APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Phillips, Mr. Justice Devadoss, Mr. Justice Venkatasubba Rao, and Mr. Justice Wallace.

GOPAL NAIDU AND ANOTHER (ACCUSED 1 AND 2), PETITIONERS,

1922, December 22.

v.

KING-EMPEROR (RESPONDENT).*

Indian Penal Code (XLV of 1860), ss. 342, 96 to 105 and 81—Wrongful confinement—Drunken person—Arrest and confinement by police officer, without warrant—Police officer charged with offence under sec. 342, Indian Penal Code—Private defence or justification—Rules of English Common Law, whether applicable to Criminal Law of India—Effect of codification—Right of private defence or justification laid down in Indian Penal Code only, applicable—Criminal Procedure Code (V of 1898), sec. 57—Madras Police Act (XXIV of 1859), sec. 21—Duties and powers of police officers.

The purpose of a codified statute is that, on any point specifically dealt with by it, the law shall be ascertained by interpreting the language used.

The Criminal Law of India has been codified in the Indian Penal Code and the Criminal Procedure Code; the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the Common Law of England in such matters at all.

Where a village magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, he is not guilty of an offence, not by virtue of the rule of English Common Law, but by reason of the provisions of section 81 or sections 96 to 105 of the Indian Penal Code.

The case in *In re Ramaswami Ayyar*, (1921) I.L.R., 44 Mad., 913, is rightly decided, not on the grounds of the

* Criminal Revision Petition No. 336 of 1922 and Criminal Revision Case No. 387 of 1922.

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English Common Law on which the decision is based, but on the provisions of the Indian Penal Code relating to private defence.

Where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property.

Held, that the arrest having been made by the police officers without warrant, for a non-cognizable offence, their action was *primâ facie* an offence under section 342 of the Indian Penal Code, unless it was justified under the provisions of the Code relating to the right of private defence or under section 81 of the same Code.

PETITION under sections 435 and 439 of the Code (V of 1898) praying the High Court to revise the judgment of the Sessions Judge of the North Arcot Division at Vellore in Criminal Appeal No. 1 of 1922 preferred against the judgment of M. SUNDARA RAJAN, the Sub-divisional Magistrate of Tiruvannāmalai, in Calendar Case No. 62 of 1921.

The petitioners were convicted by the Sub-Divisional Magistrate of the offence of wrongful confinement under section 342 of the Indian Penal Code and sentenced to pay a fine of Rs. 51 each. The petitioners were head constables, who, along with another accused, who was a Sub-Inspector, were accused of having wrongfully arrested without warrant the complainant, and confined him in the police station for a short time until he was released on furnishing security. The lower Courts found that the two petitioners arrested the complainant on the night of 8th August 1921, as he was drunk and creating a disturbance in the Brahman street of the village, and that they took him to the police station and confined him there, although one of them knew his name and address. On appeal by the accused, the Sessions Judge confirmed their conviction under section 342, Indian

Penal Code, but reduced the fine to rupees ten on each of the accused. It appeared that the complainant was charged with committing the offence of public nuisance under section 290, Indian Penal Code, and was convicted and fined rupees ten. It also appeared that one of the head constables knew the name and residence of the complainant before he was arrested without warrant. The learned Sessions Judge held that, the offence of public nuisance under section 290, Indian Penal Code, being a non-cognizable offence, the arrest without warrant was under the circumstances not justified under section 57, Criminal Procedure Code, that the petitioners were therefore guilty of "wrongful confinement" under section 342, Indian Penal Code; the learned Judge also held that section 21 of the Madras Police Act (XXIV of 1859) did not empower the police officers to act as they did. Against the order of the Sessions Judge, the two police officers preferred this Criminal Revision Petition. The case came on for hearing originally before OLDFIELD and RAMESAM, JJ., who made the following:

ORDER OF REFERENCE TO A FULL BENCH.

We are asked to revise the decision of the Sessions Judge of North Arcot, confirming the conviction of the two petitioners, Head Constables, of an offence punishable under section 342 and their sentences to pay a fine of Rs. 10 each. The findings of the lower Court are, we take it, that on the night of 8th August 1921 the two petitioners arrested one Nayinatha Udayan, as he was drunk and creating a disturbance in the Brahman street of the village, and that they took him to the station and confined him there, although one of them, it is found, knew his name and address. On those findings the learned Sessions Judge held that Nayinatha Udayan, having committed a non-cognizable offence, could not be arrested or taken to the station, inasmuch as there was no necessity for the Head Constables under section 57, Criminal Procedure Code, to do so in order that his name or residence might be ascertained.

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Here the petition has been argued first with reference to section 21 of the Madras Police Act XXIV of 1859, the contention being that this section removes any restriction on the power of arrest imposed by any other law, including the Criminal Procedure Code. Section 21 no doubt states that "it shall be the duty of every Police Officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances, to preserve the peace, to apprehend disorderly and suspicious characters;" and then further duties are described with a similar absence of precision. This section, as we understand it, expresses only some of the pious injunctions, to which our earlier Indian draftsmen were addicted, and was not intended to enlarge the powers, with which the police were at its date or have since been invested under the substantive law, whatever that law at the time in question may have been or may be. We cannot presume an intention to limit the liberty of the subject by language so general. We therefore turn to the second argument relied on by Mr. Jayarama Ayyar on behalf of the petitioners, that in fact what they did was authorized by the substantive law, as declared by judicial authority in this Presidency.

Shortly petitioners rely on the decision in *In re Ramaswami Ayyar*(1), as justifying their action. That decision we read as founded on three propositions. First that the Common Law of England would authorize an arrest, not only by the Police or a magistrate, but by any person, in the circumstances of the present case; next, that the Common Law of England is applicable to India, except where a statute either expressly or by implication has abrogated it; and thirdly, that the Common Law has not been abrogated in any way, so far as it is applicable to the facts before us.

The first of these propositions has not been disputed here; and we observe only that the Common Law power to terminate a nuisance, such as is here in question, by the arrest of the offender, is an effective and immediate remedy adapted to the circumstances of such cases. The second rests in this Presidency on the authority of *In re Venkata Reddy*(2). The learned Public Prosecutor has drawn our attention to *Satish Chandra Chakravarti* v. *Ram Dayal De*(3), and it is possible that reconsideration

(1) (1921) I.L.R., 44 Mad., 913. (2) (1913) I.L.R., 36 Mad., 216.
(3) (1921) I.L.R., 48 Calc., 388.

of the principle involved in the light of the latter decision may be justified. We do not however pursue this further, since we are clear that in connexion with the third of the propositions above stated a reference to a Full Bench must be made.

To the third proposition the learned Public Prosecutor has taken objection on the ground that certain provisions of statute law were not considered by the learned Judges in the previous case. The offence in question then, as now, was one punishable under section 290 or section 510, Indian Penal Code, Nayinatha Udayan having in fact been convicted of an offence punishable under the former. Which section however was really applicable does not matter, because the offence under each is one, for which the police cannot arrest without warrant; that is, it was non-cognizable. There is then the provision regarding arrest in non-cognizable offences, section 57, Criminal Procedure Code; and whatever the inconvenience involved, we cannot disregard the existence of this apparently exhaustive provision regarding the powers of the police in them. There is no mention of these provisions in *In re Ramaswami Ayyar*(1) and no consideration of the extent to which they abrogate the right of arrest under the English Common Law. In the absence of such mention we entertain doubt as to the correctness of the learned Judges' conclusion; and we accordingly refer to a Full Bench the question whether *In re Ramaswami Ayyar*(1) was correctly decided.

ON THIS REFERENCE

K. S. Jayarama Ayyar for petitioners.—The question referred to the Full Bench is whether the case of *In re Ramaswami Ayyar*(1), was rightly decided. That raises the question of the applicability of rules of English Common Law in determining the rights of a private citizen to arrest or apprehend others under circumstances in which the complainant was apprehended in the reported case. There are three questions to be answered: (1) What is the Common Law of

(1) (1921) I.L.R., 44 Mad., 913.

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England on the subject? There can be no doubt as to the English Common Law on the subject. The cases have been cited in *In re Ramaswami Ayyar*(1).

The second question is whether the English Common Law is applicable to India. The Privy Council has applied the English Common Law to India in the case of *Ramaloll Thackoorseydos* v. *Soojumull Dhondmull*(2) and in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(3).

This High Court has applied the English Common Law to the Indian Criminal Law of defamation, by holding that the absolute privilege of witnesses, recognized in the Common Law of England applies also to a prosecution of a person for defamation by him in the course of a deposition as a witness. See *In re Venkata Reddy*(4) The English Common Law is applicable as a rule of equity, justice and good conscience. The first introduction of the English Common Law into India was by the Charter of Charles II in 1683.

The provisions of the Criminal Procedure Code relating to arrests with or without warrant by police officers or by private persons are not exhaustive. See sections 54 to 59. Under the Towns Nuisances Act (III of 1889) the offence of nuisance is cognizable; but the Act is not applicable to rural areas and hence the offence is non-cognizable therein. Under section 21 of the Madras Police Act, XXIV of 1859, the police officers have power to prevent crimes, preserve order and peace, etc., and in exercise of such power they are competent to apprehend persons: apprehend means arrest and confine persons. The provisions relating to arrest in the above Act (XXIV of 1859), sections 22 to 25 were repealed by Act (XVII of 1862), as they were

(1) (1921) I.L.R., 44 Mad., 913.
(2) (1848) 6 M.P.C.C., 300.
(3) (1872) 11 Beng. L.R., 321 (P.C.).
(4) (1913) I.L.R., 36 Mad., 216.

provided for in the Criminal Procedure Code, XXV of 1861—vide preamble to the former Act. Sections 1 and 3 of the latter Code say that nothing in the Code affects powers outside the Code. Section 54 of the Criminal Procedure Code does not say that no police officer can arrest without warrant in any case, but only that he can do so in certain cases. Therefore his powers, if otherwise conferred, are not taken away by the Code.

Under section 59 of the Code of Criminal Procedure a private person can arrest any person for a non-bailable cognizable offence, etc. Under the English Common Law, felonies and misdemeanours were apprehensible by private citizens. Section 59 took in only a part of the Common Law relating to felonies, it did not affect the powers in other cases (misdemeanours) in which a private citizen could arrest under the Common Law, which exist outside the section. There is no wrongful restraint or confinement, where the Common Law allows it to be done. See section 97, Indian Penal Code.

Public Prosecutor, J. C. Adam, for the Crown.—Offences under sections 510 and 290, Indian Penal Code, are both non-cognizable offences under the schedule to the Criminal Procedure Code; the police cannot arrest without warrant in those cases under the Indian Law. The rules of English Common Law are not applicable except as rules of justice, equity and good conscience.

The Charter of 1661 was the earliest that made the English Common Law applicable in the Presidency Towns in India. In 1726, the Legislature specifically introduced Common and Statute Law only in Presidency Towns. Before the Indian Penal Code was passed, the Criminal Law in force in the mufassal was the Muhammadan Criminal Law, which was no longer in force after the Indian Penal Code. See Strachey, page 95. Before the Indian Penal Code, there was no Criminal Common Law

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in the mufassal; Muhammadan Criminal Law or any principle of justice was applied. The English Common Law was introduced into the Presidency Towns in 1726 and extended to the mufassal by 39 & 40 Geo. III. There is no record of English Common Law (Criminal) being applied in the mufassal. Blackstone makes a distinction between new Colonies and places where the Colony is in a country already under a system of established law: Blackstone's Commentaries, Vol. I, page 106; Stephen's History of Criminal Law, Vol. III, pages 289 and 292, Chapter "Native Court." It is not correct to say that the English Common Law (Criminal) was ever introduced into India.

The Indian Penal Code is a complete Code and cannot be augmented. *Satish Chandra Chakravarti* v. *Ram Dayal De*(1) and *Bank of England* v. *Vagliano Brothers*(2). The decision in *In re Venkata Reddy*(3) is erroneous. It was there held that the English Law of absolute privilege in defamation applies to a criminal charge of defamation, as it is not specifically dealt with in the Indian Penal Code. Defamation is exhaustively dealt with in section 499, Indian Penal Code. Here also the Criminal Procedure Code deals with arrest and the English Common Law does not apply. The defences open are laid down in Chapter IV (General Exceptions) of the Indian Penal Code, which is an exhaustive Code on the subject.

K. S. Jayarama Ayyar in reply.—The charter establishing Supreme Courts confined Common Law to Presidency Towns. Mufassal Courts are governed as to application of the Common Law by the previous charters. See Pollock's Expansion of Common Law,

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(1) (1921) I.L.R., 48 Calc., 388. (2) [1891] A.C., 107.
(3) (1913) I.L.R., 36 Mad., 216.

page 132. The second schedule to the Criminal Procedure Code only applies to police officers arresting persons and not to rights and powers of private citizens.

OPINION.

SCHWABE, C.J.

SCHWABE, C.J.—The question referred to the Full Bench is whether *In re Ramaswami Ayyar*(1) was correctly decided.

This is not a desirable form of reference to a Full Bench, because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full Bench is desired should be formulated. In *In re Ramaswami Ayyar*(1), a Village Magistrate arrested a drunken man whose conduct was at the time a grave danger to the public. In this case two police constables arrested a man who was drunk and creating disturbance, but to what extent he was a danger to others does not appear in the order of reference. The decision in *In re Ramaswami Ayyar*(1) went on the ground that the English Common Law which is "that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct showed that the public peace is likely to be endangered by his acts," as per Parke, B. in *Timothy* v. *Simpson*(2), applies to India and affords a good answer to any person charged for wrongful confinement under section 342 of the Indian Penal Code, if the facts of the case comply with that definition.

The first introduction of English Common Law in this country was in a Charter of Charles II in 1661 whereby it was ordained that the law of the Kingdom, which would include the Common Law, should be administered in this country. In later charters and

(1) (1921) I.L.R., 44 Mad., 913. (2) (1835) 4 L.J. Ex., 81.

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enactments it has been provided that the Hindu Law is to be applied between Hindus and the Muhammadan Law between Muhammadans, and in cases not otherwise provided for the principles of equity, justice and good conscience; and these latter words have been held to include material parts of the English Common Law. But for the purpose of this case it is not necessary to consider precisely to what extent and with what restrictions the Common Law of England is part of the Law of India.

In this country the Criminal Law has been codified in the Indian Penal Code and in the Code of Criminal Procedure and the principle has been well established, and is fully enunciated in the speech of Lord HALSBURY in the *Bank of England* v. *Vagliano Brothers*(1), that "where a statute is expressly said to codify the law, you are not at liberty to go outside the Code so created, because before the existence of that Code another law prevailed." This perhaps should be limited by the speech of Lord HERSCHELL (at page 145) to the effect that the purpose of the codified statute is that on any point specifically dealt with by it the law shall be ascertained by interpreting the language used.

Now there can be no doubt that the Code of Criminal Procedure deals with the powers of arrest with or without warrant, and the Indian Penal Code deals specifically with the question of wrongful confinement. It is, however, to be observed that the Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crime, although there are specific instances given permitting the arrest of persons suspected of crime, and it may be correct to say that the Code of Criminal

(1) [1891] A.C., 107.

Procedure does not specifically deal with the matter under discussion here. However this may be, the Indian Penal Code makes "wrongful confinement" an offence by section 342. What amounts to wrongful confinement must be ascertained by examining the definition contained in sections 339 and 340. If the acts complained of come within both definitions the offence has been committed unless there are other sections in the Code which provide an excuse for or a defence to what otherwise would be a crime. The Indian Penal Code defines the offence and also states what matters will afford a defence, and therefore it may be said that this Code deals specifically with the question, and it follows that the Court is not entitled to invoke the Common Law of England in the matter at all. I therefore cannot agree with the grounds of decision in *In re Ramaswami Ayyar*(1), but in my judgment, the decision was perfectly correct and can be supported on other grounds to be found on a proper interpretation of the Code itself.

By section 340 of the Indian Penal Code, whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said to wrongfully confine that person. By section 339, whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person. So the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted, *primâ facie* is wrongful confinement of the person; sections 96 and 97 give a right to every person to defend his own body and the body of every other person

(1) (1921) I.L.R., 44 Mad., 913.

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and the property of himself and of every other person against certain offences, and this *right of private defence* commences under sections 102 and 105, when a reasonable apprehension of danger to the person or property commences. In our judgment these provisions are quite wide enough to have afforded a complete defence in the case reported in *In re Ramaswami Ayyar*(1), and in effect provided for this country what is provided in England by the rule of common law referred to. The question in each case must be whether the person arresting or confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Some such provision is a necessity in a civilized community, for otherwise its citizens would be left the alternative of standing by until a crime has been committed or of themselves becoming criminals by taking what might be the only course to prevent the commission of a crime, namely the confinement of the person whose actions show that the persons and property of others are endangered. In my judgment the Indian Penal Code adequately provides the solution of the difficulty.

Reliance has been placed on section 21 of the Madras City Police Act XXIV of 1859, which provided that it shall be the duty of every Police Officer to use his best endeavour to prevent all crimes and offences and public nuisances, to preserve the peace, and to apprehend disorderly and suspicious characters. This was followed by many sections providing when a Police Officer could or could not arrest with or without warrant, but on the coming into force of the first Code of Criminal Procedure these sections were repealed, but section 21 was left unrepealed. This no doubt was done deliberately, and

(1) (1921) I.L.R., 44 Mad., 913.

it states the duties of the police in the matter of prevention of crime, leaving the matter of the arrest of persons for crimes that have been committed or are suspected to have been committed to be dealt with in future under the Code of Criminal Procedure. It is not necessary to consider in this case whether this section gives to the police wider powers in cases such as the one in question than are enjoyed by all citizens; but it is to be observed that it would be remarkable if Police Officers were by statute enjoined to preserve the peace, and a genuine attempt to do so under circumstances like the present would amount to the commission of a criminal offence by the police. It is not, however, necessary to consider this point further as it has not been specifically referred to us, but it must not be taken that I am expressing my view of the correctness or otherwise of the decision of the Referring Bench on this point.

The answer to the question referred to us is that the case in *In re Ramaswami Ayyar*(1), is rightly decided on the ground stated above. It will be for the Referring Bench to consider on the facts of this case whether the accused had a genuine and reasonable apprehension that unless the prosecutor was arrested there would be damage to the person or property of others.

Having had the opportunity of reading the judgments of my learned brothers I would add that it will be also open to the Referring Bench to consider the applicability of section 81 of the Indian Penal Code.

PHILLIPS, J.—I agree and would only add that in the present case and in similar cases the provision in section 81 of the Indian Penal Code, may also be considered. That section lays down that nothing is an offence merely by reason of its being done with the knowledge

(1) (1921) I.L.R., 44 Mad., 913.

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that it is likely to cause harm, if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property. While I am not prepared to say that this provision is strictly applicable to the facts of the case referred, it appears to me that it and other provisions of chapter IV of the Penal Code have been framed to provide for cases like the present one, to which before the enactment of the Code, the common law would have applied.

DEVADOSS, J.

DEVADOSS, J.—The question referred to the Full Bench is whether *In re Ramaswami Ayyar*(1), was correctly decided. In that case a Village Magistrate was convicted under section 341, Indian Penal Code. AYLING and COUTTS TROTTER, JJ., held that the Common Law of England was applicable to this country and that on the facts found the petitioner had "ample justification, not as Village Magistrate, but as a private citizen to put a restraint upon the complainant who was drunk and disorderly and threatened to commit breach of the peace and was a danger to the other villagers." In the case under reference the petitioners who are police constables have been convicted under section 342, Indian Penal Code, for wrongfully confining the complainant and sentenced to pay a fine of Rs. 10 each.

Two questions arise for consideration :—

1. Whether the Common Law of England is applicable to India except where a statute either expressly or by implication has abrogated it ?

2. Granting that the Common Law of England is applicable to India, whether the statute law has not abrogated it so far as it is applicable to this case ?

As regards the first point Mr. Jayarama Ayyar for the petitioners contends that the Common Law of England

(1) (1921) I.L.R., 44 Mad., 913.

is applicable to India and relies upon *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(1) and *Ramloll Thackoorseydas* v. *Soojunmull Dhondmull*(2). In the latter case an action was brought in the Supreme Court of Bombay on a wager. Lord CAMPBELL, in delivering the judgment of their Lordships of the Privy Council, observed at page 310 "The Statute, 8 and 9 Vict., Ch. 109, does not extend to India, and although both parties on the record are Hindus, no peculiar Hindu Law is alleged to exist upon the subject; therefore this case must be decided by the Common Law of England" and held that the wager in question was not illegal and could be enforced in a Court of Justice.

In *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(1) the question was whether witnesses could be sued for damages in respect of evidence given by them in a judicial proceeding. Their Lordships of the Privy Council held

"that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

In the former case, their Lordships assumed as a matter of course that the Common Law of England was applicable to contracts in Bombay. According to the charter of the Supreme Court the King's Judges were enjoined to administer the Common Law of England, and it was evidently on that ground the question whether

(1) (1873) 11 Ben. L.R., 321 (P.C.). (2) (1848) 6 M.P.C. C., 300.

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the Common Law of England was applicable or not was not raised in argument in that case. In the latter case their Lordships rest their judgment upon principles of public policy. They do not invoke the aid of the Common Law of England for holding that a witness could not be sued for damages in respect of the evidence given by him.

In re Venkata Reddy(1), a Full Bench of the Madras High Court held that the statement of an accused person in answer to a question by the Court was absolutely privileged under the Common Law of England and could not form the subject of an indictment under section 499, Indian Penal Code, even though false and made without good faith, and that exceptions to section 499, Indian Penal Code, were not exhaustive. This decision has been dissented from by a Full Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De*(2). With the greatest respect to the learned Judges who decided *In re Venkata Reddy*(1), I share with SPENCER, J., the apprehension entertained by him in that case that the cause of justice might suffer by the extension of the principle of absolute privilege to unscrupulous persons who in a petty case might make the most unfounded aspersions on the character of the relations of the complainant and his witnesses.

When the charter was granted to the Madras High Court it was provided by section 30 that to all persons brought for trial before the High Court of Madras either in the exercise of its original jurisdiction or as a Court of Appeal, reference or revision, charged with any offence, the law as contained in the Penal Code or amending Acts of such Code should be applied. Section 112 of the Government of India Act lays down that the High Courts

(1) (1913) I.L.R., 36 Mad., 216. (2) (1921) I.L.R., 48 Calc., 388.

of Calcutta, Madras and Bombay should, in the exercise of their original jurisdiction in the suits against the inhabitants of the three cities, apply the personal law in matters of inheritance, succession and contract where the parties are subject to a personal law. But no distinction is to be made with regard to the administration of the criminal law of the land except so far as that law is laid down in the Acts of the Legislatures. The powers of the Governor-General in Council to make the laws are embodied in section 65 of the Act. Subject to certain restrictions, which it is unnecessary to detail here, the central legislature has power to legislate on all subjects. The Common Law of England has not been made applicable to this country by any Act of Parliament or by any enactment of the Indian Legislature. Our attention has not been drawn to any statute or legislative enactment which makes the Common Law of England the law of the land. The charter of Charles II granted to the East India Company and the later charters enjoin upon the Company and its servants due obedience to the Common and Statute Law of England. It was only towards the close of the 18th century that the Supreme Courts in Madras, Calcutta and Bombay were established where the King's Judges administered the Common Law of England. Outside the jurisdiction of the Supreme Courts, the law of the land with regard to civil matters and the Muhammadan Law as regards offences were administered by the Company's Courts. The Principal Civil Court was called Suddar Adaulat, and the Principal Criminal Court was known as Fowzdari Adaulat. In Madras as well as in other provinces regulations were passed empowering the Courts to deal with Civil and Criminal matters. In Madras, Regulation 2 of 1802 was passed giving jurisdictions to Civil Courts. Then by Regulation 3, Rules of Civil Practice in the Zillah Courts

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were enacted. By Regulation V the Saddar Adaulat or Chief Court of Civil jurisdiction was established. Regulation VI laid down rules for the guidance of Magistrates. By Regulation VIII the Fouzdari Adaulat or Chief Criminal Court was established. From 1802 onwards various regulations were passed with regard to the trial of offenders and the trial of civil suits. By those regulations the Judges of the Zillah Court and the Saddar Adaulat were enjoined to apply the Hindu Law to Hindus and the Muhammadan Law to Muhammadans and "in cases for which no specific rule may exist the Court shall act according to justice, equity and good conscience"—Regulation II of 1802, section 17 and Regulation V of 1802, section 30. This provision was reproduced in the Madras Civil Courts' Act of 1873; and by section 16, clause (*c*) "in cases where no specific rule exists the Court shall act according to justice, equity and good conscience." English Judges who sat in the Company's Courts had cauzees and pandits to advise them on points of Muhammadan Law and Hindu Law. They naturally looked for guidance to the principles of the Common Law of England as they were familiar with that law. As well said by a famous Judge, the Common Law of England is the embodiment of common sense and in most cases the Common Law of England supplied the Judges with rules and precedents which were in accordance with justice, equity and good conscience. In this manner the Common Law of England came to be considered to be the law of the land.

There is no statutory law of torts in this country, and under the customary law of India, suits for damages for civil wrongs were almost unknown. British Courts in India entertain suits for damages for torts and give relief according to the rules of the Common Law of England. The same may be said as regards easements

and specific relief before the passing of the Easements Act and the Specific Relief Act. In enjoining the Judges in India that where there is no rule of law applicable to a particular case, they should act according to justice, equity and good conscience, the legislature left it to them to invoke the aid of the common law wherever possible. By such practice of the Courts a custom has sprung up of looking to the English Common Law for guidance and precedents where there is no customary, Hindu or Muhammadan Law or statute law governing the case. It is unnecessary to pursue the interesting subject further, in view of my opinion on the second question.

The second question is, granting that the Common Law of England is applicable to India, whether the statute law has not abrogated it so far as it is applicable to this case. Section 22 of the Police Act of 1859 empowered Police Officers to arrest without a warrant. But after the passing of the Indian Penal Code in 1860 and the Criminal Procedure Code in 1861 sections 22 to 43 were repealed by Act XVII of 1862. It is contended for the petitioners that section 21 gives power to arrest without a warrant. Section 21 lays down the duties of Police Officers. Among other things it shall be their duty to use their best endeavours to prevent crimes, etc., and to apprehend disorderly and suspicious characters. This section does not empower them to arrest persons without a warrant. The intention of the legislature is made quite clear by the repeal of section 22 which gave power to the police to arrest without a warrant; and the preamble to Act XVII of 1862 puts the matter beyond doubt. Therefore the contention that a Police Officer is entitled to arrest without a warrant by virtue of section 21 is untenable. Under section 44 of the Act penalties are provided for neglect of duty and that section as the Act now stands immediately follows section 21; and it

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can be safely assumed that a Police Officer is enjoined by section 21 to carry out certain duties, and his failure to do so without lawful excuse will subject him to penalties under section 44. We must therefore look for authority to arrest without a warrant elsewhere. The law as to arrest without warrant was first codified in sections 100, 101, 104 and 108 of the Code of Criminal Procedure Act XXV of 1861, and the provisions contained in those sections have been reproduced with slight amendments in sections 54 to 57 of the Criminal Procedure Code of 1898. Under section 54, a Police Officer may arrest without a warrant any person concerned in a cognizable offence, any person having in his possession without lawful excuse house-breaking implements, proclaimed offenders, persons in possession of stolen property, etc. Offences are classified as cognizable and non-cognizable by the Criminal Procedure Code. Cognizable offence is one in which a Police Officer may arrest a person charged or suspected of the offence without a warrant. Under section 55 an officer in charge of a Police Station may arrest (1) any person preparing to commit cognizable offence under certain circumstances, (2) persons without ostensible means of subsistence and (3) habitual offenders. Section 57 gives power to a Police Officer to arrest without warrant when any person in the presence of such Police Officer commits or is accused of committing non-cognizable offence and refuses on demand by a Police Officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false. Such person may be arrested without a warrant in order that his name or residence may be ascertained. The offence of being drunk and disorderly is not a cognizable offence, and a Police Officer cannot arrest the alleged offender without a warrant. He can arrest him only if he refuses

to give his name or residence, or gives a false name or residence. If his name or residence is known to the Police Officer, the law does not empower him to arrest such person without a warrant. In no case other than those provided by sections 54, 55 and 57 can a Police Officer arrest a person without a warrant. The law being jealous of the liberty of the subject has set wholesome bounds to the power of the police to arrest without a warrant. The Criminal Procedure Code being a complete code defining the powers of the police with regard to arrest, it is not open to a Court to travel outside the code for finding powers either for the police or for private persons to interfere with the liberty of the subject. The provisions enacted in 1861 have not been altered though the Criminal Procedure Code has been amended and re-enacted in 1872, 1882 and 1898. In this connexion I may quote the well known observations of Lord HERSCHELL in *Bank of England* v. *Vagliano Brothers*(1). In that case the question was as regards the interpretation to be placed upon section 7, sub-section 3, of the Bills of Exchange Act of 1882. The Court of Appeal relied upon the law as it existed before the Bills of Exchange Act was passed in interpreting the section. Lord HERSCHELL observed:

"I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

(1) [1891] A.C., 107.

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Under certain special and local laws power is given to certain officers to arrest without a warrant for offences under those Acts. Under the Madras Salt Act VIII of 1899, for instance, a Salt Officer may arrest without warrant a person concerned in the manufacture, sale or keeping of such contraband salt or dealing therewith. Under the Madras City Police Act, a Police Officer may arrest without warrant in certain cases.

I may also quote the words of Lord ABINGER in *Henderson* v. *Sherborne*(1).

"The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so."

The liberty of the subject should not be curtailed by importing something which is not warranted by the statute law of the land. At the same time, it is not necessary to invoke the aid of the Common Law of England in order to justify the arrest of a person who is threatening to commit an offence against the person of an individual. The general exceptions contained in Chapter IV of the Indian Penal Code afford ample protection against threatened violence to person or mischief to property.

With due respect I may observe that the learned Judges who decided *In re Ramasami Ayyar*(2), need not have rested their decision on any rule of Common Law, as the village magistrate arrested the complainant to prevent harm to himself and to others, and he was protected by section 81, Indian Penal Code; if a person threatens to commit an assault he can be disarmed and if necessary put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm happening to himself or to another person provided he does that act, *bona fide* and without unnecessary force or violence.

(1) (1837) 2 M.W., 236; 150 E.R., 743. (2) (1921) I.L.R., 44 Mad., 913

Both the Indian Penal Code and the Criminal Procedure Code are complete Codes of laws regulating the right of citizens to personal freedom; and such rights should not be curtailed by judicial decisions unless warranted by statutes. The Common Law of England applicable to a case of arrest without warrant does not apply to India. The case of an alleged illegal arrest or wrongful confinement has to be decided according to the law as contained in the Indian Penal Code and Criminal Procedure Code. My answer to the question referred to us, is, *In re Ramasami Ayyar*(1), was rightly decided, not because the Common Law of England was applicable, but by reason of the act complained of coming within the exceptions contained in Chapter IV of the Indian Penal Code.

VENKATASUBBA RAO, J.—I have come to the same conclusion, and as the question raised is one of great importance, I desire to say a few words.

It has been argued that the Common Law of England may be applied to India in regard to power to arrest and that a Police Officer or a private citizen can exercise the power independent of the provisions of the Criminal Procedure Code and any special or local law which by section 1 of the said Code is expressly declared not to be affected thereby. I am totally unable to accept this argument. The Code sets out in great detail circumstances in which arrests may be made and persons who may exercise the right. Provision is made for arrests not only after the commission of an offence but also with a view to prevent offences being committed and in some instances for securing the preservation of the peace. I may instance section 54, clause (2) which empowers a Police Officer to arrest without warrant any person having in his possession without lawful excuse any implement of house-breaking. Section 55 again authorizes any officer

(1) (1921) I.L.R., 44 Mad, 913.

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in charge of a Police Station to arrest similarly, subject to certain qualifications, a person found taking precautions to conceal his presence with a view to committing an offence or any person who has no ostensible means of subsistence or any person who by repute is a habitual robber or thief. It is thus clear that the Code contains provisions in respect of arrest both for the purpose of preventing crimes and for bringing offenders to book. The subject is exhaustively dealt with, and it is impossible to hold that a power of arrest is possessed apart from and independent of the statute law. This is my view of the law as it stands, and I may add that as the question relates to interference with the liberty of the subject it is far more desirable on grounds of public policy and expediency, that the right should be precisely defined and regulated by the legislature than that it should be left to the magistracy of the country to ascertain the law, in the words of Lord HERSCHELL in *Bank of England* v. *Vagliano Brothers*(1), by roaming over a vast number of authorities, extracting the law by a minute critical examination of previous decisions and probably also, I may add, of the statements to be found in ancient text-books. It has been pointed out to us that the only case which so far has decided that a private citizen possesses a right of arrest apart from the statute law, is *In re Ramasami Ayyar*(2). Speaking for myself I am glad to find that there is so little authority in support of the position that such right exists. In that case the accused removed to the Police Station an individual who was very drunk and bit him in the foot and tore the sacred thread of one of the witnesses. The question arose whether the accused committed an offence of wrongful restraint under section 341 of the Indian Penal Code. The learned Judges, very naturally,

(1) [1891] A.C., 107. (2) (1921) I.L.R., 44 Mad., 913.

considered that it would be unjust to punish a person for doing an act which in the interest of the orderly government of the society and the preservation of the peace should be declared lawful and they justified the act with reference to the power of arrest which every individual as an ordinary member of the general public possesses, under the Common Law of England. But with great respect, it seems to me, that if their attention had been invited to certain sections of the Indian Penal Code, they would probably have rested their judgment upon grounds other than that underlying their decision. Section 81 enacts that nothing is an offence if it be done without criminal intention and in good faith for the purpose of preventing or avoiding other harm to person or property. It was suggested that if a person who is under the influence of drink carries a revolver in his hand and runs amuck there must be the power to arrest him on the part of every citizen as otherwise disastrous results may follow. But this argument ignores that any reasonable act on the part of any citizen interfering with the freedom of the drunken person is amply protected by the aforesaid section and by other sections of the Indian Penal Code. The right of private defence conferred by that Code is quite adequate to meet all reasonable requirements. By section 97 every person is given a right to defend his own body and the body of any other person, his own property as well as the property of other persons. Under sections 100 and 104 the right of private defence may be exercised when there is a reasonable apprehension of danger to life or of grievous hurt to body or of robbery or of house-breaking or commission of other serious offences. Section 100 sets out in very clear terms that the offence which occasions the exercise of the right may be an assault as may reasonably cause the apprehension that death or

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grievous hurt will be the consequence of such assault. Assault is defined by section 351 as consisting of a gesture or preparation that is likely to cause an apprehension that criminal force will be used. Section 103 similarly provides for the exercise of the right of private defence not only when the offences specified therein are committed but also when attempts to commit them are made. In my opinion, therefore, there is no need to have resort in the circumstances such as those that existed in *In re Ramasami Ayyar*(1), to the doctrine of the Common Law that every private individual has a right to arrest. Dealing with the Sale of Goods Act 1893, 56 and 57 Vic., Ch. 71, COZENS HARDY, M.R., in *Bristol Tramways and Carriage Co.* v. *Fiat Motors, Ltd.*(2), observes:—

> "I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins*(3) or *Shepherd* v. *Pybus*(4). The object and intent of the statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods: but in so far as there is an express statutory enactment that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

In an earlier case, *Bank of England* v. *Vagliano Brothers*(5), Lord HERSCHELL remarks:—

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."

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(1) (1921) I.L.R., 44 Mad., 913. (2) [1910] L.J., 79; K.B., 1107.
(3) (1838) 4 M. & W., 399; 150 E.R., 1484.
(4) (1842) 3 Man. & G., 868; 133 E.R., 1390. (5) [1891] A.C., 107 at p. 144.

I think that every word in the observations of these eminent Judges applies with great force to the subject on hand.

The learned referring Judges conclude their Order of Reference with these words:

"And we accordingly refer to a Full Bench the question whether *In re Ramasami Ayyar*(1), was correctly decided."

My answer is that the grounds of the decision are wrong though the decision itself is correct.

WALLACE, J.—I agree with the judgment of the learned Chief Justice and would also, with my learned brothers, call in aid section 81 of the Indian Penal Code.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

KELU ACHAN (FIFTEENTH DEFENDANT), APPELLANT,

1923, January, 30.

v.

CHERIYA PARVATHI NETHIAR AND OTHERS (THIRD PLAINTIFF AND OTHERS), RESPONDENTS.*

Suits Valuation Act (VII of 1887), ss. 8 and 11—Under-valuation of suit—Suit instituted in a District Munsif's Court—Real valuation more than Rs. 5,000—Appeal to District Court—Objection taken both before District Munsif's Court and District Court—Finding by latter Court that there was no undervaluation and also that there was no prejudice on the merits—Second appeal to the High Court—Mere deprivation of right of first appeal on facts, whether a prejudice—Procedure in appeal whether proper test of prejudice.

Where by reason of an undervaluation of the suit, it was instituted in a District Munsif's Court and not in a Sub-Court, though the real valuation was more than Rs. 5,000 and a party

(1) (1921) I.L.R., 44 Mad., 913.

* Second Appeal No. 286 of 1920.