Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Petition in the Matter of David François Marais v. *The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony, for Special Leave to Appeal from the Supreme Court of the Cape of Good Hope ; delivered* 18*th December* 1901.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD MAGNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR HENRY DE VILLIERS.

[*Delivered by the Lord Chancellor.*]

This was a Petition by D. F. Marais for special leave to appeal against a decision of the Courts in Cape Colony which had refused to release him from an arrest effected by the Military Forces of the Crown on 15th August last.

It appeared sufficiently from the Petitioner's own petition as well as from the documents accompanying it that the district in which he was arrested, and the district to which he was removed (and of which removal he also complained) was a district which had been proclaimed under martial law.

The Petitioner applied to the Supreme Court complaining of his arrest and imprisonment and on 12th September last the matter of the

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Petitioner's arrest was brought before Mr. Justice Buchanan and that learned Judge after hearing the matter made the following order:—

"In the Supreme Court of the Colony of the Cape of Good Hope.

"Cape Town, Thursday, 12th September 1901.

"In the Matter of the Petition of David François Marais.

"Having heard Mr. Currey, with him Mr. S. "Solomon for Petitioner, Mr. Searle, K.C., for "the General Officer Commanding Lines of "Communication, Cape Town, and the Honour- "able the Attorney-General Sir James Rose "Innes, K.C.M.G., with him Mr. Ward, for "the Colonial Government upon Petitioner's "application for his immediate liberation and "discharge and having read the order granted "on the 6th instant calling upon the gaoler at "Beaufort West to return to this Court the "authority on which he detains Petitioner:

"Having also read the further affidavits filed "and having heard the return, made by the "Attorney-General verbally, that the gaoler "who has the custody of the Petitioner holds "him as an officer acting under the authority "and control of the military authorities in the "district in which martial law prevails:

"It is ordered that the said application be and "the same is hereby refused.

"By Order of the Court.

"J. H. Gately,

"Acting Registrar."

From the Petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne, that in the opinion of the Military Authorities there were military reasons that the Petitioner should be removed and kept in custody.

All the persons arrested were as appeared by the Warrant under which they were arrested

charged with contravening what were called "Martial Law Regulations" which regulations are set out in the Petitioner's affidavit as follows :—

"No. 14.—Rebellion, Dealings with Enemy, "&c.

"Notice is hereby given that from and after "the 22nd April 1901 all subjects of His Majesty "and all persons residing in Cape Colony who "shall in Districts thereof in which Martial Law "prevails :—

"(1.) Be actively in arms against His Majesty, "or

"(2.) Directly incite others to take up arms "against His Majesty, or

"(3.) Actively aid or assist the enemy, or

"(4.) Commit any overt act by which the safety of His Majesty's forces or subjects are endangered,

"shall immediately on arrest be tried by a "Military Court convened by authority of the "General Commanding-in-Chief His Majesty's "Forces in South Africa, and shall on conviction "be liable to the severest penalties. These "penalties include death, penal servitude, "imprisonment and fine."

"Any person reasonably suspected of such "offence is liable to be arrested without warrant. "or sent out of the district, to be hereafter dealt "with by a Military Court."

Under these circumstances their Lordships were appealed to to give special leave to appeal and Mr. Haldane on behalf of the Petitioner was fully heard on 5th November last.

The only ground susceptible of argument urged by the learned Counsel was that whereas some of the Courts were open it was impossible to apply the ordinary rule that where actual war is raging the Civil Courts have no jurisdiction to deal with military action but where acts of war

are in question the military tribunals alone are competent to deal with such questions.

The question was as fully argued before their Lordships by the learned Counsel as it could have been argued if leave to appeal had been given and their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the Petitioner's own petition and affidavit.

Martial law had been proclaimed over the district in which the Petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830.

In *Elphinstone* v. *Bedreechund,* 1 Knapp Privy Council Reports page 316 the Supreme Court at Bombay had given a large sum as damages against the Appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poonah but the great battle of Kirkee had been fought and Poonah had been taken possession of by the British forces. The treasure was seized on 17th July 1818. At Poonah some Courts had been open from the previous February and it was argued and held by the Bombay Courts that it must be held to be a time of peace and that the military authorities were responsible in damages for seizure of the treasure.

To this the Attorney-General, Sir James Scarlett replied that a Military Commander may allow the usual Courts of Justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the Commander but this does not deprive the Commander of his power or free the country from Military Government.

Lord Tenterden in giving judgment said:— "We think the proper character of the transaction "was that of hostile seizure made, if not *flagrante*, "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," and the judgment was accordingly reversed.

The truth is, that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity and whether the intervention of the military force was necessary but once let the fact of actual war be established and there is an universal consensus of opinion that the Civil Courts have no jurisdiction to call in question the propriety of the action of military authorities.

The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.

For these reasons their Lordships advised His Majesty to refuse leave to appeal.