1875.

REG. v. TUKA'YA' BIN TAMANA'.

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.

1876.

RAGHAPA' BIN HANMAPA' v. PARA'PA' BIN SHIVA'PA'.

Parápá bin Shivápá brought this suit against Raghapá and Gadgeápá. Neither of the defendants appeared either in person or by a pleader on the day (1st February 1875) which was fixed for them to appear and file their written statements. On the 9th March 1875, however, a written statement was tendered on behalf of Raghapá. The Court declined to receive it, on the ground that it had not been presented on the day fixed, and the delay had not been satisfactorily accounted for. The Court, however, framed the issues in the presence of the defendants' pleader, who was also allowed to cross-examine the plaintiff's witnesses. The Subordinate Judge passed a decree in favour of the plaintiff. In appeal the District Judge raised a preliminary issue whether an appeal lay in the case, and held that as the defendants' written statement had not been received by the Subordinate Judge, because not presented at the proper time, the judgment of the first Court was *ex parte* within the meaning of Section 119 of the Civil Procedure Code, and that, therefore, no appeal lay. The District Judge accordingly dismissed the appeal, citing *Syud Mahomed Hossein* v. *Shaik Muntozul Huq* (1) in support of his decision.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Mánekshâh Jehángirshâh for the appellant:—The defendant was present in Court with his *vakil* on the day when the issues were settled, and tendered a written statement which the Court refused to receive. His pleader cross-examined the plaintiff's witnesses. The decree, therefore, cannot be said to have been passed *ex parte*. An appeal consequently lies in such a case.

Dinkar Gangádhar for the respondent:—The defendant was absent at the first hearing. His written statement was tendered at the second hearing, which was fixed for the settlement of issues. The decree, therefore, was *ex parte*, and no appeal lies.

WESTROPP, C.J.:—There were issues settled in this cause in the presence of the defendants' pleader, who, moreover, was permitted to cross-examine and did cross-examine the witnesses. Hence there is no ground for maintaining that the decree of the Subordinate Judge was *ex parte*. We reverse the decree of the District Judge, and direct him to proceed to hear the appeal on the merits. Costs of the special appeal to abide the result.

(1) 18 Calc. W. Rep., 400 Civ. Rul.