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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.

APPELLATE CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* JAYRAM.*

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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.

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Held, that there was no legal trial, that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure Code (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

APPEALS from the convictions and sentences recorded by E. M. Pratt, Sessions Judge of Sholápur-Bijápur.

The accused, Jayram and Sakhya (with seven others), were tried on a charge of dacoity under section 395 of the Indian Penal Code (XLV of 1860) before the Sessions Judge with the aid of assessors.

As one of the assessors was ill, the trial commenced and ended with one assessor only.

The Sessions Judge gave the following reasons for this procedure:

"The panel of the assessors is a very small one, and it is very difficult to secure their attendance. The procedure adopted is perhaps not warranted by the terms of sections 284 and 285 of the Criminal Procedure Code, but it saved the delay and expense of an adjournment and was not objected to."

The Sessions Judge disagreeing with the assessor convicted two of the accused, Jayram and Sakhya, of the offence charged and sentenced them each to one year's rigorous imprisonment. The other accused were acquitted.

Thereupon Jayram and Sakhya preferred two separate appeals to the High Court.

R. W. Desai for the Crown:—No doubt the trial commenced with only one assessor. This was irregular and opposed to the rulings in *Queen-Empress* v. *Bastiano*[1] and *Queen-Empress* v. *Babu Lal*.[2] But in this case section 537 cures the irregularity, especially as the accused were represented by pleaders who could have objected to the course followed by the Judge, but did not. The irregularity was acquiesced in by the accused, as it did not prejudice them in their defence.

There was no appearance for the accused.

CANDY, J.:—As the Sessions Judge reports that the trial

(1) (1890) 15 Bom. 514. (2) (1898) 21 All. 106.

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commenced with only one assessor, we must hold that there was no legal trial (sections 284, 285, Criminal Procedure Code). See the cases of *Queen-Empress* v. *Bastiano*(1) and *Queen-Empress* v. *Babu Lal*.(2) The error is one which vitiates the proceedings. The Government Pleader drew our attention to section 537, Criminal Procedure Code, but in our opinion the provisions of that section are not applicable to this case in which the Court of Sessions was not properly constituted and thus there was no legal trial.

We must set aside the proceedings and direct a trial before a properly constituted Court.

As the Sessions Judge of Sholápur has already expressed an opinion on the merits of the case, we direct that the case be transferred to the Court of Sessions at Bijápur.

Re-trial ordered.

(1) (1890) 15 Bom. 514. (2) (1898) 21 All. 106.

APPELLATE CIVIL.

Before Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.

1901, *April* 18.

SAMARATMAL UTTAMCHAND, PLAINTIFF, *v.* GOVIND AND ANOTHER, DEFENDANTS.

Stamp—Indian Stamp Act (II of 1899), schedule I, article 5 (b)—Agreements to deliver goods in exchange for goods—Price.

Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under article 5, schedule I, of the Indian Stamp Act (II of 1899), and are liable to stamp duty of eight annas each as agreements "not otherwise provided for."

REFERENCE by Ráo Sáheb S. S. Wagle, Subordinate Judge of Bhadgaum in the Khándesh District, under section 60 of the Indian Stamp Act (II of 1899) in a Small Cause suit.

The reference was made in the following terms:

This suit has been brought by the plaintiff on two entries in his book which may be translated as follows:

* Civil Reference No. 1 of 1901.