[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 12 *of* 1870.

1873.
March 24.

DA'MODAR GORDHAN .....*Appellant.*

GANESH DEVRA'M ET AL .....*Respondents.*

Jurisdiction—Cession of Territory——Power of Indian Governments to cede territory—Notification of Cession by Government of India—Indian Evidence Act (*I. of* 1872) *Sec.* 113.

The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under Act 21 & 22 Vic., c. 106, when the Government of India was, by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company.

The Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament, and those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

Section 113 of the Evidence Act (I. of 1872) therefore, though not disallowed, is not protected by Sec. 24 of Stat. 24 & 25 Vic., c. 67, and the direction therein contained, that a notification in the *Gazette of India*, that any portion of British territory has been ceded to any native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed.

THIS was a special appeal heard in review from the decision of C. B. Izon, Acting Judge of the District of Ahmedabad, confirming, on remand from the High Court, the decree of the Munsif of Gogo.

The facts of the case, in so far as they are material, sufficiently appear from the judgment of the Court.

The special appeal was heard by LLOYD and KEMBALL, JJ.

Marriott (with him *Dhirajlál Mathurádás,* Government Pleader) for the special appellant.

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Anstey (with him *Nánábhai Haridás*) for the special respondents.

Cur. adv. vult.

KEMBALL, J. :—Before proceeding to discuss the important points raised, it will be well to sketch briefly the history of this case.

The action (Original Suit No. 380 of 1864) was brought in the Court of the Munsif of Gogo to redeem a field (situated in the village of Ghangli) which had been mortgaged in A.D. 1812 to one Gordhan. The defendant denied the mortgage and set up a sale; but the court decreed for the plaintiff. In appeal, however, the Assistant Judge of Ahmedabad reversed that decree, when a special appeal was preferred to the High Court, which remanded the case for retrial, because that the Lower Court had improperly excluded from its consideration an important document.

The regular appeal was then reheard by the District Judge himself who found the mortgage proved, and affirmed the Munsif's decree.

A second special appeal was thereupon preferred to the High Court, mainly on the ground that "the Judge had no jurisdiction to try the appeal, as the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided." This objection was based on a notification, dated the 29th January 1866, published in the *Bombay Government Gazette*, p. 197, and signed by the Chief Secretary to the Bombay Government, which signified that in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhownugger, certain villages (including Ghangli) "are removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency from and after the 1st of February 1866." No further information was offered, though time was given for

the purpose; and the Division Bench, which heard the appeal, * rejected it on the ground that there was nothing to show that the jurisdiction of the High Court and of courts subordinate to it, which once existed, had legally ceased to exist.

Subsequently, the appellant made a petition of review, and on its being shown that the transfer of the village of Ghangli from British to foreign territory was made by the order of the Government of India with the sanction of the Secretary of State, this Court considered that a good ground had been made out for the re-hearing of the special appeal, and accordingly granted the review.

The question of jurisdiction has now been formally argued before us.

The appellant's arguments, put shortly, amount to this, that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for India succeeded under the provisions of Sec. III., Chap 106 of 21 & 22 Victoria; that this Court, under Sec. 57 of the Indian Evidence Act, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette*; and, further, that this Court, being bound by the law, cannot but hold the cession to be valid under Sec. 113 of the same Evidence Act coupled with a notification in the *Gazette of India*, 4th January 1873, as follows:—"The Governor General of India in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st February 1866, ceded to the State of Bhawnagar" (the village of Ghangli being included in the same schedule).

Whereas, on behalf of the respondents, it was urged, with much force and ability, that the power to cede territory, and

* See the Judgment printed in a note at the end of the case, p. 49.

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therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and, therefore, could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone; that, therefore, the cession was invalid, and the recent notification in the *Gazette of India*, made for the purposes of Sec. 113 of the Evidence Act, was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament; that the Legislature had no power to make retrospective laws; and, lastly, that even though the question of jurisdiction be decided against the respondents, the appellant having already attorned to the jurisdiction, cannot now be heard to object.

With regard to attorning to the jurisdiction, the respondents' argument appears altogether untenable; it is advisable, therefore, at the outset to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory; but none of those cases go to the length of showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction, not before possessed, over the subject matter in dispute; and it is also manifest that if the legal effect of the cession of territory notified was to remove the village of Ghangli out of the jurisdiction of the District Court of Ahmedabad, Secs. 3 and 37 of Act XXIII. of 1861 provided an absolute bar to the Judge's hearing this appeal.

Two main questions arise in this case, one as to the effect of the declaration in the *Gazette of India*, in January last, that territory has been ceded; and the other as to the validity and legality of the cession itself.

The power of the Indian Legislature to create such a statutory presumption having been challenged, on the ground that it affects the authority of Parliament, we find that the first of these questions involves an inquiry into the very serious one of the Crown's prerogative to cede territory.

We prefer, then, first to consider, with regard to the second question, what rights for cession of territory were vested in the East India Company, for it is clear that only those powers, which the Company possessed "either alone, or by the direction and with the sanction of the Commissioners of the affairs of India," devolved upon Her Majesty's Secretary of State.

We know that from the time of their first Charter, granted by Queen Elizabeth in 1600 down to 1767, the Company were merely recognized as traders, but as their struggles with the French Company left them, at the peace of 1765, masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a Committee to inquire into the nature of the Company's Charters, the inquiry resulting in their being continued, by 7 Geo. III. Ch. 57, Sec. 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February 1769, on condition of the payment of a certain annual sum. From this date, the Company's exclusive trade and government were renewed from time to time, until, by 3 & 4 Wm. IV., Ch. 85, their trade was suspended, except in so far as it might be carried on for purposes of government, their term of government being continued until the 30th of April 1854, and, finally, this term was renewed 'until Parliament should otherwise provide," until, in fact, the passing of 21 & 22 Vict., Ch. 106, which transferred the Government of India to Her Majesty.

We see, then, that from the year 1767, when the East India Company's territorial acquisitions were first recognized as British territory, they were, from time to time, continued in possession of them, subject to the authority of Parliament.

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It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed were derived from Parliament. All the Charters from 1767 expressly entrust the Company with possession and government of the British territories and appropriation of the revenues (as a necessary means of governing) for the Crown; and the Board of Commissioners was created with "full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to, or concern, the Civil and Military Government and revenues of the said territories and acquisitions in the East Indies." And, though it may be inferred that the Company and Board had power to levy war or make peace and to make treaties with native princes and states in India for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power, under the direction and control of the Board of Commissioners, to "declare and appoint what part or parts of any of the territories under the government of the Company should, from time to time, be subject to the government of each of the several presidencies then subsisting or to be established, and to alter, from time to time, the limits of the Presidencies and Lieutenant Governorships." If, therefore, special enactments were necessary to enable the Government of the country to make internal arrangements and distributions of British territories, *a fortiori* would it appear that, without such special enactment, they were incompetent to cede any portion of them.

Mr. Forsyth, in his Cases and Opinions on Constitutional Law, page 185, gives two instances of cession (not under treaty of peace) by the East India Company to a foreign state previous to 1858:—

"1. In 1817 a cession by treaty 'in full sovereignty' to the Sikhumputtee Rajah of a part of territory formerly possessed by the Rajah of Nepaul, but ceded to the East India Company by a treaty of peace."

"2. In 1833 a cession by treaty to Rajah Voorunder Singh of a portion of Assam lying on the south of the Burrampooter river, by which the Rajah bound himself, in the administration of justice in the country now made over to him, to abstain from the practices of former Rajahs of Assam, as to *cutting off ears and noses, extracting eyes*, or otherwise mutilating and torturing." Alluding to the latter case, Mr. Forsyth adds: "This is not a very satisfactory precedent, and it shows the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous power."

And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company's *status* and powers.

Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of India to Her Majesty, we turn to consider the effect of the *Gazette* of *India's* notification.

Sec. 113 of the Evidence Act, which received the assent of the Governor General on the 15th March 1872, runs thus: "A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification." This section was first introduced in the amended Bill presented on the 30th of January 1872 to the Legislative Council of the Governor General with these remarks by the Select Committee: "A conclusive presumption is a direction by the law that the existence of one fact shall in

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all cases be inferred from proof of another. This we have provided in Secs. 112 and 113"; and "we have provided in the Chapter on the Burden of Proof that a notification in the Gazette that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject."

Our judgment in this case was passed on the 2nd December 1870 when there existed only the notification of the *Bombay Gazette* dated 29th January 1866; and we granted the review on the 16th December 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession. But on the 4th of January 1873 appeared in the *Gazette* of *India* the notification that the village of Ghangli, with several others, had been ceded seven years before; and we are now told that, even though the approval by the Secretary of State of the cession be not all sufficient, we cannot consider that question. No doubt this would be the effect of Sec. 113, provided that it lay within the power of the Legislative Council to make such a law.

What then are the powers of the Council of the Governor General? By Sec. 43, 3 & 4 Wm. IV., Ch. 85, the Governor General in Council was empowered to legislate for India, except that he "shall not have the power of making any Laws or Regulations which shall, in any way, affect any prerogative of the Crown or the authority of Parliament * * * or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown of the United Kingdom, or the sovereignty and dominion of the said Crown over any part of the said territories."

This section was repealed by Sec. 2, Act 24 & 25 Vict., Ch. 67, "The Indian Councils' Act"; but by Sec. 22 of this Act, it was again provided that "the Governor General in Council shall not have the power of making any Laws or Regulations * * * which may affect the authority of Parliament * * * or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown or the sovereignty and dominion of the said Crown over any part of the said territories." Further on, in Sec. 24 of the same Act, we find "that no Law or Regulation made by the Governor General in Council (subject to the power of disallowance by the Crown, as hereinbefore provided,) shall be deemed invalid by reason only that it affects the prerogative of the Crown."

It is a notable circumstance that the wording of the repealed Section of 3 & 4 Wm. IV., Ch. 85, and of Sec. 22 of the Councils' Act, substituted for it, differs only in one particular, *i.e.*, that in the latter the words "prerogative of the Crown" are omitted, nor is it easy to understand the reason for this omission. Prior to this Act, no general power was given to the Crown to disallow laws made by the Legislative Council.

Sec. 26 of 16 & 17 Vict., Ch. 95, declared "that no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown signified in a prescribed form;" and the Councils' Act, which repealed this, made express provision for the transmission to the Secretary of State for India of copies of all laws and regulations assented to by the Governor General and for their disallowance by Her Majesty.

In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that before the passing of the Council's Act, the Crown had previously sanctioned it, or that after that period it had not been disallowed.

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But the law expressly prohibiting the Legislative Council of India from making any law affecting the authority of Parliament is, in no way, varied or altered by the Indian Councils' Act.

The value, therefore, of Sec. 113 of the Evidence Act depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its power and that Sec. 113 was, and must continue to be, bad law.

On this point, we have been referred to the opinions of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore, and Twiss, who all appear to support the proposition that no power resides in the Crown to cede territory, save under circumstances of necessity. Most of these writers are referred to by Mr. Forsyth in the work to which we have alluded above, and the conclusion at which he appears to arrive is that while the Crown can, by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. Vattel, Puffendorf, and Grotius may or may not be accepted as authorities, but Mr. Forsyth strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative—the case of the Orange River Territory and the sale of Dunkirk by Charles II.; and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the Orange River Territory, we have been unable to consult the correspondence to which reference is advised; but as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which

it had ordained, by its letters patent, without reference to Parliament. The cases, moreover, are not analogous, for the British territories in India have been the subject of Parliamentary Legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body of the State.

It appears to be considered by some, *vide* Lord Palmerston's speech in the debate on the relinquishment by the British Crown of the Protectorate of the Ionian Islands, that a distinction exists between cessions of British freehold and of territory acquired by conquest during war and not by treaty or ceded by treaty and held as possession of the British Crown; but the cases he quoted were all, observes Mr. Forsyth, cessions at the close of a war. On what principle can such a distinction rest?

All subjects of the Crown possess the same rights and incur the same obligations. Allegiance, by the English law, is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

That Her Majesty's subjects in India have the same rights with all her other subjects is clear from the Queen's proclamation of 1858; and the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

Vattel's arguments, on the principles involved, commend themselves to our reason. In his Book 1, Ch. 21, Sec. 263, he says: "A nation ought to preserve itself; it ought to preserve all its members; it cannot abandon them, and it is under an engagement to support them in their ranks as members of the nation. It has not then a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it.

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They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or a herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body, if the public safety requires." In considering, further, whether the Prince has power to dismember the State, he says that "this depends on whether he has received full and absolute authority from the nation;" and proceeds: "The nation ought never to abandon its members but in a case of necessity or with a view to the public safety, and to preserve itself from total ruin; and the Prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the State requires."

We have no knowledge of the reasons which induced the transfer of Ghangli and other villages to the State of Bhawnagar, but it is certain that there existed no such necessity as is recognized by the publicists.

If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.

Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating, must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

This being so, Sec. 113 of the Indian Evidence Act, though not disallowed, is not protected by Sec. 24, 24 & 25 Vict., Ch. 67, and we cannot, therefore, follow its directions.

For these reasons, we decline to alter our decision, which will, therefore, stand. Costs on appellant.

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Note.—The judgment in the original special appeal in the above case was delivered on the 2nd December 1870, as follows :—

No attempt has been made to support the second objection raised in this special appeal, and the only point which we have to determine is whether, as has been urged, "the Judge had no jurisdiction to try the appeal, because the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided."

The circumstances are these. The suit was instituted in the year 1864 in the Court of the Munsif of Gogo, who awarded the plaintiff possession of the land sued for on payment of the amount of the mortgage, viz., Rs. 60. On the 18th January 1866, this decree was reversed by the Assistant Judge of Ahmedabad; but the case coming before the High Court on special appeal, it was remanded for fresh decision under date 21st December 1866, and, in accordance with this order, was disposed of by the Acting Judge of Ahmedabad on the 11th August 1869.

The disputed land is situated in the village of Ghangli, within the Pargana of Gogo (*vide* Act VI. 1859), and that Pargana forms part of the Zillah of Ahmedabad, as established by the second clause of Section 16, Regulation II. of 1827.

But it is argued that the village of Ghangli had been removed from the jurisdiction of the Civil Courts of the Bombay presidency previous to the disposal of the case by the District Judge of Ahmedabad; and that, consequently, his decree is illegal.

This argument is founded on a notification dated 29th January 1866 and published at page 197 of the *Bombay Government Gazette* for that year. It runs as follows:—

"Revenue Department.

"It is hereby notified that, in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhawnagar, the undermentioned villages belonging to the Thakore of Bhawnagar, and situated in the Parganas of Dhundooka, Rampoor, and Gogo, Zilla Ahmedabad, are, from and after the 1st of February 1866, Sumvut 1922 Maha Vud 2nd, removed from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattiawar, on the same conditions as to Jurisdiction as the villages of the Talooka of the Thakore of Bhawnagur heretofore in that province.

Sehore Talooka.
Ghangli.

By order,
(Signed) F. S. CHAPMAN,
Chief Secretary to Government

Bombay Castle, 29th January 1866."

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This notification, it may be observed, though signed by the Chief Secretary to Government, does not state by what authority it was issued, merely "by order." Appearing however, as it does, in the *Government Gazette*, and under the signature of the highest Ministerial Officer under Government, it may be assumed that it was issued by order of His Excellency the Governor in Council. But the notification is defective in a far more material point, for it omits to recite the law which was supposed to confer on the Governor in Council the power to limit the jurisdiction of the Civil and Criminal Courts of this Presidency.

It has not been shown to us that any such law exists; and, on the contrary, we find that at the time this notification was issued, Section 6 of Regulation I. of 1827, which provides that "Regulations are to be in force at such places and from such periods as may be declared in a Regulation actually in force," was unrepealed, and as the Regulation establishing the Ahmedabad Zilla, of which the village of Ghangli forms a part, was also unrepealed, it follows that a legal enactment was necessary to effect the object which Government had in view when issuing the notification referred to. It was suggested in the course of the argument that the notification might have been issued under clause 2, Section XVI., Regulation II. of 1827; but even admitting that this law gives the Governor in Council power to cede territory, no authority could be assumed to exist in that body summarily to abrogate any law in force in such territory in the face of Section VI., Regulation I. of 1827.

That this notification is inefficacious is still more apparent when we come to look at the full force it was intended to have, for it purports to affect, not only the Local Courts, but also the High Court, which under Section I., Regulation II. of 1827 and Stat. 24 & 25 Victoria, Cap. 104, H C 9, has jurisdiction over all the territories subordinate to the Presidency of Bombay in which the Code of Regulations has operation by enactment. It seems to us, therefore, that the notification referred to is, as far as the argument in this case is concerned, of no effect whatever, and that the village of Ghangli not having been legally removed from the jurisdiction of the District Court of Ahmedabad, the decree of the Judge must be upheld.