

1870. REG. v. BA'PUJI GANGA'BA'AM. no interference in any way with the orthodox worship of their deities.

From the reports sent up with reference to this case, it would appear that the custodians of this temple have steadily set their face against any such necessary rules and regulations. The duty of the police in such a case is doubtless a very difficult one to carry out, but so long as those duties are performed in a proper manner—and there is nothing to the contrary shown in this case—they have a right to look for the support of their superiors.

I consider no ground has been shown for interference with the conviction in this case. I would, therefore, reject this application.

LLOYD, J., concurred.

Petition rejected.

REG. v. EDWARD REAY.

May 21.

Bombay Legislative Council—Criminal Legislation in India—British-born Subject in the Mofussil—Police Act—Act VII. of 1867 (Bombay).

Although the old East India Company had power, under the Charters of Charles II., to make laws affecting British-born subjects, yet this power ceased in A.D. 1709, when its Charters were surrendered to Queen Anne. From that date down to the passing of the 3rd & 4th Wm. IV., c. 123 (with the exception of a limited power of legislating as regarded the local limits of the Presidency Town), no authority expressly granting power to the East India Company or the Indian Government to legislate for British-born subjects can be found.

Semle that neither the East India Company nor any Indian Government (with the like exception) possessed such power from the year 1709 till the passing of the 3rd & 4th Wm. IV., c. 123.

With the exception of offences made punishable, by the 53rd Geo. III., c. 155, s. 105, by Justices of the Peace, the Recorder's Court had, by virtue of the 37th Geo. III., c. 142, s. 10, *exclusive* criminal jurisdiction over British-born subjects throughout the Bombay Presidency; and the same *exclusive* jurisdiction was continued to the late Supreme Court, and is now exercised by the High Court, with the like exception, and some further exceptions introduced by subsequent Acts of the Government of India.

The Bombay District Police Act (No. VII. of 1867), passed by the Governor of Bombay in Council for making Laws and Regulations, is *ultra vires* in so far as it confers criminal jurisdiction upon Magistrates in the Mofussil, being also Justices of the Peace, over British-born subjects, as

it thereby affects the Acts of Parliament under which the High Court is constituted, and interferes with the criminal jurisdiction which that court possesses over British-born subjects in the Mofussil, which jurisdiction is exclusive except in so far as it is limited by Stat. 53 Geo. III., c. 155, s. 105, and certain subsequent Acts of the Government of India.

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LIEUTENANT REAY, a European-born British subject, was convicted by G. H. Johns, Magistrate F. P. at Ahmedábád, under Sec. 31 of the Bombay District Police Act, of driving in that city at night without sufficient lights, and was fined one rupee.

A. A. Borradaile, District Magistrate at Ahmedábád, entertaining doubts as to the legality of the conviction, referred the case for the orders of the High Court.

The case was argued on the 19th of January 1870, before GIBBS and SARGENT, JJ.

The Honorable *A. R. Scoble* (Acting Advocate General), with him *Green* and *Dhirajlál Mathurádás*) appeared to support the conviction.

No one appeared on the other side.

Cur. adv. vult.

On the 21st of May 1870 the following judgments, from which the facts of the case sufficiently appear, were delivered:—

GIBBS, J.:—In this case the Advocate General appears to support a conviction by the Full Power Magistrate of Ahmedábád, under the Bombay District Police Act (Bombay Act VII. of 1867), Sec. 31, of a European-born British subject for driving in the town without lamps—fined one rupee.

The District Magistrate had referred this case, under Sec. 434 of the Code of Criminal Procedure, for the orders of the High Court, on the ground that he had doubts whether British-born subjects could be convicted and punished under the Act above quoted.

The Bombay District Police Act was passed by the Legislative Council of Bombay. This Council was created under 24 & 25 Vict., c. 67; and by Sec. 42 it has power to make laws for “the peace and good government of the Presidency,”

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and for that purpose "to repeal and amend any laws and regulations made prior to the coming into operation of this Act by any authority in India, so far as they affect such Presidency: provided always that such Governor in Council shall not have the power of making any laws or regulations which shall in any way affect any Act of Parliament in force, or hereafter to be in force in such Presidency." By Sec. 43, unless the sanction of the Governor General be given, it cannot pass any Act affecting the Indian Penal Code.

As the real question in this case is the competency of the Bombay Legislative Council to pass an Act which affects British-born subjects, it becomes necessary to see whether there is any Act of Parliament under which exclusive jurisdiction over British-born subjects is given to the High Court, as, if there be, the Bombay Legislative Council could not alter that jurisdiction.

The Advocate General stated that he could find none, and that the sole mention of the subject is in the 53rd Geo. III., c. 155, s. 105, passed in 1813, but that this, being only a recital, has not the force of law; and the case of *The Queen v. The Inhabitants of Haughton (a)* was quoted as an authority for this. In that case Lord Campbell, in giving judgment, observed, "A mere recital in an Act of Parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital."

The Advocate General further argued that by Sec. 35 of the abovequoted Act, which has never been repealed, power was impliedly given to the Government to make rules for peace and good order, and that Bombay Act VII. of 1867 does nothing more than this.

It will, I think, be advisable to review the Charters, Regulations, and Acts of Parliament, in order to see what power was given to the East India Company or their Governments in India to make laws for British-born subjects; and also what courts were established, and with what jurisdictions.

And first as to the Charters relating to the East India Company.

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By the Charter of Charles II. in 1661 (the 3rd of April) power was granted to the East India Company to appoint a Governor and Councillors over each factory; and to the "said Governor and his Council" power was given to "judge all persons belonging to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute judgment accordingly."

By Charter of the same monarch dated the 27th of March 1668, by which the island of Bombay was granted to the East India Company, power was given "to make laws for the good government of the said island," and "also to impose, limit, and provide such pains, punishment, and penalties by fines, amerciaments, imprisonments of body, and, where the quality of the offence shall require, by taking away life or member, as to the said Governor and Companyshall seem necessary." The same Charter further confers on the Governor and Officers of the island powers to exercise judicial authority in the courts which the Governor and Company (*i.e.*, the East India Company) may establish, and "to correct, punish, govern, and rule all and every the subjects of Us, Our heirs and successors," according to the laws made by the Governor and Company.

Under the Charter granted by King William III., on the 5th of September 1698, to the English Company trading into the East Indies (*i.e.*, the New Company), no such powers appear to have been granted. All the Charters granted to the Old Company were, however, surrendered in 1709 to Queen Anne (*vide* Letters Patent of 7th May 1709), and we must, therefore, pass on to those that followed, and first to the Letters Patent of George I., dated 24th September 1726. By these the Mayor's Court was established in Bombay for the trial of civil matters, and the Governor in Council constituted the sole Court of Oyer and Terminer for the trial of all criminal offences except high treason, which could apparently be only tried in England. The second Charter of the

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Mayor's Court in 1753 by George II. left matters, so far as the criminal jurisdiction is concerned, in the same state. I may here remark that no change in the courts occurred until 1796, when the Stat. 37 Geo. III., c. 142, was passed, establishing the Recorder's Court at Bombay, the Letters Patent of which are dated the 20th of February 1798; under these the court was made the criminal court for the trial of all offences, treason not excepted. This was subsequently superseded in 1823 by the Supreme Court, which was created under the powers of the 4th Geo. IV., c. 71, under Letters Patent dated 8th December 1823. On this court were conferred all the powers of a Court of Oyer and Terminer; and it was finally superseded by the present High Court, created under 24 & 25 Vict., c. 104, by Letters Patent dated 26th June 1862 and 28th December 1865.

The Charter of George I. (1726) also provides for making by-laws and ordinances as follows:—

“And whereas it may be necessary that certain by-laws and ordinances should hereafter be made for the better government and regulation of the several corporations hereby erected, and it is reasonable that the power of making such by-laws and ordinances should be subject to the direction and control of the said United Company of Merchants of England trading to the East Indies, we do hereby,” &c. “give and grant to the said United Company,” &c. “that it shall and may be lawful to and for the Governors or Presidents and Councils of the several towns and factories of Madraspatnam, Bombay, and Fort William in Bengal, for the time being,” &c. “from time to time to make, constitute, and ordain by-laws, rules, and ordinances for the good government and regulation of the several corporations hereby erected, and of the inhabitants of the several towns, places, and factories aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of them.”

In the Charter of George II. the power to make by-laws and ordinances differs from that given by George I.

The paragraph runs thus :—

“ And whereas it may be necessary that certain by-laws and ordinances should hereafter be made for the better government and regulation of the several corporations and courts hereby erected, and it is reasonable that the power of making such by-laws and ordinances should be subject to the direction and control of the said United Company of Merchants of England trading to the East Indies, We do hereby” &c. “give and grant unto the said United Company, and their successors,” &c. “that it shall and may be lawful to and for the respective Governors or Presidents and Councils of the several towns and factories of Madraspatnam, Bombay, and Fort William in Bengal, for the time being respectively,” &c. “and also for the Court of Directors of the said United Company,” &c. “to make, constitute, and ordain by-laws, rules, and ordinances for the good government and regulation of the several corporations and courts hereby erected, and of the inhabitants of the several towns, places, and factories aforesaid” (*i.e.*, as to Bombay, “the town and factory of Bombay, and other the factories subordinate thereto”), “and to impose reasonable pains and penalties upon all persons offending against the same, or any of them.”

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Thus far the Charters.

The earliest Regulation relating to courts in the Bombay Presidency is Reg. V. of 1799, passed by the Governor in Council of Bombay, establishing a court in Salsette for the trial of criminal offences, and a similar one (Reg. I. of 1800) for Súrat, in both of which the courts so established are expressly declared not to have jurisdiction over British-born subjects, who are to be sent to Bombay for trial, where the Recorder's Court was then in existence; and similar provisions have been continued by subsequent enactments of the Bombay Government up to and including the Elphinstone Code in 1827.

I will now refer to the various Acts of Parliament bearing on these subjects.

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The first Act in which any reference to British-born subjects is found is the 13th of Geo. III., c. 63, s. 14 (1773), which conferred on the Supreme Court of Judicature at Calcutta, established under that Act, full power and authority "to hear and determine all complaints for any crimes, misdemeanours, or oppressions made against any of His Majesty's subjects, and such jurisdiction shall and may extend to all British subjects who shall reside in the kingdoms or provinces of Bengal, Behar, and Orissa under the protection of the said United Company."

By the 36th section of the same Act the Governor General in Council is authorised "to make and issue such rules, ordinances, and regulations for the good order and civil government of the said United Company's settlement at Fort William aforesaid, and other factories and places subordinate or to be subordinate thereto, as shall be deemed just and reasonable.....and impose, inflict, and levy reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances, and regulations." These rules, however, were not to be valid or of any force until duly registered and published in the Supreme Court with its consent and approbation.

Owing to very considerable differences which arose between the Judges of the Supreme Court and the Governor General, the above Act was modified by 21 Geo. III., c. 70, (1778), in which, after reciting the previous Act, and the fact that misunderstanding had arisen, it is enacted that the Governor General in Council in his public capacity is not subject to the Supreme Court, that parties impleaded in that court for acts done by order of the Governor General in Council may plead the general issue, and give such order in evidence, &c., "and be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said court."

Then follows an important proviso, viz., that with respect to orders of the Governor General in Council which do or shall extend to any British subject or subjects the said

Court shall have and retain as full and competent jurisdiction as if this Act had never been made.

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By the 23rd section of the Act the Governor General in Council may frame regulations for provincial courts. The section runs thus :—

“ And it is hereby enacted that the Governor General and Council shall have power and authority from time to time to frame regulations for the provincial Courts and Councils, and shall, within six months after the making the said regulations, transmit, or cause to be transmitted, copies of all the said regulations to the Court of Directors, and to one of His Majesty’s Principal Secretaries of State, which regulations His Majesty in Council may disallow or amend ; and the said regulations, if not disallowed within two years, shall be of force and authority to direct the said provincial Courts, according to the tenor of the said amendment, provided the same do not produce any new expense to the suitors in the said Court.”

The next Act to be referred to is the 26th Geo. III., c. 57 (1786), in the 29th section of which it is thus enacted :—

“ That as well the servants of the said United Company as all other of His Majesty’s subjects resident or to be resident in India shall be, and are hereby declared to be, amenable to the Courts of Oyer and Terminer and Gaol Delivery, and Courts of General or Quarter Sessions of the Peace, in any of the British settlements in India, for all murders, felonies, homicides,” &c..... “ whatsoever by them done, committed, or perpetrated.....in any of the countries or parts of Asia, Africa, or America beyond the Cape of Good Hope to the Straits of Magellan within the limits of the exclusive trade of the said United Company ;” and in the following section the jurisdiction of the Governor or President and Council of Fort St. George (Madras) in the Court of Oyer and Terminer and Gaol Delivery is extended over all British subjects whatsoever who reside in certain territories and dominions which were not included in the Charter of 1753, which comprised only “ the said town

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of Madraspatnam, and in and for Fort St. George, Fort St. David, Vizatnapatnam, the factories on the coast of Sumatra, and all other factories subordinate to Fort St. George aforesaid."

The next in order, viz., 37 Geo. III., c. 142, s. 10, which defines the jurisdiction of the Recorders' Courts, is of great moment in the decision of this case. It runs in the following words:—

"Provided nevertheless, and be it further enacted, that the said new Charter, which His Majesty is hereby empowered to grant, and the jurisdiction, powers, and authorities to be thereby established, shall extend to all British subjects who shall reside within any of the factories subject to, or dependent upon, the Governments of Madras and Bombay respectively; and the said Charter shall be competent and effectual, and the said courts therein and thereby established shall have full power and authority, according to their respective jurisdictions, to hear and determine all, and all manner of, complaints against any of His Majesty's subjects for any crimes, misdemeanours, and oppressions committed or to be committed."

By the 40th Geo. III., c. 79 (1800), the Madras Supreme Court was founded with similar jurisdiction over the Madras Presidency as the Supreme Court at Fort William had over the Presidency of Bengal. In this Act, by Sec. 11, power is given to the Governor in Council of Madras to frame regulations for the Provincial Courts and Councils within the Presidency of Madras, in the same manner as the Governor General in Council at Fort William has power under the 21st Geo. III., c. 70.

By the 47th Geo. III., c. 68 (1807), the Governments of Madras and Bombay were empowered to make rules and regulations for the good order and civil government of the towns of Madras and Bombay, and of the Company's settlements at Fort St. George and Bombay, and over factories and places subordinate thereto, and to impose, inflict, and levy reasonable fines, &c., for the non-observance of such

rules, ordinances, and regulations, in the same manner as the Governor General in Council at Fort William could, under the provisions of 13 Geo. III., c. 63, s. 36. But the said rules &c. were to be first registered in the Supreme Court at Madras and the Recorder's Court at Bombay respectively.

And by the 3rd section of this Act the Governor in Council of Bombay is authorised to make rules and regulations for the provincial Courts and Councils subject to that Presidency, in like manner as the Governor General in Council at Fort William, under 21 Geo. III., c. 70, does for that of Bengal.

The next Act to be referred to is the 53rd Geo. III., c. 155, s. 105, on the recital of which the Advocate General's argument has already been stated; it runs thus :—

“ And whereas His Majesty's British subjects resident in the British territories in India without the towns of Calcutta, Madras, and the town and island of Bombay, are now by law subject only to the jurisdiction of His Majesty's courts at Calcutta, Madras, and Bombay respectively, and are exempted from the jurisdiction of the courts established by the said United Company within the said territories, to which all other persons, whether natives or others, inhabitants in the said territories without the limits of the towns aforesaid, are amenable; and whereas it is expedient to provide more effectual redress for the native inhabitants of the said territories, as well in the case of assault, forcible entry, or other injury accompanied with force, which may be committed by British subjects at a distance from the places where His Majesty's courts are established, as in case of Civil controversies with such British subjects: be it, therefore, enacted that it shall and may be lawful for any native of India resident in the East Indies, or parts aforesaid, and without the said towns, in case of any assault, forcible entry, or other injury accompanied with force, alleged to have been done against his person or property by a British subject, to complain of such assault, forcible entry, or other injury accompanied with force, not being felony, to the Magistrate

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of the Zilla or District where the alleged offender shall be resident, or in which such offence shall have been committed ; and that such Magistrate shall have power and authority, at the instance of the person so complaining, to take cognisance of such complaint, to hear parties, to examine witnesses, and, having taken in writing the substance of the complaint defence, and evidence, to acquit or convict the person accused ; and, in case of conviction, to inflict upon such person a suitable punishment by fine not exceeding five hundred rupees, to be levied, in case of non-payment, by warrant under the hand of the said Magistrate, and upon any property of the party so convicted which may be found within the said district."

I have now noted the only charters, enactments by Parliament, or regulations which need be alluded to in arriving at a decision on the point before the court. (I have also set out the extracts at length, as many of the Charters are now difficult to procure. The Advocate General stated he was unable to obtain a copy of the Mayor's Court Charter : the copy from which I have quoted is, I believe, the only one in Bombay, and I am not aware of other copies of the Charters of Charles II. but those from which I have made these extracts.)

From a careful consideration of these, it seems to me that although the East India Company had power to make laws regarding British-born subjects under the Charters of Charles II., yet that this power ceased, at all events after the surrender of the Charters to Queen Anne, and that from that date up to the passing of the 3rd and 4th Wm. IV., c. 123, under which legislative powers "over all persons and all courts, whether established by royal charter or otherwise," were conferred exclusively on the Governor General in Council, no authority expressly granting powers to the East India Company or the Indian Government to legislate for British-born subjects can be found. It is also a fact, so far as I have been able to ascertain, that no local law or regulation was ever passed affecting British-born subjects (at all events beyond the island of Bombay or the Presidency Towns of Calcutta and Madras respectively) by any Indian Govern-

ment until 1834, when the powers of the local Governments to legislate ceased, and the Governor General's Council became the sole legislative power in India.

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The powers to make "rules, ordinances, and regulations" for the good order of the settlements or Presidency Towns of Fort William, Madras, and Bombay were, as above shown, conferred on the Government of the first in 1773, and on those of the other two in 1807; and the power to make regulations for provincial Courts and Councils was granted to the Governor General in Council in 1781, to the Governor in Council of Madras in 1800, and to that of Bombay in 1807; and the former of these powers were dependent on the consent by registration of the Supreme or other King's Courts.

As has been above shown, the Charters of George I. and II. conferred some powers of legislation on the three governments; and when the Act was passed which repealed such portion of the Charters as applied to the courts constituted by them there was a silence as to any express repeal of the powers to make laws. Of course, the "corporations and courts" created by the Charters being abolished, the power to make laws and regulations for them ceased; but it is a question whether the portion of the Charters which gave Government power to make such "for the good government of the inhabitants of the several towns, places, and factories aforesaid," was repealed until 3 & 4 Wm. IV., c. 123.

I have been especially led to consider this subject as I could find no authority for the Regulation of 1799 save this unrepealed portion of the Charter of George II. The power to make regulations for provincial courts and councils was granted to the Governor General in 1781, as above noted; and the earliest Bengal Regulation I can find regulating the jurisdiction of courts is in 1793, when a formal system for codifying "all Regulations that may be enacted," was settled by Reg. XLI. of 1793 (although revenue regulations of 1783 are quoted in Reg. I. of 1795). The powers to Madras were granted in 1800, and the first Madras Regulation on the subject that I can find was passed in 1802; while,

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although similar powers were not granted to the Bombay Government by the Imperial Legislature until 1807, yet we find Regulations were passed by it in 1799 to 1806 inclusive, the first of which is little more than a copy of the Bengal Reg. XVI. of 1793.

I have, however, by dint of searching among the old Regulations long since repealed, discovered what the state of things really was, and it confirms the view I was inclined to take, that unless the Charter of George II. gave power none existed. The preamble of Reg. II. of 1808, the first apparently passed after the receipt of the Act 47 of Geo. III., c. 68 (1807), giving power to pass Regulations for local courts, shows that the Regulations previous to that date had been passed on a right "inferred from and briefly recognised by the eleventh section of the Act of Geo. III., c. 142, passed on the 20th of July 1797" (*i.e.*, 37 Geo. III.), "but is, for the purpose of removing all doubts, more formally conferred by the 2nd section of the 47th of Geo. III., c. 68," which is then set out.

The portion of the section in 37 Geo. III. alluded to is as follows:—After setting out the jurisdiction of the Recorder's Court then founded, and stating that it shall entertain no suit against the Governor and Council for acts done in its public capacity, it goes on, "nor shall the said court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council, either within or beyond the limits of the said towns, forts, or factories, or concerning any act done according to the usage and practice of the country, and the regulations of the Governor and Council," which is certainly a very faint recognition of legislative powers, and, if so at all, must, I think, as the section must be taken as a whole, be confined solely to revenue matters.

I think, therefore, that the total absence of any express power to legislate for British-born subjects from and after Queen Anne's reign, with the exception of the limited power as regarded the local limits of the Presidency towns, and which was in a way regulated by the King's Courts, which

could refuse to register the Regulations, is in itself a very strong ground for holding that the Government of Bombay had no such power. It is true that there is no express law forbidding it; but, as the power which was once clearly given was as clearly repealed and never re-granted, I do not see how it can be argued that the power remained.

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As regards the jurisdiction of the courts, it will not be necessary for me to go beyond the first Charter granted after the surrender of the old ones to Queen Anne, viz., the Charter of George I. establishing the Mayor's Court at Bombay, which granted to the Governor in Council exclusively the powers of Oyer and Terminer over all persons, including British-born subjects, save in cases of high treason. Similar powers were confirmed to that authority by the Charter of 1753; but by the Stat. 37 of Geo. III., c. 142, s. 18, passed in 1797, these powers were expressly revoked in the following words:—

“ And be it further enacted that so much of the Charter granted by his late Majesty as confers any.....criminaljurisdiction upon.....the President and Council as a Court of.....Oyer and Terminer and Gaol Deliveryin case a new Charter shall be granted by His Majestyfrom and immediately after such publication at Bombay.....shall cease and determine, and be absolutely void to all intents and purposes.” And the jurisdiction previously granted to the Governor in Council was, by Sec. 10 of the same Act above quoted, conferred on the Recorder's Court established by Letters Patent in February 1798, *i.e.*, criminal jurisdiction “over all British subjects who shall reside within any of the factories subject to or dependent on the Government of Bombay, and to hear and determine all manner of complaints against any of His Majesty's subjects.”

Now it has been argued that this only gave a concurrent jurisdiction, and not an exclusive one, over British-born subjects; but if at this time, as I find to be the case, the Government had been deprived of their own power to try

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British-born subjects for criminal offences, and had no power to pass laws relating to them, I am at a loss to see what jurisdiction could exist with which the jurisdiction of the Recorder's Court can be said to have been concurrent.

At that time, 1798, the possessions of the East India Company in the Bombay Presidency consisted, so far as I can discover, of the island of Bombay, ceded in 1668, together with the islands of Salsette and Karanjá, which were acquired by conquest in 1774, and also the small fort of Victoria and the nine dependent villages in the Southern Konkan, of which we obtained possession in 1756, together with the English factory at Surat; and the first Regulation passed by the Governor in Council of Bombay establishing a court beyond the limits of the island was, as above noted, Reg. V. of 1799, establishing a criminal court for Salsette and Karanjá, from which jurisdiction over British-born subjects is expressly excluded.

It has been argued that this exclusion was at the pleasure of the Bombay Government, who might equally have granted to the court that jurisdiction which they withheld; but I think it must rather be held that at that time they had no power to legislate for British-born subjects, if to legislate at all; and as the Recorder's Court had, by authority of Parliament, been given jurisdiction over all British-born subjects, the exemption of such from their newly-established court by the Bombay Government was not optional, but obligatory.

That it was generally understood that British-born subjects could only be tried by the King's Courts no one, I apprehend, will deny; and all the subsequent enactments by the Bombay Government until 1834 bear out this view.

If I am correct in the opinion I have deduced from the facts before me, I can only arrive at the conclusion that the statement made in the 53rd Geo. III., c. 155, s. 105, is completely borne out, and that at that period (1813) His Majesty's British subjects were by law, viz., the 37th of Geo. III., c. 142, s. 10, only subject to the jurisdiction of His Majesty's courts at that place, and that in consequence,

as no repeal of that law has been made, the Bombay District Police Act, in giving magistrates jurisdiction over British-born subjects, for offences, which they had not previously, affects an Act of Parliament, viz., 37 Geo. III., c. 142, s. 10.

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Further, as no alteration has ever been made in the jurisdiction of the courts established by royal charters since the establishment of the Recorder's Court, excepting in so far as the 53rd of Geo. III., c. 155, s. 105, above quoted, enables magistrates in the Mofussil to deal with some minor cases, and a further power conferred by the Criminal Code of Procedure, which does not include a charge like the present, it follows that a like jurisdiction is still exercised by the High Court at this Presidency, and under the same authority, viz., that of Parliament.

Such being the case, it seems to me that the Bombay Legislative Council cannot remove from the jurisdiction of the High Court the trial of any offence over which the jurisdiction of the High Court extends; if, therefore, the offence created by the Bombay District Police Act be an offence over which the High Court has jurisdiction, the Act, so far as it relates thereto, is on this ground also "*ultra vires*," and the conviction and sentence must be set aside.

But this raises another question, viz., whether the offence is one which must be tried by a Court of Oyer and Terminer, or whether it be of such a nature as would be generally cognisable by a Justice of the Peace.

The offence of which Lieutenant Reay has been convicted was an offence against a local law, viz., the Bombay District Police Act, which extends to the Mofussil only, and consisted of driving a vehicle on a dark night without sufficient lights (Sec. xxxi., cl. 3), punishable by fine not exceeding fifty rupees; and, under Sec. 40, in the event of an offender being, as in the present case, a European British-born subject, it is enacted that the Magistrate shall, as a "Justice of the Peace, proceed for the recovery of the penalty as laid down in Stat. 53 Geo. III., c. 155, s. 105, in cases of assault." The Magistrate in this case was a Justice of the Peace.

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Now, under this lastmentioned enactment (above set out) the Magistrate has power to deal with cases of assault, forcible entry, or other injury accompanied with force not being a felony, alleged to have been committed by a British subject against a native (subsequently, by Act VII. of 1853, extended to any person, native or other); and certainly by comparison the offence against the police law of driving at night without a light is a much less heinous offence than those over which the Magistrate, being a Justice of the Peace, has jurisdiction; and it must also be admitted that, following English precedents, it would be absurd to commit a person charged with such a petty offence to the High Court for trial.

It might also perhaps be suggested that the offence charged against Lieutenant Reay could not be tried in the High Court; but it is singular that no other forum existed, until the 53rd Geo. III., c. 155, before which a British-born subject could be tried for any offence.

In England an offence created which is confined to Magistrates to punish cannot be brought before a grand jury for presentment to a Court of Oyer and Terminer (see Russell on Crimes, Vol. I., p. 88); but here it would appear that certainly until 1720, when Governors and other high officials were created Justices of the Peace, there was only *one* court for the trial of British-born subjects for *all* offences: and as the powers to be exercised by Justices of the Peace were clearly laid down, and were confined apparently to making rules for scavenging the Presidency town and raising rates for that purpose, I doubt if the distinction between indictable and other offences was ever thought of.

The power of a Justice of the Peace in India has never been placed on a clear footing, and many able officers have been of opinion that there is nothing to prevent a Justice of the Peace in the Mofussil from sitting in petty sessions, or from disposing of the same class of petty offences that they would in England.

Under the Code of Criminal Procedure, as above observed, Secs. 163 and 165, the jurisdiction of Justices of the Peace in

the Mofussil has been considerably extended, and includes all offences contained in Chap. X. of the Indian Penal Code, one of which (Sec. 188) is "disobedience to an order lawfully promulgated by a public servant," "if such disobedience causes danger to human life, health, or safety." Had, therefore, the prohibition to drive without lights on a dark night been issued by the Magistrate under Sec. 62 of the Code of Criminal Procedure, the conviction in this case might have been good; but because the order disobeyed was enacted by the Bombay Legislative Council, which in so doing affected the provisions of an Act of Parliament, it cannot be brought within Sec. 165 of the Code of Criminal Procedure, and is bad.

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The dilemma thus raised seems absurd, and the question involved is one of no small difficulty. I regret it should come up in an *ex-parte* case, in which the court could hear an argument on one side only.

Justices of the Peace in India were at first Governors and certain high officials; and it was not until the Act of 33rd Geo. III., c. 52, that power was given to the Governor General to appoint other persons to be Justices. A. D. 1720 is the earliest date on which Governors were made Justices, and it may be that the powers which were inherent in Justices of the Peace at that date may be exercised by them now.

But there is no doubt that as to any further powers they are such only as have been conferred by Act of Parliament or other competent authority (as the Governor General's Council since 1834); and I am not aware of power to Justices in the Mofussil of Bombay, to punish such an offence as Lieutenant Reay is charged with, having been conferred save by the Bombay District Police Act, now under our consideration. The question, therefore, as to whether a Justice of the Peace *quâ* Justice of the Peace could deal with this offence really turns on the same question as is above discussed, viz., the powers of the Bombay Council to pass the Act in question; and, as I have above stated my opinion on that point to be adverse to the Act, this subsequent question,

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which I have deemed it right to notice, is disposed of in a similar manner.

Under all the circumstances, then, I am of opinion that the conviction and sentence on Lieutenant Reay must be annulled, as having been passed without jurisdiction, and the fine must be repaid to him.

SARGENT, J. :—The question in this case which the Court has to decide, although doubtless an important one, lies, in my opinion, in a very small compass.

The Act under which the accused was convicted was passed by the Legislative Council of Bombay, which owes its existence to the 24th & 25th Vict., c. 67. By Sec. 42 of that Act the Governor in Council has power to make laws for the peace and good government of the Presidency, and for that purpose to repeal and amend any Laws and Regulations made prior to the coming into operation of this Act, by any authority in India, so far as they affect such Presidency: provided always that such Governor in Council shall not have the power of making any laws or regulations which shall in any way affect any Act of Parliament in force, or hereafter to be in force, in such Presidency.

By Act 37 of George III., c. 142, the powers of Oyer and Terminer over all persons, including British-born subjects, which by the Charter of George II. had been given to the Governor in Council, were revoked, and the same were conferred on the Recorder's Court, which His Majesty was thereby authorised to establish at Bombay; and authority was given to the said court to hear and determine all, and all manner of, complaints against any of His Majesty's subjects for any crimes, misdemeanours, and oppressions committed in territories subject to, or dependent on, the Government of Bombay, or which might thereafter be subject to, or dependent on, the said Government. Letters Patent were issued in February 1798 establishing the Recorder's Court.

The criminal jurisdiction over British-born subjects (at least so far as the Mofussil is concerned) would appear to have remained unaltered till 1813, when, by Act 53rd Geo. III., c. 155, Magistrates in the provinces were authorised to

act as Justices of the Peace, and to have jurisdiction in cases of assault, forcible entry, or other injury accompanied by force, not being felony, committed by British subjects residing without the limits of Bombay.

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By Act 4 of George IV., c. 71, the Recorder's Court was abolished, and it was directed that all the powers and authorities granted by Act 37 of George III., c. 142, to the Recorder's Court should be exercised by the Supreme Court thereby authorised to be erected, and which was duly established by Letters Patent on the 8th of December 1823. Lastly, by Act 24 & 25 Vict., c. 104, the erection of a High Court of Judicature was authorised to be established at Bombay by Letters Patent; and, save as by such Letters Patent might be otherwise directed, it was declared that the said court should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in the Supreme Court, which it was thereby enacted should be thenceforth abolished.

Letters Patent were issued on the 26th of June 1862, creating the High Court, and conferring on it the same original criminal jurisdiction as had been exercised by the Supreme Court. These Letters Patent were revoked by fresh Letters Patent dated 28th December 1865, leaving, however, the original criminal jurisdiction unaltered. It thus appears that in 1867, when the Police Act in question was passed, the High Court had jurisdiction over all offences committed by British-born subjects in the Mofussil except so far as was especially provided for by Act 53 Geo. III., c. 155.

It is further clear, from all the Regulations providing for the criminal jurisdiction and procedure of the courts in the Mofussil, that British-born subjects were especially exempted from their jurisdiction. This appears from the earliest Bombay Regulation, viz., Reg. V. of 1799, and from all the succeeding Regulations on the subject, concluding with Reg. XIII. of 1827, which determined the criminal jurisdiction of those courts up to the time when the present Criminal Procedure Act of 1861 was passed; and by Sec. 24 of that Act all persons are exempted from their jurisdiction who

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were so exempted by any Act of Parliament, or Regulation of the Codes of Bengal, Madras, and Bombay respectively.

Again, although the Governors and Councils at Calcutta, Madras, and Bombay were, subsequently to the establishment of the Supreme Court and Recorder's Court at those places, respectively authorised by Acts 33 Geo. III., c. 52, and 47 Geo. III., c. 68, to appoint Justices of the Peace in the provinces and places subordinate thereto, from the covenanted servants of the East India Company or other British subjects, there is no Act of Parliament except Act 53 Geo. III., c. 155, or Bombay Regulation, or Regulation of the Governor General in Council, authorising Justices of the Peace to hear and determine any offences committed by British-born subjects in the Mofussil.

It thus appears that at the time of the passing of the Police Act in question the High Court had exclusive jurisdiction over all offences committed by British-born subjects in the Mofussil except as provided by Act 53 Geo. III., c. 155.

Now, by Sec. 30 of the Police Act in question, it is enacted that whoever offends by the commission of certain acts therein enumerated (amongst which is included that with which the accused was charged in the present case, viz., of driving a vehicle on a dark night without a sufficient light so as to cause obstruction, annoyance, risk, danger, or damage to residents or passengers, shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or in default to imprisonment not exceeding eight days; and by Sec. 40 it is enacted that in case the offender shall be a European British subject the Magistrate shall, if a Justice of the Peace, proceed for the recovery of the penalty as directed by 53 Geo. III., c. 155, s. 105, and, if not a Justice of the Peace, shall record the facts, and transmit such record to any Magistrate of the district being a Justice of the Peace.

Complete jurisdiction is thus given to a Magistrate being a Justice of the Peace over a number of offences committed by European British-born subjects in the Mofussil, concurrently with the High Court, which, as has been already shown, has jurisdiction over all offences committed by the above persons.

The question, therefore, to be determined is, whether in thus creating a concurrent jurisdiction the Bombay Legislative Council have passed an Act in any way affecting the provisions of the Act of the 24th and 25th Vict., c. 104, or of the several Acts of the 4th Geo. IV., c. 71, and 37th Geo. III., c. 142, which by successive reference to the powers of the Supreme and Recorder's Court are virtually incorporated in it, so far as the original criminal jurisdiction of the court is concerned.

It was argued by the Acting Advocate General that no words are to be found in any of the above Acts which confer an exclusive criminal jurisdiction over British-born subjects, and that, therefore, the creation of a concurrent jurisdiction does not affect the provisions of the Acts in question.

Now that the provisions of the Bombay Act do not expressly or by necessary implication repeal or alter the provisions of the Imperial Acts may be readily conceded, but the expression "in any way affect" is one of much larger import than either "repeal" or "alter," and is clearly, I think, used by the Legislature to prevent the creation of a new state of things with respect to the subject-matter common to the Imperial and Bombay Acts, which, although not directly inconsistent with, would yet practically modify, the state of things which had previously existed under the provisions of the Imperial Act. In such a case the provisions of that Act would certainly be "affected" according to the ordinary and commonly received meaning of that term; and it is in that sense, therefore, in the absence of any qualifying words, that the expression must be deemed to have been used by the Legislature.

Now I do not stay to inquire whether, under the several Imperial Acts conferring on the local Governments the power of making laws and regulations, or any of them, British-born subjects could, as was contended by Mr. Scoble, have been made amenable to the criminal jurisdiction of the Company's courts in the Mofussil. Mr. Justice Gibbs has discussed that question at great length, and I would not for a moment be understood as intending to dissent from his conclusion. It

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is, however, immaterial, in my opinion, what might, or might not, have been done under those powers. They no longer exist, and it is sufficient for the decision of the question before the court to say that, as a matter of fact, the High Court had, at the time the Bombay Act was passed, exclusive jurisdiction over all offences committed by British-born subjects in the Mofussil except so far as was provided for by the Imperial Act 53 Geo. III., c. 155.

That being so, the creation of a concurrent jurisdiction practically modified the jurisdiction of the High Court and the *status* of British-born subjects. It is not too much to say that practically the jurisdiction of the court over the offences in question would become a dead letter, and the British-born subject would be deprived of the privilege he had hitherto enjoyed (subject to the provisions of the Imperial Act 53 Geo. III.), of being amenable only to the High Court, and of having the charge against him decided by a jury of his countrymen; and I can, therefore, entertain no doubt that the provisions of the imperial Acts determining the criminal jurisdiction of the High Court are "affected" by the Bombay Act in question.

With respect to the power given by the Charter of George II. to the Governor in Council to make by-laws, rules, and ordinances for the good government and regulation of the several corporations and courts thereby created, and of the inhabitants of the several towns, places, and factories of Madraspatnam, Bombay, or Fort William, for the time being belonging and subordinate thereto, and to impose reasonable pains and penalties upon all persons offending against the same, it may well be doubted whether this power is not taken away by Act 3 & 4 Wm. IV., c. 85; but in any case it would appear to be confined to Europeans engaged in and about the factories, and to be quite inapplicable to the present state of things. I am, therefore, of opinion that the conviction must be annulled, and the fine levied be restored to the accused.

Conviction and Sentence annulled.