

exempted from the rules of criminal procedure by reason of place of birth or of descent; and by Sec. 42 the jurisdiction given by the statute is not to be interfered with: and, therefore, if the two sections 25 and 42 are read together, a Justice of the Peace can try British-born subjects for such offences under the Penal Code as are within his cognisance as a Magistrate.

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COCCH, C.J.:—The two decisions of the Sadr Court quoted were passed after the Code of Criminal Procedure had come into operation, and in the last case two Judges (Forbes and Newton, JJ.) held that the accused could not be tried under the Indian Penal Code. According to my recollection, that decision has been followed in this Court and there is no reason for thinking that it is not a right one. I, therefore, concur in it. A Magistrate being a Justice of the Peace can try a British-born subject only under 53 Geo. III., c. 155, s. 105, and Act No. VII. of 1853, but under them he has no power to award, as is done in this case, imprisonment in default of payment of the fine inflicted. We must, therefore, annul the conviction and sentence, and order the accused to be tried under the statute.

WARDEN, J., concurred.

*Conviction and sentence annulled.*

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April 12.

*In re David Turnbull Stewart.*

*Escape from Custody under Civil Process—Sheriff's Bailiff—  
Offence—Act XLVIII. of 1860, Sec. 8.*

To escape from custody under Civil process is not a criminal offence within the meaning of Sec. 8 of the Presidency Towns Police Amendment Act of 1860.

Quære: whether such an escape without force is a misdemeanour at Common Law.

On the 5th of April 1869, *Pigot*, before WESTROPP, J., obtained a rule *nisi* for a writ of *certiorari* to issue directed to John Connon, Esquire, Acting Chief Magistrate of Police

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for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against David Turnbull Stewart by S. V. de Quadros, and the conviction of David T. Stewart thereon.

The rule *nisi* was allowed to issue, on David T. Stewart finding two sureties severally to be bound in the sum of Rs. 500, or on his lodging Rs. 500 with the Clerk of the Crown.

The rule was granted upon an affidavit made by David T. Stewart, in which he stated that Messrs. Beyts and Fellows had obtained a decree against him on the 16th of February 1869; that on the 24th of February S. V. de Quadros, a Sheriff's bailiff, came to his house at Mazagon, and that he, having been called by a servant, went down and met De Quadros, who produced a document which he handed to him (Stewart), stating that it was an order for his arrest; that he (Stewart) laid it on the table and said to De Quadros "very well, I will come to you immediately;" that he went up and down stairs several times while DeQuadros remained, and that De quadros neither touched him, nor said "I arrest you," nor "you are in my custody," and that he did not place the least restraint upon his (Stewart's) actions; that he (Stewart) left his house, and was subsequently taken into custody by the police at Point de Galle under a warrant.

De Quadros, in his deposition before the Magistrate, related the matter almost in the same way. He said that he arrested the prisoner; that he did not put his hand on the prisoner when he did so; he did not say to prisoner "you are in my custody," nor "you are arrested;" that he showed the prisoner the warrant of the High Court, and that the prisoner read it and returned it to him; that the prisoner went upstairs saying his wife was sick; that he did not go upstairs with the prisoner; that he did not close any door; that he said to the prisoner "here is a warrant of arrest after judgment," to which the prisoner replied "very well, I will be with you immediately." And in re-examination De Quadros said "when the prisoner went upstairs I was following, but he begged me not to follow, as his wife was sick; for that reason

I did not follow him. He promised me to come down immediately. He asked me permission to have tiffin, to which I assented."

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The Chief Magistrate, on convicting David T. Stewart, delivered the following judgment:—

"The defendant is before this Court charged, under Sec. 8 of Act XLVIII. of 1860, with having escaped from legal custody. The circumstances are these: On Wednesday the 3rd instant a Sheriff's bailiff, Simon Vincent de Quadros, came here and laid an information on oath before me to the following effect:—

"I was intrusted on the 24th ultimo with the execution of a warrant of arrest after judgment in a case in the High Court, No. 955 of 1868, against David Turnbull Stewart. I arrested him in his house at Mazagon on the same day, and he was then in my lawful custody. He escaped by stratagem and fraud, and I pray that a warrant may be issued for his apprehension, and that he may be dealt with according to law."

"I issued a warrant accordingly, and Stewart is here a prisoner thereupon. An ingenious attempt has been made by Mr. Cleary, on his behalf, to make it appear that the arrest by the Sheriff's bailiff was not good in law; that consequently the offence charged has not been committed, and that, therefore, this Court has no jurisdiction. I have been looking into the English cases and the English law, by which of course I must be bound, and it would appear to be the better Course that in making an arrest the Sheriff should actually seize or touch the defendant's body: *Gener v. Spark*, 1 Salk. 79. That course was not literally followed in this case. But if the officer, being in a position to arrest the defendant, uses such words as 'I arrest you', and the defendant acquiesces and goes with the officer, it will be a good arrest: *Horner v. Battyn and others*, Bull. N. P. 62, per Abbott, C. J., 1 C. & P. 153. Upon the evidence I conclude that quite as much as that took place between the Sheriff's bailiff and the defendant here, and, till better in-

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formed than I now am, I will not hold that any particular shibboleth or form of words between the parties is required by the law. In short, there was on Stewart's part that acquiescence in the arrest which made it good, and I think he is guilty, as described, of having made his escape by stratagem and fraud. Bilking a Sheriff's bailiff, though not had in any esteem, I am sure, amongst honourable or honest men, is certainly considered socially less an offence than the crimes which we have ordinarily to punish here. But it may be as well that it should be known throughout the community, If I am right in the law which I now lay down, that it is an offence, and that we have the power, as indeed it must be our duty when a case is proved, to punish it by a considerable term of punishment, which may be made of the most degrading kind. But having in view that it is the first case of the kind, so far as I know, which has come up here, and that the defendant has already suffered somewhat in the matter, though, to be sure, he has only himself to thank for that, I will only sentence him to fourteen days' simple imprisonment from this time, and he is sentenced accordingly."

The rule came on for argument before Westropp and Sargent, JJ. on the 9th of April 1869.,

*Scoble*, instructed by the Sheriff, showed cause against the rule. Whatever may have been the law before, since the Police Amendment Act (a) was passed, escaping from civil custody is an offence. Sec. 8 runs thus: "Whoever escapes or attempts to escape from or out of any legal custody shall be liable to be imprisoned." The words there are "any legal custody," not as in Sec. 224 of the Penal Code, where it is made Criminal to escape from legal custody in which the prisoner is for an *offence*. The words "out of any legal custody" have been introduced, instead of the words "out of any place of legal confinement," which occur in Sec. 39 of Act XIII. of 1856, to meet the case of a prisoner escaping before he reaches the place of his proposed confinement, but the expression in the earlier Act plainly includes a debtor's prison. Sec. 8 then proceeds: "and such imprisonment shall com-

(a) Act XLVIII. of 1860.

mence and take effect from and after the expiration of any sentence of imprisonment under which such person may be confined at the time of committing the offence aforesaid." The words "after the expiration of any sentence of imprisonment" do not limit the preceding part of the section, for they should be read largely as including civil process; besides, in many cases these words are redundant, as when a man is arrested by the police in the street. The very smallness of the punishment which can be inflicted shows that an escape from civil custody is intended. This is a misdemeanour at Common Law: *Regina v. Allan* (b). He also cited *The Queen v. Bhaji Duffedar* (c).

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There was an arrest in this case: *Russen v. Lucas* (d), *Arrowsmith v. Lemesurier* (e), *Berry v. Sempronius* (f), *Grainger v. Hill* (g), *Horner v. Battyn* (h), *Gener v. Spark* (i), *Weavers v. Byrne* (j), *Browne v. Ibbetson* (k), *Arden v. Goodacre* (l), *Chin v. Morris* (m) *Pocock v. Moore* (n) *Harrison v. Hodgson* (o).

*Pigot*, in support of the rule:—The principle is clear: the cases which have been mentioned on the other side show:—(1) that words do not constitute an arrest; (2) a touch does; (3) where there are words coupled with a submission on the part of the person to be arrested, that is an arrest. [SARGENT, J.:—Are words pretending to submit a submission?] No. When the bailiff is humbugged, and, therefore, does not lay hands on the creditor, it is not sufficient. There was no act here; there must be words, therefore, amounting unequivocally to a submission: *George v Radford* (p).

As to the escape being an offence, it is clear it was not a misdemeanour at common law; and the Legislature must

(b) Car. & Mar. 295; 5 Jur. N. S 296. (c) 2 Beng. Rep. F B.R. 21.

(d) 1 Car. & P. 153. (e) 2 New Rep. 211.

(f) 5 L. J. K. B. O. S. 215. (g) 4 Bing. N. C. 212.

(h) Buller N. P. P. 62. and 1 C & P. 153 *in notis*.

(i) 1 salk. 79; S. C. 1 Car. & P. 153 *in notis*. (j) 3 Ir L. Rep. 439.

(k) 9 *Ibid.* 67 (l) 11 C. B. 371.

(m) 2 C. & P. 361 (n) R. & M. 321. (o) 10 B. & C 445

(p) 3 Car. and P. 464.

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use unambiguous words before it can create a new offence. It has not done so. Act IV. of 1867, Sec. 3, is clear to show that escape from civil process is not an offence.

*Cur. adv. vult.*

12th April. WESTROPP, J.:—In this case cause was shown before my brother Sargent and myself against an order nisi for the issue of a writ of *certiorari* to the Senior Magistrate of this island, requiring him to send up the proceedings against, and summary conviction of, the applicant, Mr. David Turnbull Stewart, under the 8th section of the Presidency Towns Police Amendment Act (XLVIII. of 1860). That conviction was “for escaping from or out of the legal custody of the Sheriff’s bailiff,” Simon Vincent de Quadros, who, it is said, arrested Stewart under a warrant of arrest after judgment in a suit in this Court; No. 955 of 1868. (*Beys and another, v. Stewart*), issued pursuant to a Judge’s order founded on the judgment, and requiring the Sheriff to bring Stewart before the sitting Judge, under Sec. 273 of the Civil Procedure Code, with a view to his final commitment in execution of the judgment.

Two questions have been raised:—(1) whether an escape from custody under civil process is punishable under Sec. 8 of the Presidency Towns Police Amendment Act of 1860; (2) whether what took place between the Sheriff’s bailiff, De Quadros, and Stewart, on the 24th day of February 1869, amounted in law to an arrest: for if it did not, there could not have been any escape to be punished.

The enactment on which the first question arises is as follows: “Whoever escapes or attempts to escape from or out of any legal custody shall be liable to be imprisoned with or without hard labour for any term not exceeding three months; and such imprisonment shall commence and take effect from and after the expiration of any sentence of imprisonment under which such person may be confined at the time of committing the offence aforesaid.”

In support of the conviction it has been argued by Mr. Scoble that the words “any legal custody” in that sec-

tion are sufficiently comprehensive to include custody under civil as well as custody under criminal process, and *prima facie*, no doubt, that is so; and it has been further remarked, on the same side, that the lightness of the extreme punishment which can be inflicted, viz., imprisonment with or without hard labour for three calendar months, leads to the same conclusion.

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On the other hand, it has been contended for the prisoner that the latter part of the section, which directs that the imprisonment shall take effect from the expiration of any sentence of imprisonment under which the party may be confined at the time of committing the offence, points to the escape from custody under criminal process only, and limits the previous words "legal custody" to custody under criminal process only.

As a guide to a satisfactory construction of this enactment, the scope and meaning of which has been thus disputed, it is desirable to consider the law on the subject of escape from custody as it stood previously to the passing of that Act.

We will first refer to the common law of England. Mr. Serjeant Hawkins, in his well-known treatise on Pleas of the Crown, Bk. 2, Ch. XVII. (on Hindrances in bringing offenders to public justice), says (Sec. 5): "As to such offences by the party himself, *without force* which seem properly to come under the notion of escapes, there is little remarkable in the books; and, therefore, I shall content myself with taking notice that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever, in any case, refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. And if it be so great a crime for one not arrested to fly, in order to save himself from imprisonment for a capital offence, surely it must be at least as great a crime for one who is actually

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under the custody of the law for any such crime, by any indirect means to free himself from it. And some have holden that such an escape amounts to felony. But this opinion seems to be over-severe, and not to be maintained by the book cited to prove it."

In that chapter the author, it will be observed, was dealing with escapes *without force*. An escape is where one who is arrested gains his liberty before he is delivered by the course of the law. And it may be by the party himself either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force by the rescuing of the party from custody. Where the liberation of the party is effected, either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself with force it is called *prison-breaking*; and where it is effected by others with force it is commonly called a *rescue* (q). In Bk. 2 Ch. XVIII, Sec. 1, Serjeant Hawkins treats of escapes by the party himself *with force*, *i. e.* prison-breaking: They stand on quite a different footing from escapes without force. He says: "As to prison breaches, as they stood by the common law, it seems the better opinion that all such offences were felonies, if the party were lawfully in prison for any cause whatever, whether criminal or civil, and whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him." This state of the law was modified by 1. Edw. II., Stat. 2, which enacted that, thenceforth no prison-breaker "shall have judgment of life or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in time past it hath been used otherwise" (r). Prison breaking from lawful confinement on charges inferior to those

(q) 1 Russ. Cr. & Misd., p. 416, 3rd. Ed. p. 581, 4th Ed.

(r) 4 Stephen Com. 295, 296, 4th Ed.; 2 Hawkins P. C. c. xviii. s. 3, 4, 5, 6.

of treason or felony, is still in England punishable, as for a high misprision or contempt, with fine and imprisonment (s). Assuming, for argument's sake, that Stewart was in custody, yet, as it is not pretended that he resorted to any force to effect his escape, it cannot be maintained that the case is one of breach of prison. Sec. 9 of Chap. XVIII., where Serjeant Hawkins says that if, without any obstruction, a prisoner go out of the prison doors, being opened by the consent or negligence of the gaoler, or other, escape without using any kind of force or violence, he is guilty of a misdemeanour only, but not of felony, and the gaoler is punishable in such manner as shall be set forth more at large in the next chapter" (to which we are now about to refer) seems applicable to prisoners in custody on criminal process, only, as the next quotation tends to show.

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In Bk. 2 Ch. XIX (of Escapes suffered by Officers) Hawkins lays it down thus: "As the imprisonment must be justifiable, so must it be also for a criminal matter; and some are said to have holden that no escape is criminal but where the commitment is for felony. However, it is certain that the escape of one, committed for petit larceny only, is criminal; and it seems most agreeable to the general reason of the law that the escape of a person, committed for any other crime whatsoever, should also be criminal. For, surely, whenever the public justice requires that a person be committed for a crime, it likewise requires that he be safely kept under such commitment, and consequently may reasonably demand public satisfaction from the officer to whose custody he is committed if he neglect to keep him as he ought.

"As the imprisonment must be justifiable, and for some crime, so must its continuance at the time of the escape be grounded on that satisfaction which the public justice demands for such crime: for if a prisoner be acquitted and

(s) 2 Hawkins P. C. c xviii s. 21.

Archbold by Jervis & Welsby 693, 15th Ed. & Stephen Com. 296, 4th Ed  
1 Burr. Cr. and Misd. p. 427, 3rd Ed.; p. 592 4th Ed.

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detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he be discharged paying his fees; so that, till they be paid, the first imprisonment continued lawful, as before, for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor. Yet if a person convicted of a crime be condemned to imprisonment for a certain time, and also till he pay his fees, and he escapes after such time is elapsed without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release."

"Sir William Blackstone (4 Comm. 129) says; "An escape of a person arrested upon Criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment."

Serjeant Stephen writes to the same effect (Vol. IV., p. 294, 4th ed.); "An escape of a person lawfully arrested for crime, whether felony or misdemeanour, by gaining his liberty before he is delivered by course of law, is also an offence against public justice."

Both Blackstone and Stephen concur in saying that "the officer permitting such escape (*i. e.*, escape from custody on criminal process) is much more culpable than the prisoner, the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody till cleared by the due course of justice."

Sir William Russel, in his work on Crimes and Misdemeanours, referring to the passages from Hawkins and Blackstone which have been already quoted, in speaking

of punishable escapes by the party himself (Bk. II., Ch. xxxii., 3rd ed.), treats them as occurring where the party has been "arrested on criminal process;" and as to escapes suffered by officers, and punishable criminally, says that "an escape of this kind must be from a justifiable imprisonment for a criminal matter, after an actual arrest" (*Ibid.* s. 1) Mr. Greaves, in his recent edition (4th) of Russell's work, published in 1865, pp. 581, 582, preserves unaltered the passages just quoted. The law is similarly laid down in Archbold (15th ed., by Chief Justice Jervis and Mr. Welshy), p. 690. The imprisonment in the case of Sir Miles Hobert and William Stroud (Cro. Car. 209), from which it was alleged that they had escaped, was in respect of misdemeanour in their conduct as members of the House of Commons, and not an imprisonment for debt. The case of *Reg. v. Allan* (t) has been mentioned during the argument as throwing some doubt on the proposition that at Common Law an escape is not punishable criminally unless it be an escape from custody under criminal process. It has not been satisfactorily reported, the reasons for the decision not having been given. It seems to have been there held, on the Western Circuit, in April 1841, that it is a misdemeanour indictable at Common Law, to aid a person to escape from gaol under an order of the Insolvent Debtors' Court, granting him his discharge forthwith as to all of the debts in his schedule except two, and as to them directing him to be discharged as soon as he should have been in custody (at the suit of the creditors to whom respectively these two debts were due) for the period of thirteen calendar months. The section of the English Insolvent Debtors' Act (1 & 2 Vict., c. 110), under which this order was made, is not mentioned in either of the reports, but it would appear to have been either the 77th or 78th section, in which case, although the process in the respective suits of the detaining creditors would be civil process, yet the order of the Insolvent Debtors' Court, in so far as it deferred the insolvent's discharge from those debts for thirteen months, and, therefore, empowered those creditors to detain him in custody during that period, would be an order

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(t) Car. and Mar. 295; S. C. 5 Jur. 296.

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by way of punishment, and not civil in its nature. It, moreover, does not appear whether Allan, the party who aided, or Young, the party who escaped, used force. If force were employed by either, that case would not be in point. It would be rescue by Allan, and breach of Prison by Young, if they used force. In the 4th ed. of Russel, Mr. Greaves has placed *Reg. v. Allan* in the chapter on Rescue and Active Aiding in an escape (u). On the whole, it is doubtful how far *Reg. v. Allan* can be considered as contravening the proposition of Mr. Pigot, that at common law an escape without force is not punishable criminally, unless it be an escape from custody under criminal process.

Next, turning to legislation affecting the island of Bombay, we do not find that down to the year 1856 any legislation had taken place so as to render such an escape criminal if it were not so before. R. O. R. III. of 1827, Sec. 30, relates to escapes from the House of Correction, which is solely a criminal prison; Stat. 9 Geo. IV., c. 74, s. 31, to the escape of convicts from transportation; Act XVI. of 1852, Sec. 25, to "escape or rescue from lawful custody on a criminal charge;" Act VII. of 1854, Sec. 17, to escape from custody in respect of the heinous offences to which that Act relates. Act VIII. of 1852, Sec. 8, only provides a civil remedy, where persons, taken under Mofussil civil process within the precincts of the Presidency towns, escape from the custody of the Sheriff: so does Act VI. of 1855, Sec. 10, in the case of persons taken under civil process of the Supreme Courts of Judicature. To Act XIII, of 1856, Sec. 39, we shall presently refer.

In the Bombay Mofussil escapes from custody, under criminal process only, seem to be, and to have been, punishable as offences. Reg. XIII. of 1827, Sec. 46, applied to escapes from the criminal gaol: Reg. XIV. of 1827, Sec. 24, to forcible escapes from custody after sentence; Reg. V. of 1831 amends Reg. XIV. of 1827 by striking out the word "forcible," but applies only to escapes from custody *after sentence*: Act V. of 1858 to escapes, from gaol or other lawful custody, of persons under sentence of imprisonment for certain crimes,

(u) *Bk. II. Ch. 34.*

or under committal for trial for certain crimes: Act XVII. of 1860 to escapes by persons from "goal or other lawful custody whilst detained under sentence of imprisonment" for certain crimes. The Criminal Procedure Code (Act XXV. of 1861) Secs. 47, 112, 113 relate to escape from custody in criminal cases only.

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The Penal Code (Act XLV. of 1860) Sec. 224, which applies as well in the Presidency towns as in the Mofussil, after providing for the case of any person offering resistance or illegal obstruction to his lawful apprehension "for any offence with which he is charged, or of which he has been convicted," provides that whoever "escapes or attempts to escape from any custody in which he is lawfully detained for any such offence," shall be punished with simple or rigorous imprisonment for a term which may extend to two years, or with fine, or with both, and such punishment is to be in addition to the punishment to which he was liable for the offence with which he was charged, or of which he was convicted.

That enactment plainly applies to escapes from custody under criminal process only. We may here observe that at the Appellate Side it has been held (2 Bom. H. C. Rep., 1st ed. 134, 2nd ed. 128) that escaping from the custody of a police peon is not a voluntary obstruction of a public servant in the discharge of his public functions within the meaning of Sec. 186 of the Penal Code.

The result of our examination of Indian legislation is, that, down to the present time, escapes from custody under civil process in the Mofussil, and, down to the end of 1855, such escapes in Bombay, were not, by such legislation, rendered punishable as crimes.

Act XIII. of 1856 (the Presidency Towns Police Act), Sec 39, which section has been repealed by the Act (XLVIII. of 1860) under which Stewart has been convicted by the Senior Magistrate, is precisely the same as the 8th section of the latter Act, upon which he has been convicted, with this exception that, in lieu of the words "from or out of any legal custody" in Sec. 8 of the latter Act, the words "out

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of any place of legal confinement" are found in Sec. 39 of Act. XIII. of 1856.

As the words "legal custody," in the amending act, *prima facie* are sufficiently large to include custody under civil process, so the words "place of legal confinement" are *prima facie* sufficiently wide to comprise custody under civil process, though possibly there might be a question whether the last mentioned words would include such a peculiar case of alleged civil custody as the present. But those words are, like the words "legal custody" in the amending Act, followed by the passage which provides that the imprisonment for the escape shall take effect from and after the expiration of any sentence of imprisonment under which the party may be confined at the time of the escape—a passage which, as we think, points to a previous custody under criminal process, and narrows the construction of the phrase "place of legal confinement" in the original Act, and the phrase "legal custody" in the amending Act.

The phrase "lawful custody," it will be observed, occurs in Act V. of 1858 and Act XVII. of 1860, and in both of these Acts is applied to custody under criminal process only. "Legal custody" is of precisely equivalent import to "lawful custody," and was, we are inclined to think, in the amending Act under consideration, substituted for "place of legal confinement" in the original Act, in order to include cases in which persons, arrested under criminal process, had not yet reached a prison or place of confinement or were in transit from one prison or place of confinement to another; and not with any view to include escapes from civil custody. We do not think that the words "may be," occurring in the passage "and such imprisonment shall commence" &c., "after the expiration of any sentence of imprisonment under which such person may be confined" &c., militate against that view. Those words are completely satisfied by the possibility that the party may, previously and up to the time of his escape, have been in custody under a criminal charge, and as yet untried, and, therefore, not under any sentence of

imprisonment. It is important to note, that no provision is made for the commencement of the imprisonment under the Act in the case of the imprisonment, from which the escape is made, being under civil process.

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It being at least doubtful whether, at common law, escape from civil custody was an act punishable criminally, and up to 1856 the Legislature having in Bombay rendered escapes from custody under criminal process only punishable, and up to the present time having done no more with regard to the Mofussil; and the Penal Code, (which applies alike to the Presidency towns, and to the Mofussil,) having noticed to escape from custody under criminal process only, we think that, if by Act XIII. of 1856, or the amending Act XLVIII. of 1860, the legislature intended to render escape from civil custody, without force, punishable in the Presidency towns only, it behoved it to use clear and unequivocal language for that purpose. Again, even assuming that at common law such an escape constituted an offence, it would have been no more than a misdemeanour, and, as such punishable with fine and ordinary imprisonment only. If such an escape were for the first time to be rendered punishable with imprisonment with hard labour, the Legislative should have spoken clearly. There is no better established rule of construction of statutes than that a penal statute must be construed strictly, and that the language of it must not in any respect be strained so as to include, as offences, acts which it is doubtful whether the Legislature had in its contemplation. We think the language, both of the original Act (XIII. of 1856, Sec. 39), and of the amending Act (XLVIII. of 1860, Sec. 8), such as in all probability was intended to relate to escapes from custody under criminal process only. We are fortified in that opinion when we look at the previous legislation for this island, and at the pre-existing and present state of the law in the Mofussil of this Presidency. The language of the Legislature, being at least ambiguous, we cannot safely hold that escape from civil custody is, under the enactment in question, punishable in Bombay, or support this conviction.

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Having arrived at that conclusion upon the first question, it becomes unnecessary for us now to express any opinion upon the second and very nice question, viz., whether anything took place on the 24th of February 1869, which in law amounted to an arrest of Stewart.

The order *nisi* for the issue of a writ of *certiorari* must be made absolute.

We may observe that Sec. 111 of Act XIII. of 1856 to some extent indicates the manner in which the Magistrate should make his return to the writ.

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Dastur Husang Jamasji.....*Petitioner.*  
 R. L. Fell.....*Opponent.*

*Land Disputes—Possession—Actual Possession—Inquiry by Magistrate—Crim. Proc. Code, Sec. 318.*

A Magistrate, under Sec. 318 of the Crim. Proc. Code, is to inquire into the question who is in actual possession of the property in dispute, without considering how that possession has been obtained.

This was an application for the exercise of the High Court's extraordinary jurisdiction under Sec. 404 of the Code of Criminal Procedure.

Dorabji Pestanji Patil mortgaged a certain property, called the Hirabag property, to the East India Association as security for a loan of Rs. 88,000: the mortgage deed authorised the sale of the property if the principal loan were not paid off within three years. The applicant, Dastur Husang Jamasji, who held a lease of the property from Dadabhai, the son of Dorabji P. Patil, was in possession under his lease.

The opponent, Fell, stated that he had received a power of attorney in August 1868, from the trustees of the mortgagee, authorising him to take possession of the Hirabag property for the mortgagee; that on the receipt thereof he waited on Dastur Husang Jamasji, handed him the power of attorney, which he read, and was told by him to take possession, and