It appears, however, from the evidence that the appellant carried on business by his agent within the limits of the territory. Moreover the defendant did not protest that the Court had no jurisdiction, but appeared by an agent and defended the suit. Having done so, and having taken the chance of a judgment in his favour, he cannot now, when an action is brought against him on the judgment, take exception to the jurisdiction—see *Schibsby* v. *Westenholz*(1) followed in *Kandoth Mammi* v. *Abdu Kalandan*(2). On this point, therefore, the appellant's contention fails. Finally, it is argued that notwithstanding the judgment, the District Judge ought to have taken the evidence afresh and re-heard the case *de novo*, and that upon the facts the judgment of the Bastar Court was wrong. We are clearly of opinion that it was not intended by the Legislature when amending section 14 of the Code that parties to an action on a foreign judgment should have the right to have the case re-heard.

All that the section says is that the Judge is not to be precluded from inquiry into the merits. In the present case he has so inquired having had before him ample materials in the judgment of the Bastar Court and the evidence then taken, and he then found that the judgment was well founded.

We see no reason to differ from him. The appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Handley.

QUEEN-EMPRESS

v.

ERUGADU.*

1891.
June 10.
July 13.

Criminal Procedure Code, s. 260—Summary procedure—Bias of Magistrate.

A Deputy Magistrate, being also the Chairman of a Municipality, without issuing process, or making a record of the proceedings, or dismounting from a pony on which he was riding, convicted and fined an inhabitant of the town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way:

(1) L.R., 6 Q.B., 155. (2) 8 M.H.C.R., 14.

* Criminal Revision Cases Nos. 174 to 178 of 1891.

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Held, the Magistrate's procedure was illegal, and the conviction should be set aside.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by R. Sewell, District Magistrate of Bellary.

The case was stated as follows:—

"The Deputy Magistrate is Chairman of the Adóni Municipality, and as such is interested in keeping the town clean and preventing nuisances and encroachments. He does not say whether Venkanna made his complaint to him as a Magistrate or as Chairman of the municipality. No record of complaint was made, nor was any entry of the complaint or information made in the magisterial diary.

"The Magistrate's own explanation of the institution of the case is as follows:—'It was instituted under clause (c) of section 191, upon information received from one Venkanna and subsequent personal inspection.' No processes were issued and no notice of any kind given to the accused.

"On 12th February the Magistrate visited the spot, sitting on his pony, and there and then began and concluded his (very) 'summary trial.' There is no record of any inquiry having been made beyond the fact that the Magistrate saw the 'platform.' He does not describe it, but writes: 'The platform is over about half the road and is a real obstruction to the public, meant evidently to appropriate the whole space for the purpose of extending his house.' The plea of the accused is entered as 'admitted, but accused says he has no objection to the public walking over the platform.'

"Now (rightly or wrongly) I have no means of judging; the accused before me pleads that the whole of the case is prejudiced by the use of the word 'platform.' His plea is that the road being an alley common to only five houses, of which he owns three (or four), and it being worn into deep holes, he has mended and raised the road so as to bring it up to the level of the main street,— that there is no platform, but merely that the gravelled road in front of his own house has been raised. The plea may or may not be absolutely false, but the point is that he plainly pleaded not guilty. He did not admit any obstruction according to the record, but pleaded that there was no obstruction to the public, since the public were welcome to

"use the place. He may have 'admitted' doing something to the "road, but he did not plead guilty to causing danger, obstruc- "tion, or injury to any one in a public way, which is the sole "essence of the offence under section 283, Indian Penal Code. "Section 283 does not contemplate the punishment of a man for "raising anything in the street unless that something causes "danger, obstruction or injury to the public, and this was ex- "pressly denied by the accused and not 'admitted.'

"Having seen the place and questioned the man, the Magis- "trate promptly, without getting off his pony, fined him Rs. 20 "and went away. This proceedings was entered as a 'summary "trial,' and next day process was issued and the fine paid.

"In the other cases sent up, I gather that the procedure was "equally peculiar.

"In answer to my questions, the Deputy Magistrate . . . "has made the following explanations:—

"(i) No oral or written complaint was preferred under "section 200, Code of Criminal Procedure.

"(ii) No processes were issued against the accused.

"(iii) The Magistrate, sitting on a pony surrounded by a "number of people, among whom was the Municipal Conservancy "Inspector, and probably one or more municipal peons, visited the "lane in question and called out the house-owner. Till then the "latter had no knowledge of any criminal proceedings being taken "against him, and there is nothing whatever to show that he was "ever told that Mr. Kothanda Ramayya had come there in any "other capacity but that of Chairman of the Municipal Council, "in which capacity, probably, he had been often seen by the "accused going his rounds of inspection. To the eyes of the "accused, therefore, he had before him the Chairman of the "municipality. There was no police constable or magisterial clerk "present to show him that the Chairman had suddenly divested "himself of his municipal powers, and that he was an accused "person pleading in a Court of Justice. All appearances must "have conveyed a totally contrary opinion.

"(iv) The Magistrate . . . thinks that sitting on a "horse in the road is quite a fitting place for him to try a case, "for in a letter received by me only two days ago he describes "it 'as affording the best position for the public inquiry.'

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"(v) The entire procedure in case No. 2 appears to have "been that the Chairman-Magistrate used his eyes and thought "there was an encroachment, he called on the house-owner (from "his horse) to show cause why he should not be convicted for "'obstruction and encroachment on the road,' and on Viranna's "pleading that, though it was certainly he who had raised the "thing complained of, yet it was no obstruction, because the "public could not be injured—he was at once told that he was "fined Rs. 20.

"(vi) In none of these cases was any notice given to the "accused that they were entitled to require that the case against "them might be transferred to another Magistrate (last clause of "section 191, Code of Criminal Procedure, Act III of 1884, "section 2. I assume this from the Magistrate's reply to my "query, 'What opportunity was allowed to the accused to have the "cases transferred to another Magistrate if they thought fit under "the last clause of the section?' He replies: 'The accused did "not express their unwillingness to be tried by me, but plainly "admitted the offence (?) and submitted to my trial. There was "nothing in the circumstances of the trial to prevent . . . "their desiring a transfer.' It is plain from this answer that "none of the accused was informed that he could, if he pleased, "be tried by a court other than that of the interested Chairman-"Magistrate who sat on his horse before him.

* * * *

"A zealous Chairman of a municipality is the very last person "who should himself try cases which come to his knowledge as "Chairman, and it is a mere fiction for Mr. Kothanda Ramayya "to pretend that he was not Chairman but Magistrate when per-"ambulating the town on horseback hunting up nuisances and "encroachments. It is a well known rule that a man cannot be "both prosecutor and judge. Parallel cases are quoted in *Kharak* "*Chand Pal* v. *Tarack Chunder Gupta*(1) or I should say barely "parallel, for the present are much more flagrant instances than "either of those quoted. Perhaps the best case to refer to is "*Queen* v. *Meyer*(2), where it was ruled that a Judge ought not "to sit on a bench where he has such interest as to give him a "real bias.

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(1) I.L.R., 10 Cal., 1030. (2) 1 Q.B.D., 173.

"The Magistrate's explanation is given in the last paragraph "of his letter, No. 138, dated 25th March 1891. He says: 'I "beg to submit that, after careful observation for months together "of the requirements of the town and the numerous encroach-"ments by individuals in public places, and to the reckless manner "in which these were being used, notwithstanding numerous "punishments by Bench Magistrates, generally after considerable "delay and in remote court-houses not much attended by the "people, for whom the punishments were meant as warnings, it "seemed to me essential that to be really effective as warnings, "a few select cases should be taken up and disposed of by me "summarily and in an exemplary manner on the spot.'"

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) for the crown.

JUDGMENT.—The procedure of the Deputy Magistrate in all these cases seems to have been irregular in several respects. In the first place the proceedings were not commenced by any summons to the accused or other formal notice that a criminal investigation was about to take place.

Chapter XXII of the Code of Criminal Procedure does not appear to intend that proceedings in summary trials shall commence ordinarily otherwise than in other criminal trials either by summons or warrant, indeed section 262 implies the contrary. Section 263 requires a record of the proceedings to be made by the presiding officer, and we think that it is intended that the record shall be made at the time of the trial. Presumably the Deputy Magistrate, while seated on his pony, could not have kept the record required by section 263, and he states that no clerk accompanied him. The record must, therefore, have been prepared after the close of the trial from memory or possibly from some rough note. This is not the procedure contemplated by the Code even in summary trials.

The admissions of the accused persons are directed by section 243 to be recorded, and this also should be done at once, and the words used in the admissions should be stated as nearly as possible. Here again the procedure of the Deputy Magistrate appears to have been defective, for he does not appear to have made any record of the admissions at the time, and the record he did ultimately make, does not profess to state the words of the admissions

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and does not show what was admitted. From the record it is impossible to say whether the accused admitted only the acts or omissions with which they were charged, or admitted them with all the accompanying circumstances necessary to constitute their acts or omissions offences. This may have led to a most serious miscarriage of justice. In our opinion these errors and irregularities of procedure are sufficiently serious to invalidate the proceedings of the Deputy Magistrate, and are not such as we can overlook even to secure the very desirable end of the improvement of the sanitary condition of Adoni.

And there is another fatal objection to these proceedings, viz., that the Deputy Magistrate, as Chairman of the Municipal Council, was the very person interested in abating the nuisances, in respect of which these proceedings were taken, and was therefore a judge in his own cause.

It is true section 555 of the Criminal Procedure Code provides that the mere fact of being a Municipal Commissioner shall not of itself be a disqualification for trying any case, but the Chairman of a municipality being an executive officer, who would be the proper person to institute prosecutions for offences against the health or comfort of the town, is a very different person from a mere Municipal Commissioner, and is clearly disqualified to try such cases.

For the foregoing reasons we set aside the convictions by the Deputy Magistrate, and direct that the cases be commenced *de novo* and tried according to law by some Magistrate other than the Chairman of the municipality.