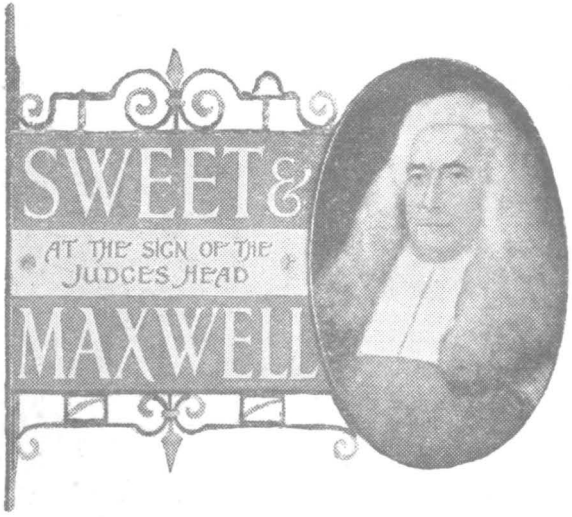
SWEET &
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THE INDIAN STATES,

THEIR

STATUS, RIGHTS AND OBLIGATIONS

BY

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"Glory be to God, who among other things has rooted out all hatred and enmity from the bosoms of these nations, and has commanded them to keep their Treaties inviolable, as the very glorious Book saith: O YE WHO BELIEVE, KEEP YOUR COVENANTS."—*Treaty between the Emperor of Persia and the Emperor of the Turks*, 1747.

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TO

HIS HIGHNESS

SHRI MAHARAJA BHUPINDER SINGHJI

MAHARAJA DHIRAJ OF PATIALA

CHANCELLOR OF THE CHAMBER OF PRINCES

This Work

IS

BY HIS HIGHNESS' PERMISSION

RESPECTFULLY DEDICATED.

PREFACE

In the course of the last few years the Indian States have acquired a great deal of practical importance. The part played by them and their rulers in the Great War, which forms one of the grandest chapters in the history of their relations with the Crown, has brought them to the fore-front of Imperial affairs. Moreover, recent constitutional changes in British India, devised without due regard to their extra-territorial effect, have clearly brought out the fact that in view of the close and intimate relationship, and of the community of interests between British India and the Indian States, the position of the States cannot legitimately be ignored in any constitutional scheme designed for British India. It is, therefore, clear that no constitution for British India can prove to be stable and successful which does not take into consideration the legal position and the rights of the Indian States.

It is, however, surprising that so far no attempt has been made to examine the legal position of the States and their *de jure* relationship with the British Government. The only exhaustive studies on the question are those of Sir William Lee-Warner and Sir Lewis Tupper, but both these writers have studied the question from the stand-

point of policy and expediency. It cannot, therefore, be denied that in ascertaining the rights and obligations of the Indian States, the contributions of Sir William Lee-Warner and of Sir Lewis Tupper cannot necessarily be of great use and profit. Nor can it be disputed that the conclusions arrived at by these two well-known officers of the Political Department of the Government of India cannot be accepted without closest scrutiny and examination. Several International publicists have attempted to examine the position of the Indian States from the standpoint of International Law, but none of them have dealt with the question exhaustively from a strictly impartial and critical point of view. Their conclusions and statements cannot be passed without challenge in view of the fact that none of them have studied the treaties, engagements, and *sanads*, which are primarily the source of the rights and obligations of the Indian States. There is another reason why their conclusions cannot be accepted by any critical and impartial student. Most of them have failed to realise the very important fact that the Indian States are not all of the same type, and that there exist important and striking differences between the States of the same category. Thus uniformity of terminology has tended to obscure the real juristic character of the Indian States. In the following pages an attempt has been made for the first time to examine the question from a purely legal standpoint, and to apply legal rules

and principles in ascertaining the exact juristic character of the Indian States, and their rights and obligations vis-a-vis the Crown.

The present writer had the privilege of listening to Sir Leslie Scott's illuminating argument before the Indian States Committee, and he takes this opportunity of expressing his indebtedness to him, although he has ventured to differ from him on certain important points. He is also thankful to Colonel K. N. Hakser of Gwalior for his many fruitful discourses on questions relating to the Indian States. He is also indebted in a special measure to Professor L. F. Rushbrook Williams of Patiala for giving him the benefit of his valuable criticisms and suggestions. He has also to thank Miss Nellie I. Gidion for her invaluable help, especially in connection with the Continental authorities discussed in the present essay.

It is needless to add that this book does not claim to have any official stamp or character. It merely embodies the results and conclusions arrived at by the present writer after a close and careful examination of the whole subject.

D. K. S.

FOREIGN MINISTRY,
PATIALA.

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CHAPTER I.

THE TREATY POSITION OF THE STATES.

THE juristic character of the Indian States and their rights and obligations are primarily founded upon treaties, engagements and *sanads*. Treaty is a consensual agreement between two or more States and necessarily presupposes the separate and independent existence of all the contracting parties. Fiore defines treaty as "*l'unione di due o piu stati nella concorde volonta dichiarata allo scopo di determinare alcuni rapporti giuridichi*" (*a*). Engagements, although unilateral, are contractual in character. The term *sanad*, however, raises several important questions. The Government of India as well as some well-known authorities (*b*) have interpreted *sanad* as a grant and, on the basis of this interpretation, have made a distinction between the States which have entered into treaties with the British Government and those which found on *sanads* their authority *vis-à-vis* the protecting Power. For instance, Sir William Lee-Warner defines *sanad* "as a diploma, patent, or deed of grant by a Sovereign of

(*a*) Fiore, *Trattato di Diritto Internazionale Publico*, Vol. 2, Cap. 5, p. 310.

(*b*) See Panikkar, *Indian States and the Government of India*, p. xx.

an office, privilege, or right." This definition is, however, erroneous. *Sanad*, according to the meaning attached to it in Indian law, signifies a document of title embodying a clear and distinct statement or a formal expression of the terms of an agreement. It does not necessarily imply any difference in status between the parties. For instance, the security bond under the Indian Civil Procedure Code contains the following words in the official *Urdu* (vernacular) version: "therefore these few words have been recorded by way of security bond to remain as *sanad*." It is clear that in this case the word *sanad* is used as a synonym for documentary evidence. In political parlance the term *sanad* is applicable to agreements concluded between two Sovereigns; it does not imply that the Sovereign giving a *sanad* is politically superior to the Sovereign accepting it. A striking example of this is the *sanad* given by the Maharaja of Patiala to Maharaja Ranjit Singh, the independent and sovereign ruler of the Punjab.

Whether a *sanad* is a grant or not depends entirely on its contents. A grant is, no doubt, usually embodied in the form of a *sanad*, but this does not mean that all *sanads* are deeds of grant or gift. Nor does the fact that the relationship between a State and the British Government has been embodied or incorporated in a *sanad*, impair or adversely affect the legal position of that State. In every case, whether a State has concluded a treaty with the British Government or has received a *sanad* from them, the legal position of the State must

necessarily depend on the terms and contents of the document in question. It follows, therefore, that the distinction made by several well-known writers between Treaty-States and *Sanad*-States cannot reasonably be maintained, although it is, no doubt, true that *sanads* in most cases attempt to impose restrictions on the authority of the States concerned —restrictions which are not found in most of the treaties. It must also be pointed out that even in cases where a *sanad* expressly purports to be a grant from the Crown, it is not necessarily a grant from the strictly legal standpoint; for instance, where a *sanad* purports to grant sovereign authority and powers which are already vested in and exercised by the grantee, the *sanad* must necessarily be interpreted as a mere admission or acknowledgment on the part of the Crown, inasmuch as the so-called grant has no operative effect. Such, for instance, are the Adoption *Sanads* of 1862 which, according to Lee-Warner, conferred on the rulers of the Indian States the right to adopt in default of natural heir. It is submitted that these Adoption *Sanads* do not have the slightest shred of operative effect. The right to adopt is conferred on every Indian ruler, Hindu or Mohammedan, by his personal law (c), and this legal right has been confirmed almost in every case by immemorial custom. When the British Govern-

(c) The personal law of an Indian ruler must be distinguished from the personal law of the ordinary members of the religious community to which he belongs, although the general principles are the same.

ment recognised the sovereignty of the Indian rulers and their heirs and successors, they necessarily recognised the right of every ruler to adopt in default of natural heir. It is, therefore, clear that the Adoption *Sanads* did nothing more than allay the apprehension caused by "the Policy of Lapse" adopted in the time of Lord Dalhousie in flagrant violation of the rights of the States recognised and guaranteed by the British Government.

It seems necessary here to refer to the important question of the construction and interpretation of the treaties and engagements. It is admitted by no less an authority than Professor Westlake that the relations between the Indian States and the British Government were, prior to the conclusion of the treaties, governed by principles of International Law. According to Sir William Lee-Warner, "the principles and even the precise language of International Law were generally and properly applied to the Indian States" prior to their acceptance of the protection of the British Crown. It follows, therefore, that the treaties with the Indian States are treaties of international character and must therefore be governed by rules and principles of interpretation accepted by International Law.

The first and foremost rule of construction is that "the treaties should be interpreted 'in the spirit of *uberrima fides*' and in a manner to carry out their manifest purposes" (*Tucker* v. *Alexandroff* (1902), 183 U.S. 424, 437) (*d*). According to Vattel, the

(*d*) Moore, *Digest of International Law*, Vol. 5.

interpretation which would render a treaty null and void cannot be admitted; it ought to be interpreted in such a manner that it may have its effect, and not prove vain and nugatory. Further, treaties between independent States, like agreements between individuals, should be interpreted according to "the natural, fair, and received acceptation of the terms in which they are expressed." There is, however, a further consideration to which all treaties of protection or unequal alliance must be subject. In Despagnet's words, "*Nous arrivons ainsi à conclure que les restrictions de droits imposées à l'État qualifié de mi-souverain sont toujours contractuelles entre deux souverainetés distinctes et que, par suite, elles doivent toujours être interpretées d'une manière restrictive . . . l'interprétation extensive des restrictions imposées à l'État mi-souverain ouvrirait la voie à tous les abus*" (*e*). Fiore says: "Like any convention limiting the free exercise of the rights of sovereign States it (a treaty of protection) must be strictly interpreted and in the sense least unfavourable to the liberty of the protected State" (*f*). Sir John Malcolm, the veteran political officer of the Government of India, expressed a similar view: "Treaties and engagements should be interpreted with much consideration to the Prince or Chief with whom they are made . . . it should be invariably explained with more leaning to the expectations originally raised

(*e*) Despagnet, *Essai sur les Protectorats*, pp. 36—37.
(*f*) Fiore, *International Law Codified*, pp. 364 *et seq.*

in the weaker than to the interests of the stronger Power" (Instructions to Assistants, 1824).

In this connection it is necessary to discuss at length the singular doctrine propounded by Lee-Warner that "the treaties, grants and engagements of the Indian Chiefs must be studied together as a whole." According to him: "Even viewed by themselves, without reference to the decisions based on them or to the accretions of the customary law, the treaties with the Indian States must be read as a whole. Too much stress cannot well be laid on this proposition. In their dealings with the multitude of States forming one group or family, neither the Company nor the King's officers have added to the collection without absolute necessity. Whenever a general principle called for the conclusion of fresh agreement with a single State whose attitude compelled the British authority to reduce its relations to writing, the occasion was taken not to revise the whole body of treaties but to declare the principle and its reasons in a single treaty. . . . In only one instance, namely, the Instrument of Transfer given by Lord Ripon to Mysore in 1881, has even an attempt been made to embody all obligations in a single document" (*g*). Westlake carries this doctrine to a *conclusio ad absurdum*. Referring to the trial of the Ruler of Baroda and his deposition in 1875 in consequence of gross misrule and maladministration, he says: "Now there was no treaty with Baroda or grant to the Gaekwar in which the condition so

(*g*) Lee-Warner, *The Native States of India*, pp. 23 *et seq.*

referred to was laid down. The Gaekwar was deemed to be subject to it only by virtue of the imperial doctrine that the position of all the Native Princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property, or of all drawers and endorsers of bills of exchange, is to be ascertained from the latest decisions with regard to them" (*h*).

This "imperial doctrine" is open to several unanswerable objections. In the first place, it entirely disregards the fundamental rule, recognised by International Law as well as by the municipal law of every civilised State, that *pacta tertiis nec nocent nec prosunt*. It is a primary principle of International Law that consent is the very basis of treaties as a legal conception; where there is no *consensus*, no *assensio mentium*, there can be no treaty. It follows, therefore, as a logical corollary that a treaty cannot be binding on a State which is a stranger to it so as to affect its rights and powers. Still less can the unilateral declarations or decisions of the Government of India affect the legal validity of the Indian treaties, for the general rule of law is *pacta sunt servanda*: "it is an essential principle of the law of nations that none of them can liberate itself from the engagements of the treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding"

(*h*) Westlake, *Collected Papers on International Law*, Chap. XIX.

(Treaty of London; see Phillimore, *Three Centuries of Treaties of Peace*, at p. 36). The same principle is applicable to agreements between private individuals. As the Code Napoleon puts it, "*les conventions n'ont d'effet qu'entre les parties contractantes*" (i). It cannot therefore be disputed that neither in International Law nor in any legal system of to-day can there be discovered the smallest trace of justification for Lee-Warner's proposition.

Secondly, if Sir William's doctrine be accepted as sound and logical, the Instrument of Transfer of Mysore must be deemed to have abrogated all the treaties, engagements and *sanads* executed prior to 1881. This is not, however, supported by facts. Thirdly, section 67 of the Government of India Act, 1858, expressly provided that all treaties entered into by the East India Company were binding on the Crown. The Royal Proclamations of 1858 and other subsequent proclamations have declared that the treaties with the Indian States are "inviolate" and "inviolable." It is, therefore, clear that the acceptance of Sir William's doctrine would render the statutory provision and the Royal Proclamations entirely null and void. Fourthly, this doctrine would reduce all the States to one general level and the differences in status which existed at the time the British Government entered into relations with the States, and which are preserved by the treaties, would completely disappear. Lee-Warner himself

(i) Roxburgh, *International Conventions and Third Parties*, Chaps. II and III.

admits that "it is equally important to study the treaties in connection with the general framework of history." But if Lee-Warner's doctrine were accepted the historical background would not have the slightest effect on the present status and condition of the Indian States.

Westlake's statement is equally objectionable. In the first place, he utterly disregards the fact that the right of intervention in cases of gross misrule or maladministration is a necessary correlative to the duty of protection against internal danger assumed by the British Government under their treaties with the State of Baroda. Further, if there was no precedent or provision in the treaties affording, expressly or by implication, justification for the trial of the Gaekwar, the action of the British Government was clearly a flagrant breach of the obligation arising under their treaties. Therefore, if Sir William's doctrine is to be accepted, all the Indian treaties and engagements must be interpreted as if they were not treaties but mere "scraps of paper" or "rotten parchment bonds," to be violated or set aside with impunity whenever the interests of the Crown made it necessary. But such an interpretation would be clearly contrary to express statutory provisions and diametrically opposed to solemn declarations and pronouncements of the Crown.

All this makes it abundantly clear that the doctrine put forward by Sir William Lee-Warner cannot reasonably be adopted in arriving at a proper evaluation of the position and status of the Indian

States. In the words of Sir Henry Maine, "the mode and degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, *which has to be separately decided in each case*, and to which no general rules apply. In the more considerable instance, there is always some treaty, engagements or Sunnud to guide us to a conclusion. . . " (*k*).

As has already been pointed out, the historical background of the treaties is highly important, and it is therefore necessary to ascertain the exact position of the States before or at the time of their negotiations with the British Government. Examined from this historical standpoint, the Indian States of to-day may be grouped under the following heads :—

(1) States which were sovereign and independent, *de jure* and *de facto*. Such, for instance, are the States of Baroda, Gwalior, Indore, Bhopal and the Phulkian States of the Punjab. As regards the State of Hyderabad, it is clear that the State originally enjoyed a status and position superior to that of the East India Company.

(2) States which were dependent *de jure* but sovereign *de facto;* for instance, the States of Tonk and Jaora which owed nominal allegiance to the Ruler of Indore.

(3) States which lost their independence and separate existence for a period, but were restored to their former status and rights, with certain restric-

(*k*) Ilbert, *The Government of India* (3rd ed.), p. 425.

tions and modifications, by the British Government; for example, the State of Mysore and *some* of the Simla Hill States.

(4) States which owe their separate and independent existence to the British Government. Such are the States created out of British territory or by dismemberment of other States. Benares furnishes an instance of the first class and Jhallawar of the second.

(5) States which paid tribute to other States. It has been contended that these tributary States did not enjoy full and complete sovereignty. This view, however, does not appear to be correct. If the position of the tributary States is carefully examined, it will be found that, apart from the payment of tribute, they enjoyed full and complete sovereignty, whether internal or external. To take one instance, the States of Jodhpur, Kotah, Bundi and Jaipur were tributaries to the Rulers of Indore and Gwalior at the time when they entered into relations with the British Power, but these States did not, by mere payment of tribute, lose or surrender any of their sovereign rights and were for all practical purposes sovereign *de jure* and *de facto*.

The Kathiawar States stood in a similar position, for they possessed and exercised all rights of sovereignty although they paid tribute to the Peshwa or to the Gaekwar. This is admitted by the British Government, which succeeded to the rights of the Peshwa and of the Gaekwar with regard to the Kathiawar States. In 1830 it was laid down by the

Court of Directors of the East India Company that "the British rights in Kathiawar were limited to the exaction of tribute." (See Despatch No. 7 of July 20, 1830, from the Court of Directors to the Government of Bombay.)

It must also be remembered in this connection that the sovereignty of a State is not, in the eye of International Law, incompatible with the payment of tribute where such payment is made not as a sign of dependence, but as the price of protection (*l*). For instance, the Barbary States of Morocco, Algiers and Tunis were paid heavy tributes by the principal maritime States of Europe as well as by the United States of America. Under its treaty with Morocco, ratified in 1797, the Government of the United States paid to the Sultan of Morocco the following sums in dollars: "for the treasury, in money or timber of construction, fifty thousand; for the great officers and relations of the Dey, one hundred thousand; consular present, thirty thousand; redemption of slaves, from two hundred to two hundred and fifty thousand; together with an *annual tribute* of from twenty-five to thirty thousand, and a consular present every two years of about nine or ten thousand dollars." These tributes were paid for the *protection* of "the subjects, people, and inhabitants of the United States," just as payments were made by the Kathiawar States to the Peshwa or to the Gaekwar

(*l*) Calvo, *Le Droit International* (5th ed.), Vol. 1, p. 172; Rivier, Vol. 1, p. 52; Halleck, *International Law*, Vol. 1, p. 68.

as the price of the protection and integrity of their territories (*m*).

(6) States which were subordinate *de jure* and *de facto* to other States; for instance, the *Sanad*-States of Bundelkhand and *some* of the States of the Central Provinces.

(7) States which at present form the class of mediatised and guaranteed States.

It seems, however, necessary to point out that in all these cases, except where there was an *operative* grant from the Crown, when the States entered into relations with the British Government, *eo instanti* they became fully and completely sovereign *de jure*; for, the subordination of one State to another by virtue of an agreement necessarily presupposes the full and complete sovereignty of the former (*n*). A grantor cannot legally and effectively grant rights or interests larger than he possesses; the *quantum* of interest or power granted must necessarily be limited by the *quantum* to which the grantor is entitled. In other words, the Indian States must be deemed to have been in possession of full and complete sovereignty *de jure* at the time when they entered into relations with the British Government, for, otherwise they could not have legally granted to the Crown the right to exercise all those powers which are at present actually exercised by the Crown.

The differences in status which existed at the time

(m) Moore, *A Digest of International Law*, Vol. 5, Secta. 783—787.

(n) Despagnet, *op. cit.*, at p. 22.

of the advent of the British Power survive to-day, as is clearly evident from the treaties and engagements. There are at present more than four hundred States in India, ranging in importance from the State of Hyderabad with a population of eleven millions and a territory of the size of France to petty States with the smallest trace of sovereign power and authority. Of the important Rulers who enjoy the title of "His Highness" and a salute of eleven guns or more there are one hundred and eight, each of whom is a member, in his own right, of the Chamber of Princes. Among these one hundred and eight ruling Princes, there exist wide differences in position and authority *vis-à-vis* the British Government, and it by no means follows that a wealthy and important State enjoys a status legally superior to that of its poorer and smaller neighbour. The measure of sovereignty and the legal position enjoyed by a particular State are always questions of fact, which have to be decided separately in each case, according to its treaties and agreements, and to which no general rules or principles apply. As already observed, these differences in status are due to the fact that the treaties governing the relationship between the States and the East India Company were concluded under varying circumstances and at varying times, so that the terms of the agreements were more or less favourable according to the political exigencies of the moment. It is, therefore, clear that generalisations would, under these circumstances, be unwarranted and illegitimate.

Upon an analytical examination from the juristic

standpoint, it will be found that the treaties, engagements and *sanads* of the Indian States fall into three different classes. In the first place, there are the treaties of protectorate. In the words of Fiore, "a treaty of protectorate is one by which a weak or uncivilised State, which assumes the condition of a protected State, and a powerful State, which assumes the position of a protecting State, establish by a common agreement, conventional limitations upon the exercise of their respective rights of sovereignty in international relations" (*o*). Secondly, some of the treaties and engagements are treaties of protection and guarantee. This class differs from the first in that there is always a clause which, either expressly or impliedly, guarantees the existence and maintenance of the power and possession of the ruling dynasty. Such treaties are "real" as well as "personal" in character. According to Klüber, "a Treaty of Guarantee is one by which one State promises to lend assistance to another when the latter is prejudiced in the exercise of its sovereign rights by some danger or menace" (*p*). He further points out that the object of a guarantee is either to assure the inviolability of a treaty or to maintain "*la situation ou possession des territoires, le constitution de l'Etat, le droit de succession.*" In the case of all these treaties of protection containing a guarantee-clause, the Indian States have obtained from the

(*o*) Fiore, *International Law Codified*, p. 364.

(*p*) Klüber, *Droit des gens*, § 157; Bluntschli, *Das Moderne Völkerrecht*, 432.

Crown a promise of protection against external aggression as well as a guarantee for the maintenance of the ruling dynasty in its present power and possession. The third class includes all those agreements which create and establish the relationship of suzerainty and vassalage between the Crown and the States concerned. Fiore defines a treaty of suzerainty as "one concluded between a civilised and an uncivilised State in which the former imposes on the latter (which accepts it) every obligation of mediate and immediate dependency in the exercise of its rights of sovereignty within the State." This definition is not complete. Whether suzerainty be interpreted in the sense in which the word was used during the regime of feudalism in Europe or in the sense in which it was understood by the Mughal Emperors of India, its essential and distinctive characteristic is that the title of the Vassal State, whether sovereign or non-sovereign, is not original but derivative; it is founded upon grants from the Suzerain State.

On the basis of this classification of the treaties and engagements the Indian States may be divided into three classes:—

(1) Protected States.
(2) "Protected and Guaranteed" (*q*) States.
(3) Vassal States (*r*).

(*q*) These must be distinguished from mediatised and guaranteed States.

(*r*) The Indian States Committee have recognised the fact that the States are not all of the same type. They say: "The

The category of Protected States includes all those States which have obtained from the British Government a promise of protection against external aggression. Such, for instance, are the States of Hyderabad, Bahawalpur, Alwar and Udaipur. The "Protected and Guaranteed" States are all those States which the British Government are under an obligation to protect against external aggression as well as against internal danger. For instance, Article 1 of the treaty of Friendship and Defensive Alliance between the British Government and the Raja of Orchha provides: "The territory which from ancient times has descended to Raja Mahinder Bikramjit Bahadur by inheritance and is now in his possession, is *hereby guaranteed to the said* Raja and to his heirs and successors, and they shall neither be molested in the enjoyment of the said territory by British Government nor by its allies or dependants, nor shall any tribute be demanded from him or them. The British Government moreover engages to protect and defend the dominions at present in Raja Mahinder Bikramjit Bahadur's possession from the aggressions of any foreign Power." Article 1 of the Tonk Treaty guarantees

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great variety of the Indian States and the differences among them render uniform treatment of them difficult in practice if not impossible." It therefore seems strange that no attempt has been made by the Committee to classify the States; nor have they kept in view this important fact when propounding their views regarding the rights and powers of the States; nor have they hesitated to make sweeping and unwarranted generalisations.

to the Nawab of Tonk and his heirs " in perpetuity, the possession of the place which he holds " and places the State of Tonk under the protection of the British Government. Article 2 of the Jaiselmer Treaty guarantees the succession of the descendants of the Maharaja.

The third class comprises all those States which derive their title from grants either from the British Government or from some other Power to which the British Government have succeeded. Such are the *Sanad*-States of Bundelkhand and some of the Simla Hill States. It would appear that the *sanads* of 1915 have placed the Behar and Orissa States also under the category of Vassal States.

In spite of wide differences between the Indian States in regard to their status and powers, as have been indicated in the preceding pages, there are, none the less, certain common characteristics presented by all the States, large or small, protected or vassal. These common characteristics may be thus briefly summarised :—

(1) All the States, protected and vassal, enjoy internal sovereignty sufficient even in the case of the smallest States to invest them with a separate and distinct personality in the eye of Municipal Law (see *Gurdial Singh* v. *Raja of Faridkot*, [1894] A. C., p. 670) as well as in the eye of International Law for certain definite purposes (*vide infra*, Chaps. III and VI). In this connection it is necessary to bear in mind the observation made by Lord Finlay in *Duff Development Co.* v. *Government of Kelantan*

([1924] A. C., p. 797). In that well-known case where the question arose as to the status of the Sultan of Kelantan, Lord Finlay observed as follows: "It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the Sovereign may in certain respects be dependent upon another. The control, for instance, of foreign affairs may be completely in the hands of a controlling Power and there may be agreements and treaties which limit the power of the Sovereign, even in internal affairs, without entailing the loss of the position of the Sovereign Power."

(2) All the States have secured from the British Government, by virtue of agreements or grants, a promise of protection against external aggression. The only apparent exception to the general rule is the State of Dholpur. The precise significance of this exception will be discussed elsewhere (*vide infra*, Chap. VIII).

(3) All the States have expressly or impliedly surrendered to the British Government certain definite rights in return for the promise of external security. These rights relate exclusively to the sphere of foreign affairs and will be discussed in another chapter (*vide infra*, Chap. VI).

There is another characteristic common to "Protected and Guaranteed" States and Vassal States which distinguish them from Protected States. As has already been indicated, the Crown is under an

obligation to protect the former from external aggression as well as from internal danger. Hence arises the right of the Crown to interfere in the internal affairs of these States in all cases of gross misrule and maladministration endangering the internal autonomy of the States. This right is correlative to the duty of protection against internal danger imposed on the Crown by the guarantee-clause in the case of "Protected and Guaranteed" States and by the very nature of the legal relationship in the case of Vassal States. This, however, must be distinguished from the right of intervention which has in certain cases been secured to the Crown by express terms of some of the treaties.

CHAPTER II.

EFFECT OF USAGE ON THE TREATY-POSITION OF THE INDIAN STATES.

It has been contended that the treaties and engagements with the Indian States have been either abrogated or modified by changes in the political circumstances of the country. The great protagonist of this view is Westlake, who strongly puts forward the contention that political changes have deprived the Indian treaties of all their legal effect, and cites in support of this contention declarations made by highest British officials in India. It is interesting to note that the political history of India presents a curious spectacle of conflicting declarations. It would not be difficult to cite declarations by Governors-General and Viceroys proclaiming the sanctity and inviolability of the Indian Treaties. Westlake's assertion is backed up by the argument that "no human arrangement can escape from decay; in all states the legislative power sets aside the obligation of contracts." It is interesting to observe the psychology of this great mind; inspired by zeal to prove his case, he brushes aside all principles of International Law which, according to him, are applicable to the Indian States, although they are not subjects of International Law, and makes no

attempt to examine the question in all its aspects; nor does he consider the important fact that the Crown or the British Government has no legislative authority over the Indian States. This doctrine has been repeatedly asserted by high authorities in British India. For instance, it was declared by one of His Majesty's representatives: "We cannot deny, however, that the treaty-position has been affected and that a body of usage, in some cases arbitrary, but always benevolent, has come into being." Lee-Warner, however, attempts to seek a basis for this proposition in the doctrine of *rebus sic stantibus* of International Law. According to him: "Treaties and engagements of the Indian States cannot be fully understood either without reference to the relations of the parties at the time of their conclusion, or without reference to the relations since established between them. As Wheaton observes, 'the moment these relations cease to exist, by means of change in the social organisation of one of the contracting parties of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen this change, the treaty ceases to be obligatory upon him.' The resignation by the Peshwa of sovereignty in 1818, the trial of the Emperor of Delhi, the transfer of the Company's rule to the Crown and the deposition of the late Gaekwar of Baroda are the historical events which affect Indian treaties and modify phrases of equality or reciprocity."

The question therefore arises, whether in Inter-

national Law can be discovered any justification for holding the view that the Indian Treaties and engagements have been either modified or abrogated by changes in the polity of the country. In dealing with this question two important facts must be borne in mind. In the first place, it must be observed that the treaties and engagements with the Indian States are intended to establish a permanent and perpetual state of affairs. For instance, Article 1 of the Udaipur Treaty provides that "there shall be a perpetual friendship, alliance and unity of interests between the two States from generation to generation and the friends and enemies of one shall be friends and enemies of both." The second important point is that according to International Law, treaties of perpetual alliance can be modified or abrogated in two ways only—either by mutual consent of the contracting parties or by the exercise by one of the parties of "the right to denounce" accruing from a change in the vital and material circumstances governing the relationship established by the treaty (*a*). In the words of Phillimore, "those who desire to free themselves from the obligations of treaty sometimes avail themselves of a maxim of the Civil Law: *conventio omnis intelligitur rebus sic stantibus*, which, according to the exposition of Sir Robert Phillimore, means 'when that state of things which was essential to, and the common cause of, the promise or engagement has undergone a material

(*a*) Fiore, *Trattato di Diritto Internazionale Publico*, Vol. 2, Cap. 5.

change, or has ceased, the foundation of the promise or engagement is gone and their obligation has ceased'" (*b*).

The doctrine *rebus sic stantibus* is, however, subject to two important limitations. In the first place, the changes in the circumstances must be material and vital. As Grotius points out, the doctrine is admissible only "in cases in which it is quite clear that the existing state of things was the sole cause of the contract." Secondly, before a State can release itself from the obligations of a treaty or engagement on the principle *rebus sic stantibus*, it is bound to give reasonably sufficient notice. To use Phillimore's language, "there must be a prior denunciation of the treaty; to act as if an existing treaty were non-existent, to abrogate it without warning, is to put the other party, who may have been relying upon it, in a worse condition than if there had been no treaty at all." According to Oppenheim, the doctrine does not "give a State the right, immediately upon the happening of a vital change of circumstances, to declare itself free from the obligations of a treaty, but should only entitle it to claim to be released from them by the other party or parties to the treaty" (*c*). Calvo is of the same opinion: "*Lorsque les circonstances se sont modifiées et que les parties cessent d'être d'accord, celui des contractants dont les intérêts sont en*

(*b*) Phillimore, *Three Centuries of Treaties of Peace*, pp. 137 *et seq.*

(*c*) Oppenheim, *International Law*, Vol. 1, p. 692.

souffrance ou qui veut définitivement rompre ses liens conventionnels est tenu de notifier à l'autre, par écrit ou verbalement, mais d'une manière expresse, son intention de laisser expirer le traité. Cette notification prend le nom de dénonciation. Lorsqu'elle repose sur des raisons sérieuses de convenance la dénonciation se justifie d'elle-même et ne saurait être considerée comme un procédé blessant ou injurieux pour la partie qui la reçoit" (*d*).

It cannot be disputed that changes in the political circumstances of the country between the years 1818 and 1858 were undoubtedly material and vital, and the right to denounce the treaties entered into with the Indian States did certainly accrue to the British Government. But there is ample evidence that at no time in the history of the relations between the British Government and the States was there evinced the slightest intention to denounce them. On the contrary, statutory ratification of the treaties in 1858 proves conclusively that there was no desire on the part of the Crown to release itself from obligations arising under its treaties with the Indian States. This was further made clear by the Royal Proclamation of 1858 assuring the Indian Rulers of the scrupulous regard of the Crown for its treaties and engagements. It may, therefore, be legitimately asserted that the treaties, engagements and *sanads* were in their entirety binding on the Crown in 1858. Since 1858 there have been several constitutional and

(*d*) Calvo, *Le Droit International*, Vol. 1, p. 678.

political changes, but none of them can be claimed as having a vital or material effect upon the treaties. Even if it be admitted for argument's sake that such changes have been material and vital, the Royal Proclamations of 1903 and 1911 clearly and expressly disclose the intention of the Crown "to maintain unimpaired the privileges, rights and dignities of the Princes of India." It follows, therefore, that there is not the slightest legal justification for upholding the view that the Indian treaties and engagements have been either modified or abrogated by vital changes of circumstances.

This leads up to the question whether, if at all, the treaty-position of the States, as set out in the previous chapter, has been affected or modified in any manner by usage or custom. According to Lee-Warner the three sources "from which the rules or principles that govern British relations with the Indian State can be drawn" are treaties and engagements, "decisions passed from time to time by the paramount power," and "the custom or usage, constantly adapting itself to the growth of society, which may be observed in their intercourse." He further observes: "Whether, even, in the case of an Indian community, claiming to be treated as a Native State, these divisible powers of sovereignty vest in one Chief or are distributed, and, if distributed, in what mode and to what degree they are distributed, are questions of fact to be decided by the evidence of treaties or by that of usage; *and usage is the more cogent of the two*. . . . Occasionally a conflict

arises between the evidence of writing and the evidence of usage, and in such cases superior weight is given to the latter" (*e*).

The question therefore arises, whether a sound legal basis for this contention can be discovered either in International Law or in the Municipal Laws of civilised States. At the outset it is necessary to distinguish between custom and usage, for according to the view accepted by all jurists there is a great deal of difference between the two. Usage has been defined as the "habit of acting in a certain way," and it does not give rise to rules of law unless and until it has hardened into a custom. According to Oppenheim, custom is "the clear and continuous habit" of performing certain actions "under the aegis of the conviction that these actions are legally necessary or legally right" (*f*). Westlake defines custom as "that line of conduct which the society has consented to regard as obligatory." The definition of custom which has received judicial sanction runs thus: "the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another" (*per* Alverstone, L.C.J., in *West Rand Central Goldmining Company* v. *R.*, [1905] 2 K. B., at p. 407) (*g*). It is clear from this accepted definition that usage cannot, in International Law, give rise to legal rules

(*e*) Lee-Warner, *op. cit.*, pp. 38 *et seq.*

(*f*) Oppenheim, *op. cit.*, Vol. 1, p. 22. See also Klüber, *Droit des Gens*, p. 6, Sec. 3.

(*g*) Roxburgh, *ubi sup.*

or principles unless it has hardened into a custom. But custom in the field of International Law has a very limited scope inasmuch as it has no legal effect except as one of the sources of International Law. It follows, therefore, that the rule of International Law regarding custom has no bearing on the question under discussion. There is, however, one important point which must not be ignored. In the sphere of International Law there is no sovereign legislature, there is no legislative body which has the power to create or amend laws. As Pradier-Fodéré points out, the regime of custom is far more important in International Law than in Municipal Law, precisely because there is no body competent to restrict the influence of custom by promulgating rules and principles of conduct (*h*). Therefore, rules and principles of International Law gradually grow up from customs by tacit acceptance of all members of international society. On the analogy of this principle it has been claimed that a body of customary law has been gradually developed governing the relations between the Indian States and the Crown. Sir Lewis Tupper is the great exponent of this view. He has, however, lost sight of an important factor which is a condition precedent to the growth of customary rules of International Law. As has been already indicated, these customary rules are founded on the tacit consent of the States. Unless, therefore, every rule has been accepted,

(*h*) Roxburgh, *ubi sup.*

either expressly or tacitly, it has no legal effect. As Ortolan says, "*L'expérience, l'imitation des précédents accomplis, un long usage pratique, habituellement et généralement observé, introduisant entre elles ce qu'on appelle une coutume qui fait régle de conduite internationale; et d'où découlent de part ou d'autre des droits positifs. La force obligatoire de la coutume est fondée sur le consentement, sur l'accord tacite des nations*" (i). The same is not equally true of customary rules governing the relations between the Crown and the Indian States. In this case, actual consent of the parties concerned is absolutely necessary, in view of the fact that their relationship is based upon express agreements, and where a customary rule is invoked as against rights secured by treaties, consent must actually be proved. In other words, the treaties must be shown to have been supplanted by subsequent agreements. Whether subsequent agreements between the Crown and the Indian States have actually modified or abrogated the treaties is a question of fact and will be discussed in the following pages.

It is now necessary to determine whether the common law rules regarding custom and usage can afford any justification for contending that the treaty-position of the States has undergone important changes. In common law before a custom can acquire any legal effect, it must satisfy certain requirements. Every custom that is deemed to have

(i) Ortolan cited by Pradier-Fodéré, *Droit International*, Vol. 1, Sec. 28. See also Oppenheim, *op. cit.*, Sec. 17, p. 21.

"the force of law" must be clear and certain, reasonable and immemorial, and not contradictory to other laws. As Coke points out: "Of every custom there be two essential parts, time and usage; time out of mind, and continual and peaceable usage without lawful interruption." It is clear that this common law rule regarding custom cannot be applied to the present question, inasmuch as the so-called customary rules regarding the Indian States are neither immemorial nor, in certain cases, consistent with express provisions of the treaties.

There is, however, another rule of English law which must be examined in this connection. It may be contended that sufficient and satisfactory basis for Lee-Warner's doctrine may be found in the rule regarding the operative effect of trade usages on written agreements. The rule has been thus stated: "Where persons enter into contractual obligations with one another under circumstances governed by particular usage, then that usage, when proved, must be considered as part of the agreement." But usage in this case must be such as has "acquired such notoriety that any person . . . who entered into contract of a nature affected by the usage must be taken to have done so with the intention that the usage should form part of the contract" (*k*). It is clear from these statements that *usage must have been in existence at the time when the contract was*

(*k*) Halsbury, *Encyclopædia of the Laws of England*, Vol. 10, pp. 249 *et seq.*

entered into and must have been known to both the contracting parties, or must have acquired such notoriety that the contracting parties can be taken to have intended to annex the usage to the express agreement. The rule is therefore clearly inapplicable to the political usages regarding the Indian States, as these did not exist at the time when the treaties and engagements were executed and therefore the contracting parties could not in any manner have intended to incorporate them in the written agreements. There is also another important principle in connection with the rule of trade usages, which is that "extrinsic evidence of usage is admissible to annex incidents to written contracts in matters with respect to which they are silent"; but such evidence is not admissible to contradict or vary the express terms of contracts. There is, therefore, no legal ground for contending, as Lee-Warner does, that when there is a conflict between the evidence of writing and the evidence of usage, superior weight must be given to the latter.

To sum up, neither International Law nor the common law affords any ground or reason for contending that the treaty-position of the Indian States has been, or can be, affected or modified by usages or customs without the consent, express or tacit, of the parties concerned. As already pointed out, the treaties and engagements can undoubtedly be modified or abrogated by subsequent agreements between the British Government and the States. The question whether, in fact, this has happened or not bristles

with difficulties, especially in view of the fact that there is a dearth of authentic materials regarding the relations between the States and the Crown. However, in the following pages an attempt has been made to examine the claims which the Government of India have put forward in opposition to express terms of the treaties, engagements and *sanads*.

The position may be thus briefly summarised. Although in certain particulars the Indian States may be said to have consented to changes in their relations with the British Government, the legal relationship created by the treaties and engagements cannot be deemed to have suffered any change or modification. Therefore, the Indian States of to-day retain and enjoy the same status as they did when the treaties and engagements were entered into; in other words, the classification that has been adopted in the previous chapter is still applicable, and the States of to-day still fall under three different categories. First, there are the Protected States, such as Bahawalpur and Alwar; second, "Protected and Guaranteed" States, such as Orchha and Jaiselmir; third, Vassal States like Panna and some of the Simla Hill States.

This classification may appear to be contrary to the Interpretation Act of 1889 which describes Indian States as States "under the *suzerainty* of Her Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General of India." This definition supplanted the earlier statutory defini-

tion of Indian States as "the dominions of the Princes and States of India in alliance with Her Majesty." It has been contended that the expression "suzerainty" substituted by the Interpretation Act for the older expression "alliance" indicates "more accurately the relations between the Rulers of these States and the British Crown as the paramount authority throughout India" (*l*).

The question therefore arises, what is the meaning of the term "suzerainty" in the above definition? The term appears to be one of those terms of art which are invariably misunderstood and misinterpreted. A high judicial authority in the course of a debate in the House of Lords attempted to define "suzerainty" thus: "Suzerain is lord paramount to the people who are subject to it . . . the control of foreign and Frontier relations essentially distinguish a paramount power. No war can be made upon adjoining Native tribes, no treaty can be made with (Foreign) Powers except by the authority of the (suzerain) country . . ." (*per* Lord Selborne, L.C., Hansard, Vol. 260, p. 109). Lord Cairns, another eminent jurist, defined the term as follows: "That the country is to have entire self-government as regards its own interior affairs, but that it cannot take action against or with an outside Power without permission of the suzerain." The Marquis of Salisbury in the course of the same debate expressed the opinion "that suzerainty did

(*l*) Ilbert, *op. cit.*, p. 292.

not preclude interference in internal affairs" (*m*). It is evident that the definitions given above, if they are definitions at all, are neither clear nor exact, especially because they fail to bring out the essential characteristics of the relationship between suzerain and vassal States, as distinguished from other forms of international guardianship.

Oppenheim has examined the question at length. According to him: "Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal. The lord was said to be the suzerain of the vassal and at that time suzerainty was a term of Constitutional Law only. . . . Modern suzerainty involves only a few rights of suzerain State over the vassal State which can be called Constitutional rights. The rights of the suzerain over the vassal States are principally international rights . . . *suzerainty is by no means sovereignty* . . . suzerainty is a kind of international guardianship" (*n*). This definition again is open to several objections. In the first place, it is not correct to say that the term suzerainty was originally a term of Constitutional Law only. There is sufficient and satisfactory evidence to prove that the term was applied to two different forms of inter-statal relationship. In the one the vassal State was beyond and outside the pale of the Constitutional Law of the suzerain State. Such were the sovereign vassal States of

(*m*) Stubbs, *Suzerainty*.
(*n*) Oppenheim, *op. cit.*, Vol. 1, p. 162.

which Vattel speaks thus: "When the homage leaves independency and sovereign authority in the administration of the State, and only leaves certain duties to the lord of the fee or even a mere honorary acknowledgment, it does not prevent the State or the feudatory Prince being strictly sovereign." In the second form of suzerainty the vassal was not a sovereign and hence came within the constitution of the suzerain State. But there was one characteristic common to both these forms of suzerainty: the title of the vassal was founded upon and derived from grants from the suzerain State. It is submitted that this is also an essential characteristic of "modern suzerainty" and distinguishes it from other forms of international guardianship such as protectorates. This is conclusively proved by the cases of Bulgaria, Egypt and Tunis. Oppenheim's definition is also open to the criticism that it does not distinguish suzerainty from the relationship existing between Protecting and Protected States, which also he describes as a form of international guardianship.

According to another authority on International Law: "*Les États vassaux ou feudataires sont ceux dont la souveraineté derive d'un autre État, et qui, comme témoignage de cette filiation, restent vis-à-vis de cet État dans un certain rapport de subordination . . . nos jours la vassalité accompagne d'ordinaire la situation d'État mi-souverain protégé et tributaire, et, quand elle s'applique à un État souverain, elle ne confére au suzerain qu'une supériorité nominale, lui attribuant tout au plus le droit de confirmer la*

nomination du chef de l'État vassal. Du reste, les degrés du rapport de subordination de l'État vassal à l'État suzerain sont nombreux " (*o*).

This examination establishes the following essential characteristics of " suzerainty " :—

(a) The suzerain State is under an obligation to protect the vassal State.

(b) The vassal State is under an obligation to observe the following conditions :—

(1) It must be loyal and faithful to the suzerain : *fiducia.*

(2) It must render service in time of war : *servitium.*

(c) The title of the vassal State is not original; it is derived from the suzerain State.

(d) In almost all cases the vassal State pays tribute to the suzerain.

(e) In all its external affairs, the vassal State is governed and guided by its suzerain. This is a characteristic which has been added by the practice of modern States to the old concept of suzerainty, according to which a sovereign vassal State was competent to live its international life in its own way so long as its conduct was not inconsistent with its obligation of fidelity (*p*).

If, therefore, the term " suzerainty " in the Interpretation Act be construed *stricto sensu*, it is clearly inapplicable to the different classes of Indian States described in the previous chapter. It may

(*o*) Pradier-Fodéré, *op. cit.*, Sec. 110.
(*p*) *Vide* Appendix F, III.

therefore be contended that the classification put forward above is no longer correct and must therefore be rejected. This contention does not, however, appear to be sound. The avowed object of the Interpretation Act was to consolidate "enactments relating to Construction of Acts of Parliament" and to shorten "the language used in Acts of Parliament." It is therefore evident that the Interpretation Act merely provides a convenient descriptive term; it is not intended to abrogate or amend the provisions of statutes already in force. It does not afford any justification for holding the view that the legal relationship between the States and the Crown as deduced from the treaties and engagements suffered considerable changes between the years 1858 and 1889.

CHAPTER III.

OPINIONS OF PUBLICISTS ON THE LEGAL POSITION OF THE STATES.

SEVERAL well-known publicists have attempted to examine and discuss the legal position of the Indian States from the point of view of International Law. It is, however, remarkable that none of them examine the question from a strictly impartial and critical standpoint. All of them trace their authority to the Manipur Resolution of the Government of India, in which it was laid down that " the principles of International Law have no bearing upon the relations " between the Government of India and the Indian States under the suzerainty of the Crown (*a*). All of them have failed to realise the very important fact that the Indian States of to-day are of different types and that there are wide differences between States of the same type. The result is that uniformity of terminology has tended to obscure the real character and position of the Indian States. Hall, for instance, says: "Protected States such as those included in the Indian Empire of Great Britain are not subjects of International Law. Indian Native States are theoretically in possession of internal sovereignty and their relations to the British Empire are in all cases

(*a*) Mukerjee, *Indian Constitutional Documents*, p. 588.

more or less defined by treaty; but in matters not provided for by treaty a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist, and the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of Native Princes are greatly affected. The treaties really amount to little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English sovereignty in India have greatly changed since these were concluded, and the modifications of their effect, which the changed conditions have rendered necessary, are thoroughly well understood and acknowledged" (*b*). In another important and well-known work of his, Hall says that the Indian States "form a class apart. With many of them treaties were entered into long ago which, if no subsequent change in the relations so established had taken place, would warrant their being looked upon as independent save in the point of any capacity to maintain intercourse with any European or Eastern Powers or any fellow Indian protected States" (*c*).

It is submitted that all these foregoing propositions are entirely founded on false assumptions and incorrect statements of facts. In the first place, it

(*b*) Hall, *International Law*, p. 28, n.

(*c*) Hall, *Foreign Jurisdiction of the British Crown*, p. 206, n.

is not correct to say that the British Government are invested with "residuary jurisdiction" in matters not provided for by the treaties. As we have already observed, there are two different types of Indian States as regards the character or nature of their title. In cases where the title is original and not derivative, it would be a sheer travesty of truth to say that "residuary jurisdiction" is vested in the British Government, for in all such cases the States concerned must be deemed to have retained all those rights and powers of sovereignty which they have not, expressly and impliedly, surrendered to the British Government. In the case of Vassal States, where the title is founded on grants from the Crown or its predecessors in title, the abstract sovereignty being in the grantor, "residuary jurisdiction" may legitimately be said to reside in the Crown except where it has been expressly conferred on the grantee. Secondly, it has been proved in the previous chapter that the changes in political circumstances and conditions have not affected in any wise or manner the validity of the Indian treaties and engagements. It is, therefore, evident that there is not the slightest justification for suggesting that the treaties "may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of Native Princes are gravely affected." The contention is unequivocally supported by the following official declaration which directly contradicts Hall's unqualified statement: "the independence of the States in matters of internal

administration carried with it a counter-obligation of non-interference in British Indian affairs . . . nor have any changes which have occurred, in the least marred the validity of the treaties which assured to the States their powers of internal administration" (*d*).

According to Westlake, "the native princes who acknowledge the Imperial Majesty of the United Kingdom have no international existence. That their dominions are contrasted with the dominions of the Queen, and that their subjects are contrasted with the subjects of the Queen, are niceties of speech handed down from other days and now devoid of international significance, though their preservation may be convenient for purposes internal to the Empire; in other words, for constitutional purposes. So, too, the term 'protectorate' as applied to the Empire in its relation to those princes, and the description of their subjects, when abroad, as persons entitled to British protection, are etymologically correct; but they do not bear the technical meaning which belongs to the protection of the Republic of San Marino and its citizens by the Kingdom of Italy" (*e*).

F. E. Smith (now the Earl of Birkenhead) expresses an exactly similar view: "To describe as protectorates the Native States of the Indian

(*d*) *Montagu-Chelmsford Report on Indian Constitutional Reforms.*

(*e*) Westlake, *Collected Papers on International Law*, pp. 216—223.

Empire seems to be a misuse of the term. In theory independent, these States are in fact subject to an ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire, and therefore not within the purview of International Law. In 1891 the Indian Government declared that 'the principles of International Law have no bearing upon the relations' between itself and the Native States under the suzerainty of the Queen Empress" (*f*).

With due deference, it is submitted that these views utterly disregard the real character and position of the Indian States. It is not a mere nicety of speech to say that the territories comprised in the Indian States are not part of His Majesty's dominions, for the distinction has a great deal of significance in the eye of the law, both municipal and international. For instance, all the States enjoy the power of dispensing justice, civil and criminal, and the justice that is dispensed is their own justice and not that of the Crown, with the consequence that His Majesty's writ does not run in the territories of the Indian States. Similarly, it cannot be disputed that the distinction has some significance even in the sphere of International Law. This important fact has been recognised by the Government of India as well as by the British Crown. In the course of the dispute with the Republic of France regarding the Island of Madagascar it was expressly stated by Her Majesty's Government that "the

(*f*) Smith, *International Law*, at p. 59.

States of India are not annexed to, nor incorporated in, the possessions of the Crown. The rulers have the right of internal administration subject to the control of the Protecting Power for the maintenance of peace and order and the suppression of abuses. The latter conducts all external relations. The position has been defined as that of subordinate alliance. *It has, however, never been contended that if those States had had pre-existing Treaties with a Foreign Power, the assumption of Protectorate by Great Britain would have abrogated these Treaties.*" In 1925 the Government of India informed the League of Nations that, although a signatory to the Geneva Dangerous Drugs Convention, they could not enforce the convention on the Indian States as it would amount to a violation of their treaties with the States. It follows, therefore, that a treaty entered into by Great Britain is not *proprio vigore* binding on the Indian States except with their implied or express consent. In other words, the States of India still retain to a certain extent their international personality and existence. This question will, however, be discussed at length in a subsequent chapter of this book.

Further, if the distinction between British territories and the territories of Indian States is a mere nicety of speech, section 67 of the Government of India Act of 1858, which ratified the treaties guaranteeing the internal sovereignty of the States, had no legal effect or consequence. The same remark is equally applicable to the Royal Proclama-

tions which declare the obligation of the Crown to respect and uphold the rights and status of the Indian Princes.

It is also submitted that from the strictly legal standpoint, there is no difference between the Sovereign States of India and those independent European principalities which are known as Protected States. As we have already seen, protectorate is a contractual relationship established between two sovereign States by virtue of which one of the contracting parties, while retaining a certain degree of sovereignty, cedes to the other the exercise of specific sovereign powers, internal or external; in return for which the grantee State undertakes to protect the grantor against external dangers (*g*). The treaties concluded by the British Government with the States of India and ratified by Parliament clearly and conclusively establish that a relationship such as described above exists between the States and the British Crown. International writers have not hesitated to include the principality of Andorra in the category of the Protected States of Europe. In comparison with this Protected State, the States of India enjoy a far larger measure of internal sovereignty. In Andorra all rights of internal sovereignty, administration, police and justice, are exercised subject to the control of the protecting State, whereas most of the Indian States enjoy full and complete internal sovereignty.

(*g*) Jenkyns, *British Rule and Jurisdiction beyond the Seas*, Chap. IX; Twiss, *Law of Nations*, Sec. 26.

Andorra has been so completely subordinated to its Protecting Power that it has been held in a well-known case that the French Police are competent to pursue and arrest criminals in the territory of Andorra without obtaining the previous consent of the territorial sovereign (*Cour de Cassation*, May 12, 1859). On the other hand, in a case where the facts were more or less similar, it was held by the Judicial Committee of the Privy Council that a fugitive criminal from British India could not be arrested within the territory of an Indian State without the consent of the territorial sovereign (*Yusuf-ud-Din* v. *Queen Empress*, 24 I. A. 137).

Westlake further maintains that the relation between the Crown and the Indian States is constitutional, and therefore governed entirely by Constitutional Law. It is submitted that this view, in spite of Westlake's high authority, cannot be supported. It has been universally admitted that Constitutional Law is the body of rules governing the relationship between *civitas* or State-person and *cives* or subjects, and regulating the organisation of *civitas* (*h*). As we have already seen, the Indian States are not part of His Majesty's dominions and the rulers of Indian States are not His Majesty's subjects. It follows, therefore, that the relation between the States and the British Government is a relation between *civitas* and *civitas* and not a relation

(*h*) Anson, *Law and Custom of Constitution*; Duguit, *Traité de Droit Constitutionel*, pp. 35 *et seq.*; Orlando, *Diritto Costituzionale*, Cap. IV.

between *civitas* and *cives*. It is, therefore, clearly established that Constitutional Law cannot legitimately be held to regulate the relations between the States and the Crown. It is equally clearly established that these relations fall entirely outside the scope and province of Municipal Law.

It is to be observed that all these authorities on International Law base their view of the status of the Indian States on the Resolution issued by the Government of India in the Manipur case so far back as the year 1891. It is really remarkable that these eminent jurists have ignored the very important fact that this declaration of the Government of India is open to several serious objections. In the first place, the declaration must be interpreted with reference to the circumstances of the case. In the Manipur case the act complained of was a violation of the obligation which the State owed to the Crown and was therefore clearly outside the scope of International Law. The relations between the States and the Crown are in the first place governed by the treaties, engagements and *sanads*, but where the provisions of the treaties are not applicable, the principles of International Law must be held to apply. Secondly, the declaration may be attacked on the question of fact, for in practice, both before and after the declaration, the Government of India as well as the States have repeatedly invoked the rules of International Law in support of their respective claims. In certain cases the relations are actually governed by rules based on International Law and

practice; as for instance, the rules of extradition, which were accepted by the Court of Directors because they were in conformity with International Law. Similarly, the representatives of the British Government in the States claim and are granted exemption from the jurisdiction of the States on the strength of International Law and practice; to take one instance, the British Residents in the States of Travancore, Cochin and Indore enjoy privileges and immunities analogous to those enjoyed by diplomatic representatives. Thirdly, it cannot be disputed that the rights of the Indian States guaranteed by treaties, the sanctity of which has been recognised by Acts of Parliament as well as by Royal Proclamations, cannot legally be curtailed or overridden by an *ex parte* or unilateral declaration on the part of one of the contracting parties. It is, therefore, clear that the Government of India were not competent to declare that the rules of International Law have no bearing on their relations with the Indian States, and this declaration is therefore not binding on the States. Finally, as Vattel says, "*un état faible, qui, pour sa sureté se met sous la protection d'un plus puissant, et s'engage, en reconnaissance, à plusieurs devoirs équivalents à cette protection, sans toutefois se dépouiller de son gouvernement et de sa souveraineté, cet état, dis-je, ne cesse point pour cela de figurer parmi les souverains qui ne reconnaissent d'autre loi que le droit de gens*" (i).

(i) Vattel, *Le Droit des Gens*, Liv. I, Cap. I, § 6.

Despagnet is another publicist who sedulously follows in Westlake's footsteps. He says: "*Les princes indous n'ont plus rien de la souveraineté proprement dite au point de vue international; il ne serait même pas exact de voir en eux des chefs d'États mi-souverains, dont les relations extérieures seraient dirigées par l'Angleterre qui, en leur laissant les droits de souveraineté intérieure, assumerait la charge de les protéger. Les anciens États de l'Inde sont devenus des colonies anglaises; leur existence propre s'est évanouie, confondue dans celle de leur conquerant, et leur autonomie interns n'est qu'une forme d'organisation coloniale qui n'a d'intérêt que pour eux et l'Angleterre. Cette autonomie, d'ailleurs, pure concession de la part du gouvernement anglais, n'est pas le résultat d'une convention internationale entre celui-ci et ces pays; elle peut être retirée ou restreinte de l'initiative de la seule souveraineté à considérer, celle de la Grande-Bretagne. La forme contractuelle des arrangements intervenus entre les Anglais et les princes indous ne doit pas faire illusion à cet égard; la politique a pu faire adopter cette forme atténuée qui respecte des susceptibilités dangereuses à éveiller, mais les autorités locales auxquelles on a fait cette concession ne représentent plus rien au point de vue international. Semblables à ces monarques que Rome maintenait honoris causâ et par ménagement politique, ces prétendus souverains locaux ne sont plus que des fonctionnaires dirigés ou contrôlés complètement par les agents britanniques, qui peu-*

vent même être jugés et déposés, comme cela a eu lieu pour le Gaekwar de Baroda en 1875. Les prétendus traités passés entre la Grande-Bretagne et les princes indiens sont assimilés par les publicistes anglais à des décisions des cours de justice d'Angleterre; ce sont des ordres véritables, plus ou moins dissimulés sous une apparence quasi-contractuelle et que le droit britannique modifie et domine souverainement suivant ses inspirations propres, sans que les princes puissent se prévaloir des espèces de conventions qu'ils ont passées. Tous les auteurs anglais ajoutent que les pretendus États de l'Inde n'ont aucune existence internationale et que, si on se sert vis-à-vis d'eux du mot protectorat, c'est pour désigner la protection que la Grande-Bretagne leur accorde en fait comme à toutes les parties de son empire colonial, sans qu'on puisse assimiler cette situation au protectorat proprement dit qui suppose un rapport international entre deux véritables États" (*k*).

These views, however, will not bear scrutiny. In the first place, it is one thing to say that the Indian States are not sovereign in the sense in which the word is used in Public International Law; it is quite a different thing to say that they do not retain the slightest vestige of international personality. Nor is this statement supported by facts, as has already been pointed out. For instance, if the Government of France desired the extradition of a fugitive criminal from an Indian State they could not proceed

(*k*) Despagnet, *op. cit.*, pp. 142—143.

under the provisions of the Extradition Treaty concluded between His Majesty's Government and the Republic of France. Similarly, International Conventions entered into by Great Britain are not *proprio vigore* binding on the Indian States. The declarations of His Majesty's Government as well as of the Government of India are equally emphatic and clear on this point. It is, therefore, evident that it cannot be legitimately disputed that the Indian States retain a certain measure of international personality and significance. Secondly, it is not correct to say, as Despagnet does, that the Indian States are analogous to British Colonies. From the strictly legal standpoint the differences between the Indian States and the Colonial possessions of Great Britain are several and strikingly important. In the first place, it cannot be ignored that the Indian States are not part of His Majesty's dominions, whereas the Colonies are under the jurisdiction of the British Crown. Similarly, the subjects of Indian States are not His Majesty's subjects, and do not owe any allegiance to the British Crown, except when they are travelling abroad, and consequently are under the protection of Great Britain. These differences, as we have already seen, are real and substantial. Thirdly, it is a sheer travesty of facts to contend that the treaties and engagements between the British Government and the Indian States are similar in character to the decisions of His Majesty's Courts of Justice. From the legal point of view there is no material difference between these treaties

and treaties concluded between two independent States enjoying sovereignty, internal and external, in the fullest measure. The one is as much founded on the consent of the parties as the other. Further, the ratification of the treaties with the Indian States by Acts of Parliament has made it absolutely clear that these treaties are as binding as the treaties concluded with independent States and subsequently ratified by Parliament. Finally, the statement that these treaties may be modified by British legislation is categorically denied by Royal Proclamations, which expressly and clearly lay down that the treaties entered into with the States of India are "inviolate" and "inviolable." Despagnet's view also ignores the fact that the Indian States lie entirely outside the jurisdiction of the Imperial Parliament and British legislation does not have the slighest shred of legal validity within the territories of the Indian States.

It is refreshing to turn from these writers to Wheaton, who makes an honest attempt to comprehend the real character and position of the States in India. According to him, the Indian States "enjoy and exercise under the sanction of the British Government the functions and attributes of internal sovereignty, but they are bound to receive the Resident or Agent appointed by the Viceroy. The Indian Government has formally declared that the principles of International Law have no bearing upon the relations between itself and the Native States under the suzerainty of the King. *Whether this declaration is rigidly correct or is completely*

followed in practice may perhaps be doubted, but it is clear that the Native Princes of India have no international status in the sense in which it is used in this volume. But for purposes other than those involving Public International relationships, and more especially with regard to matters falling within the sphere of Private International jurisprudence, these Native States of India are considered separate political communities possessing an independent, civil, criminal and fiscal jurisdiction."

According to Oppenheim, International Law deals with two different kinds of States—full sovereign States and not full sovereign States. "Full sovereign States are perfect, not full sovereign States are imperfect International Persons . . . that they cannot be full, perfect, and normal subjects of International Law there is no doubt. But it is wrong to maintain that they can have no International position whatever." He, however, holds that this view is not applicable to the Indian States. There are certain States, he says, which cannot claim to have any existence in International Law. "This is the position of the Indian vassal States of Great Britain, which have no International relations whatever, either between themselves or with foreign States. . . . The rulers of these States cannot therefore claim the privileges which, according to International Law, are due to the heads of States abroad." It is evident that Oppenheim's conclusion would be correct if his hypothesis were correct. But as a matter of fact, according to the decision of

His Majesty's Courts of Justice, the rulers of Indian States are sovereign and can therefore claim the immunity granted by the law of nations to the rulers of sovereign States. (See *Statham* v. *Statham and the Gaekwar of Baroda*, [1912] P. D. 92.) It would therefore appear that on Oppenheim's hypothesis the Indian States enjoy a certain measure of International position.

There remain to be considered two well-known officials of the Government of India who have discussed at length the question of the Indian States. The first is Sir Lewis Tupper, who contends that the Indian States are feudatories and the relationship between the Crown and the Indian States is feudal in character. It does not appear to be necessary to enter into a minute examination of this view as it has been discarded by almost every well-known writer. It will therefore be sufficient for our purpose to refer to Lee-Warner's criticisms of Tupper's doctrine. Lee-Warner says: "Parallels to the *droits seigneuriaux*, to *fiefs*, to the *comitatus*, and other incidents of feudalism, can readily be traced in Indian history, although the broad currents of their development took entirely different directions in the East and in the West. . . . But it is the superficial resemblance, confined to a very few of the petty chiefs, which makes the employment of the phrase feudatory so dangerous to the rights of the great bulk of the protected princes of India. . . . If Sir Lewis Tupper's arguments are to be taken seriously, they would warrant the conclusion that the Native

States being feudatories are British 'possessions,' and this would assuredly nullify the solemn assurances given to their rulers." Lee-Warner's last argument does not appear to be correct, for the mere fact that a State is a feudatory of another does not necessarily mean that it has no sovereign character. The real weak point in Tupper's argument is that he fails to recognise the fact that the Indian States are not all of the same type, as has been conclusively shown in the first chapter.

The next authority is Sir William Lee-Warner himself. There is a great deal in his well-known book on the Indian States that cannot be supported by logic or law; but his general view of the external sovereignty of the Indian States appears to be correct. According to him: "Violence must be done to history, diplomatic engagements, legislative enactments, legal decisions, and long established usage, if we are to discard ideas of suzerainty or sovereignty as inapplicable to the Native States of India . . . in the King-Emperor's dealings with Foreign States there is no concealment of the fact that the Rulers of Native States possess a large measure of internal sovereignty. Commercial and extradition treaties with Foreign Powers reserve such rights. . . . Thus the language of Indian treaties as well as that of British treaties with European Powers boldly affirms the sovereign rights of the Native States. The voice of British legislatures and British judges is equally clear" (*l*).

(*l*) Lee-Warner, *op. cit.*, pp. 393 *et seq.*

To sum up. It cannot be denied that the Indian States are not sovereign in the sense in which the word is used in International Law. This does not, however, mean that they have no international existence. Nor is there any sound basis for the view that International Law does not take cognisance of their existence. International persons, like persons in ordinary municipal law, are of two kinds —persons *sui juris* and persons *alieni juris*. The Indian States are international persons *alieni juris* (*m*).

As regards the application of International Law to the relationship between the Crown and the Indian States, it must be admitted that it is the agreement between the two parties that is of foremost importance, and therefore the relationship must be primarily governed by the treaties, engagements and *sanads*. But where the treaties and engagements are silent, or their provisions are inapplicable, the principles of International Law must be held to apply. The fundamental principle of modern civilised society is, *ubi societas ibi jus est*. As the rules of municipal law are evidently inapplicable to the relationship between the Crown and the States, the principles of International Law must be invoked in settling any dispute between them or in ascertaining their rights and obligations. As Lee-Warner says: "Parliament, Judges, and our Diplomatists recognise the sovereign powers of the Protected

(*m*) Phillimore, *International Law*; Oppenheim, *op. cit.*; Payn, *Cromwell on Foreign Affairs*; Rivier, *Droit des Gens.*

Princes of India, and their peculiar position outside the constitutional system of British India. If these officials in their working attire regard the Protected Princes from the point of view of International Law, it is not unreasonable to appeal for similar indulgence to the master of that Law" (*n*). Westlake also admits that the *principles* of International Law are applicable to the Indian States, although they are not subjects of International Law. Commenting on the Manipur Resolution, he says: "It would have been more accurate to speak in it of International Law simply than of the principles of International Law. If any distinction were intended between the two phrases, the former would suggest the body of rules and the latter the underlying considerations among which are those of natural justice, which it was certainly not intended to exclude from the grounds of any policy to be pursued in India" (*o*). The view put forward here is supported by no less an authority than Sir Henry Maine, who stated in an unpublished note "that if European principles are to be applied to the interpretation of the relation between the Indian Government and the Native Chiefs, they must rather be the principles of the Law of Nations than those of English Municipal Law." (See *Lachmi Narain* v. *Raja Partap Singh*, I. L. R. 2, Allahabad, at p. 6.) Equally clear and emphatic is the view expressed by Phillimore,

(*n*) Lee-Warner, *Law Quarterly Review*, Vol. 27 of 1911, p. 83.

(*o*) Westlake, *op. cit.*, Chap. XIX.

unquestionably the greatest English authority on International Law. He says: "The great point, however, to be established is, that the *principles* of international justice do govern, or ought to govern, the dealings of the Christian with the infidel community. *They are binding, for instance, upon Great Britain, in her intercourse with the native powers of India. . . .*" (*International Law*, Vol. 1, at p. 23.)

CHAPTER IV.

INTERNAL SOVEREIGNTY OF THE STATES.

In the first chapter it has been shown that the Indian States of to-day present certain common characteristics in their relationship with the Protecting Power, but in respect of internal sovereignty there are wide and strikingly important differences. The direct origin of these differences is to be found in the historical background of the treaties, *sanads* and engagements, written or unwritten; they are due partly to the differences which existed at the time when the States " entered under the protection " of the British Power, and partly to the circumstances and the political exigencies of the moment. As there is every shade and degree of internal sovereignty, each State requires separate and special examination, but such a detailed examination will be out of place in a general survey of the position of the Indian States. It is therefore proposed to divide the States into four main classes, according to the measure of internal sovereignty enjoyed and exercised by them. It must not, however, be forgotten that there may be important differences between States belonging to the same group or class.

The first class includes all those States which enjoy and exercise internal sovereignty in the

fullest measure. The rulers of all such States are members in their own right of the Chamber of Princes, the constitution of which provides that "this Chamber shall be composed of Ruling Princes of India exercising full sovereign power and unrestricted civil and criminal jurisdiction over their subjects and the power to make their own laws," but *all the members of the Chamber in their own right do not belong to this class.*

The provision of the treaties or engagements which guarantees the internal sovereignty of the States appears in a variety of forms. In some of the treaties the article runs thus: "The Maharaja and his heirs and successors shall be absolute rulers of their own country and the British jurisdiction shall not be introduced into that Principality." This is the provision found in the treaties with Udaipur, Jaipur, Jodhpur, Bikaner, Bhopal and some other important States. The treaty with Bahawalpur of 1833 provides that "as regards the internal administration of his Government and the exercise of his sovereign rights over his subjects the Nawab shall be entirely independent as heretofore." It is further stipulated that "the Officer who may be appointed on the part of the British Government to reside in the Bahawalpur State shall . . . abstain from all interference with the Nawab's government and respect the preservation of the friendly relations of the two contracting parties." The treaty of 1838 guarantees that "the Nawab and his heirs and

successors shall be absolute rulers of their country and the British jurisdiction shall not be introduced into that Principality." The corresponding provision in the *sanads* "by way of treaty" of the Phulkian States reads as follows: "The Maharaja Sahib Bahadur and his successors will, in the present and future time, exercise sovereignty with peace of mind and in perfect security, in accordance with ancient custom, over his ancestral possessions and the dominions bestowed on him by the British Government, and consider the territory granted to him by the British Government in recognition of his good services as his ancestral territory with all powers and rights internal and external." It is further provided that "complaints against the Maharaja Sahib from his subjects, Muafidars, Jagirdars, dependants, brothers and servants, etc., will on no account be listened to by the powerful British Government." The *sanads* also assure the States that "with regard to internal management and the affairs of brothers, household and relatives, the rules and arrangements made by the Maharaja Sahib Mahindar Bahadur will always be respected and not interfered with by the powerful British Government." Article 8 of the Gwalior Treaty of 1804 provides: "The Honourable Company's Government, on their part, declare that they will have no manner of concern with any of the Maharaja's relations, dependants, military chiefs or servants, with respect to whom the Maharaja is absolute; and that they will on no occasion either

afford encouragement, support or protection to any of the Maharaja's relations, dependants, chiefs or servants, who may eventually act in opposition to the Maharaja's authority, . . . and it is further agreed that no officer of the Honourable Company shall ever interfere in the internal affairs of the Maharaja's Government." Article 10 of the Indore Treaty of 1818 runs as follows: "The British Government hereby declares that it has no manner of concern with any of the Maharaja's children, relatives, dependants, subjects or servants with respect to whom the Maharaja is absolute." With the State of Hyderabad the relations of the East India Company were at first those of an inferior with a superior Power, and from 1766 until the end of the century those of equal powers allying together for mutual defence, aggression or profit. But in 1800 the Nizam " entered under the protection " of the British Government in return for which it was declared that " the Honourable Company's Government on their part hereby declare that they will have no manner of concern with any of His Highness's children, relatives, subjects or servants with regard to whom His Highness is absolute."

The second class comprises all those States which enjoy the fullest measure of internal sovereignty but whose exercise of sovereign powers may be controlled by the British Government. For instance, Article 1 of the Kolhapur Treaty of 1862 provides "that in all matters of importance the Raja of Kolhapur agrees to follow the advice of the British Govern-

ment as conveyed by the political officer representing that Government at Kolhapur." It is submitted that, upon a correct interpretation of its treaties and engagements, the State of Baroda must be deemed to belong to this group of States. It is no doubt true that the British Government have acknowledged the ruler of Baroda to be the sole sovereign within his territory (*a*), but this acknowledgment is subject to the provision of Article 5 of the Treaty of 1802 which stipulates that " there shall be a true friendship and good understanding between the Honourable East India Company and the State of Anund Rao Guikwar, in pursuance of which the Company will grant the said Chief its countenance and protection in all his public concerns, according to justice and as may appear to be for the good of the country, *respecting which he is also to listen to advice.*" Further, in 1802, the following undertaking was given by the ruler of Baroda: " Should I myself, or my successors, commit anything improper or unjust, the English Government shall interfere and see, in either case, that it is settled according to equity and reason" (Article 10 of *Malsa Kaunt* of July 29, 1802, Aitchison, Vol. VIII, at p. 39). All these stipulations were confirmed and made binding on " the contracting parties, their heirs and successors, for ever" by Article 1 of the Treaty of 1805.

It is, therefore, clear that the relationship between these States and the Crown in respect of internal

(*a*) See Aitchison, *Treaties, Engagements and Sanads*, Vol. 8, at p. 89.

sovereignty is analogous to *curatio* of Roman law; in other words, the States belonging to this class are in possession of all rights of internal sovereignty, but their exercise of them is subject to the control of the British Government.

The third class consists of all those States which have either permanently or temporarily granted to the Crown important rights of internal sovereignty or have accepted, either expressly or tacitly, restrictions on their internal authority. For instance, all the States of Kathiawar, other than those known as first-class States, belong to this group, their internal sovereignty in the sphere of jurisdiction being subject to a graduated scale of limitations. Some of the Simla Hill States may also be placed under this category. The so-called *Sanad*-States of Bundelkhand also belong to this class, their internal sovereignty being restricted especially in the matter of jurisdiction. For instance, the *sanads* restoring full criminal jurisdiction to these States expressly provide that "sentence of death shall be immediately reported to the Agent to the Governor-General, and be subject to confirmation by the Agent; and that periodical reports shall be submitted by the Chief to the Local British Political Officer of all cases in which sentences of transportation or imprisonment for life are passed by him."

The fourth class includes all those States which, while in possession of a restricted measure of sovereignty, can only exercise their restricted

sovereign powers subject to the control of the British Government whenever deemed necessary. Such are the States of Behar and Orissa and of the Central Provinces. Clause 3 of the *sanads* (*b*) of 1915 granted to the Behar and Orissa States runs as follows: "You shall conform in all matters concerning the preservation of law and order and the administration of justice generally, within the limits of your State, to the instructions issued from time to time for your guidance by the Lieutenant-Governor of Behar and Orissa in Council." Article 8 of the same *sanads* provides: "You shall consult the Commissioner of the Orissa Division or any officer duly vested with authority in that behalf by the Lieutenant-Governor of Behar and Orissa in Council, in all important matters of administration, and comply with his wishes." There is a further restriction on the jurisdictional authority of these States. The internal sovereignty of the Simla Hill States has similarly been restricted; for instance, clause 2 of the *Ikrarnamah* entered into by the Raja of Nalagarh recognises the right of the subjects of the State to appeal to the local British Agent against oppression or injustice, and under Article 3 the Raja engaged himself "on pain of forfeiture of the grant to pay implicit obedience to any advice or remonstrance which the British Agent may have occasion to offer." on behalf of the subjects of the

(*b*) The legality of these *sanads* has been rightly disputed. For a detailed examination of the question, *vide* Appendix A.

Raja. The *sanad* of the State of Bushair provides, *inter alia*, that if the Raja neglects "in showing submission and obedience to the British authorities . . . he shall incur displeasure and will be deposed." The legality of the imposition of these restrictions on the authority of the Simla Hill States by the *sanads* of 1815 and of subsequent years may be questioned, especially in view of the fact that prior to the declaration of war by the British Government against the State of Nepal, a clear and distinct assurance was given to the Simla Hill States that their ancient rights and possessions would either be restored or guaranteed on their joining forces with the British Government against the Gurkhas. This, however, does not affect the present position of the Simla Hill States; they must be deemed to have accepted the provisions of the *sanads* by acquiescence.

As regards the States of Kathiawar, their position in respect of internal sovereignty has so far been misunderstood and misinterpreted by almost all well-known writers. A recent writer has contended that the "polity of Kathiawar stands midway between independent Rulers and mediatised Chiefs." Both the Peshwa and the Gaekwar, it is asserted, claimed sovereign rights in the principalities of Kathiawar. The rights of the Peshwa were ceded by him to the British Government in 1817. In 1820 the Gaekwar surrendered his rights to the British Government when they undertook to collect and pay to the Gaekwar the tribute owing to his Government

Since then the British Government has been in the position of the sole sovereign (*c*).

This view, it is submitted, is entirely inaccurate and unsupported by authorities. Neither the Mughals nor the Marathas had acquired or exercised any authority over the Kathiawar Rulers beyond the exaction of annual tribute by force of arms. All these States were, during the ascendancy of the Mughals as well as of the Marathas, entirely independent and enjoyed internal and external sovereignty in the fullest measure. There was not the slightest restriction on their authority; nor was there any interference with their rights and powers either by the Emperor of Delhi or by the Maratha Chiefs. The succession of the British Government to the rights of the Peshwa and of the Gaekwar has not in the least degree affected the status and position of the Kathiawar States. In 1804 Colonel Walker wrote as follows: "With the reservation of their acknowledged tributary payments, the Kathiawar States are independent and at liberty to form connection with other Powers. They are not under obligation of service and neither the Peshwa nor the Gaekwar pretend to exercise any authority in Kathiawar beyond the payment of their respective tributes . . . except in the payment of their Jamabandi, the Chiefs such as Rajas, Rawals, Thakores, and Girassias were in possession and exercise of their interior right of sovereignty . . . in respect to exterior relations, they appear to have

(*c*) Panikkar, *op. cit.*, Appendix 1, at pp. 149, 150.

exercised the same freedom . . . nor does it appear that any of the States to whom they pay tribute ever interfered in their transactions, whether foreign or domestic, so long as they were not inimical to themselves" (*d*). In 1815 the Government of Bombay laid down that "neither His Highness the Gaekwar, nor the British Government, has any right of interference in the internal affairs of Nawanagar or any other principality in Kathiawar unless the interposition be expressly solicited by the chieftain of the territory." Finally, in 1830 it was decided by the Court of Directors of the East India Company that the right of the British Government in the Kathiawar States was limited to the exaction of tribute. It is, therefore, clear that the first class States of Kathiawar whose internal sovereignty has not been restricted or abridged in any manner belong to the first group of States in the classification set forth above.

Internal sovereignty embraces three different spheres of governmental activity—legislative, executive and judicial. In respect of legislation, it may be predicated of all the States, large or small, vassal or protected, that they enjoy and exercise their authority unrestricted in any manner. Attempts have no doubt been occasionally made to encroach upon the legislative authority of the States, especially in matters of international importance, but such attempts have always been strongly resisted by all

(*d*) Colonel Walker, *Report on the Settlement of Kathiawar.*

the States. Individual cases of enforcement of British Indian laws and regulations on the Indian States may occasionally be found, as in the case of the Behar and Orissa States, but such instances are few and far between, and cannot be deemed to have given rise to any regular usage. The only exception to this general statement is furnished by the State of Mysore, which, under Article 19 of the Instrument of Transfer, is bound to maintain and efficiently administer "all laws in force and rules having the force of law in the said territories when the Maharaja Chamrajendra Wadiar Bahadur is placed in possession thereof," and cannot "repeal or modify such laws or pass any laws or rules inconsistent therewith," without the previous consent of the Governor-General in Council.

It would therefore appear that the position of the Indian States is, in the matter of legislative authority, superior to that of other Protected States known to International Law. For instance, it has been decided by the French *Cour de Cassation* that laws, decrees and decisions are not effective in Tonkin except with the special promulgation of the Governor-General (*e*). The recent Nationality Decrees issued by the French Government with regard to their Protected States of Tunis and Algiers clearly indicate that the Republic of France enjoys and exercises legislative authority within the territories of these Protected States.

The differences with regard to internal sovereignty

(*e*) Despagnet, *op. cit.*, at p. 346.

envisaged in the preceding paragraphs relate particularly to judicial or jurisdictional authority. The question of jurisdictional authority raises several interesting and important problems, and will therefore be dealt with separately in a subsequent chapter. In matters of executive authority, there is a great deal of difference between one class and another and between several States of the same class, the authority of the States being almost negligible in the case of those which are subject to the control of the representative of the British Government in all important matters of administration. In general, however, all the Protected States (*f*) exercise their executive authority unrestricted in any manner.

It would, therefore, appear that the position of most of the Indian States is in this matter also superior to that of the States under the protection of the Republic of France. For instance, by Articles 3 and 12 of the Treaty of 1884 the administration of Annam is placed in the hands of the State functionaries except with regard to matters relating to customs, public works, and in general the services which require direction by or employment of Europeans, the direction of the postal and telegraph departments being also under the control of French officials. Further, whereas in Annam the French Resident-General controls the external relations of the State without interfering in the local administration of the provinces, in Tonkin are placed several

(*f*) This term is, unless otherwise stated, intended to include "Protected and Guaranteed" States.

residents under the control of the Resident-General who are competent to demand the revocation of the employees of the State who are placed under their order and subject to their authority (Articles 6 and 7 of the Treaty of 1884). Under Article 1 of the Treaty of 1883, the Bey of Tunis engages himself to proceed to such administrative judicial and financial reforms as the French Government may deem useful and necessary. In Despagnet's words, "*on peut dire que la souveraineté interne du bey a été abdiquée en faveur de la France et, de fait, c'est la France qui gouverne aujourd'hui la Tunisie pour tous les services publics importants.*" The same is equally true of Cambodia whose treaty with France of 1884 contains provisions similar to those of the Treaty of Tunis.

It must not, however, be forgotten that the internal sovereignty of the States is subject to the Crown's right of intervention which may accrue in the event of certain contingencies. In certain cases the right to interfere in the internal affairs of the States has been expressly secured to the Crown by the treaties and engagements. For instance, the *sanad* granted to the State of Mandi reserves to the Government the right to remove from the *gadi* of Mandi any Ruler " who may prove to be of worthless character and incapable of properly conducting the administration of his State." Similar provisions are to be found in some other treaties and engagements. As regard Vassal States, it cannot be denied that the right of intervention is a necessary incident of the

legal relationship of suzerainty and vassalage. In the case of "Protected and Guaranteed" States, as we have already indicated, the right of intervention in the event of imminent danger to the existence and maintenance of the authority of the State is correlative to the duty imposed on the Crown by the guarantee. In all other cases the right of intervention arises under principles of International Law. It is no doubt true that there is no consensus of opinion among publicists regarding the right of intervention, but even those who deny the existence of this right have clearly admitted that the right exists in all cases where there is a special relationship between one State and another, such as the relationship of protectorate. The right of intervention may arise in such cases in three ways:—

(a) The right of intervention on grounds of humanity.

(b) The right of interposition or diplomatic intervention to protect the person and property of British subjects and of subjects of foreign Powers in alliance with the Crown.

(c) The right of intervention and interference in the internal affairs of a State when the conditions and circumstances prevailing within the territory of that State become a danger or menace to British India or to a neighbouring State under the protection of the Crown.

The question of intervention is of primary

importance and has therefore been discussed separately in another chapter (*g*).

So far we have been discussing the question of the internal sovereignty of the States from the standpoint of the treaties and engagements. It is now necessary to ascertain how far the position described above has been affected by usage founded upon the consent of the States. The Government of India have put forward several important claims. Of these the first and foremost relates to the question of succession. "Every succession," it is asserted, "requires the approval and sanction of the Government of India." "It is essential that such approval and sanction should be announced in a formal installation Durbar by a representative of the British Government." In 1891 it was authoritatively laid down that "it is the right and duty of the British Government to settle successions in subordinate Native States. Every succession must be recognised by the British Government and no succession is valid until recognition has been given." Lee-Warner, commenting on this declaration, states that "there is no compromise or qualification in this public declaration of an obligation common to all States." However, the claim was more or less withdrawn by the Government of India when at the Conference of Princes in 1916 the Indian rulers in a body asserted "that the principle of succession in the case of Hindu States is governed by Hindu Law and usage and in the case

(*g*) *Vide infra*, Chap. VIII.

of Muhammadan States by Muhammadan Law or the custom of the State concerned. In accordance therewith, succession to the late Ruler takes place immediately as a matter of inherent right, and as such is not dependent on the approval, sanction or recognition of the Government of India." The question therefore appears to be of academic interest only, but it seems necessary to examine the grounds put forward by Lee-Warner in support of the claim. His arguments may be thus summarised:—

(1) The claim of the Government of India is founded on the rights and powers derived from the Mughal Emperors. As it was the custom of their predecessors in title to control all successions, the Government of India are equally competent to do so. This statement, however, is not supported by facts. All the Indian States did not accept or acknowledge the real or nominal suzerainty of the Mughal Emperor, and therefore in the case of independent States there was no question of control over succession. Further, before the British Government succeeded to the rights and powers of the Mughal Emperor, he had been deprived of all sovereign authority which his predecessors had enjoyed and exercised. It is therefore clear that all that the British Government acquired by succession to the Mughal Emperor was a *nominis umbra* without the smallest trace of sovereign authority.

Speaking of the downfall of the Moghul Empire after the death of Aurangzeb, Macaulay wrote as follows: "A succession of nominal sovereigns, sunk

in indolence and debauchery, sauntered away life in secluded palaces, chewing bhang, fondling concubines and listening to buffoons. A succession of ferocious invaders descended through the western passes to prey on the defenceless wealth of Hindoosthan. . . . The warlike tribes of Rajpootana threw off the Moosulman yoke. A band of mercenary soldiers occupied Rohilcund. The Sikhs ruled on the Indus. The Jats spread dismay along the Jumna. The high lands which border on the western sea-coast of India poured forth a yet more formidable race, a race which was long the terror of every native power. . . . It was under the reign of Aurangzeb that this wild clan of plunderers first descended from their mountains, and soon after his death every corner of his wide empire learned to tremble at the mighty name of the Mahrattas. Many fertile vice-royalties were entirely subdued by them. Their dominions stretched across the Peninsula from sea to sea. Mahratta captains reigned at Poona, at Gwalior, in Gujrat, in Berar and in Tanjore. *Nor did they, though they had become great sovereigns, therefore cease to be freebooters.* . . . Many provinces redeemed their harvests by the payment of an annual ransom. *Even the wretched phantom who still bore the imperial title stooped to pay this ignominious blackmail.*" In the face of this eloquent evidence, could it be justly maintained that the victorious Mahrattas or the triumphant Sikhs were subordinate vassals of the Mughal Emperor? Could it be legitimately argued that the British Government inherited from this

"assumed more a form of a succession by legitimate right," while they had intended "to mark distinctly the difference between the nominee of the paramount Power and the chieftain succeeding by hereditary right." That the Government of India was departing from the established custom and usage is clearly evident from the following extract: "By this means, although our original intention of marking a distinct line of policy on the occasion has not been so completely carried out as we could have desired, yet we trust that enough has been done to stamp the measure as an act of free grace *on the part of the Paramount Power and to strip the accession of the young Chief of all pretention to succession by either hereditary right or by that of adoption.*" Lee-Warner also argues that "the ruling Prince of almost every important State in India received a *Sanad*, and by his acceptance admitted, if there was any need for admission of that which could not be contested, the right of Her Majesty to regulate successions." This is a sheer travesty of facts. As pointed out by one of the leading Indian Rulers of to-day, the Adoption *Sanads* merely "recognised the absolute right of an Indian Ruler to name and appoint his own successor. It was the disregard of the inheritance code and custom of Indian rule that contributed to the trouble during the regime of Lord Dalhousie; it was the sympathy and farsightedness of our good Queen Victoria that recognised and promised unbroken the continuity of our ancient usage" (*h*).

(*h*) His Highness of Bikaner. Conference of Princes, 1916.

Although the claim was virtually abandoned by the Government of India in 1916, it has been revived by Lord Reading's now famous letter to the Nizam of Hyderabad in which it is boldly contended that "no succession to the Musnad of Hyderabad is valid unless it is recognised by His Majesty the King Emperor (i). It is submitted that no juristic basis can be found for this claim. The British Government could not by any stretch of imagination derive the right to control succession from the Mughal Emperor, as the Emperor himself did not possess and exercise it. Nor is the claim consistent with the rights and dignities of the Indian States secured to them by their treaties with the British Government. Nor can the claim be founded on usage as almost every Indian Ruler has denied the existence of the right. It cannot, however, be questioned that it is competent for the Crown to settle all disputed successions in Vassal States and "Protected and Guaranteed" States, for this right is incidental to the duty of protection assumed by the Crown under its treaties and engagements. Nor can it be disputed that the Crown is entitled to control succession to a Vassal State, unless the right has been expressly or impliedly excluded by the terms of the grant. This is another case where uniformity of terminology has obscured the legal position of the States.

The testimony of history is diametrically opposed

(i) Letter from His Excellency the Viceroy to His Exalted Highness the Nizam of Hyderabad, dated Delhi, March 27, 1926.

to this claim. Sir Robert Hamilton, a high British Indian authority, wrote as follows immediately after the suppression of the Great Rebellion: "In the case of Scindhia's family, *adoption has ever been the rule*; the present Maharaja succeeded by adoption, so did his immediate predecessor; and although his present Highness has had an assurance that the rights and usages of the family will not be obstructed, still a distinct recognition of the same by a renewal of the treaty would make known to his subjects that the present State was permanent. . . . *Adoption has always been the rule and custom of the Holkar State.*" Equally unquestionable is the admission made by the Government of India in 1826 when they wrote to Dowlat Rao Scindhia that "nothing could be further from the wish and intention of the British Government than to exercise now and hereafter any intervention in the internal administration of his (Scindhia's) country, *that it did not pretend to any right to control or regulate succession to the State of Gwalior, and that the Maharaja as the absolute ruler of the country should be considered to possess the undoubted right of determining the succession.*" The claim is also belied by indisputable facts of history. Between the years 1827 and 1860 there were as many as six cases of adoption in the Central Indian States alone, but in none of these cases did the British Government question the right of the Ruler to adopt in default of natural heirs.

Another claim of the Government of India relates to the control of the administration of a State during

the minority of its Ruler. The Government of India hold "that they are the trustees and custodians of the rights, interests and traditions of Native States during a minority administration." The Government of India also claim to reserve to themselves full freedom of action in dealing with the requests or instructions of a Ruler regarding the administration of his State after his demise. It is difficult, if not impossible, to discover a sound juristic basis for this claim. There is nothing in the treaties and engagements which can be deemed to confer on the Government of India such a wide and extensive claim with regard to the internal affairs of the States. Nor is the claim in its entirety founded upon the consent of the States. It is no doubt competent for the Government of India as the representative of the Crown to control and supervise the administration of a State during the minority of its Ruler in all cases where the Crown has guaranteed the maintenance of the power and position of the ruling dynasty. But even in such cases the right of interference does not arise until and unless the administrative machinery provided by the Constitutional Law of the State concerned has proved ineffective or inefficient. There is, however, sufficient evidence to show that the States appear to have accepted the contention that the Government of India are the trustees of the rights and interests of the State during a minority administration. But there is also ample evidence to prove that this consent does not extend to or cover the claim of the Government of India that the requests

or instructions of the late Ruler may be altogether disregarded by them.

The other important claims put forward by the Government of India appertain to economic and fiscal matters, such as railways and telegraphs. As regards railways the Government of India assert that their assent "is an essential preliminary to the construction or extension of any railway by a State" within its own territories. This claim has been founded on the argument that in such cases it is necessary to make full inquiries, as the projected railway may prove prejudicial to the interests of other States or to the development of railways in British India. In one case the Government of India went so far as to inflict a heavy penalty on a State which constructed a railway lying entirely within its territory without their previous assent. In another case the Government of India, after assenting to the construction of the projected railway, arbitrarily withdrew their "sanction," with the result that the exchequer of the State concerned suffered a heavy and substantial loss. It is to be noted that in neither of these cases had the State concerned accepted either tacitly or expressly the claim of the Government of India to control and supervise the construction of railways within the territories of the Indian States.

As regards the construction of telegraph systems, the Government of India have expressly recognised "the right of a State to construct, maintain and work its own independent telegraph system for internal purposes for gain or otherwise, wholly within its own

boundaries and not connected with the Imperial system." They have, however, reserved to themselves the right to construct their own telegraph system within the territories of the Indian States in disregard of the views of the States concerned when the projected telegraph system is, in their opinion, necessary "for strategetic or other exceptionally important reasons."

Similar restrictions have been imposed on the authority of the States regarding the manufacture of salt and opium. In some of these cases, no doubt, the restriction rests on agreements executed by the States, but whether these agreements are legally valid may be seriously questioned in view of the fact that in most cases the consent of the States was neither free nor voluntary.

In examining these cases of restrictions one must remember Vattel's memorable words: "*Si la nation protégée à certaines conditions ne resiste point aux enterprises de celle dont elle a recherche l'appui, si elle n'y fait aucune opposition, si elle garde un profond silence quand elle devrait et pourrait parler, sa patience, après un temps considérable, forme un consentement tacite qui legitime le droit de l'usurpateur. . . . Mais il faut bien observer que le silence, pour marquer un consentement tacite, doit être volontaire. Si la nation inferieure prouve que la violence et la crainte ont éntoufflé les témoignages de son opposition, on ne peut rien conclure.*" But, as Pradier-Fodéré points out, usurpation which is originally illegal cannot be the source of legal rights.

CHAPTER V.

JURISDICTIONAL AUTHORITY OF THE STATES (*a*).

CORRESPONDING to the variations in internal sovereignty there are different gradations of jurisdictional authority possessed and exercised by the Indian States. In general, the States may be classified into four groups according to the measure or degree of their jurisdictional authority :—

(1) Full-powered States which enjoy and exercise plenary jurisdiction over all persons and in respect of all offences committed within their territories. Such, for instance, are the Rajputana States whose treaties contain the provision that the Rulers shall be absolute masters of their countries and that British jurisdiction shall not be introduced into those principalities. The *sanads* "by way of treaty" of the Phulkian States of the Punjab expressly recognise full and complete jurisdiction of the tribunals of the States over all persons including British subjects, and no distinction whatever is therein made between European and Indian British subjects.

(*a*) The word "Jurisdiction" is here used in its restricted sense, i.e., the right to hear and decide cases.

(2) States whose jurisdictional authority is restricted in respect of persons. For instance, the Maharao of Cutch is not competent to exercise any kind of jurisdiction over the Jareja nobles of his State. Similarly the jurisdiction over the feudatories of the State of Kolhapur has been expressly reserved to the British Government. The second class States of Kathiawar also belong to this group, their criminal jurisdiction in respect of capital offences being limited to their own subjects only. Till 1922 the authority of the first class Kathiawar States was similarly restricted; they were not competent to exercise criminal jurisdiction over British subjects. This exemption of British subjects from the jurisdiction of the first class Kathiawar States was a serious interference in the internal autonomy of the States in clear violation of the rights guaranteed by the British Government, no attempt having been made to obtain the prior consent of the States concerned. In 1922, however, the repeated protests of the States ultimately induced the Government of India to abrogate the restriction. Similarly, the first class Kathiawar States were till 1917 incompetent to try any member of the police force belonging to the British Agency in Kathiawar, even if they were their own subjects. This restriction imposed by the

British Government was entirely arbitrary in view of the fact that the previous consent of the States concerned had not been secured. However, in 1917 the States were informed that "the Government have decided that jurisdiction in criminal matters over the men comprising the Kathiawar Agency Police is reserved to the Agency Court. The Government are, however, willing to allow the State Courts to take cognisance of offences committed by men of the Agency Police which are not connected with their own official duties, subject to the prior sanction of the Agent to the Governor, Kathiawar, and subject also to a power being vested in him to withdraw such cases and to transfer them to the Agency Court." These encroachments on the internal sovereignty of the Kathiawar States amount to usurpation of power inasmuch as they were not at their inception founded upon express or implied consent of the States.

Under the existing arrangement, the legality of which may be questioned, the State of Kashmir does not exercise any criminal jurisdiction over European British subjects, Americans, Europeans of any nationality other than British, Native Indian subjects of His Majesty (such Indian subjects merely visiting the territories of the State of Kashmir or acting as servants of

European subjects) and British Indian subjects accused of having committed offences conjointly with European British subjects. Similarly in civil cases the Courts of the Kashmir State have no jurisdiction where both the parties are British subjects or where the defendant is a European British subject or a British Indian subject not ordinarily residing or carrying on business within the territories of the State of Kashmir.

(3) States whose jurisdictional authority is restricted in respect of offences. The so-called *Sanad*-States of Bundelkhand belong to this group. For instance, the *sanad* conferring full criminal jurisdiction upon the Maharaja of Panna expressly provides that in respect of capital offences the sentences of death passed by the tribunals of the Panna State shall be subject to confirmation by the Representative of the British Government. Under the same *sanad* the Maharaja is required to submit to the British Representative periodical reports of all cases in which sentences of transportation or imprisonment for life are passed by him. Similarly the criminal jurisdiction of the Simla Hill States in cases of capital offences is subject to the supervision and control of the Officer representing the British Government. Whether this restriction is legally defensible may be seriously questioned, especially in view of

the fact that the *sanads* which define the rights and powers of these States contain no such provision restricting their authority, nor is there any evidence to show that they have ever consented to the exercise of supervisory jurisdiction in capital cases by the British Representative.

(4) To this class belong all those States whose jurisdictional authority is restricted both in respect of persons and of offences. For instance, the Behar and Orissa States are competent to try all criminal cases occurring within their territories, except (i) those in which Europeans are concerned, and (ii) heinous offences, such as murder, homicide and robbery. All the Kathiawar States other than those of the first and second classes belong to this group.

It has been contended that the authority of the States, even in the case of full-powered States, is subject to the residuary jurisdiction of the British Government in all matters (*b*). According to Lee-Warner: "Where the States were too small or too poor to provide proper Courts of law the Company retained in its own hands certain attributes of sovereignty. Such jurisdiction may be described as *residuary*, by which term is implied that the residue of jurisdictory attributes which have not been left with the Native sovereigns are exercised for them by

(*b*) Hall, *ubi sup.*

the British Government. It may be urged that this jurisdiction is also delegated, and in some cases such is no doubt the case, but as a rule it vests in the British Government by right or by treaty or conscious delegation. . . ." Upon a critical examination, this view does not appear to be correct. As we have already indicated, the Indian States of to-day are of three distinct and well-defined types. In the case of Protected States the relationship between the State and the Crown is founded upon an agreement under which the States have surrendered to the Crown the right to exercise certain sovereign powers. In all these cases the State, and not the Crown, is the grantor; the natural presumption therefore arises that all those rights and powers which have not been conferred on the grantee are necessarily reserved to the grantor. In other words, in all such cases residuary jurisdiction must be presumed to reside in the States concerned unless such a presumption is expressly rebutted by the terms of the agreement. In the case of a vassal State, however, it is the Crown who grants and not the State. Residuary jurisdiction in such cases must, therefore, be presumed to exist in the hands of the grantor unless such a presumption is excluded by the express terms of the grant. It is, therefore clear that there is no justification for contending that residuary jurisdiction is, in all cases, vested in the Crown.

Lee-Warner also speaks of extraordinary residuary jurisdiction. According to him, "the so-called extraordinary jurisdiction does not pretend to be

based on right or delegation; it rests upon an act of State and defies jural analysis. In such cases the Government of India interferes with authority by virtue of its paramount powers, and it does not cloak its intervention or weaken its authority by straining legal ties, or misapplying legal phrases which were devised for a totally different set of conditions." It will be clear upon a considered examination of this statement that the so-called extraordinary residuary jurisdiction has nothing to do with jurisdiction in its restricted sense. It refers exclusively to the right of intervention which the Government of India enjoys and exercises in certain cases under certain circumstances. There is not the slightest legal foundation for the claim which has often been urged by the Government of India that paramountcy is a source of jurisdiction of a judicial character.

This leads us to the question of extra-territorial jurisdiction exercised by the Crown within the territories of the Indian States. The general rule of law is that the territorial sovereignty of a State is exclusive and absolute. "It is susceptible of no limitation not imposed by itself." "All exceptions, therefore," as Marshall, C.J., points out in *The Schooner Exchange* v. *M'Faddon*, "to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." It would, therefore, appear that extra-territorial jurisdiction can flow from no other legitimate source than the consent of the State within which such jurisdiction is exercised. According to Sir Francis

Piggott: "The Queen's foreign jurisdiction in a governed country is not exercised by any inherent right of sovereignty which she herself possesses; nor by any inherent right in parliament . . . it is exercised solely in virtue of the grant or permission to exercise it which the Queen has received from the Sovereign to whom the territory belongs. . . . Sovereign's power does not rise in all its majesty and perfection over her subjects in Eastern lands; but only so much of it as Eastern Potentates will permit by grace or force of arms. It might indeed be argued that the rights she exercises in Oriental countries are not her sovereign rights at all, but merely the delegated rights of the actual Sovereigns of those countries. It is certain that they are exercised not in virtue of mere abandonment, but in virtue of a definite assignment to her. . . . Too much emphasis cannot therefore be placed upon these fundamental principles of ex-territoriality, that it has nothing whatever to do with the sovereign rights of the British Crown nor with the so-called omnipotence of the British Parliament; that its existence depends entirely on the will of the Sovereign of the country wherein it is exercised, and as its existence depends on this, so also does its extent, and its extent is to be found expressed in no other document but the treaty. . . . The exact position involved in ex-territoriality may be shortly stated thus: Such powers alone as are surrendered by the Sovereign of the country can be exercised by the Sovereign of the Treaty Power (*i.e.*, the Sovereign to whom the grant has been made);

all those powers which are not surrendered are retained" (c).

According to the preamble to the Foreign Jurisdiction Act, 1890, extra-territorial jurisdiction exercised by the British Crown within the territories of foreign States is founded upon "treaty, capitulation, grant, usage, sufferance, and other lawful means." As Piggott points out, the first three sources "obviously fall under the general head of 'Treaty'; the last three may conveniently be treated under the head of 'Sufferance.' Practically there are no other 'lawful means' of acquiring such a jurisdiction." It is evident that in the case of the first, consent of the State within whose territory jurisdiction is exercised is the foundation and source of the jurisdiction. In the case of the second, there is an implied or presumed consent on the part of the Sovereign of the State in which extra-territorial jurisdiction is exercised. Consent is, therefore, in either case the source of extra-territorial jurisdiction. As Dr. Lushington pointed out in *The Laconia*, "consent may be expressed in various ways: (1) by constant usage permitted and acquiesced in by the authorities of the State; (2) active assent; (3) or silent acquiescence where there must be full knowledge."

The decision of the Privy Council in *Muhummud Yusuf-ud-Din* v. *The Queen Empress* ((1897), 24 I. A. 137) makes it perfectly clear that these prin-

(c) Piggott, *Ex-Territoriality*, pp. 18—21.

ciples are equally applicable to the Indian States. In that well-known case the accused, who was alleged to have committed an offence in British India, was arrested at a railway station within the territories of the State of Hyderabad. The Ruler of Hyderabad having granted to the British Government "a civil and criminal jurisdiction along the line of railway" within his dominions, it was contended that the warrant for arrest was legally executed, and this contention was upheld by the Punjab High Court. On appeal the Privy Council held that the arrest was illegal on the ground that the jurisdiction granted did not relate to offences not committed on the railway nor in any way connected with its administration. It was further held that in the absence of cession of territory by the Ruler of Hyderabad a notification issued by the Governor-General in Council was inoperative to confer jurisdiction, or as the source of authority in excess of the jurisdiction granted by the Ruler of Hyderabad. Lord Halsbury, L.C., in delivering the judgment of the Court, said: "Their lordships are of opinion that the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority therefore to execute any criminal process must be derived in some way or another from the Sovereign of that territory, and the only authority relied on here is the authority given in the correspondence which constitutes the cession by the Nizam of jurisdiction to the British Government. It is important to observe that the notification upon which the learned Judges in India appear to

have relied could itself give no such authority. Even if, in more extensive terms than in fact are included in the notification, it had purported to give jurisdiction, as the stream can rise no higher than its source, that notification can only give authority to the extent to which the Sovereign of the territory (the Nizam) has permitted the British Government to make that notification. . . . The authority of which this is the only notification is derived from the sovereign power of the Nizam himself."

The most important instance of the exercise of extra-territorial jurisdiction within the territories of the Indian States is with regard to Europeans and European British subjects (*d*). Two arguments have been put forward in support of the exercise of this jurisdiction. The first argument is founded upon Lord Stowell's statement that "in the East from the oldest times an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as their fathers were —*doris amara suam non intermiscuit undam.*" According to Lee-Warner: "This attitude of caste and of the Hindu mind is naturally aggravated in the

(*d*) The Criminal Procedure Code of British India differentiates between Indian British subjects and European British subjects. European British subject is defined as "(1) any subject of His Majesty of European descent in the male line born, naturalized or domiciled in the British Islands or any colony, or (2) any subject of His Majesty who is child or grandchild of any such person by legitimate descent": section 4, sub-section 1 of the Code of Criminal Procedure.

national home of the Hindu faith by the proximity of a Western system introduced into British India. The laws of Manu are opposed to religious toleration and to the extension of equal rights to all citizens, and although many changes have taken place even beyond the frontiers of British India, the time has not yet arrived when the extra-territorial jurisdiction of the King can safely be dispensed with." It cannot, however, be denied that this statement does not correspond to facts. The criminal law of an Indian State, Hindu or Mohammedan, is practically on all fours with the penal code of British India and does not differentiate between communities and religions. It would therefore appear that there is no reason for demanding the surrender of criminal jurisdiction over Europeans and European British subjects. Even in civil cases there are no distinctions of caste or creed. Where the parties belong to the same religion the personal law of the parties applies; this may be either Hindu or Mohammedan law or the law applicable to Christians in British India. The position is exactly similar in British India and the same principles are applied by the highest British Indian tribunals. It is, therefore, evident that this argument in support of the exercise of extra-territorial jurisdiction is not applicable in the circumstances at present prevailing within the territories of the Indian States.

The second argument is founded upon the fact that the Indian States of to-day have no diplomatic intercourse with States and Powers outside India. Lee-Warner expresses this argument thus: "Sup-

posing that the Native States of India possessed international life, it cannot be doubted that European Powers would insist on the trial of their subjects residing or being in them, according to the systems of law which they are accustomed to regard as civilised. The British Government which shields the States from the diplomatic fetters forged for Egypt by the rivalry of European Powers is bound to satisfy other nations that their subjects will be justly treated." Sir Courtney Ilbert is of the same opinion. He says: "Where the external sovereignty of any State is exercised or controlled by the British Government, a third State will almost certainly claim to regard, and will, from an international point of view, be entitled to regard, the territory of the first State as being for many purposes practically British. Thus, if persons in that territory made it a basis for raids on the territory of an adjoining foreign State, that State would hold the British Government accountable. And it would be no answer to say that the arrangements entered into by the British Government with the ruler of that territory preclude British interference in such cases. The reply would be, 'We know nothing of these arrangements, except that they debar us from obtaining protection or redress, except through you, and consequently we must treat the territory as practically British.' A similar position would arise if a subject of that foreign State were grossly ill-used within the territory, and were denied justice by the

persons exercising authority there" (*e*). It must, however, be pointed out that these views do not take into consideration all the aspects of the question under discussion. It is no doubt true that where a State is *in loco parentis* with regard to another State, the first State is necessarily held responsible by other States for acts of flagrant injustice committed within the territories of the second State. This does not, however, mean that the parent State must always retain and exercise original jurisdiction over all foreigners residing or temporarily present within the territories of the minor State. It may discharge this international obligation either by supervising the exercise of jurisdiction by the minor State or by obtaining the surrender to itself of jurisdiction over foreigners in its entirety.

It is important to remember that these arguments *ab inconvenienti* may no doubt justify the claim of the British Government to the surrender of jurisdiction over foreigners residing or temporarily present within the territories of the Indian States, but they do not afford the slightest justification for the exercise of such extra-territorial jurisdiction without the consent, express or implied, of the States concerned. But the Government of India do not seem to have realised the importance of the fact that every kind of jurisdiction exercised by them within the territories of the Indian States must have its source and foundation in the consent of the States. On the other hand, they always seem to have considered themselves the sole

(*e*) Ilbert, *op. cit.*, p. 427.

and exclusive depository of every kind of jurisdiction over foreigners within the territories of the Indian States. In most cases where legal arguments are not available the Government of India have founded their claim to exercise extra-territorial jurisdiction on the vague and very much misunderstood doctrine of paramountcy.

This attitude of the Government of India was clearly evident in a recent case within the personal knowledge of the present writer. A European British subject was alleged to have committed a murder within the territory of an Indian State. When the information of the alleged murder was received by the authorities of the State a requisition for the surrender of the fugitive criminal was despatched to the Representative of the British Government. In reply the State was informed that a certificate under section 188 of the Criminal Procedure Code had already been issued by the British Representative that the charge ought to be inquired into in British India and that, therefore, the fugitive criminal could not be extradited. It was also urged that it was a well-established principle that European British subjects should be tried in British Courts even when accused of an offence committed in an Indian State. The State in reply contended that it was not aware of any well-established rule denying its right to try European British subjects, and that it was prepared to contend emphatically that there was no such rule of law. It was also pointed out that if the contention of the Government of India merely meant that it was their

policy that European British subjects should not be handed over to an Indian State for trial, such a rule of policy could not be so rigid and invariable as to admit of no exception whatever. The Government of India answered that they have always maintained their right to exercise jurisdiction over European British subjects in Indian States and have always insisted that the right was the *prerogative of the paramount Power*, although the rule was not so rigid and invariable as to admit of no exception. This contention of the Government of India was strongly disputed by the State and it was urged that paramountcy cannot be regarded as the source of jurisdiction of a judicial character. Extra-territorial jurisdiction of a judicial character, it was pointed out, is regulated by the Foreign Jurisdiction Act of 1890, according to which such jurisdiction must have its source in treaty, grant or usage, and as there was no express or implied grant or usage in the present case the jurisdiction claimed had no legal basis. These arguments were, however, of no avail and the Government of India did not even attempt to controvert them; they merely declared that the jurisdiction claimed was based on the *prerogative of the paramount Power.*

As we have already indicated, extra-territorial jurisdiction must have its foundation in the consent of the State in which such jurisdiction is exercised. Where there is no such consent, no extra-territorial jurisdiction can be claimed or exercised. This principle is supported by the decisions of the highest

British tribunals as well as by the opinions of all well-known text writers. It is therefore clear that in this case the claim of the Government of India was manifestly illegal. It is also submitted that there is no such prerogative as the prerogative of paramount power, and that the Government of India was forced to fall back on this foundation for its claim because it could find no lawful foundation. In the present case the claim of the Government of India was also in flagrant violation of the agreement entered into with the State which clearly and expressly recognised the plenary jurisdiction of the State over all British subjects, and there was no evidence that the State had ever accepted or acquiesced in any abridgment or surrender of its plenary jurisdiction. Further, it was not denied by the Government of India that the State enjoys full jurisdiction over Indian British subjects. In one case it was also conceded that the State was competent to take proceedings against foreigners of European descent. It is, therefore, difficult to see how the Government of India can justify their claim to exclusive jurisdiction over European British subjects. It must also be noted that the very fact that under the Indian Extradition Act European British subjects may be handed over to Indian States proves conclusively that there is no general rule that European British subjects are not amenable to the jurisdiction of the Indian States, as is claimed by the Government of India (*f*).

(*f*) Lee-Warner's statement that fugitive criminals who are European British subjects cannot be surrendered to Indian States

The Bhopal case affords another striking instance of the arbitrary manner in which the Government of India have usurped jurisdiction within the territories of the Indian States without the consent of the local Sovereign. In 1863 the Ruler of Bhopal entered a strong protest against the exercise of jurisdiction by the representative of the British Government over British subjects resident in the principality of Bhopal. It was pointed out that the British Government had by the treaty of 1818 not only recognised the sovereignty of the Ruler of Bhopal within his territories but had also bound themselves not to introduce British jurisdiction into the principality. The exercise of jurisdiction by the Political Agent was, therefore, a clear breach of agreement, and an encroachment on the rights and powers of the State guaranteed by the British Government. These arguments did not, however, avail with the Government of India. They contended, in the first place, that the treaty of 1818 referred only to the authority of the Ruler of Bhopal over his own subjects within his own territory, and did not afford any justification for the claim of jurisdiction over British subjects. This interpretation was, however, clearly unjustified and unwarranted. Article 9 of the Bhopal treaty provided: "The Nawab and his heirs and successors shall remain absolute rulers of their country, and the *jurisdiction of the British Government shall not in any manner be introduced into that principality.*" This was indeed

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under chapter 3 of the Indian Extradition Act, 1903, is not correct. See section 9 of the Act of 1903.

a clear and unqualified acknowledgment on the part of the Crown of the absolute territorial sovereignty of the Ruler of Bhopal; and absolute territorial sovereignty embraces jurisdiction over all persons and all places within its local limits. It follows, therefore, that the exercise of jurisdiction by the representative of British Government over British subjects resident in the State of Bhopal was a flagrant encroachment upon the sovereignty of the State acknowledged and guaranteed by the British Government. It was also clearly in violation of the express promise and assurance given by the Crown that British jurisdiction would not *in any manner* be introduced into the State of Bhopal; and the mere fact that the Ruler of Bhopal had acknowledged the supremacy of the British Crown could not render valid what was manifestly illegal. Secondly, it was argued by the Government of India that European offenders had, under the law of British India, a right to be tried in a certain form and under certain conditions which the British Government had no authority to compromise or surrender; consequently the jurisdiction of the local Sovereign must be supplanted by that of the British Government. This argument was obviously unsound and untenable. Neither the Imperial Parliament nor the Indian Legislature could legitimately confer special rights and privileges on British subjects resident outside the limits of His Majesty's dominions; and even if this was indeed contemplated by any Imperial or Indian enactment, the statute in question would not have the smallest trace of legal validity

outside British Possessions. Nor could it for a moment be asserted that British subjects would, by virtue of such a legislation, be entitled to claim privileges and powers while residing within the jurisdiction of foreign States and Princes. Thus, on these flimsy grounds, the sovereignty of the State of Bhopal was abridged by the British Government without the consent of its Ruler. Such, indeed, is the binding force of treaties in British India.

A similar but unsuccessful attempt was made in Travancore to oust the jurisdiction of the territorial Sovereign. In 1871 the Government of India protested against the exercise of jurisdiction by the Government of Travancore over European British subjects resident in Travancore. "The jurisdiction was claimed by the Travancore Darbar both as an inherent right of sovereignty and also as having been admitted by the British Government in 1837, when Europeans living in Travancore, and not being servants of the British Government, were declared to be subject to the laws of the State." The Government of India maintained that the claim advanced by the State could not be recognised because the British Crown was the Paramount Power in India. They also declared that although in 1837 the Courts in British India were not competent to try European British subjects, not being servants of the Crown, for offences committed outside the limits of British India, the law had been amended by a statute of the Imperial Parliament, and a proclamation issued thereunder invested the Courts in British India with exclusive

jurisdiction over such persons; and the Government of Travancore could not, in the face of the statute and the proclamation, claim any jurisdiction over European British subjects. This contention was repudiated on behalf of Travancore by J. D. Mayne, one of the most eminent authorities on Indian law, who observed (*inter alia*) as follows: "It cannot of course go beyond the powers given by the statute; and the statute, though binding on all British subjects, has no force against the Sovereign of Travancore or his servants, who are not subject to the authority of the British Parliament. Even if the statute purported in express terms to take away the jurisdiction previously exercised by the Courts of Travancore, it would be simply inoperative against them. *Parliament is as incapable of taking away the powers of a Court in Travancore as it is of dealing with the Courts of France.* But I agree that neither the statute nor the proclamation contemplated any interference of that sort." Confronted with this authoritative opinion the Government of India were obliged to change their views, and the State of Travancore was allowed to retain its jurisdiction subject to certain specified terms and conditions.

The claim that the paramountcy of the Crown is the source and foundation of the jurisdiction exercised by the British Government over foreigners resident in Indian States is clearly negatived by the *sanad* granted by the Nizam in 1861 conferring such jurisdiction on the representative of the British Government. This *sanad* runs as follows: "Whereas

many Europeans, foreigners and others, descendants of Europeans, and born in India, are resident in the territory of His Highness the Nizam; and as disturbances arise amongst themselves and the inhabitants of the said territory; it is hereby made known by the Nizam's Government that, in the event of any dissension or dispute arising among the classes aforenamed within the said territory, except those employed by this Circar and its dependants, the Resident at Hyderabad, or other officer or officers whom he may from time to time consider it desirable to vest with the same, shall be empowered to enquire into and punish any such offences." If paramountcy be a source of the extra-territorial jurisdiction of the Crown, where was the necessity of obtaining a grant from the Ruler of Hyderabad? What occasion was there of securing from the Rulers of Indian States cession of jurisdiction over railway lands lying within their territories? The obvious answer is that paramountcy cannot legitimately be regarded as one of the sources of the extra-territorial jurisdiction of the Crown.

Another important instance of the exercise of extra-territorial jurisdiction relates to offences committed by officers and soldiers of the British Indian army within the territories of the Indian States. The Government of India claim sole and exclusive jurisdiction over officers and soldiers of the Indian army who, while not on leave, commit any kind of offence within the territories of the Indian States, and contend that the Courts of the Indian States are not competent to exercise any kind of jurisdiction in such

cases. In a recent case within the personal knowledge of the present writer the Government of India attempted to justify their claim on the following grounds:—

(1) That their claim was consonant with International Law and practice; and

(2) That the claim was equally founded on ancient and time-honoured practice which had not been challenged by the State concerned.

In reply, the State pointed out that the decision of the Bombay High Court in *Natwa Rai's Case* (16 Bomb. 178) clearly establishes that in 1897 foreigners in the service of the Crown were not justiciable by British Indian Courts in respect of offences committed outside the limits of British India. The law had no doubt been modified by the Act of 1898, but if, for the sake of argument, the correctness of the Government of India's contention were admitted, namely, that their claim is founded on ancient and time-honoured practice, the conclusion would naturally be irresistible that the claim put forward by the Government of India was at its inception illegal, being in fact contrary to the rule laid down by the Bombay High Court in the case referred to above.

As regards the contention that the claim was founded on International Law and practice, it was pointed out that International Law does not afford any sanction whatever to the wide and extensive claim made by the Government of India. All international jurists hold the contrary view and cases of International Law clearly and unmistakably prove

the claim of the Government of India to be unfounded. It was also contended that the jurisdiction which the Government of India is legally competent to exercise in such cases is concurrent and not exclusive, and that this concurrent extra-territorial jurisdiction cannot legally be invoked until after the accused has returned to British India. It was also pointed out that the State was legally competent to exercise jurisdiction in such cases, and its jurisdiction being the jurisdiction of the *locus delicti* must prevail at least so long as the accused is within the territories of the State.

In reply, the Government of India, while disputing the contention of the State as to the position prevailing under International Law, did not deem it necessary to controvert the arguments urged by the State. They merely declared that there was no doubt as to the normal practice, and that "it has been the uniform policy of the Government of India to reserve to themselves exclusive criminal jurisdiction with respect to officers and soldiers of the British Indian army." It is needless to say that nothing could be more manifestly illegal and illegitimate than the claim that the rights of the Indian States can be overridden or abrogated by the policy of the Government of India adopted without the consent, express or implied, of the States.

As the contention of the State concerned regarding the position prevailing under International Law has been challenged by the Government of India, although no arguments or authorities have

been put forward, it seems necessary to examine the question at length. In the first place, the territorial character of criminal law and crimes is universally admitted. According to the common law, a crime or offence is a "wrongful act against the peace of the Sovereign," which implies that it must have been committed within the territorial dominions, for which "the King's Peace" is a metaphorical synonym. (See *Macleod* v. *Attorney-General*, [1891] A. C. 455, *per* Halsbury, L.C.) According to Continental jurisprudence, as an eminent French criminologist has expressed it, "*la loi pénale est principalement territoriale, et la compétence des juges du lieu de l'infraction doit primer toutes les autres*" (*g*). Therefore, "it is, and must be, perfectly clear by the law of all nations that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction" (*per* Pollock, B., in *R.* v. *Ganz* (1882), L. R. 9 Q. B. D. 93). It is no doubt true that the Legislatures of most modern States have encroached on this general rule by conferring jurisdiction on their tribunals over their own subjects committing offences in foreign territories. But it has never been claimed that this extra-territorial jurisdiction excludes the territorial jurisdiction of the *locus delicti*; nor has any civilised State or Government ever exercised or attempted to exercise this jurisdiction until after the return home of the offenders. The Statutes of the Imperial

(*g*) Beauchet, *Traité de L'Extradition*, at p. 86.

Parliament conferring extra-territorial jurisdiction on His Majesty's tribunals expressly recognise this limitation. The law of France is similar. Article 5 of the Code d'Instruction Criminelle provides that the extra-territorial jurisdiction of the French tribunals cannot be invoked in such cases "*avant le retour de l'inculpé en France.*" Italian law is equally clear; Article 5 of *Il Codice Penale* prescribes the limitation "*si trovi nel territorio del regno.*" (See also Heffter: *Das Europaische Völkerrecht*, Section 36; Article 5 of the Penal Code of the Netherlands, and Article 4 of the German Penal Code.) The *raison d'être* of this limitation has been thus expressed by M. Faustin Hélie, an authority of international reputation: "*La seule raison de la compétence de la juridiction française est la présence de l'agent sur le territoire. . . . Nous croyons donc que la justice ne peut saisir le prévenu que lorsque son retour a été volontaire . . . il résulte encore de là que son extradition ne pourrait être demandée à raison du crime qu'il a commis en pays étranger, puisque, tant qu'il réside dans ce pays, les tribunaux français ne peuvent être saisis.*" It is thus obvious that neither the *ratio legis* nor the law and practice of modern States justifies the wide and extensive claim put forward by the Government of India.

Again, it must be observed that the jurisdiction claimed by the Government of India cannot be effectively exercised without overriding fundamental and universally recognised rules of extradition; for if an offender who belongs to the British Indian army

be arrested within the territories of an Indian State, it will be perfectly within the right of that State to refuse to surrender the criminal to British authorities. The law on this point has been laid down by no less an authority than the Court of Queen's Bench in *R.* v. *Ganz* ((1882), L. R. 9 Q. B. D. 93), where it was held that no claim for extradition can be validly preferred except by the State within whose territory the offence was committed.

In the famous case of Carl Vogt, a German subject, who escaped to the United States after committing a crime in Belgium, it was held by the Government of the United States that he could not be surrendered to the German Government on the ground that the offence had not been committed within the territorial jurisdiction of the German Empire. (See also *Attorney-General of Hongkong* v. *Kwok-a-Sing*, L. R. 5 P. C. 179.)

Further, it must be pointed out that the claim of the Government of India in so far as it extends to foreigners committing offences outside His Majesty's dominions has no parallel or precedent in the history of legal systems, for no civilised State has ever tried to exercise jurisdiction over foreigners violating the penal laws of foreign States. "Criminal offences committed outside the State by foreigners against its citizens or subjects are not punished under any circumstances or conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourg, Netherlands, Portugal, Spain and Switzerland" (*h*).

(*h*) Mr. Bayard, Secretary of State to Mr. Conney, chargé of

It must also be pointed out that no juristic basis for the claim of the Government of India can be discovered in the entire field of International Law. All that International Law concedes is that the *army or military force* of one State passing through the territory of another with the consent, express or implied, of the latter is not amenable to the jurisdiction of the local Courts (*i*). But this privilege has never been extended to or claimed for the individual soldier or groups of soldiers. In 1864 the sergeant of the military guard on board an American vessel from San Francisco to Panama, while he was ashore at the latter place, got into an altercation with one of the privates of the guard, in which the latter was killed. As they both were enlisted soldiers in the United States army, the Department of State put forward a request to the Columbian Minister in the United States for the surrender of the culprit to the United States military authorities to be tried by court martial. "I am well aware," wrote Mr. Seward, the Secretary of State, to General Salgar, the Columbian Minister, "*that no obligation rests* upon the authorities of Panama or upon those of the United States of Columbia, to comply with this request; nevertheless, if the matter can be so disposed of, this *Government will esteem it a mark of courtesy on the*

Mexico, Nov. 1, 1887; see Moore, *Digest of International Law*, Vol. 2, at p. 240.

(*i*) Moore, *Digest of International Law*, Vol. 2, Sec. 251; Hall, p. 56; Fiore, p. 22; Bernard, *Traité de l'Extradition*, Vol. 2, p. 174; Heffter, Sec. 42; *The Exchange* v. *McFaddon*, *per* Marshall, C.J., Wheaton, p. 155.

part of Columbia. In the event, however, that the Governor of Panama should consider it incompatible with his attributes and prerogatives to grant the above request, I will thank you to urge upon him the speedy trial of the accused, whose friends allege in his defence that he was acting in the discharge of his official duty at the time when the unfortunate occurrence took place" (*k*).

The other important instances of the intrusion of British jurisdiction are the cases of Cantonment jurisdiction, Residency jurisdiction, and Railway jurisdiction. In each of these cases the jurisdiction exercised by the Crown depends entirely on the consent of the States. For instance, in the case of jurisdiction exercised over railway lines lying within the territories of Indian States, forms of cession of jurisdiction have been signed by almost every State. But in all these cases the jurisdiction claimed by the Government of India invariably appears to be in excess of the grant or cession. In certain cases no doubt the original grant was subsequently extended and enlarged by the States concerned, but in other cases the Government of India have extended their jurisdiction in disregard of express and emphatic protests of the States. For instance, in the case of railway jurisdiction the claim of the Government of India extends to fiscal jurisdiction which has never been expressly or impliedly ceded by the States, and this claim has been made effective, in spite of the

(*k*) See Moore, *Digest of International Law*, Vol. 2, Sec. 251, at p. 561.

opposition of the States, to the great detriment of their revenues. Similar extension has been made in the cases of Cantonment and Residency jurisdiction. The jurisdiction exercised by the Resident (the British Representative) in the State of Indore furnishes an interesting instance in point. Article 14 of the Indore Treaty of 1880 provided that "in order to maintain and improve the relations of amity and peace hereby established it is agreed that an accredited Minister from the British Government shall reside with the Maharaja Mulhar Rao Holkar." An area of a little over 400 acres was assigned by the Indore State for the use of the British Minister and his staff. It is no doubt true that the Indore State could have no jurisdiction over the person of this accredited Minister or over the persons of his staff, but at the same time jurisdiction over this area, allotted for a specified purpose, or over persons other than the Minister and his staff was never ceded by the Indore State. But in course of time the original object of the assignment has been ignored and the Residency area has been permitted to be used for a variety of purposes. "A large number of persons in no way required for Residency purposes have been allowed to build houses on these lands or on additional lands demanded for the extension of Residency limits; institutions have sprung up which have occupied large areas; a big centre of trade has come into existence; the Residency is levying various taxes (trade tax, property tax and octroi), has been appropriating the excise income, and exercising civil and criminal juris-

diction over persons within the limits, though they are not in any way connected with Agency staff." The difficulty of the situation was clearly brought out by a Minister of the Indore State in a letter addressed to the British Representative. He said: "If I were called upon to give a hypothetical case merely to enable an Englishman to realise the difficulties and perplexities entailed on us, I would offer the picture of the German Ambassador in London demarcating a certain area around his residence, inviting lots of the London population to settle around, and claiming within such area the right of administering German laws and German system in general, and claiming for the whole settlement supplies totally exempt from the taxes of England. A town in such circumstances would, of course, grow with wonderful rapidity."

In this connection it is necessary to examine Lee-Warner's statement regarding the jurisdiction exercised by the Crown over Cantonments situated within the territories of the Indian States. He says: "The British Government has the absolute right of occupying any military position it deems fit in any of the Protected States. It has received authority of its allies to protect them, and it may, by consequence of this delegation and without further reference to them, establish these cantonments in their principalities. It is essential to the efficiency and safety of the army so cantoned that it should be placed exclusively under British jurisdiction." It is difficult, if not impossible, to discover any sound legal basis for the claim that the British Government have the abso-

lute right of cantoning troops within the territories of the Indian States. The agreements between the States and the Crown impose on the Crown obligation to protect the States against external aggression, and in the case of "protected and guaranteed" States against internal danger also. This obligation does not necessarily imply the right to violate the territorial sovereignty of an Indian State except where a *casus foederis* has actually risen. In other words, the right to dispatch British troops into the territories of an Indian State does not accrue unless there is an imminent danger directly menacing the existence of the State. As a matter of fact, in each case where a British cantonment has been established within the territories of an Indian State, it has been with the express or implied consent of the State concerned.

CHAPTER VI.

POSITION OF THE STATES IN INTERNATIONAL AND INTER-STATAL AFFAIRS.

ONE of the essential characteristics of all forms of international guardianship is that the foreign relations of the minor State are subordinated to those of the guardian State. This subordination, which is a necessary incident of international guardianship, may appear in two different forms:—

(1) The guardianship may, in respect of foreign relations, be analogous to *curatio* where the right to enter into relations with foreign Powers and States is reserved to the minor State but the exercise of the right is controlled by the guardian State.

(2) The guardianship may be founded on full and complete surrender of external sovereignty, in which case the guardian State not only controls the foreign relations of the minor State but also arrogates to itself all rights incidental to and connected with foreign relations. This form of guardianship is analogous to *tutela*.

As regards the Indian States, it has been contended " that they have absolutely surrendered their rights of negotiation, confederacy and legation, and

since they are partners in the benefits secured by international and interstatal action of the British Government they must fulfil the obligations attached to the rights derived from such action" (*a*). It cannot reasonably be denied that the phrase "absolute surrender of external sovereignty" implies:—

(1) That the British Government are the sole and exclusive authority to enter into negotiations or conclude treaties with other States, Indian or foreign, on behalf of the Indian States; and

(2) That an Indian State is not competent to enter into relations with another Indian State under any circumstances.

It is submitted that this view of the external sovereignty of the Indian States is not supported by facts. If the treaties and engagements are examined from the standpoint of external relations, it will be found that the States fall into three different classes:

(1) Where no restriction has been imposed on the right to enter into negotiations with other States. For instance, no restriction whatsoever has been imposed by the treaties with Dholpur and Jaisalmir upon those States. In the case of the Phulkian States of the Punjab "all powers and rights internal and external" have been guaranteed by the British Government; this is, in the case of Patiala, further strengthened by the fact that the Patiala State has

(*a*) Lee-Warner, *op. cit.*, p. 280.

always maintained, and still maintains, diplomatic agents and posts in British India as well as in certain Indian States.

(2) Where the right is reserved to the States but its exercise is subject to the sanction and control of the British Government. For instance, Article 4 of the Udaipur Treaty runs thus: "the Maharana of Udaipur will not enter into any negotiation with any Chief or State without the knowledge and sanction of the British Government; but the usual amicable correspondence with friends and relations shall continue." Similar provision is found in the treaties with Jaipur, Jodhpur, Bundi, Kotah, Kishengarh, Alwar, Bikaner, Gwalior, Indore, Bhopal, Dewas and Datia. The treaty with Rewa provides: " the Rajah of Rewa hereby binds himself to engage in no correspondence *of a political nature* with any Foreign State or Chief whatever without the privity and consent of the British Government, or its Representative, the Agent in Bundelkhand." As regards the States of Bharatpur and Orchha, the restriction is applicable in respect of enemies of the British Government only; and

(3) Where the right has in its entirety been transferred to the British Government, as, for instance, the States of Dhar and Tonk.

It follows from this analytical examination of the treaties that the phrase " absolute surrender of sovereignty " in respect of the conduct of external affairs does not correctly describe the treaty-position of the Indian States. The position of the States

regarding their external sovereignty, as deduced from the treaties, remains unchanged except in the important particular of their relations with foreign (non-Indian) States. It cannot therefore be denied that as regards their relations *inter se*, most of the Indian States still retain and exercise certain rights of external sovereignty, although the exercise of such rights is subject to the control of the British Government. As we have already seen, this right to control arises under specific provision of the treaties with certain States. Where such restriction is not expressly or impliedly provided for in the treaties or agreements, the right arises by implication from the relationship of protection existing between such States and the British Crown. The Crown is also entitled to interfere whenever there is a dispute between one State and another. In certain cases no doubt this right results from express provision of the treaties. For instance, Article 9 of the Indore Treaty of 1818 runs as follows: "Maharajah Mulhar Rao Holkar engages never to commit any act of hostility or aggression against any of the Honourable Company's allies or dependants, or against any other Power or State whatever, In the event of difference arising, whatever adjustment the Company's government, weighing matters in the scale of truth and justice, may determine, shall have the Maharajah's entire acquiescence." Similarly, Article 5 of the treaty of Bhopal provides: "the Nawab and his heirs and successors will not commit any aggression on anyone. If by accident

disputes arise with anyone they shall be submitted to the arbitration and award of the British Government." Similar provisions are to be found in the treaties with other important States. In other cases the right to arbitrate and decide disputes between one State and another is a necessary correlative to the duty of protection imposed on the Crown.

But this treaty-position has in one important particular been modified by usage founded on the consent of the States. As regards relations with foreign (non-Indian) States, it must be admitted that the States have surrendered the exercise of all their rights of external sovereignty to the British Government. In other words, the guardianship, which was analogous to *curatio*, has acquired the character of *tutela*. This, however, does not mean that all treaties with foreign (non-Indian) States concluded by the British Crown are *proprio vigore* binding on the Indian States without their concurrence or consent. As was pointed out by one of the leading Indian States in the course of its dispute with the Government of India regarding the Slavery Convention, "in any case, where any serious evils exist, they are clearly matters which should form the subject of communication between the Government of India and the States concerned with a view to securing their willing co-operation, which can be safely relied upon. But it is respectfully submitted that they are not such in regard to which obligations could justifiably be directly or even indirectly accepted by the Government of India in the absence

of the previous consent or express authority of the State, or States, concerned, since the only competent authorities to deal with such matters are the Rulers and Governments of the States concerned . . . and the adhesion of the Government of India cannot be binding upon the Indian States since . . . the responsibility of enforcing the provisions of such a Convention upon the Indian States territories, over whose domestic concerns the Government of India have not control, would rest with the States concerned. Otherwise, it would mean an infringement of the sovereignty and the internal autonomy of the Indian States." The correctness of this contention has been admitted by the Government of India themselves. Although a signatory to the Geneva Dangerous Drugs Convention and Opium Agreement of 1925, the Government of India have admitted that they "can exercise no effective control regarding the production of opium" in the States. "To attempt to enforce any policy of suppressing or restricting the cultivation of opium in Indian States apart from any arrangement which may be entered into under Treaty obligations would mean interference in their internal administration such as the Government of India have no power to exercise either by prescriptive or by Treaty rights." (Memorandum of the Government of India to the League of Nations Opium Advisory Committee.)

It is interesting to compare the provisions of the treaties with the Indian States with the corresponding provisions in the treaties entered into by the Republic

of France with the States under its protection. For instance, Article 6 of the Treaty with the Bey of Tunis provides: "*Il s'engage à ne conclure aucun acte ayant un caractère internationale sans en avoir donné connaissance au gouvernement de la République française et sans s'être préalablement entendu avec lui.*" On the other hand, Article 5 of the Treaty with Annam entirely extinguishes the right of the protected State to enter into negotiations with another. In respect of these States it has been laid down by an eminent authority on International Law: "*En réalité, le pays protégé reste un État investi de la personnalité internationale et, par suite, muni du droit de traiter avec les autres pays; seulement cette faculté est plus ou moins restreinte, suivant les termes du pacte de protectorat, par l'abandon complet ou partiel qu'il en fait au pays protecteur, ou par le contrôle que ce dernier se reserve sur ses negociations et les resultats auxquels elles aboutissent*" (*b*).

It is submitted that, so far as the control of external affairs is concerned, there is no difference, from the strictly legal standpoint, between these States and the Indian States under the protection of Great Britain, and that Despagnet's view represents the correct position of the Indian States in the matter of International and Inter-Statal affairs.

Another important right of external sovereignty is the right of legation. As regards foreign (non-Indian) States, it cannot be denied that neither the

(*b*) Despagnet, *op. cit.*, p. 324; see also F. de Martens, p. 515, and other authorities cited by Despagnet.

Indian States nor foreign States can enjoy or exercise any such right. This is a logical corollary of the fact that the Indian States can have no direct relations with States or Powers outside India. This is not, however, true of their relations *inter se*. In fact, some of the Indian States still maintain diplomatic agents at the Courts of their neighbours. The State of Patiala has its diplomatic representatives in the States of Alwar and Jaipur which, on their part, send their duly authorised representatives to the State of Patiala. As regards the British Government in India, although in rare cases diplomatic representatives of the States are posted to important places in British India, such representatives have practically lost their diplomatic character. In one instance only do they enjoy the privileges granted to diplomatic agents; the incomes of these agents are not chargeable to the income tax of British India. Formerly the houses occupied by them were also exempt from municipal taxation, but this privilege has recently been withdrawn.

On the other hand, the British Government have their representative in every Indian State. In the case of the larger States there is always a British Resident or representative residing at the court of the Ruler. As regards other States, they have been divided into several provincial circles and there is a British representative for each circle of States, there being, in certain cases, subordinate agents in each State comprising the circle. In all these cases the British representative has primarily a diplomatic char-

acter, and is therefore not amenable to the local jurisdiction. The most striking instances of such immunity enjoyed by the British representatives are the cases of the British residents in the States of Travancore and Indore.

These British representatives are not only diplomatic agents but also administrative functionaries appointed by the British Government to discharge their obligations and to exercise the rights conferred on them by the States, but it is a well-known fact that in discharging their functions the British representatives always exhibit a tendency to arrogate to themselves powers not conferred by the treaties and engagements and to disregard the internal sovereignty of the States. In 1814 the Marquis of Hastings wrote in his Private Journal: "In our treaties with them (the Princes of India) we recognise them as independent sovereigns. Then we send a Resident to their courts. Instead of acting in the character of ambassador, he assumes the functions of a dictator; interferes in all their private concerns, countenances refractory subjects against them and makes the most ostentatious exhibition of his exercise of authority." This is as true to-day as it was in the days of the Marquis of Hastings.

Another important question closely connected with the subject under discussion is the question of extradition. Treaties have been concluded by the British Government with some of the important Indian States for the mutual surrender of fugitive criminals. Such, for instance, are the treaties with the States of

Hyderabad, Alwar, Bikaner, Jaipur and Bharatpur. Where there is no such treaty or formal agreement, extradition of fugitive criminals to and from British India depends upon arrangements made between the British Government and the Indian States. There are two important points regarding these informal arrangements. In the first place, under such arrangements, the Agent to the Governor-General is the Extradition Judge, even in cases where a fugitive criminal is demanded by the Government of India *from* an Indian State. *It is a well-established rule of law that in every case of extradition a fugitive criminal must be afforded every possible opportunity of defence.* But as in certain cases the Extradition Judge does not reside in the territories of the States, a fugitive criminal is debarred from submitting his defence, and this results in great hardship and injustice. This arrangement becomes still more objectionable when the requisition for extradition is followed by a request to take proceedings under sections 87 and 88 of the British Indian Criminal Procedure Code, for the proceedings under these sections are of a highly penal character. Secondly, whereas a full-fledged judicial officer examines the *prima facie* evidence in the case of extradition to a foreign State (non-Indian State) from British India, the Political Agent or Agent to the Governor-General serves the purpose of the Extradition Judge in cases of extradition to the Indian States. The result is that in some cases the Political Agent or the Agent to the Governor-General, who is not a trained legal expert,

is guided by considerations other than legal and judicial; and political considerations play a pre-eminent rôle, with the result that the legal right of the States suffers considerably.

As regards extradition to and from Indian States, in almost every case there is a treaty or agreement regulating the mutual surrender of fugitive criminals. Most of these extradition agreements were concluded through the medium of the British Government. There are, however, certain cases where agreements for extradition of fugitive offenders have been concluded directly by the States without the intervention of the British Government. The Government of India now contend that no inter-Statal agreement relating to extradition is valid unless it has received their approval. Whether such a claim can be substantiated depends entirely on the circumstances of each case. If there is no provision in the treaty of a particular State conferring on the British Government the right to regulate its intercourse with neighbouring Indian States, or if there is no established usage founded upon the consent of the State, the claim of the Government of India has no legal foundation. As has already been indicated, the right to control the foreign relations of Protected States is a necessary incident of the relationship of protectorate. It cannot, therefore, be denied that in all cases the British Government has the right to control the making of inter-Statal agreements, but unless there is any provision in such agreements inconsistent with the relationship between

the British Government and the States, no right accrues to the Government of India to amend or alter such agreements. But in recent cases the Government of India have always insisted that in all extradition arrangements there should be a provision conferring authority on the representative of the British Government to arbitrate and decide all cases of disputes regarding extradition between Indian States.

Closely connected with the question of the international or inter-statal position of the States is the question of the position of the Rulers of Indian States outside their territories. It has been decided by the highest judicial tribunals in England as well as in British India that the Rulers of Indian States are Sovereign and therefore not amenable to the jurisdiction of His Majesty's Courts of Justice. For instance, in the case of *Statham* v. *Statham and Gaekwar of Baroda* ([1912] P. D. p. 92), where the question arose as to whether the Gaekwar, an Indian Prince, could be cited as a co-respondent in the English Court, it was held by Bargrave Deane, J., that the Gaekwar was an independent Sovereign Prince and, therefore, the English Courts had no jurisdiction over him. In delivering the judgment of the Court, Bargrave Deane, J., said: "Grotius (De Jure Belli ac Pacis) says unequal leagues are made not only between the conquerors and the conquered, but also between people of unequal power, even such as never were at war with one another. Grotius, Pufendorf, and Vattel agree that in unequal alliances

the inferior power remains a sovereign State. Its subjects or citizens owe allegiance only to their own sovereign. Over their disputes and internal dissensions the suzerain Power as such has no jurisdiction. In short, the weaker Power may exercise the rights of sovereignty so long as by so doing no detriments are caused to the interests or influence of the suzerain Power. It follows that the inferior Power must in all alliances with other States be controlled by its suzerain. Vattel says a weak State which, in order to provide for its safety, places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection without, however, divesting itself of the right of government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations."

The British Indian Statute Law has to a certain extent recognised the sovereign character of the Indian Rulers in so far as it has defined the conditions and circumstances in which action may be brought against them in British Indian Civil Courts. Section 86 of the British Indian Code of Civil Procedure provides that any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, or whether residing within or without British India, may be sued in any competent Court only "with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India." It is further provided that such sanction "shall not be given

unless it appears to the Governor-General that the Prince, Chief, Ambassador or envoy—

(a) Has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon."

There is a further proviso that "a person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, Ambassador or envoy from whom he holds or claims to hold the property."

It is evident that the provisions of the Code of Civil Procedure differ from the principles laid down in the case referred to above in so far as it gives to the Sovereign Princes or Ruling Chiefs of India partial immunity from the jurisdiction of the Civil Courts in British India. But so far as this privilege is concerned, sections 85 and 86 make no distinction between the Rulers of Indian States and those of other foreign States outside India, for the provisions of the sections are applicable to any Sovereign Prince "whether in subordinate alliance with the British Government or otherwise."

It is remarkable that while the judicial tribunals in British India consider the Rulers of Indian States independent Sovereign Princes and, therefore, entitled to all privileges and rights conferred on

Sovereigns by the Law of Nations, the executive authority of British India has attempted to impose irksome and onerous restrictions on the liberty of the Princes. For instance, the Government of India have promulgated comprehensive and detailed rules regarding the visits of Indian Princes to places in British India. These rules, which were framed without the consent of the States, are highly opprobrious in character, and emphatic protests against their imposition have been entered by almost every Indian Prince.

The Government of India have also imposed unnecessary and illegitimate restrictions on the right of the Indian Rulers to acquire immoveable properties in British India. This claim of the Government of India is directly opposed to the law in force in British India, for the Judicial Committee of the Privy Council has expressly laid down in *Mayor of Lyons* v. *East India Company* (c) that the common law restriction regarding the acquisition of real property by aliens in England is not applicable in British India. Further, it must be pointed out that the Government of India are not competent to change the law of the land by means of administrative decrees without the sanction of the Indian Legislature. The restriction therefore appears to be clearly illegal unless the Government of India obtain the sanction of the Legislature.

Another important question which may profitably be discussed here relates to the status of the subjects

(c) 1 Moore, I. A., 175.

of the Indian States. Westlake has argued that Indian States subjects are essentially British subjects and it is a mere nicety of speech to differentiate between them. In support of this contention he has put forward the fact that the Treaty of 1873 with the Sultan of Muskat provides that in all treaties between him and England the words "British subject" should include Indian States subjects. It is, however, submitted that the instance cited by Westlake does not prove his contention. Such a provision is invariably found in the treaties between a Protecting State and foreign States. For instance, in 1813 a treaty was entered into between Great Britain and Tunis by which the Regency agreed to accord the inhabitants of the Ionian Islands privileges of British subjects. This provision did not however confer on the inhabitants of the Ionian Islands the character of British subjects, as is clear from the decision of the Court of Admiralty in the case of the Ionian ships. Further, if Indian States subjects are British subjects, the British Indian Naturalization Act is clearly inapplicable to them, but as a matter of fact it has been held that the subjects of Indian States are competent to make use of the provisions of the Naturalization Act and thus acquire the character of British subjects. British Indian Courts have also held that the subjects of Indian States are not British subjects. For instance, in a well-known case where the accused had committed dacoity in the Patiala State but had been found in British territory where they had stayed for three years, it was held by the Punjab High Court

that they were not liable to be tried by British Courts *as they were foreign subjects*, and the offence had been committed in foreign territory (*d*). In another case where a girl was enticed away in the Faridkot State from the lawful guardianship of her husband by the accused, who were Indian States subjects, and was found being conveyed by them by rail from that State to a station in the Bhawalpur State at the railway station of Abohar in British territory, it was held that as the act of kidnapping was completed outside British India, and as the accused were subjects of Indian States, the British Courts had no jurisdiction to try and convict them (*e*).

Another question which arises in connection with the international position of the States is, what is the legal effect of a war between the British Government and a foreign State on the character and position of the Indian States? In answering this question, two important points must be borne in mind. In the first place, the agreements between the Crown and the Indian States are intended to establish and continue a state of perpetual peace between the two contracting parties. For instance, the Udaipur Treaty provides: "There shall be perpetual friendship, alliance and unity of interests between the two States from generation to generation, and the friends and enemies of one shall be friends and enemies of both." Secondly, every Indian State is, either under express terms of its treaty with the Crown or by virtue of its

(*d*) *Nawabji* (1881), Punjab Record, No. 37 of 1881.
(*e*) *Jaimal Sing* (1901), P. R. 1.

legal relationship with the Crown, under the obligation to render military assistance to the Crown in case of a war between the British Government and any other State or Power. It is, therefore, evident that in the event of a war between Great Britain and a foreign Power it is the duty of every Indian State to declare that the State itself is at war with the enemy of Great Britain. But, it is submitted, unless such a declaration has actually been made either by the British Government or by the States, the territories of the States retain their neutral character and the subjects of the States are consequently entitled to all the rights and privileges conferred on the subjects of neutral States by International Law of War. This submission is founded on the decision of the Court of Admiralty in the case of the Ionian ships already referred to. On the other hand, it must not be forgotten that under its treaties and engagements with the Indian States the Crown has the right to march its troops through the territories of the Indian States and is also entitled to station troops within such territories. It follows, therefore, that a State at war with Great Britain would be perfectly entitled to consider the Indian States as enemy territories and not entitled to immunities enjoyed by neutral States. But the question is more or less of academic interest only (*f*).

(*f*) See Despagnet, *op. cit.*, p. 343.

CHAPTER VII.

THE CROWN IN RELATION TO THE STATES.

BEFORE embarking upon an examination of the relationship between the Indian States and the British Government, it seems necessary to discuss the question whether it is the Crown or the Government of India in whom the rights of the protecting Power are vested. It is no doubt true that the Crown is one and indivisible; nevertheless the question has a great deal of practical and legal importance, especially in view of the fact that according to the Indian General Clauses Act, "the Government of India" means the Governor-General in Council.

It has been claimed that it is the Government of India which is the "paramount power"; that it is with the Government of India that the Indian States have to deal. In support of this claim it has been urged:—

1. That the Government of India Act provides a special machinery for the governance of India.
2. That the Secretary of State is an integral part of this machinery, his rights, powers and duties being defined by statute; that he exercises a controlling and revisional juris-

diction over the Government of India, *i.e.*, the Governor-General in Council.

3. That the Government of India Act, 1858, creating the Secretary of State for India contemplated a separate Secretary of State for India; in other words, so long as the Act remains in force, India could not be placed in charge of the Colonial Office.
4. That the expression "Her Majesty" or "His Majesty" in the Government of India Act means not the personality of the Queen or King but an integral part of the Sovereign Power in the British Constitution.
5. That the Crown, if it intended to take any action in regard to India, could only do so through the machinery created by the Government of India Act and not independently of it.
6. That although constitutionally the territories and the rights held by the East India Co. belong to the Crown, the actual governance of British India has been assigned by Parliament to a definite body, namely, the Government of India subject to the control of the Secretary of State; and that therefore the proper interpretation of section 132 of the Government of India Act is that the treaties with the Indian States are binding upon the Government of India, and that they do not involve relations of a personal character with the King irrespective of his constitutional

position in the British Constitution, or irrespective of the constitution provided by the Government of India Act, 1919.

7. That the treaties with the Indian States were entered into not by the Crown, nor by His Majesty's Government, nor by Parliament, but by the East India Company, which had been vested with Sovereign powers. Similarly, the treaties concluded since 1858 are treaties entered into by the Government of India and not by His Majesty's Government or by the Crown.

Detailed examination of these arguments would, however, seem to show that they are either irrelevant or untenable. The first two arguments are no doubt open to no objection, but they do not exclude the legal nexus between the Crown and the Indian States; in fact, the machinery set up by the Government of India Act, 1919, is merely the medium through which the Crown exercises the rights of governance vested in it.

The third contention does not appear to be either correct or relevant. The Government of India Act, 1858, merely authorised the Crown to create another Principal Secretary of State; it did not contemplate a separate Secretary of State expressly for India, and the rights and powers assigned to the Secretary of State by the Government of India Act may be exercised by any one of His Majesty's Principal Secretaries of State, as was done recently during the late Mr. Montagu's absence from England. More-

over, even assuming that the Government of India Act contemplated a separate Secretary of State, it does not call for any comment inasmuch as it has no bearing on the question under discussion.

The position embodied in the fifth argument is true not only with regard to India alone but also with regard to all rights exercised by the Crown, including rights arising under its relations with foreign States. The mere fact that the Crown must act constitutionally through the agents provided by the Government of India Act does not, it is submitted, prove that such agents are the final authority in all matters relating to India.

The next argument is clearly unsound, because the Government of India Act does not assign the governance of India to the Governor-General in Council (see section 1 of the Government of India Act, 1915). According to Anson, by the Government of India Act, 1858, "the dual control of India was brought to an end and the government of India assigned to the Crown." It is, therefore, clear that the interpretation of section 132 of the Government of India Act, put forward in support of the contention that the relations of the Indian States are with the Government of India and not with the Crown, does not appear to be correct.

As regards the seventh argument, although it is true that as a general rule treaties, proclamations, etc., were, before 1858, expressed to be with the East India Company, and thereafter with the Government of India, the wording takes a variety of forms. For

instance, the Hyderabad Treaty of 1853 is expressed to be between the Nizam and the East India Company. The Jaypur Treaty of 1803 is expressed to be between the East India Company and the Maharaja of Jaypur. The Extradition Treaty of 1867 of Hyderabad is expressed to be with "Her Majesty the Queen of Great Britain."

It is submitted that the treaties entered into with the Indian States, both before and after 1858, derived their validity from express grants from the Crown, and that these grants did not exclude the inherent right of the Crown to enter into treaties; and the fact that this right has been exercised by the Crown simultaneously with the Government of India indicates that the Government of India act merely as agents of the Crown in respect of treaties and other foreign affairs.

On the other hand, the contention that the relations of the States are with the Crown and not with the Government of India may be supported by the following positive arguments:—

1. The treaties with the Indian States were made by the East India Company as an agent or delegate of the Crown. Therefore, when the Government of India Act, 1858, determined the agency of the East India Company the States were brought into direct relations with the Crown. This relationship has not been modified by any subsequent statutory provision; on the other hand, the statutory definitions of Indian States confirm this

relationship. Prior to the Interpretation Act, 1889, Indian States were defined by statutes as "States of India in alliance with Her Majesty" (see, for example, 24 & 25 Vict. c. 67, s. 22; 28 & 29 Vict. c. 37, s. 15). Under the Interpretation Act, 1889, Indian States are defined as "States under the suzerainty of the Crown exercised through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India." It is to be observed that the suzerainty of the Crown is exercised *through and not by* the Government of India; in other words, the suzerainty is vested in the Crown and not in the Government of India or the Secretary of State, and the Government of India are, in respect of the Indian States, merely subordinate agents of the Crown.

2. It is contended that all rights acquired by the East India Company were acquired as agents of the Crown and as such vested in the Crown *ab initio*. The Government of India Act, 1858, which made the obligations arising under treaties expressly binding on the Crown, continued the vesting of the treaty rights in the Crown. There was no specific provision in the Government of India Act, 1858, transferring these rights and obligations to any other person or body of persons. The Government of India Act, 1915, is a

consolidating and not an amending statute; it is therefore clear that no provision of the Act of 1915 can be legitimately construed as transferring from the Crown to the Secretary of State or to the Government of India the rights and obligations arising under the treaties with the Indian States.

Section 33 of the Government of India Act, 1915, has been cited in support of the contention that the rights and obligations under the treaties with the Indian States have been transferred to the Government of India. This contention is based on the ground that the word "India" in section 33 means, according to the General Clauses Act, 1897, not only British India but also the territories of the Indian States. This view, however, does not appear to be correct. The preamble of the Government of India Act, 1915, definitely states that it is an Act *to consolidate* enactments relating to the Government of India; it is not an amending or extending measure. The two most important previous enactments relating to the Government of India are the Charter Act of 1833, and the Government of India Act, 1858. Section 39 of the former and section 2 of the latter, which correspond to section 33 of the Act of 1915, vest the governance of India in the Crown. The preamble, the context and the accompanying

dispatch in one case and the definition of India in the other confine the application of the Act to British India. Section 33 of the Act of 1915 must, therefore, be construed subject to this limitation.

Secondly, the definition of "India" in the General Clauses Act, s. 3, sub-s. 27, is not one of universal or unrestricted application. Section 3 of the General Clauses Act itself excludes the application of the definitions in cases where "there is anything repugnant in the subject or context." Again, if "India" under section 33 of the Act of 1915 includes the Indian States, then it is clear that the superintendence, direction and control of the civil and military government of the States is, as much as that of British India, vested in the Governor-General in Council. It would therefore appear that the Indian States are in this case obviously included in the definition of British India in section 3, sub-section 7, of the General Clauses Act. This interpretation cannot, however, be reconciled with the definition of "India" in the General Clauses Act, according to which "India" means British India together with the Indian States. Further, the fourth schedule of the Government of India Act, 1915, repeals the whole of the Government of India Act, 1858, except section 4. The expression "India" in this

unrepealed section means British India alone. It follows, therefore, that if the definition of India in the General Clauses Act were intended to be applied to the whole of the Act of 1915, some reservation should have been made with respect to its application to this unrepealed section. Finally, the word "India" has been very loosely used in the Act of 1915. In certain places it is intended to include the Indian States, but in others it could not possibly do so. Section 20, for instance, provides that "the revenues of India shall be received for and in the name of His Majesty, and shall, subject to the provisions of this Act, be applied for the purpose of the Government of India alone." The word "India" in this section obviously means British India only. Again, section 67 authorises, with the sanction of the Governor-General, the introduction of measures in the Indian Legislature affecting the Public Debt of India or imposing any charge on the revenues of India. Here, too, "India" could not mean anything but British India. Such instances could be multiplied. It is therefore clear that the expression "India" in the Act of 1915 includes or excludes the Indian States according to the context of particular sections.

It is to be noted that section 33 deals with

the superintendence, direction and control of the governance of India; it has no reference whatever to the vesting of rights in relation to the governance of India. In this connection, attention may also be invited to section 1 of the Statute of 1915; it is evident from this section that the rights in relation to the States *may be exercised as rights incidental to the governance of India.* In other words, such rights may be exercised by the Government of India, as the governance of India is vested in them. But it cannot legitimately be contended that this section transfers the rights in question to the Government of India. The rights contemplated by this clause in section 1 are incidental to, and not included in, the governance of India, and as such the vesting of the governance of India in the Governor-General in Council leaves vested in His Majesty the rights incidental to the governance of India. The clause in question is concerned only with *the exercise of these rights* and not with their vesting. It is also clear from this section that these rights may be exercised simultaneously by the Crown and by the Governor-General in Council, or by any other agent duly authorised by the Crown in its behalf. Even if we accept *arguendo* the interpretation that the sections cited above transfer the rights and obligations arising under the Indian treaties

to the Government of India or to the Secretary of State, such interpretation is clearly contrary to section 131 of the Act of 1915, which expressly provides that nothing in the Act shall be deemed to derogate from the rights vested in the Crown. Moreover, in the words of an eminent authority on Constitutional Law, "it is clear that it is not possible for the Crown to transfer its rights under treaties to the Government of India without the assent of the Indian States (which are the other parties to the treaties)" (*a*).

3. It is obvious that no provision of the Government of India Act, 1915, expressly divests the Crown of the rights and obligations arising under its treaties with the Indian States. Nor can any specific section be construed as effecting this, for, it is a well-established canon of interpretation that "the Crown is not reached except by express words or by necessary implication. In any case where it would be to oust an existing prerogative or interest it is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit

(*a*) Keith, *Constitutional Laws of the Empire.*

terms or makes the inference irresistible" (*b*).

4. Neither the Secretary of State, nor the Government of India, nor both of them combined can, it is submitted, legally be claimed as the final authority in matters relating to the Indian States. It cannot be disputed that the East India Company was an agent or delegate of the Crown in India; under the Government of India Act of 1858, which terminated this agency, the Secretary of State succeeded the Company with the same powers and subject to the same limitations. The status of the Secretary of State under the Government of India Acts is, therefore, clear. The Secretary of State as the successor to the East India Company is only an agent of the Crown. Further, it is a fundamental principle of Constitutional Law that the Secretary of State is responsible not only to the Parliament but also to the Crown for every act done by him in his capacity as a Minister of the Crown. Therefore, every action taken by the Secretary of State in regard to the Indian States is subject to the control of the Crown. In other words, the Secretary of State is not the final authority in matters relating to the Indian States. Again, it is

(*b*) Maxwell, *Interpretation of Statutes*, pp. 117—118.

a well-established principle of law that the Secretary of State is constitutionally a unit and an integral part of His Majesty's Government. His decision is, therefore, the decision of His Majesty's Government and in important matters he is bound by constitutional practice to consult the Cabinet.

The status and character of the Government of India have not been modified by the Government of India Act, 1915. Section 33, which deals with the rights and powers of the Government of India, is a verbatim reproduction of section 39 of the Charter Act, 1833. It follows, therefore, that the Government of India enjoy the status they had under the regime of the East India Company. But before the Act of 1858 the Government of India were subordinate agents of the East India Company, as is clearly evident from a series of judicial decisions on this point. In the *Bank of Bengal* v. *United Company* (2 Morley's Digest), Sir Charles Gray repeatedly speaks of the Company and the Governor-General in Council as holding the relative position of principal and agent. The same view was maintained by the full bench of the Calcutta High Court in *Gopi Mohan Dev* v. *East India Company*. The Chief Justice in *Dhackajee* v. *East India Company* (Perry's Oriental Cases) upheld the contention that

the Governor-General in Council was an agent of the East India Company. It is equally clear from the Government of India Act itself that the Government of India possess a subordinate character, for, under section 33 the Governor-General in Council is bound to obey all orders he receives from the Secretary of State in relation to any matter concerning India. It is also to be noted that, apart from this controlling power vested in the Secretary of State, he also enjoys concurrent authority in all matters relating to India (see section 3 of the Government of India Act, 1915). All these facts make it perfectly clear that the Government of India are only subordinate agents under the complete and unqualified control of the Secretary of State.

The Foreign Jurisdiction Order in Council of 1902 has also an important bearing on this question. This Order in Council shows that the powers and jurisdiction contemplated by the Order are exercised by the Governor-General in Council as a delegate of the Crown in His Majesty's behalf (see Article 3 of the Order in Council, 1902).

It may therefore be legitimately concluded that the rights arising under treaties with the Indian States still vest in, and the obligations still accrue to, the Crown, and that the Secretary of State or the Government of

India exercise these rights under the treaties as an agent or delegate of the Crown. In other words, the Government of India Act provides merely the machinery for the exercise of these rights; it does not divest the Crown of them (*c*).

Sir Sivaswami Iyer, an eminent Indian jurist, has criticised the view set forth above. He holds that "the theory of a *vinculum juris* between the Indian States or princes and the British sovereign otherwise than in his capacity of sovereign of British India has no basis in Constitutional Law." Three arguments have been adduced in support of this view. In the first place, he contends that "it is not correct to say that the treaties were entered into with the Crown irrespective of the sovereignty of British India. The power of making treaties is a prerogative of the Crown. The treaties were entered into either with the East India Company in their sovereign capacity acting on behalf of the Crown, or the Governor-General in Council acting on behalf of the Crown. In either case the Crown acted not in a personal capacity or in the capacity of sovereign of England, but in the capacity of ruler of British India." It is obvious that this argument is fallacious inasmuch as it totally disregards the very elementary

(*c*) When the contention that the States are in relation with the Crown and not with the Government of India was first advanced by the present writer, it evoked a great deal of criticism from several eminent Indian lawyers. It is, therefore, a matter of some satisfaction that the Indian States Committee have accepted the correctness of the proposition.

rule of English Constitutional Law that the Crown is one and indivisible. It is immaterial in what capacity the Crown entered into relations with the Indian States; the States are in relation with the Crown, and the Government of India are merely subordinate agents of the Crown for the purpose of dealing with the Indian States. His second argument is that "the rights and obligations under the treaties are in the nature of covenants running with the land or prædial servitudes. The treaties do not create a mere personal right or obligation, but impose obligations on the Rulers for the time being of the Indian States in favour of the authorities for the time being in charge of the Government of India." This argument is equally ill-founded in law. It is a well-known rule of International Law that treaties of alliance like the Indian treaties are of a purely personal character, and only such treaty rights and obligations as are of an exclusively local nature can be said to "run with the land." Speaking of succession in International Law on the dismemberment of a State, Pitt-Cobbett says: "With respect to the treaty rights and obligations of the parent State, the new State will not, of course, be entitled or liable under any personal treaties, such as treaties of alliance, arbitration, or commerce; but it will succeed to rights and obligations under treaties specifically relating to territory comprised within its limits, such as treaties of cession, or treaties relating to boundaries or relating to navigation of rivers." It is, therefore, clear that if British India were to become an independent State, the treaties between

the Indian States and the Crown would not be binding on the new State, nor would it succeed to rights and obligations arising under such treaties. Sir Sivaswami Iyer's third argument is as follows: "Under the Government of India Act, the Indian Legislature has no right to legislate for the territories outside British India. But the Act contemplates the existence of political relations between the executive Government of India and the Indian States. The executive Government of British India is fully empowered to transact business with the Indian States. One provision which clinches the matter beyond doubt is the provision in section 20, clause 2, according to which the revenues of India include all tributes in respect of any territories which would have been receivable by, or in the name of, the East India Company, if the Government of India Act of 1858 had not been passed. There is surely no clearer proof of subordination to, or of the nexus with, the Government of India than the payment of tribute to the credit of the revenues of India." It is, however, submitted that the mere fact that the Government of India Act contemplates the existence of political relations between the Government of India and the Indian States does not prove that there is no *vinculum juris* between the Indian States and the Crown; on the other hand, it establishes the fact that the Government of India are mere agents of the Crown in dealing with the Indian States. Secondly, it is curious that the eminent jurist has ignored clause 1 of the very same section which he has cited. That

clause states that "the revenues of India shall be received for and in the name of His Majesty." In other words, the tributes paid by Indian States belong to, and are received in the name of, the Crown, although such tributes are earmarked for the governance of India alone. It is, therefore, manifestly clear that section 20, clause 2 of the Government of India Act does not lend the slightest support to the contention that the Indian States are subordinate to, or are in relation with, the Government of India.

The question, therefore, arises, what is the legal character of the relationship existing between the Crown and the Indian States? In answering this question we must not lose sight of two important and fundamental facts. In the first place, it must be remembered that the relationship is purely conventional; it is founded upon agreements between the two contracting parties, modified in certain cases by usage founded upon their consent. It is, therefore, evident that every obligation as well as every right of the Crown must flow from these agreements with the States; that no obligation can be enforced against the Crown and no right claimed or exercised on behalf of the Crown which is not expressly or impliedly provided for in its treaties and engagements with the Indian States. Secondly, it is necessary to bear in mind that the Indian States are not all of the same type, although they present certain common characteristics. As already indicated in the first chapter, the States of to-day fall into three different categories, and no legal conclusion can be held to be

valid unless it makes a due allowance for the differences, sometimes strikingly important, existing between the various classes of the States.

Several well-known writers on International Law have expressed the view that the Indian States are Vassal States, and that the relationship is one of suzerainty and vassalage. Oppenheim is an instance in point. But, as we have already pointed out, the term "suzerainty," if it be construed in its strictest sense, is not applicable to all the Indian States. There is, therefore, no justification for upholding the view that the relationship between the Crown and the States is a relationship of suzerainty and vassalage.

It has been repeatedly asserted by the Government of India that the Crown is the Paramount Power in relation to the Indian States, and that the relationship is one of paramountcy and subordination. Two incontrovertible objections may be urged against this view. First, paramountcy, it must be remembered, is not a technical word, not *vocabulum artis*, and has, therefore, no precise and definite significance, nor does it afford any clear-cut and definite legal concept. Westlake says: "A paramount power, such as this, is defined by being, wisely or not, left undefined. That to which no limits are set is unlimited. It is a power in India like that of Parliament in the United Kingdom, restrained in exercise by considerations of morality and expediency." In other words, the Indian treaties are mere "scraps of paper," and the solemn assurances of the Crown empty and meaningless words. Such is the impartial and judicial

attitude of the great jurist that he unhesitatingly disregards not only the fundamental concepts of International jurisprudence but also the primary principles of justice and equity when he comes to deal with the Indian States. Equally vague and nebulous is the view expressed by the Indian States Committee. They hold that it is not possible to discover any "formula which will cover the exercise of paramountcy" inasmuch as paramountcy is, according to them, governed by "Imperial necessity" and "the shifting necessities of the time." In other words, paramountcy, like equity of the early days, is "a roguish thing"; its potency depends on the elasticity of the conscience of the political authorities in British India; its extent is to be measured by the length of their feet. The evil consequences of such a doctrine are obvious. It leads to a total denial of the sovereignty of the States; it reduces their Rulers to mere cyphers of authority; their internal autonomy becomes a mere control of the wardrobe. For instance, the preamble of the Salt Agreements "extorted" from the Kathiawar States runs as follows: "His Highness recognising the rights of the Paramount Power and duty incumbent on the Chiefs of Kathiawar to regulate the production of salt in Kathiawar. . . ." It is submitted that there was not the slightest ground for interference by the British Government with a view to prohibit the manufacture of salt in the Kathiawar States, and the demand for its prohibition was flatly refused by all the States concerned. Hence the Government of

India were obliged to take resort to the convenient doctrine of paramountcy. Further, it must be borne in mind that the real object of the Government of India in imposing the Salt Agreements was to supplement the revenues of British India; the interference on their part was neither in the interest of the States nor for the benefit of India as a whole. It was, therefore, clearly a claim which could not be supported even by the Indian States Committee. The disastrous consequences of the Salt Agreements have been recognised by several British Indian administrators. Sir Michael O'Dwyer, speaking of the Bharatpur State, said: "This was a great seat of salt manufacture and was one of the most busy and prosperous parts of the State, but it has now a forlorn and depressed appearance, with large areas of land lying waste or deserted owing to bad soil, bad water, want of hands and the inroads of wild cattle. Since the abolition of the salt trade population has become sparse and the jungle has speedily encroached upon cultivation." Another striking instance of the abuse of paramountcy is afforded by the Opium Agreements. When the Government of India demanded that the State of Cutch should abolish the cultivation of poppy and the manufacture of opium, the Government of Cutch refused to fall in with the wishes of the British Indian authorities. It was then asserted on behalf of the Government of India that "in making its opium arrangements with Native States in this Presidency the British Government has acted in virtue of its powers as paramount authority, and the States are

bound to accept its decisions." The obvious object of the Government of India in demanding the prohibition of the manufacture of opium in the Indian States was to increase their revenue at the cost of the States, and international obligation was made to cloak self-interest, and the doctrine of paramountcy was pressed into service to support a claim which was manifestly illegal. An impartial Englishman wrote as follows as early as 1848: "We have no right to expect that, in order to uphold the system from which we derive an enormous revenue, they (the Native States) will subject themselves or their people to loss or inconvenience without receiving from us a reasonable compensation." That the claim of the Government of India was totally groundless and illegal is equally clear from the opinion expressed by the Royal Opium Commission of 1894—95. The Commission stated: "The authoritative extension of such prohibition to the Native States would be an interference on the part of Paramount Power, for which we can find no precedent and no justification, which would be resented by the Chiefs and their people."

Secondly, it cannot be denied that the word "paramountcy" necessarily implies that the Crown, as the Paramount Power, is competent to override the rights and powers expressly guaranteed to the Indian States; that the rights of the Crown are superior to those of the States and, therefore, the authority of the States may be disregarded whenever the Crown deems it necessary to do so. This position is not, however, supported by the treaties and

engagements which the Crown has entered into with the Indian States. Further, it is directly contrary to the first fundamental principle of the relationship between the Crown and the States referred to above.

The danger inherent in the use of the word "paramountcy" is clearly illustrated in Lord Reading's now famous letter to the Ruler of Hyderabad in which an attempt has been made to found the nature and extent of paramountcy on the etymology of the word. There it has been boldly asserted: "The sovereignty of the British Crown is supreme in India, and, therefore, no Ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only upon treaties and engagements, but exists independently of them, and apart from its prerogative in matters relating to foreign Powers and policies, it is the right and duty of the British Government, while scrupulously respecting all treaties and engagements with the Indian States, to preserve peace and order throughout India. The consequences that follow are so well-known, and so clearly applied no less to Your Exalted Highness than to other Rulers, that it seems hardly necessary to point them out. But if illustrations are necessary, I would remind Your Exalted Highness that the Ruler of Hyderabad along with other Rulers received in 1862 a *sanad* declaratory of the British Government's desire for the perpetuation of His House and Government, subject to continued loyalty to the British Crown; that no succession in the Masnad of Hydera-

bad is valid unless it is recognised by His Majesty the King-Emperor; and that the British Government is the only arbiter in cases of disputed successions." It was further added: "The right of the British Government to intervene in the internal affairs of Indian States is another instance of the consequence necessarily involved in the supremacy of the British Crown. The British Government have indeed shown again and again that they have no desire to exercise this right without grave reason. But the internal, not less than the external, security which the Ruling Princes enjoy is due ultimately to the protecting power of the British Government, and where imperial interests are concerned, or the general welfare of the people of a State is seriously and grievously affected by the action of its Government, it is with the Paramount Power that the ultimate responsibility of taking remedial action, if necessary, must lie. The varying degrees of internal sovereignty which the Rulers enjoy are all subject to the due exercise by the Paramount Power of this responsibility." This is eloquence indeed, but neither law nor logic. It betrays considerable confusion of thought and specious colouring of facts which are now the property of history. In the first place, it is curious that such an eminent jurist as the ex-Viceroy of India should have entirely disregarded the very elementary but well-established distinction between sovereignty and paramountcy. The sovereignty of the Crown in British India is one thing; its so-called paramountcy in relation to the Indian States is quite

a different thing. As Oppenheim has pointed out, sovereignty is by no means suzerainty. Similarly, the so-called paramountcy of the British Crown is essentially and fundamentally different from its sovereignty in British India. The sovereignty of the Crown in British India is inherent in it by virtue of the fact that it is the ruling Power in British India. Paramountcy, on the other hand, is *not* a necessary incident of the sovereignty of the Crown; its source and foundation lies in the consent of the States; it arises from the contracts and engagements concluded with the States. It is, therefore, clear that the so-called paramountcy of the Crown consists of those rights and powers, those fractions of sovereignty, which the Indian States have consented to surrender to the Crown. Hence it is evident that the sovereignty of the Crown in British India does not *ipso facto* invest it with any supreme power or authority over the rest of India.

It is also evident that the eminent ex-Lord Chief Justice of England has lost sight of another equally well-established distinction. The difference between "equality before the law" and "equality of status" is recognised by every system of jurisprudence as well as by International Law. It is respectfully submitted that all that the Nizam claimed was that where there was a justiciable issue between the British Government and the Government of Hyderabad, the Nizam could claim equality before the law, and that the mere fact that the British Government are the supreme authority in British India did not confer on

them any special right or privilege in the settlement of such an issue. There was not the slightest intention on the part of the Nizam to dispute the paramountcy of the Crown or to claim for himself equal rank and status. If analogy were necessary, the claim of the Nizam could be supported by the practice of civilised States in cases where there is a dispute between a private individual and a Department of State. The mere fact that a Department of State is a branch of the Sovereign Power in the State does not, according to modern practice, confer on it any special rights or privileges in all such cases. Further, it must be borne in mind that it is a gross misuse of words to apply the term "prerogative" to those rights and powers which have been surrendered to the Crown by the Indian States. The word "prerogative" is a term of Constitutional Law and has a clear and definite meaning. "Legally it extends to all powers, pre-eminences, and privileges" which are inherent in the Crown by virtue of its sovereignty. It is, therefore, clearly inapplicable to those rights and powers which Indian States have ceded to the Crown.

Further, it has been asserted that the paramountcy of the Crown exists independently of treaties and engagements. Is it seriously contended, we ask, that there is any reliable authority in support of this contention? Is there any evidence or tittle of evidence which even in a most distant manner lends support to this claim? Do the undisputed facts of history even remotely corroborate the view put

forward by the learned jurist? The answer is clearly and emphatically in the negative. Three cases have been called in aid to bolster up the claim, but even a cursory examination of law and facts makes it perfectly clear that these cases are entirely foreign to the question and do not even in the most remote degree bear out the contention that the paramountcy of the Crown is independent of treaties and engagements. In the first place, it has been asserted, by way of illustration of the doctrine, that no succession to the Masnad of Hyderabad is valid unless it is recognised by the Crown. It is, however, evident that the claim is ill-founded in law. Succession to the Masnad of Hyderabad is governed by the constitutional law of the State, and the title of a Ruler of Hyderabad, valid according to that law, must be deemed to be valid everywhere. Moreover, the British Government have repeatedly recognised the sovereignty of the Ruler of Hyderabad and his heirs and successors; it follows, therefore, that so long as the treaties are considered valid and binding, the British Government are bound to recognise the succession of a Ruler of Hyderabad whose title is valid according to the law of his State. The evidence of history is equally conclusive on this point. The first treaty with the State of Hyderabad was concluded in the year 1759, but no regular diplomatic relation was established till 1788, when a Resident was sent to the Court of Hyderabad for the first time. Since that year there have been as many as five cases of succession in Hyderabad, but on none of these occasions did the

British Government evince the slightest desire to claim that the succession of a Ruler of Hyderabad is dependent on the recognition and sanction of the British Government. The succession of Naseer-ood-Dowlah in 1829 is interesting from this view-point. To quote Briggs: "Advantage was taken of this opportunity by the Governor-General of India to revise the objectionable style in which the correspondence with the Court of Hyderabad had hitherto been carried on. In speaking of himself, the Nizam used the imperial phrase of *Ma bu Doulut*, or royal self, while the Governor-General made use of terms such as *Niyaz mund*, etc., which admitted an inferiority of rank."

The second case cited in support of the doctrine that the paramountcy of the Crown exists independently of treaties and engagements relates to the alleged right of the Crown to settle all disputes regarding succession in Indian States. Here again the bare facts of history have been totally ignored. In 1850 the Government of India themselves admitted that they had no right to interfere in the internal affairs of an Indian State in cases of disputed successions unless such a right was expressly conferred on them by stipulations in the treaties and engagements (see Aitchison, *op. cit.*, Vol. 8, p. 398). As we have elsewhere pointed out, the right to settle disputed successions may no doubt in certain cases accrue to the Crown, but in all such cases the right arises from express provisions of the treaties and

engagements or by necessary implications of such provisions; in no case can the right be founded on the extent and nature of paramountcy.

Finally, it has been claimed that the right of the British Government to intervene in the internal affairs of an Indian State is another proof of the fact that the paramountcy of the Crown exists independently of treaties and engagements. As elsewhere indicated, the Crown's right of intervention may arise in three different ways—either under treaty stipulations, or by necessary implications of the treaty stipulations, or under circumstances in which the right of intervention accrues under principles of International Law. So far as the State of Hyderabad is concerned, it cannot for a moment be disputed that the right to intervene in the internal affairs of the State of Hyderabad can only arise under principles of International Law. There is not a single word in all the treaties with the State of Hyderabad in which the right is referred to even in the most remote manner. There is not one authoritative document, not one scrap of paper, not one expression in any such document or paper, which can be construed as conferring on the British Government the right to interfere in the internal affairs of the State. This statement is fully substantiated by Lord Dalhousie's Minute of 1851. There the contention put forward by the learned ex-Lord Chief Justice of England has been expressly and specifically impugned. Lord Dalhousie wrote as follows: "Still less can I recognise such a property in the acknow-

ledged supremacy of the Government in India, as can justify its Rulers in disregarding the positive obligations of international contracts, in order to obtrude on native princes and their people a system of subversive interference, which is unwelcome alike to people and prince." He also pointed out that "the interposition of the Government of India in the internal affairs of the Nizam has on no occasion been brought into action, except on the application of His Highness himself." He also admitted that the only case in which the British Government were legally competent to intervene in the internal affairs of the State of Hyderabad was when the effect of mis-government was felt beyond the boundaries of Hyderabad State, and the safety of British India was placed in doubt, or the interest of British subjects in danger. He said: "So long as the alleged evils of His Highness' Government are confined within its limits, and affect only his own subjects, the Government of India must observe religiously the obligations of its own good faith. It has no just right to enter upon a system of direct interference in the internal affairs of His Highness' kingdom, which is explicitly forbidden by the positive stipulations of treaty, which would be utterly repugnant to the wishes of the Sovereign, our ally, and is unsought by the people over whom he rules." This was written in the year 1851, seven years before the ratification of the Indian treaties by an Act of Parliament and the issue of the Royal Proclamation declaring the intention of the Crown to maintain unimpaired the rights and dignities

of the Indian States. It follows, therefore, that the legal position of the State of Hyderabad remains identically the same as it was in the days of Lord Dalhousie. In short, neither law nor history can be tortured to lend the slightest support to the extravagant claims and unjust contentions advanced in the letter under discussion.

The claim that the paramountcy of the Crown exists independently of treaties and engagements is also emphatically negatived by the very document which Lord Reading has cited in support of his contention. The adoption *sanad* of 1862 says: "Be assured that nothing shall disturb the engagements thus made to you so long as your House is loyal to the Crown and faithful to the conditions of the Treaties, grants or engagements which record its obligations to the British Government." In other words, all the obligations which the Nizam owes to the Crown, and all the corresponding rights and powers vested in the Crown are embodied in the treaties and engagements; there is no other source or foundation of the authority of the Crown.

It is therefore clear that no general term can be devised to describe the relationship created by the treaties and engagements between the Crown and the Indian States. The only term, it is submitted, which may justifiably be used in describing the legal character of the Crown in relation to the States is the term "Protecting Power." As we have already seen, the duty of protection is a necessary incident of the relationship of suzerainty and vassalage as well

as that of protectorate. The obligation of the Crown to protect the Indian States arises in every case, whether the State is Vassal, Protected, or "Protected and Guaranteed." The right to demand the assistance of the Crown against external danger is therefore the characteristic of all the States. It cannot therefore be denied that the term "Protecting Power" is the only term which can be applied to the Crown in its relation to the Indian States.

CHAPTER VIII.

THE RIGHTS AND OBLIGATIONS OF THE CROWN.

In the last chapter it has been shown that one of the most important incidents of the relationship between the Crown and the States is that the Crown is under an obligation to protect the States against external aggression. This promise of external security has been expressed in different terms in different treaties, but it is in all cases to the same effect. For instance, Article 2 of the Bahawalpur Treaty of 1838 provides: "the British Government engages to protect the principality and territory of Bahawalpur." Article 5 of the Alwar Treaty runs thus: "as from the friendship established by the second article of the present treaty, the Honourable Company become guarantee to Maharao Rajah for the security of his country against external enemies, Maharao Rajah hereby agrees that, if any misunderstanding should arise between him and the Circar of any other Chieftain, Maharao Rajah will, in the first instance, submit the cause of dispute to the Company's Government that the Government may endeavour to settle it amicably." Similarly, by the second article of the Bharatpur Treaty of 1805, the Crown guarantees the Ruler of Bharatpur security of his State against external dangers. The only excep-

tion to this general rule is the Dholpur Treaty of 1806, Article 4 of which provides, *inter alia*: "Maharajah Ranah hereby agrees to take upon himself the responsibility of adjusting all disputes which may arise either external or internal, and no responsibility for assistance or protection remains with the Honourable Company." It is submitted that this exception is a nominal exception only, for the *de facto* relations between the State of Dholpur and the British Government prove conclusively that this provision of the Treaty has been modified by the consent of both the contracting parties. In other words, an agreement modifying the provision referred to above must be implied from the course of dealings between the Ruler of Dholpur on the one hand and the British Government on the other.

The Crown's obligation to protect an Indian State against external aggression not only extends to active aggression on the part of another State, but it also covers cases where the circumstances prevailing in a neighbouring State or in British India constitute an imminent and direct danger to the existence of the State. But in all such cases the danger must be direct and imminent, and mere apprehension or suspicion on the part of a State does not confer on it the right to demand the assistance of the Crown. As regards British India, it is the duty of the Crown not only to assist and protect a State menaced by circumstances prevailing in British India, but also to take precautionary measures against the occurrence of such circumstances. The Government of India

were therefore merely discharging their obligation when they placed on the Statute Book the Indian States (Protection against Disaffection) Act, 1922, in the teeth of opposition on the part of the Central Legislature. This Act for the first time made it a criminal offence for any person residing within the jurisdiction of the British Indian Courts to spread disaffection against the Ruler or Government of an Indian State, but in practice the Act has remained a dead letter. This is due to the fact that the Government of India have introduced the rule that whereas they would be prepared to sanction the institution of proceedings under that Act, the onus and burden of prosecution should rest entirely on the States. This raises enormous difficulties in the way of prosecuting unprincipled and mischievous journalists who carry on a vehement campaign of calumny and libel against the Princes with a view to blackmailing them. As we have pointed out, it is the duty of the Government of India as the representative of the Crown to see that the interests of the States do not suffer on account of the mischievous activities of British subjects or other persons residing within the territories of British India. But the insistence on the adherence of the rule that each State should take upon itself the task of prosecuting *in British India* the criminals concerned has made it practically impossible for any Indian State to utilise the provisions of the Indian States (Protection against Disaffection) Act. Provisions similar to those of the Indian States Protection Act are found in the *corpus*

juris of Italy and France. (See Article 25, *Leggi sulla Stampa*; and Article 36, *Loi du 29 juillet*, 1881.) But neither of these States requires that a foreign State aggrieved by the propaganda of persons residing within its jurisdiction should send its representative to carry on the prosecution of the criminals concerned. (See, for instance, Article 56, *Leggi sulla Stampa*). The result is that, despite the existence of the statute, British India has become a sort of Alsatia and a hotbed of corrupt journalists and other persons whose sole and single aim is to carry on active propaganda against the Rulers and Governments of the Indian States. It would therefore appear that the Government of India as the representatives of the Crown are not fully cognisant of the obligation which the relationship existing between the Crown and the States necessarily imposes on them.

As we have already indicated, the obligation of protection extends to internal danger in the cases of vassal States and "protected and guaranteed" States. In the case of vassal States the obligation is a necessary incident of the relationship existing between the vassal and the suzerain. In the case of "protected and guaranteed" States, the obligation arises under express provisions of the treaties and engagements. For instance, the Crown is bound by treaty to protect the person of the Ruler of Gwalior, his heirs and successors "and to protect his dominions from foreign invasion and to quell serious disturbances therein." Similar guarantees, as we

have already pointed out, are to be found in the treaties with the States of Orchha and Jaisalmir. A guarantee to the same effect appears in Article 3 of the Treaty of 1818 with the State of Dewas, which runs thus: "The British Government will further protect the Rajahs of Dewas against the attacks of enemies and will aid them in the settlement of any of their rebellious subjects and will mediate in a just and amicable manner in disputes that may arise between them and other States and petty Chiefs."

The extent of the obligation of protection against internal danger depends on the terms of the guarantee given by the Crown, and therefore each case must be examined separately in ascertaining the circumstances under which the obligation will arise. But in general it may be safely contended that the obligation does not arise unless there is a grave and imminent danger to the exercise of that right of sovereignty which has been guaranteed by the British Government or to the maintenance of the power and possession of the ruling dynasty in cases where the guarantee is to that effect. There is a further limitation. The guarantee does not afford an Indian State the right to demand the assistance of the British Government in cases where the danger menacing its existence or the maintenance of its power and possession has been the result of any incapacity or flagrant misrule on the part of its Ruler. This is clearly illustrated in the case of Jodhpur. In 1827, when there was a serious insurrection of important nobles of the Jodhpur State, the British

Government, upon the demand of assistance by the Ruler of Jodhpur, "declared that although it might perhaps be required to protect the Maharaja against unjust usurpation or wanton, but too powerful, rebellion, there was no obligation to support him against universal disaffection and insurrection caused by his own unjust incapacity and misrule." But although in such cases the Crown is competent to refuse to consider the insurrection or rebellion as a *casus foederis*, it is clearly entitled to interfere in the internal affairs of the State in order to put an end to the undesirable state of affairs existing within the State.

It seems necessary to emphasise the fact that where there is only a promise of external security without a clause guaranteeing the maintenance of the position and power of the ruling dynasty, there is no obligation on the part of the Crown to assist the State in times of internal troubles. It was on this ground that the Government of India refused to interfere in the internal affairs of the State of Bahawalpur, when there was a serious conflict between two claimants to the throne of the State. In Aitchison's words: "In 1850 the Nawab proposed to supersede his eldest son . . . and to appoint his third son . . . to be his heir. The Governor-General decided that the Government of India was not called upon to interfere in any way with the selection of a successor by His Highness. When Bahawal Khan died his heir-select succeeded him, but he was deposed by the eldest son. . . . In his difficulties

the Nawab solicited the aid of the British Government, but the Governor-General decided that, according to the treaties with Bahawalpur, the British Government was bound to support the Chief against his external enemies but was not bound to aid him against intestine commotions" (a). Similarly, in 1835, when, upon the outbreak of a rebellion, the Ruler of Indore applied to the British Government for assistance, it was refused on the ground that "the grant of assistance would require a continual interference in the internal affairs of the State, inconsistent alike with the position of Holkar and the policy of the British Government."

Corresponding to the duty of protection is the Crown's right of intervention in the internal affairs of the Indian States. As already indicated, the right may arise in three different ways. In certain cases the right of intervention has been expressly secured by the treaties and engagements. For instance, Article 10 of the Gaekwar's engagement of 1802 provides: "Should I myself, or my successors, commit anything improper or unjust, the English Government shall interfere and see, in either case, that it is settled according to equity and reason." It would therefore appear that Westlake's statement that there was no provision in the treaties with the State of Baroda justifying the intervention of the British Government in 1875 is not correct. The circumstances under which the right of intervention arises in this case depend on the terms of the treaties

(a) Aitchison, *op. cit.*, Vol. 8, p. 398.

and agreements conferring the right on the Crown. It has been contended that "treaties which record an agreement to interfere in the internal affairs of the signatory or of other sovereign States are without any standing in International Law and cannot be made to justify the interference which they contemplate" (*b*). This may be true of independent States which are sovereign in the sense in which the word is used in public International Law, but it cannot be held to apply to the case of a State which is under the international guardianship of another State, for in the latter case the relationship between the guardian State and the minor State being close and intimate, the doctrine of absolute sovereignty cannot be deemed to have complete and unrestricted force of law.

In the second class of cases the right of intervention is a necessary correlative of the duty of protection against internal danger. As we have already indicated, the obligation of protection against internal danger arises either by virtue of the relationship of suzerainty and vassalage or by virtue of the clause of guarantee embodied in some of the treaties and engagements. It has been contended that a treaty of guarantee does not necessarily confer on the guarantor the right of intervention in the internal affairs of the guaranteed State. Halleck says: "But, in treaties of equal alliance between independent and sovereign States, will a stipulation of mediation or guaranty justify generally the inter-

(*b*) Stowell, *Intervention in International Law*, p. 439.

ference of one State in the internal affairs of another, contrary to the wishes of the latter? If the interference is in itself unlawful, can any previously existing stipulation make it lawful? We think not; for the reason that a contract against public morals has no binding force, and there is more merit in its breach than in its fulfilment" (*c*). According to Hall: "It may perhaps at one time have been an open question whether a right or duty to intervene could be set up by a treaty of guarantee binding a State to maintain a particular dynasty or a particular form of government in the State to which the guarantee applied. But the doctrine that intervention on this ground is either due or permissible involves the assumption that independent States have not the right to change their government at will, and is in reality a relic of the exploded notion of ownership on the part of the Sovereign . . . as against a domestic movement it is evident that a contract of guarantee is made in favour of a party within the State and not of the State as a whole, that it therefore amounts to a promise of illegal interference, and that being thus illegal itself it cannot give a stamp of legality to an act which without it would be unlawful" (*d*). But it must be pointed out that the writers on International Law who assert that the right of intervention in the internal affairs of a State cannot arise under a treaty of guarantee are dealing mainly with the question with reference to independ-

(*c*) Halleck, *International Law*, p. 86.
(*d*) Hall, *International Law*, Sec. 93.

ent and sovereign States enjoying external sovereignty in the fullest measure. It follows, therefore, that the statement is not equally applicable in the case of a State under the control or guardianship of another. Bernard is, however, of a different opinion. He says: "A guarantee of a throne to a family, or of a particular form of government to a people—such a guarantee, for instance, as that of the Protestant succession in England, of the power of the Stadtholders in Holland, of the Braganza Dynasty in Portugal, of Monarchical Institutions in Greece—does not, unless by express words or clear implication, extend to internal troubles; and, even when it does, gives to the State undertaking it no right to interfere, unless called upon to do so, . . . the question is less simple, and the principle more feebly applies (if it applies at all) where, as in the case already mentioned of a 'protected' State, or in that of a member of a Federal Commonwealth like the German, there is a partial loss or surrender of independence. The Austrian intervention in Hesse Cassel in 1850 derived some colour, though no justification, from the fact that, for the sake of perpetual defensive alliance and from the sense of a common nationality, the minor German States have substantially submitted to an indifferent, and therefore mischievous, control by confederates more powerful than themselves" (*e*). This view, however, does not appear to be reasonable, especially in view of the fact that the relationship between a

(*e*) Bernard, *Non-Intervention*, pp. 14—15.

protecting State and a protected State necessarily implies a certain amount of control over the protected State; and the guarantee clause in the treaty of protection is not inconsistent with the legal relationship established by the treaty. If, therefore, the treaty of protection is considered valid, the guarantee clause, which is not inconsonant with it, must be deemed to be equally valid, and if it is deemed to be valid it must apply with all its necessary implications, although it must be strictly construed.

In the last group of cases the right of intervention arises under principles of International Law. In the first place, the British Government is entitled to interfere in the affairs of the Indian States on grounds of humanity. Several writers on International Law have denied the existence of the right of humanitarian intervention, but all of them hold that the right exists where there is a special relationship existing between one State and another, such as the relationship existing between a protected State and a protecting State. Arntz says: "When a Government, although acting within its rights of sovereignty, violates the right of humanity, either by measures contrary to the interest of other States, or by an excess of cruelty and injustice which is a blot on our civilisation, the right of intervention may lawfully be exercised, for, however worthy of respect are the rights of States' sovereignty and independence, there is something still more worthy of respect, and that is the right of humanity or of human society,

which must not be outraged" (*f*). Another well-known writer has remarked: "This view, it would seem, is confirmed by the fact that where a State under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, other States of the family of nations are authorised by International Law to intervene on the grounds of humanity. When these human rights are habitually violated, one or more States may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the State thus controlled" (*g*).

It would therefore appear that if the right of intervention in internal affairs can be exercised against an independent and sovereign State, it can be exercised more justifiably against a protected State by the protecting State.

Secondly, the right of intervention may arise when the person or property of British subjects or of subjects of foreign States in alliance with the Crown are in direct and immediate danger, but in such cases it must not be forgotten that in the first instance redress should be sought from the tribunals of the States concerned, and only in cases where no redress can be obtained is the British Government justified in interfering in the internal affairs of the States (*h*).

(*f*) Paya, *Cromwell on Foreign Affairs*, p. 72.

(*g*) Borchard, *The Diplomatic Protection of Citizens Abroad*, cited in Stowell, *op. cit.*, p. 57.

(*h*) The *Don Pacifico Case*, *per* Lord Palmerston in the House of Commons.

The exercise of the right of intervention under these circumstances in the internal affairs of an independent State is considered legal by international jurists. Therefore, there can be no doubt that the Crown is entitled to exercise the right as against the Indian States which have entered under its protection.

The third case, where the right of intervention arises under principles of International Law, is where the circumstances and conditions prevailing within the territories of an Indian State have become a direct and immediate danger to a neighbouring State under the protection of the Crown, or to British India itself. This has been called "the remedial right of self-preservation" by writers on International Law. Hall says: "If the safety of a State is gravely and immediately threatened either by occurrences in another State or aggression prepared there, that the Government of the latter is unable, or professes itself unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal on the supposition that the State from which the danger comes is willing, if it can, to perform its international duties" (*i*). It is evident that this principle applies with greater force to the case of the Indian States under the protection of the British Crown. It must,

(*i*) Hall, *op. cit.*, Sect. 11.

however, be observed that in all such cases, as Kent points out, "the danger must be great, distinct and imminent, and not rest on vague and uncertain suspicion." Mere chronic misgovernment or lack of modern administrative system does not, therefore, justify the exercise of this right of intervention. Maladministration or misrule must be patently grave and unjust in order to constitute a proper and just cause for intervention.

One important point must, however, be borne in mind in this connection. In exercising this right to interfere in the internal affairs of the Indian States it is the duty of the Crown to bear in mind that intervention in defiance of treaties between a Ruler and his subjects invariably leads to the reduction of the Ruler's prestige and authority, and weakens his power to carry on properly the administration of his State. As Sir Charles Metcalfe says: "Another evil of interference is that it gives too much power to our agents at foreign courts and makes Princes and Ministers very much the servants or subjects of their will. An interfering agent is an abominable nuisance wherever he may be, and our agents are apt to take that turn. They like to be masters instead of mere negotiators. They imagine, often very erroneously, that they can do good by meddling in other people's affairs, and they are impatient in witnessing any disorder which they think may be remedied by our interference, forgetting that one step in this course will unavoidably be followed by others, which will most probably lead to the destruction of the indepen-

dence of the States concerned. . . . The advocates for interference would probably maintain that it is right to anticipate mischief and prevent it by decided interference, and, as disorder will sometimes follow our adherence to non-interference, there would be much weight in that argument if our interferences were always productive of good, but we often create or aggravate mischief and disorder by injudicious interference, and prevent a natural settlement of affairs, which would otherwise take place. One of the strongest arguments in my mind against interference is that it is more apt to work evil than good. There is nothing in our political administration that requires so much circumspection, caution and discreet judgment as interference in the affairs of other States. . . . Our attempts to interfere for the better government of the other States have often been wretched failures as to our purpose, but have nevertheless had all the bad effects of interference on the States concerned, as well as on the minds of other States."

Closely connected with the Crown's right of intervention is the right claimed by the Government of India to investigate allegations made against the conduct of the Ruler of an Indian State and to take action upon the result of such inquiries. The present practice of the Government of India is governed by a Resolution issued by them in 1920 (*k*). According to this Resolution, "when in the opinion of the Governor-General the question arises of

(*k*) *Vide* Appendix G.

depriving a Ruler of an important State temporarily or permanently of any of the rights, dignities, powers or privileges, to which he as a Ruler is entitled, or debarring from the succession the heir-apparent or any other member of the family of such Ruler, who according to the law and custom of his State is entitled to succeed, the Governor-General will appoint a Commission of Enquiry to investigate the facts of the case and to offer advice unless such Ruler desires that a Commission shall not be appointed."

It must be pointed out that the Resolution merely embodies the policy of the Government of India. It cannot, therefore, be deemed to be binding on an Indian State except with its express or implied consent. The question, therefore, arises, whether it is possible to discover any sound juristic basis for the appointment of such Commissions of Enquiry. A searching analysis of the Indian treaties clearly proves that they do not afford the slightest justification for upholding the contention that the Government of India are competent to appoint such Commissioners. There is no treaty which expressly or impliedly confers on the Crown the right to try and punish the Ruler of an Indian State (*l*).

It may be contended that sufficient justification for the appointment of such Commissions may be found in those cases in which the Government of India have tried the Rulers of certain Indian States

(*l*) There are, however, *sanads* which reserve to the Crown the right to depose in the event of contingencies expressly specified therein; for instance, the Mandi *sanad*.

and, in consequence of the findings of the trials, deprived them of their ruling powers. This contention does not, however, appear to be sound. In the first place, the instances are too few to form the basis of a settled practice. Secondly, it cannot be disputed that the rights and powers of the Rulers of the Indian States, guaranteed by treaties and engagements, cannot be abridged or curtailed in any manner without their consent. It follows, therefore, that the practice of the Government of India, unless founded upon the consent of the States, must be deemed to be sterile.

It is submitted that the only justification for the appointment of such Commissions of Enquiry is to be found in the right of intervention in the internal affairs of the States which, as we have already indicated, accrues to the Crown under certain circumstances. It cannot be denied that when once the right of intervention has accrued to the Crown, the British Government are competent to take such action as under the circumstances of the case they deem necessary. It is open to them to appoint Commissions of Enquiry, and, in consequence of the findings of such Commissions, to adopt any one or more of the following measures:—

1. Appointment of a British officer or a nominee of the British Government as the chief administrative authority in the State.
2. Imposition of restrictions on the authority of the Ruler and consequent devolution of rights and powers.

3. Pecuniary compensation.
4. Deposition of the Ruler or his exclusion from the *gadi* of the State.

It must not, however, be forgotten that the action of the British Government in taking such measures as they deem necessary must be strictly consonant with principles of natural justice and equity, as well as with their obligations arising under their treaties and engagements with the Indian States. Therefore, in taking any action against the Ruler of an Indian State, the Government of India are bound to observe two important principles:—

(a) the measures adopted must be commensurate with the gravity and seriousness of the case; for instance, it would be neither just nor consistent with the treaty obligations of the Crown to deprive the Ruler of an Indian State of his rights and powers, except where the charge of an extraordinary crime has been sufficiently and satisfactorily proved against him; and

(b) under no circumstance is the Crown competent to exclude from the *gadi* of the State any person who is not either directly or indirectly responsible for the circumstances necessitating the intervention of the Crown.

Judged by these primary principles of equity and justice, the present practice of the Government of India appears to bear the stigma of arbitrariness and injustice. For instance, it is a basic principle of natural justice that no person is presumed to be

guilty until and unless his guilt has been conclusively proved by sufficient and satisfactory evidence. But this sound and salutary rule of criminal justice is totally discarded by the Government of India whenever a Commission of Enquiry is appointed to investigate allegations made against the Ruler of an Indian State. In the course of a debate in the House of Commons, Fox, then a Secretary of State, declared on behalf of the Crown that Indian princes were entitled to the justice which independent Rulers in possession of unabridged external sovereignty could claim under principles of International Law. But such is the policy of the agents of the Crown in India that the Indian Rulers are denied this bare and naked justice which even a hardened criminal is entitled to claim. The rule was enforced for the first time in the Baroda case, when the Ruler of Baroda was forcibly deprived of his sovereign powers pending the completion of the enquiry instituted to investigate the charge brought against him. In the recent Indore case the Maharaja was asked to sever his connection with the State prior to the commencement of the sittings of the Commission of Enquiry; but this unreasonable demand was stoutly resisted by the Maharaja, who preferred to abdicate rather than submit to such an unreasonable and unfair denial of justice. The dangers to which such a rule of procedure is open are clearly illustrated in the case of Rupal, one of the smallest Kathiawar principalities. In this case the Ruler was arrested on the mere suspicion that he was implicated in a murder which

had occurred within the limits of his territories. A Commission of Enquiry was appointed to investigate the charge, and, in consequence of the findings of the Commission, the Ruler was imprisoned like an ordinary convict in a British Indian gaol. After the Ruler had patiently borne the sufferings and indignities of imprisonment for several years, the Government of India came to the conclusion that the verdict of the Commission could not be supported, and decided to release the Ruler on the strength of the petitions presented by his brother Chiefs and subjects. Two or three years after his release, the Ruler of Rupal was restored to his *gadi* and invested with full ruling powers. Could there be a more glaring and flagrant instance of judicial injustice?

The Government of India have also disregarded another elementary rule of criminal justice, recognised by the jurisprudence of every civilised State, that no person other than those against whom a charge has been conclusively proved is liable to any punishment. A striking case in point relates to the State of Tonk. The Nawab of Tonk had amongst his feudatories a Thakur of Lava. In 1867 there was "an attack on the uncle and followers of the Thakur of Lava," in consequence of which an investigation was carried out by the Government of India, and they came to the conclusion "that the tragedy could not have taken place without the knowledge and, indeed, without the instigation of the Nawab." As a punishment for this crime, the Nawab was deprived of his sovereign powers, and

the fief of the Thakur of Lava was sequestered from Tonk and the tribute paid by the Thakur was transferred to the Government of India. The evidence collected by the Government of India may no doubt have established the personal guilt of the Ruler of Tonk, but there was not the slightest justification for punishing the State of Tonk and its future Rulers for all time for a crime for which neither the State nor its future Rulers could even remotely be held responsible. Further, the transference to the British Government of the tribute which Lava used to pay was also a high-handed act of injustice. Emphatic protests were lodged against this unwarranted and unjustified assumption of powers, but neither the Government of India nor the Secretary of State agreed to reconsider the action taken by the Government of India. Upon an impartial examination of the case, the inference is irresistible that the action of the Government of India was not only a total disregard of fundamental principles of justice, but also a clear and flagrant breach of the agreement by which the Crown had guaranteed the integrity of the territory of the State of Tonk.

APPENDIX A.

POSITION OF THE BIHAR AND ORISSA STATES.

The States of Bihar and Orissa may be divided into three classes:—

1. Vassal States, such as Patna and Sonpur.
2. Tributary States consisting of most of the Tributary Mahals of Orissa.
3. Sovereign States, such as Mayurbhanj and Seraikela.

As regards the first group, it is clear that they were originally vassals of the kingdom of Nagpur. In 1803 they were ceded by the Government of Nagpur to the East India Company after the treaty of Deogam, but were restored to Nagpur by the treaty of 1806. They were finally ceded to the East India Company by the treaty of 1826. In 1867 they received *sanads* from the British Government whereby they were recognised as Chiefs with full jurisdiction except in criminal cases in which sentences of death were required to be confirmed by an officer of the British Government. Several other restrictions were imposed on their authority. For instance, it was expressly laid down that the Rulers were "to accept and follow such advice and instructions as may be communicated" to them by British authorities.

The position of these States is perfectly clear. They were originally vassals of the kingdom of Nagpur. In 1826, when they were finally ceded to the East India Company, they became vassals of the Crown, but their rights and powers were not in any wise curtailed or abridged, the treaty of 1826 operating as an acknowledgment or renewal by the Crown of the grant made by

the kingdom of Nagpur. However, it cannot be disputed that the *sanads* of 1867 made several encroachments on the authority of the States, and that such encroachments were clearly unwarranted and illegal in view of the fact that the British Government succeeded to the rights and powers of the Government of Nagpur by virtue of the treaty of 1826, and could not, therefore, claim powers larger than those exercised by their predecessor in title.

The second class of Bihar and Orissa States first came into relations with the Crown in 1803, when they entered into treaty engagements with the East India Company. Before 1803 they were no doubt obliged to pay tributes to the Mahrattas, but this did not involve any restriction on their internal and external sovereignty; in other words, their position was analogous to that of Jaipur, Kotah and Bundi which paid tributes to the Mahrattas. The treaties of the Orissa States with the Company were ratified by the treaty of Deogam between the Raja of Nagpur and the East India Company. In 1889 the first attempt was made to encroach upon the rights and powers of these States. It was proposed to impose restrictions on their criminal jurisdiction, to define and curtail their powers by grant of *sanads*, and to vest in British authorities residuary jurisdiction in judicial and administrative matters. The judicial officer who recommended these proposals did not, however, fail to recognise the fact that "under treaties it is plain that there was no limit on the power of the Chiefs in the administration of civil and criminal justice." These recommendations were not accepted by the British Government, which had in 1821 enunciated their considered policy thus: "Interference should be chiefly confined to matters of a political nature, to the suppression of feuds and animosities prevailing between the Rajas and the adjoining Mahals, or between the members of their families, or between the Rajas and their subordinate Feudatories, to the correction of

systematic oppression, violence and cruelty practised by any of the Rajas, or by their officers towards the inhabitants, to the cognisance of any apparent gross violence by them of their duties of allegiance and subordination, and generally to important points which, if not attended to, might tend to violent and general outrage and confusion, or to contempt of the paramount authority of the British Government." (Bengal Government Records, 1851, No. III.)

However, in 1894 *sanads* were issued to these States curtailing their authority and powers recognised and guaranteed by the British Government. It is stated in the preamble of the *sanads* that the position of the Chiefs "requires to be defined as doubts have from time to time arisen"; but it is perfectly evident that this was a clear misstatement of fact as prior to 1894 the British Government did not have the slightest doubt regarding the authority and position of these States. It is further stated that the *sanads* were intended to guarantee the rights and privileges hitherto enjoyed by the States, but even a cursory examination of the several clauses of the *sanads* makes it manifestly clear that for the first time attempts were being made to abridge the rights and powers of the States. In 1903 these *sanads* were revised on the ground that the status and position of the States "required to be freshly defined," in spite of the fact that a definite and clear statement regarding the position of the States had been embodied in the *sanads* of 1894. In 1915 there was another revision of the *sanads*, and a similar argument for revision was put forward by the British Government.

The last group comprises the three States of Mayurbhanj, Seraikela and Kharsawan. Mayurbhanj was originally under the suzerainty of the Emperor of Delhi, as is evident from the *Farman-i-Shahi* issued by the Emperor in 1724. But apart from the payment of

tribute and the obligations of military services, the State of Mayurbhanj was practically uncontrolled in its internal administration, and was never wholly brought under Imperial jurisdiction. With the decay of the Mughal Empire Mayurbhanj seems to have established itself as an independent State. The Mahrattas, who overran the whole of Bihar and Orissa, did not succeed in establishing their supremacy over Mayurbhanj. It is, therefore, clear that at the time when the State of Mayurbhanj came into relations with the British Government, it was an independent State, enjoying fullest powers of internal and external sovereignty. In 1829 the Ruler of Mayurbhanj executed a treaty engagement with the East India Company whereby the State was placed under the protection of the British Government, but no restrictions were imposed on its rights and powers. In 1894 a *sanad*, similar to those issued to other Bihar and Orissa States, was "granted" to the Ruler of Mayurbhanj. It is clear that this *sanad* was an unjustified encroachment upon the authority of Mayurbhanj, inasmuch as it disregarded the treaty of 1829. The Ruler of Mayurbhanj was not prepared to accept the restrictions which had been unlawfully imposed on his authority, and obtained the opinion of the official counsel to the Government of Bengal. This eminent lawyer was of the opinion that the *sanad* of 1894 "in various ways derogates from his rights as the Ruler of a Tributary State . . . possessing sovereign powers, which, though not unlimited, are yet of considerable extent," and advised the Ruler that he "should, without delay, memorialise His Excellency with respect to that *sanad*, and ask for its withdrawal or amendment." The Maharaja thereupon submitted a detailed memorial to the Government of India in 1896, praying for the withdrawal or amendment of the *sanad*. But the memorial failed to achieve its object.

In the case of Seraikela, similar unwarranted

encroachments have been made upon the rights and powers exercised by the State for more than fifty years after it came into relations with the British Government. These encroachments are not only unwarranted, but also unlawful, being directly contrary to the assurances expressly and otherwise given to the State. They are also diametrically oposed to the solemn pledge contained in the Royal Proclamation of 1858 that "all treaties and engagements made by them (the Indian Princes) will be scrupulously maintained," and that the rights, dignity and honour of the Indian Princes will always be respected.

The question, therefore, arises whether the *sanads* given to the last two groups of Bihar and Orissa States can be considered valid in the eye of the law, and whether the provisions of the *sanads* can be deemed to have curtailed the rights and powers of the States. It must be borne in mind that the relationship between the Bihar and Orissa States on the one hand and the British Government on the other is purely contractual. It follows, therefore, that this relationship founded on agreements cannot be modified or otherwise affected in any manner without the consent of both the contracting parties. The *sanads* of 1894 were not, therefore, originally valid inasmuch as they were not founded on the consent of the States; and the rights and powers reserved to the British Government under these *sanads* were, therefore, tantamount to usurpation. And as Pradier-Fodéré points out, usurpation which is unlawful in its inception cannot be the source of lawful rights. It is, therefore submitted that the position of the Bihar and Orissa States belonging to the second and third groups has not been affected in any manner by the *sanads* issued to them inasmuch as these *sanads* being initially void cannot be said to have acquired legal validity by mere lapse of time.

APPENDIX B.

POSITION OF THE SIMLA HILL STATES.

BEFORE entering upon a discussion of the present status and condition of the Simla hill States, it will not be out of place to refer to three important historical facts concerning them. A critical examination of the history of these States clearly establishes the following points:—

1. that the founders of the Simla hill States were not originally of the Simla hills, but belonged to other parts of India;
2. that all these States were founded by conquest; and
3. that they did not owe their origin and existence to any grant or gift from any suzerain power or overlord.

Before the Gurkhas spread their sway over the entire territory at present known as the Simla hills, the hill States were of two different categories. There were in the first place independent principalities enjoying sovereign power and authority unrestricted in any manner. Such, for instance, were the States of Sirmore, Hindoor, and the *Barra Thakoorai*, which comprised ten independent principalities. The second class consisted of the States of Jubbal, Balsan and Soorahun, which were dependencies on the State of Sirmore. (*Punjab Government Records*, Vol. 2, pp. 393 *et seq.*) Upon the conquest of the hill territory by the Gurkhas, some of the Chiefs were deprived of their power and possession. Others were allowed to remain in full possession and enjoyment of their sovereign authority subject to the payment of tributes to the Government of Nepal. Such, for instance, were the States of Baghat and Jubbal.

When the British authorities decided upon an extensive campaign against the Gurkha power they considered "the expediency of restoring the exiled hill Chiefs to their former possessions, and holding out to them and to their subjects that expectation" with a view to stimulate their exertions in co-operating with the British Government in the expulsion of the Gurkhas, and a proclamation expressly and specifically giving an assurance to that effect was, therefore, issued to the Chiefs of the hill States. This proclamation stated: "the Commander of the British Troops is authorised and directed by his Government to promise in its name a perpetual guarantee against the Goorkha Power and to assure the Chiefs and inhabitants of the hills of *its scrupulous regard for all their ancient rights and privileges.* The British Government demands no tributes or pecuniary indemnification whatever for its assistance and protection."

"Immediately after the expulsion of the Nepal Troops by the British armies in 1815, the Native Chieftains who had been exiled during the former regime presented themselves and laid claim to their estates, which they received under certain stipulations" embodied in the *sanads* issued to them. Similar *sanads* were granted to the States which had not lost their separate existence during the ascendancy of the Gurkha power. All these *sanads*, which are still in force, have transformed the character of the hill States; they have reduced the States from independent principalities to petty vassals of the Crown. Further, some of the important stipulations incorporated in the *sanads* have imposed unjustified restrictions on the ancient rights and powers of the hill States in direct contravention of the clear and distinct assurance given to them in the year 1815.

The process of disintegration of the authority of the

States did not terminate with the *sanads*. Further restrictions have followed, and the rights and powers guaranteed by the *sanads* have been gradually reduced to a mere shadow. For instance, capital sentences passed by the State tribunals are required to be confirmed by the British authorities. The forests of the States have been entirely taken over by the British Government. Interference in judicial matters, both civil and criminal, has become very common. Judicial files are called for inspection on the application of any petitioner and sometimes cases already decided are reopened by the British authorities. Interference in executive matters has become still more common and extensive. The British officer concerned does not hesitate to parade his authority in every matter, however petty or trifling. The British Government have gradually usurped every kind of power and control over the roads which traverse the territories of the States. In excise matters the rights of the States are entirely ignored and the States are required to abide by the instructions of the British authorities. Excise laws of British India have been applied to the States by executive orders, without the consent of the Rulers. It is needless to add that repeated and emphatic protests against such usurpations and unlawful restrictions have been of no avail.

APPENDIX C.

STATUS OF THE EAST INDIA COMPANY.

As we have already indicated, the question whether the East India Company was a sovereign body or merely an agent of the Crown has an important bearing on the discussion of the precise nature of the relationship existing between the Indian States and the British Crown. Opinion is divided on this point. Some well-known Indian lawyers relying on certain judicial authorities (*a*) advocate the view that the East India Company was a sovereign power. It is submitted that this view cannot be sustained. A critical examination of judicial decisions and of Royal Charters and Statutes clearly proves that the East India Company exercised rights of sovereignty merely as an agent or delegate of the Crown under express grants.

This view is founded on several unquestionable arguments. In the first place, the decisions on which the first view is grounded do not support the contention that the East India Company was a sovereign body. In all those cases the question of sovereignty was not expressly raised or decided; it was merely held that the act in question was an Act of State. No doubt in *Rajah of Coorg* v. *The East India Company*, Romilly, M.R.,

(*a*) *The Nabob of the Carnatic* v. *East India Company*, 2 Ves. p. 56; *Gibson* v. *East India Company*, 5 Bing. N. C. 262; *Elphinstone* v. *Bedree Chand*, 1 Knapp. P. C. 316; *Doss* v. *Secretary of State*, 19 Eq. 509; *Frith* v. *The Queen*, L. R. 7 Ex. 365; *Rajah Salig Ram* v. *Secretary of State*, 12 Bengal Law Reports, 167; *Reg.* v. *Shaikh Boodin* (Perry's Oriental Cases), and *Rajah of Coorg* v. *East India Company*, 29 Beav. 300.

remarked that the East India Company was a sovereign power, but this was in the nature of an *obiter dictum* and the question of the sovereignty of the East India Company was neither directly in issue nor argued, nor was the attention of the learned Master of the Rolls invited to relevant authorities.

Secondly, important judicial decisions expressly hold that the East India Company was not sovereign, but merely an agent or delegate of the Crown. In the *Secretary of State* v. *Kamachee Boyee Sahiba* (7 M. I. A., 476) it was held by Lord Kingsdown that the property claimed by the respondent had been "seized by the British Government, acting as a sovereign power, through *its delegate* the East India Company." He expressly stated that "the East India Company exercised delegated powers of sovereignty." It was further laid down by him: "If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which according to the principle of the decision in *Buron* v. *Denman* is equivalent to previous authority," All these extracts clearly show that in the opinion of the great jurist the East India Company was an agent of the British Crown.

The East India Company was a creature of Royal Charters and Imperial Statutes. Almost all Charters unmistakeably indicate that the sovereignty of British possessions in India was vested in the Crown. This is confirmed and emphasised by all Statutes of the Imperial Parliament beginning with the Act of 1813, which declare "the undoubted sovereignty of the Crown in India."

There is still another argument in favour of the view maintained in the present essay. Simultaneous exercise of rights of sovereignty by the Crown and the East India Company under the authority of the Crown clearly proves that the East India Company exercised as agents rights

of sovereignty delegated by the Crown. This is clearly supported by the judgment of the Allahabad High Court in *Lachhmi Narain* v. *Rajah Partap Singh* (I. L. R., 2 Allahabad 1). In this case it was held that the Company acted only in virtue of the authority granted to it by the Crown, and that on Her Majesty taking over the governance of India by the Act of 1858 the rule of the Company came to an end.

Finally, it must not be forgotten that well-recognised authorities on the subject uphold the view that the East India Company exercised rights and powers of sovereignty as an agent of the Crown. "The history of British India illustrates the doctrine that no subject of the Crown can acquire dominion except on behalf of the Crown." (Jenkyns, *British Jurisdiction beyond the Seas*, p. 41, n. See also 6 Bomb. L. R. 131; L. R. 1 A. C. 332, *per* Lord Selborne, and *per* Fitzjames Stephen, Q.C., *arguendo*.)

APPENDIX D.

EXTRACTS FROM ROYAL PROCLAMATIONS.

1. Royal Proclamation of 1858.

"We hereby announce to the Native Princes of India that all Treaties and Engagements made with them by or under the authority of the Honourable East India Company are by Us accepted and will be scrupulously observed and We look for the like observance on their part. We desire no extension of Our present Territorial Possessions; and while We will admit no aggression upon Our Dominions or Our rights to be attempted with impunity, We shall sanction no encroachment on those of others. We shall respect the rights, dignity, and honour of the Native Princes as Our own; and We desire that they, as well as Our own subjects, should enjoy that prosperity and that social advancement which can only be secured by internal peace and good Government."

2. Royal Proclamation of 1903.

"To all My feudatories and subjects throughout India, I renew the assurance of My regard for their liberties, of respect for their dignities and rights, of interest in their advancement, and of devotion to their welfare, which are the supreme aim and object of My rule, and which, under the blessing of Almighty God, will lead to the increasing prosperity of My Indian Empire, and the greater happiness of its people."

3. Royal Proclamation of 1911.

"Finally, I rejoice to have this opportunity of renewing in My own person those assurances which have been given you by My revered predecessors of the maintenance of your rights and privileges and of My earnest concern for your welfare, peace, and contentment.

"May the Divine favour of Providence watch over My people and assist Me in My utmost endeavour to promote their happiness and prosperity.

"To all present, feudatories and subjects, I tender Our loving greeting."

4. Royal Proclamation of 1921 instituting the Chamber of Princes.

"In My former Proclamation I repeated the assurance given on many occasions by My Royal predecessors and Myself, of My determination ever to maintain unimpaired the privileges, rights and dignities of the Princes of India. The Princes may rest assured that this pledge remains inviolate and inviolable."

APPENDIX E.

REPORT OF THE INDIAN STATES COMMITTEE.

THE Indian States Committee was appointed:—

1. To report upon the relationship between the Paramount Power and the States, with particular reference to the rights and obligations arising from (a) treaties, engagements and sanads, and (b) usage, sufferance and other causes; and
2. To inquire into the financial and economic relations between British India and the States and to make any recommendations that the Committee may consider desirable or necessary for their more satisfactory adjustment.

The Report, therefore, deals with two different sets of questions—one purely legal, and the other economic and fiscal. The second set of questions lie entirely outside the province of the present essay. In the following pages an attempt has been made to examine the main historical and legal contributions of the Committee.

Historical inaccuracies.

Some of the important pronouncements made by the Committee are historically incorrect. For instance, the Committee are of opinion that "it is not in accordance with historical fact that when the Indian States came into contact with the British Power they were independent, each possessed of full sovereignty and of a status which a modern international lawyer would hold to be governed by the rules of International Law." They further hold: "None of the States ever held international status. Nearly all of them were subordinate

or tributory to the Mughal Empire, the Mahratta supremacy or the Sikh kingdom, and dependent on them." These statements are entirely unsupported by facts. It is no doubt true, as we have already indicated (*a*), that all the Indian States did not enjoy full and complete sovereignty when they entered into the relations with the British Crown, but this does not mean that *none* of the States could lay claim to the title of independent and sovereign States. Although originally subordinate to the Peshwa, both Sindhia and Holkar were independent Rulers at the time when they came into contact with the British Government. According to Malcolm, the British Government acknowledged Sindhia "as an independent Prince, which was done by the terms of the treaty of Salbæe and by keeping a Resident at his court." Similarly Holkar had declared himself an independent Ruler before the first treaty was concluded between him and the British Government. As regards the State of Hyderabad, according to Briggs, although the Ruler "always professed obedience to the Emperor, even when waging war against him," he became "wholly independent" from the year 1723; and diplomatic relations were contracted with him by the British Government on the assumption that he was an independent Ruler enjoying full and complete sovereignty. The States of Alwar and Bhopal were also independent principalities when they came into contact with the British Government. Similarly the Phulkian States of the Punjab enjoyed complete independence, paying no tribute and owing no allegiance, when they placed themselves under the protection of the British Crown. Further, the treaties and engagements concluded with the Indian States clearly establish the fact that the States, which came into

(*a*) *Vide* Chap. I.

treaty relations with the British Government, were independent and sovereign States *vis-à-vis* the British Crown. For instance, the preamble of the Orchha treaty of 1812 runs as follows: "The Rajah Mahendar Bickermajeet Bahader, Rajah or Oorcha, one of the Chiefs of Bundelcund, *by whom and his ancestors his present possessions have been held in successive generations* during a long course of years *without paying tribute or acknowledging vassalage to any other power*, having on all occasions manifested a sincere friendship and attachment to the British Government, and having solicited to be placed under the powerful protection of that Government, the British Government, relying on the continuance of that disposition which the Rajah has hitherto manifested towards it, and on his adherence to whatever engagements he may form on the basis of a more intimate union of his interests with those of the Honourable Company, has acceded to the Rajah's request, *and the following Articles of a Treaty of friendship and alliance are accordingly by mutual consent concluded between the British Government and the said Rajah Mahendar Bickermajeet Bahader, his heirs and successors.*" Are not these words conclusive of the opinion of the British Government at the time that there were two distinct and independent States entering into treaty relations? Is such a preamble consistent with the view of the Committee that the Indian States were neither independent nor sovereign? Could it be legitimately contended, as the Committee appear to have done, that the State of Orchha was a subordinate vassal of the Mughal Emperor or of the Peshwa?

The Committee have also ignored the fact that the mere payment of tribute does not necessarily imply loss of independence. Under the treaty of 1766 with the State of Hyderabad, the British Government was bound to pay tribute to the Nizam, but this payment can in no

account be held to have curtailed or abridged the independence of the British Government. If the Committee's views were correct, it would mean that the principal Maritime States of Europe lost their independence when they engaged themselves to pay tributes to the Barbary States: a conclusion obviously untenable.

The Committee's statement that none of the States had international status is clearly at variance with the views of well-known publicists as well as of highest British Indian authorities. According to Sir William Lee Warner, "the principles and even the precise language of International Law were generally and properly applied to the Indian States," prior to their acceptance of the protection of the British Crown. Speaking of the Indian States on the occasion of the impeachment of Hastings, Edmund Burke said: "the Law of Nations is the law of India as well as of Europe, because it is the law of reason and the law of nature, drawn from the pure source of morality, of public good, and of natural equity." Sir Robert Phillimore is equally emphatic and considers that the principles of International Law *did govern* and *ought* to govern the relations between the States and the Crown. Lord Dalhousie equally admitted the independence of some of the Indian States and the application of the rules of International Law to such States. (See *The British Crown and the Indian States*, at pp. 37-38.) Even Professor Westlake, from whom the Committee appear to have drawn their legal inspiration, was of the opinion that the rules of International Law were applicable to the Indian States when they entered into relations with the British Government.

Equally startling is the statement that "the Paramountcy of the Crown acting through its agents dates from the beginning of the nineteenth century when the British became the *de facto* sole and unquestionable Paramount Power in India." It is evident that the

Committee are not aware of the fact that the Sikh Power did not lose its supremacy in the Punjab till after the death of Maharaja Ranjit Singh in 1839. Nor do they seem to remember that the kingdom of Burma was not annexed by the Crown till the year 1852. The Committee have also challenged the proposition that the term "subordinate co-operation" used in many treaties is concerned solely with the military matters. It is, however, curious that they have not adduced the slightest shred of evidence in support of their contention.

Criticising the opinion of the eminent counsel of the Princes, the Committee say: "It is not in accordance with historical fact to say that the term 'subordinate co-operation' used in many treaties is concerned solely with military matters. The term has been used consistently for more than a century in regard to political relations. *In these and other respects the opinion of counsel appears to us to ignore a long chapter of historical experience.*" It is strange that the Committee should have questioned the views of counsel on historical grounds when their own opinions are admittedly mere caricatures of the history of the relations between the Crown and the States. It cannot be disputed that if the evidence of history is to be called in aid to support the views expressed by the Committee, a new history of India must be compiled, and unquestioned and established facts must be coloured and tortured.

When historical speculations usurp the place of facts it is not surprising that legal theories based upon such speculations should be obviously unsound. It is not possible within a short compass to examine the various theories propounded by the Committee regarding the legal position of the States. We must, therefore, be content with an examination of the main and striking pronouncements of the Committee regarding the rights and obligations of the States. In the first place, the

Committee hold: "The relationship of the Paramount Power with the States is not merely a contractual relationship, resting on treaties made more than a century ago. It is a living, growing relationship shaped by circumstances and policies, resting, as Professor Westlake has said, on a mixture of history, theory and modern fact." It is submitted that this view is palpably inconsistent with the opinion that the Indian treaties and engagements still retain their binding force and character. If the treaties have not lost their validity, the relationship is, it must be admitted, primarily contractual, and if the relationship is contractual no change or development in the relationship can take place except with the express or tacit consent of both the contracting parties. Professor Westlake no doubt holds that the relationship is not contractual, but he also holds that the treaties have been abrogated by the political changes in the country. It is, therefore, clear that his opinion cannot be pressed into service to support the contention of the Committee.

Nature of the relationship.

The Committee are of opinion that "the novel theory of a paramountcy agreement, limited as in the legal opinion, is unsupported by evidence, is thoroughly undermined by the long list of grievances placed before us which admit a paramountcy extending beyond the sphere of any such agreement, and in any case can only rest upon the doctrine, which the learned authors of the opinion rightly condemn, that the treaties must be read as a whole." It is submitted that this is clearly a *non sequitur*. It is not correct to say that the long list of grievances admit a paramountcy extending beyond the sphere of the paramountcy agreement. On the contrary, they indicate that the agents of the Crown have, in spite of solemn declarations of the Crown regarding the inviolable character of the treaties, made innumerable unjustifiable inroads upon the rights and

The paramountcy agreement.

powers of the Indian States guaranteed by the British Government. The very term "grievance" shows that these were cases of usurpations of power in flagrant violation of solemn promises and public pledges. The argument of the Committee amounts to this—it was necessary for the Crown to disregard the terms of the treaties, therefore the conduct of the agents of the Crown was legal and justifiable; hence the infringements of treaty-rights, of which the States complain, have enlarged and extended the powers of the Crown; in other words, the treaties and engagements of the Indian States are no longer binding—a proposition elsewhere emphatically condemned by the Committee.

Secondly, it is not clear why the theory of a paramountcy agreement, limited in its scope, can only rest upon the doctrine that the treaties must be read as a whole. According to the eminent counsel, paramountcy relates to external and internal security and the control of foreign affairs; the rights and obligations of the Crown in respect of these matters are nearly the same in all the treaties and engagements, and paramountcy consists of these factors which are common to all the States. Apart from these common rights and obligations, the Crown may under a particular treaty possess other important rights and powers, but these depend on the terms and contents of each particular treaty, and do not constitute essential elements of paramountcy. It is, therefore, obvious that the theory that paramountcy comprises definite rights and obligations, does not require the support of the doctrine that the treaties must be read as a whole. On the other hand, it is the view of the Committee regarding the paramountcy of the Crown which can only rest upon this doctrine. According to the Committee, paramountcy embraces all those rights and powers which the Crown enjoys and exercises with regard to the Indian States. It follows, therefore,

Criticism of the Committee's view.

that as the treaties differ in their contents and terms, the content of paramountcy must accordingly differ in different States. But, according to the Committee, the content of paramountcy is the same in regard to all the States. The conclusion is, therefore, inevitable that the theory of paramountcy enunciated by the Committee is clearly untenable unless all the treaties and engagements are read as a whole.

Divine rights of the Paramount Power.

The Committee have translated the doctrine of paramountcy into a theory of divine rights of the Paramount Power. In their hands it has become a doctrine of "sword law," a claim that there is no law but that of force. It would appear that, according to the Committee, paramountcy is a supreme deity in whose name justice and equity may be ignored, solemn pledges and assurances may be disregarded, and duly executed agreements may be set aside whenever necessary. The Committee say: "the Paramount Power has had of necessity to make decisions and exercise the functions of paramountcy beyond the terms of the treaties in accordance with changing political, social and economic conditions." Their argument on this point bears close analogy to the legal jugglery of German jurists in justification of Germany's violation of the neutrality of Belgium.

Breach of treaties as a source of rights.

The Committee take pride in the fact that intervention in defiance of the treaties commenced almost as soon as the treaties were made. They hold that such intervention has always been in the interests of the British Government "as responsible for the whole of India, in the interests of the States, and in the interests of the people of the States." The inaccuracy of this statement is conclusively proved by the evidence which was placed before the Committee by the Chamber of Princes. The Committee have cited the Hyderabad case as one of the earliest cases in which the British

The Hyderabad case of 1804.

Government have interfered in the internal affairs of the States. Three important points must be borne in mind in estimating the evidentiary value of this case. In the first place, according to Lord Dalhousie, "the interposition of the Government of India in the Internal affairs of the Nizam has *on no occasion been brought into action, except on the application of His Highness himself.*" If this statement is correct, the Hyderabad case cannot be considered as a precedent establishing the right of the British Government to interfere in the internal affairs of the States without the consent of the Rulers. Secondly, the testimony of history proves beyond doubt that the intervention of the British Government in the internal affairs of Hyderabad was neither in the interest of India as a whole, nor for the benefit of the State or its peoples; it was, therefore, clearly a case of intervention opposed to the principles laid down by the Committee. As regards the object of intervention in this case, Briggs says: "it was rightly judged that any advantage to be derived by the British from an alliance with the Hyderabad State depended on placing its resources under the control of a minister who should owe his elevation exclusively to their influence . . . two alternatives were open for adoption: either to abandon the alliance altogether, or by direct and authoritative interference to replace it on its proper basis. The adoption of the first must, in justice, have been followed by a renunciation of the territories acquired by the East India Company under the Treaty of 1800, and would in all probability have endangered the political ascendancy of the British over other Powers in India. It was therefore abandoned; the Governor-General having, on due deliberation, determined to enforce with the full right and influence of Government a settlement of the affairs of Hyderabad favourable to the interests of the Company. . . . The real, though not avowed,

object of the British Resident throughout these negotiations was to effect an arrangement which, while it gave to the Nizam the appearance of having exercised his prerogative of appointing his own dewan, left the executive in the hands of a minister who should be indebted to the Resident alone for his elevation to power, and feel that his maintenance in office depended solely on his subserviency to his wishes" (*b*).

Thirdly, according to the Committee, "intervention may take place for the benefit of the Prince, of the State, of India as a whole." In other words, in no other case is the Crown justified in interfering in the internal affairs of an Indian State. But the disastrous consequences of the intervention of the British Government in the Hyderabad case clearly show that this case does not illustrate the principles of intervention enunciated by the Committee. In 1811 the British Resident at Hyderabad pointed out to the Government of India "the progressive injury which the Nizam's affairs were suffering from the rapacious and improvident system under which they were administered." Writing in 1822 regarding the administration of the State under Chundoo Loll, the Minister in the pay of the British Government, the Resident stated as follows: "At present there is the strongest reason to believe that he (Chundoo Loll) lavishes the revenue of the State for the support of his own power, while he leaves the Army unpaid and is burdening the Government with a load of debt, which will hereafter crush the State itself or ruin its creditors." In 1823 the British Resident thus described the administration of this protégé of the Government of India: "*The merits of Chundoo Loll consist in his ready attention to the wishes of the British Government.* . . . The demerits of Chundoo Loll consist in the *gross abuse of the unlimited and irresistible power*

(*b*) Briggs, *The Nizam*, Vol. I, pp. 88 to 92

obtained by our support, in the most vicious maladministration: in a system of extortion which has ruined the country, and destroyed all confidence in the possession of property of any kind." These clear admissions bear out the contention advanced by the Nizam that the financial ruin and the gross maladministration of the State of Hyderabad in the first three decades of the nineteenth century were primarily due to the unjustified intervention of the British Government in the internal affairs of the State.

Sources of paramountcy.

The Committee are of opinion that the paramountcy of the Crown is based upon—

(a) Treaties, engagements and *sanads;*

(b) usage and sufferance; and

(c) decisions of the Government of India and the Secretary of States.

Usage as a source.

As regards the second source of paramountcy, the Committee hold that usage in itself is *not* in any way sterile. In their opinion, "usage has shaped and developed the relationship between the Paramount Power and the States from the earliest times, almost in some cases, as already stated, from the date of the treaties themselves." This bald statement is, however, open to several objections. In the first place, the Committee do not define the term "usage." If they use the term in the ordinary sense in which it is used both in Municipal and International Law, it cannot be denied that valid usage is based upon the presumption of implied consent. It follows, therefore, that where this presumption can be rebutted by strictest evidence, usage cannot have the slightest operative effect. The *dictum* that "usage in itself is not sterile" is therefore clearly opposed to the rule of Municipal Law as well as of International Law. In the Common Law, according to Tindal, C.J., "*Custom comes at last to an agreement* which has been evidenced by repeated acts of assent of

both sides from the earliest times, before the time of memory, and continuing down to our own times, that it has become the law of a particular place." (*Tyson* v. *Smith*, 9 A. & E., at p. 425.) In International Law, as Phillimore points out, usage or custom must "ripen into quasi-contract" before it can have any legally operative effect. In short, consent is the basis of custom or usage in International Law as well as in Municipal Law. The precise effect of usage on the treaty position of the States has already been examined (*c*). It is, therefore, unnecessary to discuss the question once again at length. Secondly, where usage is intended to contradict the specific provisions of the treaties, mere usage unsupported by specific evidence of consent cannot have any legal effect. Usage may rightly be said to "light up the dark places of the treaties," but it cannot on any ground be held to modify or abrogate the specific provisions of the treaties.

The Committee have founded their contention on the fact that "usage is recited as a source of jurisdiction in the preamble to the Foreign Jurisdiction Act, 1890." It must, however, be observed that the preamble merely states that usage is one of the sources of the existing extra-territorial jurisdiction of the Crown; it does not define the nature of usage which can lawfully confer such jurisdiction; nor does it afford any authority for the contention that where jurisdiction is founded upon treaties, the treaties can be modified or abrogated by usage unsupported by the express or tacit consent of the Sovereign within whose territories such jurisdiction is exercised. Further, the Committee appear to have lost sight of the fact that usage which originated during the minority of a Ruler cannot operate to curtail or abridge the rights of a State, inasmuch as such usage was at its inception illegal. The Committee have also ignored the

(*c*) *Vide* Chaps. II and V.

fact that usage which is valid in regard to one State cannot necessarily be valid in regard to another.

Decisions of the Paramount Power.

As regards the third source of paramountcy the Committee held that their contention is based on the decision of the Privy Council in *Hemchand* v. *Sakar Lal* (Bomb. L. R., p. 129). It is submitted that the interpretation put upon this case by the Committee is entirely unwarranted. All that the case decided was that the decisions of the Government of India and the Secretary of States are binding on the authorities in British India; they never held that such decisions were binding on the Indian States as well. This point is made perfectly clear by the paragraph which follows the statement quoted by the Committee.

Pronouncements of the Paramount Power.

Unwarranted reliance has also been placed by the Committee on the declarations of the Government of India. They state that "the Paramount Power has defined its authority and right to intervene with no uncertain voice on several occasions." This view is manifestly unsound. In the first place, it is contrary to the elementary principles of law and justice to assert that the unilateral and *ex parte* declarations of one of the parties to a contract can legally affect the rights and powers of the other contracting party. Secondly, there is absolutely no reason why the declarations of the Government of India should carry greater evidentiary value than the authoritative pronouncement and claims of the Indian States. The declarations of the Government of India are, if in the nature of admission, admissibly only against them, and cannot operate to abridge or curtail the rights of the States. In the third place, the Committee appear to have ignored the very important fact that the history of the relations between the Crown and the States present a striking spectacle of conflicting declarations, and that such declarations and pronouncements "need nothing short of the forcible

methods of a Procrustes" to reconcile them. For instance, no amount of human ingenuity and sophistry could reconcile Lord Dalhousie's Minute of 1851 with Lord Reading's eloquent but unfair outburst in 1926. The only principle that can be legitimately applied in the alignment of those warring pronouncements is that no declaration made after the statutory ratification of the Indian treaties can, even from the standpoint of British Indian law, be legitimately held to curtail the rights and powers of the States. Further, it is curious that the Committee have totally disregarded the authoritative pronouncements, made by highest officials in British India, which are diametrically opposed to the claims asserted by the Committee.

Activities of the Paramount Power.

The Committee have baldly questioned the statement that the so-called paramountcy of the Crown involves definite rights and obligations. Yet in dealing with the rights of the Paramount Power they have not discovered any instance of the exercise of the rights of paramountcy other than those set forth by the counsel for the Princes. They hold that "the activities of the Paramount Power may be considered under three main heads: (1) External affairs; (2) defence and protection; (3) intervention." In other words, the Committee here lend support to the view advanced by counsel that the paramountcy of the Crown relates solely and exclusively to internal and external security.

External affairs.

As regards the first head of paramountcy, the Committee state as follows: "For international purposes State territory is in the same position as British territory, and State subjects are in the same position as British subjects. The rights and duties thus assumed by the Paramount Power carry with them other consequential rights and duties. Foreign States will hold the Paramount Power responsible if an international obligation is broken by an Indian State. Therefore, the Princes

co-operate with the Paramount Power to give effect to the international obligations entered into by the Paramount Power." For lack of comprehension of the legal position of the question and total ignorance of indisputable facts, it is difficult, if not impossible, to surpass this statement. In the first place, it is not correct to say that the territory of the Indian States is in the same position as British territory for all international purposes. For instance, if a criminal, who is alleged to have committed an extraditable offence in France, escapes into an Indian State and takes refuge there, the French Government cannot demand his surrender under their extradition treaty with Great Britain, nor can the Government of Great Britain ask the State concerned to deliver up the fugitive criminal. This is in consequence of the fact that the territory of an Indian State is not in the same position as British territory. In most cases the State concerned may, no doubt, *as a matter of courtesy* surrender the fugitive offenders, but the demand for surrender cannot be considered as a matter of right. Similarly, it is not correct to say that State subjects are in the same position as British subjects. The enactments of the Imperial Parliament as well as of the Indian Legislature clearly establish the fact that, in the view of English Municipal Law, the international position of the subjects of Indian States was not analogous to that of British subjects. This explains the genesis of the Act of 1876, which declared that for the purposes of the Orders in Council specified therein "all subjects of the several princes and states in India in alliance with Her Majesty residing and being in the several dominions comprised in such orders, are and shall be deemed to be, persons enjoying Her Majesty's protection therein." This view is equally the foundation of the fifteenth section of the Foreign Jurisdiction Act, 1890, which runs as follows: "Where any Order in Council made in pur-

suance of this Act extends to persons enjoying Her Majesty's protection, the expression shall include all subjects of the several princes and states in India." Further, if Indian States subjects are for international purposes in the same position as British subjects, where was the occasion for express provisions for the extension to Indian States subjects of the privileges enjoyed in foreign States by British subjects under treaty stipulations? For instance, the Muscat agreement conferring extra-territorial jurisdiction on the Crown expressly provides "that the words 'British subjects' in all treaties between the English Government and the Muscat State shall include subjects of native Indian States." Finally, the bald and unqualified statement that "foreign States will hold the Paramount Power responsible if an international obligation is broken by an Indian State" cannot be supported either by law or facts. It is no doubt true that where there is a breach of an obligation arising under general principles of International Law foreign Governments will hold the British Crown responsible in view of its international guardianship. But where an obligation has been incurred by the British Government on their own behalf or even on behalf of India as a whole, such an obligation cannot be enforced against the States without their consent; nor can foreign States saddle on the British Crown the responsibility for the breach of such an obligation committed by an Indian State. The correctness of this proposition has been admitted by the Government of India themselves. (See *ante*, Chaps. V and VIII.)

APPENDIX F.

I. TREATY OF PROTECTION.*

The Udaipur Treaty of 1818.

Treaty between the Honourable the English East India Company and Maharana Bheemsing Rana of Udaipur, concluded by Mr. Theophilus Metcalfe on the part of the Honourable Company in virtue of full powers granted by His Excellency the Most Noble the Marquis of Hastings, K.G., Governor-General and Thakoor Ajeet Singh on the part of the Maharana in virtue of full powers conferred by the Maharana aforesaid.

Article 1.

Perpetual alliance and unity. "Real," not "personal," union.

There shall be perpetual friendship alliance and unity of interests between the two states from generation to generation and the friends and enemies of one shall be friends and enemies of both.

Article 2.

Promise of protection.

The British Government engages to protect the principality and territory of Oudeypore.

Article 3.

Acknowledgement of British supremacy.

The Maharana of Oudeypore will always act in subordinate co-operation with the British Government and acknowledge its supremacy and will not have any connection with other chiefs or states.

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* For a better example, see Hyderabad Treaty of 1800.

ARTICLE 4.

Restriction on negotiation with other States.

The Maharana of Oudeypore will not enter into any negotiation with any chief or state without the knowledge and sanction of the British Government; but his usual amicable correspondence with friends and relations shall continue.

ARTICLE 5.

Arbitration of the British Government.

The Maharana of Oudeypore will not commit aggressions upon any one; and if by accident a dispute arise with any one it shall be submitted to the arbitration and award of the British Government.

ARTICLE 6.

Tribute.

One-fourth of the revenues of the actual territory of Oudeypore shall be paid annually to the British Government as tribute for five years; and after that term three-eighths in perpetuity. The Maharana will not have any connection with any other power on account of tribute; and if any one advance claims of that nature the British Government engages to reply to them.

ARTICLE 7.

Whereas the Maharana represents that portions of the dominions of Oudeypore have fallen by improper means into the possession of others and solicits the restitution of those places; the British Government from want of accurate information is not able to enter into any positive engagement on this subject, but will always keep in view the renovation of the prosperity of the state of Oudeypore and after ascertaining the nature of each case will use its best exertions for the accomplishment of that object on every occasion on which it may be proper to do so. Whatever places may thus be restored to the state of Oudeypore by the aid of the British Government, three-eighths of their revenue shall be paid in perpetuity to the British Government.

ARTICLE 8.

The troops of the state of Oudeypore shall be furnished according to its means, at the requisition of the British Government.

ARTICLE 9.

Absolute internal sovereignty of the Ruler.

The Maharana of Oudeypore shall always be absolute ruler in his own country and the British jurisdiction shall not be introduced into that principality.

ARTICLE 10.

The present treaty of ten articles, having been concluded at Delhi and signed and sealed by Mr. Charles Theophilus Metcalfe and Thakoor Ajeet Singh Bahadur the ratifications of the same by His Excellency the Most Noble the Governor-General and Maharana Bheemsingh shall be mutually delivered within a month from this date.

Signed: C. T. METCALFE.
Signed: THAKOOR AJEET SINGH.
Signed: HASTINGS.

Ratified by His Excellency the Governor-General this 22nd day of January, 1918, in camp Oocher.

Signed: J. ADAM,
Secretary to Governor-General.

II. TREATY OF PROTECTION AND GUARANTEE.

TREATY OF ALLIANCE BETWEEN THE EAST INDIA COMPANY AND HIS HIGHNESS THE MAHARAO OF KUTCH, 1819.

Preamble.

WHEREAS a Treaty of Alliance, consisting of thirteen Articles, was concluded on the 16th January 1816, with two supplementary Articles, under date 18th June 1816, between the Honourable East India Company and the

Maharaj Rao Bharmuljee and his successors. In consequence, however, of the hostile conduct of the said Rao towards the Honourable Company, and his tyranny and oppression to his Bhayad, it has become necessary for the stability of the alliance between the contracting parties to make certain alterations in the above-mentioned Treaty.

ARTICLE 1.

Repeal and ratification.

It is hereby declared that all Articles of the aforesaid Treaty which are not modified or superseded by any of the Articles in the present Treaty shall be considered good and valid.

ARTICLE 2.

Deposition of the Ruler.

Agreeably to the desire of the Jhareja Bhayad the Honourable Company agrees in declaring Bharmuljee to have forfeited all claims to the guddee of Kutch, and he is accordingly solemnly deposed. The said Bharmuljee shall reside in Bhooj as a State prisoner, under a guard of British troops, subject, however, to be removed to a place of further security in the event of his being implicated in any intrigue, the Kutch government agreeing to pay annually the sum of 36,000 corries through the Honourable Company for the subsistence of the said Bharmuljee.

ARTICLE 3.

Election of the new Ruler.

The infant son of the late Rao Bharmuljee having been unanimously elected by the Jhareja Chiefs to succeed to the vacant throne, he and his legitimate offspring are accordingly acknowledged by the Honourable Company as the lawful sovereigns of Kutch under the name and title of Maharajah Mirzo Rao Dessuljee.

ARTICLE 4.

Appointment of the Council of Regency.

In consequence of the minority of the present Rao Dessul the Jhareja Bhayad, with the Honourable Com-

pany's advice, determine that a regency shall be formed with full powers to transact the affairs of the government. The following are chosen as the members: Jhareja Vijerajjee of Somri Roha, Jhareja Prutherajjee of Naugercha, Rajgoor Odhowjee Hirbhoy, Mehta Luckmidas Wullubjee, Khuttri Ruttonsi Jettani, and the British Resident for the time being. These six persons are entrusted with the executive management of the government of Kutch; and in order that they may perform the service of the State with effect the Honourable Company agree to afford the regency their guarantee, until the Rao completes his twentieth year, when the minority ceases.

ARTICLE 5.

Protection and dynastic guarantee.

The Honourable Company engages to guarantee the power of His Highness the Rao Dessul, his heirs and successors, and the integrity of his dominions, from foreign or domestic enemies.

ARTICLE 6.

Employment of a British force.

The Honourable Company, at the desire of Rao Shree Dessul and the Jhareja Bhayad, for the security of the government of Kutch, agrees to leave a British force in its service. For the payment of this force Rao Shree Dessuljee and the Jhareja Bhayad agree that funds shall be appropriated from the revenues of Kutch. The Honourable Company retains to itself the option of reducing or entirely withdrawing its troops (and relieving Kutch from the expense) whenever, in the opinion of government, the efficiency and strength of the Rao's authority may admit of its being done with safety.

ARTICLE 7.

The money stipulated for in the preceding Article is to be paid in instalments, each of four months, and it is

further engaged that the regency appointed in the 4th Article shall enter into a separate responsibility for the regular payment of the above kists.

ARTICLE 8.

Exclusion of foreign mercenaries.

The Kutch government engages not to allow any Arabs, Seedees, or other foreign mercenaries to remain in its territories, nor generally to entertain any soldiers, not natives of Kutch, without the consent of the Honourable Company's government.

ARTICLE 9.

Restrictions on the importation of arms and ammunitions.

The Kutch government agrees that no foreign vessels, American, European or Asiatic, shall be allowed to import into the territories of Kutch arms or military stores. The Honourable Company engages to supply the wants of the Kutch government in these articles at a fair valuation.

ARTICLE 10.

Internal sovereignty of the Ruler.

The Honourable Company engages to exercise no authority over the domestic concerns of the Rao or of those of any of the Jhareja Chieftains of the country; that the Rao, his heirs and successors, shall be absolute masters of their territory, and that the civil and criminal jurisdiction of the British Government shall not be introduced therein.

ARTICLE 11.

Limitations on the rights of the British Government.

It is clearly understood that the views of the British Government are limited to the reform and organization of the military establishment of the Kutch government, to the correction of any abuses which may operate oppressively on the inhabitants, and to the limitation of the general expenses of the State within its resources.

ARTICLE 12.

Restrictions on intercourse with other States.

The Rao, his heirs and successors, engage not to enter into negotiations with any Chief or State without the sanction of the British Government, but their customary amicable correspondence with friends and relations shall continue.

ARTICLE 13.

Loss of external sovereignty.

The Rao, his heirs and successors, engage not to commit aggressions on any Chief or State, and if any disputes with such Chief or State accidentally arise they are to be submitted for adjustment to the arbitration of the Honourable Company.

ARTICLE 14.

Military assistance to the British Government.

The Rao, his heirs and successors, engage to afford what military force they may possess to the aid of the Honourable Company's government upon its requisition. This Article, however, is not to be understood as imposing any duties on the Jhareja Bhayad contrary to their established customs.

ARTICLE 15.

Opening of the Kutch ports to British vessels.

The Kutch ports shall be open to all British vessels, in like manner as British ports shall be free to all vessels of Kutch, in order that the most friendly intercourse may be carried on between the governments.

ARTICLE 16.

Guarantee to the Chiefs.

The British Government, with the approbation of that of Kutch, engages to guarantee by separate deeds the Jhareja Chiefs of the Bhayad, and generally all Rajpoot Chiefs in Kutch and Wagur, in full enjoyment of their possessions, and further to extend the same protection to Mehta Luckmidas Wullubjee, who, for the welfare of the Kutch Durbar, has acted in concert with the Jharejas, and with great zeal and sincerity.

ARTICLE 17.

Abolition of infanticide.

His Highness the Rao, his heirs and successors, at the particular instance of the Honourable Company, engage to abolish in their own family the practice of infanticide; they also engage to join heartily with the Honourable Company in abolishing the custom generally through the Bhayads of Kutch.

ARTICLE 18.

Previously to the execution of the deed of guarantee in favour of the Jhareja Bhayad, according to the tenor of the 16th Article, a written engagement shall be entered into by them to abstain from the practice of infanticide, and specifying that in case any of them do practise it, the guilty person shall submit to a punishment of any kind that may be determined by the Honourable Company's government and the Kutch Durbar.

ARTICLE 19.

The British Resident or his Assistant shall reside in Bhooj, and be treated with appropriate respect by the Government of Kutch.

ARTICLE 20.

(Abrogated.)

ARTICLE 21.

It being contrary to the religious principles of the Jharejas and people of Kutch, that cows, bullocks, and peacocks should be killed, the Honourable Company agree not to permit these animals to be killed in the territory of Kutch or to permit in any way the religion of the natives to be obstructed.

These twenty-one Articles are binding to the Rao, his

heirs and successors, for ever, and to the Honourable Company.

Done at Bhooj on the thirteenth day of October A.D. 1819.

Signed: JAMES MACMURDO, *Captain and* Resident in Kutch.

[The Governor-General's small seal.]

Signed: HASTINGS.
Signed: J. STEWART.
Signed: J. ADAM.

Ratified by His Excellency the Governor-General in Council this fourth day of December A.D. 1819.

Signed: C. T. METCALFE,
Secretary.

III. ENGAGEMENTS OF VASSALAGE AND SUZERAINTY.

(a) THE MUNDEE SANAD OF 1846.

Preamble. Derivative title of the Ruler.

WHEREAS by the Treaty concluded between the British and Sikh Governments, on 9th March 1846, the hill country has come into the possession of the Honourable Company; and whereas Rajah Bulbeer Sein, Chief of Mundee, the highly dignified, evinced his sincere attachment and devotion to the British Government; the State of Mundee, comprised within the same boundaries as at the commencement of the British occupation, together with full administrative powers within the same, is now granted by the British Government to him and the heirs male of his body by his Ranee, from generation to generation. On failure of such heirs, any other male heir who may be proved to the British Government to be next of kin to the Rajah, shall obtain the above State with administrative powers.

Be it known to the Rajah, that the British Govern-

ment shall be at liberty to remove any one from the Guddee of Mundee who may prove to be of worthless character and incapable of properly conducting the administration of his State, and to appoint such other nearest heir of the Rajah to succeed him as may be capable of the administration of the State and entitled to succeed. The Rajah or any one as above described, who may succeed him, shall abide by the following terms entered in this Sunnud, *viz.*:— The right of the Crown to depose the Ruler.

1st.—The Rajah shall pay annually into the treasury of Simla and Subathoo, one lakh of Company's Rupees as nuzzuranah by two instalments, the first instalment on the 1st of June, corresponding with Jeth, and the second instalment on the 1st November, corresponding with Kartick. Payment of tribute.

2nd.—He shall not levy tolls and duties on goods imported and exported, but shall consider it incumbent on him to protect bankers and traders within his State.

3rd.—He shall construct roads within his territory not less than 12 feet in width, and keep them in repair.

4th.—He shall pull down and level the Forts of Kumlagurh, Anundpore, etc., and never attempt to rebuild them.

5th.—On the breaking out of disturbances, he shall, together with his troops and hill-porters, whenever required, join the British army, and be ready to execute whatever orders may be issued to him by the British authorities and supply provisions according to his means. *Servitium.*

6th.—He shall refer to the British Courts whatever dispute may arise between him and any other Chief.

7th.—In regard to the duties on the iron and salt mines, etc., situated in the territory of Mundee, rules shall be laid down after consultation with the Superintendent of the Hill States, and those rules shall not be departed from.

8th.—The Rajah shall not alienate any portion of the

lands of the said territory without the knowledge and consent of the British Government, nor transfer it by way of mortgage.

9th.—He shall so put a stop to the practices of slave-dealing, suttee, female infanticide, and the burning or drowning of lepers, which are opposed to British laws, that no one shall venture in future to revive them.

It behoves the Rajah not to encroach beyond the boundaries of his State on the territory of any other Chief, but to abide by the terms of this Sunnud and adopt such measures as may tend to the welfare of his people, the prosperity of his country, and the improvement of the soil, and ensure the administration of even-handed justice to the aggrieved, the restoration to the people of their just rights, and the security of the roads. He shall not subject his people to extortion, but keep them always contented. The subjects of the State of Mundee shall regard the Rajah and his successors as above described to be the sole proprietor of that territory, and never refuse to pay him the revenue due by them, but remain obedient to him, and act up to his just orders.

(b) THE MYSORE INSTRUMENT OF TRANSFER, 1881.

Preamble. Derivative title of the Ruler.

WHEREAS the British Government has now been for a long period in possession of the territories of Mysore and has introduced into the said territories an improved system of administration: And whereas, on the death of the late Maharaja the said Government, being desirous that the said territories should be administered by an Indian dynasty under such restrictions and conditions as might be necessary for ensuring the maintenance of the system of administration so introduced, declared that if Maharaja Chamrajendra Wadiar Bahadur, the adopted son of the late Maharaja, should, on attaining the age of eighteen years, be found qualified for the position of

ruler of the said territories, the Government thereof should be intrusted to him, subject to such conditions and restrictions as might be thereafter determined: And whereas the said Maharaja Chamrajendra Wadiar Bahadur has now attained the said age of eighteen years and appears to the British Government qualified for the position aforesaid, and is about to be intrusted with the Government of the said territories: And whereas it is expedient to grant to the said Maharaja Chamrajendra Wadiar Bahadur a written Instrument defining the conditions subject to which he will be so intrusted: It is hereby declared as follows:—

1. The Maharaja Chamrajendra Wadiar Bahadur shall, on the twenty-fifth day of March, 1881, be placed in possession of the territories of Mysore, and installed in the administration thereof.

2. The said Maharaja Chamrajendra Wadiar Bahadur and those who succeed him in manner hereinafter provided shall be entitled to hold possession of, and administer, the said territories as long as he and they fulfil the conditions hereinafter prescribed. Conditional grant.

3. The succession to the administration of the said territories shall devolve upon the lineal descendants of the said Maharaja Chamrajendra Wadiar Bahadur, whether by blood or adoption, according to the rules and usages of his family, except in case of disqualification through manifest unfitness to rule:

Provided that no succession shall be valid until it has been recognized by the Governor-General in Council. Control over succession.

In the event of a failure of lineal descendants, by blood and adoption, of the said Maharaja Chamrajendra Wadiar Bahadur, it shall be within the discretion of the Governor-General in Council to select as a successor any member of any collateral branch of the family whom he thinks fit.

4. The Maharaja Chamrajendra Wadiar Bahadur *Fiducia.*

and his successors (hereinafter called the Maharaja of Mysore) shall at all times remain faithful in allegiance and subordination to Her Majesty the Queen of Great Britain and Ireland and Empress of India, Her Heirs and Successors, and perform all the duties which in virtue of such allegiance and subordination may be demanded of them.

Servitium.

Protection against external enemies. Tribute.

5. The British Government having undertaken to defend and protect the said territories against all external enemies, and to relieve the Maharaja of Mysore of the obligation to keep troops ready to serve with the British army when required, there shall, in consideration of such undertaking, be paid from the revenues of the said territories to the British Government an annual sum of Government Rupees thirty-five lakhs in two half-yearly instalments, commencing from the said twenty-fifth day of March 1881.

6. From the date of the Maharaja's taking possession of the territories of Mysore, the British sovereignty in the island of Seringapatam shall cease and determine, and the said island shall become part of the said territories, and be held by the Maharaja upon the same conditions as those subject to which he holds the rest of the said territories.

7. The Maharaja of Mysore shall not, without the previous sanction of the Governor-General in Council, build any new fortresses or strongholds, or repair the defences of any existing fortresses or strongholds in the said territories.

Restriction on the importation of arms and ammunitions.

8. The Maharaja of Mysore shall not, without the permission of the Governor-General in Council, import, or permit to be imported, into the said territories, arms, ammunition or military stores, and shall prohibit the manufacture of arms, ammunition and military stores throughout the said territories, or at any specified place

therein, whenever required by the Governor-General in Council to do so.

Establishment of British cantonments.

9. The Maharaja of Mysore shall not object to the maintenance or establishment of British cantonments in the said territories whenever and wherever the Governor-General in Council may consider such cantonments necessary. He shall grant free of all charge such land as may be required for such cantonments, and shall renounce all jurisdiction within the lands so granted. He shall carry out in the lands adjoining British cantonments in the said territories such sanitary measures as the Governor-General in Council may declare to be necessary. He shall give every facility for the provision of supplies and articles required for the troops in such cantonments, and on goods imported or purchased for that purpose no duties or taxes of any kind shall be levied without the assent of the British Government.

Limitations regarding the army of the State.

10. The military force employed in the Mysore State for the maintenance of internal order and the Maharaja's personal dignity, and for any other purposes approved by the Governor-General in Council, shall not exceed the strength which the Governor-General in Council may, from time to time, fix. The directions of the Governor-General in Council in respect to the enlistment, organisation, equipment and drill of troops shall at all times be complied with.

Restrictions on correspondence with other States.

11. The Maharaja of Mysore shall abstain from interference in the affairs of any other State or Power, and shall have no communication or correspondence with any other State or Power, or the Agents or Officers of any other State or Power, except with the previous sanction and through the medium of the Governor-General in Council.

Restrictions on the employment of foreigners.

12. The Maharaja of Mysore shall not employ in his service any person not a native of India without the previous sanction of the Governor-General in Council,

and shall, on being so required by the Governor-General in Council, dismiss from his service any person so employed.

British currency to be a legal tender in the State.

13. The coins of the Government of India shall be a legal tender in the said territories in the cases in which payment made in such coins would, under the law for the time being in force, be a legal tender in British India; and all laws and rules for the time being applicable to coins current in British India shall apply to coins current in the said territories. The separate coinage of the Mysore State, which has long been discontinued, shall not be revived.

Free grant of land for telegraph lines.

14. The Maharaja of Mysore shall grant free of all charge such land as may be required for the construction and working of lines of telegraph in the said territories wherever the Governor-General in Council may require such land, and shall do his utmost to facilitate the construction and working of such lines. All lines of telegraph in the said territories, whether constructed and maintained at the expense of the British Government, or out of the revenues of the said territories, shall form part of the British telegraph system and shall, save in cases to be specially excepted, by agreement between the British Government and the Maharaja of Mysore, be worked by the British Telegraph Department; and all laws and rules for the time being in force in British India in respect to telegraphs shall apply to such lines of telegraph when so worked.

Free grant of land for railway purposes.

15. If the British Government at any time desires to construct or work, by itself or otherwise, a railway in the said territories, the Maharaja of Mysore shall grant free of all charge such lands as may be required for that purpose, and shall transfer to the Governor-General in Council plenary jurisdiction within such land; and no duty or tax whatever shall be levied on through traffic

carried by such railway which may not break bulk in the said territories.

Surrender of fugitive criminals.

16. The Maharaja of Mysore shall cause to be arrested and surrendered to the proper officers of the British Government any person within the said territories accused of having committed an offence in British India, for whose arrest and surrender a demand may be made by the British Resident in Mysore, or some other officer authorised by him in this behalf; and he shall afford every assistance for the trial of such persons by causing the attendance of witnesses required, and by such other means as may be necessary.

Criminal jurisdiction over European British subjects.

17. Plenary criminal jurisdiction over European British subjects in the said territories shall continue to be vested in the Governor-General in Council, and the Maharaja of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council.

Restrictions on the manufacture of salt and opium.

18. The Maharaja of Mysore shall comply with the wishes of the Governor-General in Council in the matter of prohibiting or limiting the manufacture of salt and opium, and the cultivation of poppy, in Mysore; also in the matter of giving effect to all such regulations as may be considered proper in respect to the export and import of salt, opium and poppy-heads.

Restrictions on the legislative authority of the State.

19. All laws in force and rules having the force of law in the said territories when the Maharaja Chamrajendra Wadiar Bahadur is placed in possession thereof, as shown in the Schedule hereto annexed, shall be maintained and efficiently administered, and, except with the previous consent of the Governor-General in Council, the Maharaja of Mysore shall not repeal or modify such laws, or pass any laws or rules inconsistent therewith.

20. No material change in the system of administration, as established when the Maharaja Chamrejendra

Wadiar Bahadur is placed in possession of the territories, shall be made without the consent of the Governor-General in Council.

21. All title-deeds granted and all settlements of land-revenue made during the administration of the said territories by the British Government, and in force on the said twenty-fifth day of March, 1881, shall be maintained in accordance with the respective terms thereof, except in so far as they may be rescinded or modified either by a competent Court of Law, or with the consent of the Governor-General in Council.

The Ruler must conform to the advice of the Governor-General.

22. The Maharaja of Mysore shall at all times conform to such advice as the Governor-General in Council may offer him with a view to the management of his finances, the settlement and collection of his revenues, the imposition of taxes, the administration of justice, the extension of commerce, the encouragement of trade, agriculture and industry, and any other objects connected with the advancement of His Highness's interests, the happiness of his subjects, and his relations to the British Government.

Revocation of grant in the event of breach or non-observance of conditions.

23. In the event of the breach or non-observance by the Maharaja of Mysore of any of the foregoing conditions, the Governor-General in Council may resume possession of the said territories and assume the direct administration thereof, or make such other arrangements as he may think necessary to provide adequately for the good government of the people of Mysore, or for the security of British rights and interests within the province.

24. This document shall supersede all other documents by which the position of the British Government with reference to the said territories has been formally recorded. And if any question arise as to whether any of the above conditions has been faithfully performed, or as to whether any person is entitled to succeed, or is fit

to succeed, to the administration of the said territories, the decision thereon of the Governor-General in Council shall be final.

(Signed) RIPON.

Fort William.
1st March 1881.

APPENDIX G.

COPY OF RESOLUTION No. 426/R DATED THE 29TH OCTOBER, 1920, BY THE GOVERNMENT OF INDIA IN THE FOREIGN AND POLITICAL DEPARTMENT.

The Government of India have had under consideration the question of giving effect to the recommendations contained in paragraph 309 of the Report on Indian Constitutional Reforms and are pleased to prescribe the following procedure for dealing with cases of the nature therein referred to:—

When in the opinion of the Governor-General the question arises of depriving a Ruler of an important State temporarily or permanently of any of the rights, dignities, powers or privileges, to which he as a Ruler is entitled or debarring from the succession the heir-apparent or any other member of the family of such Ruler, who according to the law and custom of his State is entitled to succeed, the Governor-General will appoint a Commission of Enquiry to investigate the facts of the case and to offer advice unless such Ruler desires that a Commission shall not be appointed.

The composition of the Commission will ordinarily include:—

(a) A judicial officer not lower in rank than a Judge of a Chartered High Court of Judicature in British India.

(b) Four persons of high status of whom not less than two will be Ruling Princes.

The names of the persons proposed as members of the Commission will be communicated to the person whose conduct is the subject of enquiry, and he will have the right of objecting without grounds stated to the appoint-

ment of any person as a Commissioner. If objection is so taken, the place of such person will be supplied by another person nominated by the Governor-General, but in that case there shall be no further right of objection.

The Governor-General will convey to the Commission an order of reference stating the matter referred for enquiry. The Ruler or other person whose conduct is the subject of enquiry, will be entitled to represent his case before the Commission by Counsel or otherwise. The Commission after hearing the evidence placed before them by direction of the Governor-General and the representations of the Ruler or person, whose conduct is under enquiry, will make their recommendations to the Governor-General in a report. The report will set forth the findings of the Commissioners on the facts relevant to the matter referred for their consideration and their recommendations will be accompanied by a copy of the proceedings and documents placed before the Commission.

The proceedings will ordinarily be treated as secret; but if the Ruler or person, whose conduct is under enquiry, desires publication, the Government of India may publish the proceedings unless there are special reasons to the contrary.

If the Government of India disagree with the findings of the Commission, the matter will be referred to His Majesty's Secretary of State for decision. The Government of India will communicate to the Ruler or person, whose conduct is under enquiry, their reason for disagreeing with the recommendations of the Commission and invite him to make a representation. This representation will accompany the reference of the Government of India to the Secretary of State; when the reference comes before the Secretary of State, the Ruler or person will be entitled to present an appeal to the Secretary of State.

When the Government of India agree with the recommendations of the Commission, their decision will be communicated to the Ruler or person, whose conduct is under enquiry. The Ruler or person concerned will be at liberty to present an appeal to the Secretary of State against the decision of the Government of India.

The cost of the Commission, other than Counsel's fees, will be borne by the Government of India.

Nothing in this resolution will be held to affect the discretion of the Government of India or of a Local Government to take such immediate action, as the circumstances may require, in the case of grave danger to the public safety.

The resolution shall be applicable to the case of all States, the Rulers of which are entitled to membership of the Chamber of Princes in their own right; it is open to the Governor-General to apply the procedure laid down in this resolution to other States also not included in the above category, in cases where it may be deemed advisable to do so.

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