

But the appellant's pleader asks, how could the appellant know the number required? I answer that he had had from the date of his release to the date of his application for copy (nearly three months) to find out. The appellant says he had not funds, but if he had applied from the jail for a copy he would have received it without any cost. If he had applied for a copy within a few days of his conviction, I should have said that he had a right to claim a deduction of the whole time. I find that the appeal is presented out of time and therefore decline to receive it."

The prisoners applied to the High Court under the revisional sections of the Code of Criminal Procedure.

Baboo *Juggut Chunder Bannerjee*, and Baboo *Taruck Nath Dutt* for the applicants.

No one appeared for the Crown.

The opinion of the High Court was delivered by

MITTER, J.—We think that the appeal was within time and should have been registered. We accordingly direct it to be registered and heard by the Sessions Judge.

*Order reversed.*

## CRIMINAL REFERENCE.

*Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.*

QUEEN EMPRESS v. NGA THA MOUNG AND OTHERS.\*

*Burmah Courts—Transfer of Case—Criminal Procedure Code, s. 178—Reference to High Court—Burmah Courts Act (Act XVII of 1875) s. 80.*

The local Government has no power under s. 178 of the Code of Criminal Procedure to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but the local Government has the power to transfer a case from the District of Rangoon to the Sessions division of Pegu.

THIS was a reference under s. 80, cl. (b), of the Burmah Courts' Act (Act XVII of 1875) from the special Court constituted by that Act. The question referred was whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon. The facts of the case are fully set out in the opinions of the Judicial Commissioner of British Burmah,

\* Criminal Reference No. 1 and letter No. C. R. 9.1 from Registrar, Special Court of British Burmah, dated Rangoon, the 10th January 1884.

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Mr. Jardine, and of the Recorder of Rangoon, Mr. Egerton Allen, which are as follows :—

MR. JARDINE.—The prisoners in this case were prosecuted before a Magistrate having jurisdiction in the town of Rangoon, the town being a district in which the Recorder of Rangoon exercises the powers of a Court of Session under s. 60 of the Burmah Courts' Act of 1875. The same section declares that for the purposes of s. 64a of the Code of Criminal Procedure the Court of the Recorder shall be deemed to be a High Court, and s. 61 confers on the Recorder all the powers of a High Court under the Code of Criminal Procedure in respect to the proceedings of the Magistrates of the town.

Under s. 3 of the Criminal Procedure Code of 1882, the reference to s. 64a must be taken to be made to s. 527 of the same Code. In other respects s. 1 of the same Code preserves the special legislation of the Local Courts' Act where there is no specific provision to the contrary.

The Magistrate committed the prisoners for trial before the Recorder's Court. No doubt about the jurisdiction of the Recorder to hold the trial seems to have been suggested, and no reference was made to the Judicial Commissioner under s. 185, nor any proceeding taken to quash the commitment under s. 215.

The learned Recorder wrote to the Secretary to the Chief Commissioner to request that the local Government will be pleased, under the provisions of s. 178 of the Criminal Procedure Code, to direct the transfer of the cases to the Pegu Sessions division for trial by the Sessions Court of that division.

The order of the Chief Commissioner is contained in a letter of 20th September 1883 from his Secretary to the Recorder, directing that the cases be tried in the Sessions division of Pegu. Upon this the learned Recorder forwarded the Record to the Commissioner of Pegu who, under s. 85 of the Burmah Courts' Act, "is deemed to have the powers of a Sessions Judge." The Commissioner tried the prisoners in his Sessions Court sitting at Rangoon, the prisoners appealed to me as a Judicial Commissioner, and I admitted their appeals, and then referred them to the special Court for disposal, as I had doubts about the validity of the order of transfer and the jurisdiction of the Commissioner to determine the merits of the appeals.

I am of opinion that s. 178 does not deal with transfers of cases from one Court to another; a separate chapter 44 is given to such transfers. So far as the present case is concerned ss. 526 and 527 apply. Under s. 526 the High Court can only act for specific reasons, the power of transfer being evidently one which ought to be rarely exercised under s. 527, the equivalent of the old s. 64a. The order of the transfer must come from the Governor-General of India in Council.

Section 178 appears to me to allow the local Government to direct the trial of cases in a place outside the local jurisdiction of the trying Court, or in a separate portion of the local jurisdiction. For example, if the Com-

missioner of Arakan is directed by the Government under s. 10 of the Courts' Act to hold his Civil Court in Rangoon, the Government might also under s. 178 order the same officer to hold trial of Arakan criminal commitments at Rangoon. The same as to the Recorder's Court under s. 45 of the local Act. In this way I would try to reconcile s. 178 of the Criminal Procedure Code with ss. 70 and 77 of the local Act, and s. 527 of the Criminal Procedure Code. Section 77 gives the Chief Commissioner a power to transfer any criminal case pending in the Recorder's Court to the special Court, but not to any other Court, the principle of the law being apparently that the transfer shall not be to an inferior Court. The special Court is superior and the Commissioner's Court inferior in powers to the Recorder's Court.

I am bound to take notice of a construction of the local Act by Mr. R. Crosthwaite, Judicial Commissioner in 1880, when the Chief Commissioner passed an order under s. 59 of the local Act transferring to the Judicial Commissioner's Court a criminal case pending for trial in the Recorder's Court on a due commitment. At that time the Judicial Commissioner sat in a jurisdiction transferred from the Commissioner of Pegu and with the powers of a Sessions Judge. Mr. Crosthwaite held that s. 59 did not apply to criminal cases, and it does not seem to have occurred to either him or the local Government that s. 63 of the Criminal Procedure Code then in force (the equivalent of s. 178) was in any way relevant. The concluding part of Mr. Crosthwaite's judgment in that case (*Queen Empress v. Abdul*) explains his view of the effect of s. 60 of the Burmah Courts' Act, and as I am of the same opinion I quote the passage:—

"The last clause of s. 60 of the Act was apparently intended to provide for cases like the present as well as for others, for it enacts that for the purposes of s. 64a. of the Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court. The present case then may, under this section, be regarded for the purpose of s. 64a of the Criminal Procedure Code as pending before a High Court, and if it is necessary to transfer the case the Governor-General in Council can do so under s. 64a. The transfer cannot, perhaps, be made to the Judicial Commissioner because he cannot try criminal cases as a High Court, and the transfer must be made from one High Court to another High Court. But as to this I need give no opinion. There is, it seems to me, a remedy provided for difficulties of the present description by the last clause of s. 60, and if under that clause the Governor-General can only transfer the trial of a criminal case from the Court of the Recorder to a chartered High Court, it is very possible that the Legislature so intended that, and it did not intend that any Court other than a chartered High Court should exercise the jurisdiction over European British subjects conferred by the Act upon the Recorder.

"I am of opinion then that, as the terms of s. 59 plainly do not relate to the transfer of criminal trials, and that as the provisions of s. 60 give

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the Governor-General in Council the power to transfer criminal trials from the Recorder's Court where it is expedient to do so, the construction contended for would be bad in itself, and would be opposed to other provisions of the law, and I therefore conclude that I have no jurisdiction to try this case and I am bound under these circumstances to decline to try it."

The Court of the Recorder is the creature of the local Act and is unique in its powers, some of these being those of a Court of Sessions, others those of a High Court, and these considerations appear to me to give force to Mr. Crosthwaite's reasoning. If the Legislature had intended to give greater power of transfer than what s. 77 gave already, I think it would have used clearer words for that purpose. The Recorder's jurisdiction in many respects resembles the Original Side in a Presidency Town.

As my learned colleague differs in opinion, we must refer the point to the High Court of Bengal, and I would do this before disposing of the merits.

MR. C. P. EGBERTON ALLEN.—"Whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon."

In my opinion the local Government may, acting under the provisions of s. 178 of the Code of Criminal Procedure, direct that a case committed for trial to my Court acting as a Court of Session may be tried by the Court of the Sessions division presided over by the Commissioner of Pegu, subject to the proviso to s. 178.

There can be no doubt that the Court of the Recorder of Rangoon is differently constituted from any other criminal Court, and therefore it is impossible to apply the section of the Criminal Procedure Code to it in all respects. But with regard to s. 178 it seems to me applicable in this way, that when the Court sits as a Court of Session it applies but not when it sits as a High Court.

In cases where I sit as a High Court, if it was desirable to transfer for trial elsewhere, a case committed to me, I think such transfer would be made not by the local Government, but by the Governor-General in Council.

As I read Mr. Crosthwaite's judgment the point was not decided by him, his opinion only being given. The point for decision before Mr. Crosthwaite was whether the local Government could transfer a criminal case from the Recorder's Court to a Court of Session under the provisions of s. 9 of the Burmah Courts' Act, and he held it could not be done as that section applied to civil and not to criminal cases.

The point referred by the learned Judges of the special Court was "whether the local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon."

*The Advocate General (Mr. Paul) for the Crown.*

*The Deputy Legal Remembrances (Mr. Kilby) for the other side.*

The judgment of the Court was delivered by

PRINSEP. J.,—This case arises out of a reference by the special Court of British Burmah made under s. 80, cl. (b), of the Burmah Courts' Act.

The point submitted for decision is stated to be whether the local Government has power to transfer for trial to the Court of Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon.

We would, however, premise by stating that the point on which the Judges of the special Court in British Burmah have differed is not accurately expressed, in so far as it has arisen from the case before them. We find rather from the record that the case really for our decision is whether the local Government has power to direct that a case duly committed to the Recorder of Rangoon in which the accused are natives shall be transferred and tried in any Sessions division, or, as in the present case, in the Sessions division of Pegu.

By s. 60 of the Burmah Courts' Act the Recorder is empowered to exercise the powers of a Court of Sessions within the local limits of his ordinary civil jurisdiction. This we understand to be the powers of a Court of Session as defined in Chapter III of the Code of Criminal Procedure. In order to provide for the passing of sentence of death, which when passed by a Court of Session is subject to the confirmation of a High Court, it is provided that when a sentence of death is passed by the Recorder as a Court of Session it shall be subject to the confirmation of the special Court. These are the general powers of the Recorder's Court, except as regards the trial of European British subjects; in other respects it is deemed to be a High Court, and not a Court of Session. Clause 3 of s. 60 of the Burmah Courts' Act declares that for the purposes of s. 64a of the Code of Criminal Procedure, that is, s. 527 of the present Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court. Under s. 61 the Recorder is given the powers of a High Court under the Code in regard to revision of proceedings of the Magistrates within his local jurisdiction. And under s. 62 of the same Act the Recorder is given the powers of a High Court for the trial of, or otherwise with reference to, European British subjects and persons charged jointly

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with them. Looking, therefore, at these sections it appears to us that in the exercise of revisional jurisdiction, or in the transfer of cases triable by him from his Court to any High Court, and in all matters connected with the trials of European British subjects and persons charged jointly with them, the Recorder possesses all the powers of a High Court. But in other respects he exercises only the powers of a Court of Session.

This is a case which does not fall within s. 527 of the present Code of Criminal Procedure, nor is it a case connected with the revisional jurisdiction of the Court of the Recorder, nor is it a case in which a European British subject, or persons charged jointly with him, is to be tried.

Therefore, in our opinion, it falls within the jurisdiction which the Recorder possesses, acting merely as a Court of Session. Under s. 178 of the present Code of Criminal Procedure "the local Government may direct that any case or class of cases committed for trial in any district may be tried in any Sessions division." In regard to such cases Rangoon is a district, and the Recorder's Court is the Court of Session of the Sessions division. The conclusion is therefore inevitable that under this section the local Government is empowered to direct that any ordinary case (such, for instance, as the case before us) committed for trial by the Recorder's Court at Rangoon shall be transferred for trial by the Sessions division of Pegu. But if the local Government went further and directed that the case should be tried by a particular Court, we think that such direction and order cannot be sustained, as it is beyond s. 178 of the Code. It has been urged against this view that under s. 77 of the local Act the Chief Commissioner may direct that any criminal case pending in the Court of the Recorder of Rangoon shall be transferred to and tried before the special Court, and that hence we should presume that it was not the intention of the Legislature that any such transfer should be made to a Court of Session. But the answer to this objection is obvious. The special Court has been created by the local Act; it is not recognised by the Criminal Procedure Code, and if it were intended to transfer a case from the Recorder of Rangoon to the Judicial Commissioner, it could only be done by the special provisions contained in the

local Act. This does not, as appears to have been held by the Judicial Commissioner, necessarily or by implication, lead to the conclusion that the Legislature never intended any case committed to the Court of Rangoon should not be tried in another Sessions division.

Strictly speaking, therefore, the answer we should give to the reference by the special Court should be that the local Government has no power under s. 178 of the Criminal Procedure Code to transfer for trial to the Court of the Commissioner a criminal case duly committed for trial by the Court of the Recorder of Rangoon, but that the local Government has the power to transfer a case from the district of Rangoon to the Sessions division of Pegu.

Attorney for both parties : ; The Government Solicitor, Mr. R. S. Upton.

### APPELLATE CIVIL.

*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.*

KASHI NATH CHUKERBATI (PLAINTIFF) v. BRINDABUN  
CHUKERBATI (DEFENDANT.)\*

*Evidence of oral agreement—Fraud—Act I of 1872, s. 92, proviso 1—Contract—Unlawful consideration—Act IX of 1872, s. 23.*

Plaintiff sued to recover rent under a *kabuliat*. The defendant admitted execution of the *kabuliat*, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs. 282 out of the purchase money, and to obtain for him from the purchaser a mourasi pottah of the land ; it never having been intended that any rent should be payable under the *kabuliat*.

*Held*, that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties.

This was a suit to recover rent from the defendant under a registered *kabuliat*.

The defendant denied that the plaintiff was the owner of the land, but admitted the *kabuliat*, contending that there was an oral agreement between himself and the plaintiff that no rent should be paid or received, and stated that the *kabuliat* was executed in order

\* Appeal from Appellate Decree No. 2400 of 1882, against the decree of Baboo Uma Charan Kastogiri, First Subordinate Judge of Tipperah, dated 28th of September 1882, reversing the decree of Baboo Behari Lal Mookerji, Acting Munsiff of Ramraigan, dated the 11th of November 1881.

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