

that the plaintiff knew that he had no real claim against the defendant when he brought his action in the High Court (a very different plea to that relied on by the District Judge). We must, therefore, assume that his claim was honest, and that the compromise was made *bonâ fide*. The agreement was a perfectly reasonable one; the plaintiff consented to forbear prosecuting what he considered to be a good claim, and the defendant obtained the advantage of escaping from the annoyances attending a law-suit. The plaintiff's forbearance to continue his suit constituted a good consideration; in the absence, then, of any allegation, in the written statement, that the plaintiff did not *bonâ fide* believe, in his first suit, that he had a fair chance of success,—in other words, that his claim was fraudulent,—it was immaterial in the suit now before us whether that claim was good or bad. Therefore, assuming that the plaintiff did contumaciously refuse to give evidence—a point on which we express no opinion—it was clearly not on a material fact in the case, and we must hold that it was a wrong exercise of the discretion given to Courts under Section 170 of the Code of Civil Procedure to reject on that ground the plaintiff's claim. We, accordingly, reverse the decrees of the lower Courts, and award the claim in full with costs throughout on the respondent.

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*Decree reversed and claim awarded.*

[ORIGINAL CIVIL JURISDICTION.]

*Suit No. 348 of 1875.*

July 19.

HORMASJI KARSETJI and others ..... *Plaintiffs.*

W. G. PEDDER, Municipal Commissioner, }  
and another ..... } *Defendants.*

*Injunction—Bombay Act III. of 1872—Town duty—“Spirits”—Toddy.*

*Quære*—Whether the Court ought to interfere by way of injunction with the exercise of a right, or alleged right, of officers of a municipal body to levy taxes and dues.

Toddy-juice, whether in a fermented or unfermented state, is not “spirits” within the meaning of Bombay Act III. of 1872, and is, therefore, not liable,

1875. on importation into Bombay, to a town duty of As. 4 per gallon imposed on spirits by Schedule B of that Act.

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THE plaintiffs instituted a suit against the defendants, as Municipal Commissioner and Acting Municipal Commissioner of Bombay, for the recovery of damages sustained by the plaintiffs by reason of the defendants having levied a town duty of As. 4 per gallon on the plaintiffs' toddy-juice imported into Bombay from Bhándup.

*Farran*, on behalf of the plaintiffs, on the 13th July 1875 obtained a rule *nisi* calling on the defendants to show cause why they should not be restrained from levying such duty.

The rule came on for argument before GREEN, J., on the 15th July 1875, when

*Inverarity* on behalf of the defendants showed cause. Toddy is commonly known as "spirits", and is so described in Regulation XXI. of 1827, Section 54, Clause 2. The preamble of that regulation shows that one of its objects was to prevent intoxication amongst the people. Our affidavits show the intoxicating properties of fermented toddy, that fermentation has almost invariably set in before the pots are removed from the trees, and that, on the fermentation setting in, the toddy immediately acquires intoxicating properties. Toddy, therefore, being known as spirits, and adapted for the purposes of intoxication, must be considered to be spirits within the meaning of Bombay Act III. of 1872, and, consequently, the town duty has been rightly levied on it.

*Jardine* in support of the rule.—Regulation XXI. of 1827, Section 54, is not embodied in the Bombay Municipal Act, and the definition of toddy as a spirit in the Regulation is for the purposes of the Regulation only. The care with which in that Regulation and in Act XVIII. of 1853, Section 15, toddy is specially included among spirits, shows that in the ordinary acceptance of the term toddy is not a spirit. The two properties of being fermented and being intoxicating, do not of themselves constitute toddy a spirit; otherwise beer would be a spirit; but a duty distinct from that on spirits is

specially imposed on beer by Schedule B of Bombay Act III. of 1872. There being no definition of spirits in that Act, the ordinary definition must be accepted, viz. "an inflammable liquid produced by the process of distillation." The Act, imposing a duty on the subject, must be construed strictly against the Government. A duty of As. 4 per gallon on toddy would be prohibitive.

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On the 19th July 1875 the following judgment was delivered by

GREEN, J. :—By Section 114 of the Bombay Municipal Act III. of 1872 it is enacted, "Duties at the rates specified in the Schedule B, annexed to this Act, shall be leviable in respect of the several articles therein specified when imported from any place into the city of Bombay. The said duties shall be called Town Duties, and shall be leviable in addition to any Customs duties prescribed by law." In Schedule B are contained, amongst others, the following articles :—"Wines and spirits, rate per gallon 4 annas"; "Beer, rate per gallon 6 pies."

The plaintiffs are the administrators of one Karsetji Kavasji Ashburner, and the defendants are, respectively, the Municipal Commissioner and Acting Municipal Commissioner for the city of Bombay. The plaintiffs claim, as administrators of the said Karsetji Kavasji, to be owners of certain lands in the villages of Bhándup, Navur, and Conjurám, in the island of Salsette, under a grant to their predecessor in title by the President and Governor in Council of Bombay, under date the 7th September 1803. By one of the articles of this grant, after reciting that the Hon'ble Company had exercised, and then exercised, the right of taxing certain brab trées growing on the lands so granted, it was agreed on the part of the Company to relinquish all property in the brab and other trees situate on any part of the said lands in favour of the grantee, his heirs, executors, administrators, and assigns. The plaint alleges that the deceased Karsetji Kavasji (and, as appears from the grant of letters of administration to the plaintiffs, his decease took place on the 9th February 1875).

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had, previously to the month of November 1874, been in the habit of causing the juice called toddy to be drawn from the brab and wild date trees (amounting to many thousands in number) growing on the said lands, and bringing the same to a distillery at Bhándup and therein distilling from such juice a spirit called "arrack". That in October 1874 the deceased, Karsetji Kávasji, ceased to distil spirits from the said toddy, and under an agreement entered into with one Edulji Hormasji and one Pestonji Nánábhoy, of Bombay, began to import a considerable portion of the toddy drawn from his said trees in its natural unfermented state into the city of Bombay; but the said toddy was for that purpose put into casks, which were conveyed from Bhándup to Bombay by the G. I. P. Railway, and that a large quantity of such toddy was thus imported by the said Karsetji Kávasji into Bombay in the months of November and December 1874 and during the early portion of the month of January 1875. On the 2nd February 1875, the plaintiffs further allege, the Railway Company refused to deliver to the consignees at Bombay certain casks of unfermented toddy which had been sent by the said Karsetji Kávasji from Bhándup to Bombay, except on payment of town duty at 4 annas a gallon; that in so refusing the officers of the Railway Company stated they were acting at the instance and under the orders of the Municipal Commissioner, who had classed toddy-juice, for the purpose of levying duty on it, with other country liquors. The plaintiffs further allege that, since the death of the said Karsetji Kávasji, and on the 19th April 1875, they caused another cask of toddy-juice to be sent by the railway from Bhándup to Bombay, but that delivery was refused, except on payment of a town duty of 4 annas per gallon. From the correspondence annexed to the plaint it appears that the first defendant, the Municipal Commissioner, and his successor or *locum tenens*, the Acting Commissioner, contend that, under Section 114 of the Bombay Municipal Act 1872, and Schedule B to the same Act, they are entitled to levy 4 annas per gallon as town duty on toddy-juice imported into Bombay as being "spirits". The

plaint prays (amongst other things) that the plaintiffs may be declared entitled to import toddy drawn from the trees upon the said estate at Bhándup into the city of Bombay without being subjected by the defendants to the payment of town duty upon the same, and that the defendants, their servants, and agents, may be restrained by injunction from levying town duty upon the toddy imported by the plaintiffs into the city of Bombay from the said estate at Bhándup. On the 13th July, instant, a rule was granted by this Court calling upon the defendants to show cause why they, their servants and agents, should not be restrained by injunction from levying town duty upon the toddy imported by the plaintiffs into the city of Bombay from the estate at Bhándup in the plaint mentioned. On the 15th July, instant, the said rule came on to be argued.

Had any objection been made by the defendants on the point, I should, as at present advised, have had considerable difficulty in holding that such a case as the present is a proper, or perhaps even an admissible, case for the Court to interfere in by way of injunction. I have not been able to find any precedent for a Court of Equity issuing an injunction against officers of Government exercising a right, or alleged right, of levying taxes or rates. The *dicta* in the cases of *Ellis v. Earl Grey* (a), *Rankin v. Huskisson* (b), *Hill v. Reardon* (c), and *Felkin v. Lord Herbert* (d), furnish examples of the cases with their limitations in which the Court interferes by injunction against officers of Government. On the other hand, the Anon. case in 2 Ves. 620, and *Attorney-General v. The Mayor of Lichfield* (e), seem to show that a Court of Equity has jurisdiction by way of injunction over a municipal authority to a certain extent with regard to the levy of rates. However this may be, no objection was made on this ground on the part of the defendants in showing cause against the rule. It is very possible that they are content to have the matter determined in as speedy and simple a manner as possible, and the question here is in itself one that may be

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(a) 6 Sim. 214. (b) 4 Sim. 13. (c) Jac. 84, S. C. 2 Russ. 608.

(d) 30 L. J. Ch. 604. (e) 11 Beav. 120.

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as well decided on a motion for an injunction as in a suit grounded on a claim for money had and received, or what in England might have taken the form of an action of replevin. Assuming, however, that this Court has jurisdiction to interfere by way of injunction in such a case as the present, the simple question is, has the Municipal Commissioner a right to levy a town duty on toddy-juice imported into Bombay as being "spirits"? The affidavits filed on behalf of the defendants are mainly directed to show that fermentation takes place in toddy-juice at a very much earlier point of time after it has been drawn from the tree than the affidavit filed on behalf of the plaintiffs allow, and that, so soon as the process of fermentation has commenced, toddy-juice begins to have intoxicating properties. This evidence is intended, I presume, to show that, having regard to the necessary lapse of time occupied in collecting the juice from the trees at Bhándup, in putting it into casks and in the transit of the casks to Bombay, the toddy-juice when it arrives at Bombay must be in a considerably advanced stage of fermentation, and so becomes an intoxicating liquor. In the affidavits of Dr. Weir, Health Officer of the Municipality) and Mr. Wilson (Analytical Chemist), filed on behalf of the defendants, I find it stated that toddy-juice, completely fermented, would contain from 5 to 8 per cent. of pure spirit. The argument of the defendants, on this part of the case, seems to be that, because this toddy-juice when it arrives in Bombay, say, at least, four or five hours after it has been drawn from the trees near Bhándup, must be in a considerably advanced stage of fermentation and possess intoxicating properties, therefore it is spirit. I do not follow this argument. Wine and beer are both fermented liquors and intoxicating, and yet are not spirits. It is quite clear to me that to constitute "spirits" something beyond fermentation and the possession of intoxicating properties must be found. Regulation XXI. of 1827, Chapter XI., intituled "Rules under which spirituous liquors are allowed to be manufactured at stations subordinate to the Presidency of Bombay and duties to be levied thereon," has been relied on by the defendants as showing that spirits ought to be held to include

toddy-juice. In Clause 2 of Section LIV. it is provided: "The term 'spirit' or 'spirituous liquor' is to be understood to include toddy in a fermented state." So, again, by Section 15 of Act XVIII. of 1853, intituled "An Act for regulating the sale of spirituous liquors, &c., in cantonments," and which recites that "it is expedient to regulate the sale of spirituous liquors, wine, and intoxicating drugs within military cantonments," it is provided that in the construction of that Act "the words 'spirituous liquor' shall include toddy in a state of fermentation or after it has been fermented." But the very fact of it being considered necessary expressly to provide that for the purposes of those enactments (which are very different to the purpose of the Bombay Municipal Act of 1872 in authorising the levy of town duties) spirit or spirituous liquor shall include fermented toddy-juice, seems to me rather to show that *ex vi termini* and in common parlance toddy-juice even when fermented is not "spirits". Beyond this it does not seem to me that Regulation XXI. of 1827, Chapter XI., has any bearing on the present case, as the question here is whether a town duty can be imposed on imported toddy-juice under Bombay Act III. of 1872, as being spirits when the Act contains no provision that spirits shall be deemed to include toddy. Now, unless it is quite clear that of itself and in common parlance (for, as I have mentioned, we have no assistance here from an interpretation clause) the word "spirits" includes toddy-juice, the levy of a town duty on toddy-juice under the Municipal Act is an unauthorised levy. Courts of Justice, before they construe legislative enactments as imposing any tax, duty, rate, toll, or other burthen on the subject, require, according to the well-settled rule applicable in such cases, that the intention of the Legislature should be expressed in clear, unambiguous language. "*In dubio*," says Lord Brougham, in the *Stockton and Darlington Railway Company v. Barret (f)*, "you are always to lean against the construction which imposes a burthen on the subject." The meaning of the Legislature to tax him must be "clear". In the present case, however, I cannot

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(f) 11 Cl. & Fin. 590; see p. 607.

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say that I feel even a doubt that the word "spirits" in the Act in question ought not to be held to include toddy-juice, whether partly or completely fermented. In the case of the *Attorney-General v. Bailey (g)* (brought to the attention of the Court by the learned counsel for the defendants, more I should suppose for the purpose of attempting to avoid the effect of it than as being an authority in his favour) the Court of Exchequer in England had to consider the meaning of the word "spirits" in the English Excise Acts. There, as here, there was the absence of any statutable definition of the word, and the Court had to assume that it was used in those Acts in the sense in which it was ordinarily understood. The point for decision was whether under those Acts "sweet spirits of nitre" (which, it is to be observed, was stated to contain no less than 80 per cent. of uncombined spirits) was to be included in the word "spirits", and the Court decided that it was not. Rolfe, B., in delivering the judgment of the Court, says: "And we think that nothing can be taken to be 'spirits' within the meaning of the 6 Geo. IV., C. 80", (and he had before stated that he assumed the word to be used in that Act in the sense ordinarily understood,) "which does not come under the definition of an inflammable liquid produced by distillation, either pure, or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the genuine appellation of spirits." It is, I think, essential to the definition of spirits that it be something produced by distillation, *i.e.*, liquid produced drop by drop from vapour. As a point of etymology it is, I think, pretty clear that it was only by reason of such very material substances as brandy, rum, and gin, or rather their essential element, having once existed in a state of vapour, that they came to be designated by a name in itself so inappropriate as "spirits". That "spirits" is a word properly and in common parlance applicable only to a liquid produced by distillation, is illustrated by the following description in McCulloch's Commercial Dictionary:— "All inflammable liquors obtained by distillation, as

brandy, rum, geneva, whisky, gin, &c. are comprised under this designation;" *i.e.*, of spirits. So in Smith's Wealth of Nations, B. V., Ch. 2, we find this passage—" Fermented liquors brewed, and spirituous liquors distilled, not for sale, but for private use, are not, in Great Britain, liable to any duties of excise."

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For these reasons I am of opinion that toddy-juice—though, when fermented, it contains a small quantity of alcohol (from 5 to 8 per cent.)—cannot be held to be included under the term "spirits". No doubt, fermented toddy-juice, when subjected to distillation, will produce spirits or alcohol. But alcohol or spirit may be obtained by distillation from many other matters not only fermented liquids, such as beer and wine, but also from molasses, beet root, apples, and wood. But these substances because they can be made to produce "spirits" are not themselves "spirits".

Having, therefore, no other guide to the meaning of the word "spirits" as used in Schedule B, than the consideration of its ordinary meaning within which, in my opinion, toddy-juice does not come, the conclusion at which I have arrived is that toddy-juice, whether unfermented or fermented, is not within Schedule B of the Municipal Act, and that on importation into the city of Bombay it is not liable to town duty. I may add that it is very improbable that the Legislature could ever have intended by the Act in question to impose a duty of 4 annas a gallon on toddy-juice imported into Bombay. The object of imposing town duties was to gain a revenue for the Municipality, not to prohibit the import of toddy-juice. Having regard, however, to the fact that the outside retail selling price of toddy-juice in the island of Bombay is little, if at all, over 3 annas a gallon, it is evident that to exact 4 annas a gallon town duty on its import into the island, so far from yielding any revenue to the Municipality, would, under ordinary circumstances, act as an absolute exclusion of it. The rule for an injunction must be made absolute; costs are reserved to the hearing.