

## Crown Cases.

### REG. V. VYANKATVA'MI'.

*North Cánará, Transfer of—Convict—Right of Appeal—Sadr Court—Crim. Proc. Code, Secs. 19 and 408—Reg. II. of 1827, Sec. XVI., Cl. 2—Bom. Act III. of 1863—16 & 17 Vic., c. 95—21 & 22 Vic., c. 106—24 & 25 Vic., c. 67—24 & 25 Vic., c. 104.*

*Held* that there was nothing in the manner in which the district of North Cánará was detached from the Madras Presidency, and annexed to, the Presidency of Bombay, to prevent the Code of Criminal Procedure; from operating therein, as if it had always formed a part of the Presidency of Bombay, or to deprive a convict found guilty by the Session Judge of the District, on the 18th of September 1862, of the right of appeal, which he then would have had to the High Court, by virtue of Sec. 408 of the Criminal Procedure Code, and of 24 & 25 Vic., c. 104, and the Letters Patent [of 1862], Cl. 26.

The power given by 16 & 17 Vic., c. 95, to alter the distribution of territories among the Presidencies, was vested by 21 & 22 Vic., c. 106, in the Secretary of State for India, by whose order of the 28th of February 1862 North Cánará was annexed: the new arrangement of territory to take effect from such date as the Governor General of Indian in Council, should, by proclamation, appoint for the purposes of the India Councils Act, 1861; which Act has reference solely to the constitution and functions of the Legislative Councils, and does not purport to affect in any way the exercise of the general powers of Government, or the administration of justice and the jurisdiction and authority of the Courts of Justice:—the annexation for these purposes being made by the Secretary of State, and not being qualified or controlled by the proviso in Sec. 47 of 24 & 25 Vic., c. 67, which cannot be construed as a substantive enactment, or as qualifying or restraining the power vested in the Secretary of State.

Meaning of the term "Sadr Court," as defined by Act VIII. of 1842, and by Sec. 19 of the Criminal Procedure Code.

Giving an appeal to the High Court, under the Criminal Procedure Code, is not subjecting a District to the Regulations, within the meaning of Reg. II. of 1827, Sec. XVI., Cl. 2.

Bombay Act III. of 1863 observed upon.

Analogous cases of ceded or conquered territory in America.

**T**HIS was an appeal from a conviction made on the 18th of September 1862, by the Session Judge of North Cánará, by which the prisoner was sentenced to be transported for ten years, for offences against the Indian Penal Code; and the case was argued before FORBES, COUCH, and NEWTON, JJ.,

upon the preliminary question, whether the petitioner had any right of appeal to the High Court of Bombay.

*White* for the prisoner.

*The Advocate General (Hon'ble A. J. Lewis) contra.*

*Cur. adv. vult.*

FORBES, J. :—Vyankatsvámí, who has been sentenced by the Session Judge of North Cánará to ten years' transportation for offences against the Indian Penal Code, desires to appeal to this court, and it is contended against him that we have no jurisdiction to entertain the appeal.

By an order made by the Right Honourable the Secretary of State for India in Council, dated the 28th of February 1862, under 16 & 17 Vic., c. 95, s. 18, and 21 & 22 Vic., c. 106, the district of North Cánará, which formed a part of the Presidency of Fort St. George, was, with the exception of the táluká of Kandápúr, detached from that Presidency, and annexed to the Presidency of Bombay: it being further ordered that the aforesaid new distribution and arrangement of territory was to take effect from such date as the Governor General of India in Council should, by proclamation, appoint for the purposes of the Indian Councils' Act. A proclamation was accordingly issued by the Governor General in Council, on the 15th of April 1862, declaring that the district of North Cánará, with the exception of the táluká of Kandápúr, should be detached from the Presidency of Fort St. George, and annexed to the Presidency of Bombay, from the 16th day of April 1862.

It is admitted by the learned counsel who appears to resist the application of Vyankatsvámí, that this annexation of North Cánará to the Presidency of Bombay was duly and lawfully made; and, therefore, no observation need be made upon that point.

The Legislative Council of Bombay passed an Act, No. III. of 1863, which received the assent of the Governor of Bombay on the 4th of January 1863, and of the Governor General on the 25th of March 1863. By Sec. 6 of that Act: "The district of North Cánará, with the exception of the táluká of Candápúr, as transferred from the Presidency of Fort

1864.

REG.

v.

VYANKAT-  
SVA'MÍ.

1864.  
REG.  
v.  
VYANKAT-  
SVA'MI.

St. George, shall, from and after the 16th day of April 1862, be subject to the Regulations and Acts which are, or shall at any time hereafter be, in force within the territories subject to the Presidency of Bombay.”

The sentence recorded against the prisoner Vyankatśvámí was passed on the 18th of September 1862; and it is contended that by Sec. 7 of Act No. III. of 1863 above mentioned, nothing in the Act is to affect any acts done, or proceedings held, or order made, in the district of North Cánará previously to the passing of the Act; that by Sec. XVI., Cl. 2, of Reg. II. of 1827 of the Bombay Code, no territory can be rendered subject to the Regulations except by Regulation; that the sentence against the prisoner Vyankatśvámí, having been passed after the annexation of the district of North Cánará to the Presidency of Bombay, but before the passing of Act No. III. of 1863, was passed at a time when the district of North Cánará had not yet been brought under the Bombay law, and that, therefore, this court has no jurisdiction.

I think that Sec. 7 of Act No. III. of 1863 must be so read, if possible, as to be not incompatible with Sec. 6 of the same Act. Sec. 6 declaring that the district of North Cánará is to be subject to the Bombay Regulations and Acts from and after the 16th day of April 1862, the words in Sec. 7 “nothing in this Act shall affect any acts done in the district of North Cánará previously to the passing of this Act” must not be read literally, or they would destroy the provisions of Sec. 6: for many acts done in North Cánará must be affected by the substitution of the law of Bombay for the law of Madras, and if this substitution do not take place, then the provision contained in Sec. 6 has no effect. I should be willing to take the meaning of Sec. 7 to be, as I have little doubt it was intended to be, that nothing in this Act is to affect any act not done according to the Bombay law, but according to the Madras law, so as to render that act illegal by reason only of the introduction of Bombay law being made to have a retrospective effect.

But I am not inclined to rely upon this view, because

although the Bombay Government is not in words debarred from so doing by the Indian Councils' Act, still I entertain some doubt whether it has the power of passing a law, which is not merely a remedial law of a retrospective nature, confirming rights already existing, or adding to the means of enforcing existing obligations, but is a law affecting private rights retrospectively, and even relating to penal and criminal proceedings, so as that it may perchance make an act criminal which was innocent at the time it was done.

Besides, I think that a view of the subject, quite distinct from that which has been taken, may be relied upon as showing that this court has jurisdiction in the present instance.

Before its annexation the district of North Cánará was subject to the Madras Presidency, into which, as well as into the Presidency of Bombay and other parts of "British India," the Indian Penal Code and the Code of Criminal Procedure were introduced from the 1st day of January 1862 (Penal Code, Sec. 1; Criminal Procedure Code, Secs. 3 and 445). It is a general rule that "the laws, usages, and municipal regulations in force at the time of the conquest or cession of a territory remain in force until changed by the new sovereign:" Kent's Commentaries, Vol. I., p. 187; or, as Blackstone expresses it, "in conquered or ceded countries that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country:" Vol. I., p. 109; and Sec. 47 of the Indian Councils' Act of 1861, which gives the Governor General in Council certain powers in regard to altering the boundaries of provinces, provides that any law made by the Government of any Presidency shall continue in force in any part thereof which may be severed therefrom until superseded by law of the Governor General in Council, or of the Governor of the Presidency to which such part may become annexed.

The prisoner has been tried under the Penal Code, and with the forms prescribed by the Code of Criminal Proce-

1864.  
REG.  
v.  
VYANKAT-  
SVA'MI'.

1864.  
REG.  
P.  
VANKAT-  
SAMI.

duro. Now Sec. 408 of the Code of Criminal Procedure enacts that any person convicted on a trial held by a Court of Session may appeal to the Şadr Court. The appeal, since the abolition of the late Şadr Courts, lies to the High Courts; and the only question is whether, in the present instance, the appeal lies to the High Court at Madras or to this court. I cannot doubt that it lies to this court. The principle is that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory:" Story's Conflict of Laws, § 18. It follows that, "on the other hand, no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions:" *Ibid.*, § 539. The High Court of Madras can have no jurisdiction within the Presidency of Bombay, of which North Cánará has become a part. The analogy which is applicable is that of a conquest. When the territory composing the State of Vermont separated from New York, and erected itself into an independent State, and certain citizens of New York, having landed property in Vermont, but deriving title from New York, claimed compensation from the latter State, and were heard at the bar of the Houses of Assembly, it was argued against them, and the doctrine prevailed, that the independence of Vermont was an act of force beyond the power of the State of New York to control, and equivalent to a conquest of that territory. Clearly a State having lost a part of its territory by conquest can no longer exercise authority therein, and similarly of territory ceded without conquest.

It may be well to remark that the definition of a "Şadr Court" which is contained in Sec. 19 of the Code of Criminal Procedure does not [merely] apply to the Presidencies of Madras or Bombay, but [also] to any part of the territories in British India not subject to the General Regulations of Bengal, Madras, or Bombay, to which the Code may have been extended, under the provisions of Sec. 445 thereof.

I think further that there are other grounds for considering that this court has jurisdiction. The order of the Secretary of State detaching North Cánará from the Presidency

of Fort St. George, and annexing it to the Presidency of Bombay, was complete in every respect except as to the time from which the annexation was to take effect. All that was left to the Governor General in Council was the authority to declare that time by proclamation. The annexation was the act of Her Majesty's Government, not that of the Government of India ; and, regarded in that light, must be considered as having of itself changed the law of the annexed district from the date of annexation, and introduced the law of the Bombay Presidency.

I am of opinion that this court has jurisdiction to entertain the appeal of the prisoner Vyankatsvámí.

COUCH, J. :—This was an appeal from a conviction made on the 18th of September 1862 by the Session Judge of North Cánará, for offences against the Penal Code, upon which the petitioner was sentenced to be transported for ten years ; and the case has been argued before us by Mr. White, as counsel for the petitioner, and the Advocate General, instructed on behalf of the Government, upon the preliminary questions whether the petitioner has any right of appeal to this court.

At the time of the conviction the Session Judge was acting for, and the trial took place in a portion of, North Cánará which formerly formed a part of the Presidency of Madras ; but which had for some time previous to the trial been annexed to the Presidency of Bombay ; the Judge deriving his authority from an appointment made by the Governor of Bombay in Council, and notified in the *Government Gazette* of the 7th of May 1862. The petitioner was tried under the provisions of the Code of Criminal Procedure (Act XXV. of 1861), which, by Sec. 445, came into operation in the Presidencies of Bengal, Madras, and Bombay on the 1st of July 1862 ; and he claims to be entitled to appeal to this court by virtue of Sec. 408, which provides that any person convicted on a trial held by a Court of Session may appeal to the Şadr Court ; this court now having, by virtue of the Act 24 & 25 Vic., c. 104, and the Letters Patent constituting it, all the jurisdiction and powers of the Şadr Court of the Presidency of Bombay, and

1864.  
REG.  
v.  
VYANKAT-  
SVA'MÍ.

1861.  
REG.  
v.  
VYANKAT-  
SAA'AM'.

being, by Cl. 26 of the Letters Patent, ordained to be a Court of Appeal from the Criminal Courts of the Presidency of Bombay, and from all other Courts, whether within or without the said Presidency, from which there was then an appeal to the Court of Şadr Fouzdári Adálat at Bombay. The words "Şadr Court" in Sec. 408 must be taken to mean the Şadr Court of the Presidency, or in those parts of British India to which the Code of Criminal Procedure shall be extended, under Sec. 445, the highest Criminal Court of appeal or revision established in such part (Sec. 19). And by Act VIII. of 1842, in force at the time of the passing of the Code of Criminal Procedure, but since repealed by Act XVII. of 1862, it is enacted that, in future Acts generally applicable to all the Presidencies, the term "Şadr Court" shall be deemed applicable to the Courts respectively of the highest Civil and Criminal jurisdiction, as the case may be, of all the Presidencies.

The district of North Cánará having at one time formed part of the Presidency of Madras, and the appeal from the courts of that district having been to the Şadr Court of that Presidency, it becomes necessary to inquire by what authority, and in what manner, the district had been detached from the Madras Presidency, and annexed to the Presidency of Bombay; and whether there is anything to prevent the Code of Criminal Procedure from operating in the district as if it had always formed part of the Bombay Presidency, or to deprive the petitioner of the right of appeal to this court, which he would then undoubtedly have had.

The annexation was made by an order of the Secretary of State for India in Council, dated the 28th of February 1862, and published in the *Bombay Government Gazette* of the 1st of May 1862; and after reciting that, by the Act 16 & 17 Vic., c. 95, power was given to the Court of Directors, under the directions and control of the Board of Commissioners for the affairs of India, from time to time, to make such new distribution and arrangement of the territories subject to the Government of the East India Company among the Presidencies and Lieutenant Governorships

for the time being subsisting therein, as to them might seem expedient; and that the said recited power was then, by the operation of the Act 21 & 22 Vic., c. 106, vested in the Secretary of State for India in Council, it proceeded as follows:—"It is hereby ordered that the district of North Cánará, which said district now forms a part of the Presidency of Fort St. George, shall, with the exception of the Táluká of Kandápúr, be detached from that Presidency, and shall be annexed to, and form part of, the Presidency of Bombay, the said Táluká of Kandápúr remaining as heretofore a part of the Presidency of Fort St. George: And it is further ordered that the aforesaid new distribution and arrangement of territory shall take effect from such date as the Governor General of India in Council shall, by proclamation, appoint for the purposes of the Indian Councils' Act, 1861."

1861.  
REG.  
v.  
VYANKAT-  
SVA'MÍ.

The proclamation of the Governor General of India in Council was as follows:—

"Whereas it is declared by Sec. 47 of the Act 24 & 25 Vic., Cap. 67, that it shall be lawful for the Governor General in Council, by proclamation, to fix the limit of any Presidency, Division, Province, or Territory of India for the purposes of the said Act: and further, by proclamation, to divide or alter, from time to time, the limits of any such Presidency, Division, Province, or Territory for the said purpose; His Excellency the Governor General of India in Council, by virtue of the authority vested in him as above, does hereby declare and proclaim that the District of North Cánará, which at present forms a part of the Presidency of Fort St. George, shall, with the exception of the Táluká of Candápúr, from the sixteenth day of April 1862, be detached from that Presidency, and shall from the same date be annexed to, and form part of, the Presidency of Bombay for the purposes of the said Act, the said Táluká of Kandápúr remaining as heretofore a part of the Presidency of Fort St. George."

Sec. 47 of the Act 24 & Vic., Cap. 67, is as follows:—

"It shall be lawful for the Governor General in Council, by such proclamation as aforesaid, to fix the limits of any

1861.  
REG.  
v.  
VIANKAT-  
SVA'MI.

Presidency, Division, Province, or Territory in India for the purposes of this Act, and further, by proclamation, to divide or alter, from time, to time, the limits of any such Presidency, Division, Province, or Territory for the said purposes : Provided always that any Law or Regulation made by the Governor or Lieutenant Governor in Council of any Presidency, Division, Province, or Territory shall continue in force in any part thereof which may be severed therefrom by any such proclamation, until superseded by Law or Regulation of the Governor General in Council, or of the Governor or Lieutenant Governor in Council of the Presidency, Division, Province, or Territory to which such parts may become annexed."

The Governor General in Council is to fix the limits of the Presidency for the purposes of the Act, and to divide or alter, from time to time, the limits of any Presidency for the said purposes. Now the purposes of the Act appear, from the preamble and its enactments, to be the consolidating and amending the provisions of former Acts of Parliament respecting the constitution and functions of the Council of the Governor General of India ; and giving power to the Governors in Council of the Presidencies of Fort St. George and Bombay to make laws and regulations for the government of those Presidencies. The Act does not purport to provide for, or in any way to affect, the exercise of the general powers of Government in either of those Presidencies, or the administration of justice and the jurisdiction and authority of the Courts of Justice established in them. The annexation for these purposes, I think, is made by the Secretary of State for India in Council, by virtue of the authority derived from the previous Acts ; and is not qualified or controlled by the proviso in Sec. 47 of the Act 24 & 25 Vic., c. 67. "The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent : " Story, J., Kent's Commentaries, Vol. I., 523, note b. And I think this proviso cannot be construed as a substantive enactment, or as qualifying or restraining the power vested in the Secretary of State for India, whose order took effect as soon as the time had been fixed by the proclamation

of the Governor General, without which the annexation, so far as regarded the power of the Governor of Bombay in Council to make laws and regulations for the district, was not complete.

1864.  
REG.  
r.  
VYANKAT-  
SVA'MI.

But the laws and regulations mentioned in the proviso are those made by the Governor or Lieutenant Governor in Council of the Presidency, Division, or Province.

The right of appeal to the High Court of Madras before the district in question was detached from that Presidency was not derived from any such law or regulation; but from an Act of the Legislative Council of India in force in both Presidencies. And that Act gave an appeal to the High Court at Madras (being in the place of the Şadr Court), not by reason of the Şadr Court at Madras being expressly mentioned, or an appeal to it from the courts of the district in question being given in terms; but because the Şadr Court at Madras was then the Court of Appeal of the Presidency of which the district formed a part. It has ceased to be so, and this court is the Court of Appeal of the Presidency of which the district now forms a part; and I think, upon the same principle that the High Court at Madras must formerly have been held to be the Court of Appeal, we ought to hold this court now to be so.

Reg. II. of 1827, Sec. 16, Cl. 2, was referred to in the course of the argument. By this it is enacted that the number and respective limits of the zillás established under the Presidency of Bombay may at all times be altered by Government: provided that no territory shall be subject to the regulations except by regulations. I think this does not affect the case, as this is not an alteration of a zillá by a proclamation of the Government; and what has been before quoted as to the office of a proviso is applicable. Nor can the giving an appeal to this Court under the Criminal Procedure Code be, I think, held to be subjecting the district to the regulations.

As this is a question depending upon the construction of Acts of Parliament and the intention of the Legislature, and

1864.

REG.

v.

VTANKAT-  
SVA'MI'.

is not the case of a ceded or conquered country, but simply the transfer of a district from one subordinate government to another, I think but little assistance can be derived either from principles of law, or from authorities. But if it is to be treated as ceded territory, an authority in support of the jurisdiction of this court is to be found in Kent's Commentaries. In Vol. I., p. 482, 10th Edition, speaking of laws within the jurisdiction of a State purchased by Congress, with the consent of the State, for national purposes, and ceded to the United States, the learned author says: The Courts of the United States have sole and exclusive jurisdiction over an offence committed within a ceded place, notwithstanding the ordinary reservation of the right to execute civil and military process of the State. That was no reservation of any sovereignty or jurisdiction." And at page 483:—"It follows as a consequence from this doctrine of the Federal Courts that State Courts cannot take cognizance of any offences committed within such ceded districts; and, on the other hand, that the inhabitants of such places cannot exercise any civil or political privileges under the laws of the State, because they are not bound by those laws. This has been so decided in the State Courts."

In the view I have taken of this case, Act III. of 1863 becomes immaterial; and I will only say that at present it appears to me difficult to reconcile Secs. 6 and 7, and to give to Sec. 6 any retrospective effect.

For the reasons I have stated, I am of opinion that we ought to hear and determine the petitioner's appeal.

NEWTON, J. :—It seems to me to be sufficient, for determination of the question before us, to decide what is the interpretation to be put on the words "Şadr Court" in Sec. 408 of the Code of Criminal Procedure, with reference to the present case.

The Code came into operation in Madras, as in Bombay, on the 1st of January 1862. It was thus in force in the district of North Cánará at the date of the duly authorised and effectual transfer of that district by Her Majesty's Principal Secretary of State for India, and the Governor General in

Council, from the Presidency of Madras to that of Bombay (16th April 1862).

No question appears to arise with respect to the effect of Sec. 47 of the Indian Councils' Act, as the Code of Criminal Procedure is not a law or regulation of the character therein described.

The district of North Cánará (with the exception of the táluká of Candápúr) having, therefore, been severed from the Presidency of Madras, and annexed to the Presidency of Bombay, before the trial of the case under consideration, and having passed from the one Presidency to the other with the Code of Criminal Procedure in uninterrupted operation within its limits, the provision of law contained in that Code to the effect that "any person convicted on a trial held by a Court of Session may appeal to the Şadr Court" cannot, with respect to cases tried by a Session Court in the transferred district subsequently to the date of the transfer, be held to give an appeal to the High Court at Madras, but must, in my opinion, be interpreted as making the decision in such cases appealable to the High Court at Bombay.

I consider, therefore, that we should admit the appeal of the convict.

*Appeal admitted.*

—o:~o:~o:—  
REG. V. KARSAN GOJÁ'.

REG. V. BA'1 RUPA'.

April 22.

*Adultery—Nátrá—Dissolution of Marriage—Custom of Caste—Hindú Law—Ind. Pen. Code, Secs. 52, 79, 494, and 497.*

Held that a custom of the Talapda Kolí caste, that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage (nátrá) with another man during the lifetime of her first husband and without his consent, was invalid, as being entirely opposed to the spirit of the Hindú law; and that such marriage was "void by reason of its taking place during the life of such husband," and therefore punishable, as regards the woman, under Sec. 494 of the Indian Penal Code; and that the man with whom the woman so married, having had sexual intercourse with her, and it being found that he did not honestly believe that she had become his wife, was guilty of adultery, under Sec. 497.

THE prisoners, Karsan Gojá, aged about twenty-two, and Bá1 Rupá, aged about fifteen, Hindús of the Talapda Kolí caste, and inhabitants of the Urpár Parganá, in the

1864.  
REG.  
v.  
VYANKAT-  
SVA'MI'.