1870.
REG. v. SHIVBASA'PA'.

Criminal Procedure Code does not apply to cases like the present.

"The order of the Magistrate F. P. awarding compensation of Rs. 50 to be paid to the widow of Chanápá is illegal, and the proceedings of the Magistrate F. P. are submitted for the orders of the High Court.

"Under Secs. 23 G and 434 of the Criminal Procedure, it was competent to the Magistrate of the District to refer the case for the orders of the Honourable the Judges of Her Majesty's High Court, but, to avoid delay, and as the Judge has a concurrent jurisdiction, present action has been taken."

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM :—The Court considers that the Session Judge's view is correct, and reverses the order awarding compensation to the widow of the deceased.

A Magistrate F. P. is not immediately subordinate to the Session Court, and, therefore, the Session Judge is in error in supposing that he has concurrent jurisdiction with the Magistrate of the District, under Sec. 434 of the Code of Criminal Procedure. His proper course, if he think that an illegal sentence or order has been passed by a Magistrate F. P., is, not to call for the proceedings under Sec. 434, but to report to the High Court, which will then call for the proceedings under Sec. 404.

Order of compensation reversed.

REG. v. HA'U NA'GJI *et al.*

Dec. 1.

Nuisance—Gambling—Common Gaming-house—Bombay Act III. of 1866, Sec. 14—Ind. Pen. Code, Sec. 268.

A common gaming-house is one which is kept or used for profit or gain, and may constitute a public nuisance; but it cannot be held, in the absence of evidence of any actual annoyance to the public, that every person who admits gamblers into his house, and all persons who game therein, are guilty of a public nuisance within the meaning of Sec. 268 of the Indian Penal Code.

THE accused were convicted by the 1st Class Subordinate Magistrate of Dhandhuká, under Sec. 291 of the Indian

Penal Code, of the offence of continuing a public nuisance, by gambling in a house belonging to some of them, after injunction not to continue such nuisance. They appealed to the District Magistrate, who confirmed the convictions. Thereupon an application for the exercise of the extraordinary jurisdiction was made to the High Court.

The application was heard by GIBBS and MELVILL, JJ.

Nágindás Tulsidás for the appellants.

Dhirajlál Mathurádás, Government Pleader, for the Crown.

The following judgment, from which the facts sufficiently appear, was delivered by the Court:—

In England it has been held to be a nuisance to keep a common gaming-house: *Rex.* v. *Rogier and another* (*a*); *Rex* v. *Taylor* (*b*). Looking to the form of the indictments in these cases, which charge the accused with keeping a certain common gaming-house for "lucre and gain," we think that the term "common gaming-house" in England is understood in the same sense as it is defined in Sec. 14 of Bombay Act III. of 1866. That section is as follows:—

"The words 'common gaming-house,' shall be taken to mean any house, room, or place in which cards, dice, tables, or other instruments of gaming are kept or used for the profit or gain of the person owning or keeping such house, room, or place, whether by way of charge for the use of the instruments of gaming, or of the house, room, or place, or otherwise howsoever."

A similar definition is contained in Sec. 1, Act III. of 1867.

There is nothing to show that the house of the accused Nos. 3 and 5 in this case was a gaming-house kept by them for profit or gain; and, in the absence of evidence on this point, it cannot be held to be a common gaming-house. We think, therefore, that the conviction cannot be sustained on the ground that all gaming-houses are nuisances in the eye of the law. On the other hand, there appears to be no evidence that either the keepers or frequenters of this

(*a*) 1 B. & C. 272. (*b*) 3 B. & C. 502.

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particular house acted in such a manner as to cause a public nuisance within the meaning of Sec. 268 of the Penal Code. Although, following the English decisions, we might perhaps hold that a common gaming-house, to which every one who chooses to pay is able to go, is necessarily a nuisance, and that no evidence of any actual annoyance to the public is in such a case required, yet we cannot, without such evidence, hold that every person who admits gamblers into his house, and every person who games therein, is guilty of a public nuisance.

Convictions and Sentences reversed.

Dec. 1.

REG. v. SANGA'PA' bin BASHIA'PA'.

Indian Income Tax Act—General Clauses Act—Imprisonment in default of Payment of Fine.

The Indian Income Tax Act (Act IX. of 1869, supplemented by Act XXIII. of 1869) having been passed subsequently to the General Clauses Act (No. I. of 1868), Sec. 5 of the latter authorises the award of imprisonment in default of payment of the fine imposed under Sec. 25 of the former.

THIS was a case referred for the orders of the High Court by J. Elphinston, Magistrate of the District of Kánará. The accused, having failed to pay the additional tax imposed upon him under the supplementary Income Tax Act (No. XXIII. of 1869,) was sentenced, on conviction, by the First Class Subordinate Magistrate of Kumptá, to pay a fine of Rs. 6, or in default to suffer fifteen days' simple imprisonment. In referring the case, the District Magistrate stated that "neither of the Income Tax Acts (IX. and XXIII. of 1869) prescribes imprisonment for default of payment of a fine, Sec. 26 referring to recoveries only, and that the High Court held the same view in 1868, in the case of *Reg.* v. *Chenáppá valad Nágáppá* (*a*). That was a case disposed of under Sec. 15 of the License Tax Act (XXI. of 1867), as amended by Sec. 3 of Act XXIX. of 1867; but the 25th section of Act IX. of 1869, under which Sangápá was fined, would be found to be a corresponding one to Sec. 15 of Act XXI. of

(*a*) 5 Bom. H. C. Rep., Cr. Ca. 44.