Issue notice to 2nd party not to interfere with the working of the market of the 1st party or with those persons who habitually attend."

On notice of this order being served on the opposite party, they filed a petition on the 4th January 1904, stating that the application made by the petitioner was untrue, and alleging that the petitioner had obstructed a public passage to the north by excavating a ditch. The Subdivisional Magistrate held a local inquiry, and on the 11th January 1904 passed the following order :—"Local inquiry held, the *tattee* buildings put up on the road southwards from the post-office and at the south-west corner of the same must be removed. They are obviously put up to block the road, which is a public way and used by carts. The former building to be removed entirely and the other so far as to leave a track not less than fifteen feet wide. Issue notice accordingly under s. 133 of the Criminal Procedure Code." The petitioner received notice, and in showing cause urged that the alleged way was the private property of the Rani, and he asked for a jury to be appointed. The jury were appointed, and the Subdivisional Magistrate instead of first satisfying himself as to the *bona-fides* of the claim and then determining whether the parties should be referred to the Civil Court proceeded to refer the following question to the jury : "Is there a public right-of-way at the points where stand the buildings whose removal has been ordered ?" On the 24th April 1904 the jury by a majority of four to three found that the property belonged to the Rani, but that the public had a right-of-way over it. Thereupon the Subdivisional Magistrate on the 26th April made his former order under s. 133 of the Code absolute, and gave the petitioner three weeks' time to remove the buildings.

Babu *Joy Gopal Ghose* for the opposite party. The verdict of the jury, although in terms a decision on the question as to the public right-of-way, is in fact a finding that the Magistrate's order was a reasonable one. It therefore meets the requirements [981] of the section substantially. In any case, if the proceedings were irregular, there has been no failure of justice, and s. 537 of the Criminal Procedure Code cures the irregularity, if any.

Mr. *Donogh*, (Babu *Akhoy Kumar Banerjee* with him) for the petitioner. The petitioner appeared before the Magistrate in answer to the notice and claimed the land on which the public right-of-way was alleged

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to exist as belonging to the Rani, and at the same time asked for the appointment of a jury under s. 135 of the Code. The Magistrate should thereupon have proceeded first to determine whether the claim was a *bona fide* one or not : see *Kailash Chunder Sen* v. *Ram Lall Mitra* (1). If he decided that it was a *bona fide* claim, he should have allowed the parties an opportunity of having the disputed rights determined by a Civil Court : see *Queen-Empress* v. *Bissessur Sahu* (2). If he decided that it was not so, he might then have appointed a jury under s. 138 of the Code.

The jury being appointed, the question which the Magistrate should have referred to them was whether his order was reasonable and proper as required by s. 139 (1). Instead of which the question which he gave them to decide was whether there was a public right-of-way or not. It could never have been intended that a jury appointed under Chapter X of the Code should be left to themselves in the way they have been to act independently of the Magistrate and without any supervision. Such a procedure is wholly foreign and opposed to the functions of a jury. They have thus been allowed to go beyond the scope of their authority. The proceedings are irregular and contrary to law and should be set aside.

Cur. adv. vult.

PRATT AND HANDLEY, JJ. This is a somewhat peculiar case, and the proceedings are marked by several irregularities.

On the 11th January last the Subdivisional Officer of Sitamarhi passed the following order :—" Local inquiry held, the *tattee* buildings put up on the road southwards from the post-office and at the south-west corner of the same must be removed. They **[982]** are obviously put up to block the road, which is a public way and used by carts. The former building to be removed entirely and the other so far as to leave a track not less than 15 feet wide. Issue notice accordingly under section 133 of the Criminal Procedure Code." The petitioner, who is *karpardaz* of Rani Raj Bansi Koer, received notice and showed cause, urging that the alleged way is the private property of his employer, and asking for a jury to be appointed.

The Magistrate instead of first satisfying himself as to the *bona fides* of the claim, as required by law, see *Preonath Dey* v. *Gobordhone Malo*(3), and then determining whether the parties should be referred to the Civil Court, see *Queen-Empress* v. *Bissessur Sahu* (2)—proceeded to refer the following question to a jury : " Is there a public right-of-way at the points where stand the buildings whose removal has been ordered ? " That was not a proper reference. What the jury had to try was whether the Magistrate's order was reasonable and proper.

Misled as they were, the jury went beyond their province, and ultimately by a bare majority of four to three they found that the property belonged to the Rani, but that the public had a right-of-way over it. Whether the particular order made by the Magistrate was entirely reasonable and proper they did not say. We think it is clear that the case has been dealt with in a manner not warranted by law, and we accordingly quash the Magistrate's order dated the 26th April last.

Rule made absolute.

(1) (1899) I. L. R. 26 Cal. 869.
(2) (1890) I. L. R. 17 Cal. 562.
(3) (1897) I. L. R. 25 Cal. 278.