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These cases certainly show that a plaintiff must be held to the state of facts and equities alleged and pleaded by him in his plaint, or involved in or consistent therewith, and I do not see why a defendant is not similarly bound.

In the present suit not only is the case of adverse possession not raised by the written statement, but the direct contrary is alleged. The defendant has, in his written statement, solemnly affirmed to be true that very fact which in the witness-box he solemnly affirmed to be untrue, namely, that the plaintiff was in possession in 1865, and that, too, without affecting to give any explanation of the allegations in his written statement, or why his story was altered.

The first object of Courts of Justice is, by assertion on the one side and denial on the other, to bring the parties to issue; that is, to ascertain the point in dispute between them, and upon which they are to go to trial. This was done in early times by the parties orally in open Court in the presence of the Judge; now it is done by means of written pleadings. To allow a defendant, who has affirmed or denied one state of facts by his pleadings, to affirm or deny the direct contrary at the trial, would render pleadings worse than nugatory, and make them but a means of working injustice, and would be but to encourage fraud and perjury.

I hold, therefore, that it was not competent for the defendant to set up at the trial a case of adverse possession against the plaintiff, as being in direct contradiction of his written statement, and I decline to consider the evidence adduced on that point. The only defence open to the defendant is that of purchase, and this he has failed to prove.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* TUKAYA' BIN TAMANA'.

September 14.

Criminal Procedure Code (Act X. of 1872), Sections 220, 314, and 454—Penal Code (Act XLV. of 1860), Sections 457 and 380—Simultaneous conviction of several offences—Sentence.

In a case of conviction of house-breaking by night, in order to commit theft, under Section 457, and theft, under Section 380 of the Indian Penal Code, there may either be one sentence for both offences, or separate sentences for each

offence, provided that the total punishment awarded does not exceed that which may be given for the graver offence (1), (2).

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THE prisoner Tukayá bin Tamaná was tried by Shrinivas Ballagi, Magistrate 1st Class, at Ampur, in the District of Belgaum, on two charges, viz., house-breaking by night, under Section 457, and theft in a dwelling-house, under Section 380 of the Indian Penal Code, and, being convicted on both the charges, was sentenced by the Magistrate to suffer rigorous imprisonment for fifteen months as a punishment for both the offences. On a review of the Magistrate's criminal return, the High Court sent for the record and proceedings of the case, to see whether, regard being had to their ruling in *Reg.* v. *Haridás*, it was a material error on the part of the Magistrate, 1st Class, not to have passed separate sentences. On receipt of the record the question was considered by WEST and PINHEY, JJ., and submitted for the opinion of a Full Bench with the following remarks :—

WEST, J. :—In this case the Magistrate, having convicted the accused of house-breaking by night and of theft committed on the same occasion, has sentenced him, under Sections 457 and 380 of the Indian Penal Code, to fifteen months' rigorous imprisonment. The sentence being a single one, the case has been called for to determine whether "it was a material error not to have passed separate sentences" for the house-breaking and the theft.

In the case of *Reg.* v. *Haridás Shámdás* and others, disposed of on the 18th February 1875, it was ruled that, on a conviction of house-breaking and of theft, the Court is bound to pass separate sentences for each of the two offences, on each element of the joint offence. In the previous case of *Reg.* v. *Govindá*, disposed of on the 11th December 1873, it had been laid down in a similar case that, advertence being had to the provisions of Section 454 of the Criminal Procedure Code, the two offences were, for the purpose of awarding punishment, to be regarded as one. The accused,

(1) Similarly in the case of a conviction of several offences under Section 453 of the Criminal Procedure Code, it appears to be a matter of indifference whether several sentences are passed or an aggregate sentence, *Reg.* v. *Gulám Abás*, 12 Bom. H. C. Rep. 147.

(2) See the case of *Noujan*, 7 Mad. H. C. Rep. 375, and the *Queen* v. *Nungroo*, 6 N. W. P. H. C. Rep. 293.

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having been sentenced to imprisonment for the house-breaking, and to whipping for the theft, was made subject to a punishment (imprisonment *plus* whipping) greater than could have been inflicted upon him for the graver of the two offences, he not having been previously convicted. If a separate sentence must of necessity be passed for each offence of which an accused person is convicted, under the several heads of a multiple charge, and the sentence is in each instance to be controlled only by the law applicable to the offence regarded as standing apart from those embraced in the other heads of the charge, it does not seem that the punishment of whipping for a theft, added to one of imprisonment for a house-breaking, could properly have been regarded as illegal. In *Reg.* v. *Govindá*, therefore, the sentence of whipping ought to have been allowed to stand. But while Sections 220 and 314 of the Code of Criminal Procedure are not to be deprived of their intended operation, and it may be consistent with the recognition of this principle that while they are allowed without qualification to govern the ordinary cases of offences not closely connected together and forming the embodiment of a substantially single criminal intent, the provisions of Section 454 shall be held to apply, as those of a more special enactment, to the class of cases embraced within the scope of that section, and so far to act in the particular instances by way of modification of the more general earlier rules. The illustration to para. III. of Section 454 indicates that house-breaking *plus* an offence for the perpetration of which the house-breaking was committed, are regarded by the Legislature, for purposes of punishment, as one combined offence. Para. III. says that the aggregate punishment is not to exceed that of the combined or graver offence, and it seems unlikely that separate sentences were meant to be insisted on, which in the aggregate could not award more punishment than could be awarded by a single sentence. The paragraph, while it speaks of separate charges for each elementary offence, says nothing of separate sentences, and its mention of "a punishment", not "punishments", seems to indicate that a single punishment by a single sentence was rather contemplated in the case of complex crimes. It is, no doubt, legal to pass sentences on each head of a charge, though those heads together go to make up a charge of a single complex offence, if these in the aggregate satisfy the provision of para. III. of Section 454; but it does not seem to

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be illegal to pass a single sentence in such cases, by which precisely the same result may be obtained, and the apparent purpose of the Legislature in some instances more completely secured. But it is necessary that this question should be disposed of by a Full Bench, to which we accordingly refer it.

Accordingly the question was considered by a Full Bench, consisting of WESTROPP, C.J., KEMBALL, WEST, and NA'NA'BHA'I HARIDA'S, JJ., on the 14th September 1875.

No counsel or pleader was instructed either on behalf of the Crown or the prisoner. The following is the decision of the Full Bench :—

PER CURIAM.—There should either be one sentence for both offences in a case of conviction of house-breaking by night in order to commit theft, and theft, not exceeding that which may be given by the law for the graver offence, or separate sentences for each offence, provided that in the aggregate the punishment awarded does not exceed that which may be given for the graver offence.

[APPELLATE CIVIL JURISDICTION.]

1876. April 5.

Special Appeal No. 405 *of* 1875.

RAGHAPA' BIN HANMAPA' (DEFENDANT AND APPELLANT) *v.* PARA'PA' BIN SHIVA'PA' (PLAINTIFF AND RESPONDENT).

The Civil Procedure Code (Act VIII. of 1859*), Section* 119*—Ex parte decree.*

The Court of first instance refused to receive the defendants' written statement, because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained. The Court, however, framed the issues in the presence of the defendants' pleader, who was also permitted to cross-examine the plaintiff's witnesses. The Court made a decree in favour of the plaintiff. In appeal, the District Judge held that the decree of the first Court was *ex parte*, under Section 119 of the Civil Procedure Code, and that, therefore, no appeal lay.

Held by the High Court in special appeal that the decree of the first Court was not *ex parte* under the circumstances.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, reversing the decree of the Subordinate Judge of Gadak.