

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

AGA MOHAMMED JAFFER TEHRANI v. MIRZA NAZIRULLAH.\*

1868  
Nov. 21.

*Commission—Native State or Prince in Alliance—Admissibility of Evidence—Act VIII. of 1859, ss. 177, 178, and 179.*

See Act XIV.  
of 1859, Chap.  
25 Sec. 390.

The kingdom of Ava is not the territory of a native prince, or state in alliance with the British Government, within the meaning of section 177 of Act VIII. of 1859.

A commission for the examination of a witness, at Mandalay, can only issue from the High Court.

The consent of parties is not requisite to the admissibility of evidence taken under such commission, if the examination have been upon oath or affirmation.

THE following case was submitted for the decision of the High Court by the Recorder of the Court of Rangoon, under Act XXI. of 1863, section 22.

“The first question is, whether a commission for the examination of a witness, at Mandalay, in the territories of the King of Ava, ought to be sent by this Court under the 177th section of Act VIII. of 1859, or whether this Court ought to apply to the High Court to send such a commission under section 178.

“It is contended by the advocate for the defendant, that Mandalay is not within the territories of a native prince or state in alliance with the British Government, within the meaning of the 177th section.

“It appears to me that this contention is wrong. There is no treaty of alliance, offensive and defensive, between the Queen of England and the King of Ava, so that the two states cannot be said to be in alliance according to the definitions of Wheaton. But at the same time there is a commercial treaty between the two Governments, and we have a political agent at the Court of Mandalay, (see Political Notification, No. 572, dated Simla, June 3rd, 1858.) It has been held that Cabul is in alliance with the British Government within the meaning of section

\* Reference by the Recorder of Rangoon.

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177, see *Metir Banoo v. Mahamed Moom Khan* (1). I am not aware whether there be or no a treaty of alliance between the British Government and that of Cabul; and it seems to me that section 177 would practically be of little use if the power of the Court to send a commission depended on the existence of such a treaty.

“If, however, their Lordships should consider that the commission should be sent by the High Court, which, I take for granted, corresponds with the Sudder Court alluded to in section 178, then I would request them to direct a commission in this case to, &c.

“The second question, which I am desired to refer to their Lordships, is whether the depositions of witnesses taken under a commission, sent to Mandalay, under either of the two sections, 177 or 178, can be read in evidence except by consent?

“Section 179 says, that ‘no deposition taken under a commission shall be read in evidence without the consent of the party against whom the same may be offered, unless it be proved that the deponent is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend to be personally examined, or distant, without collusion, more than a hundred miles from the place where the Court is held, or exempted by reason of rank or sex from personal appearance in Court, or unless the Court shall, at its discretion, dispense with the proof of any of the above circumstances, or shall authorize the deposition of any witness being read in evidence notwithstanding proof that the causes for taking such deposition have ceased at the time of reading the same.’ This section does not, it seems to me, make the deposition evidence, even supposing the witness be dead, or sick, or absent, &c. It only provides, that it shall not be evidence, unless he be dead, sick, or absent, &c. Section 175 gives the Court power to give directions for taking the examination of witnesses under the commission, but it would be impossible, as I am informed in the present case, to obtain the deposition of some of the witnesses whose evidence is required upon oath, as they are officials of

the Burmese Court, and would refuse to be sworn, even if an oath could be imposed. It appears to me that the deposition of a witness, taken on oath in a semi-barbarous country, where the penalties attaching to perjury are merely nominal, could hardly be read in evidence in a Court of Justice in the British Territories, unless by consent of parties."

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The judgment of the Court was delivered by

PEACOCK, C. J.—We are of opinion that the Kingdom of Ava is not the territory of a native prince or state in alliance with the British Government within the meaning of Section 177 of Act VIII. of 1859, for we are not aware of any treaty of alliance between the two Governments. The case, therefore, appears to fall within section 178, and we have directed a commission to issue under that section. If the witnesses be examined upon oath or affirmation, the evidence will be admissible without consent of parties upon proof being given in the Recorder's Court of such fact as is required by section 179 of Act VIII. of 1859 to be proved, in order to render the depositions capable of being read in evidence.

We have no power to compel the witnesses to attend before the commissioner for examination, or to take any oath or affirmation, or to give evidence. If the evidence be given on oath or affirmation, as required by the commission, the evidence will be admissible. The weight to be attached to it will be matter for the Recorder to decide.

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*Before Mr. Justice Phear and Mr. Justice Hobhouse.*

RAMKUMAR MANDAL AND OTHERS (DEFENDANTS) v BRAJAHARI  
MRIDHA (PLAINTIFF.)\*

1868  
No. 2.

*Lease at Annual Rent (मन वमन)—Registration—Act XX. of 1866, s. 19, c. 4.*

A lease for no definite time, but fixing an annual rent (मन वमन), falls within clause 4 of sec. 17 of Act XX. of 1866, and must be registered in order to be admissible in evidence.

See Act II  
of 1877  
Sec 17 (d)

THIS was a suit for declaration of a right of fishery in certain jalkar land, on the allegation that the plaintiff was the lessee

\* Special Appeal, No. 1951 of 1868, from a decree of the Subordinate Judge of 24-Pergunnahs, affirming a decree of the Moonsiff of that District.