

must, therefore, be treated as one brought for an act of wrong done by him. As held by the Full Bench of this Court in *William Allen v. Bai Shri Dariaba* <sup>(1)</sup>, upon the construction of section 82 of the Bombay Civil Courts Act, 1869, "the question" of jurisdiction "cannot be determined by the description given by the plaintiff himself of his suit. . . . This question of the Court in which the suit is to be tried must be determined from the contents of the plaint and a consideration of the position occupied by the defendant." In the present case both these requirements are fulfilled. The plaint alleges in substance that the Administrator General has wrongfully kept the plaintiffs out of possession to which they are entitled, and the position of the Administrator General is that of a public officer who in virtue of his office holds the property. We must, therefore, confirm the decree with costs.

*Decree confirmed.*

(1) (1896) 21 Bom. p. 771.

## CRIMINAL REVISION.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, on difference of opinion between Mr. Justice Chandavarkar and Mr. Justice Aston.*

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*Indian Penal Code (Act XLV of 1860), section 193—Criminal Procedure Code (Act V of 1898), sections 435, 439—Perjury—Contradictory statements—Power of the High Court to interfere in revisional jurisdiction.*

Where the accused was convicted and sentenced under section 193 of the Indian Penal Code (Act XLV of 1860) of giving false evidence in a judicial proceeding and where the charge was based on the allegation that in two depositions, one given on the 3rd December, 1896, and the other on the 23rd March, 1901, the accused had made two contradictory statements, and the case for the prosecution was that on that ground, though it could not be proved which of the alleged contradictory statements was false, the accused's conviction should be upheld,

*Held, (by Jenkins, C.J., reversing\* the conviction and setting aside the sentence in revisional jurisdiction,) that to convict an accused of giving false*

\* Criminal application for revision, No. 332 of 1903.

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evidence, it is necessary to show not only that he has made a statement which is false, but that he also either knew or believed it to be false or did not believe it to be true.

Where it is sought to establish guilt solely on contradictory statements, although the Court "may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong and swear to the reverse without meaning to swear falsely either time."

Where the conviction is based on merely the statements contained in the charge without examining the whole of the depositions, the conviction is an error of law.

Where the conviction of the accused for perjury in such a case was sustained by additional evidence, namely, the statements of the brother of the accused not made on oath at the trial of the case,

*Held* that the statements were inadmissible and, if relied on, would vitiate the judgment.

The admission in evidence of a statement made by the accused having no real bearing on the case but showing only at the most that the accused in other matters had been untruthful, would be highly improper.

The controlling power of the High Court "is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. This discretion ought not to be crystallized, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

*Per Chandavarkar, J.*—In the case of perjury arising out of contradictory statements the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless on oath he has stated facts on which his first statement was based and then denied those facts on oath on a subsequent occasion.

Where the sole and whole question is—are the statements forming the subject of the charge so contrary that one or the other of them must be necessarily false?—the answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the construction of any document, is a question of law not of fact.

The law as laid down in the Criminal Procedure Code (Act V of 1898) gives the High Court no power to go into evidence in revision. The Bombay High Court has, as a matter of practice, held that it will not go into evidence as a rule, but will interfere only under special circumstances, or where there is an error of law.

The accused in a criminal case is merely on the defensive and, unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him.

*Per Aston, J. (contra):*—The rule of practice is that the High Court ordinarily refrains from opening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice.

Where the question before the High Court exercising its powers of revision under section 439 of the Criminal Procedure Code (Act V of 1898) is one of appreciation of evidence, the rule of practice adopted is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it.

“Under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless indeed some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and directly contradictory statement at another.” It is not the duty of the Court of first instance (and far less of a Court of appeal or revision) to supply *ab extra* an explanation which the accused himself has not suggested or an intention or knowledge which the accused has not claimed.

CRIMINAL application for revision under section 439 of the Criminal Procedure Code (Act V of 1898) of an order passed by A. Lucas, Sessions Judge of Poona, confirming in appeal the conviction and sentence against the applicant (accused) passed by Ráo Bahádur Y. T. Mirikar, Special Magistrate, First Class, Ahmednagar, for perjury under section 193 of the Indian Penal Code (Act XLV of 1860).

The facts of the case were as under:—

One Ranu valad Nama Pandit was the owner of two fields, survey Nos. 19 and 21. He had mortgaged them to two Marwadi brothers, Bankatlal and Ramlal, who assigned their mortgage rights to Ramkisan valad Haribhaga Marwadi. The assignee brought a suit, No. 429 of 1895, in the Court of the Subordinate Judge of Shevgaum against the mortgagor Ranu for the recovery of the mortgage debt by sale of the mortgaged property. The defendant Ranu contended that the mortgaged property was sold at auction for arrears of Government revenue

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and was purchased by one Lachiram in 1872, therefore, the sons of the auction-purchaser, who had since died, should be joined as parties to the suit. On the said contention, Lachiram's sons, namely, Bankatram (accused-applicant), Shivnarayan and Dhondiram, were joined as co-defendants. They presented a joint written statement urging that they had become absolute owners of the property by reason of the auction-purchase by their father at the revenue sale. The Subordinate Judge disallowed their contention on the ground that they were not entitled to rely on the revenue sale, it being not confirmed by the Collector, and gave a decree for the plaintiff. During the trial of the said suit Bankatram (accused-applicant) was examined as a witness on the 3rd December, 1896, and he deposed as follows:—

EXHIBIT (D).

(Translation.)

I know the parties. Lands in dispute stand in the name of Ranu. He pays assessment thereof and cultivates them. My father had paid assessment before. My father used to say that he paid the assessment. I have never cultivated the lands personally. I have hitherto taken no steps to have the lands transferred to my name. (The lands) have been let out under an oral agreement to the defendant. My father let out the lands to Ranu for cultivation about 20 or 22 years ago. I was not then present. Subsequently I let (them) to Ranu for cultivation. I receive Rs. 10 income per annum. There is no documentary proof of this with me. When Ranu paid the assessment he used to pay Rs. 10. Other people were present. \* \* I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivnarayan became divided about 10 years ago. On that occasion also there was no document made with respect to partition. No memos, etc., were made relating to the property. *Dhondiram lives separate from me. I have only given him a cloth-shop. No divisions (allotments of shares) have been made.\** Rama Dhagya is my debtor.

Cross-examination:—*I myself am in possession of all ancestral lands and manage them.*

Subsequently in the year 1900 Dhondiram brought a suit, No. 115 of 1900, in the Court of the Subordinate Judge of Shevgaum against the said Ranu to enforce a mortgage debt by sale of the mortgaged property, namely, survey Nos. 19 and 21. The Subordinate Judge dismissed the suit by upholding the defend-

\* वाटप्या झाड्या नाहींत (Vatāpyā zāḍiā nāhīnt).

ant's contention that he had satisfied the mortgage debt by paying the *vasul* (income) in full satisfaction of the debt. In this suit also Bankatram (accused-applicant) was examined as a witness on the 23rd March, 1901, and he deposed as follows:—

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## EXHIBIT (E).

(Translation.)

*I am plaintiff's eldest brother. We are divided. It is 13 or 14 years since we separated by effecting partition. Three garden lands and two debtors, Jahágirdár and Deshpánde, are left joint. House, etc., is not joint. I and Dhondiram became separate in Shake 1808 or 1809, and the third brother, Shivrinarayan, had separated in Shake 1807 or 1808. At that time Dhondiram might have been 12 or 13 years old. Since separation Dhondiram began to manage his estate. We were united before partition and all dealings were joint, and I used to manage (them). I knew that the survey number in suit was mortgaged to the plaintiff when the (mortgage) bond was produced in Court in suit No. 429 of 1895. In that suit I was a defendant. I and my brother have given written statement, Exhibit 20, in that suit. I did not mention the fact of the mortgage in the written statement in that suit because I was not aware of the fact of the mortgage. The land in suit was purchased by my father at an auction-sale held for default of payment of assessment and the defendant was cultivating the land on payment of rent about 2 or 3 years before we gave the written statement in 1895. The land had fallen to my share on partition. The defendant did not give me and Dhondiram wheat, gram, jowári, kardi, kadba and two bullocks by way of vasul in satisfaction of the bond. I was never summoned by the Mámlatdár on the application of the defendant and I know nothing about the application. I don't remember whether I gave my deposition or not in suit No. 429 of 1895. A copy is read out to me (but) I do not remember whether I gave my deposition or not according to it. What I have stated above, namely, that it is 12 or 13 years since Dhondiram was separated and all was partitioned out to him, is true. Only cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit No. 429 of 1895, that no partition took place, that all immoveable estate is in my possession, is not true.*

Ranu valad Nama applied to the Subordinate Judge for sanction to prosecute Bankatram (accused-applicant) and his brother Dhondiram for perjury and the Subordinate Judge granted the sanction under section 193 of Indian Penal Code. Against the order of the Subordinate Judge Bankatram and Dhondiram applied to the Sessions Judge at Ahmednagar for the revocation of the sanction. The Sessions Judge confirmed the order so far as Bankatram was concerned but amended it with respect to Dhondiram by ordering his prosecution under section 209 of the

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Indian Penal Code for dishonestly making a false claim in a Court of Justice. Owing to the order of the Sessions Judge two separate trials were held by the First Class Magistrate of Shevgaum who discharged Dhondiram and framed the following charge against Bankatram :—

That you, on or about the 3rd day of December, 1896, at Shevgaum, were examined as a witness in case No. 429 of 1895, before the Subordinate Judge of Shevgaum and being bound by oath to speak the truth intentionally gave false evidence, knowing it to be false, as follows :—

“1. Dhondiram lives separate from me. I have only given him the cloth-shop. *There is no partition.*”

“All the ancestral lands are in my possession and I manage them.”

2. Similarly you were examined as a witness before the said Subordinate Judge on 23rd March, 1901, in case No. 115 of 1900, and you have intentionally given false evidence, knowing it to be false, as follows :—

“I am plaintiff's elder brother” (plaintiff is Dhondiram). “We live separate. *It is 13 or 14 years back our partition took place.* Myself and Dhondiram divided in Shake 1808 or 1899; Dhondiram was aged 12 or 13 years. *Dhondiram manages his estate since partition.* It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession.”

“That the land in dispute had come to my share.”

“That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made.”

You have thus deliberately and falsely made two contradictory statements and that either of them is false or one is false.

Soon after the charge was framed the First Class Magistrate of Shevgaum was transferred from that place to Sangamner and the subsequent proceedings were held in the Court of the Special First Class Magistrate of Ahmednagar, who, on the 5th August, 1903, took down Bankatram's statement, which was as follows :—

Q.—Did you give your deposition (Exhibit D) which is now read out to you in the Subordinate Judge's Court?

A.—Yes, I have given that deposition.

Q.—A deposition (Exhibit E) is now read out to you. Did you give it?

A.—According to what I have heard I have given.

Q.—Will you be able to state the reason why there are discrepancies in the above two depositions?

A.—I cannot tell. (My) vakil will tell you on my behalf.

The Special First Class Magistrate of Ahmednagar, on the 31st August, 1903, found the accused Bankatram guilty of the

offence charged and sentenced him to suffer rigorous imprisonment for three months and pay a fine of Rs. 300 and in default to suffer further rigorous imprisonment for one month. The Magistrate in his judgment made the following remarks:—

The suit No. 429 was brought by an assignee of a mortgagee wherein the accused, his two brothers Shivnarayan and Dhondiram and also the complainant were defendants (Exhibit O). From the evidence of the brothers of the accused (Exhibits L and M), his own admission when he was examined as a witness in a criminal case against Dhondiram (Exhibit N), his statement in Civil Suit No. 115 of 1900 (Exhibit E), and his statement as an accused before Magistrate, First Class, Mr. Joshi (Exhibit R), there can be no doubt that he deliberately made the false statement to secure his own ends probably with respect to the land in dispute. Herein the attempt seems to have been to set up a plea that there was no partition between him and his brothers and the property was joint. Looking to his statement of 1901 the plea of partition between him and his brothers is apparent and a flat contradiction of his previous statement. While under examination a copy of the statement of 1896 was read to him and he has plainly stated that it was not true.

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From the facts and circumstances noted above there can be no doubt of the guilt of the accused. The only possible circumstance in favour of the accused in attenuating his crime is that the statements were made after a lapse of five years. The first in 1896 and the last in 1901. I am constrained to observe that offences of the kind are not uncommon in these parts through the wiliness of the money-lending class of the Marwadi to whom the accused belongs. Very few come to light unless detected in a Court of Justice or in a particular case for the gratification of a private grudge. Complainant's conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped unconscious of the dangerous net laid down for him. There is no question of the gravity of his offence. But considering the lapse of time the statements were made and looking into the circumstances of the case on the whole the accused deserves some leniency in awarding the punishment on him.

On appeal by the accused the Sessions Judge of Ahmednagar having had to deal with the application for the revocation of sanction, moved the High Court to transfer the case to some other Court. The case was accordingly transferred to the Court of the Sessions Judge of Poona, who, in confirming the conviction and sentence, observed as follows:—

It now remains for me to consider whether in the present case the two statements are so contradictory as to be irreconcilable, bearing in mind that in such cases every presumption is to be made in favour of their being reconcilable.

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I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and Dhondiram. Whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile them. I therefore consider that one of these statements must be false to the accused's knowledge and that he must have made this false statement intentionally.

Against the order of the Sessions Judge the accused preferred an application for revision under section 439 of the Criminal Procedure Code. The case was heard by a Division Bench composed of Chandavarkar and Aston, JJ., who, on the 4th April, 1904, delivered the following judgments:—

CHANDAVARKAR, J.:—The petitioner before us was convicted by the Special Magistrate, First Class, of Ahmednagar, under section 193 of the Indian Penal Code of the offence of intentionally giving false evidence in a judicial proceeding by making two contradictory statements, one of which he knew to be false. The Sessions Judge of Poona, to whom the petitioner's appeal against the conviction was transferred by the orders of this Court, has confirmed the conviction. We are now asked to quash the conviction under our Revisional Jurisdiction and the first ground urged by Mr. Branson in support of the petition is that the two statements, one or the other of which has been held by the Courts below to be false, are not necessarily contradictory. I am of opinion that Mr. Branson's contention must be allowed. The statements were both made by the petitioner with reference to the question whether he was joint with or divided from his younger brother, Dhondiram. The first statement made by the petitioner was in a deposition dated the 3rd December, 1896, in suit No. 429 of 1895 of the Subordinate Judge's Court at Shevgaon and is as follows:—

“Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them.”

The second statement was made by the petitioner in his deposition dated the 23rd March, 1901, in suit No. 115 of 1900 of the same Court and is as follows:—

“I am plaintiff's elder brother” (plaintiff is Dhondiram).

“We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram has been managing his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given to Dhondiram; that no share was given to him and that all the immoveable property is in my possession”; “that the land in dispute has come to my share.” “That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made.”

Now upon the statements contained in the two depositions and made the subject of the alternative charge against the petitioner the learned Sessions Judge, who heard the appeal against the conviction, says:—

“I have carefully read the two depositions made by the accused in the two Civil suits and it is clear that in the suit of 1895 he intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the suit of 1900 he intended it to be believed that a partition of property had taken place between himself and Dhondiram 12 or 13 years previously. The accused himself has not attempted to reconcile these two statements nor is it, in my opinion, possible to reconcile them.”

The contradiction then between the two depositions consists in this—that on the first occasion the petitioner stated in effect that there had been no partition between him and Dhondiram, whereas on the second occasion he stated that there had been one. But unless partition in a Hindu joint family is evidenced by a deed (and in this case the petitioner in his first deposition distinctly stated that there was no deed relating to the separation between him and Dhondiram) it has to be inferred from the acts and mutual dealings of the parties. As observed by Mr. Mayne in his Hindu Law “Numerous circumstances are set out by the Native writers as being more or less conclusive of a partition having taken place, such, as separate food, dwelling or worship; separate enjoyment of the property; separate income and expenditure; business transactions with each other and the like. But all these circumstances are merely evidence, and not

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conclusive evidence, of the fact of partition".<sup>(1)</sup> In such a case a man may well think and say as an inference of law from those acts and circumstances that there is no partition and on a subsequent occasion he may change his view as to the legal consequence of those acts and dealings and draw a contrary inference. Because he took one view of the facts on one occasion and a directly opposite view on a subsequent occasion it does not and cannot, in my opinion, necessarily follow that he has perjured himself by making contradictory statements. The statements are contradictory only so far as the man's conclusion or opinion on the facts goes. But the law does not punish a man as a perjurer because he has changed his opinion. It is often a nice question what is enough in point of law to constitute partition in a Hindu joint family and our Courts afford instances of cases where upon the same facts one Judge has held partition proved and another Judge has held otherwise. When, therefore, a witness deposing on oath states on one occasion that there was no partition and on another states that there was one, he must be presumed to be stating *not a fact* as to which there can possibly be no two views but his own impression of the legal consequences of the relations between the coparceners in a Hindu family.

So far, therefore, as the contradiction attributed by the learned Sessions Judge to the two statements of the petitioner consists in the *factum* of partition, the conviction cannot, in my opinion, stand. It is a well known rule of law applied by eminent Judges to cases of perjury arising out of contradictory statements, that the Court dealing with them should not convict unless fully satisfied that the statements are from every point of view irreconcilable, and if the contradiction consists in two statements opposed to each other as to matters of inference or opinion on which a man may take one view at one time and a contrary view at another, there can be no perjury, unless he has on oath stated *facts* on which his first statement was based and then denied those *facts* on oath on a subsequent occasion.

The question, therefore, is whether, apart from the petitioner's contradictory statements as to partition, he has stated any fact in

(1) Mayne's Hindu Law, p. 651 (6th Edn.).

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his first deposition which he denied in his second deposition. I, therefore, turn to the statements of fact contained in the first deposition, so far as they were made the subject of the charge. The first statement of fact then is:—"Dhondiram lives separate from me." That statement is not denied but re-affirmed in the second deposition. The next is:—"I have only given him the cloth-shop". That no doubt appears at first as if it were denied in the second deposition; but there again it is not, as the deposition shows, a denial that the cloth-shop had been given to Dhondiram but a denial that no partition had taken place. The statement in the second deposition is:—"It is not true as stated in the deposition in suit No. 429 of 1895 that only the cloth-shop had been given to Dhondiram and that no partition had taken place." The third statement of fact in the first deposition was:—"All the ancestral lands are in my possession and I manage them." The statement in the subsequent deposition was:—"It is not true what I stated in my deposition in case No. 429 of 1895 that . . . all the immoveable property is in my possession." I cannot understand how these two statements are necessarily contradictory. In the first deposition the witness spoke of "ancestral lands" only and stated that they were in his possession. In the second deposition, he is asked about "all the immoveable property"—a wider term than mere lands—and he says "it is not true that all the immoveable property is in my possession." The ancestral lands may be in his possession and yet at the same time he may not be in possession of all the immoveable property but only of some, *i.e.*, the lands. It is not found by the Courts below that the immoveable property consisted only of lands. Moreover the second deposition shows that the family had immoveable property besides lands. There the petitioner stated:—"Three fields and two debtors, the Jaghir-dar and the Deshpande, are joint. The house, &c., is not joint." He had stated nothing about "the house, &c." in his first deposition.

The last statement which was made the subject of the charge is contained in the second deposition. It is as follows:—"The land in dispute had come to my share."

This is said to be contradicted by the petitioner's previous

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statement:—"All the ancestral lands are in my possession and I manage them."

But where is the necessary contradiction between the two? In the former he is speaking of the land in dispute having fallen to his share, whereas in the latter he is speaking of that and the other lands being in his possession and management. The two statements relate to two different things—the former statement to his title, *i.e.*, to the land having fallen to his share at the partition; the latter to his possession, which is distinct from title.

But it was urged before us by the Government Pleader in support of the conviction that the petitioner himself had not attempted to reconcile the two statements, as if *his* failure to reconcile them is fatal to his case. It is the duty of the Court to see whether the statements can be reconciled or not. The accused in a criminal case is merely on the defensive and unless there is any positive admission of a fact by him, any omission on his part to explain what indeed can be explained without his explanation should not be pressed against him. When he states in his second deposition that what he stated in his first was not true, he must be taken to have substantially meant that his denial of the relation of separated coparcenery between him and his brother was not true. That, as I have observed already, bears on the question whether they were divided or not in point of law. It is a matter of opinion and as such cannot be made the basis of a conviction for perjury.

Under these circumstances, I think, we are bound to interfere in revision. The accused has been convicted by the lower Courts upon the sole fact that his statements contained in his two depositions are contradictory. As was conceded at the Bar by the learned Government Pleader before us, there is no evidence beyond the statements charged to support the conviction and none has been relied upon by the Courts below. The sole and whole question is—are the statements forming the subject of the charge so contradictory that one or the other of them must be necessarily false? The answer to that question depends upon the construction to be put upon the two depositions from which the statements are taken and their construction, as indeed the

construction of any document, is a question of law, not of fact. To say that the two Courts have found upon facts is to lose sight of the common rule of law that where you have to construe a document or documents to infer a fact, the construction is one for the Judge, not for the jury; and in the present case, the evidence of perjury solely resting upon the interpretation of the accused's depositions and a correct interpretation of them showing no necessary contradiction between the two statements charged as contradictory, in my opinion, there is no legal evidence to sustain the conviction. In other words, there is no evidence to go before a jury. My conclusion that the conviction in this case must be set aside by no means involves a departure from the practice of this Court which is as a general rule not to interfere in revision with findings of fact based upon appreciation of evidence by a lower Court. It is not correct to say that the law as laid down in the Criminal Procedure Code gives us no power to go into evidence in revision. We have the power, but this Court has as a matter of practice held that it will not go into evidence as a rule, but will interfere only under special circumstances or where there is an error of law. The analogy drawn from second appeals in civil cases is beside the question when we are dealing with a criminal case in revision. But however that be, I proceed in this case upon the well recognised principle that there is an error of law where a lower Court in convicting an accused person has misread a document or documents.

For these reasons, deeming it unnecessary to consider the other point of law raised by Mr. Branson, I am of opinion that the conviction and sentence must be set aside and the accused acquitted.

ASTON, J.:—I find myself in the unfortunate position of being unable to concur.

We are asked to disturb in revision a finding of fact arrived at by the Magistrate and also by the Sessions Judge. The rule of practice which ordinarily debars us from reopening questions of fact, when no appeal lies, except on some ground of law and in order to remedy a clear miscarriage of justice has been often affirmed. See the remarks of Jardine, J., in *Queen-Empress v.*

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*Chagan* (1). The question whether we are to depart from that rule when no very exceptional grounds exist, and on no fixed principle, seems to me one of importance.

If we suffer exceptions to swallow this rule we shall be granting the second appeal which the Legislature forbids; and we must entertain such "appeals by way of revision" under disadvantages so serious that it may well be doubted whether we are likely to arrive at a nearer approximation to the truth than that arrived at by the Courts below.

There exists an inevitable tendency in such second appeals to eliminate the advantage which the party on the side of truth has and to which that party is justly entitled, from the demeanour of witnesses, from the mode in which any attitude is taken up or changed, and from the local colour and unrecorded *minute* which give a flavour to evidence, a flavour which becomes imperceptible in second appeal. In the endeavours to remedy a particular mischief, a larger evil becomes thus introduced. The further the trial of issues of fact is removed from the real *venue* and the more desperate the situation, the greater the risk of recklessness in the instructions upon which a Court is asked to disbelieve witnesses who may happen to be truthful: and the tendency increases to treat the evidence of witnesses who happen to be in fact trustworthy as if they are unworthy of credit unless corroborated to the extent that is looked for in the testimony of criminal accomplices. The apprehension thus engendered and the discouragement caused to (already reluctant) witnesses of facts to give evidence must constitute a serious hindrance to the administration of justice.

A Court of appeal has to contend with such disadvantages, but in a lesser degree, and it does so in pursuance of a duty imposed by the law. A Court of revision which undertakes a fresh adjudication as to the facts when no appeal lies, undertakes a self-imposed task under conditions far less favourable to the elucidation of the truth than those which exist in a local tribunal. Moreover the truth being often known to a much wider circle than the parties and witnesses themselves the effect of a

(1) (1890) 14 Bom. 331 at p. 342.

mistake in estimating the truth is not confined to the mere miscarriage of justice in a particular case. The effect is more far-reaching

I will therefore state at greater length than would otherwise have been necessary my reasons for holding that the present case is not one calling for the interference of a Court of revision.

On the 3rd December, 1896, the petitioner Bankatram Lachiram Marwadi as a party witness in suit No. 429 of 1895 in the Court of the Subordinate Judge of Shevgaum said on solemn affirmation:—

“Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them.”

On the 23rd March, 1901, as a witness in suit No. 115 of 1900 in the same Court he said on solemn affirmation:—

“I am plaintiff Dhondiram’s elder brother. We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809 (A.D. 1886 or 1887). Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895, that only cloth-shop was given to Dhondiram, that no share was given to him and that all the immoveable property is in my possession. That the land in dispute had come to my share. That it is true which I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made.”

The First Class Magistrate Mr. Mirikar, who tried the case, convicted the petitioner under an alternative charge, in which the above statements are set out, being convinced, on the evidence adduced, that in one or the other of the said two judicial proceedings the petitioner had intentionally given false evidence by making a false statement which he knew to be false.

In coming to that conclusion the Magistrate based his decision upon the evidence summarized in his judgment. It will be observed that this evidence is not confined to any apparent irreconcilability between the evidence given by the petitioner on the two occasions.

The evidence included the further statements of the petitioner himself when full opportunity was afforded to him to

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reconcile his contradictory depositions. The Magistrate took into consideration the circumstances under which petitioner gave his evidence in each of the two civil suits as the Magistrate was entitled to do, for as remarked in *Edgington v. Fitzmaurice*<sup>(1)</sup> cited quite recently in a decision of this Court, the history of a case is to be looked to in testing the truth or falsity or animus of a statement.

Moreover the petitioner's pleader had at the trial strongly urged that the proviso to section 132 of the Evidence Act (I of 1872) applies to the facts and circumstances of the case, a contention which is wholly irrelevant if the petitioner did not incriminate himself by the answers he gave in his deposition in the latter suit.

The Sessions Judge came to the conclusion that it is clear that by his statements in the earlier suit the petitioner intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram, whereas in his statement in the later suit he intended it to be believed that a partition had taken place 13 or 14 years previously.

So viewing the general purport of the statements of petitioner on the two occasions he points out that the accused has not attempted to reconcile them and considers it is not possible to reconcile them. It may be presumed that the Sessions Judge meant irreconcilable *as they stand*, because it is difficult to conceive how any two contradictory statements can possibly be irreconcilable if the same words used in each are treated as used in a different sense in each statement. The Sessions Judge goes on to say, "I therefore consider that one of these statements must be false to the accused's knowledge and that he must have made the false statement intentionally."

That is clearly a finding of fact. Even if that finding had been based upon the contradiction between the depositions of the accused no question of construction of documents would arise, for the depositions are merely the judicial proof of the oral evidence given by the petitioner in the two judicial proceedings referred to in the charge. But, as already pointed out, that finding of fact that the petitioner in one or other of the said two

(1) (1885) 29 Ch. D. 459.

civil suits intentionally gave false evidence is based not only on the *prima facie* contradiction in portions of petitioner's depositions set out in the charge, but also upon other evidence recorded. Whether that finding of fact is supported by the evidence is a matter of appreciation of evidence.

"It is only in very exceptional cases that this Court sitting as a Court of Revision deals with questions of evidence, and disturbs or supplements the finding of a lower Court on a question of fact—*Queen-Empress v. Shekk Sahab Badrudin*<sup>(1)</sup>. It will do so, in the interests of justice, where the inquiry in the lower Court has been faulty—*Nobin Krishna v. Rassick Lall*<sup>(2)</sup>." See *Bhawoo Jivaji v. Mulji Dayal*<sup>(3)</sup>.

"Section 439 of the Criminal Procedure Code provides that the High Court in revision may (subject to certain limitations not necessary now to be dwelt upon) in its discretion exercise any of the powers conferred on a Court of appeal. The interference of the High Court in revision is not therefore limited to matters of law; but it is fully competent to this Court to enter into matters of fact if it thinks fit. On the other hand it is not bound to go into evidence if it does not think fit, and the question is where should it exercise this discretionary power and where not. Clearly the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. Section 440, which makes it optional with the Court in revision to hear parties or their pleaders, renders this quite clear. Indeed, were it otherwise, there would virtually be a second appeal on facts in every case in which the parties came up to this Court. This we do not think the Legislature could have intended. There must appear upon the face of the judgment or order complained of or of the record some ground (which need not always be a ground of law) to induce this Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. Where there is no such ground, the practice has been to limit the interference in revision to matters of law," *Keshab Chunder Roy v. Akhil Metey*<sup>(4)</sup> where the

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(1) 1883) 8 Bom. 197.

(3) 1888) 12 Bom. 377 at p. 390.

(2) 1884) 10 Cal. 1047.

(4) 1895) 22 Cal. 998 at p. 1001.

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cases of *Nobin Krishna Mookerjee v. Russick Lall Laha*<sup>(1)</sup>; *Reid v. Richardson*<sup>(2)</sup>; *Queen-Empress v. Shekh Sahab Badrudin*<sup>(3)</sup>; *Bharoo Jivaji v. Mulji Dayal*<sup>(4)</sup> and *Queen-Empress v. Chagan Dayaram*<sup>(5)</sup> are cited as authorities for the above view of the law and practice.

The actual words used in section 439 of the Criminal Procedure Code (V of 1898) are "the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338." In none of these cited sections is any power conferred to re-open findings of fact, but it may be inferred that the powers actually conferred by these sections are to be exercised in accordance with, and subject to, the other provisions of the Code. It is section 418 which enacts that "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 shall lie on a matter of law only," thus by implication conferring on an Appellate Court a power to re-open findings of fact. One of the questions which arises in construing section 439 of the Code is whether a concurrent finding of fact by two different Courts stands on a lower footing than a finding in a trial by jury and whether the Legislature could have intended that such a concurrent finding, where there is evidence to sustain it, should be disturbed by a Court of revision. For it has always been conceded that the revisional jurisdiction conferred by section 439 of the Code is to be exercised with due regard to the other provisions of the Code which forbid a second appeal.

The limits within which this Court will exercise its discretion as to disturbing a finding of fact on mere appreciation of evidence were long ago pointed out. In *Queen-Empress v. Shekh Sahab Badrudin*<sup>(6)</sup> *Kemball, J.*, remarked in the course of the argument: "Our rule is that in cases in which there is no appeal we do not weigh the evidence or disturb the Magistrate's finding. If we did so, we should be giving the appeal forbidden by law. Under the old Code we did not deny that

<sup>(1)</sup> (1884) 10 Cal. 1047.

<sup>(2)</sup> (1887) 14 Cal. 361.

<sup>(3)</sup> (1883) 8 Bom. 197.

<sup>(4)</sup> (1888) 12 Bom. 377.

<sup>(5)</sup> (1890) 14 Bom. 331.

<sup>(6)</sup> (1883) 8 Bom. 197 at p. 198.

we had the power of going into the evidence, but we invariably refused to exercise it, save upon a question of law, *e.g.*, that there was no evidence whatever to sustain a conviction"; and the judgment in that case says:—"The question with which we are now concerned, is whether the circumstances brought to our notice in the present case are such that we ought, in the exercise of our discretion, to reverse the convictions of the two accused on the ground that the evidence does not support them. Hitherto we have refused, and we shall continue to refuse, save on very exceptional grounds, to exercise that discretion."

Where the question before this Court exercising its powers of revision under section 439 of the Criminal Procedure Code is one of appreciation of evidence, the rule of practice adopted, so far as I gather from the decisions and from such experience as I have obtained on this Bench, is to refuse to disturb a conviction when there is legal evidence, oral or documentary, to sustain it: and I understood Mr. Branson's arguments to be directed to show that there was some error in law in the trial and that the conviction was for one reason or another illegal.

It was contended that even though a person may have clearly given false evidence intentionally in one or other of two depositions made by him, he cannot, under the provisions of the Criminal Procedure Code, be successfully prosecuted unless it can be established in the affirmative on which of the two occasions his evidence was false.

The case of *Queen-Empress v. Mugapa*<sup>(1)</sup> decided by a Full Bench (without any argument at the Bar) was cited as authority to show that in such circumstances an alternative charge cannot be framed. This use of the ruling in that case invites two observations. First, it was intended to apply where there is no other evidence but the contradictory statements. Secondly, that decision was passed before the Code was amended by Act V of 1898 and dealt with the contradiction between statements made to a Police officer making an investigation under section 161 and statements made in a Court of justice.

Under the Criminal Procedure Code then in force a witness examined orally by a Police officer was bound to answer *truly*

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and being thus bound by an express provision of law to state the truth (section 191, Indian Penal Code) prosecutions became common for giving false evidence when a witness contradicted in Court a statement he had made to the Police.

Such prosecutions came deservedly into disrepute because they were calculated to deter persons who had designedly or carelessly made incorrect statements to the Police from speaking the truth in Court. The ruling in *Queen-Empress v. Mugapa*<sup>(1)</sup> dealt with such a prosecution. The law has since been altered, the word "truly" is now omitted in section 161, Criminal Procedure Code, and the following illustration is added to section 236 :—

"(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false."

Mr. Branson contended that this is an "inapt" illustration and does not alter the effect of the section 236 which, according to his argument, does not authorise an alternative charge in such a case. But if this is so, the Legislature would presumably have amended section 236 itself instead of merely adding the illustration quoted.

Section 236 is as follows :—"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

It was argued that the "series of acts" here contemplated must be a series of connected acts. The section does not say so: and a series of acts may be a series of disconnected acts or series of connected acts. Then it was said that "several offences" means offences not of the same kind.

We are dealing not with section 72 of Indian Penal Code, where the "several offences" to be specified in an alternative judgment may well mean offences not of the same kind, but with the

<sup>(1)</sup> (1893) 18 Bom. 377.

provision of the Criminal Procedure Code as to joinder of charges.

Even the "*distinct*" offences contemplated in section 233 of the Criminal Procedure Code may be offences of the same kind as may be seen by reference to section 234, for it is only when three distinct offences are of the same kind and committed within the space of twelve months, that they can be charged and tried at the same trial except in the cases covered by sections 235, 236, 239.

A finding that A has committed murder by administering poison to B, or stabbing him, or by drowning him, is not an alternative judgment under section 72 of the Indian Penal Code, but a judgment that A has committed one offence of murder by one or other of the said three different acts.

So a finding that A has committed the offence of intentionally giving false evidence in one or other of two depositions absolutely contradictory and unexplained is not an alternative judgment under section 72 of the Penal Code, though if a separate charge were framed in respect of each of the two depositions, [there would be several offences charged within the view of the Criminal Procedure Code and the judgment might then be alternative within the view of the Criminal Procedure Code. Whether the prosecution elected to proceed upon one charge framed alternatively or upon two separate charges would be a matter of form as long as section 236 remains in the Code, but if that section be eliminated the remaining sections as to joinder of charges would create difficulties especially if there happen to be an interval of more than a year between the two depositions.

The addition of illustration (b) to section 236 of the Act V of 1898 seems to show that in the view of the Legislature section 236 removes those difficulties, a view in accord with the Full Bench decision of the Calcutta High Court as far back as 1874 in *Queen v. Mahomed Hoomayoon Shaw*<sup>(1)</sup>.

A conviction is therefore in my opinion legal on an alternative charge of an offence under section 193 of the Indian Penal Code.

Then it was argued that the statements set out in the charge from the two depositions are not absolutely irreconcilable and therefore the conviction is bad in law.

(1) (1874) 13 Beng. L. R. 324.

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That argument I understand to be based upon the decisions in *Queen v. Bidu Noskya*<sup>(1)</sup> and *Queen-Empress v. Ramji*<sup>(2)</sup>, and more especially upon a remark of Duthoit, J., in *Queen-Empress v. Ghulet*<sup>(3)</sup>: "Every possible presumption in favour of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false." That remark occurs in an exhaustive Judgment in which Duthoit, J., sets out the grounds for his opinion that "under the law of British India, it is not necessary that the charge should allege which of two contradictory statements upon oath is false, but it is sufficient (unless, indeed, some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time, and a directly contrary statement at another."<sup>(4)</sup>

That being the view of the law of British India which that elaborate Judgment upholds, a view which the Legislature as already shown has sought to affirm by adding the new ill. (b) to section 236 of the Criminal Procedure Code (Act V of 1898), it must be obvious that when Duthoit, J., said "every possible presumption in favour of a reconciliation between the two statements should be made," he did not mean to imply that it is any part of the duty of a Court of first instance (and far less of a Court of appeal or revision) to supply, *ab extra*, an explanation which the accused himself has not suggested, or an intention or knowledge which the accused has not claimed.

Section 106 of the Evidence Act (I of 1872) enacts that "when any fact is specially within the knowledge of any person the burden of proving that fact is upon him," and ill. (a) to that section runs: "when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him."

To make my meaning plain I may refer to the ordinary rule in section 114, Evidence Act, ill. (a), that "a Court may presume

(1) (1869) 13 Beng. L. R. 325 (f. n.).

(2) (1885) 10 Bonn 124.

(3) (1884) 7 All. 44, p. 63.

(4) (1884) *Ibid.*, p. 46.

that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession."

But if an accused person in such circumstances were to offer no explanation and say he had none to offer, and a Magistrate were to convict him it would surely be, to quote words used by Sir Barnes Peacock in *Queen v. Mussamat Zameerun*,<sup>(1)</sup> "trifling with the administration of justice" for an appellate or a revisional Court to reverse the conviction because the Magistrate had not taken into consideration some explanation not suggested by the accused but within the bounds of possibility, such as that the accused may have been hypnotised and the stolen property surreptitiously introduced into his pocket.

What the Court has to consider is the evidence\*and any explanation the accused may offer, not every possible explanation which ingenuity may imagine after the trial is over.

So in a trial for perjury when the course is adopted of framing a charge containing contradictory statements of such a nature that they, when taken in combination, disclose according to the prosecution the specific offence of intentionally giving false evidence, "it must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them intentionally spoke falsely in regard to one of them. This it is the province of the jury or Court to determine"—per Morris, J., in *Queen v. Mahomed Hoomayoon Shaw*.<sup>(2)</sup>

At such a trial it is of the utmost importance that "the accused should have every possible opportunity of explaining the statements in question, and of showing that the alleged contradiction does not really exist"—per Strachey, C.J., in *Queen-Empress v. Puran*<sup>(3)</sup>—and any evidence as to intention or knowledge and any explanation offered will form part of the evidence to be weighed and appreciated by the Court which tries the case and, where an appeal lies, by the appellate Court.

(1) (1866) 6 W. R. 65 at p. 68 (Cri. Rul.). (2) (1874) 13 Beng. L. R., p. 335.

(3) (1899) All. W. N. 39 at p. 40.

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In *Queen-Empress v. Ramji*<sup>(1)</sup> Wedderburn, J., cited *Queen v. Bidu Noshyo*<sup>(2)</sup> as laying down the principle that "in charges founded upon supposed contradictory statements every presumption in favour of the possible reconciliation of the statements must be made." But in that Bombay case the Court was dealing with the question whether the impugned statements taken as they stood, in their ordinary meaning, were absolutely contradictory and it came to the conclusion that so viewed they were not contradictory.

In *Queen v. Bidu Noshyo*<sup>(2)</sup> the Court was dealing with supposed contradictory statements without explanation or evidence, *ab extra*, to show that the words used were used in other than their ordinary sense, or that there was no such intention or knowledge as the law requires. The statements were therefore examined as they stood to see whether as they stood they were so absolutely contradictory that it was impossible that both should be true; and it was in regard to such an examination that Markby, J., observed: "it is of course plain that before a prisoner can be convicted of perjury on the ground that he has made two contradictory statements without ascertaining which of the two is true, and which is false, every presumption in favour of the possible reconciliation of the statements must be made."

Remembering the sort of prosecution for which the above principle was laid down and bearing also in mind that it follows from the very definition of the offence of giving false evidence (sections 191, 193 of the Indian Penal Code) that even where the statements charged are *per se* irreconcilable or absolutely contradictory, the accused cannot be convicted if he can satisfy the Court by evidence or credible explanation that neither statement was false to his knowledge or intentionally false, the only question which now remains is whether there is evidence on the record to sustain the concurrent finding of fact of both the lower Courts that in one or the other of the depositions quoted in the charge the accused intentionally gave false evidence. That in fact is the true issue. Looking to the evidence before the Court of first instance already discussed in

(1) (1885) 10 Bom. 124 at p. 130.

(2) (1869) 13 Beng. L. R., p. 330 (f. n.).

the Magistrate's Judgment it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding.

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That being so and the question before us being really one of appreciation of evidence, it would be in accordance with the practice of this Court, as I understand it, to refuse to interfere as a Court of revision, and I would accordingly decline to interfere.

But if we are to go into the evidence, then I would say that upon the evidence in this case there is in my opinion no room for reasonable doubt that the petitioner did in one or the other of the depositions quoted in the charge intentionally give false evidence.

I do not attach importance to the fact that the term "all the ancestral lands" in one deposition is changed to "all the immoveable property" in the other, the accused did not himself give any significance to this, when reiterated opportunities for explanation were given. In 1895 he says explicitly: "there is no partition;" in 1901 he says: "it is 13 or 14 years back our partition took place; myself and Dhondiram divided in Shake 1808." In 1895 he says explicitly: "I have only given him (Dhondiram) the cloth-shop;" in 1901 he says equally explicitly: "it is not true what is stated in my deposition in case No. 439 of 1895 that only cloth-shop was given to Dhondiram"; and further: "Dhondiram separated before 12 or 13 years and all division of property was made."

Confronted in 1901 with this contradiction he does not suggest that he was using the same words in different senses, or attempt to explain; on the contrary he says plainly that his earlier evidence was untrue.

There are the depositions themselves which by their tenor show with what intent the impugned statements were made on each occasion. When further opportunities are given, in the course of the criminal prosecution, for explanation, he twice reiterates (15th May and 5th August, 1903) that he has no explanation himself to offer.

It is unnecessary therefore to pursue further the evidence discussed in the Judgment of the Magistrate.

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The Judges having thus differed, the case was referred to Jenkins, C.J., under section 429 of the Criminal Procedure Code.

*Branson with Gangaram B. Rele* for the applicant (accused) :—  
Wrong construction has been put upon the depositions of the accused. Even in his first deposition he says that he was divided from his brother Dhondiram. There was no division by metes and bounds. The three brothers divided the property according to their convenience. Further, the whole of the property was not divided because the accused distinctly says in his second deposition that two debtors and some property, which could not be partitioned, were kept intact. It was very hard upon the accused to ignore the fact that a long time had elapsed between the two depositions and that during the interval circumstances might have occurred which brought about a change in his opinion as to the state of things at two different times.

The second deposition does not, as is apparent from the way it has been recorded, represent the real state of affairs. In that deposition the accused is referred to his first deposition and is made to say something which he never said in his first deposition. There is no warrant in law to support such a course.

Great stress has been laid upon the inability of the accused to explain away the alleged inconsistencies in his depositions. But there is an explanation in the depositions themselves. If the two depositions be read together as a whole the apparent discrepancies vanish away. Our case has been prejudiced by selecting stray passages from the two depositions and comparing them together for making out the discrepancies. If there are apparent discrepancies, it is the duty of the Court to see whether there is anything in the case which can explain them. An accused person cannot be convicted simply on the ground that he is not able to explain the contradictions in his depositions. He can be convicted only if the discrepancies are in no way reconcilable.

Admitting for the sake of argument that the two depositions contain contradictory statements, still we contend that there was no necessity in the earlier suit to put questions with respect to partition. The questions were utterly irrelevant to the pleadings. Therefore it was not necessary to institute a comparison between

the two depositions, Starling's Criminal Law, p. 242. Thus if the first deposition be eliminated, the second deposition stands by itself alone, and then there would be nothing on the record to show that it is false.

Further, to support the conviction of the accused some other evidence is brought on the record. But that evidence was inadmissible and it was highly irregular to refer to it. The evidence consists of two statements made by Dhondiram and Shivnarayan, the brothers of the accused, in the trial against Dhondiram. There are two other Exhibits, one of them is a statement made by the accused which is in no way material to the present inquiry and the other is the joint written statement filed by the accused and his brothers in suit No. 429 of 1895. It is impossible to understand the object with which the written statement was brought on the record of this trial. The members of a family may be divided still there is nothing to prevent them from filing a joint written statement.

The Special First Class Magistrate who tried the case has observed in his judgment that the accused has been entrapped and that the complainant is not the real prosecutor but there are some other persons behind the scene.

Our next contention is that the alternative charge cannot be sustained. Section 236 of the Criminal Procedure Code contemplates offences arising out of a single act or a series of acts. In the present case the two depositions were not given in the same suit and were not given at times which governed a series of acts. They were given in two different suits, which were brought by different parties, with respect to different causes of action. Section 236 is, therefore, not applicable and the illustration to that section is not in accord with it. Our contention is fortified by the ruling of the Full Bench of this Court in *Queen-Empress v. Mugapa*.<sup>(1)</sup>

*Rao Bahádur V. J. Kirtikar* (Government Pleader), for the Crown :—The statements embodied in the charge clearly show that they are discrepant, and there is no explanation offered by

(1) (1893) 18 Bom. 377.

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the accused with respect to them though he was called upon by the Magistrate to do so.

[JENKINS, C.J. :—If there are discrepancies they are merely apparent and the depositions, when read together, clearly explain them away. Even in his first deposition the accused says that he was divided from his brother Dhondiram.]

The Magistrate has relied upon some other evidence to support the conviction. There are his own statements which incriminate him. They clearly show that he is not a man who tells the truth. The ruling in *Queen-Empress v. Mugapa*<sup>(1)</sup> was relied on but it is not applicable because one of the statements therein was made before a police officer.

[JENKINS, C.J. :—That is a ruling of the Full Bench of this Court and I am bound by it.]

JENKINS, C.J. :—The accused, Bankatram Lachiram, having been convicted under section 193 of the Indian Penal Code of giving false evidence in a judicial proceeding, and sentenced to imprisonment and a fine, has applied to this Court in revision. In consequence, however, of a division in opinion on the part of the Judges composing the Bench, before whom the application was heard, the case has been laid before me as provided by section 439 of the Criminal Procedure Code.

The charge is based on the allegation that in two depositions, one given on the 3rd of December, 1896, the other on the 23rd of March, 1901, the accused has made contradictory statements, and the case of the prosecution is that, on that ground, though it cannot be proved which of these alleged contradictory statements was false, the accused's conviction should be upheld.

To convict an accused of giving false evidence it is necessary to show not only that he has made a statement which is false, but also that he either knew or believed it to be false or did not believe it to be true.

It has been said by very high authority, and the remark has manifest application to a case where, as in the present, it is sought to establish guilt solely on contradictory statements, that

(1) (1893) 18 Bom. 377.

“ although you may believe that on the one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury ; for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.”<sup>(1)</sup>

It is clear therefore that one must approach a case resting merely on supposed contradictions with the greatest caution, and more particularly where, as here, a number of years intervenes between the two statements. In this case there is an additional occasion for caution in the motive and origin of this prosecution as described by the Magistrate, who says “ complainant’s conduct in the case could not but attract notice. He is an illiterate and ignorant peasant and seems evidently a tool in the hands of designing persons ill-disposed to the accused. The present case seems to be one got up from spite and accused well entrapped, unconscious of the dangerous net laid out for him”.

The accused, it is said, belongs to the Marwadi class ; but whatever he may be, he is entitled to demand that he shall only be convicted of an offence under the Penal Code on legal evidence. What then are the proofs on which his conviction rests ?

The two statements are set out in the charge in the following terms :—

*First statement.*—“ Dhondiram lives separate from me. I have only given him the cloth-shop. There is no partition. All the ancestral lands are in my possession and I manage them.”

*Second statement.*—“ I am plaintiff’s elder brother ” (plaintiff is Dhondiram). “ We live separate. It is 13 or 14 years back our partition took place. Myself and Dhondiram divided in Shake 1808 or 1809. Dhondiram was aged 12 or 13. Dhondiram manages his estate since partition. It is not true what is stated in my deposition in case No. 429 of 1895 that only the cloth-shop was given to Dhondiram ; that no share was given to him and that all the immovable property is in my possession ; that the land in dispute has come to my share.” “ That it is true what I have stated that Dhondiram separated before 12 or 13 years and all division of the property was made.”\*

(1) Per Holroyd, J., in *R. v. Jackson* (1823) 1 Lewin C. C. 270.

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In the opinion of both the lower Courts these statements were so contradictory as to be incapable of reasonable reconciliation.

It is common ground that in the second statement the accused made out that there had been a partition between him and his brother Dhondiram. Turning then to the first statement as set forth in the charge, we find the following words placed in the accused's mouth: "there is no partition." Here then, says the prosecution, is an irreconcilable contradiction, here are the undoubted proofs of guilt.

But to judge of the true meaning of any single phrase it is necessary to see what the accused said in the rest of his deposition; for perhaps there may be found that which will throw a fresh light on the words which form the subject of the charge. Yet I cannot find in the judgment of either of the lower Courts any trace of such an investigation: I say this because I fail to see how the rest of the depositions could have been read without its at once becoming apparent that an erroneous construction had been placed on the accused's testimony in the earlier deposition.

Now going back but a few sentences earlier in the first statement than those on which the prosecution rely I find this is what the accused said on that occasion:

"I became divided from Dhondiram. There was no document made with respect to partition then. My brother Shivanarayan became divided about ten years ago. On that occasion also there was no document made with respect to partition. No memos., &c., were made relating to the property. Dhondiram lives separate from me. I have only given him a cloth-shop. No divisions (i.e., allotments of shares) have been made. Rama Dhagya is my debtor.

Cross-examination: I myself am in possession of all ancestral lands and manage them."

This translation is approved on both sides and contains the so-called incriminating passage.

This then is the deposition from which, according to the Sessions Judge, it is evident that the accused "intended it to be believed that no partition of property had taken place between himself and his brother Dhondiram."

So far from the deposition evincing the intention imputed to it, in my opinion it points emphatically the other way: there is

a distinct assertion of division from Dhondiram and of division from Shivnarayan, followed by the statement that Dhondiram lives separate from him. Here is the clearest statement of a partition. While the statement ascribed to the accused, "There is no partition," manifestly does not bear the meaning that has been placed on it: the proper rendering is "No divisions (*i.e.*, allotments of shares) have been made," and I say this not only because that has the approval of the Court interpreter, but also because it is obviously demanded by the context.

The meaning of the passage taken as a whole is obvious; it is that there has been a division, that is a partition, though there is no document evidencing it, and no partition by metes and bounds has been effected. Whether this statement is true or false is not shown, and in the circumstances is immaterial: the point to be kept in mind is that the conviction of the accused proceeds wholly upon the assumption that there is in this deposition a negation of partition, which is contradictory of the assertion of partition contained in the second deposition. I have shown that there is no warrant for the assumption, and with it the justification of the conviction so far as it rests on it completely disappears. The Magistrate seems to have seen a contradiction between the statements "All the ancestral lands are in my possession and I manage them" on the one hand and what the accused has stated in his second deposition on the other. It therefore becomes necessary to examine the second deposition, and when that is done it will be seen that there are omitted from the charge portions of the deposition which materially affect those included in it. Thus we have this sentence "It is 13 or 14 years back our partition took place": this might be taken to indicate a complete partition by metes and bounds, but the next sentence, which is omitted from the charge, shows this is not so, for there it is said "Three garden lands and two debtors, Jahagirdar and Deshpande, are left joint," showing that there was not a complete partition.

Then I feel bound to refer to another portion of the deposition for the purpose of showing the unsatisfactory materials on which the conviction is based. It runs as follows:—"What is stated above, *viz.*, that it is 12 or 13 years since Dhondiram was

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separated and all was partitioned out to him is true": now the accused never had said this; he had made the statement to which I have already referred as pointing to an incomplete partition; yet this is a part of that on which the conviction was based. The deposition then proceeds as follows:— "Only the cloth-shop was given to Dhondiram (on partition). What is written in my deposition in suit No. 429 of 1895, that no partition took place, that all immoveable estate is in my possession is not true."

But here again the accused had never said in his earlier deposition what is here ascribed to him; I have already pointed out that so far from alleging that no partition took place, he distinctly says that he became divided both from Dhondiram and from Shivnarayan: similarly he never said in the first deposition "All immoveable estate is in my possession": what he did say is "I myself am in possession of all ancestral lands and manage them". I notice that in one of the judgments it is said that no importance is attached to this: I cannot understand this: it appears to me completely to overlook the fact that besides the lands there was a house and also that in the first deposition the cloth-shop was stated to have been given to Dhondiram, so that while it might have been true that the ancestral lands were in the accused's possession, it would not have been true to say that all the immovable property was in his possession; and thus there is an obvious and most material distinction between the two statements. That this was a distinction present to the accused's mind is apparent from the second deposition where he says, "Three garden lands . . . are left joint. House, &c., is not joint." Here we find a clear distinction drawn between the lands on the one hand and the house on the other, though they both were immovable property. It will be apparent from what I have here said that the second deposition was either recorded with great carelessness, or the examination of which it purports to be a record was conducted on lines that never should have been permitted, in that it ascribed to the witness prior statements he had not made. A more unsatisfactory foundation for a charge of giving false evidence there could not be; but apart from this I am clear there

are no such contradictions as can form the legal basis of a conviction.

Had the whole of the depositions been examined with care and not merely the statements contained in the charge, I cannot believe that the lower Courts would have come to the conclusion they did, and I have not the slightest hesitation in holding that a conviction on these materials was an error of law.

In the opinion however of one of the learned Judges from whom this reference is made this Court should decline to interfere, and in arriving at this view he has said "Looking to the evidence before the Court of First Instance already discussed in the Magistrate's judgment, it is impossible to say that this issue was decided merely upon the contradiction between the impugned statements, or to say that there is not evidence to sustain the Magistrate's finding". Now this additional evidence consists of Exhibits L, M, N and O. But it is clear that so far as the Magistrate rested his decision on the two first of these Exhibits he committed an error of law: they were, I am told, statements by the accused's brothers, not made on oath in this case, and therefore obviously inadmissible. If, therefore, the Magistrate relied on them, that of itself would vitiate his judgment.

The other two Exhibits were made by the accused, but the prosecution, when challenged, could not suggest that they had any real bearing on the case and at most would only show that the accused in other matters had been untruthful. It requires no citation of authority to show that their admission for such a purpose would be highly improper. The result therefore is this that so far as the Magistrate did not rely merely upon the contradiction, he committed an additional error.

But the suggestion that this Court should not interfere calls for further notice, as it rests on a train of reasoning which I cannot pass without remark, though I conceive it to be inapplicable to the circumstances of this case.

The powers of the High Court are defined by the Code of Criminal Procedure: and it is there that we must go to learn what its powers are. Section 435 empowers the High Court to call for and examine the record of any proceeding before any

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Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

Then by Section 439 it is provided that in the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338.

The Legislature could not have expressed itself with greater clearness, but it has been suggested that the Courts have imposed on the plain terms of these sections a gloss which narrows the scope of the discretion vested in the High Courts.

If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us I recall the words of an eminent English Judge. "I desire to repeat," he said, "what I have said before, that this controlling power of the Court is a discretionary power, and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions, ought as far as practicable to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case."

These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other.

The exigencies of the case now in hand emphatically call for the interference of this Court, and my opinion is that the conviction and the sentence should be set aside and the accused acquitted, and the fine (if paid) refunded.

Though at one time I thought otherwise, on further reflection I think the decision of the Full Bench of this Court consisting of Sir Charles Sargent, C.J., and Telang, Candy and Fulton, JJ., in *Queen-Empress v. Mugapa* <sup>(1)</sup> does not cover this case.

(1) (1893) 18 Bom. 377.

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## APPELLATE CIVIL.

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*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.*

KUNJ BIHARI PRASADJI PURSHOTTAM PRASADJI (ORIGINAL PLAINTIFF), APPELLANT, v. KESHAVLAL HIRALAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS. \*

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*Specific Relief Act (I of 1877), section 42—Declaratory Suit—Declaration—Further Relief—Court—Jurisdiction.*

Section 42 of the Specific Relief Act enacts that no Court shall make a declaration in a suit in which the plaintiff being able to seek further relief omits to do so. The section does not empower the Court to dismiss such a suit.

An injunction is a "further relief" within the meaning of section 42 of the Specific Relief Act.

*Farasram v. Bhimbhai* <sup>(1)</sup> followed.

SECOND appeal from the decision of Mr. S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad.

Suit for declaration and injunction.

One Purshottam Prasadji, who was the last owner or *gadipati* of the Swaminarayan's temple at Ahmedabad, died on the 10th December, 1901. Previously to his death Purshottam Prasadji made a will on the 21st April, 1901, whereby he adopted defendant No. 14 as his adopted son, and appointed defendants

\* Second Appeal 593 of 1903.

(1) (1903) 5 Bom. L. R. 195.