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interim receiver with powers to act under section 52, or grant to the present *interim* receiver under section 20 of the Act such powers. I would also remark that the adjudication should now be proceeded with with proper despatch. I understand that a duplicate file has been opened, and in case of further appeal to this Court there should be no more of the delays that have happened in the past. The order in question will be formally set aside. Under the circumstances there will be no order as to costs of this appeal.

DUNKLEY, J.—I agree.

FULL BENCH (CRIMINAL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley.

1935

May 29.

KING-EMPEROR

v.

MAUNG BO MAUNG.*

Public servant—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), s. 197 (1)—Delegation Rules, 1926, rule 4—"L" Circular No. 48 of 1926—Appointment of assistant accountants in the Treasury—Appointment and removal by Deputy Commissioner—Deputy Commissioner not the agent of Local Government for the purpose of appointment and removal—Charge of criminal breach of trust—Offence not an offence in discharge of duty.

Rule 4 of the Delegation Rules, 1926, made by the Secretary of State for India empowers the Local Government in respect of the subordinate services, not merely to delegate the power of appointment and removal to a subordinate authority, but to authorize such subordinate authority independently so to appoint or remove. In virtue of this power the Local Government by "L" Circular No. 48 of 1926 has authorized the Deputy Commissioner to appoint assistant accountants in the Treasury in his district. In making such appointments the Deputy Commissioner does not act for or on behalf of the Local Government; the power of appointment and by implication the power of removal and dismissal from office of such subor-

* Criminal Revision No. 240 of 1935 arising out of the order of the First Additional Magistrate of Prome in Criminal Trial No. 17 of 1935.

dinate officers is absolutely vested in the Deputy Commissioner. Rule 4 is not abrogated by, and is not inconsistent with, the rules made by the Secretary of State in 1930.

Consequently, no sanction of the Local Government is necessary under s. 197 (1) of the Criminal Procedure Code for the prosecution of an assistant accountant in a sub-treasury for an offence under s. 409 of the Indian Penal Code.

Moreover, in committing such an offence the officer cannot be said to be acting in the discharge of his official duty. His office has merely provided him with the opportunity of committing the offence.

Kyaw Htin v. *Ah Yoo*, I.L.R. 12 Ran. 530—*distinguished*.

A. Eggar (Government Advocate) for the Crown. If a person is, in fact, removable from his office without the sanction of the Local Government or some higher authority no sanction under s. 197 of the Criminal Procedure Code is necessary for prosecuting him for an offence committed by him. The assistant accountant in the present case was appointed by the Deputy Commissioner under "L" Circular No. 48 of 1926. Under s. 96B (2) of the Government of India Act the Secretary of State for India in Council may make rules for the classification of the Civil Services in India and their conditions of service. The rule-making power in this behalf may be delegated to Local Governments. Rules were made by the Secretary of State in 1924 (*Gazette of India*, 1924, Part I, p. 552) for the classification of the Civil Services in India. These rules have been superseded by a new set of rules in 1930, but rule 7 of these rules saves all old rules not inconsistent with the new provisions. Rule 4 of the old rules defined subordinate services (in which is included the office of an assistant accountant), and under rule 15 powers of punishment as regards subordinate services were delegated to the Local Government. Rule 4 of the Civil Services (Governors' Provinces) Delegation Rules, 1926, appearing on 17 of the Local Government Circulars, Vol. 2,

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delegated to the Local Government the power to make rules regulating the conditions of service of subordinate services. In the exercise of the above powers the Local Government has made further rules for subordinate services, Local Government Circulars (Vol. 2), and in cases not specifically provided for in the various items in the schedule annexed to the rules the last item of that schedule gives the appointing authority power to dismiss its appointees. An assistant accountant will come within this item and s. 197, therefore, can have no application.

The decision in *Kyaw Htin* v. *Ah Yoo* (1) does not correctly state the law. It should really have been based on the Excise Act. With similar materials the Court in *Emperor* v. *Jalal-ud-din* (2) took a contrary view.

In Cr. Rev. No. 114B of 1935 a learned Judge of this Court followed the decision in *Kyaw Htin* v. *Ah Yoo* ; but there again the judgment should have been based on the Rangoon Town Police Act.

S. 197 was not intended to give protection to all public servants because if that were so it would have been very easy for the Legislature to have said " all civil servants of the Crown " instead of a public servant " not removable from his office save by or with the sanction of a Local Government." See also *Mahamad Yasin* v. *Emperor* (3) ; *In re Reddy Venkayya* (4).

Thet Tun for the respondent. The Circular shows that the Deputy Commissioner was acting as the delegate of the Local Government in making appointments. The Treasury Department is in fact an

(1) I.L.R. 12 Ran. 530.
(2) I.L.R. 48 All. 264.
(3) I.L.R. 52 Cal. 431.
(4) 12 M.L.T. 351.

Imperial Department, and appointments are made on behalf of the Government of India.

PAGE, C.J.—In this case Maung Bo Maung was prosecuted before the 1st Additional Special Power Magistrate of Prome for an alleged offence of criminal breach of trust as a public servant under section 409 of the Indian Penal Code. Maung Bo Maung at the time when he was prosecuted was an assistant accountant employed at the Thègôn sub-treasury, and in that capacity he was a public servant within the meaning of that term as used in section 197 of the Code of Criminal Procedure (Act V of 1898). Section 197 (*1*) of the Code runs as follows :

> " When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

In the present case the sanction of the Local Government has not been obtained, and the 1st Additional Special Power Magistrate before whom the case was tried was of opinion that sanction was necessary as the case fell within section 197 of the Code. In these circumstances the 1st Additional Special Power Magistrate directed " that the accused Maung Bo Maung be released as far as this case is concerned."

It may be well to point out that a direction in that sense is not a form of order known to the law. The learned Government Advocate has now applied for revision of this order upon the

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ground that in the circumstances of the present case the sanction of the Local Government was not required. That depends upon whether Maung Bo Maung was a " public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority." If what had happened had been that, the appointment of an assistant accountant of the Treasury lying with the Local Government, the Local Government had merely authorized some other person or authority to make the appointment for them I am of opinion that the appointment of Maung Bo Maung would have been an appointment by the Local Government, and inasmuch as the power of appointment connotes the power of dismissal [see section 16 of the General Clauses Act (I of 1898)], it would have followed that the power to remove Maung Bo Maung remained vested in the Local Government, and Maung Bo Maung would be a person who was " not removable from his office save by or with the sanction of the Local Government." I respectfully agree with the following observations of Coutts Trotter J. that are referred to in *Kyaw Htin* v. *Ah Yoo* (1) :

> " In my opinion the delegation by the Local Government of its power to a special officer only means that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done ; and it is an ordinary case of *qui facit per alium facit per se*. It is no doubt done in accordance with that delegation, but nevertheless it remains the act of the Local Government."

On the other hand if the power of appointing Maung Bo Maung assistant accountant of the Treasury had duly been transferred to some other

(1) (1934) I.L.R. 12 Ran. 530, 533.

authority by the Local Government or otherwise then, inasmuch as the power of appointment involves the power of removal, the sanction of the Local Government in the present case would not be necessary, because Maung Bo Maung would not be a public servant " not removable from his office save by or with the sanction of the Local Government." The determination of the present case, therefore, depends upon whether or not the power of appointment and removal of assistant accountants in the Treasury had been duly conferred upon or transferred to some authority other than the Local Government.

Now, under section 96B (*1*) of the Government of India Act it is provided that in the case of every person in the civil service of the Crown in India " no person in that service may be dismissed by any authority subordinate to that by which he was appointed," and by section 96B (*2*)

" the Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local governments, or authorise the Indian Legislature or local legislatures to make laws regulating the public services."

Now, on the 27th of April 1926 the Secretary of State under the rules passed on that date in rule 4 prescribed that

" 4. (1) Notwithstanding anything contained in any rule made under, or confirmed by, the Government of India Act, the power to make rules regulating the conditions of service, pay, allowances, and pensions of provincial and subordinate services and of officers holding special posts is hereby delegated to the Local

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Governments of Governors' Provinces provided that no such rule (not being a rule regulating compensatory allowances) shall adversely affect any person who was a member of a provincial or subordinate service or was holding a special post on the 9th March 1926."

We are of opinion that Maung Bo Maung as an assistant accountant was a member of the subordinate service.

On the 5th of November 1926, as appears from "L" Circular No. 48 of 1926, the Local Government made certain rules *inter alia* regarding the appointment of treasury accountants, and under rule 4 it is laid down that

"the grade of Assistant Accountant is common both to the Headquarters Treasury and to the Sub-Treasury establishment. The sanctioned scale of pay is Rs. 45—5—70 and appointments to this grade are made by the Deputy Commissioner from candidates who must be qualified under the Clerkship Rules."

Now, Maung Bo Maung was appointed assistant accountant of the Treasury, Thègôn, on the 24th September 1929, and he was appointed to that position by the Deputy Commissioner. It follows, therefore, that the Deputy Commissioner is the authority with power to remove or dismiss him from his office.

On the 19th June 1930 the Secretary of State for India in Council, pursuant to the powers conferred by sub-section 2 of section 96B of the Government of India Act, made certain rules. Under rule 1 (*2*) of these rules the Civil Services (Governors' Provinces) Classification Rules and the Civil Services (Governors' Provinces) Delegation Rules, 1926, are cancelled, one of such Delegation Rules being rule 4 (*1*) of the 27th April 1926. By rule 7, however, it is provided that

"where by these rules power is delegated to, or conferred upon, any authority to make rules regulating the classification, the

methods of recruitment, the conditions of service, the pay, allowances and pensions, or the discipline and conduct of any class of the Civil Services specified in Rule 14, the rules, notifications, and orders, by whatsoever authority made, regulating these matters in respect of that class which were in operation on the date these rules were made shall remain in operation except in so far as they may be inconsistent with these rules or may be specifically cancelled or modified in exercise of the aforesaid power by the authority to which it is delegated."

It followed, therefore, that rule 4 of the Delegation Rules of April 1926 would remain in force except in so far as it was inconsistent with the rules of 1930. By rule 44 of 1930 it is provided that

"the power to make rules providing for the following matters in respect of subordinate services under the administrative control of a Government is hereby delegated to such Government, namely:

(*a*) the making of first appointments,
(*b*) the methods of recruitment,
(*c*) the number and character of posts, and
(*d*) conditions of service, pay and allowances and pensions",

and by rule 54 it is prescribed that

"the power to make rules prescribing the penalties that may be imposed on members of Subordinate Services under the administrative control of a Government, the authorities which may impose such penalties, the appeals which may be preferred from orders imposing such penalties, the conditions subject to which and the authorities by which such orders may be reversed or altered in cases in which no appeal lies or in which no appeal is preferred, is hereby delegated to such Government",

and under rule 49 the penalties referred to in rule 54 include removal or dismissal from the civil service of the Crown.

In my opinion rule 4 of the Delegation Rules of April 1926 was neither abrogated by, nor inconsistent with, the rules of 1930, and therefore it governs the

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legal position of Maung Bo Maung so far as his appointment and dismissal are concerned. I am of opinion that under rule 4 of the 5th November 1926 the Local Government did not authorize the Deputy Commissioner to act for them in appointing Maung Bo Maung, but transferred out and out to the Deputy Commissioner the power to appoint assistant accountants within his district and by implication the power to remove or dismiss them from their office. In my opinion in such circumstances there is no room for section 197 of the Code of Criminal Procedure to operate, and the previous sanction of the Local Government was not necessary for the prosecution of Maung Bo Maung in the present case. It is unnecessary to consider whether the actual decision in *Kyaw Htin* v. *Ah Yoo* (1) was correct or not because that case turned upon provisions of law other than those with which we are concerned in the present case. Each case depends upon its own facts, and it is neither necessary nor desirable in the present case that we should investigate the *ratio decidendi* or the validity of any decision other than that which is under consideration.

I desire to add, however, that, in my opinion, even if Maung Bo Maung had been "a public servant who is not removable from office save by or with the sanction of the Local Government" the sanction of the Local Government would not have been necessary before commencing the present prosecution, because under section 197 the previous sanction of the Local Government is only required where the accused is charged "with any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." In the

(1) (1934) I.L.R. 12 Pan. 530.

present case in which it is alleged that Maung Bo Maung was guilty of criminal breach of trust it is in my opinion plain that, although if he had not been a government official Maung Bo Maung might not have been enabled to commit the offence with which he was charged, in committing the alleged offence he was neither "acting nor purporting to act in the discharge of his official duty", for he was acting not as an official but as a thief. Upon this further ground also, in my opinion, the application in revision must be accepted ; the order of which complaint is made set aside, and the proceedings returned to the 1st Additional Special Power Magistrate of Prome in order that they may be continued and determined according to law.

MYA BU, J.—I agree.

DUNKLEY, J.—I agree with my Lord the Chief Justice, but desire to add a few observations. In order that sub-section (*1*) of section 197 of the Criminal Procedure Code may be applicable to the trial of a public servant for an offence two conditions are necessary ; first, that the public servant in question should not be removable from his office save by or with the sanction of the Local Government, and, secondly, that the offence which he is alleged to have committed should have been committed by him while acting or purporting to act in the discharge of his official duty. To my mind, it is clear that when a public servant commits criminal breach of trust in respect of moneys belonging to Government which pass through his hands, he cannot be said to be acting or even purporting to act in the execution of his duty as such public servant. The words "purporting to act" connote that the public servant

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means or intends or purposes to act as such, or that his action conveys to the mind of another that he is acting as such.

Now in so committing criminal breach of trust a public servant does not mean or intend or purport to act in the execution of his duty; on the contrary, he intends to act in direct opposition to his duty, and his office provides him merely with the opportunity of committing the offence. Nor is his action such as to cause another person to think that he is acting in the discharge of his duty. Consequently, on this ground section 197 of the Criminal Procedure Code can have no application in the present case.

With regard to the second condition, that the public servant in question should be removable from office only by or with the sanction of the Local Government, it is clear from the terms of the section that if any authority subordinate to the Local Government has the power of removal, section 197 of the Code could not have any application.

We have been referred in the course of argument to the case of *Emperor* v. *Jalal-ud-din* (1). With all due respect to the learned Judges who decided that case, it seems to me that there was some confusion of thought between a delegation of authority and a conferment of authority on some other person, and for this reason the illustration given in the judgment, of the powers of the Chief Justice to appoint officials of the High Court, was not apposite. In its true sense "to delegate" means to appoint a person to exercise authority on one's behalf. If that is what was done by the Local Government, then the maxim *qui facit per alium facit per se* would be applicable, and it would have to be held that the act of the authority

(1) (1925) I.L.R. 48 All. 264.

to whom the power of removal was delegated was the act of the Local Government, and that therefore the removal was the act of the Local Government and not of any subordinate authority. But if the Local Government under statutory powers grants to an authority subordinate to itself power to appoint and remove, which power can be exercised independently of the Local Government, then obviously the appointment is made, not by the Local Government, but by the subordinate authority. I agree with my Lord the Chief Justice that rule 4 of the Delegation Rules, made by the Secretary of State for India in 1926, has given power to the Local Government, in respect of the Subordinate Services, not merely to delegate the power of appointment and removal to a subordinate authority but to authorize such subordinate authority independently so to appoint or remove, and, in my opinion, rule 4 of the rules of 1926 has not been cancelled by the Secretary of State's more recent rules of 1930, but, on the contrary, has been amplified and explained so as to make it clear that the authority granted by rule 4 was not merely a power of delegation but authority to give independent power of appointment and removal. In regard to assistant accountants this authority has been exercised by the Local Government in Local Government "L" Circular No. 48 of 1926, and the power thereby conferred upon Deputy Commissioners is not a delegated authority, but a power to appoint and remove independent of the Local Government.

We have been asked to express our dissent from the judgment of my learned brother Mosely in *Kyaw Htin* v. *Ah Yoo* (1), but in deciding the

(1) (1934) I.L.R. 12 Ran. 530.

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application before us it is unnecessary and, in fact, is impossible to express an opinion as to the correctness or otherwise of this judgment, which turned upon a consideration of the special provisions of the Burma Excise Act and the notifications thereunder, and is only an authority for what it actually decided. If I may, with all due respect, say so, I think it would perhaps have been better if my learned brother had based his decision solely on the special provisions of this Act, without reference to the rules under the Government of India Act. In all such cases as *Kyaw Htin* v. *Ah Yoo* (1), where a special Act is concerned, special considerations arise which do not arise in a case like the present, which turns upon the rules made under the Government of India Act only.

I agree that this case must now be sent back to the 1st Additional Special Power Magistrate of Prome with a direction to him to rearrest the respondent and proceed with the trial. As the respondent has so far been on bail, there will be no objection to releasing him again on bail.

(1) (1934) I.L.R. 12 Ran. 530.