LOCH, J.—We concur in the opinion expressed by the Judge, and direct that the fine imposed upon Thakur Sing and his party be remitted.

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QUEEN
v.
TULSI SING.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

IN THE MATTER OF BANKA BIHARI GHOSE.*

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Jany. 9.

Tolls—Arrears of Rent—Illegal Arrest.

A, the lessee of a toll, was in arrear to Government in respect of the rent. The Magistrate issued a summons to him, whereby it was recited that a plaint had been preferred against him (A) for the offence of not paying the sum of rupees 262 for arrears of rent, and A was summoned to appear before the Magistrate to answer the charge. A did not appear on the day appointed, but had an application presented for postponement of the demand for arrears of rent, on the grounds therein stated. On the following day, the Magistrate passed the following order: "Whereas the debtor, defendant, has not appeared in person, the summons has been disobeyed: therefore, it is ordered that a warrant be issued for the arrest of the defendant." Proceedings were afterwards taken upon the warrant. *Held*, that all the proceedings taken by the Magistrate were irregular, and must be set aside.

ON the 5th December 1868, Banka Bihari Ghose petitioned the High Court, alleging as follows:—

"That on the 30th March 1868, your petitioner got an ijara of the Bakrahat toll bar from the Magistrate of Zilla 24-Pergunnas.

"That, during the last heavy showers of rain, a greater portion of the road being broken, your petitioner applied to the Magistrate of 24-Pergunnas, on the 25th June 1868, for repairing the road and giving a remission of the rent payable by your petitioner.

"That, subsequently, a charge for not paying 262 rupees on account of arrears of rent having been instituted against your petitioner, on the 8th July 1868, a notice was issued, directing your petitioner to appear before the Magistrate of 24-Pergunnas, on the 15th idem.

"That, on the said 15th July, your petitioner presented an application to the Magistrate, requesting him, on the grounds stated therein, to postpone for a while the demand for arrears of rent

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"That, on the 16th July 1868, the Magistrate of 24-Per-
"gunnas passed the following order: 'Whereas the debtor,
"defendant, has not appeared in person, the summons has been
"disobeyed; therefore, it is ordered that a warrant be issued for
"the arrest of the defendant.'

"That, subsequently, on the 5th August, your petitioner appeared personally, and applied to the Magistrate for deducting from the amount which had been deposited by him, the amount of rateable arrears, and refunding to him the remainder of the deposit money, and for withdrawing the illegal warrant which had been directed to be issued for the arrest of your petitioner.

"That, notwithstanding these applications, on the 13th Ahgran last, some constables went into the house of your petitioner at Arbellia and entered into his zenana.

"That your petitioner submits, that, under the circumstances of the case, the Magistrate had no jurisdiction to issue the warrant complained of by your petitioner.

"That, therefore, your petitioner prays that your Lordships may be pleased to direct the Magistrate of 24-Pergunnas to show cause, under what law, and for what offence, he issued the warrant for the arrest of your petitioner. And your petitioner further prays that your Lordships may be pleased to set aside the order of the Magistrate of Zilla 24-Pergnnnas, whereby he directed a warrant to be issued for the arrest of your petitioner."

Upon this the Court, (PEACOCK, C. J., and MITTER, J.) ordered the Magistrate of the 24-Pergunnas to suspend further proceedings, and to send up the papers to the Court, permitting him at the same time, if he were so minded, to show cause why his order should not be set aside.

On the 23rd December, the Magistate by letter showed cause as follows :—

"With reference to the Court's resolution on the petition of Banka Bihari Ghose, farmer of the Bakrahat toll bar, execution of the warrant has been stayed pending the further orders of the Court.

"2. I beg to forward herewith the record, and to show cause as follows, why the order should not be set aside.

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"3. The petitioner is the farmer of a toll-gate under Act VIII. of 1851, and is, under clause 2 of the Act, liable to the same responsiblities, as he would be, if similarly employed in the collection of land revenue.

"4. His position is very much analogous to that of the farmer of a ferry under Regulation VI. of 1819. The law has, in their case, provided (section 10, Regulation VI. of 1819,) for recovery of arrears in the mode prescribed for the recovery of money embezzled by native ministerial officers, that is in acordance with section 7, Regulation XVIII. of 1817.

"5. There is no specific mode of recovery of arrears from defaulting toll farmers precribed in the law quoted, but by the provision that persons employed in the management and collection of the tolls are liable to the same responsibilities as would belong to them, if employed in the collection of the land revenue, I infer that they may be proceeded against on default as persons similarly employed in the collection of the land revenue may be.

"6. The liablity of a farmer of land revenue to arrest on default under section 23, Regulation VII. of 1799 has not so far as I am aware, been ever questioned, and consequently in my opininon, a farmer of the toll revenue is similarly liable.

"7. It is perhaps scarcely necessary to call atention to the fact that the process under question bears date anterior to the 10th August last, on which day the section of the Regulation under which it was issued ceased to be law by the enactment of Act VII. B. C. of 1868."

The judgment of the Court was delivered by

PEACOCK, C. J.—We think that the order of the Magistrate dated the 16th of July 1868, and the warrant issued thereon ought to be set aside.

The petitioner, against whom the warrant was issued, was the lessee of the tolls to be collected at a certain toll-gate. Certain arrears of rent payable under the lease being unpaid, the Magistrate issued a summons for the appearance of the petitioner. It does not appear, on the face of the summons, under what law the Magistrate was proceeding; but the summons recites that a

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complaint having been preferred aginst the petitioner for the offence of not paying the sum of Rupees 262 for arrears of rent, the petitioner was summoned to appear before the Magistrate to answer the charge. From the use of the word "offence," it would seem that the Magistrate was treating the case as one of a criminal, and not of a civil nature. The petitioner did not appear in pursuance of the summons; but he sent a kaifiat to the effect that the road having been out of repair and carriages and passengers having been unable to pass along it, he had been unable to collect the tolls in repect of which the rent was payable. Upon that the Magistrate made the order in question. The order is in these words: "Since the debtor has not appeared in person, he has thereby disobeyed the order of the Court; therefore, it is ordered that a warrant be issued to arrest the defendant;" and a warrant was issued accordingly.

It does not appear, on the face of the order, under what provision of law the Magistrate was acting in ordering a warrant to be issued for default of appearance according to the terms of the summons. The only law of which I am aware which could give any color of justification for the issue of the warrant, is section 73 of the Code of Criminal Procedure, which authorizes a Magistrate, after default made to a summons, to issue a warrant of arrest against the person summoned.

If the order was made and the warrant issued under the provisions of the Code of Criminal Procedure, this Court, under the power of revision vested in it by section 404, may set aside the proceedings for an error in law.

If the Magistrate considered that the non-payment of the rent due under the lease was a criminal offence, it appears to me that he was wrong in point of law; and that he had no power under the Code of Criminal Procedure to arrest the prisoner for not appearing to the summons, and the Court in that case would have no difficulty in quashing the order and warrant, and all proceedings taken under them.

When the rule for setting aside the order was made by this Court, the Magistrate was authorized to show any cause he might think fit why the order should not be quashed, and the Magistrate in his letter of the 23rd December 1868, has stated his reasons.

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He contends, first, that the petitioner as farmer of a toll-gate, under Act VIII. of 1851, is under clause 2 of that Act, subject to the same responsibilities as he would have been if similarly employed in the collection of land revenue; and that he was, consequently, liable to be dealt with under section 23, Regulation VII. of 1799.

That Act authorizes the local Government to fix the rates of tolls to be levied upon any road made or repaired at the expense of the Government, and to place the collection of such tolls under the management of such persons as may appear to them proper; and it is enacted by the section to which the Magistrate refers, that all persons employed in the mangement and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land revenue.

It is unnecessary to consider, under what provision of the law the tolls were leased to the petitioner by the Magistrate, for it appears to me that the lessee of tolls is not a person employed in the management and collection of the tolls within the meaning of Act VIII. of 1851. If he was a manager and collector of tolls he would be liable to pay over the tolls when collected and to be punished for embezzlement if he should appropriate them to his own use. But a farmer or lessee of tolls collects them for his own use, and pays the rent in consideration of which the tolls are made over to him for the term of the lease. It appears that the warrant was issued on the same day on which Regulation VII. of 1799 was repealed by Act VII of 1868. I will not stop now to enquire whether a warrant issued on the very day on which the Regulation was repealed, could be justified by the Regulation, because I am of opinion that if the warrant had been issued whilst the regulation was in full force, it would not have been justified by the Regulation.

Section 23, clause 2, authorized proceedings to be taken in the event of any arrear of revenue being undischarged on the 1st day of the month succeeding that for which the arrear should have become due. The section extended not only to arrears of revenue properly so called, but to arrears of revenue as described in section 2, Regulation XIV. of 1793. It applied, therefore, to arrears of rent due from a farmer of land. The procedure thereby pointed out, was to require payment of the arrear due

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with interest, and, if not paid, it authorized the attachment of the estate of the proprietor from whom the arrear should be due; or, in the case of a farmer, both the attachment of his farm and the arrest of his person. The arrest was to be made by the Collector as a fiscal, not as a criminal officer, in the mode prescribed by section 5, Regulation XIV. of 1793. The procedure pointed out by that section was very different from that adopted in the present case. In particular, the amount of the arrear due from the defaulter was to be specified in the warrant. In this case the order for the arrest of the petitioner was not for non-payment of the arrear, but for disobeying the order of the Court in not appearing personally, according to the tenor of the summons; and the order was made not in the character of Collector, but in the character of Magistrate.

Further, the Collector contends that the position of the petitioner was very analogous to that of the farmer of a ferry under Regulation VI. of 1819, by section 10 of which recovery of arrears may be made in the mode prescribed for the recovery of money embezzled by native ministerial officers in accordance with section 7, Regulation XVIII. of 1817. It is unnecessary to refer to this contention of the Magistrate further, than to say that however analogous the position of a farmer of tolls and the farmer of a ferry may be, the law which is applicable to the farmer of a ferry has not been extended to the farmer of the tolls of a road.

The lease of the tolls did certainly stipulate that, if the rent should not be paid, it might be recovered in the mode prescribed for the recovery of money embezzled by native ministerial officers; but I apprehend it is perfectly clear that such a stipulation could not legally be made, and that the Magistrate as lessor of the tolls had no right to reserve a remedy other than that which the law provided.

If a zemindar should stipulate upon the grant of a talook hat if the rent should not be paid, the lessee may be dealt with in the same manner as a native ministerial officer who embezzles money, and that it should not be necessary for him to proceed under Act X. of 1859, such a stipulation would not be binding The Magistrate could no more stipulate that any particular

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law should be applicable to the rent reserved in the lease in question than a zemindar could make a binding stipulation to the effect to which I have referred.

In this case, the Magistrate was proceeding in his character of Magistrate, and not in his character of Collector, and it appears to me that he had no authority whatever to issue the warrant; and that this Court has the power under the Code of Criminal Procedure, to quash it upon revision; and further, it appears to me that if the case did not fall within the Code of Criminal Procedure, this Court under its general power of superintendence would have power to quash an order made by a Magistrate for the issue of a warrant in a case in which he had no jurisdiction whatever so to proceed. We are of opinion, therefore, that the order must be quashed, and all subsequent proceedings thereon, including the warrant, set aside, the petitioner having undertaken not to take any legal proceedings for any thing done under the warrant or order. This undertaking, of course, does not extend to any proceedings which the Magistrate or Collector may have instituted or may institute with reference to the conduct of the mofussil officers in executing the warrant, pending the rule, contrary to the orders of the Magistrate and of this Court.

Before Sir Barnes Peacock, Kt., Chief Justice and Mr. Justice Mitter.

1869
Mar. 5.

THE QUEEN *v.* KABIL MANJI AND OTHERS.*

Obstructing Navigation—Act V. (B. C.) of 1864.

To render a person liable to punishment under section 16, Act V. (B.) C.) of 1864, for obstructing the line of navigation of a Government canal, it must be shown that he wilfully obstructed the navigation.

Baboo *Srikant Mullik* for the petitioner.

THE judgment of the Court was delivered by

PEACOCK, C.J.—In this case, Mr. Beaufort, the Judge of the 24-Pergunnas, has sent up a conviction of three manjis, for having obstructed the line of navigation in the new canal, opposite Sura

* Reference by the Sessions Judge of the 24-Pergunnas.