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a mixed question of law and fact; but as to the first objection, it is, in our opinion, one which must prevail against the defendant's title. The Court had clearly no jurisdiction as regards the subject-matter to entertain the suit, and the decree was, therefore, null and void, and could not constitute the basis of any title.

But it was urged for the defendant that the plaintiff himself was a party to the mortgagee's suit, and that he was estopped from now taking the objection to the jurisdiction. But apart from the circumstance that the plaintiff was a minor at the time, there could be no question of estoppel by conduct between the judgment-debtor and the purchaser at auction, who derives his title from proceedings which are entirely *in invitum* as regards the former. The defendant not having established his title, the plaintiff, who is the holder of the *hak*, whether still subject or not to the mortgage, is entitled, as against the defendant, to a declaration that he, and not the defendant, is entitled to the *hak*. We must, therefore, confirm the decree with costs.

Decree confirmed.

ORIGINAL CRIMINAL.

FULL BENCH.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Bayley and Mr. Justice Scott.

QUEEN EMPRESS v. A. MORTON AND MOORTEZA ALI.

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November
27 to 29.

Jurisdiction—Practice—Procedure—Code of Criminal Procedure (X. of 1882) applicable to proceedings in the Court of the Judicial Superintendent of Railways in II. H. the Nizám's Dominions—Sanction of proceedings—Subsequent sanction of no effect—Irregular commitment accepted by High Court—Criminal Procedure Code (X. of 1882) secs. 197 and 532—Power of Court of Judicial Superintendent of Railways to commit to High Court—Charges preferred by Advocate General—Letters Patent, 1865, clause 24—European British subjects.

The provisions of the Code of Criminal Procedure (X of 1882) apply to the Court of the Judicial Superintendent of Railways in his Highness the Nizám's Dominions held at Secunderabad.

Where, after a magisterial inquiry, a European British subject, being a public servant within the meaning of section 197 of the Criminal Procedure Code (X of 1882), was committed for trial to the High Court of Bombay by the Judicial Superintendent of Railways in his Highness the Nizám's Dominions, without any previous sanction having been obtained as required by that section, *Held* that the proceedings were irregular and without jurisdiction and that a sanction subsequently obtained was of no effect; but

Held also, that the provisions of section 532 of the Criminal Procedure Code applied, and that the Judge presiding at the Criminal Sessions of the High Court had power, in his discretion, to accept the commitment, and to proceed with the trial of the prisoner.

PER SARGENT, C. J.—The Court of the Judicial Superintendent of Railways in His Highness the Nizám's Dominions is subordinate to the High Court of Bombay in all criminal matters relating to European British subjects.

PER BAYLEY, J.—The Court of the Judicial Superintendent of Railways in His Highness the Nizám's Dominions is not subject to the superintendence of the High Court of Bombay within the meaning of clause 24 of the Letters Patent 1865, and a prisoner committed by the former Court for trial to the High Court cannot be tried on charges preferred by the Advocate General under that clause.

BOTH the prisoners in this case were employed on His Highness the Nizám's State Railway, the head offices of which were at Secunderabad. The first prisoner Andrew Morton, a European British subject, was the officer in charge of the engineering and locomotive departments of the Railway, and Moorteza Ali was chief clerk in the engineering department. On the 27th September 1884, after an inquiry, both the prisoners were committed for trial under section 214 of the Criminal Procedure Code (X of 1882) to the High Court of Bombay by Colonel A. F. Dobbs, Judicial Superintendent of Railways, H. H. Nizám's Dominions.

The charges framed against Morton by the Judicial Superintendent were as follows:—(1) forgery or abetment of forgery in having made or caused to be made certain fictitious measurements of work done on the railway (Indian Penal Code, sections 468, 471, and 109); (2) criminal breach of trust in making improper and excessive payments to a contractor for work done on the said railway (Indian Penal Code, section 409); (3) accepting illegal gratification from the said contractor (Indian Penal Code, section 101).

Moorteza Ali was charged (1) with forgery or abetment of forgery in making out certain fictitious pay orders for work done

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on the said railway (Indian Penal Code, sections 468 and 109); (2) with accepting illegal gratification (Indian Penal Code, section 161).

Morton was a public servant within the meaning of section 197 of the Criminal Procedure Code (X of 1882), and under the provisions of that section the sanction of the Government of India was necessary for his prosecution. The sanction, it appeared, had not been obtained until after Morton had been committed for trial to the High Court. It was contained in a letter from the Government of India to the Resident at Hyderabad, dated the 12th November 1884.

The depositions of the witnesses taken before Colonel Dobbs at Secunderabad were duly transmitted to the Crown Office, Bombay, and upon them additional charges were framed against both the prisoners, sanction for which was obtained from the Government of India by telegram dated the 22nd November 1884. Charges against the prisoners were also framed by the prosecution and preferred by the Advocate General under clause 24 of the Letters Patent, 1865, upon which, it was contended, the prisoners might be tried by the High Court without any sanction by the Government of India.

The prisoners were arraigned before Bayley, J. on the 26th November 1884. Morton claimed to be tried by a mixed jury under section 451 of the Criminal Procedure Code (X of 1882), whereupon Moorteza Ali claimed under section 452 to be separately tried, and an order was accordingly made to that effect. Morton was then put forward for trial on the above charges. Upon ascertaining that, as above stated, the sanction of the Government of India for Morton's prosecution had not been obtained until after his committal to the High Court, his Lordship postponed the trial and reserved the following questions for the consideration of a Full Bench under clause 25 of the Letters Patent, 1865:

(1) Whether, having regard to the fact that the sanction of the Government of India for the prosecution of Andrew Morton, being a public servant of the Government of India, was not given until after the termination of the proceedings before the committing

Magistrate at Secunderabad, and after the committal of the said Andrew Morton for trial at the High Court of Bombay, this Court has now jurisdiction to try the said Andrew Morton, either on the charges framed and amended by the Clerk of the Crown or on those preferred by the Advocate General on the 25th November 1884 subsequent to the giving of sanction by the Governor General in Council by letter dated 12th November 1884 from the Under Secretary to the Government of India, Public Works Department, to the Resident of Hyderabad, and by a telegram dated 22nd November 1884.

(2) Whether this Court in the events which have happened has any jurisdiction to try the prisoner Moorteza Ali, and if not, whether this Court can direct any and what further proceedings to be taken against him.

The above points were argued before the Full Bench on the 27th November 1884.

Kirkpatrick appeared for the prosecution.

Jardine for the prisoner A. Morton.

Leith for the prisoner Moorteza Ali.

Jardine.—The prisoner Morton is a public servant. After a magisterial inquiry at Secunderabad he was committed for trial here on the 27th September 1884. No sanction was obtained until November 1884. Under section 197 of the Criminal Procedure Code (X of 1882) the proceedings were *coram non iudice* and the committal is illegal. The Magistrate had no jurisdiction.

[BAYLEY, J.—Does the Criminal Procedure Code apply to the Magistrate at Secunderabad?]

The office of Judicial Superintendent of Railways appears to have been created in 1864. A number of rules for the guidance of the officer holding that appointment were sanctioned and issued by the Government of India.⁽¹⁾ The third rule directs him to be

(1) The rules referred to were produced from the Records of the Hyderabad Residency and were stated to have been communicated to the Judicial Superintendent of Railways, Hyderabad, with letter No. 1038, dated 10th June 1864, and to have received the assent of the Government of India as intimated in the Foreign Secretary's letter No. 581 of 4th July 1864.

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“guided generally by the principles and rules of the Criminal Procedure Code.” See also the Extradition Act (XI of 1872), sections 4 to 8: the Foreign Jurisdiction and Extradition Act (XXI of 1879) sec. 8: Criminal Procedure Code (X of 1882), section 188. The provisions of section 197 apply and the committal is invalid. Subsequent sanction is not sufficient. *Reg. v. Rámá bin Gopál.*⁽¹⁾

Nor can the prisoners be tried on the charges preferred by the Advocate General. Clause 24 of the Letters Patent, 1865, does not apply. The Court at Secunderabad is not under the superintendence of the High Court, but of the Resident at Hyderabad. (See Rules).

Section 532 of the Criminal Procedure Code (X of 1882) does not apply. The Magistrate did not “purport to exercise powers duly conferred.” He had no power at all. This section only applies where the High Court can direct a fresh inquiry. It cannot do so here. [Counsel referred to *Empress of India v. Jagannáth*,⁽²⁾ and Prinsep’s Criminal Procedure Code, p. 488 (6th Ed.)]

Leith for Moorteza Ali.—The jurisdiction of this Court to try the native prisoner in this case exists only where there is a joint trial. See sections 214 and 452 of the Criminal Procedure Code (Act X of 1882). He has been granted a separate trial and cannot now be tried here. Further, if the proceedings against Morton are quashed as being illegal, Moorteza Ali has been improperly committed to this Court for trial.

Kirkpatrick for the prosecution.—Sanction under section 197 is required only for the proceedings against Morton. It is not needed for the proceedings against Moorteza Ali. We contend (1) that the Criminal Procedure Code (X of 1882) in force in British India applies to the Court at Secunderabad; see Act XI of 1872, section 8; Act XXI of 1879, sections 6 and 8; Statute 28 and 29 Vic., cap. 15, section 3; Government Notification, dated 23rd September 1874, No. 1203⁽³⁾; and Notification 179 J.⁽⁴⁾

(1) 1 Bom. H. C. Rep. 107.

(2) I. L. R. 3 All. 258.

(3) See *Gazette of India*, 1874, p. 484, and see notes to sec. 458 of Cr. Pro. Code, 1882, Agnew and Henderson’s edition.

(4) See *Gazette of India*, 1874, p. 486, and see notes to sec. 458 of Cr. Pro. Code, 1882, Agnew and Henderson’s edition.

(2) The sanction obtained is sufficient, although not procured prior to the commencement of the proceedings, see *Reg. v. Jivan Vāsudev* cited in *Reg. v. Parshram Keshav*; ⁽¹⁾ see Code of Criminal Procedure (XXV of 1861), section 167; Act X of 1872, section 466; Act X of 1875, section 132. (3) Even if the proceedings before the Magistrate were irregular, for want of sanction this Court may accept the commitment and try the prisoner: see section 532 of the Code; or (4) he may be tried on the charges preferred by the Advocate General under clause 24 of Letters Patent, 1865, which need no sanction: see section 194 of the Code.

As to Moorteza Ali he may, in any event, be tried by this Court. He has obtained an order for a separate trial. His case is now independent of Morton's case. See section 336 of the Code.

C. A. V.

Nov. 29.—SARGENT, C.J.—The question before us is whether the Judge now presiding at the Criminal Sessions of the High Court can proceed with the trial of the two prisoners who have been committed to this Court by the Magistrate at Secunderabad. One of the prisoners is admittedly a European British subject and a public servant, and it is not denied that the provisions of section 197 of the Criminal Procedure Code (X of 1882) would apply to his case. By that section it is enacted that when a public servant is accused as such public servant of any offence, no Court shall take cognizance of such offence without the previous sanction of the Government. Now, it appears that the magisterial inquiry before Colonel Dobbs was held without such sanction having been previously obtained. That inquiry terminated in the committal of the prisoners for trial on the 27th September. The sanction of the Government, which has been put in evidence, is dated the 12th November, nearly two months subsequently to the termination of the proceedings before the Magistrate; and the question is whether, under the circumstances, the committal of the prisoners to this Court was so irregular as to prevent this Court from proceeding to try the case.

The first point which arises for determination is whether the Code of Criminal Procedure (X of 1882) applies to the Court of

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(1) 7 Bom. H. C. Rep. Cr. Ca. 61.

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the Judicial Superintendent of Railways at Secunderabad, and in order to decide that point, it is necessary to consider the source from which that officer derives his authority. It appears that the Court of the Judicial Superintendent of Railways at Secunderabad was established in 1864. By the provisions of section 6 of Act XI of 1872 the Governor-General in Council is authorised to appoint any European British subject in any country or place beyond the limits of British India to be a Justice of the Peace; and it provides that every such Justice of the Peace shall have all the powers conferred on Magistrates of the First Class who are Justices of the Peace and European British subjects by any law for the time being in force in British India relating to criminal procedure; and it further provides that the Governor-General in Council may direct to what Court having jurisdiction over European British subjects any such Justice of the Peace is to commit for trial. In the exercise of these powers Colonel Dobbs, by whom the prisoners were committed, was appointed Judicial Superintendent of Railways in His Highness the Nizam's dominions, and now holds that office.

We have next to ascertain the relation in which the Judicial Superintendent of Railways stands to this High Court. By Statute 28 and 29 Vic., cap. 15, section 3, power was given to the Governor-General in Council to alter the local limits of the jurisdiction of the High Courts in India (his Lordship read the section), and in exercise of that power the Governor-General by a Notification dated 23rd September 1874,⁽¹⁾ No. 178j, ordered that original and appellate criminal jurisdiction over European British subjects of Her Majesty, being Christians resident in the Native States and territories named in the order, should be exercised by the High Court of Bombay, and Hyderabad, in which Colonel Dobbs' court is held, is one of the territories mentioned in the notification. By a further notification dated 3rd September 1874, No. 179,⁽²⁾ the Governor-General in Council directed that all Justices of the Peace within the territories specified in the

(1) See notes to sec. 458 of the Criminal Procedure Code, 1882 (Agnew and Henderson's edition) and *Gazette of India*, 1874, p. 485.

(2) *Gazette of India*, 1874, p. 486. See Agnew and Henderson's Criminal Procedure Code, 1882, notes to sec. 458.

preceding notification should commit for trial to the High Courts respectively having jurisdiction under the said notification, such European British subjects being Christians as are required by Act X of 1872 to be committed to a High Court.

With regard to the law applicable to that Court it is provided in section 8 of the Extradition Act, XI of 1872, and also in section 8 of the Extradition Act, XXI of 1879, that the law relating to offences and to criminal procedure for the time being in force in British India shall, subject as to procedure to modifications by the Governor-General in Council, extend to all European British subjects in allied States and to all native Indian subjects of Her Majesty in any place beyond British India.

The matter then stands thus: Colonel Dobbs is a Justice of the Peace, and by section 6 of Act XI of 1872 and section 6 of Act XXI of 1879 he is invested with all the powers of a Magistrate of the first class. Under the notification of the Governor-General in Council, to which I have referred, he has the power of committing to this High Court, which by a similar notification is invested with original and appellate criminal jurisdiction over European British subjects in the district in which the Court in question is held; and, lastly, the Extradition Acts of 1872 and 1879 extend to European British subjects the criminal law of procedure in force in British India. I am of opinion that the effect of these various Acts and notifications is to render the Court of the Judicial Superintendent of Railways in His Highness the Nizam's dominions subordinate to the High Court in all criminal matters relating to European British subjects and that this High Court must deal with such cases as if they were cases arising in British India.

We may then consider the question as to the effect of the absence of a previous sanction for the proceedings against the prisoners; as if those proceedings had taken place before a Magistrate in British India.

The language of section 197 of the Criminal Procedure Code (X of 1882) is so strong in requiring a previous sanction that, in my opinion, if no such sanction has been obtained there is no jurisdiction; and I think Colonel Dobbs had no jurisdiction to

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commit this case. Section 532 of the Criminal Procedure Code, however, authorizes the High Court to accept an irregular commitment and to proceed with the trial if it considers the accused has not been injured thereby, unless before the commitment objection was made to the jurisdiction of the Magistrate which was not the case here. I am of opinion that the commitment in this case was an irregular commitment, but that the Judge presiding in the Court of Criminal Sessions to which the prisoners have been committed has power in his discretion under the provisions of section 532 of the Code to accept the commitment and to proceed with the trial.

BAYLEY, J.—In deciding the question now before us we have first to ascertain the constitution and authority of the court by which the prisoners have been committed for trial, and the relation of that court to the High Court of Bombay. The court presided over by the Judicial Superintendent of Railways within His Highness the Nizam's dominions appears to have been established in 1864, and in that year a series of rules for its guidance was drawn up and sanctioned by the Government of India. The first of these rules declares that the jurisdiction of the Judicial Superintendent of Railways extends over all persons, European and Native British subjects or otherwise, employed upon the railways within His Highness the Nizam's dominions, and over all servants and others in their employ; and that he is to take cognizance of all offences committed by or charges against such persons regarding matters cognizable by a Magistrate. The second rule declares that he holds a commission as Justice of the Peace from the Supreme Court of Bombay and is vested with the full powers of a Magistrate by the Governor-General.

By the Statute 37 Geo. III. c. 142. s. 10, European British subjects committing offences in Native States were made liable to the jurisdiction of the Supreme Courts.

The third section of Statute 28 and 29 Vic. cap. 15 empowered the Governor-General in Council by order from time to time to authorize and empower any High Court in India to exercise all or any portion of its jurisdiction and powers within any such portion of Her Majesty's dominions in India, not included within the limits of the Presidency for which such High Court was established, as

the Governor-General in Council may from time to time determine, and to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the princes and States of India in alliance with Her Majesty, as the said Governor-General in Council may, in manner aforesaid, from time to time determine. In pursuance of the powers vested in him by that statute, a notification was issued by the Governor General in Council, dated the 23rd September 1874,⁽¹⁾ giving the High Court of Bombay original and appellate criminal jurisdiction over European British subjects of Her Majesty being Christians resident in the Native States, territories, and chiefships mentioned in a list appended to the notification, and in that list we find the Hyderabad Assigned Districts and also Hyderabad excepting the assigned districts. By a subsequent notification in exercise of the powers vested in him by section 6 of the Extradition Act XI of 1872 the Governor General in Council directed that all Justices of the Peace within the States, territories, and chiefships specified in the preceding notification shall commit for trial to the High Courts respectively, having jurisdiction under the said notification, such European British subjects as are required by Act X of 1872 (the Criminal Procedure Code then in force in British India) to be committed to a High Court. It is clear, therefore, that the Judicial Superintendent of Railways has power to commit prisoners for trial to the High Court of Bombay and that this Court has jurisdiction to try them.

But a further question has to be considered, *viz.* what is the law to be administered by the Judicial Superintendent of Railways and by which he is to be guided in his procedure? The point in the present case is whether the proceedings before the Magistrate are not invalid by reason of the non-observance of the provisions of section 197 of the Criminal Procedure Code (X of 1882) now in force in British India; and we have, therefore, to determine whether or not this Code is applicable to a court situated in the territories of His Highness the Nizam.

Section 8 of the Extradition Act XI of 1872 declares that the law relating to offences and to Criminal Procedure for the time

(1) See Agnew and Henderson's Criminal Procedure Code, p. 334 notes to sec. 458, and see *Gazette of India*, 1874, p. 485.

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being in force in British India shall, subject as to procedure to such notification as the Governor General in Council from time to time directs, extend to all British subjects, European and Native, in Native States. That Act has been repealed by the Extradition Act XXI of 1879, but section 8 of this later Act is to the same effect. The principle of these enactments is not new. Mr. Justice Story says⁽¹⁾: "Every nation has hitherto assumed it as clear that it possesses the right to regulate and govern its own native-born subjects everywhere, and, consequently, that its laws extend to and bind subjects at all time and in all places. This is commonly adduced as a consequence of what is called natural allegiance, that is of allegiance to the Government of the territory of a man's birth." We must, therefore, hold, having regard to the authorities I have referred to, that, for all purposes whether as to the offence charged or the procedure to be followed the law applicable in the case of the prisoner Morton is the law which would be applicable, if he was a resident within the Presidency of Bombay.

The Codes of Criminal Procedure have been framed so as to give European British subjects the benefit of the law both as to offences and procedure which is administered by the High Courts of British India. Section 79 of the Code of 1872 gave them a right of appeal to the High Court from a conviction by a competent Magistrate; and section 81 of the same Code gave them a right to apply to the High Court, if detained in custody by any person (his Lordship read the section). In the present Code (X of 1882), sections 408 and 416 and 456 preserve to European British subjects the same rights which they had under the Code of 1872, and lastly, section 463 provides in general terms that criminal proceedings against European British subjects before a Court of Sessions and High Court shall, except as otherwise expressly provided, be conducted according to the provisions of the Code. It is clear, I think, that it was the intention of the Legislature that European British subjects although resident within the territories of Native States should be subject to the same law in every respect as European British subjects residing in the mofussil of any of the Presidencies of India.

(1) Story's Conflict of Laws, para 21.

That being so, then, we come to the question now raised on behalf of the prisoner Morton, *viz.* whether the proceedings against him before the Judicial Superintendent of Railways are valid under section 197 of the Code, and whether this Court can proceed to try him. Previously to the enactment of the present Code the Act applicable to this Court was the High Court's Criminal Procedure Act X of 1875, and the section which required a sanction in cases like the present was section 132. That section expressly provided that "the sanction must be given before the commencement of the proceedings." Section 197 of the present Code requires "the previous sanction of the Government." I am unable to see any distinction in the language used in the two sections, and I can discover in the later Code of 1882 no indication that the Legislature intended to relax the strictness of the rule clearly laid down in the Act of 1875. In this case "the previous sanction of the Government" for the proceedings against Morton was not obtained. He was committed on the 27th September at the termination of the proceedings before Colonel Dobbs, which lasted a considerable time. The sanction was not obtained until the 12th November, and I am of opinion that under these circumstances all the proceedings against him were illegal and without jurisdiction. The case of *Gahan v. Lafitte*⁽¹⁾ cited in *Reg. v. Rámá bin Gopál*⁽²⁾ is strong authority to show that a sanction subsequently obtained cannot ratify illegal proceedings.

The prosecution, however, rely on section 532 of the Code. That section corresponds with section 25 of Act X of 1875, the language of which is almost the same. Probably the commencement of section 532 refers to the magistrates mentioned in sections 36 and 37, but I think the section is not limited in its operation only to such magistrates. It is in my opinion applicable to this case, and under its provisions the Judge presiding at the Criminal Sessions of the High Court may accept the commitment of the prisoner if it considers that he has not been injured.

In order to elude the difficulty arising from the absence of a previous sanction of Government for the proceedings before the Magistrate, counsel for the prosecution has framed a number of

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(1) 3 Moore's P. C. Ca. 332.

(2) 1 Bom. H. C. Rep. 107.

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charges against the prisoner Morton in all respects similar to the charges drawn by the Clerk of the Crown, for which the sanction of the Advocate General has been obtained; and it is contended that the prisoner might be tried upon these charges under clause 24 of the Letters Patent, 1865. That clause is as follows: (his Lordship read the clause). Now under that clause charges can only be preferred by the Advocate-General against persons residing "within the jurisdiction of a Court now subject to the superintendence of the High Court." I do not think that the Court of the Judicial Superintendent of Railways at Secunderabad is subject to the superintendence of this Court. The rules that have been referred to as published by the Government of India for the guidance of the Judicial Superintendent show that the Resident at Hyderabad is the authority which exercises superintending power over that Court, and it is clear, I think, that it is only with regard to European British subjects which may be brought before the Judicial Superintendent that this Court has any power at all except where, as in this case, native prisoners may be committed for trial under section 214 of the Code. I am of opinion, therefore, that the prisoner could not be tried upon the charges preferred by the Advocate General.

SCOTT, J.—I concur.

SARGENT, C. J.—The result is that the trial of the prisoner Morton may proceed, if the presiding Judge considers that the accused has not been injured by the irregularity that has occurred. If he decides to proceed with the trial of prisoner No. 1, then the second prisoner Moorteza Ali may also be tried, but if the commitment of Morton be quashed the commitment of Moorteza Ali must be quashed also.

Attorneys for the prosecution.—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for prisoner Morton.—Messrs. *Payne, Gilbert, and Sayani.*

Attorneys for prisoner Moorteza Ali.—Messrs. *Tobin and Rough-
ton.*