

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.*

ABRAHAM AND OTHERS (PLAINTIFFS),

and

HOLMES (DEFENDANT).*

1888.
April 20.

*Army Act, 1881, s. 144—Sub-Conductor, Ordnance Department, is a soldier—
Civil Procedure Code, s. 468.*

A Sub-Conductor of Ordnance on the Madras Establishment of Her Majesty's Indian Military Forces, holding a warrant from the Government of Madras, is a soldier within the meaning of s. 144 of the Army Act, 1881.

In a suit to recover Rs. 183-7-0 a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned the summons unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action :

Held, that the Commissary of Ordnance was bound to serve the summons under s. 468 of the Code of Civil Procedure, although the defendant might be entitled to the privilege given by s. 144 of the Army Act, 1881.

CASE referred under s. 617 of the Code of Civil Procedure by A. J. Mangalam Pillai, Subordinate Judge at Tadpatri, in a Small Cause suit.

The facts were stated as follows :—

“This is a suit by Messrs. Abraham and Company of Bellary against Sub-Conductor S. Holmes for recovery of Rs. 183-7-0 due by him on account of goods purchased from plaintiffs from time to time.

“The Commissary of Ordnance, to whom the summons was sent for service on the defendant, returned the said summons unserved, stating that in accordance with s. 144, Army Act of 1881, soldiers are not liable to be sued for any debt, unless the sum exceeds thirty pounds over and above all costs of suits.

“Thereupon I requested information as to the grounds upon which he considered Sub-Conductor Holmes to be a soldier.

“In reply he stated, referring to Sub-Conductor Holmes' warrant that Sub-Conductor Holmes is a Warrant officer not holding

* Referred Case No. 13 of 1887.

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an honorary commission, and therefore under Army Act, s. 190, cl. 6, is included in the expression of soldier.

“Then I requested him to forward for perusal, the warrant of Sub-Conductor Holmes. He accordingly sent a copy of the warrant.

“Upon perusal of the said warrant, I requested information whether Sub-Conductor Holmes is bound to render continuously for a term military service to Her Majesty in any part of the world. In his reply he again quoted s. 190, cls. 6 and 8 of the Army Act of 1881.

“The warrant does not contain any condition that Sub-Conductor Holmes is bound to serve Her Majesty in any part of the world continuously for any term of years, and the Commissary of Ordnance himself admits in his letter No. 5238 of the 10th February last, that Mr. Holmes is not bound to serve Her Majesty for any particular term, and that Mr. Holmes belonging to Her Majesty’s Indian Military Forces, would not ordinarily be required to serve out of India, and relies upon what he designates as instructions contained in the Manual of Military Law, viz., that the word soldier practically includes all persons subject to military law other than officers.

“But I think that the exemption from the jurisdiction of the civil courts in respect of soldiers relates only to soldiers of the regular forces, who, as defined in the Act, are bound to serve Her Majesty continuously for a term in any part of the world.

“I therefore submit for the decision of their Lordships the Judges of the High Court the following questions, viz.:— (1) Whether on the grounds stated by the Commissary of Ordnance, Sub-Conductor Holmes is exempt from the jurisdiction of the civil Courts? (2) Whether he was justified on the basis of his own view of the law in refusing to serve the summons issued by me?”

The parties did not appear.

The Government Pleader (Mr. *Powell*) was called on to show cause why the Commissary-General should not be directed to serve the summons.

The Court (Collins, C.J., and Shephard, J.) delivered the following

JUDGMENT:—We think that Sub-Conductor Holmes is a soldier of Her Majesty’s Forces within the meaning of s. 144 of the Army Act, 1881.

The Commissary-General is in error in supposing that he is not bound to accept and serve the summons. He is bound to do so under s. 468 of the Civil Procedure Code, although the soldier is entitled to the protection given by s. 144 and is not compelled to appear in Court in person.

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APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.

MANJAYA

against

SESHA SHETTI.*

1888.
April 11, 24.

Penal Code, s. 500—Statement by witness—Privilege absolute.

M.S. was convicted under s. 500 of the Indian Penal Code of defaming S.S. by making a certain statement when under cross-examination as a witness before a Court of criminal jurisdiction:

Held; that the conviction was bad.

The statements of witnesses are privileged; if false, the remedy is by indictment for perjury and not for defamation.

CASE referred under s. 438 of the Code of Criminal Procedure by J. W. Best, Sessions Judge of South Canara.

The petitioner was convicted by Mir Shujat Ali Khan, Head Assistant Magistrate of Canara, in calendar case No. 106 of 1887 and fined Rs. 15 under s. 500 of the Penal Code.

The Sessions Judge stated the case as follows:—

“The contention on behalf of the petitioner is that the words constituting the alleged defamation were elicited from him in the course of his cross-examination as a witness in a case under trial before the Third-class Magistrate at Kundapur, and are therefore privileged.

“Such no doubt, is the law in England. *Seaman v. Netherclift*(1) and *Goffin v. Donnelly*(2). As stated by Cockburn, C.J., in the former case, page 56, “if there is anything as to which the authority is overwhelming, it is that a witness is privileged to the

* Criminal Revision Case No. 126 of 1888. (1) L.R., 2 C.P.D., 53.
(2) L.R., 6 Q.B.D., 307.