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 CHUNDER
 GHOSE
 v.
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 BUNDO-
 PADHYA.

In the case of *Varmah Valia v. Vurmah Kunhi Kutty* (1), which was a case of a public endowment, the transfer of the office of trustees at the mere will of the trustees for the time being was held to be invalid as being in contravention of the special arrangements made by the founder, and as involving apprehended inconvenience in the carrying out of the trust. The case of *Mancharam v. Pranshankar* (2), whilst affirming the invalidity of an alienation of the office of *sebait* to a stranger, supports the respondent's case so far, that it upholds an alienation made in favour of a member of the founder's family.

These cases therefore do not militate against the view that in the case of a private endowment an alienation of the *sebait's* office, made with the concurrence of the whole family, and for the benefit of the endowment, would be valid.

Upon reason and upon authority therefore we think that the deed of 1254 is a valid document, and that the plaintiff is entitled to succeed in this suit.

In this view of the case it is unnecessary to consider the question whether the plaintiff has acquired a title by twelve years' possession.

The result is that this appeal must be dismissed with costs.

Appeal dismissed.

T. A. P.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Macpherson.

QUEEN-EMPRESS *v.* BISSESSUR SAHU AND ANOTHER.*

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Criminal Procedure Code (Act X of 1882), Section 133—Removal of obstruction in public way—Question of title—Bonâ fides of claim of title, Right of Magistrate to enquire into—Jurisdiction.

In a proceeding under section 133 of the Criminal Procedure Code for the purpose of compelling the removal of an obstruction from a public

* Criminal reference No. 49 of 1890, made by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 17th of February 1890, against the order passed by Munshi Serajul-Huq, Deputy Magistrate of Sarun, dated the 14th of January 1890.

(1) I. L. R., 1 Mad., 235.

(2) I. L. R., 6 Bom., 298.

way where a *bond fide* question as to the way being public is raised, there is no jurisdiction to make an order under the section, and the question should be left for determination by the Civil Court. To have this effect, however, the claim must be *bond fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bond fide* or not.

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This was a reference by the Sessions Judge of Sarun under the provisions of section 438 of the Criminal Procedure Code.

The terms of the reference were as follows:—

“It appears that the District Magistrate on the complaint of Kharag Narain and others, and on a police report, took proceedings against Bissessur Sahu, the petitioner before me, and against Ram Saran Sahu under section 133, Criminal Procedure Code, by directing them to remove certain obstructions from a public way, or to appear before one of his subordinates and move to have the order set aside. The public way referred to is said to be a village pathway, which is used by the public, and the obstructions complained of consisted of a wall, a stack of bricks, and a shed placed and erected on a portion of the pathway. These persons in due course appeared before the Deputy Magistrate and raised certain objections. Bissessur Sahu urged that there was no public pathway in existence on the spot as alleged by the complaining parties, while Ram Saran, admitting the existence of such a pathway, denied that it has been obstructed. The Deputy Magistrate went into evidence, and he finds as a fact that the pathway is in existence and that it is a public pathway, and further that it has been obstructed as alleged by Bissessur Sahu. He accordingly ordered him to remove the obstructions within seven days, and to restore the pathway to its former condition.

“Bissessur Sahu now urges before me that under several rulings of the High Court the Magistrate was not competent to determine the question as to whether the pathway was a public or private way, and I think his contention is correct. The rulings cited are the following:—*Basaruddin Bhuiyah v. Bahar Ali* (1), *Askar Mea v. Sabdar Mea* (2), and *Lal Mea v. Nasir Khalushi* (3), and in these it was held that whenever a *bond fide* question seems

(1) I. L. R., 11 Calc., 8.

(2) I. L. R., 12 Calc., 137.

(3) I. L. R., 12 Calc., 696.

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to exist (as in the present case) as to whether there is a public road in existence at the place named, such question is one for the civil courts to decide, because the enquiry contemplated by sections 133 *et seq.*, Criminal Procedure Code, is an enquiry into the existence or non-existence of the obstruction complained of and not an enquiry into disputed question of titles.

“Such being the law, I think the Deputy Magistrate’s order cannot be sustained, and I accordingly recommend that it be set aside.”

No one appeared on the reference.

The order of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

In this case Kharag Narain Singh and others complained to the District Magistrate under section 133, Code of Criminal Procedure, against Bissessur Sahu, Ram Sarun Sahu, and Piyar Chand Sahu, alleging that they had obstructed a certain public way by placing bricks and erecting a shed thereon. The District Magistrate ordered a police enquiry to be made. The police reported that Bissessur and Ram Sarun had obstructed a path by a mud wall, the stacking of bricks and the erection of a shed. The District Magistrate thereupon issued an order under section 133, Code of Criminal Procedure, requiring Bissessur and Ram Sarun to remove the obstructions, or to appear and show cause against such order. The defendants filed written statements; Bissessur denied the existence of the path obstructed; Ram Sarun admitted its existence, but denied having obstructed it.

The Deputy Magistrate, to whom the case was referred, visited the spot and examined a number of witnesses and found that the path in question is in existence, that it is a public one, and that it has in part been obstructed by the defendant Bissessur.

During the progress of the investigation before the Deputy Magistrate an attempt was made to compromise the case, and a petition of compromise was filed, in which Bissessur admitted that the path in question was a public one. The Deputy Magistrate refused to allow the case to be compromised, “because the path is a public one, and the parties concerned in this case had no right to make any change in its width and allow the wall to stand on a part of it.”

The Deputy Magistrate confirmed the conditional order of the Magistrate, and directed Bissessur to remove the obstructions complained of within seven days.

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Bissessur obtained a rule from the Sessions Judge calling on the Deputy Magistrate and the complainants to show cause why the order of the Deputy Magistrate should not be set aside.

On the argument of the rule, Bissessur contended that under several rulings of the High Court, *viz.*, *Basaruddin Bhuiah v. Bakar Ali* (1), *Askar Mea v. Sabdar Mea* (2), and *Lal Miah v. Nasir Khalashi* (3), the Magistrate was not competent to determine the question as to whether the pathway was a public or private way.

The Sessions Judge has referred the case to us with a recommendation that the Deputy Magistrate's order should be set aside, on the ground that there was a *bond fide* question raised by Bissessur as to whether the path in question was a public way or not, and that the cases cited showed that when such a question was raised, there was no jurisdiction to make an order under section 133, Code of Criminal Procedure.

We quite agree with the Sessions Judge that the Deputy Magistrate ought not to have made the order if there was a *bond fide* contention on Bissessur's part that the path was not a public way.

In *Luckhee Narain Bunerjee v. Ram Kumar Mukherjee* (4), the law is thus laid down:—"When such a question is *bond fide* raised, the Magistrate ought not to make an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court. The claim of title must, however, in order that it should be allowed to have this effect, be *bond fide*, and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bond fide* or a mere pretence."

We entirely concur in this view of the law.

We therefore set aside the order of the Deputy Magistrate, and direct him, after notice to both parties, to investigate the

(1) I. L. R., 11 Calc., 8.

(3) I. L. R., 12 Calc., 696.

(2) I. L. R., 12 Calc., 137.

(4) I. L. R., 15 Calc., 564.

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complaint *de novo*. If he is satisfied that the defendants' contention that the way in question is not a public way is *bond fide*, and not a mere pretence, he should set aside the Magistrate's conditional order. If he finds, having reasonable and probable cause for his decision, that the contention is not *bond fide*, he should confirm the conditional order.

H. T. H.

Order reversed.

Before Mr. Justice Norris and Mr. Justice Macpherson.

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QUEEN-EMPRESS v. HARRIDAS SAN.*

*Bengal Excise Act (Bengal Act VII of 1878), sections 53, 59, 60—
 Sale by servant of licensed vendor in presence of master—
 Liability of servant.*

The accused, who was the servant of a licensed retail vendor of spirituous and fermented liquors under Bengal Act VII of 1878, was convicted of an offence under section 53 of that Act for selling exciseable liquor without a license. The sale charged against him was of a quantity of *puchwai* in excess of that allowed to be sold under the license of his master. The sale was made in the presence of the master, the licensee, the accused merely handing the liquor to the purchaser at his master's request. *Held* that the conviction was bad, as the facts did not establish a *sale* by the accused, the mere mechanical act of handing the liquor to the purchaser not constituting a *sale* by the accused.

THIS was a reference by the Sessions Judge of Birbhoom under the provisions of section 438 of the Code of Criminal Procedure. The terms of the reference were as follows:—

“The petitioner Harridas San has been convicted under section 53, Bengal Act VII of 1878, and sentenced to pay a fine of Rs. 15, or in default to undergo simple imprisonment for two weeks.

* Criminal reference No. 53 of 1890, made by J. Whitmore, Esq., Sessions Judge of Birbhoom, dated the 24th February 1890, against the order passed by N. K. Sarkar, Esq., Joint-Magistrate of Birbhoom, dated the 17th of January 1890.