

We cannot find any authority that a withdrawal under such circumstances disentitles a wife to charge her husband with desertion.

We think, therefore, that we ought to grant a decree *nisi* for a dissolution of the marriage, instead of a judicial separation, and that the petitioner should have her costs in both Courts on scale 2.

*Appeal allowed.*

Attorney for the appellant: Mr. *Fink*.

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## APPELLATE CRIMINAL.

*Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.*

THE EMPRESS *v.* KUDRUTOOLLAH AND OTHERS.\*

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March 22.

*Practice—Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X 1872), ss. 4, 220, 221.*

Section 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require, that the conviction or acquittal should be by the Magistrate who drew the charge.

THE prisoners were charged with rioting under s. 147 of the Penal Code.

The facts of the case, and the reasons for the reference, sufficiently appear from the order of the Sessions Judge referring it to the High Court, and which ran as follows:

“ At the sitting of the Court for the trial of this case an  
“ illegality was apparent on the very face of the commitment.  
“ It appears that the Joint Magistrate has gone through the case  
“ and all but decided it, having drawn up a charge, examined  
“ the witnesses for the defence, and recorded two judgments, or  
“ a judgment with a postscript, the former dated 29th December  
“ 1877, and the latter dated 18th January 1878. On this last  
“ date the Joint Magistrate records an order that the charge

\* Criminal Reference, No. 17 of 1878, from the order of H. C. Sutherland, Esq., Sessions Judge of Zilla Backergunge, dated the 13th March 1878.

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“ which he had himself drawn up was cancelled, and that the  
 “ prisoners were committed to the Sessions. This I hold that the  
 “ Joint Magistrate had no power to do. Having drawn up a  
 “ charge, the Joint Magistrate was bound to convict or acquit.  
 “ He had no third course open to him, *vide* explanation, s. 220,  
 “ Criminal Procedure Code. It cannot be contended that s. 221  
 “ helps the Joint Magistrate, because it is clear that the two  
 “ sections must be read together. It cannot be said that s. 221  
 “ justified a procedure which s. 220 distinctly precludes; and  
 “ there is all the more reason for this when it is borne in mind  
 “ that the explanation to s. 220 is altogether new in the Criminal  
 “ Procedure Code. Clearly then the legislature knew what  
 “ they were about, and they could hardly, with their eyes open,  
 “ have introduced the explanation to s. 220 providing that  
 “ if a charge is drawn up the prisoner must be either acquitted  
 “ or convicted, and go on in s. 221 to provide a third course for  
 “ Magistrates to follow. I hold then that, by the words “ at any  
 “ stage of the trial,” in s. 221, the legislature fully and deli-  
 “ berately intended that the explanation in the previous section  
 “ should be followed and read consistently, and read to mean  
 “ at any stage before the Magistrate had drawn up a charge.

“ There is a further difficulty in the case. The Joint  
 “ Magistrate has only committed on the same charge on which  
 “ he had previously charged the prisoners as triable before him.  
 “ The necessity for the commitment is not, therefore, apparent.

“ I have searched in vain for any reported case to throw  
 “ light on the present difficulty. I certainly never before heard  
 “ of a Magistrate cancelling a charge once made.

“ The case must be referred to the High Court under s. 197,  
 “ explanation, Criminal Procedure Code, in order that the Joint  
 “ Magistrate’s commitment may be quashed.”

No one appeared upon the hearing of the reference, and the  
 judgment of the Court was delivered by

JACKSON, J.—“ Trial,” according to the definition in s. 4  
 of the Criminal Procedure Code, means “the proceedings taken  
 in Court after a charge has been drawn up.” It is clear; there-  
 fore, that s. 221 of the Criminal Procedure Code, which

follows s. 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial: for this purpose s. 221 may be regarded as a proviso to s. 220. It may be added that, though the explanation to s. 220 provides that if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it.

We see no reason, therefore, to quash the commitment.

*Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.*

THE EMPRESS v. BUTTO KRISTO DOSS AND ANOTHER.\*

*Public Servant—Penal Code, ss. 21 and 109.*

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A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Indian Penal Code.

IN this case the accused were charged under s. 109 of the Penal Code with offering a bribe to Mr. Hume, who was alleged to be a public servant. It would appear that Mr. Hume was appointed by the Government Solicitor, with the approval of the Government, and under arrangements sanctioned by the Governor-General in Council, to act as Government Prosecutor in the Calcutta Police Courts.

The point referred by the Presidency Magistrate for the opinion of the High Court was, whether, under these circumstances, Mr. Hume was to be considered a public servant.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—We think it clear that the person appointed by the Government Solicitor, with the approval of the Government, to act as Government Prosecutor, under the arrangements made by the Governor-General in Council, is a public servant within the meaning of s. 21, Indian Penal Code.

\* Criminal Reference, No. 51 of 1878, from an order passed by F. J. Marsden, Esq., Presidency Magistrate of Calcutta.