

issue an order to the village officers to give effect thereto. And s. 18 (1) provides that the party to whom the Mamlatdar shall give immediate possession shall continue in possession until ousted by a decree or order of a civil Court. But if the party, against whom the Mamlatdar's order is passed, can be allowed to successfully resist the effect of that order, then the Mamlatdar's decision may be merely a *brutum fulmen*. It must be presumed that, when the law provides that the Mamlatdar [160] shall issue an order to the village officers to give effect to his decision, the law implies that power is given to the Mamlatdar, to see that effect is really given to his decision.

It has already been ruled by this Court (*Baji Dev v. Sadashiv Bhaishankar* (2) that a Mamlatdar granting immediate possession under the Mamlatdars' Courts Act (then V of 1864) has the power to direct the breaking open of a door of a house when it may be necessary for the purpose of giving effect to his order. In the same way and for the same purpose he may use force to eject the person against whom the order has been passed and to give effect to his decision.

Order reversed.

14 B. 160.

APPELLATE CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Jardine.

In re JOB SOLOMON.* [20th July, 1889.]

Criminal Procedure Code (Act X of 1882), ss. 452, 408, 404—Appeal—Right of appeal to the High Court by a person other than a European British subject jointly tried with such subject—Hyderabad—Jurisdiction of High Court of Bombay over European British subjects at Hyderabad.

A person, not being a European British subject, who is tried before a District Magistrate jointly with a European British subject, cannot claim, under s. 452 of the Code of Criminal Procedure (Act X of 1882), the right of appeal to the High Court which is exclusively reserved to such European British subject.

[D., L.B.R. (1893—1900) 516 (518).]

THIS was an appeal from the conviction and sentence passed by L. S. Newmarch, acting Cantonment Magistrate and District Magistrate of Secunderabad.

The accused Job Solomon was charged along with one Clive Durant with defamation in respect of certain matter printed and published in the

* Criminal Appeal, No. 152 of 1889.

(1) Section 18. The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a civil Court :

Provided that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in the civil Court mesne profits for the time he may be kept out of possession of any property, or out of enjoyment of any use.

Provided further that in any subsequent suit or other proceeding in the ordinary civil Courts between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property, or the enjoyment of any use, shall not be held to be conclusive.

(2) 5 B. H. C. R. A. C. J. 158.

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14 B. 157.

1889 *Hyderabad Record*, a newspaper published in Hyderabad, in the dominions
 JULY 20. of his Highness the Nizam.

APPEL- Both the accused were British subjects of her Majesty resident in
 LATE Hyderabad. Solomon was a Eurasian, and Durant a European British
 CRIMINAL. subject. They were both tried jointly by L. S. Newmarch, [161]
 14 B. 160. Cantonment Magistrate and District Magistrate of Secunderabad, found
 guilty, and sentenced to undergo simple imprisonment.—Durant for four
 months, and Solomon for three months, together with a fine of Rs. 500.

Both appealed to the High Court. At the hearing of Solomon's appeal, the question arose as to whether he had a right of appeal to the High Court.

Branson (with him *S. M. Rele*), for Solomon :—I admit that Solomon is not a European British subject. I admit also that the law applicable to the present case is that laid down in the Code of Criminal Procedure. Solomon cannot, indeed, claim the benefit of proviso (b) to s. 408 of the Code; but, as he was tried jointly with a European British subject, he is entitled, under s. 452, to appeal to the High Court, just as his co-accused is entitled. The words of the section are wide enough to cover proceedings in appeal. The procedure there contemplated is not confined to trials only, but extends to appeals also.

JUDGMENT.

SCOTT, J.—This is an application by one Job Solomon for leave to appeal from a conviction passed by the Cantonment Magistrate of Secunderabad. The applicant is a British subject of Her Majesty, but, on his own statement in the proceedings, not an European British subject. He was accused jointly, and under s. 452 of the Code of Criminal Procedure tried jointly, with one Clive Durant, who is a European British subject.

By notification of the Governor-General in Council of 1874, issued in pursuance of 28 and 29 Viet., c. 15, s. 3, original and appellate jurisdiction was given to the High Court of Bombay in respect of European British subjects resident in Hyderabad. Under s. 8 of the Foreign Jurisdiction Act of 1879, the law of British India is extended to all subjects of Her Majesty, native or European, in Native States of India. This case is, therefore, governed by the Criminal Procedure Code. The right of appeal direct to the High Court is expressly given to European British subjects by s. 408 of the Code of Criminal Procedure. But that right of direct appeal here is not given to any other person. In all other cases the appeal is to the Sessions Judge from a Magistrate. Section 404 says that no appeal [162] shall lie except as provided by the Code or other law in force. Under such circumstances can a person, not a European British subject, claim the right reserved to a European British subject, because he elected to be tried jointly with a person of that class? Durant has the right of direct appeal; does Solomon possess it also? Does the fact of the joint trial carry with it, by implication, the right of appeal? We are of opinion that right is not so given by implication. The contrary opinion would be in distinct contradiction of s. 404. Under s. 8 of the Foreign Jurisdiction Act XXI of 1879 the criminal law and criminal procedure of British India is extended to all subjects, native or European, of Her Majesty in Native States. The applicant, under that Code, has only the right of appeal he would have had, if he had been tried separately,—that is to say, an appeal to the Sessions Judge s. 408). It is not necessary for us now to decide to what appellate authority the applicant can apply.

The current India list states that the First Assistant to the Resident is a judicial officer next in grade to the Cantonment Magistrate, and is vested with the powers of a Sessions Judge. If that be so, the appeal from the Cantonment Magistrate, under the Criminal Procedure Code, s. 408, applicable under s. 8 of Act XXI of 1879, would lie to the First Assistant. But we are not called upon to decide that question judicially. Our only decision now is that the appeal does not lie to this Court, and the application must be rejected.

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JARDINE, J.—The appellant, Job Solomon, was tried and convicted by the Cantonment Magistrate of Secunderabad on the verdict of a jury. The learned counsel for the appellant has stated that he was jointly tried with a European British subject, and that the Cantonment Magistrate held the trial in his jurisdiction as District Magistrate. No objection has been raised to the competency of the Magistrate to hold the trial. Although the point was raised, it has not been contended for Solomon that he is a European British subject, nor do the proceedings accompanying the petition of appeal show that he is, or that he claimed that *status*. Having regard to s. 8 of the Foreign Jurisdiction Act XXI of 1879, we may assume that Solomon was tried under the provisions of the Code of Criminal Procedure, [163] s. 451A, cl. 6, which extends to trials of European British subject by a District Magistrate, who is also a Justice of the Peace sitting with a jury, the procedure in jury trials before a Court of Sessions, and that this section has doubtless been taken by the Magistrate to extend s. 452 to this case and to empower him to try Solomon jointly with the European British subject, in the absence of any claim by Solomon to a separate trial. (See *Queen Empress v. Mc Carthy* (1).)

Assuming that Solomon is not a European British subject I am of opinion that this Court has no jurisdiction to admit his appeal. His counsel rested his argument on the Criminal Procedure Code, and has argued that the words "procedure on the trial shall be the same" in s. 452 of the Code of Criminal Procedure are intended to include the procedure as to appeal so as to allow the convicted person not an European British subject, but jointly tried with the European British subject, to appeal to the High Court, as the European British subject may, I do not think, on reading the whole section, that this was the intendment of the Legislature: at any rate it has not expressed this intention, and this would be a case of *quod voluit non dixit*. The Legislature has, moreover, spoken clearly in two other sections of the same Code. Section 408 deals with appeals from Magistrates. It says: "Any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Sessions." In this case, as shown by s. 416, this right applies to convictions in petty cases and on summary trials where other convicts are under ss. 413 and 414 debarred from appeal. By making this particular provision, the Legislature has excluded their application to other cases, according to the rule *expressio unius est exclusio alterius*. But were there room for any doubt, it would be cleared away by s. 404, which says "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force." I am of opinion, therefore, that Solomon is not entitled, under the Code of Criminal Procedure, to appeal to this Court.

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[164] The next question is, whether any other law gives this Court jurisdiction to admit his appeal. As pointed out in *Queen-Empress v. W. D. Edwards* (1), the 27th clause of the Amended Letters Patent of 1865 require us to "exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force." I am not aware of any law which confers on this Court an appellate criminal jurisdiction over persons, not European British subjects, convicted in the territories of the Nizam. The Act of Parliament 28 and 29 Vict., c. 15, s. 3 enables the Governor-General in Council to authorize and empower us to exercise all or any portion of the jurisdiction conferred by the Letters Patent "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 Governor-General in Council may, by order from time to time, determine. In pursuance of this Statute the Governor-General in Council has by a notification, No. 178 J., dated 23rd September 1874, (printed in both Prinsep's and Agnew's Code of Criminal Procedure under s. 458), conferred on this High Court of Judicature an appellate Criminal Jurisdiction over European British subjects of Her Majesty, being Christians, resident in the Native State of Hyderabad, excepting the Assigned Districts. No other order in Council or enactment (see *Thornton, v. Thornton* (2) has been shown us, which extends the appellate criminal jurisdiction of this High Court to persons in the Nizam's territories other than the persons described. In the absence of any averment or other reason to believe that Solomon is a European British subject and a Christian, I am of opinion that we have no jurisdiction to entertain his appeal, and that we must reject it.

Appeal rejected.

14 B. 165.

[165] REVISIONAL CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Jardine.

QUEEN-EMPRESS v. LAKHMIDAS MAKANDAS.* [25th July, 1889.]

Criminal Procedure Code (Act X of 1882), s. 144—Magistrate's authority to prohibit the public generally from giving caste-dinners—Notice.

Owing to the prevalence of cholera, the District Magistrate of Broach issued an order, in the form of a proclamation, under s. 144 of the Criminal Procedure Code (Act X of 1882), forbidding the public generally to give caste-dinners in the city. The order was posted in different quarters of the city, including the street in which the accused had his dwelling-house.

A few days after the promulgation of this order, the accused gave a feast in a private house to about 500 people of his caste. He was thereupon convicted of disobedience to an order duly promulgated by a public servant under s. 188, cl. (b), of the Indian Penal Code, (XLV of 1860) and sentenced to a fine Rs. 35.

Held, reversing the conviction and sentence, that the District Magistrate's order was, both in its substance and, its manner of publication, illegal, as being beyond the powers conferred by s. 144 of the Code of Criminal Procedure (Act X of 1882). The power of the Magistrate under that section is confined to the direction to a particular person to abstain from acts of a certain character, or to the public generally to abstain from similar acts when frequenting a *particular* place.

[R., 24 B. 527 (532) ; 17 A.W.N. 50.]

* Criminal Review No. 210 of 1889.