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the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained; but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE EMPRESS OF INDIA *v.* DILJOUR MISSER.*

1877
Feb. 20.

Conviction of offence committed before the Penal Code came into operation—Regulation IV of 1797—*Act XVII of* 1862—*Act I of* 1868 (*General Clauses Consolidation Act*), *s.* 6.

The prisoner was found guilty and sentenced under Regulation IV of 1797 to transportation for life, for a murder committed in 1861, before the Penal

* Criminal Reference, No. 176 of 1876, from an order of A. V. Palmer, Esq., Sessions Judge of Shahabad, dated the 7th August, 1876.

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Code came into operation; and the case was sent up to the High Court to confirm the sentence. Regulation IV of 1797 was repealed by Act XVII of 1862, and that Act was wholly repealed by Acts VIII of 1868 and X of 1872. *Held*, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.

THE prisoner was charged with murder, alleged to have been committed on 24th May 1861, before the Penal Code came into force, and he had evaded arrest up to the time of his apprehension. The prisoner was, on 7th August 1876, found guilty by Mr. A. V. Palmer, Sessions Judge of Shahabad, of culpable homicide not amounting to murder, and sentenced to transportation for life. The case was referred by the Judge under Regulation IV of 1797, s. 3, for the orders of the High Court, and on its coming before Markby and Ainslie, JJ., the following note was made thereon by those Judges:—

"Regulation IV of 1797 was repealed by Act XVII of 1862 with some reservations, but as appears by a case (1) just decided,

(1) *R.* v. *Lall Shaha. Criminal Appeal, No.* 438 *of* 1876. In this case the prisoner was convicted in May, 1876, of robbery committed in 1857, under s. 3, Regulation LIII of 1803, and s. 3, Regulation XVI of 1825, and was sentenced, under s. 395 of the Penal Code, to seven years' rigorous imprisonment. His appeal came before Markby, Ainslie, and Mitter, JJ., on 17th August, 1876, when the following judgment was delivered:—

MARKBY, J.—In this case the prisoner has been tried for robbery by open violence, and sentenced to seven years' rigorous imprisonment, under Regulation LIII of 1803, s. 3, and Regulation XVI of 1825, s. 3. He has appealed to this Court, and his first ground of appeal is, that those Regulations having been repealed, the conviction is illegal. These Regulations were repealed by Act XVII of 1862 with a certain saving as to past offences. Act XVII of 1862 was repealed by Act VIII of 1868, except ss. 3, 4, 5, and 6. These sections were repealed by the Code of Criminal Procedure of 1872. It would, therefore, seem that this ground of the prisoner's appeal is well founded. From another case of a somewhat similar character, which is now before us, we gather that there is an opinion prevalent in the Courts of the country, that the old criminal laws antecedent to the Penal Code have not been swept away to the extent to which they appear to us to have been on a perusal of the Statutes above referred to. We regret that we have had no assistance on behalf of the Crown in the investigation of this matter, but as far as we are able to judge upon the information before us, this conviction appears to be illegal, and we order it to be set aside, and the prisoner discharged.

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those reservations have been also repealed, so that the Sessions Judge was not empowered to make the reference he has done. Nor are we aware of any regulation in existence under which the prisoner could be punished for culpable homicide committed on the 24th of May 1861. Unless, therefore, some cause be shewn to the contrary, the conviction must be set aside as illegal."

Notice was ordered to be given to the Government Pleader and to the prisoner, and the case subsequently came before Markby, Ainslie, and Mitter, JJ., who referred it to a Full Bench with the following remarks:—

"In a case which came before this Court on appeal a short time ago, it was held by us that Act XVII of 1862 was totally repealed by Acts VIII of 1868 and X of 1872, and that therefore no conviction for an offence committed prior to 1862 could be maintained. That case was not argued, and we were therefore only able to express our opinion with reference to such research as we could ourselves make into the matter. Very shortly afterwards the present case was referred to us under Regulation IV of 1797, s. 3, to confirm a sentence passed by the Sessions Judge of Shahabad, for an offence committed on the 24th May 1861. We, accordingly, gave notice that we should again consider this question, and the Junior Government Pleader has appeared to argue it. He maintains that, notwithstanding the repeal of Act XVII of 1862, the prisoner may be still tried and punished, because of the proviso in s. 6 of the General Clauses Act (I of 1868). We find considerable difficulty in coming to a conclusion as to the operation of this section in the present case, and as the question is one of general importance, it should, we think, be heard by a Full Bench."

No Counsel appeared on either side before the Full Bench.

The opinion of the Full Bench was delivered by—

GARTH, C.J.—In this case the prisoner has been convicted of culpable homicide not amounting to murder committed on the 24th May 1861, and sentenced to transportation for life. Act XVII of 1862, under which the prisoner has been tried

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and convicted for this offence, has been totally repealed by Acts VIII of 1868 and X of 1872. It has, however, been contended that, notwithstanding this total repeal of Act XVII of 1862, the prisoner may still be tried and convicted under that Act by virtue of the provisions of s. 6 of the General Clauses Act (I of 1868). We have considered this clause, and upon the whole we think that it does not apply to the present case. The conviction, therefore, must be set aside, and the prisoner discharged.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1876
Nov. 27.

MORAN AND OTHERS (PLAINTIFFS,) *v.* MITTU BIBEE AND OTHERS (DEFENDANTS).

Appeal to Privy Council—Act VI of 1874, *s.* 5—*Substantial Question of Law.*

The substantial question of law which, by s. 5, Act VI of 1874, the appeal must involve, in order to give an appeal to the Privy Council in a case where the decree appealed from affirms the decision of the Court below, is not limited to a question of law arising out of the facts as found by the Courts from whose decisions it is desired to appeal. A question of law arising on the evidence taken in the case is, without reference to the findings of the lower Courts, sufficient to found an appeal.

APPLICATION on notice for a certificate under Act VI of 1874 for leave to appeal to Her Majesty in Council from the judgments and decrees made in the suit by the Appeal Court (Garth, C. J., and Macpherson, J.) on the 15th September, and by the Original Court (Phear, J.,) on 6th March 1876. The judgment of the Original Court was in favor of the defendants, and that decision was upheld by the Appeal Court, who dismissed the appeal. The facts of the case, together with the judgments of both Courts, have been already reported (1).

(1) I. L. R., 2 Calc., 58.