18 B. 570=Chitty's S. C.C.R. 409.

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ORIGINAL CIVIL.

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Before Bayley, C. J. (Acting), and Mr. Justice Farran.

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GANESDAS RAMNARAYAN AND OTHERS, (*Plaintiffs*) *v.* LACHMINARAYAN AND OTHERS (*Defendants*).* [29th June and 20th July, 1894.]

Hundi—Shah jog hundi—Shah jog hundi *endorsed to a particular person—Stolen* hundi *—Payment by drawee without inquiry to wrong person—Liability of drawee to lawful owner of* hundi.

On the 8th December, 1893, the plaintiff at Sholapore having bought *a shah jog hundi* there, drawn upon the defendants in Bombay, endorsed it to Ramrukh Ramkisson and sent it by post to him for collection. In course of its transmission it was stolen, and the name of Ramrukh Ramkisson was expunged, and another name, *viz.*, that of Dwarkadas Lalji, was substituted. On the 9th December, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants paid it without inquiry as to the responsibility or position of the person to whom they paid it. The plaintiff sued the defendants for value of the *hundi*.

Held—(1) that the defendants were guilty of conversion of the *hundi* and were liable to the plaintiff, the lawful owner thereof, in trover.

(2) that the *hundi* continued to be *shah jog* after being endorsed to a particular person.

[F., 9 C.W.N. 841; R., 5 C.W.N. 313 (317); 16 Bom. L.R. 434=25 Ind. Cas. 52.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.

The plaintiff having bought at Sholapur a *shah jog hundi* drawn upon the defendant at Bombay endorsed it to his agent at Bombay, Ramrukh Ramkisson, and sent it by post to him for collection. In course of its transmission it was stolen, and the [571] name of Ramrukh Ramkisson was expunged, and another name, *viz.*, that of Dwarkadas Lalji, was substituted in its place. On the 9th December, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants thereupon without inquiry paid it. The plaintiffs in this suit sought to recover the value of the *hundi* from the defendants.

The following is a full statement of the facts as stated in the judgment of the Chief Judge:—

On the 8th December, 1893, the plaintiffs' firm at Sholapur bought a *shah jog hundi* at that place and paid full value for the same. It was then endorsed in favour of Ramrukh Ramkisson, the plaintiff's agent in Bombay, for realization, and on the same day sent to him by post. At the same time a post card was sent advising the despatch of the *hundi*. Neither letter nor post card arrived at their destination. Not hearing of their arrival, the plaintiffs' firm sent a second post card, in reply to which their agent stated that no *hundi* was received. The plaintiffs at Sholapur thereupon on the 14th December, 1893, went to the drawer and demanded a *petha*. The drawer, however, having by that time received the *khoka* from the defendant, declined to give a *petha*. The plaintiffs' man then came to Bombay to make inquiries. It then appeared that the *hundi* had been presented to the defendant on the 9th December, 1893, by some person giving his name as Dwarkadas Lalji and giving an address in

* Small Cause Court Reference No. $\frac{22}{1734}$ of 1894.

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Hanuman Gully, and that the defendant had sent the money there by his man, who had paid it to some one whom he took to be the cashier of the said Dwarkadas Lalji. On the defendant's man going there again with the plaintiffs' man, no trace of any person known as Dwarkadas Lalji could be found, nor were his whereabouts discovered. It was quite clear that the *hundi* was stolen or intercepted during transit and the name of Ramrukh Ramkisson expunged and that of Dwarkadas Lalji substituted. The defendant admittedly paid the amount of the *hundi* without inquiry as to the respectability or position of the person to whom he paid.

The above facts having been proved, the Chief Judge gave his judgment as follows :—

[572] "I have no hesitation in adhering to my former finding that the old established custom still prevails, and that a defendant cannot avoid liability in respect of a *shah jog hundi* which he has paid, unless he can show that he has paid it to *shah*. The only question is whether in this case the *hundi* being specially endorsed makes any difference. No doubt the effect of the endorsement would be to restrict payment to the indorsee or some one claiming through him; but this cannot, in my opinion, render the words *shah jog* nugatory, and I think payment could only be made to such endorsee after due inquiry to see whether or not he was *shah*. This view is borne out by the case of *Thakur Das* v. *Futteh Mull* (1), and is also in accordance, to a certain extent, with the view taken by the defendant's own witnesses, who say they never look to the endorsement but only to the body of the *hundi*. No authority has been quoted in support of the proposition that a *shah jog hundi* loses its character as such, by being endorsed in favour of a particular person.

"As to whether the acts of the defendant amounted to a conversion of the *hundi*, I think that there can be no doubt. By accepting it, paying the amount to a person not entitled to it, and receiving the *khoka* and forwarding it to the drawer, the defendant clearly converted the *hundi* to his own use and deprived the plaintiff, the lawful owner of the *hundi*, of his right in it. The plaintiff can, therefore, sue him in trover.

"The charges of negligence on the part of the plaintiff are unsupported by any evidence, and must fail. In my opinion, the plaintiffs acted with all due diligence, and however soon they communicated with the defendants it would have been of no avail, as the *hundi* was paid on the 9th December, 1893, the very next day after its despatch. In my opinion, also the defendant is deserving of blame in not paying more attention to the endorsement on the *hundi*, a cursory glance at which would show that it had been tampered with, something expunged, and the name of Dwarkadas Lalji written over. Under these circumstances I must pass a decree for the plaintiffs for Rs. 1,010 and costs, and certify Rs. 135 as the professional costs of the plaintiff's attorney. At the request of the defendant I make my judgment contingent on the opinion of the High Court."

The following was the case stated for the High Court :—

"1. This was a suit brought by the plaintiffs as the last *bona fide* holders for value of a *hundi* for Rs. 1,000 to recover that sum and interest from the defendants, who were the drawer and drawee of the said *hundi*.

"2. On reading the plaint I was of opinion that there was no cause of action therein disclosed against the first defendant, the drawer of the *hundi*, and acting on the suggestion of the Court, the plaintiffs' attorney

(1) 7 B. L. R. 275.

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accordingly withdrew his claim as against the first defendant, and the suit proceeded against the drawee alone, who is hereafter called the defendant.

[573]" 3. The facts of the case are fully set out in my judgment, copy of which is hereto annexed, and to which for brevity's sake I crave leave to refer.

" 4. I was of opinion, on the evidence, that there had been no such change in the custom of merchants with regard to paying *shah jog hundi* as the defendant alleged, but that the custom as stated in the case reported at 6 Bom. H. C. Rep. 24, still obtained and is in force, and that such a *hundi* was only payable to a person who was *shah*, of which fact it is necessary for the payee to satisfy himself before he can safely make payment.

" 5. I was of opinion that in this case the defendant having admittedly paid the amount of this *hundi*, without any inquiry, to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawer, had been guilty of conversion of the said *hundi* and was liable to the plaintiffs, the lawful owners thereof, in trover (see *Lovell* v. *Martin* (1).

" 6. It did not, in my opinion, alter the character of the *hundi* that it was endorsed for realization in favour of a particular individual. That fact could not, I thought, absolve the defendant of the duty which would otherwise lie upon him of making inquiries as to the respectability and position of the payee (see *Thakur Das* v. *Futteh Mull* (2)).

"7. Under these circumstances I held that the defendant had converted the *hundi* to his use, for which act he was answerable to the plaintiffs. I, therefore, passed a decree against him for Rs. 1,010 (the amount of the said *hundi* and two months' interest at the rate of 6 per cent. per annum) and costs, and certified Rs. 135 as the professional costs of the plaintiff's attorney. At the request of the defendant's pleader I made my judgment contingent on the opinion of the High Court.

" 8. The defendant's pleader formulated the following questions:—

" (i) Whether the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant?

[574] " (ii) If yes, whether the defendant is liable to refund to the plaintiffs the amount of the *hundi*?

" (iii) Whether (the *hundi* being payable by endorsement to Dwarkadas Lalji), the defendant is not discharged by such payment?

" (iv) Whether the *hundi* continued to be a *shah jog hundi* after being endorsed to a particular person?

" (v) Whether the drawee's omission to detect the alteration is such negligence on his part as to render him liable to the plaintiffs?

" Whether there was any privity of contract between plaintiffs, who were the payees of the *hundi*, and the defendant, the drawee, who had not accepted in their favour?

" 9. The first question appeared to me to be a question rather of fact than of law, but otherwise unobjectionable.

" The second question depends on the answer given to the first.

" To the third and fourth questions I have no objection.

"The points raised by the fifth and sixth questions were not decided by me, as on the view which I took of the case it appeared to be unnecessary. I apprehend, therefore, that their Lordships will not answer them, unless their opinion on the point of conversion should be contrary to mine.

(1) 4 Taunt, 799.

(2) 7 B. L. R. 275.

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In case that may be so, I should perhaps mention that, in my opinion, and as a point of fact, the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it is apparent, on the most cursory glance, that some name has been expunged and the name of Dwarkadas Lalji written over it in a handwriting different to that of the rest of the endorsement.

"10. With these remarks I leave the case in their Lordships' hands. The defendant has deposited in Court the amount of the decree and costs, together with Rs. 50 to meet the costs of reference."

Lang and *Scott*, for the second defendant:—The question is whether the drawee who has not accepted is liable to the holder and endorsee. It is not a question of his liability to the drawer. We say there is no privity of contract between the plaintiff and the [575] defendant. We contend that the judgment in *Davlatram* v. *Bulakidas* (1) applies to the case where a *hundi* without endorsement is presented for payment. It is only then that the obligation to inquire into the solvency and respectability of the *shah* arises. But there is no such obligation where, as in this case, the name of the person actually presenting the *hundi* appears endorsed upon it. The only obligation in such a case is to see that the person so named in the *hundi* is the person presenting it. That person is then the *shah*. No further inquiry need be made. We rely on the case of *Thakur Das* v. *Futteh Mull* (2). They also cited *Sulleman Hussein* v. *The New Oriental Bank Corporation* (3) and *Lovell* v. *Martin* (4).

There was no negligence on the defendants' part, inasmuch as they ascertained that the name of the person who presented the *hundi* was the name endorsed on it. He referred to s. 85 of the Negotiable Instruments Act and s. 59 of the English Act 16 and 17 Vict., c. 59.

[FARRAN, J.—You must read the whole of the Negotiable Instruments Act with reference to s. 2. Local usage is not affected.]

Inverarity, for plaintiff:—The plaintiff is found to be the lawful holder of the *hundi*. He as lawful holder endorsed it to his agent for collection. It was stolen, and an endorsement was forged on it. A forged endorsement is a nullity; Chalmers on Bills of Exchange, p. 63—80. The *hundi* is to be regarded as if there was no name in it.

Dwarkadas Lalji was never the *shah* to whom payment was to be made. He referred to *Thakur Das* v. *Futteh Mull* (2); Byles on Bills of Exchange, p. 346. The Negotiable Instruments Act is to be read with ss. 6, 7 and 10 and s. 85. The defendant's honesty is irrelevant: Pollock on Torts, 310-311; *Hollins* v. *Fowler* (5).

Cur. adv. vult.

JUDGMENT.

[576] *July* 20. BAYLEY, C. J.—From the case stated by the Chief Judge of the Court of Small Causes, Bombay, it appears that on the 8th December, 1893, the plaintiffs' firm at Sholapur having bought a *shah jog hundi* for Rs. 1,000, and paid full value for it, endorsed it in favour of Ramrukh Ramkisson, their agent in Bombay, for realization, and on the same day, sent it to him by post. At the same time a post card was sent advising the despatch of the *hundi*. Neither letter nor post card arrived at its destination. The *hundi* had been stolen or intercepted during the

(1) 6 B. H. C. R. O.C.J. 24.
(2) 7 B. L. R. 275 (278, 302).
(3) 15 B. 267.
(4) 4 Taunt, 799.
(5) L.R. 7 H. L. 757.

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transit, the name of Ramrukh Ramkisson expunged, and that of Dwarkadas Lalji substituted. Not hearing of its arrival, the plaintiffs' firm sent a second post card, in reply to which their agent stated that no *hundi* had been received. The plaintiffs at Sholapur, thereupon, on the 14th December, 1893, went to the drawer and demanded a *petha*. (duplicate). The drawer, however, having by that time received the *khoka* (receipted *hundi*) from the defendant declined to give a *petha*. The plaintiffs' man then came to Bombay to make inquiries, and it then appeared that the *hundi* had been presented to the defendant on the 9th December, 1893, by some person giving his name as Dwarkadas Lalji and giving an address in Hanuman Gully, and that defendant had sent the money there by his man, who paid it to some one whom he took to be the cashier of Dwarkadas Lalji. On defendant's man going there again with plaintiffs' man, no trace of any person known as Dwarkadas Lalji could be found, nor was his whereabouts discovered.

The Chief Judge was of opinion that defendant having admittedly paid the amount of the *hundi* without any inquiry to a person who was not *shah*, and having received the *khoka* with an endorsement of payment, and having returned the same to the drawer, had been guilty of conversion of the *hundi*, and was liable to the plaintiffs, the lawful owners thereof, in trover. He was also of opinion that it did not alter the character of the *hundi* that it was endorsed for realization in favour of a particular individual, and that that fact could not absolve the defendant of the duty which would otherwise lie upon him of making inquiries as to the respectability and position of the payee.

[577] The *hundi*, which is in the Marvadi language and character, is not made payable to any particular person by name, but, according to the translation annexed to the proceedings, states: "Immediately on the receipt of the *hundi* please pay the money in *hundi* currency to the *shah*."

Now the meaning of *hundis* made payable to *shah* and the usage in regard to such documents among native merchants on this side of India was very fully considered in a case which came before Sir Joseph Arnould in 1869 in which a large body of evidence was given on the subject—*Davlatram* v. *Bulakhidas* (1); and, as s. 1 of "the Negotiable Instruments Act, 1881" (Act XXVI of 1881) states that nothing in that Act contained affects any local usage relating to any instrument in an oriental language, unless such usages are excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by that Act, and no such words are to be found in the *hundi* in question, the usage proved as well as the decision in that case afford a guide of which this Court can avail itself in the determination of the points submitted for our consideration by the Chief Judge of the Small Causes Court.

In his very able judgment in that case Sir Joseph Arnould said (p. 25) that "*hundis* made payable to *shah*, *shah jogi*, differ from bills of exchange in one very material circumstance, amongst others, that, as a general rule, the acceptance of the drawee is not written across them, so as thereby to give them an additional degree of mercantile credit, and to that extent make it just to impose an additional degree of liability on the acceptor," and "that as a general rule *hundis* are very frequently not presented for acceptance before they are presented for payment, before, that is, they are either due or overdue." "It is also stated," said the learned

(1) 6 B. H. C. R. O. C. J. 24.

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Judge, "that the name of the *shah* or person who has bought or holds the *hundi* must always be endorsed on it, before it is presented." At p. 27, he says: "It will be convenient to advert to those points in which both parties substantially agree. And first as to the very important point of the meaning attached in the Hindu mercantile world to the formula 'Payable to *shah*.' Now the result of the evidence on both sides [578] as to this point, supported by the learned etymological evidence of Mr. Balaji Pandurang, is clearly this, that *shah* means a responsible and respectable person, a man of worth and substance known in the bazar. A *hundi* payable to *shah* is paid on the responsibility of the *shah*. If he be not known to the drawee, inquiry is to be made about him, and the amount of the *hundi* is not paid till that inquiry is satisfactorily answered, or till some one known to the drawee is found to identify him or speak to his responsibility."

The defendant was well aware of the existence of this usage, as it was alleged on his behalf at the hearing that the custom of merchants had changed with respect to the necessity which previously existed of making due inquiries before payment of a *shah jog hundi*, but the Chief Judge states that the defendant had entirely failed to prove any such change of custom, and that his witnesses called for that purpose were utterly unreliable.

The Advocate General, who appeared for the defendant in the argument in this Court, relied upon a dictum of Sir Barnes Peacock, C. J., reported in VII Bengal L. R. 289, note III, to the effect that the *hundi* in that case would pass at any rate prior to acceptance by delivery. The *hundi* there was drawn in Bombay on a firm in Calcutta and was payable fifty-one days after date in favour of Sewdas Damoni. The case was decided in 1865, four years before the decision of Sir J. Arnould, and it is difficult from the report to discover whether the *hundi* there was or was not a *shah jogi hundi*. The words *shah jogi* or *shah* do not occur anywhere in the report, and if the *hundi* in that case was not a *shah jogi* one, the expression of opinion of Sir Barnes Peacock would be extra judicial and of no binding authority. In a case which came before the Appellate Court at Calcutta in 1871—*Thakur Das* v. *Futteh Mull* (1) the dictum of Sir Barnes Peacock, C. J., was relied on, on behalf of the defendant, but the Court said that it was not clear how that expression of opinion was pertinent to the case before the Court, and that it supposed that the Court never meant to lay down that under Hindu law every one who took the *hundi*, even though he obtained it by fraud, would be treated as a "*shah jog*." The Judges said p. 302: "then who answers to the term '*shah jog*' unless it be the person designated by real (not fictitious) endorsements? [579] And when a Hindu maker or rightful owner of a *hundi* payable in terms to the *shah jog* endorses it as sold or sent to A, he obviously means to pass the right of dealing with the *hundi* to A alone (p. 303)" . . . . . "I certainly am not aware (said Phear, J., in delivering the judgment of the Court) of any rule of Hindu law, customary or otherwise, which would have the effect of making the word '*shah jog*' mean payable to bearer, quite independently of the endorsements" (p. 304).

Reliance was also placed on behalf of the defendant on s. 85 of the Negotiable Instruments Act, 1881. That section says: "Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course." Assuming that that

(1) 7 B. L. R. 275.

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section might be applicable to a Marvadi *hundi*, the *hundi* in the present case, we may remark, is not a cheque, and is not payable to order, but to the *shah*. By s. 6 a cheque is defined to be a bill of exchange drawn on a specified banker; a bill of exchange is by s. 5 stated to be an instrument directing a certain person to pay a certain sum of money to or to the order of a certain person or to the bearer of the instrument whereas this *hundi* is payable to the *shah*, and, as already noticed, Sir Joseph Arnould points out how bills of exchange differ from *hundis* like the one now in question. Then by s. 85 the drawee is discharged only "by payment in due course." And by s. 10 "payment in due course means payment without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

In the present case, payment to Dwarkadas Lalji was not "payment in due course," as the defendant was bound by the custom of Hindu merchants to make inquiries as to the person who presented the *hundi* to him for payment, and the Chief Judge has found that the defendant admittedly paid the amount of the *hundi* without inquiry as to the respectability or position of the person to whom he paid; and, moreover, he found as a fact that the defendant was negligent in not detecting the forged endorsement on the *hundi*, inasmuch as it was apparent on the most cursory glance that some name has been expunged and the name of Dwarkadas Lalji written over it in a handwriting [580] different to that of the rest of the endorsement. He also found that the defendants' own witnesses said that they never looked to the endorsement, but only to the body of the *hundi*. The Chief Judge added that no authority had been quoted to him, nor was any cited to us, in support of the proposition that a *shah jogi hundi* loses its character as such by being endorsed in favour of a particular person. We think that the Chief Judge was justified in holding, upon the authority of *Lovell* v. *Martin* (1), that the defendants had been guilty of conversion of the *hundi* and were liable to the plaintiffs, the lawful owners thereof, in trover.

A similar point was decided in April, 1894, in England. There the payee of a crossed cheque specially endorsed it to the plaintiff and posted it to him. A stranger, having obtained possession of the cheque during the course of transmission, obliterated the endorsement to the plaintiff, and having substituted a special endorsement to himself, presented it at the defendants' bank and requested them to collect it for him. They did so, and handed the money over to him. In an action brought by the plaintiffs for conversion, it was held that the defendants were liable for the amount of the cheque—*Kleinwort Sons & Co.* v. *Comptoir National D'Escompte De Paris* (2).

We, therefore, agree with the view taken by the Chief Judge and answer the questions he had submitted to this Court thus:—We hold—(1) That the circumstances of the case amount to a conversion of the *hundi* on the part of the defendant. (2) That the defendant is liable to refund to the plaintiffs the amount of the *hundi*. (3) That (the *hundi* being payable by endorsement to Dwarkadas Lalji) the defendant is not discharged by such payment. (4) That the *hundi* continued to be a *shah jogi hundi* after being endorsed to a particular person. It is unnecessary to return any

(1) 4 Taunt, 799.

(2) (1894) 2 Q.B. 157.

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answers to the fifth and sixth questions. The costs of this reference will be costs in the case to be taxed on the original side of this Court.

Attorneys for the plaintiffs :—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendants :—Messrs. *Bhaishankar and Kanga.*

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18 B. 581.

[581] CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

In re DEVJI VALAD BHAVANI AND ANOTHER.* [11th September, 1893.]

Criminal Procedure Code (Act X of 1882), ss. 478 and 195—Civil Procedure Code (XIV of 1882), ss. 278, 273—Inquiry into claim to attached property—Civil Court's power to commit the party making such claim or his witness on a charge of forgery and perjury—Subsequent civil suit by claimant to establish his right to the property—Stay of Criminal proceedings pending civil litigation.

It is not an invariable rule that criminal proceedings should be stayed during the pendency of civil litigation regarding the same subject-matter.

Certain property was attached in execution of a decree. Thereupon accused No. 1 applied to have the attachment raised, on the ground that he had purchased the property from the judgment-debtor under a sale-deed executed long before the date of the attachment. In the summary inquiry which was made under s. 278 of the Code of Civil Procedure (Act XIV of 1882), he produced the sale-deed, and accused No. 2 was called as his witness and supported his claim. The Subordinate Judge found that the deed was a forgery, and rejected the claim. Proceeding then under s. 478 of the Code of Criminal Procedure (Act X of 1882) he held the inquiry directed by that section, and committed both the accused to the Sessions Court on charges of perjury and forgery. During the pendency of the inquiry under s. 478, the accused No. 1 filed a civil suit to establish the genuineness of the sale-deed and set aside the attachment. He also applied to the High Court to quash the commitment or stay the criminal proceedings pending the disposal of the civil suit.

Held, refusing the application, that the mere fact that a regular suit was filed to establish the genuineness of the sale-deed was not a sufficient ground for quashing the commitment, or for adjourning the trial pending the hearing of the civil suit.

Held, also, that the power given to a Civil Court under chap. XXXV of the Code of Criminal Procedure (Act X of 1882) to take action regarding "any offence referred to in s. 195" is not ordinarily restricted, in regard to offences relating to documents, to such offences only when committed by a party to the proceeding in which the document was given in evidence. It extends also to such offences when committed by a witness of the party.

[F., 1 Bom. Cr. Cas. 212 = 14 Bom. L.R. 968 = 13 Cr. L.J. 848 = 17 Ind. Cas. 720; R., 26 B. 785 (790); 23 C. 610 (613, 620); 31 C. 858 (861); 34 C. 848 = 6 C L.J. 531 = 11 C.W.N. 712 (714) = 5 Cr.L. J. 480; 37 C. 250 = 10 C.L J. 564 = 14 C.W.N. 330 = 11 Cr.L.J. 37 = 4 Ind. Cas. 710; 32 M. 49 (57) = 9 Cr.L.J. 41 = 19 M.L.J. 42 = 4 M.L.T. 404; 15 C.W.N. 565 = 12 Cr. L.J. 101 = 9 Ind. Cas. 577 ; D., 30 M. 226 (227) = 6 Cr. L.J. 131.]

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

Certain property was attached in execution of a decree. Thereupon Devji valad Bhavani (accused No. 1) applied, under s. 278 of the Code of Civil Procedure, to have the attachment raised, alleging that the property attached had been previously sold [582] to him by the judgment-debtor by a deed of sale dated 10th September, 1892.

* Criminal Revision No. 214 of 1893.