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appeal against a judgment of acquittal," and the appeal in the present case being restricted to a judgment of conviction for a particular offence, all that the Sessions Judge had to do was to see whether that conviction was supported by the evidence or not; for he had no power to enquire whether the prisoner had been properly or improperly acquited of the other charge for which he was tried by the Magistrate.

I do not think that the provisions of section 426 were ever inten ded by the Legislature to override that great principle of Criminal Jurisprudence, which says that no man's life or liberty ought to be jeopardized twice for the same offence. In the Full Bench case already cited by me, it has been held that this Court has no power, either has a Court of revision or as a Court of appeal, to convict a prisoner of an offence for which he has been already tried and acquitted by a Court of competent jurisdiction; and I do not think that the Sessions Judge had any power to do that indirectly which he is not campetent to do directly according to the principal laid down in that case.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp.

C. J. DUMAINE (PLAINTIFF *v.* UTLAM SING (DEFENDANT).*

Act X of 1859, s. 13—Notice—Special Appeal.

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In a suit for enhancement of rent, it was objected, on behalf of the defendant, in special appeal, that service of notice had not been proved. *Held*, the question was one of fact, and the objection ought therefore to have been taken in the Court of first instance.

Mr. *R. E. Twidale* for appellant.

Baboo *Iswar Chandra Chuckerbutty* for respondent.

The judgment of the Court was delivered by

COUCH, C. J.—With regard to the objection taken by the pleader for the defendant (respondent) with reference to the ruling of the Full Bench in the case of *Akhoy Sankar Chuckerbutty* v. *Raja Indra Bhusan Deb Roy* (1) to the effect that service of notice has not been proved, we think, as already observed in the course of the argument, that it is now too late to entertain that objection, nor do we think the defendant competent to take it in the lower Appellate Court on remand. It is an objection which ought to have been taken in the Court of first instance. The question as to whether notice was given or not is a question of fact; and if the objection had been taken at the proper time, the plaintiff would have had an opportunity of proving

Special Appeal No. 2954 of 1869, from a decree of the Judicial Commissioner of Chota Nagpore, dated the 13th Sepetember 1869, reversing a decree of the Assistant Commissioner of that district, dated the 3rd May 1869.

(1) 4 B. L. R., F. B., 78.

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that notice had been given. Section 13, Act X of 1859, says that such notice shall be served on the application of the person to whom the rent is payable; and although the title of the plaintiff accrued only three days before the suit was commenced, it is possible that the notice might have been given by the zemindar who was the person to whom the rent was payable and that might have been shown if the objection had been taken at the proper time.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

1870
July 2.

IN THE MATTER OF THE PETITION OF NABA KUMAR BANERJEE.*

Code of Criminal Procedure, (Act XXV of 1861), s. 36—Removal of a Case by the Magistrate from the File of a Subordinate Magistrate.

Interference by the High Court in a case where the Magistrate had improperly exercised his discretion in removing a case from the file of a Deputy Magistrate.

Baboo *Hem Chaudra Banerjee* for petitioner.

KEMP, J.—The prisoner in this case is one Naba Kumar Banjeree, a late stamp-vendor of the Moonsiff's Court of Serampore. It appears that the Nazir of the Sub-Division of Serampore had absconded with certain property and moneys in his charge, in respect of which a charge was laid against him. There were also, it appears two register books of stamps missing; and the prisoner, Naba Kumar Banerjee, being suspected of having something to do with the books being missing, is charged with the theft of the said registers by the Deputy Collector of Serampore. The case was made over for trial to the Deputy Magistrate of Serampore. The Deputy Magistrate, after taking the evidence for the prosecution, recorded his opinion that the discrepancies in the evidence for the prosecution were of so glaring a nature that it was impossible to sustain the charge brought by the prosecution against the prisoner, Naba Kumar Banerjee; but as the mooktear for the prosecution had asked the Court to postpone the case to enable him to procure copies of the evidence, stating that he would then be able to show to the Deputy Magistrate that the prisoner ought not to be discharged, he appears to have acceded to the request of the mooktear, and admitted the accused to bail. On another occasion, the mooktear for the prosecution appears to have made a similar application, and the case was again postponed. After the Deputy Magistrate had given the above expression of opinion, the case, it appears, was suddenly removed from his file by the Officiating Magistrate of Hooghly.

*Miscellaneous Criminal Appeal, No. 47 of 1870, from an order of the Deputy Magistrate of Serampore, dated the 13th April 1870.

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IN THE MATTER OF THE PETTION OF NABA KUMAR BANERJEE.

In the order removing the case, no reasons whatever have been given for doing so. The transfer is made under section 36 of the Code of Criminal Procedure; and although that section does not say that the Magistrate is bound to give any reasons, and enacts that the Magistrate is competent to withdraw any criminal case from any Court subordinate to such Magistrate within his district or division, and to try the case himself, or to refer it for trial to any other such Court competent to try the same, we think that, under the circumstances of this case, considering that the case was complete, and that the Deputy Magistrate had expressed an opinion that the evidence for the prosecution was not sufficient to support the charge, the Magistrate has not exercised a wise or proper discretion in removing this case from the file of the Deputy Magistrate of Serampore to that of the Joint Magistrate of Hooghly. When the case came up on a former occasion, before the Chief Justice and myself, we thought it necessary to call upon the Magistrate to show cause why he had acted in this manner, and he has now submitted an explanation. He refers, first, to the fact of the Deputy Magistrate being to a certain extent subordinate to the prosecutor; secondly, to a rumour that the Deputy Magistrate had made improper remarks to a mooktear in the cases thirldy, that the Deputy Magistrate, residing in a small place like Serampore, and being in a position to hear much talk and rumour about the case, was unfit to try it; and, fourthly, that his amlas were related to parties in the case. These reasons, we think, are wholly insufficient for removing the case from the Deputy Magistrate's file at the late stage at which it was so removed. They may be very good reasons for not making the case over to the Deputy Magistrate, but not sufficient reasons after he had expressed an opinion unfavorable to the prosecution to suddenly withdraw it from his file. We think therefore that the Magistrate has not acted wisely in removing this case from the file of the Deputy Magistrate to that of the Joint Magistrate of Hooghly. It will therefore be replaced on the file of the Deputy Magistrate, who will dispose of it in due course.

Before Mr. Justice L. S. Jackson and Mr. Justice E. Jackson.

GURU PRASAD ROY AND ANOTHER (DEFENDANTS) *v.* RAI BABOO DHANPAT SING (PLAINTIFF).*

1870
June 2.

Cause of Action—Suit to Recover Money advanced on a Bond before the Money became due—Failure to Register a Bond—Breach of Agreement.

A. executed a bond in favor of B., but failed to cause the registration of the same. Before the amount secured by the bond became due, B. sued A. for recovery

* Special Appeal, No. 698 of 1870, from a decree of the Officiating Judge of Moorshedabad, dated the 28th December 1869, modifying a decree of the Subordinate Judge of that district, dated the 27th August 1869.