APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* RA'MCHANDRA GOVIND HARSHE.* 1895. *March* 12.

Fraud—Misappropriation—Charge of misappropriation of specific sums of money—Evidence—Evidence of general deficiency—Criminal Procedure Code (Act X of 1882), Secs. 503, 507—Commission—Evidence taken on commission, admissibility of—Evidence Act (I of 1872), Sec. 33—Right and opportunity to cross-examine—Evidence improperly admitted—New trial—Evidence Act (I of 1872), Sec. 167—Practice—Procedure.

The accused was charged with abetting the offence of criminal breach of trust committed by the názir of the Small Causes Court at Poona. The accused was a kárkún in the názir's office and it was his duty to keep the accounts of moneys received in the office from judgment-debtors and of moneys paid out to decree-holders. He was charged with abetting the misappropriation of three sums, *viz.*, Rs. 20 on the 19th November, 1885, Rs. 45 on the 23rd November, 1885, and Rs. 10 on the 26th June, 1886. As to the first sum, it was alleged that an instalment of Rs. 25 due under a decree had been paid into the názir's office by a judgment-debtor on the 19th November, 1885, but the accused had entered in the office day-book only Rs. 5, thereby enabling the balance of Rs. 20 to be misappropriated. It appeared, however, that a sum of Rs. 25, being the instalment due to the decree-holder under the above decree, had been in due course paid out to him on the 4th December, 1885. As to the second sum of Rs. 45, it was alleged that a sum of Rs. 50 had been paid in, but only Rs. 5 had been entered by the accused, the balance being misappropriated. It appeared, however, in this case also that the full amount of the instalment, *viz.* Rs. 50, had been duly paid out to the decree-holder a few days after its receipt. As to the third sum, it was alleged that the total receipts entered in the book on the 26th June, 1886, were Rs. 55, but the figure entered as the total was only Rs. 45 and that the balance of Rs. 10 had been misappropriated. The jury found the accused guilty on all three charges. On appeal by him it was contended that there was no evidence of the misappropriation of the specific sums in respect of which he was charged. There was evidence of a general deficiency, but there was no evidence that these specific sums formed part of that deficiency. On the contrary the evidence showed that the instalments paid into the office had been duly paid out to the persons to whom they were payable.

Held, that the jury having had the facts brought to their notice, their verdict was final, and the High Court would not interfere with the verdict.

Depositions taken on commission in criminal cases although inadmissible under Chapter 40 of the Criminal Procedure Code (Act X of 1882) may be admitted under section 33 of the Evidence Act (I of 1872), if the requirements of the proviso to that section have been complied with.

The words "opportunity to cross-examine" in the proviso to section 33 do not imply that the actual presence of the cross-examining party or his agent before the tribunal taking the evidence is necessary.

*Criminal Appeal, No. 367 of 1894.

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To make evidence admissible against an accused person under section 33 of the Evidence Act, the fact that he had full opportunity of cross-examination, if not admitted, must be proved.

Quere—Whether the opportunity to administer cross-interrogatories under a commission is an "opportunity to cross-examine" within the meaning of the proviso to section 33 of the Evidence Act so as to render the evidence taken on interrogatories admissible.

The provisions of section 167 of the Evidence Act (I of 1872) apply to criminal trials by jury.

Held, that when part of the evidence, which has been allowed to go to the jury, is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under section 167 of the Indian Evidence Act (I of 1872), or to quash the verdict and order a retrial.

The law as settled in England by the *Queen* v. *Gibson*(1) and as stated by the Privy Council in *Makin* v. *Attorney General of New South Wales* (2) with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India. *Wafadár Khán* v. *Queen-Empress* (3) not followed.

APPEAL from the conviction and sentence recorded by G. Jacob, Sessions Judge at Poona.

The accused had been employed as a kárkún from 1872 to 1889 under the názir of the Small Causes Court at Poona. It was his duty (*inter alia*) to keep the account of moneys received in the názir's office from judgment-debtors and of moneys paid out to decree-holders. In 1890 large defalcations amounting to several thousands of rupees were discovered in the názir's accounts, and the názir was tried and convicted of criminal breach of trust.

In 1894 the accused was arrested and tried upon charges framed against him in connection with the same defalcations. The charges were with respect to three sums of money alleged to have been misappropriated, *viz.* Rs. 20 on the 19th November, 1885, Rs. 45 on the 23rd November, 1885, and Rs. 10 on the 26th June, 1886, and they were framed under sections 409, 109 and 218 of the Indian Penal Code. The accused was convicted by the jury of abetting the misappropriation of each of the above sums of money, and for each offence he was sentenced to eighteen months' rigorous imprisonment.

The first set of charges related, as above mentioned, to a sum of Rs. 20, as to which it was alleged that an instalment of Rs. 25

(1) L. R., 18 Q. B. D., 537. (2) L. R. (1894), A. C., 57. See pp. 69-70.
(3) I. L. R., 21 Calc., 955.

due under a decree had been paid into the názir's office by a judgment-debtor on the 19th November, 1885. But the accused entered in the office day-book only Rs. 5, thereby enabling the balance of Rs. 20 to be misappropriated either by himself or by the názir. It appeared, however, that a sum of Rs. 25, being the instalment due to the decree-holder, had been in due course paid out to him on the 4th December, 1885.

The second set of charges related to a sum of Rs. 45. On the 23rd November, 1885, a judgment-debtor under another decree had paid in an instalment of Rs. 50, but the entry made by the accused was Rs. 5, thereby (it was alleged) enabling the balance of Rs. 45 to be misappropriated either by himself or by the názir. It appeared, however, in this case also, that the full amount of the instalment, *viz.* Rs. 50, was duly paid out to the judgment-creditor on the 27th November, 1885.

The third set of charges related to a sum of Rs. 10. As to this it appeared that the total receipts entered in the books for the 26th June, 1886, amounted to Rs. 55, but the total entered was only Rs. 45, and it was alleged that the difference, *viz.* Rs. 10, had been misappropriated, and that the total had been wrongly entered by the accused in order to render misappropriation possible.

The case for the prosecution was that the accused either himself misappropriated the difference on each of these occasions, or aided and abetted the názir in misappropriating the money by wilfully making false entries in the books.

The case for the defence was that the entries in question were made through mistake under pressure of work, and not with any guilty knowledge or dishonest intention.

During the course of the preliminary inquiry, the committing Magistrate issued a commission under section 503 of the Criminal Procedure Code (Act X of 1882) to the Agent to the Governor-General at Indore for the examination of Ráo Bahádur K. C. Bedárkar, Diván of Indore, who had been Judge of the Court of Small Causes at Poona at the time when the offences were alleged to have been committed. The witness was examined by means of interrogatories and cross-interrogatories. At the trial before the Sessions Court, the deposition of this witness was

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tendered in evidence by the prosecution. The accused's pleader objected to its admissibility. But the Sessions Judge over-ruled the objection, holding that the deposition was admissible under section 33 of the Indian Evidence Act (I of 1872), as the attendance of the witness could not be procured without unreasonable delay and expense.

The jury unanimously acquitted the prisoner of the principal offence of criminal breach of trust under section 409 of the Indian Penal Code, but by a majority of four to one found him guilty of abetment of criminal breach of trust in respect of each of the items under section 109 of the Code. The jury were of opinion that the moneys had been misappropriated by the názir with the knowledge of the accused, and that the accused deliberately made the false entries with the intention of enabling the názir to misappropriate the moneys.

The Sessions Judge, concurring with the verdict of the jury, convicted the prisoner under sections 409 and 109 of the Indian Penal Code (Act XLV of 1860) of abetment of criminal breach of trust, and sentenced him to eighteen months' rigorous imprisonment for each of the said offences. He also convicted the prisoner under section 218 of the Code, but did not pass any separate sentence for the offence charged under that section.

Against this conviction and sentence the accused appealed to the High Court.

Kirkpatrick (with *N. C. Chandávarkar*) for the appellant:—The Judge has misdirected the jury. The charge was inadequate in not pointing out that there was no evidence given that the principal offence had been committed. That being so, the charge of abetment cannot be sustained. Further, the prosecution is bound to prove the misappropriation of the specific sums in respect of which the accused is charged. This is not proved, nor is there any evidence of it. There is evidence of a general deficiency, but no evidence that these sums formed part of that deficiency. On the contrary the instalment of Rs. 25, which is the subject of the first charge, and which was paid in by the judgment-debtor on the 19th November, was paid out in full on the 4th December to the judgment-creditor. So also the sum of

Rs. 50 which was paid in by the judgment-debtor on the 23rd November was paid out to the judgment-creditor on the 27th November—Russell on Crimes (5th Ed.), Vol. 2, pp. 377-378; *Reg.* v. *Wolstenholme* (1); *Rex* v. *Grove* (2); *Reg.* v. *Lloyd Jones* (3). As to the third charge, nothing is proved except that the addition of the day's receipts is wrong, and the total is less by Rs. 10 than it ought to be. There is no evidence but the mere fact of the discrepant figures—section 34 of the Indian Evidence Act (I of 1872). There is no evidence that the wrong figures are fraudulently and intentionally entered.

Next we contend that the evidence taken on commission was wrongly admitted by the Sessions Court. The commission had not been issued by that Court, but by the Police Court—*Queen-Empress* v. *Jacob* (4); *Empress* v. *Dabee Pershad* (5). It was rightly held inadmissible under the Criminal Procedure Code (Act X of 1882), secs. 503—507. It ought not, then, to have been admitted under the Evidence Act. The former Code gave the right to a commission and laid down the limits within which the right could be exercised. It was not intended that although the terms of the Code were not complied with, the evidence could be admitted under some other Act. If so, the limitations laid down by the Code would be futile. But even under section 33 of the Evidence Act (I of 1872) the evidence was not admissible—*Queen-Empress* v. *Burke* (6); *Queen-Empress* v. *Jacob* (4); *Empress* v. *Dabee Pershad* (7).

[JARDINE, J.:—Had the accused the right and opportunity to cross-examine? See *Reg.* v. *Day* (8).]

No. Mere cross-interrogatories could not be cross-examination under section 33.

If the evidence taken on commission was improperly admitted and allowed to go to the jury, the verdict is bad. We say there should be a new trial notwithstanding section 167 of the Evidence

(1) 11 Cox, C. C., 313.
(2) 7 C. and P., 635.
(3) 8 C. and P., 288.
(4) I. L. R., 19 Cal., 113.
(5) I. L. R., 6 Cal., 532.
(6) I. L. R., 6 All., 224.
(7) I. L. R., 6 All., 224.
(8) 6 Cox, C. C., 55.

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Act—*Queen* v. *Gibson*(1); *Makin* v. *Attorney General of New South Wales*(2). This last is a Privy Council case which this Court is bound to follow, although it is contrary to previous decisions of this Court. See per Melvill, J., in *Manjunáth* v. *Venkatesh*(3).

JARDINE, J.:—We do not think it necessary to call on the prosecution as to the first point raised in argument; for we think that as to that point the jury were sufficiently directed by the Sessions Judge, and their decision is final. The facts were brought to their notice, and they appear to have considered them and to have given their verdict accordingly. We do not think that we should be justified in interfering with that verdict. But we desire to hear the pleader for the Crown upon the other two points, *viz.* (1) was the evidence taken on commission admissible? (2) If not, if that evidence was improperly admitted, what course should this Court adopt in dealing with the case, having regard to the principles laid down in *Makin* v. *Attorney General of New South Wales* (2) and to section 167 of the Evidence Act (I of 1872) and the series of decisions upon this section?

Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader, for the Crown:—The commission to examine Mr. Bedárkar was issued by the committing Magistrate under section 503 of the Code of Criminal Procedure (Act X of 1882). Reading sections 503 and 507 of the Code together, the evidence taken on commission becomes part of the record of the case. I adopt the argument of the Advocate General in *Queen-Empress* v. *Jacob*(4). A commitment is only a preliminary stage of the trial, and the trial continues until it ends in a verdict. The evidence taken on commission is, therefore, admissible under section 507 of the Code of Criminal Procedure.

But it is also admissible under section 33 of the Indian Evidence Act (I of 1872). The accused had the opportunity of cross-examining the witness, and he availed himself of that opportunity by putting cross-interrogatories. The cross-interrogatories take the place of cross-examination within the meaning of section 33 of the Evidence Act. The provisions of this section are not

(1) 18 Q. B. D., 537.
(2) L. R. (1894) A. C., 57. See pp. 69 and 70.
(3) I. L. R., 6 Bom., at p. 57, 58.
(4) I. L. R., 19 Cal., 113, at p. 117.

affected in any way by section 507 of the Code of Criminal Procedure. The deposition of Mr. Bedárkar taken on commission is, therefore, admissible in evidence.

Even if it were inadmissible, the remaining evidence on the record is sufficient to sustain the conviction. Section 167 of the Evidence Act would then apply. This section applies to criminal as well as to civil Courts. This Court has often held that the improper admission of evidence would not be a ground for interference with a verdict if the remaining evidence on the record be sufficient to warrant a conviction—*Reg.* v. *Amrita* (1); *Imp.* v. *Pitámber*(2); *Imp.* v. *Pandharináth*(3); *Reg.* v. *Futá Adaji*(4); see also *Queen* v. *Hurribole* (5).

JARDINE, J.:—The prisoner was convicted, on the verdict of the jury, on three heads of charge relating to different sums of money, of abetment of criminal breach of trust under sections 109 and 409 of the Indian Penal Code, and upon this verdict sentences were passed by the Sessions Judge. At the same trial the Judge after taking the opinion of the members of the jury as assessors convicted the prisoner on three heads of charge under section 218 of making incorrect entries of the above three sums of money, by stating the sum received at each payment as less than it was. No sentence was passed under section 218.

At the hearing of the appeal Mr. Kirkpatrick argued several questions of law on behalf of the prisoner. The first point taken was misdirection. He argued that the Judge ought to have directed the jury that there was no evidence of the substantive misappropriation, nor of the abetment. He cited some of the cases in 2 Russell on Crimes, Book IV, Chapter 19, section 4, such as *Reg.* v. *Lloyd Jones*(6); *Reg.* v. *Wolstenholme*(7), to show that there must be proof to satisfy the jury of receipt of the particular sum and misappropriation of the same as distinguished from evidence of a general deficiency. The charge delivered by the Judge shows sufficiently that he required the jury to find separately as to each specific misappropriation charged,

(1) 10 Bom. H. C. Rep., 497.
(2) I. L. R., 2 Bom., 61.
(3) I. L. R., 6 Bom., 34.
(4) 11 Bom. H. C. Rep., 247.
(5) I. L. R., 1 Cal., 207.
(6) 8 C. & P., 228.
(7) 11 Cox. C. C., 313.

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and the verdict delivered is specific as to each. It was, however, contended that the absence of evidence should have been pointed out. But we are of opinion that there was evidence on which the jury might judge, not merely conjecture—*Queen-Empress* v. *Vajerám*[1]. The present is distinguished from all the cases cited by evidence that the sums in each case accounted for by the written entries were less than the sums received. Not one of the three transactions is merely one of non-entry or general deficiency. It was for the jury as judges of the facts to form an opinion whether the evidence disclosed fraud or mere negligence, and in so doing the jury might draw such presumption about facts from the course of business and the conduct of persons as section 114 of the Indian Evidence Act allows a Court to do. Being satisfied that there was no misdirection, we did not call on the learned Government Pleader to reply on this point.

The second question raised by Mr. Kirkpatrick was as to the admissibility as evidence at the trial of the deposition of a witness obtained by a commission issued by the committing Magistrate and forming part of the record of his inquiry. When tendered for the Crown, and objected to for the prisoner, the learned Judge held that section 33 of the Indian Evidence Act applied to the deposition; and in the exercise of the judicial discretion allowed by that section admitted it on the ground that the attendance of the witness who was at Indore, in a Native State, could not be obtained without unreasonable delay and expense. It has been only faintly argued by the Government Pleader that the deposition may be held admissible under Chapter 40 of the Code of Criminal Procedure (Act X of 1882); and so far we see no reason to differ from the contrary view expressed by Wilson, J., in *Queen Empress* v. *Jacob*[2], or from the reasons given in the report. The argument of Mr. Kirkpatrick does not contest the exercise of the discretion by the Judge as wrong; and, therefore, the particular question arising on section 33 in the last mentioned case and before Oldfield, J., in *Queen-Empress* v. *Burke*[3] is not before us, at least not in the same form. It does not appear to have been urged at the trial that there was something very special in the case

(1) I. L. R., 16 Bom., at p. 423. (2) I. L. R., 19 Cal., 113.
(3) I. L. R., 6 All., 224.

which rendered personal presence necessary—*Empress* v. *Lál Gangádhar*[1]. We must, therefore, hold, in the absence of objections, that the first part of section 33 applied to the deposition. So does the explanation. We mean that there is nothing in the language used showing that a deposition like the present was meant to be excluded. No authority has been cited on the construction. Mr. Kirkpatrick's argument was that as special provision is made in Chapter 40 of the Code of Criminal Procedure for commissions in criminal cases, that chapter must be treated as exhaustive. We think, however, that no sufficient reason exists for making that concession, or limiting the force of general words in section 33. This view is not against the principle of section 390 of the Code of Civil Procedure (Act XIV of 1882), and the use made of depositions taken in Zanzibár in *Empress* v. *Dossájee*[2]. The same judicial discretion used as to depositions of witnesses examined by the committing Court or in another Court in a case between the same parties under section 33 of the Indian Evidence Act, has to be used and was used about this commission evidence, and the cases show that the use of this discretion may be challenged in appeal. Thus safeguards exist against abuse.

In the argument on section 33, the question was discussed whether the proviso had, as is necessary, been satisfied. As we are of opinion that much of the matter of the deposition was inadmissible for reasons we will give, it is perhaps not necessary for our decision to construe the proviso; and as my brother Fulton refrains, therefore, from giving an opinion on that point, I state my own views with some diffidence. The only point in doubt was, whether at the taking of the evidence by the Commissioner at Indore, the prisoner had "the opportunity to cross-examine", the right to cross-examine being expressly given by section 505 of the Code of Criminal Procedure (Act X of 1882). As to the opportunity, the record shows that the prisoner had questions, headed "cross-examination" questions and "supplemental cross-examination" questions, put as counter interrogatories, and also got notice of the day appointed for taking the evidence. Neither he nor his pleader attended. There may be circumstances where, although a prisoner has the right, he has not the opportunity,

(1) I. L. R., 6 Bom., at p. 287. (2) I. L. R., 3 Bom., 334.

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e.g., where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there. When the want of opportunity is pleaded, the trying Court makes inquiry before admitting the evidence—*Queen* v. *Mowjan*[1]; *Reg.* v. *Day*[2]; *Reg* v. *Williams*[3].

At the Court's suggestion the Government Pleader called on the committing Magistrate for information; and that officer's statement, which is accepted here on behalf of the prisoner, shows that no desire to be present at Mr. Bedárkar's examination was expressed. No objection on the ground of want of opportunity was apparently made to the Magistrate, nor to the Sessions Judge, nor is it set forth in the appeals, nor after the invitation of this Court has this want been shown to exist. The ruling in *Hitchins* v. *Hitchins*[4] is under the circumstances an authority for declining to hold that the deposition is inadmissible on the ground suggested. To hold that the proviso in section 33 of the Evidence Act requires proof of the presence before the Commissioner of the cross-examining party or his agent, would be to put a strain on the words and lead to inconvenience. If presence were necessary, the word would have been used as in 11 and 12 Vic., c. 42, s. 17. In 30 and 31 Vic., c. 35, a statute enabling the depositions of sick witnesses in criminal cases to be taken before trial, we find provision in section 6 that on proof of death of the witness the deposition may be read on proof "that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same." In section 7 follows a power to convey the prisoner in actual custody to the place where the statement is to be taken. The Indian law has made no provision of that sort: a prisoner under sentence cannot insist on being brought before the Court to support his appeal, as is ruled in this Court's Resolution in Chambers, in *Re Antoine José*, dated 4th September, 1869. If, then, we were to hold that presence or opportunity of presence is required to

(1) 20 Cal. W. R. (Cr. Rul.), 69.
(2) 6 Cox. C. C., 55.
(3) 12 Cox. C. C., 101.
(4) L. R. 1 P. and D., 153.

satisfy the proviso, much difficulty would be found in getting evidence under the enabling section 33 of the Evidence Act where a party is in custody.

These considerations favour the construction of the words "opportunity to cross-examine" as including the method of cross-interrogatories which for many years was the chief mode of cross-examination in the Courts of Equity and the Admiralty Courts in England, and for which provision is made in the Common Law Procedure Acts. Where the whole examination was in writing—epistolary as Jeremy Bentham calls it—as distinguished from *vivâ voce* examination at the trial, the cross-examination was in writing too, and is so treated in the reports—*Pole* v. *Rodgers*(1); *Williamson* v. *Page*(2). The whole system is described in Gresley's Evidence in the Court of Equity, Part III, c. 5, sec. 1: and its ineffectual character discussed as compared with the *vivâ voce* method, the opinions of the Chancery Commission and of eminent Judges being cited. Though the point was not taken by Mr. Kirkpatrick, we paused in order to consider whether counter-interrogatories, though described in these books as a form of cross-examination, were to be treated as such in interpreting our codes. With reference to my brother Fulton's doubt, I may recall the remark of Bentham—in his work on judicial evidence if my memory is right—that the method of cross-examination *vivâ voce*, that which the term first suggests and the only effective method, is peculiarly English, and the word has no exact equivalent in the civil law or any continental jurisprudence. It is of high importance that no security for truth, especially in criminal cases, should be weakened. On our rules of evidence, said Lord Abinger, the property, the liberty and the lives of men depend: and, therefore, while I give my opinion, I agree with Fulton, J., that this point ought to be more solemnly argued before it is decided solemnly.

In the present case the Court, having noticed that there was no evidence nor admission on the record to support the statement of the Sessions Judge that the accused had full opportunity of cross-examining, had to make its own inquiries. We are of opinion that this fact, if not admitted, must be proved, as was ruled

(1) 3 Bing. N. C., 780. (2) 1 C. B., 464.

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in *Queen* v. *Mowjan*(1), and as may be inferred from section 136 of the Evidence Act. Commissions ought not to be issued without good and sufficient reasons: the discretion is judicial, as shown by the Indian cases and the practice of the Courts of England—*In Re Boyse. Crofton* v. *Crofton*(2); *Cook* v. *Allcock & Co.*(3). The exercise of the discretion in the present case by the Sessions Judge, is open to re-consideration in appeal as shown by *Queen* v. *Mowjan*(1) and *Cleave* v. *Jones*(4) and 1 Taylor on Evidence, sec. 22.

This brings us to two objections taken by Mr. Kirkpatrick, though not taken at the trial, *viz.* that certain questions and certain answers in the evidence of Mr. Bedárkar are inadmissible, and that the general tenor of the statements is to prejudice the prisoner in the eyes of the jury. We are of opinion that some of the questions are unfairly framed and some of the answers stating mere opinions and suspicions are inadmissible as evidence—to which in a Court of Equity just objections would have been taken—to which under section 507 of the Criminal Procedure Code (Act X of 1882) just exception might and ought to have been taken before the Magistrate, which also the Sessions Judge ought in his discretion under section 298 of that Code to have prevented being read in the trial. To avoid imperilling the verdict, the admission of such evidence ought not to be pressed by the prosecution—*Reg.* v. *Russell*(5). See also *Reg.* v. *Kásináth Dinkar*(6). It is probable that the jury were much influenced by Mr. Bedárkar's opinions on the chief issue they had to try. The facts occurred when Mr. Bedárkar was a Judge and the prisoner was a clerk in his Court. Juries usually give weight to the opinion of Judges. They know that Judges are used to deal with conflicting evidence, to question, to sift, to weigh it impartially: to test it by the presumptions based on general experience which are now settled rules of law. I remember a reported case in England where the learned Judge says: "If two Judges came and swore to the fact I would believe it," as if that would be equal to a confirmatory oath in which it would be impossible to lie. So also the poet Browning, who is fond of these legal questions, makes "Sludge the Medium" or

(1) 20 Calc. W. R. (Cr. R.), 69.
(2) 20 Ch. D., 760.
(3) 21 Q. B. D., 178.
(4) 7 Exch. Rep., 421.
(5) 6 Cox., 60.
(6) 8 Bom. H. C. R., at p. 153, Cr. Ca.

spirit-rapper explain that his imposture gained the common belief as soon as it was made to appear that a Judge believed in it. The jury must have known that the issue in this case, whether the prisoner's conduct showed fraud or negligence, is one with which Judges are dealing so constantly as to acquire great experience. As the Sessions Judge drew their attention to Mr. Bedárkar's evidence in general terms, the jury probably were influenced by his opinions and suspicions that frauds had been committed in which the prisoner took part, the very issue on which they had to pronounce a verdict as judges of the facts, but on the evidence before them, not on the opinions of other persons.

The result of my consideration is to hold the evidence taken on commission to have complied with and to be admissible under section 33 of the Indian Evidence Act. We are both clear, however, that part of it was inadmissible as irrelevant, and must be excluded as prejudicial under that Act and section 507 of the Code of Criminal Procedure.

As this Court holds part to be inadmissible, it becomes necessary to decide whether this Court in dealing with the remaining evidence on the record should adhere to the practice based on former decisions such as *Reg.* v. *Fattechand*(1), *Reg.* v. *Ramswami*(2), *Reg.* v. *Naorojee*(3), *Reg.* v. *Amrita*(4), *Imperatrix* v. *Pitámber*(5), *Imperatrix* v. *Pandharináth*(6) as to the power of the Court where there has been misdirection or where inadmissible evidence has been allowed to go to the jury; or whether, as has been strongly pressed by Mr. Kirkpatrick, this Court should follow Beverley and Banerjee, JJ., in *Wafadár Khán* v. *Queen-Empress*(7) as to the application of some passages in the judgment of the Judicial Committee of the Privy Council in *Makin* v. *Attorney General of New South Wales*(8). The Indian cases above cited being based on special Indian enactments, such as Act II of 1855 and the corresponding section 167 of the present Evidence Act (I of 1872) and sections 537 and 423, clause (*d*) of the Criminal Procedure Code (Act X of 1882), propound a

(1) 5 Bom. H. C. Rep., 85 Cr. Ca.
(2) 6 *Idem*, 47.
(3) 9 *Idem*, 358.
(4) 10 *Idem*, 497.
(5) I. L. R., 2 Bom., 61.
(6) I. L. R., 6 Bom., 34.
(7) I. L. R., 21 Cal., 955.
(8) L. R. (1891), A. C., 57.

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different view of the law to what is settled in England by the *Queen* v. *Gibson*[1]. We would remark also that in the recent case from New South Wales before the Privy Council no such special enactment as section 167 of the Indian Evidence Act was referred to, either in the arguments or the decision.

The words "in any case" used in this section are wide, and long ago were interpreted to include criminal trials by jury. It is also obvious in interpreting a statute applying to the Mofussil of India, where trial by jury is the creation of statute—*Reg.* v. *Khanderáo*[2], *Queen* v. *Hari Prasad*[3], *Queen-Empress* v. *Dádá Aná*[4], *Queen* v. *Elahi Bax*[5] (where Sir Barnes Peacock says that in the Mofussil, trial by jury is in its infancy), analogies from a system where the statutes deal with that institution as part of the common law must be warily used. In the recent Calcutta case[6] no authority is cited for the interpretation of the word "erroneous" in section 423, clause (*d*), at p. 976 of the report: and the procedure under section 307 shows that the Legislature in certain circumstances throws on the Judges of the High Court the duty either of determining the facts which have been already before a jury, or of ordering a new trial. Sometimes it appears after error found that the case depends on conflicting testimony which ought to be weighed by a Court before whom the witnesses appear; and this may be a reason for ordering a new trial. It is difficult to lay down with precision rules to meet all cases—*Queen* v. *Gagalu*[7], but not so difficult in practice. In *Imperatrix* v. *Rupya*[8] the Court (Birdwood and Jardine, JJ.) followed *Reg.* v. *Ramswami*[9], *Reg.* v. *Amrita*[10] and the case of *Elahi Bax*[5], and a new trial by jury was directed. In *Imperatrix* v. *Kushya*[11], where the facts were hard to determine, a new trial by the Judge and assessors was directed by Jardine and Ránade, JJ. In *Imperatrix* v. *Nanu*[12], the same Judges ordered a new trial by jury as judges of the facts, *Reg.* v. *Fattechand*[13] being

(1) 18 Q. B. D., 537.
(2) I. L. R., 1 Bom., at p. 13.
(3) 8 Beng. L. R., 562; S. C. 14 Cal. W. R., 59.
(4) I. L. R., 15 Bom., at pp. 481, 483.
(5) Beng. L. R. Sup. Vol. (Full Bench) at 472. S. C. 5 Cal. W. R. (Cr. Rul.), 80.
(6) I. L. R., 21 Cal., 955.
(7) 4 Beng. L. R. at p. 50, Appx.
(8) Cr. Rul. 12 of 1886.
(9) 6 Bom. H. C. Rep., 47.
(10) 10 *Idem*, 497.
(11) Ap. 377 of 1893, 21st Nov. 1893.
(12) Ap. 400 of 1893, 30th Jan. 1894.
(13) 5 Bom. H. C. Rep., 85 Cr. Ca.

cited. In *Government of Bombay* v. *Dhanji*[1], where the jury had been misdirected that confessions must be corroborated, the same Judges ordered a new trial. It cannot be supposed that the Indian Legislature in its successive recastings of the Procedure Code was ignorant of the tenor of the decisions or the reasons given for them in such full judgments as that of Sir B. Peacock in *Elahi Bax's* case.

The present decided inclination of our opinion, as may be gathered from the above, is that the language used by the Judicial Committee in the case from New South Wales does not apply to the Codes of India. In *Reg.* v. *Rámswámi*[2] this Court ordered a new trial, as the evidence was of such a character as to render it difficult to pronounce upon its value without hearing the witnesses. It has been conceded for the prisoner that the present case differs: the evidence is one-sided and practically undisputed: the result depends on the inference from that evidence, whether only negligence or fraud is proved beyond reasonable doubt. As remarked already, such issues are constantly determined by the Judges here; and this one has been fully argued. We see no reason, then, for ordering a fresh trial.

We have then to apply the test adopted from *Elahi Bax's*[3] case by Warden and Sargent, JJ., in *Reg.* v. *Fattechand*[4]—whether if the case had been tried by a Judge and assessors, the Court would set aside the verdict. We cannot say on the evidence that the verdict is wrong. In two of the cases the receipt of the money by the prisoner is admitted. In the third it may be inferred. The ledger entries show the real sums received; they differ from and were made later by the prisoner from the false entries he made in the day-book. It may beyond reasonable doubt be found as a fact that the prisoner had a hand in the fraudulent misappropriation of each of the three sums. With regard to the conviction passed under section 218 by the Judge with the aid of assessors we see no sufficient reason to differ from his conclusions. For the above reasons the Court confirms the convictions and sentences, and dismisses this appeal.

Appeal dismissed.

(1) Ap. 240 of 1894, 11th Oct. 1894.

(2) 6 Bom. H. C. Rep., 47.

(3) Beng. L. R. Sup. Vol. (Full Bench) at p. 472. S. C. 5 Cal. W. R. (Cr. Rul.), 80.

(4) 5 Bom. H. C. Rep., 85 Cr. Ca.