CALCUTTA HIGH COURT

D. Weston

Vs

Peary Mohan Dass

(Woodroffe and Coxe, JJ. D Chatterjee, C.J.)

17.08.1912

JUDGMENT

Woodroffe, J.

1. Before passing to the evidence I will deal with the question of the standard of proofrequired of the plaintiff in a case such as this, to which both the judgment and the argument have referred. The learned Judge has cited in support of his views in this matter the case of *Jarat Kumari Dassi v. Bissessur Dutt*[1] which was heard by the Chief Justice and myself. I wish to point out that the observations to which Mr. Justice Fletcher refers are to be found in the judgment of the Chief Justice, and that the separate judgment which I then delivered contains the grounds on which I disposed of that appeal.

2. In my opinion there is but one rule of evidence which in India applies to both civil and criminal trials, and that is contained in the definition of the terms "proved" and "disproved" in Section 3 of the Evidence Act. This Act, to use the language of the Chief Justice in the case cited, "in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof." The test in each case is, would a prudent man after considering the matters before him (which vary with each case) deem the fact in issue to be proved or disproved? In a matter of this kind the conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And speaking for myself where, whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is, the greater of necessity is the force of the evidence required to overcome such presumption I cannot myself imagine a Court saying to a party, who, as in this case, may be

a person-holding a high and responsible position, with a previous unblemished record: "It is true that I have reasonable doubts whether you did the grossly criminal acts with which you are charged, but I find that you did so all the same." And this exclusion of reasonable doubt is all that the so-called " criminal proof" requires. What I understand the Chief Justice to have held, and with this part of his judgment I agree, is, that the English rule in these matters (whatever it be, for authorities are not at one) does not, as such, apply to India. He proceeded, however, to say that the presumption against misconduct is not (as I have also said) without its due weight, though (he adds) the standard of proof, to the exclusion of all reasonable doubt required in a criminal case, may not be applicable. That is not that it is not applicable, but it possibly may not be. For this, two English cases are cited. Apart from the fact that the English authorities are not uniform on the subject, in my opinion the reasons which exclude the application of the English rule (whatever it may be) in this country, also exclude as authorities the cases which are said to embody and interpret it. Whatever, however, be the standard of proof applicable, and assuming it to be as the learned Judge puts it, the plaintiff has in my opinion, for the reasons which I give in my review of the facts to which I now proceed, failed to satisfy it.

3. After the decision of this Court in the criminal appeal, the Government deputed the Commissioner" of Burdwan, Mr. D. J. Macpherson, to inquire into and report upon the charges made against the police in respect of the alleged conspiracy. This was done on the 10th June, 1909, and on following days. Mr. Macpherson, who has been called in this case, took the evidence of witnesses in the presence of Mr. K. B. Dutt, who was implicated by the informers' reports and who is said to have been the chief complainant and spokesman for the others. Some of the statements of the witnesses in that enquiry have been put in and used, and the witnesses for the plaintiff have been considerably cross-examined as to important discrepancies between these two statements then and now made. learned Counsel for the respondent has rightly objected to the admission of any statement which, is not relevant to evidence actually given at the trial. The depositions at the enquiry are only admissible either to corroborate or contradict evidence given here. Mr. Macpherson then made a report, and a question arose about its production. I cannot see myself how a finding on a departmental inquiry or Mr. Macpherson's opinion in the matter could under any circumstances be evidence" before us. But in any case the Government claim, as it was entitled to do, privilege. We have been told that in the House of Commons the Secretary of State declared that it was not advisable that the report should be published during the pendency of these proceedings. A similar privilege was claimed for a confidential diary of the Maulvi. Mr. Justice Fletcher allowed both claims of privilege. A suggestion was, however, made in cross-examination on behalf of the plaintiff that the Government claimed this privilege because it knew that the documents would, if produced, falsify the defence and that it did not, to use counsel's word, "dare", therefore to produce them. The question in which this unfounded suggestion that

Government was assisting a case known by it to be false was made was a scandalous one and was very rightly disallowed by Mr. Justice Fletcher. The supposition is not be tolerated that the Government of this country, one of whose functions is to administer justice through the very Court in which this accusation was made, was itself party to a conspiracy to defeat the just claims of the plaintiff by wrongfully withholding that which, if produced, would establish the falsity of a defence of its officers which they had further aided by public money. The suggestion serves, however, as a leading sample of the reckless and unfounded charges which have been made throughout this case.

4. On this point of privilege another matter must be noted; when a document is in fact privileged no adverse inference can be drawn from its non-production, for to allow this would be in fact to destroy the privilege. This rule applies as regards the party claiming privilege. A fortiori, where, as here, privilege is claimed by a third person, no adverse inference can be drawn against any party to the suit in consequence of such claim and allowance of privilege. The learned Judge, however, when dealing with the evidence, notes that the confidential diary was not produced, with the apparent object of drawing an adverse inference therefrom. If further the suggestion was that the confidential diary had been kept back the appellants have rightly contended that such an inference was prejudicial to them. The defendants do not represent the Government, though being its officers the costs of their defence are, I understand, borne by, it. They are sued personally for their, own alleged personal wrongs. Had they been the parties claiming and allowed privilege, no adverse inference could be drawn against them. But they are not. They in fact complain that the decision of the Government not to produce these documents has hampered them in their defence. In particular it is claimed that the production of the Maulvi's confidential diary would have helped to establish, as I think it might, the authenticity of the informer's reports which have been challenged. The learned Judge further allowed the claim of privilege for which the Evidence Act, Section 125, provides, but has yet in several instances drawn inferences adverse to the police defendants by reason of the non-disclosure by them of the source of their information, the subject of the privilege. The learned Judge's comments were, in my opinion, not open to him. It must be of course first determined whether there is a privilege or not. But it is obvious that after the Court has once held that a document or subject-matter of enquiry is privileged, with the result that the other party cannot compel production or answer, the comment is not then open to the Court that the party to whom privilege has been allowed has not done or said that which the law and the Court have said he cannot be compelled to do or to say. I will only add as regards Section 125 of the Evidence Act that though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put

forward, but that it is a duty of the Judge apart from objection taken to exclude the evidence. A fortiori if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness.

5. The learned Judge, in dealing with the evidence of the witnesses for the defence, in more than one l place says that it is a matter of comment how Lai Mohan was able to discover them. The law, however, for the purposes of the administration of justice provides that a police officer shall not be compelled to say whence he got any information as to the commission of an offence (Evidence Act, Section 125). The protection does not depend upon a claim being made, and it is the duty of the Court, apart from objection taken, to exclude such evidence. Here, moreover, the witness claimed and was allowed privilege. This being so, it was not in my opinion open to the Court which allowed the privilege, to draw inferences adverse to the case which the witness was called to support because that did not appear on the witnesses' evidence which the Jaw had protected from disclosure.

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6. I next pass to the arrest of the plaintiff. The first question which arises is whether Mr. Weston was in law justified in effecting that arrest. Section 5 of the Explosive Substances. Act (VI of 1908) enacts that a person who knowingly has in his possession or control an explosive substance under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession or under his control for a lawful object, is punishable unless he-shows that he had it in his possession or control for a lawful object. Therefore, once it is established that a person has under such circumstances in his possession or under his control an explosive substances the statute casts the onus on him of proving that lie had it in his possession or control for an innocent purpose. Section 6 of the same Act deals with abettors. Any, person who by money, provision of premises, supply of materials or in any other manner abets or is accessory to the commission of any offence under the Act, 1 is punishable in the same way as if he had committed the offence itself.

7. The first question then is whether the bomb must be taken to have been in the plaintiff's possession or control. The bomb was not found in any place in the separate and exclusive possession of any other person than the plaintiff, ft was found in the boitakhana, a common room in possession of the family, by whom it was used and to .which they all had access. As pointed out in Queen-Empress v. Sang am Lall (1893) I.L.R. 15 All. 129 where articles are found in a house in such a place or places as several persons living in the house may have access to, there is no presumption as to possession and control that those articles are in the possession or control of any other person than the karta or housemaster (in this case the plaintiff). This case was followed

in the criminal appeal of Santosh against his conviction to this Court. There the Chief Justice said: " Had the bomb been found in Santosh's room when the search was made there, this might have been fair ground for imputing to him possession or control within the meaning of the Act. But the discovery in the boitakhana, a place equally open to others, taken by itself points no more to possession or control in Santosh than in the others who had equal access with him to this place." The judgment in appeal also holds that in such a case the karta or managing head of the family is prima facie responsible. But in this case the learned Judge holds that he was not, and as the Appeal Court held that the discovery of the bomb in the boitakhana did not indicate an exclusive possession by Santosh, it follows according to the Judgment that the bomb must be deemed to have been in the possession of nobody, and nobody was liable to account for it. But if the bomb was there, it was obvious that someone was accountable 'for it. The grounds for this conclusion are that the police, having acted on information showing that the article was in the exclusive possession of Santosh, they were not entitled to arrest the plaintiff merely on the ground that the bomb was in fact found in a public room in the house of which he was the owner. The answer, however, in the first place is that this does not correctly represent the information which the police had. The reports, it is true, do not mention the plaintiff and show that it was Santosh who took the bomb to the house. The reports do not state that the plaintiff had no responsibility, nor do they, nor could they, state that after the bomb was taken by Santosh to the house it remained in his exclusive possession. They deal with the movement of the bomb only during the period antecedent to that act. What they say is that the bomb was taken by Santosh to the boitakhana, a room which is a public room, where it was found. And for a finding in such room the owner of the house was responsible. It is quite possible that information may show that an explosive substance is taken to a house by a particular person, and that when it gets there another person may also become liable for its possession. The bomb having been found in what is by law the plaintiff's possession, the latter was called upon to account for such possession, though information showed that before it came into his " possession it was in the possession of someone else, namely, his son, who was also the means by which it came there. It may well be that a person may take a bomb to the house of another and ask the latter to keep it for him, and the latter may do so or permit it to be kept in a place which the law deems to be his custody. In short, the finding of the bomb in the possession or control of another justifies his arrest.

8. The learned Judge, however, next holds that the arrest was not justified as the pleadings show that the defendants did not arrest the plaintiff as the owner of the house under Section 5, but as an accessory under Section 6, of the Explosive Substances Act. He is of opinion that a different defence has been setup to that raised in the pleadings. Had this been so, I should have been ill-disposed to shut the defendants out on a merely technical plea, seeing it in no way affected the evidence which the plaintiff had given or might give, and that the plaintiff has shifted his own

case from that stated in the plaint throughout the whole trial. In my opinion, however, the learned Judge's finding is not justified.

9. In the first place it is, in my opinion, immaterial in this case under what section of the Act the arrest was made, if, in fact, the circumstances were such that the Act justified arrest. If a person were arrested, say, on a charge of theft, but it turned out that he should have been arrested for criminal misappropriation, it seems to me, apart from any question of surprise and the necessity for calling any particular evidence, to be hardly possible or sensible that he could bring a suit for malicious arrest, claiming Rs. 10,000 or other damages saying: "it is quite true you could have arrested me for criminal misappropriation, but as you did not and pursued me for theft, I want my damages, because, though liable in fact to arrest, the warrant was issued under the wrong section." Such a conclusion, would, it appears to me, stultify the law. I may cite in this connection the observations of Mr. Justice Harington in *Clarke v. Brojendra Kishore Roy Chowdhury*[2] the appeal in which has recently been decreed by the Privy Council: " In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under; that J to my mind is of very little importance; the defendant is entitled to call in aid any statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search." The present case is not even one of different Acts, but of different sections under the same Act. It is, however, unnecessary to decide this question in the present suit as the learned Judge is in error in supposing that the warrant was under Section 6 and not under Section 5.. . . . .

10. The learned Judge, however, gave effect to this belated argument and has held that notwithstanding the application for arrest, warrant, and proceedings were under Sections 4 and 5; that the plaintiff himself stated and understood that he was being proceeded against under Sections 4 and 5, and that his counsel at the trial proceeded on the same basis---the defendants were not entitled to say that they acted under Sections 4 and 5, because they are held to have pleaded (apparently in ignorance of the plain facts), that the plaintiff was arrested as an accessory under Section 6. There is no mention of that section in the written statement, but the learned Judge reads the reference to accessory as implying action under that section. The word accessory is, however, there used not with reference to the warrant but to the information which the police had received prior to the application for a warrant. It was thought that that information, coupled with the circumstances of the case, including the fact of the bomb being in the house, of which the plaintiff was owner,, raised a reasonable suspicion against the plaintiff that he was fully aware of what was being done. The application for the warrant was actually under Sections 4 and 5 and against the plaintiff as owner of the huuse. If the proceeding had been under Section 6 presumably the written statement would have so said. It could not have done so, however, unless

the gentleman who drew it had never seen the application, warrant, and proceedings in the case, including the plaintiffs own petition. However this be, it is plain that an erroneous statement in the pleadings (assuming that for the sake of argument, though not holding that there was one) cannot overcome the actual fact apparent on the face of the record and admitted by the plaintiff himself and his counsel. The latter should not (after having dealt with the case as one under Section 5) have been permitted to shift his ground in the last stages of the case, in reply. I hold that it is established beyond all doubt that action was taken I under Sections 4 and 5 and not Section 6, and that the defendants are not precluded by anything in their pleadings from avowing that which is plainly the fact. If, as I have found, the defendants were not responsible for the bomb, then Section 5 justified the arrest of the plaintiff on its discovery in his house. In fact, Mr. Dutt is recorded as having said in the first Court that "if the plaintiff had been arrested on the 8th July nothing could have been said "; and this for the reason that the plaintiff was the owner of the house. His case then, and until he shifted it in reply, was that his client should (if the defendants' case be true) have been arrested on the 8th July, but the fact that he was not, but later on, on the 23rd, showed that Mr. Weston had no bond fide belief in his right to proceed against him as the owner of the house.

11. Mr. Dutt who personally cross-examined the witness Paramananda who was making charges against him, suggested to him that Mr. Weston, in concert and conspiracy with the Maulvi and Mr. Hadrill, put tip this witness to tell a false story, and either forged or put forward this document knowing it to be forged, which suggestion the witness denied. This suggestion was supported by another that Mr. Hadrill and the counsel then appearing for the Crown, were putting up with Mr. Weston and that the witness Akshoy Pal was there also. As in other cases, an attempt has been made before us to show that what was suggested was not that which the question put obviously meant, and that there was no charge against the defendants of fabricating this document, or using it, knowing it to be fabricated. This explanation I do not accept. The Advocate-General subsequently took exception to the examination. From that discussion it appears that the charge was understood and stated to be one of procuring false evidence and fabricating a document, or using as genuine a document known to be forged. Instead of counsel for the plaintiff at once rising and saying that "this is not our charge", they acquiesced in it and stated that they accepted full responsibility for it. In examination-in-chief Mr. Weston was examined as to the charge, which was specifically stated. Again counsel for plaintiff acquiesced in the charge being as then stated. Again, according to the transcript, Mr. Dutt repeated his accusation of fabrication when Mr. Justice Fletcher pointed out that it had not been put to Mr. Hadrill, nor, I may add, to Mr. Weston, in cross-examination. And the learned Judge in his judgment,' while holding the document to be a forgery, added: "But while saying this I am satisfied on the evidence that there is not the slightest ground for suspecting -that either Mr.

Weston or Mr. Hadrill had anything to do with it, nor did they in any way suspect that it was not a genuine document." An application was made to Mr. J. C. Dutt, attorney for the plaintiff, to state the grounds on which this question was put, but Mr. J. C. Dutt replied that he was advised not to answer. An application to the Court by Mr. Hadrill for an enquiry was refuged, the matter being pendente lite. Before us the matter has been put in this form, namely, that the document was put forward at the instances of Mr. Weston, though Mr. Bose says whether Mr. Weston had knowledge that the document was forged he "cannot say", nor can he say that the document was made at the instance of Mr. Hadrill. In my opinion, this is not a creditable manner of dealing: with the question. In the first place no attempt should have been made to deny that the charge made was that which appears on the face of the question; which was understood and stated without objection by counsel for the defence; which was put to Mr. Weston without objection; which was repeated in express terms by Mr. Dutt in his reply; and which was so understood by the learned Judge who rejected it. Secondly, the learned Judge having found, as the fact is, that there was not the slightest ground for the charge, learned Counsel should frankly have with/-drawn it and then stated to the Court the grounds, if any really existed, on which Mr. Dutt considered himself: justified in putting it.

12. Such grounds as have been put forward by Mr. Bose (for Mr. Dutt has not himself attempted to justify his charge) are no grounds whatever for the charge, which should never have been made. Mr. Garth has, in consequence, asked us to refer Mr. Dutt's conduct J in preferring this unfounded charge, to the Court, for consideration whether action should be taken against counsel in respect of it. I do not, however, propose to do so; notwithstanding the number and reckless character of other unfounded charges, exceeding any in my experience, which have been made in this suit, because I think that, with this expression of opinion, this case, which has already occupied enough of the public time, should in all its aspects now come to a close. I wish, however, to add some observations to j what I have said. After this charge had been made the Advocate-General requested the Court to ask Mr. Dutt whether he made the charge on instructions, and if so, on whose. Mr. Justice Fletcher appears to have considered that he was not entitled to do that. I In my opinion the Court is so entitled, and that were (this not so, it would be powerless to prevent that abuse of cross-examination which the law directs. Instructions to counsel further are only privileged in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court. If the latter calls for written instructions it cannot, obviously use them as evidence in the cause which is tried, and for the purpose of such trial would have to treat then as confidential. They could, however, in my opinion, be called for then and there, and be used after the trial on the determination of the question whether disciplinary action should be taken against counsel by the Full Court to which the matter would then have to be referred. If the Court were shorn of this power it might not be able to take such

action in a class of case which most justified it. The learned Judge also appeared to think (see interlocutory judgment not printed, dated 2nd February 1911) that he was prevented from acting by reason of the fact that the question reflected not on the witness but on a third party, and that Section 150 of the Evidence Act mast be referred back to Section 146 which, in the opinion of the learned Judge, had no application. I am myself not prepared to hold that, even if Section 146 did not apply, the Court could not do that which is necessary for the effective exercise of its disciplinary powers over advocates; but I may further point out that even on a strict reading of these sections," Section 146 did apply, for the question, though it did reflect on third parties, also reflected on the witness. I wish further to add that in-my opinion it is not sufficient even to plead instructions. Counsel have a responsibility in 'the matter, and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward.

13. In connection with this question of cross-examination, which appears to have been often conducted both in form, manner and tone in an insulting and provocative way, I notice that Mr. Dutt claimed to be entitled to regulate the civility which he should extend to a witness. On an objection by Mr. Gregory to the offensive tone of Mr. Dutt's examination of Captain Weinman, he is recorded as saying: "I have been more civil than he deserves." I see no ground for this observation in the evidence, and provocative remarks of this kind to witnesses should be disallowed. On another similar objection, in the case of another witness, the Court is reported to have remarked that it must allow some latitude to counsel. In my opinion, no latitude should be allowed in such matters at all. The cross-examination also contains a large number of unfair and misleading questions. When, moreover, counsel puts it to the witness that he may take a statement from him, or otherwise states the case, care should be taken to see that the witness may not have ground for thinking that his confidence has been misplaced.

14. It is obvious that the fact that a third party was kicked (if the story be true) on the 11th August, has no bearing on the issue whether the defendants put a bomb in the plaintiffs ho/use prior to the 8th of the preceding July, or arrested without cause the plaintiff on the 23rd of that month, however reprehensible in-itself such savagery would be. Objection was also taken to the reference which the learned Judge gays he made after the trial was over to some medical works not stated. The objection is well founded, for whatever a Court relies on should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point: *Durga Prasad Singh v. Ram Doyal Chaudhuri*[3]

15. I now deal with the question whether Mr. K. B. Dutt should have accepted a retainer in this case; whether he should have been called as a witness; and what is the effect of his not having in fact been called. Though these matters raise questions of professional conduct, I am not dealing

with them simply on this ground, but because they have a most important bearing on the decision of this case. Objection was taken before Mr. Justice Fletcher to Mr. Dutt's appearance as counsel in this case on the following main grounds: That he had a personal interest in, and had in fact "engineered", the case; that he had a personal knowledge of the facts of the case; that he was a proper and material and, indeed, necessary witness to facts in the case; that having been concorned in preferring charges he should support them, by his testimony; and that, both witnesses and counsel would be embarrassed by his appearance, the more particularly so as serious charges, such as bribery, were personally made against him. The learned Judge overruled these objections in the, following passage: "It was made a matter of deliberate and unrestrained attack on Mr. Dutt that he had not gone into the witness-box. Mr. Dutt has himself explained the reason of his abstention, and that reason appears to me to be satisfactory. His client, in whose favour his testimony would have been given, with full knowledge of this, saw fit to retain him as his counsel^ and it cannot be suggested that there was anything improper in Mr. Dutt's accepting the retainer."

16. I will deal first with the question whether Mr. Dutt should have appeared as counsel in this case. Mr. Justice Fletcher is of opinion that it cannot be suggested that there was anything improper in his doing so. I should have myself, in the absence of any other authority, thought that under the circumstances of this case to which I shall refer, it was not proper I am, however, fortified in this view by the answers which were given by the Bar Council to certain questions put to them on this very matter, and in respect of this very case. We have referred to the Bar Council's report with the consent of counsel on both sides. It will be found set out in 16 C. W. N., XLVI. Their decision is of course not binding on us as Judges. But the Bar Council are the recognised authority on all matters of professional conduct and etiquette affecting counsel, and their opinion therefore is of the greatest weight and value. Their reply to the questions put to them was this: (i) If counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept a retainer therein, (ii) If he accepts a retainer not knowing or having reason to believe that he will be such a witness, but at the opening or at any subsequent stage before evidence is concluded it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear in the case unless lie cannot retire without jeopardising the interests' of his client, (iii) If counsel knows or has reason to believe that his own professional conduct en matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer, (iv) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in Clause (ii) ante, (v) In either of the cases mentioned in Clauses (ii) and (iv), there is no rule of professional ethics which debars counsel, if he continues to act as counsel in the case,

from going into the witness-box and being cross-examined.

17. I agree with this opinion. The question then is whether Mr. Dutt does not come within rule (i), and of this, on the facts, there is, in my opinion, no question. Mr. Dutt is, I believe, one of the leading citizens of Midnapore and an old resident there, where he is, or was, the Chairman of its Municipality. He has also engaged in politics, was Chairman of the Midnapore Conference, and the chief of what is called the "Moderate" section of Nationalist politicians. His position is set out in the statement which he made under Section 161 of the Criminal Procedure Code to the defendant Lai Mohan Guha. Mr. Dutt took some part in what are called swadeshi cases. He must be, from his position, of course, well aware of the political condition of Midnapore, and the ins and outs of Nationalist politicians, whether Moderate or Extreme, in the district. He was himself implicated in the informer Laha's reports as being a member of the so-called "bomb conspiracy". It is in evidence that from the 9th July to the 23rd July the plaintiff consulted him almost daily, and reported to him what was being done as regards his son in prison,' the alleged misdoings of the police, as also the plaintiff's own alleged conversations with Mr. Weston in particular; and this is extremely important, he was, according to the plaintiff, told that Mr. Weston had declared to the plaintiff that he knew him to be innocent, that he need not be nervous, but had notwithstanding told the plaintiff that he would arrest him if he did not get his son to make a confession, which the plaintiff understood Mr. Weston to know to be a false one. Mr. Dutt was one of the spokesmen of the alleged grievances of Midnapore at the visit of Mr. Maddox on the 4th August, 1908. If we are to believe Maity he can also speak to the fact that Mr. Weston sent more than one chit to the plaintiff and the contents of them. He was present at the Pleaders' Library on the 15th August when Ashutosh made his alleged revelations about the police. On the 16th August he telegraphed and thereafter communicated with Government on the subject of the alleged misconduct of the police. He appears to have been concerned in the preparation of the statements of witnesses sent to Government against the police on the 27th August. He is said to have directed that note-books should be kept recording complaints against the police. He was present as counsel on the 31st August, when it is alleged that the Court was of set purpose kept by him in ignorance of the fact that his clients were filing petitions of retractation of confession. He is concerned in the subsequent proceedings. He was present as spokesman and gave evidence at Mr. Macpherson's enquiry. He is said to have had information of a large number, if not all, of the principal incidents in this case, such, for instance, as the alleged kicking of Surendra, and to have had personal knowledge as to others. He is charged with having written a letter offering a bribe to the witness, Akhoy Pal, and is alleged to have bribed a large number of other witnesses in the case. In addition to his own personal interest, a number of the actors and witnesses in this case are Mr. Dutt's relations or connections, such as Madhu Sudan Dutt in charge of the room where the bomb at Saroda Dutt's house was found, Rash Behary Ghose, who Mr. Justice Fletcher

thinks sent the. "stabbing portrait" to Mr. Weston threatening his life, Sreenarain Pal, implicated by the reports, Jogjiban, an accused in the Arms Act case and the Midnapore bomb conspiracy case, Santosh Dass, the latter's mother-in-law, and Nibaran Chunder Mitter. The circumstances point to his having an interest in, and having taken an active, and I think leading, part in the institution and prosecution of this suit which represents in effect his own claims and grievances and those of others. It is not necessary, therefore, to go into every detail. It is sufficient to say that Mr. Dutt's name crops up in every part of the evidence either as the person directly concerned, or as having personal knowledge of the facts, or as being in a position to corroborate them.

18. It is obvious that, under these circumstances Mr. Dutt must have known that he was an important witness in the case, and it was therefore not proper of him to have accepted a retainer in the action. I wish to add a reference to a decision of this Court. One of the results of Mr. Dutt's appearance was this---that he had to examine and cross-examine as to matters on which he had personal knowledge, such as alleged conversations between him and the witness. And he actually cross-examined a witness who made charges of personal corruption against himself, a most unseemly spectacle. In the decision to which I refer, which is unreported, In the matter of certain Counsel, (4th August 1908), the Full Bench observed as to the unprofessional and objectionable character of counsel cross-examining a witness as to facts within his personal knowledge. Sir Francis Maclean, C.J., then said, delivering the judgment of the Court: "I agree with what has fallen from the Advocate-General, that the effect upon the minds of a jury of a cross-examination conducted in this method might prove injurious to the administration of justice." The Chief Justice here refers to its effect on the jury, but as I will later show, the fact that Mr. Dutt has conducted this case has had a prejudicial effect on the mind of the learned J Judge. The Chief Justice continued: "Suppose for a moment that a leading advocate were in cross-examination to put to the witness in the box a question, of this sort,---'Why did you not tell me so and so, and so and so?' The possible effect upon the mind of the jury might be that they might regard the suggestion of counsel as being pitted against the statement of the witness, an entirely fallacious view, with the result that, in consequence, they might disbelieve the latter. The Chief Justice then considered the effect which might be produced upon the mind of the witness himself; how such an examination might be very embarrassing and conducive to his giving answers he might not otherwise have given. To these I add the obvious embarrassment of counsel on the other side in examining or cross-examining to personal charges against their opponent. The objection, I may lastly add, was not removed by Mr. Dutt saying instead of "Did I not do so?" "Did I not say so?", "Did not Mr. K. B. Dutt do or say so?"

19. I next deal with the question of whether, having accepted such a retainer, Mr. Dutt should nevertheless have gone into the witness-box. Mr. Justice Fletcher then says: " Having done this

(that is accepted the ' brief) it was in strict accordance with- the rule of; professional ethics of almost universal application, that, having taken up the position of an advocate, he should refrain from testifying at a trial which was being conducted by him.' The learned Judge places the matter too high, as amongst other matters a reference to Clause 5 of the Bar Council's report shows. There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such. There have been several cases, both in England and this country, in which this course has been taken without objection. Two unreported instances are noted in Sethna v. Mirza Mahomed Shirasi . It is true that in that case Mr. Justice Beaman held absolutely that the Court would not allow counsel conducting cases to give evidence on behalf of their clients in respect of matters with which they were acquainted before they were retained, but that they might do so as regards matters occurring after their retainer. But such decision is, in my opinion, erroneous It omits to notice that *Stones v. Byron*[4], *and Deane v. Packwood* [5]*n. were not followed in Cobbett v. Hudson*[6] It is opposed to Mr. Inverarity's case, which the learned Judge cites. Considered as a rule of absolute exclusion, as opposed to an expression of opinion of what is desirable, the decision is in direct conflict with the Evidence Act, and both with the Privy Council decision to which I next refer, and the opinion of the Bar Council regulating questions of professional conduct above cited. The learned Judge who decided that case failed to distinguish between competency and the opinion that as a general rule it is desirable that the same person should not be both advocate and witness. In the Privy Council decision, *Corea v. Peiris*[7] a gentleman named Schroder was examined as witness, though counsel in the case. The Judicial Committee did not disapprove of this as contrary to the professional ethics of which Mr. Justice Fletcher speaks, but on the contrary there stated that counsel had been properly examined.

20. The true rule in such matters is, in my opinion, as follows. Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer see Section 118 of the Evidence Act and Cobbett v. Hudson (1852) 1 E. & B. 11(Supra). The Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for counsel retained in the case to give his evidence in it. There are cases in which he properly may, and, indeed, should do so. At the same time it is recognized by both the Court and the profession that, as a general practice, it is undesirable, when the matter to which counsel deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal, much must depend on the circumstances of each case. In the present case having regard to Mr. Dutt's interest in the proceedings, the fact that he has taken part in the events referred to in them, and has both personal and reported knowledge of a very large number of the facts testified to in the evidence, it was in high degree undesirable that he should have been. both counsel and witness. The real

objection in MrAputt's case is that he was counsel in the case and not, therefore, as he would properly otherwise have been, a witness. I may added that Curry v. Walter (1796) 1 Esp. 456 to which Mr. Bose referred, has no bearing. There counsel was subpoenaed to prove what had been stated by him on motion in Court. The Court was of opinion that on such a matter counsel should not be called, but that the party should prove it by other means, or witnesses who are present; but it should be at the option of the counsel whether he would give his testimony or not. The Court therefore decided that it was not obligatory on counsel in such a matter to give evidence, though he might do so if he liked. It did not decide that, he could not give evidence. It is further of no authority in this country where counsel must obey a subpoena to give evidence, as any one else must do.

21. The next point (which is the material one here) is whether the appellants were entitled to ask the learned Judge to draw inferences adverse to the plaintiff from the fact that Mr. Dutt had not been called. This they were clearly entitled to do. If it be a fact that under the circumstances of this case Mr. Dutt could not properly have been both counsel and witness, those circumstances also show that it was improper of him to have been counsel at all. And if he were not counsel, there can be no possible question but that, he was a material and necessary witness. It was not open to Mr. Dutt to act in breach of a professional rule, and then to plead the fact of such breach both as a reason why he could not be a witness and also why-adverse comment should not be made upon the fact that he was not a witness. If it be that as counsel he ought not, under the circumstances of this case or otherwise, to have been a witness, then it was the act of his client which made Mr. Dutt counsel, and he cannot plead his own act against such comment, If Mr. Justice Fletcher's view were correct, then If a litigant is aware that a particular counsel has knowledge of a fact which he does not wish disclosed, or that such counsel's evidence if given would contradict him, he has only to retain him and then say to the Court: "You must not draw inferences against me, because I do not call the man who can speak to the facts which I ask the Court to believe, for I have made him my counsel."

22. The next question is, what is the nature of the inference which should be drawn from the fact that the plaintiff has put forward Mr. Dutt as his counsel and not as his witness? The learned Judge says: "Mr. Dutt has himself explained the reason of his abstention (from the witness-box) and that reason appears to me to be satisfactory." What those reasons were are not stated, and the learned Judge has therefore not placed us in a position to appreciate them. But if those reasons were that Mr. Dutt had not in fact personal knowledge of the facts, or were a statement of the extent to which he was concerned in those facts, or as to the nature of those facts, such a statement being in the nature of evidence should have come from him in the stand, and not from his place at the Bar. The learned Judge next says: " His client, in whose favour his testimony

would have been given, with full knowledge of this fact saw fit to retain him as his counsel." How and on what grounds could the learned Judge assume, as he here does, that had Mr. Dutt been a witness, which he was not, his testimony, would have been given in favour of his client? This observation indicates the danger to which Sir Francis Maclean, C.J., in the case above cited, referred, namely, that inferences unsupported by the evidence of counsel himself may be drawn from his mere appearance in support of a cause of the facts of which he is alleged to have personal knowledge. So far from the inference being what the learned Judge states, it is precisely the other way. The learned Judge has himself correctly stated the rule when dealing with the defendants' case, viz., that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The same rule applies to Mr. Dutt, for whether he could or could not as counsel have given evidence in this case, he should not have been counsel, and could and should have given evidence for the reasons I have given.

23. On this matter it only remains to indicate on what points such presumption should in this case work. It works as regards every one of the facts, to the chief of which I have alluded, in which Mr. Dutt was himself an actor, or had alleged personal or reported knowledge. I need not repeat them here. They are also mentioned in detail in the evidence. I only say here that in my opinion the most important points affected by this presumption are the alleged reports made to Mr. Dutt between the 8th and 23rd July as to the alleged conduct of Mr. Weston and the police, subsequent information on the same points received by him, the circumstances leading to the institution of this suit; and matters in the suit itself, such as the incident of the 31st August which Mr. Dutt, who was then counsel, makes the basis of a charge of dishonesty against the defendants and the presiding magistrate, Mr. Nelson. So far from presuming, a& the learned Judge does, that Mr. Dutt's testimony on these and other points would have been in favour his client, I presume the other way, and the learned Judge might have himself so found if Mr. Dutt had gone into the stand. One of the chief grounds on which this suit has been decreed against Mr. Weston is the alleged conversations he had with the plaintiff, when he is supposed to have repeatedly told the latter that he was innocent, that there were therefore no grounds for proceeding against him and that he need not be nervous, and yet that he expressly avowed his alleged illegalities by telling the plaintiff that he would arrest him nevertheless if he did not get a confession from his son. These conversations are said to have been reported to Mr. Dutt at the same time. Is it to be conceived that if Mr. Dutt had been told about these at the time it would not have been of the first importance that this should be proved? Would not Mr. Dutt have been called to give that presumptively independent evidence which the suit now lacks. I assume that Mr. Dutt was not called because he could not corroborate the plaintiff, or his case, on this, or other points. Had he done so, it would have been necessary for him to explain how he did not mention the subject of the alleged reported conversations to Mr. Maddox on the 4th August, but had, on the contrary, no

complaint to make against Mr. Weston; how he did not mention it in his letter to Government of the 27th August; how it finds no place in the subsequent proceedings, and does not see the light of day until this suit, and then, after Bonomali's charge had failed, it is pat forward as the basis of the new case on which the suit has been decreed.

24. In this connection I desire, in justice to counsel for the appellants in the first Court, to deal with another matter. Mr. Justice Fletcher, who has, in my opinion erroneously approved of Mr. Dutt's conduct, has, on the other hand, in my opinion, passed an undeserved judgment on the conduct of counsel for the defence. After having observed that Mr. Dutt had followed the rule of professional ethics, he continues: "I may observe that this rule of professional conduct was not, I regret to say, observed by" Mr. Dutt's opponents." This observation is based on the fact that Mr. Norton called Mr. Gregory (a junior counsel in the case) as his witness, and the latter gave his evidence. Mr. Gregory was called to repel a, suggestion of Mr. Dutt, who in his numerous charges has not spared members of his own profession, that Mr. Gregory had not in respect of a particular matter, viz., that arising out of exhibit 61, properly and fairly conducted the case before the Sessions Judge, and had attempted to keep back the document from the Court. Mr. Gregory from his place at the Bar gave his explanation. Though not so bound, it was properly open to Mr. Dutt to accept a statement made in such a matter, and in such circumstances, from a fellow member of his own profession. He refused and objected to the statement being made. Thereupon Mr. Norton put Mr. Gregory in the witness-box, when he was cross-examined at length by Mr. Dutt, who, amongst other matters, thrice made to him the misleading suggestion that the counsel Mr. Morrison was not present in Court on the 23rd when A. K. Pal, who speaks to this document was examined, though it is clear from the record that he was in fact present. I have already stated what in my opinion the general rules are as regards the calling of counsel as witness. In my opinion Mr. Norton was fully justified in calling Mr. Gregory, both in protection of the latter's professional reputation, which had been in fact groundlessly assailed, and of his own client's interest.

25. In this connection I may cite an observation of Sir Francis Maclean, C.J., in the case of Nunda Lal Bose v. Nistarini Dassi 1900) I.L.R. 27 Calc. 428, 439. "I can scarcely suppose that any counsel, if he understood that the other (sic) were not prepared to accept his statement made lipoid his word of honour, would not himself ask that he might be allowed to give his evidence in the usual way."

26. Mr. Norton has also invited our opinion on another matter on which the learned Judge has censured him. During the examination of the witness Mr. Wilson, the latter produced at the request of Mr. H. D. Bose, who was cross-examining him, a private pocket-book. An irrelevant cross-examination on it followed. The book being a private one, Mr. Norton marked the pages to

which counsel might refer in respect of the subject of his cross-examination, the other pages referring to other matters. Mr. Bose, however, looked at pages which had not been so marked. On the face of it this was highly improper on the part of Mr. Bose, and Mr. Norton appears to have naturally expressed his opinion strongly to this effect. The learned Judge is, however, stated not to have then and there, as I think should have been done, determined who was in fault. Mr. Bose brought in next day a written explanation of his conduct, which the learned Judge is said to have refused to have gone into, and then the matter ended until the judgment, when the learned Judge observed as follows: "I may further add that I viewed at the time, and still view, with complete disapproval Mr. Norton's unfounded and abusive attack on Mr. Dutt's janior, Mr. H. D. Bose." I do not know, what the explanation was which Mr. Bose offered, and on which the learned Judge refused to adjudicate, and I am not therefore in a position to say whether Mr. Bose was to blame. Prima facie and in the absence of proper explanation Mr. Norton wag justified in taking strong exception to Mr. Bose conduct. The matter might have been decided the and there, but as it was not, I cannot say that Mr. Norton was open to censure. I may further observe that the judgment states no grounds on which it is based, though the admitted fact that Mr. Bose from one cause or another looked at the unmarked pages, in my opinion, called for such grounds.

27. It only remains on the questions of fact in this case to put together the different conclusions for which my reasons have been previously given.

28. The fifth issue raises the question of limitation. The Advocate-General contended, and in my opinion rightly, so far as regards the causes of action for malicious arrest and prosecution, that the suit was barred. Upon these causes of action the suit should have been dismissed in limine. The learned Judge, however, stated that he would subsequently hear the argument about. limitation, and would meanwhile hear the evidence. The plaint is not, as the learned Judge has stated, a "mofussil pleading," which according to Privy Council rulings of about the middle of last Century and later (when such pleadings were often very imperfect) should not be read too strictly. It was no doubt filed in a Mofussil Court, but is in the English form of pleading, and I should say had been settled by counsel, as one would also naturally expect in a case of this importance. . Now the suit-is described in the plaint as " valued at Rs. 10,000 on account of damages for wrongful confinement and malicious-prosecution." Though the plaint also alleges trespass,' it seems that the suit was really based on the two other torts, as it is in respect of these that damage is alleged to be suffered, and the cause of action is said to have arisen on the 31st August, 1908, when the plaintiff was set at liberty. I will, however, assume that, with malicious arrest and prosecution, was included trespass, All these acts are well 'known torts, and the only peculiarity about the suit is than the plaintiff alleges that these torts were committee by three men acting in conspiracy, instead of by one In one sense this allegation of conspiracy is immaterial to

the action, for the acts alleged are such that if proved against any one defendant, he is entitled as, against that defendant to a decree. The reason, however, why conspiracy is alleged is obvious. According to the plaintiff it was the Maulvi who was directly, responsible for the bomb; so, in order to implicate. Mr. Weston and the other defendants in the charge, it had to be alleged that there was a conspiracy between him and them to do this act. Similarly, it, was Mr. Weston who ordered the arrest which i& alleged to be done in conspiracy with the other, defendants to bring them into the charge. But their, suit remains what it is;---a suit against joint tort-feasors. If it was a suit against one person, it would be admittedly barred as regards the arrest and prosecution. I may leave out of account the alleged trespass if that was part of the cause of action, as the result of Mr. Justice Fletcher's judgment is that there was no trespass in fact, and that also is what I have held. If the suit is barred as against one person, the period of limitation is not extended because it happens to be against three. This is admitted. But then it is said, and Mr. Justice Fletcher has held, that there is another cause of action which the plaintiff has himself nowhere stated. It is said that besides the cause of action on the torts, there is a cause of action to recover special damage by reason of a conspiracy to cause damage. The learned Judge accordingly framed an issue which does not arise on the pleadings, alleging a general conspiracy to cause damage of which the trespass, arrest and malicious prosecution were merely the overt acts. I have asked learned Counsel to produces to the Court authority for the proposition on which the learned Judge has proceeded, viz., that the same set of facts may constitute two causes of action, viz., for a tort and for a conspiracy to cause damage. And none has been produced. The reason of this is that the two exclude one another. If a joint tort is committed there is no necessity to have recourse to any law of conspiracy. And on an action to recover damage resulting from a conspiracy, as distinct from an action on a joint tort, the conspiracy is one to do an act which, if done by an individual, would not constitute a tort, but is actionable by reason of special damage having been caused thereby. The two in fact are mutually exclusive. There is a conspiracy to commit a crime; a conspiracy to commit a tort; and a conspiracy for an unlawful purpose in respect of an act which, if done by an individual, would neither be a crime nor a tort. All these may be the subject of criminal prosecution. In respect of the civil remedy, where there is a joint tort, the action is on the tort against the joint tort-feasors. In any other case, where in carrying into effect the conspiracy the conspirators inflict damage on a individual, he may sue for the particular damage he has thus separately suffered. In the former case the cause of action is on the tort, and in the latter on the special damage. There is a further difference in that in actions on tort, general damage is, except in special cases, sufficient, whereas in such a conspiracy there must be special damage. The class of cases to which the learned Judge refers establishes that there are instances in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although if one of them did the same act by himself and without any pre-concert with others he would escape liability, both civil and criminal. I agree with the

learned Judge in thinking that an action on such a conspiracy would lie in this country, but the-point here is different, viz., what is the plaintiff's cause of action, and what is the limitation applicable? It appears to me to be quite clear that the suit is on joint torts, and that the arrest, imprisonment and prosecution are governed by the one-year rule under Articles 19 and 23 of the Limitation Act. Mr. Justice Fletcher is of opinion that though the suit is described as a suit for malicious prosecution, it is in fact not one. Whilst the learned Judge assigns no grounds for this view, it also appears to be; inconsistent with a previous statement made by him, that the plaintiff had two causes of action--one for damage and one for malicious prosecution. As the learned Judge's finding as regards trespass and search was a dismissal on the facts, it is not necessary to enquire whether Articles 36 or 39, or both, would apply so far as the suit alleges wrongful search and trespass. In my opinion the suit is barred on the other causes of action, and should not have been entertained on that cause of action on which it has been decreed. On the sixth and last issue I am of opinion that if it was necessary, as according to the learned Judge's view of the case it was, to prove special damage, such damage has not been proved. Portion (but what is not stated) of the Rs. 1,000 which the learned Judge has given the plaintiff was, it appears, spent to obtain the release of his soh, which is not damage to the plaintiff in this suit, and no "evidence strictly so-called has been called to prove the expenditure of the residue. These findings dispose of all the issues, both of fact and. law, before us.

29. I would accordingly decree this appeal and dismiss the suit, the plaintiff-respondent paying all (including reserved) costs in both Courts.

Coxe, J.

30. I entirely concur with the judgment of Mr. Justice Woodroffe both as to the order and as to the grounds therefor.

D. Chatterjee J.

31. This appeal arises out of a suit described as one for damages for wrongful confinement and malicious prosecution. The defendants pleaded limitation before the Court below, but were overruled The question of limitation has been pressed before us and I shall deal with it first.

32. The plaintiff was arrested on the 23rd of July and discharged on the 81st of August 1908. The suit was filed on the 15th of November 1909, i.e., more than one year after the discharge, and would therefore be barred in so far as it was one for wrongful confinement, or false imprisonment and malicious prosecution under Articles 19 and 23, Schedule 1, of the Limitation Act. The plaintiff's legal advisers evidently saw this, and it was stated in the 14th paragraph of the plaint that, the period of the notices served under Section 80 of the Civil Procedure Code

being excluded, no part of the plaintiff's case was barred. The Court below has held, however, that no such notice was necessary, and no exception has been taken to that view of the law before us, and no reliance has been placed upon any such notice as an answer to the plea of limitation. It has been contended, however, that the suit was based on a conspiracy between the several defendants, and as conspiracy is a distinct cause of action by itself, the suit must fall either under, Article 86 or Article 120, and is therefore not barred; it has been further contended that the illegal Search of the plaintiff's house is a cause of action which at least is not barred, as it would fall either under Article 36 or Article 39 or Article 120. The first contention as regards conspiracy has found favour with Mr. Justice Fletcher, and I shall deal with it first. The learned Judge has relied on the case of Quinn v, Leatham. [1901] A. C. 495, 506, and Mr. Dutt has also relied on the same in support of his argument. The learned Judge says: "The truth of the matter is that in a case like the present the plaintiff has two causes of action---one to recover the damage that has been occasioned to him as the result of the conspiracy, and the other to recover damages for malicious prosecution against the defendants as joint tort-feasors. This is well illustrated by the case of Quinn v. Leathern [1901] A. C. 495, 506. "With great deference I think that that case itself contains an answer to the argument. Lord. Halsbury, in delivering the first judgment in that case, says: "There are two observations of a general character which I wish to make---one is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Now what are the facts in Quinn v. Leathern [1901] A. C. 495, 506 and what does the case decide? The defendants were the officer-bearers of a trade-union; they threatened the plaintiff with injury if he employed men who were not members of the union; the plaintiff was willing to have his men enrolled as members, but defendants insisted on his dismissing them and taking members of the union in their, place; the plaintiff refused, and they then threatened a large customer of the plaintiff with injury if he dealt with the plaintiff, and thus compelled him to cease to deal with the plaintiff. The plaintiff brought a suit for damages. The plaintiff had every right to carry on his trade in the way most profitable to him, provided he did not infringe on the rights of other people, and so had the customer of the plaintiff every right to deal with whomsoever he pleased under similar restrictions, and the defendants had maliciously invaded this right of the plaintiff and injured him by unlawful means, and the defendants were therefore held liable. It was found that there was conspiracy and threats carried into execution by the defendants to the injury of the plaintiff, the object being not to serve any trade interests of their own, but to injure the plaintiff, because he would not comply with their requisition to dismiss his innocent servants. It is true that the concerted action of a number of men' has an element of

aggravation, and is more irresistible than the unaided act of a single individual, and some of the cases support the view that a combination of several persons to do an unlawful act may be actionable when a similar act by an individual is not, but I do not think there is any authority for holding that a tort, when committed by several persons acting in concert, is different from the same tort committed by a single individual. A trespass is a trespass, whether it is committed by one person or by more, and so is a malicious prosecution or false imprisonment. The combination in such cases may be an element of aggravation in the assessment of damages, but does not to my mind suffice to make it a different tort. In the very case of Quinn v. Leathern [1901] A. C. 495, 537 Lord Lindley said: "It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My-Lords; one man without others behind him who "would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had, could not have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action."

33. In a similar case, Giblan v. National Amalgamated Labourers' Union [1903] 2 K. B. 600, 619, 623 Lord Justice Romer said: "I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of;" and Lord Justice Stirling said: "I am far from satisfied that they are not such as to be' illegal, even, if done by a single individual." Read by the light of the facts, the case decides no more than this, that a number of persons who, without justification, intimidate a third person by threats of doing him harm, and thereby coerce that third person into' causing harm to the plaintiff, are guilty of an actionable wrong. Giblan's case shows that conspiracy or wrongful combination is not a material element in the constitution of the wrong. In this country the Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been" perpetrated. If it were not so, the greatest uncertainty would be introduced into the law of limitation applicable to a particular case, for, a plaintiff might easily take his case out of the statute by charging more than one person with & wrong, and a defendant would not know when he is secure against a charge. But supposing that conspiracy to perpetrate a wrong was a separate cause of action by itself, it would not be actionable unless it caused special damage by itself. In the present case, however, the whole damage caused is by reason of the imprisonment and prosecution. The plaintiff deposes that the imprisonment cost him Rs. 1,000 in law charges, and that is the only damage proved and decreed. The present case, therefore, considered as a suit for damages for wrongful confinement and malicious prosecution is barred

by limitation under Articles 19 and 23 of the first Schedule to the Limitation Act.

34. There is a side issue as to whether Mr. Dutt ought to have appeared as a witness in the case and not as counsel? I think he ought to have appeared as a witness. He could have thrown light on many parts of the case in which we have had to grope in the dark. I think the case of the plaintiff on the facts has suffered materially by reason of his absence from the witness-box, whilst he himself has been made the subject of repeated attacks without any means of adequately answering them* I think he has been sadly misadvised in this matter. There was a reference to the English Bar Council by the legal advisers of the appellants and an opinion obtained which will be found on page xlvi, 16 Calcutta Weekly Notes. This I have no doubt is no authority for the Court, and was allowed to be read only with the consent of Mr. Dutt. The opinion of the Council is against Mr. Dutt. The opinion of the Privy Council in the case of Corea v. Peiris [1909] A.C. 549, 557; 14 C.W.N. 86 also seems to support the same view. There the respondent tendered his own counsel as a witness and the District Judge refused to admit his evidence. The Supreme Court of Ceylon, on appeal, had him examined, and the Privy Council say as to this: "He was tendered as a witness for the respondent at the trial, but the District Judge ruled' on some quite unsustainable ground, that, being the respondent's advocate, his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined." It is a pity therefore, I repeat that he considered himself debarred by any rule of professional ethics from giving his evidence in the case.

35. Complaint has also been made that some of his questions in cross-examination were without justification. It may be that his own personal knowledge of the facts supplemented his instructions in these matters, but that is the more a reason why he should have given his evidence under the sanction of an oath and subject to the test of cross-examination. The suggestions made, however, have been abandoned.

Cases Referred.

1(1911) I.L.R. 39 Calc. 245, 255
2(1909) I.L.R. 36 Calc. 433, 451
3(1910) I.L.R. 38 Calc. 154
4(1846) 4 Dowl. & L. 393
5(1847) 4 Dowl. & L. 395
6(1852) 1 E. & B. 11
7[1909] A. C. 549; 14 C. W. N. 86