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passed the orginal decree, but it would, we are inclined to think, be properly deemed to apply according to its spirit to an order by the appellate Court. However, it is not now necessary to decide the point, as we have no doubt that the decision was a right one for the reasons given by the Assistant Judge. The Assistant Judge refused to consider the application made to him to amend the decree under s. 206, as that question was not, strictly speaking, before the Subordinate Judge, and at the most he only expressed an opinion. We think the Assistant Judge adopted, on the whole, the right course, and we must confirm the order with costs.

Decree confirmed.

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13 B. 500.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

PARSOTAM VITHAL (*Plaintiff*) *v.* ABDUL REHMANBHAI (*Defendant*).*
[23rd January, 1889.]

Service of summons—Application for fresh issue—Civil Procedure Code (Act XIV of 1882), ss. 99 A and 72—Limitation—Practice.

An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is within the period prescribed by s. 99A of the Civil Procedure Code (Act XIV of 1882), if made within one year from the date of the nazir's countersignature below the bailiff's endorsement of non-service, the nazir being the proper officer of the Court to whom under s. 72 of the Code the summons is delivered for service, and who is to return it to the Court if unserved.

THIS was a reference by Rav Saheb Harisukhram Manekram, Subordinate Judge of Viramgam, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

[501] The suit was registered on the 17th September, 1887, and the original summons to the defendant to appear and defend the suit was on the same day issued for the 10th October 1887. It was delivered by the nazir to the bailiff on the 22nd September 1887. The bailiff went on the 7th October,—*i.e.*, three days before the day of hearing—to serve it, but found that the defendant's house was locked. On the same day he made his return to that effect, but it was not presented to the proper officer of the Court till the day of hearing, in consequence of the nazir having declined to countersign it till that day. The bailiff had put the date 10th October 1887, just close to the date of the return, 7th October, 1887, to show when the nazir's countersignature was made. The application for fresh summons was presented on the 9th October, 1888.

The question referred by the Subordinate Judge for the High Court's decision was—

Whether an application for a fresh summons to a defendant, the case against whom has lain over under s. 99A of the Code of Civil Procedure, 1882, in consequence of the summons originally issued having been returned unserved, is within the period of limitation prescribed by the section, *viz.*, one year, if it is made within a year of the date on which the summons was brought before the Court on the day of hearing fixed for the case?

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* Civil Reference, No. 17 of 1888.

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Manekshah Jehangirshah, for the plaintiff:—It is not from the date of the bailiff's return of the summons as unserved that the one year under s. 99A of the Civil Procedure Code (Act XIV of 1882) is to be counted. The bailiff is the nazir's subordinate, and not the proper officer of the Court entrusted with the service of the summons. The application in question, therefore, was within time as counted from the date of the nazir's countersignature.

Vasudev Gopal Bhandarkar, for the defendant, contended that s. 80 and the following sections of the Civil Procedure Code spoke of the person actually serving the summons, and it was from the date of the bailiff's return of the summons as unserved that the one year should be counted. The application of the plaintiff was **[502]** therefore, barred, being made more than one year from the bailiff's return of the summons.

JUDGMENT.

SARGENT, C. J.—The nazir is the proper officer of the Court to whom under s. 72 of the Code of Civil Procedure (Act XIV of 1882) the summons is delivered for service. It is, therefore, for him to return the summons to the Court as unserved, and this he does by countersigning the bailiff's endorsement. The one year would, therefore, run from 10th October, 1887, and the application for a fresh summons is not too late.

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13 B. 502 = 13 Ind. Jur. 469.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Candy.

QUEEN EMPRESS *v.* GUNDYA.* [28th January, 1889.]

Criminal Procedure Code (Act X of 1882), s. 530, cl. (p)—Offence originally cognizable by a Second Class Magistrate—Subsequently non-cognizable by reason of an aggravating circumstance—Duty of an inferior Court—Practice—High Court's power of interference.

The accused were charged before a Magistrate of the Second Class with causing grievous hurt as members of an unlawful assembly under ss. 149 and 325 of the Indian Penal Code. The evidence showed that one of the accused had used an axe in causing the hurt. The Magistrate apparently ignored this fact, and he convicted the accused under s. 325 of the Code. The accused appealed.

The District Magistrate who heard one appeal, and the First Class Magistrate who heard the rest of the appeals, were both of opinion that the offence committed by the accused was one of causing grievous hurt with a dangerous weapon, within the meaning of s. 326 of the Penal Code, and as such beyond the jurisdiction of the Second Class Magistrate. But they did not think it proper under the circumstances of the case to quash the convictions.

The Sessions Judge on examining the record of the case was of opinion that as the offence committed by the accused was not cognizable by the trying Magistrate, his proceedings were void *ab initio* under s. 530 of the Criminal Procedure Code. He, therefore, referred the case to the High Court, and recommended that the convictions under s. 325 should be set aside.

Held, that the proceedings before the the Second Class Magistrate were not void *ab initio*, as he had jurisdiction to try the accused for offences punishable under ss. 149 and 325 of the Indian Penal Code with which they were originally charged.

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* Criminal Reference, No. 152 of 1888.