1894.

BASÁVA v. LINGAN-GAUDA.

very texts on which the great dispute has turned, *i. e.*, whether at Hindu law the adoption of an only son is valid. No living priest of importance nor learned man has been called to prove these adoptions to be wrong or contrary to religion or practice: there is no evidence of any such adoption being followed by caste meeting or penance or ecclesiastical censure. The family guru, witness 255, says he does not know the Shástras: and although his tongue declares these adoptions to be wrong, his acts speak differently, as he took a part without remonstrance in the adoption under our consideration in this case.

The Court now confirms the decree of the Subordinate Judge of the First Class in all particulars: but adds to it a declaration that the plaintiff-respondent takes the property awarded to him subject to the obligation to provide a sufficient maintenance for the first defendant Basáva: the costs of the cross-objections to be paid by the respondent: and all the other costs of the appeal by the appellants.

Decree confirmed.

ORIGINAL CIVIL.

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

1894.
December 10, 11.

H. A. ACWORTH, MUNICIPAL COMMISSIONER OF BOMBAY (ORIGINAL DEFENDANT), APPELLANT, *v.* SHA'VAKSHA DHUNJIBHA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

Malicious prosecution—Procuring wrongful execution of a warrant of arrest—Reasonable and probable cause.

The plaintiff sued the Municipal Commissioner of Bombay for damages, alleging that the Commissioner had maliciously and without reasonable and probable cause procured a warrant to be issued against him on 24th March, 1892, and subsequently procured that warrant to be executed at a time when its force was spent, and under circumstances when it ought not to have been executed. From the evidence it appeared that on the 21st December, 1891, a notice was served on the plaintiff under section 232 of the City of Bombay Municipal Act (III of 1888) requiring him to do certain drainage work upon premises belonging to him. The work not having been done, a summons was issued against him on the 11th February, 1892, requiring him to appear before the

* Suit No. 614 of 1892.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

Presidency Magistrate to answer a charge of not having complied with the above notice. The summons was returnable on the 25th February, 1892, and on that day the plaintiff appeared, but the hearing was postponed until the 24th March, 1892. On the 27th February, 1892, the plaintiff wrote to the defendant objecting to the nature of the work he was required to do, and adding "after this explanation I will leave the matter in the hands of the Drainage Department to do the work, and will pay the expenses." In reply to this letter the Executive Engineer on the 21st March informed the plaintiff that he must appear in Court on the 24th March, and also requested him to "take the work in hand at once and complete it within the time now allowed." On the 22nd March, 1892, the plaintiff replied by letter stating that he did not understand the work, and asking the Municipality to get it done, he offering to pay the expense. The letter ended as follows:—"I do not see any reason now to attend in Police Court on 24th instant, as I am ready and willing to do the work." The plaintiff did not attend the Court on the 24th March. On that same day (the 24th) a letter signed by the Municipal Commissioner was delivered to the plaintiff, dated the 23rd March, informing him that a "fresh summons" had been issued against him for not complying with the requirements of the notice served on him. The Courts held that the non-appearance of the plaintiff on the 24th March was not caused by the receipt of this letter. On the 24th *idem*, in consequence of the non-appearance of the plaintiff in obedience to the summons, a warrant of arrest was issued against him. The date originally inserted in the warrant for the plaintiff's appearance before the Magistrate was the 7th April, but this date was subsequently altered to the 2nd June. There was no evidence as to how or by whom this alteration was made. The plaintiff having heard on the 25th March of the issue of the warrant appeared next day (the 26th) before the Magistrate and surrendered, showing to the Magistrate the defendant's letter of the 23rd March and explaining why he had not attended on the 24th. A note was made of his surrender and he was told by the Magistrate to appear on the 7th April. The plaintiff, however, did not get the warrant cancelled. He stated that at the office of the Presidency Magistrate's Court he was informed that the warrant was with the Municipality, and that he then went away and did nothing more. On the 7th April the Municipal Engineer went to the plaintiff's premises and pointed out the work that was to be done. He (the plaintiff alleged) told the plaintiff that he need not attend the Police Court that day, as he would get the hearing of the summons postponed for a fortnight. The plaintiff then instructed a plumber to do the requisite work, which was completed (as plaintiff alleged) on the 26th April and was passed and approved by the municipal authorities. The plaintiff swore that he attended the Police Court on the 21st April, but apparently did not bring his appearance to the notice of the Magistrate, as the municipal officers had left the Court before he arrived. He further stated that he attended again on the 28th April, but was told by a municipal inspector that he might go away, as the work was done. Another hearing was apparently fixed on the 19th May, but the case was again adjourned to the 2nd June. On the 31st May the plaintiff was arrested in execution of the warrant of the 24th March. The evidence was that on that morning, at 8 o'clock, a municipal inspector (Hormasji Cursetji) who was not called as a witness at the hearing, accompanied by a police sepoy, went to the plaintiff's house and pointed out the plaintiff to the sepoy, who arrested him and took him in custody to the police station and subsequently before

the Magistrate. He was released on depositing Rs. 25 as security for appearing when required. On the 16th June the plaintiff again appeared in the Police Court when the summons was withdrawn. The plaintiff claimed Rs. 10,000 as damages for malicious prosecution, wrongful arrest and detention in custody, and false imprisonment.

The defendant denied that he had applied for or obtained the warrant for the plaintiff's arrest, or that he or his servants had anything to do with the arrest or was responsible for it, save that a sub-inspector who knew nothing of the warrant had pointed out the plaintiff to a police officer at the latter's request. He further denied that the proceedings were malicious and without reasonable and probable cause. The lower Court (Starling, J.) held that the defendant was liable for the wrongful execution of the warrant against the plaintiff, and awarded the latter Rs. 500. On appeal,

Held, affirming the decree of the lower Court, that the defendant was liable. On the 28th April at any rate the warrant in question was a spent warrant and could not be properly executed, as it was, on the 31st May. As the warrant was issued by the Magistrate of his own accord, the defendant would not be liable for its execution (as shown by the case of *West* v. *Smallwood*(1)) unless he or his subordinates took an active part in executing it. The mere circumstance that the plaintiff was pointed out to the police officer who executed the warrant by a municipal inspector might not of itself amount to taking an active part. But there were special circumstances which should be taken into consideration in conjunction with it. The length of time which elapsed before the warrant was executed, and the alteration of the date in the direction contained in the warrant as to taking bail, not explained in any way and which could not have been made by the police, pointed to the warrant having been, if not in the actual keeping of the municipal authorities at any rate under their control, and to the police having been set in motion by them. Under these circumstances it was incumbent on the defendant to give rebutting evidence, and more especially to call the municipal inspector to explain the circumstances under which he pointed out the plaintiff to the police officer who executed the warrant.

APPEAL from Starling, J.

Suit to recover Rs. 10,000 as damages for the improper issue of a warrant against the plaintiff and for malicious arrest.

In December, 1891, the plaintiff in Bombay was served with a notice by the defendant under section 232 of the City of Bombay Municipal Act, III of 1888, to do certain drainage work upon premises belonging to him in Bombay. The work not being done, a summons under section 471 of the Act was issued against him in February, 1892, requiring him to appear before the Presidency Magistrate to answer a charge of not having drained his premises in compliance with the said notice. The summons was made returnable on the 25th February, 1892, and on that day the

(1) 3 M. and W., 418.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHA'I.

plaintiff appeared before the Magistrate when the hearing was postponed until the 24th March, 1892.

On the 27th February, 1892, the defendant wrote the following letter to the plaintiff:—

"DEAR SIR,—I beg to bring to your information and at the same time protest that instead of decrease the nuisance, the Drainage Department will increase every day complaint under the following circumstances.

"To my house there is a pucka pavement gully and a cesspool well built according to the notice served on me under section 257, No. 1016, which is working up to this time without any hindrance and it (sic.) also open to the garden. This will be certified by the inspector of the Health Department. Now I am summoned, No. 345, before Magistrate not complying to put gully trap, &c. I, therefore, inform you that I am ready to do the work, but mind there will be an often hindrance of the free pass of the water of the *náni* to the cesspool, and there will be an often complaint.

"Please, therefore, be good enough to order not to disturb the present system. At present *náni* water runs into the cesspool by a good slope, and not a drop stops into the chunam and cement gutter which they wanted to shut up and choked often; at present water runs right into the cesspool, which water every day removes by cart.

"All this place often visited by an inspector whose name I think Mr. Dosonere, who will inform you about it.

"After this explanation if you insist upon me I will leave the matter into the hands of the Drainage Department to do the work and will pay the expenses and at the same time they will be responsible for the future cleanliness and nuisance."

In reply to that letter the plaintiff received the following letter from the defendant, dated the 21st March, 1892:—

"SIR,—Referring to your letter dated the 27th February, to the address of the Municipal Commissioner, I have the honour to inform you that the case in the Magistrate's Court, Girgaum, in respect of the drainage of your premises in Gowália Tank Road, has been postponed to the 24th March, 1892, on which day it will be necessary for you to appear.

"I have to request you that you will take the work in hand at once and satisfactorily complete it within the time now allowed."

On the 22nd March the plaintiff wrote as follows to the Municipal Executive Engineer:—

"*22nd March, 1892.*

"DEAR SIR,—In reply to your No. 8119 of 1892, I beg to inform you that I don't understand what to have it done, and at the same time to avoid the mistake I wish you will kindly appoint one man to do the work to your satisfaction, and I will pay the expenses.

"I use to attend my business from 7 A.M. till 6 P.M., so I cannot show him the work what you wanted to have it; so please on receipt of this letter send one licensed

plumber with instruction, as well as, please, inform him what money will be required to purchase the pipes, &c., which I will pay him.

"I myself don't understand, so please get it done by the man of your satisfaction.

"I don't see any reason now to attend in Police Court on 24th instant, as I am ready and willing to do the work."

On the 24th March the plaintiff received the following letter dated the 23rd March and purporting to be also a reply to his letter of the 27th February:—

"No. 29922 of 1892.

"In answer to his letter dated 27th ultimo, Mr. Shávaksha Dhunjibhái is referred to this office No. 17710 of 31st October last, and is informed that a fresh summons has been issued against him for not complying with requirements of the notice served on him."

The plaint stated that in consequence of this letter he did not attend the Police Court on the 24th March as he expected to be served with another summons; but on the 25th he read in a newspaper that a warrant had been applied for and obtained against him for not having attended on the 24th.

He accordingly went to the Police Court and surrendered himself, showing to the Magistrate the letter of the 23rd March, and explaining why he had not attended on the 24th. A note was made of his surrender and he was told by the Magistrate to appear on the 7th April.

On the 7th April, one of the municipal engineers visited the plaintiff's premises and pointed out the work that was to be done.

He (the plaintiff alleged) told the plaintiff that the hearing of the summons would be postponed for a fortnight and that he need not attend the Police Court on that day (*i. e.* the 7th April).

The plaintiff attended the Police Court on the 21st April and again on the 28th April. On the latter day one of the officers of the Drainage Department met him at the Police Court and told him he might go away, giving him to understand that the matter had been settled. The work on the plaintiff's premises was completed on the 26th April and was passed and approved by the municipal authorities.

The plaint further stated that the plaintiff heard nothing more about the matter until the morning of the 31st May when he was arrested by a police constable (who was attended by one of

1894.

ACWORTH v. SHA'VAKSHA DHUNJIBHA'I.

the municipal inspectors) in execution of the warrant of the 24th March to which, as above stated, the plaintiff had surrendered.

The warrant when signed by the Presidency Magistrate was in the following form:—

"To all Constables and other Her Majesty's Officers of the Peace for the town of Bombay and the places subordinate thereto.

"Whereas Shávaksha Dhunjibhái at Gowália Tank Road of Bombay stands charged with the offence of breach of Municipal Act, section 232, you are hereby directed to arrest the said Shávaksha Dhunjibhái and to produce him at the Second Presidency Magistrate's Court at Bombay before such Presidency Magistrate as may then be resent.

"If the said Shávaksha Dhunjibhái shall give bail himself in the sum of Rs. 25, with one surety in the sum of Rs. 25, to attend before me on the 7th April, 1892, he may be released."

When executed the date 7th April had been erased with a pencil and 2nd June written above it.

The plaintiff was taken in custody to the police station and was subsequently brought before the Magistrate. He was then released on depositing Rs. 25 as security for appearing when required.

On the 8th June, 1892, the plaintiff received the following letter from the Executive Engineer of the Municipality:—

"SIR,—In continuation of this office No. D. $\frac{299}{16\text{-}4\text{-}92}$, I have the honour to inform you that the case in the Magistrate's Court, Girgaum, in respect of the drainage of your premises in Gowália Tank Road, has been postponed to the 16th June, 1892, on which day it will be necessary for you to appear.

"I have to request that you will take the work in hand at once and satisfactorily complete it within the time now allowed."

To that letter the plaintiff replied as follows:—

"*Bombay, 9th June 1892.*

"JAMES W. SMITH, ESQUIRE,

Municipality.

"SIR,—In reply to your letter dated 8th instant, I beg to inform you that according to your department's instruction the disputed work has been done by the plumber since seven or eight days ago, and one of your inspectors, I am told by my man with plumber, been in my absence to see the work on the 7th instant.

"You will please note that as I am ignorant of the work, so please see again whether the plumber have worked to your satisfaction or not; if not, then insist upon him to do more work, as the plumber is bound to do the work to your satisfaction.

"I am quite at a loss to understand as per your letter No. D.—299 of 16th instant (April) which was shown to the plumber who informed me that such work has been done since 26th April, except the present disputed gully trap which was before disallowed, and now you wanted to have it, so the plumber has put it since many days.

"You write to take the work in hand while the work done many days ago.

"Please pay a visit to the work before the 16th June."

On the 16th June, 1892, the plaintiff again appeared in the Police Court when the summons was withdrawn.

The plaintiff claimed Rs. 10,000 as damages "for malicious prosecution, wrongful arrest and detention in custody, and false imprisonment."

The defendant in his written statement (*inter alia*) denied that he had applied for or obtained the warrant for the plaintiff's arrest. He stated that on the 24th March the case was called on in the Police Court and that on plaintiff's non-appearance the Magistrate had issued the warrant. The written statement further stated as follows:—

"8. The defendant says that neither he nor any of the municipal authorities caused or had anything to do with the arrest of the plaintiff on the 31st May, 1892, save and except that a sub-inspector who knew nothing about the issue of the warrant pointed out to the police officer at his request the plaintiff as the person who appeared to be named in a warrant which the police officer had with him for service. The defendant denies that he was in any way responsible for the said arrest or what followed thereupon.

"9. The defendant denies that the institution of the said proceedings against the plaintiff and the continuance thereof were malicious and without reasonable and probable cause, or that the said arrest and detention in custody of the plaintiff was improper, wrongful and illegal as alleged."

The case was heard by Starling, J.

Russell (with *Lang*, Advocate General) for the plaintiff. He cited Addison on Torts (6th Ed.), p. 150; *Churchill* v. *Siggers*[1]; *Johnson* v. *Emerson*[2]; *Morrell* v. *Martin*[3]; *West* v. *Smallwood*[4]; Starling's Criminal Law (5th Ed.), p. 257.

Macpherson and *Inverarity* for the defendant. They cited Pollock on Torts (3rd Ed.), p. 204; *Huffer* v. *Allen*[5]; *Bank of*

(1) 3 El. & Bl., 929 at p. 937.
(2) L. R., 6 Ex., 373.
(3) 3 M. & G., 595.
(4) 3 M. & W., 418.
(5) L. R., 2 Ex., 15.

1894.

ACWORTH v. SHA'VAKSHA DHUNJIBHÁI.

New South Wales v. *Owston*[1]; *Metropolitan Bank* v. *Pooley*[2]; *Spencer* v. *Jacob*[3]; *Gibson* v. *Veasey*[4]; Addison on Torts (6th Ed.), p. 160.

STARLING, J.:—This suit is filed by the plaintiff against the defendant, the Municipal Commissioner, to recover damages from him for the improper issue of a warrant against the plaintiff and for his improper arrest under that warrant. The facts upon which the plaintiff bases his case are fully set out in the plaint, but the plaintiff nowhere distinctly sets out the legal aspect of his claim. I, however, gather from para. 14 of the plaint that he charges that the defendant, maliciously and without reasonable and probable cause, procured a warrant to be issued against him on the 24th March, 1892, and that, subsequently, he maliciously and without reasonable and probable cause procured that warrant to be executed at a time when its force was spent and under circumstances under which it ought not to have been executed, and on this view of the case I shall found my judgment.

The defendant in his written statement sets out his view of the facts, and denies that the plaintiff has sustained any damage, and that he is in law liable for what has happened. The plaintiff is a man who, in the opinion of the municipal officers, has given "endless trouble" to them by neglecting to put the drainage into his cesspools into a proper sanitary condition; and I think that their opinion is a correct one, and that the conduct of the plaintiff before the 24th March, 1892, is certainly not such as to enlist the sympathy of the Court with him. During the whole of the latter half of 1891 correspondence was going on between the plaintiff and the Health Department about the insanitary condition of the plaintiff's drainage, but nothing whatever resulted therefrom, and on the 21st December, 1891, a notice was served upon him under section 232 of Bombay Act III of 1888 requiring him to do certain works. That notice was not complied with, and on the 11th February, 1892, a summons, (which, however, bears no date) was issued against the plaintiff for not having drained his premises in compliance with the beforementioned notice and requiring him to attend at the Girgaum Police Court on the 25th February, 1892.

(1) 4 Ap. Ca., 270.
(2) 10 Ap. Ca., 210.
(3) 1 M. & M., 180.
(4) 15 L. T. (N. S.), 586.

The plaintiff appeared on tl at day, and the hearing of the case was postponed from time to time until the 24th March, 1892. On the 24th March the plaintiff was not present, and the Magistrate, Mr. Hamilton, after taking evidence of the service of the summons, and, I presume, also taking judicial notice of the case having been called on before him, and the plaintiff having been ordered to appear on the days to which it was adjourned, and especially on the 24th March, all of which was necessary for his subsequent action, issued a warrant for the arrest of the plaintiff for non-appearance on that day. That warrant, in my opinion, is on the face of it bad. It simply recites that the plaintiff was charged with the offence of breach of section 232 of the Municipal Act and orders his arrest. Now the Magistrate had no authority to issue a warrant against any one for non-compliance with a notice issued under that section, for by section 471 of the same Act a neglect to comply with the provisions of section 232 is only punishable by fine. He could only issue a warrant when he has reason to believe that the defendant has absconded, or will not obey the summons, or when the defendant fails to appear to the summons, and service of the summons in due time for him to appear is proved to the Magistrate (section 90 of the Criminal Procedure Code of 1882). Therefore, on the face of a warrant in a summons case there should appear a statement of the offence charged, that a summons was issued, that its service was duly proved, and that the defendant did not appear—or, as in the present case, that the defendant appeared on a certain day, that he was then ordered to appear on a certain other day, and that on the latter day he did not appear, otherwise the warrant on the face of it would appear to have been issued without jurisdiction. The form in use in England is given in Burn's Justice of the Peace, "Warrant of Apprehension," Vol. V, p. 1117. No. VII of the Forms of Process annexed to the Criminal Procedure Code is for a warrant for the arrest of a witness, and that shows how such a document should be drawn up in a case where a summons is ordinarily the proper means of compelling attendance.

There is no form given for a warrant for the arrest of an accused after non-obedience to a summons, but a little consideration of form No. II (Warrant of Arrest) in connection with No. VII

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

will show that what I have stated above ought to have appeared in the warrant in this case. The form is as follows: "Whereas ——of——stands charged with the offence of (here state the offence) you are hereby directed to arrest," &c. Now it is an elementary rule of law that the offence stated must be one for which the Magistrate can issue a warrant; the offence of contravening a notice under section 232 of the Municipal Act is not such an offence; but the offence of having been summoned to answer a contravention of such a notice and not appearing in answer to such summons is such an offence. Consequently, the statement of the issue of a summons and non-obedience thereto must appear on the warrant. This objection may appear to be a technical one; but in my opinion the omission to state the real cause for arrest arises from a want of appreciation of what that cause is, and is probably a cause of the subsequent irregularities which I shall have to notice. The municipal officers have apparently not looked upon these warrants as merely instruments to compel the accused to attend at the next hearing, but as means of pressure by which the accused could be brought up at any time if he did not obey the notice served upon him; for they are not executed forthwith, or necessarily in time for the next hearing, but apparently are left in the hands of a police sepoy to be executed when he has time, or when he sees fit to execute them, or when some municipal servant points out the accused; whereas they ought to be executed at once, and the accused kept in custody or held to bail.

Then the question arises, How was it that the plaintiff was absent on the 24th March? He says that he did not attend in consequence of a letter from the defendant dated the 23rd March (Exhibit G) in these terms (His Lordship read the letter above set forth and continued:—) Now that letter does not say that the plaintiff need not attend on the 24th March, though I am inclined to think that he might infer that as a fresh summons had been issued against him, the former one was cancelled, and that he need not attend till the new summons was served upon him. But in order that this letter should have any effect upon his mind, it was necessary that he should have received it before 1 P.M. on the 24th. He says he received it at his office in the Fort in the forenoon of the 24th, and in that he is corrobo-

rated by his son. I cannot say that the evidence on behalf of the defendant satisfies me that I ought not to accept the story of the plaintiff and his son. The date 24-3-1892, 1-45 P.M., or else 7-45 P.M. (I really cannot say which it is) attached to the initials acknowledging the receipt of Exhibit G would be a very important piece of evidence if it was in the handwriting of the plaintiff's son. The plaintiff and his son, however, swear it is not. To me it appears to be in a different handwriting to the initials and written with a different pencil. Byrámji Dádábhai says these figures were there on the 17th June, 1892, when he made a pencil memorandum in answer to the defendant's first enquiry endorsed on Exhibit Q; but if they were there then, I cannot conceive why, in answer to the defendant's enquiry when Exhibit G was delivered, Byrámji did not reply "on the 24th March, 1892, at 1-45 P.M."; whereas he only gives the date, and the defendant has to make another enquiry about the hour. If the case for the defendant had been that on the 16th June enquiries were made, and that the date and hour were then ascertained and noted against the initials as the result of the enquiry, I should have given considerable weight to those figures; but as that is not the case, they did not impress me at all. I cannot give any weight to the evidence of the peon Ganpat Gopál, who professes to remember all the details of the round he took when he delivered this particular letter, whereas he cannot remember any other round; and a comparison of the evidence of this witness with that of Byrámji Dádábhai leaves me with the feeling that on this point I cannot give much weight to their evidence. Consequently, if I had definitely to determine this point, I think I should have to accept the evidence of the plaintiff and his son. I should also have to go into the circumstances under which this letter was written and sent. It is alleged that it was written under some misapprehension, but no evidence has been given as to how the misapprehension arose or who was liable for this mistake, except that Mr. James says he had nothing to do with drafting or sending it, though the draft is one which would issue from his office. I do not, however, think that it was this letter which determined the plaintiff's action in not going to the Police Court on the 24th March, though if he did receive it on the fore-

1894.

ACWORTH v. SHÁVAKSHÁ DHUNJIBHÁI.

noon of that day it might possibly have confirmed him in his previously formed intention. The Acting Executive Engineer by his letter of 21st March had told the plaintiff to appear on the 24th. In answer to that the plaintiff replied on the 22nd saying he did not know how to set about the business, and asking the Executive Engineer to send some plumber to put his drainage to right and that he would pay him. He then goes on, "I don't see any reason now to attend in the Police Court on the 24th instant as I am ready and willing to do the work." Consequently, I am of opinion that on the 22nd the plaintiff had made up his mind that he need not attend on the 24th, and so did not attend. Under these circumstances I do not consider the defendant is responsible for the non-appearance of the plaintiff on that day. Then it appears from the evidence that on non-appearance of an accused the Magistrate issues a warrant as a matter of course on proof of service; and Mr. James swears he made no application for a warrant though he knew of its issue, as appears from a memorandum in his handwriting in Exhibit I. Consequently, I am of opinion that the defendant is in no way responsible for the issue of the warrant; and he is not responsible for its defective form, as it was made out in the office of the Magistrate's Court without any intervention of the defendant's officers.

On the 26th March, the plaintiff, having heard of the issue of the warrant, went to the Magistrate at the Girgaum Police Court to surrender to the warrant, in order to avoid arrest. According to the plaintiff's account the Magistrate referred him to the office, and there he was informed that the warrant was with the Municipality, and thereupon he went away and did nothing more. According to the evidence of Sitárám Dhákji, the judicial clerk, the Magistrate would have sent him into the office to see if a warrant had really been issued against him, and if so, he would have been referred to the officer in whose charge the warrant was. I think the latter account is more probable. Now, this does not seem to me to be a right mode of procedure. When the defendant surrenders to a warrant, it is the duty of the Magistrate to keep him in custody to answer the charge, or to hold him to bail, not to let him go again by sending him to search, perhaps all over Bombay, for the officer in charge of the warrant, and then be

arrested and brought in custody to the Court—the thing he wished to avoid. I do not suppose that the Magistrate would thus act if the charge were a serious one under the Penal Code, and this practice is probably only in regard to municipal warrants which do not seem to be of much account. But proceedings under any warrant should be conducted on the same principles whatever the offence charged against the accused, and if he surrenders before he is arrested, due provision ought to be made at once for his appearance at the proper time. The defendant is not responsible for the action of the Magistrate, and I think that the plaintiff has in part himself to thank for what happened afterwards, for any sensible man would have notified what he had done to the municipal officer and to the police superintendent in charge of the warrant, though, of course, he was not bound to do so.

The next day of hearing was on the 7th April, and for appearance on that day the plaintiff would have, under the order on the warrant to have given bail if he had been theretofore arrested; but on that day the matter was postponed till the 21st, when the plaintiff appeared, the warrant not having been executed. By the appearance of the plaintiff on that day without having been arrested, in my opinion the force of this warrant was spent, and he ought not to have been subsequently arrested for his default in appearance on the 24th March. If it was desired to arrest him afterwards it could only be as the result of subsequent non-appearance and on a fresh warrant. Mr. James, who was in charge of the case, knew from a memorandum on Exhibit No. 1 that the warrant had not been executed, and in my opinion, he ought to have brought to the notice of the Magistrate that a warrant was out against the plaintiff and asked him to recall it and to have seen that the proper steps were taken for that purpose; for section 75 of the Criminal Procedure Code (X of 1882) provides that every warrant shall remain in force until it is cancelled by the Court which issued it or is executed. Mr. James in his report to the defendant says that if the plaintiff had communicated with the Drainage Department after the 26th March, when he surrendered to the warrant, it would have been withdrawn as a matter of course. If so, I cannot understand why it was not withdrawn on the 21st April when the plaintiff appeared in Court.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

I consider Mr. James' omission to withdraw the warrant on the 21st April a grave neglect of duty, probably arising from a want of knowledge of what the real meaning and end of the issue of such a warrant was; but as he was the officer in charge of these prosecutions it was his duty to have had the requisite knowledge. If the warrant had then been withdrawn, the necessity for this suit would never have arisen. Of course, the plaintiff knew the warrant was out against him, and might himself have asked to have it withdrawn, but an accused person may not know of the issue of a warrant, and consequently if the prosecuting officer does not do his duty, he would be helpless, and might be improperly arrested without opportunity of preventing it.

On the 28th April the plaintiff again attended at the Police Court, and the matter seems to have been adjourned. Then there seems to have been another hearing fixed for the 19th May, but of what happened then we have no account, though the municipal officers do not complain of the plaintiff not having been present then, and the case was adjourned till the 2nd June, at which time it would appear that the work which had to be done by the plaintiff was not completed to the satisfaction of the municipal officers, but the work seems to have been done all but some small matter which was considered necessary to complete it. On the 31st May the plaintiff was arrested. As to the reason why, no explanation was given; and whether the officer in charge of the warrant suddenly woke up to the consciousness of its being in his possession and got a municipal servant to point the plaintiff out, or whether one of Mr. James' subordinates thought the execution of the warrant would hasten the operations at the plaintiff's place, and so suggested that it should be executed, is left entirely to conjecture. If the latter were shown to be the case, that would be evidence of malice, for the use of a warrant or any other process for the arrest of a person for any indirect object is evidence of malice—*Melia* v. *Neute*[1]; *Tebbutt* v. *Holt*[2]. All we know is that Mr. James says it was not executed by his orders, and from the evidence of the plaintiff that Hormasji Cursetji, a municipal inspector, who has not been called, accompanied by a police sepoy, went to the plaintiff's house about 8 A.M.

(1) 3 F. & F., 757. (2) 1 C. and K., 280.

on the 31st May, and pointed the plaintiff out to the sepoy, who arrested him, the warrant seems then to have been in the possession of Hormasji. It also appears that when a police sepoy wants to have any one pointed out to him for the execution of a warrant, he goes to the Ward Office, and some one from the office is sent with him for that purpose. There certainly was a want of reasonable and probable cause for the execution of this warrant at the time it was executed; but the question is, whether the defendant is responsible for its execution? We have these facts proved—that Mr. James, the responsible officer in charge of the case against the plaintiff, did not take steps to have it recalled at a time when, in my opinion, he ought to have done so; he also took no steps to inform his office that it was not to be executed, in consequence of which one of his subordinates who, I think, was authorised to do so, pointed out the plaintiff to the police sepoy who arrested him. I do not think that the plaintiff could under the circumstances have brought responsibility home to the defendant by more direct evidence; while, on the other hand, it was open to the defendant to call the whole of the office responsible for this matter and show that the arrest was put in train in a way which did not render him liable for it. For instance, it might have been shown by Hormasji (if such was the case) that the police sepoy came to him of his own motion, and asked him to point out the plaintiff, and that, knowing the plaintiff, he did so as a matter of course; but not even Hormasji was called, though named by the plaintiff in his evidence, and in his letter of 4th June, 1892, (Exhibit J) when he asked for an explanation from the defendant as to why he had been arrested. I think, therefore, that the defendant not having shown that this warrant was executed without the knowledge of any of the officers under him must be held responsible for its execution without reasonable and probable cause.

It still remains to determine whether it was also caused to be executed maliciously; for although malice may be presumed from want of reasonable and probable cause, it is not necessarily so to be presumed—*Mitchell* v. *Jenkins* [1]. Malice is not merely a wrongful act done without just cause or excuse, but "a wrongful

(1) 5 B. and Ad. 588.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

act done *intentionally* without just cause or excuse"—*Johnson* v. *Emerson* [1]. On the other hand, if what was done was a pure mistake on the part of those for whom the defendant is responsible, that would be no malice. See the summing up of Alderson, B., in *Heath* v. *Heape*[2], which was approved of by the Court in Banco; so, too, if the execution of the warrant was through carelessnes—*Spencer* v. *Jacob*[3]. There is, as I have said, no evidence to show that the arrest was through mistake or carelessness; consequently it is necessary to consider what is the effect of the omission of Mr. James to see on the 21st April that the warrant was withdrawn. The case of *Tebbut* v. *Holt*[4] seems to me to be in point. There the defendant, as the attorney of one Eales, who had recovered judgment against the plaintiff, and one Frazer and a third person sued out two warrants of *Ca Sa*, one into London and the other into Surrey. On the former, Frazer was arrested, but was subsequently released by the defendant on his giving a promissory note signed by himself and another for the amount of the debt, and thereby the judgment was satisfied. A few days after the promissory note was given, the plaintiff was arrested in Surrey; and for this arrest he brought the suit. In summing up to the jury, Parke, B., made the following remarks:—"It appears here that the defendant, on the 9th September, took the promissory note of Frazer and another person, payable four months after date, for the amount of debt and costs. This note was a payment of the debt and costs, and was, in point of law, a satisfaction of the judgment as to all the three original defendants. And *primâ facie*, it is to be considered the duty of Mr. Holt, the present defendant, to have given some directions to the Sheriff of Surrey not to proceed further against the present plaintiff on the writ which was in his hands; and it has been held that an omission by an attorney to do so is *primâ facie* evidence of malice. But you must not find for the plaintiff unless you are satisfied that the defendant was actuated by what in law is termed malice. . . . Still by this *primâ facie* evidence of malice, Mr. Holt is called upon to give some explanation, but he does not appear to give any that is very satisfactory. . . . If the defendant has not satisfac-

(1) L. R., 6 Ex., 373.
(2) 1 H. and N., at p. 479.
(3) 1 Mood and M., 190.
(4) 1 C. and K., 280.

torily explained the matter to you, by showing you some good reason, why he did not countermand this writ, I think you ought to find for the plaintiff."

Now that case seems to me to be on all fours with the present. I have held that it was the duty of Mr. James to have withdrawn the warrant against the plaintiff on the 21st April at the latest, but he did not do so, and the consequence was that the plaintiff was wrongfully arrested. The defendant has given no evidence to show why that warrant was not withdrawn or why no notice was given to the office not to point out the plaintiff, and I consider that I as a jury am thereupon entitled to find that there was malice in law.

There is, however, another fact which I discovered on an examination of the warrant itself. The warrant was on the face of it intended to have been executed before the 7th April, for in the direction at the foot as to taking bail, it is stated that the bail to be taken was for the plaintiff's attendance on the 7th April. The words and figures "7th April" have been run through with a pen, and over them "2nd June" has been written. The words "on the 7th April, 1892," seem to have been inserted at the time the warrant was originally issued, and appear to be in the same handwriting as the rest of the writing in the warrant. The words "2nd June" are in a different handwriting and are not verified by the initials or signature of the Magistrate, and as no mention is made in the record of the case as to any renewal of the warrant, I must come to the conclusion that the Magistrate did not authorize the alteration. The hearing before the 2nd June was on the 19th May, and there was no evidence given that the defendant was in default through non-authorized non-appearance on that day; consequently there would have been no ground on that day on which the Magistrate could have issued a fresh warrant or authorized the alteration of the return day of the old one. The date in the warrant must have been altered on or after the 19th May, because it would be on that day that the hearing for the 2nd June would be fixed. The police authorities could not have altered it on their own motion, because they are not in charge of municipal cases and, therefore, would not, except by the merest accident, know to what day the

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

hearing of a particular case was adjourned. Consequently, if the police altered it, it must have been from information given them by some one connected with the Municipality; but I do not think the police would thus tamper with a warrant, for such an action is a very serious one, and to my mind comes somewhat near to forgery. I must, therefore, come to the conclusion that it was altered by some one connected with the Drainage Department, and if I were sitting on a jury I should feel myself justified, legally and morally, in coming to the conclusion that the officers of the department having got tired of the plaintiff's dilatoriness thought it advisable to put pressure on him by causing him to be arrested, and some one, in order to enable the warrant to be executed and bail to be given for the next day of hearing, altered the 7th April into the 2nd June. The want of any explanation as to why the warrant was executed is, as I have shown, sufficient to enable me to find malice, and this episode of the alteration of the date on the warrant shows a probable reason (I do not say known to the defendant or his solicitors) why no explanation on that point was forthcoming.

I must, therefore, find that the warrant was on the 31st May executed maliciously and without reasonable and probable cause under circumstances which render the defendant liable to the plaintiff in this action. If the inference drawn by me as to the reason of the execution of the warrant was proved by direct evidence, I should give the plaintiff very much heavier damages than I am going to award him, for it is intolerable that process restraining the liberty of the subject should be used for any other purpose than that for which it is directly intended, and where restraining process has been used for indirect objects very exemplary damages should be given. Under all the circumstances of the case I pass a decree for the plaintiff for Rs. 500 and costs.

The defendant appealed.

Macpherson and *Scott* for the appellant (defendant):—From the evidence it appears that the plaintiff's arrest was effected with the assistance of one of the municipal servants who pointed him out to the police. That was not within the scope of his employment, and the defendant is, therefore, not liable for

the arrest. The plaintiff must show malice: Pollock on Torts (3rd Ed.), p. 204; Addison on Torts (6th Ed.), 148; *Hope* v. *Evered*[1]. The defendant had nothing to do with the issue of the warrant of arrest. It was issued because the plaintiff did not appear upon the summons. They cited *Bank of New South Wales* v. *Owston*[2]; *Heath* v. *Heape*[3]; *Tebbut* v. *Holt*[4].

Russell (with *Lang*, Advocate General) for the respondent (plaintiff):—They cited *West* v. *Smallwood*[5]; *Kelly* v. *Mid. G. W. Rail. Co.*[6]; *Heaven* v. *Pender*[7]; *Johnson* v. *Emerson*[8]; *Mitchell* v. *Jenkins*[9].

SARGENT, C. J.:—This is an appeal from the decree of the Divisional Court awarding to the plaintiff Rs. 500 as damages for the improper issue of a warrant on the 24th March, 1892, and for the improper arrest of the plaintiff under that warrant on the 31st May, 1892.

The main facts of the case are not disputed. After a protracted correspondence between the Health Department of the Municipality and the plaintiff with respect to the state of his drains, a notice was served on the plaintiff on 21st December, 1891, under section 232 of Bombay Act III of 1888 requesting him to do certain work. That work not having been done, a summons was issued against him on the 11th February, 1892, for not having complied with the notice and requiring him to attend at the Girgaum Police Court on the 25th February. The plaintiff appeared on that day and the hearing was adjourned to the 10th and then to the 24th March, when plaintiff failed to appear, and the Magistrate then issued the warrant for his arrest, of which the plaintiff complains.

It was scarcely contended that the Health Department was not justified in taking out the summons; but it was said that there was no necessity for going on with it after the plaintiff's letter of 27th February. But that letter was not a compliance with the notice, but an argumentative letter in which the plaintiff left the

(1) 17 Q. B. D., 338.
(2) 4 Ap. Ca., 270.
(3) 1 H. and N., 478.
(4) 1 C. and K., 280, at p. 288.
(5) 3 M. and W., 418.
(6) Ir. Rep. 7 C. L., 3.
(7) 11 Q. B. D., 503.
(8) L. R., 6 Ex., 373.
(9) 5 B. and Ad., 588.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

work to be carried out by the Drainage Department at his expense, which the Municipality were not forced to accede to. It was urged, however, that the letter of 23rd March, written by the Municipal Commissioner in answer to plaintiff's letter of 27th February, was the cause of plaintiff's absence on 24th March. That letter no doubt speaks of "a fresh summons" having been issued against the plaintiff for not complying with the notice served on him; but as it was in answer to his letter of the 27th February complaining of a summons being issued, the plaintiff could scarcely have thought that it referred to any other than that summons, although it is termed a "fresh" summons. But in any case we entirely agree with the Divisional Court that having regard to plaintiff's statement in his letter of 22nd March to the Acting Executive Engineer "that he did not see any reason now to attend in the Police Court on 24th instant as he was ready and willing to do the work" it was not the letter of the 23rd March (assuming it to have been received on the forenoon of the 24th March) which determined the plaintiff's non-attendance at the Court. Lastly, there is no reason to doubt that Mr. James, the Drainage Engineer, who attended in Court on 24th March with reference to this summons, had no knowledge of its having been written, or that the use of the word "fresh" was other than a pure mistake.

With reference to the issuing of the warrant, the evidence of Mr. James as to what took place on the 24th March before the Magistrate read in conjunction with the statement of Sitárám Dhákji Wasliker, senior judicial clerk to the Magistrate, can leave no doubt that the warrant was not applied for by Mr. James, or any other official of the Municipality, but was issued by the Magistrate of his own accord for non-appearance, and after making the usual preliminary enquiry as to service of the summons and as to whether the work had been executed. It may be that the warrant so issued was technically invalid, as the Divisional Court pointed out, for not stating that it was on account of plaintiff's non-appearance on the 24th March that it was issued. But it was in the usual form according to the evidence of the senior judicial clerk, and in any case whatever defect there might be on the face of it, it was issued by the Magistrate of his own accord,

and the defendant would not be held responsible for its defects (*Hope* v. *Evered*[1].)

It was contended for the plaintiff that it was really issued for non-obedience of the notice and that, therefore, the Magistrate had no authority to issue it; but there is no evidence whatever to support such a view of what took place before the Magistrate; and even if there were, the defendant would not be liable for what was done by the Magistrate. It will be sufficient to refer to the remarks of the Judges in *West* v. *Smallwood*[2], where the Magistrate had issued a warrant without legal authority.

I now pass to the important questions in the case which arise out of the execution of the warrant by the arrest of the plaintiff on the 31st May, 1892. It appears that on the 26th March the plaintiff having heard of the warrant surrendered to it by presenting himself before the Magistrate, who told him to appear on the 7th April; that he did not, however, appear on that day, as Mr. Bragg, of the Drainage Department, told him that the hearing of the summons had been postponed to the 21st April. On the 21st April the plaintiff appeared in the Court, but found that the hearing had been adjourned to the 28th April. He appeared on the 28th when Mr. Bragg gave him to understand, as the plaintiff says, that the matter had been settled. From that time till the morning of the 31st May, when he was arrested, plaintiff says he heard nothing about it; but on being placed before the Magistrate he was released on depositing Rs. 25 as security for his appearance whenever required. On the 2nd June the case came on again before the Magistrate, both the plaintiff and Mr. James being present, when the hearing was postponed to the 16th June, on which day the work having been completed, the summons was withdrawn by the municipal authorities.

The history of this case, as well as the Magistrate's record of the case, shows, as the Judge of the Division Court points out, that warrants of arrest issued for non-appearance on a certain day are held over by the authorities to be executed at any time during the continuance of the summons proceedings. Whether such a practice is a correct one, it is not necessary to express an opinion, as it is plain, we think, that in the present case after the plaintiff attended before the Magistrate and surrendered to the warrant

(1) 17 Q. B. D., 338. (2) 3 M. and W., 418.

1894.

ACWORTH v. SHÁVAKSHA DHUNJIBHÁI.

he was told to appear on the 7th April. At any rate on 28th April the warrant in question was a spent warrant and could not be properly executed. As it is no part of the defendant's case that it was renewed by the Magistrate, the question, therefore, is whether the defendant is to be held liable for its execution on the 31st May. As the warrant was issued by the Magistrate of his own accord, the case of *West* v. *Smallwood* (1) shows that the defendant would not be liable for its execution unless he or his subordinates took an active part in it. The mere circumstance that the plaintiff was pointed out to the police officer who executed the warrant by Hormasji Cursetji, a municipal inspector, may not of itself, as the Judge seems to have thought, amount to taking an active part. But here there are other special circumstances which must be taken into consideration in conjunction with it. The long time which elapsed before the warrant was executed, and the alteration in the direction as to taking bail at the foot of it from 7th April to 2nd June, not verified by the Magistrate's initials, nor explained by any entry of renewal in the record of the case and which, we agree with the Division Court, could scarcely have been made by the police who knew nothing of what was going on in the summons proceedings, point to the warrant having been, if not in the actual keeping of the municipal authorities, at any rate to its having been under their control and to the police having been set in motion by them.

Under these circumstances it was incumbent, we think, on the defendant to give rebutting evidence and more especially to call Hormasji to explain the circumstances under which he was sent to accompany the police officer, and to deny, if possible, the statement of the plaintiff that the warrant was in his hand when it was served on the plaintiff. No such evidence has been given, and we feel constrained to come to the conclusion that the municipal authorities did take an active part in the execution of the warrant, and must be held liable for plaintiff's arrest, unless they can give some satisfactory explanation. Their explanation of the arrest is, that it was a mistake on the part of the police. In the view we have taken of the evidence, they have to show that it was a pure mistake on their own part; and we

(1) 3 M. and W., 418.

agree with the Division Court that the municipal authorities cannot be heard to say that their action was due to a mistake, when they must have known that plaintiff had appeared at any rate on the 28th, if not on the 21st April, and must be credited with the knowledge of what would be the effect of such appearance on the issue of the warrant.

It has been, however, contended before us that the defendant, the Municipal Commissioner, is not liable for the action of his subordinates in this matter, and the judgment of the Privy Council in this case of the *Bank of New South Wales* v. *Owston*(1) was relied on. Sir Montague Smith, who delivered the judgment of the Council in that case, states the result of the authorities to be that the authority of a special agent to arrest may be implied when the duties which the officer had to discharge could not be efficiently performed unless he had such power. Looking at the nature of the business which Mr. James' Department was entrusted with, it is plain it would be practically impossible to enforce the provisions of section 232 of the Municipal Act if one of the most ordinary steps in the proceedings against an offender before the Magistrate, *viz.*, the enforcing attendance by summons of arrest, required the express authority of the Commissioner.

For these reasons we are of opinion that the decree of the Division Court must be confirmed with costs.

Attorneys for the appellant (defendant No. 1):—Messrs. *Crawford, Burder and Company.*

Attorneys for the defendant (plaintiff):—Messrs. *Tyabji, Dáyábhái and Company.*

(1) 4 Ap. Ca, 270.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

LA'LJI SHA'MJI AND OTHERS (PLAINTIFFS), *v.* WA'LJI WARDHMA'N AND OTHERS (DEFENDANTS).*

1895.
Feb. 12, 18
19, 21.

Caste—Caste question—Regulation II of 1827, *Sec.* 21—*Jurisdiction of civil Court—Majority of caste, right of.*

The plaintiffs and defendants were members of the Kutchi Dossa Oswál caste of Hindus residing in Bombay. The plaintiffs alleged that by a resolution of the caste

* Suit No, 390 of 1894.