1893 AUG. 8. APPELLATE CIVIL. 18 B. 433.

a tenant was held not to be a mirasdar though he and his predecessors had held for over a century. But this last-named case is really inapplicable, as the tenancy commenced with a lease on the construction of which the decision depended; and looking to the other decisions above referred to, as also to those in *Babaji* and *Nanaji* v. *Narayan* (1) and *Daulata* v. *Sakharam* (2), I think that, finding as the Assistant Judge did that the tenancy had lasted for at least eighty years and that its commencement could not be ascertained, he was entitled to hold that it was by reason of antiquity that no satisfactory evidence of the origin of the tenancy was forthcoming and to apply s. 83 of the Land Revenue Code.

As regards the mesne profits, it was contended that allowance should have been made for the plaintiff's rents for two years. But I think the Assistant Judge was right in holding that as the Mantris had not proved what rent they were entitled to, no deduction could be made on account of it. It was their duty to give evidence as to the amount of rent due, and as they failed to do so, such rent could not be taken into account.

The point taken in the memorandum of appeal, that the Court should have considered whether the purchase by the plaintiffs, **[440]** who were agents of the inamdars, was or was not for the inamdars, was not pressed in argument.

Under these circumstances, I think we must confirm the decree of the lower Court and direct the appellan s in appeals Nos. 682 and 758 respectively to pay all costs of such appeals.

Decree confirmed.

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18 B. 440.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* KUTRAPA.* [14th August, 1893.]

Railway Act (IX of 1890), s. 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.

Section 113, sub-s. (4) (3) of the Indian Railway Act (IX of 1890), which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

[F., 20 M. 385 (386); 1 Bom. L.R. 126; 4 Ind. Cas. 236=5 N.L.R. 151 (152); **R.**, 21 C. 979 (985); 11 Cr. L.J. 577=8 Ind. Cas. 190=35 P.W.R. 1910 (Cr).**]**

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* Criminal Review No. 179 of 1893.

(1) 3 B. 340. (2) 14 B. 392.

(3) Section 113, sub-s. (4) of Act IX of 1890, provides as follows:—"If a passenger liable to pay the excess charge and fare mentioned in sub-s. (1) or the excess charge and any difference of fare mentioned in sub-s. (2) fails or refuses to pay the same on demand being made therefor under one or other of those sub-sections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate, and shall, as it is recovered, be paid to the railway administration.

1893
AUG. 14.

CRIMINAL REVISION.

18 B. 440.

THE accused was prosecuted before the First Class Magistrate of Poona under s. 113 of the Indian Railway Act (IX of 1890) for travelling in a railway without a ticket.

The Magistrate ordered the accused to pay the Railway Company Rs. 2-1 on account of railway fare, and Re. 1 as excess charge, or in default to undergo three days' simple imprisonment.

The High Court in the exercise of its revisional jurisdiction sent for the record of the case.

[441] There was no appearance either for the Crown or for the accused.

JUDGMENT.

Per Curiam.—We do not think that the provision in s. 113 of the Railway Act, which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, authorized the Magistrate to impose imprisonment in default. Section 64 of the Indian Penal Code applies to all fines imposed for offences. And by s. 5 of the General Clauses Act (I of 1868) ss. 63 to 67 of the Indian Penal Code and 63 of the Criminal Procedure Code (now s. 386) apply to all fines imposed under the authority of any Act hereinafter to be passed. But we cannot say that the excess charge and fare referred to in s. 113 of Act IX of 1890 is a fine, though it may be recovered as such. The provisions of s. 64 of the Indian Penal Code provide imprisonment as a punishment for the offender, and not merely as a means of recovering the fine, which can be recovered under s. 386 of the Criminal Procedure Code (X of 1882). It is true that in s. 560 of the Criminal Procedure Code (as in the old s. 250) it seems to be assumed that the expression "recoverable as a fine" includes the power of imprisonment in default of payment, but the language of s. 552 suggests a contrary inference. We think, then, that we cannot safely determine the construction of s. 113 of the Railway Act by any analogy based on the wording of either s. 552 or 560 of the Criminal Procedure Code, but must be guided by the general principle that imprisonment cannot be ordered except in cases in which it is expressly prescribed.

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18 B. 442.

[442] REVISIONAL CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* PHEROZSHA PESTONJI.* [17th August, 1893.]

Judge—Disqualification of a Judge—Personal interest—Crim. Pro. Code (Act X of 1882), s. 555—Bombay District Municipal Act (VI of 1873), s. 84—Municipal offence.

The mere fact that a Magistrate is the vice-president of a district municipality and chairman of the managing committee does not disqualify him from trying a charge of an offence brought by the municipality under Bombay Act VI of 1873. But if he has taken any part in promoting the prosecution, as, for instance, by concurring in sanctioning it at a meeting of the managing committee or otherwise, he will be disqualified by reason of the existence of a personal interest over and above what may be supposed to be felt by every municipal commissioner in the affairs of the municipality.

[R., 23 C. 44 (47); U.B.R. (1897—1901) 133 Cr.]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Revision Application No. 163 of 1892.