CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RAM CHANDRA DAS, ONE OF THE SECOND PARTY (PETITIONER), *v.* MONOHUR ROY AND OTHERS, FIRST PARTY (OPPOSITE PARTIES).* 1893 *April*, 14.

Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned"—Witnesses—Issue of summons to witnesses—Magistrate, duty of—Process to enforce attendance of witnesses.

THE words "parties concerned" in s. 145 of the Criminal Procedure Code do not necessarily mean only the persons who are disputing, but include also persons who are interested in, or claiming a right to, the property in dispute.

Though in a proceeding under s. 145, the evidence is to be recorded as in a summons case, it is the duty of the Magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so.

Hurendro Narain Singh Chowdhry v. *Bhobani Prea Baruani* (1) followed.

OF these cases, one (Rule 111) was a dispute as to the possession of certain land, which led to an order under section 145 of the Criminal Procedure Code, and the other (Rule 109) was a case of unlawful assembly, assault and theft, arising out of the dispute as to the land. The facts of the case under section 145 of the Criminal Procedure Code are alone material to this report.

The dispute was concerning a chur which had been gradually formed on the western bank of the river Ganges, which one party alleged was a portion of chur Kristodebpur (bearing *touji* No. 151 in the Burdwan Collectorate), of which they alleged they had been in possession for a long time past; the other party contending that the disputed chur was in the possession of, and belonged to, Grija Nath Roy Chowdhry and Jatindra Nath Ray Chowdhry, zamindars of Satkira, the Digapaty Raj estate under the Court of

* Criminal Revision Nos. 109 and 111 of 1893 against the order passed by J. Kelleher, Esq., Sessions Judge of Burdwan, dated the 20th of January 1893, modifying the order passed by Babu Nogendra Nath Pal Chowdhuri, Deputy Magistrate of Kalna, dated the 7th of January 1893.

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Wards, and one Ram Das Gangooly of Santipore, who were the owners of mauzas Panpara and Gyaspur (appertaining to *towji* No. 508 in the Jessore Collectorate) on the opposite side of the river: the allegations of the second party being that the chur was formed by the re-formation on the other side of the river of portions of the two mauzas of Panpara and Gyaspur, which had been diluviated by the river.

The head constable of the Kulna police station having reported that the dispute was likely to occasion a breach of the peace, the Deputy Magistrate instituted proceedings under section 145 of the Code, and had notices served on Monohur Roy, Kali Das Hazra, gomasta of Koondun Lall Karpur, and Goberdhone Sheik, a tenant of the chur, as the first party; and on Ram Chandra Das, Brojo Nath Ghose, gomasta of the Panpara zamindars, and Kali Charan Singh, a lathial in their employ, as the second party, to put in their claims as to the fact of possession.

An application was made on 14th December 1892 by the second party for summonses for thirty-four witnesses whom they wished to appear and give or produce evidence in support of their case; but the Deputy Magistrate ordered the issue of summons only on five of such witnesses; and only four witnesses were examined for the second party. On their witnesses not attending without summons, the Magistrate refused to postpone the case for their attendance. Several preliminary objections were taken to the proceedings by the pleader for the second party, but the judgment of the Magistrate in one of them only is material to the present report. He said :—

"Another preliminary objection was that as the zamindars of Panpara, the Digapaty estate under the Court of Wards, and the Satkira estate under the Court of Wards, under whom the gomastas Ram Chunder and Brojo Nath of the second party serve, having not been made a party, the proceeding cannot be valid. But to this I must say that no breach of the peace is expected from a manager under the Court of Wards who cannot be a party to such high-handed and illegal means, and I doubt very much if they were actually aware of the proceedings of these underlings, the gomastas under a zamindar. This I say, as I don't find any proof or sign throughout the proceedings that the said managers in any way are taking any interest in this case, and, therefore, it would be quite useless to drag them here in an undesirable proceeding of a Criminal Court. Then, as regards the evidence

of actual possession, that adduced for the first party, I cannot but say, is overwhelming; whereas for the second party, I may say, almost nil. *Jamabandis, pattas,* &c., of many years back were filed for the first party and not a bit of paper for the other."

Eventually the Deputy Magistrate found the first party in possession of the disputed chur.

On the application of the second party, a rule (No. 111) was granted to show cause why this order should not be set aside. A rule (No. 109) was also granted in the case of unlawful assembly and theft, but that is not material to this report.

The petition on which the rule was granted stated that the persons whom the second party were desirous of having called as witnesses on their behalf were all of them material witnesses, some of them being the zamindars' managers and officers under the Court of Wards, having the custody of the zamindari papers and documents relating to the lands of the disputed chur; and the rest being ryots of the said chur and respectable inhabitants of adjoining places.

The material portion of the prayer of the petition was "that in the absence of the owners or proprietors having, or claiming to have, an interest in, or possession over, the subject matter in dispute, no order under section 145 of the Criminal Procedure Code can be passed, and that the order of the Lower Court is bad in law, and as such ought to be set aside; that the second party being admitted to be mere servants, and having, or pretending to have, no claim, right, or possession of their own over the said lands, cannot be made parties to a proceeding under section 145 of the Criminal Procedure Code, and that the orders under sections 144 and 145 of the said Code cannot be made in a proceeding against them, and the proceedings of the Lower Court being irregular and illegal, ought to be set aside; and that the Lower Court ought to have allowed the applications of the second party for summons on all their witnesses, and to have granted the postponement as applied for by them, to enable them to procure the attendance of their witnesses, and that the second party have been materially prejudiced by the Lower Court's orders on the said applications."

Mr. *Pugh* and Babu *Surendra Nath Motilal* in support of the rule.

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Babu *Dwarkanath Chuckerbutty* showed cause.

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

We have heard together these two rules—one granted to show cause why an order under section 145, Criminal Procedure Code, should not be set aside, and the other referring to the conviction of three men under sections 143 and 379 of the Penal Code. The charge was in respect of theft of crops on a portion of the land which was in dispute in the 145 section case, and so far as the question of possession of the crops said to have been looted is concerned, it follows that the case is connected to some extent with the section 145 proceedings. The rule was granted on several grounds, but after hearing the learned Counsel in support of it, we thought that so far as the section 145 proceedings are concerned there are only two grounds which we have to consider, and we think that on both those grounds the application must be successful. The first ground is this. It is said that the persons before the court in the 145 proceedings did not include all persons who were concerned in the dispute, and that the real owners of the land adjoining who claimed this land were not parties to the proceedings, the parties being their servants. Now, under section 145, a Magistrate is bound to require "the parties concerned" in the dispute to attend his court. The words "parties concerned" do not, we think, necessarily mean only the persons who are disputing They include persons who are interested in the dispute, persons who claim a right to the property which is in dispute. That, we think, is clear, because if only the persons who are disputing were to be made parties it might turn out that the Court would be unable on their evidence to come to any conclusion, and would make an order under section 146, which would have a distinctly prejudicial effect on a person who may have a real claim to the land and may be in possession and yet may not be disputing or committing any act likely to cause a breach of the peace. We think the construction that the words "parties concerned" in section 145 include persons who are interested in, or claiming a right to the property, is the reasonable construction, and that it is the duty of the Magistrate, on the materials before him, to ascertain, so far as he can, who

are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his court is concerned, may be disposed of in one proceeding. On that point we think the applicant must succeed, and that the Magistrate was wrong in not doing what we think the law required him to do.

There is another ground upon which we think the order must be set aside, and that is this. It appears that an application was made to the Magistrate to subpœna a number of witnesses whom the second party wished to be examined, but that the application was refused. Our attention has been called to a case of *Hurendro Narain Singh Chowdhry* v. *Bhobani Prea Baruani* (1) decided by Prinsep and Grant, JJ., who considered that in a section 145 proceeding, although it is a case in which the evidence is to be recorded as a summons case, it is the duty of the Magistrate to issue such processes unless he shows good reasons to the contrary. Here the application was made seven days before the case of the second party began. There was, therefore, ample time apparently to serve the processes upon some of the witnesses. At any rate, it is impossible to say that this application for process was made for the purpose of delay, and we think the second party was entitled to have a chance of having their witnesses in court. On these two grounds we think that the order is bad and must be set aside.

The question then that remains is whether we ought to direct a fresh trial setting aside these proceedings from the beginning, or allow these proceedings to continue. We think in this case it would be better to set the whole proceeding aside. The primary object of section 145 is the preservation of peace in the district. If, at the present moment, there is any likelihood of the peace being broken, it is competent to the Magistrate to institute fresh proceedings under the section. If, as a matter of fact, there is no prospect of the peace being disturbed, there seems to be no necessity why these proceedings, which have been going on for some time, should continue. We therefore set aside the order and proceedings under section 145.

(Their Lordships then considered Rule 109, and in that case eventually set aside the conviction and ordered a new trial.)

J.V.W. *Rules made absolute.*

(1) I. L. R., 11 Calc., 762.