REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

QUEEN-EMPRESS *v.* DORA'BJI HORMASJI.* 1885. *September* 9.

The Code of Criminal Procedure (Act X of 1882), *Sec.* 437—*Inquiry—Further inquiry—Fresh inquiry—Jurisdiction—Notice—District Magistrate—Subordinate Magistrate.*

When a complaint has been dismissed under section 203 of the Criminal Procedure Code (Act X of 1882), or an accused person discharged by a Subordinate Magistrate, the District Magistrate has power, under section 437 of the Code, to direct any Magistrate subordinate to him to make further inquiry into the complaint dismissed, or into the case of the accused person discharged, even though there be no additional evidence disclosed, or allegation that such exists.

The term "further inquiry" in section 437 is not restricted to "inquiry upon further materials or further or additional evidence."

Before directing further inquiry under section 437 it is not obligatory on the District Magistrate to give notice to the person discharged, or against whom the complaint was dismissed.

When an order directing such inquiry is made, the Subordinate Magistrate to whom it is directed, has jurisdiction, and is bound to carry it out.

Such order remains in force until it is duly set aside or withdrawn.

Difference between the powers of the District Magistrate under the former Criminal Procedure Code (Act X, 1872,) and the present one (Act X, 1882,) pointed out.

Imperatrix v. *Gowdápá* (1) explained.

Chundi Churn Bhuttacharjea v. *Hem Chunder Banerjea*(2) commented on.

Jeebunkisto Roy v. *Shib Chunder Das* (3), *Queen-Empress* v. *Hasnu* (4), and *Queen-Empress* v. *Amir Khán* (5) commented on and doubted.

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882), by G. W. Vidal, District Magistrate of Thána, for the orders of the High Court. He stated the case thus:—

"1. The accused in this case was prosecuted, under sections 25 and 26 of the Railway Act IV of 1879, before Ráv Sáheb Sitárám Dámodar, First Class Magistrate, Kalyán. It was shown by the witnesses for the prosecution that the accused, Dorábji Hormasji,

*Criminal Reference, No. 100 of 1885.

(1) I. L. R., 2 Bom., 535.
(2) I. L. R., 10 Calc., 207.
(3) I. L. R., 10 Calc., 1027.
(4) I. L. R., 6 All., 367.
(5) I. L. R., 8 Mad., 336.

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was the driver of a goods' train on the North-East Division of the G. I. P. Railway on the night of the 14th March, 1885; that the train in question was timed to leave Kására at 8-35 P.M., and to reach Kalyán at 11-55 P.M. on the same evening; that the driver passing the Titwálla Station at 11-20 P.M. arrived at Kalyán at 11-30 P.M., instead of 11-55 P.M.; that the driver thus drove his engine at an excessive rate of speed, the usual time allowed for goods' trains between Titwálla and Kalyán being 30 minutes; that on arriving at Kalyán the No. 56 up goods' train was standing at the station and was duly protected by two semaphore signals as required by the rules; that the accused, disregarding the danger signals, drove his train No. 6 into the Kalyán Station at a speed of from 15 to 20 miles an hour, and caused a collision between his train and the No. 56 up goods' train, which resulted in the rear brake of that train being broken to pieces and in two other wagons of the same train being damaged.

"2. The above is a brief outline of the case for the prosecution. If the evidence offered in support of the above allegations showed that the facts were as above described, it is clear that the accused committed the offences punishable under sections 25 and 26 of the Railway Act IV of 1879, (1) by performing his duty in an *improper manner*, and (2) by endangering the safety of persons while in the discharge of his duty by disobedience of rules and by a rash and negligent act.

"3. The First Class Magistrate after hearing the evidence for the prosecution and examining the accused, for the reasons set forth in his order of the 8th May, 1885, discharged the accused under section 253 of the Code of Criminal Procedure (X of 1882).

"4. At the instance of the railway authorities I called for the records of the case under section 435 of the Criminal Procedure Code (X of 1882), and being satisfied, after reviewing the evidence, that the order of discharge was under the circumstances an improper one, and that the evidence, if unrebutted, was sufficient to support a charge under section 26 of the Railway Act IV of 1879, I directed, under section 437 of the Criminal Procedure Code and for the reasons set forth in my proceeding and order of the 4th July, 1885, that further inquiry should be made into the complaint,

and transferred the case for this purpose to the Court of Mr. H. W. Bagnell, First Class Magistrate, under section 528 of the same Code.

"5. Mr. Bagnell on receipt of this direction under section 437 appointed a day accordingly for the further inquiry, and issued processes to secure the attendance of the accused and the witnesses. On the case being called on it was objected that Mr. Bagnell had no jurisdiction, on the grounds, as set forth in his finding of the 17th July, 1885, (1) that the accused had not, prior to the District Magistrate's order under section 437, been served with a notice to show cause why such order should not be made; and (2) that the accused, having been discharged after a full inquiry before a competent Court, was entitled to the benefit of such discharge, unless some further evidence was disclosed.

"6. As regards the first objection, Mr. Bagnell found that no notice had been issued to the accused. In support of this objection the authority of the ruling of the Allahabad High Court in the case of *Imperatrix* v. *Hasnu* [1] and that of *Chundi Churn Bhuttacharjea* v. *Hem Chunder Banerjea* [2] was quoted.

"7. As regards the second objection, also, Mr. Bagnell found that a full inquiry before a competent Magistrate had been held. This objection was supported by the ruling of the Calcutta High Court in *Jeebunkisto Roy* v. *Shib Chunder Das*[3].

"8. On the facts as above stated the First Class Magistrate held that he had no jurisdiction to proceed with the case, or to comply with the order of the District Magistrate, under section 437 of the Criminal Procedure Code (X of 1882). He consequently discharged the accused, and forwarded the proceedings for any further steps that might be thought necessary.

"9. My opinion is, that the order of discharge under section 253 passed by Ráv Sáheb Sitárám Dámodar was improper, on the ground that the evidence recorded by him disclosed a strong *primâ-facie* case against the accused, of having committed the offence or offences charged against him, and that the accused should, therefore, have been put on his trial, and not discharged.

(1) I. L. R., 6 All., 367. (2) I. L. R., 10 Calc., 207.
(3) I. L. R., 10 Calc., 1027.

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"10. I think, also, that Mr. Bagnell was wrong, in view of the order under section 437 directing further inquiry to be made, in holding that he had no jurisdiction. The rulings quoted, upon which it is to be presumed that Mr. Bagnell relied, certainly support the contentions, (1) that notice to the accused to show cause was essential, and (2) that a further inquiry under section 437 means an enquiry on fresh evidence, and not a rehearing on substantially the same evidence. But I cannot find that the Bombay High Court has in any recorded ruling placed the same interpretation on section 437 as regards either of the points, and it appears to me that Mr. Bagnell's proper course under the circumstances would have been to record the objections raised, and postpone further proceedings until such a date as would have given the accused opportunity in the interval to take steps to get the order, passed by me under section 437, set aside by the High Court, if irregular.

"11. Under these circumstances it appears that the proper course now is for me to submit the proceedings in the original case, and the further proceedings consequent on my order under section 437, for the orders of the High Court.

"12. Should the High Court be of opinion that the evidence recorded in the case was sufficient, if unrebutted, to sustain a charge under sections 25 and 26 of the Railway Act IV of 1879, I would request that the order of discharge passed by Ráv Sáheb Sitárám Dámodar under section 253 be set aside, and that further inquiry may be directed to be made."

Anderson for the accused.—The District Magistrate had no jurisdiction to make the order directing the Subordinate Magistrate of the First Class, Mr. Bagnell, to make further inquiry—*Imperatrix* v. *Gowdápá*[1]. That was a case under Act X of 1872. If that case is sound law under the old Code of Criminal Procedure, it is, *a fortiori*, so under section 437 of the present Code, there having been in this case a full and complete inquiry. If it were not sound law, the ridiculous result pointed out by Melvill, J., in the above cited case would follow, *viz.*, "the District Magistrate, if not satisfied with the order of discharge passed

(1) I. L. R., 2 Bom., 535.

by one Subordinate Magistrate, might refer the case for fresh inquiry to every one of his subordinates in succession, and, if each inquiry resulted in the discharge of the accused, the District Magistrate might, as a last resource, try the case himself." My contention is supported by the cases of *Chundi Churn Bhuttacharjea* v. *Hem Chunder Banerjea*[1]; *Jeebunkisto Roy* v. *Shib Chunder Das*[2]; *Queen-Empress* v. *Hasnu*[3]; *Queen-Empress* v. *Erramreddi*[4]; and *Queen-Empress* v. *Amir Khán*[5]. Supposing the District Magistrate had jurisdiction to make the order, he ought not to have made it in the circumstances of the case. In an unreported case of *Queen-Empress* v. *Dondi Bogar*, decided by West and Nánábhái Haridas, JJ., on the 3rd of December, 1884, and which is noted in the statement of criminal rulings by the High Court at Bombay for the year 1884, it was held that "where the trying Magistrate had arrived at the conclusion that no *primâ-facie* case had been made out against an accused person, the High Court could not command him to arrive at a different conclusion on the facts." The order made by the District Magistrate in this case was, moreover, made *ex parte* without notice to the accused. Section 437 of the Code should be construed by the light of sections 436 and 439, and interpreted so as to forbid the District Magistrate from making an order prejudicial to the accused without giving him a notice. The term "further inquiry" in section 437 means inquiry on further materials or further or additional evidence. The same expression occurs in section 423, cl. (*a*). The expression "fresh inquiry" occurs in section 436, which, however, relates to cases exclusively triable by a Court of Sessions, and seems defectively worded.

V. N. Mandlik, Government Pleader, for the Crown.—The case of *Imperatrix* v. *Gowdápá*[6] was under the old Code. Section 437 of the Code of 1882 gives to the District Magistrate more extended powers. It enables the District Magistrate to order further inquiry "into the case of *any* accused person who has been discharged." The other cases cited do not touch the point

(1) I. L. R., 10 Calc., 207.
(2) I. L. R., 10 Calc., 1027.
(3) I. L. R., 6 All., 367.
(4) I. L. R., 8 Mad., 296.
(5) I. L. R., 8 Mad., 336.
(6) I. L. R., 2 Bom., 535.

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of the District Magistrate's jurisdiction. In the case of *Queen-Empress* v. *Pirya Gopál*[1] it was held that First Class Magistrates were subordinate to the Magistrate of the District within the meaning of section 435. Section 437 requires no notice to be given to the accused. The Legislature has provided notice in sections 436 and 439, and by omitting it in section 437 clearly shows its intention not to require it. *Expressio unius est exclusio alterius.* The District Magistrate must by his order have intended some substantial further inquiry in consonance with law. Section 4 of the Code defines "inquiry" to include *every* inquiry conducted under the Code by a Magistrate or Court.

NÁNÁBHÁI HARIDÁS, J.—This is a reference made to us, on the 25th July last, by the District Magistrate of Thána under the following circumstances :—

The accused was prosecuted by the G. I. P. Railway Company before Ráv Sáheb Sitárám Dámodar, First Class Magistrate, Kalyán, under sections 25 and 26 of the Railway Act (IV of 1879).

The Magistrate, after hearing the evidence for the prosecution, and examining the accused, discharged him on the 8th May last under section 253 of the Criminal Procedure Code (X of 1882), for the reasons stated by him in his order of that date.

With that order the railway authorities were not satisfied, and they moved the District Magistrate to send for and look into the case. This the District Magistrate did, and the result of his examination of the record was that he was satisfied that the order of discharge passed on the 8th May was an improper order. He thought that the evidence, if unrebutted, was sufficient to support a charge under section 26 of the Railway Act IV of 1879. He, accordingly, under section 437 of the Criminal Procedure Code (X of 1882), and for the reasons stated by him in his order of the 4th July last, directed "further inquiry," and transferred the case for that purpose to another First Class Magistrate, Mr. Bagnell, under section 528 of the Criminal Procedure Code (X of 1882).

On receipt of this order Mr. Bagnell appointed a day (17th July) for making the "further inquiry," and issued processes for the attendance of the witnesses and the accused.

(1) I. L. R. 9 Bom., 100.

On the day appointed, Mr. Bagnell took up the case. No one appeared for the Railway Company, but Mr. Anderson appeared for the accused; and, after hearing such arguments as were offered to him on behalf of the accused, Mr. Bagnell was of opinion that he had no jurisdiction to carry out the District Magistrate's order directing such "further inquiry," because that order, according to him, was not warranted by law, for the reasons stated by him. The accused was, therefore, again discharged, and Mr. Bagnell returned the proceedings to the District Magistrate for such steps being taken as the latter might deem fit. Mr. Bagnell thus declined to carry out an express order of the District Magistrate. His reasons for doing so we shall presently consider.

Under the above circumstances the District Magistrate has, under section 438 of the Criminal Procedure Code (X of 1882), made this reference to us, in order that under section 439 we may pass such orders on the case as we may deem fit.

As the re-opening of the case against the accused, and consequently his re-arrest, were at the instance of the railway authorities, we thought it desirable that they should have notice of this reference, in order that they might, if they wished to be heard, have an opportunity of appearing before us. We, accordingly, directed a notice to them, and a similar notice to the Government Pleader. The railway authorities have chosen not to appear. The Government Pleader has appeared in support of the reference.

Now, it seems to us that the questions we have to decide on this reference are:—

(1). Whether Mr. Bagnell had jurisdiction or not to carry out the District Magistrate's order of the 4th July last?

(2). Whether the District Magistrate had jurisdiction or not to make such order? and

(3). What orders we should now pass under the circumstances brought to our notice in the course of the arguments, or otherwise appearing in the case?

Our decision upon the first question must evidently depend upon our decision upon the second; for, if the District Magistrate had jurisdiction to make the order for "further inquiry," Mr. Bagnell

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has not only jurisdiction, but was bound to carry out that order, whatever opinion he may have entertained as to its propriety; and, accordingly, we directed the arguments to be first confined to that point.

In support of his contention that the District Magistrate had no jurisdiction to make the order he did, Mr. Anderson has referred us to *Imperatrix* v. *Gowdápá*[1]. This case was followed by a Full Bench in *Imperatrix* v. *Hargovan Nathu*[2] on the 10th October, 1878. So far, therefore, as it applies to the case before us, we are bound to follow it, sitting as a Division Bench. Let us, then, see how far, if at all, it applies to the case before us. At first sight it appears to be one directly in point, and, therefore, one that must govern the present case. But a careful comparison of the facts of that case with those of the present, and a similar comparison of the provisions of the former and present Codes of Criminal Procedure lead us to the conclusion that it does not govern the present case at all. It was a case in which the accused had been discharged by a First Class Magistrate under section 215 of the former Criminal Procedure Code (Act X of 1872). The case was called for under section 295 of the same Code by the District Magistrate, who "not being satisfied with the reasons given for the order of discharge, sent the record to another First Class Magistrate....., directing him to try the case afresh." The High Court held that section 296 of the Code, which empowered the District Magistrate to interfere in certain cases of discharge by Subordinate Magistrates, did not include cases of discharge under section 215, which that case was, and that, therefore, in that particular case, coming under section 215, it was incompetent to the District Magistrate to make the order he did. They, accordingly, held that "the proper course for the Magistrate of the District to adopt is to refer the proceedings for the orders of the High Court," who could deal with the matter under section 297 of the Code. To have a clear understanding of this ruling it is desirable to consider the provisions of the different sections of the Criminal Procedure Code then in force. Section 215, which was a part of Chapter XVII, treating "of the

(1) I. L. R., 2 Bom., 535. (2) Unreported.

trial of warrant cases by Magistrates," directed that if a Magistrate, after examining the complainant and the witnesses for the prosecution, and after examining the accused, "finds that no offence has been proved against the accused person," he shall discharge him." Section 295 enabled the District Magistrate to call for records to satisfy himself *as to the legality of any sentence or order* passed by a subordinate Court. Section 296 empowered him to report cases for the orders of the High Court. It empowered him also, when an accused person was "improperly discharged" and the case was a "Session case," to "direct the accused person to be committed for trial." It further empowered him, "if the evidence shows that some other offence has been committed by the accused person," to direct *the subordinate Court* "to inquire into such offence." Melvill, J., in the case referred to, after considering the provisions of section 296, observes: "According to the ordinary rules of construction, the conclusion from this express provision is that, *in cases other than those specified in section* 296, the Magistrate of the District cannot order *a fresh inquiry* when there has been a discharge by a Subordinate Magistrate." The case he was dealing with was one not specified in that section.

Now, let us consider the corresponding sections of the present Code of Criminal Procedure. Section 253, para. 1, (para. 2 having no bearing upon the question before us), substantially agrees with section 215 of the former Code, and it was under this section (253) that the accused in the present case was discharged. Section 435, para. 1, of the present Code corresponds with section 295 of the former, and empowers the District Magistrate to call for papers to satisfy himself *as to the correctness, legality, or propriety of any finding, sentence or order* of any subordinate Court. This enlarges the scope of the District Magistrate's inquiry. Section 436 corresponds with section 296 of the former Code. Section 437 corresponds with section 298 of the previous Code, and a comparison of the provisions of these two sections will show clearly what powers, not possessed by the District Magistrate under the former Code, have been, since its repeal, conferred upon him by the new Code.

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Section 298 empowered a District Magistrate to "direct any Subordinate Magistrate to make further inquiry into *any complaint dismissed* under section 147," which had reference only to dismissal of complaints before any process was issued for the accused's appearance, and is re-enacted in section 203 of the present Code. Now, section 437 of the present Code, under which the District Magistrate has acted in making his order of the 4th July last, provides that "on examining any record, under section 435 or otherwise,.....the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203," [up to this point the power under the two sections is the same], "or", (and note this is the new power given to the District Magistrate which he did not possess under the former Code which Melvill, J., was discussing in the case cited), "into the case of *any accused person who has been discharged.*"

This new provision in the present Criminal Procedure Code clearly empowers the District Magistrate to interfere with the discharge of "any accused person" whatever by a Subordinate Magistrate, whether the case is one triable by a Court of Session and the order of discharge one under section 209, or by a Magistrate and the order one under section 253 of the Code. When the District Magistrate has ordered the very thing to be done which the Code empowers him to order, and in the very words of the Code, it is difficult to say he had no jurisdiction to order it.

In support of the same contention—want of jurisdiction in the District Magistrate to make the order—further arguments are offered to us based on *Chundi Churn Bhuttacharjea* v. *Hem Chunder Banerjea*(1); *Jeebunkisto Roy* v. *Shib Chunder Das*(2); *Queen-Empress* v. *Hasnu*(3); *Queen-Empress* v. *Erramreddi*(4); and *Queen-Empress* v. *Amir Khán*(5). These arguments, however, which we shall notice further on in connection with those

(1) I. L. R., 10 Calc., 207.
(2) I. L. R., 10 Calc., 1027.
(3) I. L. R., 6 All., 367.
(4) I. L. R., 8 Mad., 296.
(5) I. L. R., 8 Mad., 336.

cases, seem to us to be directed against the correctness or propriety of the District Magistrate's order, as distinguished from his jurisdiction to make such order. The two things are clearly distinguishable. A Magistrate may have undoubted jurisdiction to punish for a certain offence—say theft, but he may, in a particular case, misapply the law, or misappreciate the evidence given, and convict or acquit on such misapplication or misappreciation. In such case his decision is wrong, incorrect, or improper, and an Appellate Court, or a Court of revision, when applied to, will reverse it on that ground, if satisfied of the same. In the present case the accused made no attempt to have the District Magistrate's order of the 4th July upset by a higher Court, on the ground of its being erroneous or improper, and it, therefore, still stands unreversed and in full force.

Such being the case, we are of opinion that the District Magistrate had jurisdiction to make the order he did on the 4th July, and that Mr. Bagnell had jurisdiction to carry it out. We are further of opinion that as a subordinate Court it was not competent to Mr. Bagnell to question the propriety of the District Magistrate's order, and that if he had any doubt on the point, he ought to have directed the accused to apply to the High Court to have it set aside, allowing him time for that purpose, and postponing the "further inquiry" pending the result of any such application. Instead of following this course, he improperly declined to exercise a jurisdiction vested in him by law, and we must accordingly upset his order of the 17th July.

We now proceed briefly to consider the arguments urged against the propriety of the District Magistrate's order and the cases relied upon in support of them. It is urged that, even though the District Magistrate had jurisdiction to make the order of the 4th July, he ought not to have made it under the circumstances appearing in this case. In support of this contention we are referred to certain cases. The first case referred to is that of *Chundi Churn Bhuttacharjea* v. *Hem Chunder Banerjea*[1]. It was a case in which the complaint had been

(1) I. L. R., 10 Calc., 207.

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dismissed, and the accused discharged by the Deputy Magistrate of Serampore. The Sessions Judge of Hoogly, on being applied to by the complainant, considered that "the judicial inquiry into the petitioner's complaint has been most perfunctory." He considered it was not a case of false complaint; but that there was a "real foundation for the complaint." He further held that "the record of the evidence by the Deputy Magistrate is a perfect burlesque of justice." Under these circumstances, purporting to act under section 437, Criminal Procedure Code (X of 1882), he directed another Magistrate—a Second Class Magistrate—Shama Churn Dás, "to make further inquiry into this case." This order was made *ex parte*, without any notice to the accused who thereupon applied to the High Court to set it aside. The order was set aside for reasons which we shall presently consider. It may be observed in this place that the procedure adopted by the accused in that case was the right one. The accused in this case before us omitted to apply to the High Court, and thereby virtually submitted to the District Magistrate's order of the 4th July, which order, therefore, is still unreversed and in his way. As already stated above, the High Court set aside the Sessions Judge's order directing the Second Class Magistrate to make "further inquiry." That order is based on three separate grounds, one of which seems to us to be sufficient to support it, though the others are also relied upon by the Court. It is that, under section 437, Criminal Procedure Code (X of 1882), it was not competent to the Sessions Judge to order a particular Subordinate Magistrate by name to make such inquiry. It may be said that if it is not competent to a Sessions Judge to do so, *a fortiori* it is not competent to the District Magistrate, as in this case, to do so, and this argument seems to have influenced Mr. Bagnell to some extent. But such an argument is evidently untenable, having regard to the express terms of section 437, Criminal Procedure Code (X of 1882); and Field, J., in his judgment in that case accordingly observes: "The Legislature appears to have contemplated that the Magistrate of the District should exercise a discretion as to the selection of any Magistrate subordinate to him, and this discretion seems to

have been vested in the District Magistrate, and not in the Sessions Judge." If this ground is good, as we are disposed to regard it, it alone is sufficient to support the order made by the learned Judges in that case; and the two other reasons given by them were not strictly necessary to the decision of the particular case before them. Still they are reasons concurred in by some other Judges, and, as they are pressed upon us in this case, we shall make a few remarks about them. As to one of those reasons—want of notice to the accused—since that is relied upon in this case as an objection to the District Magistrate's order, the learned counsel who represented the accused was unable to refer us to any thing in section 437, or in any other portion of the Criminal Procedure Code, which requires any notice to be given to the accused before an order can be passed under that section. It is, no doubt, a general principle of criminal jurisprudence that no order prejudicially affecting an accused person should be passed without giving him an opportunity of being heard, and there is nothing in the Code to prevent such notice being given. One may even go so far as to say that the District Magistrate would have done well, if he had given such notice in the present case before making the order he did. We ourselves give such notice, and we shall consider whether a rule should not be made and promulgated requiring the lower Courts to follow the same practice. But we cannot hold, in the absence of any such provision in the Code, and of any rule on the subject, that any such notice was absolutely necessary before the Magistrate made the order. The subject of notice and the principle above referred to were evidently not absent from the mind of the Legislature when section 437 was enacted. In section 436 there is an express provision for such notice being given, when an accused, improperly discharged in a case triable exclusively by a Court of Session, is to be committed for trial[1]; but there is no such provision when another step is to be taken against the accused under the same section[2]. Again, while there is no such provision in section 437, under which the District Magistrate

(1) Proviso (*a*). (2) Proviso (*b*).

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acted, there is one in section 439[1]. From this one may infer, that whenever the giving of notice is deemed necessary, the Legislature has expressly provided for it; and we are afraid we should be making a new law, instead of declaring the existing law, if we held that under section 437 it was necessary to give such notice before the District Magistrate made his order in this case, and that his order was bad for want of such notice. In this connection we would further notice the provisions of section 440 of the Code, which lays down that "no party has any right to be heard, either personally or by pleader, before any Court when exercising its powers of revision," which the District Magistrate was doing when he made the order in this case. It does not appear that this view of the matter was presented to the Calcutta High Court in the above case, or to the Allahabad High Court in the case of *Queen-Empress* v. *Hasnu*[2].

We next come to a somewhat more difficult question as to the meaning of the expression "further inquiry" in section 437, Criminal Procedure Code (X of 1882). It is urged before us, as it was urged before Mr. Bagnell, that the District Magistrate's order under section 253, Criminal Procedure Code, was not warranted by law, inasmuch as there had been a full inquiry by a competent Magistrate, and no further evidence was disclosed, and the same Calcutta case is relied upon in support of this contention. In that case Mitter, J., understands by that expression "further inquiry," an inquiry on "further evidence," and Field, J., an inquiry upon "further materials or further evidence." In another Calcutta case, *Jeebunkisto Roy* v. *Shib Chunder Das*[3], two other learned Judges (Tottenham and Norris, JJ.,) hold that "the law allows a further inquiry *only* where there has not been a full inquiry, and where further evidence is disclosed." The case of *Queen-Empress* v. *Hasnu*[4] is also substantially to the same effect; and so is that of *Queen-Empress* v. *Amir Khán*[5], although the learned Judges in that case observe that where an order for further inquiry, originally issued on insufficient grounds, is

(1) Para. 2.
(2) I. L. R., 6 All., 367.
(3) I. L. R., 10 Calc., 1027.
(4) I. L. R., 6 All., 367.
(5) I. L. R., 8 Mad., 336.

duly carried out, and further evidence has been forthcoming, they conceive it to be their duty "to uphold the proceedings, including the order."

Now, let us turn again for a time to the provisions of some of the sections of the Criminal Procedure Code to see if such is the correct interpretation of section 437. As observed by Turner, C. J., in the Madras case above referred to, we must, we think, read sections 435—439 together on this subject. Section 435, as formerly observed, empowers a District Magistrate to call for the record of any case from an inferior Court to satisfy himself "as to the *correctness*, legality or propriety of any finding, sentence, or order." This is large enough to include a finding of fact depending upon an appreciation of the evidence recorded by the lower Court. If, on examination of the record so called for, he is satisfied that the finding is correct—that the evidence has been correctly appreciated—he simply returns the record, assuming there is no other ground for interference. If, however, on such examination, he is satisfied that the finding is incorrect—that the evidence has not been correctly appreciated—and the accused "improperly discharged" on what seems to him to be a misappreciation of the evidence by the lower Court, what is he to do? We shall assume that in calling for the record he has acted *ex mero motu*, and not upon the complainant's application. The case may be one triable exclusively by a Court of Session or by a Magistrate. Section 436 empowers him, if the case is triable exclusively by a Court of Session, to order the accused to be committed for trial. In every other case of improper discharge, section 437 empowers him to direct "further inquiry."

The section does not say he can do that *only* when there is a "contention" that "further evidence" is forthcoming, or when "further evidence is disclosed," as laid down by the Calcutta High Court. And in the case we have assumed there can be no such "contention" or disclosure by any one. It may perhaps be desirable to impose some such restriction upon the very large powers of the District Magistrate; but we have no power to import any such restriction into the section, when the Legislature has expressly empowered him to make or order further inquiry

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"into the case of any accused person who has been discharged," without subjecting the exercise of that power to any such condition. Taking sections 435 and 437 together, his power to interfere in cases of improper discharge by inferior Courts, by ordering further inquiry, would seem to be co-extensive with the power of the High Court itself; and if no such condition can be imposed upon the exercise of such power by the latter, it is difficult to see how it can be imposed upon such exercise by the former. When such cases come before the High Court to be dealt with under section 439, the High Court may, exercising the powers of an Appellate Court under section 423, *reverse a finding*, or alter or *reverse an order*, not a conviction or sentence—in doing which it may have to differ in its appreciation of the evidence on the record—or it may direct "further inquiry," or under section 428 direct "additional evidence" to be taken, indicating the possibility of "further inquiry" without "additional evidence." Again, sections 375 and 380 *(d)* of the Criminal Procedure Code (X of 1882) clearly show that there may be a "further inquiry" without "additional evidence." It is true sections 375 and 380 relate to another class of cases, but that does not affect the question. If the Legislature conceived it to be possible that there might be a "further inquiry" without "additional evidence", as sections 375 and 380 would show was the case, the argument, that the expression "further inquiry" in section 437 necessarily implies "additional evidence", fails.

Suppose a Subordinate Magistrate has discharged an accused without considering some points bearing on the guilt or innocence of the accused, may not the District Magistrate, if satisfied of the impropriety of the order of discharge, decide those points himself, or direct them to be decided by the Subordinate Magistrate, on the evidence already on the record, and pass a new decision according as he finds them for or against the accused? There is nothing in the section to prevent his doing so. Besides, even if we assume that "further inquiry" necessarily implies additional evidence, we ought to bear in mind that additional evidence is frequently as effectually elicited by a further examination of the same witnesses, on the same or additional points,

as by an examination of new witnesses. There may be thus a "further inquiry" upon the same evidence, as well as upon additional evidence, whether elicited from the same witnesses or new witnesses.

In the Madras case above referred to, Turner, C.J., observes (p. 339):—"The Judge apparently regards the term" 'further inquiry' "as identical in meaning with the terms" 'fresh inquiry.' ....."This is not its obvious meaning." He refers to section 436, which enacts that in a case triable exclusively by a Court of Session, if an accused person has been "improperly discharged," the District Magistrate may, "instead of directing a *fresh inquiry*, order him to be committed for trial." This section evidently implies the power of directing a "fresh inquiry;" and, unless the expression "further inquiry" in the following section (437) is equivalent to, or includes a "fresh inquiry," there seems to be no other section in the chapter that gives the District Magistrate any such power—a point which does not appear to have attracted the learned Chief Justice's attention. Now, there is another consideration which has some bearing on the question before us. If an accused person is discharged by one Magistrate, that order does not amount to an "acquittal" under section 403. If, therefore, the complainant prefers another complaint to another Magistrate regarding the same matter, there is nothing to prevent such complaint being inquired into—*Kistorám Mòhara* v. *Anis*[1]; *Nowab Sing* v. *Kokil Singh*[2]; *Reg.* v. *Devama and Somshekhar*[3]; and *Queen-Empress* v. *Dhondi Bogar*[4].

For these among other reasons, as at present advised, we are not prepared to hold that the District Magistrate's order in this case was not warranted by law, even though no additional evidence was disclosed. But it is not necessary to express any very decided opinion upon this point; for, even assuming that "additional evidence" was necessary to render "further inquiry" possible in this case, it seems, from the record before us, that on receipt of the

(1) 20 Calc. W. R., Cr. R., 47.
(2) 24 Calc. W. R., Cr. R., 70.
(3) I. L. R., 1 Bom., 64.
(4) Bom. H. C. Cr. Rulings dated 3rd December 1884.

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District Magistrate's order of the 4th July, Mr. Bagnell directed a plan to be made of the locality, the scene of the accident, and he summoned the witnesses who were supposed to be cognizant of the facts of the case. If he had waited for the plan containing the particular information he wanted, and had further examined those witnesses, he would have had before him additional evidence upon which he might have come to a different conclusion from that which Ráv Sáheb Sitárám Dámodar had arrived at. It is not clear, then, that there was no room for further inquiry in this case. What the result of it would have been is quite another matter. Possibly, Mr. Bagnell would after such inquiry have come to the same conclusion as Ráv Sáheb Sitárám Dámodar, and in that case there was nothing to prevent the accused being again discharged. Such being the case, and, as already observed above, the District Magistrate's order being still in force, it remains for us to determine what orders we should now pass on this reference. The District Magistrate would probably not have taken up the case at all, if he had not been specially moved to do so by the railway authorities. They would seem to have been at first dissatisfied with Ráv Sáheb Sitárám's order of discharge. But they are evidently now satisfied with that order founded upon his appreciation of the evidence before him; for by not appearing before Mr. Bagnell, nor before us after notice, they have unmistakably shown their desire not to proceed any further against the accused. The whole of the evidence seems to have been reviewed at some length by Ráv Sáheb Sitárám in his judgment of the 8th May. He has disbelieved some of the witnesses as being interested in making out the accused to be guilty to save themselves from unpleasant consequences. He has attached little or no weight to the evidence of others, on account of their incompetencey to judge of matters deposed to by them, and has further found some to have tampered with the block book by "creating suspicious evidence." He has also observed contradictions and discrepancies in the statements of the witnesses, and relied upon the account given by the accused, which, according to him, is supported by the evidence of a disinterested witness for the prosecution. Thus upon a consideration of the whole of the evidence for the prosecution, with the demeanour of the witnesses

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before him, he has come to the conclusion that the evidence against the accused is not sufficiently strong to put him upon his defence. We have not heard Mr. Anderson upon that evidence, and are, therefore, not in a position to express any opinion as to whether Ráv Sáheb Sitárám is right or wrong in his estimate of it. But we find that the District Magistrate has come to an opposite conclusion. In doing so, however, he had not the advantage of a discussion of the evidence from the accused's point of view; and it is quite possible, if he had had that advantage, that he might have come to the same conclusion as Ráv Sáheb Sitárám had arrived at. The case is one of a somewhat complicated character, involving conflict of evidence, and we think the District Magistrate should now give the accused an opportunity of being heard in support of the order of discharge. If after doing so he considers that order to be right, or if it appears to him unnecessary or undesirable to prosecute the accused any further, he is at liberty to withdraw his order of the 4th July.

Order accordingly.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

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LAKSHMANDA'S BHAGATRA'MJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MANOHAR GANESH TA'MBEKAR AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Nibandh—Prescription—Grant—Allowance—Immoveable property—Hindu law.

The right to receive annually a fixed permanent allowance payable out of the revenues of a temple is '*nibandh*,' and must be regarded as immoveable property under the Hindu law; but this rule could not enable the right to be acquired by prescription.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of Ahmedabad, reversing the decree of Ráv Sáheb Harderám Anuprám Munshi, Subordinate Judge of Umreth.

The plaintiff, the priest of the temple of Raghunáthji, sued Manohar Ganesh Támbekar, *inámdár* and manager of the temple of Ranchhodráiji at Dákor, to recover five years' arrears of a fixed

* Second Appeal, No. 474 of 1883.