ruling would be tantamount to an extension by judicial decision of the local Act to territory to which the proper authority has never extended it, and might be inconsistent with the intention of section 178 of the Code of Criminal Procedure (X of 1882).

At the present stage of the case before us, we refrain from giving further reasons; but, as regards the point of jurisdiction, we are of opinion that we can admit the appeal, and as it amounts to a claim to have the conviction reduced to culpable homicide not amounting to murder, and as there is nothing on record to show that the charge was explained as well as read to the prisoner, (see section 271 of the Code of Criminal Procedure (X of 1882), we consider that the appeal is one to be admitted. We fix it for hearing on the 7th January, 1886. The notices required by law, to issue.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* PRIVATE MANGAL TEKCHAND.*

1886. *January* 25.

Perim—The Aden Act (Act II of 1864)—Jurisdiction of the Resident at Aden over offences triable by a Court of Session committed at Perim—Criminal Procedure Codes (Act X of 1872), Secs. 2 and 15, and (Act X of 1882), Secs. 1, 3, 7 and 9.

Held, notwithstanding the notification of the Government of Bombay (No. 2336), dated the 6th May 1884, including the island of Perim within the Sessions Division and District of Aden and empowering the officer in command of the troops stationed at Perim to commit persons for trial to the Court of Sessions at Aden, that the Court of the Political Resident at Aden had no jurisdiction over the island of Perim, and that the Political Resident at Aden was not a Judge of a Court of Session for that island.

Where, therefore, a person charged with having committed murder at Perim was committed by the Magistrate at Perim for trial in the Court of the Political Resident at Aden, where he was convicted and sentenced to death, the conviction was annulled, and the prisoner was ordered to be re-tried before a Court of competent jurisdiction.

The island of Perim, although under the control of the Political Resident at Aden, cannot be regarded as part of Aden, and the provisions of the Aden Act II of 1864 are not in force at Perim.

* Confirmation Case, 19 of 1885.

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Act II of 1864 did not create a separate Court of Session at Aden. The Court created was the Court of the Resident, and the powers of that Court and of a Court of Session are not commensurate.

THE accused, Mangal Tekchand, was committed for trial on a charge of murder committed in the island of Perim by Captain Snell, First Class Magistrate at Perim, on the 26th August, 1885. He was tried by the Political Resident at Aden on the 14th September, 1885. The accused pleaded guilty of murder, and was sentenced to death. By a Government notification (No. 2336), dated the 6th May, 1884 (*Government Gazette* for 1884, page 351), the island of Perim was included within the Sessions Division and District of Aden, and the officer in command of the troops stationed at Perim was empowered to commit persons for trial to the Court of Session at Aden. The case was referred by the Political Resident to the High Court of Bombay for confirmation of the sentence under section 28 of the Aden Act II of 1864. The accused preferred an appeal to the High Court from the conviction and sentence.

On the 30th of November, 1885, the High Court (Birdwood and Jardine, JJ.) held that Perim was part of British India and of the Presidency of Bombay, and that the Code of Criminal Procedure (X of 1882) was in force there, but entertained doubts as to whether the Court of the Resident at Aden was a Court of Session within the meaning of the Code for the trial of cases arising in Perim, and also whether the Resident, *ex officio*, and without having been appointed a Sessions Judge, could be held to be a Sessions Judge within the intention of the Code for the trial of such cases. They, therefore, expressed their desire to have these points argued by counsel.

Latham (Advocate General) for the Crown :—Either Perim is part of Aden and, as such, is governed by the Aden Act II of 1864, or the Court of the Resident at Aden is a Court of Session within the meaning of the Code of Criminal Procedure (X of 1882) and, therefore the Resident, as a Judge of that Court, is a Sessions Judge under the Code, and so competent to try cases arising in Perim, which is now included in the Sessions Division of Aden.

As to the first point, the Aden Act no doubt does not define the limits of Aden. But, looking to the preamble of the Act, the circumstances under which it was passed, the mischief that it was intended to remedy, and the inconvenience that would result from restricting its scope and operation to the peninsula alone, I contend that the term Aden, as used in the Act, includes not only the peninsula, but also all the territory subject to the Resident's authority. Just as British India includes not only India geographically, but India politically, including Aden. If Little Aden is part of Aden, so is Perim. Perim has never enjoyed any independent government of its own. It has always been governed by the Resident at Aden. See Hunter's Imperial Gazetteer, Vol. 1, p. 12, and Vol. 7, p. 372.

Perim was thus a part of Aden when Act II of 1864 was passed. But, if not under section 17 of that Act, the administration of criminal justice at Aden is vested in the Resident's Court under section 20. The Resident shall exercise all the powers of a Court of Session as defined in the Criminal Procedure Code. The word *defined* in this section refers to the "powers" of a Court of Session, and not "to the Court of Session," because the Criminal Procedure Code of 1861 does not define what is a Court of Session, but it defines the powers of such a Court. Section 23 introduces the Code of Criminal Procedure as the law of procedure. Under section 28, the sentence of death passed by the Resident is subject to confirmation by the High Court. Looking at the Act as a whole, and particularly at section 20, it is clear that the Resident's Court was constituted a Court of Session by Act II of 1864.

Reading with this Act, Act X of 1872, section 14 introduces a change. The existing local jurisdictions of Courts of Session are converted into "Sessions Divisions." Under section 10 no new Sessions Judges need be appointed. Even supposing that Perim was not originally within the local jurisdiction of the Sessions Court at Aden, still Government Notification No. 2336 of 1884 includes Perim within the Sessions Division and District of Aden. The effect of that notification is this: The Resident at Aden, who under the local Act had been a Judge of the Sessions Court

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became under section 10 of Act X of 1872 a Sessions Judge in a Sessions Division, and, therefore, by virtue of the notification a Sessions Judge for the island of Perim also. Coming to Act X of 1882, section 7 provides that the Sessions Divisions and Districts existing when this Code came into force shall continue to be such, unless and until they are altered. Aden being a Sessions Division before, continued such under this Code.

Reading the local Act and the different Codes of Procedure together, we come to the conclusion, first, that the Court of the Resident at Aden is a Court of Session as defined in the Code; secondly, that the Resident, as a Judge of that Court, is a Sessions Judge in a Sessions Division; and, thirdly, as Perim is included in the Sessions Division of Aden, the Resident is competent to try prisoners committed to his Court from that island.

When a prisoner is committed to the Sessions Court at Aden, he is subject to the procedure obtaining in that Court under Act II of 1864 and the Code of Criminal Procedure. The Government Notification of 1884 either created a new Sessions Court or it did not. If it did, the Code of Criminal Procedure alone would apply, and then an appeal would lie. If it did not, then the case should be dealt with as a confirmation case under section 28 of Act II of 1864. I contend that the notification did not create a new Sessions Court, and, therefore, no appeal lies to this Court.

Shámráv Vithal for the accused:—Whether this case is treated as an appeal under section 29, or as a confirmation case under section 28, the Court should consider whether the offence amounts to murder, or to culpable homicide not amounting to murder. I submit that the prisoner is guilty of the lighter offence, considering the serious and sudden provocation he received.

JARDINE, J.:—In our order of the 30th November, 1885, we gave reasons for holding that the island of Perim is part of British India and of the Presidency of Bombay, and that the Code of Criminal Procedure is in force there. We were inclined to hold that, for certain purposes, the Court of the Resident at Aden, established under Act II of 1864, may be regarded as a Court of Session, and the local area to which that Act applies as a Sessions

Division. We had doubts, however, whether the Court of the Resident could be held to be a Court of Session within the intention of the Code for the trial of cases arising in the island of Perim, and also whether the Resident, *ex officio*, and without having been appointed a Sessions Judge, could be held to be a Sessions Judge within the meaning of the Code for the trial of such cases. We intimated our wish to have these points argued by counsel, and, subject to further argument on the whole question of jurisdiction, we admitted the appeal of the prisoner.

We have had the advantage of full argument by the learned Advocate General, who put forward his chief contention in the form of the following dilemma. Either Perim is part of Aden within the meaning of Act II of 1864, and thus under the jurisdiction of the Court of the Resident,—or, reading that Act with the different Codes of Criminal Procedure, the Court will hold the Resident's Court to be a Court of Session, and the Resident to be Judge of such a Court, and thus a Sessions Judge under the Code and so competent to try cases arising in Perim since the inclusion of Perim in the Sessions Division of Aden by order of Government under section 7 of the present Code.

It has been argued that Perim has always, since its occupation in 1857, been under the control of the Resident at Aden, and never had a Government of its own[1]: that in no part of the Act II of 1864 is any attempt made to define Aden: that the inconvenience, to rectify which, according to the preamble, the Act was passed, must have been as great at Perim as in the settlement on the Arabian land: that the enacting part is co-extensive with the reciting part: that there is nothing to entitle this Court to pick and choose any locality under the Resident's authority as being under the Act II of 1864, and that the most convenient construction is one which would include, as subject to the Act, the whole territory for the time being administered by the Resident. Otherwise, the peninsula of Little Aden, which was acquired in 1868, would have to be excluded: whereas, if Little Aden be included, so must Perim. The definition of Aden, it was urged, is not necessarily limited to the place so called, as is shown by the definition of

(1) Hunter's Gazetteer of India, Vol. I, p. 12; Vol. 7, p. 372

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British India including territories like Perim which, speaking geographically, are not in India at all.

As to the last point, it is to be remarked that the elastic term *British India* as used in legislation has been defined by the Legislature so as to extend it beyond the common and geographical meaning; but no legislative permission has been shown us for extending the ordinary meaning of the term *Aden*.

It appears to us, moreover, unnecessary to complicate the question about Perim by attempting to define the jurisdictions in Little Aden. We have no information as to whether Little Aden was or was not made part of the Presidency of Bombay, or whether it has ever been made a Sessions Division or part of a Sessions Division. Perim is an island by itself, a long way off. The Secretary of State in Council, the Government of India and the Government of Bombay have in their notifications treated it as a separate territory. We have to deal with the intention of the Legislature in enacting Act II of 1864; and, in the absence of any indication to the contrary, we must hold that there was no intention to apply that legislation to Perim. In some Acts of the Government of India—*e. g.*, Act VIII of 1876, secs. 5, 26 and 35, and Act VIII of 1878, secs. 3 and 128—Aden means the port of Aden, and to hold that it includes Perim would lead to absurd results. In the Scheduled Districts Act XIV of 1874 and the Laws Local Extent Act XV of 1874, both of which were passed to clear up doubts about the local extent of different enactments, Aden is specified as a District, but there is no mention of Perim.

The other part of the Advocate General's argument was based on the words of the local Act II of 1864 and the different Codes of Criminal Procedure. The Courts at Aden are creations of the local Act, although some of their powers are defined with reference to powers of Courts established under the Code of Criminal Procedure; and although so far as the Criminal Courts are concerned, and *save as in the Act II of 1864 provided*, the proceedings are to be regulated by the Code. The administration of criminal justice is vested in the Resident, although certain jurisdictions may be conferred on the Assistant Resident. The Resident, like the Recorder of Rangoon under Act XVII of

1875, is a unique Court. Under section 20 he has the powers of a Court of Session, and also those of a Magistrate, as defined in the Code of Criminal Procedure. But he has power to try European British subjects for all offences not punishable with death under the Indian Penal Code, a power far more extensive than the jurisdiction of a Sessions Judge over such persons and more nearly resembling the jurisdiction which the Supreme Court used to exercise within the limits of the East India Company's trading charter. The Resident's Court differs, again, from the Courts established under the Code of Criminal Procedure, as section 29 of Act II of 1864 declares that "no appeal shall lie from an order or sentence passed by the Resident in any criminal case." Such a provision, if newly applied to a district in this Presidency, to which the Code of Criminal Procedure extends, would affect the jurisdiction of this Court by barring appeals allowed to this Court by that Code. We have already expressed our opinion that the Aden Act II of 1864 does not by its own force extend to Perim.

Again, as the Secretary of State in Council has by a Resolution, dated the 10th September, 1884, made the provisions of the Statute 33 Vic., cap. 3, applicable to Perim, the island has become a Scheduled District by the operation of the interpretation clause in section 1 of Act XIV of 1874. That Act empowers the Local Government, with the previous sanction of the Government of India, to declare what enactments are and what are not in force in the Scheduled Districts, and also to extend to any of the Scheduled Districts, or to any part of any such District, any enactment which is in force in any part of British India at the date of such extension. As this mode of applying an enactment to a Scheduled District is expressly provided by the Legislature, we think a Court should hesitate to declare that the same effect may be produced in any less formal manner, as, *e. g.*, by an executive order including the Scheduled District in another territory where the enactment happens to be in force, or by any uncertain judicial inference from the construction of statutes. A *fortiori*, we must refuse our assent to the argument that, as the Court of Session for the island of Perim is the Court of the Resident at Aden, the special law of procedure applicable to trials held by the Resident under Act II of 1864 ought to be applied in the case of

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a person committed for trial from Perim. Such a ruling would lead to results plainly opposed to the intention of the Legislature. For, as no notification, formally issued under the powers of the Scheduled Districts Act XIV of 1874, can affect the criminal jurisdiction of any Court over European British subjects, it would be contrary to the principles that guide the interpretation of penal statutes to hold that an order under section 7 of the Code of Criminal Procedure (X of 1882), including a place in the Sessions Division of Aden, should have that effect. We are, therefore, of opinion that the order in question contained in the notification of the 6th May, 1884, cannot be held to have made the special provisions of the Aden Act II of 1864, found in sections 21, 22 and 29, apply to offences committed by European British subjects in the island of Perim, so as to supersede the general law applicable to them contained in sections 447 and 449 of the Code of Criminal Procedure (X of 1882,) either as regards trial or appeal to this Court. It would be hard to hold that a mere order about the limits of a Sessions Division should result in such important changes of jurisdiction as well as procedure. We come to the conclusion that the special rules of the Aden Act do not apply to offences cognizable by a Court of Session committed in Perim, and, by parity of reasoning, that the Resident, as Resident under that Act, has no jurisdiction to try commitments for such offences.

These conclusions appear to us in accord with the general principles under which penal statutes are construed. These principles were considered by the Judicial Committee of Her Majesty's Privy Council in the case of *Nga Hoong* v. *The Queen*[1], where the Judges of the Supreme Court at Calcutta had differed in opinion and had recorded separate judgments. The appeal was fully argued, and the inconvenience likely to result from their decision was clearly present to the minds of their Lordships. The words about jurisdiction on which interpretation was placed, seem, at first sight, wide enough in grammatical meaning to confer the jurisdiction on the Supreme Court, and so a majority of the Judges of that Court held. But applying the rule that, with respect to the criminal law, the construction is always to be strict, the Judicial Committee held the conviction wrong, the reason being that the

(1) 7 Moore's Ind. Ap., 72.

enactment was not intended by the Legislature to render persons liable to the jurisdiction of the Supreme Court who would not have been liable before. The Resident's jurisdiction under the Act II of 1864 does not, in our opinion, as already stated, extend to Perim by force of the Act itself. We cannot extend it by mere inference, nor introduce its provisions as procedure, which is much the same thing.

But as the Advocate General contends that the Resident is a Sessions Judge under the Code of Criminal Procedure, we must follow the steps of that argument, and see whether, without violating the intention of the enactments and trespassing on the powers vested in the Government, we can identify him as such an officer.

The language of Act II of 1864 shows that, among other functions and powers, the Resident, in whose Court the administration of civil and criminal justice at Aden is declared to be vested, has those of a Court of Session. Save as in the Act provided, proceedings in Courts are to be regulated by the Code of Criminal Procedure. That Code is thus introduced *sub modo*, but the special features of the local Act were preserved by section 2 of Act X of 1872 and by sections 1 and 3 of the present Code, Act X of 1882. The local Act provides for the administration of criminal justice, and creates a Court, *viz.*, that of the Resident, which, to use the language of the High Court of Calcutta in *Queen-Empress* v. *Nga Tha Moung*[1], as regards the Special Court of British Burma, is not recognized by the Criminal Procedure Code. The Court is one, though there is a plurality of functions. The powers are expressed by phrases taken from the Code, which is also applied to fill up gaps that might otherwise exist in procedure. Such expressions as "powers of a Court of Session" are often used by the Legislature as a concise and convenient way of describing a particular jurisdiction or function of a Court. Other similar expressions, such as "powers of a District Judge in the Bombay Presidency," "powers of a Magistrate or of a Subordinate Magistrate of the First or Second Class, as described in the Code of Criminal Procedure" occur in the Act II of 1864

(1) I. L. R., 10 Calc., 643.

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This terminology saves the trouble and risk of fuller and minuter statement. Another instance of the same kind is found in 24 and 25 Vic., cap. 104, sec. 8, which abolished the Supreme Courts and the Courts of Sadar Adálat and Faujdári Adálat and enacted that the High Court "shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts" so abolished. On careful consideration of the Act II of 1864, we are unable to hold that any separate Court of Session was created. The Court created was the Court of the Resident: the powers of that Court and a Court of Session were not made commensurate, as clearly appears from section 20 and the other sections already noticed as conferring different powers from those of a Court of Session.

It is questionable, therefore, whether as the local Act made sufficient provision, there was any need to create a Sessions Division at Aden on the passing of Act X of 1872, and no such Division appears to have been created there under section 12 of that Code. Nor was it competent to the Government to create a Court of Session within the meaning of section 15 of that Code for the territory to which Act II of 1864 applied, as another Court with special jurisdiction of its own, *viz.*, the Court of the Resident, had already been constituted, and the Code and the local Act expressly save the special procedure and jurisdiction from the operation of the Code when otherwise the two enactments would be in conflict. It follows from this reasoning that the Local Government could not appoint a Sessions Judge for Aden under the Code, and it has never made such an appointment. We are of opinion that the Resident was not a Judge deemed to have been appointed under that Code.

The same reasoning, *mutatis mutandis*, applies to the Code (Act X of 1882) and its corresponding sections 1, 7 and 9. The special law and the special jurisdiction are not to be affected except by special provision, as section 1 expressly declares. Although section 9 continues existing Courts of Session, section 2, as to appointments, only applies to those made under certain repealed enactments, none of which have been quoted as providing in any way for the appointment of a Resident at Aden. Even, therefore, if a

Sessions Judge under the Code could lawfully exercise jurisdiction in the territory over which, by virtue of the Act II of 1864, the Court of the Resident at Aden has criminal jurisdiction, we would be bound to hold that, in the absence of an appointment as Judge of a Court of Session for a Sessions Division, the Resident is not such a Judge. Section 9 of the Code (Act X of 1882) leaves no room for inference on this point.

The result of our consideration of the case is that we are of opinion that the Court of the Resident established under Act II of 1864 has no jurisdiction over the island of Perim, and that the Resident has never been appointed a Judge of a Court of Session for that island. He had, therefore, no jurisdiction to try the prisoner.

He has held the trial as Resident with the powers of a Sessions Judge; but as he has not reserved any point of law, and as the Advocate General has not certified to any error in the judgment, the provisions of sections 29 and 30 of Act II of 1864 bar the appeal of the prisoner, which is, therefore, dismissed.

But as we have to deal with the sentence of death under section 28 of the same Act, which is to be read with chapter 27 of the Code of Criminal Procedure (X of 1882), we must give effect to our opinion, that the Resident had no jurisdiction to try the case, by annulling the conviction. We are not insensible to the inconvenience so caused in this particular case. Yet it is the first which has come from Perim; and, as remarked by Sausse, C. J., in *Reg.* v. *Rámá Gopál*[1], the argument drawn from inconvenience can only influence the judgment of the Court to a very limited extent. That decision we take as authority for holding that any subsequent ratification of the Resident's proceedings would be without avail. Inconvenience must, as the learned Chief Justice remarked, follow whenever judicial appointments are not made in accordance with the essential provisions of the statute creating the office. The inconvenience is likely to be great in such circumstances. *Gahan* v. *Lafitte*[2] is one of the few instances in point. Following the terms of the order in the case of *Reg.* v. *Rámá Gopál*[1], we now annul the conviction and

(1) 1 Bom. H. C. Rep., Cr. Ca., 107. (2) 3 Moore's P. C. Ca., 382.

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sentence, and direct the prisoner to be tried before a Court of competent jurisdiction.

We think we ought to add that, in order properly to carry out the intention of the Legislature, a Court of Session for a Sessions Division, including Perim, remains to be created, and a Judge appointed thereto by the Local Government. We notice that, in enacting section 7 of the Code of Criminal Procedure (Act X of 1882), the words "excluding the Presidency towns" were inserted; and it is probable that, if the peculiar jurisdiction of the Court of the Resident and the complete provisions made in Act II of 1864 for the Aden settlement had been brought to notice at the time, a similar exclusion of Aden might have been made, so as to make the meaning of the second clause of section 1 of the Code more readily apparent as regards the local jurisdiction.

Conviction and sentence reversed, and re-trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *March* 11.

QUEEN-EMPRESS *v.* MANGAL TEKCHAND. *

Order of transfer—Powers of the High Court—The Code of Criminal Procedure (Act X of 1882), Sec. 526—The Scheduled Districts Act XIV of 1874, Secs. 3, 5, 6—The Aden Act II of 1864.

Per BIRDWOOD, J.:—The High Court cannot, under section 526 of the Criminal Procedure Code (Act X of 1882), any more than under section 25 of the Civil Procedure Code (Act XIV of 1882), direct the transfer of a case, which is not properly before a Subordinate Court of competent jurisdiction to receive and try it.

Peary Lall Mozoomdár v. *Komal Kishore Dassia*(1) followed.

Queen-Empress v. *Thaku*(2) distinguished.

Under section 5 of the "Scheduled Districts Act XIV of 1874" the Local Government cannot, by extending an Act which is of necessarily restricted application, make its provisions applicable to an entirely new subject-matter, *viz.*, the litigation of a new local area.

Accordingly where the Government of Bombay issued the following notification No. 823 of 1886:—"In exercise of the powers conferred by section 5 of the

* Criminal Application, No. 63 of 1886.

(1) I. L. R., 6 Calc., 30. (2) I. L. R., 8 Bom., 312