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condition of the contract, if it is held that it is immaterial, then there would be an end of the case.

Mr. *Acworth*, for the plaintiff, was not called upon.

The opinion of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was delivered by

PIGOT, J.—We think that in this case it is not necessary to call on Mr. Acworth. The principle to be applied is sufficiently expounded by Mr. Justice Gibbs in the case of *Mitchel* v. *Lapage* (1).

We think it quite clear that the learned Second Judge of the Small Cause Court is quite right in the view which he takes, and that our answer to the question put by him must be in the affirmative that there is a contract between the parties, for breach of which the plaintiff can sue for damages.

Attorney for plaintiff: Mr. *R. Rutter*.

Attorneys for the defendant: Messrs. *Gregory* and *Jones*.

T. A. P.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

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March 24.

GIRISH CHUNDER GHOSE AND ANOTHER (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE PARTY).*

Magistrate, disqualifying interest of—Criminal proceedings—Irregularity—"Personally interested"—Criminal Procedure Code, 1882, *s.* 555.

Where a District Magistrate, as prosecutor, initiated and directed the proceedings against certain accused persons who were charged by him with having committed offences punishable under sections 143 and 150 of the Penal Code, and where it appeared that the District Magistrate had himself taken an active part in causing the dispersion of the unlawful assembly, and had pursued and directed the pursuit of the members thereof, and that he subsequently took pains to collect the evidence showing the connection of

* Criminal Revision No. 114 of 1893, against the order passed by A. E. Staley, Esq., Sessions Judge of Backergunge, dated the 11th of January 1893, modifying the order passed by H. Savage, Esq., District Magistrate of Backergunge, dated the 25th of December 1892.

(1) 1 Holt's Rep. 253.

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the accused with the unlawful assembly and the keeping of armed men, on which evidence the accused were afterwards convicted by himself; and where it also appeared from the judgment of the District Magistrate that he had embodied therein matters which, if relevant, showed that he should have been examined as a witness, and that such matters should not have been stated without the accused having had an opportunity of testing them by cross-examination: *Held*, that the District Magistrate was disqualified from trying the case himself, and that the conviction must be set aside and a fresh trial held before some other Magistrate.

The words "personally interested" as used in section 555 of the Code of Criminal Procedure do not merely mean "privately interested" or "interested as a private individual," but include such an interest as the District Magistrate must have had under the above circumstances in the conviction of the accused.

THE petitioners in this case were convicted by the District Magistrate of Backergunge, under sections 150 and 143 of the Penal Code, of employing armed men for the purpose of taking part in an unlawful assembly, and sentenced to six months' rigorous imprisonment and to pay each a fine of one thousand rupees. From this conviction and sentence there was an appeal to the Sessions Judge, who reduced the sentence of fine to 200 rupees each, but upheld the conviction and the order as to imprisonment.

The petitioners thereupon moved the High Court in its revisional jurisdiction and obtained a rule on the ground that the trial was bad in law, inasmuch as the Magistrate who had tried the petitioners was personally interested in the case.

The facts of the case and the part taken by the Magistrate himself in initiating the proceedings and in dispersing the assembly and collecting the evidence against the accused are sufficiently disclosed in the judgment of the High Court.

On the rule coming on to be heard, Mr. *P. L. Roy* and Baboo *Atulya Charan Bose* appeared for the petitioners in support of the rule.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) and Baboo *Durga Mohan Das* for the Crown.

Mr. *P. L. Roy*.—In this case although the Magistrate in his explanation says that he saw nothing and did nothing to disqualify him from trying this case, yet it is quite clear from his

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judgment and the evidence in the case, that he was the virtual prosecutor, judge, and one of the principal witnesses in the case. Assuming that my contention is right with regard to the part taken by the Magistrate in this case, he had clearly no jurisdiction to try this case by reason of the restrictions contained in section 555 of the Code of Criminal Procedure. Having initiated the prosecution himself, the accused would have been entitled, had they so demanded, to a transfer of the case—see section 191, clause (*c*) and the last paragraph of the same section added by Act III of 1884, section 2. It is true that the accused did not take this objection at the trial before the Magistrate, but they did raise this point in appeal before the lower Appellate Court, but the objection was overruled. It is a well-known and settled proposition of law that in criminal cases an objection affecting the jurisdiction of the Court may be taken at any time and at any stage: waiver or consent on the part of the accused as regards jurisdiction is immaterial. See *The Queen* v. *Bhola Nath Sen* (1), *Empress* v. *Donnelly* (2), *Wood* v. *The Corporation of the Town of Calcutta* (3), *Loburi Domini* v. *The Assam Railway and Trading Company* (4). In the last-mentioned case, the learned Judges observe—" It may be necessary, for reasons to which we need not advert on the present occasion, that in certain parts of this country executive and judicial functions should be united in the person of the same individual; but this union of duties is an abnormal state of things, and experience of its operation is not wanting in instances to show that, in the interests of justice, the discharge of judicial duties by an officer who also exercises executive functions cannot be too carefully watched." The Magistrate in this case was one of the principal witnesses of the alleged occurrence, and must, therefore, be considered disqualified as a Judge. In trying the case under such circumstances, he must have started with a real, though unconscious, bias against the accused. It was held in the case of *In re Het Lall Roy* (5) that the District Magistrate, having taken an active part in the initiation of the prosecution, had no jurisdiction to hear the appeal. It has also been held,

(1) I. L. R., 2 Calc., 23.
(2) I. L. R., 2 Calc., 405.
(3) I. L. R., 7 Calc., 322.
(4) I. L. R., 10 Calc., 915.
(5) 22 W. R., Cr. 75.

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in several cases, that where a District Magistrate in his capacity as Collector had instituted prosecutions under the Stamp Law and afterwards tried the cases in his capacity as Magistrate and convicted the accused, the objection to such a trial was well-founded upon the familiar principle "that the same person cannot both be prosecutor and Judge." See *The Queen* v. *Nadi Chand Poddar* (1), *Empress* v. *Gangadhar Bhunjo* (2), *Empress* v. *Deoki Nandan Lal* (3).

The disqualification of the Magistrate, under section 555 of the Code of Criminal Procedure, to try this case is beyond all doubt. If it is the case, as I suggest, that the Magistrate has initiated these proceedings, then he must be held to be "personally interested" within the meaning of that section. The word "personally" as used there has a wider signification than the mere literal meaning. It includes every kind of legal interest, however small, and it has been so held in more than one case; see *Empress* v. *Donnelly* (4), *In re Het Lall Roy* (5).

The Magistrate distinctly imports into his judgment of this case his own knowledge of the locality, the circumstances of the arrest, what he saw of the alleged occurrence, and of other matters in connection with the conduct of the accused before and after the commencement of the trial which the accused had no opportunity of testing by cross-examination. Those facts were not before the Court under the sanction of any oath or affirmation, and such a procedure cannot but be highly prejudicial to the accused. See *In re Hurro Chunder Paul* (6).

The question of "personal interest" of Judges and Magistrates trying cases was discussed in *Serjeant* v. *Dale* (7), and it was there laid down that if a Magistrate has any legal interest in the decision of a case, however small the interest may be, he is disqualified from trying it. The Judges in the above case (see p. 667 of the report) lay down this salutary principle, "that it is important to clear away everything which might engender

(1) 24 W. R., Cr. 1.
(2) I. L. R., 3 Calc., 622.
(3) I. L. R., 2 All., 806.
(4) I. L. R., 2 Calc., 405.
(5) 22 W. R., Cr. 75.
(6) 20 W. R., Cr. 76.
(7) L. R., 2 Q. B. D., 558.

suspicion and distrust of the tribunal and so promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The *Deputy Legal Remembrancer contra.*—The Magistrate in his explanation says that he saw nothing and did nothing to disqualify him from trying the case. We must accept what the Magistrate says, in spite of all protestations on the other side. [RAMPINI J.—But the Magistrate's own judgment shows that he saw a good deal and himself initiated the case.] But the accused took no objection to his jurisdiction. [TREVELYAN J.—Is it a valid proposition of law that in criminal cases, unless an objection is taken at the time, it cannot be raised in a higher Court?] That depends upon circumstances. Here, the accused were defended by mukhtears and yet no objection was taken. They wait for the result of the trial, and only take the objection before the Sessions Judge in appeal. The Sessions Judge did not think much of the objection and overruled it. No good will result from a retrial, and the rule should be discharged.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

This is a rule calling on the other side to show cause why the convictions of, and sentences passed on, the applicants, should not be set aside, on the ground that the case should not have been tried by the District Magistrate of Backergunge, as he was personally interested in the case.

The applicants have been convicted under sections 150 and 143, Penal Code, of employing armed men for the purpose of taking part in an unlawful assembly.

The case appears to have been instituted by the District Magistrate of Backergunge of his own motion under the provisions of section 191, cl. (*c*).

The facts which gave rise to the case are described by the Magistrate in his judgment as follows:—"The evidence of the Inspector of Police, Patur Khalo, shows that on the 19th instant accused Girish Chunder Ghose (hereafter styled accused No. 1) filed before him at Golachapa thannah a petition (exhibit P1), in which it was alleged that Mohini Baboo had collected some

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lathials, but as from the demeanour of the accused it was suspected that he himself had lathials assembled, he was told that no action would be taken on the petition, which was brought to my notice at the time. Golachapa thanuah, by river, for any large boat, is about a day's journey from Kali chur, but a small boat can get through the Ulania *khal* and thus reach the chur in five or six hours. I had the police launch with me. On the morning of 20th the launch was sent round to the Gopalai river, and with the Inspector, the Magistrate's peshkar, and one or two others I walked to Ulania, got on the launch, and crossed the Kajal river to chur Kali. Thus the visit was entirely unexpected. When we landed a man was seen running towards the south (in direction of the katcheries of both parties). The Inspector stopped, and he (witness Fazeemuddin) then said Surendra Baboo's lathials were surrounding his house.

"The Inspector went on towards Mohini Baboo's katchery. The peshkar, the serang, and a khalasi of the steamer, Tarumuddin, and myself went towards the north.

"The evidence of Tarumuddin, the serang and khalasi, shows that they got ahead of others, and when they had crossed a strip of jungle near Tarumuddin's house they saw a band of lathials armed with spears and other weapons in and around Tarumuddin's *bari*, and some of them engaged in pulling down his stack of paddy.

"The cry was raised of 'police.' The lathials fled, were pursued, and one of them (witness Borandi Rari) was caught armed with a '*chawal*,' a formidable instrument with a long bamboo haft and a 3-pronged iron head, each prong being barbed.

"Subsequently a constable, while looking for lathials on the island, came across one Dagu (witness) in some jungle, chased him into a house and arrested him, and subsequently brought him before me the next day.

"After the chase of the boat the Inspector and others returned with me in the launch to Golachapa."

The following passages in the depositions of the witnesses in the case show what an active part the District Magistrate took

in initiating the proceedings and in collecting evidence against the accused: —

Shambhu Nath Aitch, Inspector:—"I know the defendant Girish Chunder Ghose. He filed exhibit P1 before me at Golachapa on 19th instant, and said that Mohini Baboo had many people assembled unlawfully in Kali chur and that they were seizing the tenants. I informed the District Magistrate, who was at the place, and afterwards the informant was told that no action would be taken on this p.tition, as it was too vague. It was suspected from his demeanour he had people of his own assembled, and had brought the informa ion with the intention of deceiving. He was dismissed from Golachapa about 3 P.M. Next morning I started with the Magistrate and peshkar on pretence of seeing the road to Ulania. We walked to Ulania, and there got on the launch, which had been sent round, and crossed to Kali chur, where we landed at 10 or 11 A.M. The Magistrate ordered me to go to Mohini Baboo's katchery, and himself with others went with the informant. Then I came off to the launch with Girish Ghose. On arriving on the launch I found a constable, who brought in the man Borandi, with a *chawal* and with instructions to follow with the launch as the Magistrate was in pursuit of the lathials. I went with the launch around the north of the island, and after going a long way found the Magistrate and others, and received orders to catch a boat in which lathials had gone off to another chur." Tarumuddin cultivator:—"A short time after Jounatullah had left his *bari*, some 10 or 12 lathials came from the south and surrounded my *bari*. They had lathies, *dal*, *sulfi*, *leza*, *chawal*. Seeing them I ran off to the west to look myself for the constable, and as I was running I saw the launch at the bank and the Bara Daroga seized me. I was asked where Mohini Baboo's katchery was, and then questioned about lathials. I said I could point them out near my house. The sahib and people with him ran with me. There was a cry of 'Sahib has come,' and the lathials fled east. We ran after them." Gour Kissor Chatterjee, peshkar, says:—"On Tuesday I came with the Magistrate to Kali chur on the launch. After landing we were going towards Mohini Baboo's katchery, when we found one Tarumuddin running, and the Inspector caught him, thinking he was a lathial. He told us,

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when questioned, that Surendra Baboo's lathials were at his house. On that the Inspector was sent by the Magistrate to the katchery of Mohini Baboo and himself with me. After we had gone some distance a man seeing us turned. As we cried 'seize' he fled at full speed, and after him the serang, khalasi, and Tarumuddin got ahead. I was tired out, and so fell behind. The Magistrate was behind me. Looking round I saw some 8 or 9 lathials with lathis, spears, &c., standing facing us some 300 cubits to the south. I did not see the Magistrate then, so I turned back to look for him, and when I got to Tarumuddin's *bari*, heard the Magistrate had chased the lathials towards the east. Leaving Borandi in charge of Tarumuddin's brother, I followed the Magistrate to the east, and on the way met Hari Singh, constable. After going a long way I joined the Magistrate, and we tracked the lathials and searched for them in jungle and *baris*. At last when we got to the bank of the river we heard the lathials were in a '*chatra*.' Then we went to the *bari* of Samaruddin Mirdha of Surendra Baboo on way to the *chatra*. The Magistrate searched there, and after that when we got into the *math* south of it we saw a jungle south of the *math*, and men moving about in that jungle. Suspecting the lathials were there, we ran to it and found the lathials had got on a boat from the jungle, and running through the jungle to the boat I saw a boat going off." Hamid Ali, serang of police launch, says:—"On Tuesday I brought the Magistrate to this *khal* here on Kali chur. I landed with the Magistrate and others, and afterwards ran with the Magistrate to the north. I and Meheruddin khalasi got ahead with this man (Tarumuddin). Tarumuddin was then with us. We ran on to the *darra* of the *bari* and saw some 10 or 12 men with lathis, *dal*, *sulfi*, in and around his *bari*, and some of them throwing down paddy from his stack. There was then a cry of 'police,' and then seeing us the lathials fled to the east with their weapons. We followed some 5 or 6 *kanis* through the *math*, and Tarumuddin, who got some 10 cubits ahead, got hold of one of the lathials. That man lifted up a *chawal* (this one) to strike him. We other two then fell on him and took the instrument from him, and held him and produced him before the peshkar. Then we followed to where the sahib was to the south, in which direction

the other lathials had fled, and he then sent me to bring the launch round to that side of the island. I brought the launch round, and the Magistrate got on it. We chased them........... a *boat to* Sir *chur.*"

From these passages from the Magistrate's judgment and the evidence it appears to us to be clear that the present proceedings were initiated by the Magistrate; that he took an active part in causing the dispersion of the unlawful assembly which was found committing mischief on the homestead of the witness Tarumuddin; that he pursued and directed the pursuit of the members of that assembly; and that subsequently he took pains to collect the evidence showing the connection of the applicants with that unlawful assembly, and the keeping of armed men, on which they were afterwards convicted.

We think that in these circumstances the Magistrate should not have tried the case himself. In the first place, section 555, Criminal Procedure Code, provides that no Magistrate, except with the permission of the Court to which an appeal lies from his Court, shall try any case to or in which he is a party, or personally interested.

Now, in this case it is clear that the District Magistrate from first to last was the prosecutor. He initiated and directed the whole proceedings. He may also, we think, be said to have been personally interested in them, for the word "personally" in section 555 does not, we think, mean merely "privately interested" or "interested as a private individual," but includes such an interest as the District Magistrate must in this case have had in the conviction of the accused [see the case of *In re Het Lall Roy* (1)].

Secondly, the Magistrate in the passage from his judgment, which has been read, and in other passages—for instance, in those in which he describes the locality in which the unlawful assembly took place—has described matter which came under his own observation. He therefore has embodied in his judgment matters which, if relevant, should have been deposed to by him on oath in the witness-box. Now, it is clear that no Magistrate can try a case in which he is himself a witness. The rule laid down in *Empress*

(1) 22 W. R., Cr. 75.

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v. *Donnelly* (1) and many other rulings is that a Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. The Magistrate in a letter which has been read to us states that he only witnessed the facts deposed to by the witnesses from a distance, and it has been said that his evidence could not have materially affected the result of the case. But this appears to us to be immaterial. The accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence, and which they had no opportunity of testing by cross-examination and of rebutting [see the case of *In re Hurro Chunder Paul* (2)].

We therefore consider that in the circumstances of the case the Magistrate was disqualified from trying it himself, and we accordingly set aside the convictions and sentences and direct that the accused be re-tried by some other Magistrate of the Backergunge district.

We would add that in passing this order we wish to cast no reflections on the District Magistrate, who appears to have been actuated by a zealous desire to preserve the peace of his district. But, as pointed out by Mellor and Lush, JJ., in the case of *Serjeant* v. *Dale* (3) when laying down the rule that if a Magistrate has any legal interest in the decision of a case, he is disqualified from trying it, no matter how small that interest may be :—"The law in laying down this strict rule had regard not so much perhaps to the motive which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

H. T. H.

Rule made absolute and convictions quashed.

(1) I. L. R., 2 Calc., 405.

(2) 20 W. R., Cr. 76.

(3) L. R., 2 R. B. D., 558.