

1869
 Reg.
 v.
 John Connou.

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.

1869
 April 21.

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

referred for the keys to Rastamji Dadabhai; that on applying for them Rastamji told him he had not the keys, and had nothing to do with the property except as agent for the son of the proprietor; that accordingly he (Fell), accompanied by the *vakil*, Mr. Cross, went to Hirabag on the 30th of October 1868, found the gates open, entered the premises, took possession under the power of attorney, placed a man of his own in charge, and on the following day put his own locks on the gates of the property. Dastur Husang denied having given authority to Fell to take possession, and disputed his (Fell's) right to retain possession. Fell thereupon applied to Alexander G. Fraser, Magistrate F. P. at Puna, to take proceedings under Sec. 318 of the Code of Criminal Procedure. The Magistrate considered that Fell had obtained the authority of Dastur Husang to take possession of the property; that he accordingly took possession, not by force, nor multitude of hands, but quietly, unopposed, and by legal authority; but observed that, assuming the possession of Fell to be illegal, the fact that the Legislature had provided a remedy in such cases in Act XIV. of 1859, Sec. 15, warranted the inference that the Legislature intended the Magistrate should decide in cases of disputed possession without reference to the way in which possession was obtained. The Magistrate, therefore, without reference to the merits of either party to a right of possession, proceeded to inquire which party was in actual possession, and finding that Fell was in such possession, forbade all disturbance of it until such time as he was ousted by due course of law.

1869
Dastur Husang
Jamajji
v.
R. L. Fell.

Against this order Dastur Husang having presented the present application to the High Court, and the case was heard before COUCH, C.J., and NEWTON, J.

Marriott, for the petitioner:—The Magistrate says that possession, if once obtained, whether legally or not, cannot be disturbed unless by due course of law. But Sec. 318 of the Code of Criminal Procedure does not protect possession obtained illegally, *e.g.*, by force or fraud. Suppose a trespasser to enter into a vacant bungalow, can he be said to be

1869

Dastur Husang
Jamasi.

R. L. Fell

in possession of it. Here the possession obtained was fraudulent and by trespass.

G. F. Rimington, for the opponent.

Couch, C.J.:—In this case the Magistrate has found that Fell is in actual possession of the property, and that this possession was obtained under the authority of the Dastur, and it does not appear that the power of attorney which Fell held from the trustees of the mortgagees was ever revoked; but this is immaterial, for Sec. 318 of the Code of Criminal Procedure requires the Magistrate merely to see which party is in actual possession of the property in dispute, since it provides that in cases of disputes relating to the possession of land, premises, &c., the Magistrate shall call on all parties concerned in such dispute to attend his court, and “to give in a written statement of their respective claims, as respects the *fact of actual possession* of the subject of dispute.” In another part of the section it is provided that “the Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire which party is in *possession* of the subject of dispute,” and though the word “*actual*” does not occur in this part of the section, we must read that part with reference to what precedes it. It cannot be supposed that where the Magistrate is to call upon the parties to give in their statements as respects the fact of actual possession only, he is to go into the question of legal possession, which it is for the civil court alone to decide. The object of the interposition of the Magistrate under the section is to prevent a breach of the peace, and with that view he should keep in possession the party which is found to be in actual possession. The Magistrate here has inquired into the fact of actual possession, and has found that Fell was in such possession. The propriety of this finding on the evidence cannot be questioned here, and, as there is no ground for holding that an error in law has been committed by the Magistrate, we must reject the application.

NEWTON, J., concurred.

Petition rejected.