1867, as amended by Act XXIX. of 1867; and Sec. 26 of Act IX. of 1869 was an exact copy of Sec. 17 of Act XXI. of 1867, under which the High Court ruled that the trying Magistrate had, under the Act, no power to award imprisonment in default of payment of a fine."

The reference was heard by Gibbs and Melvill, JJ.

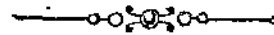
Per Curiam:—The Indian Income Tax having been passed subsequently to the General Clauses Act (No. I. of 1868), Sec. 5 of the latter Act disposes of the Magistrate's objection.

The record and proceedings in the case to be returned.

Papers returned.

Sec. 5 of the General Clauses Act runs as follows:—

"The provisions of Sections sixty-three to seventy, both inclusive, of the Indian Penal Code, and of Section sixty-one of the Code of Criminal Procedure, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary."



Reg. v. Reay.

Dec. 16.

Privy Council—Appeals in Criminal Trials—Referred Case—Criminal Proc. Code, Sec. 404—*Amended Letters Patent of* 1865, *Cl.* 41.

The High Court has no power, under Cl. 41 of the Amended Letters Patent of 1865, to grant leave to appeal to Her Majesty in Council from an order made or decision given in a criminal case referred by a Magistrate, under Sec. 404 of the Code of Criminal Procedure.

THE order of the High Court, made on the 21st of May 1870, annulling the conviction and sentence of Mr. Reay, and the proceedings in the case generally, will be found reported in the 7th volume of the Bombay High Court Reports, at p. 6 of the Crown Cases.

That order was made upon the proceedings in the case having been referred by the District Magistrate of Ahmedábád for the orders of the High Court, under Sec. 404 of the Code of Criminal Procedure.

A petition for leave to appeal from that order to Her Majesty in Council was presented by *Dhirajlál Mathurádás* (Government Prosecutor).

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The petition came on for hearing before WESTROPP, C. J., GIBBS and MELVILL, JJ., on the 9th of December 1870.

The Honorable A. R. Scoble (Acting Advocate General), in support of the petition:—Appeals to the Privy Council in criminal cases are regulated by Cl. 41 of the Amended Letters Patent of 1865. By that clause appeals are allowed "from any judgment, order, or sentence of the High Court in the exercise of original criminal jurisdiction, or in any criminal case where a point or points of law have been reserved for the opinion of the High Court, in manner hereinbefore provided, by any court which has exercised original jurisdiction, provided that the High Court shall declare that the case is a fit one for such appeal." The decision in *Reg.* v. *Reay* does not fall under the first part, but it is contended that it comes within the meaning of the latter portion of the clause, as being a decision on a point of law reserved for the opinion of the High Court. It is true the section is limited to those cases where a point or points of law have been reserved *in manner hereinbefore provided* by any court which has exercised original jurisdiction, and it may be said that the words "*in manner* hereinbefore provided" refer to Cl. 25, which, after declaring that "there shall be no appeal to the said High Court of Bombay from any sentence or order passed or made in any criminal trial before the court of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court," proceeds to say that "it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court." The reference in *Reg.* v. *Reay* was made under Sec. 28 of the Charter, and the question, therefore, is whether the decision of the High Court upon a point of law referred to it by a Magistrate cannot be included under the comprehensive words of the latter portion of Sec. 41. The reference in *Reg.* v. *Reay* was on a point of law referred (if not reserved) for the opinion of the High Court by a court which had exercised criminal jurisdiction; for the Magistrate of Ahmedábád, in referring this point for the opinion of the High Court in a case tried before the Full

Power Magistrate then exercised criminal jurisdiction. The large words used in Sec. 41, "by *any court* which has exercised original criminal jurisdiction," liberally construed, warrant a construction by which appeals under Sec. 41 will lie in cases decided by the High Court under Sec. 28, as well as under Sec. 25. Even if the case does not fall within Sec. 41, I contend that unless the Charter in express terms takes away the right of appeal, that right does not cease to exist merely because in certain cases that Charter makes provision for appeals. This has been expressly affirmed to be so in the case of *The Falkland Islands Company* v. *The Queen* (*a*). The case of *Reg.* v. *A'lu Párú* (*b*), as well as the case of *The Queen* v. *Eduljee Byramjee* (*c*), may be distinguished from the present, as it was there decided that where leave to appeal had been applied for, and this Court *had refused* its permission, the Privy Council could not admit the appeal. Under the old Charter of the Supreme Court, this Court had absolute discretion in the matter, and the order of rejection was held in those cases to be final. In the case of *The Queen* v. *Joykissen Mookerjee* (*d*) the Privy Council implicitly assert the existence of a prerogative right of appeal in matters of criminal jurisdiction: "They think it will suffice for the purpose of this case to assume that it does exist" (p. 191). The fact, no doubt, is, as remarked in the judgment of Dr. Lushington, that "in no instance whatever * * * has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case." Though in *Reg.* v. *Joykissen Mookerjee* the Privy Council declined, from a fear of the consequences, to advise Her Majesty to grant an appeal, in a purely criminal case, there is a class of quasi-criminal cases in which, by reason of the important issues involved, they have declared that they would admit an appeal: *The Attorney General of N. S. Wales* v. *Bertrand* (*e*). The present case is of this kind, as the decision of this Court will have the effect of invalidating many Acts affecting Europeans in all the Presidencies. The point here

(*a*) 1 Moo. P. C. C., N. S., 299. (*b*) 3 Moo. Ind. App. 488.
(*c*) *Ibid.* 468. (*d*) 9 *Ibid.* 168. (*e*) Law Rep. 1 P. C. Cs. 520.

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is one exclusively of law, and though, under Sec. 407 of Act XXV. of 1861, no appeal lies from a judgment of acquittal, the Privy Council has admitted appeals even in cases of acquittal where a determination of law led to the acquittal, as in this case: *The Queen* v. *Murphy* (*f*).

Cur. adv. vult.

Dec. 16. The judgment of the Court was pronounced this day by

WESTROPP, C.J. :—In the case of *Reg* v. *Reay* (reported in 7 Bom. H. C. Rep., Cr. Ca. 6) the Advocate General, on Wednesday last, applied, on behalf of the Bombay Government, to my brothers Gibbs and Melvill and myself, for leave, under the 41st section of the Charter of this Court dated the 28th of December 1865, to appeal to Her Majesty in Council against the decision of Mr. Justice Gibbs and Sir Charles Sargent (now absent in Europe) pronounced on the 21st of May in the present year. That decision was not made in the exercise of original criminal jurisdiction, nor as we think, in any criminal case where any point or points of law have, within the meaning of that section, been reserved for the opinion of the High Court in manner thereinbefore (*i. e.,* in that Charter) provided. The previous provisions to which the 41st section seems to us to refer, are those contained in the 25th and 26th sections, which relate to the reservation of points of law for argument before the High Court as a court of original criminal jurisdiction, and not to the provisions contained in the 27th and 28th sections, in which the High Court is regarded as a court of appeal, reference, and revision. We, therefore, are of opinion that we have no authority under the Charter to give permission to the Crown to appeal to Her Majesty in Council against a decision made, as that of Mr. Justice Gibbs and Sir C. Sargent, upon a case decided originally by a Full Power Magistrate, and referred to the High Court by the District Magistrate. Had we the power, we should not hesitate to exercise it (upon the condition of the Crown providing eminent counsel to argue the case before the Judicial Com-

(*f*) Law Rep. 2 P. C. Ca. 535.

mittee of the Privy Council, as well on behalf of the defence as on behalf of the prosecution, for it could not be expected that Lieutenant Reay should do so, the fine having been only one rupee), the question as to the scope of the powers of the Bombay Legislature involved in this case being of considerable importance, and one which it is desirable should be brought before the tribunal of final resort. In saying thus much, my brother Gibbs is not to be understood as in anywise departing from the judgment which he has given, and my brother Melvill and myself are not to be taken as expressing any opinion as to whether or not the question on which the appeal is sought, has been rightly decided. In fact we have not formed any opinion upon that point.

We say nothing as to the probable result of an application made directly to Her Majesty in Council for leave to appeal. It is sufficient for us to state our opinion that we do not think that in a case so circumstanced as this, howsoever willing we may be to grant such permission, we have any power to do so. The motion of the learned Advocate General must, therefore, stand refused.

Petition rejected.

June 23.

REG. v. BA'PU PARBAT.

Practice—Charge.

Proper course laid down for a Judge to adopt when the facts proved do not support the charge as laid.

BA'PU PARBAT was committed by the Magistrate of Khedá, on a charge of adultery, alleged to have been committed on or about the 10th of December 1869, for trial before the Court of Session at Ahmedábád.

E. T. Candy, the Acting Assistant Judge who tried the prisoner, found that the overt act of adultery as alleged in the charge could not be proved to have been committed on the 10th of December 1869, but, being of opinion that there was reason to believe that *after* the 10th of December 1869 the accused lived with the wife of the complainant in adultery, the Assistant Judge, though he formally acquitted the accused,