

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 cosequence 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 provison 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 magistratus 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, at 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 immediately, 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).]