1872

W. MORAN v. DEWAN ALI SIRANG.

did not allege; and if he had ordered the money which was then in Court to be paid over to the plaintiffs, he would without raising any technical question, have done real justice between the parties. It may be that the procedure adopted by the plaintiffs is not quite correct, and that it is an informal kind of inter-pleader which is not authorized by the Act, but it arises out of the circumstances that, instead of the claim having been preferred to the steamer, the money is substituted and paid into Court. I see no reason why that should not be allowed, the defendant not having been prejudiced in any way.

We make an order that the money be paid out to the plaintiffs, and that the defendant do pay the plaintiffs the costs of reserving the question, and stating the same for the opinion of this Court, to be taxed according to the scale which is usually allowed in references from the Small Cause Court.

Attorneys for the plaintiff: Messrs *Gray* and *Sen*.

Pleader for the defendant: Mr. *DeSilva*,

[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Loch, Mr. Justice Jackson, Mr. Justice Glover, Mr. Justice Mitter, and Mr. Justice Ainslie.

THE QUEEN *v.* HIRA LAL DAL AND OTHERS IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.*

Trial by Magistrate of Charge instituted by him as Sub-Registrar—Registration Act XX of 1866.

The proceedings of a Magistrate who tries prisoners charged with having committed offences under sections 93 and 94 of the Indian Registration Act XX of 1866 (1) are not illegal, and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his capacity of Sub-Registrar.

Under such circumstances, where it can be done, it would be better if the case were tried by some other person.

* Miscellaneous Criminal Case, No. 89 of 1871.

(1) See sections 80, 81, Act VIII of 1871.

1871

THE QUEEN v. HIRA LAL DAS.

THE prisoners in this case were charged by the Assistant Magistrate of Mudbhunnee in his capacity of Sub-Registrar with offences under sections 93 and 94 of Act XX of 1866, in having falsely personated or abetted the false personation of one Balgabinda Das, who was alleged to have executed a bond, which the prisoners presented for registration. They were afterwards tried by the same officer as Assistant Magistrate. On their trial they made a statement amounting to a plea of not guilty, and evidence having been taken, two of the prisoners were sentenced to a year's imprisonment, and the third to imprisonment for six months. Against this sentence they appealed to the Judge of Tirhoot, who, following the decisions of the High Court in the cases of *The Queen* v. *Chandra Sikar Rai* (1) and *In re Bharat Chandra Sen* (2), held that the proceedings of the Assistant Magistrate were *ab initio* without jurisdiction, inasmuch as the Sub-Registrar who had set on foot the prosecution and the Magistrate who had convicted the prisoners, were one and the same person, and that he was therefore, according to the cases cited, debarred from trying a case which he had himself set on foot.

The record of the case was sent for by the High Court under section 404, Code of Criminal Procedure, on the motion of Mr. Bell, the Legal Remembrancer. The case came on before Macpherson and Glover, JJ., on the 15th of September 1871,

(1) 5 B. L. R., 100.

(2) *Before Mr. Justice Kemp and Mr. Justice Ainslie.*

The 26th November 1870.

In re BHARAT CHANDRA SEN, PETITIONER.

Baboos *Kali Mohan Das* and *Nalit Chandra Sein* for the petitioner.

KEMP, J.—This is an application on the part of Bharat Chandra Sein, head clerk in the Sub-Registrar's office of Tipperah.

The point taken by his pleader is that the Magistrate who is also Sub-Registrar investigated the case in the first instance and subsequently tried and convicted his client as Magistrate.

We think that, on the principle that no one should be a Judge in any case in which he is himself interested, as also on the principles laid down in a decision of a Divisional Bench of this Court in *The Queen* v. *Chandra Sikar Rai* (a) the Magistrate ought not to have tried this case.

We therefore quash his proceedings, and direct that the case be tried by some other official having power to try it.

The fine must be refunded.

(a) 5 B. L. R., 100.

1871

THE QUEEN v. HIRA LAL DAS.

who considering that the Magistrate had no such interest in the case as to disqualify him from trying it himself, referred the question to the Full Bench, "Are the proceedings of A. B. a Magistrate who tries prisoners charged with having committed offences under sections 93 and 94 of Act XX of 1866, illegal and without jurisdiction, or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same A. B. in his official capacity of Sub-Registrar."

Mr. *Bell*, the Legal Remembrancer, on behalf of the Government, contended that, assuming the Assistant Magistrate was an interested party, his proceedings would not on this account be void *ab initio*, they would only be voidable. The fact of the prisoners submitting without objection to be tried by the Assistant Magistrate, amounted to a waiver of any objection which they might have urged as to the Magistrate being an interested party. *Reg.* v. *The Justices of Richmond, Surrey* (1); and cases collected at page 5109 of Fisher's Digest, Title, Justice of the Peace. [COUCH, C. J.—The practice in England is that, if a Justice is interested in the subject-matter of the suit, he discloses his interests, and leaves the parties to decide whether they are willing to abide by his decision in the case]. The case discloses no interest on the part of the Assistant Magistrate at all. As Sub-Registrar it came to his knowledge that there was reason to believe that the prisoners had been guilty of false personation: and with the sanction of the Registrar he directed criminal proceedings to be taken against them. In instituting these proceedings he had no private interest to serve; he was merely discharging a public duty; he had no interest that could disqualify him from afterwards trying the case as a Magistrate. The interest that disqualifies must either arise from relationship to the parties or be of a direct pecuniary nature—*The Queen* v. *Rand* (2), *The Queen* v. *The Manchester, Sheffield,* and *Lincolnshire Railway Company* (3). Circumstances

(1) 8 Cox.' C. C., 314.
(2) L. R., 1 Q. B., 230.
(3) L. R., 2 Q. B., 339.

form which a mere bias can be inferred are not sufficient—*Reg* v. *Dean of Rochester* (1). The fact that the convicting officer had in his public capacity instituted the prosecution is not an interest that disqualifies—*Wildes* v. *Russell* (2), where the authorities are collected. *In the Queen* v. *Mukta Sing* (3), Norman, J., held that the conviction was good, though the Judge had not only instituted the prosecution, but had also given evidence before himself against the prisoners. To the same effect is the case of the *Justices of the Peace for the Town of Calcutta* v. *The Maharanee of Burdwan* (4). The principal case on the other side, upon which the Sessions Judge relied, is the case of the *Queen* v. *Chandra Sikar Rai* (5): now that case decided that an Assistant Magistrate, whose process had been disregarded by a witness, was not competent to try the witness under section 174 of the Penal Code for disobedience to the summons of his own Court. [GLOVER, J.—The question referred to the Full Bench was whether the Assistant Magistrate could try a case which he had instituted as Sub-Registrar. The case of *The Queen* v. *Chandra Sikar Rai* (5) turns upon the construction of a particular section of the Procedure Code.] The principle involved in that case seems identical with that involved in the present reference. It decided that an Assistant Magistrate should not try a witness under section 174 of the Penal Code for an offence committed against his own Court, and this is opposed to the rulings both at Madras and Bombay, at the latter in *Reg* v. *Garu bin Tátiá Selar* (6). [COUCH, C. J.—The point was not decided there, for it was never raised]. The point was certainly not expressly raised, but the report shows that the Magistrate who convicted the witness was the same Magistrate whose process had been treated with contempt. The decision turned upon another point, but the case shows the practice of the Court. In the Madras High Court Proceedings, 26th July 1869 (7), the point was expressly decided. It was there held that sections 171—175 of the Code of Criminal Procedure were enabling sections,

(1) 20 L.J., Q.B., 467; S.C., 17 Q. B., 1.
(2) L. R., 1 C. P., 722.
(3) 4 B. L. R., Ap. Cr,. 15.
(4) 1 I. J., N. S., 102.
(5) 5 B. L. R., 100.
(6) 5 Bom. H.C., Rep., C.C., 38.
(7) 4 Mad. H. C,, Rep. Rulings LII.

1871

THE QUEEN v. HIRA LAL DAS.

and that under those sections, a Magistrate could try a witness for disobeying the process of his Court, and was not obliged to send him to another Magistrate for trial. There are many sub-divisions in which there is only one Magisterial officer, and if he is debarred from trying offences which have come to his knowledge in his official capacity, the great advantages of the sub-divisional system will be done away with, and petty cases, instead of being promptly tried upon the spot, will have to be disposed of, to the great inconvenience of the parties, at the distant station of the District Magistrate.

Mr. *G. Gregory* for the prisoners.—Assuming that a conviction under the circumstances is only voidable, and not void *ab initio*, there must be some means of getting rid of it. The prisoners appealed to the Judge, and the Judge on such appeal has set aside the conviction. It is now a nullity. It has no existence and, therefore, no longer is it only voidable.

That the prisoners did not object in time is of no consequence, for serious informality like this cannot be waived in a criminal case—*The Queen* v. *Bertrand* (1). Consent cannot give jurisdiction to a Judge in a criminal case if the Judge does not possess it or is disqualified by law. [JACKSON, J.—Suppose the prisoner does not challenge a juror in time.] The juror then is not disqualified. He is only disqualified when he is challenged. The men summoned to sit as jurors are not *ab initio* disqualified but are competent to act as jurors. The law gives the prisoner the privilege to challenge a certain number, but he must exercise the privilege at a certain time. If he does not, the privilege is lost, but the cause of disqualification in this case existed, if at all, from the beginning which even the express consent of the prisoner would not remove. Mr. Bell's reasoning could only prevail in a civil case. Besides, these matters have not been referred to the Full Bench by the Division Bench.

The interest in this case is, that the Magistrate decided a case in which he was both *actor* and *judex*. The maxim of law that disqualifies Judges to try cases on the ground

(1) L. R., 1 P. C., 520.

1871

THE QUEEN v. HIRA LAL DAS.

of interest is variously expressed, but its real object is to exclude a Judge before whom the prisoner could not get a fair trial, whether it to be for personal interest or any other cause. The Magistrate, as Sub-Registrar, satisfied himself that the prisoners were guilty of the offence under the Registration Act before he sent them before the Magistrate to be tried. When he afterwards tried them himself, can it be said that he tried the prisoners with that freedom from bias and foregone conclution with which another Magistrate would have tried them ? The object of the maxim is to secure to a party, in civil or criminal cases, the right of not being prejudiced in his trial by any interest in the Judge, or undue bias, or bad feeling, or any foregone conclusion. The existence or application of these wholesome maxims does not depend upon the sections of the Code of Criminal Procedure, but they apply in every Court where English jurisprudence prevails, "for *jura naturæ sunt immutabilia*, and they are *leges legum*" *Day* v. *Savadge* (1)—to which all other laws are subservient. In an anonymous case reported in 1 Salkeld's Reports, 396, a Judge is said to have been laid by the heels for having sat as a Judge in his own cause. The cases given in the books are merely summary instances of the application of this useful rule of law, but are not exhaustive of its whole extent and application, and the true meaning and extent can only be gathered from a very large number of cases. In the case between the *Parishes of Great Charte and Kennington* (2), it was held that Lord Raymond, a Justice, could not join in removing a pauper from his own parish. The case of *Wildes* v. *Russel* (3) is very easily explained. The relation there of Prosecutor and Judge is created by Statute. The true reason, for that decision is given by Mr. Justice Montague Smith where he says, "the maxim *nemo sibi esse judex vel suis jus dicere debet* cannot have any reference to a state of things like this where the relation is created by Statute and the Judges have a duty imposed upon them to investigate and decide. Suppose the Clerk of the Peace were wilfully to falsify a record of the Court, is it to be said that they have not power to bring

(1) Hob., 87.

(2) 2 Str., 1173.

(3) L. R., 1 C. P., 722.

1871

THE QUEEN v. HIRA LAL DAS.

him before themselves and investigate such a charge. It would plainly be their duty to do so" (1). Upon the same principal rests the decision of Norman, J., in *The Queen* v. *Mukta Sing* (2) for the learned Judge says : " It may be said in the present case that the complaint in the Magistrate's Court was preferred by the Sessions Judge. It should be observed, however, the complaint is one which could hardly be made, except with the sanction of the Judge under section 169, Code of Criminal Procedure." And on this principle also was the decision in *Queen* v. *Dean and Chapter of Rochester* (3).

Section 172, Code of Criminal Procedure, expressly enacts that " it shall be competent to a Court of Session to charge a person for any such offence committed before it, or under its own cognizance, if the offence be triable by the Court of Session exclusively, and to commit or hold to bail and to try such person upon its own charge." If the Sessions Judge had this power already why was section 172 passed ? The Legislature made an exception to the rule or maxim in question, because in cases of false evidence the Judge, before whom the false evidence is given, is perhaps the best Judge, of the falsity of such evidence But there is no similar provision in the law to enable subordinate tribunals to commit and to try at once.

The inconvenience alluded to is in this case imaginary ? There are a great many Magistrates in Tirhoot competent to try this case. Where there is but one Magistrate, an exception may be made to the rule for the ends of justice. The rule is not an inflexible rule. But wherever it is possible, the Magistrate trying an accused person, should be free from any bias or ill feeling—Russel on arbitration, 2nd edition, page 108, and the cases cited in the argument in *William Dimes's* case (4). There are several cases in the Reports of this Court in which Magistrates have been censured by the High Court for the over-zeal displayed by them in such cases, arising, no doubt, from a conviction previously formed of the prisoner's guilt. The cases relied upon by the Judge—*The Queen* v. *Chandra Sikar Roy* (5)

(1) 1 L. R., 1 C. P., 747.
(2) 4 B. L. R., Ap. Cr., 15. 19.
(3) 17 Q. B., 1 S. C., 20 L. J., Q. B., 467.
(4) 14 Q. B., 554.
(5) 5 B. L. R., 100.

1871

THE QUEEN v. HIRA LAL DAS.

and *In re Bharat Chandra Sen* (1) will shew that it has been the practice of this Court to exclude Judges who are, or may be, under a possible bias from trying cases commenced by them. The extent and application of the maxim can be gathered from a variety of cases. The *Parishes of Great Charte* and *Kennington* (2) *The Queen* v. *Allen* (3), *Ellis* v. *Hopper* (4), *The Queen* v. *The Recorder of Cambridge* (5). *In re Ollerton* (6).

Mr. *Bell* in reply.—The cases which have been referred to on the other side may be explained on the ground that the Justices, whose proceedings were reversed, were disqualified to act as Judges from having an interest in the subject-matter of dispute. The case of *The Queen* v. *Bertrand* (7) merely decides that it was irregular on the part of a Judge, even with the consent of the prisoner's Counsel, to read to the Jury the depositions of the witnesses, instead of producing before the Jury the witnesses themselves. But there is no question of any irregularity in this case. The argument founded on section 172 of the Criminal Procedure Code, that the fact of the Legislature having specially authorized Sessions Judges to try offenders committed by themselves is a proof that it was never intended that any other officers should exercise the functions of both prosecutors and Judges, arises from a misapprehension of the circumstances under which section 172 was passed. Formerly Sessions Judges could not commit for offences committed before themselves; and section 172 was passed to give them this power. The fact of Sessions Judges being expressly authorized to try their own commitments shows that the Legislature recognizes the principle that public officers could be both prosecutors and Judges. Section 68 of the Procedure Code confers this two-fold power on Magistrates in the same way that section 172 confers it upon Judges. The Magistrate who accuses a party does not necessarily make up his mind as to the prisoner's guilt. No one can

(1) *Ante*, p. 423.
(2) 2 Str., 1173.
(3) 33 L. J., Mag. Ca., 98.
(4) 3 H. & N., 766.
(5) 8 E. & B., 637.
(6) 15 C. B., 796.
(7) L. R., 1 P. C., 520.

1872

THE QUEEN v. HIRA LAL DAS.

seriously contend that a Magistrate would desire to convict an innocent man.

COUCH, C. J.—The question which is referred to us is (*reads*). Section 95 (Act XX of 1866) provides that "a prosecution for any offence under this Act coming to the knowledge of a Registering Officer in his official capacity may be instituted by the Registrar General, the Registrar, or," which is this case "(with the sanction of the Registrar to whom he is subordinate), the Sub-Registrar in whose territory, district or sub-district, as the case may be, the offence has been committed." And that "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or Subordinate Magistrate of the first class."

I think that the Legislature, when this section was passed, did not contemplate the Sub-Registrar being also the Magistrate, and himself exercising the power of a Magistrate and trying the case; and certainly where it can be done it would, to my mind, be better that same other person than the Sub-Registrar should try the case. But I agree with the referring Judges in thinking that the words of the section do not indicate that he must be another person. The words of the section are not sufficient to prohibit him from doing it; and therefore the other question arises whether there is any general rule of law with regard to the Judge being interested which would apply, and which would prevent the Sub-Registrar being the Magistrate who tried the case.

Now the interest which disqualifies a Judge is not merely a pecuniary interest; that would be too limited a way of describing such an interest; but in describing it we ought rather to use the language of Norman, J., in the case of *The Queen* v. *Mukta Sing* (1) that is to say "a personal or a pecuniary interest." A Magistrate could not try a person for an assault upon himself; and without defining precisely what amounts to personal interest, it appears to me that there must be either a personal or pecuniary interest in order to disqualify a Judge

(1) 4 B. L. R., Ap, Cr., 15, 20.

or Magistrate from exercising the general jurisdiction which is conferred upon him. It is not a question of want of jurisdiction so much as of a disability arising from interest to exercise his jurisdiction in the particular case.

In this case I think the Sub-Registrar has not such an interest in the matter as disqualifies him from trying the case; and I may observe, with reference to some of the arguments that have been used as to the Sub-Registrar having made up his mind and that the accused would have no chance of a fair trial, that the sanction of the superior officer, the Registrar is required before the prosecution can be instituted, and certainly I do not consider that the prosecution will not be instituted unless the Sub-Registrar has made up his mind as to the guilt of the party. It is his duty, when he comes to know that an offence has been committed, to cause a prosecution to be instituted; by which I understand that there is *primâ facie* evidence of an offence having been committed, that there is that which renders it proper that there should be an enquiry, and the Registrar accordingly gives his sanction to it; and certainly, I cannot suppose that because an officer in his position sanctions the institution of a prosecution, his mind is made up as to the guilt of the party, and that he is not willing to consider the evidence which may be produced before him when he comes to try the case. In this case there appears to be no such interest as would prevent the case from going before the Magistrate as the trying authority; but, as I have already said, it would be better, where it can be avoided, that it should not be done, and it may very well be that the Court in its discretion would in similar cases direct the transfer of the case, in order that it should be tried by some other officer.

Section 172 of the Code of Criminal Procedure does not, in my opinion, afford any argument in favor of the proposition that the Sub-Registrar could not try the case. I understand section 172 to be this, that whereas the Court of Session would not have authority before the passing of the Code to frame a charge, or commit for trial in respect of offences committed under the preceding sections, a special power is given to it in this particular instance to do so. That is a sufficient

1871

THE QUEEN v. HIRA LAL DAS.

explanation of section 172, and the section does not afford any ground for the contention of Mr. Gregory, that, because there is a special provision of that kind, by the general law a Judge instituting proceedings against a person cannot also try him.

I think that the question that has been put to us by the Division Court must be answered in the negative, that it is not illegal or without jurisdiction or otherwise bad for the Magistrate to try a person in the case supposed.

Then there is another question which it may be well to consider, namely, what order should be made upon this answer being given to the question referred? I rather think that had better be disposed of by the learned Judges who referred the question, as they can deal with that matter better than we can, having had all the facts of the case before them.

LOCH, J.—I concur.

JACKSON, J.—I am of the same opinion. I admit that I have not been free from doubt. It seems to me, on reading the terms of section 95, Act XX of 1866, that the Legislature had in contemplation, first the person by whom proceedings of this kind might be instituted, and then a Magistrate of a specified grade, before whom such charges must be instituted, and that the Legislature, in passing that section, did not contemplate the union of those two capacities in the same person. I admit, however, that the Legislature has not in this instance used words sufficiently clear to exclude the union of those two persons. In the case of *The Queen* v. *Chandra Sikar Rai* (1) we had to deal with the wording of a different Act where the words used were more emphatic. There the law speaks of sending a particular person, in custody and charged with having committed a certain offence before a specified Magistrate. If the same words had been found in section 95, Act XX of 1866, I should probably have held the same opinion in this case as I did in the other case.

(1) 5 B. L. R., 100.

1871

THE QUEEN v. HIRA LAL DAS.

GLOVER, J.—I concur in the answer to be proposed given to the question referred by the Division Bench.

MITTER, J.—I concur in the proposed answer to the reference.

AINSLIE, J.—I concur.

[ORIGINAL CIVIL.]

1872
March 12.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

THE JUSTICES OF THE PEACE FOR CALCUTTA *v.* THE ORIENTAL GAS COMPANY (LIMITED.)

Appeal—Mandamus, Order making absolute Rule Nisi for—Liability of Justices to make Compensation—Act VI of 1863 (*B. C.*), *ss.* 151, 226, 229, *and* 230.

By section 151 of Act VI of 1863 (B. C.) the Justices are empowered in making any main or sewers for the drainage of Calcutta "to carry such sewers through, across or under any street, or any place laid out as, or intended for a street, or any cellar or vault which may be under any of the streets, and (after reasonable notice in writing in that behalf) into, through, or under any inclosed or other land whatsoever, making full compensation for any damage done thereby: and if any dispute shall arise touching the amount or apportionment of such compensation, the same shall be settled in the manner thereinafter provided for the settlement of disputes respecting damages and expenses." Section 229 provides that "in all cases where any damages, costs, or expenses are by this Act directed to be paid, the amount of the same, in case of dispute, shall be ascertained and determined by a Judge of the Calcutta Court of Small Causes." Section 226 provides that a month's notice shall be given before any action is brought under the Act against the Justices. By Act V of 1857, the Oriental Gas Company was empowered to lay down pipes, and execute other necessary works for the supply of gas to Calcutta. In an application by the Company for a writ of *mandamus* to compel the Justices to join with the Company in referring to a Judge of the Small Cause Court to ascertain the amount payable to the Company as compensation for damage alleged to have been occasioned to their pipes, &c., by the drainage works of the Justices, an affidavit was filed in which the Company's manager stated specifically the loss that had been occasioned and that he had, on personal inspection, satisfied himself that the loss was occasioned by the negligent execution of the drainage works of the Justices. The affidavit on behalf of the Justices stated that "in carrying out such drainage works, the Justices or their contractors, agents, or servants have not damaged the pipes, &c., of the Company, and that the Justices deny that they are in any manner liable for

See also
14 B L R, 362
13 B L R. 96
I, L. R.
1 Mad 148
1 Cal 102