Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED (DEFENDANTS), *v.* MIRZA MAHOMED ALI SHERAGEE (PLAINTIFF).* 1873 *Jan.* 23.

Jurisdiction of British Municipal Court—Act of State—Title to Timber—Confiscation by Governor of foreign State—Measure of Damages.

The plaintiff brought a suit at Tonghoo in British Burmah to recover possession of certain timber, which he alleged the defendants had, wrongfully and in collusion with the Burmese Governor of Ninghan, taken out of his possession in foreign territory and removed to Tonghoo. The defendants stated that they had acquired the timber from theGovernor of Ninghan in terms of an agreement between them and the Burmese Government. It appeared that the Governor of Ninghan had confiscated the plaintiff's timber in contravention of a royal mandate. After the institution of the suit, the defendants removed the timber from Tonghoo to Rangoon. *Held*, that a British Municipal Court might enquire into the character of the act of theGovernor ofNinghan, and was not bound to accept it as an act of State.

TheCourt below having fixed the price of the timber at Rangoon as the alternative damages in Case af non-delivery, the High Court refused to interfere with such award.

THIS was a suit brought in the Court of the Assistant Commissioner at Tonghoo for the recovery of 65 logs of teak timber or their value. The plaintiff alleged that the logs were part of a large number felled or purchased by him under and during the continuance of licenses to work the Ninghan forest granted to him by the Burmese Government, and for which he had paid it more than Rs. 24,000. The logs bore his hammer-marks.

On the 15th July 1867, Messrs Darwood and Goldenbergh, acting as agents or trustees for the defendants, obtained from the King of Burmah a lease of, or license to work, the Ninghan forest for four years from October 1867. The lease contained no mention of previous licensees, but it prohibited the export of certain descriptions of timber from the King's territories by any persons other than the defendants. On the 11th November 1867 Darwood and Goldenbergh obtained a supplementary grant which empowered them to buy up timber felled before the time of the commencement of their lease at Rs. 2 less than its mar-

* Regular Appeals, Nos., 67 and 68 of 1872, from the decree of the Recorder of Rangoon, dated 8th January 1872.

1873

THE "BOMBAY BURMAH TRADING CORPORATION, LIMITED, v. MIRZA MAHOMED ALI SHERAGEE.

ket-value, provided however that, if they failed to buy it, the owner should be at liberty to sell it as they pleased. On hearing of the defendants' lease, the plaintiff got a royal mandate from the King of Burmah, the effect of which was that the defendants should be at liberty to take the plaintiff's good timber at the rates they had agreed to pay for timber in their contract with the King, and that they should have the option of taking the plaintiff's inferior timber at Rs. 2 less ; but in case they failed so to take it, that the plaintiff should be entitled to sell his timber without let or hindrance. This mandate was forwarded to Ninghan, and there read aloud in the presence of the Woon or Governor, Darwood, and the other persons interested. Immediately after its receipt, the Woon, as the Recorder found, "commenced a series of illegal and oppressive acts towards the plaintiff, to which Darwood was privy, if he did not instigate them, in order to drive the plaintiff away, or compel him to part with his timber for what he could get for it." Ultimately, the Woon confiscated the plaintiff's timber, caused his own marks to be placed upon it, and transferred the property in it to the defendants, who had previously received formal notice of the plaintiff's claim. Thereupon, the plaintiff brought the present suit alleging in his plaint that the defendants had wrongfully and in gross collusion with the Governor of Ninghan taken the timber out of his possession in the foreign jurisdiction, and removed it into British Burmah, and that the timber was then at Tonghoo. After the institution of the suit, the defendants further removed the timber from Tonghoo to Rangoon, and they also succeeded in getting the suit transferred to the Court of the Recorder of Rangoon, notwithstanding that nearly all the witnesses resided at Tonghoo. The defence raised by the defendants was that, under the agreement or license of the 15th July 1867, they alone were entitled to work and bring out timber from the forest of Ninghan ; that the logs in dispute had been purchased by them from the Governor of Ninghan in terms of the said agreement, and that they never had been the property of the plaintiff. They also, during the course of the suit, objected to the jurisdiction of the Court, but the objection was overruled on the authority of the opinion expressed by the High Court in

1873

THE BOMBAY BURMAH TRADING CORPORATION LIMITED v. MIRZA MAHOMED ALI SHERAGEE.

Saya Loo v. *Nga Paw Loo* (1). At the trial issues were fixed, of which the first was "whether the plaintiff is entitled to recover from the defendants the 65 logs of timber specified in the plaint or the value thereof."

The Recorder passed a decree in the plaintiff's favor, fixing the alternative damages, in case of non-delivery, at Rs. 50 a log, which was the market rate at Rangoon.

The defendants appealed to the High Court.

The *Advocate-General, offg.* (Mr. *Paul*) and Mr. *Woodroffe* for the appellants.

Mr. *Evans* and Mr. *Macrae* for the respondent.

The *Advocate-General*.—The first issue is too vague. The plaintiff has not established his title to the timber; the mere fact that the logs bore his marks is not sufficient evidence of title—*Snadden* v. *Todd, Findlay and Co.* (2). The defendants acquired the timber from the Woon, who had confiscated it in his official capacity; whether or not the confiscation was wrongful is immaterial; it was an act of State, and as such not cognizable by the Municipal Courts of a foreign country; see Forsyth's Cases and Opinions, p. 86—*Buron* v. *Denman* (3), *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (4), and *The Raja of Coorg* v. *The East India Company* (5). The damages have been wrongly estimated The proper measure of damages was the value of the timber at Tonghoo when the suit was brought, and interest for the time it was detained. If it were otherwise, a person wrongfully dispossessed might lie by until his property had been improved by the labor or at the expense of the wrong-doer, and then claim it at the enhanced value—*Jëgon* v. *Vigian* (6). In any case the plaintiff ought not to have recovered more than the market-value at Rangoon after deducting the expense incurred in removing the timber from Tonghoo.

(1) 6 W. R., Civ. Ref., 4.
(2) 7 W. R., 286.
(3) 2 Exch., 167.
(4) 7 Moo. I. A., 476.
(5) 29 Beav., 300.
(6) 40 L. J. Ch., 389; see p. 395; S. C. L. R., 6 Ch., 742.

1873

THE BOMBAY BURMAH TRADING CORPORATION LIMITED v. MIRZA MAHOMED AL SHERAGEE.

Mr. *Evans* for the respondent.—The evidence shows that the marks on the timber are evidence of ownership. It cannot be contended that every act of a public officer is an act of State. See *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1), as to what constitutes an act of State. The damages were properly estimated.

Mr. *Macrae* on the same side.—The confiscation of the plaintiff's timber by the Woon was in direct contravention of the royal mandate, and cannot therefore be considered an act of State. With regard to damages, if this action had been brought in England, it would have been in trover, in which the conversion would have formed the gist of the plaintiff's right, but the jury might have taken the nature of the taking into consideration in awarding damages, and the Court would not grant a new trial on the ground that the damages were excessive. In this country the Court is not fettered by technicalities, and can give such damages as it thinks just. If the case had been decided at Tonghoo, the damages would still have been the value of the timber where it was found. The defendant could not claim to be recouped the cost of carriage to Rangoon, that carriage being tortious: see Selgwick on damages, p. 564.

The *Advocate-General* in reply.—The Woon's act was an act of State—*Elphinstone* v. *Bedreechund* (2). If the title of the person who took from the Woon can be attacked in a British Court, then an action would lie against the Woon himself if he happened to come within the jurisdiction, the cause of action having arisen in foreign territories would not bar the suit; see *Saya Loo* v. *Nga Paw Loo* (3). I contend that a British Municipal Court cannot enquire whether or not the act of a foreign Governor was legally valid, since that would be taking cognizance of an act of State. If the plaintiff's marks on the timber were evidence of his ownership, the Woon's marks must equally be evidence of the Woon's ownership.

(1) 7 Moo. I. A., 476, at p. 501.
(2) 1 Knapp., 316.
(3) 6 W. R., Civ. Ref., 4.

1873

THE BOMEAY BURMAH TRADING CORPORATION LIMITED v. MIRZA MAHOMED ALI SHERAGEE.

The judgment of the Court was delivered by

JACKSON, J.—I think we can have no doubt as to what our decision ought to be on this appeal.

(His Lordship, after briefly stating the facts and the first issue, continued,)—It is complained by the Advocate-General, and I think not without justice, that this issue was too vague and general in terms, but it has not been shown that the defendants were prejudiced by the vagueness. Each party was represented by Counsel and agents who thoroughly understood what case they had to make; and it does not appear that either party was precluded from adducing any evidence which he thought material to his case. The result was that, upon the evidence the Recoder came to the conclusion that the timber was shown to belong to the plaintiff, and to have been wrongfully and without right taken by the defendants undoubtedly with the aid of the person who at that time held the office of Woon or Governor of Ninghan. Having come to this finding, the Recorder ordered possession of the timber to be delivered to the plaintiff; and in default of delivery of possession, that the plaintiff recover from the defendants Rs. 50 for each log, being the price of teak timber then prevailing at Rangoon.

On appeal before us, the defendants take several grounds, on the first of which the learned Advocate-General contends that the plaintiff has not made out his right to the timber in suit. It appears to me that the evidence on this point is overwhelming in favor of the plaintiff. The plaintiff has made out the license, or rather the grant which he said he obtained from the royal authority in Burmah, and has, I think, shown that the timber to which the suit refers was either cut or purchased by him from other parties during the continuance of that grant.

It is then said that the validity of the plaintiff's title depends upon the proof that he paid to the Burmese Government the amount stipulated in the grant. It seems to me that this is a matter on the proof of which the defendants are not entitled to insist; and that even if they are so entitled, it has been sufficiently proved from the account put in by the plaintiff, as well as by the parol evidence, that he had paid from time to time the amounts stated into the royal treasury, and it certainly does

1873

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED v. MIRZA MAHOMED ALI SHERAGEE

not appear from anything shown on the other side that the plaintiff was in any default on that account.

Then it is said that the defendants had in fact good title to this timber, having acquired it from the Governor of Ninghan, who, in turn, had taken it out of the possession of the plaintiff by an act of confiscation, which confiscation is relied on as an act of State such as a British Court is not competent to question. The learned Advocate-General contends that this defence of an act of State being set up on the part of his clients, and it being shown that the person through whom or by whose assistance the defendants had taken possession of the timber was the foreign local authority Governor or Woon, however oppressive, or arbitrary, or unjust the act of the said officer may have been, a Court of British India is not entitled to enquire into the character of that act, and must accept it as an act of State. I cannot however assent to this proposition. It seems to me that, when the defendants set up as justification something which they call an act of State, the Court is bound to see whether the act relied upon is one of that character. Here it is found that, so far from the act of the Governor of Ninghan being ratified by or in conformity with the will of the supreme authority in Burmah, it was in fact in express contravention of the royal mandate, and to my mind it is destitute of all the characteristics which one might expect to find in anything of an act of State. It does not appear that any sentence or official order was issued under which the expoliation, as I must call it, took place. So far from that, it appears that, in order to facilitate the acquisition of the timber by the defendants, the Governor commenced a series of illegal and oppressive acts towards the plaintiff, and to use threats of charges alleged to have been preferred against him by one Abdool Gunny, so as to compel him to leave the Burmese territory.

We are then told that the placing of marks on the timber by the Woon amounted to an act of confiscation. It seems to me, however, that it was not so. If the order of the Governor was not an act of State, and, as I have already said, it was not, no more was the imposing of the mark. I think that the plaintiff has made out his right to the timber, and that the defend-

1873

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, v. MIRZA MAHOMED ALI SHERAGEE.

ants have wholly failed to establish the proposition on which they relied. Further, I may observe, as pointed out by Mitter, J., that the defendants in their written statement never relied on, or referred to, the so-called act of State; and that if they had done so, no doubt a formal issue would have been framed on that point, and not only the defendants, but also the plaintiff, might have had the opportunity of producing evidence such as each party thought fit to adduce.

A further question then has been raised as to the amount of damages allowed to the plaintiff in the suit. It has been a matter of complaint that the Court in awarding to the plaintiff alternative damages has given him the gross value of timber then prevailing at Rangoon without taking into consideration, and making any deduction on account of, the charges incurred by the defendants in removing the timber to that place. The learned Advocate-General has invited us to lay down on this subject some general rule as to the principle on which such damages should be assessed. In the present case I think it quite unnecessary that we should accept any such responsibility. The duty which the Court had to perform under s. 191 of the Civil Procedure Code is clear. "When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be had." Now, in a case like the present, the money to be paid as an alternative was manifestly the value of the timber if that could be clearly ascertained. At the time of the bringing of the suit, the timber was at Tonghoo. It is stated, and no doubt truly, that the value of the timber at Tonghoo is considerably less than the value of the same at Rangoon. The carrying of the timber from Tonghoo to Rangoon by the defendants after the suit had been commenced, and after the defendants therefore had full notice that the plaintiff had taken steps to recover his property, was entirely at their own risk. If the law had not provided; as it does in s. 191, that the Court should state the amount of money to be paid as an alternative, the decree, no doubt, should have directed delivery of the specific property decreed to the plaintiff. Can it be said in that case that the Court ought to have ordered that, before delivery

1873

THE BOMBAY BURMAH TRADING CORPORATION LIMITED v. MIRZA MAHOMED ALI SHERAGEE.

of the thing to the plaintiff, the plaintiff do reimburse the defendants the charges of bringing the timber to Rangoon? I think not. It must also be borne in mind that the difference between the value of timber at Tonghoo and at Rangoon is not simply made up of the charges incurred in the transport of it, but depends in a large degree upon the wider market at Rangoon and the facility of sale. The defendants having, as is shown above, at their own risk removed the timber from Tonghoo to the place where the suit was afterwards tried, I think the plaintiff is entitled to insist upon the delivery of it to him, and in default of delivery to recover the value of it; and although I quite assent to the proposition of the learned Advocate-General that it is not the business of the Civil Court to inflict punishment on defendants, taking motives into consideration, I must say that we have had sufficient experience of timber suits from Rangoon, and in particular enough is disclosed in the facts of the present case, to make it no matter of regret that the defendants should be made liable to pay heavy damages.

I think therefore that this appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Glover and Mr, Justice Mitter.

1873
January 24.

BISTOO CHUNDER BANERJEE (PLAINTIFF) *v.* NITHORE MONEE DABEE AND ANOTHER (DEFENDANTS).*

Suit for Contribution—Interest—Act XXXII of 1839 (1).

In suits for contribution it is in the discretion of the Court to allow or refuse interest on the amount claimed, whether there has been a written demand for it or not.

(1) "Upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debt or that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

* Special Appeal, No. 615 of 1872, from a decree of the Subordinate Judge of East Burdwan, dated the 30th November 1871, affirming the decree of the Munsif of that district, dated the 15th December 1870.