

The judgment was delivered by

WILSON, J.—I consider it unnecessary to go into the facts, but upon the broad principle of law, laid down in the case of *Earl Cholmondeley v. Lord Clinton* (1), viz., that an attorney having discharged his client cannot change sides, I will not enter into or decide the motion on the facts as stated in the affidavits. I feel myself bound to follow the ruling laid down in the case cited. I thought it would be for the benefit of the profession, that attorneys should know clearly what cases they were entitled to take up. Mr. Wheeler having admitted that he took an active part in the conduct of the defendants' case, I consider that the defendants are entitled to the order asked for; but in granting the application I wish it to be understood, that I have not entered into a discussion of the facts of the present case, and have refrained from any consideration of the question as to which of the parties to the application would be most prejudiced by my order. I would, therefore, simply decide the matter upon the point of law laid down in the case cited by Mr. Hill.

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AGAR-  
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*Application granted.*

Attorney for the plaintiff: Messrs. *Wheeler and Sowton.*

Attorney for the defendants: Mr. *Pittar.*

## APPELLATE CRIMINAL.

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

IN THE MATTER OF THE PETITION OF QUIROS AND ANOTHER.\*

THE EMPRESS v. ALLEN AND OTHERS.

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*June 15.*

*Privilege—Waiver—European British Subject—Criminal Procedure Code  
(Act X of 1872), ss. 82 and 84.*

Section 84 of the Criminal Procedure Code must be construed strictly with s. 72, and before a European British subject can be considered to have

\* Criminal Motion, No. 116 of 1880, against the order of Charles P. Casperz, Esq., Assistant Magistrate of Raneegunge, dated the 18th May 1880.

(1) 19 Ves., 261.

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waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly 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.

The provisions of s. 72 of the Code of Criminal Procedure relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, constitute a privilege,—that is to say, they are not so much words taking away jurisdiction entirely, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up.

No person can by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstance not personal to the accused.

*The Queen v. Bholanath Sen* (1) distinguished.

The waiver of privilege spoken of in s. 84 must be an absolute giving up of all the rights, with reference to chap. vii of the Code of Criminal Procedure, which a European British subject has; and the words 'dealt with as such before the Magistrate' mean everything contained in the chapter,—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which the accused would be liable.

THE facts of this case were as follows:—Quiros and Maunders and several others, all European British subjects, were, on the 18th May 1880, charged with rioting and violence before an Assistant Magistrate vested with the powers of a Magistrate of the second class only. The Assistant Magistrate was aware that, as European British subjects, the persons charged before him were, under s. 72, triable only by a Magistrate of the first class, who was also a Justice of the Peace, and not by him; and, accordingly, before putting them on trial, asked each of them whether he had any objection to be tried before him, a Magistrate of the second class. It did not, however, appear that he informed them that, under s. 72, he had no jurisdiction to try the case, and that they were triable only by a Magistrate of a higher grade. Each of the accused said, that he had no objection to the Assistant Magistrate hearing the case, and the trial, accordingly, proceeded, and terminated in the conviction of all the accused. Quiros and Maunders received sentences of two and one month's rigorous imprisonment respectively, and the others were fined.

(1) I. L. R., 2 Calc., 23.

Quiros and Maunders then applied to the High Court to quash the entire proceedings, on the ground that, under s. 72, the Assistant Magistrate, having only second class powers, had no jurisdiction to try European British subjects.

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Mr. *Piffard* appeared for the petitioners.

No one appeared for the Crown.

Mr. *Piffard*.—The provisions of s. 72 point out clearly the officers who are to have jurisdiction over European British subjects. The Magistrate in this case had no jurisdiction. [JACKSON, J.—Your clients have waived their privilege; they cannot now say that the Magistrate had no jurisdiction.] Section 72 does not confer a privilege which can be waived so as to give jurisdiction. Consent cannot give jurisdiction—*Foy's case* (1). [JACKSON, J.—That case was decided before the Criminal Procedure Code was passed. Does not s. 84 afford a complete answer to your present contention?] I submit not. The principle that consent cannot give jurisdiction is one that has governed the Courts for years. The Legislature has not abolished the principle; it has merely said, that if the claim is not made, the person charged “shall be held to have waived his privilege as such British subject.” It has not defined the consequence of such waiver, nor said that waiver shall create jurisdiction, and if it had intended to do so, apt words would have been used. [JACKSON, J.—If the words ‘waived his privilege’ do not mean that the Court in which he might have pleaded his privilege shall have power to try him, what do they mean?] Under ordinary circumstances, if a Magistrate tries a person without jurisdiction and sentences and imprisons him, he may be liable to a suit for damages for false imprisonment, and the object of the Legislature was to protect a Magistrate from such consequences—*The Queen v. Bholanath Sen* (2). If consent can validate a conviction, it must also validate an acquittal. Suppose the case of a man waiving his right to be tried by a higher tribunal in order to be tried before a friend, and he is acquitted, or convicted and

(1) 1 Tay. & Bell, 219.

(2) I. L. R., 2 Calc., 23.

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slightly punished, could he plead such acquittal or conviction in bar of further proceedings against him ?

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—We are of opinion that the provisions of s. 72 of the Code of Criminal Procedure relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, do in fact constitute a privilege,—that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the British subject a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables him to give up. It appears to us that that is the only view of the section which is compatible with a reasonable construction of s. 84. We have had cited to us a case with which we are of course familiar—the case of *Foy* (1), in which judgment was given by Sir L. Peel, and a more recent case before Mr. Justice Macpherson and Mr. Justice Morris—*The Queen v. Bholanath Sen* (2). The case of *Foy* it appears to me unnecessary to mention at present, because the state of the law and the state of the jurisdiction under which that case was decided was altogether different, and has in fact passed away. In regard to the judgment delivered by Macpherson, J., I entirely concur in it, and for this reason, that there is nothing in the Code of Criminal Procedure—and I apprehend there never could be any provision—which would enable an accused person to waive an objection to jurisdiction which was not personal to himself,—that is to say, no person could by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try, by some circumstances not personal to the accused. That was the case in the matter before Mr. Justice Macpherson. There it was alleged that, of the three Magistrates who constituted the bench, one—the presiding Magistrate—was the virtual prosecutor, and another had himself a personal and pecuniary interest in the case, and therefore no consent of the prisoner

(1) 1 Tay. and Bell, 219.

(2) I. L. R., 2 Calc., 23.

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could get over these disqualifications. As to s. 84, the language is peculiar; it does not declare that a European British subject may waive his privilege, but it provides that if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject. Mr. Piffard suggested to us that the meaning of the words 'waive his privilege' in that section is, that the accused, while retaining all his rights as to want of jurisdiction, which s. 72 confers, so that he could not be tried except by a particular Court or Magistrate, might yet deprive himself of the right to bring an action for damages. It appears to us, that that is not a reasonable construction. We do not think that the Legislature could have meant that a person might be tried or committed by a Magistrate whose act in so trying or committing him would be altogether invalid, so that such act could be immediately got rid of by application to the proper Court, but that the accused by waiver should protect the Magistrate so that no action would afterwards lie for damages. It appears to us that the waiver of the privilege spoken of must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has; and the words 'dealt with before the Magistrate' mean everything contained in this chapter,—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which he would be liable.

But then we are also of opinion that s. 84 must be construed strictly with s. 72, and that we must read them as if they were connected together by the word 'but,'—that is to say: "No Magistrate shall have jurisdiction to enquire into a complaint or try a charge against a European British subject unless he is a Magistrate of the first class, *but* if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege." And clearly we think that, before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly

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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.*

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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.