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(X of 1873) empowers a Court to administer an oath. The Magistrate who records a statement under section 164 is a Court. He is, therefore, competent to administer an oath to the person making the statement. If the statement is false, the person is liable to a charge of giving false evidence under section 191 of the Indian Penal Code. He is also liable under section 193 of the Penal Code. The police investigation is but preliminary to the proceedings before the committing Magistrate. The statement is, therefore, made at a stage of a judicial proceeding within the meaning of section 193 of the Penal Code. Refers to *Empress v. Malka*⁽¹⁾; *Imperatrix v. Irbasápá*⁽²⁾; *Queen Empress v. Parshráam Raysing*⁽³⁾.

PER CURIAM :—The Court is of opinion that a statement taken by a Third Class Magistrate under section 164 of the Code of Criminal Procedure, such Magistrate not having authority to carry on the preliminary inquiry in the case, is not evidence, in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code, such that when the statement is contradicted afterwards before the Magistrate having jurisdiction, and exercising it in the preliminary inquiry into an accusation of murder, it will form a sufficient basis for an alternative charge of giving false evidence in a judicial proceeding.

Conviction and sentence reversed.

(1) I. L. R., 2 Bom., 643. (2) I. L. R., 4 Bom., 479 (3) I. L. R., 8 Bom., 216.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

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March 22.

SHANKAR MURLIDHAR, (DEFENDANT NO. 2), APPLICANT, v. MOHAN-LA'L JADURA'M, (PLAINTIFF), OPPONENT.*

Contract Act (IX of 1872), Sec. 108, Exception I—Possession with consent of owner—Bailment—Bailee—Sale by bailee of goods bailed—Title of vendee.

The general rule laid down by section 108 of the Contract Act, that no seller can give to a buyer a better title than he has himself, is qualified by Exception I to that section. But the possession contemplated by that exception does not extend to every case of detention of chattels with the owner's consent. The exception has particular relation to the cases of persons allowed by owners to have

* Application, No. 200 of 1886.

the *indicia* of property, or possession under such circumstances as may naturally induce others to regard them as owners, and constituting some degree of negligence or defect of precaution imputable to the true owners.

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Where, however, the detention of a chattel is allowed for a particular limited purpose there is not a possession such as is required by the exception.

In the case of a gratuitous bailment of a chattel, the possession remains constructively with the owner.

S. left with C. a buffalo and a calf, to be taken care of during his absence from home. C. sold the animals to M. S. sued to recover them.

Held, that the bailment by S. to C. was a gratuitous one, or else a mere custody by C. for S.; that S. was, therefore, at the time of sale in constructive possession of the animals, and C. could not transfer to M. an ownership that he had not himself.

THIS was an application under section 622 of the Civil Procedure Code (XIV of 1882).

The applicant, Shankar Murlidhar, left a buffalo and its calf with one Chhaganlál, to be taken care of during his absence at Násik. On his return he found that Chhaganlál had sold the animals to Mohanlál for Rs. 80 on the 13th September, 1884. Shankar, therefore, sued Chhaganlál, and obtained a decree, in execution of which he recovered possession of the animals. Thereupon Mohanlál filed a suit, both against Chhaganlál and Shankar, to recover the animals in question. The Subordinate Judge held that Chhaganlál having been in possession of the cattle with the consent of the owner at the time of the sale, Mohanlál acquired a good title by his purchase, under Exception I to section 108 of the Indian Contract Act (IX of 1872), he having acted in good faith and under circumstances which were not such as to raise a reasonable presumption that Chhaganlál had no right to sell the cattle. He, therefore, passed a decree in Mohanlál's favour.

This decree was upheld, on revision, by the Acting Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Against this decision Shankar applied to the High Court under its Extraordinary Jurisdiction. A rule *nisi* was granted on the 23rd December, 1886.

Shivrám Vithal Bhandárkar for the applicant.

Naginlás Tulsidás for the opponent.

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WEST, J. :—In the present case the plaintiff Mohanlál sued to recover a buffalo and its calf. He alleged that he had purchased them in September, 1884, from Chhaganlál, and had then let them on hire to the vendor. In September, 1885, Shankar obtained a decree for possession of the buffalo and calf against Chhaganlál, and took possession of them under a decree in his favour. His case was that he had bailed the buffalo and a calf to Chhaganlál, to be taken care of during his (Shankar's) absence at Násik.

By this decree Mohanlál could not, of course, be affected, he not having been made a party to the suit and claiming under a title prior in origin to the suit of *Shankar v. Chhaganlál*.

When Mohanlál's suit came on for decision, the Subordinate Judge on the issue of Chhaganlál's ownership and of Mohanlál's purchase found in the affirmative. But his judgment sets forth very distinctly, in spite of some confusion of the parties, that he considered that the ownership of Shankar and his bailment to Chhaganlál were proved. He thought, apparently, that the mere leaving of the cattle by Shankar with Chhaganlál for care gave to Chhaganlál such a possession that Chhaganlál could sell them and give a good title to Mohanlál. As a fact, he found there had been such a sale, and he decreed a restoration of the cattle to Mohanlál, or, in default, payment of their value with costs.

The Special Judge, revising this decision, dealt only with the question of the alleged colourable sale by Chhaganlál to Mohanlál. He found the purchase had been a *boná fide* one on Mohanlál's part, and upheld the decree of the Subordinate Judge. He did not, though he remarks on the confusion in the Subordinate Judge's judgment, go into the question of whether Mohanlál could, even by a purchase in good faith from Chhaganlál, obtain a title better than that held by Chhaganlál himself. But though the general rule, of a person's not being able to transfer a right not belonging to him, is qualified by the Exception I to section 108 of the Indian Contract Act (IX of 1872), yet it is plain that "possession by consent of the owner" in that section is far from extending to every case of detention of chattels with the owner's

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consent. The exception has particular relation to the cases of persons allowed by owners to have the *indicia* of property or possession under such circumstances as may naturally induce others to regard them as owners, and constituting some degree of negligence or defect of precaution imputable to the true owners. Where, however, the detention of the chattel is allowed for a particular limited purpose, it has been held—*Greenwood v. Holquette*⁽¹⁾—that there is not a possession such as is contemplated by the Exception I to section 108 of the Indian Contract Act. The English case of *Johnson v. The Credit Lyonnais*⁽²⁾ is to the same effect. There a purchaser of a quantity of tobacco left it with the vendor, and sent for parcels of it according to his needs. It was held that the vendor's possession was not such that he could give a title by sale against the real owner. In *Lotan v. Cross*⁽³⁾ Lord Ellenborough said that in the case of a gratuitous bailment of a chattel the possession remains constructively with the owner, and Savigny says this is so even in the case of a letting for hire (see Savigny on Possession, sec. 23).

In the present case, Shankar's bailment to Chhaganlál, if it was made as the Subordinate Judge has found, was a gratuitous one, or else a mere custody by Chhaganlál for Shankar. According to the case just cited, there would, under such circumstances, be no change of possession. Chhaganlál would not hold the property except by mere detention, and could not, therefore, transfer to Mohanlál an ownership that he had not himself. The Special Judge has in a rather difficult case quite misconceived, as we think, the principles with which he ought to have approached the Subordinate Judge's judgment in revision. It would be attended with disastrous consequences, if any person, on whose field a buffalo was put to pasture, and who had promised to look after it, could sell the animal in fraud of the true owner. We reverse the decree of the Special Judge, in order that, after considering the facts as to Shankar's ownership and the relations amongst the parties, he may pass a new decision. Costs to abide the event.

Decree reversed and case remanded.

(1) 12 Beng. L. R., 42.

(2) L. R., 2 C. P. Div., 224.

(3) 2 Camp., 464.