

vatan against any injurious claim and he can register the plaintiff as a vatandárs. He has not, it seems, done either. In these circumstances, the Court below must consider whether execution can proceed on the present application, and the Collector whether he can prevent it, and, if he can, whether he ought to do so. We therefore reverse the decree, and remand the case for re-trial and new decree, awarding costs.

Decree reversed and case remanded.

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REVISIONAL CRIMINAL.

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

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June 20.

Jurisdiction of High Court—European, British subjects in Native States—Law applicable to British subjects in Native States—Cantonment Magistrate's Court at Secunderabad—Power of High Court to transfer for trial a case pending in Cantonment Magistrate's Court—The Code of Criminal Procedure, Act X of 1882, Sec. 526—Act III of 1884, Sec. 11.

Act XXI of 1879, section 8 (which corresponds with section 8 of Act XI of 1872 now repealed), extends to all British subjects, European or Native, in Native States in alliance with Her Majesty the law relating to offences and criminal procedure for the time being in British India. The Code of Criminal Procedure (Act X of 1882), with the amendments introduced by Act III of 1884, is thus, by virtue of that section, applicable to such British subjects, Native or European.

The High Court of Bombay having been vested by notification of the Governor General of India in Council, No. 178 of 23rd September, 1874, with original and appellate criminal jurisdiction over European British subjects, being Christians, resident, amongst other places, at Secunderabad, outside the Presidency of Bombay and within the territories of His Highness the Nizám of Hyderabad, the Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of section 526 of the Code of Criminal Procedure, Act X of 1882, as amended by Act III of 1884, sec. 11 : and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any criminal Court of equal or superior jurisdiction.

The High Court by an order under section 526 of the Criminal Procedure Code (Act X of 1882) transferred the present case of defamation from the Court of the Cantonment Magistrate at Secunderabad to the High Court for trial, on the ground that no machinery for a trial by jury existed at Secunderabad.

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THIS was an application under section 526 of the Code of Criminal Procedure, Act X of 1882, amended by Act III of 1884.

The petitioners stated that they were European British subjects residing at Chadarghát, within the dominions of His Highness the Nizám of Hyderabad, but without the limits of the Residency Bázár at Secunderabad, wherein Captain Thornton, Cantonment Magistrate of Secunderabad, held his court and exercised certain criminal jurisdiction; that the Residency Bázár was a place beyond the limits of British India; that the petitioners were subject to the original and appellate criminal jurisdiction of the High Court of Bombay under the terms of a notification of the Governor General of India in Council, No. 178⁽¹⁾ dated 23rd September 1874, issued in the exercise of the powers conferred by 28 and 29 Vic., cap. 15, sec. 3. The petitioners further stated that on the 21st May, 1885, one Major Neville, Commander of His Highness the Nizám's Regular Troops, lodged a complaint in the said Cantonment Magistrate's Court, charging the petitioners with having committed offences punishable under sections 501, 502 and 503 of the Indian Penal Code, by publishing a certain article in a newspaper, called *The Telegraph*, published at Secunderabad in its issue on the 8th of May, 1885, of which newspaper the petitioners were proprietors, managers, printers, and publishers; that the said Cantonment Magistrate had directed warrants to be issued against the petitioners, and caused the same to be executed; that the petitioners, having been arrested under the said warrants, had surrendered themselves under protest, and were released subsequently on bail; that on the 10th June, 1885, the petitioners had appeared before the said Magistrate and formally protested against his jurisdiction, and further contended that, if it should be held that he had jurisdiction, they should be dealt with as European British subjects and tried by jury; that they should be allowed an opportunity of moving the High Court of Bombay for a transfer of the case to that Court, or to such other Court as might be ordered, on the ground that an impartial trial could not be had in the said Magistrate's Court; that the said Magis-

⁽¹⁾ See *Gazette of India*, 1874, p. 483, and see *Prinsep's Code of Criminal Procedure*, 1882 (6th ed.), p. 428.

trate held that he had jurisdiction to try the petitioners, and that they were not entitled to be tried by a jury, the provisions of Act III of 1884 not having been extended to the Cantonment limits of Secunderabad, though the Criminal Procedure Code (X of 1882) had been so extended, and directed that the case should proceed; that the said Cantonment Magistrate had, and exercised, the power of District Magistrate as provided by the said Code of Criminal Procedure; that the petitioners had submitted that Act III of 1884, being an Act amending the Criminal Procedure Code (Act X of 1882), applied to the said Magistrate's Court, and claimed to be tried by a jury, and prayed that they might be allowed an opportunity of submitting their contention to the High Court, and that ultimately the Magistrate allowed the case to stand over for this purpose.

The petition, after stating the circumstances out of which the case had arisen, proceeded as follows:—

“Your petitioners are advised that, under the circumstances of the case, the Cantonment Magistrate had no jurisdiction to entertain the said charges, and that this Honourable Court alone has original criminal jurisdiction over them; that the said sections of the Penal Code have no application to your petitioners' case; and that, even if the said Magistrate has jurisdiction in the said case, the same ought to be tried before a jury; and your petitioners further submit that the said case should be transferred from the Court of the said Magistrate to this Honourable Court, on the ground that it involves nice questions of law and of exceptional difficulty.

“Your petitioners, therefore, pray as follows:—

“(1). That this Honourable Court will be pleased to send for the papers and proceedings in the said case, and quash the decision and order of the said Cantonment Magistrate of Secunderabad, directing that the said case should be proceeded with before him, the said Magistrate having no jurisdiction to try your petitioners on the charge aforesaid.

“(2). That, in the event of this Honourable Court holding that the said Magistrate has jurisdiction to try your petitioners on

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the said charge, this Honourable Court will be pleased to direct that the said case be transferred to, and be tried before, itself.

“(3). That, in the event of this Honourable Court holding that the said Magistrate has jurisdiction to try your petitioners on the said charge and declining to order the transfer of the said case as aforesaid, this Honourable Court will be pleased to quash the order of the said Magistrate, declining to allow your petitioners to be dealt with as European British subjects, under the provisions of the Criminal Procedure Code as amended by Act III of 1884, and to direct that your petitioners be tried before a jury under the provision of the said Code.

“(4). That this Honourable Court may be pleased to make such further or other orders in the case as the justice of the case may require.”

Macpherson and Anderson for the petitioners.

Inverarity and Vicdji, contra.

Macpherson.—The petitioners are Christian European British subjects; and they apply for an order transferring to this High Court, for trial, the case now pending against them in the Court of the Cantonment Magistrate of Secunderabad, which is situate outside the limits of British India and within the dominions of His Highness the Nizám of Hyderabad.

The petitioners are charged under the Penal Code with having published defamatory matter within the Cantonment of Secunderabad in *The Telegraph Newspaper*, of which they are proprietors, printers, and publishers. They reside at Chadargát, a suburb of the city of Hyderabad, but outside the Cantonment limits of Secunderabad.

Our application is made under clause (a) of section 526 of the Criminal Procedure Code (Act X of 1882) and under clause (e) of section 11 of Act III of 1884. The first question is, whether this High Court has jurisdiction to entertain this application; and that depends on whether the Cantonment Magistrate's Court, in which the case is pending, is subordinate to this High Court.

The Cantonment Magistrate (Captain Thornton) was appointed by a Government notification a Justice of the Peace. Power to

make such appointment beyond the limits of British India is given to the Governor General in Council by section 6 of Act XXI of 1879, and by that section a Justice of the Peace so appointed has, in proceedings against European British subjects, all the powers conferred by the Criminal Procedure Code upon Magistrates of the first class who are Justices of the Peace and European British subjects. The petitioners are admittedly European British subjects residing in the dominions of the Nizám; and by section 8 of Act XXI of 1879 the law of British India, both as to offences and as to criminal procedure, is made applicable to them. In the *Queen Empress v. Morton*⁽¹⁾, Bayley, J., said, that it was clearly the intention of the Legislature that the European British subjects resident in Native States should be subject to the same law in all respects as those residing in the Mofussil of any Presidency in India.

[SARGENT, C. J.—Section 8 of Act XXI of 1879 makes the same law applicable also to Native Indian subjects of Her Majesty beyond the limits of British India : so that it would seem that, if the High Court is to exercise revisional jurisdiction over one class, it must also do so on the other.]

Yes, that is so. By a Government notification dated the 7th May, 1884, the Cantonments Act (III of 1880) was extended to Secunderabad, and by clause 3 (b) of that notification the Cantonment Magistrate is given the powers of a District Magistrate as defined by the Criminal Procedure Code. Captain Thornton, therefore, is a District Magistrate and a Justice of the Peace, and the High Court can exercise over him all the power it can exercise over any District Magistrate and Justice of the Peace in British India.

By two Government notifications, Nos. 1203 and 178 J, issued under Stat. 28 and 29 Vic., cap. 15, sec. 3, and dated 23rd September 1874⁽²⁾, the High Court of Bombay has original and appellate criminal jurisdiction over European British subjects in the Hyderabad State. Revisional jurisdiction is included in the

(1) *Supra*, p. 288 ; see p. 298.

(2) See *Gazette of India*, 1874, pp. 484-485, and see Criminal Procedure Code (X of 1882), notes to section 458 (Prinsep's edition).

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appellate jurisdiction thus conferred upon this High Court. See also clause 28 of Letters Patent, 1865. A Court with such jurisdiction must have the power to transfer under section 256 of the Code. The Magistrate's Court is subordinate to the High Court.

The next question is, whether the accused are entitled to be tried by a jury. The Magistrate has refused us a trial by jury. We contend that under the Criminal Procedure Code (X of 1882) and Act III of 1882 we have a right to claim a jury.

Anderson on the same side.—The original and appellate jurisdiction of the High Court, which by Government notification was extended to Hyderabad, was its jurisdiction under the Letters Patent, 1865, and that jurisdiction includes the power to transfer: see clause 29 of the Letters Patent, 1865.

[BAYLEY, J., referred to Stat. 37 Geo. III, c. 142, sec. 10.]

Inverarity, contra.—The original and appellate jurisdiction of this Court, which has been extended to Hyderabad, does not include power of reference and revision, or the power to transfer a case. The latter powers are quite distinct from the former, and are dealt with separately in the Letters Patent, 1865: see clauses 28 and 29. Clauses 29 and 30 show clearly that a Court of appeal is not necessarily a Court of reference and revision. The Criminal Procedure Code (X of 1882) also shows that these powers are distinct.

Stat. 28 and 29 Vic., cap. 15, sec. 3, and Stat. 37 Geo. III, cap. 147, gives jurisdiction over persons, not over Courts.

[BAYLEY, J.—An appeal must mean an appeal from some Court.]

It does not appear what Courts were referred to. But, admitting that Stat. 28 and 29 Vic., cap. 15, sec. 3, enables the Governor General by notification to authorize the High Court to exercise its jurisdiction at Hyderabad, the notification relied on, relates only to Christians, and it does not appear that the petitioners are Christians. Assuming, however, that they are Christians, and that the notification is in accordance with the statute, its effect is merely to permit the High Court to exercise at Secunderabad the powers given to it by clauses 22 and 27 of the Letters Patent, 1865, but not the powers given by clauses 28 and 29. Again,

the power to send for proceedings cannot be exercised until there has been a trial.

Section 8 of Act XXI of 1879 only gives power to Magistrates in Native States to apply, in cases of European British subjects, the Indian Penal Code and Criminal Procedure Code, but does not give this Court a jurisdiction over those Magistrates. The Indian Legislature cannot enlarge the jurisdiction of the High Court. By the Stat. 28 and 29 Vic., cap. 15, the Governor General was enabled to give jurisdiction by notification. It cannot be given by enactment of the Indian Legislature.

Macpherson in reply.—The Court will assume that Act XXI of 1879 is valid and in force. Section 8 of that Act makes section 526 of the Criminal Procedure Code (X of 1882) applicable. The notification of 1874 further makes clause 29 of the Letters Patent applicable.

Cur. adv. vult.

June 29. SARGENT, C. J.—This is an application by two persons, alleging themselves to be European British subjects, residing at Chadarghát, within the dominions of the Nizám, and asking that the criminal proceedings, which have been commenced against them for libel in the Cantonment Magistrate's Court at Secunderabad, should be removed to this Court under section 526 of the Criminal Procedure Code (Act X of 1882) as amended by Act III of 1884. To decide this question, it becomes necessary to ascertain with precision the jurisdiction of the Courts established by the Governor General in Council in the Nizám's dominions, as well as the jurisdiction exercised by this High Court over those Courts.

First, I will refer to the Foreign Jurisdiction and Extradition Act, XI of 1872. The object of that Act, as shown by the preamble, was to remove doubts which had arisen as to how far the exercise of power and jurisdiction by the Governor General, beyond the limits of British India, and the application thereof, was controlled by, and dependent on, the laws of British India. The Governor General, by section 4, is enabled to exercise any power or jurisdiction which he may have in any country or place beyond British India, and to delegate the same to any servant of

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the British Government in such manner, or to such extent, as the Governor General in Council from time to time thinks fit; and by section 8 of the Act it is provided that the law relating to offences and criminal procedure *for the time being* in British India as to procedure, &c., extends to all British subjects, European or Native, in Native States.

In 1874, by notification of the Governor General in Council⁽¹⁾ made in exercise of powers given him by Stat. 28 and 29 Vic., cap. 15, it was directed that original and appellate jurisdiction over European British subjects resident in the States therein enumerated should be exercised by the High Courts, and jurisdiction was particularly given to this High Court in respect of European British subjects resident in Hyderabad, where the petitioners reside. The Foreign Jurisdiction Act of 1872 was repealed by Act XXI of 1879, but its provisions relating to European British subjects resident in Native States remained unaltered; and by section 8 of the Act of 1879 there is the same provision, that the law *for the time being* in British India, relating to offences and to criminal procedure, should extend to European British subjects in the dominions of Princes and States in India in alliance with Her Majesty: so that after that Act was passed, as before, the law relating to offences and criminal procedure, as applied to European British subjects in Native States to be administered by Courts exercising the powers conferred on them by the Governor General was to be the law *for the time being* in British India.

By the passing of Act III of 1884, certain amendments, in respect of European British subjects, were introduced into the Code of Criminal Procedure Act X of 1882; and, apparently, with the view of giving the Cantonment Magistrate the greater powers which were by the above Act conferred on District Magistrates with reference to European British subjects, the Cantonment Magistrate has recently been invested with the powers of a District Magistrate over European British subjects, having up to that time been, as we understand, a Justice of the Peace and a Magistrate with first class powers.

(1) See *Gazette of India*, 1874, pp. 484 and 485; and see Prinsep's *Criminal Procedure Code* (6th ed.), p. 428.

The first question, therefore, for determination is, whether the power of transferring a case to itself is included in the original and appellate jurisdiction which is vested in this Court by the notification of 1874. It was said that that power is a special one, not belonging to either jurisdiction, which is confined by clause 23 of the Letters Patent, 1865, in the case of original jurisdiction, to the trial of persons brought before it in the due course of law, and in the case of the appellate jurisdiction by clause 27 to trying appeals from Courts in such cases as are subject to appeal by virtue of any law in force; and that the power of transfer given by clause 29 is not associated with either jurisdiction. It is to be remarked, however, that, by section 15 of the Act for establishing High Courts of Judicature (Stat. 24 and 25 Vic., cap. 104) the power of transfer from one Court to any other of equal or superior jurisdiction was intended to be given over all Courts subject to the appellate jurisdiction of the High Courts, as being apparently an incident of its superintendence over such Courts. But in any case we think that, having regard to section 8 of the Foreign Jurisdiction Act XI of 1872, which was the Act in force at the date of the notification in question, we should best give effect to the intention of the Governor General in Council, by holding that the appellate jurisdiction of the High Court, as contemplated by that notification, included all powers which the High Court possessed in 1874 over Courts in India from which it was a Court of appeal, which undoubtedly included the power of transfer over such Courts as being subordinate to it given by section 64 of the Criminal Procedure Code of 1872—a power which is still in force in a more detailed and elaborate form in section 526 of the present Code. Now, this Court is a Court of appeal from the Cantonment Magistrate as a Justice of the Peace, with the powers of a First Class Magistrate, or as a District Magistrate in the case of European British subjects, as shown by section 408 of the Criminal Procedure Code, clause (b), which gives to a European British subject the option of appeal to the High Court from a conviction by a Magistrate of the First Class or a District Magistrate. I am, therefore, of opinion, that this Court has the power, in the case of a European British subject, of transferring to this Court

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a case from the Cantonment Magistrate acting either as a Justice of the Peace and as a First Class Magistrate, or as a District Magistrate, with the increased powers given to him by Act III of 1884; and no one can doubt, I think, that it is of the highest importance that it should possess such a power.

BAYLEY, J.—I am entirely of the same opinion, and concur fully with the Chief Justice.

SCOTT, J.—I fully concur in the opinion of the Chief Justice. But this is a matter of considerable importance, and it is useful to accumulate additional arguments in favour of our decision. I, therefore, add a few supplementary remarks to the learned judgment just pronounced. The power of transferring suits from an inferior Court before judgment, in case of the exercise of either an excess of jurisdiction, or an error of jurisdiction, or any other just ground, was given to the late Supreme Court by its Charter (section 10), which invested that Court with the jurisdiction and authority of the Court of King's Bench. This power has been considered so essential to the proper administration of justice, that it has been given to all Colonial Courts; and it has been held that even a privative clause in a Statute does not absolutely deprive the superior Court of it in case of a manifest defect of jurisdiction in the lower tribunal—*Colonial Bank of Australia v. Willan*⁽¹⁾. It was expressly retained by section 15 of the High Court Charter Act (24 and 25 Vic., cap. 104), and by that section a general power of superintendence, including transfer, was given in explicit terms to the High Court "over all Courts subject to its appellate jurisdiction". The question remains, whether it is applicable in the present case. By 28 Vic., cap. 15, sec. 3, it is left to the Governor General in Council to determine the jurisdiction to be exercised over Christian British subjects in Native States, such as Hyderabad. His Excellency could, of course, have created any special limited jurisdiction he thought proper. But by notification in 1874⁽²⁾ the Governor General in Council conferred on the High Court of Bombay, original and appellate jurisdiction over Christian British subjects in Hyderabad.

⁽¹⁾L. R., 5 P. C., p. 442.

⁽²⁾See *Gazette of India*, 1874, pp. 484 and 485; and see Prinsep's *Criminal Procedure Code* (6th ed.), p. 428.

A doubt was raised in the course of argument, whether the words "appellate jurisdiction" here used, included the superintending power of transfer. It seems to me, in consideration of the beneficent nature of that power and the leaning of the authorities in its favour, that such a doubt ought not to be determined in the restrictive sense if the wider construction can reasonably be applied. If the Legislature (or rather the Governor General in Council) intended to restrict the jurisdiction of the High Court given to it as an appellate Court by section 15 of its Charter, I think formal and explicit expression would have been given to that intention. The Legislature cannot have intended that a special and limited jurisdiction should be inferred from words that have already received an authoritative interpretation in a wider sense. I may add, that the decision of a recent Full Bench supports this view—*Shiva Nathaji v. Joma Káshináth*⁽¹⁾. In the course of their judgment the Court said: "The power of control is almost essential to the conception of a Supreme Court, and cannot be divested except by express statutory provisions." It may also be noticed as a further argument, that if the High Court were not to exercise this power, which appears to be almost indispensable to the proper administration of justice, no other authority exists by which it would be exercised. Suppose, for instance, this Court decides that Act III of 1884 is applicable to British subjects in Hyderabad, and the inferior Court there refuses to admit the applicability. In that case, if the High Court had no power of transfer, a British subject would have to submit to trial there before a Court without jurisdiction, the decision would have to be reversed on appeal, and sent back for retrial, before he could obtain his statutory right to a jury trial.

I may add one further argument. The preamble of an Act has been called a key to its understanding, and may properly be consulted in order to fix the scope or limit of a Statute. Now, the preamble to the Foreign Jurisdiction Act of 1879, after reciting that the Governor General has by treaty obtained power and jurisdiction beyond the limits of British India, goes on to

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state the object of the Act to be the settlement of doubts as to how far such power and jurisdiction are controlled by, and depend on, the laws of British India. Reading section 8 by the light of this preamble, it is clear that all questions of jurisdiction concerning British subjects in Native States must be settled by reference to the Indian Code of Procedure. This section removes all remaining doubt, if any remains, on the question we have to decide; and I am of opinion that, although the notification of 1874 is silent as to the meaning it intended to give to the words "appellate jurisdiction," the construction given them by the High Court Charter must be applied.

I have nothing more to add to the judgment of the learned Chief Justice, with which, I have already said, I fully agree.

July 1, 1885. *Macpherson*.—The jurisdiction question having been decided in my favour, I now move for the transfer of the case to this Court, or for an order directing the Cantonment Magistrate to commit the case to this Court for trial. I say a fair and impartial trial cannot be had in that Court; and, secondly, that it is expedient for the ends of justice that the case should be tried here. Captain Thornton is a District Magistrate, and cannot divest himself of that capacity, and say he is merely a Magistrate of the first class. The case must, therefore, be tried by a jury, and there is no machinery for getting a jury at Secunderabad. It may be doubted whether European British subjects, supposing they are available at Secunderabad, are bound to obey the command to serve on the jury, they being beyond the limits of British India. Captain Thornton never having tried a jury case before, it is not desirable that this case should be tried by him. The case having excited considerable interest in Secunderabad, it is not probable that unprejudiced jurors could be had there.

Inverarity.—If no machinery exists at present to get a jury, it could be created within a week. There is a large European population at Secunderabad from which the First Assistant Resident, who is a Sessions Judge, with the assistance of some officer appointed by the Resident could take steps to prepare a jury list and empanel a proper jury. The case may have excited

considerable local feeling ; but there is nothing to show that that feeling is against the accused, which alone can be a ground for a transfer.

SARGENT, C. J.—We think that the application of the petitioners to have the trial removed from the Court of the Cantonment Magistrate to this Court should be granted, although we see no reason to think that, if the case were tried at Secunderabad, there would not be a fair and impartial trial. If a trial by jury were to take place there, the jurors would not be military men, who are exempt from service on the jury by the law ; there is a considerable body of Europeans in civil life from which the jury would be drawn, and there is no reason to suppose that such a jury would in any way be prepossessed in favour of Major Neville. On the contrary they would probably belong socially to the same class as the petitioners. If, therefore, the machinery existed at Secunderabad for a trial by jury, there would be no reason for removing the case.

It would appear, however, that no such machinery does exist. The petitioners telegraphed to Secunderabad for information on the point, and have received a reply that there was none. The other side have produced no evidence to the contrary, or adduced any reasons for supposing that a jury can be empannelled at Secunderabad. Before Act III of 1884 there was no need for trial by jury at Secunderabad, and we have no reason to doubt that there is as yet no list from which a jury could be empannelled. We are, accordingly, of opinion that the case should be removed, as a matter of necessity, to the High Court at Bombay.

We direct that an order under section 526 of the Code of Criminal Procedure as amended by section 11 of Act III of 1884 should go down, directing the Cantonment Magistrate to commit the case to this Court on the 9th of this month, when the parties will appear before him, and to transmit here all the papers belonging to the case.

Order accordingly.

Attorneys for the prosecution.—Messrs. *Macfarlane and Edgelow.*

Attorneys for the petitioners (accused).—Messrs. *Jefferson, Bkâishankar and Dinsha.*

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