

1880  
 IN THE  
 MATTER OF  
 THE PETI-  
 TION OF  
 QUIROS.

made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. Now, in the case before us, for anything that appears to the contrary, the question put to the accused may simply have been whether they had any personal objection to Mr. Casperz as Magistrate to try them. The answer naturally would be, "We have no objection to be tried by Mr. Casperz." But if the question had been—"You stand here as European British subjects, which I know you to be, and as such British subjects you have the right to claim that you should not be tried except by Magistrates of a certain class to which class I do not belong. Do you claim that right or not?" The answer might have been quite different, and it would be entirely for them to choose whether they would avail themselves of that privilege or not. It does not appear that any such question was put to them in the present case, and therefore we think the proceedings before the Assistant Magistrate were bad, and the conviction must be quashed.

Application has been made by Mr. Piffard that this judgment might apply to the case of two other prisoners who have been also convicted, but who are not petitioners before us. We think that Mr. Casperz should be called upon to state whether, in point of fact, the provisions of the Code of Criminal Procedure were made known to those two prisoners.

*Conviction set aside.*

*Before Mr. Justice Jackson and Mr. Justice Tottenham.*

1880  
 June 15.

IN THE MATTER OF THE PETITION OF SURJANARAIN DASS AND OTHERS.  
 THE EMPRESS ON THE PROSECUTION OF D. R. DALY-v. SURJANARAIN  
 DASS AND OTHERS.\*

*Order by Executive Officer—Power of Judicial Courts to question the legality of such order.*

Where an executive officer makes an order or issues a notification under the provisions of the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order

\* Criminal Motion, No. 87 of 1880, against the order of Baboo Ishan Chunder Potronovis, Extra Assistant Commissioner of Sylhet, dated 23rd of December 1879.

or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.

Mr. *M. Ghose* and Baboo *Durga Mohun Dass* for the petitioners.

Mr. *Kilby* for the Crown.

THE facts of this case sufficiently appear in the judgment of the Court (JACKSON and TOTTENHAM, JJ.), which was delivered by

JACKSON, J.—We are altogether unable to approve of the decision of the Sessions Judge in this case, as it appears to us that he has missed the true points in the case, and has given prominence—and given, so to say, by his judgment a certain validity—to that which he ought to have discountenanced.

As we understand the statements of the contending parties, the Maharaja of Tippera claimed a right to collect certain duties, of which the nature is not precisely stated, in respect of bamboos cut not only over land admittedly belonging to him, but over land of which the ownership appears to be in doubt, and of which at any rate the Collector of Sylhet appears to have made a grant to the opposing parties in these proceedings. Whether upon application from the grantee or otherwise, the Deputy Commissioner, as Collector, appears to have taken upon himself to issue a proclamation to all persons concerned, warning them that the collection of duties or tolls on the part of the Maharaja was illegal. Notwithstanding the issue of that proclamation, the people of the Maharaja appear to have made a further demand of tolls which was resisted by the Collector's grantee, and thence a dispute arose; and the result of that was, that certain persons were convicted in the Court of the Extra Assistant Commissioner, and sentenced to rigorous imprisonment and fine. These persons appealed to the Sessions Judge, and the Sessions Judge, in our opinion very strangely, says:—  
“So long as the order of the Deputy Commissioner stands, and until it has been set aside, these appellants have no right to dis-

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obey the order of the Deputy Commissioner, and to take the law into their own hands. It is not for this Court to form an opinion of the legality or the illegality of the order of the Deputy Commissioner. The employers of these appellants have their remedy by suit or otherwise." This declaration of the Sessions Judge would seem to justify the doctrine, that any public servant, with or without authority, is at liberty to issue any notification which seems good to him, and that any person committing an act contravening such notification is liable to be punished. The Judge goes on to say:—"The evidence for the prosecution proves that these appellants did illegally assemble." Now, except in so far as the assembly was in contravention of the Deputy Commissioner's proclamation, it does not appear to have been illegal at all. Further on the Judge says:—"The order of the Deputy Commissioner has clearly made over to the Chowtully Garden managers the sole right to the south side of the Sawal Charra, and forbade the Maharaja of Tippera and his people to make any collections." This is a view of the functions of the Deputy Commissioner very much wider than anything that my previous experience has made me acquainted with. When the Code of Criminal Procedure authorizes the making of orders by executive authorities with the view of preventing a breach of the peace or for similar purposes, it has always been held, and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not. This was precisely the occasion on which it was the duty of the Sessions Judge to consider whether that order was properly made or not. The order of the Sessions Judge, upon the ground on which it is based, cannot be supported. It, no doubt, remains to be considered, and it has not been considered, whether the agents of the Maharaja of Tippera or his farmer did, with a view to enforce any right or supposed right, commit any act which comes within the purview of s. 141 of the Indian Penal Code, and for which, therefore, they are properly punishable. That

is a question which the Sessions Judge ought to inquire into, and with a view to the consideration of which this case must go back. There can be no doubt, we think, that if the Maharaja has been accustomed to levy these duties or tolls or whatever they are called, and attempted on the present occasion to levy them from the persons from whom they are due, that would be an "attempt to enforce a right or supposed right."

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*Case remanded.*

## APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.*

SHEO CHURUN SINGH (DEFENDANT) *v.* FAKERA DOOBAY AND  
OTHERS (PLAINTIFFS).\*

1880  
*June 8.*

*Res judicata—Intervenors—Rights as between original Defendant and Intervenors—Suit for Possession.*

Where a plaintiff claimed certain property, and two persons intervened and were allowed to put in their claim to a portion of it, which claim at the hearing, the intervenors, however, refrained from pressing, and the suit was decided in favor of the plaintiff, the original defendant alone appealing (unsuccessfully) against the decree—

*Held*, that it was not open to the intervenors to institute any fresh proceedings to obtain the property against the original defendant; the decree in the suit in which they intervened being conclusive as between them and such defendant.

*Sinagnana Tevar v. Periasami Tevar* (1) distinguished.

THIS was a suit brought by one Fakera Doobay and others against Sheo Churun Singh to recover possession of certain lands, in which suit two persons desired and were allowed to come in as intervenors, claiming a portion of the property in question. At the hearings before the lower Courts, the intervenors did not press their claim, and the suit was decided in favor of

\* Appeal from Appellate Decree, No. 200 of 1879, against the decree of J. R. Richardson, Esq., Judge of Tirhoot, dated the 23rd September 1878, affirming the decree of Baboo Ram Prasad, Second Subordinate Judge of that district, dated the 12th June 1877.

(1) I. L. R., 1 Mad., 312; S. C., L. R., 5 I. A., 61.