1875.

GANPAT PUTAYA' v. THE COLLECTOR OF KANARA.

plaintiffs, and places means in their hands to proceed to judgment against their defendants. It is, therefore, reasonable—supposing always that it is reasonable to levy court fees at all—that the Crown, in consideration of its giving up its right to those fees, should have, for their defrayal, the first claim on the proceeds of the pauper suit. Without the forbearance of the Government to insist on its ordinary rule, the suit, in such a case, could not have been brought or the money realized. As the Government Pleader urged at the bar, if this precedence be not allowed to the Crown, the issue of prohibitory notices under Section 236 of the Code of Civil Procedure, instead of furthering justice, would, in many cases, defeat it by defeating the Government's claim for costs altogether.

This being our opinion on the point, it is unnecessary to discuss the other points raised in argument, and we must confirm the decree of the lower court with costs.

Decree confirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

Reference by the Session Judge of Poona under Section 263 of the Code of Criminal Procedure in

1875. Oct. 12.

REG. *v.* KHANDERA'V BA'JIRA'V AND SIX OTHERS.

The Code of Criminal Procedure, Section 263—Trial by Jury—Acquittal—Verdict reversed.

The Code of Criminal Procedure, Section 263, casts upon the High Court the duty both of Judge and Jury; but notwithstanding this difference, which clothes it with greater powers and responsibilities than the superior courts in England, it will, as far as may be, be guided by the principle of English law that the verdict of a Jury will not be set aside unless it be perverse and patently wrong, or may have been induced by an error of the Judge. In a proper case, however, the High Court wil rectify the verdict of a Jury.

THIS was a reference by W. H. Newnham, the Session Judge of Poona, under Section 263 of the Code of Criminal Procedure.

This was one of the numerous Dekhan agrarian riot cases. The accused Khanderáv Bájiráv and six others were committed by Mr. Macpherson, Magistrate, F. C., in the Poona District, on the

1875.

REG. v. KHANDERA'V BA'JIRA'V.

charges under Sections 326 and 457 of the Indian Penal Code. The complainant Vithalráv, who is by profession a money-lender, alleged that the accused persons, along with 50 or a 100 persons who were at some distance, broke open the house in which he was sleeping, demanded immediate surrender of his bonds, attacked him in various ways with sticks, and lastly, accused No. 2 caught hold of his nose and accused No. 1 cut it off with an instrument which looked like a knife. He also deposed that accused No. 2 took a gold ring off his finger. The Session Judge on perusing the evidence of the complainant before the committing Magistrate and the other evidence, added the charge of dacoity against all the accused before commencing the trial. In summing up the facts to the jury the judge explained to them that each of the accused present at the attack was equally liable with the rest of his fellows in carrying out the common object of all. After reading out such portions of the evidence as he deemed necessary, he stated to the jury that there were discrepancies with regard to the abstraction of the gold ring, and that he did not believe those witnesses who deposed to it. He also told them that to constitute the offence of dacoity it must be established that some property was carried off.

The jury found all the accused "not guilty." With this verdict the Session Judge disagreed, and he therefore referred the matter to the High Court.

The case was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Inverarity (*Dhirajlál Mathurádás*, Government Pleader, with him) in support of the reference.—The evidence shows beyond a doubt that the offences imputed to the accused, including dacoity, are proved. The discrepancies about the abstraction of the gold ring are unimportant. At any rate there is clear evidence that the complainant's documents were violently carried off by the accused. Section 263 of the Code of Criminal Procedure gives ample powers to the High Court to set aside a jury's verdict in a proper case, and this is such a case.

Nagindás Tulsidás, contra.—The Court should not look into the case to see whether there is sufficient evidence for the conviction of the accused. Such a procedure destroys the finality of a jury's

1875.

REG. v. KHANDERA'V BA'JIRA'V.

verdict. [WEST, J.—We are directed by Section 263 to deal with the case as with an appeal. Can you point out any cases in which it was held that we could not examine the evidence?] No: but even if the Court had such power, the evidence does not warrant the Court's unusual interference. The Judge has himself disbelieved some of the witnesses in important particulars, and the jury were quite justified in bringing their verdict, which is not perverse, and should not, therefore, be set aside.

Invernarity.—In reply.

WEST, J., in delivering the judgment of the Court, said:—The seven prisoners were committed to the Poona Court of Session for trial on the charges of voluntarily causing grievous hurt by means of a cutting instrument (Section 326 of the Indian Penal Code) and of house-breaking by night with intent to commit an offence punishable with imprisonment (Section 457). To this the Session Judge added the charge of dacoity under Section 395. The jury unanimously brought in a verdict of not guilty on all these charges; but the Session Judge, being of a different opinion, referred the case to the High Court under Section 263 of the Code of Criminal Procedure.

The portion of Section 263, under which we have to deal with this case, runs thus:—"The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts, as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict, and if it convict him, shall pass such sentence as might have been passed by the Court of Session." The powers, which this section confers on the High Court and the corresponding duty which it has to perform, differ to some extent from the powers and duties of the Court of Queen's Bench and other superior courts in England in dealing with cases which come before them in the exercise of their high function of reviewing matters disposed of by subordinate courts. It was provided by Magna Charta, as a fundamental constitutional principle, that a free man's liberty or property was not to be interfered with *nisi per legale judicium parium suorum.* This passage has been variously interpreted, as may be seen by comparing Hallam

with Reeves; but, in practice, it has long been made a basis for the legal function of the jury, its supremacy in determining questions of fact. In criminal cases "if an improper verdict of not guilty is found in felonies and misdemeanours, the Courts do not set it aside, holding it to be better that the guilty should escape than that the matter should be tried over again:" (Per Alderson, B., in *Hall* v. *Green* (1);) and even in a penal action it was held in the case just referred to, as in many others, that a wrong verdict is not a ground for a new trial. In ordinary civil cases new trials are granted if the court thinks there has been misconduct on the part of the jury; but in such cases the judges have always to bear the leading principle in mind; when they set aside the verdict of a jury the case has to be submitted for the consideration of a new jury; but every instance of the kind is in some degree an interference with the intended finality of the jury's verdict, and the power is used but very sparingly. Here the law on these subjects is different, and the difference is very important. Trial by jury is a recent institution in India; the judge may differ from the jury as to the facts, and the duty of dealing with a case of that kind is then cast upon the High Court. On a reference by the Session Judge, the whole case is opened up. The section we have quoted lays down that the Court may acquit or convict without reference to the charges made against the accused. In other words, the functions both of the judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England.

Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided, as far as may be, by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury, unless it be perverse and patently wrong, or may have been induced by an error of the judge. We adhere generally to this principle, notwithstanding our large discretionary powers, first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the legislature, and secondly, because any undue interference may tend to diminish

(1) 23 L. J. N. S. 15 M. C.

1875.

REG. v. KHANDERA'V BA'JIRA'V.

the sense of responsibility which it is desirable that a jury should cherish. We think, however, that by our rectifying a jury's verdict in a proper case, we shall increase, not diminish, that sense of responsibility. Burke, profoundly versed in the principles of the British constitution, said of juries:—"I will make no man, nor any set of men, a complement of the constitution." In this country, we must never let our acquiescence grow into a betrayal of justice. When juries know that their verdicts are liable to the scrutiny and supervision of this Court, they will feel the necessity of exercising conscientious deliberation in arriving at their verdict. The same check will prevent temptations to a wilfully wrong verdict from being held out to them. It is our duty in the present case to satisfy ourselves that the verdict of acquittal is proper, or at least sustainable; and if we find that it is not, the law enjoins on us to set it aside and pass the right judgment ourselves.

If the Session Judge had summed up the facts in the way in which, we think, he ought to have done so, and if the jury had then, in the face of his charge, returned a verdict of acquittal, such a verdict might, we think, have been called a perverse one. According to the charge, we do not think it can be called perverse, but we are of opinion that the Judge took a wrong view in impressing on the jury that the evidence as to the abstraction of the ring from the complainant Vithalrá'v's finger was not to be believed, and that a charge of dacoity was, therefore, not sustainable. We see no reason to distrust the evidence on that point, the matter having at once been mentioned, and the discrepancies as to it being few and unimportant. By the Judge's expressing his opinion as to the untrustworthiness of a portion of the evidence of three material witnesses, he needlessly, according to our view, put an impediment in the way of the jury, who could not well be blamed for extending their disbelief to the entire testimony of those witnesses. This disbelief would justify their verdict, but that verdict, which would, under ordinary circumstances, have been a perverse one, is none the less a means of defeating justice, because it was induced wholly or in part by a wrong suggestion on the part of the Judge. If a wrong decision has been brought about in any way, we must, on a reference, such as this, endeavour to correct it.

1875.

REG. v. KHANDERA'V BA'JIRA'V.

The acquittal, therefore, is not to be set aside the less, because the Judge and the jury have both committed a mistake. Taking this view we reverse the jury's verdict; and our next duty is to find what precise offence or offences the accused or any of them have committed. We consider it proved that all the accused committed theft of the complainant's bonds, and put him under bodily restraint as a means of doing so. This is sufficient to constitute dacoity, and we find all the accused guilty of it. Nos. 1 and 2, in committing that offence, inflicted grievous hurt by cutting off the complainant's nose. The minimum punishment which can be inflicted for that offence under Section 397 is seven years' rigorous imprisonment. We say rigorous, because it would not be appropriate to a case like this to order simple imprisonment. Looking, however, to the conduct of these two accused and the state of the country, we think it our duty to pass upon each of them a sentence of transportation for ten years. In the case of the others a smaller sentence will suffice. They were present at the infliction of grievous hurt by the first and second accused, and if their object also was to assist in that transaction, they would, under the law, be equally guilty of the graver offence. The circumstances proved in this case do not, however, render it necessary to hold that the common object of the whole assembly was to inflict grievous hurt, or that this was a necessary or any probable consequence of the robbery. We shall, therefore, pass upon each of the accused Nos. 3 to 7 a sentence of two years' rigorous imprisonment.

[APPELLATE CRIMINAL JURISDICTION.]

Appeal by the Government of Bombay.

REG. *v.* MARUTI D'ADA' AND OTHERS.

Abetment—Acquittal of principal no bar to conviction of abettor.

1875. Oct. 12.

The offence of abetment under the Indian Penal Code is a substantive offence. The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal.

THIS was an appeal by the Government of Bombay praying for the reversal of the order of acquittal recorded by N. Daniell,