1871.

REG. v. RA'VJI TA'JU.

that where the law requires a written record to be kept of a trial, that record is the only proper evidence of the proceeding. This being so, parol evidence of such a proceeding is inadmissible (Taylor on Evidence, Sec. 370, p. 399). And that this rule is founded in reason is sufficiently evident from this very case, since, for ought that the witnesses prove, the inquiry in which the impugned statement was made may have been a mere departmental investigation. The Assistant Judge contented himself with the assertion of a Chitnis that the impugned statement was made by the accused on the trial of Vináyak Diváker, and on this has founded a conviction without having the proceedings on that trial before him. We think there should be a uniformity of practice on this important point, and shall, accordingly, consider it in chambers.

Conviction and sentence reversed.

Oct. 4.

REG. v. YENKU BA'PUJI', KRISHNA bin PA'NDU, and TUKA'RA'M KEDA'RI.

Municipal Commissioners—Subordinate Magistrates—Jurisdiction to try for breach of Municipal Rules—Act XXVI. of 1850—*Municipal Rules made* ultra vires—Ultra vires *doctrine explained.*

Municipal Commisioners appointed under Act XXVI. of 1850 have not, by that Act, conferred upon them, nor are they entitled to assume, judicial powers with reference to breaches of Rules or Bye-laws made by them under that Act.

Reg. v. *Kálidás Keval* (*a*) approved and followed.

The authority to try offenders against such Rules or Bye-laws is vested in the Magistrates of the country, and Subordinate as well as other Magistrates have jurisdiction to try such offenders.

Reg. v. *Dharmáyá valad Sangápá* approved (*b*).

Rules made under the above Act which purport to give the Managing Committee of such Municipal Commissioners power to try offenders against such Rules, or to levy fines upon them, are *ultra vires* and illegal.

Rules of the Municipalities of Balsád, Súrat, Malcolm Pet, and Ahmedábád referred to and commented on. How far a rule partially *ultra vires* and partially *intra vires* can be enforced, as to the latter portion, considered.

TWO questions arose in this case: (1) Whether Act XXVI. of 1850 conferred upon Municipal Commissioners of

(*a*) 5 Bom. H. C. Rep., Cr. Ca. 10. (*b*) 8 *Ibid.* 12.

1871.
REG. v. YENKU BA'PUJI et al.

Mofussil Towns, or entitled them to assume, judicial powers with reference to breaches of Rules or Bye-Laws made by those Commissioners, under that Act; and if not, (2) whether Subordinate as well as other Magistrates had authority to try offenders against those Rules or Bye-Laws.

The above questions were, by KEMBALL, J., referred for the determination of a Full Bench, and were considered by a Court consisting of WESTROPP, C.J., and GIBBS, MELVILL, KEMBALL, and WEST, JJ.

The circumstances under which the questions arose sufficiently appear in the judgment of the Court, which was, on the 4th of October 1871, delivered by

WESTROPP, C. J.:—It appeared, in the District Magistrate's monthly return, for June 1871, of cases tried by Magistrates F. P. in the District of Sátárá, that Yenku Bápuji, Krishṇa bin Pánḍu, and Tukárám bin Kedári were tried and convicted by J. K. Spence, Magistrate F. P., for "infraction of the Municipal Rules of Malcolm Peṭ, in that they constructed closed verandahs to their houses without the sanction of the Municipal Commissioners, and encroached on the public roads; Yenku Bápuji and Krishṇa bin Pánḍu having previously been made to remove similar verandahs—Sec. 7 of Act XXVI. of 1850"; for which offences Yenku Bápuji was sentenced to pay a fine of Rs. 50, Krishṇa bin Pánḍu a fine of Rs. 25, and Tukárám bin Kedári a fine of Rs. 5, under Sec. VII., cl. 5, Act XXVI. of 1850, and cl. 1, Sec. VII. of the Rules of the Municipality of Malcolm Peṭ. The fines were paid into court, and the accused were thereupon discharged.

Upon that case, as it appeared in the monthly return, the Registrar of the High Court, in the exercise of his duty, made the following remark:—

"The recent ruling of the Court" (*vide* Criminal Referred Cases Nos. 60 and 61 of 1871 from Balsáḍ), "in which it was

held that the enforcement of Act XXVI. of 1850 is a function of the Commissioners appointed under the Act, except as to the levy of rates and penalties, might be communicated to the District Magistrate, with a request that it may be acted on in future in his District, instead of the ruling in *Reg.* v. *Kálidás Keval*" (*c*).

1871.
REG.
v.
YENKU BA'PUJI *et al.*

And Mr. Justice Kemball directed that the question should be referred to a Full Bench, there being two rulings apparently opposed to each other.

Since that reference was made, the District Magistrate of Sátárá has furnished us with a copy of the Rules of the Municipality of Malcolm Pet, framed under Act XXVI. of 1850. Sec. v., Cl. 3, Art. 4, which enables the Municipal Commissioners to prohibit encroachments on public roads by the building of *oṭlás*, steps, verandahs, &c. jutting out beyond the general line or level, includes within it such an offence as that charged against the three persons accused in the present case. Sec. VII., cl. 1 and 2 (approved by the Governor in Council on the 9th of May 1871), are as follow :—

"Sec. VII., Cl. 1.—Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under authority of any such Rules, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding Rs. 50, or, in the case of continuing a nuisance, to a fine not exceeding 5 Rs. for every day that such nuisance is continued.

"Cl. 2.—All such fines shall be leviable by distraint, and be credited to the Municipal Funds."

The words "on conviction before a Magistrate" in cl. 1 clearly show that a trial by a Magistrate, and a conviction by him, are intended by that rule to take place before he issues any warrant to levy.

The principle on which the two Balsád cases (above referred to by the Registrar as Nos. 60 and 61 of 1871) were decided, being, that the Municipal Commissioners alone had, under Act XXVI. of 1850, the right to adjudicate on the liability to penalties and taxes—a decision opposed to that in *Reg.* v. *Kálidás Keval*, which proceeded upon the opposite

(*c*) 5 Bom. H. C. Rep. 10.

1871.
REG. v. YENKU BA'PUJI et al.

principle, namely, that the right to adjudicate lay with the magistracy—we think it desirable to consider the grounds of these decisions; and although the present case from Malcolm Peṭ has not arisen upon any question as to taxes, yet, as the Balsáḍ cases did so arise, we think it may be useful to compare some of the municipal rules of Malcolm Peṭ, as to taxes, with those of Balsáḍ, Súrat, and Ahmedábád on the same subject. Sec. II., cl. 1, of the Malcolm Peṭ rules provides what the taxes shall be. Cl. 2, that a bill for them shall be presented to the person liable. Cl. 3, that if the bill be not paid within two days after presentation, the managing committee may cause a notice of demand to be served on the person liable, "and if such person shall not, within twenty days from the service of such notice of demand, pay the sum due, or show sufficient cause for non-payment of the same, such sums, with all costs, may be levied by distress and sale of property under a warrant from the Magistrate, as provided in Sec. 12 of Act XXVI. of 1850." There is not in that rule (as in the Súrat, Balsáḍ, and Ahmedábád municipal rules), in addition to the taxes and costs to be levied, any penalty leviable for the non-payment of the taxes. Nor is there any mention of a conviction before a Magistrate, or of a summons to be granted by him before he issues his warrant, but there is a declaration that the warrant is to be issued "as provided in Section 12 of Act XXVI. of 1850." Sec. 10 of that Act might also have been advantageously mentioned in that rule. In considering the Balsáḍ rules we shall deal with the question of the power of the Municipal Commissioners to reserve, for their own adjudication, alleged breaches of the rules to pay municipal taxes. However, so far as regards the above cl. 3 of Sec. II. of the Malcolm Peṭ rules, even assuming that the Commissioners intended by it to reserve to themselves such right to adjudicate, their subsequently made rule, Sec. VII., cl. 1, already quoted, makes no exception of breaches of cl. 3, Sec. II., and has the effect of qualifying that rule, and of—properly, as we think—subjecting breaches of it, as well as of any other of the municipal rules of Malcolm Peṭ, to the adjudication of the magistracy only.

In the two Balsád cases mentioned in the note made by the Registrar (No. 60 of 1871, *Reg.* v. *Báburáv Bhiklo*, and No. 61 of 1871, *Reg.* v. *Lakhmá Bhagván and Dhádko Bhiklo*), the accused persons respectively had been tried and convicted by a First Class Subordinate Magistrate of Balsád for breaches of Rule 29 of the Municipal Rules of Balsád in attempting to evade payment of municipal taxes, and were respectively fined one rupee.

Rules 28 and 29 of the Balsád Municipality are precisely the same as Rules 28 and 29 of the Súrat Municipality, and are as follow:—

"28. If any person refuses to pay any tax legally due, the tax collector may detain a portion of his goods or property sufficient to cover the amount, provided that immediate application for process under Sec. 10 of Act XXVI. of 1850 be made through the Secretary [of the Municipality] to a Magistrate having jurisdiction.

"29. Any person convicted of evading, or attempting to evade, payment of taxes, shall be liable to a penalty not exceeding Rs. 50 in addition to the amount of the tax due from him. The Managing Committee shall impose the penalty at their discretion, after due investigation, and shall apply, through their Secretary, to a Magistrate having jurisdiction, for its enforcement, under Sec. 10 of Act XXVI. of 1850. They may award to the informer a portion of the penalty not exceeding one-third."

Those Rules 28 and 29 were, as regards Balsád, sanctioned by Government on the 19th of September 1867, and as regards Súrat on the 11th of April 1867.

Rule 28, so far as it purports to authorise the detention of goods or property by the tax collector, cannot be regarded as valid, it being in excess of the remedies for the recovery of taxes prescribed in Act XXVI. of 1850, Secs. 10 and 12. The effect of inconsistency between bye-laws, and the Act or Charter which empowers a company, corporation, or other public body to make bye-laws, shall be discussed presently.

Amended Rule 55 of the Balsád Municipal Rules was, on the 9th of May 1871, sanctioned by Government in lieu of the original rule bearing the same number. That amended Rule 55 is as follows:—"Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under the authority of

1871.
REG. v. YENKU BA'PUJI et al.

any such rule, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding Rs. 50, or, in the case of continuing a nuisance, to a fine not exceeding Rs. 5 for every day that such nuisance is continued. All such fines are leviable by distraint under the provisions of the aforesaid Act XXVI. of 1850, and on realisation shall be credited to the Municipality."

That rule contains no exception of breaches of Rule 29, but, on the contrary, omits an exception, which would have included Rule 29, and was contained in the original Rule 55 of the Balsád Rules. That original Rule 55 was precisely the same as Rule 55 of the Súrat Rules. The careful omission of this exception in the amended Rule 55 of the Balsád Rules, and the general scope of that rule, must be considered as rescinding so much of Rule 29 as affects to reserve to the managing committee of the municipality of Balsád the right of adjudication upon such breaches. The words "on conviction before a Magistrate," in that amended Rule 55, show that a trial by a Magistrate is contemplated.

Whether Rule 29, unqualified by the amended Rule 55, was a valid rule as it originally stood in the Balsád Rules, and apparently still stands in the Súrat Rules, shall be presently considered.

Rule 55 of the Súrat Rules, as it stands in our copy, is as follows:—

"*55.* Any disobedience of the orders of the Municipality under the foregoing Rules shall, *unless otherwise specially provided therein*, be punished, on conviction before any Magistrate, by a fine not exceeding Rs. 50, as provided in Act XXVI. of 1850, and in case of continued disobedience by a fine not exceeding Rs. 5 for every day during which such disobedience shall be wilfully continued. All such fines shall be levied as provided in Act II. of 1839, and shall be credited to the Municipal Funds."

The words "unless otherwise specially provided therein" have the effect of leaving Rule 29 of the Súrat Rules unaffected by this rule (55). Whether Rule 29 can be maintained, remains, as already mentioned, for further consideration.

In the Rules of the Ahmedábád Municipality we find the following rule in Ch. II., relating to Taxes:—

"XVII. Any person or persons convicted of evading, or attempting to evade, payment of dues authorised to be levied in the city and suburbs of Ahmedábád, shall be liable to a penalty not exceeding fifty rupees, in addition to the tax leviable according to the Schedule in Appendix B. All such fines shall be levied by distraint by the Managing Committee, and credited to the Municipal Fund, and the Managing Committee may, at their discretion, reward the informer with any sum not exceeding one-third of the amount of the fine imposed."

So far, at least, as that rule purports to empower the managing committee themselves to levy fines, it is clearly *ultra vires* and illegal, inasmuch as Act XXVI. of 1850 in express words gives that power to a Magistrate. However, in Ch. VIII., headed "Penalties for infraction of Municipal Rules," are two rules, 52 and 53, which, in the copy of the Ahmedábád Rules now before us, appear to have been subsequently inserted, and inasmuch as there is no saving in Rule 52 of the breaches of the rules for payment of taxes, that rule (52) would appear to rescind so much of Rule 17 as can be regarded as empowering the managing committee either to adjudicate upon such breaches, or to levy penalties, and seems rightly to leave those duties to a Magistrate.

Rule LII. is—"Whoever breaks any of the Municipal Rules sanctioned by Government, or disobeys any order made by the Municipal Commissioners under the authority of any such rule, is liable, under Act XXVI. of 1850, on conviction before a Magistrate having jurisdiction, to a fine not exceeding fifty rupees, and in the case of continuing a nuisance to a fine not exceeding five rupees for every day that such nuisance is continued." That rule properly contemplates a trial by a Magistrate.

Rule LIII. is—"All such fines are leviable by distraint under the provisions of the aforesaid Act XXVI. of 1850, and, on realisation, shall be credited to the Municipality."

The District Magistrate, Mr. Hope, referred the two Balsád cases, Nos. 60 and 61 of 1871, above mentioned, to the High Court, under Sec. 434 of the Criminal Procedure Code, as convictions which were illegal, because, he said, the Subordinate Magistrate had no jurisdiction to try the case under the said 29th rule, which restricts the power of inflicting

1871.
REG. v. YENKU BA'PUJI et al.

fines to the managing committee, and leaves the enforcement of them only to the Magistrate. And, upon that ground, two of the Judges, who have considered the present case, annulled the convictions, but their attention had not been called to *Reg.* v. *Kálidás Keval*, nor was the amended Rule 55 (which I have stated to have been lately introduced into the Balsád Rules, and as apparently having had the effect of rescinding so much of Rule 29 as purported to reserve to the managing committee any right to adjudicate upon alleged breaches of that rule by evasion or attempts to evade the payment of municipal taxes) submitted to them.

The Registrar having suggested, as a consequence flowing from the ruling in the two Balsád cases, that in the present (Malcolm Pet) case the right of adjudication lay with the Municipality, and not with the Magistrate, and that only the ministerial duty of levying such penalty as the Municipality might impose, in the event of a breach of the municipal rules, was intrusted to a Magistrate, and my brother Kemball having referred that question to a Full Bench as the subject of conflicting decisions of Division Courts, it has been considered by my brothers Gibbs, Melvill, Kemball, and West, and myself.

Reg v. *Kálidás Keval* was decided by Couch, C. J., and Newton, J., after their attention had been fully directed to Act XXVI. of 1850. They annulled the conviction and sentence in the case, which had been tried and disposed of by the managing committee of the Ahmedábád municipal commission, on the ground that the committee had not any power by law to try and convict the accused person (*Kálidás Keval*) of the offence (committing a nuisance), inasmuch as "Secs. 6 and 7 of Act XXVI. of 1850 do not authorise the giving to the managing committee the power of adjudicating in case of alleged breach of any rules therein referred to, and Sec. 10 of the same Act has provided for the recovery of fines by Magistrates."

There certainly is not any judicial authority, or power (by making rules to that effect) to assume any judicial authority, conferred *in express terms*, by Secs. 6 and 7 of Act XXVI.

1871.
REG.
v.
YENKU
BA'PUJI
al et.

of 1850, upon the Municipal Commissioners. The only mode by which the bestowal of such an authority upon the Municipal Commissioners could be contended for in argument, would be by construing Sec. 10 as not conferring any judicial authority upon the Magistrates, and as limiting their functions under the Act to the ministerial process of levying the taxes and penalties mentioned in that section, and by holding that such a limitation rendered it necessary to imply, from the somewhat vague language of Secs. 6 and 7, that the right to try persons charged with breaches of the rules, which those sections in express terms empower the Municipal Commissioners to make, is, by those sections, vested in the Municipal Commissioners.

By Sec. 6 it appears that the Commissioners (including the Magistrate) are appointed "for putting the Act in force," and are given authority "to prepare rules for more effectually accomplishing the purposes for which they are appointed, *which rules, when approved by the Governor, or Governor in Council, &c., shall be of the same force within the said town or suburb,* until altered or rescinded, as hereinafter provided, *as if they were inserted in this Act.*"

Whether that power of making rules, although extensive, would warrant the making of rules wholly unreasonable in themselves, is perhaps doubtful. It certainly would not warrant the making of rules inconsistent with the Act. Ordinarily a corporation or company, whether authorised by prescription, or by charter or statute, to make rules, or, as they are more frequently styled, bye-laws, cannot make any valid rules which are unreasonable in themselves: 2 Com. Dig. "Bye-law," (B. 1) (C. 6, 7); 8 Rep. 126; 11 *Ibid.* 54 *b*; *Elwood* v. *Bullock* (*b*). Whether a rule made under Act XXVI. of 1850 would be void on the ground of unreasonableness only, it is unnecessary for us now to decide. But it is certain that a corporation, or company, or other public body, whether created by Act of Parliament or by Charter, has not any power of making bye-laws beyond what is clearly given to it by the Act or Charter: *Kirk* v.

(*b*) 6 Q. B. 383.

1871.
REG. v. YENKU BA'PUJI et al.

Nowill (*c*); *Rex* v. *Spencer* (*d*); *Rex* v. *Cutbush* (*e*); *Rex* v. *Breton* (*f*); *Dunston* v. *Imperial Gas Company* (*g*); *Reg.* v. *Wood* (*h*); *Dearden* v. *Townsend* (*i*); *Waite* v. *Local Board of Health* (*j*); and such rules or bye-laws, if inconsistent with the provisions, either express or implied, of the Charter or Statute, would be void as being *ultra vires*, although sanctioned by the Executive Government. In *Elwood* v. *Bullock* (*k*), a bye-law, which was deemed to be wholly unreasonable, was, by the Court of Queen's Bench in 1844, held to be void, although duly published and notified to a Secretary of State under the Stat. 5 & 6 Wm. IV., c. 76, s. 90, and not disallowed by him. The bye-law had been made by the corporation of Bury St. Edmunds, by virtue of a charter and of the said statute, of which the 90th section empowered that corporation (amongst others) to make bye-laws for the good rule and government of the borough, and for the prevention of nuisances, and to appoint fines, and provided "that no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof, shall have been sent, sealed with the seal of the said borough, to one of His Majesty's Principal Secretaries of State, and shall have been affixed on the outer door of the Town Hall or," &c.; "and if, at any time within the said period of forty days, His Majesty, with the advice of his Council, shall disallow the same bye-law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation;" and Sec. 91 enacted "that all the provisions hereinafter contained relative to offences against this Act, punishable upon summary conviction, shall be taken to apply to all offences committed in breach of any bye-law or regulation, made by virtue of this Act." On this point of sanction, *The Stationers' Company* v. *Salisbury* (*l*) may be

(*c*) 1 T. R. 118, 124. (*d*) 3 Burr. 1827, 1837, 1838, 1839.
(*e*) 4 Burr. 2204, 2207, 2208. (*f*) *Ibid.* 2260, 2267.
(*g*) 3 B. & Ad. 125.
(*h*) 5 El. & Bl. 49 S. C. nom. *Reg.* v. *Rose*; 1 Jur., N. S., 802; 24 L. J. M. C. 130.
(*i*) L. R. 1, Q. B. 10. (*j*) L. R. 3, Q. B. 5. (*k*) 6 Q. B. 383.
(*l*) Comberbach 221.

advantageously referred to. I shall presently advert more fully to that case.

As an unmistakeable instance in which a rule or bye-law, purporting to be made under Act XXVI. of 1850, would be *ultra vires*, let us suppose a rule that any person throwing rubbish into the streets should be fined Rs. 100; that would be opposed to Sec. VII., cl. 5, which limits the highest allowable range of the penalty to Rs. 50, and would, therefore, be a void rule. The degree of repugnance could not alter the case; provided the rule were repugnant to the Act to any extent, the rule would, to that extent at least, be void, and, as we shall presently show, if indivisible, would be totaly void.

Sec. 7 of Act XXVI. of 1850 enacts that "The Rules to be prepared by the said Commissioners shall provide, among other things, for those following, that is to say." Then follow five subjects as to which rules should be made: the 1*st* relating to the appointment of officers, &c.; the 2*nd* to the raising of money by taxation for the purposes of the Act, and its due application when raised; 3*rdly*, "the manner in which from time to time the Rules in force are to be amended or rescinded, and new rules are to be made, with the approval, in every case, of the Governor, or Governor in Council," &c. 4*thly*—"The definition and prohibition of nuisances within the town or suburb." 5*thly*—"The imposition of reasonable penalties for breach of any rule made by the Commissioners, not exceeding fifty rupees, or, in the case of continuing nuisance, not exceeding five rupees for every day that such nuisance is continued."

The contention against the Municipality on the present question would be, that *primâ facie* the 5th clause of Sec. VII. means, not that the Commissioners should adjudicate whether or not any particular individual had violated their rules, but should fix (within certain specified limits) reasonable penalties to be inflicted generally for breaches of their rules, or for continuing nuisances, according to the gravity of such breaches or continuing nuisances respectively.

1871.

REG. v. YENKU BA'PUJI *et al.*

Thus, it would seem that the power to make rules for the imposition of such penalties is, when standing by itself, merely a power to make a general tariff of penalties for breaches of the bye-laws, and not a power to adjudicate, or even to determine who shall adjudicate, that any person in particular has committed such a breach. Most probably the learned Judges who decided *Reg.* v. *Kálidás Keval* were of opinion that if the Legislature intended to confer a judicial power upon the Municipal Commissioners, it should have done so in clear terms, and not left such an intention to be laboriously spelt out of the various parts of the Act. For ordinarily, and in the absence of any special remedy given by the Act or Charter constituting the corporation, or board, or company, or of a prescriptive authority in the corporation, the only remedy whereby a penalty affixed to a breach of a bye-law can be recovered is by action of debt; and it may not be levied by imprisonment, or distress and sale: Com. Dig., Bye-law (D. 1), (D. 2), (E. 1), (E. 2); 8 Rep. 127 *b*; 1 Rolle Ab. 367 (5); *Adley* v. *Reeves* (*m*), where Lord Ellenborough, C. J., says: "A bye-law giving a remedy by distress for the recovery of the penalty would be bad;" and again: "It is true, undoubtedly, that if the law give a power of inflicting a penalty, where it gives the end, it also gives the means of attaining it by *action*, but it does not give any extraordinary means;" and, speaking of the bye-law in that case, he said: "It certainly is a bye-law not authorised by any usage stated in the case." Le Blanc, J., said: "If the usage only authorises the infliction of a penalty and stops there, I am not aware of any case which shows that a bye-law may go further than the common-law mode of recovering it by action." Hence it was that, in order to give a more summary and less expensive mode than a civil action for the recovery, as well of taxes, as of penalties in respect of breaches of the rules or bye-laws to be made by the Municipal Commissioners under Act XXVI. of 1850, some such enactment as its 10th section became

(*m*) 2 M. & S. 53, 60, 61. See also, as to action of debt for a penalty under a bye-law, 1 Bos. & P. 89, 98; 2 Wils. R. 266; 3 *Ibid.* 155; Willes R. 384.

necessary. That section is as follows:—"10. The powers of Act II. of 1839 for the recovery of fines shall be applied for the recovery of all arrears of taxes and penalties under this Act; and every Magistrate shall put in force the powers of the said Act II. of 1839 for that purpose, whenever thereunto required by the Commissioners, or any of their officers deputed by them, for the purposes of enforcing payment of arrears of taxes imposed under this Act." Act II. of 1839, which has been repealed by Act XVII. of 1862, but still subsists for the purposes of Act XXVI. of 1850 (*n*), enacted (Sec. 1) that "in all cases of fines by which offenders are or may be punishable by any Magistrate, according to the provisions of any Act heretofore passed, *or which shall hereafter be passed, by the Governor General of India in Council,* it shall be lawful, in case of non-payment, if no other means for enforcing the payment are or shall be provided, for the Magistrate, by warrant under his hand, to levy the amount of such fine by distress and sale of the goods and chattels of the offender which may be found within his jurisdiction," and, in default of such property, by imprisonment. And the 3rd section enacted "that in all cases in which offenders are or may be punishable by fine before a Magistrate according to the provisions of any Act heretofore passed, *or which shall hereafter be passed, by the Governor General of India in Council,* it shall be lawful for the Magistrate, *and he is hereby required,* to receive proof of the commission of the offence upon oath, or upon solemn affirmation in cases where a solemn affirmation is receivable by law instead of an oath," the glossarial section (4) defining the terms "fine" and "fines" as including all "penalties" and "forfeitures." It is clear that, so far as Act II. of 1839 is concerned, the hearing and conviction by the Magistrate were to precede the fine. But the contention for the municipality would be that Sec. 10 of Act XXVI. of 1850 adopts only so much of Act II. of 1839 as is ministerial, namely, the issuing of the warrant of distress and sale, or of imprisonment in default of goods and

(*n*) So decided *in re Motee Gokal,* 3rd October 1866—*vide* 1 West's Acts, note on Sec. 10 of Act XXVI. of 1850.

1871.
REG. v. YENKU BA'PUJI et al.

chattels; and that the powers of Act II. of 1839 for the *recovery* of fines shall be applied for the *recovery* of all arrears of taxes and penalties "under Act XXVI. of 1850," shows that this is the right construction, as well by the use of the word recovery as by coupling "taxes" with "penalties"—an argument which, it may be said, is fortified by the further direction that the Magistrate shall put in force the powers of Act II. of 1839 "for that purpose," namely, the recovery of all arrears of taxes and penalties, "whenever thereunto required by the Commissioners, or any of their officers deputed by them for the purposes of enforcing payment of arrears of taxes imposed under this Act" (XXVI. of 1850). But as to this last argument it should be observed that the words "whenever thereunto required by the Commissioners or their officers," &c., must not be taken in a sense too large, or opposed to common right. We should hesitate to assert that they mean more than "whenever thereunto lawfully and properly required by," &c. It is difficult to see why, if the Municipality was intrusted by the Legislature with the power of adjudication, it should not have been likewise intrusted with authority to carry into effect its decisions, or why the cumbrous process of sending the Commissioners or their officers to a Magistrate for his warrant, as to the issuing of which he would be a mere automaton, should have been resorted to. Why should the intervention of the Magistrate be required, if he were to be powerless to check illegality or oppression, or to inquire into the justice of the demand for taxes or the liability to penalties, and if the right to adjudicate upon both were to be surrendered to the interested Municipality? Admitting in these respects the supremacy of the Legislature (1 Kent Com. 502, 10th ed.), yet such an intention it seems unreasonable, without clear, unambiguous, and convincing language on its part, to attribute to it, and it would be most unusual for any Legislature to adopt such a course, and for courts of justice to assume that it intended to do so. The authorities to which we shall next advert show how persistently courts of justice have shunned any such assumption, even as regards the levy of taxes, and that *à fortiori* have they done so as regards the levy of penal-

ties. Those decisions are founded not upon any technical doctrine connected with ancient corporations, but upon two general rules, old indeed, but which we hope may never become obsolete in British territory, either in the East or in the West, namely, (1) that no man nor body politic shall be the judge in his or their own cause, and (2) that no man shall suffer either in purse or person without an opportunity of being heard.

It should be noted that Secs. 10 and 12 of Act XXVI. of 1850 do not contain any prohibition to the Magistrate's proceeding in the usual way before granting a warrant of distress; and the existence of such a provision as that in Sec. 3 of Act II. of 1839, which expressly requires a Magistrate, acting under that and subsequent Acts, to investigate cases before he grants warrants, doubled the necessity on the part of the Legislature to speak explicitly in Act XXVI. of 1850 when referring in it for the powers of the Magistrate to Act II. of 1839, if intending to discard a provision so important and so just as Sec. 3.

Independently even of express legislation to that effect, it is a general rule of English law that where a Magistrate grants a warrant in the nature of execution, he is bound first to summon and hear the party against whom it is sought, unless the statute, under which he acts, renders it perfectly clear that his function is ministerial only, or in some other manner dispenses with the summons and hearing.

In *Rex* v. *Benn* (*o*), which was an application for a mandamus against two justices of the peace for the county of Cumberland, to compel them to grant warrants of distress to levy poor-rate, which the justices refused to grant, because no previous summonses had been sued out from them, the Court of King's Bench refused to grant any *such* mandamus. Lord Kenyon, C.J., said: "The payment of the poor-rate, unless it be set aside, must be enforced; and if the magistrates will not issue a summons to the person who refuses to pay the rate, this court will grant a mandamus to compel them to do it; but a summons must precede a warrant of distress,

(*o*) 6 T. R. 198.

1871.
REG. v. YENKU BA'PUJI et al.

which is in the nature of an execution. On the summons, the party may show a sufficient reason to the magistrates why the warrant should not issue, as for instance that he had already paid the assessment to one of the parish officers, who has not accounted for it. But it is an invariable maxim in our law that no man shall be punished before he has had an opportunity of being heard: whereas if a warrant of distress were to be issued without any previous summons, the party would have no opportunity of showing cause why the execution should not issue against him." And in *Harper* v. *Carr* (*p*), (which was an action of trespass against a churchwarden for taking the anchor of a ship as a distress for non-payment of a poor-rate under a warrant of magistrates, and in which action it was held that the magistrates ought to be co-defendants with the churchwarden, and that the granting of their warrant was a judicial, and not a ministerial act), Lord Kenyon, C. J., in referring to an argument at the bar that justices of the peace act ministerially in granting a warrant of distress for *non-payment* of a poor-rate, in the same manner as when they *allow* a rate, said (*q*): "I think that the case of allowing a poor-rate is the single instance in which the justices act ministerially; but there the allowance alone does not put the rate into a state to be enforced, for it is still open to an appeal by any person who thinks himself aggrieved. But in the instance of granting a warrant of distress, the justices exercise a discretion, after inquiring into the circumstances of the case. It is an essential rule in the administration of justice, that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted, as we decided in *Rex* v. *Benn*; and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted." In *Rex* v. *Hughes and others* (justices of the borough of Stafford), Patteson, J., said (*r*): "How does this case differ from that of a distress for a poor-rate? There the justices have nothing to do with making the rate, and

(*p*) 7 T. R. 270, 275. (*q*) *Ibid.* p. 275. (*r*) 3 Ad. & E. 430.

no control over it; and the clause in Statute 43 Eliz., c. 2, s. 4,* empowering them to distrain, makes no mention of a summons. Yet it has been repeatedly held that a summons must issue before the warrant of distress for a poor-rate." Counsel replied: "Here a tribunal (that of the commissioners) is expressly constituted for the purpose of hearing any complaint against the assessment." Patteson, J.: "In the other case (that of poor-rate) the sessions are such a tribunal." Counsel: "Here the enactments are such that the commissioners and magistrates form as it were branches of one court. The magistrates have no discretionary power as to granting a warrant. The Act, indeed, would be nugatory if they might take the rate into consideration when called upon to grant a warrant." Patteson, J.: "The defendant might insist on many things independent of the propriety of the rate; for instance, that it had never been demanded of him." That dialogue in *Rex* v. *Hughes* bears very strongly upon the present case. *Rex* v. *Hughes* (*s*) arose upon a local Act of Parliament empowering commissioners to make paving and lighting rates, and to hear and relieve parties complaining of such rates. The Act also gave an appeal from the commissioners to the sessions. And it provided that on non-payment of rates for seven days after personal demand, it should be lawful for certain justices, upon *proof on oath* of such demand and non-payment, to issue a distress warrant. The justices being applied to for such a *warrant* on sworn information, stating the making of the rate, and that it was demanded and not paid, refused to grant the warrant without having the alleged defaulter summoned before them. The court refused a mandamus to compel the justices to issue a warrant without summoning the alleged defaulter, *and further held that even if the Act authorised the*

* The words of that enactment are: "It shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two such justices of the peace as aforesaid, to levy as well the said sums of money, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods," &c. Then followed a power to commit in default of distress.

(*s*) 3 Ad. & E. 425.

1871.
REG.
v.
YENKU BA'PUJI
et al.

justices to grant a warrant without summons, they nevertheless acted rightly in not so granting it. Lord Denman, C.J., in that case, after referring to the ruling on the Stat. 43 Eliz., c. 2, that a summons must issue before warrant of distress for poor-rate, said: "Why should we suppose that the Legislature intended any different mode of proceeding under the present Act. Nothing can be more unreasonable than the course here proposed; *and unless it were expressly directed by Act of Parliament,* I should think that magistrates ought not to proceed to the arbitrary act of issuing a warrant without calling upon the party to show whether he had, or had not, in fact, paid the rate, or why it had not been paid. In my opinion, the magistrates in the case have done themselves honour by refusing so to proceed." Littledale, J., and Williams, J., concurred, as did also Patteson, J., who in giving his judgment said: "It is not necessary to the construction we are giving the statute to say that the justices are invested with a power over the rate; nor are they. The whole object of the summons would be, that the party might be heard to show cause why he should not pay the rate. *At all events the Act does not compel the justices to issue a warrant without calling the party before them.*" A still stronger case than *Rex* v. *Hughes* is that of *Painter* v. *The Liverpool Gas Company* (*t*). The statute establishing the defendants' company enacted that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk, by warrant of any justice of the peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action," &c. In an action of trover brought against the company by a party distrained upon, it was held that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained

(*t*) 3 Ad. & E. 433.

upon, was illegal, though a summons and hearing were not in terms required by the Act. The company endeavoured to justify under that warrant, and stated that it was issued upon the complaint of their collector, and that he, by virtue of it, and under their authority, seized the plaintiff's goods for the purpose of levying a sum owing by him to them, and duly demanded according to the Act. The court, however, held that the warrant, although it would have protected the clerk or an officer, was no justification to the company, they not having acted in obedience to it, but put it in force as parties. The court then expressed their approbation of the doctrine of Lord Kenyon, C.J., in *Rex* v. *Benn* and *Harper* v. *Carr*. Littledale, J., in particular, said: "The warrant here is in the nature of an execution; and both upon the principle stated in *Rex* v. *Benn*, and in common justice, such process ought not to issue without a hearing of the party:" and Williams, J.: "I never heard the proposition doubted that a party is not to suffer in person or in purse without an opportunity of being heard."

In the Rules of all four of the municipalities (Balsád, Súrat, Malcolm Peṭ, and Ahmedábád), the fines are directed to be credited to those municipalities respectively. In adjudicating upon the liability of particular individuals to those fines, as well as to the taxes, those municipalities would be adjudicating in their own cause. How completely hostile the law is to allowing a municipality to decide upon questions in which it is interested, is shown by *Hesketh* v. *Braddock* (*u*), in which a bye-law of the corporation of Chester that none but freemen of the city of Chester shall keep shop within it, and which confined the action of debt, to be brought by the city treasurer for recovery of the penalty, to the Portmote Court, where none but the sheriff or coroner (who must be freemen) can array a jury, was held to be a void bye-law. Lord Mansfield said: "The minuteness of the interest won't relax the objection. For the degrees of influence can't be measured; no line can be drawn, but that of a total exclusion of all degrees whatsoever."

(*u*) 3 Burr. 1847.

1871.
REG. v. YENKU BA'PUJI et al.

The principle which prevailed in that case was also laid down in the strongest possible manner in *Day* v. *Savadge* (*v*); and see 1 Rolle Ab. 367, pl. 7. The case of *The Stationers' Company* v. *Salisbury* (*w*) was an action of debt for a penalty upon a bye-law of the company "that the master, wardens, and assistants, or major part of them, should from time to time elect such members as they think fit into the livery, and if any person so elected refuse to accept the same office, &c. without a reasonable excuse, to be approved by the court of assistants, that the person so refusing should forfeit £40." The declaration recited the bye-law, averred the election of the defendant by the livery, his refusal to accept the office, *per quod actio accrevit*, &c., and that he had no reasonable excuse. The defendant demurred, because, as was argued for him by Northey, (1) the bye-law was bad, as making the company the judges of the reasonableness of the excuse; for which he cited 1 Rolle Ab. 364, pl. 7; and *Dr. Bonham's Case* (*x*). (2) Even if the bye-law were good, there was no good breach of it assigned, as it was not shown that he had been summoned by the company to show cause why the penalty should not be inflicted. Sir Bartholomew Shower, for the company, argued (*inter alia*) that, the defendant having demurred, the averment, that he had no reasonable excuse, must be taken to be true, and that the bye-law was good. Holt, C. J., said: "Here the cause of excuse is to be approved by them (the court of assistants), so that if it were reasonable and not approved, the party would be without remedy; and we cannot here reject that part; where a parcel of bye-laws come before us together, some good and some bad, they may be severed; but not so where the sense is entire, as in this case." Sir B. Shower: "Suppose it were, upon due proof, to be allowed by a certain officer, sure that were good." Holt, C. J.: "I doubt

(*v*) Hob. R. 85, 87.

(*w*) Comberbach 221.—See also *Clarke* v. *Tucket*, 2 Ventris 182; S. C. 3 Levinz 281.

(*x*) 8 Rep. 114 *a*; and see Fraser's note (*c*) at p. 118 *a* (375).

that." Sir B. Shower: "This bye-law was signed by the Lord Chancellor Finch." Per Curiam: "'Tis never the better for that, for that is done of course. So we used to do in the Circuits (*y*); but if the orders (bye-laws) be not good, let the parties look to that at their peril." The Reporter mentions that "the court inclined for the defendant" upon both points, but recommended a reference of the dispute to the Lord Mayor.

We are not aware that there is any good reason for expecting a greater degree of impartiality from a Mofussil Municipality than from an English Municipality or other public body, so as to warrant any supposition that the Indian Legislature intended to lay down a rule for India different from that which prevails in England.

Of the numerous instances in which the same rule has been applied to individuals, and that neither the Judge himself may decide his own cause nor even his deputy, it is sufficient to refer to *Dimes* v. *The Grand Junction Canal* (*z*), where a decision of Lord Chancellor Cottenham was set aside on the ground that he was interested; and to *The City of London* v. *Wood* (*a*), and *The Mayor of Hereford's Case* (*b*).

For these reasons we think that we ought to abide by the principle of the decision in *Reg.* v. *Kálidás Keval* (*c*), that the Legislature has not, by Act XXVI. of 1850, conferred upon or authorised municipalities to assume judicial powers; but even if the point could be regarded as doubtful, we think that the rule *stare decisis* is here properly applicable. That case has not only been followed here, but was not, when decided, new doctrine. This appears from *Reg.* v. *Malhárji* (*d*), in which the same Judges who afterwards decided *Reg.* v. *Kálidás Keval*, though holding that under the Criminal Procedure Code, as it then (November 1866) stood, a Subordinate Magistrate had not jurisdiction to try an

(*y*) See 1 Rolle Ab. 363. (*z*) 3 Ho. of Lds. 759.
(*a*) 12 Mod. Rep. 669, 686; 1 Salk. 397. (*b*) 1 Salk. 396.
(*c*) 5 Bom. H. C. Rep., Cr. Ca. 10. (*d*) 3 *Ibid.* 36.

1871.
REG. v. YENKU BA'PUJI et al.

offender against one of the rules of the Municipality of Puná, made under Act XXVI. of 1850, Sec. VII., cl. 5, stated their opinion to be that a Full Power Magistrate would have had jurisdiction to try him. And, since Act VIII. of 1869, amending the Criminal Procedure Code, was passed, it has been held by Lloyd and Kemball, JJ., that a Subordinate Magistrate may try an offender against rules made by a Municipality (Egatpurá) under Act XXVI. of 1850, Sec. 7— *Reg.* v. *Dharmáyá valad Sangápá* (*e*)—inasmuch as the last part of the Schedule to Act VIII. of 1869, headed "Offences against other laws," empowers "any Magistrate" to try such offences "if punishable with fine only, or with imprisonment for less than one year," the court being of opinion that, as the explanatory note No. 7 at the head of that schedule, namely, "The last part of this schedule, headed 'Offences against other laws,' shall not be taken to alter or affect any special provision, contained in such laws, regarding the procedure to be followed in the case of offences made punishable thereby," related only to procedure, and not to jurisdiction, it did not prohibit the cognisance of such cases by Subordinate Magistrates, provided that the offence be punishable by fine only, or with imprisonment for less than one year. We agree with our brothers Lloyd and Kemball in thinking that the amended Schedule C. P. C. gives jurisdiction to Subordinate Magistrates to punish breaches of Municipal Rules. The exception in Sec. 21 of the Criminal Procedure Code, of "offences which are by any such law made punishable by some other authority therein specially mentioned," has not been overlooked by us. The case of *Reg.* v. *Hirá Jivá* (*f*), decided upon Reg. XXI. of 1827, Sec. 7, wherein the Zillá Magistrate is specially designated, and other Magistrates impliedly excluded, is an instance of such an exception. But the phrase used in Act XXVI. of 1850, Sec. 10, is "every Magistrate;" and we do not feel compelled to resort to the definition in Act II. of 1839, Sec. 4, to narrow the scope of that phrase, which is in itself sufficiently wide to include "any Magis-

(*e*) 8 Bom. H. C. Rep., Cr. Ca. 12. (*f*) 7 *Ibid.* 59.

trate" within the meaning of the last part of the amended Schedule of the Criminal Procedure Code just mentioned.

On the question whether Rule 29 of the Balsád Rules (as it stood before it was modified by Rule 55), or Rule 29 of the Súrat Rules (as it now appears to stand), is divisible, *i.e.*, can be held good as to the penalty and as to the mode of levying it, but void only as to the mode of adjudication; and whether Rule 17 of the Ahmedábád Rules (before it was modified by the operation of Rule 52) may be regarded as divisible, *i.e.*, good as to the penalty, and void only as to the mode of adjudication and the mode of levying the penalty, we simply point out the authorities, and deem it unnecessary now to express an opinion.

Chief Baron Comyn in his Digest, Bye-law (C. 7) says: "A bye-law, *being entire*, if it be unreasonable in any particular, shall be void for the whole; as if the penalty be unreasonable, or to be levied by imprisonment, sale, &c. &c." In *Rex* v. *Faversham* (*g*) Lord Kenyon, C.J., said: "Though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other." Watson, B., in giving judgment in *The Blackpool Board of Health* v. *Bennett* (*h*) observed: "Although the old rule of law to be found in Com. Dig., Bye-law (C. 7), which says that a bye-law bad in part is bad in the whole, is qualified to this extent, that, if the good part is independent and unconnected with the bad, the good part would be valid and binding: *Rex.* v. *Faversham.*"

It is not quite just to C.B. Comyn to represent him as laying down generally that a bye-law, bad in part, is bad in the whole, for he guarded his remark with the words "being entire;" which are equivalent to "if indivisible," and such was recognised to be his meaning by the Court of Queen's Bench: *Reg.* v. *Lundie* (*i*). That case is itself deserving

(*g*) 8 T. R. 352, 356.

(*h*) 4 H. & N. 137, 138; see also *Eden* v. *Foster*, 2 P. Wms. 327. As to a Canadian ordinance good in part and void in part, see Forsyth's Cases and Opinions, 465.

(*i*) 8 Jur., N. S., 640, 641; a better report than that in 31 L. J., N. S., 157 Mag. Ca.

1871.
REG. v. YENKU BA'PUJI et al.

of notice as one in which a bye-law was held to be bad in part and good in part. There one of the bye-laws made by the "pasture masters" of the common pastures of the borough of Beverley, under the 6th Wm. IV., c. 70, passed to provide for the proper regulation thereof, provided that "if any person shall stock and depasture (*inter alia*) a vicious horse on any part of the common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the said stock and cattle, shall *respectively* forfeit and pay for every such offence the sum of £5." The court held that so much of the bye-law, as referred to the infliction of the fine upon the person actually transgressing the same, was divisible from that portion which referred to the owner of the stock; that the former part of the bye-law was reasonable and good, and might stand independently of the latter part, which subjected the owner to the penalty, which if bad, as being unreasonable, might be rejected. The Judges dwelt much upon the word "respectively" as aiding in a division of the good from the bad portion of the bye-law. Crompton, J., said: "The passage in Comyn's Digest must be held, I think, to apply to those cases where a bye-law is in its nature indivisible; there, undoubtedly, if bad in any particular, it must be held to be bad altogether; but, for the reasons I have stated, this rule is here inapplicable." The opinion of Holt, C.J., in *The Stationers' Company* v. *Salisbury* (*j*), already mentioned, appears to have been that the bye-law there was indivisible, and, therefore, wholly void. In *Clarke* v. *Tuckett* (*k*) a similar conclusion seems to have been arrived at with respect to a bye-law made by the corporation of Exeter.

We are of opinion that Rule 29 of the Balsád Rules (before it was partially rescinded by Rule 55) was, and Rule 29 of the Súrat Rules (as it now appears to stand) is bad, so far at all events as the right to adjudicate, upon the liability of any offender against those rules to the penalties which they purported to authorise, was reserved to the Municipality. The same vice existed in Ahmedabad Rule 17 before it was

(*j*) Comberbach 221. (*k*) 2 Ventris 182, S. C.; 3 Levinz 281.

partly rescinded by Rule 52, with this additional defect, that the right to levy the penalties was reserved to the Municipality, in direct contravention of Secs. 10 and 12 of Act XXVI. of 1850.

1871.
REG. v. YENKU BA'PUJI et al.

We think that in the Balsád cases the Subordinate Magistrate had jurisdiction, and that the convictions, therefore, ought not to have been annulled.

In the present case from Malcolm Peṭ, we think that the Magistrate F. P. also had jurisdiction, and, therefore, that this court ought not to interfere with the convictions and sentences.

REG. v. KA'STYA' RA'MA' *et al.*

Jurisdiction—High Seas within three miles from shore—British India, Territorial Limits of—12 & 13 *Vict.*, *c.* 96—23 & 24 *Vict.*, *c.* 88—*Power to legislate for High Seas—Mischief—Ind. Pen. Code, Secs.* 425 *and* 427.

Sept. 20.

An offence committed on the high seas but within three miles from the coast of British India, as being committed within the territorial limits of British India, is punishable under the provisions of the Indian Penal Code.

The ordinary Criminal Courts of the country have jurisdiction over such offences by virtue of the Stat. 12 & 13 Vict., c. 96, ss. 2 and 3, extended to India by Stat. 23 & 24 Vict., c. 88.

Semble. The Governor General of India in Council has no power to legislate for offences committed on the high seas outside the territorial limits of British India, though he has power to legislate in respect of offences committed on the high seas within three miles of its coasts.

Meaning and effect of Stat. 12 & 13 Vict., c. 69, ss. 2 and 3, considered.

The *Queen* v. *Thompson* (1 Beng. L. Rep., O. Cr. J. 1) commented on.

Where certain of the inhabitants of the village of Manori, in the Thánáa District, sallied out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by the villagers of a neighbouring village: *it was held* (I.) that a Magistrate F. P. in the Thánáa District had jurisdiction over the offenders; (II.) that the Indian Penal Code was the substantive law applicable to the case; and (III.) that the offence amounted to mischief within the meaning of Secs. 425 and 427 of that Code.

THIS was an application to the High Court for the exercise of its extraordinary criminal jurisdiction.

The facts of the case and the nature of the application are fully set out in the judgments delivered.