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Oct. 8,

[ORIGINAL CRIMINAL JURISDICTION.]

REG. V. NAVROJI DA'DA'BHA'I.

Evidence—Confession—Inducement—Person in authority—Practice in Criminal trials—Letters Patent, Cl. 26—Powers of High Court when point of law is reserved—Alteration of sentence—Indian Evidence Act, Secs. 24 and 167.

W., a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the account of the prisoner, who was a booking clerk of the Company, went to him and told him that "he had better pay the money than go to jail" and added that "it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rs. 826-8-0. The prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of this and of other sums:—

Held that the words used by W., the travelling auditor, constituted an inducement to the prisoner to confess, and that W. was a person in authority within the meaning of Section 24 of the Indian Evidence Act, and that the receipt signed by the prisoner was, therefore, not admissible in evidence on his trial.

Held also (Bayley, J., *dissentiente*) that the High Court, in considering a point of law reserved under Cl. 26 of the Letters Patent, where it is of opinion that evidence has been improperly admitted as to one of two heads of charge of which a prisoner stands convicted (the two heads of charge relating to distinct and separate offences) and that the conviction on such head of charge is bad, has power to review the whole case and, if it appears that the evidence improperly admitted could not reasonably be supposed to have influenced the jury as to the latter head of charge, ought not to set aside the conviction on that head of charge but should proceed to pass judgment and sentence on it.

Seemle. Sec. 167 of the Indian Evidence Act applies to criminal trials by jury in the High Court.

NAVROJI DA'DA'BHA'I and one Harichand Ganpat were tried, before Green, J., and a special jury at the fourth Criminal Sessions of 1872, on the following heads of charge:—

I.—That Navroji Dádábháí and Harichand Ganpat, on the 2nd day of July 1872, committed criminal breach of trust as clerks of a sum of Rs. 729-6-9.

II.—That on the same day Navroji Dádábháí committed criminal breach of trust as a clerk of the same sum and that Harichand Ganpat abetted him.

III.—That on the same day Harichand Ganpat committed criminal breach of trust as a clerk of the same sum and Navroji Dádábhái abetted him.

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IV.—That Navroji Dádábhái and Harichand Ganpat, on the 5th July 1872, committed criminal breach of trust as clerks of a sum of Rs. 826-8-0.

V.—That on the same day Navroji Dádábhái committed criminal breach of trust as a clerk of the same sum and Harichand Ganpat abetted him.

VI.—That on the same day Harichand Ganpat committed criminal breach of trust as a clerk of the same sum and Navroji Dádábhái abetted him.

In the 7th, 8th, 9th, 10th, 11th, and 12th, heads of charge the same prisoners were charged with dishonest misappropriation of the aforesaid sums of Rs. 729-6-9 and Rs. 826-8-0, or with abetment of the other prisoner in so doing, corresponding *mutatis mutandis* to the first six charges.

The prisoner Navroji Dádábhái was found guilty by the jury on the 2nd and 5th heads of charge, no verdict being recorded on the remaining heads, and was sentenced to three years' rigorous imprisonment. As to the prisoner Harichand Ganpat, the jury were not able to agree on a verdict and were discharged.

The learned Judge (under Clause 25 of the amended Letters Patent) reserved, for the opinion of the High Court, the point of law whether a receipt for the sum of Rs. 826-8-0, referred to in the 4th, 5th, and 6th heads of charge, given by the prisoner Navroji Dádábhái was properly admitted in evidence. The circumstances under which this point arose, appear from the case stated by the learned Judge. It was as follows :—

“Mr. Wainwright, the first witness for the prosecution, (who was Travelling Auditor in the service of the G. I. P. Railway Company, the prosecutor, and who discovered the deficiencies in respect of which the charges were made) in cross-examination by Mr. Anstey, Counsel for the prisoner

1872. Harichand Ganpat, stated as follows :—‘ I recommended
 REG. Dádábháí (*i.e.*, the first prisoner) to pay the money. I went
 v. to his house ; he offered Rs. 2,000. He could not raise the
 NAVROJI whole (*i.e.*, of the deficiency). This was on the 11th (*i.e.*,
 DA'DA'BHA'I. July 1872). On the 12th, the prisoners were suspended.
 The prisoners were not arrested. Dádábháí said he would try
 to raise the money and that he would remain at the station.
 Mr. Keily first charged Harichand in my presence on the
 12th.’ In cross-examination by Mr. Inverarity, the Counsel
 for Navroji Dádábháí, the same witness stated : ‘ When I
 saw the first prisoner, I told him he had better pay the mo-
 ney than go to jail and that it would be better for him to
 tell the truth.’ * * *

“ Then Mr. Keily was called. In his examination-in-chief
 he stated : ‘ Mr. Wainwright brought Navroji Dádábháí to
 my office and said he was a defaulter to the extent of about
 Rs. 3,000. After the conversation with me, I don’t think
 Navroji ever returned to his house. I asked Navroji to
 explain the cause of the defalcations. In my presence no
 inducement or threat was offered to Navroji either by me or
 by Mr. Wainwright.’ (Here Mr. Inverarity objected to any
 thing in the nature of a confession or admission by Navroji
 to Mr. Keily being given in evidence and referred to Secs. 24
 and 28 of the new Evidence Act. At a suggestion from me
 Mr. Marriott, Counsel for the prosecution, did not further
 press the matter and no evidence was given as to what
 Navroji said to Mr. Keily.) So far no point arose which
 was reserved or asked to be reserved, and I have stated the
 evidence so far in order that the Court may appreciate the
 point which subsequently arose. One set of the charges, it
 will have been observed, related to criminal breach of trust
 and dishonest misappropriation, on 5th July 1872, of a
 sum of Rs. 826-8-0—charges quite distinct in themselves,
 and in respect of the evidence given in support of
 them, to the charges which had reference to the sum
 of Rs. 729-6-9 on the 2nd July 1872. This sum of
 Rs. 826-8-0 was a sum received in the office of the Traffic
 Manager at Boree Bunder Station during the first few days

of July for season tickets and which, it was alleged, had been, according to the practice, taken by a clerk in that office to the office of the Coaching Department at the same station, in which last named office the two prisoners were clerks. The case was that a clerk from the Traffic Manager's office had, on the 5th July, taken the Rs. 826-8-0 and paid it to the prisoner, Navroji, whose duty it was to pay it over to the prisoner, Harichand Ganpat, the head clerk in the Coaching office, for transmission to the Company's cashier. One Mahádev Gopál (a clerk in the Traffic Manager's office at the Boree Bunder Station) was called and stated: 'Between the 1st and 5th July 1872 certain season tickets were issued (*i.e.*, in the Traffic Manager's office). The money received for these tickets was Rs. 826-8-0. I paid that money over to Navroji Dádábhái on the 5th July. I was in the habit of paying to Harichand Ganpat or Navroji Dádábhái. On this occasion I did so to Navroji Dádábhái in the presence of, and by the direction of, Harichand Ganpat. I got no receipt then. I got a receipt afterwards.' (A document was shewn to witness which was afterwards marked as Exhibit E.)

" Mr. Inverarity then objected to the reception of this document which purported to be signed by Navroji Dádábhái and to bear date the 11th day of July 1872, and to acknowledge the receipt from the witness, Mahádev, on the 5th July 1872 of a sum of Rs. 826-8-0, as being irrelevant and inadmissible under Sec. 24 of the new Evidence Act, and requested me to read the cross-examination before the Committing Magistrate as to this point of Mr. Keily and of the witness, Mahádev Gopál. Having done so, I asked Mr. Marriott if he pressed the reception of the document. He said: 'Yes, there is no evidence of any threat or inducement causing Navroji to sign this receipt.' After some discussion I held the document admissible, even assuming that the receipt taken in conjunction with the circumstances could be regarded as a confession within Sec. 24. It did not appear to me that the signing of the receipt by Navroji was caused by any inducement, threat, or promise within Sec. 24 of the Act. I

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1872. said, however, that if Mr. Inverarity desired it, I would
 REG. reserve the question as to the admissibility in evidence of
 " NAVROJI Exhibit E for the consideration of the High Court, where-
 DA'DA'BHAI. upon Mr. Inverarity stated that he desired such question
 to be so reserved. The witness then said in answer to
 Mr. Marriott: 'Navroji gave the receipt on the 11th July.
 It bears his signature'. (Here the receipt was put in and
 marked E) when the witness went on: 'Mr. Keily asked
 him (that is Navroji) if he had received the money from
 Mahádeo (*i.e.*) the witness. He said "Yes." Upon that
 Mr. Keily said to him: "Then give a receipt for it." He
 gave this receipt.' On the cross-examination by Mr. Inve-
 rarity, the witness said: 'On this occasion (*i.e.*, on the 5th
 July) I paid Rs. 826-8-0 without any receipt that day. When
 this document (*i.e.*, Exhibit E) was signed, Mr. Keily,
 Mr. Wainwright and one Chintáman Báburáv were present.
 The whole list of these figures was in my handwriting.
 Mr. Wainwright's name is as a witness. Afterwards on the
 11th of July I did not hear Mr. Wainwright say to Navroji
 that he would go to gaol or anything to that effect. I did
 not hear Mr. Keily say anything about paying up the money
 at that time (that is when the witness brought the document
 from the Traffic Manager's office to where Navroji was).
 Navroji was in Mr. Keily's office. He was not brought
 there by Mr. Wainwright. I found him sitting on a chair.
 I had prepared the document on the day I brought it.
 When I produced the paper, Mr. Keily said to Navroji, "If
 you have received the money, sign the paper." He (Nav-
 roji) looked at the document and saw the result. He had
 only to see that the amount received was represented there.
 Mr. Keily did not say to Navroji, while I was there, that it
 would be better for him, if he signed the receipt. In re-
 examination by Mr. Marriott, the witness says: 'I had
 previously got receipts signed by Navroji. This is one,
 (receipt of October 1870 put in and marked Exhibit H).
 Exhibit E shewn to witness again: 'In the handwriting
 of Navroji are the whole of the words "Received from
 Mahadarow (*i.e.*, the witness Mahádev Gopál) the sum of
 Rs. 826-8-0 only on the 5th July 1872.—N. D. 11-7-72."

“ The question reserved for the opinion of the High Court is, whether the document marked as Exhibit E was properly admitted as evidence against the accused Navroji Dádábhái.”

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The point reserved came on for argument before SARGENT, Acting C.J., and BAYLEY and GREEN, JJ., on the 28th of September 1872.

Marriott (with him *Farran*) in support of the conviction :— Mr. Wainwright was not a person in authority within the meaning of Section 24 of the Indian Evidence Act 1872. A person in authority means a person who has control over the prosecution of the accused: *Reg. v. Hannah Moore (a)*, *Reg. v. Sleeman (b)*, *Reg. v. Taylor (c)*. Mr. Wainwright had no such control; he was merely a fellow clerk of the accused; his duties, as an auditor appointed to go through the accounts of the Boree Bunder Station, were merely to check those accounts and report to his and the prisoner's common superiors. To treat him as a person in authority would be fraught with the dangers pointed out by Mr. Taylor in para. 801 of his work on evidence. Assuming Mr. Wainwright to have been a person in authority, yet, before the evidence given subsequently to an inducement held out by him should be rejected, it must appear to the Court that the confession was caused by such inducement. All the circumstances of the case, the character of the man holding out the inducement, the time and place when and where it was held out, must be taken into account. This the Judge, who tried the case, did, and he admitted the evidence. This Court will not interfere with his discretion.

If the Court is against me on these points, then I say that Exhibit E had no bearing whatever on the first three heads of charge, and on the second three heads of charge there was ample evidence to warrant the finding of the Jury without having recourse to Exhibit E. Under these circumstances, the Court will not interfere with the judgment that

(a) 2 Den. Cr. Ca. 522. (b) 23 L. J. Mag. Ca. 19.

(c) 8 Car. & P. 733.

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has been given: Letters Patent of 1865, Cl. 25 and 26, and Indian Evidence Act, Sec. 167.

Austey and Inverarity for the prisoner:—Wainwright was clearly a person in authority. He it was who was set to detect, and did detect, the defalcations of the prisoner: *Reg. v. Warringham (d)*, *Thomas v. Rhymney Railway Co. (e)*, *Baldry's case (f)*. Archibold lays down the law on this point at page 199 of his work on evidence in criminal cases, 15th edn. Wainwright was concerned in arresting the prisoner; and it was he who brought him before Mr. Keily, and that alone would render Wainwright a person in authority: case cited at p. 527 of the Report of *Hannah Moore's case (g)*, *Reg. v. Upchurch (h)*, *Reg. v. Paratt (i)*, cited with approbation by Mr. Russell: see III. Russell on Crimes, p. 386 (4th edn.), Taylor on Evidence, para. 802. There was a direct inducement held out: *Reg. v. Hearn (j)*. The whole of the confession ought to have been rejected. When once there was evidence of inducement, however slight, no confession ought to have been admitted, until it was proved that the effect of such inducement had been entirely removed: *Rea v. Nuté* and *Rea v. Sexton*, cited at III. Russell on Crimes, p. 378, *Sherrington's case (k)*, *Reg. v. Hewett (l)*.

If the evidence has been improperly admitted, the prisoner is entitled to his discharge, for this Court cannot say how much or how little weight Exhibit E had on the minds of the jury. It may have affected, and probably did affect, their finding on each of the charges; but even if that were not so, this Court has no power to alter the judgment that has been pronounced. It must either confirm or annul it. It cannot direct judgment to be entered on what it may consider to be a good head of charge and direct an acquittal on the other. That would be virtually for the Court to place itself in the position of the jury, which is

(d) 2 Den. Cr. Ca. 447. 15 Jur. 318. (e) L. Rep. 5 Q. B. 226; 6 Ib. 266.

(f) 2 Den. Cr. Ca. 430, 447. (g) 2 Den. Cr. Ca. 527.

(h) Mood. Cr. Ca. 465. (i) 4 Car. & P. 570.

(j) Car. & M. 109. (k) 2 Lew. 123.

(l) C. & M. Cr. Ca. 534.

contrary to all precedent and to practice. Clause 26 of the Letters Patent must be read by the light of the previously prevailing practice in England and India. It certainly gives the Court no more power than is conferred on the Court for Crown cases reserved in England by Statute 11 & 12 Vict., c. 78; and the practice of that Court, when evidence has been improperly received on the trial of a prisoner, is to annul the conviction and direct the prisoner to be discharged. Nor can this Court order a new trial, as this is a case of felony: *Reg. v. Bertrand* (m), and *Reg. v. Murphy* (n), overruling, so far at least as this Court is concerned, the case of *Reg. v. Scaife* (o). As judgment has been entered up generally, even supposing the judgment as to one count to be good, the judgment is void: *O'Connell's case* (p). Lastly Sec. 167 of the Indian Evidence Act is merely the re-enactment of a section (57) of the Evidence Act II. of 1855, and only applies, as the latter section also only applied, to civil cases. *Reg. v. Frawin* (q) was also cited.

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Marriott in reply :—The two charges were essentially distinct and unconnected. The offences were committed on different days. The Letters Patent expressly give the Court power to alter the sentence and to pass such judgment and sentence as to the High Court may seem fit. *O'Connell's case* is no longer law, if it ever was law in India: Stat. 11 & 12 Vict., c. 78, s. 5; *Holloway. v. The Queen* (r).

Cur. adv. vult.

SARGENT, C.J. :—This case comes before the Full Court on a point of law reserved by Mr. Justice Green, under the 25th and 26th sections of the Letters Patent of 1865, on the trial of Navroji Dádábhái and Harichand Ganpat at the Criminal Sessions in September last.

The prisoners were tried on the following charges. (His Lordship stated the charges as given in the case and proceeded :—) The prisoner Navroji Dádábhái was found guilty

(m) L. Rep. 1 P. C. 520. (n) L. Rep. 2 P. C. 535.

(o) 17 Q. B. 238; S. C. 2 Den. Cr. Ca. 281. (p) 11 Cl. & F. 155.

(q) 6 Cox, Cr. Ca. 530. (r) 2 Den. Cr. Ca. 287; 17 Q. B. 317.

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by the jury of the second and fifth charges and was sentenced by Mr. Justice Green to three years' rigorous imprisonment. As to the prisoner Harichand Ganpat, the jury were not able to agree on a verdict and were finally discharged.

The point of law was reserved by the learned Judge under the following circumstances. (His Lordship read the special case and proceeded :—)The question reserved for the opinion of this Court is whether the document marked as Exhibit E was properly admitted as evidence against the accused Navroji Dádábháí.

The answer to this question depends upon the application of Secs. 5 and 24 of the Indian Evidence Act of 1872, which came into force on 1st September last, and by Sec. 1 is made applicable to all judicial proceedings in or before any Court, and, by Sec. 2, repeals all rules of evidence derived from any other source.

Sec. 5 provides that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are thereafter declared to be relevant and of no others.

By Sec. 6, the confession by the prisoner that he had received the sum of Rs. 826-8-0 from Mahádev Gopál would be a relevant fact.

By Sec. 24, however, "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The rule of English law relating to confessions of this nature has been variously stated by different Judges.

In *Rex v. Thomas (s)*, Mr. Justice Coleridge lays down that the proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one, and that rule was substantially adopted by Mr. Justice Littledale in *Rex v. Court (t)*. However in *Rex v. Baldry (u)*, we find Lord Campbell saying "that the rule is that if any worldly advantage be held out or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias and that, therefore, it would be better not to submit it to the jury."

The rule, as laid down in the section in question, appears to be worded in accordance with a suggestion expressed by Mr. Baron Parke in *Rex v. Hannah Moore (v)*. He there says : "The cases on this subject have gone quite far enough and ought not to be extended. It is admitted that confessions ought to be excluded unless voluntary, and the Judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary, is whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held that in all cases the Judge was to determine that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat."

Sec. 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.

Now, the confession in question was made at the office of Mr. Keily, the Assistant Traffic Manager, where he had

(s) 7 C. & P. 345.

(t) 7 C. & P. 486.

(u) 2 Den. C. C. 430.

(v) 21 L. J. Mag. Ca. 199.

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been taken by Mr. Wainwright. He was there asked by Mr. Keily if he had received the money from the witness Mahádev on which he said "yes." Mr. Keily upon that said to him: "Then give a receipt for it;" and he there and then gave a receipt, which is the document E in question, to the witness Mahádev. There is no evidence whatever of any threat or promise having been used or held out on that occasion; and if the case turned simply upon what took place before Mr. Keily, there would be clearly nothing to make the confession irrelevant under Sec. 24 or to prevent the admissibility of the document E as evidence under Sec. 5. But it was said that the making the confession was caused by the inducement, threat, or promise which, it was contended, was contained in the words which Mr. Wainwright had previously addressed to the prisoner at his own house, namely, "That he had better pay the money than go to gaol; and that it would be better for him to tell the truth."

A preliminary objection was taken by the prosecution that Mr. Wainwright was not a person in authority. No definition or illustration is given of the expression "person in authority." It is an expression well known to English lawyers on questions of this nature; and although, as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides.

Now, Mr. Wainwright had been previously employed by the Company as one of its travelling auditors. He had returned from England but a few days before the occurrence in question, and had been appointed to duty connected with the Audit Department at the Boree Bunder Station. He sat in the Coaching Office, he says, as a clerk and checked the books in the Office. He was engaged in re-auditing accounts already audited, namely, those of the month of June, and also checking the accounts of July before the usual time for auditing had arrived. It is plain, therefore, that he had once filled an important post under the Company, namely that of

travelling auditor, and was then engaged on special service. Whilst employed in this special duty, he discovers the defalcations in the accounts in respect of which the charges are made; he proceeds to the prisoner's house to examine him on the subject, not as a friend as suggested by the prosecution, for we find him immediately afterwards taking him before his superior officer, Mr. Keily, but in his official capacity after he had formed the opinion that the prisoner was bound to account for the deficiencies, for he says he had told Harichand that prisoner was deficient.

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Under these circumstances, it appears to me impossible, unless a very restricted and literal meaning is to be given to the expression "person in authority," to hold that Wainwright was not a person in authority. He would clearly be so, I think, according to English authorities. The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority as in the *Queen v. Warringham (w)*, where Parke Baron held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority; and we find the rule so laid down in Archibold's Criminal Practice.

Assuming that Wainwright was a person in authority within the section, did the words addressed by him to the prisoner amount to an inducement, threat, or promise sufficient to give him grounds which would appear to him reasonable that he would, by confessing, gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him?

His words "you had better pay the money than go to gaol and that it would be better for him to tell the truth" appear to me to bear but one construction, and that is, "you must know all about these deficiencies, and you had better therefore at once confess the truth and pay and so avoid being sent to prison where you certainly will be, if you do not do so."

(w) 2 Den. C. C. 447n.

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They operate as an inducement by the suggestion which they carry with them that he would certainly be sent to gaol, if he did not confess and pay, and that if he did, he would not be sent. That these words would, according to English authorities, be regarded as an inducement, cannot be doubted. It is only necessary to refer to C. Baron Pollock's judgment in *Baldrys' case* (x). And I must say that coming from a man in Wainwright's position, whose business it was to report to the authorities of the Company and who had it in his power to represent the matter in any light he might think proper, the inducement may well be deemed sufficient to operate upon the mind of a man placed in the position of the prisoner so as to lead him to suppose he would escape going to gaol by confessing and paying. Undoubtedly, he was not led to expect any advantage from merely telling the truth; but the confessing was the first step in the course of action which was to insure it, and he clearly contemplated trying to complete it by offering Rs. 2,000 and saying he would try to raise the money from his friends and by remaining, as Mr. Baker says, for a week at the Station in the expectation of paying.

I cannot, therefore, doubt that the words in question were sufficient to render any confession inadmissible made before the impression had been fully removed. Had it then been removed before the confession was actually made? I think it would be contrary to all the probabilities of the case to suppose, as it certainly would be opposed to all English authorities to hold, that the confession had been effaced in the short interval which, on the evidence must be taken to have elapsed between the conversation at the prisoner's house and his interview with Mr. Keily. The prisoner walked with Mr. Wainwright to Mr. Keily's office, and nothing was said to him by Mr. Keily to remove the impression at that interview. I can come, therefore, to no other conclusion than that the document was inadmissible in evidence.

That being so, it remains to determine what is the judgment and sentence which this Court ought to pass in exercise of the power given to it by the concluding words of Sec. 26 of the Letters Patent: "That the Court is finally to determine such point or points of law and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." It was contended for the prisoner that the judgment or sentence so to be passed must be in accordance with the procedure and practice in use in the late Supreme Court, by which, according to Sec. 38 of the Letters Patent, it is provided that, subject to such laws and regulations as should thereafter be made by the Governor General in relation thereto, the proceedings in all criminal cases which should be brought before this Court in the exercise of its Ordinary Original Criminal Jurisdiction should be regulated; and that the only judgment in this case which could be passed in accordance with such practice, would be to declare the conviction on both the second and fifth counts bad, to reverse the judgment or sentence of the Sessions Judge and to order the prisoner to be discharged.

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Now, assuming for the moment that, independently of the operation of the new Evidence Act, our judgment ought to be in accordance with the practice of the late Supreme Court, is the conclusion contended for borne out by what was, or must be deemed to have been, the practice of that Court? The records of that Court do not, it appears, afford any decision in point. The practice, however, of the Supreme Court was undoubtedly in the main that of the Courts in England.

Now, at page 213 of Russell on Crimes it is stated as the English practice that if a case be clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because some other evidence was given which ought not to have been received; but if the case without such improper evidence were not so

1872. REG. NAVROJI DA'DA'BHAI. clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The learned writer then proceeds: "But as it seems now to be settled that where evidence, objected to on the trial of a cause, is received by the Judge and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial on the ground that it is impossible for the Court to say what effect such evidence may have produced on the jury; it may well be doubted whether, if the Judges were of opinion that any evidence had been improperly admitted or rejected in a criminal case, the conviction would be supported."

The doubt as to the practice, it is to be observed, depends upon the power to direct a new trial in felony which, it was then supposed, had been established by the case of *Reg. v. Scaife* (y). That case, however, since the decisions of the Judicial Committee of the Privy Council in *Rex v. Bertrand* (z) and *Rex v. Murphy* (a), must be considered of very doubtful authority even in England.

The authorities cited by Mr. Russell in support of the practice as first stated by him are *Rex v. Tinkler* (b), *Rex v. Ball*, (c) and *Rex v. Oldroyd* (d). In the latter case all the Judges expressed an opinion that the doctrine said to have been laid down in *Margaret Tinkler's case* was sound, namely, that although evidence had been improperly received, yet that the case appearing clear against the prisoner without that evidence, it was no reason to stay the execution.

In *Rex v. Ball* all the Judges expressed the same opinion. The report says: "Whether the Judges on a case reserved would hold a conviction wrong on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the Judges seemed to think, must depend on the nature of the case and the weight of the evi-

(y) 17 Q. B. 238. (z) L. R. 1 Priv. C. 520.
 (a) L. R. 2 Priv. C. 535. (b) East P. C. 354.
 (c) R. & R. 132. (d) R. & R. 88.

dence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought, that as there could not be a new trial in felony, such a conviction ought not to be set aside, because some other evidence had been given which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The conviction in this case was held right."

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It is to be remarked that in neither of the cases was it necessary to act on the doctrines, as the Judges considered the evidence was admissible.

In the latter case, however, the doctrine was apparently fully discussed, because one of the Judges thought the evidence in question wholly inadmissible.

Whether the doctrine was so laid down in *Tinkler's case*, which took place in 1781, may perhaps be doubted. At page IV. of the preface to 1st volume of Denison's Crown Cases, a doubt is thrown, apparently on the authority of a manuscript note by Lord Denman to his copy of Russell and Ryan, on the accuracy of the note to *Ball's case* in Russell and Ryan ascribing the doctrine to the Judges in *Tinkler's case*. It certainly does not appear clear from the report in East P. C. that any part of the evidence, as is assumed in the note to Russell and Ryan, was considered inadmissible. However, there is no reason to doubt that all the Judges in 1807 expressed their approval of the above doctrine in *Ball's case*, Lord Denman in his note to his copy of Russell and Ryan says "Quære this doctrine", and cites *Reg. v. Sutton (e)*, and *Edwards v. Evans (f)*. But the former case only decides that the Court would not grant a new trial in an indictment for the non-repairing of a bridge, the verdict having been for the defendant; and in the latter, which was an action under

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the Bribery Act, the Court refused a new trial because the rejected evidence was not material. In this case the Court took upon itself to say that the jury would have come to the same decision in any case, and so far supports the practice contended for. I have been unable to find any decisions in the Crown cases reserved under the 11th & 12th Vict, c. 78, which bear upon this question of practice.

In view of the above authorities the right conclusion would appear to be that there has not been any well established uniform practice in England as to the course to be pursued where evidence had been improperly admitted.

I have so far considered the question independently of the 167th section of the new Evidence Act, which provides that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

The words of this section are identical with those of Sec. 57 of Act II. of 1855; but the latter Act contains no express words making it applicable to all Courts whatever, and it might be doubted whether all its provisions were intended to be enforced in all proceedings, criminal as well as civil. However, in *Reg. v. Rámsrámi Mulliár (g)* Sec. 57 was held to be applicable to this Court on its Appellate Jurisdiction in the case of an appeal from the sentence of the Session Judge of Pána, where the prisoner had been tried and convicted by a jury.

But whatever doubt may have arisen under the Act of 1855, the provisions of the new Evidence Act are made applicable by the clearest possible words to all judicial proceedings in or before any Court, and are, therefore, applicable

to this Court, sitting under Sec. 26 of the Letters Patent, "to determine the point of law reserved and pass such judgment and sentence as to this Court shall seem right;" and whatever was or must be deemed to have been the practice of this Court before the Act passed, must, by the concluding words of Sec. 38 of the Letters Patent, be modified by the provisions of the Act so far as they apply to the practice in question.

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It was said, however, that the section could not have been intended so to apply, as there was no "decision" and yet, the first question which the Court has to determine, after deciding that evidence was improperly admitted, is whether the verdict of the jury, or in other words, the conviction, should be supported or set aside, *i.e.*, reversed. But what is the verdict but the decision of the jury as to the guilt of the prisoner in respect of the offence with which he is charged.

It was further contended that the Court has only the case stated by the Judge before it, and therefore not necessarily the means of determining the effect of the rest of the evidence, if indeed it can look at anything more. But it is to be remarked that the section does not provide for a case being stated by the Judge as directed by the 11 and 12 Vict., c. 78, nor has such ever been the practice in this Court. The section simply authorizes the Judge to reserve the point of law, and directs the Court to review the case, *i.e.*, I apprehend, all that took place at the trials so far as is necessary for deciding the question of law and passing the proper judgment and sentence.

In the present case the Judge was a member of the Court, his notes of the evidence were referred to during the hearing of the case and we had all the materials for deciding as to the effect of the remaining evidence; I should, therefore, have great hesitation in coming to the conclusion that under those circumstances we ought not to give effect to the 167th section of the new Evidence Act in determining whether the

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conviction on both the counts should be set aside and the judgment reversed.

But at any rate the clear expression of the intention of the Indian legislature, that decisions should not in any case be reversed, if the rest of the evidence justifies the conclusion, should at least, I cannot doubt, influence our practice in cases where, like the present, it may not be yet clearly defined and established, and should, therefore, in the present case, I think, determine it at least within the limits of that practice which met with the approval of all the Judges in *Ball's case* and *Oldroyd's case*, and which, it must be remembered, falls very short of the rule laid down in Sec. 167 of the Evidence Act. This course will be still further justified if it should be held that the Court has no power to order a new trial.

Applying that rule in the present case, I can have no doubt that we ought not to reverse the finding of the jury on the second count relating to the item of Rs. 729-6-9. That item belongs to a perfectly different account from that to which the document E relates. The evidence in support of it was quite distinct and of such a nature as to leave no reasonable ground for supposing that the document E could have had any effect on the minds of the jury. As to the fifth count, we cannot do otherwise than reverse the conviction.

The case stands, therefore, thus, that there has been a general judgment passed on two counts in respect of which the conviction as to one is bad. It was said that in that case the decision of the House of Lords in *O'Connell v. The Queen* (*h*) applies, and that the judgment must be reversed. Whether the doctrine laid down in that case must be deemed to have been the practice of this Court since the decision of House of Lords, it is unnecessary to consider, as I can entertain no doubt that supposing the judgment bad, the Letters Patent enable us to pass judgment upon the second count on

which there is a good conviction. In *Holloway v. The Queen* (i) this was stated by Lord Campbell to be the effect of 11 & 12 Vict., c. 78, s. 5, the provisions of which, so far as this question is concerned, are the same as those of clause 26 of the Letters Patent.

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The sentence of three years' rigorous imprisonment is, in my opinion, a proper one to pass upon the conviction of a person in the position of the prisoner of such an act of criminal breach of trust as is charged by the second count; and the judgment which this Court should, in my opinion, pass is that the judgment be affirmed.

BAYLEY, J. :— I concur with the Chief Justice in thinking that under Section 24 of the Indian Evidence Act, 1872, the receipt that has been referred to as Exhibit E was not admissible in evidence; and I also concur in considering it doubtful whether we are at liberty to consult English authorities in determining what is the meaning of the expression "person in authority" as used in that section. Upon these points I do not desire to add anything to what has been said by the Chief Justice, and I pass on to consider the far more important question that has been raised in this case, namely, what is the consequence of the admission at the trial of a document which we, sitting to consider a point of law reserved for our consideration, determine to have been inadmissible. Can this Court review the evidence in the case to see whether or not, after rejecting such improper evidence, it ought to sustain the conviction? That question is to my mind one of the utmost importance and deserving of the most careful consideration. In order to arrive at the proper answer to it, I shall briefly consider what was the state of the law in England before the passing of the Stat. 11 & 12 Vict., c. 78, and what was the state of the law after that Statute; and I shall state then what, in my opinion, is the true construction of those clauses of the Letters Patent which must be considered as governing the present case.

(i) 17 Q. B. 317.

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For the law in England before the Statute 11 & 12 Vict., c. 78, I refer to Archibold's work on Pleading and Evidence in Criminal Cases at page 169 (16th edn.) where he says: "The practice has long existed, where any objection was taken on the part of a defendant on a trial before any Court of Oyer and Terminer and Gaol Delivery for treason or felony, either to the indictment or the evidence, which the Judge considered worthy of more mature consideration, to take the opinion of the jury upon the facts proved, and to reserve the objection for the consideration of all the judges, upon a case stated by the judge who presided at the trial: and if the judges, or a majority of them, were of opinion that the objection was well founded, the defendant was recommended to the Crown for a pardon. * * * Upon a case so reserved, the judges did not sit strictly as a court, but rather as assessors to the judge who tried the case, and the judgment ultimately pronounced was considered in law as his judgment, the reasons on which it was founded not being publicly declared by the judges." In that state of the law, it will be observed, the Court had no power of itself to alter, or interfere with, the finding of the jury. All it could do was to recommend the prisoner to the Crown for a pardon.

It was considered by the legislature advisable to amend the law, and accordingly the Statute 11 & 12 Vict., c. 78, under the provisions of which the present Court for the consideration of Crown Cases Reserved was established, was passed in the year 1848. The recital in the first section of that Statute is important as showing the intended scope of the enactment. It is as follows:—"Whereas it is expedient to provide a better mode than that now in use of deciding any difficult Question of Law which may arise in Criminal Trials in any Court of Oyer and Terminer and Gaol Delivery and to make further Amendments in the Administration of the Criminal Law: Be it enacted that when any Person shall have been convicted," &c. The section then goes on to provide that the Judge, before whom a case shall have been tried, may, in his discretion, reserve any Question of Law, which shall have arisen on the Trial, for the consideration of the Court for

Crown Cases Reserved. The second section provides that the Court shall thereupon have full power and authority to hear and finally determine the said Question or Questions and thereupon to reverse, affirm, or amend any Judgment which shall have been given on the Indictment or Inquisition on the Trial whereof such Question or Questions have arisen, or to avoid such Judgment and to order an Entry to be made on the Record that in the Judgment of the Court the Party convicted ought not to have been convicted, or to arrest the Judgment or order Judgment to be given thereon, if no Judgment shall have been given, as they shall be advised, or to make such other order as Justice may require. The section then goes on to provide (His Lordship read the remaining portion of the section and the third and fourth and fifth sections of the Act and the Schedule which provides the form in which the certificate of the Court is to be drawn up, and proceeded :—) There is nothing in that Act which would indicate any, even the slightest, intention on the part of the Legislature to effect such an enormous revolution in the procedure of Criminal Courts, I may say in the history of the liberty of the subject as would have occurred if an appeal upon the facts had been given to the Judges constituting the Court of criminal appeal. Except when powers of summary conviction have been given by Statute, a man is convicted or acquitted by the verdict of his countrymen. To borrow the words of Tindal, C.J., in *O'Connell v. The Queen* (j): "In criminal proceedings the jury have no other question before them than whether the prisoner is guilty or not guilty of the charge in the indictment; no other duty to perform but that of pronouncing him to be the one or the other. They have no concern whatever in assessing or awarding the punishment. It is the province of the Court to pass sentence on the whole or on part of the record as the law requires; either a fixed punishment, if any Statute has so directed, or if a discretionary punishment is given by law, such measure of punishment as under the particular circumstances the defendant ought to receive" (p. 240). And Mr. Justice Patte-

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 REG. ings the jurors merely find the party guilty or not guilty ;
 2. they have nothing to do with the punishment or with any-
 NAYROJI thing at all analogous to assessment of damages in civil cases.
 DA'DA'BHAI. The Court is free to give judgment on the whole, or on part
 of the indictment, as the law may require and no uncertainty
 can arise. Therefore the reason for the rule in civil actions
 does not and cannot apply to criminal cases” (p. 260). The
 Statute 11 & 12 Vict., c. 78, was passed to provide for the
 argument of any difficult question of law reserved by the
 Judge and for nothing else. It did not give, nor did it
 purport to give, the Court power to review the evidence
 upon which the prisoner had been found guilty.

I now turn to the consideration of the Letters Patent.
 At the time of the granting of the Letters Patent in 1862,
 and indeed down to the present time, that Statute (11 & 12
 Vict., c. 78) was and is in force in England. The Letters
 Patent were framed in England by lawyers fully conversant
 with the then existing law regarding criminal trials and with
 the practice of reserving points of law for the consideration
 of the Court established by 11 & 12 Vict., c. 78 ; and it
 would be but natural to expect they would adopt the im-
 provements recently made in the law of England when
 framing those provisions of the Letters Patent relating to
 criminal procedure in the three Presidency towns of Calcutta,
 Madras, and Bombay, where trial by jury in its pure and
 unadulterated form had, to go no further back than the first
 introduction of the Supreme Courts, (*i.e.*), in Calcutta from
 1774, in Madras from 1800, and in Bombay from 1823,
 always been the tribunal before which, under the presidency
 of one of the Judges of the Supreme Courts, persons had been
 tried.

The clauses in the Charter of 1862 relating to criminal
 trials in the Ordinary Original Criminal Jurisdiction are the
 21st and following clauses.

The 21st clause is as follows :—“ And We do further ordain
 that the said High Court of Judicature at Bombay shall have
 Ordinary Original Criminal Jurisdiction within the local limits

of its Ordinary Original Civil Jurisdiction, and in respect of all persons beyond such limits over whom the said Supreme Court at Bombay now has Criminal Jurisdiction.”

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The 22nd clause provides that the High Court shall be empowered to try all persons brought before it in due course of law. The 24th is this : “ We do further ordain that there shall be no appeal to the said High Court of Judicature at Bombay from any sentence or order passed in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.” And Cl. 25 then provides that “ on such point or points of law being so reserved as aforesaid * * * the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right.”

The Supreme Court, in its criminal procedure, was guided by the law of England except where it had been altered by legislative authority in England or India. My experience of the practice of that Court only extended from January 1861 until its abolition in 1862 ; but I remember the case tried in December 1861 that generally goes by the name of the *Bhättiá Conspiracy Case*, where an objection was, after verdict, taken by myself as Counsel for some of the defendants to the sufficiency of the indictment, and Sir Mathew Sausse sat with Sir Joseph Arnould to hear the argument on the point. There, however, the pleadings were held by the Court to have been perfectly correct, and the conviction being sustained, the Chief Justice retired from the Bench before Sir Joseph Arnould proceeded to pass sentence on the defendants. In the case of *Regina v. Elmstone and Whitwell and others (k)* I reserved a point of law for the

1872. opinion of the High Court, viz., whether the prisoner could
 REG. be legally convicted upon all or any of the charges, but did
 v. not pass sentence until after it had been determined upon
 NAVROJI which of the charges judgment could properly be entered up.
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The Letters Patent of 1862 did not, I think, make any material difference in the mode of procedure during the progress of a trial from that which had existed in the late Supreme Court, further than by providing for the reservation of a point of law at the discretion of the Presiding Judge for argument before a Full Court, and for the final disposal of the case when such Court had pronounced its opinion upon the point reserved. They clearly did not give the High Court power to grant a new trial, and such could not have been granted by the Supreme Court whilst it was in existence. The general opinion of the profession in England had always been that no new trial could be granted in a case of felony. Here, under the law in force previous to the coming into operation of the Indian Penal Code, the offences of which the prisoner has been convicted, would have been felony (see Act XIII of 1850).

The case of *Reg. v. Scaife (l)*, where a new trial was ordered, broke in upon that rule; but that was a peculiar case, and it seems to have been there assumed that the Court had power to direct a new trial. However, that decision cannot be now treated as good law, for in the case of *Reg. v. Bertrand (m)* (which is an authority binding upon this Court) it was decided that there could not be a new trial in cases of felony. The very important decision of the Lords of the Privy Council in that case has, I think, a material bearing upon the present question. There the prisoner had been tried by the Supreme Court of New South Wales, and the jury, not agreeing, was discharged, and a fresh trial had. On the second trial at the same sittings before another jury, some of the witnesses having been resworn, the evidence given by them at the first trial was by consent read over to them from the Judge's notes, liberty being given both to the prosecution and to the

(l) 2 Den. C. C. 281 ; 17 Q. B. 238.

(m) Law Rep. 1 P. C. 520.

prisoner to examine and cross-examine. Under these circumstances the Supreme Court of New South Wales granted a new trial, and it was held that it had no power to do so. In giving judgment the Judicial Committee express themselves at page 533 as follows:—"Hitherto it was admitted that they had, except in the instance of *The Queen v. Scarfe*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in this historical account; and if their Lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections, perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion: what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this Committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law, it may seem to be. In saying this, their Lordships desire to be understood as expressing no opinion that the introduction of new trials in Felony would or would not be expedient, or conduce to a more just or more careful administration of the law;" and at page 534 their Lordships say: "It is a mistake, moreover, to consider the question only with reference to the prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even when he is advised by Counsel, and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing. For thus it will be seen that a most important consideration is forgotten,—that of the jury charged with deciding on the effect of the evidence. It is essential that

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no unnecessary difficulty should be thrown in the way of their understanding and rightly appreciating it."

That case was followed by *Reg. v. Murphy (n)*, where it had been held by the Supreme Court of New South Wales that that Court had power to order that judgment on a verdict be vacated and to grant a *venire de novo*; but Chief Justice Erle, in delivering the opinion of the Lords of the Judicial Committee after referring to *Bertrand's case*, says: "First their Lordships consider that the present case is, in substance, an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. * * * The law on this subject was declared by their Lordships in the former case of *Reg. v. Bertrand*, and we consider that the law so declared governs the present case." And further on, after referring to the remarks of Blackburn, J., in *Reg. v. Winsor*, the Chief Justice continues: "Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good and the prisoner has been given in charge to a jury in due form of law empanelled, chosen and sworn and a verdict of conviction or acquittal has been returned."

Now is there in the charter of our Court any intention to vary or depart from the law as thus laid down by the Privy Council? I can see no indication in the clause I have read or in any other clauses of the Letters Patent, that any power to review the evidence was given to us by the Letters Patent further than was necessary to decide the point or points of law reserved for our consideration. The right of appeal is, by Clause 25, expressly negatived; and were we to review the evidence for the purpose, not of deciding the point of law, but of seeing whether there is other evidence sufficient to support the conviction, we should, in effect, supersede, by our judgment on the facts, the verdict already given by the special jury; and, as I said during the argument, I

should require clear and unmistakable language in the Letters Patent before I should venture to exercise such a power.

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In Archbold's Practice at p. 165 it is laid down as to the state of the law before the Court of Crown Cases Reserved was established as follows: "But where there appears to be sufficient evidence to support the indictment after rejecting any improper evidence which may have been received, the rule for a new trial will be refused" and a reference is then given to 1 East P. C., p. 354, and Russell and Ryan, p. 88. The case in Russell and Ryan's Crown Cases Reserved referred to there is a decision in 1805 in *Rex. v. Benjamin Oldroyd*. In that case the prisoner was tried before Mr. Baron Graham, at the Lent Assizes for the County of York, in the year 1805, for the murder of his father at Sandal Magna, on the 12th of July 1804, by strangling him. He was convicted upon circumstantial evidence, but the learned Judge respited his execution upon an objection, pressed upon him by the Counsel for the prisoner, as to the admissibility in evidence of a deposition read upon the trial under the following circumstances.

The Counsel for the prosecution at the close of their case observed to the learned Judge that they did not mean to call the mother of the prisoner, Elizabeth Oldroyd, strong suspicions having fallen upon her as having been an accomplice; but the Judge thought it right, in compliance with the usual practice (her name being on the back of the indictment as having been examined before the Grand Jury), to have her examined, which was accordingly done. The learned Judge, observing upon this examination that the evidence given by the woman was in favour of the prisoner, and materially different from her deposition taken before the Coroner, thought it proper to have the deposition read, for the purpose of affecting the credit of her testimony so given on the trial; and in summing up the case to the jury he stated that her testimony was not to be relied upon, and left the matter of the prisoner's guilt entirely upon the other evidence. The question reserved for the opinion of the Judges was whether

1872. it was competent to the Judge, under the circumstances stated, to order this deposition to be read in order to impeach the credit of the witness. The case was taken into consideration at a meeting of all the Judges in Easter Term, 11th of May, and again on the 18th of May, 1805, when they were all of opinion that it was competent, under the circumstances, for the Judge to order the deposition to be read to impeach the credit of the witness. It was then considered whether, laying the evidence of the prisoner's mother entirely out of the case, there was sufficient evidence to go to the jury. Graham, B., read to the Judges from his notes the evidence given on the trial; and, upon consideration, the Judges were of opinion that there was evidence sufficient to go to the jury, and that the jury having found the prisoner guilty, there were not circumstances sufficient to raise a doubt so as to induce any interposition to prevent the law taking its course. There is another case in Russell and Ryan on the same point reported at p. 132 decided by the Judges in 1807. In that case it is said that although it appears upon a case reserved that evidence has been admitted at the trial which ought not to have been received; yet if the Judges are of opinion that there is ample evidence to support the indictment after rejecting such improper evidence, they will not set aside the conviction.

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With reference to these cases Mr. Denison, at page 4 of the preface to the first volume of his Crown Cases Reserved, observes: "The importance of this (printing Crown Cases Reserved in the precise words in which they are stated for the consideration of the Judges) is obvious; but may be rendered more evident by the following instance of an important mistake which was pointed out to the Editor by Lord Denman in a note to the case of *R. v. Ball*, R. & R. C. C. 133, n (b); where it seems probable that the learned Editors were misled by an incomplete or inaccurate copy of the case reserved.

The marginal note to the case of *R. v. Ball* R. & R. 132, is as follows:—

Although it appears, upon a case reserved, that evidence has been admitted at the trial which ought not to have been received, yet, if the Judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction."

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The Report of the opinion of the Judges is as follows (p. 133) :—

"Whether the Judges on a case reserved, would hold a conviction wrong, on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the Judges seemed to think must depend on the nature of the case, and the weight of the evidence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought, that as there could not be a new trial in felony, such a conviction ought not to be set aside (b) because some other evidence had been given which ought not to have been received; but if the case, without such improper evidence, were not so clearly made out and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. The conviction in this case was held right."

Note (b) is as follows :—

"In Margaret Tinkler's Case, MSS, C.C.R. 1781, all the Judges thought the evidence of a witness of the name of Parsons (d) ought not in strictness to have been received; but, as the evidence was ample without it, the Judges did not think themselves bound to stop the course of justice. See the facts of this case, I. East P. C., 354. See *Rex v. Treble East. T.*, 1810, post."

The Editor avails himself of Lord Denman's permission to print the following MS. notes (c. d.) made by his Lordship in his copy of Russell and Ryan :—

(c.) "Quære this doctrine. See *R. v. Sutton*, 5 B. Ald. 52, and *Edwards v. Evans*, 3 East 456., Le Blanc's judgment in particular."

The judgment of Mr. Justice Le Blanc, upon which Lord Denman doubted the correctness of the view taken in *Rex. v. Ball*, is as follows: "The ground on which new trials are granted, on account of the rejection of a witness who was prepared to give evidence relative to the issue, is that the Court cannot weigh the degree of relevancy, or say what effect any fact that is relevant would have had on the minds of the jury."

That judgment bears out the doubt expressed by Lord Denman as to the correctness of the view said to have

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been taken by the Judges in *Reg. v. Ball*, and I believe that case has not been acted upon in practice and cannot be relied on as a guide, as the Court then followed the case of *Margaret Tinkler*, which had been incorrectly reported. I think that we are in the same position as, I believe, the Judges in England now are when a point is reserved for their consideration under the 11 & 12 Vict., c. 78, and that we have no power to review the evidence and say what has and what has not weighed with the jury.

For the prisoner the case of *Reg. v. O'Connell* was relied upon, and it was said that the judgment in the present case was bad, as it is general on all the counts. Whether I should feel constrained to follow the decision of the House of Lords in that case, if a similar point arose here, I am not at present prepared to say. The decision was arrived at against the opinion of a majority of the Judges, seven being against the view eventually taken by the Lords and two only in favor of it, and ultimately the decision was arrived at by three law Lords against two. The case has been commented on by Lord St. Leonards—see his work on the Law of Real Property, page 31, pl. 21, and it is no longer law in England as Section 5 of the 11th & 12th Vict., c. 78, was passed to prevent a similar miscarriage of justice. Lord Campbell, in the case of *Holloway v. The Queen (o)*, says: "On the construction of the Statute 11 & 12 Vict., c. 78, s. 5, I have no doubt that, if there should be one good count, and the rest bad, we should be bound either to give judgment on the good count, or remit the case to the Court below, for them to pass such judgment. It was, indeed, held in *Reg. v. Bourne (p)* that the Court of Error could not give judgment on a valid count, even where there was but one sentence which could be passed. I, as Attorney General, conducted that case on the part of the Crown, and bowed to the decision of the Court, though I doubted its correctness, and my opinion was strengthened by the doubt of my brother Patteson, who will always be to me an oracle of the law. In that case I should have directed further proceed-

ings in error, but the prisoners had been discharged. It was always my opinion that, where the sentence was discretionary, the Court of Error could not well pronounce the judgment, and the Court below should; but that, if only one judgment could be given, the Court above might safely pass the sentence which ought to have been passed by the Court below. Now, however, it is expressly provided by the late Act, that if judgment is reversed, the Court of Error may either pronounce the proper judgment or remit the record to the Court below, in order that they may do so. And, where the indictment has good and bad counts, so that the Court below ought to have arrested judgment on some and sentenced on others, but they have sentenced on all, the Court of Error is no longer under difficulty, but may itself arrest judgment on the bad counts, and sentence on the good. It has been suggested that this takes place only where a sentence which has been pronounced is the wrong one; but I think the rule applies where the judgment has been improper; as where it proceeds upon several counts and one is defective: and, if we find a good count in the present instance, I do not see any difficulty in our either sentencing upon it or remitting the record for that purpose to the Sessions."

Reliance was placed by the Counsel for the prosecution on the 167th section of the new Evidence Act. That section was copied from Sec. 57 of Act II. of 1855 which has generally been considered to have applied only to civil cases. The terms of the sections are apt only when applied to such; and I for one shall be slow to construe it, Sec. 167, so as to override the right of all subjects in the Presidency Towns to be tried in Her Majesty's Court by Judge and jury; and to assume that we have power to argue on the finding, or to take upon ourselves the power of a jury, is a proposition to which I cannot accede, for I do not think that when that section was drawn, it was intended to give, or that it does in fact give, this Court power to exercise the functions of a jury. My learned colleagues are in substance retrying the case, omitting the piece of evidence which this Court unanimously

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holds to be inadmissible. I record my strenuous protest against assuming such a power to ourselves. The section is inapplicable to trial by jury in the Presidency Towns, and was never, in my opinion, intended to alter the constitution or vary the powers of this Court which, sitting as we here are, is a Court for deciding difficult points of law reserved for its consideration. The term 'decision' is inapplicable to a trial by Judge and jury. It cannot be the 'decision' of the Court, for the Court has no power to ascribe guilt or innocence to the prisoner. What 'decision' has there been here? The verdict of the jury is part only of the process by which the prisoner is sentenced by the Judge, but is not a 'decision.' The 'decision' of a case is not with the jury. I consider that section to be wholly inapplicable to the present case. For these reasons I am of opinion that the conviction and sentence should be quashed.

GREEN, J. :—The questions before this Court for decision are (1) whether the document, which was admitted in evidence at the trial and marked as Exhibit E was not irrelevant and, therefore, inadmissible in evidence against the prisoners; and (2) supposing the document to have been inadmissible, what order this Court should make.

With regard to the first question, I may observe that at the time of the trial and when the document in question was tendered, I was of opinion that it was admissible, as it did not then appear to me that the signing of it by the prisoner Navroji Dádábháí, was caused by any inducement, threat, or promise within the meaning of Sec. 24 of the Indian Evidence Act, 1872. After the full discussion, however, which the evidence bearing on this question has received on the present occasion, and having regard to the clearer view of the exact sequence of events on the day when that document was signed, which that discussion has afforded to me, I am now of opinion that the document ought to have been deemed inadmissible under the section of the Act above referred to. On the first question, therefore, I agree with my learned colleagues that Exhibit E was not admissible in evidence.

The second question depends on the construction to be put on Clauses 26 and 38 of the Letters Patent of the 28th December 1865, and on Sec. 167 of the Indian Evidence Act 1872.

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In construing Clause 26 of the Letters Patent, I agree that under Clause 38, we are to have regard to the procedure and practice in criminal cases of the late Supreme Court, and this, in substance and speaking generally and so far as it had not been varied by any legislative enactments applying to India, was the procedure and practice of Courts of Oyer and Terminer and Gaol Delivery in England. The only remedy of a person alleging himself to be aggrieved by a conviction or sentence of the late Supreme Court, sitting as a Court of Oyer and Terminer, was by appeal to the Queen in Council, where the Supreme Court thought fit to allow such appeal. The Letters Patent of 1823, constituting the late Supreme Court, are silent as to any power of that Court, sitting as a Court of Oyer and Terminer and Gaol Delivery, to reserve any points which might have arisen in the course of a criminal trial, or of that Court, sitting in any other capacity, to entertain and deal with any such reserved points. The Letters Patent, however, gave, as I have said, a general right to appeal to the King in Council in all criminal cases where the Supreme Court thought fit to allow the appeal, and, in case of capital sentences, gave the Court power, when a proper occasion appeared to such Court to exist for an exercise of mercy, to suspend the execution of such capital sentence till the royal pleasure should be known. There was, however, under the Charter of the Supreme Court, no such power, as is contained in Clauses 25 and 26 of the Letters Patent of 1865, to reserve for the opinion of the Court a point or points of law, and for such last mentioned Court to dispose of the same.

In the case commonly called the *Bhattia Conspiracy Case*, tried at the December Criminal Sessions 1861 of the late Supreme Court of Bombay, to which my brother Bayley has referred (and in which I had the honour to appear as junior counsel with him for the defence), there was no case reserved

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for another Court. After the verdict was delivered, the defendant's counsel asked that sentence might not be pronounced and that an opportunity might be afforded of moving in arrest of judgment or for a new trial. On the following day, Sir Mathew Sausse, the Chief Justice, sat as assessor to hear the motion with Sir Joseph Arnould who had presided at the trial. It was still an adjourned sitting of the Court as a Court of Oyer and Terminer and Gaol Delivery, and not of the Supreme Court exercising the powers of the Court of Queen's Bench in England; and for this reason, the Judges held that the motion for a new trial could not be entertained by them, as they were not sitting in exercise of the powers of the Court of Queen's Bench to grant a new trial. The motion however to arrest judgment, was made on the ground that the indictment did not disclose any criminal offence at all, and this was disposed of by the Court. I have looked through all the volumes of reports of cases decided by the late Supreme Courts here and at Calcutta which are accessible to me, and though I find a number of instances of motions in arrest of judgment and motions for new trial in cases of misdemeanour and in cases where, before sentence, a doubt had been entertained as to jurisdiction, and the point has been argued before two or more Judges, as assessors, with a view to recommending the prisoner to the mercy of the Crown, I have not been able to come upon any instance of a point, arising in a criminal case, having been reserved for the opinion of the Court in any way analogous to that provided by Act 11 & 12 Vict., c. 78, in England. I am still of the opinion, which I ventured to express at the argument of this case, that no practice of reserving points arising in criminal trials existed in the time of the Supreme Court, and that the only practice, which could be any guide to us, (apart, of course, from the provisions in Clauses 26 and 38 of the Letters Patent), was that which prevailed in England independently of Act 11 & 12 Vict., c. 78.

Had the words of Cl. 26 of the Letters Patent been identical with those of Section 2 of Act 11 & 12 Vict., c. 78, I agree that regard should be had to the course which would

have been pursued by the Court for Crown Cases Reserved in disposing of a case like the present. But in the first place, no authority has been cited at the bar, nor am I aware of any, in which a question like the present has been dealt with by that Court; and in the second place, the language of cl. 26 differs, in an important point, from that of Section 2 of the Act. Section 2 of the Act, after providing for the statement in a case signed by the Judge who presided at the trial, of the question or questions of law reserved and the transmission of such case, provides that the Justices and Barons "shall thereupon have full power and authority to hear and finally determine the said question or questions and thereupon to reverse, affirm, or amend any judgment, which shall have been given, &c., or to avoid such judgment &c., &c., or to make such other order as justice may require," &c. The 26th clause of the Charter provides that where a point or points of law shall have been reserved for the opinion of the High Court by a Court of Original Criminal Jurisdiction, "the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." There is nothing in Sec. 2 of the Act like the words "review the case or such part of it as may be necessary." On the other hand, there is no provision in the Letters Patent for any "case" to be stated by the Court of Original Criminal Jurisdiction, and the word "case" occurs in this 26th clause for the first and only time. I am not disposed to hold that by these words, it was intended to give this Court any general power of interfering with the verdict of a jury in a criminal case, or of entertaining anything in the nature of an appeal from it. It is clear, however, that power is given to the Court to interfere with a verdict, and the judgment thereon, in the sense of setting it aside. An appeal consists, in general, in the reconsideration by another Court of the decision of a Court

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of first instance or intermediate Court of appeal on the same materials as were before the Court whose decision is under reconsideration. But when the verdict of a jury has been given on evidence some portion of which was not properly admissible, and when a Court, in considering a point of law reserved as to the admissibility of such last mentioned portion of evidence, entertains the consideration of the question whether, excluding the evidence, as to the admissibility of which there is a question, the verdict is still clearly sustainable, the last mentioned Court is not hearing an *appeal* from the verdict of the jury, for the reason that that Court considers the decision, not on the same materials, namely, the whole evidence which was before the jury, but on part only of those materials, namely, the evidence less the inadmissible portion. For this reason, I consider that for this Court to take such a course is not open to the objection that the verdict of a jury in a criminal matter and the judgment and sentence thereon of this Court, sitting as a Court of Original Criminal Jurisdiction, are not the subject of an appeal to this Court sitting in another capacity. In my opinion, this 26th clause gives this Court power of reviewing, that is, reconsidering, the *case* (by which I can only understand, the pleadings, proceedings, and evidence) so far as may be necessary for the purposes afterwards mentioned in the clause, namely, the final determination of the point or points of law, and that being determined, so far as may be necessary for the purpose of altering the sentence (as for instance, if an illegal sentence has been passed), and of passing such judgment and sentence as to the Court shall seem meet. In some cases, as for instance where the question is of altering a sentence and passing a new sentence, this Court must of necessity look at the evidence in order to determine what sentence ought to be awarded. I should not, indeed, be disposed, unless necessitated to do so, to put an interpretation on this clause inconsistent with the procedure and practice in criminal cases of the late Supreme Court. But I do not find any necessity to do so, so far as regards the present case,

if such procedure and practice is to be deemed to be that, in use in England before the passing of Act 11 & 12 Vict., c. 78. The three cases cited by Sir W. M. Russell at p. 213 of the 3rd volume of his Treatise on Crimes and Misdemeanours, of *Rex v. Tinkler*, *Rex v. Oldroyd*, and *Rex v. Ball* have, so far as I can see, never been overruled. Lord Denman seems to have doubted the doctrine laid down in *Rex v. Ball*. But the doctrine there laid down was assented to by all the Judges present, and a doctrine, so laid down, is not, as it seems to me, to be got rid of by a MS. *quære* made for private purposes by another Judge however eminent. Lord Denman also remarks that the statement of the case of *Rex v. Tinkler* in note (F) to the report of *Rex v. Ball* is not quite correct. But this note (F) is one by the editors, Messrs. Russell and Ryan, and there is nothing in the report to show that the Judges, who laid down the doctrine in *Rex v. Ball*, were misled by, or relied upon, this alleged incorrect statement of the case of *Rex v. Tinkler*, or even had any statement, correct or incorrect, of that case before them at all. Whether the facts in the case of *Rex v. Tinkler*, on which the doctrine reported to have been laid by the Judges in that case, were correctly or incorrectly stated, it is not alleged that the doctrine laid down was incorrectly reported, and I am not aware of any decision which overrules the doctrine so laid down which was in 1781, or which was laid down in the two later cases *Rex v. Oldroyd* (in 1805) and *Rex v. Ball* (in 1807), and I venture to express the opinion that the doctrine there laid down is a safe and reasonable one.

In the present case, however, it is not necessary to go so far as the doctrine laid down in *Rex v. Ball* would, perhaps, warrant, and to hold that the Court, disposing of a point or points of law reserved, if it considers that any evidence tendered on the part of the prosecution on one head of charge has been improperly admitted by the Judge trying the case, has power to look at the evidence in support of that head of charge, against the admission of which no exception can be taken, and say whether on that alone, the cou

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viction on that head of charge can be sustained. The present case is not the case of a single offence charged. The prisoner was convicted on the second head of charge of committing criminal breach of trust as a clerk on the 2nd July 1872 as to a sum of Rs. 729-6-9, and on the fifth head of charge, of the same offence on the 5th July 1872 as to a sum of Rs. 826-8-0. The evidence improperly admitted, as having been procured by threat or inducement, was an acknowledgment, given by the prisoner under his hand on the 11th July 1872, that he had, on the 5th July 1872, received from one Mádhavráo the sum of Rs. 826-8-0. How this piece of evidence can be supposed to have had the slightest influence on any reasonable being as tending to show that the prisoner, on the 2nd July 1872, committed criminal breach of trust of a sum of Rs. 729-6-9, I am wholly at a loss to conceive. When the Legislature allowed several counts to be contained in one indictment (or what is the same thing, several heads of charge in one charge) relating to different offences, it must be supposed to have given juries credit for sufficient intelligence to distribute the evidence, given on the part of the prosecution, to the respective offences charged to which that evidence was, in logic and common sense, applicable. It was argued in the present case that the admission of the receipt in question in evidence supplied evidence of a dishonest intent and so might have had an effect on the minds of the jury with regard to the sum of Rs. 729-6-9 misappropriated three days before. I am unable to agree to this. The receipt is simply what I have stated and nothing more, *viz.*, an admission of the receipt, on the 5th July 1872, of a sum of Rs. 826-8-0, and does not, in any way, involve an admission of having misappropriated that money or any money. The receipt of this sum was, no doubt, a fact necessary to be proved before the prisoner could be convicted on the fifth head of charge, and the document in question materially corroborated the other evidence there was of the fact of this receipt, but does not show, or tend to show, any dishonest intent so far as regards either that sum or the sum of Rs. 729-6-9, as

the receiving the money by the prisoner and his written acknowledgment were both occurrences in the ordinary and proper discharge of his duty. Even admitting, as a general principle (though to do so would seem to be a contravention of Sec. 167 of the Indian Evidence Act of the present year), that the Court, considering the point reserved, ought not to attempt to estimate what effect the admission of a piece of irrelevant evidence may have had on the minds of a jury with regard to a charge to which such evidence is admitted as being applicable, or to regard itself as competent to pronounce that the evidence could have had no effect, the principle must, I think, be limited to the case where a single offence is charged. Where different offences are allowed to be charged against a prisoner in one indictment or instrument of charge, a case may easily be supposed where evidence has been laid before the jury during the trial, wholly irrelevant to the charge of which they convict the prisoner, and yet that the fact of such evidence having been before the jury would furnish no ground for setting aside the conviction. For instance, if a prisoner be charged with two different offences under several heads and be acquitted as to one and convicted as to another, he would not be heard to argue that the conviction as to the latter ought to be set aside because evidence, relevant perhaps to the offence of which he had been acquitted, but irrelevant to the offence of which he had been convicted, had been laid before the jury, and that it was impossible to say what influence such evidence, irrelevant, as it was, to the offence of which he had been convicted, might have had on the minds of the jury in convicting him of that offence.

But any doubt which might have existed on the question as to the validity of this conviction is, in my opinion, set at rest by Section 167 of the Indian Evidence Act of 1872, applying, as it does, as well to the High Court sitting as a Court of Original Criminal Jurisdiction as to this Court sitting for the consideration of a reserved point. It seems clear to me that to set aside the judgment and sentence in this case founded on the verdict of the jury, would be to reverse

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For these reasons, I concur with the Chief Justice in the opinion that the judgment and sentence be affirmed.

[ORIGINAL CIVIL JURISDICTION.]

Appeal No. 210.

Oct. 5.

Suit No. 822 of 1871.

SONBA'I, widow of FAZUL HABIBHA'I, and
 another *Plaintiffs.*
 AHMEDBHA'I HABIBHA'I and another *Defendants.*

Procedure—Appeal to Privy Council—Interlocutory judgment—Letters Patent of High Court, Cl. 15 and 40—Intermediate appeal to High Court—Discretion—Order for Inspection of documents—Appeal from order in Chambers.

No appeal lies, under Section 40 of the Amended Letters Patent of the High Court, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, until such judgment or order has been subjected to an appeal to the High Court under Clause 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under Clause 15 is given directly to the Privy Council.

Seemle—The High Court will not, in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice, such as an order for the inspection of documents.

Under Clause 15 of the Letters Patent and under the rules of the High Court, an appeal to the High Court from an interlocutory order made by one of its Judges only lies in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts.

IN the above suit and in a cross suit (No. 639 of 1871) between the same parties, Gibbs, J., sitting in Chambers, made an order, on the 9th of Sept. 1872, that the defendant, Ahmedbhái Habibbhái should “produce and give full inspection of all books of account of the late Habibbhái Ebráhim deceased and of the said Ahmedbhái Habibbhái as executor of the last