Act, 1907 (7 Edw. VII, c. 23), section 5 (4). In England, however, the prisoner has to be formally found guilty. In India he is formally acquitted under the Indian Penal Code, section 84 and the Criminal Procedure Code, section 470. But even under the Criminal Procedure Code as it at present stands, I think that under section 471 (1) and (4) and section 474 the Court is entitled to direct the prisoner to be detained pending further orders from Government.

In the result, therefore, I see no reason to modify the Court's order except as regards the verbal amendment I have already referred to, viz., to delete the words "under that section" and insert the word "further" before "orders".

I will only add that I think it was quite proper to bring the matter to our attention and that the discussion which has ensued has been a useful one.

Order accordingly.

R. R.

CRIMINAL REVIEW.

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR *v.* MADHAV LAXMAN AND ANOTHER.*

1918.

April 3.

Criminal Procedure Code (Act V of 1898), sections 197, 239 and 532—Sanction to prosecute public servants—Form of sanction—Public servants conspiring to cheat three persons—Joint trial—Commitment, quashing of, after the trial has once commenced—Practice and procedure.

The two accused, the Kulkarni and the Patil of a village, conspired to cheat certain ryots of their money. Sanction to prosecute them was given by the Collector "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots".

* Criminal Review No. 415 of 1917.

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They were tried at one trial by the Additional Sessions Judge, who heard the whole case and recorded the opinions of the assessors. The case then stood over for judgment. But the learned Judge being of opinion that the sanction was invalid and that the joint trial of the two persons for distinct offences of the same kind was not permissible, quashed the commitment and directed a fresh inquiry under section 532 of the Criminal Procedure Code. On review,

Held, that the sanction was not invalid, inasmuch as the sanctioning authority had applied its mind to the facts of the case and sanctioned the prosecution of the accused, and had also sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots.

Held, also, that the joint trial of the accused was regular, because the offences charged against them were committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code, there having been clear proximity of time and space, clear continuity of action and sufficiently specific community of purpose.

Held, further, that under the circumstances the lower Court had no power to quash the commitment and direct a fresh inquiry under section 532, the proper procedure being to move the High Court for a quashing of the commitment under section 215 of the Criminal Procedure Code, 1898.

PROCEEDINGS on review.

The two accused persons, who were the Kulkarni and the Patil of the village of Bhandiwad, were charged with three offences punishable under section 420 of the Indian Penal Code, in that they exacted from three of the ryots of the village sums of money in excess of the land assessment payable to the Government when the ryots went to pay in the assessment.

Sanction for the prosecution of the accused was granted by the Collector, under section 197 of the Criminal Procedure Code, "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots".

The Sub-divisional Magistrate of Dharwar (Mr. L. J. Sedgwick) inquired into the case and committed the accused to take their trial before the Court of Session.

The trial went on before the Additional Sessions Judge of Dharwar (Mr. *V.* M. Ferrers) with the aid of assessors. The case was heard and the opinions of the assessors recorded. The case then stood over for judgment. But the learned Judge being of opinion that the sanction was not proper in form and the joint trial of the two accused was not permissible in law, quashed the commitment and ordered a fresh inquiry against the accused under the provisions of section 532 of the Criminal Procedure Code, on the following grounds :—

As things are, these points have been passed over in silence; and it has been a point of doubt with me whether it is a part of my business to raise on behalf of the accused questions which they have not raised upon their own account.

It is, I believe, the traditional practice of the British Courts of Justice, that where a prisoner is undefended, the Judge himself undertakes the conduct of the defence.

Following what I believe to be the traditional course, I feel it my duty to advert to certain particulars which the accused have allowed to pass in silence. In a criminal trial forms prescribed by Statute must be strictly observed, and the Court is bound to draw no inference of waiver, especially in a case where there has been an omission to perform a duty imposed by the Legislature in the interest of the accused (9 Bom. L. R. 556). The omission which I have in my mind is connected with the sanction.

In the case of this section 197 it has several times been pointed out that under it (unlike section 195) a general sanction is insufficient. The offence must be specified and the specification must be made by the sanctioning authority which cannot delegate its functions. In this connection I cannot do better than to quote the very words of the sanction which were held by the High Court of Madras to be no legal sanction under section 197. The words of that sanction are :—"Bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation". This Madras case has been distinguished in the Punjab from a case in which prosecution was sanctioned for an "offence briefly described in the schedules hereto annexed". But this distinction does not avail in the case of the sanction now before me. There is here no schedule, the words are "such other offence with which it may be necessary to prosecute". This appears to be not only a delegation of the powers of selecting a particular offence, but also a delegation even laxer than that which was condemned in Madras. There the officer who was to make choice of an offence or offences was nominated, here it is evident

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that the sanctioning authority has not only delegated the task of selecting the particular facts and the particular charge, but it has also delegated that task to some person or persons not particularised.

For defective sanction under section 195 there is a saving clause in section 537. But this sanction is given under section 197, and for a defective sanction under section 197 there is no *salvo*.

I cannot but think that under the Ruling of the High Court of Madras, I am bound to hold that the sanction in this case is not legally valid.

I am next met with a second obstacle of an equally technical nature. Two persons have been jointly charged with committing three several offences of the same kind.

Now under section 234 when a person is accused of more offences than one of the same kind committed within a twelve month, he may be charged with and tried at one trial for any number of them not exceeding three.

Now since by definition [C.P.C. section 4 (*2*) and I.P.C. section 9] words importing the singular number include the plural number, it might easily be supposed that since "a person" may be thus tried, "two persons" may be tried in like manner. This is not so. Section 234 does not apply to a charge against several persons accused of several offences, unless the acts constituting these offences form the same transaction in respect of all these persons (33 Cal. 292: see also 1 Sind L. R. 73). Now mere proximity of time is not enough to unite a number of acts into one transaction. What is required is community of purpose and continuity of action. The unities of time and place may have some evidential value, but by themselves they do not form such a connecting thread as will enable a number of separate incidents to be handled as one. There must be one purpose running through the whole. Such a purpose is not to be found in a mere general propensity to make money at the expense of the public. Something more definite and specific is required. If a man with the intention of appropriating a particular estate forge a number of different muniments of title, all these forgeries make one transaction. But if two village officers, sitting at the receipt of assessment, cheat each successive payee out of a penny, every individual case is an independent transaction, and they cannot be regarded as one or so treated for the purposes of a prosecution.

The point which I am now making is not a subtle refinement of my own invention. It is a well-ascertained law, laid down by competent authority in more cases than one. Closely analogous to the present case is the case of the Registrar to whom seven documents were presented by seven different persons at one time. The Registrar took an unlawful gratification of one rupee for each document. It was held that unless the Registrar had refused to register any one of the documents until all seven of the applicants paid each his rupee, there was not one transaction, but seven.

Another similar case is that of the six directors of a pretended Provident Fund who were jointly charged with having committed breaches of trust in respect of three separate sums of money. It was held that the trial was void *ab initio*.

Section 222 (2) will naturally suggest itself as a possible justification for the charge as framed. But this section will not serve. It applies only to charges of criminal breach of trust and dishonest misappropriation. It does not apply to a charge of cheating (1 A. L. J. 599), and it does not apply when there are more accused than one (13 Cr. L. J. 506). Nor can the defect be cured by striking out two of the offences and proceeding with the third. Section 227 would warrant the Court in altering a charge by striking out redundancies; but it does not warrant the striking out of a charge for the purpose of curing an illegality already committed, after the mischief which the Legislature intended to prevent had been done (29 Mad. 569).

It has been held that in case of misjoinder, the fact that the accused do not object will not validate the trial. A conviction had after such a trial has often been set aside even though no objection was taken at the trial (26 Mad. 125; 12 Cr. L. J. 567).

These being the circumstances, and this state of the case-law, the probability that a conviction in this Court would be followed by a successful appeal to the High Court is a probability so considerable that it is incumbent upon me to proceed with circumspection. It seems to be the most prudent course to apply section 532 of the Civil Procedure Code, to quash the commitment and to direct a fresh inquiry.

The District Magistrate of Dharwar referred the case to the High Court for setting aside the order, as he was of opinion that the learned Judge had no power to proceed under section 532 after he had once accepted the commitment, and that the only course left open to him was to refer the case to the High Court for quashing the commitment under section 215 of the Criminal Procedure Code.

This reference was not accepted by the High Court. It was ordered to be returned to the District Magistrate. But the High Court in its review jurisdiction, directed a rule to issue "to show cause why the order made by the Additional Sessions Judge on the 10th September 1917 should not be set aside and why the trial should not be proceeded with and finished according to law, or why a

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retrial should not be ordered or why such other order as may appear proper to the Court under the circumstances should not be made".

The rule was heard.

S. V. Palekar, *amicus curiae*, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, J.:—The facts relating to this case are briefly these. The accused who are the Kulkarni and the Patil of the village of Bhandiwad were committed to the Court of Session on the 15th August 1917 on a charge of cheating three persons. They were tried by the Additional Sessions Judge of Dharwar with the aid of assessors. The evidence and the opinion of the assessors were recorded. The case was then adjourned for judgment.

On the 10th September 1917 the learned Additional Sessions Judge made an order under section 532 of the Criminal Procedure Code quashing the commitment and directing a fresh enquiry. This order was originally brought to the notice of this Court by the District Magistrate; but the Court refused to entertain the reference made by him against the order of the Additional Sessions Judge. The order made by the Additional Sessions Judge having been brought to the notice of this Court, a rule was issued with a view to determine the legality of this order.

We have now heard the learned Government Pleader, who contends that the order is illegal. As there was no appearance on behalf of the accused, we requested Mr. Palekar to present the arguments in favour of the order, and we are obliged to Mr. Palekar for having done so.

The order of the lower Court is based on two grounds: first, that the sanction under section 197 of

the Code is invalid, and, secondly, that the joint trial of the two accused for three distinct offiences of the same kind is illegal.

In the first place the order is wrong, because section 532 has no application to a case of this kind. That section applies to a case where any Magistrate or other authority purporting to exercise the powers duly conferred, which are not so conferred, has committed an accused person for trial to a Court of Session. In the present case there is no question that the Magistrate, who committed the accused for trial to the Court of Session, had the power to do so, and consequently, in my opinion, even assuming for the sake of argument that the grounds, upon which the order is based, are valid, the lower Court would have no power to quash the commitment and direct a fresh enquiry under section 532. The proper procedure for the lower Court would have been to make a reference to this Court with a recommendation that the commitment should be quashed, as under section 215 of the Code a commitment can be quashed by the High Court only and only on a point of law.

In the view, however, I take of the grounds upon which this order is based, it is unnecessary to deal with the order in question on the footing that section 532, Criminal Procedure Code, has no application. The first ground relates to the form of the sanction. The sanction in this case is given by the Collector of Dharwar for the prosecution of Madhavrao Luxman Kulkarni and Ningangowda Dyamangowda Patil "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots". It seems to me that the sanction is not invalid on account of vagueness in the designation of the offences in respect of which the

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prosecution is sanctioned. The sanction in the present case is in form very much like the sanction that was given in the case of *Imperatrix* v. *Lakshman Sakharam*[1], where the sanction directed that the accused be "placed on his trial under section 466, Indian Penal Code, or any other section which may seem applicable after further investigation". This sanction was held by the learned Judges in that case to be sufficient under section 466 of the Code of 1872, corresponding to section 197 of the present Code; and it seems to me that the present sanction is equally valid and proper. Even apart from this authority, I should have taken the same view as to the validity of the sanction.

The case of *Queen-Empress* v. *Samavier*[2], which has been relied upon by the learned Additional Sessions Judge in support of his view, does not seem to me to have any application. There the Board of Revenue sanctioned the prosecution of a Deputy Tahsildar by the Collector of the District "for bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a criminal Court". The judgment in the case shows that this sanction was held to be invalid, because the resolution of the Board of Revenue was read as not sanctioning the prosecution of the accused in that case for any offence designated by itself, but as merely delegating to the Collector the power of selecting out of several such charges as he thought likely to stand investigation.

In the present case in my opinion there is no such delegation. The sanctioning authority has applied its mind to the facts of the case and sanctioned the prosecution of the accused persons and has also, in my opinion, sufficiently designated the offence or offences which may be established in connection with obtaining money

(1) (1877) 2 Bom. 481. (2) (1893) 16 Mad. 468.

from ryots. Thus the case of *Queen-Empress* v. *Samavier*[1], which must be taken with reference to the facts in that case, does not show that the sanction in the present case is invalid in any way. It is significant to note that no objection was taken to the validity of the sanction by the accused at the trial.

In this view of the case, it is not necessary to consider the further point, which has been urged by the learned Government Pleader, that no sanction under section 197 is necessary for prosecuting the accused persons on a charge of cheating. Several cases have been referred to in the course of the argument; but, in view of the decision in *Imperatrix* v. *Lakshman Sakharam*[2], it may not be easy to accept the argument. It is not necessary, however, to express any opinion on this point.

The second ground relates to the joint trial of the two accused persons on the charge of cheating the three persons specified in the charge. The learned Additional Sessions Judge has come to the conclusion that the cheating of these three persons cannot be said to form part of the same transaction within the meaning of section 239, that section 234 of the Code does not apply to the trial of more persons than one; that consequently there has been a misjoinder of charges and that the joint trial is illegal. It is not necessary to refer to the various cases to which the learned Judge has referred in order to decide this point. The whole question is, whether on the facts alleged by the prosecution, these acts, viz., cheating the three persons mentioned in the charge, were committed in the same transaction or not. The case for the prosecution is that the two accused, the Kulkarni and the Patil, conspired together and cheated certain persons on the 17th of March 1916 by asking

(1) (1893) 16 Mad. 468.

(2) (1877) 2 Bom. 481.

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them to pay certain small sums in excess of what was properly payable by them as assessment. The case for the prosecution in effect is that the purpose of the two accused was one and the same, namely, to induce the different persons who went to pay the land revenue on that day to pay more than what was legally payable by them to the Government, that they acted in concert and that the purpose was not merely the general purpose of cheating the villagers, but that the scheme adopted by them was a common scheme.

Having regard to the meaning put on the word "transaction" in the various decisions of this Court, it is clear to my mind that according to the prosecution case these offences were committed in the same transaction. There was clear proximity of time and space, there was clear continuity of action, and there was sufficiently specific community of purpose.

Under these circumstances, it seems to me that the charge as framed is in no way illegal, and that there is nothing in the charge which can be properly held to vitiate the trial.

The case of the Sub-Registrar (*Girwardhari Lal* v. *The King-Emperor*[1]), and the case of the Directors (*Choragudi Venkatadri* v. *Emperor*[2]), referred to by the lower Court, are clearly distinguishable from the present case. In each case really it is a question of fact whether the offences in respect of which more persons than one are charged at the same trial are committed in the same transaction, and that must be determined with reference to the facts of the case. In holding at this stage that there is nothing illegal about the charge, I am only taking the story of the prosecution without expressing any opinion as to the merits of that story.

(1) (1909) 13 C. W. N. 1062. (2) (1910) 33 Mad. 502.

The result, therefore, is that both the grounds on which the lower Court has based its order fail, that neither the commitment nor the trial is illegal, and that the order of the lower Court must be set aside.

The question still remains as to what order we should now make. The trial was all but complete, when this order was made, and ordinarily I should have preferred to direct that the trial should be resumed from the stage where it was left and finished according to law. But the difficulty has arisen in consequence of the delay owing to this order, and the subsequent proceedings which became necessary in consequence of the order. By asking the learned Judge now to write his judgment, we would be practically asking him to weigh the evidence recorded more than six months ago. It is not reasonable to expect the learned Judge to refresh his memory of the evidence without the aid of further arguments; and on principle it is desirable that the course which necessitates the writing of a judgment in a Sessions trial, in which the evidence is recorded more than six months ago, should be avoided. My learned brother is definitely of opinion that under such circumstances, the proper course is to direct a retrial; and under the peculiar circumstances of this case, I have also come to the conclusion that though the trial, so far as it has proceeded, is legal and proper, the best course would be to order a retrial according to law. The accused have not appeared before us, though the terms of the Rule issued by this Court clearly gave them notice that a retrial might be ordered by this Court. It is unfortunate that we have to deal with this matter at an interlocutory stage and to direct a retrial owing to the lapse of time; but it is the best order that could be made under the circumstances in the interests of justice.

I would, therefore, set aside the order made by the lower Court and direct that the accused be retried according to law.

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I desire to make it clear that the discretion of the trial Court under the provisions of the Code in framing the charge or charges against the accused and in directing a joint trial is not to be fettered in any way by the view which I have taken as to the legality of the present charge and the trial.

[The rest of the judgment is not material to this report.]

MARTEN, J.:—The course which the learned Additional Sessions Judge, Mr. Ferrers, took in this case was as unusual as it is embarrassing in the result. The case was heard in the ordinary way, evidence was taken, the assessors gave their opinions, and then the learned Judge reserved his judgment. So far everything followed a normal course, but apparently in the course of considering his judgment, the learned Judge thought that it was his duty, in following what he conceived to be the English practice, to undertake the conduct of the defence. In fact the time for conducting the defence was over as the hearing had been finished, but in his judgment the learned Judge raised two technical objections, which, as far as I can ascertain, were never put to the Government Pleader or argued before him and which ought to have been taken at the beginning of the trial if at all. Then having considered those technical objections, he decided that they were good, and having next held that section 532 applied, the learned Judge quashed the commitment and directed a fresh enquiry. In other words, the whole proceedings were to commence *de novo*.

Now in the first place I think the learned Judge has stated what I have understood to be the English practice far too broadly. He says:—"It is, I believe, the traditional practice of the British Courts of Justice, that where a prisoner is undefended, the Judge himself

undertakes the conduct of the defence. Following what I believe to be the traditional course I feel it my duty to advert to certain particulars which the accused have allowed to pass in silence". Now in England if a prisoner is undefended the Judge very frequently asks a barrister to conduct the case for the defence. But if that course is not followed, I think it is inaccurate to say that the Judge conducts the case for the defence. That to my mind implies that the Judge instead of being an independent officer holding the balance even between the Crown on the one side and the prisoner on the other, leaves that position and adopts the position of an advocate. If he does adopt the position of an advocate, then at once he is in this danger of thinking that the points he himself has taken are sound ones. I cannot help thinking that the learned Judge arrived at the conclusion, which he eventually did, in this case, largely owing to the mistaken idea of the course that he should adopt where a prisoner is undefended. That all proper points should be brought out on behalf of the prisoner, that if necessary a Judge should closely examine the Crown witnesses, and that he should put the points for the defence to the jury, is all commonplace, but I protest against the notion that a Judge, whether the prisoner is defended or undefended, should deviate from his position of strict impartiality between the Crown on the one side and the prisoner on the other. I must not, however, be understood as thinking that the Judge erred in taking the objections at that late stage. It was unfortunate that they did not occur to anybody before, but that may happen however careful Judge and counsel are. Whenever they did occur, I think it was right to take them.

Next, turning to the section under which the learned Judge acted, viz., section 532, I agree with my learned brother that even if the learned Judge's objections were

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well-founded, that section did not enable him to quash the present commitment, so that in any event his actual decision seems to be erroneous.

Next, taking the technical objections which I have referred to, they were two. One was that the sanction given to prosecute was inadequate, because it amounted, as the learned Judge thought, to delegation, and, secondly, that there was a misjoinder of charges. Now, as regards the first point as to the sanction, the learned Judge seems to have followed the decision in *Queen-Empress* v. *Samavier*[1], without considering closely enough the facts of the case and the precise sanction given in that case and in this. I think that when the two sanctions are read side by side, there is a clear difference between them. In the case of *Queen-Empress* v. *Samavier*[1] I think there was a complete delegation to the Deputy Collector to bring any such charges as he, the Deputy Collector, would think likely to stand investigation. That is the way I read the sanction given in the Madras case. But here the words are different, for the sanction given was "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots." As I read those words, it means this, that cheating was put as what I may call the primary offence, but if for technical reasons it was necessary to add some other offence in connection with the same set of facts then the proper authority was at liberty to do so. Personally I think that is allowable. In the decision which my learned brother referred to in *Imperatrix* v. *Lakshman Sakharam*[2] the sanction is expressed I think in better terms than the one we have got to deal with here. But it amounts to the same thing, namely, that a person is to be put on trial under a particular section or any other section which may seem proper

(1) (1893) 16 Mad. 468. (2) (1877) 2 Bom. 481.

after further investigation. In that respect I agree with what was said in *Girwardhari Lal* v. *The King-Emperor*[a], that these sanctions are not to be looked upon as if they were the precise charge to be framed. Some latitude must be given to the gentleman who has to frame the legal charge in precise language. At the same time I quite see that the sanction given must be substantially definite, but I do not think it is an objection if some words are added which does enable the accused to be put on trial in conformity with one particular section or with such other sections of the Code as may seem proper under the circumstances and arising out of certain facts referred to definitely in the sanction.

I accordingly think that the sanction given in the present case was sufficient, but in saying that I do not mean to say that I think it should be adopted as a precedent. I think the form that was used might very well have been improved upon, but I think it was sufficient under the Act. I express no opinion on the point whether sanction was necessary at all but will assume for the purposes of this case, though without deciding the point, that sanction was necessary.

Then the next point is as regards the misjoinder of charges. Here the three villagers who are alleged to be the victims of the accused were all paying the same Government tax on the same day and all together before the two accused. The case for the prosecution, as I understand it, is that there was really a conspiracy between the two accused to defraud each of these villagers in connection with the payment of this tax. In my opinion, on the facts of this case, this amounted to "the same transaction" within the meaning of section 239 of the Criminal Procedure Code. There

[a] (1909) 13 C. W. N. 1062.

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certainly was the same continuity of purpose as regards the accused and taking the other circumstances into consideration, viz., that all the three accused were there at the same time paying the same tax, I think it does amount to the same transaction. In that view there could be no misjoinder of charges. In this respect I think the decision in *Emperor* v. *Ganesh Narayan*[1] affords a useful guide to what is proper under the circumstances. Personally I feel that a wide meaning ought to be given to the words "the same transaction." Then it will be for the Judge in any particular case at the trial to say that although there is one charge yet he would direct separate trials of certain matters in that charge. That is the remedy if he thinks that any embarrassment may be caused to the prisoners at the trial by joinder of charges.

Then as regards the case that was relied on the other way, viz., *Girwardhari Lal* v. *The King-Emperor*[2], really no decision was arrived at by the Court. All that the Court did was to say that as it could not ascertain the facts as to what the nature of the offences were, they were not inclined to interfere in revision, as no objection had been made at the trial as to any misjoinder.

The next question is: What course are we to take? Judgment was given seven months ago. Everything was finished except the judgment, and the learned Judge did not take the course which, as at present advised and without hearing arguments on the point, I should have thought he might have taken, namely, to have given an alternative judgment based on the one hand on the hypothesis that his technical objections were right and on the other hand that they were wrong, and then sent the case up to the High Court. If he had taken that course, we should have been in a position to

(1) (1912) 14 Bom. L. R. 972. (2) (1909) 13 C. W. N. 1062.

say finally what should be done. But as it is, it seems to me the only alternatives before us are either to direct in effect the learned Judge to write his judgment on the merits or to have a retrial. Personally I am opposed to the idea that a proper judgment may be written seven months after the case has been tried, and none the less so because the case is of a criminal nature. It is almost impossible to imagine that the facts can remain fresh in the Judge's mind or that he will have any real recollection of the witnesses when he comes to make up his mind on which side the truth lies. I do not think it sufficient to say that the learned Judge can read up his notes of the case and notes of the argument. That won't necessarily bring back the faces of the witnesses and what he thought of them at the trial.

Therefore I am clearly of opinion that the proper course in the present case is to direct a retrial. We have got here very unusual circumstances, but I think that when such unusual circumstances do arise, the safest rule ordinarily is to begin *de novo*, and try the matter over again.

I accordingly agree that there should be a retrial in the present case, and of course the learned Judge's order must be set aside.

At the retrial it will be in the discretion of the Judge who tries the case to direct separate trials if he thinks fit as regards any one or more of these villagers who are alleged to have been defrauded. That is a matter for his discretion, but as far as I can see on the facts, so far as they have been put before me, there is no necessity for ordering separate trials. But our judgments must not fetter his discretion in any way. [The rest of the judgment is not material to this report.]

Order set aside. Retrial ordered.

R. R.