

Article 120 can apply only if article 134 is not applicable to the case. The question, therefore, is whether the suit can be treated as one for possession within the meaning of article 134. That article provides for suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgage and afterwards purchased from the trustee or mortgagee for a valuable consideration. The limitation is twelve years, and it runs from the date of the purchase.

The fifth prayer in the plaint is, "that the property may be taken from the possession of the defendants and delivered to the possession and custody of the person who may be appointed *mohunt* and trustee for the management of the idol's properties;" and section 539, as we have already observed, does contemplate a suit of this nature as coming within its scope.

That being so, we do not think that it would be any undue straining of language to say that a suit for such a purpose is a suit to recover possession of property which had been bequeathed in trust and afterwards purchased from the trustee. Article 134 therefore applies to this suit, and it is not barred by limitation.

The grounds urged before us therefore all fail and the appeal must be dismissed with costs.

Appeal dismissed.

F. K. D.

CRIMINAL REFERENCE.

Before Mr. Justice Rampini and Mr. Justice Stevens.

QUEEN-EMPRESS v. KAYBMULLAH MANDAL AND OTHERS.*

Magistrate, Jurisdiction of—Power of Commitment to Sessions Judge—Code of Criminal Procedure (Act X of 1882), sections 23, 207, 245, 254—Penal Code (Act XLV of 1860), section 147—Circular order No. 9 of 6th September 1869—Rioting.

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The commitment of a case under section 147 of the Penal Code to the Court of Session by a Deputy Magistrate is not necessarily illegal.

Although the case is shown to be triable only by a Magistrate under the second schedule of the Criminal Procedure Code, there is nothing in section 254 of the Criminal Procedure Code which prevents a Magistrate commit-

* Criminal Reference No. 55 of 1897, made by A. Ahmad, Esq., Sessions Judge of Rungpur, dated the 23rd of March 1897.

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ting a case under section 147 of the Penal Code to the Court of Session, provided he finds that the accused has committed an offence, which in his opinion cannot be adequately punished by him.

The instructions contained in Circular No. 9 of 6th September 1869 are to be read subject to the provisions of the Criminal Procedure Code.

THE accused were charged before a Deputy Magistrate with the offence of rioting under section 147 of the Penal Code, with respect to the cutting of certain crops. From the evidence it appeared that one of the men concerned in the riot, who was on the side of the person cutting the crops, died from effects of injury alleged to have been inflicted by an axe by some one connected with the affray. The Deputy Magistrate was of opinion that following the orders contained in Circular No. 9 of 6th September 1869, it was his duty to commit the accused to the Court of Sessions. The Officiating Sessions Judge of Rungpur, Mr. Ahmad, to whom the accused was committed, being of opinion that the commitment of the accused under section 147 of the Penal Code was illegal, such offence being one exclusively triable by a Magistrate according to Schedule II of the Criminal Procedure Code, referred it to this Court for the purpose of getting the commitment quashed.

Babu *Hem Chunder Mitter* for the accused.—The Deputy Magistrate states that he has committed the case to the Sessions Court, because of the Circular Order of the High Court No. 9 of 6th September 1869 (1) That Circular does not apply to this case as “death has not resulted in this case from injuries voluntarily inflicted by the party accused.” The Deputy Magistrate has not understood the true meaning of the Circular. Under section 206 of the Criminal Procedure Code the Magistrate can commit any person for trial to the Court of Session for any offence triable by such Court, and under section 28 of the Criminal Procedure Code the Court of Session, subject to the other provisions of the Code, may try any offence under the Penal Code. Section 254 requires that the Magistrate shall try the accused in a warrant case, if in the opinion of the Magistrate the accused could be adequately punished by him. In the present case the Magistrate does not say that the accused could not be adequately punished by him, and therefore he had no power under the law to com-

mit this case to the Sessions Court. The commitment should be quashed.

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The judgment of the High Court (RAMPINI and STEVENS, JJ.) was as follows :—

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This is a reference by the Officiating Sessions Judge of Rungpur inviting us to quash the commitment of Kayemullah Mandal and others committed to his Court by the Sub-Divisional Officer of Gaibanda for trial of an offence under section 147 of the Penal Code.

The Sessions Judge considers that the commitment of the accused in this case is illegal, inasmuch as the offence with which the accused are charged is one "exclusively triable by Magistrates." But this is not the case. The Sessions Judge has looked only at the schedule appended to the Criminal Procedure Code, but this schedule must be read along with the Code itself. Now one of the sections of the Code is section 28, under which the Court of Sessions has "subject to the other provisions of the Code" power to try an accused person for any offence. Then under section 207 a Magistrate, who is competent to commit to the Court of Sessions, can commit to that Court both cases triable exclusively by that Court, and cases which in his opinion ought to be tried by that Court. The commitment of a case under section 147 to the Court of Sessions therefore is not necessarily illegal. On the other hand, there are sections which limit a Magistrate's power of commitment. In a summons case he is bound to proceed under section 245 of the Criminal Procedure Code. In a warrant case, he is bound by the provisions of section 254.

This section prescribes that, when a Magistrate is of opinion that there is ground for presuming that an accused has committed an offence triable under Chapter XXI, which such Magistrate is competent to try, and which in his opinion can be adequately punished by him, he *shall* frame in writing a charge against him. This section therefore would seem to leave the Magistrate in these circumstances no option. But if, on the other hand, the Magistrate finds that the accused has committed an offence which in his opinion cannot be adequately punished by him, there would seem to be nothing to prevent his committing

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the case to the Court of Sessions, notwithstanding the fact that in the schedule appended to the Code the case may be shown as triable by a Magistrate.

The learned pleader, who appears in support of this reference, however, argues (1) that the Magistrate was not of this opinion in this case ; and (2) that he could not be of this opinion, as the maximum punishment for an offence under section 147 of the Penal Code is two years, and the Magistrate was himself competent to pass such a sentence. But an offence under section 147 of the Penal Code is also punishable with fine of an unlimited amount, while the Magistrate could impose a fine of Rs. 1,000 only. The Magistrate might therefore have committed this case to the Court of Sessions if he had considered that the fine which he could impose would not be an adequate punishment of the accused's offence.

It is, however, true that in this case the Magistrate did not commit the accused to the Court of Sessions for this reason. His proceedings were peculiar. He first drew up a charge against the accused under section 147 of the Penal Code for trial before himself. This was on the 9th January last. Then, on the 13th March, he drew up another charge against the accused for the same offence and committed them for trial to the Court of Sessions, his reason for doing so being that a man was said to have been killed in the rioting, and he thought that in consequence of the instructions of this Court, conveyed in its Circular No. 9 of 6th September 1869, he could not try the case himself. He, of course, misapprehended the meaning of this Court's Circular, which was never intended to direct Magistrates to commit cases to the Sessions Court otherwise than in accordance with the provisions of the law. And we think that as he does not say that he considered this case to be one in which he was not competent to inflict an adequate punishment, he could not under section 254 of the Criminal Procedure Code commit the case to the Court of Sessions.

We accordingly quash the commitment of the accused in this case, and direct that the Sub-Divisional Magistrate of Gaibanda do proceed with the trial of the accused without delay and complete it accordingly to law.

C. E. G.