

(1) Number of pages 48
(2) Date of repair 28.3.88
(3) Initials of the Referencer

29/3

TAMIL NADU ARCHIVES

GOVERNMENT OF TAMIL NADU

Judicial

DEPARTMENT

G.O. No.	2490-2491	Press:
B.P. No:		Mis:
Dated	10. 12 - 1878	198-

Not to be folded or roughly handled

TAMIL NADU ARCHIVES

GOVERNMENT OF TAMIL NADU

DEPARTMENT

22979 M17	1017 5.2
391	1017 5.2

belonging to the Government of India

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

10th December 1878; No. 2490.

Bills—Legislative.

Read the following paper:—

No. 48. From G. MUTUSAMI CHETTY, Esq., Acting Presidency Magistrate, (Town Police), to the Acting Chief Secretary to Government, dated Madras, 29th November 1878, No. 142.

I have the honor, in reply to G.O., dated 7th August 1878, No. 1586, to submit the following remarks on the Bill to amend the Code of Civil Procedure.

2. Section 43, paragraph 2.—Under Mortgage Bonds for money secured on immovable property, a mortgagee has two remedies, viz., one against the person of the debtor, and the other against the mortgaged property. Where the debt does not exceed 500 Rupees, the remedy against the person is generally sought in a Court of Small Causes, which has no power to hear claims relating to immovable property, and is therefore incompetent to grant the leave required by this section for omitting to sue for the remedy against the property. The operation of this section will, therefore, have the effect of either preventing mortgagees from seeking the former remedy in a Court of Small Causes, or of depriving them of the right of seeking the remedy against the mortgaged property in a Court competent to grant it, should they prefer to sue for the remedy against the debtor's person in a Court of Small Causes. This will cause some hardship, which it will be desirable to remove.

3. Section 53, paragraph C.—For the word "subscribed" the word "signed" should be substituted as is done in Sections 51, 393, &c.

4. Section 588.—Much doubt is felt as to the orders against which two appeals are allowed under this Code. Orders passed in execution, relating to questions regarding the amount of mesne profits, have been held to fall under the head of Decrees as defined in Section 2 of this Code, and a second appeal claimed under Section 584; but by the proposed omission, from clause j, Section 588 of the words "of the same nature with appealable orders made in the course of a suit," only one appeal will lie against all orders passed under Section 244, inclusive of those relating to questions regarding the amount of mesne profits. These are frequently as important as the questions of right to the property from which they are derived, involving, as they do in some cases, claims for sums of money equal to the value of the property itself. It will, therefore, be advisable to restore both the appeals given by Act XXIII of 1861, subject to such pecuniary limitations as the Legislature may think fit to impose.

5. Section 336.—The provisions of clause 2. of this Section should be extended to entries made for the purpose of attaching the goods of a debtor in execution.

* Section 15, Act II of 1864.

" 25, " VIII of 1865.

injuriously. Violations of the said provisions of the Revenue and Rent Recovery Acts being declared† penal, have secured

† Section 21, Act II of 1864.

" 30, " VIII of 1865.

to the persons concerned protection from molestation on the part of Zemindars and Government servants engaged in the collection of revenue, which it will be advisable

‡ Dudley versus Jotharam Davi and another.

to extend to judgment-debtors. According to a recent decision‡ of the High

Court herewith submitted, the seizure of goods in execution, after sun-set and before sun-rise by two execution creditors, made after violently forcing open the debtor's outer door, is held to be legal, though in England the legality of the proceeding would be open to objection. When the forcible entry was made with the privity of the execution creditor or by a special Bailiff, *vide Semayne's Case*, Smith's Leading Cases, 6th Edition, Volume 1, pages 100 and 102. The decision of the High Court above referred to has created a good deal of doubt about the sufficiency of the provisions of the Penal Code to repress such violent acts as those above referred to, and execution creditors will not be slow to take advantage of the doubtful state of the Law, as indicated by the High Court of Madras, to forcibly break open the outer doors of their debtors by night or by day, in order to levy execution against their goods to the great annoyance of the inmates of the house. It is true that the forcing open the outer door has been admitted by the High Court to be an actionable wrong, but before a suit for damages could be prosecuted to a successful issue, the debtor and his family will have to endure an amount of annoyance, suffering, and hardship for which the damages that might afterwards be awarded by a Civil Court in such cases will hardly be any compensation. Unless the creditors are deterred by some penal provision of Law on the subject from adopting violent steps, as is done in the case of goods seized under the Revenue and Rent Recovery Acts, the remote, and in some cases uncertain, relief to be obtained by the prosecution of a claim for damages in a Civil Court will fail to secure to debtors in general, who must be regarded as peaceful citizens when they have not committed any breach of criminal law, that protection which the Legislature have thought fit to vouchsafe to the defaulting tenants of Government and of Zemindars and other landholders.

6. I beg also to submit in connection with the said subject a copy of my judgment in the case of *Dudley versus Jotharam* and another alluded to in the decision of the High Court above referred to.

7. *Section 642.*—It is desirable to extend the provisions of clause 2 of this Section to accused persons in criminal cases. I need not give my reasons for the change, as I understand that the subject has been brought to the special notice of Government by the Chief Magistrate.

Vide G.O., dated 9th July 1878, No. 1366.

No. 49. ORDER THEREON, 10th December 1878, No. 2490.

Ordered to be forwarded to the Government of India in continuation of papers in G.O., 31st October 1878, No. 2228.

(True Extract.)

G. Munster
Acting Chief Secretary.

To M.R.Ry. G. Mutusami Chettiar.

Exd. F. R. Bantleman.

JUDICIAL DEPARTMENT.

Bills—Legislative.

No. 2491.

FROM

C. G. MASTER, Esq.,

Acting Chief Secretary to the Government of Fort St. George.

TO

THE SECRETARY TO THE GOVERNMENT OF INDIA,

LEGISLATIVE DEPARTMENT.

SIR,

I am directed by His Grace the Governor in Council to forward, for the consideration of the Government of India, the accompanying paper by G. Mutusami Chettiar, Acting Presidency Magistrate, on the provisions of the Bill to amend the Code of Civil Procedure, in continuation of the papers forwarded with my letter, 31st October 1878, No. 2220.

I have the honor to be,

Sir,

Your most obedient servant,

FORT ST. GEORGE,
10th December 1878.

Acting Chief Secretary.

From G. MUTUSAMI CHETTY, Esq., Acting Presidency Magistrate, (Town Police), to the Acting Chief Secretary to Government, dated Madras, 29th November 1878, No. 142.

I have the honor, in reply to G.O., dated 7th August 1878, No. 1586, to submit the following remarks on the Bill to amend the Code of Civil Procedure.

2. *Section 43, paragraph 2.*—Under Mortgage Bonds for money secured on immovable property, a mortgagee has two remedies, viz., one against the person of the debtor, and the other against the mortgaged property. Where the debt does not exceed 500 Rupees, the remedy against the person is generally sought in a Court of Small Causes, which has no power to hear claims relating to immovable property, and is therefore incompetent to grant the leave required by this section for omitting to sue for the remedy against the property. The operation of this section will, therefore, have the effect of either preventing mortgagees from seeking the former remedy in a Court of Small Causes, or of depriving them of the right of seeking the remedy against the mortgaged property in a Court competent to grant it, should they prefer to sue for the remedy against the debtor's person in a Court of Small Causes. This will cause some hardship, which it will be desirable to remove.

3. *Section 53, paragraph C.*—For the word "subscribed" the word "signed" should be substituted as is done in Sections 51, 393, &c.

Bill of 1878
JUDICIAL

G. MUTUSAMI CHETTY

Pres. Magistrate

Madras

G.O., 10th December 1878, No. 2153

RECEIVED
10th Dec 1878

From the Acting Chief Secretary to the Government of Fort St. George, dated 10th December 1878, No. 2491.

4. *Section 588.*—Much doubt is felt as to the orders against which two appeals are allowed under this Code. Orders passed in execution, relating to questions regarding the amount of mesne profits, have been held to fall under the head of Decrees as defined in Section 2 of this Code, and a second appeal claimed under Section 584; but by the proposed omission, from clause j, Section 588 of the words "of the same nature with appealable orders made in the course of a suit," only one appeal will lie against all orders passed under Section 244, inclusive of those relating to questions regarding the amount of mesne profits. These are frequently as important as the questions of right to the property from which they are derived, involving, as they do in some cases, claims for sums of money equal to the value of the property itself. It will, therefore, be advisable to restore both the appeals given by Act XXIII of 1861, subject to such pecuniary limitations as the Legislature may think fit to impose.

5. *Section 336.*—The provisions of clause 2 of this Section should be extended to entries made for the purpose of attaching the goods of a debtor in execution.

* Section 15, Act II of 1864.

" 25, " VIII of 1865.

injuriously. Violations of the said provisions of the Revenue and Rent Recovery Acts being declared† penal, have secured to the persons concerned protection from molestation on the part of Zemindars and Government servants engaged in the collection of revenue, which it will be advisable to extend to judgment-debtors. According to a recent decision‡ of the High Court herewith submitted, the seizure of goods in execution, after sun-set and before sun-rise by two execution creditors, made after violently forcing open the debtor's outer door, is held to be legal, though in England the legality of the proceeding would be open to objection. When the forcible entry was made with the privity of the execution creditor or by a special Bailiff, *vide Semayne's Case*, Smith's Leading Cases, 6th Edition, Volume 1, pages 100 and 102. The decision of the High Court above referred to has created a good deal of doubt about the sufficiency of the provisions of the Penal Code to repress such violent acts as those above referred to, and execution creditors will not be slow to take advantage of the doubtful state of the Law, as indicated by the High Court of Madras, to forcibly break open the outer doors of their debtors by night or by day, in order to levy execution against their goods to the great annoyance of the inmates of the house. It is true that the forcing open the outer door has been admitted by the High Court to be an actionable wrong, but before a suit for damages could be prosecuted to a successful issue, the debtor and his family will have to endure an amount of annoyance, suffering, and hardship for which the damages that might afterwards be awarded by a Civil Court in such cases will hardly be any compensation. Unless the creditors are deterred by some penal provision of Law on the subject from adopting violent steps, as is done in the case of goods seized under the Revenue and Rent Recovery Acts, the remote, and in some cases uncertain, relief to be obtained by the prosecution of a claim for damages in a Civil Court will fail to secure to debtors in general, who must be regarded as peaceful citizens when they have not committed any breach of criminal law, that protection which the Legislature have thought fit to vouchsafe to the defaulting tenants of Government and of Zemindars and other landholders.

† Section 21, Act II of 1864.

" 30, " VIII of 1865.

‡ *Dudley versus Jotharam Davi and another.*

6. I beg also to submit in connection with the said subject a copy of my judgment in the case of *Dudley versus Jotharam and another* alluded to in the decision of the High Court above referred to.

7. *Section 642.*—It is desirable to extend the provisions of clause 2 of this Section to accused persons in criminal cases. I need not give my reasons for the change, as I understand that the subject has been brought to the special notice of Government by the Chief Magistrate.

Vide G.O., dated 9th July 1878, No. 1366.

Ed. F. R. Bantleman.

1878.
JUDICIAL DEPARTMENT.

From
The Acting Chief Secretary to the
Govt. of Port St. George.
To
The Secy. to the Govt. of India,
Legislative Department.

Date 16th December 1878.

Issued

Recd.

No. 2461.

Reference

12th January. - Forwarding letter from G.
Macdonald, Chairman, Acting Presidency Magistrate,
travelling towards the Hill to inspect
the Hill and then proceed.

In the High Court of Judicature at Madras
Friday, the twenty seventh day of Sept.
One thousand eight hundred and seventy
eight

Present

The Honorable Mr. Justice Innes.

and
The Honorable Mr. Justice Muttuswamy
Aiyar

Criminal Appeals No. 500 of 1878

Jotharaw Doney and } Appellants
Munsoor Duckett } (Prisoners)

Appeal praying that the sentences
passed in Calendar Case No. 21974 of
1878 on the file of the Presidency
Magistrates Court (Black Town
Division) may be quashed and that,
pending the disposal of the appeal
the said sentences may be suspended
and the appellants released on bail.

This Case coming on for re-hearing
on Wednesday the twenty fifth day of
September One thousand eight hundred
and seventy eight and having stood

over for consideration till this day, the
Court delivered ^{the} following Judgments:-
Mr. Justice Innes.

The case originally came before
us on a petition of Appeal. The accused
persons had been convicted and sentenced
by the Presidency Magistrate
Mr. Muttusamy Setti to six months
simple imprisonment and to pay a fine
of Rupees 200, or, in default to 2 months
more simple imprisonment or a charge
of lurking-house trespass by night or
house breaking by night under Section
456 of the Indian Penal Code.

The Appeal was on the following
grounds:- That the evidence does not
disclose the offence of which they have been
convicted and such conviction is against
the weight of evidence and contrary to law.
That there is no evidence of criminal intent
and that the whole circumstances of the
case point to an absence of the same.

At the hearing of the Appeal
it

it was objected by the Crown Prosecutor
that no Appeal lies in such a case and
after hearing the argument upon this point
we came to the conclusion that the inten-
tion of the Legislature as apparent from
the plain language of the Statute was
that in such cases there should be no
appeal, as the term of imprisonment
to which the Prisoners are sentenced does
not exceed 6 months and the fine does
not exceed 200 Rupees.

There is no provision in the Presidency
Magistrates Act similar to that of the latter
Clause of Section 214 of the Code of Criminal
Procedure authorizing an appeal from a
sentence in which two or more punishments
as imprisonment and fine are combined.

All we have to do therefore is
to see whether the Magistrate has sentenced
the Prisoner to a term of Imprisonment
exceeding 6 months or to a fine exceeding
200 Rupees. If not there is no appeal.

With regard to the fine there is of
course no question. It was suggested that
the

the alternative imprisonment in default of payment of fine must, for the purpose of Appeal, be added to the term of Six Months substantive imprisonment.

But we think that the words "to imprison - ment for a term of six months or to fine exceeding 200 Rupees" are confined in their meaning to substantive sentences and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine not being paid. This view seems to be borne out by Section 11 in which the sentence of two years imprisonment, which the Magistrate is authorized to pass and within which his jurisdiction is limited, is the substantive sentence and is entirely exclusive of the imprisonment he may award in default of payment of fine. For these reasons we rejected the Appeal. It was urged upon us, however, that we might take cognizance of the Case under Section 147 of the High Courts Criminal Procedure Act of 1875.

The Crown Prosecutor objected that we had no application before us on which we could act under that Section and that sitting as a Court of Appeal we could not act under a Law which relates only, as the preamble indicates to the procedure of the High Courts in the exercise of their original Criminal Jurisdiction. We think there is nothing in these objections. A division bench of the High Court engaged for the time being upon appellate work is not thereby disqualified from exercising jurisdiction in matters within the cognizance of the High Court arising within its original territorial jurisdiction, whether they be of a Civil or Criminal nature. The powers to be exercised under Section 147 which replaces the old writ of certiorari, are very similar if not identical with the revision powers conferred by the Code of Criminal Procedure and the exercise of them is not confined to

to any particular branch of the Court. The Section requires the Court to make the direction for the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary Original Criminal jurisdiction, whenever it appears to the High Court that the direction will promote the ends of justice, and as it appeared to us that the condition for the exercise of our jurisdiction had arisen and the record was already before us, we decided to hear the case as a case transferred under that Section. Several important questions having arisen in the course of the argument we reserved judgment till to-day.

The accused persons were charged with lurking house-trespass or house-breaking and have been convicted of the offence charged.

It is not very material, but we may notice in passing that, unless the charge was intended to be in the alternative, it should have stated definitely with which of these distinct offences the accused persons were

were charged.

From the last paragraph of the judgment, it would appear that the conviction was of house-breaking, and as the Magistrate convicts the offender of the offence charged, it would seem that the offence intended to be charged was house-breaking alone, and this also appears from the first paragraph of the judgment. However an essential ingredient of either of these offences is criminal-trespass, and an act is not criminal trespass unless it is done with one of the intents mentioned in the Section defining that offence (Section 441) Vizt the intent to commit an offence or to intimidate, insult or annoy any person in possession of the property in respect of which the Criminal trespass is alleged; and the main question for our consideration is whether there is any thing on the record to show that the act of the Prisoners was done with any one of these intents. The facts found are as follows.

The Prisoners, execution creditors of the Complainant, accompanied by a bailiff

of the Small Cause Court who was entrusted
with a Warrant directing the attachment
of certain furniture in the Complainant's
house, burst open the closed door of
Complainant before sun rise on the day
in question, and entered the Complainant's
house. It is assumed in the judgment
and no doubt with perfect accuracy, that
the ultimate intent of the Prisoners in
breaking into the house was to execute
their decree - a perfectly lawful intent.
It does not, however, follow that the
ultimate is the only object. An offence
may be committed in the prosecution of
that object. And the entry upon property
with intent to commit such an offence
in prosecution of a lawful ultimate object,
would constitute the offence of Criminal
trespass. Similarly into the method used
in pursuance of the ultimate intent there
may enter a subordinate intent to intimidate,
insult or annoy. We can only interfere under
Section 147 of the High Court's Criminal
Procedure Code upon the merits, and if
we found upon the record any evidence
of

of facts relied upon by the Magistrate
showing any intent upon which the decision
might be supported, we should be
bound to uphold it. It was said that
every one must be taken to intend the natural
consequence of his acts and that the
natural consequence of breaking the door
was to cause annoyance to the Complainant
and that the Prisoners must therefore
be taken to have intended to cause
annoyance. It is perfectly open to a
Court to apply this rule when it is
shown that the consequence has followed
the act. For instance, where by the violence
of another's voluntary act, death has directly
followed, it may be inferred in the absence
of explanation that the intention was to kill.
But even then the inference is not a matter
of law. It is necessary that the Court
or jury should be satisfied that in the
circumstances such an intent was present
to the mind of the accused person.
In the present Case, the existence of
annoyance was not found though there
was some evidence of it in the statement
of

of the Sergeant that Mr. Dudley complained to him of the breakage of his doors. If the Magistrate had found upon this, that there had been annoyance and that Prisoner had entertained the intent to annoy, we must have accepted that finding, though we might not have concurred in the conclusion drawn. He has not however found this. There is no evidence of any intent to intimidate or insult Mr. Dudley as to whether there is evidence of an intent to commit an offence, it was suggested that the breakage of the door was mischief and that there was an intent to commit this offence. It may be questionable whether to bring the act within the Section the intent must not be an intent to do something subsequent to not concomitant with the entry; but it is not necessary to determine this, as, although the Magistrate finds that the door was broken open, that finding is not sufficient to show that ^{the} the opinion of the Magistrate that evidence established that the value or

or utility of the door was appreciably diminished or that it was affected injuriously; and without finding to this effect we cannot hold that the offence of mischief was found by the Magistrate to have been committed.

In the position in which we are as a Court revising the proceedings of a Subordinate Court we are not at liberty either as to any possible annoyance caused or as to the breaking open the door to supply intents that have not been found. It is not open ^{to us} to say that in the one case the offence of mischief was committed or in the other that annoyance was caused, and that the intent to do either act was present to the minds of either of the Prisoners. In fact I think the circumstances go to show very clearly that the sole intent contemplated and present to their minds was to obtain execution of their decree.

The only finding of the Magistrate is that there was a breaking and that it was unwarranted. No doubt it was so, but it is not every injurious act that is criminally punishable and the bare breaking

breaking open of the door is certainly not
so.

The criminal cognizance of trespass
is limited by the Criminal Law of India
except in certain special cases to those defined
in Section 441 of the Indian Penal Code
and as the acts found to have been
committed do not answer to the definition
contained in that Section, there was no
criminal trespass and therefore no
house breaking by night.

I would therefore quash
the convictions and sentences and
direct the release of the Prisoners.

Mr. Justice Muttasani Aiyar
Three questions arise for the decision
in this appeal

1. Does an appeal lie?
2. Can we interfere as a Court of
Revision?
3. Is the conviction bad on the
merits?

I may dispose the first two questions

in a few words

The Section which gives us juris-
diction to entertain an appeal refers
in terms to a sentence of imprisonment
exceeding six months or fine exceeding
Rupees 200. It does not refer either
to a sentence which awards imprison-
ment and fine or to any alternative
imprisonment awarded on default
of payment of fine. The contention is
that the alternative imprisonment
should be added to the substantive
imprisonment and that we should
treat this sentence as if it were a sentence
that awarded eight instead of six
months imprisonment. Such a
construction would do violence to the
language of the Section. The words
imprisonment or fine without more
would ordinarily mean imprisonment
or fine awarded as substantive
punishments; and there is nothing
in

in any of the other Sections of the Act that indicates a different intention.

I am therefore of opinion that no appeal lies from this sentence.

With reference to the 2^d question, I have no doubt that we can revise the sentence if it is illegal. As to the objection that it is not competent for us to revise the sentence when we sit on the Appellate side, though it is competent for us to do so, when we sit on the original side my answer is, that wherever we sit we form a division bench of the High Court dealing with a case decided by a Magistrate in the Presidency Town and as such competent to revise it when necessary.

As to the 3^d question. I do not think that the conviction can be upheld, for the facts found do not constitute the offence charged. The Magistrate

finds that the door of the Prosecutor's house was forced open at 5 in the morning and holds that it is house breaking punishable under Section 456 of the Indian Penal Code. It is clear that the act which was intended to be done after entering the house was to cause certain property to be attached in execution of a decree, and as this is an act which the Prisoner had a legal right to do, no intention such as is necessary to constitute criminal trespass can be inferred from it. The primary intention which it is reasonable to infer from forcing open the door to attach property is an intention to violate the right of the Prosecutor to exclude strangers from his house. The breaking into the house would certainly amount to an infringement of this right and as such be an actionable wrong but

but I do not see how it is criminal.
It is said that it would be an illegal
annoyance. If it is, every civil trespass
would be so, there would be a civil
right infringed, and the infringement
might be regarded in our sense as
causing annoyance. It has often been
ruled by this Court that every civil
trespass is not a criminal trespass.

Section 144i seems to me to contemplate
the entry into property in the possession
of another as a means to another act
and to regard the intention with which
it is made in relation to that act.

Here the only act to which the entry
can be referred as a means is the
seizure of property in execution,
an act perfectly legal in itself.
There may be cases in which the
ultimate object may be legal
while the means employed to attain
it

it may be criminal. But in this case
there is no finding that any act was
done in addition to breaking into the
house to levy execution on certain
goods.

I am therefore of opinion that
the Magistrate was wrong in
presuming criminal intention from
the bare mode of entry.

It is argued that the entry
upon the evidence before us amounts
to mischief. But there is no finding
that any mischief has been caused.
It is not the offence charged or made
the subject of investigation.

On these grounds I am also of
opinion that the sentence must be
quashed.

/ True Copies /

/ Sig / J. Weir

Acting Registrar

(True copies)

Appellate side

For Mr. Murray
at Pres. table

Calendar for 1874 of 1878. J. H. Dudley,
Judgment. Jonathan and Davy
 another

1. The Prisoners are charged with House
 Breaking by Night. They plead not guilty.
 They state that the Prosecutors house
 being open they entered it but they have
 not examined any witnesses to prove
 the Plea -

2. The Prosecutor swears that the back
 doors of his house were not open on the
 day mentioned in the Charge but were
 nailed down securely and fastened, so
 that they can neither be opened outside
 nor inside without the nails being
 withdrawn; that he examined the bolts
 on Monday evening and found the doors
 and found the same in the state described
 in his deposition; that on Tuesday next
 at 8 o'clock M. he was awake by hearing an
 immense crash and noise, immediately
 jumped out from his bed, and he
 into the back yard and there saw the
 doors

Concurrence of 1871

Judgment by the
 High Court

in Criminal Appeal,
 of 1870 of 1878

by Jonathan Davy
 and another.

noted by
 J. H. Dudley

1870/1878

doors partly forced open; that before he reached the back entrance they were completely burst open, that No 1 then came pushing into the yard; that No 2 was then standing inside the door calling Gabriel a Bailiff of the Court of Small Causes whom he desired to put on his belt; and that he Prosecutor sent information to the 1st Witness of what had happened.

3. The 1st Witness Sergeant Marshall, a neighbour of the Prosecutor, swears that at 5 o'clock on the morning of Tuesday he heard a crash, which the 2^d Witness Choualance said was caused by the back doors of the Prosecutors' house having been forced open by two persons, that shortly after, being sent for by the Prosecutor, went to his house, inspected the back doors and found that they had been burst open, that the upper loop of the top bolt of the door was not in its proper place, but was lying on the ground and that

that the state of the bolts and the doors of which a full description is given in his Deposition was such, as to make him believe it to be the result of force applied from outside to open the doors.

4. The 2^d and 3^d Witnesses swear to having seen the Prisoners (of whose bolts have been identified by the former and only No 2 by the latter) engaged in the act of opening the doors at 5 o'clock on the morning of Tuesday, and the 2^d Witness adds that he also saw Nos 1 and 2 enter the Prosecutors' house through the passage so opened.

5. The evidence of the Prosecutor and his Witnesses is so clear, positive and consistent that I have no hesitation in believing their testimony which places it beyond a doubt that the Prisoners broke into the Prosecutors' house on the date mentioned in the Charge.

6. The next question to be considered is

is whether the fact of the Prisoners being accompanied by a Bailiff of the Small Cause Court, who was entrusted with a Warrant directing the attachment of certain furniture which was in the Prosecutors house, justified them in forcing open the outer doors of the Prosecutors house. Had this act been done by the Bailiff himself it could not in my opinion be defended, for it is only in "Cases when the door is open" the Sheriff may enter the house and do "execution at the suit of any Subject" "either of the body or of goods" and that "it is not lawful for him at the suit of a Common person to break the Defendants house to execute any process at the suit of any Subject" (Semayne's Case Smiths leading Cases, pages 108 and 110). The Bailiffs being officers much inferior to the Sheriff or persons of little or no value could certainly not commit an act which

which if committed by the Sheriff would make him a trespasser. It is also worthy of remark that in the present case neither the Sheriff nor the Bailiff forced open the doors, but that the act was committed by the Prisoners who are the Execution Creditors, in presence of the Bailiff who was simply witnessing it.

7. Turning to Section 21 (Madras) Act 11 of 1864 and Section 30 Act ~~III~~ of 1866 I find that the forcing open the outer door of a Dwelling house in certain cases is declared to be an offence punishable with imprisonment not exceeding 6 months or fine not exceeding 500 Rupees. Though these enactments are not applicable to the execution of processes issued in Civil Suits, yet they show in what light such acts are held by the Legislature.

8. Under Section 271 of the new Code of Civil Procedure the power of a person (executing any process under that Code directing

27/11/78

Enclosure II
Judgment of Mr.
Presidency Magistrate
in the case of
J. H. Dutt
vs
Jothamma, Dargam
etc.

Jud. DEPARTMENT 12/11/78

No.
From *Sy. Muktasani Chetkar, Asst. Presidency Magistrate,*
Dated *29 Nov 78, No 142.*

FOR ORDERS.

As the High Court has
their opinion in the ^{ent} Proceeding
Amendment Bill who expedient
forwarded to the Govt. and
the report of this Govt. has already
been made. vide G.O. & to G. of
2. 31 Oct 78, Nos 222 & 2229.

Mr. Muktasani Chetkar's
report may now be sent on
in continuation; but please
his remarks on Sec: 33b in con-
nection with the High Court's
reversal his conviction of two
- makers freely breaking open the
door & entering the premises of
their judgment after late
sunset & sunrise.

4-12-78.

7/11

No 1142

Presidency Magistrate, Court
(Town) Madras
29th November 1878.

The Hon. Mr. Justice
in the Court
of the Presidency
Magistrate.

FOR ORDERS.

From

G. Muttuswamy Chetty Esq.
of Presidency Magistrate
(Town) Madras

To

C. J. Master Esquire
Ag. Chief Secretary to Government
Fort St. George.

Sir

I have the honor in reply to
G.O. dated 4th August 1878 No 1586 to
submit the following remarks on the
Bill to amend the Code of Civil Procedure.

Sec: 43 para 2

2. Under Mortgage Bonds for money
secured on immovable property a mortgagee
has two remedies viz one against the
person of the debtor, and the other against
the mortgaged property. When the
debt does not exceed 500 Rupees, the
remedy against the person is generally
sought in a Court of Small Causes,
which has no power to hear claims
relating to immovable property, and
is

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is therefore incompetent to grant the leave required by this section ^{for making} to sue for the remedy against the property.

The operation of this section will therefore have the effect of either preventing mortgagors from seeking the former remedy in a Court of Small Causes, or of depriving them of the right of seeking the remedy against the mortgaged property in a Court Competent to grant it, should they prefer to sue for the remedy against the debtor's person in a Court of Small Causes. This will cause some hardships, which it will be desirable to remove.

3. For the word "subscribed" Sec: 53 para 2
the word "signed" should be substituted as is done in Sections 51. 373 &c.

4. Much doubt is felt as to Sec: 588
the orders against which two appeals are allowed under this Code. Orders passed in execution, relating to questions regarding the amount of mesne profits have been held to fall under the head

head of Decrees as defined in ^{2 P 27} Section 2 of this Code, and a second appeal claimed under Section 584; but by the proposed omission, from clause j Section 588, of the words "of the same nature with" "appealable orders made in the" "Course of a Suit," only one appeal will lie against all orders passed under Section 244, inclusive of those relating to questions regarding the amount of mesne profits. These are frequently as important as the questions of right to the property from which they are derived, involving, as they do in some cases, claims for sums of money equal to the value of the property itself. It will therefore be advisable to restore both the appeals given by Act xiv of 1861, subject to such pecuniary limitations as the Legislature may think fit to impose.

Sec: 336

5. The provisions of clause 2 of this

this section should be extended to entries
made for the purpose of attaching the
goods of a debtor in execution. Similar
provisions exist in the case of goods to
be seized in satisfaction of arrears
of Revenue or rent and have not worked
injurious. Violations of the said
provisions of the Revenue & Rent
Recovery Acts being declared penal,
have secured to the persons concerned
protection from molestation on the part
of Zamindars and Government servants
engaged in the collection of Revenue,
which it will be advisable to extend
to judgment debtors. According to a recent
Decision of the High Court herewith
submitted, the seizure of goods in
execution, after sunset and before
sunrise by two execution creditors,
made, after violently forcing open
the debtor's outer door, is held to be
illegal, though in England the
legality of the proceeding would be
open to objection, when the forcible
entry was made with the privity
of

Sec: 18 Act 11 of 1864
Sec: 25 Act 11 of 1864
Sec: 20 Act 11 of 1864
Dudley
Jotharam Bai
V another

of the execution creditor or by a Special Bailiff.
See Mayne's Case in the Leading Cases 6th
edition Volume 1 pages 100 & 102. The Decision
of the High Court above referred to has
created a good deal of doubt about the
sufficiency of the provisions of the Penal
Code to repress such violent acts as those
above referred to, and execution creditors
will not be slow to take advantage
of the doubtful state of the Law, as
indicated by the High Court of
Madras, to forcibly break open the
outer doors of their debtors by night or
by day, in order to levy execution against
their goods to the great annoyance of
the inmates of the house. It is true that
the forcing open the outer door has been
admitted by the High Court to be an
actionable wrong, but before a suit
for damages could be presented to
a successful issue, the debtor and
his family will have to endure
an amount of annoyance, suffering
and hardship for which the
damages that might afterwards
be awarded by a Civil Court in
such

Such cases will hardly be any compensation. Unless the creditors are deterred by some special provision of Law on the Subject from adopting violent steps, as is done in the case of Goods seized under the Process and Attachment Acts, the remote and in some Cases uncertain relief to be obtained by the prosecution of a claim for damages in a Civil Court will fail to secure to debtors in general, who must be regarded as peaceful citizens when they have not committed any breach of Criminal Law, that protection which the Legislature have thought fit to vouchsafe to the defaulting tenants of Government and of Zamindars and other Land holders.

I beg also to submit in connection with the said Subject a Copy of my judgment in the case of Rudray vs Gokharan and another alluded to in the Resolution of the High Court above referred to.

It is desirable to extend Sec 642 the provisions of clause 2 of this Section to secured persons in Criminal Cases.

Cases. I need not give my reasons for the change, as I understand that the Subject has been brought to the special notice of Government vide G.O. 8/9th July 1878 by the Chief Magistrate.

I have the honor to be

Sir

Your Most Obedient Servant,

John Macnamara
Acting Presidency Magistrate.

With Order Vol. 11.

