1864.
Jan. 20.

REG. v. RA'MA' bin GOPA'L.

Jurisdiction—Joint Judge—Consent of Governor General—Act XXIX. of 1845—Ratification.

The consent of the Governor General in Council, required by Sec. 5 of Act XXIX. of 1845, to the appointment of a Joint Judge, must be given before the appointment is made.

The doctrine of subsequent ratification does not apply in a criminal case.

IN this case sentence of death had been passed upon one Rámá bin Gopál by the Joint Judge at Tháṇá, C. Gonne, and the record and proceedings in the case were submitted for confirmation to the High Court, agreeably to Sec. 22 of the Criminal Procedure Code. The appointment of the Joint Judge not having been sanctioned by the Government of India, as required by Act XXIX. of 1845, and the High Court entertaining doubts as to the legality of the sentence, inquiries were made of Government whether Mr. Gonne's appointment was made with the sanction of the Governor General under Sec. 5 of Act XXIX. of 1845, and it was ascertained that the appointment was made in anticipation of the consent of that authority, but that the consent of the Governor General in Council had since been received. The Judges of the High Court, finding considerable difficulty in sustaining the conviction, were desirous of affording to Government an opportunity, if so advised, of having the legality of the appointment argued before the Court.

The case was accordingly argued, December 7, 1863, before SAUSSE, C.J., WESTROPP J., and TUCKER, J.

White, for the Crown, in support of the conviction, argued that the words of the Act did not prohibit the Joint Judge from acting, unless previous consent had been obtained, nor was his appointment made void in the absence of consent. The period at which the consent is to be given is a matter of fair doubt on the words of the Act. The consequences of holding the judicial acts of the Judge void would be of very serious inconvenience, as the trial would in that case have been *coram non judice*, and the Judge and those acting in execution of his decree would be liable to criminal proceedings, though Act XVIII. of 1850 might afford some protection in such a case against Civil proceedings. The decisions on the English Marriage Acts, according to which marriages are not void for irregularity unless the statute expressly enacts to that effect, go strongly to show that without express words an irregularity like the present will not be held to vitiate a judi-

cial act. Then the Government of Bombay has intrinsic authority to appoint Judges (Sec. 34 of Reg. II. of 1827); and Reg. XIX. of 1830 was the basis of Act XXIX. of 1845, but with the additional requisite of the consent of the Governor General. The inference to be drawn is that consent was required rather for financial reasons than any other, and this consideration is an additional ground for holding that previous consent was non-essential. Besides, the Government, by giving subsequent consent, had ratified all acts done since the original appointment. This is not like the case of an execution of a power where consent of a third person is made necessary. The following authorities were cited:—*Margate Pier Co.* v. *Hannan*, 3 B. & Ald. 266; *Doe d. Governors of Bristol Hospital* v. *Norton*, 11 M. & W. 913; *Rex* v. *Birmingham*, 8 B. & C. 29; *Bateman* v. *Davis*, 3 Madd. Ch. Rep. 98; *Buron* v. *Denman*, Exch. 167.

Green followed:—Such a construction is, if possible, to be placed on the words of enactments as will uphold the ministerial and judicial acts of persons *de facto* exercising the functions of public officers; here the words did not expressly require either concurrent or anterior consent. The absence of anterior or concurrent consent was an objection for the Government of India alone to take, and not for a litigant party; the condition of consent to the appointment was introduced from financial considerations, and not as a check on injudicious appointments by the local Government. Again, the principle of subsequent ratification applies here. The following additional authorities were relied on:—Viner's Abridgment, Title "Offices and Officers," G 4; Comyn's Digest, "Justices," C 2, "Justices of the Peace," A 8; Broom's Legal Maxims, p. 779; 1 Smith's Leading Cases (5th ed.), p. 307.

Cur. ad. vult.

SAUSSE, C.J.:—In this case the prisoner was tried for murder, convicted and sentenced to death, upon the 2nd of June 1863, by Mr. Gonne, who describes himself as "Joint Session Judge at Tanna." The case was sent up to this court for confirmation, as required by law, and in addition the prisoner appealed against his conviction, and prayed that upon a review of the record, and all proceedings in the case, he might be discharged. The court has thus full jurisdiction, and, under cls. 26 and 27 of the Letters Patent, and Sec. 9 of 24 & 25 Vict.,

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c. 104, it is called upon to exercise that jurisdiction in as ample manner as the late Sadr Court used to do. Amongst the various and anomalous services, towards Government and the public, which that court was called upon, or used, to perform, was that of jealously watching (at least in cases for confirmation or upon petition of appeal) whether the subordinate trying authorities had, by reason of their respective appointments, legal jurisdiction to try the cases which came before them; and to assist the Judges in the performance of that duty, they employed an officer whose function it was "to keep a statement of the powers with which magisterial and judicial officers are vested," and that register was referred to when any question of jurisdiction arose. Since the constitution of the High Court that officer has been continued, and many cases have occurred in which the question of jurisdiction of the subordinate courts came in question, and some wherein that jurisdiction depended upon whether the Government had, or had not, appointed the Judges according to the provisions of the Legislative Acts creating the office. The present is a case of the latter description. The office of "Joint Session Judge" for the Presidency of Bombay was created by Sec. 5 of Act XXIX. of 1845, and in the following words:—"And it is hereby enacted that it shall be lawful for the Governor in Council of Bombay, with the consent of the Governor General in Council, whenever the state of criminal business may render it expedient, to appoint, in any zilla within the said territories" (of Bombay), "a Joint Session Judge, who shall be vested with co-extensive powers," &c., "with the Session Judge of the Zilla," &c. It appearing from our records, founded upon the *Government Gazette*, that Mr. Gonne had been appointed by the Governor in Council of Bombay only, this court in effect called for the commission under which he had acted when trying this case, and was then officially apprised by Government that although Mr. Gonne had been appointed on 21st March 1863 as Joint Session Judge, yet that no sanction or consent had been obtained from the Governor General in Council until July 1863, when, with a view of meeting the objection raised in the present case, that consent was antedated to the 21st of March previous. The trial took place in the intervening period. These latter facts do not appear upon the record and the proceedings as sent up from the inferior court. But error of this kind does not require to appear upon the face of the record if otherwise judicially before the appellate court. The judgment may be falsified,

reversed, or avoided by showing the special matter without writ of error (4 Blackstone, "Reversal of Judgment;" 2 Hawk. P. C. 459). This court is now called upon to decide, very much as if the objection had been taken at the trial by a plea to the jurisdiction, whether at the time of the trial Mr. Gonne was acting under such a commission as gave him jurisdiction to exercise the powers of a Session Judge. It has been principally contended, on behalf of the Government of Bombay, that upon the wording of the statute a fair and reasonable doubt exists as to whether the consent of the Governor General in Council should precede the appointment, or whether it might not be given afterwards; that under such circumstances the principle laid down and acted upon in the *Margate Pier Company* v. *Hannan** should be applied to the present case, and that the Court should take advantage of the doubt to uphold the judicial acts of a person *de facto* exercising the office of a Judge. That case was an action of trespass, and it goes to this extent, but no further, that if a person be clothed with a perfect commission of Justice of the Peace, and there be in the statute under which he was appointed a prohibition against his acting until certain acts be done, the statute will be construed so as not to invalidate the acts, but as rendering the individual liable to the penal consequences of having disregarded the prohibition. If in the present case Mr. Gonne had been clothed with a perfect commission, but had acted without having complied with any precedent conditions imposed by the statute of 1845 (such as taking oaths, &c.), then that case would have been in point; but the question here is, had Mr. Gonne been vested with a perfect or sufficient commission to give him jurisdiction to exercise the functions of a Session Judge at the time of trial? Sec. 5 of Act XXIX. of 1845 clearly requires the act of appointment to be preceded or accompanied by the consent of the Governor General in Council, or, in other words, the power to appoint is clogged with a condition which must be complied with before there can be a valid exercise of the statutable power. This construction is powerfully sustained by Sec. 59 of 3 & 4 Wm. IV., c. 85, which provides that no Governor, or Governor in Council, shall have the power of creating any new office, or granting any salary, gratuity, or allowance, without the previous sanction of the Governor-Gene-

* 3 Bar. & Ald. 266.

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ral of India. That condition not having been complied with, the Governor in Council of Bombay had no power to grant Mr. Gonne a perfect commission to act as Joint Session Judge, and Mr. Gonne's acts were consequently performed without legal jurisdiction.

It was suggested, rather than attempted to be argued seriously, that the well-known legal maxim of "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" applied to the present case, and that the subsequent ratification of the act of the Governor in Council of Bombay, by the Governor General of India in Council, validated all intervening judicial acts. No case was cited in which such a doctrine was upheld in a criminal case. There is neither principle nor authority to support the proposition, and it would be a misapprehension and misapplication of the principle involved in the above maxim, which is founded upon the relation of principal and agent, to apply it to a case like the present. The case of *Gahan and others* v. *Lafitte** shows the jealousy with which the principle of "ratification" is regarded by the highest courts in England when calculated to take away a right or work a wrong. It appeared in that case that the court of the island of St. Lucia, which was constituted by order of the Queen in Council, was to be legally holden before a Chief Justice and two Puisne Justices, appointed by and holding at the will of the Sovereign; or in case of death, suspension, resignation, &c. to be appointed provisionally by the Governor of the island. The Chief Justice had been suspended, and another Judge had resigned. The Governor exercised his power by appointing two in their places, and the third Judge having declined to attend the court so constituted, the Governor informed him that he treated his absence as a resignation, and accordingly appointed a third Judge in his place. That third Judge denied that he had resigned or intended to do so. It is to be observed that the Governor had legal power of suspending that third Judge, and of appointing another in his place. The court thus constituted exercised the power of imprisonment for contempt, and the party incarcerated brought an action, and recovered £3,000 damages, against the three Judges so appointed by the Governor, upon the ground that those three Judges did not form a legal court. Pending the action, an order by

* 8 Moo. P. Co. Ca. 382.

the Queen in Council was issued, ratifying all acts done by those three Judges, and that ratification was relied upon by the appellants before the Privy Council as a bar to the action, in addition to the ground that, having been Judges *de facto* at the time of the imprisonment, their judicial acts should be considered valid. But the Privy Council, in delivering judgment through Lord Brougham, allowed no force to the ratification by the Queen in Council (from which the court held its constitution), and they upheld the verdict to the extent of £1,500 against the Judges appointed by the Governor. That case was decided upon the ground that the Judges appointed by the Governor were sitting under an imperfect commission, and that its acts were, therefore, invalid. The case of the *Margate Pier Company* v. *Hannan* was also relied upon to sustain the appellant's case, but no weight was given to it, as the commission was an imperfect one. It has been also urged in this case, that great inconvenience may follow from holding that the Joint Session Judge had not jurisdiction to try the cases which are now pending on appeal before this court. No doubt there may, but similar inconvenience must follow whenever judicial appointments are not made in accordance with the essential provisions of the statute creating the office. The argument drawn from inconvenience can only influence the judgment of a court to a very limited extent. In the present case the conviction and sentence are annulled, and the prisoner is directed to be tried before a court of competent jurisdiction.

WESTROPP, J. :—I concur fully in the judgment of the Chief Justice.

TUCKER, J. :—I wish to add a few words. I was at first disposed to dissent from the conclusion at which the Court has arrived, as I was of opinion that the words "with the consent of the Governor General of India in Council" in Act XXIX. of 1845 might be reasonably interpreted to include "subsequent" as well as "prior" or "simultaneous" consent; and I considered that if the letter of the Act would admit of two reasonable constructions, one of which if acted upon would cause not only great public inconvenience, but certain injury to many persons, while from the other no similar consequences would follow, we were bound to reject the former, and to give effect to the latter. On referring, however, to the Act of Parliament which conferred the legislative authority under which Act XXIX. of 1845 was passed (3 & 4 Wm.

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IV., Ch. 85), I find it expressly enacted in Sec. 59 "that no Governor in Council shall have the power of creating any new office without the previous sanction of the Governor General of India in Council." Reading the Indian Act by the light thrown upon it by the Imperial Statute, I can come to no other conclusion than that the framers of the former Act adapted its provisions in this respect to those of the Act of Parliament, and that, therefore, the consent of the Governor General required by the Act was the *previous* consent; and that until this consent had been obtained no office of Joint Session Judge could be created. The proceedings of the present trial must, therefore, be annulled, as holden *coram non judice*. I wish it to be understood that, although it appears to have been sometimes the practice of the late Ṣadr Court, and also of this court, to entertain and determine questions of jurisdiction which had not been raised by the pleading, I am not prepared to assent to the view that this was a proper course, or that it will be incumbent on this court to follow it on future occasions.*

Conviction and sentence annulled.

Original Civil Jurisdiction.

1863.
Nov. 7.

KA'VASJI FRA'MJI .... *Plaintiff.*

WALLACE ..... *Defendant.*

Jurisdiction—Dwell—Letters Patent of High Court, cl. 12.

The defendant, an officer in the Bombay Staff Corps, holding an appointment in Sind, came to Bombay on leave, and remained about ten days. During his stay in Bombay he was served with a writ of summons on a cause of action arising in Sind.

Held—That the defendant did not "dwell" within the local limits, so as to give the Court jurisdiction under cl. 12 of the Letters Patent.

THIS was an action to recover Rs. 1,643 for the use and occupation of a bungalow at Sakkar, in Upper Sind, from 1855 to 1863. The cause came on this day for settlement of issues, before ARNOULD, J.

Dunbar, for the defendant, objected that the court had no jurisdiction. The cause of action arose in Sind, and the defendant did not "dwell or carry on business or work for gain" within the local limits of the ordinary original jurisdic-

* Act XIV. of 1864 was subsequently passed to give validity to the judicial acts and proceedings of Mr. Gonne between February 25, 1863, and July 11, 1863.