

the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive". In *Abdool Hálim v. Doorga Proshád Banerjee*<sup>(1)</sup> the application of this test is considered, and the judgment may perhaps be of assistance to the Courts below in determining whether the agreement in the present case was contrary to "good policy and justice" in the sense in which that expression is used by the Privy Council in the cases above referred to. We must, therefore, reverse the decree of the Court below, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

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*Decree reversed.*

) I. L. R., 5 Calc., 4.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

QUEEN-EMPRESS v. J. GRANT.\*

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April 30.

*European British subject—Privilege—Waiver—High Court—Jurisdiction of High Court over European British subjects in Sind—Code of Criminal Procedure (Act X of 1882), Secs. 4, Cl. (i), 453 and 454—Bombay Act XII of 1866.*

Where a European British subject waives his right to be dealt with as such by the Magistrate before whom he is tried, he thereby loses all the benefits of the special procedure provided for him under Chapter XXXIII of the Code of Criminal Procedure (Act X of 1882), including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code in cases other than those against European British subjects in the place where he is tried.

The definition of "High Court" in section 4, clause (i), of the Code of Criminal Procedure (Act X of 1882) must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter.

If, therefore, in any particular case, the special rules contained in Chapter XXXIII of the Code cease to have any application, the definition of "High Court" in the former part of section 4, clause (i), ceases also to have any application to such a case. The definition in the latter part of the section then prevails, and the case falls within the category of "other cases" to which that part of the section applies.

\* Review, No. 53 of 1888,

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The accused, a European British subject, was tried before the City Magistrate of Karachi and convicted of criminal breach of trust under section 409 of the Indian Penal Code, and sentenced to six months' simple imprisonment.

At the trial, he waived his right to be tried as a European British subject.

*Held*, that the accused was not subject to the revisional jurisdiction of the High Court. The accused not having been tried under the special procedure laid down for the trial of European British subjects, the Sadar Court in Sind, which, under Bombay Act XII of 1866, was the highest Court of appeal in all civil and criminal matters in Sind, had the revisional powers of a High Court in the present case by virtue of the latter part of section 4, clause (i), of the Code of Criminal Procedure.

THE accused, James Grant, was tried before Francis Gibbon, City Magistrate of Karachi, and convicted of criminal breach of trust under section 409 of the Indian Penal Code (Act XLV of 1860), and sentenced to six months' simple imprisonment.

At the trial the accused waived his privilege to be dealt with as a European British subject.

On a review of the Magistrate's criminal return, which was forwarded by the Judge of the Sadar Court in Sind "as the return of the trial of a European British subject," the High Court sent for the record and proceedings of the case, and considering that the sentence appeared to be inadequate as well as illegal, issued a notice to the accused, under section 439 of the Code of Criminal Procedure (Act X of 1882), to show cause why the conviction and sentence should not be reversed and why he should not be committed to the High Court for trial.

The case was argued before Birdwood and Parsons, JJ.

*Inverarity* for the accused:—The High Court has no jurisdiction to revise the proceedings in this case. The accused waived his right to be tried as a European British subject. He, therefore, lost all the benefit of the special procedure laid down in Chapter XXXIII of the Code of Criminal Procedure (X of 1882). That chapter does not oust the ordinary Criminal Courts of jurisdiction. It confers on a European British subject a privilege to be tried by a certain class of Courts and by no others. Such a privilege may be waived by the accused. And when it is waived, he is amenable to the jurisdiction of the ordinary tribunals.

In the present case, the accused, having waived his privilege, must be taken to have been tried under the general provisions of the Code. The only Court, therefore, that can revise the proceedings of this case is the Sadar Court in Sind, which, under Bombay Act XII of 1866, is the highest Court of appeal in civil and criminal matters in Sind. That Court for the purposes of this case falls within the definition of the term 'High Court' as given in section 4, clause (i), of Act X of 1882. This Court has, therefore, no jurisdiction to revise the proceedings of the Court below. Refers to the ruling *In the matter of the petition of Quiros*<sup>(1)</sup>.

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BIRDWOOD, J.:—We called for this case on a review of the Karáchi City Magistrate's criminal return for January last, which was forwarded to us by the Judge of the Sadar Court in Sind as the return of the trial of a European British subject. On an examination of the record and proceedings, the sentence passed by the City Magistrate appeared to us to be inadequate; and if the accused could be regarded as a European British subject, it would have been illegal. We, therefore, issued a notice to the accused, under section 439 of the Code of Criminal Procedure, to show cause why the conviction and sentence should not be reversed, and why he should not be committed to the High Court for trial.

It is argued by Mr. Inverarity, the learned counsel for the accused, that as he did not claim at the trial to be dealt with as a European British subject, he cannot now be regarded as such; and that as the offence was committed in Sind, where the highest Court of criminal appeal or revision is the Sadar Court, the case falls under the general rules of the Code of Criminal Procedure, and not under the special rules contained in Chapter XXXIII; and that, therefore, the High Court at Bombay has no jurisdiction to review the case under Chapter XXXII. The decision of the Calcutta High Court in the case of *Quiros and another*<sup>(1)</sup> is relied on in support of this argument. In that case, Quiros and Maunders and several others, all European British subjects, were charged with rioting and violence before an Assistant Magistrate vested with the powers of a Magistrate of the Second Class

<sup>1</sup> I. L. R., 6 Calc., 83.

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only. Under section 72 of the Code of Criminal Procedure of 1872, they were triable only by a Magistrate of the First Class, who was also a Justice of the Peace. Before putting them on their trial, the Second Class Magistrate asked each of them whether he objected to be tried by him. He did not, however, inform them that, under section 72, he had no jurisdiction, and that they were triable only by a Magistrate of a higher class. None of the accused objected; and the trial proceeded and ended in their conviction. Quiros and Maunders applied to the High Court to quash the proceedings, on the ground that the Magistrate had no jurisdiction to try European British subjects. The High Court quashed the proceedings, on the ground that the Magistrate, before asking the applicants whether they waived their right to be dealt with as European British subjects, did not inform them of the particular right given them by section 72 of Act X of 1872. In disposing of the case, Jackson and Tottenham, JJ., expressed their opinion (at p. 86) as to the proper construction of section 72 of that Act, and also of section 84, which corresponds to section 454 of the Code of 1882. They held that the provisions of section 72 constituted in fact a privilege—"that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the European British subjects a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables them to give up." As to the waiver referred to in section 84, the learned Judges observe (at p. 87) that it "must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has; and the words 'dealt with before the Magistrate' mean everything contained in this chapter,—that is to say, the tribunal having cognisance of the case, the procedure, and also the punishment to which he would be liable." That is a construction which we are prepared to adopt as a proper construction of section 454 of the present Code; but it does not sufficiently meet the difficulty which arises in the present case with reference to the definition of the expression "High Court" contained in section 4, clause (i), of the Code. By waiving his right to be dealt with as a European British subject before the City Magistrate, the accused in the

present case would have no right, in an appeal or an application for revision, to complain that the City Magistrate had exceeded the powers given him by section 446 of the Code by sentencing him to more than three months' imprisonment; for section 454 expressly bars any such complaint "in any subsequent stage" of the case. No right that the accused might have asserted under Chapter XXXIII can now be asserted by him in any Court. But the question before us is, whether, by waiving his right to be dealt with as a European British subject before the City Magistrate, he can now practically oust this Court of the jurisdiction which it would otherwise have possessed under Chapter XXXII of reviewing the City Magistrate's proceedings, and can practically clothe the Sadar Court in Sind with such jurisdiction. Under Bombay Act XII of 1866, that Court is the highest Court of appeal in civil and criminal matters in Sind within the meaning of the Code; and as such it would have the revisional powers of a High Court in the present case by virtue of the latter part of the definition in section 4, clause (i), of the Code if the definition in the former part of that clause is affected by the provisions of Chapter XXXIII, and especially of section 454. If the definition is not affected by section 454, then the proceedings in the present case, being admittedly against a European British subject charged with an offence committed in the Bombay Presidency, the expression "High Court," as used in Chapter XXXII, would necessarily be construed, in reference to those proceedings, as meaning the High Court at Bombay. There is an obvious inconvenience in making the jurisdiction of the superior Courts depend, in any particular class of cases, upon the will of accused persons. Chapter XXXIII of the Code, moreover, concerns itself mainly with the appointment of proper tribunals of original jurisdiction for the trial of European British subjects, the appointment of an appellate tribunal in certain cases being provided for in proviso (b) to section 408. As no reference is expressly made to revisional proceedings in Chapter XXXIII, this Court would not readily adopt a construction of section 454 which would oust its jurisdiction in any case. It is not without hesitation, therefore, that we have been led in the present case to adopt the view of the law contended for by Mr. Inverarity.

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We think that the definition in section 4 must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter. The intention of the Legislature was not, we think, to recognise an existing inherent jurisdiction in the Presidency High Courts or to confer a future exclusive jurisdiction on these High Courts over all European British subjects liable to criminal proceedings in any part of a presidency. If that had been the intention, it would have been stated in express language in some part of the Code other than that reserved for mere preliminary matters. The provision would probably have found a place in Chapter XXXIII itself, or at all events in the chapters relating to appeal and revision. As we find no such express provision in the body of the Code, though a chapter is expressly devoted to proceedings against Europeans and Americans, the reference in section 4 (i) to "proceedings against European British subjects" must be understood as made to proceedings against European British subjects as such, for which special provision is made in Chapter XXXIII. If, therefore, in any particular case, the special rules contained in Chapter XXXIII cease to have any application, the definition of "High Court" in section 4, clause (i), ceases also to have any application to such case. The definition in the latter part of section 4, clause (i), then prevails; and the case falls within the category of "other cases" to which that part of the definition applies; and if the case is one tried in the province of Sind, the High Court, in reference to the proceedings in it, would be the Sadar Court in Sind. It is not unreasonable to hold that it was the intention of the Legislature, when providing a special procedure in cases against European British subjects, to treat that procedure as strictly exceptional. Where it was to be applied it was to be binding on certain Courts and chains of Courts, including the highest Courts of appeal and revision. Where it was not applicable,—that is, where the right to it might be waived,—the ordinary rules of procedure applicable to other cases in the Courts ordinarily having jurisdiction in them were to prevail. Where a European British subject waives his right to be dealt with as

such by the Magistrate before whom he is tried, he "shall not assert it in any subsequent stage of the same case." He thereby loses all the benefits of the special procedure provided for him, including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code, in cases other than those against European British subjects, in the place where he is tried. As the accused in the present case waived his rights as a European British subject, he would not have the right to ask us to review the proceedings in his case: and we have not the right to interfere.

The record and proceedings should, therefore, be returned to the City Magistrate with a copy of our judgment. A copy should also be furnished to the Judge of the Sadar Court.

PARSONS, J. :—I concur in holding that we have no jurisdiction to revise the proceedings of the Magistrate in this case. The High Court of Judicature at Bombay is, under the Code of Criminal Procedure, so far as the province of Sind is concerned, a High Court only in reference to proceedings against European British subjects, or persons jointly charged with European British subjects—section 4 (*i*). The meaning of the term European British subject is defined in clause (*u*) of the same section. Chapter XXXIII of the Code treats of criminal proceedings against Europeans (including European British subjects) and Americans. It is clear that the intention of the Legislature in enacting that chapter was to confer upon a particular class of persons a privilege which each such person might claim or waive at his option; and although the chapter is neither so explicit when read with the rest of the Code and with some other Acts, nor so well arranged as might have been expected, the intention, I think, has been attained, so that it can be given legal effect to; for if sections 443 to 452 are passed over as relating to procedure after the commencement of the actual proceedings, and sections 453 and 454 (which ought really to come first as dealing with the very commencement of the proceedings), are considered, it will be seen that they provide the following procedure, *viz.*, that when a person is brought before a Magistrate charged with an offence, the

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Magistrate shall, unless he has reason to believe that that person is not a European British subject, ask him whether he is such a subject or not. If the person replies that he is a European British subject and claims to be dealt with as such, the Magistrate shall inquire into the truth of the statement, and shall then decide whether he is or is not a European British subject; and shall deal with him accordingly,—that is to say, he shall apply to the case the special provisions which regulate criminal proceedings against European British subjects, and which have been previously set out in sections 443 to 452. In such a case the proceedings would be proceedings against a European British subject. If, on the other hand, the person replies that he is not a European British subject, or that, being such a subject, he does not claim to be dealt with as such, or if the claim is made and the grounds of such claim are not proved, the Magistrate shall deal with him accordingly,—that is to say, he shall apply to the case the provisions of the Code which regulate ordinary enquiries and trials. In such a case, the proceedings would not be proceedings against a European British subject.

In the case at present before us the proceedings fell under the latter category; for, although the Magistrate did not, as he ought to have done, ask the accused, when he was first brought before him on the 16th December, whether he was a European British subject, the accused himself on the 3rd January waived any claim he might have to be dealt with as such; and this waiver must be held to relate back to the commencement of the proceedings, more especially as there is no decision by the Magistrate on the record that the accused is a European British subject. It may perhaps be said that the effect of this decision will be to place a different meaning on the term "European British subject" to that given in section 4, clause (ii) of the Code, but really this is not so. Before a person can be held to be a European British subject, he must prove that he comes within the terms of that definition, and to do this, it is necessary that he both make the claim and establish it. There can be no such *status* without a claim and a decision that it exists. In the present case no such claim has been made and no such decision has been passed. There is nothing, therefore, to show that the *status* of a Euro



pean British subject exists, and that the accused comes within the terms of the definition of such a subject as is given in section 4 of the Code. The proceedings, therefore, not being proceedings against a European British subject, have been wrongly entered as such in the returns sent to this Court by the Courts in Sind, and must be returned to the Magistrate (who for the purposes of this trial had needlessly styled himself a Justice of the Peace). They are subject to revision, not by this High Court, but by the Sadar Court in Sind, which is the High Court in reference to them.

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### APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and  
Mr. Justice Nánábhái Haridás.*

MORESHWAR BA'KRISHNA, (ORIGINAL PLAINTIFF), APPELLANT, v.  
DATTU AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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April 26.

*Registration Act III of 1877, Sec. 50—Priority—Possession of mortgagor as tenant to mortgagee—No notice to bond-fide purchaser—Notice.*

By an unregistered deed of sale dated the 1st June, 1881, the first defendant sold to the plaintiff, for Rs. 90, certain land which had been previously mortgaged with possession by him to the plaintiff. The first defendant had remained in possession subsequently to the mortgage as the tenant of the plaintiff under a lease which was not registered. On the 16th April, 1883, the first defendant sold the property to defendant No. 2, who registered his deed, took actual possession of the land, and got it transferred to his name in the revenue books. The plaintiff now sued to recover possession from defendant No. 2, who contended (*inter alia*) that his deed being registered was preferable to the plaintiff's prior, but unregistered, deed of sale. The Court of first instance awarded the plaintiff's claim. The defendants appealed to the District Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court,

*Held*, confirming the decree of the lower Appellate Court, that defendant No. 2 having registered his deed of the 16th April, 1883, was entitled, under section 50 of Act III of 1877, in priority to the plaintiff, whose deeds were not registered, although earlier in date.

It was contended for the plaintiff that the possession of defendant No. 1 as tenant to the plaintiff subsequently to the mortgage and sale of the land to the plaintiff was the possession of the plaintiff, and that such possession operated as constructive notice of the plaintiff's title to defendant No. 2.

*Held*, that the possession by defendant No. 1 as mortgagor was not notice to defendant No. 2 of the plaintiff's title. Defendant No. 1 being the vendor of the land to defendant No. 2, the latter could have no reason to suppose that he was in possession otherwise than as owner.

\* Second Appeal, No. 275 of 1886.