

AND THE LORD SAID UNTO—

**Reports of Cases Argued and Determined Before
The Lords Of the Privy Council, 1829-31
By Jerome Wm. Knapp, Barrister-At-Law, Vol. I.
[A note Contributed by Dr. B. R. Ambedkar]**

The case *In re justices of the Supreme Court of Judicature*, which is reprinted below was decided on the 14th of May 1829. It would, however, be a mistake to suppose that the case is of antiquarian interest merely because it is 107 years old. The case is not only of interest to students of History but it is also of interest to students of Law and to the general public as well. Students of History know the jealousy and the hatred that subsisted between the Officers of the East India Company and the Officers of the crown during the period of Double Government that preceded the Mutiny. The reader of the *Memoirs of Sir Edward West* will recall how a Governor appointed by the East India Company contrived to have a duel with a Judge of the Supreme Court appointed by the King. To the student of History the case is of interest because it illustrates the length to which this jealousy and hatred between the officers of the Company and the officers of the King had gone in those old days. To the student of Law the case though old is of great and present-day importance. The issue raised in the case was whether the Supreme Court established in Bombay had a right to issue a Writ of *Habeas Corpus* against a person not residing within its original local Jurisdiction. That the decision had relation to the powers of the Supreme Court which has ceased to exist does not lessen the importance of the case to the student of present day Law because although the Supreme Court has ceased to exist the power of the present High Court to issue the writ of *Habeas Corpus*, outside its original local Jurisdiction is a question which can be answered only by reference to the powers which once belonged to the Supreme Court. This is so because according to the Letters Patent the High

Court has only such powers as once belonged to the Supreme Court. To know the powers of High Court one must know the powers of the Supreme Court. Sir John Grant, the Chief Justice of the Supreme Court was driven to make the application to the Privy Council which became the subject matter of the decision because the Government of Bombay refused to execute his writs. Although the general question— whether the law should provide that the Executive shall be bound to carry out the orders of the Judiciary was not a question directly in issue yet there could hardly be a question of greater importance from the standpoint of the general public. In any Political Constitution the Judiciary is the weakest organ as compared to the Legislature and the Executive. It depends upon the Legislature for the powers it possesses and upon the Executive for the carrying out of its orders. The Executive generally respects the orders of the Judiciary and carries them out. It is true that in the case reported, the Judiciary had no authority to issue a Writ and, therefore, the Executive was justified in refusing to carry it out. But an occasion may arise where an Executive out of spite or out of contumacy refuses to execute the Writ of the Judiciary. Should that happen Justice will remain hung up in the air and a grave public question might arise involving menace to the life, liberty and property of the citizen. These observations are suggested by reason of the contrast which one finds between the provisions in the New Government of India Act, of 1935 relating to the obligation of the Executive to carry out the Writs of the Federal Court or the High Court and analogous provisions in the Constitution of the United States and the erstwhile German Republic which served as an interlude between the fall of the Kaiser and the rise of Hitler. It would certainly be a profitable study to pursue this matter and the curious will naturally do so.

(See overleaf the Judgment referred above)

By Petition from Bombay

IN RE THE JUSTICES OF THE SUPREME COURT OF JUDICATURE
(14TH MAY, 1829)

The Supreme Court of Bombay has no power to issue a writ of *habeas corpus* except when directed to a person resident within those local limits wherein it has a general jurisdiction, or to a person out of those limits who is personally subject to its jurisdiction [1 Knapp, 58].

The Supreme Court has no power to issue a writ of *habeas corpus* to the gaoler or officer of the native court such officer having no power to discharge persons imprisoned under the authority of a native court [1 Knapp, 58].

The Supreme Court is bound to notice the jurisdiction of a native court without having it set forth specially in the return to a writ of *habeas corpus* [1 Knapp, 59].

This case arose on the petition of Sir John Peter Grant, Knight, only surviving justice of the Supreme Court of Judicature at Bombay. It stated that by letters patent of the 8th of December*, in the fourth year of the present reign, his Majesty was pleased to grant, direct, ordain and appoint, that there should be within the settlement of Bombay a Court of Record, which should be called the Supreme Court of Judicature at Bombay; and did thereby create, direct and constitute the said Supreme Court of Judicature at Bombay to be a Court of Record, and that the same should consist of, and be holden by and before, one principal Judge, who should be and be called the Chief Justice of the Supreme Court of Judicature at Bombay, and two other judges, who should be and be called the puisne Justices of the Supreme Court of Judicature at Bombay.

And that the said Chief Justice and the said puisne Justices should severally and respectively be, and they were all and every of them thereby appointed to be, Justices, and conservators of the peace, and coroners, within and throughout the settlement of Bombay, and the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and all the territories

[* 1823. The text of the charter is given in Morley's Dig. Vol. II., P. 638. The constitution and powers of the High Court of Bombay are now defined by letters patent of Dec. 28, 1865 (State. R. and O. Rev. Vol. IV., P, 108), issued in pursuance of the Indian High Courts Act, 1861 (21 and 25 Viet. 104)]

which then where, or thereafter might be, subject to or dependent upon the Government of Bombay aforesaid, and to have such jurisdiction and authority as his Majesty's justices of his Majesty's Court of King's Bench had and might lawfully exercise within that part of Great Britain called England, as far as circumstances would admit.

And that the said Supreme Court of Judicature at Bombay should have and use, as occasion might require, a seal bearing a device or impression of his Majesty's royal arms; and that all writes, summonses, precepts, rules, orders, and other mandatory process to be used, issued or awarded by the said Supreme Court of Judicature at Bombay, should run and be in the name and style of his Majesty, and be sealed with the seal of the said Supreme Court.

And that the King by the said letters patent constituted and appointed Sir Edward West, Knight, then recorder of Bombay, to be the first Chief Justice, and Sir Ralph Rice, Knight, then recorder of Prince of Wales's Island, and Sir Charles Harcourt Chambers, Knight, to be the first puisne Justices of the said Supreme Court of Judicature at Bombay.

And the King did further direct, ordain and appoint a certain jurisdiction to appertain to the said Supreme Court of Judicature, for the hearing and determining of suits and actions arising in the territories subject to or depending upon the said Government, subject to certain provisos, exemptions, and declarations in the said letters patent mentioned, and did appoint a certain form of proceeding for the commencing, prosecuting, hearing and determining such civil suits and actions, and for the awarding and issuing of execution on the judgements pronounced therein.

And that the King was also pleased to grant, ordain and appoint, that the said Supreme Court should be a court of equity, and have equitable jurisdiction over the persons in the said letters patent described, and should be a court of oyer and terminer, and gaol delivery in and for the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and also a court of ecclesiastical jurisdiction within and throughout the town and island of Bombay and the limits thereof; and further, that the said Supreme Court should be a Court of Admiralty in and for the said

town and island of Bombay and the limits thereof, and the factories subordinate thereto, and all the territories which then were or thereafter might be, subject to or dependent upon the said Government.

And that the said Sir R. Rice, Knight, resigned the office of senior puisne Justice of the said Supreme Court of Judicature at Bombay, in November 1827, when the said Sir C. H. Chambers became senior puisne Justice thereof; and the said Sir R. Rice having resigned his office, the petitioner was by letters patent of the 30th of August 1827, appointed one of the puisne Justices of the said Supreme Court in his room; and that he took his seat as such at Bombay, on the 9th day of February 1828.

And that the said Chief Justice Sir Edward West departed his life on the 18th of August 1828; and that on the 3rd day of October in that year a letter was addressed :

“To Sir C. H. Chambers, and the petitioner, as puisne Justices of the Supreme Court of Judicature, dated Bombay Castle, 3rd October 1828, and signed, by John Malcolm, the Governor; T. Bradford, Lieutenant-General, Commander of the Forces; J. J. Sparrow, and John Romer, the Second and Third Members of the Council.”

Which letter was of the following tenor :

Honourable Sirs :

“We are quite aware that we transgress upon ordinary forms in addressing this letter to you; but the circumstances under which we are placed will, we trust, justify this departure from usage, and our knowledge of your private and public characters leads us to hope, that what we state will be received in that spirit, in which it is written; and that, notwithstanding your strict obligations to fulfil every part of your high and sacred duty as British Judges, you will, on this extraordinary occasion, deem yourselves at liberty to consider as much the objects, as the rules of the Court over which you preside; and viewing the intention of the Legislature in its institution, as directed to the aid and support of the Government instructed with the administration of this Presidency, you will, for a short period, be induced by our representations to abstain from

any acts (however legal you may deem them) which, under the measures, we have felt ourselves compelled to take and which we deem essential to the interests committed to our charge, must have the effect of producing open collision between our authority and yours, and by doing so, not only diminish that respect in the native population of this country which it is so essential to both to maintain, but seriously to weaken, by a supposed division in our internal rule, those impressions on the minds of our native subjects, the existence of which is indispensable to the peace, prosperity and permanence of the Indian empire. This conclusion refers to a variety of circumstances which we are equally forbid from explaining as you are from attending to such explanation; but we deem it necessary to state our conviction of the truth of what we have asserted, expecting that it may have some weight with you as connected with the preservation of that strength in the Government, which in all our territories, and particularly those we have so recently acquired, is the chief, if not the only power we possess for maintaining that general peace, on the continuance of which the means of good rule, and of administering law under any form must always depend.

“2. In consequence of recent proceedings in the Supreme Court, in the cases of Moro Ragonath [1 Knapp, 8] and Bappoo Gunness [1 Knapp, 11], we have felt compelled, for reasons which we have fully stated to our superiors, to direct that no further legal proceedings be admitted in the case of Moro Ragonath; and that no returns be made to any writs of *habeas corpus* of a similar nature to those recently issued and directed to any officers of the provincial courts, or to any of our native subjects not residing in the island of Bombay.

“3. We are quite sensible of the deep responsibility we incur by these measures, but must look for our justification in the necessity of our situation. The grounds upon which we act have exclusive reference to considerations of civil Government and of State policy; but as our resolution cannot be altered until we receive the commands of those high authorities to which we are subject, we inform you of them; and we do most anxiously hope, that the considerations we have before stated may lend you to limit

yourselves to those protests and appeals against our conduct in the cases specified, that you may deem it your duty to make, as any other conduct must, for reasons already stated, prove deeply injurious to the public interests, and can, under the resolution taken and avowed by Government, produce no result favourable either to the immediate or future establishment of the extended jurisdiction you have claimed. A very short period will elapse before an answer is received to the full and urgent reference we have made upon this subject; and we must again express our hope, that even the obligations under which we are sensible to act, are not so imperative as to impel you to proceedings which the Government has thus explicitly stated its resolution to oppose.

“We have the honour to be, etc. etc.”

The petition then stated, that on Monday the 6th October instant, the Supreme Court being assembled for the despatch of its judicial business, Sir C. H. Chambers caused this letter to be read to the court by the clerk of the Crown; after which the petitioner concurring with Sir C. H. Chambers in opinion regarding both the form and the substance of the communication, the court directed that the clerk of the Crown should inform the Chief Secretary to the Government of the Presidency, by letter, that the said letter had been received, and that the Judges could take no notice thereof.

That it was the intention of the said Sir C. H. Chambers and the petitioner to have laid before his Majesty, in an humble petition, the circumstances which were therein above set forth, and most dutifully and submissively have to be sought his Majesty's royal protection against what they agreed in considering a most unconstitutional and criminal attempt, on the part of those armed with the whole power, civil and military, of the Presidency, to approach the Supreme Court of Judicature within the same, not by their humble petition, or by motion, by themselves or their counsel, in open court, the only way in which the law, for the wisest purposes, permitted his Majesty's Judges to be addressed, but by means of such covert and private communication, as was strictly forbidden by the forms reared by the wisdom of ages, for the intrenching their persons against the danger and even the pollution of undue solicitation or menace, and this for the declared purpose of inducing the Judges, notwithstanding their most sacred

obligations to God, to the King, and to themselves, to refuse to administer justice according to what they should deem to be law, in compliance with such notions as those who had thus approached them might from time to time entertain of what they should call State policy.

That, while a petition to the above effect was preparing to be transmitted to England, Sir Charles Harcourt Chambers, then acting as Chief Justice of the said Supreme Court, suddenly died on the 13th of October 1828.

The petition then proceeded at considerable length to explain the motives that influenced the petitioner and his colleague during these proceedings to impugn the conduct of the Governor and Council, and to show the benefit of the Supreme Court having the power to issue the writ of *habeas corpus* in the manner they claimed. It ultimately prayed, that it might therefore please His Majesty to take the premises into his Royal and most gracious consideration, and to give such commands concerning the same as to His Majesty's Royal wisdom should seem meet, for the due vindication and protection of the dignity and lawful authority of His Majesty's Supreme Court of Judicature at Bombay.

The case of Moro Ragonath [1 Knapp, 5] which is alluded to in the petition may be thus briefly stated; on the 25th of August 1828, writ of *habeas corpus ad subjiciendum*, directed to Pandoorung Ramchander for the production of the body of Moro Ragonath, his ward, was moved for before Mr. Justice Grant, the petitioner, at his chambers, on the affidavit of Dinkar Gopal Dew, which stated that Moro Ragonath had been confined for nearly a year, and was still kept in confinement by Pandoorung Ramchander against his will, and under circumstances attended with great hardship and cruelty. This motion was opposed by the Advocate General, on the ground that Pandoorung Ramchander and Moro Ragonath were natives, residing at Poona, and not amenable to the jurisdiction of the Supreme Court. The granting of the writ was postponed for various reasons until the 30th of August, during which time additional affidavits were put in, and in these it was stated that Moro Ragonath having made his escape from Pandoorung Ramchander on the 12th of July, was retaken and sent back again to his custody by persons acting under the order and by the directions of John

Andrew Dunlop, esq., a British-born subject, and a Provincial Magistrate at Poona. After considerable discussion, the writ was ordered to issue, and was made returnable to the Court on the 15th of September then next, it was translated by order of the Court into the Mahratta language, and duly served on Pandoorung Ramchander. A return was made and filed to this writ in these terms :—

“I, Pandoorung Ramchander Dumdurre, am the relation and friend of the Peishwah. I never in my life have been the servant of the English Government, or of the English. At the time the Company’s Government took this country, they gave me word I should live without fear or molestation. Depending upon that, I remained in Poona; and as for my grandson, Moro Ragonath, I am his grandfather; he was placed under my care, that I might take care of him according to the usual custom. He, the said boy, is fourteen years old; for that reason, according to the Shaster of the Hindoos, he is without knowledge; he is bound to behave agreeably to the orders of the person under whose charge he lives; and further, it is necessary to take care of the property and wealth of the boy; more than this, there is nothing, and there is nothing more done (by me to him,) than by those to whose care a boy is delivered, or the usual orders of seniority in a Hindu’s family. Should I by any chance do more or less, the same being made known to the Adawlut at Poona, it would be immediately stopped. After Moro Ragonath’s grandmother died, he was delivered into my charge, according to the rule, and I agreed to undertake that charge, in order that my grandson’s wealth might not be ruined. Without the leave of those by whose authority I took the charge upon my head, I cannot relinquish it. Dated 10th of September 1828, 1st of Bhadrpad Sood Shalabar 1750, the name of the year being Surodharee.”

This return was objected to on two grounds; firstly, that there was no return, “*paratum habeo corpus* ;” secondly, that no reason was stated to excuse the disobedience, but that the writ ought not to have issued, which was a reason the Court ought not to receive; and an attachment against Pandoorung Ramchander was moved for. The Judges took time to deliberate on the question, and on the 29th of September they delivered their judgement, that a writ of *alias habeas corpus* should issue, returnable on the 10th of October then next.

The case of Bappoo Gunness [1 Knapp 6] came before the Supreme Court on an application for a writ of *habeas corpus ad subjiciendum*, to the head gaoler of the gaol at Tannah, directing him to produce the body of Bappoo Gunness, then a prisoner in his custody. The writ was granted on the affidavit of one Babool Ranjee, stating that he had applied to the gaoler for a copy of the warrant under which Bappoo Gunness was confined, and that it had been refused to him. The writ issued on the 10th, and was made returnable on the 19th of September 1828. A return to it was made by the nazir of the court of Adawlut of the northern Konkan, and the gaoler to whom the writ was directed in these terms:— “That before the coming in of the writ, Bappoo Gunness was taken and detained in our custody by virtue of a certain order in writing of the Adawlut Court of the zillah of the northern Konkan, in the Mahratta language, and in the following form:” which was set out, and stated in effect that Bappoo Gunness having been found guilty of embezzlement, was sentenced to two years imprisonment, and a fine of 350 rupees, or in default of payment of that sum to a year’s additional imprisonment. The body of the prisoner not having been produced on the 19th, the Judges would not suffer the return to be read, and directed an attachment to issue against the gaoler. On the 26th the attachment was set aside on payment of the costs, at the instance of the Advocate-General, and Bappoo Gunness having been brought into Court, the return was read, and held insufficient, because the authority of the Adawlut Court was not stated in it; four days time was allowed to amend it, the prisoner being in the mean while committed to the gaol at Bombay. The return was not amended within that time, the Advocate-General stating to the Court that the reason why it had not been amended, was because Government would not suffer the authority of the Provincial Courts to be questioned; and Bappoo Gunness was discharged from custody.

Denman, (Common Serjeant,) and *Alderson*, for the Petitioner,—It is perfectly clear that the Supreme Court of Judicature possesses the power of issuing a writ of *habeas corpus* directed to all the King’s subjects, of whatever description, resident within the territories of Bombay, in order to set free the body of any of the King’s subjects detained by them.

The Supreme Court of Bombay derives its several powers from the charter by which it was constituted, in pursuance of the Act of the fourth of the present King [Dec. 8, 1823. See Morley's *Dig.* Vol. II. p. 638]. The original necessity of granting those powers to the Courts of Law in our East Indian possessions arose out of the complaints of oppression, and the disputes of persons in authority there, which at different times during the last reign were brought before the Company and Parliament in this country.

One of the resolutions adopted on this important subject at a meeting of the Court of Proprietors, on the 10th of May 1773, was, "that an application should be made for a new charter of justice, to enable the Company to add to each of the Mayors Courts at the three Presidencies, and to the Courts of the Governors and Councils as Courts of Oyer and Terminer, a barrister to act as recorder, to extend the powers of the Mayors Courts." The additional words of the resolutions are most remarkable on the present occasion: "and particularly to introduce the privilege of the *habeas corpus* into India." It is remarkable, too, that in a petition presented to the House of Lords in the same year, the East India Company stated, "that the most effectual provision of all others to prevent oppression which was recommended by the Company *viz.* that of the *habeas corpus*, whereby men might know of what crime they were accused, and by whom imprisoned, was omitted."

The Supreme Court of Judicature at Calcutta was opened on the 22nd of October 1774, from which period, for a long course of years, writs of *habeas corpus* were regularly issued; most of them apparently to native subjects, and not to those who by way of distinction are called British subjects residing in those territories. On the 16th of January in the year following a motion was made for a *habeas corpus* to the keeper of a place called the prison of the Dewanee Cutcherree, to bring up a person confined there, and the writ was ordered to issue. It should be observed, that by the 13th Geo. III. c. 63 [The Regulating Act, 1773], the King's Court had no more jurisdiction in Calcutta over natives or others, except as a Court of Oyer and Terminer and Gaol Delivery, than in any other part of the dominions of the Crown of England within the Presidency, and that the Zemindary Courts of the Company continued to exercise a jurisdiction over natives in Calcutta, just as the

Zemindary Courts do at the present time. Those Courts are exclusive, as to the complaints, suits and actions against natives not in the employment or service of the Company, or of a British subject, and not brought before the Court of Oyer and Terminer and Gaol Delivery. On the 17th of January a return was made to a *habeas corpus* which had been granted to a person of the name of Golum Hider, to produce *Sum ju*, a female infant of eleven years of age, stating that the child was voluntarily under his care, and not underrestraint. On the 19th of January of the same year a writ was issued to Jona Mullick, keeper of the prison of the Dewanee Adawlut in Calcutta, to bring up the body of Banchuram Roy. That writ was objected to by counsel on Saturday the 21st of January, inasmuch as it issued on the statute of Cha. II., and was not marked *per statum*. It was answered by the Chief Justice that the writ might be considered as at common law. A motion then was made for quashing the writ, because the common law of England did not extend to India, or at least to no other than British subject: but this motion was rejected by the court; for on January the 31st a return was made to the writ, and the doctrine was by consequence denied. But when, on the 2nd of March in the same year, the return was read again, stating the imprisonment to be in a civil suit for debt, by order of the Court of Dewanee Adawlut, the Supreme Court at Calcutta proceeded to inquire whether that court, which undoubtedly possessed a competent jurisdiction in many cases, possessed in it that which was then under discusson. The plaintiff was a British subject, and the defendant his *gomastah* or steward, and therefore in the employment of a British subject; both parties were amenable to the jurisdiction of the Supreme Court, and neither of them within that of the Dewanee Adawlut. The keeper of the prison being in court to make his return, the prisoner was discharged. The Supreme Court thus exercised its authority in determining that the return did not bring the prisoner within the jurisdiction of the inferior court.

Again, on the 28th of March 1775, a return was made by Jona Mullick, keeper of the gaol of Fousdary Adawlut, to *habeas corpus*, to bring up the body of one Seremani there confined. On the 23rd of December in the same year a writ of *habeas corpus*, directed to Warren Hastings, esquire, the Governor-General, to bring up the body of Joseph Pavessi, was returned in court, the return being

made by the Governor-General himself, without the slightest intimation of objection, and the said Pavessi was discharged, the Governor-General having declined to state as true, in an amended return, a necessary fact which he had only on report. Pavessi had been taken up in order to be sent out of India contrary to law, he being not a British subject.* It appears, therefore, that at that early period the reform of the Indian Governments, and the superintendence of the English law over the settlement, were considered synonymous; and one great object contemplated by the Company itself, was the introduction of the writ of *habeas corpus*, authorizing any man deprived of his personal freedom to compel the party who imprisoned him to show that he did so by authority of law.

At Calcutta, various instances of the same kind might be cited, and others have occurred at Madras. The importance of the writ of *habeas corpus* has been strongly and justly felt. Whatever Act was passed, and whatever charter was granted, subject to whatever limitation of powers, there was no exception to that writ, and no limitation of its sphere in any of those statutes or charters.

But the writ of *habeas corpus* was expressly given to the Supreme Court of Calcutta by the letters-patent of the 13th Geo. III. **, they conferred upon that court "such jurisdiction and authority as our Justices of the Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit." The writs of *habeas corpus* issued under that power do not appear to have been questioned in any manner which could raise a doubt as to their authority. The erection of the Supreme Court of Bombay has reference to the powers given to the Supreme Court of Calcutta. The 4th Geo. IV.(c. 71), indeed gives His Majesty the power by

*This and the preceding cases appear to have been quoted from a pamphlet published in October 1828, at Bombay, and entitled "Proceedings of the Governor and Council at Bombay towards His Majesty's Supreme Court of Judicature." They are there stated to have been extracted from MS., notes made by one of the Judges appointed at the first establishment of the Supreme Court at Calcutta.

**[The text of the charter is given in Morley's Dig. Vol. II., p. 549. The constitution and powers of the High Court of Calcutta are now defined by letters patent of Dec. 28, 1865 (Stat. R. and O. Rev. Vol. (iv.) p. 82), issued in pursuance of the Indian High Courts Act, 1861 (24 and 25 Viet. C. 104)]

charter or letters patent, “to erect and establish a Supreme Court of Judicature at Bombay, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and control, in the said town and island of Bombay and the limits thereof, and the territories subordinate thereto, and within the territories which then were or thereafter might be subject to or dependent upon the Government of Bombay, as the Supreme Court of Judicature at Fort Williams in Bengal, by virtue of any law then in force and unrepealed, did consist of, was invested with, or subject to, within the said Fort Williams, or the places subject to or dependent upon the Government thereof; provided always, that the Governor and Council at Bombay, and the Governor-General at Fort Williams aforesaid, should enjoy the same exemption, and no other, from the authority of the Supreme Court of Judicature to be there erected, as were enjoyed by the said Governor-General and Council at Fort Williams aforesaid for the time being, from the jurisdiction of the Supreme Court of Judicature there.” That is the only proviso for the exemption of the Governor and Council of Bombay; but the Governor-General and Council of Fort Williams are not only exempted from the jurisdiction of the Court, *but have by the 21st Geo. III, the power of exempting others also from its jurisdiction by their order in writing; which approaches very nearly to the latter in question.

In pursuance of this Act of 4th Geo. IV. [c. 71] His Majesty erected the Supreme Court of Judicature at Bombay, by his Letters Patent [Morley’s *Dig.* Vol. II. p. 638]. By these letters he gave to it various powers and authorities which are exercised by his ordinary

*21st Geo. 3, c. 70, s 2. “If any person or persons be impleaded in any action or process, civil or criminal, in the said Supreme Court, for any act or acts done by order of the said Governor-General and Council, in writing, he or they may plead the general issue, and give such order in evidence; which said order, with proof that the act or acts done have or has been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal in the said Court”.

By section the third of the same Act it is provided, that with respect to such order of the Governor-General and Council as shall extend to any British subject or subjects, the court shall have and retain as full and competent jurisdiction as if the Act had never been made.

writes in the Kingdom of England; and he thought proper to limit the extent of its civil jurisdiction, of its ecclesiastical jurisdiction, and of its jurisdiction as a Court of Oyer and Terminer; but these are the only respects in which he limited, as to the extent of territory, those powers which the court was to possess. The clause limiting the civil jurisdiction is in these words [clause 28]: "And we do further direct, ordain and appoint, that the jurisdiction, powers, and authorities of the said Supreme Court of Judicature at Bombay shall extend to all such persons as have been heretofore described and distinguished in our charters of justice for Bombay by the appellation of British subjects, who shall reside within any of the factories subject to or dependant upon the Government of Bombay." It thus states, that all the jurisdiction, powers, and authorities of the Supreme Court of Bombay are to extend to those persons; but it cannot mean that the general jurisdiction of the court extends to no others. But if the whole of the article be read thus, "That the jurisdiction, power, and authority of the Supreme Court of Bombay shall extend to (and that the said court shall be competent and effectual, and shall have full power and authority to hear and determine all suits and actions whatsoever against) any of our said subjects distinguished," etc.; it would then apply only to the civil jurisdiction alone, as to suits and controversies, and have no reference to any limitation on the other jurisdiction of the court. In like manner the Court of Equity is to extend over all the same persons as those who have civil suits. So again, in speaking of the criminal jurisdiction, the charter [clause 44] authorizes and empowers the said Supreme Court to "inquire, hear, and determine of all treasons, murders, felonies, misdemeanors, etc. committed by any of the King's subjects in any of the territories subject to or dependent upon the Government of Bombay." Now, if all the powers of the court had been previously limited by the clause of the charter granting the civil jurisdiction to subjects residing within the factories, this clause would be inconsistent with it. It, therefore, shows that limitation not to extend to all its powers and authorities, but to its civil jurisdiction alone. The result is then, that first, all the general powers of the Court of King's Bench throughout a district including Poona and Tannah, the places in question, are given to the Supreme Court; then a civil authority is given, limited to a smaller district; and then other jurisdiction are given it, limited in the same manner.

The language of this charter thus becomes as intelligible as the principle on which it rests. The native subject shall not have his contract interpreted by a foreign law; but it equally imports him, whether contending with another native, or with a British-born subject, to be secured from that invasion of individual liberty, without which no justice of any kind can be obtained. The distinction is manifest between the ordinary objects of civil and criminal justice, and the high prerogatives vested in the Crown for the immediate protection of all its subjects. The powers which belong to His Majesty by virtue of his royal station, to be exercised by him through his Judges in the Court of King's Bench, exist in conquered countries as well as those to which he succeeded when he came to the Crown. They cannot be taken from him, but by his own concurrence with the two other branches of the Legislature, in words which can leave no doubt of the intention to make so great a sacrifice.

In these letters patent there is also this proviso [clause 45]: "That the Supreme Court shall not be competent to try any indictment or information against the Governor-General and others who are specified, except in particular cases." Now the power of granting a criminal information is not involved in that of trying actions and indictments; yet the proviso clearly implies, that in all cases excluded from it under the circumstances there directed, the Supreme Court might hear a motion for a criminal information.

It was only in the year 1827 (R. V. Wright, 1827, Morley's Dig. Vol. I. p. 120) that Sir Charles Grey had occasion to give a judgement, which proves the opinion of that learned Chief Justice on the subject. A motion was made for a criminal information against a variety of persons who had obstructed a Sheriff's officer in executing the process of the court. Some of the parties complained of were native subjects not open to the ordinary jurisdiction; no indictment could have been preferred against them. But the others were British subjects, or those employed by British subjects, who clearly would not fall within the exception. Sir Charles Grey expressly recognizes the distinction which we have drawn. "A question had been made, whether the Court possessed authority to grant a criminal information against Mendy Ally Khan, as it had been said that he was not subject to this jurisdiction, as he was not an inhabitant. In his own opinion, however (the opinion of the Chief Justice of Bengal), the question

of the jurisdiction of the court should not be entertained. There were two distinct powers of jurisdiction vested in the court, that of Oyer and Terminer and of the Court of King's Bench. The former was limited; but the latter was not, but extended throughout all the Provinces under this Government. It was his opinion, that the Supreme Court possessed authority to grant information anywhere in the Company's territories, for any act for which the Court of King's Bench could issue one in England. The Court had a complete power of punishing any native, foreigner, or other person whosoever, contempt or violent obstruction of the process of the court, in the same way as the Court of King's Bench. It would be perfectly anomalous to say that it did not possess the power of punishing that by the more deliberate mode of information, which could be effected by the mere summary process of attachment. He could not confine it to that question, seeing that they possessed the jurisdiction of the Court of King's Bench. He did not know that the Court might enter into a criminal information against any person whatever. He should state, however, that such an authority should be executed sparingly, and with caution. This would set the question of the grounds of the criminal information at rest, as their jurisdiction over Mendy Ally Khan did not depend on his being an inhabitant of Calcutta." He then proceeds to say, "that as some of those persons were not subject to indictment, and those subject to it were the least guilty parties, he would not grant a criminal information, but thought it better to leave it altogether to an indictment."

In this passage the power to try indictments is clearly separated, both from the right to issue attachment for contempt, and from that of granting criminal informations. Indictment can be tried by the Supreme Court only in its character of a Court of Oyer and Terminer, and its power to try them is bounded by the terms of the exception; but the power of punishing contempt is inherent in all courts. The power of proceeding by criminal information is inherent in the Court of King's Bench and is transferred, without limitation as to persons, by the terms of the charter to the Supreme Court.

Numerous cases might be drawn from the books, if authority were wanted, to inform your Lordships that, that power does exist

in the manner described. In Bourn's case, Cro. James, p. 543, "Montague, Chief Justice, said that the privilege of the Cinque Ports, that the King's writ runs not there, is to be intended between party and party, but no such privilege can be against the King: and this writ (a writ of *habeas corpus*) is a prerogative writ which concerns the King's justice to be administered to his subject; for the King ought to have an account why any of his subjects are imprisoned; and it is agreeable to all persons and places, and no answer can satisfy it but to return the clause with *paratum habeo corpus*, etc.; and this writ hath been awarded out of this court to Calais, and all other places within the Kingdom, and to dispute it is not to dispute the jurisdiction, but the power of the King and His Court, which is not to be disputed; and of this opinion were all the other justices;" This doctrine of Lord Chief Justice Montague is fortified by precedents of the King's writ having been awarded to Calais and other places within the dominion of the Crown of England, and has been fully recognized by the Courts in a variety of cases between that time and this. Lord Mansfield, in the case of Cowle, 2 Burrow's Reports, p. 834, laid it down that the King's writ must be said to run in all places throughout his dominions, but that this was not the case with all writs; and therefore, when he came to lay down the rule in that case, his Lordship directed it to be entered that writs of *venire facias* do not run in the town of Berwick; but he decided also, that the high prerogative writs arising out of a different source have a much more extensive operation. Now these high prerogative arise out of the natural allegiance the subject owes to the King, and the protection which that allegiance requires of the King for the subject? This is the principle which is stated in Calvin's case in 7th Report (1), *viz.*, that allegiance is the duty of the subject, and that protection is the duty of the King. Whenever therefore the subject owes allegiance, the King owes protection. Now can it be contended that in the case of any conquered country annexed to his Majesty's dominions the inhabitants of that country do not owe him allegiance? If they do, it must follow that the King must owe them protection, and that protection is to be, as in the present instance, given, by his issuing by virtue of his prerogative his writ of *habeas corpus*, that he may know whether they are lawfully imprisoned or not; or his writ of *certiorari*, that he may know whether any

proceedings which have been commenced against them are conformable to the law; or his writ of prohibition, that he may keep the respective courts throughout his dominions in the due exercise of their duties; or his writs of *mandamus*, that he may oblige persons to do such acts as they are bound to perform. Therefore, when the King grants to a particular court, by virtue of the authority of an Act of Parliament, these powers arising out of his prerogative, the court has them in their full extent, unless he limits them, either as to extent of territory, or in some other way. Here the King has granted the same powers as the King's Bench exercises in England, to be exercised by the Supreme Court of Bombay throughout a territory including the places to which these writs have been sent. It may be true, that the natives of India are not within the jurisdiction of the Supreme Court for the purpose of suing one another for private matters of dispute; that certain writs known to our law would not run as between party and party, and yet that the prerogative writs of the Crown being restrained by no clause in the charter, nor taken away by the direct words of an Act of Parliament, the sole power sufficient for that purpose must remain in the Crown, and exercised by that court to which the constitution has assigned so high and inestimable an authority.

In the early part of his able argument in the Court of Bombay, the Advocate-General of Bombay referred to the celebrated Patna case, in the year 1777, before Sir Elijah Impey, and from his expressions, endeavoured to infer that the Court had no jurisdiction over the natives in a case like the present (Patna, Appendix, No. 17, Judgement of Sir, E. Impey, in the case of *Nadarah Begum v. Behader Beg*). "In this country, the gross body of the people are not, and only certain persons answering particular descriptions are, objects of the King's laws or of the jurisdiction of this court. As therefore there are other laws and other courts, such as they are, to whom the bulk of the natives are amenable, and we were not anxious to extend our jurisdiction, we have suffered these pleas to the jurisdiction to be pleaded as freely as any other plea," etc. On this doctrine great stress was laid by Mr. Dewar: but Sir Elijah Impey's authority was not wanted in support of the fact, that natives

are exempt from the jurisdiction of the Supreme Court. The question still comes round. What jurisdiction is here contemplated? Is it that jurisdiction to issue high prerogative writs, which cannot be abolished without positive enactment; or is it that jurisdiction to decide those controversies between party and party, which the law designates by the name of suits and actions? Sir Elijah must have referred to the latter in the case where he permitted plea to the jurisdiction to be freely pleaded.

It was then argued, that because this Act of the 21st Geo. 3, cap. 70, enacted (section 11) that “Governor-General and Council should cause the name, description and place of usual abode and all natives employed in the service of the East India Company, in the offices therein mentioned, to be entered in a book or books to be alphabetically disposed,” that those precautions would hardly have been taken to ascertain what natives should be subject to the jurisdiction, if all natives without exception were. But in a limited sense of the word, we have no objection to admit that certain classes alone are within the jurisdiction. The registry of all the persons described is equally desirable for this purpose, whether our argument in favour of its embracing all in its more liberal sense, be well or ill founded.

Having spoken of the high prerogative writs in general, we proceed to speak of the writ of *habeas corpus* in particular. In the year 1818 the doctrines held concerning that writ were examined by Lord Eldon, in Crowley’s case, 2nd Swanston, p. 1. A person had been committed by commissioners of Bankrupt for not answering satisfactorily, a motion was made for a writ of *habeas corpus* in vacation, and the question whether he possessed such a power was discussed by him with great care. He found a case in point decided by Lord Chancellor Nottingham (Jenkes’s case, 1676, 6 How St. Tr. 1189); but he resolutely overruled that decision when he found it inconsistent with the principles of the law of England. He treated it there as known law, that no man’s liberty should be invaded without the supreme legal authority having power to pronounce immediately on the reason of that restraint; and that this prerogative of the King might be called into action at any time, and could not be affected by general words in a statute.

The case of Moro Ragonath (1 Knapp, 8) gave rise to the extraordinary interference of the Governor and Council of

Bombay. In that case, although a writ of *habeas corpus* issued, the body was not brought into court, nor any return made to the writ, though a strange, anomalous, questionable document, came from the person to whom it had been sent. The fact stated in that document, if true, might have been returned to the court, and the cause, if sufficient, would have been admitted by the court. If appeared too on the proceedings that the person to whom the writ was directed had obtained the authority of Mr. Dunlop, a Justice of Peace of that part of the world, to keep Moro Ragonath in custody, and we apprehend may well be considered as an agent employed by Mr. Dunlop, and thus answering the narrowest description of those within the jurisdiction.

It is a much less daring presumption than the fiction in the law, that any person brought before the Court of Common Pleas by *habeas corpus* is a privileged person; and therefore Lord Eldon and Mr. Justice Blackstone commend the Common Pleas for presuming the party arrested to have their privilege when they knew he had not, because the law cannot endure that a man under unjust imprisonment shall return to it.

It can hardly ever indeed happen that a person in the Indian territory should be imprisoned without the intervention of English subjects properly so called.

The gaoler, in almost every case, is a native; all the officers of the native courts are natives; but the authority of the native courts is almost always under the control of English subjects. Servants of the East India Company preside over their jurisdictions. It would require a great deal of ingenuity, and a most remarkable concurrence of circumstances to find any person imprisoning another, and not acting under the employment of British subjects.

The letter-missive to the Supreme Court (1 Knapp, 4) assumes to repeal the letters patent granted by the King in respect of all except those residing within the island of Bombay, or such as have been employed by the British authorities; it claims to refuse the execution of writs directed to any officer of the Provincial Courts; and in conformity with this assumption of power by the government were its proceedings in the case of Bappoo Gunness (1 Knapp, 6).

The Counsel then proceeding to comment on the terms of the letter of the Governor and Council to the Judges.

The Lord Chancellor (Lord Lyndhurst) observed, "What we have met here for is to ascertain the jurisdiction of the Supreme Court of Bombay. The object is discussion of what their power is."

The prerogative of issuing writs of *habeas corpus* is inherent in the Crown, and can only be abolished by express words and none such are found in the charter. Such writs are issuable by the law of England from the Court of King's Bench, and they run into any dominions under the sway of the English Crown. Such writs have frequently issued from the English Supreme Courts at the several Indian Presidencies, which have all the powers of the English King's Bench vested in them by Act of Parliament. Certain restrictions are imposed on the jurisdiction of the Supreme Court with regard to the persons subject to it; but those must be applied, by a reasonable construction, to its ordinary operations as a Court of Oyer and Terminer and of Gaol Delivery, not extended to the power of issuing those high prerogative writs which are indispensable for the safety of all the liege subjects of the Crown when urgent necessity demands immediate and decisive inter-position. But even if the subjects purely native could not be questioned for the imprisonment of a fellow subject, still the agents of those courts which act under British Judges are manifestly excluded from the pretended exemption.

The celebrated statute of *habeas corpus* (31 Car. II. c.2) is intituled, "An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas;" and in *The King v. Cowle* (*R. v. Cowle*, 1759, 2nd Burr. 835), it is stated, that the power of the King's Bench in England extends to the granting writs of this description directed to persons in the colonies, though the necessity for issuing them had not then occurred. That the court has such a power, appears from the authority of Lord Mansfield [*King v. Cowle*, 2nd Burrows (835)], and from the fact that writs of this description have issued into all the dominions of the Crown of England. They may, and do, extend, therefore, beyond the limits of the ordinary civil jurisdiction of the court here; and so in India the Supreme Court may have this jurisdiction throughout all the conquered territories, though its civil jurisdiction be limited to Bombay alone. The duty of the Court of King's Bench in England,

in such cases, has been most correctly stated by Lord Coke, in his description of the authority of the Court of King's Bench (Co. Instit. pt. 4, cap. 7); "For the pleasure of God and the quiteness of our subjects, to save our conscience and to keep our oath, by the assent of our great men and other of our Council, we have commanded our Justices that they shall from henceforth do even law and execution of right to all our subjects, rich and poor, without having regard to any person, without letting to do right for any letters or commandment which may come to them from us, or any other, or by any other cause". If the Court of King's Bench in England would not have neglected to do right for any letters the King of England might send to them, it is too much to expect that the Judges of the Supreme Court of Bombay should, without remonstrating receive from the Governor and Council of that Settlement a letter or commandment interfering with the upright and conscientious discharge of their judicial functions.

Bosanquet and Spankie (Serjeants) for the East India Company.— It is obvious, from the words of the Act of the 4th of his present Majesty, that the intention was not to give any jurisdiction to the Supreme Court at Bombay within the territories subject to Bombay, beyond that exercised by the Supreme Court within the Presidency of Fort Williams. In one respect, it will be found that the jurisdiction given by the charter carrying into effect the objects of that Act is less.

But, for the present, let us suppose that the authority conferred is to the full extent the same as that conferred on the Supreme Court of Fort Williams. The great principle of the jurisdiction of the new courts which were established in India by the 13th of Geo. III. (Morley's Dig. Vol. II., p. 549) was this, that so far as locality was concerned in the town of Calcutta, there was conferred an unqualified territorial jurisdiction over all the inhabitants. There is another jurisdiction, not so extensive in its effects, though reaching throughout the dominions subject to the Presidency, applicable to the designated classes of persons. The two things are most perfectly distinct; and we admit that so far as the privileges and authorities of the Court of King's Bench in England can be applied, either to the localities of Calcutta or Bombay, or to the designated classes, the

jurisdictions may be conceded; but it does not follow that they should have in the territory at large a jurisdiction, either to attach upon individuals not of the designated class, or to control the proceedings of other courts of a distinct authority. The distinction appears to have been wisely and considerably adopted by the Legislature. At Fort Williams, at Madras, and Bombay, the English law had prevailed for at least a century. It had prevailed, at all events, from the charter of Geo. I. (1726 : 13 Geo. I). It was known as the existing law there antecedently to the year 1774 : persons had been tried and condemned under the local jurisdiction of Calcutta for forgery and other crimes created by English status. Those who came to those towns, which were a kind of English colonies, came to the English law: they came to a place where they could no more evade the jurisdiction than men who come to England have a right to be tried by the law they leave behind them. The other class was a class who became subject, by their own acts, the servants of the Company, or British subjects, etc. etc.; who by voluntarily entering into those services rendered themselves subject to the jurisdiction of the King's Courts. It was the policy of the law to leave those persons out of the local limits and of the designated classes, in point of jurisdiction, to be governed by their own law; and the exception was an exception to which they subjected themselves; and this is the view taken of the subject in the speech of Sir Elijah Impey in the House of Commons [Parliamentary History, Vol. 26 (1341-1416)].

The power enjoyed by the native or provincial court, is a power possessed by them long antecedent to the British conquests in India, and which exists, except where it has been altered by the legislative authority, which the British Parliament does not directly exercise, but which it has confided to the Governor General in Council. Thus all persons not subject to the King's Courts are living under their own laws, under the authority of the British Legislature, and may be considered, to many purposes, as a separate nation under a different government. What is the power of the Court of King's Bench supposed to be? The King himself formerly exercising his sovereign authority in the *aula regis*, which he now exercises by that court, still called the Court of our Lord the King before the King himself. The whole administration is derived from the ancient *aula regis*, the centre of all judicial authority; and all the

King's courts are subject, without exception or distinction, to the control of the Court of King's Bench. But the laws of England are not the laws of India. There is a code of laws which the King has thought fit, by the consent of his Parliament, to continue or enact and which are not the King's laws in the sense that the laws of England are. There is therefore no analogy between the circumstances. The Courts in England are all drawn from the same source, they all flow in the same channel, they all apply to the same persons. But the laws in India are derived from a different source; they attach upon different classes of men; they have nothing in common with the laws of England. To confer upon the English courts of law existing locally in Calcutta or Bombay a control over the native laws and courts, would be a species of anomalous judicial administration, which we trust will never be sanctioned by the British Legislature.

Previous to the establishment of the Supreme Court in the year 1773, there were Mayors Courts at Calcutta, Madras and Bombay. The statute of 13th Geo. III. (c. 63) authorized the institution of a Supreme Court only at Calcutta. The language of that Act, and the charter founded upon it, gave rise to various discussions. Certain circumstances, which have been treated as precedents on the other side, took place previous to the 21st Geo. III. (c.70); but according to the best information which we have received, no instance is to be found since the passing of the 21st Geo. III. in 1781 (c.70), in which an attempt has been made by the Court at any one of the three Presidencies, to issue a writ of *habeas corpus* of the description now contended for.

The statute of the 13th of Geo. III. (cap. 63) in the year 1773 provides (sect. 13) that his Majesty shall have power to erect a Supreme Court at Fort William, and a proviso to this effect is added (sect. 14): "That the said new charter, and the jurisdiction, powers and authorities to be thereby established, shall not may extend to all British subjects who shall reside in the Kingdom or Provinces of Bengal, Bihar, and Orissa, or any of them, under the protection of the said United Company; and the same charter shall be competent and effectual, and the Supreme Court of Judicature therein and thereby to be established shall have full power and authority to hear and determine all complaints against any of his Majesty's subjects,

for any crimes, misdemeanors, or oppressions committed, or to be committed, and also to entertain, hear and determine any suits or actions whatsoever against any of his Majesty's subjects in Bengal, Bihar, and Orissa, and any suit, action or complaint against any person who shall, at the time when such debt, or cause of action, or complaint shall have arisen, have been employed by or shall then have been directly or indirectly in the service of, the said United Company, or of any of his Majesty's subjects."

Whatever obscurity or ambiguity may be found in particular clauses or expressions of this charter, or of the Act of Parliament, we apprehend that the court which was established was not a court of general jurisdiction throughout all the Provinces, in the nature of the Court of King's Bench, with certain exceptions, but a court of local and limited jurisdiction, with an extended jurisdiction, in certain cases, over certain descriptions of persons. This undoubtedly is a most material distinction in principle. It has been universally understood, that these are courts of limited and local jurisdiction, having a general jurisdiction within those local limits, not only over British subjects, but over all the native subjects, Mahommedans and Hindus as well as Christians, in all matters criminal and civil; subject to a proviso that the persons of different religions should be judged according to their respective religions, in certain cases; and that beyond these limits the courts shall have a certain jurisdiction over certain persons described to be British subjects, and persons in the service either of the East India Company or of other British subjects.

The next material proviso (sect. 16) is, "That the Supreme Court shall hear and determine any suits or actions of any of his Majesty's subjects against any inhabitant of India, residing in Bengal, Bihar, Orissa, or any of them, upon any contract or agreement in writing, where the cause of action shall exceed the sum of 500 current rupees, and where the said inhabitant shall have agreed in the said contract that in case of dispute the matter shall be heard and determined in the said Supreme Court." This is certainly a very extraordinary provision to be introduced into an Act which is supposed to establish a court of general jurisdiction.

*The Act of 13th Geo. III. (c.63), and the charter founded upon it, gave rise to various disputes, arising, among other things, out of the issuing of the writ of *habeas corpus*; in consequence of which the Act of 21 Geo. III. cap. 70, was passed for the purpose of removing doubts with respect to persons subject to the jurisdiction of the Supreme Court. The writ of *habeas corpus* had been issued to persons who were owners of land; and it was contended that any person who held the land and who paid rent, but had no other occupation connecting him with the East India Company, was to be considered as a person within the service of the East India Company, and as such within the general jurisdiction of the court. It has been said that applications were made on the part of the East India Company that provision should be made in the Act, giving power to issue the writ of *habeas corpus*. To what particular descriptions of persons the direction of such writs was intended to be confined is not stated; but if the subject was brought under the consideration of Government, and yet no clause was introduced in the Act of 21st Geo. III. (c. 70), then we have the less reason to suppose it was the particular intention of the Legislature to give the authority contended for. Certainly it is not expressly given, but the persons to whom writs of *habeas corpus* are said to have been addressed are expressly excepted from the jurisdiction of the Court in the 9th and 10th sections of that Act, which says, generally, that natives under the circumstances therein particularized shall not be subject to the jurisdiction of the court on account of those circumstances; thereby clearly assuming, that but for those circumstances as natives, they would not be subject to the jurisdiction of the court. And then a clause is added, "that for more perfectly ascertaining those natives who should be subject to the jurisdiction of the Supreme Court, the Governor General and Council should cause the name, description, and place of usual abode, of all natives employed in the service of the East India Company, with certain exceptions, to be entered in a book or books alphabetically disposed."

*For a short and entertaining, although perhaps not a very impartial account of these disputes, see Mill's History of British India, Book 5th, Chapter 6th.

How, then, was this matter understood soon after the passing of the 21st Geo. III. (c.70)? Out of the transactions which took place between the year 1773 and the year 1781, various accusations arose against the individuals occupying certain high stations, and among others, there was a charge against the Chief Justice of the Supreme Court, Sir Elijah Impey, who made his defence in the House of Commons, in a speech which was afterwards printed in the shape of a separate publication, and is correctly copied in the 26th Volume of the Parliamentary History (1341-1416). "The charter," says Sir Elijah Impey, at page 1358 of that work, "has given a criminal jurisdiction, not local and territorial, over the Provinces, but personal, over pan of the inhabitants, answering to certain descriptions; but the jurisdiction given over the inhabitants of Calcutta is universal, that being a territorial jurisdiction throughout the whole town of Calcutta." The object of the learned Judge upon this occasion was different from that which is now the subject of consideration; for it became important for him to show that the jurisdiction in Calcutta was a general jurisdiction, and that the jurisdiction in the Provinces was not a general jurisdiction. "The first, as to the Provinces at large, is new, and was introduced by that charter. All the laws of England established by that charter I admit to be new, as to them, and only to be supported by the authority of that charter; but with regard to the town of Calcutta, the operation of the statute was different. Long before the erection of the Supreme Court in 1774, there had existed in Calcutta courts in the nature of Oyer and Terminer and Gaol Delivery, administering the criminal laws of England with a territorial jurisdiction over Calcutta. The 13th Geo. III. (c. 63) abolished these courts to make room for the Supreme Court. It gave to the Supreme Court the power of trying the same crimes, with a territorial jurisdiction co-extensive with that of the old court."

It has been intimated that the jurisdiction now contended for has been enforced at Madras. Such a jurisdiction is at variance with the doctrine stated by Sir Thomas Strange, Chief Justice of Madras in the year 1802, in the first Volume of his Reports (Notes of Cases at Madras), page 135, *Nagapah Chitty v. Rachummah and another*. He there says, "It has been truly observed, that it is impossible to argue in this court from any analogous cases of jurisdiction in the courts at home. Those courts being by their constitution, according

to their respective modes and purposes of proceeding, the great depositaries of the universal justice of the realm, and as such, in every instance in which it is attempted to withdraw a case from their cognizance, bound to see, distinctly and unequivocally, that a jurisdiction adequate to the object in view exists elsewhere. If that be not stated so as to appear to the court, a plea to the jurisdiction fails, and the jurisdiction remains. But it is different here, because, though coordinate in its nature with those courts so far as its jurisdiction attaches, the jurisdiction of this court is limited with regard to persons not being British subjects." This passage, we apprehend, bears on the very subject under consideration here. Though there are words in this charter giving to the court the authority of the Court of King's Bench, it is the nature of the authority which is described, and not the extent of the jurisdiction. The extent of the jurisdiction is limited by other clauses; but the nature of the authority which the Judges are entitled to exercise where they have jurisdiction, whether within the local limits in respect of the inhabitants generally, or beyond the local limits in respect of British subjects, for English purposes, and administering English law, is in the nature of the authority exercised by the Court of King's Bench in England. "Generally speaking," adds Sir Thomas Strange (page 136), "it is restricted with regard to the natives (whether wisely or not is not for us to consider) to the inhabitants of Madras, and the plea therefore very properly confines itself to these facts; upon which the court is fairly called upon to say, whether the defendants, being natives, can be considered as inhabitants of Madras for the purpose of being subject to our jurisdiction upon the present bill. It is said in many cases, *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* be read (as was always read by Lord Mansfield) *justitiam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that so far from its being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different

example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their commission. Neither are we to presume that justice will not be done, though this court, sustaining the plea, should decline the office of rendering it.”

There are various passages to be found in different statutes which strongly show, not, perhaps, the entire exemption of the natives of India from the jurisdiction of the Supreme Court, but that the authority of the Supreme Court was never intended to embrace them; and that they were never comprehended within that extensive authority which was given to the Supreme Court with respect to British subjects.

Your Lordships will find in the 53rd of Geo. III., cap. 155, a long list of offences created in various clauses, all of which are introduced by words importing in clear terms the distinction between the local and personal jurisdiction of the court. At section 114, after reciting that it “was expedient that the stealing securities for the payment of money within the East Indies should be made felony,” and so on, it enacts, that if any person or persons within the “local limits of the criminal jurisdiction of any of his Majesty’s courts at Fort William, Fort Saint George, Bombay, or Prince of Wales’s Island, or if any person or persons, personally subject to the jurisdiction of any of the said courts at any place in the East Indies :” so that the distinction between the local jurisdiction the court, and the personal jurisdiction of the court, is very distinctly recognized, and that there may be persons within the local limits of the jurisdiction who are not personally subject, acknowledging a distinction between the local and the personal jurisdiction.

A question then arises whether a native who is an officer of a Provincial Court, a Gaoler, for instance, and who as such may be considered as a person in the service of the East India Company, is subject to have an *habeas corpus* directed to him in his character of Gaoler, for the purpose of bringing up a native prisoner in his custody before the Supreme Court at Bombay. If we are right in supposing that there never has been any intention of giving to the Supreme Court a control over the proceedings of the Provincial Courts, if a regular succession of appeals has been established from

the Provincial Courts up to the highest appellate tribunal and in cases of sufficient magnitude to justify it to your Lordships at this Board, passing by the Supreme Court, and proceeding in a course of judicature entirely distinct from that of the Supreme Court, it is a most important question whether the course of proceeding is to be entirely evaded, on a ground very similar to that acted upon between 1773 and 1781. At that time certain natives, because they held land, or because they were employed in certain transactions, were contended to be within the language of the Act of Parliament and charter, which subjected persons in the service of the East India Company to the jurisdiction of the Supreme Court. Let it be admitted for the argument that the gaoler of a Provincial Court stands in the character of a person in the service of the Company and that he would be liable, as such, to have an *habeas corpus* directed to him, if he, as an individual, detained any person in his custody. Does it, therefore, follow that his character as a servant of the Company would give a right to the court to direct an *habeas corpus* to that person, to bring up a person in his custody as a prisoner of the local court? Does it give a right to the Supreme Court to examine into the constitution of the court (for this has been asserted), and to review its proceedings? It has been said the court must have before it all the regulations and laws by which the Provincial Court was constituted, whether such court be a part of the original establishment of the Mogul Government not yet altered, or whether it be a new court established under the authority given by Parliament to the Government to make regulations. All this, according to the doctrine contended for, must be brought before the court in the shape of a return, for the Supreme Court to judge, first, whether the Provincial Court has been legally constituted, its proceedings have been properly conducted. We humbly apprehend, that it is manifest from the whole tenor of the Acts of Parliament and charter, that no such jurisdiction was intended to be given. In the Regulating Act of 21st George III. (c. 70), Section 23, it is enacted "that the Governor General and Council shall have power and authority from time to time to frame regulations for the Provincial Courts and Councils." Here is a distinct legislative recognition of these Provincial Courts. A similar power is given to the Governments of Madras and Bombay to regulate the proceedings of the Provincial Courts of their Presidencies, and all those

regulations are subject to the revision of his Majesty in Council. They are all directed to be transmitted to the Secretary of State, and if not altered, they become the law of the provinces by which those courts are governed. It is quite clear, therefore, that the Legislature has distinctly recognized the existence of those courts, the manner in which they are to be regulated, and the law by which they are to be governed. The regulations for the government of the provinces require no registration in the Supreme Court; while those which bind the inhabitants of Calcutta, Madras, and Bombay, and all British subjects, must be registered in and approved by these courts.

Then we come to this section, (sec. 24) ; “That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country courts, for any judgement, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court.” So that although a native should be in the service of the East India Company as an officer of a provincial court, and although a British subject should be a Judge of such a court, for acts done in such court, no action lies against him. The same language is to be found in the charters; but although no action is allowed to try whether the act was legal or not in the Supreme Court, yet it is contended that the legality of the proceedings may be examined through the medium of an *habeas corpus*. This appears an extraordinary argument; and seeing that there is no provision to that effect in any of the Acts, we venture to submit that there is no ground for issuing the writ.

We will now consider the charter recently granted to Bombay (*Morley's Dig.*, Vol. II., P. 638). This charter contains a clause on which the whole question turns, and but for which there would be no ground of argument. The clause (clause 10) runs thus : “That the said Chief Justice and the said puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of Peace, and coroners, within and throughout the settlement of Bombay, and the town and island of Bombay, and the limits thereof and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to or dependent upon the Government of Bombay aforesaid, and to have such *jurisdiction and authority* as our Justices of our Court of King's Bench have and may lawfully

exercise within that part of Great Britain called England, as far as circumstances will admit." Now, is it possible to construe this section otherwise than as saying that they are to be Justices and Conservators of Peace throughout the Presidency of Bombay, and to have such jurisdiction and authority *secundum subjectam materiam*? that is, as such Justices and Conservators of Peace as the Justices of the King's Bench, who we know are Justices of Peace, have and may exercise in that character throughout the whole realm of England, as far as circumstances will admit. Unquestionably, the Judges of the Supreme Court are so with respect to all British subject throughout the provinces; and as such, the jurisdiction they have is of the nature of the jurisdiction which is possessed by the Judges of the King's Bench when acting as Justices and Conservators of Peace.

It is insisted, however, that by this clause all the powers of the Court of King's Bench in England are granted to the Supreme Court at Bombay, not merely throughout the settlement of Bombay, but throughout the territories subject to the Presidency of Bombay, unlimited in any manner whatever with respect to persons; and that the Court of King's Bench has authority to issue such a writ to any part of the provinces subject to the different Presidencies of India; a position into which it is not necessary to enter at large, but which, we apprehend, is founded upon an expression in one of Lord Mansfield's judgements (Cowle's Case, 2nd Burrows, P. 856), in which he mentions, "the plantations". In that very judgement, however, his Lordship says he does not recollect or know of any instance of a writ of *habeas corpus* having been issued to such dominions. Applications, he says, had been made to this Board upon the subject, and we all know that this Board has a general superintendence in matter of law over the colonies. If, therefore, an affidavit should be laid, before the court, in which some individual was bold enough to swear to circumstances giving a *prima facie* jurisdiction to it, according to the doctrine contended for, an individual imprisoned at the foot of the Himmalayah Mountains must be brought from thence to the Court of King's Bench at Westminster, provided that the Court of King's Bench should think fit to issue a writ. It is said that the court possessed this power, and

it was exercised when Calais was in the possession of this country. Of that there is no doubt. Calais sent members to Parliament, and at one period the law of England prevailed there. It is not necessary, however, to enter into this question.

We understand that a learned dissertation was made in the court below, founded on the doctrines of Lord Hale, in which a distinction is made between the *jura summi imperii* and the *jura mixti imperii* or *potestas jurisdictionis* (Hale's Analysis of the Civil Part of the Law of England, section 6th); and it was contended that though the Supreme Court has no jurisdiction in the ordinary sense of that word, that is no civil jurisdiction over natives; that is it has not criminal jurisdiction; that it has not equitable jurisdiction, that it has not that ecclesiastical jurisdiction; that it has not Admiralty jurisdiction, yet that it has a *potestas* to be exercised over all the subjects of the King.* Now it is remarkable, that in almost every part of this charter but that now under consideration, the words "power, jurisdiction, and authority" are to be found; but in this particular clause the word "power" is not found. It is very singular, that where so much is built upon the term power, as distinct from jurisdiction, the word expressing power should not be found. But what is jurisdiction as distinguished from power? and what jurisdiction is this which is meant to be exercised? In the Pandects, lib, ii, tit, 1, the nature of jurisdiction is fully discussed, and one of the commentators gives a definition of it in a single line, "*jurisdictionest notio quae jure magistratus competit.*"**

*Sir Peter Grant, in his judgement in the court below, after mentioning the distinction drawn by Lord Hale between *the jura summi imperii* and *mixti imperii*, proceeded to state Lord Coke's description of the Court of King's Bench, 4th Instit. cap. 7; and observed. "The third description of power possessed by this court has reference to the supreme ministerial authority which is lodged in it, altogether separate and distinct from its judicial jurisdiction or the power it exercises in the trying of cases, whether in the first instance or by way of appeal: being a sovereign *potestas imperii*, expressly described by Lord Coke as a power to correct errors and misdemeanors judicial; not by the way of trying, hearing, and determining, as in pleas of the Crown, but by issuing the prerogative and mandatory writs of the Crown; as of *habeas corpus*, *prohibition*, *mandamus*, and by bailing any person for any offence whatsoever."

**Cujacil paratitla in Pandecta, lib, ii, tit. 1: jurisdiction's proprie notio est quae jure magistratus competit, quae enim maridata a magistratueu, aut a lege specialiter magistratui delegata est, non jure suo competit; officio quidem magistratrus continetur sed jurisdictione non continetur.

It is said that the Supreme Courts are Courts of King's Bench, with all the authority of the King's Bench. In Wales the jurisdiction to the Court of Great Sessions is given by the 34th and 35th of Henry VIII, c. 28, nearly in the same words. They have been introduced too into the charters of the Courts of almost all his Majesty's colonies, and are, indeed, a general formula, of which the most extensive import must be qualified by the specific provision by which it is accompanied.

It is worth while to observe also, that a clause (sec. 4) of a similar description is to be found in the charter given to the Supreme Court at Fort William (Morley's Dig. ii., P. 551); and that clause is taken from a clause in the charter of the 26th Geo. II. page 446, of the charters of the Company, and which ordains directs, establishes and appoints, that "the Governor or President and Council of Fort William in Bengal for the time being, shall be Justices of Peace, and have power to act as Justices of Peace, and as Commissioners of Oyer and Terminer and general Gaol Delivery; and that they, or any three or more of them (whereof the Governor or President, or in his absence the senior of the Council then residing at Fort William aforesaid, to be one) shall and may hold sessions of the peace, and of Oyer and Terminer and Gaol Delivery respectively, in and for the said town or factory of Calcutta, at Fort William in Bengal, and other the factories subordinate thereto, and do all such other acts as Justices of Peace and Commissioners of Oyer and Terminer and Gaol Delivery, with such powers, jurisdictions, and authorities, and under such regulations and restrictions, as are herein before given, granted, limited, and appointed, concerning Justices of Peace and Commissioners of Oyer and Terminer and Gaol Delivery for the said town of Madraspatnam." The clause respecting Madras is found at page 430, and is in these words: "We do give and grant unto the said Company and their successors and do by these presents will, ordain, establish, and appoint, that the Governor or President and Council of Fort Saint George aforesaid for the time being, shall be Justices of Peace and have power to act as Justices of Peace in and for the said town of Madraspatnam, and in and for Fort Saint George, Fort Saint David, Vizapatam, the factories on the coast of Sumatra, and all other the factories

subordinate to Fort Saint George aforesaid, in the same or the like manner, and with the same or the like power as Justices of Peace constituted by any Commission or letter patent under our great seal of Great Britain, for any county, city, or town corporate in that part of our said kingdom called England, do or may exercise such office.” It was right, when a Supreme Court was constituted, that the Judges of that court should also be declared to be justices and Conservators of Peace throughout the whole extent in which they had occasion to act at all, either in their ordinary jurisdiction, or their more extended jurisdiction; and it was then natural, that instead of giving to the Judges a jurisdiction assimilated to that of Justices of Peace by their commission, they should have a power as Conservators and Justices of Peace, of the nature possessed by the Judges of the Court of King’s Bench, and such appears to be the manifest intention of this section.

It has been, too, contended on the other side, that the Supreme Court has the power of issuing all the mandatory writs of the Crown to all the courts, of whatever description, within the territories subject to the Presidency of Bombay. If that power existed under the former general clause, why does the charter proceed, after establishing Courts of Request and Quarter Sessions, “to grant and ordain that all the said Courts, and Justices and other Magistrates appointed for the town and island of Bombay, and the factories subordinate thereto, shall be subject to the order and control of the Supreme Court of Judicature, in such sort, manner and form, as the inferior courts and Magistrates of England are by law subject to the order and control of our Court of King’s Bench; to which end the said Supreme Court is empowered and authorized to award and issue a writ or writs *of mandamus, certiorari, procedendo, or error*” (clause 59; Morley’s Dig. ii., P. 677). Where was the use of this clause, giving the court this jurisdiction with respect to certain courts to be erected within the local limits of Bombay, if it had a general jurisdiction over every court established within the limits of the territories subject to the Presidency. The Court indeed had a further jurisdiction in its character of a Court of Oyer and Terminer.

In the statute of 34 Geo. III., chap. 52, which was the Charter Act preceding the last, a power is given to the Governor General of

Bengal to issue commissions of the peace in His Majesty's name, and to appoint Justices of Peace for the Province and Presidency, island, town and factory of Bombay, and the places belonging or subordinate thereto : and a clause is added, (sec. 153) declaring "that all convictions, judgements, orders, and other proceedings, which shall be had, made or pronounced by or before any Justice or Justices of Peace within any of the British settlements or territories in India, out of the court of Oyer and Terminer within and for the same, shall and may be removed by writ of *certiorari* into the court of Oyer and Terminer and Gaol Delivery, of and from the same Presidency, al the instance of any of the parties thereby affected or aggrieved."

A similar provision is also made with respect to convictions before the Zillah Magistrates, by the 53rd of the late King, in cap. 155, Sec. 105 by which a power of removing them by *certiorari* is given in the court of Oyer and Terminer of the Presidency. Now it is a maxim, that where the power of issuing the writ of *certiorari* is not expressly taken away, it exists by common law in the Court of King's Bench; and to oust their jurisdiction it must be taken away expressly. But here it is not the question of taking it away; but the question is of giving it expressly, and whether it would have existed at all unless so given. The Judges of the Court of Oyer and Terminer at Bombay are the Judges of the Supreme Court: but they do not take this superintending authority over the Zilla Courts *qua* Supreme Court; but a special authority is given to them for that purpose to issue a *certiorari* out of the Court of Oyer and Terminer. This tends strongly to show that the Supreme Court, as such, does not possess the power which is contended for.

Lord Tenterden.— "The conviction of the Justices of Peace may be removed by *certiorari* into the Supreme Court of the Presidency."

Into the Court of Oyer and Terminer, that court being constituted of the same persons. But the authority is not given to them as Judge of the Supreme Court, but as Justices of Oyer and Terminer.

The charter of Bombay does not suppose it confers an universal criminal jurisdiction, for it constitutes a court of Oyer and

Terminer and Gaol Delivery, to enable the court to exercise criminal jurisdiction. The power of civil jurisdiction is given specifically :— The persons to be subject to the jurisdiction are specifically pointed out. A general jurisdiction over the Provinces can never be supposed to be given unqualified, and with all the privileges and prerogatives of the Court of King's Bench. The Supreme Court is a civil court and a court of equity; and according to the rules of construction applied on the other side you give all, and then you give a portion; you give all the jurisdiction; you give as it were the whole estate, and then you dole out in detail these little beneficial legacies. Those who have already obtained the whole, are to have, under this rule of construction, something less than the whole.

With respect to Moro Ragonath (1 Knapp, 8), however, it is impossible to contend that such a power could have been given to the Supreme Court of Bombay as was attempted to be exercised in his case. He was residing at Poonah. It was wanted to remove a cause into the court of Bombay. A *habeas corpus* was granted on an affidavit, and a person of high rank, nearly related to the deposed family, was called upon to bring up the body of a boy of whom he was the natural guardian, but who it was stated was then unduly detained in his custody. The question arises immediatley, how was he subject to this jurisdiction? If he had resisted, and a scuffle ensued, how could an attachment have been issued against those who disobeyed the writ? By this power of issuing an attachment you give a local jurisdiction, which by the regular prescribed terms of the charter does not exist. If the party disobeying is of the designated class subject to the jurisdiction of the Supreme Court, he ought to be registered : this man was not registered, and therefore there seems to have been no jurisdiction at all in the Court to have issued the writ : and he never could have been guilty of contempt in disobeying it. Even the Roman Emperor tells his subjects they are not bound to obey where the Judge exceeds the limits of his territorial jurisdiction: Pand, lib. 2. tit. 1. sec. 20. "*extra territorium judicenti impune non paretur.*"

With respect to the case of Bappoo Gunness (1 Knapp, 11), a writ of *habeas corpus* was directed to the gaoler of the Provincial

Court. If such jurisdiction in issuing the writ is allowed, every person acting under the authority of the Court on receiving such a writ, must bring up the body to the Presidency, or state in detail the reasons of the detention, by whom made, and so on. How could such officers state the circumstances with such precision as to obviate objection? A return to a *habeas corpus* drawn at Delhi or Poonah would be found extremely deficient according to our forms. Those who framed these laws could never have overlooked that consideration, and it is clear they never intended to let in such a state of things at all.

It may be important to call your Lordships' attention to this circumstance, that provision is made in various Acts for the establishment and regulation of the Provincial Courts with a course of appeal. By the 37th Geo. III cap. 142, sec. 8, the regulations of the Governor General affecting the natives are to be formed into a code, and published in all the native languages, that the natives may know what is the law to which they have to look. This was a measure first adopted by the late Marquis Cornwallis, and found to be so highly beneficial that it was adopted by the Legislature, and made part of the law of the country.

There is a regular establishment of Provincial Courts, with a succession of appeals from the lowest court to a court of the highest appellate jurisdiction, both in criminal and in civil matters, established at the several Presidencies. The Court of Suddur Dewany Adawlut is the highest court of appeal in India in civil, as the Court of Suddur Nizamut Adawlut is the highest court of appeal in criminal cases. Both these courts are recognized by the 53rd Geo. III. (c. 155). A provision is also made for an appeal to His Majesty in Council, in cases above the value of £5000 from the Court of Appeal in India, passing by the Supreme Court. At Bombay, the numerous regulations concerning the Courts of Justice have with great labour and care been lately reviewed, and formed into a code. This code was published in 1827, and clearly shows that as much pains have been taken for the protection of the subject, to enable him to obtain redress from any injury which he may sustain from Provincial Courts or Magistrates in the territories of Bombay, as in any part of His Majesty's dominions. With respect to the improper

detention of persons, there are particular regulations, all which the Magistrates are bound by their oaths to carry into execution; and if they act corruptly they are subject to be proceeded against in the Supreme Court, for which there is a special provision by statute. In Regulation XII, the manner in which the senior Magistrate is to superintend all subordinate officers is pointed out, and by Regulation XIII, the Judge is bound to visit all the gaols, for the purpose of ascertaining whether persons are unlawfully detained there; he is to visit both the criminal and civil gaols, to notice to the officer concerned erroneous judgements, and to forward cases, if necessary, to the Suddur Foujdaree Adawlut for revised decision.

It is not intended to say that a man who is in the service of the Company as an officer of a Provincial Court is therefore exempted from the jurisdiction of the Supreme Courts in matters where he acts as an individual; but it is declared, that if he detains any person by the orders of the Provincial Court he is subject to no action for such an act, nor is the Judge subject to an action. The only proceeding against him in the Supreme Court is by information, in case of corruption. When a person is detained under the orders of the courts in the Provinces the Supreme Court cannot order such person to be brought up for the purpose of investigating his case. That court has no such superintending jurisdiction over the courts in the Provinces as that which Lord Coke in his fourth Institute states the Court of King's Bench to possess, by virtue of which it superintends and restrains the excesses of all the inferior jurisdictions of the country. Such an authority has not been given to the Supreme Court, and consequently the issuing of the writ of *habeas corpus* in the cases mentioned in the petition were illegal acts.

Mr. Denman, in reply.—The Supreme Court at Bombay is made a Court of Oyer and Terminer, it has also the jurisdiction of the Court of King's Bench in England, and it is as incident to that court that the present power is claimed.

It has express power (clause 59, Morley's Dig. ii. p. 677) over the Court of Requests and the Court of Quarter Sessions, "to issue

writs of *mandamus*, *certiorari*, *procedendo*, or error, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment". Now the question is asked, why the charter should give these particulars if they were already included in the general grant. Is this, then, the first time that in all the rolls of English Acts of Parliament an unnecessary power can be shown to have been created, or express terms to have been used, where they were superseded by clear implication, or that the figure of speech called tautology can be detected? Unless the argument is pushed to that extent it is plainly worth nothing; and that it cannot be fairly pushed to that extent the experience of every session demonstrates.

But if this clause proves any thing it proves a great deal too much. The only writs enumerated in it are those of *mandamus*, *certiorari*, *procedendo*, and error. There is no mention of *habeas corpus* in this charter; yet it is stated on all hands that writs of *habeas corpus* have constantly issued; and if not, the *certiorari* for removing convictions and orders of Magistrates would be of little value. Why set aside the judgement against a man who has been convicted by a Justice, if the man is himself to remain in gaol, and the writ of *habeas corpus* cannot rescue him?

It is admitted that within Fort William in Bengal the Supreme Court of Calcutta is authorized to issue writs of *habeas corpus*; therefore within the territories of Bombay, as described in the fourth of his present Majesty (4 Geo. iv. c. 71), the same power must exist in this Supreme Court.

It is to be a court for all "the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and within the factories which now are, or hereafter may be, subject to or dependent upon; "with such powers as are given within Fort William in Bengal aforesaid, or the places subject to, or dependent upon, the Government thereof" (clause 10, Morley's Dig. ii. p. 645).

Thus appointed, they form a Supreme Court, which is "to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit" (clause 10). Here is a court with all the powers which the Court of

King's Bench possesses in this country. Then where is the exception which is to prevent its jurisdiction from attaching in any particular case? We find it affecting actions, suits and indictments: as affecting criminal information, writs of *habeas corpus*, and the other high prerogative writs, it is nowhere to be found.

The single decision of Sir Thomas Strange (*Nagapah Chitty v. Rachummah*) has no relation to our question. A person that was not within the jurisdiction of the court at Madras had been actually brought within it by a fraudulent process of law.

The Chief Justice there decided (1 Strange's Madras Cases, p. 135), "That as where a native has been brought for some purpose to Madras by Government, against his will, and a third party, not concerned in bringing him here, attempts to take advantage of his being within the limits, to hold him to the jurisdiction, it seems to be agreed it is not to be permitted; much less ought it to be so in a case, where they were brought here, in their necessary defence against the injurious act of the plaintiff, of the consequences of which he would now take advantage to fix them, contrary to the maxim that no man should take advantage of his own wrong."

The whole effect, then, of the only case cited is this; that in a civil suit between individuals, where the defendant was clearly not within the jurisdiction, unless the plaintiffs fraudulent proceeding brought him within it, such a proceeding should not endure to the benefit to the wrong-doer and the prejudice of the party wronged.

It is truly stated, that no clause has expressly given the power of issuing mandatory writs; but as the existence of that power is unquestionable, since it has been always exercised, and can be traced to no origin but the erection of a Supreme Court with all the functions of the English King's Bench, we have here another proof, that the words erecting it are more than a mere formula, and have received their full effect. The statute of the 21st Geo. III. (c.70) is said to have made a difference not easily comprehended; for if its object really was to prevent the 13th Geo. III. (c. 63) from having so extensive an operation, the change would have been brought about by a plain enactment.

No judgement was delivered in this case, but the report of the Privy Council, which was affirmed by His Majesty, was.

“That the writs of *habeas corpus* were improperly issued in the two cases referred to in the said petition.

“That the Supreme Court has no power or authority to issue a writ of *habeas corpus* except when directed either to a person resident within those local limits wherein such court has a general jurisdiction, or to a person out of such local limits, who is personally subject to the civil and criminal jurisdiction of the Supreme Court.

“That the Supreme Court has no power or authority to issue a writ of *habeas corpus* to the gaoler or officer of a native court as such officer, the Supreme Court having no power to discharge persons imprisoned under the authority of a native court.

“That the Supreme Court is bound to notice the jurisdiction of the Native Court, without having the same specially set forth in the return to a writ of *habeas corpus* .”

NOTE :— Before this decision had been pronounced, the Supreme Court at Bombay had closed under the following circumstances. No return having been made on the 10th of October 1828 to the writ *alias habeas corpus* directed to Pandoorang Ramchunder, a *pluries habeas corpus* was ordered to issue, returnable immediately, and marked in the penalty of 10,000 rupees. To this writ also no return was made; and on the 23rd of February 1829, Mr. Justice Grant ordered an attachment to issue against Pandoorang, and that it should be directed to the Governor and Council, in order that they might execute it by such person or persons as they might depute for that purpose; he also directed a letter to be sent at the same time to the Secretary of Government to explain the reasons of the Court acting in this manner, and enclosing copies of the affidavits and proceedings in the case. Upon the receipt of this letter and writ, the Secretary replied, that it was the intention of the Government to persist in the line of conduct

expressed in the letter of the 3rd of October 1829, until they received orders from their superiors in England. After this reply, Mr. Justice Grant, on the 1st of April 1829, declared that the Court had ceased on all its sides, and that he would perform none of the functions of a Judge until the Court had received an assurance that its authority would be respected, and its process obeyed, and rendered effectual by the Government of the Presidency. *Asiatic Register*, vol. 28, p. 351, *et seq.*

[The letter patent, under which the existing High Courts in India were constituted, and which were issued under the Indian High Courts Act, 1861 (24 and 25Vict. c. 104), are dated severally as follows: Calcutta, 28th Dec. 1865; Madras, 28th Dec. 1865; Bombay, 28th Dec. 1865; North-Western Provinces, 17th March 1866. The letters patent are set out at length in Stat. R. and O. Rev. vol. iv. pp. 82-131. As to the jurisdiction of the High Courts, see Ilbert, *Government of India*, pp. 241-255. See also the same work, pp. 387-405 (application of English law to natives of India); pp. 406-463 (British jurisdiction in Native States).]

