"In Com. Dig. 'Imprisoment.' (G) it is said : 'Every restraint of the liberty of a free man will be an imprisonment.' For this the authorities cited are 2 Inst., 482 ; Hobert & Stroud's Case, Cro. Car., 209. But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the Statute of *Westminister* 2nd, (1 Stat. 13 Ed. 1, c. 48,) 'in prisona" and says, 'every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison.' The passage in Cro. Car. 209, (Hobert & Stroud's Case), is from a curious case of an information against Sir *Miles Hobert* and Mr. *Stroud* for escaping out of the Gate House prison, to which they had been committed by the king. The question was, whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in *London*, and through the favour of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate House : the occasion is somewhat singularly expressed in the decision of the Court which was, 'that their *voluntary* retirement to the close stool' in the Gate House 'made them to be prisoners'. The resolution, however, in question is this, 'that the prison of the [384] King's Bench is not any local prison confined only to one place, and that *every place* where any person is restrained of his liberty is a prison ; as if one take sanctuary and depart thence, he shall be said to break prison." *Per* Williams, J. (*Ibid.*, p. 748), "And it is that *entire* restraint upon the will which, I apprehend, constitutes the imprisonment."

If the Sessions Judge had applied that view of the law of the case to the facts he found, he would, it may be supposed, have passed an order under s. 437 of the Code of Criminal Procedure directing further inquiry. In that further inquiry the accused may meet the case for the prosecution by producing rebutting evidence. See *Hari Dass* v. *Saritulla* (1). The Magistrate may also take evidence which he has omitted to take, as in this case.

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13 B. 384.

CRIMINAL REFERENCE.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS v. SHANKAR.* [13th December, 1888.]

Sanction to prosecute—Criminal Procedure Code (Act X of 1882), s. 195 and 478—Court's power to proceed under s. 478 after sanction given to a private person—Dismissal of a complaint by a private person no bar to proceedings under s. 478.

The granting of a sanction to a private person under clause (c) of s. 195 of the Code of Criminal Procedure (Act X of 1882) does not debar a Civil Court from proceeding under s. 478 ; nor can the dismissal by a Magistrate of a complaint made by a private person be held to be a bar, till set aside to a proceeding under that section.

[F., 34 B. 88=11 Bom.L.R. 855 (857)=10 Cr.L.J. 431=3 Ind. Cas. 962 ; R., 31 M. 140 (148) (F.B.)=7 Cr.L.J. 54=17 M.L.J. 584=3 M.L.T. 79 ; 8 Bom.L.R. 694 (696) ; Rat, Unr. Cr. Cas. 587.]

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* Criminal Reference, No. 172 of 1888.

(1) 15 C. 608.

1888
DEC. 13.
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CRIMINAL REFERENCE.
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13 B. 384.

THIS was a reference by M. G. McCorkell, Sessions Judge of Kanara, under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was made in the following terms:—"The accused in this case was committed for trial under the provisions of ss. 478 and 479, Criminal Procedure Code, by Rav Saheb Vishwanath Vaikunt Wagh, on charges under ss. 468, 471, [385] and 511 of the Indian Penal Code. When the accused first appeared before the Court of Sessions, he was found to be not in a mental condition to be tried. The trial was accordingly adjourned to the 2nd November, on which date the accused appeared and was found to have sufficiently recovered his mental health to be in a position to plead to the charge and instruct his pleader and otherwise conduct his defence. When the charge was about to be read out to the accused, Mr. Shivram Subhrao, who appeared as his pleader, took exception to the legality of the commitment. The grounds on which the commitment is challenged, are as follows:—1. Inasmuch as the Subordinate Judge had granted a sanction, under s. 195 of the Code of Criminal Procedure, to a private individual, it was not competent to the Subordinate Judge to proceed against the accused in respect of the same charge. 2. The proceedings against the accused were instituted after a lapse of more than six months from the date on which the sanction was granted. 3. A complaint had been lodged by a private complainant on the 2nd July before a competent Magistrate of the first class, who dismissed the complaint; and the Subordinate Judge, or any one else, had no authority to lodge a fresh complaint until the order dismissing the first complaint had been cancelled. 4. Although objection was taken to the procedure of the Subordinate Magistrate when the matter was before him, he gave no heed to the objection, but has wrongly committed the case for trial. Two points appear to arise in this case. 1. When a Court has granted a sanction to a private person under s. 195 of the Criminal Procedure Code, is it competent for the same Court to institute proceedings against the same person for whose prosecution a sanction under s. 195 of the Code of Criminal Procedure has been granted, either while such sanction is in force or at any subsequent period? When a Court has granted a sanction to a private Individual under s. 195 of the Code of Criminal Procedure, and the person to whom the sanction was granted has lodged a complaint before a Magistrate competent to entertain and dispose of such complaint, and such complaint has been dismissed by the Magistrate, is it competent for the Court which granted the sanction to institute fresh proceedings against the person for whose [386] prosecution the sanction had been granted without having the order dismissing the complaint set aside by a competent authority? In my opinion, both these questions should be answered in the negative. The facts of the case necessary for understanding the present reference appear to be as follows. The present accused was a plaintiff in a certain suit in the Court of the Subordinate Judge of Honavar. That suit was compromised on the 6th July, 1886, the defendant paying Rs. 2 in cash to the plaintiff and agreeing to pay Rs. 8 on a certain fixed date. These terms of the compromise were reduced to writing. This "*rajinama*", or agreement, was duly completed and handed over to the plaintiff to be recorded by him in Court. Instead, however, of producing this document, he produced another totally different from the original "*rajinama*". Rav Saheb Ramachandra Venkatesh Chatki was the Subordinate Judge. It does not appear that the Court (*i.e.* Rav Saheb Ramchandra Venkatesh) took any steps to have the accused prosecuted. But on the 22nd March. 1887,

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Manjaya, the defendant in the civil suit, made an application for a sanction, and an order was passed on the 26th idem granting the requisite sanction. Manjaya never came forward to take out the sanction, and ultimately a notice was sent to him. In reply to this notice, the Court was informed that Manjaya was dead. Iraya, the son of Manjaya, however, came forward and asked that the sanction might be granted in his name. This was done, and the formal sanction was dated the 2nd January, 1888. It does not appear that any notice was given to the accused, either before the order of 26th March, 1887, or the granting of the sanction, on the 2nd January, 1888. The omission to allow the accused an opportunity to show cause was, in my opinion, a very grave one; but as authorities are conflicting as to the necessity of notice in such cases, it is impossible to say that the irregularity amounts to an illegality. Iraya had this sanction, but he took no action on it until the 2nd July, 1888, when he lodged a complaint before a first class Magistrate, who, however, dismissed it......Admittedly before the expiration of the six months, the Court which granted the sanction issued a warrant for the apprehension of the accused. This procedure was, I am of opinion, illegal. The Court authorized a certain [387] person to prosecute. The Court could not, while the sanction was in force, authorize any one else. The Court was competent to prosecute in the first instance: but when it granted the sanction to Iraya, it transferred its authority, and until that authority was revoked, either by lapse of time or cancellation of the sanction, I am clearly of opinion that the Court was *functus officio*, and the present prosecution and commitment are illegal.

There was no appearance for the Crown or for the accused.

OPINION.

BIRDWOOD, J.—The granting of a sanction under cl. (c) of s. 195 of the Code of Criminal Procedure to a private person does not, in our opinion, bar a Civil Court from proceeding under s. 478; nor can the dismissal by a Magistrate of a complaint made by the private person be held to be a bar, till set aside, to a proceeding under that section. A private person may never act on the sanction, or his sanction may fail, as in the present case. Is the Court, then, unable to take such further action as the interests of justice may demand? It seems to us that, even though a Court grants a sanction under s. 195, it is still at liberty to proceed under s. 478, especially under such circumstances as existed in the present case, where there was ground to suspect that the accused had induced the private complainant to withdraw from the prosecution. The Sessions Judge should, therefore, proceed with the trial.

JARDINE, J.—The two questions stated by the learned Judge relate to competency as a matter of law and not of discretion, and ought, in my opinion, to be answered in the affirmative. On principle there appears to be no reason why the mere fact that a Court had, under s. 195 of the Code of Criminal Procedure, given a private person sanction to prosecute, should debar the Court itself from instituting proceedings under s. 478. The sanction under s. 195 leaves the private person free to exercise his own unfettered discretion as to whether he will proceed or not—*In the matter of the petition of Girdhari Mondul* (1). But when a Court proceeds under s. 478, the responsibility for the prosecution rests upon the Judge

(1) 8 C. 435 (439).

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entirely; such a prosecution being a very different thing from a [388] prosecution instituted on the complaint of a private party, and merely sanctioned by the Court—*The Queen* v. *Baijoo Lall* (1). The object of all prosecutions is the punishment of offences committed; but if the view taken by the Sessions Judge is correct, this aim would, in many cases, be frustrated, as where the private person who has obtained the sanction compounds the offence, or wilfully delays so as to let the limitation of six months expire—*Empress* v. *Gauri Shankar* (2). So great an interference with the ordinary right of the Crown to prosecute offences would require express statute. But I find no such rule in the Code of Criminal Procedure or elsewhere; and as to the authorities, those I have cited above appear to me adverse to the Sessions Judge's opinion. Similar reasoning applies to the effect of the dismissal of the private person's complaint under s. 203 of the Criminal Procedure Code. Section 403 declares that a dismissal is not an acquittal such as bars a fresh trial for the same offence; it cannot be pleaded by the accused as a valid objection to his trial on the commitment to the Sessions; it thus resembles a Bill preferred to a Grand Jury, who throw it out. This cannot be pleaded afterwards as an acquittal—2 Hale Pl. Cr., 246. See also *Empress on the prosecution of Jogendronath Bose* v. *Thompson* (3). The case before us is not a summons case, and I do not wish my remarks to be taken as having any reference to the construction of s. 247 of the Criminal Procedure Code. The Sessions Judge leaves somewhat in doubt the question of fact, whether the complaint had been dismissed. Assuming now that it has not been dismissed, the sanction must have expired from lapse of time. In *Empress* v. *Nipcha* (4) it was held that where the person to whom the sanction was given did not avail himself of it, the Magistrate of the district was competent, under s. 142 of the Criminal Procedure Code of 1872, to take up the case without complaint. The object of chap. 35 of the Criminal Procedure Code is to enable the Courts to take prompt and effectual means to prosecute offences affecting the administration of justice. The cases already cited show that this aim of the Legislature would in many cases be delayed and frustrated if it [389] were held, that when a Court grants the sanction to a private person, it transfers its own authority. Instead, therefore, of quashing the commitment to the Sessions, we must direct the Sessions Judge to proceed with the trial.

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13 B. 389.

REVISIONAL CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* MURARJI GOKULDAS.* [20th December, 1888.]

Indian Oaths Act (*X of* 1873), *ss.* 8, 9, 10, 11—*Applicability to criminal proceedings*—"*Party to a judicial proceeding*" *does not include complainant or accused.*

The provisions of ss. 8—11 of the Indian Oaths Act (X of 1873) do not apply to criminal proceedings.

The expression "party to a judicial proceeding" in s. 8 of the Act does not include either the complainant or the accused in a criminal case.

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* Criminal Review, No. 435 of 1888.

(1) 1 C. 450. (2) 6 A. 42. (3) 6 C. 523. (4) 4 C. 712.