1902 JULY 10.

CRIMINAL REVISION.

30 C. 443=7 C. W. N. 174.

initiate proceedings under s. 145 he must make a formal order under sub-section (1) of that section. No such order has been made in these proceedings. The Magistrate has no power to bind any one down under sub-section (6). The Magistrate has converted a proceeding commenced under s. 107 into one under s. 145, and this he has no right to do. The order is therefore bad, and without jurisdiction.

Babu *Jogesh Chunder Dey* for the opposite party. The Magistrate acted on information when he called upon the parties to show cause under s. 107 of the Criminal Procedure Code, just as he would have done, if he had wished to draw up proceedings under s. 145. Although the Magistrate did not make a formal order under sub-section (1) of s. 145 the notice calling upon the parties to show cause under s. 107 may be read in place of that formal order. The making or not of a formal order under sub-section (1) of s. 145 is, I submit, a question of procedure, and does not in any way affect the jurisdiction of the Magistrate.

STEVENS AND MITRA, JJ. The Rule in this case was issued to show cause why an order purporting to have been made under sub-section (6) of section 145 of the Code of Criminal Procedure should not be set aside on the ground that such order was made without jurisdiction, inasmuch as no preliminary order had been passed under the provisions of sub-section (1) of section 145.

It is quite clear to us that this Rule must be made absolute. There is a long current of decisions of this Court to the effect that the making of a formal order under sub-section (1) of section 145 is absolutely necessary to give the Magistrate jurisdiction to initiate proceedings under that section. In the present case a notice was issued on the parties under section 107 of the Code of Criminal Procedure to show cause why they should not execute a **[445]** bond to keep the peace for one year. When the case came on for hearing, the Sub-divisional Officer recorded an order, in the course of which he stated that it appeared to him quite obvious that, on the facts, the case was one for the application of section 145 of the Code of Criminal Procedure, and not of section 107. He thereupon proceeded at once to do what he called "bind down" the first party under sub-section (6) of section 145. The expression of course was not correct, and, what is of more importance, the order itself was entirely bad.

The Rule is therefore made absolute, and the order made by the Sub-divisional Officer on the 30th January 1902 is set aside.

Rule made absolute.

30 C. 446 (=7 C. W. N. 412.)

[446] ORIGINAL CIVIL.

BHUPATI RAM *v.* SOURENDRA MOHUN TAGORE.*

[13th February, 1903].

Interest—Agreement to pay interest—Evidence, admissibility of—Promissory note—Civil Procedure Code (Act XIV of 1882), Chapter XXXIX, s. 532.

In a suit instituted under Chapter XXXIX of the Civil Procedure Code (Act XIV of 1882) the plaintiff is not entitled to recover any interest unless such interest is specified in the promissory note itself, or to give evidence regarding any agreement to pay interest.

Remfry v. *Shillingford* (1) referred to.

[Dist. 17 M. L. J. 290. Not foll. 2 Pat. L. J. 451.]

*Original Civil Suit No. 863 of 1902.

(1) (1876) I. L. R. 1 Cal. 130.

1903
FEB. 18.

ORIGINAL CIVIL.

30 C 446=7 C. W. N. 412.

ORIGINAL SUIT.

This suit was instituted under Chapter XXXIX of the Civil Procedure Code to recover from the defendant, Rajah Sir Sourendra Mohun Tagore, a certain sum due on a promissory note. There was no interest specified in the note, but the plaintiff alleged that there was an agreement, apart from the note, to pay interest, and mentioned in the summons a sum due for interest, calculating it on the basis of the agreement.

Mr. *N. Chatterjee* for the plaintiff. The explanation added to s. 532 of the Code entitles the plaintiff to give evidence of the separate agreement to pay interest. In *Remfry* v. *Shillingford* (1) PHEAR, J. held that Act V of 1866 was intended only to apply to those cases in which the bill itself, together with mere lapse of time, was sufficient to establish for the plaintiff a *prima facie* right, and the learned Judge therefore excluded the evidence that was offered to be given. To obviate the difficulty felt by that learned Judge, the explanation to s. 532 was added, by which the procedure under Chapter XXXIX of the Code has been extended to cases other than those in which the bill, hundi [447] or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover.

The defendant did not apply for leave to enter appearance.

AMEER ALI, J. This suit is under Chapter XXXIX of the Civil Procedure Code, which lays down a certain procedure entitling the plaintiff to obtain a decree without going into evidence. The form of the summons is prescribed in schedule 4, form 172. Section 532 prescribes that when the procedure under Chapter XXXIX is adopted, and a summons is taken out in accordance with the form given in the schedule, the defendant shall not be entitled to appear without leave, and if he has not obtained such leave or does not appear to defend pursuant to such leave, the plaintiff shall be entitled to a decree for any such sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of decree.

In the case before me no interest is specified in the note, but the plaintiff in his plaint claims interest under an agreement said to have been entered into a part from the note, and has chosen to calculate the interest on that basis and to insert it in the summons. When the case came on before me on the 9th February I pointed out to learned counsel that under section 532 the interest must be specified in the note. He contended on the authority of *Remfry* v. *Shillingford* (1) and the explanation attached to section 532 that he was entitled to give evidence regarding the agreement as to interest. I am of opinion that this position is wholly untenable ; in fact, the case just referred to is entirely against the proposition. In that case the promissory note was payable by instalments, and contained a stipulation that in default in payment of the first instalment the whole amount was to become due. A suit was brought thereupon under the Bills of Exchange Act V of 1866, the provisions of which for the purposes of this case may be taken as in *pari materia* with the provisions of section 532, and the Judge there held that no such suit could be brought under Act V of 1866. In the beginning of his judgment Mr. Justice Phear said as follows : "I think the Act was only intended to apply to those cases in which the bill itself, together with mere lapse of time [448] is sufficient to establish for the

(1) (1876) I. L. R. 1 Cal. 130.

1903 FEB. 13.

ORIGINAL CIVIL.

30 C. 446=7 C. W. N. 412.

plaintiff a *prima facie* right to recover." Anybody who was conversant with the language of Statutes would put the same construction on the provisions of Act V of 1866, and would put the same construction upon the provisions of section 532. But the Legislature did not apparently understand what Mr. Justice Phear was aiming at, and apparently not understanding the meaning of the language, inserted the explanation, which, so far as I am able to construe, conveys absolutely no meaning. The object apparently of the draughtsman was to negative what Mr. Justice Phear had stated, and with that object the explanation was put in, which seemingly contradicts Mr. Justice Phear's *dictum*, and goes no further. It does not explain what class of cases the section applies to. It only says : " This section is not confined to cases in which the bill, hundi, or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover." As it stands, speaking with all respect, it is wholly unintelligible and meaningless, and stultifies the substantive provisions of the section.

In my opinion the plaintiff is not entitled to recover interest on this action, no interest having been specified in the note.

Mr. Chatterjee, on behalf of the plaintiff, has applied that, that being my opinion, he might be allowed to proceed under Chapter V of the Code. That course was ordered by Mr. Justice Phear in the case referred to, and I propose to allow the plaintiff to adopt that course, and I will give him the summons under Chapter V. The order will be drawn up in the same way as in that case.

Attorney for the plaintiff : *J. C. Dutt.*

30 C. 449.

[449] CRIMINAL REVISION.

RADHABULLAV ROY *v.* BENODE BEHARI CHATTERJEE.*

[10th July, 1902.]

Jurisdiction—Transfer of criminal case to Subordinate Magistrate—District Magistrate, power of, to pass order relating to case not on his own file—Criminal Procedure Code (Act V of 1898) ss. 190, 192, 435.

When a case is once made over for disposal to a Subordinate Magistrate by the District Magistrate, the latter is not competent to pass any order relating to it other than an order such as might be made by him under Chapter XXXII of the Code of Criminal Procedure.

Moul Singh v. *Mahabir Singh* (1) and *Golapdy Sheikh* v. *Queen-Empress* (2) referred to.

[**Ref.** 32 Cal. 783=9 C. W. N. 810 ; **Dist.** 33 Cal. 119=18 Cr. L. J 433=15 I. C. 65.]

RULE granted to the petitioners, Radhabullav Roy Chowdhuri and another.

This was a Rule calling upon the District Magistrate of Maldah to show cause why the order made on the 5th April 1902 directing the prosecution of the petitioners should not be set aside, on the ground that the order was one which was not within his jurisdiction to make.

On the 18th December 1901, the complainant, Benode Behari Chatterjee, lodged a complaint before the senior Deputy Magistrate of Maldah who was in charge of the station, during the absence of the District Magistrate, charging the petitioners and one Punchanand Das with an offence punishable under s. 504 of the Penal Code. The senior Deputy

*Criminal Revision No. 442 of 1902.

(1) (1899) 4 C. W. N. 242. (2) (1900) I. L. R. 27 Cal. 979.