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on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon cannot be tried. Here the Sessions Judge thought that Narayan was not proved to have wilfully concealed anything essential or to have given false evidence, differing on this point from the Magistrate, who thought that he had given false evidence and therefore committed him. I agree with the Sessions Judge. There may be some suspicion against Nimgouda, but the evidence does not disclose any case against him, in regard to which it can be said with any certainty that Narayan has wilfully concealed anything essential or given false evidence. His conviction therefore must be reversed and he must be discharged.

Order accordingly.

FULL BENCH.

APPELLATE CRIMINAL.

Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe, and Mr. Justice Chandavarkar.

KING-EMPEROR v. PARBHUSHANKAR.*

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Criminal Procedure Code (Act V of 1898), sections 269 and 418—Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.

Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

* Criminal Appeal No. 4 of 1901.

Held, by a Full Bench that under section 418 an appeal lay in this case on matters of law only and not on matters of fact.

Per Jenkins, C.J.—The words in section 418 of the Criminal Procedure Code, 1898, “when the trial was by jury” mean “when the trial in fact was by jury” and not “when the trial should have been by jury.”

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APPEAL from the conviction and sentence recorded by F. X. DeSouza, Sessions Judge of Ahmedabad.

The accused was committed to the Court of Session at Ahmedabad for trial on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

At the commencement of the trial which was by jury the charge was amended by the addition of counts under sections 304 and 325 of the Code.

The latter offences were triable with the aid of assessors and not by a jury at Ahmedabad.

The Sessions Judge, however, proceeded with the trial on all the charges. The jury unanimously acquitted the accused of offences under sections 302 and 304 of the Indian Penal Code (Act XLV of 1860); but convicted him under section 325 of the Code. The Judge thereupon sentenced him to four years' rigorous imprisonment and a fine of Rs. 1,000.

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

The appeal at first came on for hearing before a Division Bench (Candy and Chandavarkar, JJ.), who referred to a Full Bench the question “Whether an appeal in the present case lies on a matter of law only.”

The following was the referring judgment.

CANDY, J.:—A preliminary point of considerable importance has arisen in this appeal. The question is, whether an appeal lies on matters of fact. Section 418 of the Criminal Procedure Code provides that “where the trial was by jury the appeal shall lie on a matter of law only.” This trial was by jury. The accused was committed to the Court of Session of Ahmedabad on a charge of murder (section 302, Indian Penal Code). That was apparently the only charge framed by the Magistrate.

When the trial in the Sessions Court began, before the accused was called on to plead, the charge was amended (presumably by

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direction of the Sessions Judge) by the addition of counts under sections 304 and 325 of the Indian Penal Code. Such offences are not triable by a jury at Ahmedabad. Therefore, under section 269 (3) of the Criminal Procedure Code, the accused should have been tried for these latter offences by the Court of Session with the aid of the jurors as assessors.

This provision of the law was apparently not followed by the Sessions Judge. He charged the jury on all three counts, and indicated the circumstances under which it was, he said, open to the jury to convict of culpable homicide not amounting to murder or of voluntarily causing grievous hurt. The jury returned the unanimous verdict that accused was not guilty of murder, nor of culpable homicide not amounting to murder, but that he was guilty of voluntarily causing grievous hurt under section 325 of the Indian Penal Code, and that he was sane when he committed the act. On this the Sessions Judge, accepting the unanimous verdict of the jury, found the accused guilty of an offence under section 325 of the Indian Penal Code, and sentenced him.

Section 536 of the Criminal Procedure Code provides that if an offence triable with the aid of assessors is tried by a jury, the trial shall not, on that ground only, be invalid.

So here the trial was not invalid because the Sessions Judge did not ask the jurors as assessors for their opinions on the charges under sections 304 and 325. But still the fact remains that "the trial was by jury," in which case the appeal shall lie on a matter of law only. To apply the language of Parsons, Acting C.J., in *Queen-Empress v. Jeyram*,⁽¹⁾ "the procedure of the Sessions Judge was clearly most irregular, but it appears on the authorities that we must accept the trial by jury as a legal one," and, if the Sessions Judge disagrees with the verdict of the jury on the charge of an offence which should properly have been tried with the aid of the jurors as assessors, he should submit the case under section 307. In other words, as "the trial was by jury," and was a "legal trial," the Sessions Judge could not treat the verdict of the jurors as the opinion of assessors, and record a finding in opposition to that verdict and opinion.

(1) (1899) 23 Bom. 696, p. 697.

In the above case, Parsons, Acting C.J., referred to the decision of this Court in *Imp. v. Dev Vithu*.⁽¹⁾ In this latter case the second accused was tried on charges under sections 457 and 380 of the Indian Penal Code. The first charge was triable by jury; the second with the aid of the jurors as assessors. The Sessions Judge took the verdict of the jurors on both charges (which was one of acquittal), and did not require each of the jurors as assessors to state his opinion orally on the charge under section 380, but referred the whole case to the High Court under section 307. The High Court upheld the verdict of acquittal on the charge of an offence under section 457, and then proceeded to deal with the charge of the offence under section 380. The learned Judges (Jardine and Telang, JJ.), relying on the Calcutta decision in *Bhootnath Dey's case*,⁽²⁾ held that there had been a trial by jury of the charge of an offence under section 380, and that therefore the Sessions Judge had jurisdiction to refer the verdict to the High Court, and thus that the High Court could convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. Their Lordships then convicted the accused of an offence under section 380. In other words, the second accused was deprived of his right of appeal, which he would have been able to exercise had the Sessions Judge been directed to record a judgment, after considering the opinions of the jurors as assessors. Their Lordships did not directly refer to this point, but they remarked: "Any prejudice which prisoner might incur is prevented by our practice of giving him notice of the hearing of the reference, and so great is the respect of the High Courts for verdicts of juries that a prisoner so acquitted has an advantage, as a general rule, over one in whose favour there are only the opinions of assessors."

Their Lordships also remarked that the decision in *Bhootnath Dey's case* was passed after consideration of *Empress v. Mohim Chunder Rai*,⁽³⁾ in which the opinion was expressed by Maclean, J. (Mitter, J. *dubitante*) that "the prisoners, who would have been entitled to an appeal on the facts, if the case had been tried

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(1) (1892) Cr. R. No. 19.

(2) (1879) 4 Cal. L. R. 495.

(3) (1878) 3 Cal. 765.

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with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoners' right of appeal."

In our opinion the question is not what ought to be the case, so much as what is the law. Nothing would have been easier than for the Legislature to insert in clause 1 of section 536 a provision preserving the right of appeal on facts. If, following the Bombay ruling above quoted, we must hold here distinctly that the case under section 325 was tried by a jury, then the law says that there shall be an appeal on a matter of law only.

Bhootnath Dey's case was followed by the Calcutta High Court in *Surja Kurmi v. Queen-Empress*,⁽¹⁾ in which the Sessions Judge, treating the verdict of the jury as the opinion of assessors, recorded a judgment, convicting the accused of an offence which was triable with the aid of assessors. The High Court (Hill and Stevens, JJ.) set aside the conviction and remanded the case to the Sessions Judge in order that he might deal with it according to law by passing an order either under section 306 or 307 of the Criminal Procedure Code. The Court held that the case was "tried by a jury" within the meaning of section 536. If so, then it was equally a "trial by jury" within the meaning of section 418. Conviction or acquittal cannot make any difference in the fact that the trial was by jury. If in a case which should have been tried with the aid of assessors, there is in fact a valid trial by a jury, and in such a case the Sessions Judge cannot (as shown in the rulings quoted above), treating the verdict of jurors as opinions of assessors, record a judgment, but must, if he disagrees with the verdict, refer the case to the High Court, then it is difficult to see how in a similar case the High Court can treat the verdict of the jury as their opinion as assessors.

In the case of *Imperatrix v. Lalbu*⁽²⁾ the Sessions Judge tried the accused by jury, the charges being of offences under sections 302 and 318 of the Indian Penal Code. The charge under section 318 was not triable by Jury. The jury acquitted accused on both charges. Government appealed. This Court (Parsons and

(1) (1898) 25 Cal. 555.

(2) (1898) Cr. R. No. 15.

Ranade, J.J.), taking the verdict of the jury to be their opinions as assessors, went into the facts, and found that accused had committed an offence under section 318, and convicted and sentenced her. Obviously, if the law allows an appeal on facts in such a case when there is an acquittal, there should equally be an appeal on facts where there is a conviction. The difficulty is that the words of the law (section 418) are "where the trial was by jury." If the words were "except where the conviction or acquittal was of an offence triable by jury," then there would be no difficulty. And this would meet the case of a conviction under the provisions of section 238 of the Criminal Procedure Code, according to which an accused may be convicted of a minor offence, though he is not charged with it. In the present case before us, if the Sessions Judge had not added the counts under sections 304 and 325, would it not still have been open to the jury to convict of an offence under either of those sections? Would there then have been an appeal on facts as the law now stands? The "trial was by jury."

In the case of *Queen Empress v. Jeyram*,⁽¹⁾ noted above, Parsons, Acting C.J., remarked that the decision of this Court in *Imperatrix v. Lalbu*—also noted above—as to the right of appeal in a case so tried (namely by jury when it ought to have been tried with the aid of assessors) in no way conflicts with the decisions of the Bombay and Calcutta High Courts that a case so tried must be treated as a valid trial by jury, so that if the Judge disagrees with the verdict, his only course is to make a reference under section 307.

With the greatest respect it may be pointed out that the decisions are inconsistent. If such a case must be distinctly treated as a trial by jury, so much so that the Judge is not entitled to regard the verdict of the jurors as their opinions as assessors, then the principle of trial by jury must apply that there is an appeal on a matter of law only.

In our opinion the mistake has arisen in supposing that the decision in *Bhootnath Dey's* case is applicable to the present law. That decision was passed under Act X of 1872, which contained

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no provision as to the procedure to be followed, when the accused is charged at the same trial with several offences of which some are and some not triable by jury. Then came Act X of 1882, section 269, which provided that in such a case the accused should be tried on all the charges by jury. Then came the amendment made by Act X of 1886, section 9, which is the law at present. In *Imperatrix v. Dev (supra)*, Jardine, J., expressed the opinion that the amendment made by section 9 of Act X of 1886 restored the procedure of 1872, section 233, as interpreted in *Bhootnath Dey's case*.

We are unable to concur in that opinion. When *Bhootnath Dey's case* was decided in 1879, there was no provision in the law applicable to such a case, except that if an offence triable with assessors is tried by a jury, the trial shall not, on that ground merely, be invalid. The learned Judges, Mitter and Prinsep, JJ., held that the whole case must be taken as having been tried by jury. This decision was embodied in Act X of 1882, section 269, and was the law till section 269 was amended by Act X of 1886, section 9. Under the law so amended, we think that it may be taken as open both to the Sessions Judge and to the High Court in such a case, in which the opinion of each juror as an assessor has not been taken, to treat the verdict as those opinions, and to proceed to judgment, just as if the case had been tried with the aid of assessors. In such a view of the law an appeal would lie on a matter of fact. But as this view is not free from doubt, having regard to the language of section 418, and as, moreover, it is in direct conflict with the decisions above noted of the Bombay and Calcutta High Courts, we think that the question, whether an appeal in the present case lies on a matter of law only, is one which should be decided by a Full Bench; and we therefore direct that the papers of this appeal be laid before the Chief Justice.

This reference was argued before Jenkins, C.J., Candy, Fulton, Crowe and Chandavarkar, JJ.

Ráo Báhádur V. J. Kirtikar, Government Pleader, for the Crown:—In this case no appeal lies on matters of fact. Section 418 of the Criminal Procedure Code (Act V of 1898)—*Surja*

Kurmi v. Queen Empress.⁽¹⁾ The accused ought no doubt to have been tried at Ahmedabad for the offence of which he has been convicted, not by a jury but with the aid of assessors. But the irregularity does not make the trial invalid—Section 536 of the Criminal Procedure Code (Act V of 1898); *In the matter of Bhoot-rath Dey*⁽²⁾; *Queen Empress v. Jeyram.*⁽³⁾

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P. M. Mehta (with *L. A. Shah*) for the accused.

Sections 418, 269 and 536 are the sections to be considered. Reading section 269 with section 418, it is clear that section 418 which deprives the accused of an appeal on matters of fact applies only when the offence with which he is charged is exclusively triable by jury. It does not apply where the offences charged are partly triable by jury and partly with the aid of assessors. In the Code (Act X of 1872) there was no provision similar to section 269 of the present Code. Nevertheless the ruling in the *Queen v. Doorga Churn*⁽⁴⁾ shows that an appeal would lie on matters of fact where an offence which was not triable by jury was in fact tried by jury. *Queen Empress v. Lalbu*⁽⁵⁾ shows that in a case like this an appeal on facts will lie—see also *Queen Empress v. Jeyram.*⁽⁶⁾ Section 536 of the Code does not cure an irregularity which changes the whole character of the proceedings. We submit that the present case, though tried by a jury, ought to be taken as if tried with the aid of assessors, and thus an appeal on matters of fact will lie.

JENKINS, C.J. :—The accused was at the trial of this case charged with several offences, of which one is, and two are not, triable by jury. A jury was chosen, the trial proceeded, and at the end the Judge charged the jury, who by their verdict found the accused guilty of an offence under section 325 of the Indian Penal Code. This offence is not triable by jury. The finding and sentence of the Sessions Judge is thus recorded: "Accepting the unanimous verdict of the jury, I find the accused guilty of an offence under section 325 of the Indian Penal Code, and I sentence him to

(1) (1898) 25 Cal. 555.

(2) (1879) 4 Cal. L. R. 405.

(3) (1899) 23 Bom. 696.

(4) (1875) 24 Cal. W. R. 30.

(5) (1898) Cr. Rul. No. 15.

(6) (1899) 23 Bom. 696.

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rigorous imprisonment for a period of four years and to pay a fine of one thousand rupees, &c. &c."

-From this finding and sentence the accused has appealed, and the question referred for our decision is whether an appeal will lie on the facts.

I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404 of the Criminal Procedure Code provides that "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force," and under section 418 "an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only." At the same time it is provided by section 536 that "if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground be invalid."

These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the Court of Sessions with the aid of the jurors as assessors.

The offence therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial: but did it attract the consequences of section 418? This turns on the precise force in that section of the words "where the trial was by jury." Do they mean "where the trial should have been by jury" or "where the trial in fact was by jury"? In my opinion the words are themselves the clearest answer to this question: they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused, who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the

circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact.

CANDY, J.:—I have but little to add to what I have said in the referring judgment. Possibly if, before final orders are passed, a Sessions Judge treats the verdict of the jurors as their opinions as assessors, and proceeds to judgment just as if the case had been tried with the aid of assessors, then it may be said that the case was not “tried by a jury,” and that therefore an appeal would lie on a matter of fact.

But that is not the present case in which the Sessions Judge has recorded no judgment beyond accepting the verdict of the jurors. In such a case it seems impossible to avoid the distinct terms of section 418. Thus, as the trial was by jury, the appeal shall lie on a matter of law only. It is evident that in section 418 the Legislature deliberately used the words “the trial was by jury” instead of “offence triable by jury” as in section 536. Trial by jury is regarded as a privilege, carrying with it certain liabilities. If an offence triable by a jury is tried with the aid of assessors, then, provided objection is taken before the Court records its finding, the trial will be invalid. The accused has been deprived of a valuable privilege which it is open to him up to the last stage in the case to preserve.

But the converse is different. If the accused obtains the privilege to which, strictly speaking, he is not entitled, it is not presumed that he will take any objection. He has the chance of a verdict in his favour, a verdict which can only be upset under exceptional circumstances. If the verdict is against him, he cannot turn round and claim an appeal on matters of fact.

With reference to the mention of section 439, I would remark that the fact that an accused has obtained the privilege to which he was not strictly entitled, and has taken the chance of an adverse verdict, is no ground *per se* for the High Court exercising its power of revision under section 439. No doubt when the case is before it, the High Court can act under section 439, and in doing so will be guided, not I think by errors of procedure in the Sessions Court, which have not affected the facts of the case, but by the well-known principles according to which all the

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High Courts in this country in non-appealable cases have limited their interference with findings of fact on appreciation of the evidence.

Also I am not prepared, without further consideration, to assent to the opinion that when an appeal to the High Court on a point of law (misdirection) in a case which was tried by jury is successful, the High Court can assume the functions of a jury and find on the facts without the necessity of a re-trial.

I would answer the question referred to the Full Bench in the affirmative.

FULTON, J.:—My answer to the question whether in this case an appeal lies on a matter of law only must be in the affirmative.

On the charge in respect of which the accused has been convicted he was tried by a jury, though the offence was triable with the aid of assessors. Section 536 of the Criminal Procedure Code provides that in such circumstances the trial shall not on that ground only be invalid. There was therefore a valid trial. That trial was by jury; and according to section 418, where the trial was by jury, the appeal shall lie on a matter of law only.

Mr. Mehta urged that we should read section 418 with section 269 and treat the words "where the trial was by jury" as meaning "where the trial was by jury according to the provisions of section 269." But we cannot put this construction on section 418 without materially altering its language, which I do not think we are justified in doing. The words "where the trial was by jury" are plain enough and cannot be read as meaning where the offence was triable by jury under section 269. Moreover, this construction might be found very inconvenient in the converse case where an offence properly triable by jury was by mistake tried with the aid of assessors.

It may seem hard that a prisoner, who, if he had not been irregularly tried in the Court of Session, would have had an appeal to the High Court on the facts, should by reason of that irregularity be deprived of his appeal. But the grievance is more apparent than real. Under section 439 the High Court has the widest powers of revision, and, if it finds that owing to an irregularity in the Court below the prisoner is in danger of being

wronged, it will, I think, exercise those powers even to the extent of considering the correctness of the verdict, just as, sometimes in proper cases, it reviews Magisterial decisions which are not open to appeal.

It may be argued that this view enables an accused person to secure the effect of an appeal in cases in which by law no appeal is allowed. But a similar objection may be urged in almost every case in which the revisional powers of the High Court are used, for it is only when there is no appeal that the necessity ever arises for the exercise of such powers. The Court, no doubt, always keeps in view the finality intended by the law, and only interferes when it is satisfied that a miscarriage of justice will result if revision is refused. But at the same time, whilst it recognizes that finality in certain cases is intended, it has also to bear in mind that the Legislature has conferred on it powers of revision, which it is intended to exercise where wrong will otherwise pass unredressed. No general rule can be laid down determining the cases in which the Court ought to exercise these powers. No such rule has been prescribed by the Legislature, and no opinion of this Court can supplement or take away from the provisions of the law. In the present case it seems to me that it is entirely for the learned Judges of the Division Bench to determine in their discretion whether they will go into the facts or not.

I have not thought it necessary to discuss the various decisions so fully set forth in the reference of my learned colleagues. But I wish to point out that although the opinion that in a case like the present no appeal lies may be at variance with some of the *dicta* in *Imp. v. Lalbu*,⁽¹⁾ it is in no way inconsistent with the result, for in that case there had been a clear misdirection to the jury which in itself was sufficient to give ground for appeal.

CROWE, J. :—The accused was charged before the Sessions Court at Ahmedabad with an offence under section 302 of the Indian Penal Code triable by jury. During the trial other charges were added under sections 304 and 325, of offences which are not triable by jury at Ahmedabad.

(1) Cr. R. 15 for 1898.

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The law provides—section 269, clause 3, Criminal Procedure Code—that in a mixed trial where some of the offences charged are triable by jury and some are not, the accused should be tried by jury for such offences as are triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as are not triable by jury. This course was not followed by the Sessions Judge. His summing up had reference to all the offences with which the accused was charged, and at the conclusion of the trial the jury returned a unanimous verdict that the accused was guilty of an offence under section 325 of the Indian Penal Code. This verdict was accepted by the Sessions Judge, who forthwith found the accused guilty and sentenced him accordingly. The question which now arises and which has been referred for decision to a Full Bench, is whether the accused has a right to appeal on the facts. Section 418 of the Criminal Procedure Code provides that when the trial was by jury an appeal shall lie on a matter of law only. In the present case it seems impossible to hold that the trial was not by jury. The jurors were chosen by lot, the verdict of the majority (in this case it was unanimous) was given by the foreman, and was accepted and acted on by the Sessions Judge. In no respect was the procedure prescribed by law for the trial of cases with the aid of assessors followed. Assessors were not chosen, nor were they required each to state his opinion orally, nor did the Sessions Judge pronounce judgment according to the provisions of section 367 of the Criminal Procedure Code. Section 536 of the Criminal Procedure Code was apparently designed to meet the actual circumstances of cases like the present, and it lays down that if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground only be invalid.

The trial being a valid trial by jury, the provisions of section 418, if that section is read in its natural and ordinary sense, are a bar to an appeal on matters of fact.

The question arises whether the accused has been prejudiced by the procedure followed by the Sessions Judge. I think clearly not. He has had the advantage of the opinion of the jury on all matters of fact, by which the judge is bound. It seems clear from the wording of section 536 that that is the view entertained by

the Legislature, because although a trial is not invalid on the mere ground that an offence triable with the aid of assessors is tried by a jury, in the converse case when the offender is entitled to be tried by a jury and has been tried with the aid of assessors, the trial on that ground alone, may be declared invalid, if the objection be taken before the Court records its finding; the law apparently holding that the accused has been deprived of a right or privilege by an error of procedure.

For these reasons I am of opinion that in the case stated no appeal lies.

CHANDAVARKAR, J. :—I venture to think that there is an apparent deficiency in the language used by the Legislature in section 536 of the Code of Criminal Procedure, and whether we construe it singly or along with section 418, it is as open to the construction for which Mr. Mehta contended as that pressed on us by the learned Government Pleader. The negative form of the language used in section 536 lends some support to the contention that where an accused person, who ought to have been tried with the aid of assessors, is tried by a jury, the Legislature says merely, that the trial shall not on that ground only be invalid, *i.e.* the trial shall not be treated as a nullity, not that it shall be treated for all purposes as a valid jury trial. The wording of section 418 is also, in my view, not altogether precise. It is also capable of more than one meaning. No doubt that section says that where an accused person "was tried by jury," an appeal shall lie on a matter of law only. But the words "was tried" may be construed to mean "where an accused person was, according to law, tried by a jury," as much as they may be taken to mean "where as a matter of fact, whether according to law or not, an accused person was tried by a jury." Where the language used by the Legislature is capable of more than one construction, I should lean in favour of that which is beneficial to the accused. If the result of the construction which the learned Government Pleader has asked us to put upon these sections were simply to deprive the accused of the right of appeal he would have had on facts, had he been, as he ought to have been, tried with the aid of assessors, I should have held that more clear and positive

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language was necessary in the sections of the Code to justify that construction as the only one possible and to impute to the Legislature the intention to deprive the accused of that right. But it is not a case where the accused is simply deprived of the right of appeal on facts given to him by the Code. It is rather a case where he loses one right and gains another instead. If, as a result of being tried by a jury, when he ought to have been tried with the aid of assessors, his right of appeal on facts ceases, he at the same time secures the privilege of a trial by jury, and the whole scheme of the Code of Criminal Procedure is to treat trial by jury as a privilege, as valuable as, if not more valuable than, the other rights. This is rendered even more clear by the distinction which is made by the Legislature in section 536 between a case where an accused person who ought to have been tried with the aid of assessors is tried by a jury, and a case where an accused person who ought to have been tried by a jury is tried with the aid of assessors. In the former case the Legislature says that the trial shall not be invalid; whereas in the latter the trial shall not be invalid unless objection is taken to the trial before the Court records its finding. It is obvious that in the former case the accused gets a privilege, whereas in the latter the accused has given to him the option of waiving the privilege he has. These considerations make the intention of the Legislature clear in spite of the apparent deficiency of the language used. I would therefore answer the question referred to us in the affirmative.

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Before Mr. Justice Candy and Mr. Justice Fulton.

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Criminal Procedure Code (Act V of 1898), sections 284, 285 and 537—Trial with assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.

In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

* Criminal Appeals Nos. 88 and 89 of 1901.