[ORIGINAL CRIMINAL JURISDICTION.]

1876.

November 24.

REG. *v.* VITHALDAS PRANJIVANDAS AND OTHERS.

High Courts Criminal Procedure Act (*X. of* 1875), *Section* 33—*Constitution of jury.*

Act X. of 1875, Section 33, contemplates that the names of the jury to be "chosen by lot" shall all be drawn out of one box containing the names of all persons summoned to act as jurors.

THE prisoners, who were all Hindus, were charged with attempting to pass a forged currency note. The majority of the jury, who had been selected in the mode that had been adopted since the coming into force of Act X. of 1875[1], were Europeans.

Purcell for the first prisoner objected that the jury had not been drawn "by lot" as contemplated in Act X. of 1875, Section 33; a mode of drawing which insured the majority of the jury being Europeans could not be called a drawing by lot. All the names ought to be drawn from one box. The question arose incidentally in the case of *Reg.* v. *Lalubhái*[2], but in disposing of that case the learned Judges expressed no decided opinion on the present point.

[BAYLEY, J., referred to the concluding paragraph of Section 49, and to the Crown Office Rule made by the Supreme Court in 1842 for "Ballotting Petty Jury" (No. 592) at page 155 of the Rules and Orders of the Supreme Court of Judicature at Bombay.]

Inverarity for the third prisoner took the same objection. Section 33 of the High Courts Criminal Procedure Act contemplates the drawing of all the names of the jury from one box. In that case they might, no doubt, be all Europeans, but again there might not be a single European on the jury. But, if the present mode of drawing be followed, there must always be a majority of Europeans on the jury. The present mode is, therefore, opposed to the provisions of the Act.

Farran for the Crown:—According to the present mode the jury are practically drawn by lot, though in certain proportions. It is a chance what particular *name* is drawn, and that is all that is contemplated in Section 33 of the Act. The *nationality* of the majority of the jury, no doubt, is not a matter of chance according

(1) *Reg.* v. *Lalubhái*, I. L. R., 1 Bom. 232. (2) I. L. R., 1 Bom. 232.

to the present mode of drawing, but the section does not contemplate that it should be. There is nothing in Act X. of 1875 which gives Native prisoners the right to demand a majority of Natives on the jury. That was ruled in *Reg.* v. *Lalubhái*[1], and the learned Judges who decided that case also expressed an opinion in favour of the present mode of drawing[2]. The present mode is the same as that followed under the old Crown Rules. If the present mode be incorrect, all the criminal cases which have been tried during the last thirty years have been erroneously conducted.

BAYLEY, J. :—The objection having now been taken, must, after the short consideration I have been able to give it, I think, be allowed. Section 33 of the High Courts Criminal Procedure Act (X. of 1875) enacts that "The jury shall consist of nine persons, who shall be chosen by lot from the persons summoned to act as jurors."

Section 39 enacts that, save as therein provided, the High Courts shall retain all their present powers respecting the summoning, empannelling, qualification, challenging and service of jurors, and shall have power to make such rules on these subjects (consistent with the provisions of the Act) as seem to them to be proper ; and that "all rules relating to jurors now in force in the same High Courts shall (so far as they are consistent with this Act) remain in force until repealed or altered by new rules made under this Section."

The rule as to ballotting for petty juries, which was made in 1842, is to be found at p. 155 of the Collection of Rules and Orders of the Supreme Court of Bombay printed for Government in 1852—a collection which, as appears from the preface, was compiled by Mr. McKenzie, the Clerk of the then Chief Justice, Sir Erskine Perry, "under his Lordship's guidance, and with the assistance of the officers of the Court." That rule and the others contained in the collection, relating to juries, were framed under the powers given to the Supreme Court by the Statute 7 Geo. IV. C. 37, "An Act to regulate the appointment of Juries in the East Indies," Section 2.

(1) I. L. R., 1 Bom. 232.

(2) The report of *Reg.* v. *Lalubhái* had not been published at the time of this trial.

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The rule as to ballotting for petty juries refers to the one next preceding it, as to the ballotting for grand juries, and I will, therefore, read both of them :—

"XI.—BALLOTTING GRAND JURY.

521.—The name of each man who shall be summoned for the Grand Jury with the place of his abode and addition shall be written on a distinct piece of paper or card, such pieces of paper or card being all as nearly as may be of equal size, and shall be delivered by the Under-Sheriff unto the Clerk of the Crown, and shall by him be put together in a box, and he shall from the said box in open Court draw the said pieces of paper, or card, indiscriminately one after the other, and the names of the first twenty-three that shall be drawn out and appear, except such as shall be excused by the Court for good and sufficient reason, shall act and be the Grand Jury for that sessions."

"XII.—BALLOTTING PETTY JURY.

522.—The name of each man who shall be summoned for the Petty Jury with his place of abode and addition shall be written and delivered to the Clerk of the Crown as aforesaid and placed in a box, and the said names shall be drawn as aforesaid, and the twelve persons whose names shall be first drawn, of whom six shall be British subjects, that shall appear and not be challenged or set aside or excused, shall form the Petty Jury on each trial : provided also, that on the trial of any person who professes the Christian religion the twelve persons professing that religion whose names shall be first drawn that shall appear and shall not be challenged or set aside or excused shall form the Petty Jury on such trial."

Since I first practised in the late Supreme Court (Jan. 1861), the practice at the Criminal Sessions, until the coming into operation of Act X. of 1875, was to have separate ballot boxes, or rather two long boxes, the ones now in Court, each containing three compartments, and marked on the outside 'Europeans,' 'Indo-Britons,' 'Portuguese,' 'Parsees,' 'Hindoos,' 'Mahomedans.' The first six names were drawn from the European compartment, then three from the compartments marked Indo-Britons and Portuguese, and one from each of the three remaining compartments. Since juries

of nine were established in 1875, the practice has been to draw the first five names out of the European compartment, and the four others from the other compartments.

I am not aware that the rule I have quoted has ever been varied or abolished by any subsequent rule, though the practice seems scarcely to have been in strict accordance with it. Section 49 of Act X. of 1875, however, says that all rules relating to juries now in force in the High Courts shall (so far as they are consistent with the Act) remain in force until repealed or altered by new rules made under that section. That section preserves the old rules, but it does not apparently preserve any practice which may have sprung up inconsistent with them.

It is, of course, unnecessary to give any opinion as to the validity of the mode of ballotting up to the present time.

Looking, therefore, at the two rules of 1842, which I have cited, and at Section 33 of Act X. of 1875, it appears to me that the nine persons who are to be chosen by lot to form the jury ought to be selected from the entire number of persons summoned to act as jurors, and that this selection, which is to be 'by lot,' ought to be made from one box and not from six boxes. Such a mode of selection is more in accordance with the provisions of the new Act and the rule of 1842 than the mode hitherto adopted, and I accordingly direct that the names of the persons of all nationalities be put into one box, and that nine names be drawn out indiscriminately to form a jury for the trial of the present case [1].

NOTE FURNISHED BY MR. JUSTICE BAYLEY TO THE REPORTER.

In the Charter, dated 26th March 1774, of the Supreme Court at Fort William, Clause 19 (2 Morley's Digest, page 570), and in the Charter, dated 26th December 1800, of the Supreme Court at Madras, Clause 33 (2 Morley's Digest, page 615), the petty juries to be summoned are to be "other good and sufficient men being Subjects of Great Britain of us, our heirs or successors, and resident in the said town of Calcutta," and "other good and sufficient men, being persons heretofore described and distinguished as British Subjects of us, our heirs and successors, and resident in Fort St. George or the said town of Madras or the limits thereof, or the factories subordinate thereto."

In the Charter, dated 8th December 1823, establishing the Supreme Court of Bombay, Clause 43 (2 Morley's Digest, page 667) the petty juries to be summoned

(1) The mode of selection thus adopted was followed at the trial of all the subsequent cases at the same sessions.

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are to be "other good and sufficient men, being persons so heretofore described and distinguished as British Subjects of us, our heirs and successors, and resident in the said town or island of Bombay or the limits thereof, or the factories subordinate thereto."

The provisions of the Statute, 7 *Geo. IV., C.* 37, under which the jury rules of 1842 were made by the late Supreme Court, are important.

It recites that by the 13th Geo. III., C. 63, it was among other things enacted that all offences and misdemeanors, which should be laid, tried, and inquired of, in the Supreme Court at Fort William, should be tried by a jury of British subjects, resident in the town of Calcutta, and not otherwise; and that it was expedient that the right and duty of serving on juries within the limits of the local jurisdiction of the several Supreme Courts at Calcutta, Madras, and Bombay should be further extended. It was enacted (Section 1) "That all good and sufficient persons, resident within the limits of the several towns of Calcutta, Madras and Bombay, and not being the subjects of any Foreign State, shall, according to such rules and subject to such qualifications as shall be fixed in manner hereinafter mentioned, be deemed capable of serving as Jurors on Grand or Petty Juries, and upon all other Inquests, and shall be liable to be summoned accordingly, anything in the said Act or in any other Act, Charter, or usage to the contrary notwithstanding."

By Section 2 it was enacted "That the respective Courts of Judicature at Calcutta, Madras, and Bombay shall have power from time to time to make and establish such rules with respect to the qualification, appointment, form of summoning, challenging, and service of such Jurors, and such other regulations relating thereto as they may respectively deem expedient and proper: provided always that copies of all such Rules and Regulations as shall be so made and established by such Courts of Judicature shall be certified under the hands and seals of the Judges of such Courts, to the President of the Board of Commissioners for the affairs of India, to be laid before His Majesty for His Royal approbation, correction, or refusal; and such Rules and Regulations shall be observed until the same shall be repealed or varied, and in the last case with such variation as shall be made therein."

By Section 3 (and last) it was enacted "That the Grand Juries in all cases, and all juries for the trial of persons professing the Christian religion, shall consist wholly of persons professing the Christian religion."

The last cited section (3) was from and after the 1st July 1832 repealed by the Statute 2 *and* 3 *William IV., C.* 117, *Section* 2.

Mr. Justice Bayley has inquired, but has been unable to discover that any rules have been made since 1842, altering the mode of balloting for petty juries prescribed in the Rule (No. XII. 522) quoted in the Report. He apprehends that such rule was in force when the "High Courts Criminal Procedure Act, 1875" came into operation on the 1st May 1875.

In the rules framed by the late Supreme Court of Bombay in 1828, under the 7th Geo. IV., C. 37, as to the qualification and exemption of jurors (Nos. 508, 509, page 150 of the Collection of Rules and Orders of the Supreme Court), no distinction is taken between Europeans and Natives; but every man, except as therein excepted, between the ages of 21 and 60, who is a resident householder within the town and island of Bombay, if possessed of the property qualification there stated

" is qualified and liable to serve on Juries. But persons who do not understand the English language shall not serve on Juries nor be inserted in the list."

The rule made in 1842, as to the precept to the Sheriff to summon jurors (No. 518, page 154 of the Collection of Rules and Orders of the Supreme Court) directs that " The Clerk of the Crown shall, fourteen days at least before each Sessions of Oyer and Terminer, issue his precept to the Sheriff, commanding him to summon thirty of the principal inhabitants, resident in the town and island of Bombay, being Subjects of the King, to attend as a Grand Jury, and forty-eight good and sufficient men, being Subjects of the King, resident within the island of Bombay, or the factories subordinate thereto, to serve on the Petty Jury."

And by the next succeeding rule (519) one-half of those summoned to serve as petty jurors shall be (1) British subjects.

[APPELLATE CIVIL JURISDICTION.]

Civil Referred Case No. 97 of 1876.

PRANSHANKAR SHIVSHANKAR (DEFENDANT, APPELLANT) *v.* GOVINDHLAL PARBHUDAS (PLAINTIFF, RESPONDENT).

Action for damages caused by a civil action—Costs.

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause ; nor will it lie to recover costs awarded by a Civil Court.

THE following case was submitted for the opinion of the High Court by Gopalrao Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad :—

" The plaintiff Pranshankar obtained a decree against one Govind Khusab, in the Subordinate Judge's Court, and got two houses attached on the 20th July 1872. Govind Purbhudas, defendant in the present suit, applied to the Court under Section 246 of the Code of Civil Procedure, on the 1st August 1872, for removal of the attachment laid on the houses, alleging that they were purchased by him. The objection was allowed by the Subordinate Judge, who ordered the attachment to be removed. Whereupon the plaintiff instituted a regular suit against the defendant which was decided in favour of the latter. Against this decision the plaintiff appealed to the Assistant Judge's Court, which decided on the 26th August 1874 that the purchase-deed was fraudulent, and that the objection to the sale be disallowed. Consequently the plaintiff recovered the amount decreed, not by sale of the houses, but by cash payment of Rs. 600. The plaintiff

(1) See 1 Morley's Digest, page 89, British subject, Note 1.

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now seeks in this Court to recover interest at 9 per cent. per annum, from 20th July 1872 to 25th October 1875, during which period he was prevented from executing his decree by the defendant, and the amount of costs that was paid by him to the defendant, as awarded by the Subordinate Judge in the miscellaneous application for removing the attachment. The question is whether a suit for such damages can be maintained.

"My opinion is that the claim should be maintained, as the transaction on the part of the defendant appears to be tinged with fraud, as seen from the decision of the Assistant Judge."

The reference was considered in Court by MELVILL and NA'NA'BHA'I HARIDA'S, JJ., on the 28th November 1876.

No counsel or pleader was instructed on either side.

PER CURIAM :—The Court is of opinion that the suit will not lie. An action is not maintainable for damages occasioned by a civil action, even though brought maliciously, and without reasonable and probable cause (*see* Addison on Wrongs, p. 599, 3rd edition) ; neither will a suit lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded : *Chengulva Raya Mudali* v. *Thangatchi Ammal* (1).

PRIVY COUNCIL.

June 20 *and* 21, 1876.

PRESENT :

SIR BARNES PEACOCK.	SIR ROBERT P. COLLIER.
SIR MONTAGUE E. SMITH.	SIR HENRY S. KEATING.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

COWASJEE NANABHOY (DEFENDANT) *v.* LALLBHOY VULLUBHOY AND OTHERS (PLAINTIFFS).

Contract of partnership—Right of co-partners to dissolve partnership.

A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a commission on the sale, during his life-time, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on, except at a loss : nor does it imply

(1) 6 Mad. H. C. Rep. 192.