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limitation; it was held that when the question of limitation was decided in plaintiff's favour, then the amount of the mortgage-debt was to be decided. The case of *Hiru* v. *Bhikaji* (1) is very similar to the present case, the defendants admitting that there was a mortgage, but pleading that it was for a different sum and of an earlier date. But the case of *Moro* v. *Dada* (2) was very different, for there the defendant referred to a mortgage only to show that it had been paid off, not to admit any liability upon it.

We think therefore in the present case that the plaintiff was entitled to have the question of the mortgage for Rs. 256 inquired into, and we reverse the decrees of the lower Courts and remand the case for a decision on the merits. All costs hitherto incurred to abide the result.

Decree reversed and case remanded.

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[369] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* KHODA UMA AND OTHERS.* [27th June, 1892.]

Criminal Procedure Code (Act X of 1882), ss. 227 and 237—Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—Extradition—Lex fori.

The accused were subjects of His Highness the Gaekwar of Baroda. They were extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under s. 398 of the Indian Penal Code (XLV of 1860). The Sessions Judge amended the charge to one under s. 395, on the ground that, as the accused had been extradited on a charge under s. 395, they could be tried and convicted only under that section, and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them.

Held, reversing the order of acquittal, that it was competent to the Sessions Judge to alter the charge under s. 227 of the Code of Criminal Procedure (Act X of 1882) and under s. 238 to convict the accused of the minor offence, which the evidence established.

Held, also, that the Code of Criminal Procedure was applicable as *lex fori*.

[R., Rat. Unr. Cr. Cas. 773 (774).]

APPEAL by the Local Government against an order of acquittal passed by the Sessions Judge of Ahmedabad.

The accused were subjects of His Highness the Gaekwar of Baroda. They were charged with committing dacoity in a village in the Ahmedabad District. Their extradition was obtained on the representation of the District Magistrate of Ahmedabad that there was evidence to prove a *prima facie* case of dacoity against them.

The Magistrate, who held a preliminary inquiry into the matter, committed the accused for trial to the Court of Session on a charge of attempting to commit dacoity when armed with deadly weapons, an offence punishable under s. 398 of the Indian Penal Code.

The Sessions Judge was of opinion that, as the accused had been extradited for dacoity under s. 395 of the Penal Code, they could be tried

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* Criminal Appeal No. 84 of 1892.

(1) P. J. (1888) p. 131. (2) P. J. (1889) p. 159.

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only for that offence, and for no other. He, [370] therefore, amended the charge to one under s. 395 of the Code.

At the conclusion of the trial, the Sessions Judge, agreeing with one of the assessors, acquitted the accused for the following reasons :—

"The facts established against the accused are that they went to the complainant's field to steal grass. While so engaged they were disturbed. They abandoned the booty, and, in order to cover their retreat, they caused hurt to their pursuers, and also threatened them. Following the ruling of the Madras High Court in 1865 cited by both Mayne and Starling in their annotations of the Indian Penal Code, and *Reg.* v. *Kalio* (1), I am of opinion that the accused cannot be convicted of dacoity, and as they were extradited for trial on that charge, they cannot be tried and convicted of any other."

Against this order of acquittal the Government of Bombay appealed to the High Court.

Lang (Acting Advocate-General), with Rao Saheb *Vasudev Jagannath Kirtikar*, for the Crown.—Section 395 of the Indian Penal Code applies, as the evidence shows that the prisoners, when caught in the act of stealing, caused hurt to the complainant and his men. They were, therefore, guilty of dacoity. But, assuming that they committed theft only, the Sessions Judge had jurisdiction both to try and convict them of this offence. This jurisdiction is not taken away by the mere fact that their extradition was obtained on a charge of some other offence. Extradition is merely a means of bringing the offenders to trial before the proper Court. When they are brought before the proper Court that Court has jurisdiction to try them on any charge. Jurisdiction is independent of extradition. Jurisdiction is local: see Clarke on Extradition (2nd ed.), p. 101. There is no treaty preventing the British Government trying the prisoners on any charge. The treaty with His Highness the Gaekwar (see Aitchison's Treaties, Vol. IV, 230) provides generally for the surrender of all kinds of offenders. It does not specify any [371] particular offence for which they are to be surrendered, or tried when so surrendered. The ordinary law, therefore, applies, and the Sessions Judge had jurisdiction to try and convict the accused of dacoity, or of theft. Section 237 of the Criminal Procedure Code (X of 1882) would allow a conviction even under s. 382 of the Indian Penal Code.

There was no appearance for the accused.

JUDGMENT.

JARDINE, J.—The eight accused were committed for trial for attempt to commit dacoity under s. 398 of the Penal Code. The Sessions Judge amended the charge to one of dacoity under s. 395, being of opinion that as they had been handed over by the Gaekwar on a representation that they had committed dacoity they should be tried only under s. 395. Differing from one assessor, and agreeing with the other, he acquitted the prisoners and discharged them. The judgment shows that the Sessions Judge was satisfied that the eight prisoners did commit the alleged theft of grass, but that as they had abandoned the grass before they used violence to the owners, and as the violence was used to cover their retreat rather than secure the grass, the offence of dacoity was not committed. He also remarked that "as they were only extradited for trial on that charge they cannot be tried and convicted of any other." He gives no

(1) B.H.C. Cr. Ruling, 27th June 1872.

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authority in support of this proposition. The Advocate-General has argued on behalf of the appellant, the Governor of Bombay in Council, that the acquittal on the charge of dacoity is wrong, as the evidence is most consistent with the theory that when the prisoners being intercepted by the owners of the grass used violence, they meant by that means to prevent the recovery of the grass. That may possibly have been the fact, and it must have been so held by one of the assessors. But the question of intention is not beyond doubt; and we do not think sufficient reason has been shown for this Court to convict of dacoity. We concur, however, in the contention of the Advocate-General that there is nothing apparent in the circumstances of the extradition to justify the view of the Sessions Judge that the ordinary provisions of the Criminal Procedure Code were not binding on the Sessions Court as its *lex fori*. We think that it was competent to that Court to alter the charge under [372] s. 227, and that it was incumbent on it in its expressed views on the facts to convict of theft under s. 238, when acquitting of the more serious charge of dacoity. The offence was committed in the district of Ahmedabad. Therefore the local law applied: "Crimes are in their nature local: and the jurisdiction of crimes is local," per De Grey, C.J., in *Rafael* v. *Verelst* (1); *Keighley* v. *Bell* (2), and other cases mentioned in Forsyth's Constitutional Law, 249. "By the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to justice," per Heath, J., in *Mure* v. *Kaye* (3). It appears also that the British Government has a special convention with the Gaekwar, made in 1817, whereby the two contracting parties bind themselves in general terms to hand over "offenders." See Aitchison's Treaties, Vol. IV, p. 230. There seems to be no stipulation that the requisition to the Gaekwar shall state the offence in terms of the Penal Code: and the requirement of justice that the conviction shall be based on the facts proved, and the provision of s. 238 of the Procedure Code, which allows conviction for a minor offence not charged, as, *e.g.*, for theft on a charge of robbery or dacoity, do not conflict at all with the principles of comity or involve any breach of public faith. We reverse the order of acquittal of the eight prisoners, and convict them of the offence of theft, punishable under s. 379 of the Indian Penal Code, and we sentence each of them to rigorous imprisonment for three years.

TELANG, J.—The Sessions Judge has, on the evidence, come to the conclusion that the offence of dacoity is not proved against the accused. And although it is possible to arrive at a different conclusion on the question, whether, when they were obstructed, they had abandoned their booty, still I do not think the evidence is such as to justify us in adopting that conclusion against the opinion of the Sessions Judge. And if the opinion of the Sessions Judge on the question of fact is accepted, the Madras case quoted by him is an authority for holding that the terms of s. 390 are not satisfied. The Sessions Judge was, [373] therefore, right in his decision that the accused in this case could not be properly convicted of dacoity. He has, however, further decided that the accused cannot be tried or convicted on any other charge. He lays it down broadly that when the extradition of an accused person has been obtained on a representation charging him with a particular offence, the Court can try him only for that offence. According to the Sessions Judge's view, it is apparently not competent to the Court to try or

(1) 2 W. Blackstone, p. 1058. (2) 4 Fost. & Fin. 790. (3) 4 Taunt, 43.

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convict the accused of any other offence, even though it is of a character cognate to the one mentioned or referred to in the extradition proceedings, and even though it is proved by substantially the same facts as those alleged for obtaining the extradition. The Sessions Judge has not quoted any authority for the proposition he has laid down; and it is certainly not one which can be said to be self-evident. *Prima facie*, indeed, it would appear to be erroneous. For if it is once conceded that the Court before which the accused are put upon their trial has jurisdiction to try them, such jurisdiction must, ordinarily speaking, extend to all offences committed within the jurisdiction of the trying Court, and not lying outside its legal power of investigation. Extradition is only a means of bringing the accused before the tribunals having jurisdiction. It is not even like the sanction for prosecution, for instance, which under s. 167 of the old Criminal Procedure Code was held to be indispensable to confer jurisdiction on the Court—*Reg.* v. *Vinayak Divakar* (1). Now in the case before us there is, no doubt, that quite independently of the extradition the Sessions Judge had full jurisdiction to try the accused. Although they are stated to be subjects of His Highness the Gaekwar, the facts on which the prosecution is based are stated to have occurred within British territory. And as Lord Chancellor Halsbury said in *Macleod* v. *The Attorney-General for New South Wales* (2) "all crime is local; the jurisdiction over the crime belongs to the country where the crime is committed." See also Kent's Commentaries quoted in Clarke on Extradition, (2nd Ed.), p. 10. If, then, the jurisdiction of the Court cannot be disputed, what is there to justify the Court in [374] applying at the trial other rules and principles than those which in ordinary cases it is bound to apply under the Code of Criminal Procedure? I confess I can perceive nothing. It is true that in the very recent case of *In re Bellencontre* (3), which was a case of a *habeas corpus* arising on a warrant which described Bellencontre as having been guilty of frauds as a bailee and of frauds as an agent, Cave, J., having come to the conclusion that the *prima facie* case required by the Extradition Statutes of 1870-73 was made out only as regards 4 out of the 19 offences charged against the accused by the French Government, went on to say that "the only object of specifying those cases is in order to give the prisoner the right, if he wishes to make use of it, to object to being tried in France for those other offences—for the other 15—on the ground that those are not in themselves crimes for which he could have been extradited." That, however, was a case which arose on the Extradition Acts and the treaty between France and England. And the remark of Cave, J., above set out does not say what would have been the result if such an objection as he there indicated had been taken before an English Court. See Clarke on Extradition (2nd Ed.), pp. 98 *et seq.* But in any case it only applies in terms where the objection can be taken that the offence was one for which the prisoner could not properly have been extradited at all. No such objection is shown to be sustainable here. On the contrary, the treaty (see Aitchison's Treaties, Vol. IV, 230) between the British and Gaekwar Governments relates generally to all offenders. See, as to this point, Clarke on Extradition (2nd Ed.), p. 14. And therefore in this case the extradition without any restriction whatever would be perfectly regular; and the jurisdiction independent of it would stand unaffected. Further,

(1) 8 B. H C. R. (Cr. Ca.), 32.
(2) L. R. (1891) A. C. 458. (See also 8 B. H. C. R. (Cr. Ca). 74-9.)
(3) L. R. (1891), 2 Q. B. 122.

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assuming that the extradition proceedings could in some way limit the jurisdiction of the Sessions Court, it is plain that there is nothing here on the face of those proceedings to warrant the conclusion that any such limitation has been in fact imposed. The mere circumstance that the offence of dacoity alone is mentioned when extradition is demanded does not necessarily lead to the conclusion that the extradition is allowed for the purpose of a trial only on that [375] charge, and on no other charge whatever. And in any event it could not exclude a trial and conviction on any charge which the facts disclosed in the extradition proceedings would suffice to sustain. On the whole, therefore, it appears to me that, whether, in law, the jurisdiction of our Courts can or cannot be restricted by the condition on which extradition is allowed, no such restriction has, in fact, been imposed in this particular case, and, therefore, it was open to the Court below, and consequently it was its duty, to have tried the accused in this case under the same rules as apply to ordinary trials under the Code of Criminal Procedure. And the Sessions Judge ought to have convicted the prisoners in this case of the minor offence which the facts proved in evidence showed the prisoners had committed.

Order of acquittal reversed.

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17 B. 375.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

DAGDU (*Original Defendant*), *Appellant v.* PANCHAMSING GANGARAM (*Original Plaintiff*), *Respondent.**

[3rd July, 1892.]

Execution sale—Decree—Purchasers at successive execution sales—Title obtained by first purchaser—Certificate of sale obtained by second purchaser before certificate obtained by first purchaser—Priority—Civil Procedure Code (Act XIV of 1882), s. 316—What is the title which vests under the section—Limitation in application of provisions of section—Confirmation of sale—Certificate of sale.

On 27th February, 1886, the plaintiff purchased certain land at a Court sale held in execution of a decree. On the 10th March, 1886, the same property was put up for sale in execution of another decree, and purchased by the defendant. The sale to the defendant was confirmed on 3rd July, 1886, and the sale to the plaintiff not until the 21st July, 1886. Certificates of sale were issued to both plaintiff and defendant on the same day, *viz.*, on the 22nd September, 1886, and on the 14th February, 1887, the defendant was put in possession. In 1889, the plaintiff brought this suit to recover possession.

The defendant relied on s. 316 of the Civil Procedure Code (Act XIV of 1882). He contended that as under that section the title of a purchaser at a Court sale vests at the date of the confirmation of the sale to him, his (the defendant's) right was superior to that of the plaintiff, inasmuch as the sale to him was confirmed on the 3rd July, 1886, while the sale to the plaintiff was not confirmed until afterwards, *viz.*, on the 21st July.

[376] *Held* that the plaintiff was entitled to recover. By his prior purchase he had acquired an equitable or inchoate title to the property which was subsequently perfected by the certificate of sale. Nothing therefore passed to the defendant under his second sale.

The words "the title to the property sold" in s. 316 of the Code of Civil Procedure (Act XIV of 1882) mean the full perfected title arising on the sale becoming absolute. It is that title which under the section does not vest in the purchaser until confirmation. That provision, however, need not necessarily be construed

* Second Appeal No. 228 of 1891.