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suit, and to pay to the plaintiff three parts out of seven of the plaintiff's taxed costs of the suit as between party and party of the suit. The delay in bringing the suit was very great: so, too, the delay in serving the summons. The plaintiff succeeded in establishing his equitable mortgage to the extent of Rs. 3,000 only, although he claimed Rs. 4,000 more, and could not have established it at all if we had not granted to him the indulgence of perfecting his title by obtaining and giving in evidence a new deed of assignment from Pestanji Dinsha. The plaintiff and defendant Ganpat Pandurang must, respectively, bear their own costs of the appeal. The defendants Vithoba Pandurang and Govind Pandurang must, respectively, bear their own costs of the suit and of the appeal (if any). The deposit of defendant Ganpat Pandurang, as security for costs of appeal, must be returned to him.

Attorneys for the appellant.—Messrs. *Shapurji and Thakurdas*.

Attorney for the respondent.—Mr. *J. C. Cama*.

ORIGINAL CRIMINAL.

(68)

Before Sir C. Sargent, Justice.

EMPRESS v. DOSSAJI GULAM HUSEIN.

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December 3.

Jurisdiction of High Court to try criminal cases sent from Zanzibar—Stat. 6 & 7, Vic., c. 94.—Stat. 28 & 29, Vic., c. 116—Stat. 29 & 30, Vic., c. 87—Order in Council of 9th August 1866—Evidence—Deposition of witnesses—Indian Evidence Act (I of 1872), Sec. 33.

The High Court at Bombay has jurisdiction to try a prisoner accused of having committed murder at Zanzibar, and sent by the British Consul at Zanzibar for trial to Bombay.

A prisoner accused of having committed murder at Zanzibar was sent by the British Consul there for trial before the High Court at Bombay. The Consul could not enforce the attendance of witnesses at Bombay, but he transmitted to the High Court the depositions which he had taken in the course of the inquiry he had held with regard to the commission of the alleged offence. In the absence of the witnesses these depositions were tendered in evidence at the trial in Bombay.

Held that the British Consul at Zanzibar was authorized to take the depositions, and that they were admissible in evidence at the trial, under section 33 of the Indian Evidence Act (I of 1872),

THE prisoner was charged with having committed murder at Zanzibar. The case had been investigated by Dr. Kirk, the British Consul at Zanzibar, by whom the prisoner was sent to Bombay for trial before the High Court. The Consul had no power to require the witnesses to attend to give evidence at Bombay, but he transmitted the depositions which he had taken during the inquiry.

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The *Advocate General* (Honourable J. Marriott) and *Inverarity* for the prosecution.

Gill for the prisoner..

The prisoner pleaded to the jurisdiction of the Court.

Gill.—The High Court of Bombay has no jurisdiction in this case. The Order in Consul of the 9th August 1866, under the authority of which the Consul has acted, does not empower him to inquire into a case of murder. Clause 23(1) of the Order in Council enables the Consul to send for trial to this Court “any British subject charged with the commission of any crime or offence, the *cognizance whereof may at any time appertain to him.*”

(1) XXIII.—And it is further ordered that it shall be lawful for Her Majesty's Consul to cause any British subject, charged with the commission of any crime or offence, the cognizance whereof may at any time appertain to him, to be sent, in any of Her Majesty's ships of war, or in any British vessel, to Her Majesty's territory of Bombay for trial before the High Court of the said territory; and it shall be lawful for the Commander of any of Her Majesty's ships of war, or of any British vessel, to receive any such person on board, with a warrant from the said Consul addressed to the Chief Magistrate of Police of the said territory, and thereupon to keep and detain in lawful custody, and to convey him in custody to Bombay, and, on his arrival there, to deliver him with the said warrant into the custody of the said Chief Magistrate of Police, or other officer within the said territory lawfully acting as such, who, on receipt of the said warrant, and of the party therein named, shall be authorized to commit, and shall commit, such party, so sent for trial, to the Common Gaol of the said territory; it shall be lawful for the keeper of the said Common Gaol to cause such party to be detained in safe and proper custody, and to be produced upon the order of the said High Court; and the High Court at the Sessions, to be holden next after such committal, shall proceed to hear and determine the charge against such party, and punish him for the same, if found guilty, in the same manner as if the crime, with which he may be charged, had been committed within Her Majesty's and territory of Bombay.

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But clause 14(1) only enables him to award a punishment of twelve months' imprisonment, or a fine of one thousand dollars, which shows that capital offences are not within his jurisdiction. Stat. 6 & 7, Vic., c. 94, empowers Her Majesty by Order in Council to direct a prisoner to be sent for trial to a *British colony*. This Court, therefore, cannot try the accused.

The *Advocate General* referred to Stat. 28 & 29, Vic., c. 116, and Stat. 29 & 30, Vic., c. 87.

SARGENT, J.—I am of opinion that this Court has power to try the prisoner.

The prisoner, on being called upon to plead, claimed to be tried.

(1) XIV.—And it is further ordered, that if the crime or offence, whereof any person, being a British subject, may be accused before Her Majesty's Consul as aforesaid, shall appear to such Consul to be of such a nature as, if proved, would not be adequately punished by the infliction of such punishment as aforesaid, it shall be lawful for such Consul to summon not less than two, or not more than four, disinterested British subjects of good repute to sit with him as assessors for inquiring of, trying and determining the charges against such persons; and the Consul, when he shall try any such charge with the assistance of the assessors or aforesaid, shall, if he is himself convinced of the guilt of the party accused, have power to award any amount of punishment not exceeding imprisonment for twelve calendar months, or a fine of one thousand dollars; and the assessors aforesaid shall have no authority to decide on the innocence or guilt of the party accused, or on the amount of punishment to be awarded to him on conviction, but in the event of the said assessors, or any of them, dissenting from the conviction of, or from the amount of punishment awarded to, the accused party, the assessors or assessor so dissenting shall be authorized to record in the minutes of the proceedings the ground on which they or he may so dissent; and the Consul shall forthwith report to the High Court at Bombay the fact of such dissent, and of its having been so recorded in the minutes of the proceedings, and shall, as soon as possible, lay before the said Court copies of the whole of the depositions and proceedings, with the dissent of the assessor or assessors recorded therein; and it shall be lawful thereupon for the Court, by warrant under seal addressed to the Consul, to confirm or vary or remit altogether, as to the Court may seem fit, the sentence and punishment awarded to the party accused, and such Consul shall give immediate effect to the injunction of any such warrant; Provided always that in any case in which the assessors or assessors shall dissent from the conviction of, or from the amount of punishment awarded to, the accused party, it shall be lawful for Her Majesty's Consul to take good and sufficient bail from the accused party to appear and undergo the punishment awarded to him, provided the same, or any portion thereof, be confirmed by the Court, which punishment so confirmed shall commence and take effect from the day on which the decision of the Court shall be notified to the party accused,

The *Advocate General* in stating the case for the prosecution said that the only evidence consisted of the depositions of witnesses who had been examined at Zanzibar before the Consul; that the Consul had no power to require the witnesses to attend at Bombay; and the High Court was not authorized to send a commission to Zanzibar for the purpose of taking evidence. After stating the circumstances under which the alleged offence had been committed, he tendered in evidence the deposition of Mahomed Adamji, dated the 25th June 1878, signed by Dr. Kirk, the Consul at Zanzibar, and sealed with his seal as British Agent and Consul at Zanzibar.

Gill objected to the depositions being received. The Consul had no power to take the depositions in case of murder. Clause 13 (1)

(1) XIII.—And it is further ordered, that it shall be lawful of Her Majesty's Consul to cause to be apprehended and brought before him any British subject who may be charged with having committed any crime or offence within the dominions of the Sultan of Zanzibar; and such Consul shall thereupon proceed with all convenient speed to inquire of the same, and for such purpose shall have power to examine on oath, or in such form and with such ceremony as the witness shall declare to be binding on his conscience, any witness who may appear before him to prove the charge; and also shall have power to compel any person, being a British subject, who may be competent to give evidence as to the guilt or innocence of the party so charged, to appear and give evidence, and to punish the wilful default of any such person to appear and give evidence, after reasonable notice of the day of the hearing of such charge, by fine or imprisonment, in like manner as is provided in Article X of this Order; and shall examine every such witness in the presence and hearing of the party accused, and shall afford the party accused all reasonable facility for cross-examining such witness, and shall cause the deposition of every such witness to be reduced to writing, and the same to be read over and, if necessary, explained to the party accused, together with any other evidence that may have been urged against him during the course of the inquiry, and shall require such accused party to defend himself against the charge brought against him, and, if necessary, advise him of the legal effect of any voluntary confession and shall take the evidence of any witness whom the accused party may tender to be examined in his defence; and every witness, being a British subject, so examined as aforesaid, who shall upon any such occasion give wilfully false testimony, may be convicted of and punished for the crime of wilful and corrupt perjury; and when the case has been fully inquired into, and the innocence or guilt of the person accused has been established to the satisfaction of the Consul, the Consul, as the case may be, shall either discharge the party accused from custody, if satisfied of his innocence, or proceed to pass sentence on him satisfied of his guilt; and it shall be lawful for the Consul having inquired of, tried and determined in the manner aforesaid any charge which may be brought before him, to award to the party convicted any amount of punishment not exceeding imprisonment for one calendar month, or a fine of 200 dollars.

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of the Order in Council, dated the 9th August 1866, only authorizes the Consul to proceed in cases punishable with imprisonment for one month, or with a fine of 200 dollars. Clause 14 gives him a larger power, but in these case he must be assisted by two assessors. Clause 16(1) goes further, but also requires the presence of assessors. He professedly acted under the authority of clause 23 of the Order in Council, and section 4 of Stat. 6 & 7, Vic., c. 94. This latter section, in connexion with Stat. 28 & 29, Vic., c. 116, enables him to send the prisoner here for trial, but not to hold a preliminary inquiry and to take deposition; and clause 23 of the Order in Council limits his authority to cases, of which he had cognizance, which are defined by clauses 13, 14 and 16. Clause 13 only refers to cases in which the Consul may himself decide on the guilt or innocence of the prisoner: so it does not apply to the present case. Clauses 15 and 16 direct him to inquire with the aid of assessors, and he has not obeyed these provisions. The depositions were, therefore, irregularly made, and cannot be received. The learned Coun. e' also relied on section 33 of the Indian Evidence Act (I of 1872).

The *Advocate General*.—Clauses 13 and 23 of the Order in Council must be read together, and they authorize the Consul to send the prisoner to Bombay for trial. To make the depositions receivable in evidence under section 33 of the Evidence Act, it is enough to show that unreasonable delay must otherwise be caused.

SARGENT, J.—I have no doubt that, by the capitulation entered

(1)XVI.—And it is further ordered, that in any case in which any British subject shall be accused before Her Majesty's Consul of the crime of arson or house-breaking, or cutting and maiming, or stabbing or wounding, or of any assault endangering life, or of wilfully causing any bodily injury dangerous to life, or of wilful or corrupt perjury, or of engaging in or being accessory to the purchase or sale of slaves, or of having slaves illegally in his possession, the proceedings before the Consul shall be carried on the which aid of assessors convened in the manner aforesaid; and it shall be lawful of the Consul, if to him it shall seem fit, cause any person convicted before him to any of the crimes aforesaid, over and above any fine or imprisonment which may be awarded to such person, to be sent out of the dominions of the Sultan of Zanzibar for such time as to him shall seem meet, in the manner pointed out in the next preceding article of this Order, notwithstanding the crime, laid the to charge of such person, may be the first of which he has been convicted before the Consul.

into with the Sultan of Zanzibar, the British Consul is given full authority to hold an inquiry in cases of offences like the present. By section 1 of Stat. 6 & 7, Vic., c. 94, it is declared that Her Majesty may exercise any power or jurisdiction which she then had or might at any time thereafter have within any country or place out of her dominions in the same and as ample a manner as if she had acquired such power or jurisdiction by the cession or conquest of territory. Accordingly, under clause 13 of the Order in Council, dated 9th August 1866, it is ordered that "it shall be lawful for Her Majesty's Consul to cause to be apprehended and brought before him any British subject who may be charged with having committed any crime or offence within the dominions of the Sultan of Zanzibar and such Consul shall thereupon proceed with all convenient speed to inquire of the same, and for such purposes shall have power to examine on oath, or in such form and with such ceremony as the witness shall declare to be binding on his conscience, any witness who may appear before him to prove the charge, &c." (His Lordship read the clause.) This clause enables the Consul to inquire into—in other words—take "cognizance" of all crimes and offences, but only to inflict a limited amount of punishment. Then by the 14th clause the Consul is authorized to call in the aid of assessors if he thinks that the crime is of such a nature that it would not be adequately punished under the authority vested in him by the preceding clause, and having done so to pass a severe sentence. Subsequently, the 23rd clause enables him to send to Bombay for trial any British subject charged with "any crime or offence of which the Consul has cognizance;" and the 24th clause requires the Consul, on any occasion of sending a prisoner to Bombay for trial, to observe the provision of Stat. 6 & 7, Vic., c. 94.

I am of opinion that the Consul was authorized by law to take the depositions of witnesses in this case, and that they are admissible under section 33 of the Indian Evidence Act.

The trial then proceeded upon the depositions and the prisoner was acquitted.

Attorney for the prosecution.—Mr. *R. Hearn*, Public Prosecutor.

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