

[316] ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT
BOMBAY.

The Hon. MOUNTSTUART ELPHINSTONE and HENRY DUNDAS ROBERTSON,
—*Appellants*; and HEERACHUND BEDRECHUND, and JELMEL ANOOP-
CHUND, Executors of AMEERCHUND BERDACHUND,—*Respondents*
[June 3, 19, July 14, 1830].

The members of the provisional government of a recently conquered country seized the property of a native of the conquered country, who had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made, and which was at a distance from the scene of actual hostilities. Held, that the seizure must be regarded in the light of a hostile seizure, and that a Municipal Court had no jurisdiction on the subject [1 Knapp, 360].

Seemle.—The circumstances, that at the time of the seizure the city where it was made had been for some months previously in the undisturbed possession of the provisional government; and that Courts of Justice under the authority of that government were sitting in it for the administration of justice, do not alter the character of the transaction.

This was an appeal from a judgment of the Supreme Court of Bombay, dated the 6th of February 1827, awarding to the respondent 1,745,290 rupees, 3 quarters, 32 reas, damages, and 16,303 rupees, 3 quarters, costs. The action in which it was given had been brought in trover by Ameerschund Berdachund against the appellants and the East India Company, for the recovery of damages for the seizure of treasure to a large amount from Narroba Outia, a nobleman of high rank under the Mahratta government, and formerly treasurer to the Peishwa, to whom Ameerschund was executor. The circumstances under which the seizure took place appeared on the trial to be as follows:

On the 16th of November 1817, after the battle [317] of Kirkee, the Peishwa, Bajee Row, left his capital, Poonah, which was the next day taken possession of by the British forces. On the 15th of December 1817, the Marquis of Hastings, the Governor-General of India, appointed the appellant Elphinstone sole commissioner for the settlement of the territory conquered from the Peishwa, with authority over all the civil and military officers employed in it, and also authorized him to nominate a secretary and such other officers, as might be necessary to assist him in the functions of his office.

Mr. Elphinstone, on the 11th of February 1818, issued a proclamation at Sattara, in which, after setting forth various acts of aggression by the Peishwa against the British Government, he proceeded to state, "that by these acts of perfidy and violence Bajee Row has compelled the British Government to drive him from his musnud, and to conquer his dominions. For this purpose a force has gone in pursuit of Bajee Row, which will allow him no rest; another is employed in taking his forts; a third has arrived by the way of Ahmednugur, and a greater force than either is now entering by way of Candeish, under the personal command of his Excellency Sir Thomas Hislop; a force under General Munro is reducing the Carnatic; and a force from Bombay is taking the forts in the Concan, and occupying that country, so that in a short time no trace of Bajee Row will remain. The Raja of Sattara, who is now a prisoner in Bajee Row's hands, will be released, and placed at the head of an independent sovereignty of such an extent as may maintain the Raja and [318] his family in comfort and dignity. With this view the fort of Sattara has been taken, the Raja's flag has been set up in it, and his former ministry have been called into employment. Whatever country is assigned to the Raja will be administered by him, and he will be bound to establish a system of justice and order. The rest of the country will be held by the Honourable Company. The revenue will be collected for the Government, but all property real or personal will be secured.

All Whuttan and Enam (hereditary property), Wurshausun (annual stipends), and all religious and charitable establishments, will be protected, and all religious sects will be tolerated, and their customs maintained, as far as it is just and reasonable. The farming system is abolished. Officers shall be forthwith appointed to collect a regular and moderate revenue on the part of the British Government, to administer justice, and to encourage the cultivators of the soil: they will be authorized to allow of remissions in consideration of the circumstances of the times. All persons are prohibited from paying revenue to Bajee Row or his adherents, or assisting them in any shape. No reduction will be made from the revenue in consequence of such payments. Wuttundars, and other holders of lands, are required to quit his standard, and repair to their villages within two months from this time. The Zemindars will report the names of those who remain, and all who fail to appear in that time shall forfeit their lands, and be pursued without remission until they are entirely crushed. All persons, whether belonging to the army or otherwise, who may attempt to lay waste the country, or to plunder [319] the roads, will be put to death wherever they are found."

Mr. Elphinstone, by a letter, dated the 6th of February 1818, appointed the other appellant, Captain Robertson, provisional collector and magistrate of the city of Poonah, and the adjacent country. He had been previously nominated by General Sir Lionel Smith to the command of the guards there, and he retained this command until September 1818, when he relinquished it to Major Fearon. Mr. Elphinstone's letter proceeded in these terms, "The extent of your district will hereafter nearly correspond with that of the Praunt of Poonah; but until the neighbouring districts shall have been settled I beg you not to confine your exertions to those limits, but endeavour to bring under your authority as much of the country as may be within your power. The first consideration therefore is to deprive the enemy of his resources, and in this and all other points every thing must be made subservient to the conduct of the war. All arrangements that interfere with that object must be reserved for times of greater tranquillity." The letter then proceeded to give instructions as to taking possession of the enemy's country; for rewarding the potails and villages which might declare in our favour; and for sending native agents and parties of sebundies* to places where their presence might be useful, and to authorize Captain Robertson to entertain a thousand sebundies, or [320] more if he should find them necessary. "Some organization," it was observed, "might be resorted to, by which this species of soldiery might be improved; but it was to be remembered, that it did not suit our policy to preserve a military spirit amongst them, but to allow them to sink into judges and collectors peons. When a village has once submitted, any practices in favour of the enemy must be punished, as acts of rebellion, by martial law. The commander in chief at Poonah will be directed to assemble a court-martial, for the trial of such persons as you may think fit to bring before it, and to inflict capital punishment immediately on conviction. The same course must be adopted with regard to persons at Poonah who shall conspire against our government, and likewise with all banditti who may assemble in the neighbourhood of the capital. I particularly call your attention to the necessity of inflicting prompt and severe punishment on persons of this description. Prisoners taken from the body of Bajee Row's troops, who may pass through your district in the course of military operation, must for the present be regarded as regular troops; but parties sent to plunder the country are in all cases to be considered as freebooters, and either refused quarter, or put to death after a summary inquiry, when there is any doubt of their guilt. All other crimes you will investigate according to the forms of justice usual in the country, modified as you may think expedient; and in all cases you will endeavour to enforce the existing laws and customs, unless where they are clearly [321] repugnant to reason and natural equity. The same rules apply to civil trials, in which I particularly recommend the adoption of that system of arbitration already prevalent, subject to your confirmation. You will not fail to bear in mind the necessity of adhering to the customs of the country

* Irregular native soldiers employed in the service of the revenue and police. See Glossary, by Wilkins, to Fifth Report of Committee of the House of Commons on the Affairs of the East India Company.

during the present provisional government. This may even be extended to the exemption of Bramins from capital punishment, except when guilty of treason, or of joining banditti in plundering the country. All established religious institutions are to be maintained, and the expense to be allowed by Government. This is of course not to extend to Bajee Row's establishment for performing magical ceremonies (anushtan), nor to his personal charities; but such of the former as are of ancient institution, like the annual anushtan for rain at Pashanee, and such of the latter as seem required by humanity, ought nevertheless to be kept up. You will exercise your own judgment on the subject. To enable you to protect the country from small parties of banditti and insurgents, a detail of twelve companies of sepoys, and two hundred auxiliary horse, will be placed at your disposal as soon as the state of the garrison of Poonah will admit of. In case you should require further aid, you will apply to the commanding officer, who will be requested to afford it to the utmost extent of his means; but it must rest with him to judge of the practicability of the service required, and of the prudence of sparing the necessary detachment from his force. If any considerable portion of the enemy's army should approach Poonah, all arrangement for the protection [322] of the country must rest with the commanding officer, and you will no doubt think it advisable on such occasions to place your own parties at his disposal, retaining no more than are absolutely necessary for the purposes of police; in like manner you will have the exclusive command of the guards in the town, but when threatened by an enemy you will see the necessity of placing them under the commanding officer, and allowing him to make all arrangements he may think necessary for the defence of the place. You will of course apprehend all sepoys or followers who may be found disturbing the peace of the city, or marauding in the neighbouring villages; but you will send them to the commanding officer for punishment, furnishing him with all information you may possess in proof of their guilt." The letter then proceeded to give full instructions as to the arrangements that were to be pursued in the collection of the revenue, the assurances that were to be given to the landed proprietors, of the protection of property, the line of conduct to be pursued to the Bheels and Rammoosees,* and to direct that the police of the country should be managed through the potails (chiefs of villages) supported, when necessary, by the sebundies and regular troops. It also contained a direction to make over Bajee Row's property to the prize-agent; "but any part of it which the religious or other prejudices of the people required to be respected, is [323] to be retained on account of the Public, the value being fixed in communication with the prize-agent. Gokla's and Trimbuckjee's property is also to be considered as prize. I have the honour to enclose a copy and translation of a proclamation I have issued to the inhabitants of the Peishwa's former dominions; I beg you to pay scrupulous attention to all the promises contained in it. I need not point out to you the great attention that must be paid to the peculiar prejudices of the inhabitants of Poonah. Beef is on no account to be killed in the town, or any where but in our own camps for the use of the European troops. No European soldiers are to be allowed to enter the city on any account; and the former prohibition against officers and gentlemen visiting it without permission, unless on duty, is to be strictly kept up. No European of any description is to be permitted to reside within the city."

Under this letter of instructions Captain Robertson continued in possession of the government of Poonah and the adjacent country until the time of the seizure of the treasure, on account of which the action was brought. After the defeat at Kirkee, the Peishwa kept his army moving about in different parts of his territory until the latter end of the month of May 1818, when he was finally driven out of it, and on the 3d of the following June he surrendered himself and his army in Candesh to Sir J. Malcolm.

Narroba left Poonah at the same time as the Peishwa; he did not however continue with that prince, but immediately went to the fortress of Ryeghur, of which he was governor, and he remained [324] there in that character until the 9th of

* Native tribes living in the mountains, not under subjection to the Mahratta government, and generally carrying on a system of plundering warfare with the inhabitants of the plains.

May 1818, when the fortress surrendered, after a fortnight's siege, to Colonel Prother. By the articles of capitulation the inhabitants of the fortress were allowed to go to whatever place they might choose, and take away their own property; but not any other property. Narroba was however suspected by Colonel Prother of having fraudulently sent away large quantities of treasure, the property of the Peishwa, and the Colonel under that impression caused his baggage to be searched on going out of the fort. Four boxes, filled with gold coin and jewels, together with thirty-eight empty money-bags, were found in it, and were seized by the Colonel as public property, which Narroba had no right to carry away. The Colonel made a report to the Government of his conduct, and suspicions of Narroba, and in consequence of this report, orders were sent both to him and Captain Robertson to seize Narroba's person. Narroba went from Ryeghur to Poonah, and resided there until the time of the seizure in question in his own house, which had belonged to him previously to the commencement of hostilities. Considerable discussion took place however in the course of the argument before the Privy Council, as to the manner in which he went there, and the character in which he was considered by Government during his residence. According to the statement of his executor, Amerchund, (in a memorial which he presented to the Governor of Bombay before this action was brought, and which was read in evidence at the trial in the Court below), Colonel Prother seized his person, and after confining him for three or four days, sent him under a guard to Mr. Elphinstone at Poonah, [325] who released him, and allowed him to go to his own house, over which, however, a guard was placed, and he remained thus in a state of confinement and arrest until the time in question. The correctness of this statement was however questioned by the counsel for the respondents on the authority of a passage in a letter from Colonel Prother to Mr. Elphinstone, dated at the camp near Paulia, 17th of June 1818, which had been tendered in evidence at the trial on the part of the appellants, and had been rejected by the Court below: it had however been printed in the papers laid before the Council. The passage in question was, "As Mr. Secretary Warder has authorized me to secure the person of Narroba Outia, if found in the Company's territories, I suppose he is not gone as he intended to Poonah; if he has arrived, and resides there, of course it will be attended with no difficulty in securing his person, if such a measure may by you be thought necessary."

The seizure of the treasure for which this action was brought took place on the 17th of July 1818, when Captain Robertson, having been informed that a quantity of public treasure which had been carried out of Ryeghur by different persons of the garrison in fraud of the capitulation, had been brought to Narroba at Poonah, and was secreted by him there, caused his house to be searched by his assistant in the revenue and judicial department, Mr. Lumsden, and the commander of the sebundies, Captain Houston, accompanied by a party of troops acting under their orders. They found there fourteen bags of Venetians (Sequins), and fourteen bags of gold [326] Mohurs, which they seized, together with Narroba's account-books. Narroba was at the same time, together with his chief clerk, Dhondoo Bullol, committed to prison. They were both of them during their imprisonment repeatedly interrogated by Captain Robertson respecting this treasure, and Narroba was at length liberated on the 7th of November 1818, upon delivering up five more bags of Venetians, which Captain Robertson was induced to believe he had secreted of the public money in addition to the bags which had been seized. He also entered into security for his personal appearance, when required.

During the time of these transactions no actual hostilities were carried on in the immediate neighbourhood of Poonah. The headquarters of Major-General Sir Lionel Smith, whose command extended over Poonah and the country adjacent, were, from the time of the expulsion of the Peishwa from his dominions in May 1818 to December in that year, at Seroor, which is distant about forty-two miles from Poonah, according to his evidence which was taken in the Court below. "During that period he was constantly backwards and forwards between Poonah and Seroor, and was in the habit of receiving reports as to the tranquil state of the country, or otherwise, as brigadier of division. Wherever he received information that the horsemen of the enemy had means of re-assembling, he despatched troops to preserve the tranquillity of the country, and see that they did not re-

assemble. He considered that he anticipated the tranquillity of the country by sending the detachments, and if he had not sent the detachments he considered they [327] would have been up again. They were not subdued, but dispersed; he knew of 30,000 of the military class dispersed about the country; he was in constant correspondence with the commissioner, both on military and political subjects, during 1818, and long afterwards. He corresponded with the commissioner on the disposal of our troops over the country. The commissioner consulted him in the first instance, and he gave him his opinion of the military arrangements. He considered it to be necessary that the force should be very strong to keep the tranquillity of the country. The peace-garrison of Poonah was only two battalions of native infantry; but in 1818 it consisted of four battalions of native infantry, an European regiment, and a regiment of cavalry; he should say 3500 effective men. He considered it a necessary precaution to let every body see we had an overwhelming force, on account of there being a disaffected population, and the fact of one government having been overturned and another set up, and the character of the people being turbulent, and that these causes for keeping up a great force at Poonah continued during the whole of 1818, and for a later period. He kept his force at Seroor in a state of complete readiness for the field without any reduction of men, and did take the field in October in that year, when he went down southwards towards the Krishna." This evidence of the state of the country was corroborated by several other officers. During this period also no disturbance appeared to have taken place in the city of Poonah itself, and no attack was made upon it, although the guards there were stated to [328] have been more upon the alert, and stronger than in peaceable times. A Court of Adawlut was also open there, and Captain Robertson presided as judge in it, both on civil and criminal trials. He performed his judicial duties in the same way as they had been performed under the Peishwa's government. Notwithstanding, however, the Peishwa's surrender of himself and his army to Sir J. Malcolm on the 3d of June 1818, some of his fortresses still held out against the English,* and hostilities were not terminated in the province of Candeish until the surrender of Amulnair in the December following.

Narroba after his release applied to the governor of Bombay for the restoration both of the treasure which had been taken from him by Colonel Prother at Ryeghur, and from his house at Poonah by Captain Robertson's orders, and also of the five bags of Venetians which he had subsequently given up to Captain Robertson. The Government referred his claim to Mr. Chaplin, who succeeded Mr. Elphinstone in the office of commissioner of the Deccan. Mr. Chaplin, after examining Narroba himself, and investigating his accounts, made a report to Government in the year 1821, the nature of which did not appear on the trial. The Government persisted however in refusing to restore the treasure. Narroba died in the following year, but the claim was renewed by his executor Amerchund Berdachund, who in the latter end of the year 1825 commenced the action of trover against the appellants and the East [329] India Company, from the judgment in which this appeal was instituted.

The particulars of his claim were sent by his attorney to the attorney of the defendants, and were afterwards read at the trial; they consisted of four accounts, the first was of gold coin, jewels and shawls, the property of Narroba, seized by Colonel Prother at Rhyghur. The second, of gold Venetians and mohurs, the property of Narroba, seized by Captain Robertson at Poonah; the third, of gold mohurs and silver rupees, the private property of Bajee Row,† intrusted to Narroba, and

* The principal of these were Malligaum, which surrendered on the 16th of June, Pritchithgur, which surrendered on the 25th of June, and Moolheir, which surrendered on the 3d of July 1818.

† A distinction appears to have been drawn in the court at Bombay between the public and the private property of the Peishwa. The late decision in the Privy Council in the case of the *Advocate-General of Bombay v. Amerchund*, has however declared that distinction to have been unfounded. In that case the Advocate-General of Bombay filed an information against Amerchund, who was a banker at Poonah, to recover, on behalf of the Crown, a large sum of money which had been deposited

seized at [330] Ryeghur in violation of the terms of the capitulation; and the fourth, of gold mohurs, the private property of Bajee Row, intrusted to Narroba, and seized by Captain Robertson at Poonah. They amounted altogether, including interest, which had been calculated upon the property from the time of the seizures, to 36,56,00,07 rupees, 70 q', but in the course of the proceedings the claim for the property seized at Ryeghur was given up.

The defendants pleaded the general issue, and obtained a rule *nisi*, on the ground of His Majesty's interest being concerned, and otherwise for want of jurisdiction, which was on argument discharged with costs; and leave to appeal against the judgment on that occasion was refused to them as contrary to the practice of the Court.*

with him by the Peishwa previously to the conquest of that city by the British troops. The Court below gave a verdict and judgment against the Crown. The Advocate-General appealed from that judgment, and the case was argued before the Privy Council on the 28th March 1829. The ground of defence taken by the Respondent's Counsel, Spankie, (Serjeant) and Bruce, independently of some technical objections to the information and general arguments on the evidence, was, that part of the money was the private property (Khasgheet) of the Peishwa, and not belonging to or used by him for public purposes, and that not having been seized by the Government during the war it could not be recovered after the termination of it. In support of these propositions they cited Puffendorf, book 8, c. 6, s. 22, 23, and the *Attorney-General v. Weeden and Shooles*, Parker, 267. The Solicitor-General and Serjeant Bosanquet for the Appellants, cited *e contra contra* Bynkershoeck, Quaes. Ju. Pub. lib. 1, cap. 4, "Ecquando res hostium mobiles et praesertim naves fiunt capientium," and c. 7, "Hostium actiones et credita quae apud nos inveniuntur an exorto bello recte publicentur." The Privy Council reversed the judgment of the Court at Bombay. In the course of the argument Lord Tenterden asked, "What is the distinction between the public and private property of an absolute sovereign? You mean by public property, generally speaking, the property of the state, but in the property of an absolute sovereign, who may dispose of every thing at any time, and in any way he pleases, is there any distinction?" and in delivering the judgment of their Lordships he also observed, "another point made, which applies itself only to a part of the information, is, that the property was not proved to have been the public property of the Peishwa. Upon that point I have already intimated my opinion, and I have the concurrence of the other Lords of the Council with me in it, that when you are speaking of the property of an absolute sovereign there is no pretence for drawing a distinction, the whole of it belongs to him as sovereign, and he may dispose of it for his public or private purposes in whatever manner he may think proper."

* By the character of the Supreme Court at Bombay the right of appeal is given from any of its "judgments or determinations." The right of appeal is given in the same terms by the charter of the Supreme Court at Madras; and the same terms had been used in the charter of the Recorder's Court of that settlement. Till lately the Courts in India appear to have held these terms, "judgments or determinations," to apply only to final judgments, and that consequently no appeal laid from interlocutory judgments. The correctness of this construction however appears to be dubious since the decision of the Privy Council in the case of the *East India Company v. Syed Alley Khan* [1827, 7 Moo. Ind. App. 555].

In that case there were two decrees of the Supreme Court of Madras, in a suit in equity, the first dated the 22d of May 1820, declaring the rights of the parties, and directing the accounts to be taken by the Master, the second dated the 28th of July 1821, on further directions, confirming the Master's report. The East India Company, on the 26th of January 1822, presented a petition to the Supreme Court for leave to appeal against both these judgments; and that Court granted them leave to do so on the 28th of the same month. The case came before the Privy Council on the 2d of February 1825, on a petition of the respondents to dismiss the appellants (East India Company's) petition of appeal to the King in Council, so far as it sought to affect or reverse the decree of the 22d of May 1820. Their Lordships granted the prayer of the petition. The grounds of their decision were thus stated

[331] They then moved the Court for leave to withdraw their plea of the general issue, and to plead it again [332] with other pleas, showing that the property, the conversion of which was stated in this action, was [333] taken and seized as lawful prize, and so by right of war and conquest. This motion was also refused, with costs. The Court then proceeded to try the [334] action between the parties; and the cause, from the great number of witnesses and exhibits produced on both sides, lasted twenty-two days. At the conclusion the Court dismissed the action as against the East India Company, and gave the judgment and verdict against the appellants, which was appealed against. In assessing the damages the Court declared they gave not only the value of the property at the time of the alleged conversion, but also compound interest at the rate of six per cent. on it to the time of the final judgment. The property in respect of which they intended to give the damages and interest appeared from the terms of the judgments delivered by the Chief Justice, Sir E. West, and the puisne Judge, Mr. Justice Chambers, to have been Narroba's private property, seized in his house, and the six bags of Venetians he afterwards gave up. Some difficulty, however, was found on ascertaining upon which of the items of the particulars of claim they were given, as the sum recovered upon the judgment much exceeded what it would have done, had the damages been assessed on that calculation. The principal question below was, whether the treasure seized was the private property of Narroba, or whether it was public property which had been intrusted to his care by the Peishwa, and had been conveyed by him to Ryeghur, and brought fraudulently from thence, in breach of the capitulation, to his house at Poonah. This question depended upon a train of very complicated and, in many

by Lord Gifford:—"The charter which gives the liberty of appealing from a decree of the Supreme Court has provided that no appeal should be allowed by that Court, unless the petition for that purpose should be preferred within six months from the day of pronouncing the judgment or determination complained of. Now the first judgment complained of was pronounced in May 1820, and therefore considerably more than six months before the application was made to appeal; and it has been fairly admitted in argument; and it could not be denied that was a judgment that might have been brought before us, although it directed a further account to be taken as consequential to the decision of the Court as to the right of the parties. If the East India Company chose to prosecute the appeal from the decree upon further directions, there can be no objection; but the question is, whether the Court below had any right upon that decree, upon further directions, to give them a right to appeal against the first decree, which decided the rights of the parties. This Board cannot say they had a right to do so. The complainants might have petitioned specially upon that point, but it must have been in the nature of a special application, stating special circumstances, and showing a strong case to the Board for permitting them to have that indulgence, and also accounting for their negligence in not having appealed in due time. The application which they have already made is only asking for leave to appeal as a matter of course against the first decree; and this Board are of opinion that such permission cannot be given to them, and therefore that the respondents petition must be granted, so as to restrict them to the appeal against the decree upon further directions."

The East India Company then presented another petition, specially for leave to appeal against the decree of the 22d of May 1820, stating the practice of the Court below as to the refusal of appeals against interlocutory decrees, and accompanied by an affidavit of Sir Thomas Strange, the late Chief Justice of Madras, in which he confirmed the allegations of the petition, and stated, that during the time he held the office of Chief Justice, if any application had been made for leave to appeal against the order of the 22d of May, it would have been refused as premature. The petition was heard before their Lordships on the 4th of February 1826; and the counsel for the East India Company, Serjeants Bosanquet and Spankie, cited, in corroboration of their statement, the case of *Johnson v. The East India Company*, 1st Strange's notes, 18. The judgment of their Lordships was delivered by Lord Gifford, who after recapitulating the former proceedings, in this case, went on to say, "they (the East India Company) have now presented a petition praying the indulgence of this Board, stating that an error had existed at the Supreme Court at

points, contradictory circumstantial evidence; and other questions arose, as to whether particular parts of this evidence had or not been improperly admitted or rejected by the Court below, and [335] whether interest ought to have been allowed in an action of this description.* All these questions were argued before the Privy Council; but their Lordships gave no decision upon them, and the arguments are not therefore reported.

The Solicitor General, (Sir E. Sugden,) and Wightman, for the appellants:—The first question will be, whether the Court below had jurisdiction, speaking generally, with reference to its charter; secondly, if it had jurisdiction in that respect, whether it had jurisdiction in this case, with regard to the subject-matter; and thirdly, whether the circumstances under which Narroba was placed had not taken away his right to apply to that Court.

There is no evidence on any part of the record to show that Poonah has ever been annexed to the government of Bombay, and consequently no evidence that the Municipal Court there ever had jurisdiction over the matters in question. Although indeed we know as an historical fact, that Poonah has been annexed to that government, yet the annexation did not take place till a period much later than that of the transaction which gave rise to this action. It appears from the evidence, that at that time Poonah was in an unsettled state. The proclamation of Mr. Elphinstone stated that an independent sove-[336]-reignty should be provided for the Raja of Sattara; and even supposing that this proclamation amounted to a convention between the British Government and the inhabitants of the conquered territories, (as it was improperly held to have been in the Court below,) it would not have been

Madras, ever since the granting of the charter in the year 1800 down to the present period; and they had procured the affidavit of the respectable judge who formerly filled the highest judicial situation in that court, who swears, 'that during the whole time he so held and exercised the said office an established practice existed (founded on a prevailing understanding of the intention and construction of the said letters patent) of granting leave to appeal to His Majesty in Council from judgments or determinations of the said Court of Judicature only on the ultimate conclusion of a suit, when the whole suit, and every thing regarding it, save only execution, had attained maturity, and when the party dissatisfied might have the benefit of such right of appeal, to the extent of every part of the proceeding on which error might be assignable.' A case has also been stated before us, determined so long ago as 1799, which was before the period of granting the present charter; but the words of the charter then existing were very similar to the present charter; and upon that occasion the court below determined that it was not competent to parties to appeal upon what was considered merely as an interlocutory judgment. Under these circumstances the question is, whether this error, which has prevailed up to the time when this appeal was presented, is such an error, as should induce the Board to grant the Company the indulgence now asked. It has been urged before us, that this case ought to be determined as if it was a case pending between two humble individuals. Not only ought it to be so determined, but this court will look with jealousy upon a case, where such a powerful body as the East India Company is concerned. We think, however, that as in a case we decided this morning, where an error exists in the officers of a court, and the court itself, it will be too much to shut out a party from their right of appeal; and we, with great reluctance, grant the permission to appeal in the present instance." His Lordship then proceeded to state, that from the laches of the East India Company in not having previously presented their petition, it would be impossible to grant them this indulgence, except upon their paying the whole of the respondents costs on the proceedings before the Council.

[See *Morgan v. Leech*, 1841, 3 Moo. P.C. 368; *D'Ortiac v. D'Ortiac*, 1844, 4 Moo. P.C. 374; *Shire v. Shire*, 1845, 5 Moo. P.C. 81; *Camilleri v. Fleri*, 1845, *ib.* 161; *In re Minchin*, 1847, 6 Moo. P.C. 43.]

* The Counsel for the Appellants relied on the general rule, that interest cannot be recovered in trover. The counsel for the Respondents cited, in support of the decision of the Court below the cases of *In re Badger*, 2 Barn. and Ald. 691; *Fisher v. Prince*, 3 Burr. 1364; *Mercer v. Jones*, 3 Camp. 477; and *Vencata Runga Pillay v. The East India Company*, 1st Strange's notes, 179.

a breach of the terms offered by it, if Poonah had been placed under the dominion of the Raja, and never formed part of the British territories. The truth is, that the country at that time was in its passage to a settlement one way or other, but what that settlement was to be was undecided; and if this was its state, no action could be maintained in the Court at Bombay. Even, however, if the Court at Bombay could have had jurisdiction in common cases, it could not have had jurisdiction in a case of this description.

Nothing was said in the Proclamation of Mr. Elphinstone about the establishment of the King's Courts of Justice. There must be some sort of tribunals of justice in every conquered country to arrange the immediate disputes of the people; but from the evidence in this case it appears that Poonah was under military dominion to a period much later than that in which these transactions took place. In fact, hostilities did not cease until the surrender of Amulnair in the latter end of the month of November. Up to that time positive engagements were taking place; there was an actual state of warfare; and no civil rule could be said to have existed to give any person the rights of a subject, or to relieve him from military dominion. The proclamation only contemplated a state of this kind. The Wuttundars and holders of land who remained with Bajee Row were there threatened to be pursued without inter-[337]-mission, until they were entirely crushed. All persons who should attempt to lay waste the country or plunder the roads were told by it, that they would be put to death wherever they might be found. Did these expressions mean that those persons should be brought to trial in a Municipal Court, or that they should be punished by the power of the sword? It was impossible to say that there was any civil rule in the country beyond what must be necessary in all countries even in a state of warfare. During the whole time a military force was requisite to preserve order; and there can be no concurrent jurisdiction between the civil and military powers. Supposing that Poonah had actually been attacked (and such an occurrence is contemplated in Captain Robertson's instructions); and suppose that the military force had found it necessary to resort to severe measures, and that many persons had lost their lives in consequence of them, if the ground taken by the Judges in the Court below can be maintained, it must necessarily follow that our own soldiers and adherents might have been brought to trial for their lives before these Judges as a Municipal Court for their conduct on such occasion. No country can ever be thoroughly brought under subjection, if it is to be held, that, where there has been a conquest, and no capitulation, the mere publication of a proclamation desiring the people to be quiet, and telling them what means would be resorted to if they were not so, so far reduces the country under the civil rule, that the army loses its control, and the Municipal Courts acquire altogether jurisdiction, so that every action of the officers in the direction of military affairs is liable to their [338] cognizance. This point was however taken for granted throughout the judgment of the Judges of the Court below. They assumed the proclamation to be a convention, that the peaceable inhabitants were taken under the protection of the conqueror, and became our subjects, and that consequently their power as a Municipal Court arose. Such a doctrine, if established, would tend to unnerve the arms of the soldier, and to render quite fruitless the conquest he had obtained.

In support of this position the Judges in the Court below principally relied on the cases of *Campbell v. Hall* (State Trials, vol. 23, p. 322, and Cowper, 205), and *Fabrigas v. Mostyn* (Cowper, 165), and on their authority they asserted that the country having been conquered by the British arms became a dominion of the King in the right of his Crown; and that the conquered inhabitants once received into the conqueror's protection became his subjects, and were universally to be regarded in that light, and not as enemies and aliens. Both these cases are distinguishable from the present. In *Campbell v. Hall* an action was brought against the collector of customs at Grenada by a merchant resident there. Grenada had been surrendered to the British in 1762 by a former capitulation, in which there were terms and articles on both sides, and in the treaty of peace in 1763 it was ceded to us by France. The act on account of which the action was instituted, was committed after the treaty, and when the island was as clearly therefore a part of His Majesty's empire as any of his foreign possessions could be. In *Fabrigas v. Mostyn* an action was [339] brought for an act done in 1773, in the

island of Minorca, which had been ceded to the Crown of Great Britain in 1713 by the treaty of Utrecht, and had been therefore sixty years under His Majesty's government, and during the whole of this time Courts of Justice had been regularly held. The state of things therefore both in Grenada and Minorca, at the time the causes of action in both these cases arose, was very different to that at Poonah at the time of the seizure of this treasure, when the only ground for saying that it was under the protection of the British Government was the proclamation, and there had been no capitulation, and no annexation of the country to our dominion by a treaty of peace.

But assuming that the proclamation amounted to a convention between the British Government and the people of Poonah, Narroba cannot be held to be entitled to the benefit of it. There must be two parties to a convention; there must be terms tendered by the one and accepted by the other. Can Narroba be said to have accepted the terms of this proclamation, when at the time it was issued, he had left Poonah, and continued for more than two months afterwards in arms against us. The treasure in question at least cannot be protected by the proclamation, for it appears not to have been in Narroba's house at the time the proclamation was issued, and if it had been, it would have been liable to seizure as the property of an enemy.

But perhaps it may be contended, that although Narroba was not at the time of its publication entitled to the benefits of the proclamation, he afterwards became so by the capitulation of Ryeghur. [340] The answer to such a proposition is, that he was proved to have broken the terms of that capitulation, and therefore he was not entitled to the benefit of it. At any rate, such was the decision of Colonel Prother, who sent him to Poonah a prisoner of war, and a Municipal Court has no power to dispute the judgment of a commanding officer on points of this description. The Colonel was responsible to Government for any misconduct, but not to a Court of Justice. Even if the Arab garrison had attempted to rescue their commander, and the Colonel had put them all to the sword, he would not have been amenable for such an action to the jurisdiction of the Supreme Court. Questions respecting the infraction or observance of treaties never have before been agitated before courts of law, any more than questions respecting booty acquired in a continental land war, as was observed by Lord Mansfield in *Lindo v. Rodney* (Douglas, 313). The construction of the articles of a capitulation, and the decision as to who are entitled to the benefit of it, and the manner in which it is to be carried into execution, belongs at the time to the conqueror. If he misconstrues or breaks the articles he commits a violation of the laws of nations, for which reparation must be given to the other side, or reprisals taken, but which can never be the ground of an action in a Municipal Court. Did such a jurisdiction exist, it would be found most inconvenient in practice; but the fact of its never having been exercised in any court of law furnishes a very strong presumption against its ever having existed. There are no direct decisions on this point in the books, because the ques-[341]-tion never has arisen; but it lies on the other side to show why a jurisdiction which never has been claimed before should now, for the first time, be exercised.

But even if Narroba had been entitled to the benefit of the capitulation, the utmost, that the terms of it allowed him, was to go with his army and property wherever he chose. He might have gone and joined the Peishwa, who was then still in arms against us, or he might have put himself at the head of the thirty thousand of the military classes whom General Smith describes as dispersed about the country. There was nothing in the articles of capitulation to constitute him a British subject. It cannot be held that a man may at his own election make himself our subject, and entitle himself to all the privileges of that character, and that with the arms, which he had just used against us in his hands, he might take up his residence in any part of our country, he might think proper to choose. But even admitting this proposition, Narroba had no power of making such an election. He was sent to Poonah as a prisoner of war for a breach of the articles of capitulation, and remained there under military surveillance, and a guard was placed over him, until the time of the seizure of the property in question, so that he neither had nor could have then acquired the right of a British subject. He was an alien enemy, not entitled to the benefit of the proclamation, because he had not complied

with its terms; not entitled to the benefit of the capitulation, because he had been adjudged to have broken them by the only authority, who was competent to judge of the question; and not entitled to claim the protection of the [342] British government as an inhabitant of a conquered country, because he inhabited that country not as a free agent, but under the control of the military force. For these reasons, therefore, even if your Lordships are of opinion that the Court below had jurisdiction to try the cause, we submit that their judgment ought to be reversed.

J. Williams (K.C.) and Denman (K.C.), for the Respondents, and with them were Stephen (Serjeant), Adams (Dr.), and Lewis.—The charter by which the Supreme Court at Bombay was constituted gave to it in express words "Jurisdiction over all such persons as had been theretofore described or distinguished by the appellation of British subjects, and full power and authority to determine all suits and actions whatsoever against any such subjects arising in territories subject to or dependent upon, or which thereafter should be subject to, or dependent upon, the government of Bombay, or within any of the dominions of the native Princes of India in alliance with the said government, or against any person or persons who at the time when the cause of action should have arisen should have been employed by, or have been directly or indirectly in the service of, the East India Company." Both Mr. Elphinstone and Captain Robertson were in the service of the East India Company, and the jurisdiction of the Court to try an action to which they were made defendants, so far as regards its charter, cannot be disputed.

It is said that the Supreme Court could have no jurisdiction in this particular case, or over any act done [343] in the Deccan in the year 1818, because the country was in a state of war; that martial law was the only law that prevailed during that period, and that no civil rule was established. To answer this, it is necessary to look at the nature of the war in the course of which that province was subdued. It was a war of conquest and annexation, and its sole and avowed object was to place the principality of the Peishwa under the dominion of the East India Company. The proclamation of Mr. Elphinstone early declared this to be the intention of our Government; and from the moment that proclamation was issued in every part of the country, that was conquered, became at the time of its conquest part and parcel of the dominions of the Crown of England. On the 16th of November 1817 the Peishwa fled from his capital, and it was taken possession of by us, and has ever since remained in our possession, which is the best answer that can be given to the argument, that it might have been transferred to the Raja of Sattara. If indeed it is not to be held to have been annexed to our territories by its conquest, and by Mr. Elphinstone's proclamation, can it be held to have been annexed to them at all, for no additional act has ever been executed to transfer it to our dominions? The proclamation was most justly held by the Court below to have amounted to a convention. It was a convention between the British Government on the one side, and those inhabitants of the conquered territory on the other side who might think fit to come in and claim the protection it offered to their persons and property. If King William the 3d, at the time of the Revolution, after he had come over to England [344] had refused to abide by the terms of the proclamation he had published in Holland, if he had said, there are two or three forts still holding out in the Highlands; there are forces still in arms against me; my proclamation is no agreement, it is all on one side; there is nothing in it that can oblige me to give a free government to England until the whole realm is subdued; what would have been thought of his argument or his integrity? We are not indeed left entirely to our imaginations to conjecture what opinion would have been formed of them at that time (20th Jan. 1692); for we well know, that when Bishop Burnet maintained in a pastoral letter, that he had gained the throne by right of conquest, and was not bound by his proclamation, the consequence was, that his letter was ordered by the House of Commons to be publicly consigned to the flames by a not very dignified personage. Such was the manner in which Parliament received such an argument in those days; and we consider that it is not entitled to any more respect in the present. In the ordinary transactions of common life, if a man proclaims in the newspapers, that he intends selling his estate upon particular conditions, and afterwards he attempts to evade the performance of these conditions, we know that the Court of

Chancery will enforce them; because, as we are told in Sugden's Treatise on Vendors and Purchasers (cap. 1, s. 4), an advertisement in the newspapers is held to be a contract with all the world.

But then it is said, that the country was unsettled, or in a state of passage from one settlement [345] to another. Such a state is unknown in our laws. A country must either be in a state of war or a state of peace, although it is sometimes difficult to define the actual boundaries between them. The distinction between the day and the night is perfectly intelligible, but who can ascertain the exact point where the one ends and the other begins. At the time however of the seizure of the treasure in July, Poonah had remained in the undisputed possession of the English since the time of its occupation by General Smith in the preceding November; the Peishwa had surrendered in June; all regular war was completely at an end; the only warfare, that continued, was irregular and transitory, and nothing remained to be conquered but a few detached forts, all of which were at the distance of more than 120 miles from Poonah, and appear to have been held out by refractory Arab garrisons against the will of their commanders. It cannot therefore be disputed that in point of fact at least Poonah was perfectly subdued and tranquil, and consequently in a state of peace: and we are furnished by our text-writers with an easy criterion, to judge whether it was not so in point of law also. Lord Hale (Pleas of the Crown, part 1st, c. 26, p. 344) records one of the resolutions of the Judges in the Earl of Lancaster's case to have been, that "whenever the King's courts are open it is time of peace in judgment of law;" and Lord Coke in his Commentary on Littleton says (Co. Litt. 249 b), "Tempus pacis est, quando Cancellaria, et aliae curiae regiae sunt apertae, quibus lex fiebat cuicunque prout fieri consuevit;" and he goes on; "and [346] therefore, when the courts of justice lie open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, et silent leges inter arma, then it is said to be time of war." So that where there is a doubt as to the actual position of affairs in a country, and it is shown that the King's Courts are open, that country must be held in law to be in a state of peace. At Poonah the Courts had been open since February 1818; and therefore it must be held to have been in a state of peace at the time of the seizure of this treasure, especially as during the whole of the intermediate time no actual conflict had ever taken place in it. An opposite holding would indeed lead to this conclusion, that no action could have been brought in any Court, an argument which could not very well be maintained by the defendants. Captain Robertson, who himself presided at the Court of Adawlut during the period in question. Wherever the country is so far settled that protection is afforded to life and to property, the man who acts illegally under colour of military authority is amenable to the laws, and must answer for his conduct in a court of justice.

There was nothing in the character of either of the defendants to render them irresponsible. In *Fabrigas v. Mostyn* (Cowp. 165), and *Campbell v. Hall* (23 St. Tr. 322; Cowp. 205), governors were held liable for acts they had done without legal authority. A commissioner is at most only equal to a governor; perhaps his office is rather inferior; [347] at any rate he cannot pretend to a greater degree of irresponsibility. Captain Robertson, as an inferior officer to the commissioner, has still less claims to be exempted from the general rule. It does not signify for what period countries have been conquered and placed under the protection of the British throne; it is enough that they have been and remain so; and the distinction which has been attempted between the cases of Poonah, and those of Grenada [*Campbell v. Hall ubi sup.*] and Minorca [*Mostyn v. Fabrigas ubi sup.*], from the greater lapse of time, that the latter colonies had been in our possession, cannot be supported.

If however any objection is to be raised to the jurisdiction of the Court at Bombay in this instance, it cannot be done without giving another jurisdiction, to which the complaining party may apply. Upon this point, the first decision took place in the *Nabob of the Carnatic v. The East India Company* (1st Vesey, jun. 37), and the question was completely set at rest by the case of *The King v. Johnstone* (6th East, 583), where, after a very considerable argument, it was

decided, that to establish a plea to the jurisdiction of any Court it is necessary for you to show that some other, and what, Court, has jurisdiction over the matter in dispute.

But then it is said, that admitting the Court below to have had jurisdiction, and that the country was in a state of peace, Narroba was not entitled to claim the benefit of their jurisdiction, because he was an alien enemy, not entitled to the benefit of either the proclamation of Mr. Elphinstone, the capitulation with Colonel Prother, or the state of tranquillity the country was in. The defence of alien [348] enemy applies only to the time of action brought; and a plea of this nature is bad, if it does not state the plaintiff to be so previous to and up to the filing of the suit. It cannot be contended, that if Narroba had lived to the time of the institution of this action, that he would then have been an alien enemy; and if he would not have been so then, the question would arise, when he ceased to be one. If indeed it is necessary that a treaty of peace should be signed before the inhabitants of a conquered country cease to be considered as aliens, and become entitled to the protection of the conqueror, neither he nor any of the other inhabitants of Poonah would either then or now have been entitled to sue in the courts of Bombay. Captain Robertson might at this very time enter into the house of any Brahmin and seize all his property, and the injured man would be entitled to no redress, because no actual pacification has been concluded, and the country must still be held to be unsettled. Such a proposition cannot however be maintained; and after the proclamation of Mr. Elphinstone, and the subsequent reduction of the country to a state of tranquillity, every one of its inhabitants had a right to claim the protection of the British Government. Narroba was not excluded from the terms of the proclamation. Wuttundars, and holders of hereditary land who should continue in arms two months after its date alone were excepted from its benefit. No evidence is produced by the other side to show that he fell within the excepted class. Had he done so he would have become again entitled to those benefits by his capitulation with Colonel Prother. By that he was allowed to retire with his property to [349] whatever place he chose. No doubt the knowledge of the protection offered by the proclamation to the persons and property of those, who should come in and submit themselves, had considerable weight in influencing him to surrender the fortress, which appears to have been of great strength, and which Colonel Prother seems to have thought himself fortunate in gaining possession of before the commencement of the rainy season. His subsequent detention by the Colonel on a suspicion of having broken the articles of capitulation by secreting the public money, which we contend was unfounded, cannot make any difference in the case. The Colonel indeed, who was entitled to a share of the prize-money gained by the capture of the fortress, and who increased that money by the seizure of Narroba's property, was very unfit to act as a judge whether the property belonged to the State, and was liable to seizure, or was private property, and protected by the capitulation. Captain Robertson subsequently was an equally improper judge on the same subject, for he was entitled to five per cent. on all the property seized; for, as Lord Stowell has observed, in the case of the *Two Friends* (1st Robinson, 282), "One of the great ends of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decisions of adverse interests to those who can have no interest in the determination of any such cases." But it is said that Narroba was sent to Poonah as a prisoner of war. The only evidence of this is the statement of his executor Ameerschund's memorial, who of [350] course could only speak from the information of others. It appears however from Colonel Prother's own letter that he went voluntarily there, for the Colonel does not know whether he had gone or not, which could not be the case if he had sent him under a guard. Having thus gone there, he resided peaceably in his own house until the time of the seizure; and whether or not a peon was in consequence of the suspicions, that were entertained, set to watch, if any treasure was sent to him, is of very little importance. He was entitled to the protection of the British Government; and the conduct of the civil magistrate in imprisoning him, and seizing his property for a supposed breach of a military capitulation was unjustifiable.

The treasure in respect of which this judgment was given was Narroba's own. Supposing however that it belonged to the Peishwa; supposing the evidence to be

true that has been adduced on the other side, that a large quantity of treasure had been conveyed out of the fortress previously to the capitulation, and since that time had been brought to Narroba's house at Poonah, still Narroba would have had a sufficient special property in that treasure to have maintained an action of trover against any wrong-doer who should take possession of it. "To give the conqueror a right of propriety, that will hold good against the conquered," says Puffendorf (Book 8, c. 6, s. 20), "there must of necessity be a pacification and agreement between both the parties, otherwise the right is supposed to continue in the old proprietor, and whenever he is strong enough he may justly struggle to recover it." Now here the [351] propriety of the treasure had never been acquired by the British troops during the war. The Peishwa had surrendered to Sir J. Malcolm upon terms in the preceding month, although what those terms were does not appear in the evidence in this cause, and the propriety of the treasure remained in him, and Narroba, as his agent, had a right to maintain possession of it against the appellant. At any rate, as the mere possessor of it, he had a right to maintain his possession of it against all the world except the actual proprietor, as was held in the case of the chimney-sweeper who found a jewel [*Armorie v. Delamirie*, 1722, 1 Stra. 505; 1 Sm. L. C. 10th ed. 343]; and neither of the appellants had any claim to that character. Admitting therefore the case on the opposite side to be true, though it is, as we contend, contrary to the weight of evidence, the judgment of the Court below must be sustained.

The Attorney-General, (Sir J. Scarlett,) in reply.—When the success of a commander of an army enables him to take military occupation of a country, he may either deliver it up to the ravages of his soldiery, if he is cruelly disposed, or may place commissioners in it to preserve tranquillity, till final arrangements are made respecting it; and in the latter case it is very advisable to allow the usual courts of justice, that existed in the country before the invasion, to continue their jurisdiction upon such subjects as the commissioners may not think proper to reserve for the consideration of the commander; but this does not deprive that commander of his power, or free the country from military government. In the present case, when the [352] Peishwa had been driven away from Poonah, although that city was taken possession of by the British forces, other places still remained under his dominion, and it was the object therefore of the British commander to cover by a military force the greatest extent of country he could, and to induce the inhabitants to submit to the British arms; for this purpose, Lord Hastings, who was the general-in-chief of the army, as well as vested with the supreme government of India, appointed Mr. Elphinstone a commissioner for the provisional administration of the country during the time that it was occupied by His Majesty's forces. The country was under a military occupation in every sense of the word during the continuance of Mr. Elphinstone's commission, notwithstanding the existence of the ancient tribunals of justice for certain purposes, and the Municipal Courts at Bombay ought not therefore to have entertained any suit of this kind. If it had been the policy of the British Government to have accepted the submission of Bajee Row, and to have replaced him on his throne, upon his making such sacrifices of treasure, or such a cession of dominion, as they might have thought fit to have exacted, could it have been contended, that what was done in the interval by the commissioner in the execution of the orders of Lord Hastings, or in the exercise of his discretion, would have been the subject of jurisdiction in the Civil Court at Bombay? Had Mr. Elphinstone in pursuance of instructions from the governor-general seized Gokla, or any other chief who was adhering to the Peishwa, can it be held that the chief could have brought an action against him for assault and imprisonment? And yet such con-[353]clusions appear inevitable from the premises on the other side.

Captain Robertson was appointed by Mr. Elphinstone to this provisional government of Poonah until the war was ended. His instructions told him that the first consideration was "To deprive the enemy of his resources, and in this and all other points every thing must for the time be made subservient to the conduct of the war." Now money forms the sinews of war; and Captain Robertson therefore, if he had reason to suspect that any person resident in Poonah was in possession of

treasure, and meant to use or dispose of it for the benefit of the Peishwa, had distinct authority by this order to have adopted such measures as would have prevented the money having been thus made use of. According to the argument on the other side, however, he could not, with a view to that object, have seized any treasure without exposing himself to an action. I however beg leave to say, that even if he had been mistaken in his suspicions he would not have been liable to any action in any Court, either in India or in England. It is upon this letter of instructions that the other side rely, as showing that the country was in a state of peace, and that Captain Robertson was in the civil administration of it, and therefore responsible to the Court of Justice in Bombay. There are parts of it however which show that he was vested with a military authority: "When a village has once submitted, any practices in favour of the enemy must be punished as acts of rebellion, by martial law. The commanding officer at Poonah will be directed to assemble a court-martial for the trial of such persons as you [354] may bring before it, and to inflict capital punishment immediately on conviction. The same course must be adopted with regard to persons in Poonah who shall conspire against our government, and likewise with all banditti who may assemble in the neighbourhood of the capital." Can it be said, that peace was established in this place, when the person intrusted with the administration of it was authorised to assemble, at his discretion, a court-martial, and try persons by martial law? "No European soldiers are to be permitted to enter the city on any account." Now assuming Poonah to have been a part of the British territories in a state of peace, and in no respect subject to martial law, but governed either by the laws of the country, authorized by His Majesty, or the laws of Great Britain, so far as they applied, there is no doubt that Captain Robertson could not have prevented officers from entering the town, and would have been liable to an action of trespass for attempting to do so; but such a supposition cannot be maintained. Your Lordships cannot doubt that Captain Robertson was a military officer, acting over military officers, and whether he acted rightly or wrongly must be determined by his own superiors, and cannot be determined in a civil court. Bajee Row's property was by these instructions directed to be made over to the prize-agent, and yet it is for the very act of taking possession of his property that Captain Robertson is made defendant with the government of the country in a civil action. Gokla's and Trimbuckjee's property was also to be considered as prize, and yet, according to the argument on the other side, if Captain Robertson had taken their property [355] in a house at Poonah he was liable to an action in the Court of Bombay: Mr. Elphinstone who gave the order was liable, and the East India Company was also liable, because it was by their officers that the order was given. So that the government of a country, which employs a general to carry on a war, is to become liable afterwards in its own Court of Justice for taking the property of its enemies which had been confiscated, because they had refused to submit; and if His Majesty was unfortunately to engage in another war, and to obtain possession of an island belonging to the enemy by force of arms, and directions were sent from home that the laws of the country should be preserved and all property respected, with the exception of that of certain individuals, who had taken an active part in the hostilities, and to whom his Majesty did not think fit to extend the privilege of subjects, the authorities who executed that order would be liable to have an action brought against them in the Court of King's Bench for having obeyed it.

The proclamation of Mr. Elphinstone was a proclamation by a military commander, to induce the inhabitants of the country invaded to submit to his authority. No doubt the terms of that proclamation were kept, but the breach of them could never have been the subject of inquiry in a civil court, although it might have been the subject of a remonstrance by petition to the Government. Proclamations are always issued on such occasions. We have had an instance of one issued lately in the regency of Algiers. Can it however be said, that if any Moor or Bedouin had come in and submitted, and had afterwards been refused the protec-[356]-tion promised him under the terms of that proclamation, he could, after the conquest of the territory and the occupation of the town, have brought an action in the French courts against General Bourmont for a violation of the proclamation. It is clear

that a general must be tried by another tribunal. The Government alone has the power to determine whether he has acted rightly or wrongly.

Narroba however could claim no benefit of the terms of Mr. Elphinstone's proclamation. Wuttundars and other holders of land are required by it to quit the standard of Bajee Row and return to their villages within two months from its date. It appears from Narroba's own will (which is in evidence in the cause), and by which he devises land, that he was a holder of land. It is equally clear that he adhered to the Peishwa; because, after the proclamation he was in command of the fort of Ryeghur, and opposed the besieging army. So that he is not only in terms excluded from claiming the benefit of this proclamation, but he was told by it that he would be pursued without remission until he should be crushed. Supposing even, that this proclamation had the force of a convention to those who submitted under it, by the same rule, and by the same spirit of interpretation, did it not except those, who did not submit and take the benefit of it? Was not Narroba, who was in arms after the proclamation, and did not submit within the time mentioned in it, as distinctly excepted in terms from claiming the benefit of it, as if he had been named in it. But if Captain Robertson and Mr. Elphinstone, acting under a suspicion that turned out to be unfounded, had entered Narroba's house and taken [357] every farthing of his property, under the terms by which Mr. Elphinstone held his government, and Captain Robertson his authority, no action could have been maintained by Narroba either against one or the other of them. It is unnecessary to refer to any decisions upon the law of England, or any modern jurists, to illustrate the position, that in a state resulting from a state of war, if property is seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authority, but no action can be maintained against the party who has taken it in a court of law. If an English naval commander seizes property as enemies' property, that turns out clearly to be British property, he forfeits his prize in the Court of Admiralty, and that Court awards the return of it to the party from whom it was taken; but the case of *Le Caux v. Eden* (Douglas, 573), decides the question that no British subject can maintain an action against the captor. The Court of Admiralty is the proper tribunal for the trial of questions of prize or no prize, and it exercises this jurisdiction as a Court of Prize, under a commission* from His Majesty; and if it makes an unsatisfactory determination the appeal lies to His Majesty in Council, for the King reserves the ultimate right to decide on such questions by his own authority, and does not commit their determination to any Municipal Court of justice. Now booty taken under the colour of military authority falls under the same rule. If property is taken by [358] an officer under the supposition that it is the property of a hostile state, or of individuals, which ought to be confiscated, no Municipal Court can judge of the propriety or impropriety of the seizure; it can be judged of only by an authority delegated by His Majesty, and by His Majesty ultimately, assisted by your Lordships as his Council. There are no direct decisions upon such questions, because, as was stated by Lord Mansfield in *Lindo v. Rodney* (Douglas, 592), they are cases of rare occurrence.

We have Colonel Prother's letter, who conducted the siege of Ryeghur, written immediately after the capitulation, in which he states that Narroba had conveyed away property in fraud of the treaty, and that he suspects Narroba to have in his possession a great deal of public property. There are two orders given to Colonel Prother, and afterwards to Captain Robertson, by the Government, that Narroba is to be seized wherever he is found, as he has been guilty of a violation of the treaty. But even suppose that Colonel Prother had most clearly broken the terms of the capitulation, and had thought fit, upon some unfounded suspicion of his own, to seize and imprison Narroba. Could any English lawyer maintain that at the conclusion of the war Narroba could bring an action in consequence against the Colonel, if he could prove that he had not been guilty of anything that took him out of the treaty, and that by the laws of war he was entitled to the benefit of it? It is clear that a complaint to the Superior Government would have been the only means of obtaining redress for any [359] wrong he might have been guilty of. In

* For the form of one of these commissions, and generally on this subject, see *ex parte Lynch*, 1st Maddock, 18.

what a situation would an officer be placed who signed a capitulation, for he must be the judge at the moment, whether individuals are entitled to the benefit of it, and it would be impossible to limit him in the exercise of his authority; and yet if he suspected that half the garrison were combining against him, and destroyed it for his own security, according to the argument on the other side he would be liable to be tried for murder.

It is clear, however, without resorting to the parol evidence given on the trial, that Narroba had concealed the property of the Peishwa. One of the accounts rendered by Bedreechund himself, as one of the particulars for which he instituted the action, is intitled, "The Honourable English East India Company, the honourable Mr. Elphinstone, and Captain H. D. Robertson, debtors to Amerchund Bedreechund, executor of Narroo Govind Outia, deceased, July 18th, 1818, to the following private property of Bajee Row, intrusted to Narroo Govind Outia, and seized by Captain H. D. Robertson at Poonah," and then the amount is given of gold mohurs and Venetians. Thus the very property it was the object of the military commander to confiscate and hand over to the prize-agent is admitted by the plaintiff who brings this action to have been in the possession of Narroba at Poonah. Was not Captain Robertson sufficiently justified by the terms of his appointment, the terms of the proclamation, and the whole tenor of the authority under which he and Mr. Elphinstone exercised their control in seizing this property? Is it not a matter of indifference whether or not any of Narroba's pro-[360]-perty was included in the seizure? Any man who adhered to the Peishwa after the publication of the proclamation was in terms excepted from all those advantages, that the conquering party was disposed to give to those, who submitted, but from which those, who adhered to the enemy were debarred; and can it be disputed that the concealing of his property is an adherence to the enemy? If Captain Robertson had acted only on a suspicion that turned out to be unfounded, acting under the authority he possessed, he would not have been answerable to the Municipal Court of Bombay, or to any other Municipal Court, but only to Government; but by the admission of the party himself it is evident that Narroba had concealed property of the Peishwa; by so doing he forfeited all rights to claim the benefit of the proclamation, the capitulation, or the instructions given by Mr. Elphinstone with regard to the property of those persons, who submitted to the Government, when our army took possession of the territory. This plaintiff therefore cannot stand entitled to the judgment he has obtained. The Court below had no jurisdiction in this case, and if they had a jurisdiction they ought to have decided contrary to what they have done, for the property seized was the property of Bajee Row; and even if some of Narroba's own personal property was mixed with it he had forfeited it by adhering to the enemy, and had no right to maintain an action in respect to it.

Lord Tenterden.—We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, [361] yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject; but that, if anything was done amiss, recourse could only be had to the Government for redress. We shall therefore recommend it to His Majesty to reverse the judgment.

[The following memorandum appears at the end of 1 Knapp]:—

After the decision in the case of *Elphinstone v. Bedreechund*, the Respondent presented a memorial to the King in Council, claiming the treasure seized as his private property, and praying that his claim might be heard either before a Committee of the Privy Council, or some other competent tribunal to be appointed by His Majesty for that purpose. A Committee of the Council was accordingly appointed, and after hearing, on the 1st and 12th of July 1831, J. Williams, K.C., Stephen, Serjeant, and Adams, Dr., for the Memorialist, Sir J. Scarlett, K.C., and Wightman, for the Crown, and Drinkwater, who obtained leave to appear for the army of the Deccan, Lord Tenterden pronounced their decision to be, "That they could not advise His Majesty that the Memorialist had made out his claim."

[S.C. with full annotations in 2 St. Tr. N.S. 379. On point as to act of state, cf. the following cases: *Doss v. Secretary of State for India in Council*, 1875, L.R.

19 Eq. 509; *Grant v. Secretary of State for India in Council*, 1877, 2 C.P.D. 445; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 1859, 13 Moo. P.C. 22, 7 Moo. Ind. App. p. 476; *Rajah of Coorg v. East India Co.* 1860, 29 Beav. 300; *Rajah Sahig Ram v. Secretary of State for India in Council*, 1872, L.R. Ind. App. Suppt. 119; *Forester v. Secretary of State for India in Council*, 1872, L.R. Ind. App. Suppt. 10; *Sirdar Bhagwan Sing v. Secretary of State for India*, 1874, L.R. 2 Ind. App. 38; *Walker v. Baird* (1892), A.C. 491; *Poll v. Lord Advocate*, 1899, 1 Fraser, 823. See also Ilbert, *Government of India*, pp. 172-178, and note by the same author on "Act of State" in 1 *Rul. Cas.* pp. 802 *et seq.*]

[362]

ON APPEAL FROM LOWER CANADA.

JAMES ROGERSON and Others,—*Appellants*; ISAAC CORRIE REID,—*Respondent* [July 10, 14, 1830].

A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they (the Newry House), would send out the rigging. The Quebec House enter into a contract with some shipbuilders accordingly. The Newry House then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec House, held, that the property in it was vested in the Newry House, and that the Quebec House had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of Custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house.

The respondent, on the 3d of July 1826, commenced an action of re-vindication * against the appellant for the recovery of some anchors and rigging; and on the same day the articles were seized by the sheriff under a writ of attachment (*entiercement*, or *saisie de re-vindication*), sued out by the respondent. The appellant appeared to the action, and put in a defence *à fonds en fait*, which is in the nature of our general issue. The facts which were proved by the evidence, and were undisputed by either party were as follows:

It is usual for British merchants to give orders for building of ships to merchants resident at Canada, as agents on commission; and in such cases the common course is for the Canadian merchant to contract with the actual builder to advance [363] him the requisite monies, according to the terms of contracting for materials and work in the colony, and to draw from time to time for such advances on the British merchant, and for the British merchant to send out to the Canadian merchant the necessary rigging for the ship, and also a master to superintend the building of it, and navigate it to Europe.

Messrs. Henry and Reid, who were merchants resident at Newry in Ireland, by a letter dated the 23d of August 1825, directed the appellants, who were merchants resident at Quebec, "to contract for the building of a vessel of certain dimensions therein mentioned, to be called the *Ocean*, to be complete in cabin, and every other thing except the rigging; and they desired to be advised in good time of the appellants having made the contract, so as to be able to send out the rigging; and they agreed to allow the appellants two and a half per cent. commission for their trouble. Captain Maxwell was to have the command." The appellants contracted with some

* The form of declaration in re-vindication, as used in the courts of Lower Canada, closely resembles that of our own declaration in trover, except that it concludes with praying for the benefit of a writ of *entiercement*, or *saisie arrêt*. Under this writ the goods are liable to be seized by the sheriff, and kept in his custody by way of deposit until the trial. For the general nature and effects of this action see Potier, *Traité de la Propriété*, partie 2de.