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It is, however, argued that the time taken up in the review proceedings ought to be excepted from this ruling, on the analogy of *Nicholson v. Nicholson* (1), where on granting a new trial the Judge Ordinary said that the alimony *pendente lite* remained in force. Now, as pointed out in Macrae, p. 167, there is some resemblance between the reasons for, and procedure in new trial and review. I am not prepared to say that this Court, while a petition for review is still pending before it, may not have a discretion to allot or continue alimony *pendente lite*. I can well imagine cases to which the reasoning in *Dunn v. Dunn* may justly apply, where the Judge thinks that the wife may be ultimately successful. But no motion for continuing the alimony was made to Mr. Justice Birdwood: the present claim is made after that learned Judge had finally refused the review with costs, and after he had ceased to be Judge of this Court. The reasoning in *Wells v. Wells* clearly shows that I should refrain from interference, especially as the wife has appealed against the order refusing to review. There the Judge Ordinary laid down that "such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open." The judgment of this Court being final, so far as this Court is concerned, I refuse alimony for the period of the review proceedings.

[154] To grant it on an application made so late, the husband having no notice of it before, and, therefore, no special reason for getting the review matter determined speedily, would encourage frivolous endeavours to spin out litigation at the husband's expense. Alimony is given *pendente lite* for the husband's protection, to prevent the wife using the husband's credit, but the course taken since the dismissal of the suit has left him without this protection. The basis of the wife's application is that she is without means. I ask, as in *Noblett v. Noblett* (2), if the plaintiff was in such a state, why did she not apply earlier? See, too, *Twisleton v. Twisleton* (3). I must refuse to allot alimony during the review proceedings on the ground of delay. I now dismiss the application with costs.

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ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice), and Mr. Justice Farran.

FRAMJI MANEKJI PUNJAJI AND ANOTHER (Plaintiffs) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Defendant).*

[2nd September, 1892.]

Abkari (Bombay) Act V of 1878, s. 55—Construction—"Or" read "nor"—Order of confiscation.

Section 55 of the Bombay Abkari Act V of 1878 provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November 1891, and an order of confiscation was made on the 17th November 1891. The order was made after hearing the plaintiffs.

* Small Cause Court Suit No. 5724 of 1892.

(1) 3 Swab. & Trist. 214.

(2) L.R. 1 P. & D. 651.

(3) L.R. 2 P. & D. 339.

Held, that under the provisions of the Abkari Act, s. 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure.

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REFERENCE from the Bombay Court of Small Causes, under s. 69 of the Presidency Small Cause Courts Act (XV of 1882).

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[155] The Judge stated the case as follows :—

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1. In this case the plaintiffs, who carry on business in Bombay in Indian condiments, sought to recover from the defendant the sum of Rs. 560, being the value of 25 casks of toddy vinegar, the property of the plaintiffs, imported from Goa on the 7th of February, 1891. The plaintiffs allege in their statement of claim that the said casks of vinegar were wrongfully and without any justifiable cause detained by the Collector of Customs at Bombay on their landing on the said 7th February, and then illegally and without proper cause seized by the Collector on the 5th November, 1891, and illegally and unjustifiably confiscated on the 17th November, 1891.

2. A copy of the summons and a copy of the plaintiffs' bill of particulars are hereto annexed.

3. The defence to the action was justification under the Bombay Abkari Act V of 1878. Sections 7, 9, 37, 54, 55 and 67 (1) were particularly relied on in support of this plea.

[156] 4. The seizure and confiscation of the goods on the dates alleged in the particulars of demand were not denied.

(1) The following are the sections of Act V (Bombay) of 1878 referred to :—

Section 7.—Subject to such orders as aforesaid, the Commissioners may at any time after inquiry recorded in writing, fine, dismiss, suspend or reduce any subordinate officer appointed or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions of the last preceding section, for any breach of departmental rules or discipline, or for carelessness, unfitness, neglect of duty or other misconduct.

Section 9.—No liquor or intoxicating drug shall be imported by land or by sea into any part of the Presidency of Bombay unless—

(a) it is liable to the payment of duty under the Indian Tariff Act, 1875, or any other law for the time being in force relating to the duties of customs on goods imported into British India and the duty prescribed by such law has been paid thereon ; or

(b) such import is permitted under the power next hereinafter conferred.

Subject to the orders of Government, the Collector may from time to time :

(c) permit the import of liquor, or intoxicating drug, or of any kind of liquor or intoxicating drugs other than liquor or intoxicating drugs liable to the payment of duty under such law as aforesaid, on payment of duty, if any, to which the same is liable under this Act and on such other terms as he thinks fit, and

(d) cancel such permission.

Power to seize
liquor, &c., in open
places, and to detain,
search and arrest.

[156] Section 37.—Any Commissioner, or Collector or other Abkari Officer duly empowered in this behalf, may

(a) seize in any open place, or in transit, any liquor or intoxicating drug or any other thing which he has reason to believe to be liable to confiscation under this or any other law for the time being in force relating to Abkari revenue ;

(b) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and if such person has any such liquor, drug, or other things in his possession, arrest him.

Section 54.—All liquor or intoxicating drugs, imported, exported, transported, removed, manufactured, sold or had in possession in contravention of this Act, or of any rules or order made under this Act, or of any license, permit or pass obtained under the Act, and

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[Clauses 5 to 9 of the case stated are not material for the purposes of this report, and are, therefore, omitted.]

[157] The order of confiscation was made after hearing the plaintiffs.

10. The points for determination were:—

(1) Whether this vinegar was liquor within the purview of the Bombay Abkari Act V of 1878?

(2) If so, whether it is liable to the payment of duty under the Indian Tariff Act XVI of 1875, or any other law for the time being in force relating to Custom duties on goods imported into British India?

(3) Whether the seizure was properly made on 5th November, 1891?

All toddy drawn from any tree in contravention of this Act, or of any such rule, order, license, permit, or pass as aforesaid; and

All liquor, if any, and all intoxicating drugs, if any, lawfully imported, exported, transported, removed, manufactured, sold or had in possession, and all toddy, if any, lawfully drawn, along with, or in addition to, any liquor or intoxicating drugs, imported, exported, transported, removed, manufactured, sold or had in possession, or along with, or in addition to, any toddy drawn as aforesaid, and

All stills, utensils, implements or apparatus whatsoever for the manufacture of liquor, or of any intoxicating drug, used, kept, or had in possession in contravention of this Act, or of any rule or order made under this Act, or of any license obtained under this Act, and

All materials collected or had in possession for the purpose of unlawfully manufacturing liquor or any intoxicating drug, and

The vessels, packages, and coverings in which any liquor, intoxicating drug, still, utensil, implement, apparatus, or material aforesaid, is found, and the other contents, if any, of the vessel or package in which the same is found, and the animals, carts, vessels, or other conveyances used in carrying the same

Shall be liable to confiscation.

Order of confiscation by whom to be made.

Section 55.—All confiscations under this Act shall be adjusted by the Collector:

Provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

[157] Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector, be given an option of redeeming it on payment of such fine as the Collector thinks fit.

Section 67.—No action shall lie against Government, or against any Abkari Officer for damages in any Civil Court for any act *bona fide* done or ordered to be done by them in pursuance of this Act, or of any law at the time in force relating to Abkari revenue.

And all prosecutions of any Abkari Officer, and all actions which may be lawfully brought against Government or against any Abkari Officer, in respect of anything done, or alleged to have been done, in pursuance of this Act, shall be instituted within four months from the date of the act complained of, and not afterwards.

And any such action shall be dismissed

(a) If the plaintiff does not prove that, previously to bringing such action, he has presented all such appeals allowed by this Act, or by any other law for the time being in force, as within the aforesaid period of four months it was possible to present; or,

(b) In the case of an action for damages, if tender of sufficient amends shall have been made before the action was brought, or if, after the institution of the action, a sufficient sum of money is paid into Court with costs, by or on behalf of the defendant; or,

Provided that nothing in this section shall be deemed to affect the powers or jurisdiction of Her Majesty's High Court of Judicature or of the Court of Small Causes at Bombay.

(4) Whether the order of confiscation of 17th November, 1891, fulfils the requirements of s. 55, and whether it is valid even though made before the expiration of a month from the date of seizure, but after hearing the plaintiffs and receiving such proofs as they wished to adduce?

[158] (5) If such order was invalid, what damages, if any, were the plaintiffs entitled to under the circumstances of the case?

11. As to s. 67, I was of opinion that the acts complained of were not within its protection. Moreover, the Collector could not be said to have acted *bona fide*, in the legal sense of the term.

12. In the view I took of the 55th section it became unnecessary to decide the first, second and third questions.

13. It runs thus:—"All confiscations under this Act shall be made by the Collector; provided that no order of adjudication shall be made by the Collector until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." This is a highly penal proceeding, and, to put it very mildly, it makes one of the parties a judge in his own cause. It ought to receive a strict interpretation. It first provides that all confiscations shall be made by the Collector. Then follows a provision which is expressed in negative terms, and is, therefore, imperative. It says no such order shall be made until the expiration of a month. This is the first limitation to the exercise of the Collector's powers. It peremptorily forbids him to pass the order in any event, until the lapse of a month. If he makes one within the prescribed period, it is wholly void and inoperative, and is a mere nullity. The proviso then goes on to impose another condition, and the restriction to the exercise of his power in respect of a wholly different matter, *viz.*, he is not to make the order without hearing the claimant or objector. It has been maintained for the defence that the proviso authorized the Collector to adjudge confiscation upon the happening of one of the two contingencies either after a month or after hearing the claimants. If this argument be sound, the Collector would not be bound to grant a hearing. He may positively refuse to hear, wait for a month, and then confiscate the goods. If the two clauses are to be read in the alternative, that would be the necessary consequence. He has the option of doing one of two matters, and he does one, no matter why, in preference to the other. This construction [159] would be revolting to the legal mind. Mr. Little felt the force of the objection, and sought to destroy it by suggesting a transposition of the two clauses, which he thought would make the "hearing" compulsory. In the first place, such a transposition is inadmissible in a fiscal statute, but, secondly, it does not really help to solve the difficulty: "Provided that no order of adjudication shall be made without hearing any person who claims a right to the things seized, or until the expiration of a month after seizure." This leaves the Collector's option untouched. He may still elect to postpone taking action for a month instead of hearing the party grieved. If the clause relating to "hearing" acquires an obligatory force by reason of its holding the first place in the sentence, why should not the clause applicable to the month make it equally incumbent on the Collector to stay his hand until the expiration of a month? It already stands first.

14. The construction placed by the Court upon the section and its proviso receives strong support from the following considerations. It avoids the consequence of a precipitate decision by leaving the Collector freedom

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for a whole month to alter his mind, or modify his views. At the same time the party feeling himself aggrieved has a whole month within which to produce his evidence. The draftsman was no pedant. Having enjoined a prohibition as to time he did not pause to consider whether the use of the conjunction "nor" instead of "or" in the sentence would not better satisfy all grammatical proprieties. For these reasons the Court disallowed the plea of justification.

15. The remaining question relates to the amount of damages. For this purpose the whole circumstances of the case must be looked to from 7th February. There were repeated demands. The plaintiffs were deprived of the possession and use of their goods. The Collector persistently, and in spite of plaintiffs' remonstrances, refused to deliver up the goods. The detention, after the Collector had opportunities of satisfying himself as to the quality of the goods for the purposes aforesaid, was unauthorized. I, therefore, awarded the value of the goods before they got deteriorated in the manner and owing to the causes stated in this reference.

[160] There was a decree in plaintiffs' favour for Rs. 307 and costs contingent upon the opinion of the High Court.

16. At the close of the case I was required by Mr. Little to state a case for the opinion of the High Court, which I have now the honour to solicit upon the questions—

(1) Whether under the provisions of s. 55 of the Bombay Abkari Act of 1878 the Collector can make a valid order of confiscation before the expiration of one month from the date of seizing the things intended to be confiscated, but after hearing the person who claims a right to them?

(2) Whether the plaintiffs were entitled to the damages awarded in the face of their admission that the goods were valueless at the time of seizure and confiscation in November?

Anderson, for the plaintiffs:—As to the construction of s. 55 he contended that "or" should be read "nor."

Lang (Acting Advocate-General), for the defendant.

The following authorities were referred to:—Maxwell on Statutes, p. 284: *Metropolitan Board of Works v. Steed* (1).

OPINION.

BAYLEY, C. J. (Acting).—In this case I am of opinion that the learned Small Cause Court Judge's view of the proper construction to be given to s. 55 of Act V of 1878 is correct. The provisions of this Act, it is to be remarked, are intended to be in protection of the subject. It is also to be borne in mind that they are of a highly penal nature. The Court, therefore, will be very averse to anything like a strained construction of this section, if that construction is one which tends to cut down the protection intended to be given to the public.

Now this section runs thus:—

"All confiscation under this Act shall be adjudged by the Collector, provided that no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim.

[161] Whenever confiscation is ordered under this Act, the owner of the thing ordered to be confiscated may, at the discretion of the Collector,

(1) 8 Q.B.D. 445.

be given an option of redeeming it on payment of such fine as the Collector thinks fit."

To my mind that language is sufficiently plain and intelligible. It may be that it would be more strictly grammatical to have used 'nor' in stead of 'or' in this sentence. But the meaning of the section, I think, is clear; it is that both these conditions must be fulfilled before an order of confiscation can be made. And that this was the deliberate intention of the Legislature I can very well believe. A month does not seem too long a period to provide before such a serious step as an order of confiscation is allowed to be taken. It is highly desirable that such an order as that should not be made in a hurry.

The construction contended for by the Advocate-General is, I think, a very laboured construction entailing a distant straining of the language of the section; which, as I have already said, seems to be plain and intelligible enough as it stands. Why should the Court so strain the language of the section? I think no reason, certainly no sufficient reason has been shown as to taking that course, if we are at liberty to take it.

On these grounds I think the answer to the first question, referred to us by the learned Fourth Judge of the Small Cause Court, should be in the negative.

FARRAN, J.— I am quite of the same opinion. Now the first provision of this s. 55 is this:—

"No order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated" * *

That is in the broadest and the most imperative terms. It is a provision dealing with the condition of time. The second provision, *viz.*, "or without hearing any person who claims a right thereto, &c.," has nothing to do with the question of time. In such a section as this—a section dealing with the conditions to be observed before making the order of confiscation—one would expect both these matters to be provided for: both a provision as to the time [162] that must be allowed to elapse before such an order is made and also a provision as to the claimant's right to be heard. Presumably, therefore, the second provision is an addition to, and not in substitution for, the first provision. Is there anything in the language used which overrides this presumption? On the contrary, it is only by reading this section, as perhaps a purist might read it, that room is left for any other construction. Using language as it is commonly used, the word 'or' in a sentence constructed as this is, would as often be used as the word 'nor,' to which here, I think, it is clearly equivalent. The illustration put during the argument gives an example of such a case. One may say to a child "you are not to leave the house for an hour, or without your great coat." Can there be a shadow of doubt as to what is there meant? This property of the word 'or' in a sentence thus formed seems to be a peculiarity of the language, as is well shown by Grove, J., in *The Metropolitan Board of Works v. Steed* (1). In a sentence beginning with a negative, as this does, 'or' is understood as repeating or carrying on that negative, *i.e.*, as equivalent to 'nor.'

Certainly, had the intention of the Legislature been otherwise, you would have expected to have found the plain and imperative provision

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

GAUSKHA (*Original Plaintiff*), Appellant v. ABDUL ROPKHA AND ANOTHER (*Original Defendants*), Respondents.* [4th February, 1892.]

Decree against a sirdar—Political Agent's Court—Death of the sirdar—Application for execution against the heirs—Change of status—Jurisdiction—Civil Court—Section 649, para. 2, of the Civil Procedure Code (Act XIV of 1882).

A *sirdar* against whom a decree was passed in the Court of the Political Agent having died, the decree-holder applied for execution against his heirs. The [163] Political Agent rejected the application, holding that he had no jurisdiction over the heirs who were not *sirdars*. The decree-holder then applied for execution to the Court of the First Class Subordinate Judge of Dharwar, who would have had jurisdiction to try the suit if the deceased defendant had not been a *sirdar*, but that Court also rejected the application on the ground that s. 649, para. 2 of the Civil Procedure Code (Act XIV of 1882) applies in cases where the territorial jurisdiction of the Court is changed, and not where the status of the parties is changed, and that the decree-holder should obtain a declaration that the decree was binding against the heirs, who were not *sirdars*.

Held, reversing the order, that the terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction.

THIS was an appeal from the decision of Rao Bahadur Kasinath Balkrishna Marathe, First Class Subordinate Judge of Dharwar.

A decree was passed in the Court of the Political Agent at Kolhapur against one Abdul Rophkha, a *sirdar* and *jaghirdar* of Bad in the Dharwar District. After the passing of the decree, Abdul Rophkha died, and the applicant Gauskha, *jaghirdar* of Bad, presented an application for execution of the decree against Hasan and Mahamadkha, sons and heirs of the judgment-debtor, Abdul Rophkha. The Political Agent rejected the application on the ground that he had no jurisdiction over the sons who were not *sirdars*. The applicant, thereupon, applied to the Court of the First Class Subordinate Judge of Dharwar, who declined to pass an order for execution, being of opinion that s. 649, para 2, of the Civil Procedure Code (Act XIV of 1882) "does not give jurisdiction in cases wherein there is a change of status of the parties to the decree. The said section has full scope in cases where the territorial jurisdiction of Court is changed, and not in cases where the status of the parties is changed. I am inclined to think that the plaintiff must obtain a declaration that his decree against the father, who was a *sirdar*, is binding on the heirs, although they are not *sirdars*." The Subordinate Judge accordingly rejected the application.

The applicant appealed to the High Court.

Shamrav Vithal, for the appellant.

Mahadeo Waman Bhat, for the respondents.

* Appeal No. 111 of 1891.