identical, and it cannot be permitted that the defendants should be subjected to a second litigation, when their whole liability could have been disposed of in the first suit. Our answer to this reference, therefore, is that the Small Cause Court Judge is right in holding the plaintiffs' claim to be barred.

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DEBI DIA SINGH v. AJAIB SING

FULL BENCH.

1881 *March* 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* MUHAMMAD JAFIR AND OTHERS.

Security for keeping the peace—High Court's powers of revision—Defect in form of summons not prejudicing persons required to show cause—Act X of 1872 (*Criminal Procedure Code*), *ss.* 297, 491, 492.

Certain persons were convicted by a Magistrate of the first class of assault, an offence punishable under s. 352 of Act X of 1877. The case was brought to the knowledge of the High Court by the complainant preferring a petition to it, together with a copy of the Magistrate's order. This petition was laid before Straight, J., who, observing that the case was one in which the Magistrate should have taken security from such persons for keeping the peace, as provided by s. 489 of Act of 1872, directed the Magistrate to summon such persons to show cause why they should not be required, under s. 491 of that Act, to enter into a bond to keep the peace. The Magistrate accordingly summoned such persons as directed, the summonses setting forth that they were issued "under the orders of the High Court." The Magistrate took evidence on behalf of such persons, and eventually made an order requiring such persons to enter into a bond to keep the peace. Such persons were fully aware of the order made by Straight, J. Such persons applied to the High Court to set aside the order requiring them to enter into a bond to keep the peace, on the ground that the Magistrate had not proceeded of his own motion, but under the order of Straight, J., which was made without jurisdiction, and on the ground that the summonses had not set forth the report or information on which they were issued.

Held by STUART, C. J., that, inasmuch as Straight, J., when he made his order, represented the full authority and jurisdiction of the High Court, such order was final, and the application could not be entertained.

Held by PEARSON, J., SPANKIE, J., and OLDFIELD, J., (SPANKIE, J., doubting whether such order could be questioned) that the order of Straight, J., was one which he was competent to make as a Court of Revision under s. 297 of Act X of 1872.

Held by PEARSON, J., and SPANKIE, J., that, inasmuch as such persons had not been in the slightest degree prejudiced by the defect in the summonses which were

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issued to them, such defect was not a ground on which to set aside the Magistrate's order requiring them to enter into a bond to keep the peace.

THREE persons, named Muhammad Jafir, Akbar, and Ghisu, were, on the 20th February, 1880, convicted by Sayyid Ali Hasan, exercising the powers of a first class Magistrate in Jaunpur, of wrongfully restraining and assaulting one Lalman, offences punishable under ss. 341 and 352 of the Indian Penal Code respectively, and were punished with fines. Lalman subsequently preferred a petition to the High Court, together with a copy of the Magistrate's order, such petition being apparently directed against the sentences inflicted by the Magistrate. On the 16th July, 1880, Straight, J., made the following order on such petition, in the exercise of the revisional powers of the High Court:—

STRAIGHT, J.—It seems to me that this is just one of the cases in which the Magistrate should, in addition to the punishment he inflicted in the way of fine, have required the defendants to find securities for the peace, as provided by s. 489 of the Criminal Procedure Code. Whatever the fault of the complainant, he has been subjected to a very gross indignity, and the Magistrate himself says that it was done intentionally, and would seem to convey by his remarks that it is likely to be repeated. I, therefore, direct him, having regard to all the circumstances and the convictions under s. 352 of the Indian Penal Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required, under s. 491 of the Criminal Procedure Code, to enter into a bond to keep the peace, with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine.

The Magistrate accordingly summoned Muhammad Jafir, Akbar, and Ghisu to show cause why they should not be required to enter into a bond to keep the peace, and, on their failing to show cause, by an order dated the 26th August, 1880, bound them over in their own recognizances to keep the peace for eight months. They applied to the High Court for the revision, under s. 297 of Act X of 1872, of this order, on the ground that the Magistrate had not proceeded *suo motu*, but had proceeded in obedience to the order of Straight, J., which was made without jurisdiction, and under

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these circumstances the order of the Magistrate was contrary to law and should be quashed; and that, as the summons did not contain the particulars or information required by s. 492 of Act X of 1872, it was irregular, and the order of the Magistrate should be quashed. This application came before Pearson, J., who, as it called in question the legality of the order passed by Straight, J., directed that the application should be laid before a Full Bench for disposal.

Mr. *Dillon* and Mr. *Amir-ud-din*, for the petitioners.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The following judgments were delivered by the Full Bench:

STUART, C.J.—I expressed the opinion at the hearing, and I am very clear, that we have no power to entertain this application. Mr. Justice Straight when he made the order of the 16th July last represented the full authority and jurisdiction of the Court and his order is final. Mr. Justice Straight, if he had any doubt on the subject, might have himself, or on the application of the parties, or either of them, referred the question to the Full Bench, but this proceeding not having been resorted to, and the case having left his hands on the order which he made, that order is final and cannot be revised. I may at the same time perhaps be permitted to observe that the learned Judge exercised a sound discretion in passing it. The present application must, therefore, be dismissed. (The remainder of the judgment of the learned Chief Justice is not material for the purposes of this report.)

PEARSON, J.—Mr. Justice Straight's order of the 16th July last directed the Magistrate to summon the petitioners to show cause why they should not be required to enter into a bond to keep the peace with or without sureties. That order was apparently passed under s. 297 of Act X of 1872, which provides that "in any case either called for by itself, or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." The proceeding which was brought

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under the High Court's notice by Lalman's petition of the 8th July last was the judgment of the Deputy Magistrate of Jaunpur, dated the 20th February last; and the fault found with it was that, "in addition to the punishment he inflicted on the present petitioners by way of fine, he had not required them to find securities for the peace as provided by s. 489 of the Criminal Procedure Code." Whether the omission of the Deputy Magistrate, in the exercise of his discretion, to take action under s. 489 of Act X of 1872, after convicting the petitioners under s. 352, Indian Penal Code, was a material error in his proceeding is a question which may, I think, reasonably be answered in the affirmative. It was an error analogous to that of passing an inadequate sentence. Mr. Justice Straight was, therefore, competent to pass any order which appeared to him to be fit. By the order which he passed the Deputy Magistrate's attention was called to "the circumstances and the convictions under s. 352," and he was directed to exercise his discretion after proceeding under s. 491 of Act X of 1872. I cannot hold that he contravened the law in complying with the order which required him to perform his duty. There is not any reason to believe that the petitioners were in the slightest degree prejudiced by the defect in the summons to which the second paragraph of the application of the 10th September last refers. The complaint is that the substance of the report or information on which the summons was issued was not set forth therein. All that was stated was that it was issued under the orders of the High Court. The Deputy Magistrate has dealt with this complaint in his proceeding of the 26th August last, and shown that the petitioners must have been perfectly aware of the reasons for proposing to bind them over to keep the peace. I would dismiss the application.

SPANKIE, J.—Sayyid Ali Hasan, Deputy Magistrate of Jaunpur, on the 20th February of the present year convicted Muhammad Jafir, Akbar, and Ghisu, Muhammadans, under ss. 341 and 352, Indian Penal Code, holding it established by the evidence that they had gone to the field of the complainant, a Brahman, and there had caused him wrongful restraint, and had used criminal force against him. There had been, the Deputy Magistrate states, a bitter enmity between the parties, as shown by many records of criminal and

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revenue cases. The defendants, belonging to an influential community and possessed of wealth, did not suffer from this litigation, but the Brahman complainant was ruined. He had lost the greater portion of his occupancy-lands, and being a person of bad temper little sympathy was felt for him. On the 6th November, 1879, he had taken two ploughs to his field, and was preparing land for barley and peas. The three defendants went to the field, seized him, and with the aid of some other persons are said to have put a rope with some bones round his neck, and Jafir is said to have spat in his face. Their object was to pollute the Brahman, and so compel him to leave the village. The Deputy Magistrate was not satisfied that the accused Jafir had spat in the complainant's face, or that the accused had put a rope and bones round his neck, but he found that there had been wrongful restraint and assault. He, therefore, convicted the accused as above stated under ss. 341 and 352. The complainant petitioned this Court, urging that he had been spat upon, and a necklace of bones had been placed round his neck: he had been disgraced and polluted, being a Brahman, and he prayed for justice. One of the learned Judges of this Court remarked that the case "was just one of the cases in which the Magistrate should, in addition to the punishment he inflicted in the way of fine, have required the defendants to find securities for the peace, as provided by s. 489 of the Criminal Procedure Code. Whatever the fault of the complainant, he had been subjected to a very gross indignity, and the Magistrate himself says that it was intentionally done, and would seem to convey by his remarks that it is likely to be repeated. I, therefore, direct him, having regard to all the circumstances and the convictions under s. 352, Indian Penal Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required to enter into a bond to keep the peace, with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine." On receipt of this Court's proceeding, the Deputy Magistrate issued a summons calling upon the convicted persons to show cause why they should not be bound to keep the peace for the space of eight months. He took evidence on their part as to their respectability, their position as bankers, and the bad character of the complainant, to which, however, he does not appear to have

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attached much weight. But it had been urged before him that the summons did not set forth the substance of complaint against the accused, and, therefore, the proceedings under s. 491 were illegal. The Deputy Magistrate thus deals with the objection: "I do not think that there is force in the argument, because it is clear that proceedings have been taken under exceptional circumstances, and the accused have had ample opportunities of knowing that their presence in the Court was required for a particular object: they had also been at the High Court to witness how the case was being disposed of, that is to say, they were fully aware of the order that the High Court had passed in the case, and, I think, it was quite enough to say in the summons that they were required to be bound in their own recognizances under orders from the High Court: I have stated in my former decision in the assault case the petition of the accused, and that of Lalman, and I am of opinion that the law does not require any more proof against the accused, and I may presume safely that there is reasonable apprehension of a breach of the peace on the part of Muhammad Jafir, Akbar, and Ghisu." The Deputy Magistrate then directs that the three persons should execute a bond in the prescribed form for eight months, or in default that they should suffer simple imprisonment for that period or for a shorter period, if they do not obey the order. From this order a petition was filed in this Court, and it was contended that the Magistrate did not proceed *suo motu* under s. 489 (probably s. 491 is meant) of the Criminal Procedure Code, but a summons was issued under the order of the High Court, which had no jurisdiction to give such order; the issue of a summons under such order was illegal; the summons did not contain the particulars required by s. 492 of the Criminal Procedure Code; the irregularity was material, and the order should be annulled. The learned Judge who entertained the petition records the following order: "As this application calls in question the legality of the order passed by Mr. Justice Straight on the 16th July last, I direct that it be laid before a Full Bench."

I have some doubts, and expressed them at the hearing of this reference, whether we are competent to question the legality of the order of this Court on the 16th July last. Perhaps, however,

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we may indirectly express an opinion regarding it, in dealing with the application of Muhammad Jafir and others, which was admitted by the referring Judge, and has been sent to us for disposal. The Court in passing the order of the 16th July last must have been acting as a Court of Revision under s. 297 of Act X of 1872. The Judge does not appear to have had the record in the case before him (it perhaps would have been better if he had sent for it), but he had a copy of the Deputy Magistrate's finding. There had been an offence followed by conviction of the nature of those offences described in s. 489 of the Criminal Procedure Code. In such cases, when the Court or Magistrate by whom any person is convicted, or the Court or Magistrate by which or by whom the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace, such Court or Magistrate may direct that the person so convicted be required to execute a formal engagement for keeping the peace, for any term not exceeding one year, or three years if the order be passed by a Court of Session. The learned Judge having before him on the 16th July last the finding and sentence of the Deputy Magistrate in the case of assault was competent to deal with it as a Court of Revision, and it is clear that he considered that the Magistrate should have acted under the terms of s. 489 of the Criminal Procedure Code, already referred to. As the learned Judge on the 16th July was the Court by which the final order would be passed, after reversing the judgment of the Deputy Magistrate, it appears to me that he had full jurisdiction to direct, if he pleased, the Magistrate to exercise the powers vested in him by the section. But I would say more than this. If the Deputy Magistrate had not, in the Court's opinion, exercised a sound and reasonable discretion in omitting to require securities in addition to the order already passed in the case, the Court might properly regard the omission as a material error in a judicial proceeding, and this being so it was at liberty to pass such an order as it thought fit. Being also the Court making the final order, the Judge himself would have been at liberty to require the convicted persons to execute the formal engagement mentioned in the third paragraph of the section. Instead, however, of acting under the provisions of s. 489

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the learned Judge, taking the Deputy Magistrate to find that the acts of the three defendants had been intentionally done, and also that they were likely to be repeated, directed the Magistrate to proceed under s. 491, Criminal Procedure Code. Under the terms of that section the Magistrate must receive information that any person is likely to commit a breach of the peace or to do any act that may probably occasion a breach of the peace. The summons required by the section may be issued on any report or other information which appears credible and which the Magistrate believes. But he cannot bind over a person until he has adjudicated on evidence before him. Under this section no doubt the Magistrate of a Division of a District or a Magistrate of the first class is the officer to act. There is no reference in the section to any other Court, and though it is, I think, competent for this Court to direct or require that security may be taken under s. 489 under the circumstances referred to above, I am not so satisfied that it has the power to initiate by positive order proceedings under s. 491 of the Criminal Procedure Code. On the other hand I apprehend that this Court, having a case before it either as a Court of appeal or reference, would be justified in calling a Magistrate's attention to the probability of a breach of the peace between the parties, should any such danger appear from the proceedings before the Court to be imminent. For instance the Court in some cases might have acted of its own motion under s. 489, but did not do so, because some months, as in this case, had elapsed from the date of the conviction, and a proceeding under s. 489 should be simultaneous with the conviction, as the order made under the section is in addition to any other order passed in the case. But it might appear afterwards that a breach of the peace was imminent and some further and speedy action was desirable, as indeed it may have been in the case before us, in which the accused persons had been punished with a fine, or in default a week's confinement, and the parties were at large again with their natural ill-feelings still more intensified. In such a case, this Court would, I think, be at liberty to instruct the Magistrate to act under s. 491. The direction in Mr. Justice Straight's order was rather by way of instruction than a positive order requiring the parties to furnish security. The order directs the Magistrate, "having

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regard to all the circumstances and the convictions under s. 352 of the Code, to summon Muhammad Jafir, Akbar, and Ghisu before him, to show cause why they should not be required under s. 491 of the Criminal Procedure Code to enter into a bond to keep the peace with or without sureties, the amount of such bond and the extent of such sureties being left to him to determine." Such a direction or instruction may be regarded as one mode of informing the Magistrate of the probability of a breach of the peace. The terms of the Explanation to s. 491 are very wide. The summons may issue "on any report or other information which appears credible, and which the Magistrate believes." What happened then in this case? The Magistrate reconsiders the former evidence and hears any evidence offered by the parties summoned, and comes to the conclusion that "there is reasonable apprehension of a breach of the peace," and he makes his own order in the way which seemed to himself to be necessary under the circumstances of the case and with reference to the position of the parties. Entertaining this view of the case, I am not prepared to say that the order of this Court, dated 16th July last, was illegal. In so far then as the application now contends that this order was illegal, and, therefore, all proceedings under it were illegal, I would answer that there was no illegality. Whether the Deputy Magistrate's subsequent procedure after the receipt of the Judge's remarks was regular or not is another matter. He should I consider have drawn out, on receipt of the Judge's direction, a proceeding in which he should have stated all the circumstances of the previous conviction, and his reasons for believing that a breach of the peace was likely. Next the substance of this information should have been set forth in the summons with the other particulars required by s. 492. Had this been done the Magistrate would have been acting in conformity with the provision of s. 492. He appears to have acted irregularly by omitting to say more than that the parties were required to be bound in their own recognizances "under orders from the High Court." Under certain circumstances it might have happened that the parties summoned would have been prejudiced by the omission to fulfil all the conditions of s. 492, and in such a case the Court would have felt bound to interfere. But we have the assurance and finding of the Deputy Magistrate in this case

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that "the accused had ample opportunities of knowing that their presence in the Court was required for a particular object: they had also been at the High Court to witness how the case was being disposed of by Mr. Justice Straight, *i. e.*, they were fully aware of the order that the High Court had passed in the case." On this finding I could not say that the petitioners had been prejudiced in their defence to the summons by the procedure of the Magistrate now made the subject of complaint. Moreover, their witnesses were examined. The *nature* of the proceedings under chapter XXXVII of the Code of Criminal Procedure is judicial. There must be an adjudication on evidence, and as the provisions of s. 283 are applicable to cases of revision as well as appeal I would say that the objections taken by Mr. Dillon for the petitioners fail. I observe that s. 489 is cited, probably by some accidental error, in the petition of the 10th September by Mr. Dillon. It is not really contended that the Magistrate had acted under s. 489 ; s. 491 is clearly meant. I would dismiss the application for the reasons given above.

OLDFIELD, J.—In my opinion, the application should be dismissed. The Magistrate's proceedings were taken under the direction of this Court acting within its power under s. 297 of the Code of Criminal Procedure. There is no force in the second ground of objection.

STRAIGHT, J.—Having regard to the circumstance that an order of my own is the subject of this reference for revision, I think it best to abstain from taking part in the judgment of the Full Bench.

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March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

AZIM-UD-DIN (DEFENDANT) *v.* BALDEO (PLAINTIFF).*

Suit to have an execution-sale, which had been set aside, confirmed—Act X of 1877 (Civil Procedure Code), ss. 311, 312, 588—Finality of order setting aside sale.

Held (OLDFIELD, J., dissenting) that a suit by the purchaser at a sale of immoveable property in execution of a decree, which has been set aside under ss. 311 and

* Appeal under s. 10 of the Letters Patent, No. 4 of 1880.