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SOVEREIGNTY AND PARAMOUNTCY IN INDIA.

BY
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SOVEREIGNTY AND PARAMOUNTCY IN INDIA.

CHAPTER I.

PRELIMINARY REMARKS.

INDIA is defined by the Interpretation Act of 1889 to consist of British India (which is in turn defined by the same Act) together with any territories of any native prince or chief under the Suzerainty of Her Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to him. These territories whose princes or chiefs are said to be thus under the suzerainty of the British Crown are commonly referred to as "the Native States of India," or "the Protected States of India," or "the Indian States." In current discussions relating to them the last of these phrases appears to have found most favour. In this study, therefore, we shall speak of "the Indian States," and by the phrase will be meant those States which are included together with British India in India as defined by the Interpretation Act, and which at the same time are frequently described by the other phrases mentioned above.

In regard to any given territory in India, it will always be a question of fact whether it is British Indian territory or the territory of an Indian State. The question may also arise in the form of whether a given territory is an *estate* lying within British India and in the *ownership* of a *proprietor*, perhaps of exalted rank and enjoying special rights and privileges, or whether it is a *state* lying outside British India and which is *subject* to a *ruler*. It is not always easy to determine which

territories are Indian States and which not. The differences in the *apparent* situation of the various Indian States are so great that doubts may arise whether some territories are entitled to this status or not. It is not easy to disentangle the rights proper to Indian States, and therefore it may happen to be hard to say in respect of a given territory that it enjoys such rights as an Indian State does and so is an Indian State. In point of fact, as we shall come to see, rights presuppose status: the status of a territory is a matter of prior determination. It is the first matter of fact to be determined, and the facts upon which it is determined are historical. Such facts must vary greatly from case to case, but when they are investigated they will usually make it plain what the status of a given territory has been and is, whether by war, treaties and other historical acts it has been incorporated in British India, or whether it has been treated as an Indian State. In any case, such questions have by now been generally cleared up, and it is fairly settled which territories are Indian States and which are not. The case of *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, (1906) A. C. p. 212, shows in connection with the Kathiawar States how the solution of such questions is reached, and there are earlier cases referring to Kathiawar and the Orissa Mahals which will be mentioned later.

The position of the British Crown in India is that in relation to British India it exercises full sovereignty, and in relation to the Indian States it occupies the position of the Paramount Power. This is a general statement which is evidently capable of, and requires, further elucidation; for instance, as to what is the difference between the position of a full sovereign and that of a Paramount Power, as to what is the position of a Paramount Power or the nature of paramountcy, as to the persons or authorities by whom such sovereignty and paramountcy are exercised and enjoyed.

It is the object of this study to attempt an elucidation of the foregoing general statement and to do so from a legal standpoint, but rather as regards the question of paramountcy and the problem of the Indian States than as regards British

India and the sovereignty of the British Crown therein: for the latter point suffers from no obscurity, but the former from a very considerable degree of it. Such a study demands a certain preliminary justification, for to regard the problem of the Indian States from a legal standpoint may appear to some an anomalous proceeding.

It is sometimes claimed that the relations of the Indian States with the Paramount Power are governed by political and not by legal considerations. Such a phrase may bear one of two meanings. In the first place, it may mean that the relations of the parties are a matter of pure fact, to which considerations of *rights* have no application. Whatever is actually from time to time done between the parties is the only point to be ascertained, and whatever this may be, it can be tested by no criterion of rights whatever. This is naturally an idea repugnant to the Indian States: and it is an idea which has never been positively stated by the Paramount Power. On the contrary, the Paramount Power has always regarded its actions as justifiable in terms of rights. In early days it has sometimes refrained from courses of action on the ground of their incompatibility with rights (at that date, in its opinion, rights belonging to international law). In later times, the view of the Department of the Indian Government directly concerned is virtually set forth in Sir Robert Lee-Warner's book, "The Native States of India," which is an attempt to express in legal terms and to justify, upon roughly equitable principles, the course of action actually pursued in relation to the Indian States. Controversy followed this publication, in which the eminent jurist Professor Westlake took part, and that controversy was directed to the question of the status of the Indian States from a *legal* standpoint. The same point of view is implicit in most of the important dispatches and documents bearing on the subject down to the most recent of them, Lord Reading's correspondence with the Nizam in 1926. Finally the Indian States Committee (generally referred to as "the Butler Committee"), in its Report published in 1929, considers that the rules governing

the relations of the Indian States to the Paramount Power form a very special part of the constitutional law of the Empire (though just how much this may mean is another question). Clearly there has thus been a constant appeal to notions of rights by both parties, and also on the whole to the cogency of particular branches or principles of law in regard to this problem. It is not really conceivable that at the present day the Paramount Power should abandon this order of ideas and declare baldly that whatever is, is right.

The second meaning which the statement under consideration may bear is that the rights between the parties are not referable to, or determinable by, the principles of any of the recognised branches of law. There are rights between them which ought to be respected, but they are not rights which relate to either international, or constitutional, or municipal law. Such rights, however, are certainly regarded as at least quasi-legal: and they might perhaps be described as "political rights." They have nothing to do with international law, as it would be impossible in international law to uphold many of the actions of the Paramount Power which claims to exercise these "political rights." An attempt to systematise them leads to the statement that the relations of the Indian States and the Paramount Power are governed by a special body of rules, *sui generis*, which Lee-Warner calls "Indian Political Law." This is apparently the doctrine which underlies the Report of the Butler Committee. The first portion of the terms of reference of that Committee were—

"(1) to report upon the relationship between the Paramount Power and the Indian States with particular reference to the rights and obligations arising from:—

- (a) treaties, engagements, and sanads, and
- (b) usage, sufferance and other causes."

In this skilfully drafted paragraph there is no reference to law or legal principles as either the source or the test of any of the rights and obligations in question: and it is perhaps significant that the Committee in their remarks upon the Opinion

of Counsel submitted to them on behalf of certain of the Indian Princes, though they enumerate various points in which they accept or reject that Opinion, make no reference to the conclusion which stands at the head of that Opinion, namely, that:—"In the analysis of the relationship between the states and the Crown legal principles must be enunciated and applied." The statement of the Committee, already referred to, that the rules governing the relations of the Indian States and the Paramount Power form a very special part of the constitutional law of the Empire, is also worded so as to admit of the recognition of such a special body of rules.

Such an attitude, however, is really identical with that examined already. If the relationship between the Indian States and the Paramount Power is governed by the rules of Indian Political Law, what are these rules? They are merely the rules collected from the practice prevailing between the parties (including their practice in regard to treaties), which may not be tested by any principles of general jurisprudence external to themselves. Again whatever is, is right: but such a claim, as we have seen, has never really been made. The coinor of the name "Indian Political Law" is constantly appealing to some kind of equity and right to justify the rules he collects from practice: and what it comes to is that the relationship in question is to be governed by rules which are collected from practice and then justified by principles of so-called equity, but these principles may only be imported *ex post facto*, must be brought in piecemeal as required, and virtually detached from the general body of jurisprudence so as not to be themselves ordered or tested at all. The final result will be that, while our system of jurisprudence has covered the whole range of rights in the *practical* sphere of human activity, there is still one corner of that sphere which is not so covered, and in which rules may on occasion prevail, similar to those prevailing in some branch or branches of our comprehensive system, but falling outside it. This is a most illogical and unsatisfactory circumstance. The fact is that once rights, duties, obligations, appeals to systems of law, justifications upon equitable prin-

ciples are admitted, as they have been here, it will be found that they fall somewhere into the system of jurisprudence, and cannot be arbitrarily detached therefrom and thereby from their own premises. Thus to say that there are rights between the parties, but that they are "political" rights and governed by "Indian Political Law," is merely to describe in an apparently legal phrase a state of affairs in which facts alone have force.

The Butler Committee appears to have been chary of arguments from, or in reply to, legal principles in its report: but such an attitude is not, for the reasons given, tenable. There is ample reason to submit the phenomena examined by that Committee to legal analysis. It is certain that the Indian States will not forego their contention that this should be done. It is also certain that the adoption of this point of view will make the relations of the parties far more amicable, and that time and circumstances have made it necessary that such a point of view should now prevail: and this belief is, in the last event, the ground for this study being attempted.

CHAPTER II.

THE LEGAL STATUS OF THE INDIAN STATES.

THE first point to be decided is where to look for the principles of law applicable to the relationship between the Indian States and the Paramount Power. This is the object of considering the legal status of the Indian States. Such a question cannot be solved *a priori*, but only after consideration of the facts, so that there has been a tendency to treat this question as an appendix to the study of the practical details of the relationship in question: but it is really a question which must be answered at the outset if the whole problem is usefully to be studied from the legal point of view. Rights and claims will have to be tested, ordered, justified: according as the status of the parties makes applicable international law, private law, or constitutional law, different principles will become applicable and different results will be arrived at. In our opinion also there has been a confusion between two sets of facts, namely, the facts of the practical working of a system, and the facts of history from which that system has sprung. It is really the latter that concern us here.

Mainly, two theories have been held as to the status of the Indian States: they have been thought to be subject to either *international* or *constitutional* law. Recently a third view has been put forward, which is really a variant of the first of those already mentioned, and may be described as the *contractual* theory. It will therefore be necessary to examine (1) (a) the international theory; (b) the contractual theory; and (2) the constitutional theory.

(1) (a) The International Theory.

Various points appear to favour the idea that the Indian States are subjects of international law.

At one period, apparently, the British Government in India considered that they, or some of them, were. Thus in 1822 Lord Hastings refused to adopt a suggested course of action in regard to the Nizam of Hyderabad on the ground that no principle of the "law of nations" left room for us to act on the presumption underlying the action suggested. Lord Hastings made at the same time a distinction between States "professedly feudatory," and those "standing in the denomination of allies." Again, down to 1858, intervention to prevent misgovernment in Indian States was held to be impossible, because they were independent states, and the remedy where an intolerable situation arose was the remedy of international law, war and, if necessary, annexation, as in the case of Coorg in 1834. Further, as to the status of Indian States as "allies," it should be observed that in Acts of Parliament they are described as "states in alliance" with the British Government down to the Interpretation Act of 1889.

The instruments which have been concluded between the Indian States and the Paramount Power are generally described as *treaties*. There may be *engagements* given by Indian Princes, or *sanads*, that is *grants*, made by the Paramount Power. But in the case of all the greater states the major instruments are treaties described as such, and made between the duly accredited representatives of two powers apparently alike in status. These treaties were made for the most part before 1858, when, as remarked above, the theory seems to have prevailed with the British Government that the Indian States were international units.

The "Indian States" are said not to form part of the King's Dominions. This was declared to be the law as regards one group of states by the Judicial Committee of the Privy Council, so as to exclude an appeal to that body from the court of a political agent. Again, it is stated by Ilbert, "their territory is not British territory." He further says, "their subjects are not British subjects." As regards the subjects of Indian States, they do not pay revenue to the British Government, they are not, while in their own territories, amenable to British juris-

diction, they require naturalisation in order to become subjects of British India. Above all, in this connection, British law does not, generally speaking, apply within the territories of Indian States, and British courts do not exercise their functions therein.

This last incident is a part of the situation of general autonomy in their internal affairs which is enjoyed by the Indian States. However subordinate, on any theory, they may be to the British Government in their external affairs, internally they are ruled by their own Princes, who are in varying degrees the fount of law, justice and executive power within their own territories.

Finally, it may be mentioned that an Indian Prince enjoys the same immunity from the jurisdiction of the British courts as is accorded to the sovereign of a foreign state.

Much can, however, be urged in specific answer to these various points.

The Paramount Power no longer admits, and for a long time past has not admitted, that the Indian States enjoy an international status like its own, and that the principles of international law are applicable to its relationship with them. In Gazette No. 1700 E. of the 21st of August, 1891, the Government of India laid it down that:—

“The principles of international law have no bearing upon the relations between the Government of India as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter.”

This attitude was strongly re-asserted in the correspondence, above referred to, of Lord Reading with the Nizam in 1926. This may be an *ex parte* statement, but at least it cancels the earlier expressions, and suggests that the position may have changed since those were made.

It has been suggested by Professor Westlake, writing in 1910, that the Indian States could not be subjects of international law because that law only applied to those states by

whose consent that law was operative; namely, in his opinion, at that time, the European states, the extra European states of European population, and possibly Japan, though the adhesion of Siam, Persia and China to the Hague Court brought them to some extent within the system by evidencing their consent. This is hardly an adequate statement of the position at the present time, nor was it perhaps even so at the time that it was written. It is, however, at least clear that the Indian States could not claim to enjoy in international law a position of sovereignty equal to that enjoyed by the Paramount Power. But international law can find room in its system for states which are described as semi-sovereign. Such states are exceptional and their existence is always clearly recognised by explicit international instruments. Such a status has never been recognised as belonging to the Indian States: the British Government, as the power protecting such semi-sovereign states, would need to be a party to such recognition, and it never would be now, nor ever (we may venture to assert) would have been since the time of Lord Wellesley's Governor-Generalship, whatever its views as to the applicability of the principles of international law to its own dealings with the Indian States between that time and 1858.

Against the refusal to intervene, followed by the penalty of annexation, as practised down to 1858, must be set the practice of intervention after 1858. This, it is suggested, was a wrongful usurpation: it may rather be the consequence of a change in the whole position.

As regards the exclusion of the territory of Indian States from the King's Dominions, this is really a corollary of the internal autonomy they enjoy. Such autonomy need not imply an international status, even though it be in any respect wider than that of any other unit in the British Empire: which was indeed, until recently, the case, seeing that the British Parliament never could pass a law for an Indian State. As to the nationality of Indian States' subjects, although in India they are not British (which really means British Indian) subjects, unless naturalised in British India, they receive and are entitled

to the same protection and privileges abroad as British Indian subjects. This may be an unimportant point, since such a state of affairs would follow in any case from the surrender by the Indian States of the conduct of their external affairs to the Paramount Power. It may, however, be observed that Professor Westlake took the view that the naturalisation of Indian States' subjects in British India was an act without international significance, and that the nationality in international law of Indian States' subjects was that which outside powers were compelled to attribute to them, namely, British.

This wide degree of internal autonomy, together with the status accorded to their rulers by the British Courts, very naturally suggests that the Indian States enjoy an imperfect international status, regulated by treaties concluded down to 1858, and at the date of which, in the earliest instance, the state concluding the treaty was possessed of a perfect international status. To admit this, however, is to ignore the facts of the situation and the development of history.

Even as regards the historical situation at the given point where a State first made a treaty with the British in India, this theory is not as a general rule accurate. Practically every State in India at the given date acknowledged a suzerain, whether some Maratha chieftain, or the Peshwa as head of the Maratha confederation, or the Mogul Emperor of Delhi, or, in the case of the Sikhs, the government of Ranjit Singh. Whatever the value in practical affairs of such an acknowledgment, it cannot be wholly disregarded: it was by no means so disregarded by the Indian States themselves. Even in Lord Hastings' time the Nizam refused to do what the Wazir of Oudh did and assume the title of King, on the ground of his allegiance to the Emperor of Delhi. In surveying this field, the enquirer soon becomes conscious that it is impossible to apply the clear-cut notions of western political thought to the shifting entities of Indian politics, linked by allegiances as definite in sentiment as they appear unsubstantial in practice, as near in internal organisation to the estates of oppressive landlords or the camps of invading armies as they are to political states or the seats of

regular governments. If an enquirer turns to the internal organisation of the Maratha confederation, he is confronted by something different from any western state or confederation of states. That organisation is nothing more than an elaborate arrangement for the distribution of the share of the land revenue claimed from conquered, occupied, or plundered territories: to the process of collecting such share certain judicial and administrative functions are necessarily annexed. But that is a state of affairs which does not remotely resemble even the earliest stage of feudalism in the west. Although in feudal society the conception of sovereignty had not been arrived at, the actual functions of the superior authorities fall into the same three categories as sovereign rights in the later sense—the legislative, the executive, the judicial. In feudal times, as in later times, the superior authorities of western societies were concerned with these functions. The distribution of these functions was to some extent regulated in feudal times on the basis of the tenure of land, but land was held on service and not on partition of its produce. Land revenue in that sense never comes into the scheme of the rights of the superior or sovereign in western politics. But in India the position is quite different. The great functions of western sovereignty are unimportant, and the mark of internal sovereignty is everywhere found to be nothing but a claim to some sort of lordship of the land issuing in a right to a share of its produce. A State or States of this kind have none of the internal organisation or cohesion which would enable them to assume the external modes and mien of independence proper to a state which is a full external sovereign in the western sense. Another factor in sovereignty in the west is in the origin of the modern units, which derive as a general rule from national unity, or from claims of legal (usually hereditary) rights. Taking the Maratha States again, the case is entirely different: allowing for the accident of date which determined a different mode of recognition, no Maratha State differs in origin from the State of Tonk, which was created by the British in favour of a successful brigand. The Maratha chieftains equally proceeded

from brigandage to a claim of territorial sovereignty; Amir Khan might have done the same, had not the British first defeated him and then granted him such sovereignty themselves. Analogies have been drawn between the position of the subordinate princes in India and those of the Holy Roman Empire; but even this analogy could never have been carried through if the question had had to be thrashed out, for, apart from what has already been said, there was no statute, no juridical definition in India comparable to that of the Empire in the West. Much less could any subordinate prince have been equated, except in casual, day-to-day political practice with a western state like England or France. At the most, and ignoring much of the above, three potentates only might at some time or other during the period in question have asserted such a status—the Emperor of Delhi, the Peshwa, and Ranjit Singh. These three Powers have all disappeared, and the last survivor of them, the last of the Moguls, was deposed and tried for treason against the British Crown after the Mutiny. It is therefore quite unsound to regard the Indian States as subjects of international law, even at the period when the British Government in India was regulating its practice by the principles of that law, and entering into treaties with Indian States upon an apparent footing of equality. It did so because it could conceive no other practice, and at that time statesmen could not discern the essential distinctions which existed.

Much less does this theory of the status of the Indian States take into proper consideration the course of historical development, as distinct from the supposed historical situation at a now relatively remote date. Let it be assumed that at some such date each Indian State was possessed of full international status. The subsequent development of history appears none the less, independently of all other considerations, to have deprived them of this. It will be well briefly to summarise this development. The history of the British in India falls into three periods. The first, which may be held to end at the grant of the Diwani of Bengal in 1765, may be neglected for our present purpose. With that grant the East India Com-

pany became an Indian power similar to the powerful Indian states then existing. The next period is occupied with the rise of the East India Company to the position of dominant and Paramount Power, and with the extension of the dominions under its direct sovereignty to the full limits which have since been maintained. This process was completed with the annexation of Oudh in 1856, and the period ends with the proclamation of the direct sovereignty of the British Crown in 1858. The third period extends from 1858 to the present day: its history is the history of the internal administration of a unified empire by the British Crown in India, and the relations of that empire with the world beyond its borders.

In the two aforesaid periods since 1765, the relations of the British in India and the Indian States have passed through three major phases. The first extends to the close of the governor-generalship of the Marquis Wellesley, and is the phase in which the policy of the ring fence and its concomitant, the subsidiary treaty, prevailed. In this phase the Company defended its frontiers by defending the further frontier of the states on its own borders at the expense of those states. The forces maintained in those states on this basis were used, especially by Lord Wellesley, for the purpose of securing the Company's interests in those states, but the object was always to keep at arm's length from the Company's territories war and invasion. The extension of the Company's territories was on the whole limited, and it was desired to avoid any general responsibility for the peninsula as a whole. The next phase was initiated by the Marquis Hastings, with his treaties of subordinate co-operation. In this phase, the Indian States were isolated from the outer world, and also from each other. With some fluctuations and uncertainty of reasoning a positive paramountcy was developed, and the sense of the responsibility of the British for the condition of the whole peninsula grew to maturity. Concurrently the whole of India up to its natural boundaries was incorporated in the Empire of the British, a process completed with the Sikh wars. The third phase began in 1858. Its distinguishing feature is the renunciation of further extensions of the territory of British India, and the

development in practice of the exercise of the responsibility of the British for the condition of the whole peninsula, that is to say, of what may be from that date onwards described as the two portions of the British Empire in India, British India and the Indian States. The history of this practical development falls into two minor phases, a phase of relative suspicion and aggressiveness towards the Indian States extending to the time of Lord Minto, and a phase of conciliation, relaxation and confidence from that time onwards.

This is a course of development which it is impossible to ignore in considering the present status of the Indian States. The important point is that the status of the British in India has utterly changed since the period from 1800—1825; correlatively so has that of the Indian States, whatever assumption is made as to their status at or about that period. If this change has not been made or evidenced in explicit terms, that is merely because the necessity has not been felt. Whether the acquiescence of the Indian States were to be pleaded or not by the Paramount Power, these historical facts would have to be recognised in any adjudication on the problem. It is not that the status of the Indian States or the value of their treaties with the British have been worn down by time and usage, but rather that in the tide of history the British in India and the Indian States alike have "suffered a sea-change."

Finally it must be observed that, looked at purely from the point of view of the present day, the Indian States do not present the appearance of being subjects of international law. They are not protectorates recognised by international instruments: they are not states which are visible at all to outside powers except as a part of the British Empire in India. Their position within that Empire is not the concern of outside states, which can only look to their position vis-à-vis of the world in general. The Paramount Power strongly denies the application of international law to its relations with them, and, if ever any definite action to legitimate this point of view became necessary, would, without doubt, take it effectually.

It may therefore be said that this theory of the status of the Indian States is unsound as regards their position at the

time of their first contact with the Paramount Power, as regards the historical development that has taken place, and as regards their present appearance. At most, certain incidents in their present relationship to the Paramount Power have been borrowed from the sphere of international law, or resemble the incidents of international status.

(1) (b) *The Contractual Theory.*

This theory is, as stated, or purports to be, a variant or extension of the international theory. It is formulated in the Opinion of Counsel submitted on behalf of certain of the Indian Princes to the Butler Committee, and printed as an appendix to that Committee's Report.

At this point we have only to deal with the foundation, the theory of status, on which the Opinion referred to rests: we need not now pursue the detailed exposition of this theory which occupies the greater part of this Opinion. The foundation of the argument may be summarised as follows:—

The relationship between each State and the Paramount Power is, and has been since the time of the first treaty between the two, purely contractual. The Indian States were at the time of their first respective contacts with the British powers in India fully sovereign international units, which would have been regarded by an international lawyer as subject to the rules of international law in their relations between themselves and to the British power. They came to transfer certain sovereign rights to the British power: the rules of international law applied to this transfer. But from that moment onwards their relationship to the Paramount Power ceased to be one of which international law takes cognisance. In ascertaining the rights and obligations which now subsist between the Paramount Power and the Indian States, the legal principles to be applied are well-recognised legal principles which are applied in ascertaining mutual rights and obligations where no municipal law is enforceable. These principles are (1) cession of sovereign rights is made only by consent of the transferor,

(2) a contract can only be varied by consent of all the parties to it. A corollary to these two principles is that an agreement to cede sovereign powers is normally embodied in a formal instrument, and where it is not so embodied, the onus lies on the Paramount Power to prove it.

It is at once evident that this is a specious attempt to gain the advantages (without assuming the liabilities) of international status, while not advancing the untenable claim to a present enjoyment of it. Until the signature of its first treaty ceding a sovereign right, an Indian State was a full subject of international law: thenceforward its relationship to the Paramount Power ceased to be one of which international law takes cognizance. It is for this reason that we treat this theory as a variant of the international theory: and in our view it suffers, of course, from the same radical unsoundness. We need not repeat previous arguments: but it is not the fact, whatever views may once have been held by either party, that at the time of their first respective contacts with the British the Indian States were full subjects of international law; nor is it possible, in view of the historical development that has taken place, to rest their relationship to the Paramount Power solely on agreements apparently concluded under the ægis of international law, and variations of them by subsequent agreement. In fact, this theory suffers from the defect apparent in the international theory of not facing the whole facts of the case: it seizes upon certain phenomena only, an alleged situation of the States four generations ago and certain instruments evidencing part of the rights subsisting between them and the Paramount Power, but it neither tests the correspondence of these phenomena with real fact, nor does it offer any reasons for excluding all remaining phenomena from its purview.

It may be well to pause here and consider the implications of the claim constituted by this theory. Let us suppose for a moment that the Indian States were at a given time full international units and that they have lost, by voluntary agreement only, certain attributes of that status. Now it is undoubted that one of the items in such an agreement or agreements is

invariably the establishment of perpetual friendship between the parties. Suppose a State to be intolerably misgoverned and the Paramount Power to make a representation that the government be improved: the State remains deaf to repeated appeals. Circumstances are easily imaginable in which such proceedings would be no less than an unfriendly act. The result will quite properly be the interposition of force, followed by either the variation of the treaty, and that virtually by the will of one party only, or annexation. A glance at the history of Oudh will fully confirm this view.

The view taken by the theory under consideration is in this connection highly peculiar. What it holds in effect is that until a given state entered into a treaty with the British it was exposed to the penalty of war and annexation in case of opposition to the British; but when such *treaty* had been concluded, the possibility of varying it under ordinary rules of *international* law was totally excluded, and it became subject to the strict rule of *municipal* law that a *contract* can only be varied by consent of the parties, without there being any possibility here of an aggrieved party resorting to a court for the determination of a dispute.

The fact is that there is a second radical objection to this theory. It is incorrect to regard a treaty as an instrument equivalent to a contract. A *contract* is an agreement formed under the ægis of municipal law and enforceable by the sanctions of that law; a *treaty* is an agreement having quite other sanctions and not fitted to sustain the attributes of a contract. It can immediately be seen that the concepts of municipal law have to be emptied of much of their force in the sphere of international law. Consent in one sphere will be the full intention to execute willingly, or in the view of the just weight of legal process, and in the other sphere mere acquiescence for so long as the relative circumstances of the parties may compel. An agreement in one sphere is enforceable at law in pursuance of ascertained principles of justice: in the other sphere an agreement is enforceable at war, and there is no guarantee that justice will prevail. Thus the treaty of 1839 became enforceable

at war in 1914; if Germany had won that war, it is possible that the violation of Belgian neutrality would have become part of the public statute of Europe. It is absurd to say that such an instrument as a treaty is only variable or denounceable in the way that a contract is.

In the theory under consideration the two things are confused. A treaty concluded (by this theory) under international law is made to operate only by the principles of municipal law. We are told that legal principles are to be applied which are proper where no municipal law applies: but the chief of the principles brought forward is in its strictness a principle of municipal law and nothing else.

The logical result of such a view would appear to be that there is no general set of rights enjoyed by the Paramount Power in relation to the states, but that the relationship of each State to the Paramount Power must be determined by the analysis of its separate agreement or agreements with the Paramount Power. To some extent this is argued to be so by the exponents of this theory. They admit and indeed claim that the Paramount Power has different rights in regard to different States, and that its possession of a right in regard to one state does not justify a legal conclusion that it possesses a similar right over another State. Yet in the same Opinion it is admitted that certain rights do reside in the Paramount Power, and that such rights are summed up in the term Paramountty; and in order to understand what the rights are which are comported in that term it is said to be necessary to ascertain what are the matters in respect of which there has been a cession of sovereignty on the part of *all* the states. This is a contention which ought surely to have been exploded by the merest glance at the volumes of Aitchison. To collect the rights of the Paramount Power in this way would be an impossible task; it would require an endless labour of comparison between similar and dissimilar clauses, of interpretation, of construction, of proof and disproof. Of course, tacit agreement can be called in aid, but this will rebound on the exponents of the theory, and the Opinion in question was anxious to limit it as far as

possible. Working on the mere face of the instruments, even with the aid of variations tacitly agreed, it would be little more than a *jeu d'esprit* to exhibit a set of rights constituting the highest common factor of the agreements between the Paramount Power on the one hand and (say) Sindhia, the Kathiawar chiefs, and Pudukota on the other.

Again, what becomes of the case where a treaty has been denounced by one party? This happened with the first treaty made (in 1803) with Jaipur. It was supposed to be permanently binding, but the British denounced it next year. If a contract were made and no term set to its operation, it could at the most be dissolved by an application to a court of law: where is the equivalence between such an instrument and a treaty which in such circumstances, failing mutual consent, is and must be determinable by the unilateral action of one party? It may equally be difficult to construe together as contracts documents relating to a single state. Reference may be made to the instruments concluded with the rulers of Rajpipla (a first-class state in the Rewa Kanta agency), given in Aitchison (1876), Vol. IV. p. 266 *sqq.* First comes an agreement between the East India Company and one Verisal, whom they had put in possession; in the course of this agreement it is declared that Verisal and his father "do agree to act upon everything relating to the settlement of all the affairs of my country in conformity with the advice of the Honourable Company." That appears to give the British unlimited rights of interference. This was on October 11th, 1821. On November 26th, 1823, a new treaty was made: this recites the delivery of the chieftainship to Verisal, and then contains more or less the usual clauses of a treaty of that period, including merely a promise to submit disputes with third parties to the decision of the Company. Now in a case like this, how are such successive instruments to be read? Was there a novation or a discharge and a new contract? Why, since Verisal received but did not give consideration on the occasion of the second treaty? The fact is that here again treaties are not contracts; contracts must be novated or discharged, while a later treaty supersedes an earlier without

regard to questions of consideration. What is more, consideration is not an element at all in the validity of a treaty, but it is essential to a contract.

It is rightly observed by the Butler Report that an agreement as to a general set of rights constituting Paramountcy, such as is sought by this theory to be established, can only be evidenced by the process, properly condemned in the very same Opinion, of reading the treaties *as a whole*, not by the process of reading them all.

To return to the two legal principles appealed to by this theory: the second, as we have seen, rests upon a confusion, and the first (regarding the transfer of sovereign rights) is also misleading. It may be true that in a cession of sovereign rights it is the consent of the transferor which is the effective element: but this has nothing to do with the possibility that sovereign rights may grow up in, or inhere in, a sovereign authority without having been transferred or ceded by anybody. This, on a correct view of the facts, is what has happened in India, and can only be denied on an erroneous view being taken, as already described, of the situation of the Indian States at the time of their first contact with the British and of the course of history since that date.

The contractual theory thus rests upon wrong premises, does not take into consideration all the facts, and attempts to apply incorrect or misleading principles.

It may here be observed that we have called, and shall continue to call, the major instruments subsisting between the *Paramount Power and the Indian States* "*treaties*." But with the rejection of theories which regard the Indian States as subjects of international law, nothing can be decided in the light of that branch of law as to the nature of these instruments by reason merely of their name. Our view of their force and nature will be explained later.

It now remains to acknowledge that in some matters Indian States have purely contractual rights and obligations. These exist between particular States and parties other than the Paramount Power, in some cases with another Indian State,

but in the most important instances with the Government of British India. There are plenty of instruments among the collection of treaties, engagements, and sanads which are really of this nature. It will be easy to pick them out, and we shall endeavour to give examples later. There are equally rights and obligations of the same kind, which are not evidenced in such written documents. On all this question further observations will be made. It may just be remarked here that where such written documents exist in the collection of instruments, their nature, and the essential distinction which has to be drawn respecting them, have been obscured by the degree of uncertainty which has reigned as to whether or not the Paramount Power was the Government of British India.

2. The Constitutional Theory.

With the rejection of the two theories already examined, the theory of a constitutional status of the Indian States within the British Empire holds the field. It is the only alternative; its correctness becomes increasingly probable as one by one the difficulties of the other theories pass before the mind. It only remains to point out its congruence to the facts of the present and of the past.

It was long ago observed by Professor Westlake, in regard to the Indian States, that: "Wherever a body presents itself externally as a unit . . . the term 'constitutional' may fairly be used to express whatever political relations, possessing any degree of fixity, exist between the smaller bodies or individual men that constitute the unit."

That the Indian States are from an external point of view a unit or units in the British Empire cannot be denied or doubted. They are in fact included, as far as the outside world is concerned, in one of the major units of that Empire—India. By an internal arrangement, an Indian Prince is included in the Indian delegation to the Assembly of the League of Nations, and has also been included in the Imperial War Cabinet. The appearance of a prince in the Indian delegation at Geneva is

by no means a step towards according the Indian States an international status: it is rather, on the contrary, a clear indication of their constitutional status. Had they been units bound to the *British Empire* by the ties of international law, and which had committed the conduct of their foreign affairs to the King-Emperor's Government, *no such inclusion* would have been accorded: the delegation of their foreign affairs, completely made, would have precluded it; or had the terms of such delegation been varied, then it would have been proper for them to have been represented quite independently. But as members of the Empire in the fullest sense it is conceded that, with change of time and circumstances, practice and convention *should change*; accordingly this new situation was recognised, and it was sought to give them some representation in the delegation appearing for that part of the Empire to which geographically they belong. The extent to which externally the Indian States form a unit with the British Empire goes far beyond anything recognizable in international law: they are involved in war and peace on the declaration of the King-Emperor's Government without even a separate or special declaration expressly made on their behalf in such a case; they do not receive nor appoint diplomatic agents, nor even consular agents from any foreign power. No convention with other powers places them in the exclusive sphere of British control or influence, but every international act for at least 100 years past, and the acquiescence of foreign powers, recognise them implicitly as a part of the British Empire and nothing else. They must and can only be regarded as a part of that Empire, enjoying within it constitutional rights and privileges, and subject in it to constitutional rights of the Paramount Power. As already pointed out, certain of the rights and privileges thus enjoyed by the Indian States resemble, or are borrowed from, the rights enjoyed by states which are the subjects of international law.

Historically, the course of development sketched in a previous section implies the gradual creation of a constitutional relationship between the British and the Indian States, and the subse-

quent modification of the incidents of that status in various directions. It is impossible to argue that the position of the British in India in 1858 was the same as their position in 1804; and by as much as in fact the position of the British had altered between the two dates, by so much had that of the Indian States. If a constitutional status is attributed to the Indian States, full weight can be given to this course of development, and it can be satisfactorily comprehended. From 1765 to 1804 we see the British predominance in India growing by reason of their superior equipment and organisation, and a slow extension of the territory incorporated in their direct dominions; with the territories not so incorporated they maintain relations of varying closeness, concerned always with a design to keep at arm's length from their own territories disturbances endemic in territories for which they desire to accept no responsibility. Between 1816 and 1858 a crucial change takes place. The British cease to be the sovereigns of territories situated in India and the predominant Indian power: they become the rulers of the whole of India. They do not at once perceive or accept all the implications of this: they endeavour still to confine their responsibilities to the territories under their direct sovereignty. But they do, in fact, pacify the whole peninsula, and in effect maintain order throughout it. Where disorder in a pronounced degree appears, they no longer merely endeavour to ward off damage to their own territories; they interfere—on a mistaken principle, perhaps. They demonstrate, as at Gwalior; they annex where there is open hostility, in Coorg; they annex at last, where misgovernment is intolerable, in Oudh. As observed, the express principle is not perhaps the one really applicable, but underlying its exercise is a new and right conception of the British position in India. A shallow and unsatisfactory right of suzerainty is asserted in the doctrine of lapse. The first cases of interference of the British in Indian States in order to provide for their administration take place in Mysore and in Kathiawar. Measures in accord with the theory of the time are taken to eradicate throughout India customs abhorrent to the British conscience, such as suttee. The

point from which the underlying change in the conception of the British power in India must necessarily date is the Governor-Generalship of Lord Hastings, when practically speaking all India south of the Sutlej was consolidated within the British Empire. Thereupon followed the hesitating development sketched above, in the course of which mistakes and misapplications of principle prevented the immediate revelation of the true position. Finally, in 1858, the Crown resumed the sovereignty which had been till then exercised in its behalf by the East India Company, and took the opportunity then to proclaim the full extent of the power vested in it. It stood forth as sovereign, not only *in place* of the East India Company, but *in face* of the Indian States as well as of British India; as a corollary it abandoned the controlling right as against the Indian States which had hitherto been mistakenly thought applicable—namely, the right of annexation—and thenceforth fearlessly asserted the controlling right proper to the status of the parties—the right of intervention.

Again, the position was not at once made explicit. Lord Canning can still write of visiting a state with the penalty of “confiscation, in the event of disloyalty or flagrant breach of engagement.” But with Lord Mayo the true policy was put into effect. It is heard in his words to the Rajput chiefs:—“If we support you in your powers, we expect in return good government.” The Paramount Power is no longer indifferent to the condition of Indian States until forced by a sheerly intolerable state of affairs to interfere and annex. And in Lord Northbrook’s time the case of the Gaekwas of Baroda points the realities of the situation. Interference, deposition, but no annexation; and the declaration at last that “Misrule on the part of a government which is upheld by the British Power is misrule in the responsibility for which the British Government becomes in a measure involved. It becomes, therefore, not only the right, but the positive duty, of the British Government to see that the administration of a state in such a condition is reformed, and gross abuses are removed.” A long road has been travelled since Lord Hastings’ day, from

the India where interference was impossible in states "standing in the denomination of allies," to the India where all States are "upheld by the British Power." In 1889 a short paragraph in a general statute of the British Parliament bears witness to the full recognition by the Paramount Power of the position it has attained, and the rulers of Indian States are spoken of not as "in alliance with Her Majesty," but as "under the suzerainty of Her Majesty." This is their description in the Interpretation Act, 1889, to which reference was made at the beginning of this study.

The theory under consideration has now been upheld and explained in a brilliant and learned article by Professor Sir W. S. Holdsworth, K.C., D.C.L., in the *Law Quarterly Review* for October, 1930. The present essay was completed in manuscript before Sir W. S. Holdsworth's article appeared. We have therefore thought fit to embody our views upon the points comprised in the article in question in an appendix which is attached to this chapter. We think it will be best for a reader to continue to the end of this chapter and then read the appendix rather than to turn to it at this point, as the views there advanced depend to a great extent on the remaining sections of this chapter.

On a true view of all the facts, therefore, our argument is that the relationship of the Indian States to the Paramount Power falls to be determined by the principles of constitutional law, and forms part of the constitutional law of the British Empire. Our task now is to describe the elements of that relationship. Before doing so, it is desirable to make some further observations upon two points: in the first place, in regard to the problem of sovereignty generally; in the second, as to the nature of constitutional law.

Sovereignty.

It will have been evident to the reader of the preceding pages that the concept of sovereignty is the source of all the doubts and questionings that beset the problem of the Indian

States. They are autonomous yet not independent. The rulers of those states set the highest possible value on the recognition of their sovereign status. The claim to have possessed the fullness of sovereignty in the past is above all a foundation for the claim to possess it still in a wider degree than has hitherto been recognised, and also of a claim to maintain a dignity and honourable situation as sovereign princes which has never been denied to them. It is, therefore, necessary to consider briefly whether an attempt to treat their relationship to the Paramount Power as a matter of constitutional law is calculated to narrow the sovereignty of the Indian States, or to reduce the exceptional dignity enjoyed by their rulers.

It is certainly unlikely that the application of constitutional law will secure to the Indian Princes immunities quite as wide as those claimed for them sometimes, particularly on the basis of the contractual theory. It is equally not the fact that all the proceedings of the Paramount Power can be regarded as justifiable by constitutional law. As a constitutional part of the British Empire, a very exceptional degree of sovereignty and very extensive rights can be secured to the Indian States.

The problem of sovereignty has been a thorny one in western political thought. As we have seen, it is certainly unsound to apply the western doctrine of external sovereignty in international law undiluted to the existing Indian States as they were at any period. However, formerly (and this was the source of the practice of the Paramount Power for many years) it was inconceivable how a sovereign state could remain sovereign and yet form part of a larger unit, except on the then new-fangled and little understood federative principle. It was then later pointed out by Maine that in any case subordination in some branches of sovereignty did not necessarily derogate from sovereign status, though it did from independence; this followed from the theory of the divisibility of sovereignty. That theory scarcely goes quite far enough to fit present day facts.

Sovereignty may be looked at from two points of view, the external and the internal. From the latter point of view, it

was considered in the west to comprise various powers vested in the sovereign, which may be grouped under three categories—the executive, the legislative, and the judicial. This was for a considerable time an adequate view of the political machinery of the west, and the persons or bodies in whom these powers were vested, and these powers themselves were fairly definable and defined. It could be argued that in every state there was a single indivisible centre where the sovereignty of that state resided. This was the Austinian doctrine, but by the time it was advanced its day was already passed. With the advent of the federal state and constitutions, such as that of the United States, this order of ideas began to grow cloudier. The division of sovereign powers between the central and local governments in a federal state, the deliberate attempt to establish closer control over the organs of government, made it increasingly difficult to locate the internal sovereign (in the old sense) of a given state. The inquirer may be driven to the conclusion that it is the body which (though endowed with no other function) has the power to alter the constitution, a jejune and unsatisfying conclusion. The theory of the divisibility of sovereignty (applied by Maine to Indian questions) to some extent met this dissolution of the old doctrine. But the matter has now gone further: and sovereignty in its external sense, which the federal system had on the whole left solid and untouched (though in certain cases federal constitutions had led to some inconvenience in practice), is also taking on a new aspect. What is alleged to be the present constitution of the British Empire answers even externally neither to the old idea of a unitary sovereign state, nor to the idea of a federal sovereign state: and internally, also, it is a constitution entirely *sui generis*.

It rests upon the doctrine (express since 1926, though not yet completely elaborated) of a complete equality in status between the United Kingdom and the group of self-governing Dominions which owe allegiance to the British Crown, combined with some (but as yet uncertain) difference of function between their various governments: this latter element presumably

resolves itself into the general conduct by one of such governments, namely, that of the United Kingdom, of the *foreign relations of the whole Empire, but subject to consultation and agreement with the rest, and to the right of the others to appoint representatives of their own abroad.* The degree of co-operation and consultation necessary under such an arrangement remains to be worked out in practice. It is unnecessary to stress the difference between such a state of affairs and any federal arrangement. There is no trace here of a division of sovereign functions between a central and local governments, there is no absolute committal of foreign affairs to the central government: there is nothing but a group of fully sovereign states not allied but united.

This state of affairs has come about by developments since the declaration of war in 1914. Previously the direction of foreign affairs was definitely and exclusively vested in the British Government, and the Dominions did not appoint representatives abroad; internally, also, the sovereignty of the Dominions was limited by the power of the British Parliament to pass a law expressly applying to any given Dominion, by the inability of a Dominion legislature to pass a law overriding such law as aforesaid passed by the British Parliament, by the power of the British Government to advise the Crown to disallow Dominion legislation, and by the right of the British Parliament (which could still in 1914 be regarded as unquestionable in theory) to repeal the constitution granted by it to a Dominion. It is now advised, by a Conference which met to consider these questions, that the declaration of 1926 requires the abolition of the first three of these internal limitations. As to the last—the power to repeal a Dominion constitution—the time has undoubtedly come when it is so unthinkable that it should be exercised in practice that it will have to be acknowledged as no longer constitutional. This is *an ordinary course for the growth of a constitutional rule to take.* Apart from the general change which has come over the status of the Dominions, it must certainly be doubtful how the British Parliament could repeal the constitution or alter

the present status of the Irish Free State: and in view of that it is more than ever impossible to maintain, even in the barest theory, its obsolete and unexercisable power in regard to any other Dominion. The result will be to delimit (and limit) anew the sphere of authority of the British Parliament, not to reduce the power of Parliament within the sphere to which its authority extends.

The result of this development has been to change the relative position of the Indian States in the British Empire. Under the old order they occupied a position which might be regarded as, on the whole, rather more extended in the scope of its sovereignty than that of a self-governing dominion: true, their subordination in foreign affairs was, if anything, more complete, but their total immunity from the exercise of sovereign powers by Parliament was definitely greater. This is no longer so; in view of the situation now occupied by the Dominions, the scope of their sovereignty is now somewhat greater than that of the Indian States: nevertheless, what is important is that it has now become quite clear that an empire can exist and a system of constitutional law govern that empire without any division of sovereignty upon federal principles, without a single body finally sovereign throughout the whole territory of the Empire, and without its being possible, even for foreign powers, to disregard the sovereignty of constituent units. It will therefore be possible within that empire to find a place for units which claim all the immunities that the Indian States claim or ought to possess, without any check being necessarily applied to those immunities, and without their title to sovereign status being in any way impugned. The importance for the question of the Indian States of this development in political institutions will be especially clear to readers of Lee-Warner's final chapter; his conclusions are obviously dictated by the understanding that a tie of international law does not bind the Indian States to the Paramount Power, combined with a reluctance to admit a constitutional tie on account of his fear of letting in the power of the British Parliament, and derogating from the sovereign dignity of the Indian Princes.

The peculiar dignity of the Indian Princes is equally undeniable, inasmuch as they rank as royalties and transmit their dignity, alone among the heads of units within the British Empire, by the same means as that of the King-Emperor himself is transmitted—by hereditary right. In being the rulers of constituent parts of the British Empire, and exercising authority under the constitution of the Empire, they in no way diminish their status as royal and sovereign persons.

The Nature of Constitutional Law.

The various branches of law differ not only in their specific content, but in their methods and in the nature of the rights which form their content. The rights enforced by private law are ascertainable from enactment or the pronouncements of the courts which declare rules of common law or equity, and their sanction is the process of the courts. The rights of international law are supposed to be collected from the universal practice of nations, and their sanction is the assent of all nations, and in particular the assent of the parties submitting to be bound in a particular dispute by them. Constitutional law, dealing with the rules which control between themselves the members of political bodies always in the process of historical growth, is the most elastic and delicate of the kinds of law and the most subtle to grasp in its sources and its sanctions.

Constitutional law is a general term covering the category of rights secured by the constitution of each various state. It may be said that the constitution of a political unit includes every item in the conduct of its government, and the relation of its subordinate members to the superior powers therein, which, if at a given moment it was desired to embody in an express declaration the then state of affairs in regard to those matters, ought to be included in such declaration. Constitutional law in its full general sense deals with the sources and criteria to be applied in determining the items falling to be declared as rights in such a case as the foregoing definition envisages.

For this purpose the enquirer will examine *express enactments and instruments* which are relevant. In some cases the

great bulk of the constitution is embodied in a formal document or documents: particular constitutional rights may be embodied in individual laws or documents or decisions of the courts. The latter in many cases refer to and are framed as mere declarations of the common law of the country in question; this is another source of constitutional right. The common law is said to be the common custom of the realm: but it is essential to consider that custom as historically established. The common law has a historical origin, and, where not embodied in statutes, it is a body of law on which the courts look as historically pre-existing any decision upon it. In essence, therefore, it is the *ancient custom* of the realm: its essence is its historical character and its traditional identification with the society concerned: its sources are as untraceable as the origin of that society, but it is present in that society as soon as that society attains to individual existence. It may be observed that it appears to be the nature of a right deriving from ancient custom, or else it is the policy underlying the recognition accorded to such custom that such a right can be abandoned by the superior against the inferior, but not vice versa. In cases where less or little of the constitution of a society is embodied in express instruments, much of that constitution is to be sought in binding *convention* and custom. We are very familiar with this in England: the conventions of our constitution are a vastly important part of it, and much has been written concerning them. They are the rules in accordance with which from time to time the discretionary power vested in a government is to be exercised, so that it may not be used to nullify the checks placed upon it in a constitution; in other words, they are designed, where a constitution limits the power of a government but for convenience a certain discretion is not expressly taken away from that government, to ensure that the letter of the constitution (which does not take away that discretion) should not be used to violate its spirit (which does take it away). They must not be confused with customary checks imposed on an arbitrary sovereign: these will be common law rights. Conventions are a peculiarity of unwritten and non-rigid constitutions. Their sanction is³ that a breach of them will lead to a breach of

substantive law: they may be violated without a direct breach of the law, but the consequence will be that the person who violates them will, if he persists in that course, find himself involved in subsidiary breaches of the law. Conventions are periodical: they may alter from time to time. What is no breach of a convention at one period may become one later. Finally, there is a set of rights which are also not derived from written instruments or ancient customs and are not conventions as above defined, but which *result* from the growth of a constitution and the society living under it, and may (like, in this point, conventions) alter with such growth. These may be called *resultant rights*. They *result* from the character which has been impressed on a given constitution in the course of its growth and development. They form, so to speak, an equitable body of constitutional rights, rights in the assertion of which a party could not be held guilty of an unconscionable proceeding, or which it would be unconscionable for a party to deny. But the denial of them, unlike the breach of convention, leads to no breach of substantive law. They grow up unseen, and are usually recognised *ex post facto* after some dispute has necessitated their vindication. Nevertheless, if its view of a given constitution is to be complete, constitutional law cannot ignore them. It is, besides, desirable to recognise such rights before a dispute forces their express recognition, such recognition often being the consequence of civil disturbance. An example is the secession question in the United States of America at the time of the Civil War. The simple view is that the Confederate States exercised their proper right of secession, and were coerced in defiance of right by the Northern States: but nobody can really be satisfied that the Federal Government was guilty of pure injustice in standing out for the recognition of the fact that in the three generations which had elapsed since the Union, and as a *result* of the growth and life of the society in question during that period, a superior right had grown up in the Federal State to resist its own dissolution. It was a right *resulting* from the growth of the society up to its then condition. It would have been wiser and better to recognise it without

recourse to civil war. Again, it is impossible, although no dispute has yet arisen, to neglect, in considering the constitution of the British Empire, the question of the right of neutrality or secession in the Dominions; in any study of that subject, the question has to be faced and either hedged or pronounced upon. It is a right of the same kind, and it is much to be hoped that it will gradually be elucidated and decided before some crisis forces its decision in a bitter or violent way. Another example has already been referred to—the disappearance of the right of the Parliament of the United Kingdom to repeal a Dominion constitution. Indeed, all the rights which, as mentioned in the preceding section, are now recommended to be abolished in favour of the Dominions are so recommended because a superior right of just the kind we are describing has grown up in the Dominions, and has been (wisely) recognised in 1926. The very declaration which recognised the present status of the Dominions did not claim to declare a new status, but a status, a set of rights, already existing in defiance of the express constitutional rules then in force. It is not logical to say that such rights are derived from the fully sovereign status of the Dominions: it still remains to account for their attaining that status, and this is only to be accounted for by recognising that from a process of historical growth new rights emerge and result. It is then immaterial whether we regard the Dominions as endowed by this process with such rights severally and separately, or with the right to a status carrying these as incidents.

As already observed, these rights are not as a rule considered or defined in time: but in taking a true constructive view of any constitution, they *ought to be considered and recognised* as substantive rights, whichever party the enquirer may decide against, and whatever the assent accorded in the practical sphere. They may be rights in question between a central and subordinate government or between a government and its subjects. They always involve a radical dispute as to constitutional rights which cannot be resolved under any other category of constitutional law.

These are the sources from which constitutional rights may be derived, and whether a given right is traceable to such a source is the criterion which determines its existence. In examining the constitutional rules governing the relationship of the Paramount Power it will be necessary to examine, in regard to any right or obligation claimed by the parties, whether it can rest on (1) written instruments; (2) ancient custom; (3) convention (as-defined above); (4) resultant right, tested by the history and character of the relationship in question. Of these, (3) convention, in view of its definition, will not be applicable. On the other hand, much recourse must be had to (2) and (4), ancient custom and resultant right. These two sources of right have usually been cited in connection with the Indian States as "usage"; we think, however, that our classification of them is preferable. There are rights which do not all depend on "usage" of the same length, precision, or clearness: the basis of particular rights can be better exposed, and the justice of the claim to them better appreciated, if the distinction made above is observed. "Usage" is a vague word, and the employment of it suggests that the mere doing of a thing for a sufficient length or number of times (and, indeed, often just once) invests the doing of it (some time or other) with the quality of right: even (or it may be, especially) in constitutional law, this is not so. This question is touched upon at greater length in the appendix to this chapter.

It will help the understanding of these points if we state where we think that ancient custom must be sought for in regard to the relationship of the Paramount Power and the Indian States. It appears from our historical summary that the assumption of the position of Paramount Power by the British must be dated to the Governor-Generalship of Lord Hastings. Previous to that the British had been the strongest power in India, but no more. From Lord Hastings' time a different principle underlies their acts and policies, a responsibility inherent in the exercise of an imperial power. It is from this moment that there is a Paramount Power vis-à-vis of the Indian States and an association between the two: it is when we can

refer a right back or near to this period that we shall say it is founded on ancient custom. There followed thirty-five years during which the position was imperfectly comprehended, and during which the association so formed gave rise by its continuance to fresh rights, which are those we call resultant rights. These emerge in the latter part of the period from 1825—1858. We do not think that at present any claim of right can arise out of transactions later than 1858: any claim to set up a custom or a precedent after that date is ineffectual, there can then only be acts which accord with or infringe perfected rights. But the possibility of growth and alteration cannot, of course, be excluded, and it may be that new rights are already ripe to emerge.

It appears to us that by this analysis we allow for what often eludes an enquirer, the element of growth in constitutional rights: and at the same time we are not driven to accept a constitution of such fluidity that no right under it can have any duration nor, therefore, any reality.

APPENDIX TO CHAPTER II.

Sir W. S. Holdsworth in the "Law Quarterly Review."

It has been observed that the Butler Committee were somewhat chary of legal argument. In the *Law Quarterly Review* for October, 1930 (Vol. XLVI., No. 184), Sir W. S. Holdsworth, K.C., D.C.L., the legal member of that Committee and a most eminent jurist and legal historian, has published an article, entitled "The Indian States and India," which constitutes the long-awaited explanation, upon legal principles, of the conclusions adopted by the Butler Committee.

Expectancy has not been disappointed by the character of this profound and learned essay. With much of it we are in agreement; much of it, which touches upon points ignored by us, we should desire to embody in our own scheme. We should

wish to refer first to these points before offering, with great deference, a criticism in respect of one somewhat important matter.

Sir W. S. Holdsworth provides the reasoned answer which the Butler Committee did not give to the Opinion of Sir Leslie Scott, setting out what we have described as the Contractual Theory. We regard Sir W. S. Holdsworth's criticism as conclusive. His grounds of criticism are in general agreement with our own. He takes the point that, at their first contact with the British, the Indian States were not, in general, fully independent states (p. 410). He points out that to depend on the treaties only is impossible where in so many cases they are incomplete or wholly to seek (p. 411). He repeats what the Committee observed, that the authors of the Opinion found themselves forced to admit *some* rights in the Paramount Power which was, on their theory, only possible by reading the treaties as a whole (p. 411). He brings out also the changing phases of historical development which must be allowed (pp. 413—415), and recalls a principle of international law which, we think, reinforces our own distinction between treaties and contracts, namely, that treaties are not void for duress (p. 421).

We think that the learned author accounts most ingeniously for the existence of incidents in the relationship of the Paramount Power and the Indian States which resemble incidents of International Law. This, in his view, is due to the fact that sovereignty is divided between the parties. We would desire to express our agreement with this and to adopt it as the true explanation of that fact which we have already commented on.

The learned author has also devoted considerable space (pp. 424—435, *passim*) to an examination of the Paramountcy of the Crown in its relations to the British Constitution. This is a point on which we ourselves have not touched, as we have confined ourselves to the attempt to analyse the relationship between the Paramount Power and the Indian States, and have been content when we have given our reasons for locating the Paramount Power as the Crown of England. We think, however, that in his treatment of this question the learned author

is most illuminating, and we should equally adopt his own conclusions here. They in no way conflict with our own scheme. It is in this section of his essay that he deals with the powers of Parliament in relation to the Indian States and the means of altering the rights of the Paramount Power or its location. We find his argument on these points wholly consistent and convincing, and we only desire to point out that, in our opinion, the same conclusion follows from an examination of the relation of the Crown as Paramount Power to the other members of the sovereign body according to the English constitution as follows and is deduced by us from the nature of the rights subsisting between the Paramount Power and the Indian States. All the arguments of the learned author as to the transfer of Paramountcy elsewhere than it at present resides are, in our opinion, conclusive and satisfying.

We desire to make two minor criticisms before proceeding to a more important point. We do not think the analogies of the growth of the cabinet system or of case law (pp. 419, 420) are satisfactory as regards the growth of usage. We do not think that the argument regarding the effect of the Proclamation of 1858 (pp. 417, 418) is convincing, for it appears to us that the whole difficulty in regard to that Proclamation is comprised in the single phrase about the treaties being "scrupulously maintained." To this phrase the learned author *does not* refer in his argument, and we do not think that the difficulty regarding it is overcome by the clause of the Proclamation which he does quote.

As we have said, the criticism of the Contractual Theory is to our mind admirable and conclusive. It is in the third item of that criticism that the basis of Sir W. Holdsworth's own view is first made to appear: this is, in brief, the force of usage. *It is here that we ourselves, with great deference, feel compelled to offer a more extensive criticism.*

The learned author combats Sir Leslie Scott's opinion that usage is of itself sterile. In doing so, he points out that usage is the basis of the English Common Law, and that mercantile usage is still creating law; later he quotes from Blackstone,

"Our common law depends upon custom." It appears to us that the cogency of his argument in this connection depends on the identification of the usage in question here with the kind of custom which is admittedly one of the stages in the growth of systems of law. It is, however, necessary to comprehend what this implies, and to envisage the actual facts of the case in question. The usage which we have here to consider is the usage of the Paramount Power in its dealings with the Indian States, and it resolves itself into the practice of the Political Department of the Indian Government, backed ultimately by the fiat of the Secretary of State; as to how it shall treat the States, when and how it shall intervene, what limits it will admit to its own authority. The very great body of this practice dates from after 1858. Is such a body of rules at all the same thing as the sort of custom on which our common law depends? It is surely true to say that that sort of custom has a peculiar quality of *historical* force: its force is not that a thing has been done once, nor ten, nor even fifty times, but because our fathers held it right as far back as legal memory can penetrate. Now it is fairly evident from Sir W. Holdsworth's article that this is not true of the usage in question here. This usage rests essentially not upon tradition as to rights, but upon innovation as to practice: the whole point of appealing to it is *not to say that a particular thing has been done as of right time out of memory*, but that it has been done at such a time or times, and thereafter can be done again as of right. Surely it is not right to identify the kind of custom or usage implied in these two sets of facts. It is perfectly true that we cannot, in considering the relationship of the Paramount Power and the Indian States, go back to time out of memory. But "time out of memory" in this connection only means the mists of the age in which the society in question came into being. As regards the relationship in question, we can go back to the time when the society bound together in it was brought into being, and this is the direction in which we can legitimately appeal to custom. We cannot say that because a thing was done once or twice a right to do it again arises:

what we have to say, and what is meant by custom as a source of law, is that immemorially (sc. since the given society has been in existence) a right to do such a thing existed. That is the sort of custom from which common law has grown. As to the custom of the *Lex Mercatoria*, this seems to us to be a different matter, and to be clearly distinguishable: it belongs to a special department of municipal law, and its force is admitted only in an advanced stage of a legal system. It is *given* force by the Courts or by statute, it is not recognised as *having* force in virtue of which the Court must pronounce its decision accordingly.

It therefore appears to us that there is a confusion between such usage as that of the Political Department and custom as a source or primitive stage of law; in speaking of the first, what is really meant is a compendium of rights claimed by virtue of acts done and suffered, while in speaking of the second, we mean the recognition accorded to a given right (not the acquiescence in a given act) from the original age of a given society.

Now Sir W. Holdsworth is not himself content to leave the question of usage at that. He does not, we apprehend, really contend that usage or custom, in the sense (which applies here) of a thing done once or so many times, is *in itself* the source of rights. On the contrary, he proceeds to offer various sources from which custom (identified with the usage in question), itself the source of rights, in its turn derives its binding force. It is therefore evident that, even on the view he takes, the rights which he claims by usage have their roots still further back in something behind this usage or custom, by virtue of which this usage or custom has or obtains legal force. He observes, at p. 415:—

“It is in the *need* (*italics ours*) for the exercise of some general control . . . that we can see the origins of . . . usage.”

This might mean by “origins” the occasion which called for the usage: but the sentence at least suggests that a historical necessity has in some way imparted force to usage.

Again, at p. 419, the learned author speaks of the legal position which the Paramount Power now holds being built up by the practice of the Political Department, “which is *designed* (italics ours) to promote an harmonious relationship between the Paramount Power and the States,” and he cites the analogy of the growth of the cabinet system with a corresponding *design*. Here again we can discern the offer of some justification for that usage which was itself to be the source of rights.

Again, Sir W. Holdsworth does not admit that the rights of the Paramount Power derived from usage are absolute and unlimited, but seeks to put some limit on them: but in doing this he implies that something external determined the direction in which usage should grow, and so in some sort gave force to that usage which accordingly did grow.

The learned author, however, is more explicit than this. On pages 426—427 he analyses the various sources of the Paramountcy of the Crown, and concludes that in all of them to some extent—even in usage—consent or acceptance is the operative factor. He states that, so far as usage has given the Paramount Power its position as suzerain, the relationship between it and the Indian States depends on their acceptance of that suzerainty (p. 427). Further down on the same page he writes as follows:—

“But though this suzerainty of the Paramount Power, *which rests on usage and sufferance* (italics ours), does not depend so directly on consent as those parts of it which rest on treaties, engagements, and sanads, it has in it elements of consent. The fact that the suzerainty of the Paramount Power has been accepted introduces one of these elements. The fact that this suzerainty is founded on usage introduces another, ‘nam diuturni mores *consensu utentium comprobati* legem imitantur’; and Blackstone agrees with this view. ‘It is,’ he says, ‘one of the characteristic marks of English liberty that our common law depends upon custom: which carries this internal evidence of consent along with it, that it probably was introduced by the voluntary consent of the people.’”

With great deference, this seems to us to be a somewhat confusing statement. Apparently the suzerainty of the Paramount Power rests (partly) on usage which itself has force, because it is based on consent; while the acceptance of the suzerainty, created by consensual usage, is a collateral justification for it. It appears to us that, in view of this, the learned author cannot really mean that usage has force of itself to create rights: we have practically got back to the view that usage is evidence of agreement, and has such force as it may thereby.

Usage itself, therefore, draws from some external source its living force; and one view is that this source is consent. In considering this we are entitled to ask three questions: (i) What sort of consent? (ii) Is consent of any sort really the basis of custom or customary rights? (iii) Is the consent which operates in the relationship of the Paramount Power and the Indian States the sort of consent which occurs in relation to that sort of rights?

(i) Consent is a wide term which may include states of mind of very differing quality. In legal questions, however, some broad distinctions can easily be drawn regarding it. Thus it may be free or it may be forced. In municipal law, as between individuals, it must be free; in international law, as regards particular transactions, it may be forced. At the same time, the sanction of international law is the consent of the nations, and clearly in this wide connection such consent must be free: it would contradict the nature of international law if a nation could be coerced or, as would then follow, if one nation could coerce all the rest into accepting the doctrines of international law. In constitutional law a similar distinction can be applied. There may be consent to acts held to be contrary to right, and that consent will, if opportunity to review the question occurs, be held ineffectual to justify the acts, or at any rate to make new law out of them. It is really mere acquiescence. On the other hand, in an advanced community furnished with representative institutions, it is no great fiction to say that all the members consent with each other to the laws established through

their representatives appointed for the purpose. This, however, is clearly not the sort of consent which lies behind custom and customary rights when these take on the character of law. That consent is much nearer the acquiescence in oppressive acts; it may be distinguished as assent. The object of it is something felt to be a right. It is probably not the result of any reflection or educated understanding: its most probable progenitors are religion, respect for superiors, submission to a king, and respect for what already is or is thought to be ancestral teaching.

(ii) But, if this is so, is it not misleading to speak of consent in this connection, and is some form of consent really what gives custom its binding force? We are certainly far from what Blackstone had in mind when he spoke of custom being "probably" introduced "by the voluntary consent of the people." That is merely one of the rationalising, pseudo-historical ideas, like the Social Contract, typical of political thought at that period. It is not satisfactory to accept such dicta merely because they are pronounced by a great lawyer without subjecting them to tests which he was not in a position to apply. Then Sir W. Holdsworth's quotation from the *Institutes* does not carry much conviction: its language, as Sandars pointed out, is vague, and the Roman lawyers formed no certain view as to the origins or sanctions of law. Incidentally, it may be asked what exactly a Byzantine of the 6th century understood by "consensus": it may well have been something different from any of the forms of consent which we have mentioned. We have indicated at the end of the last paragraph the way in which we think some form of consent occurs in relation to custom, but we are led to think that such form of consent is in no sense the source or the sanction of custom. It may theoretically be true that a primitive community could by positive agreement of its members alter a custom: it may be true that the assent of its members to an innovation having the character of custom could instantly substitute the observance of one custom for another: but this is in neither case the same thing as saying that custom has force because of the consent of those

who observe it. In practice it would never be found that such a community would alter its customs by obtaining the consent of its members to do so. In such a community the operative sanctions of customary law are quite different: the truth is not that people obey customs because they have consented to them, but because they recognise the rights comprised in such customs to be founded elsewhere. They assent, they do not consent.

(iii) It seems to us, moreover, that the kind of consent which does occur in relation to custom is not at all the kind of consent with which we have to deal in the present case. It is true that as regards the attitude of the Indian States to the practice of the Political Department, we are concerned with what is nearer to assent than consent: but we think it is nearest of all to what we described as mere acquiescence. It seems to us that the essential characteristic of the assent made to custom is that it is an assent to what is considered to be right, the rightness being derived from another source than the will of the assentor: but it is impossible to argue that this is the state of affairs in the present case. It is not the fact that the Indian States have assented as of right to the usage comprised in the practice of the Political Department, though they have acquiesced in it.

We think, therefore, that the explanation suggested by Sir W. Holdsworth of the source and sanction of those rights claimed by the Paramount Power outside the written instruments breaks down. We do not think it correct to identify the usage called in aid with what is meant by custom as a source or primitive stage of law. We do not think that consent is a significant element in the force of custom. We do not think that the acquiescence of the Indian States in the practice of the Paramount Power is identical with that sort of assent which does exist in relation to custom.

It appears to us that, in considering the relationship of the Paramount Power and the Indian States, it is both misleading and unnecessary to emphasise (as do both Sir W. Holdsworth and Sir Leslie Scott in different ways) what may be called the consensual element. The force of consent as meaning voluntary

agreement belongs to the sphere of the relations between mutually exclusive individuals: it applies with differing incidents to the legal contracts between private persons and between separate, independent states. It applies so long as the parties to a transaction present to each other a solid exterior, so that their contracts with each other can be defined and isolated instance by instance. It ceases to apply where the parties are associated in the common process of involuntary growth which is incidental to every form of constitutional union. In that case their positions are defined by reference to the whole of which they both form part, and their rights alter with its exigencies. In an early stage, customary rights may be respected as comprising rights referable somehow to the functions of the members and sanctioned by all sorts of unquestionable beliefs, and then it may be said some form of assent is given to such rights. Later, internal growth will take place and external environment may alter: thence the balance of the members may be altered and new rights emerge between them, which may be so far from receiving any form of assent that they may have to be forcibly vindicated, without their quality being thereby tainted.

Now, abandoning the insistence on consent, whether operating through contract or through usage in Sir W. Holdsworth's sense, our attempt is to find a basis for the rights of the Paramount Power and the Indian States either in something equivalent to that kind of custom which is a source or primitive stage of law, or in that principle of social growth which we believe does give rise from time to time to new constitutional rights. As regards the first, it is perfectly evident that in the case of the society formed by the Paramount Power and the Indian States, we are not going to find customary rights fading away into the mists of antiquity. But, as we have said, the forceful thing in such customs is not that their origin is remote or lost, but that it is associated with the origin of the given society: and it is therefore equivalent for us in the present case to go back to the point where we happen to know that the given society came into being, and see if people then thought that a given right

existed and acted upon it. We do not think that there will be any question that, in the instances we shall later examine, they did do so: and therefore in these instances we shall consider ourselves justified in deriving rights from a recognised source according to the principles of constitutional law, namely, ancient custom or common law. In regard to such rights an element of assent may well be present: and we think this will not be questioned in the case of the rights which we shall treat thus. For they are mostly such rights as it is necessary to secure to the Indian States, rights such as those of protection and exclusion from the King's Dominions, or else rights of the Paramount Power which are on no theory in dispute, such as the right of isolation. Then, when we come to deal with some rights claimed by the Paramount Power and disputed, we shall appeal to our other source of constitutional rights in which assent plays no part at all, and we shall not need to attempt a demonstration that consent has been given where it has not.

For these reasons we do not find satisfaction in the theories which have been so learnedly and ably advanced by Sir W. Holdsworth and Sir Leslie Scott, and we venture to offer our own alternative solution of the problem.

CHAPTER III.

RIGHTS AND OBLIGATIONS OF THE PARAMOUNT POWER AND OF
THE INDIAN STATES.

IN applying the principles enunciated in the last chapter to the case of the Indian States, it is immediately obvious that a very great number of written instruments are subsisting between each State and the Paramount Power—called variously treaties, engagements and sanads. It is next to be remarked that these instruments differ greatly in their provisions and that therefore to some extent the relationship to the Paramount Power differs in the case of every State. It is very important to bear this in mind: for, in a general treatment of the subject it is not possible for this reason to establish the relationship in each actual case precisely. Whenever a practical question arises, the first step must always be to look at the exact terms of the instruments subsisting between the given State and the Paramount Power: it may not be sufficient to consider only the general rights vested in either party and susceptible of being stated in a generally applicable manner.

A. CONTRACTUAL RIGHTS.

Referring back to the discussion of the Contractual Theory, we acknowledged that in some matters Indian States had contractual rights and obligations. It will be convenient to dispose of these now, though in doing so we shall have to make an assumption, the grounds for which will be discussed later. This assumption is that the Government of British India is not the Paramount Power. Now we have already given our grounds for considering that the mutual rights and obligations of the Paramount Power and the Indian States are of a constitutional

and not a contractual nature. Matters, therefore, in which Indian States have contractual rights and obligations will be matters where the relationship in question is not with the Paramount Power but with a third party, and such third party may be and often is the Government of British India. They will be matters of arrangement between two parties who are both parts of the same whole on an equal footing: this is the essential distinction.

It may be objected that, as we shall come to see, the conduct of the external relations of all the Indian States is committed to the Paramount Power. This would not however prevent the Paramount Power from bringing an Indian State into relations with a third party: and on the strictest view this is perhaps what has happened in these cases. Or it might be pointed out that in practice there have been relaxations of this general rule as to the external relations of Indian States and that may have occurred especially in the case of their relations with British India owing again to the distinction not having been appreciated between the Paramount Power and the Government of British India. There is a historical reason why this distinction was not properly drawn, which we shall mention later. The question in any case appears to us academic for, granted that the Paramount Power is not the Government of British India, relations do in fact exist the benefit of which is taken as one party not by the Paramount Power but by the Government of British India: and however this has come about, we have here instances of contractual rights and obligations subsisting with regard to Indian States.

The matters in question comprise, first, current matters of common interest to British India and the Indian States as to which no definite agreement has been expressly completed. This is a very wide and important field: it comprises most of the matters with which the last part of the Report of the Butler Committee is concerned, and it covers matters in respect of which there is a wide-spread sense of grievance among the Indian States. Such is the question of the allocation to them of a share in the revenue of the Maritime Customs of India: such again is the question of the Salt Monopoly. Excise and opium

we also include here, as well the suppression of mail or telegraph systems in Indian States, and even the question of mints and coinage. In none of these cases can we find that a constitutional right of the Paramount Power is in question but in all cases it is a question where the benefit as to one party is taken by the Government of British India and where, therefore, there is in effect or should be a recognised contractual bond between that Government and the State or States concerned. It will be pointed out later that the Indian States have a right not to be subordinated or deferred in any way to the Government or interests of British India: and a cognate point may be made here, from the aspect of the legal relation actually in question, namely, that these matters being matters of contract, the rules of contract prevail and they should be adjusted on the strictest principle of mutual fair-dealing, without pressure or denial of right. The details of this adjustment lie outside the scope of this study. Our object is only to distinguish this order of questions from constitutional matters.

Secondly, among these contractual matters, there are express agreements, to be found among the collection of treaties and engagements, the benefit of which agreements as to one party is taken by the Government of British India and which are thus of a contractual nature. Important examples can easily be found. There is the lease of the Sambhar salt lake and deposits. There is the perpetual lease of Berar from the Nizam of Hyderabad. It is quite clear that in effect the other party to such instruments as these is the Government of British India: it is that Government, and not the Crown as Paramount Power, whose salt monopoly benefits and which administers Berar subject to the terms of the agreement. In such matters, the same principles apply as were alluded to in the previous paragraph: these are matters of agreement, which should only be freely formed. It is not our intention to enter into the tangled history of Berar, but it may be permitted to remark that the history of the contract at present subsisting in regard to that territory is one which would not be looked upon with favour in a court of law.

This leads us to advance an important corollary, before closing the discussion of these matters. As remarked, it is the nature of contract to be enforceable at law before a proper tribunal: and it appears to us that this ought to be the case as regards these contracts. Suggestions have sometimes been made that a tribunal should be established to adjudicate upon all disputes as to the rights and obligations of the Indian States. We do not think that such a demand is in general well-founded. It does not appear that generally or invariably constitutional rights must be enforceable before a tribunal: in some peculiar and modern cases, a constitution has provided for judicial decision in such questions, and in some cases between subject and sovereign a pronouncement of the ordinary courts can be obtained. It by no means follows that wherever there is a complex of constitutional rights and obligations, any question arising out of them ought to be decided by a judicial tribunal. On the other hand contractual matters are in their essence justiciable and therefore there ought to be a tribunal to decide such questions as we have just been discussing.

It may be objected that the Paramount Power has a constitutional right to resolve disputes between an Indian State and a third party, either as a judge or as the repository of the external personality of every Indian State. But even if this were so, and whatever the capacity in which it acted, it appears to us that the authority of the Paramount Power in such a case is conditioned by the general rights of the Indian States; and any power of settling such questions possessed by the Paramount Power is only exerciseable with strict regard to those rights and without attention to extraneous matters. Referring again to *Berar*, the decision there hardly falls within this principle. We are doubtless once more confronted with the confusion of the Paramount Power and the Government of British India: now that that question has been elucidated, the propriety of judicial decision in matters of this nature becomes all the plainer.

Having now cleared out of the way the instruments of a contractual nature which bind the Indian States and parties

other than the Paramount Power, it is necessary to consider the remainder (and the great bulk) of the instruments in the collection of treaties, engagements, and sanads, which are concerned with the constitutional relationship subsisting between the Paramount Power and the Indian States. In general henceforth, references to "treaties" etc. will mean documents of this nature and not such documents as have been dealt with under the present heading.

B. SPECIAL RIGHTS.

In a general examination of the subject, it is only possible to state the general distinctions which must be drawn in construing the instruments in question. It was at one time claimed that the treaties with the Indian States should be read as a whole, and that rights granted to the Paramount Power by a treaty with one State could be claimed by it against another. The Butler Committee has rejected this doctrine. That rejection is right. The doctrine undoubtedly owed its existence to the necessity of overriding some clauses in treaties with certain states: but if the rights desired to be secured by that process can in reality find a proper foundation elsewhere, the doctrine in question may be rejected. It was and is an *unsatisfactory* doctrine: it is only necessary to observe that it resulted in a constant appeal, against all States, to the Mysore instrument of 1881, an instrument very late in date, of a quite special nature, and relating to quite peculiar circumstances.

The principle which we propose to adopt is as follows. A treaty with an Indian State may and usually does contain (1) clauses which express the special incidents of its relationship to the Paramount Power, incidents inapplicable to any other State, (2) clauses which express rights or obligations of a general nature able to be applied to other States in general. Incidents and clauses of the nature of (1) which are inapplicable except to a given State, comprise the *Special Rights*, referred to in the heading to this paragraph. Incidents and clauses of the nature of (2) are merely particular and express instances of the *General Rights* which will be considered in the next section

and which are not founded on the written instruments at all. There may also be subsisting General Rights to which no reference is made in the instrument. Where a General Right is thus embodied in a particular expression, it is no doubt appropriate that any action in the particular case in pursuance of it should be founded on the particular expression of it: but the source of the right, as a General Right, is other. In some cases, also, a General Right may appear to be intensified or extended by the provisions of a particular instrument but really in that case there is a Special Right created. The treaties may further contain (3) clauses which conflict with a General Right and are therefore of no effect.

It may be objected that to draw such a distinction will quickly lead us to deny the repeated assertion of the Crown that the treaties are fully binding on it and that it will maintain the rights, privileges, and dignities of the Princes. It is, as a matter of fact, a quibble to say that every treaty is word for word of full force and effect, or in other words that every one is clause by clause an expression of special rights. To that extent all such declarations go too far. Constitutional law cannot blind itself to the fact that the treaties are only binding, of their own force, where they express special rights and are binding, where they express general rights, by virtue of the force of those general rights: but they are of no avail where they conflict with general rights. It should be observed that with the exception of the Proclamation of 1858 the declarations in question confine themselves to a non-committal phrase, i.e., they speak of maintaining the rights, privileges, and dignities of the Indian Princes. It is only in the Proclamation of 1858 that words are used which might imply the literal and complete validity of the treaties. As already observed, such words unfortunately go too far. Undoubtedly at the time they were used the true position was not fully appreciated. Canning's dictum regarding the power of "confiscation" is there to show what qualifications were really attached to the Proclamation.

It is a matter of the greatest importance to justify the principle which we are proposing. We believe its justification

to be implicit in the actual and historical facts. It is, on the one hand, essential to provide for that great majority of cases where there are no instruments from which the whole even of the rights enjoyed by an Indian State as such (apart from the corresponding obligations) can be derived or deduced. On the other hand, we are persuaded that a relationship does subsist between the Paramount Power and the Indian States which permits and requires us to recognise rights in the parties deriving from quite other sources than written agreement. It is then, logically, only possible to conclude that it is these sources to which we must always look for the justification of the rights in question and that such written instruments as exist cannot override such rights and can be no more than summaries or expressions, more or less perfect, of them: and then we shall avoid our first difficulty, because where such written instruments partly or wholly fail us, we are still not at a loss for the foundation or nature of the rights which we desire to establish.

It has already been pointed out that the most extreme partisans of the treaties admit the existence of *some* rights resembling general rights but propose to determine them by an impossible method. It may also be observed that to base the situation on a literal and complete validity of the treaties is only satisfactory where a full set of treaties exists. In many cases of even substantial states this is not the case: for instance, in such a case as that of Rajpipla it would be difficult to arrive at a practicable set of mutual rights from the written instruments merely. Then no doubt appeal will be made to agreement otherwise evidenced: but that will only lead straight to the position that every right claimed by the Paramount Power will be justified unless it has been the subject of constant and explicit rejection or protest, which is hardly a position the partisans of the treaties as literal and fully adequate agreements can desire.

On different lines, practically the same conclusion is thus reached as in the case of the doctrine of reading the treaties as a whole. In applying that doctrine, it was always held that

there were certain obligations peculiar and special to each State, and that certain obligations expressed in the treaties with that State were particular examples of rights claimed against every State and might in the particular instance extend or intensify (but never limit or detract from) such a general right. Nevertheless it appears that the former view was in some cases mistaken as to the rights which might be claimed against all States and tended to interpret some special rights as general rights: and the general reasons, for which we prefer the view which we have adopted, have already been pointed out.

Special rights, subsisting between the Paramount Power and a particular Indian State, form part of the same complex of rights and obligations as do general rights. For this general reason they are no more of a contractual nature than are general rights: nor are the instruments, which evidence them, on their face contracts. Such rights are items in the constitutional relationship existing between the Paramount Power and the Indian States and they spring from the same roots, as do general rights, in historical circumstance and constitutional grant and exaction. On the other hand, they subsist between the Paramount Power and particular Indian States and therefore they cannot be determined by deductions universally applicable. It follows that there must be in each particular case explicit evidence of them. They must be expressed in written instruments or otherwise must admit of unimpeachable proof. Mere usage does not constitute such proof, though it may raise some presumption in favour of one party. It would be most important that, wherever the rights of the Paramount Power and a particular Indian State came up for practical consideration, the point here raised should be borne in mind.

It may be useful to take an example of the treaties subsisting with a particular state and see how these principles apply to them.

The following treaties are given in Aitchison as having been concluded with the State of Jaipur: (1) Treaty of alliance, 1803; (2) Treaty of Alliance, 1818; (3) Agreements mediated with feudatory chiefs, 1819; (4) Treaty varying tribute clause

of 1818 treaty, 1871; (5) Extradition treaty, 1868; (6) Letter accepting conditions proposed by the Government of India regarding railway construction, 1868; (7) Treaty relating to Sambhar Salt Lake, 1869. The Maharajah of Jaipur also received a Sanad of Adoption, 1862. This is a fairly representative list of documents, including as it does a general treaty, an extradition treaty, railway agreement, and an adoption sanad.

The document (1), treaty of 1803, was dissolved in 1804. The document (7), treaty relating to Sambhar Salt Lake, is an obvious example of a contract taking effect between a State and the Government of British India.

The documents (3), agreements with feudatories, are an example of a common type of document which may or may not lead to the creation of special rights in or against the Paramount Power according as whether such document contains any guarantee on the part of the Paramount Power or not. Otherwise they will be mere contracts, mediated by it. In the case under consideration they do not create special rights: they were merely concluded by the mediation of the Paramount Power. It may be observed in passing that the fact of this mediation in 1819 is already significant of the future course of events: the process was quite common, and it is very hard to distinguish it from intervention in the internal affairs of a State, even when it was the consequence of a request by one of the parties.

Document (5), Extradition Treaty, deals with the extradition of offenders as between the State and British India. The subject of extradition is a somewhat thorny one. It has two aspects: (i) extradition to countries other than British India, (ii) extradition to British India. In either case it appears to depend properly on general rights. Where such treaties are found, therefore, as in the present case, they must be read accordingly. As a matter of fact, there are not many: they are no longer concluded and where subsisting are more or less obsolete. The subject of extradition will therefore fall to be elucidated in the course of considering general rights.

Document (6) constitutes a railway agreement. By this phrase we do not refer to such an instrument as a railway loan agreement: such instruments are contracts. There is no such instrument in the present case. A railway agreement denotes the agreement concluded with States upon the construction of a railway crossing the frontier of a given state providing (with some early exceptions where a transfer of territory was taken) for transfer of jurisdiction, abolition of transit dues, assistance in construction, and cognate matters. These agreements vary much in form but are identical in substance, and their conclusion was insisted on by the Government of India. The case of the railway extension in Patiala is an example of such insistence: there is also internal evidence of it in the document (6) now under consideration.

As far as the cession of jurisdiction is concerned, it appears that this insistence was rightful: it depends on the respective rights of the Paramount Power and the Indian States in matters of defence and protection. It will be again referred to later. This would apply to every railway once constructed crossing the frontier of an Indian State: once constructed, a jurisdiction over it uniform with the jurisdiction over lines to which it is linked appears to be a necessity of the defensive system. Furthermore, the same general rights in regard to protection and defence might give rise to a right in the Paramount Power to insist on the construction of a railway over a particular course: but here it appears that strategic considerations would have to be carefully considered and all circumstances taken into account. It does not appear that economic considerations, or those of general welfare and convenience, are the basis of a general right which would carry attached to it such a right as this. As regards jurisdiction over constructed railways, it appears therefore that a general right to the cession of this exists, and as regards the course of railway construction a general right to ensure strategic interests, but not economic interests or so-called all-India interests, also exists. As regards assistance in construction and abolition of transit dues, it appears that these are in each case matters of contract and ought

to be the subject of the fullest and freest consent by the Indian State concerned: for they are clearly matters of economic interest or general welfare, quite divorced from the questions of defence or protection in which alone the rights before enumerated are properly grounded.

A Sanad of Adoption was also granted in 1862. These Sanads of Adoption, which are now held by some 180 States, express the recognition by the Paramount Power of the validity of the adoption of an heir by a ruling chief, on failure of natural heirs, such adoption by a Hindu ruler to be according to Hindu law and the customs of his race, and in the case of a Moslem ruler, legitimate according to Mohammedan law. The bulk of these sanads were issued in 1862, and it was intended that they should set at rest the uneasiness of the ruling chiefs which had been aroused by the assertion during the previous twenty years of the doctrine of lapse, the doctrine that on failure of natural heirs a State escheated to the Paramount Power. It is claimed by the Paramount Power that the right of adoption is conferred by such a sanad, though apparently it would be recognised in the case of States other than the 180 principal States to which such sanads have actually been issued: it is claimed by the Princes that the right of adoption always existed, and that a sanad of this sort is no more than a record of the recognition by the Paramount Power of a pre-existing and inviolable right.

It would appear that in this matter the Princes' view is the correct one. The doctrine of the lapse of a State on failure of natural heirs is sought to be upheld by Lee-Warner: but he can adduce no argument save the citation of a distinction drawn by Hindu law between succession to the property of a private person and to that of a chief, which is scarcely relevant even by analogy. The inadmissibility of the doctrine is on the other hand well demonstrated by a passage in Tupper's "Our Indian Protectorate." The appeal to Hindu law was far from decisive. The appeal to past practice of other powers produced no instance of an adoption invalidated by the refusal of recognition by a suzerain: nor is it proper to equate the position of the British with that of the

Mogul Emperor, either speaking generally or as against such a state for instance as Hyderabad. Inadmissible distinctions were advanced, as that between "dependent" and "independent" states. No attempt was made to determine the meaning of such phrases as "heirs and successors" used in undoubtedly valid instruments subsisting between the States and ourselves. The onus of proving a right of adoption has never been laid on the Princes: the onus has always been assumed by the Paramount Power to establish its right to lapse. That onus has never been discharged. It appears therefore that there is a general right of adoption in the Princes, incidental to the fact that succession, like all other questions internal to each State, is governed by the laws of that state. Where a Sanad of Adoption has been granted, it should be treated as no more than a record that in a particular instance the Paramount Power has acknowledged this general right.

There remain the documents (2) and (4), the general treaty and the treaty varying the tribute clause thereof. The treaty with Jeypore is one of Lord Hastings' treaties of "subordinate co-operation," of which a number were concluded about the same time during his régime and of which the model has been used again later. They are all on the one strict model, and in many phrases or clauses identical. These treaties as observed above will contain provisions which may either (i) create special rights, (ii) express general rights, (iii) be subject to general rights. The treaty with Jaipur may be summarised clause by clause as follows:—1. Perpetual alliance and unity of interests between the State and the Paramount Power. 2. Engagement by Paramount Power to protect the State. 3. Engagement by the Ruler of the State always to act in subordinate co-operation with and acknowledge the supremacy of the British Government, and not to have any connection with other chiefs or states. 4. Engagement by the ruler of the State not to negotiate with other chiefs or States, but his amicable correspondence with friends and relations excepted. 5. Engagement by the ruler of the State not to commit aggressions, and to submit disputes to the arbitration of the British Government.

6. Tribute clause (varied by the treaty of 1871). 7. Undertaking by the ruler of the State to furnish troops according to his means at the requisition of the British Government. 8. Engagement by the British Government that the Ruler of the State shall always be absolute in his territories and the British jurisdiction shall not be introduced therein. 9. A special and peculiar clause assuring the Maharaja of favourable consideration and attention to his interests. 10. Delivery of treaty.

It appears that this treaty ought to be analysed and read as follows:—

6 and 9. Special rights of the State. .

1 and 2. Expression in this particular instance of the general right of the States to protection by the Paramount Power.

3, 4 and 5. Expression in this particular instance of the general right of the Paramount Power to regulate the external affairs of the States.

7. Special right of the Paramount Power to the military assistance specified.

8. Expression in this particular instance of the general right of the States to immunity from British interference, but subject to the general right of the Paramount Power to interfere in certain cases.

The bulk of the treaty, therefore, deals with general rights. This may appear surprising and unsatisfactory. But it must be recalled again that there are relatively a large number of States in regard to which no such comprehensive instruments exist. On what basis then are they to enjoy such rights as the general rights which are here expressed? Either those rights rest on an independent basis, and then where they are expressed in a treaty they must be mere expressions of a right founded elsewhere, or the treaties must be read as a whole. We adopt the first alternative. It may be recalled that no more than some fifty-five instruments prohibit negotiations with other powers or states: this is a mere instance of the wide field which has to

be covered otherwise than from the express provisions of written instruments.

As to the special rights expressed in the above instrument, the application of this analysis to clauses 6 and 9 is obvious. The nature of clause 7 may give rise to more speculation. On the principal of reading the treaties as a whole, clauses such as this were used to re-inforce the claim of the Paramount Power to the unlimited military assistance of the States. Abandoning that principle, we cannot so use the clause, and we further think that that claim was ill-founded. It appears, as will be argued later, that the States have a general right to protection. A general right in the Paramount Power to demand unlimited military assistance from them for that purpose would be incompatible with such a right. Consequently where such a right exists, it is a special right: and where no special right is expressed, the State has the right to protection and the Paramount Power the duty to protect it with nothing but voluntary assistance from the State itself.

It will be observed that not every general right receives a particular expression in the instruments concluded with a particular State. Here, for instance, we have no expression of the general right of intervention in certain cases and of limiting the military establishment of Indian States enjoyed by the Paramount Power. Such general rights may be in certain instances the subject of particular expressions: as, for instance, the limiting of military establishment in a treaty with Sindhuia and the right of intervention in the Mysore instrument of 1881. It should be observed again here that such a particular expression of a general right can never detract from or limit that right. If by such expression such right is extended or intensified, such extension is to be regarded, as observed above, as a special right. Such are the rights secured by article 22 of the Mysore instrument 1881: while the particular limit imposed on the army of Gwattior, does not bar the Paramount Power from further limiting the same nor affect its right to impose any necessary limit on the forces of another State, the general right of the Paramount Power being what it is in this connection.

It will thus be seen that in order to construe consistently and in true accord with the rights of the parties the written instruments subsisting between the Indian States and the Paramount Power, it is most of all necessary to determine what are the general rights of the parties respectively derived from the other sources on which constitutional law draws.

C. GENERAL RIGHTS.

General Rights are those rights and obligations binding on the one hand the Paramount Power and on the other every Indian State. They are derived in the present case from one of those two sources which we have defined above as common law, or *ancient custom* and *resultant right*. They appear to be comprised in the following heads.

1. Allegiance.

The rulers of Indian States owe allegiance to the Crown of Great Britain. This follows from the combined facts that these States form part of the British Empire, and that the rights of the Paramount Power are now directly enjoyed by the Crown. No doubt is likely to be cast on this right. It has been asserted in countless declarations by various rulers of such States. It is evidenced by their attendance at the Durbars of the King-Emperor. It is a resultant right, not derived from ancient custom, but belonging to the fully developed stage of the relationship between the parties.

The rights of the Paramount Power were first acquired and exercised by the East India Company, not as sovereign of British India, but in a distinct capacity as Paramount Power vis-à-vis of the Indian States and as trustee for the Crown: since the termination of the trusteeship in 1858 they are exercised by the Crown directly, again not as an element in the sovereignty of British India, but in a distinct capacity vis-à-vis of the Indian States. Any other conclusion would conflict with general rights hereafter enumerated, especially with the general

right of the Indian States to immunity from British jurisdiction. The course of development was as follows: general rights were constituted which necessitated a complete distinctness being predicated of the Paramount Power from the Government of British India: the relationship between the parties grew to a point where a full union was achieved and in consequence a right of allegiance sprang up in the Paramount Power, the Crown ended the trusteeship of the East India Company, and the exercise of all the rights of the Paramount Power, including the right to the allegiance which had by then become due, fell into the direct enjoyment of the Crown. A recognition of this is implied in the recommendation of the Butler Committee (correct also in view of another general right of the Indian States to be examined later) that the Viceroy and not the Governor-General in Council should be the agent for the Crown in all dealings with the Indian States: if this is done, it will then be clear that the Viceroy unites two functions, that of representative of the Crown as Paramount Power vis-à-vis of the Indian States and that of Governor-General of British India under the Acts of Parliament relating thereto.

There is a historical reason for the confusion which has to some extent existed between the Paramount Power and the Government of British India. So long as there was no question of responsible government in British India the necessity of drawing distinction in question was not felt. The Governor-General in Council under the old system could, if he so willed, adequately preserve the rights of the Indian States. With the decision to introduce responsible government in British India, and the passage of the Act of 1919, this ceased to be so. In so far as the Governor-General in Council was responsible to or exposed to the influence of elective legislatures in British India he became, and was necessarily felt to be, no longer able adequately to protect the position of the Indian States. The creation of a Chamber of Princes, carried out so differently from the establishment of the reformed constitution, further stressed the necessary distinctions. Hence the right view of the situation became at last apparent.

Reference may be made here to considerations which are sometimes urged against the proposal of the Butler Committee in question and against this general doctrine. The point is sometimes taken that the treaties are expressed to be concluded with the Government of British India: but this would not preclude such Government from being the repository for this purpose of a separate authority. More serious is the fact that all the resources needed and used for carrying out the functions of the Paramount Power are supplied by the Government of British India. The army in India is under their control, the agents of the Paramount Power in the Indian States are officers of British India services. It is in view of such facts that the other side of this question must be seriously allowed for. It is difficult to see how such arrangements as these are to be accepted by British India and all voice in affairs, where she supplies the sinews of action, taken from her executive government. It must, however, be allowed that the army in India must also be considered to be maintained for the protection of the Indian States. Then there are those instruments and matters already alluded to, which are proper contracts or matters of contract between British India and the States. In regard to these, it will no doubt be easy for the Viceroy to be the intermediary between the parties: but all the same here again is a set of questions in regard to which a *bonâ fide* doubt as to the true view of the position might exist. However, that the view now taken is correct, must be admitted: and the points referred to *must be dealt with accordingly*.

It is probable that this right to allegiance was the last to emerge out of the developing relationship between the Indian States and the Paramount Power. It will be recalled that Coorg was annexed in 1834 as a consequence of the open hostility of the Rajah to the British Government. As already observed, the true relationship between the parties was hardly appreciated at that date: but it would be wrong to cite this as an example where loyalty was not claimed from the ruler of an Indian State. It is rather an example of the claim on the part of the Paramount Power to a regard from such ruler which, when the

relationship between them was completely developed and perfected, issued in the duty of allegiance. Mention may be made of the accusation of treason levelled against the last Mogul emperor in 1858, but his position was of course peculiar. A charge of disloyalty was made against the Gaekwar of Baroda in 1875, but he was deposed on other grounds. A similar charge, leading in this case to execution, was made against the Jubraj of Manipur, who had been recognised as rajah, in 1891, and his breach of allegiance was an offence distinct from and additional to his denial of other rights which the Paramount Power sought properly to exercise.

The recognition of the existence of this right in 1858 inspires the words of Lord Canning's despatch of April 30th, 1860: "The Crown of England stands forth the unquestioned ruler and paramount power in all India, and is, for the first time, brought face to face with its feudatories." It may be heard again in the final sentence of the Adoption Sanads: "so long as your house is loyal to the Crown."

There follow from this right, the rights of the Crown in regard to the grant of honours and titles. The Crown is now the sole fount of official honours and titles and the arbiter of official precedence among the Indian Princes. An honour or title cannot be received by an Indian Prince from another source without the sanction of the Crown. It is significant that the first table of salutes was drawn up in 1857, and such a table was actually first issued in 1860, that is to say precisely at the time when, as previously argued, the right of the Paramount Power to allegiance was perfected. How far unofficially a particular degree of respect may attach to an Indian Prince—as, for instance, to the Maharana of Udaipur—is another matter: but only the honours, titles and precedence granted and recognised by the Crown are now full honours in the sense of being officially respected.

We have so far been discussing the obligation of allegiance due by the Indian Princes. It is necessary also to determine the question of the allegiance due by their subjects. This allegiance is due by the subjects of any Indian State to the

ruler of it. This is not one of the constitutional rights incident to the association existing between the Paramount Power and the Indian States: it existed from even before the time that the association between the Indian States and the Paramount Power came into being and was not affected thereby, being a right carried over in the society thus constituted as an element in the nature of one of the parties entering into that association. It is not one of the constitutional rights subsisting between the Paramount Power and the Indian States: it is presupposed by these rights or certain of them.

A similar corollary in regard to honours follows. An Indian Prince may confer a title on one of his own subjects. His subjects may, however, receive titles from the Crown; and the Crown does not sanction the receipt of a title from an Indian Prince by anyone not his subject.

It is claimed that to some extent the subjects of an Indian State owe a double allegiance—to their ruler and to the King-Emperor. This claim does not appear to be strictly allowable. Allegiance is properly a personal duty and its ultimate meaning should rest in a personal tie. Where a person stands in relation to two authorities, the one proximate and the other remote, and the proximate authority derives from the remote, then the allegiance properly goes to the embodiment of the remote authority. But where the proximate authority does not derive from the remote and an allegiance is undoubtedly due to the proximate authority, nothing but confusion can follow from exacting another allegiance for the remote authority. The test case here is the Manipur case of 1891. It is not quite clear whether in this case a breach of allegiance to the Paramount Power was alleged against the rebels in Manipur. It appears that their breach of allegiance to their own ruler was virtually condoned by the recognition of the Jubraj. Such breach of allegiance to their own ruler perhaps ought not to have been condoned. However, other rights of the Paramount Power gave good ground for intervention, and resistance to that intervention was necessarily an offence, and in that case was

aggravated by murder. It could also be argued that the recognition of the Jubraj as ruler imposed on him in that capacity the duty of allegiance. He was executed for waging war against the Queen Empress and abetment of murder: and the offenders generally were found guilty of rebellion and murder. On the whole it appears preferable to consider that the doctrine of double allegiance was not here invoked, and that strictly speaking no such allegiance is due, although necessarily resistance to the rights of the Paramount Power is unlawful. It can easily be imagined that a doctrine of double allegiance would, if strictly insisted on and generally understood, lead to great confusion and perhaps to sad difficulty and injustice in individual cases. It must follow that an Indian Prince has a right to the assistance of the Paramount Power in exacting the allegiance of his own subjects and the suppression of internal disturbance which he cannot control himself, though other rights of the Paramount Power may justify his being denied such assistance or granted it only on terms.

As rulers entitled to the allegiance of their subjects, the Indian Princes are entitled in British Courts to the status of foreign sovereignty, such status being the subject of judicial notice.

2. Isolation.

The Paramount Power has a general right to conduct the whole relations of any Indian State with every power or state within or without India. The Indian States have no contact whatever with foreign states: they neither receive nor appoint any kind of diplomatic agent, nor declare war or peace, nor form nor execute any engagement save through the Paramount Power. They are not known to the League of Nations, though an Indian Prince is included for domestic convenience in the Indian delegation to that body. They cannot correspond for official purposes, conduct negotiations, or form agreements among themselves, though in this respect the Paramount Power has waived its general right to a very considerable extent during the last twenty-five years. The right, however, exists unaltered.

This right must be held to be based on ancient custom. It is observed by Lee-Warner that no more than fifty-five out of the mass of engagements with Indian States expressly prohibit correspondence or negotiation with other powers or states. But the general obligation of the Indian States in this respect has been in force at least from the time of Lord Hastings: it is admitted by every theory which has been held in regard to the position of the Indian States. It is the right upon which the definition of an Indian State can most easily be framed. States against which the Paramount Power cannot claim the right are not Indian States, although they may be related in close and peculiar ways to the British Government. Such states are Nepal and Bhutan: but these states are not bound by such an obligation and are not Indian States. Nepal made its own treaty with Tibet in 1856.

Various corollaries depend from this right of the Paramount Power. The Indian States are bound by the diplomatic acts of the Paramount Power and so by those of His Majesty's Government. They are involved in its declaration of war or peace. The rulers of Indian States must do what is necessary in their own territories to make effective international obligations undertaken by the Paramount Power: this is pointedly illustrated in connection with the Slave Trade. Obligations for the suppression of this are undertaken by His Majesty's Government, and the subjects of an Indian State in other parts of the British Empire are amenable to the laws in force in this regard: within an Indian State the ruler of that State must see that the obligations assumed in this respect are given effect to. An example is the procedure adopted in regard to subjects of Kutch: proclamations of the Rao have imposed the necessary penalties upon Kutchi subjects within Kutch guilty of slave trade offences. Legislation may also be applied in the British Empire which is directed to the benefit of foreign States but is not consequent upon treaties: such are the Foreign Enlistment Acts. The Paramount Power has also a right to the co-operation of the Indian States in the policy of those acts, and for obvious

geographical reasons on the same basis as exists in regard to such matters in the rest of India. On the other hand the subjects of Indian States are entitled outside the British Empire to the protection of His Majesty's Government and are entitled to be granted passports. Orders in Council under the Foreign Jurisdiction Act extend to them where they extend to persons enjoying His Majesty's protection. Their status in other parts of the British Empire is that of British Indian subjects.

Rights are also claimed by the Paramount Power in regard to jurisdiction over foreigners in Indian States and in regard to extradition. These will be examined later.

Mention having been made above of the waiver of its rights by the Paramount Power as regards the relations of the Indian States between themselves, reference should here be made to the most important result of this waiver, the creation by Royal Proclamation in 1921 of a Chamber of Princes. This body consists of the rulers of the greater States and representatives chosen by groups from among the rulers of the lesser States. It has an elected Chancellor and a Standing Committee; and it is said to be in meetings of this latter body that its most important decisions are arrived at. The Chamber has not been supported by all the Princes and some of the most powerful hold aloof. It has been an important forum for consultation and joint decision by certain States or groups of States: but it cannot be regarded as a completely representative assembly of the Indian States or as a fully formed and satisfactory organ in the scheme of their constitutional relations. We should therefore hesitate to say that a development has yet taken place on which we could found a resultant right in the Indian States to this or some other form of organisation: such a right may be on the point of emergence, but for the present we prefer to regard the right of the Paramount Power to isolate the Indian States as unimpaired, though temporarily the subject of a gracious relaxation.

Sometimes as a corollary of the right under consideration, a general right is claimed for the Paramount Power to settle

all disputes in which an Indian State is involved. Undoubtedly any such right must be closely connected with the right of isolation, so that it will be convenient to discuss it here. As a matter of fact, it appears to us unsatisfactory to make a claim in respect of such a right in general terms: to do so is to miss *making a clear and proper distinction between the various kinds of dispute which may involve an Indian State, and the various functions which may be discharged by the Paramount Power in regard to such disputes.* *Primâ facie, there is a distinction between three possible kinds of dispute; disputes may arise (i) between an Indian State and the Paramount Power, (ii) between two Indian States, (iii) between an Indian State and a party not being either the Paramount Power or an Indian State.* Lord Reading, in his letter of March 27th, 1926, to the Nizam of Hyderabad, wrote: "It is the right and privilege of the Paramount Power to decide all disputes that may arise between States, or between one of the States and itself." Here the third of our suggested categories is missing, which appears to us confusing, as the dispute about Berar, in respect of which this letter was written, in our view actually falls within that category: *but in the letter in question the distinction between the Paramount Power and the Government of British India is not clearly drawn, which may account for the omission in question.* But there is a further distinction, which we have already adumbrated in the section dealing with Contractual Rights of the Indian States: this is the distinction between disputes arising out of matters in regard to which, either through the mediation or with the consent of the Paramount Power, direct relations have been established between an Indian State and a third party, and disputes arising out of matters which are dealt with by the Paramount Power without any direct link being forged between the Indian State involved and the other party. *In either of these two sorts of disputes the other party might be either another Indian State or an outside party; and as regards the first of these two kinds of disputes, we have seen reason to regard the matters which are the source of them as matters regulable upon a basis of contract.* Disputes between

an Indian State and the Paramount Power remain as a third category, and the proper distinction to draw is the following:—

- (i) Disputes arising out of matters where there is a direct relation between an Indian State and a party other than the Paramount Power, which relation is contractual.
- (ii) Disputes arising between an Indian State and a third party with whom it has not been put in direct relationship.
- (iii) Disputes between an Indian State and the Paramount Power.

As regards (i), we have already given our reasons for considering that the Paramount Power ought, if it arrogates to itself the decision of them, to proceed judicially, and for thinking that they ought rather to be justiciable before a proper tribunal.

As regards (ii), the act of the Paramount Power in settling them is on quite a different basis: it acts as the repository of the external personality of every Indian State, or, to borrow the terms of private law, as the agent of every Indian State fully empowered and irrevocably appointed in respect of such matters: and the authority of the Paramount Power in such matters is a proper corollary of the right of isolation.

As regards (iii), these will arise in respect of the rights and obligations subsisting between the Paramount Power and the Indian States. We have stated our view that such matters are not naturally or essentially required to be the subject of judicial decision: there is no inherent objection to a decision being given by the Paramount Power. But the difficulty is that a general right to give a decision in such matters cannot be entirely arbitrary, or there would be no reason to ascribe to the Indian States any general rights at all against the Paramount Power: any such right must be a right of decision which is bound to be exercised in accordance with the rights and obligations of the parties. If a decision so given was in accord with the rights of the parties, that is sufficient ground for it

to rest on and there is no reason for wishing to carry the matter elsewhere or for invoking a right in the decider to give the decision, as a means of justifying the decision. Such a right is really only required in order to shield a decision which is contrary to rights. But to admit such a general right would stultify our whole inquiry, so that we cannot do so. The true view appears to us to be that some of the general rights of the Paramount Power are bound to be to some extent arbitrary in their exercise: we shall notice this more particularly in dealing with the right of intervention, and shall then suggest a reason for this. Again, for instance, the same applies to the general rights of the Paramount Power in matters of defence. It seems that when matters comprised in categories (i) and (ii) are put aside, the disputes under category (iii), which the Paramount Power claims the right and may have occasion to decide, will arise from the occurrence of this arbitrary element in its general rights. If, as seems possible for a reason to be explained later, we can allow for and admit this arbitrary element, there will be no need to stand upon a separate general right of the Paramount Power to decide disputes where it is itself a party. We think it therefore unnecessary to admit such a right.

3. Protection and defence.

The Indian States have a general right to the protection of the Paramount Power against external aggression. Their right to such protection against internal disturbance is, as already observed, comprised in their right to the allegiance of their subjects. This right of external protection must be held to be a right based upon ancient custom. It is doubtless made explicit in many treaties with major states: but again, if this right were to be enjoyed only on the strength of a treaty stipulation, many a state would be deprived of it. The Kathiawar States may be referred to: it is said that their right to protection rests on the assumption by the British Government of the Peshwa's duties towards them together with the cession of his tribute.

But it would be difficult to say what right to protection or other right worth the name they had against the Peshwa: the fact is that he ceded to the British a right to mulkgiri tribute, which implied a pretext to invade rather than a duty to protect. It is necessary to assume that these States acquired a right to protection from the time that they were associated first with the Paramount Power, that is from the time of Lord Hastings. Actually it seems that a bare forty States enjoy formal treaty stipulations assuring them of protection (apart from a phrase in the Adoption Sanads of 1862, on which nobody could rest this right). As Metcalfe said, in Lord Hastings' time it became "the established policy of the British Government to maintain tranquillity among the states of India": the position, which the British Government then assumed, infused from the first this right of protection into the association between the Indian States and the Paramount Power, and the practice of the period illustrates this.

The important point to consider is whether this is such a general right as requires any liability of an Indian State to contribute to defence to be a special liability varying from case to case, or whether it is a general right in the States to the full assistance of the Paramount Power only on condition of themselves being liable to make unlimited efforts for the same end. As already stated, we believe the former to be the correct view. We do not see how the second view can really be argued. It appears to us that the right of the States to protection must in logic underlie all other rights in this sphere. A right to protection, combined with a duty of unlimited contribution, amounts to no more than a right to assistance: it will then be really the State which is receiving mere aid from the Paramount Power, not the Paramount Power which receives aid from the State. Such a combination of rights appears to us to be proper and suitable between allied and equal powers resting merely on treaty, but not in a constitutional association where one party is, as in the present case, dependent and subordinate. It must be held that the duty of protecting all the subordinate units of its territory rests absolutely with an authority occupying a

situation such as that of the Paramount Power. In that case any right of positive contribution in men or money must be a mere special right in the Paramount Power against any given State. The same argument is implied and the same conclusion expressed in paragraph 48 of the Report of the Butler Committee and this should really be conclusive.

The isolation of the Indian States was previously adverted to, and the conclusion there stated strengthens the foregoing argument. The committal of foreign policy to the conduct of the Paramount Power seems to impose on it also a general and fundamental duty in respect of defence and protection: this may readily be seen, if it is considered that since the Sikh wars most of the Indian States lie outside the zone of probable hostilities, and such hostilities, as the Paramount Power might demand their unlimited assistance in, might only in very remote circumstances affect their territories and governments, and might spring from policies and decisions in which the States might be very far from being the primary consideration and in forming which they had no voice.

One important point should however also be emphasised in this connection. The right of the Indian States to protection is bound up with the maintenance of peace and order throughout the whole of India. It is not only concerned with the preservation of India from foreign invasion but it imports also the prevention of any recurrence of anarchic conditions or widespread internal disorder such as prevailed before British rule was established.

Various rights are claimed by the Paramount Power in regard to defence, which are as it were the other face of its duty in this matter.

The Paramount Power claims a general right of passage and cantonment for its troops. This appears to be a well-founded claim. It follows that if the Paramount Power has a general duty of protection it must be the judge of the measures necessary to carry out this duty. It must have the right to move troops through the territories of its subordinates and to establish

therein such military posts as it deems requisite. Assistance in procuring supplies for troops is also a claim well-founded for the same reason.

It would appear also that the general duty of the Paramount Power in this connection gives it certain general rights as regards communications. It could not be denied that efficient defence may demand some control over communications and this control may well vary according to the nature of the different means of communications, the strategical necessities at particular times, and the developments of military science. Thus, at the present day, the duty of defence (which, let it be repeated, looks to internal as well as external dangers) demands that the Paramount Power should have the right to insist on the construction of strategic lines of railway: such a right would require great care and the most perfect good faith in its exercise. Then it is undoubtedly a military necessity that a single system of jurisdiction should embrace all lines that form links across the boundaries of Indian States and so the Paramount Power has a right to the cession of such jurisdiction. The case of roads is for practical reasons somewhat different: it is difficult to conceive how a right to jurisdiction could ever be claimed in respect of them nor has it ever been claimed. On the other hand, the consideration of strategic necessity in their construction or in their maintenance ought to apply here too. With the growth of motor traffic and military mechanisation this question may well require further attention. Air transport again may give rise to new rights correlative to the duty of defence. Rights such as these are not resultant general rights: they are merely elements in a general right and duty which vary with material circumstances. Telegraph and telephone communication also necessitates the right of the Paramount Power to extend and perfect a system of its own throughout India. It cannot however be claimed that economic considerations, such as the maintenance of a monopoly, justify the suppression of systems internal to a single state. Here, again, we begin to touch on the sphere of contract, administration and economics which is different from that of constitutional

right and, though subordinate to the latter, often necessitates practical adjustments and relaxations. The same considerations apply to mail and post questions and govern the question of mail robbery.

A cession of jurisdiction on the establishment of a cantonment is also claimed but this will be dealt with later as will the question of extradition of deserters.

It remains to consider the question of the military establishments of the Indian States themselves. The Paramount Power claims a general right to limit the military establishments and equipment of the Indian States, their recruitment of troops, and the fortifications within their territories. It appears that such a claim is well-founded. It seems that admittedly this right cannot be derived from ancient custom but it is a resultant right from the nature of the association between the parties. It is clear that the general right of protection which has operated in favour of the States rendered unnecessary the maintenance of their complete liberty in such matters, while with the complete incorporation of India in the British Empire such liberty inevitably endangers the general preservation of order for which the Paramount Power is ultimately responsible, and might even force the Paramount Power to employ its troops in vigilance towards the very States which it is obliged to protect—a most anomalous position. A general right of the Paramount Power to control such matters thus results from the historical development which has taken place. The classic example of the assertion of this right occurred in Gwalior in 1844. The right of the Paramount Power would appear to include a right to limit the size of the armies of Indian States, to prevent systems of training and recruitment tending to pass the whole population through the cadres, to prevent the enlistment of foreigners and the immigration of foreigners for purely military purposes, to control the building of fortifications, and to control the manufacture and acquisition of arms and military material. These rights cannot, however, be extended to any general control over immigration or over imports (this being an important proviso in regard to States with a seaboard).

Such measures as the establishment of Imperial Service Troops do not affect the question of the rights at issue, but are events of an administrative and occasional order.

4. Exclusion from the King's Dominions.

We are about to describe under this heading a general right of the Indian States, which is perhaps more usually referred to as their right either to "immunity from British jurisdiction" or to "the enjoyment of internal sovereignty."

Exclusion from the King's Dominions means as regards the Indian States that they are not subject to the jurisdiction of Parliament: the laws of England or of British India do not apply within them, the courts by law established in England or British India do not function within them. They have their own laws and governments which prevail to the exclusion of all others within their own territories: and where in pursuance of the general rights enjoyed by the Paramount Power any action is taken within their territories that action is taken on the executive authority of the Crown (in which as Paramount Power such rights are vested), and the authority of Parliament can only be invoked in order to legitimate such actions from the point of view of the laws of England, and not as endowing such actions with legality from the point of view of the Indian States.

In the case of the major states there is usually a clause in their main treaty or treaties (as in the Jaipur treaty examined above) expressing this right of the State: but this does not apply to the agglomerations of minor States. Appealing to the sources from which by our argument general rights are derived, the right under consideration is based upon ancient custom: it has been the basis on which the relationship of the Paramount Power and the Indian States has been built from the earliest moment that the association between them came into being. In some cases of groups of minor states it has been, after many years, the subject of investigation, and has been held to be enjoyed by such States as a right enjoyed by them from the moment of their first association with the Paramount Power.

This has been the case with the Orissa Mahals: and equally with the Kathiawar States. These latter were held by the Privy Council not to be "within the King's Dominions" so as to allow of an appeal to that body: and in that judgment is implied the conclusion of Sir Henry Maine in 1864 that, whatever the degree of our interference in Kathiawar, it was limited to such interference as would not conflict with the "only undoubted right of sovereignty" possessed by those States, namely, "immunity from foreign laws."

The view of the British Courts in this connection may be briefly noticed here. The position of the Kathiawar States has twice been considered by the Privy Council. In *Dámodhár Gordhan v. Deorám Kánji* (Indian Law Reports, 1 Bom. p. 367), it was held that where territory had been transferred in accordance with a treaty with the Thakur of Bhavnagar "from the district of Gogo, subject to the Regulations, to the Kattywad Political Agency," there was a re-arrangement of jurisdictions within British territory and not a cession of territory. It is easily seen that such a decision, as well as certain remarks, in the judgments was capable of being taken to mean that the Kathiawar States were "within British territory": but the point was not actually decided. The case was decided on the Court's view of a particular and unusual transaction, and did not lay down a general principle. The position of these States was definitely established by the Privy Council in the case of *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, (1906) A. C. p. 212, in which the Court held, upon consideration of the history of the relations between Kathiawar and the British, that Kathiawar as a whole was not "within the King's Dominions" so as to allow of an appeal from the court of the Political Agent to the Privy Council.

The cases referring to the Orissa Mahals are less important. In *Hursee Mahapatro v. Dinobundo Patro* (Indian Law Reports, 7 Cal. 523), two judges sitting as a court of Criminal Appeal held that the tributary mahals of Orissa, and in particular the territory of the Rajah of Killa Mohurbhunj, were part of British India. This decision was reversed as to the

same territory by a majority of three to two among five judges sitting again as a court of Criminal Appeal in *Empress v. Keshub Mohajan* (Indian Law Reports, 8 Cal. 985): and this decision was followed by two judges sitting as a court of criminal revision in *In the matter of Bichitrnanand* (Indian Law Reports, 16 Cal. p. 667). These Mahals are therefore also outside British India. In any case the decision in the case of *Hemchand Devchand* is authoritative: but it must be remembered that it is all a question of fact. The facts in Kathiawar and in Orissa are different: in Kathiawar the British acquired certain *rights* from the Pashwa and the Gaekwar, the Orissa Mahals came to them with a cession of territory. In these two sets of cases the result has been the same: but there are territories, *estates*, within British India and rajas also, and these have not this immunity, nor has the ruler of an Indian State as regards land he holds within British India. The fact to be established is whether a given State or territory is a State historically entitled to that status and its attendant rights. Then, as one of those rights, this immunity follows.

It was Sir Henry Maine's contention that Kathiawar was properly called foreign territory: but this view we have rejected. Taking into account all the facts, as we have said, our argument is that the Indian States are indeed without the King's Dominions, but that the proper meaning of this phrase is that they enjoy immunity from foreign law to the extent above stated.

A most important corollary follows now from this right. The Paramount Power can no longer alter this state of affairs by annexation. The Indian States have now the right to be preserved integrally and to enjoy by virtue of being so preserved the right now under discussion. The intention to annex Indian State territory was definitely and finally renounced by the Proclamation of 1858, which provides a clear and unequivocal recognition of this right. It may be asked how, if this right is founded on ancient custom, this corollary did not always follow from it. The answer is that until the emergence as a resultant right of the right of intervention which will next be

discussed, a right of annexation existed for the purposes which the right of intervention now answers. It is therefore only with the perfecting of the right of intervention and upon the Proclamation of 1858 that this corollary could become attached to this right.

It follows from the above that Parliament cannot legislate for the Indian States. It has never attempted to do so, and its long-continued abstention in this respect is another point of evidence that demonstrates the dependence of the right under consideration from ancient custom. No Act of Parliament for the government of India applies to the Indian States: the earlier may make reference to the treaty-making power of the East India Company, the later may confirm the treaties made by that body. But these are, as observed, points of domestic legislation. Parliament cannot legislate in constitutional matters any more than in other respects for the Indian States: consequently they cannot be affected by any new legislation dealing with the Government of British India. There is no Parliamentary jurisdiction which is in abeyance: Parliament could not do now what it has never done, because such an action as we are considering is not merely an action which Parliament has never taken, but an action which it never could take. It is not debarred from it by virtue of its own past actions, by virtue of a custom it has imposed on itself and could alter or by an alleged estoppel, but by a law outside its sphere and control altogether, namely, the constitutional law regulating the relationship of the Paramount Power and the Indian States. Neither is the Paramount Power as such subordinate to Parliament, though the enjoyment of the rights of that Power by the British Crown may have to be, again from a domestic point of view, the subject of Parliamentary regulation: Parliament could not therefore compel the Paramount Power to do for it indirectly what it cannot do itself. It follows further that the Indian States cannot lawfully be subordinated in any particular to the Government of British India, although the Crown may have used that body as its agent in the exercise of its rights, and the interests and affairs of the Indian States ought not

to be regulated by that Government in any way with a view to the interests or affairs of British India. This also squares with the recommendation of the Butler Committee that the Viceroy and not the Governor General in Council should in future be the agent for the Crown in all dealings with the Indian States, though we have examined that recommendation in regard to another general right. Any subordination to British India would be a subordination to the British Parliament and a contradiction of the right under consideration. It also appears that it is not legitimate to act in regard to the Indian States from what have been called imperial or all-India considerations. In constitutional law there is no such thing as "all-India." There may be economic or other interests of an "all-India" nature: but these afford no legal basis for any act. Any act of the Paramount Power against an Indian State can only be in pursuance of a general right against the Indian States or a special right against the State in question: it cannot be based on an alleged interest of an imperial or all-India nature. There is no general right in the Paramount Power to act against the States in consideration of such an interest.

Having thus stated the right of the Indian States to immunity from the jurisdiction of outside authority, we have now to consider the general rights on which rest invasions of that immunity by the Paramount Power to which alone the Indian States are subordinate.

5. Intervention.

Controversy has recently been carried on round the right of the Paramount Power to intervene in certain circumstances in the internal affairs of the Indian States. The right has been strongly denied by the exponents of the contractual theory, basing themselves on the clause so often found in treaties by which the absolute power of the ruler of the State with respect to his own subjects is affirmed or an undertaking given that British jurisdiction shall not be introduced into the State. As

we are not basing our argument merely on treaty clauses, this contention does not appeal to us. We think the right in question is well-founded but it is necessary to determine its nature and to arrive if possible at a definition of it which covers the varied instances.

It must first be pointed out that many striking instances of the interference or the power to interfere of the Paramount Power in the internal affairs of the Indian States are not instances of the exercise of its general right in that connection: they are instances of special rights. Such is the case with its rights in Mysore. The powers to interfere in Mysore are the result of conditions imposed on the occasion of the restoration of the Hindu dynasty. Rights such as it has against Kutch are also obviously special rights. Had such conditions not been imposed, the Paramount Power would have had its normal general right of intervention: as it is, it has an additional and unusually extensive power of intervention by virtue of such special rights.

The right of intervention is a resultant right and perfected instances of its exercise are to be sought after 1858. The instances of interference which can be observed before that date clearly negative an attempt to derive this right from ancient custom: it grew out of the association of the Indian States and the Paramount Power but was not an incident of that relation when first formed. On the other hand, such instances of interference before 1858 equally well illustrate the gradual and inevitable emergence of such a right: they demonstrate how impossible it was for the Paramount Power, given an association such as had come into existence between itself and the Indian States, to refrain entirely from interference in their internal affairs.

For instance, the Paramount Power interfered in Jodhpur in 1824 to secure terms for subordinate chiefs, and again in 1839 to secure good government. It established a supreme court in Kathiawar in 1831 and has at intervals remodelled the forms of its administration there, in order to secure good government in the territories of an agglomeration of small

states mostly incapable of administering themselves. There was interference in Jaipur between 1818 and 1833 owing to corruption and misgovernment in order to secure the interests of the Paramount Power: and in 1835, after an attempt on the life of the Agent, a Council of Regency under his superintendence was formed. There was a minority Administration by British Officers in Nagpur down to 1830 but here the position perhaps rather resembled that in Mysore. Kashmir was granted "in independent charge" in 1846 but two years later the strongest threats of interference were made in view of misgovernment there. In 1844 Gwalior was invaded in order to reduce its rebellious army. Most extreme of all, the sense of the impossibility of allowing misgovernment to be perpetuated led to the annexation of Coorg in 1834 and that of Oudh in 1856 (in the latter case after long hesitation as to how to convert a moral duty into a legal right). On the other hand, in 1835 the Maharaja of Indore was refused help against his own rebellious subjects on the ground that the internal affairs of the state were no concern of the Paramount Power: and a similar declaration accompanied our very interference of 1844 in Gwalior. Finally, it may be recalled how many agreements between chiefs and their feudatory subjects were mediated by the Paramount Power.

This is an instructive list. On the one hand, it is quite impossible to extract from it a right of intervention, such as now exists, going back to Lord Hastings' time. On the other hand, it clearly demonstrates that in this period the Paramount Power was gradually realising its responsibilities though still striving to avoid them. Sometimes it felt able to disclaim them altogether, as in Indore in 1835 (though here another right was also in issue): sometimes it felt compelled to assume them in consequence of its own interests, as in Jaipur and to some extent in the Coorg annexation: sometimes it attempted to reconcile its desire to disclaim with the same necessity for action in its own interest, as in Gwalior in 1844 (though here of course, another general right is also in question): sometimes it could not escape from assuming sooner

or later and acting upon its responsibilities, as in the Jodhpur cases, Kathiawar and the Oudh annexation. The right in question is in process of growth from the assumption by the British of the paramount power in India through the development of the association between them as Paramount Power and the Indian States, and there resulted the right of intervention proper to the association in question and which has existed since 1858.

What is the right proper to such association, must be gathered from the character of such association. The character of the association in question was that of an association between the British Crown as Paramount Power and a number of territorial entities, at the same time isolated each by each but equally guaranteed protection, and immunity from laws other than their several own by that Paramount Power, while at the same time the British Crown in Parliament held in full sovereignty territories forming together with the said territorial entities a geographical unit, and excluded from such geographical unit any authority superior to itself. Such an association amounted to an incorporation of the whole geographical unit in the British Empire and to the assumption by the British Crown of a responsibility for the good and orderly government of that whole geographical unit directly in its own territories and indirectly in those of the subordinate governments in question. The right of intervention which resulted in course of history is a right of intervention for the discharge of such a responsibility compatible with the character before attributed to the subordinate governments. It is in the light of this that instances in which the exercise of this right has been claimed and of the various modes of such exercise can usefully be mentioned.

Lec-Warner enumerates five heads under which he considers that the right of intervention is to be exercised. The first is to prevent dismemberment of a State. Thus the wills of chiefs dividing their state between two sons have been set aside, as in Ali Rajpur in 1862: or, if dismemberment has been allowed, only one share has retained the status of an Indian State, as in

Kurundwar. Special cases may however occur where a new Indian State is created out of an old one, as Jhalawar from Kotah in 1838. The second head is to suppress rebellion. In our view this is not in all cases a head under which the right which we are at present examining falls to be exercised. We consider that in this case there is not a right of intervention in the Paramount Power but rather a right to assistance in the ruler of the State: and this right was adverted to in the section dealing with "Allegiance." However, if a case can be supposed in which a State was disturbed by rebellion and yet the ruler for reasons of his own did not invoke the aid of the Paramount Power, it would then seem that the Paramount Power would have a right to intervene under our present head: this will be understood from what follows. The third head given is for the suppression of gross misrule: the warning of 1848 to the Maharaja of Kashmir is quoted and Lord Northbrook's words addressed to the Gaikwar of Baroda in 1875; "Misrule on the part of a Government which is upheld by the British power, is misrule in the responsibility for which the British Government becomes in a measure involved." The fourth head is for the suppression of inhuman practices. Such were infanticide, suttee and slavery: and under the same category are ranked individual acts of cruelty committed by the ruler of an Indian State. The fifth and last of Lee-Warner's heads is for the securing of religious toleration. It will readily be seen that these five heads amount to nothing more than a claim that there is a right to intervene in order either to prevent the probability of eventual misrule or disorder or to suppress actual misrule or disorder: as we have already stated, we consider that it is just to this end—the maintenance of good and orderly government—that the right of intervention exists. The determination of the standard of good and orderly government rests with the discretion of the Paramount Power. It will readily be seen that the right of the Indian States to immunity from foreign law implies a recognition of the fact that good and orderly government in an Indian State is not to be measured by the methods of government employed or the results attained in British India. This is a fundamental point. The British

Crown as sovereign (in Parliament) of British India and Paramount Power is ultimately responsible for good and orderly government throughout India but it applies different standards in this respect in its own provinces and in States where its responsibility only implies an occasional and extraordinary intervention.

Lee-Warner's heads are, however, a useful catalogue of the kind of ways in which good and orderly government may be lost to an Indian State; and by the limited occasions for intervention which they provide and the proviso which he includes that intervention must not proceed on the basis of imposing on a State government the principles or methods of our rule of our own territories, they demonstrate equally that intervention directed to its proper end must nevertheless be compatible with the character secured to the subordinate governments in their association with the Paramount Power.

A somewhat different list of the occasions and modes of intervention is given in the Butler Report, as follows:—First, for the benefit of the Prince. This occurs in regard to succession. In 1891 it was laid down that no succession was valid until recognised by the Paramount Power: but in 1917 this view was modified, and now a natural heir succeeds as a matter of course and there is an exchange of notifications. In cases of disputed succession the Paramount Power decides. Cases of adoption are apparently held to be governed by Lord Canning's sanads subject however to the consent of the Paramount Power: but as already stated, we consider that these sanads created no new right in those on whom they were conferred, and the right of adoption according to the laws of their State, religion, or family is possessed by the rulers of Indian States. It is in any case a little difficult to understand the value of the sanads if adoptions are still subject to the consent of the Paramount Power. It appears to us that in regard to successions the right of the Paramount Power to intervene is limited to cases of disputed succession, where such right would be directed to the same end as in other cases.

Under the same head, the Butler Report instances the right to intervene in cases of a minority of an Indian Prince. This

right Lee-Warner had incorrectly derived from the Royal Prerogative. It is evident that here again we have an intervention directed to preventing probable misrule or disorder, and to this end it is obviously legitimate that the person of the youthful prince should be under control, that the administration should be supervised for him, and that any necessary conditions should be imposed upon or security taken from those whose acts might disturb good and orderly government. In 1917 strict rules were laid down to be followed by officers of the Paramount Power entrusted with powers during minorities in Indian States: this was a most desirable proceeding, for there can be little doubt that some abuse and misdirection of those powers had on occasions occurred before that date.

Secondly, the Butler Report considers that the right of intervention can be exercised for the benefit of the State. This covers occasions of gross misrule: intervention may then lead to deposition of the Prince or curtailment or supervision of his authority. It is stated that in these cases under a recent Resolution of the Government of India, a commission must first be offered to inquire and report. This head further covers cases of disloyalty or serious crime: it is not stated whether a commission is offered in such cases, but such was the procedure in a recent case where the commission of a crime in British territory cast suspicion on the Durbar of an Indian State. Further, under this head are mentioned barbarous practices such as suttee and infanticide, and torture and barbarous punishments. This list comprises cases of intervention for the maintenance of good government. Cases of disloyalty are covered by the right of allegiance. Cases of serious crime would be cases of misrule if committed in the State in question: if committed outside it, they would equally fall under the head of the maintenance of good and orderly government for the maintenance of which the British Crown is responsible, as stated throughout the *whole* geographical unit in question: the criminal not being in such a case amenable to any court, the right of intervention will be found to be exerciseable for exactly the same end² as in other cases.

Thirdly, the Butler Report considers the right of intervention may be exercised for settlement and pacification. Kathiawar is the instance cited. This is evidently once more a right directed to the end of maintaining good and orderly government: and it is in this connection that the prevention of dismemberment of States should also be considered as a ground for intervention.

Fourthly and fifthly, the Butler Report mentions the right of the Paramount Power to intervene for the benefit of India and the introduction of British jurisdiction into the Indian States. The latter of these two heads in our opinion is not related to the right of intervention proper, and it will be separately treated. We do not equally believe that a right of intervention for "all-India" reasons exists, and any rights claimed on this title are either wrongly claimed or can be justified on other and proper grounds.

It remains to gather up the strands of this discussion. In the first place, an attempt has been made to find a lawful basis for this right of intervention: on the theory which has been adopted throughout of the sources from which constitutional rights are derived, it has been described as a resultant right, and an attempt has been made to explain the nature of it by reference to the character of the society or association from the existence and growth of which in due historical course it resulted. Secondly, various modes and instances of its exercise have been examined, and it has been found that those which can legitimately or properly be referred to this right are concerned either with the remedy or the prevention of misrule or disorder. Certain claims in respect of this right have been rejected, others have been justified but found to rest really on other grounds than those formerly advanced. The conclusion that the remedy or prevention of misrule or disorder is the end to which this right is directed accords with what was said of the character of the society in relation to which it exists.

Depending on the same characterisation of the society in question, it has to be concluded that this right must not only be directed to its proper end, but must also be in its exercise

compatible with the character attributed to the subordinate governments comprised in that society. There must not therefore be any infringement of the immunity of a State from foreign law. There must not be any permanent infringement of the powers of its constituted authority where nothing but a remedy is aimed at, though there may be such infringement either permanent or of unusual duration where prevention is the aim: this applies to minorities and to such cases as Kathiawar. There must in any case be no permanent measures against the lawful dynasty whose rule is to be perpetuated. This leads to the conclusion that the right of intervention is only properly exercised against individuals whose acts amount to or whose situation may cause breaches of the good and orderly government for which the British Crown has assumed responsibility throughout the geographical unit of which the Indian States form part. This seems to us to accord with Lord Reading's statement in his letter of March 27th, 1926, to the Nizam of Hyderabad, where he wrote: "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 good order throughout India."

The following reflections will point the meaning of this conclusion. Let us suppose a state with a Moslem ruler and a Moslem majority where the playing of music outside mosques at the time of prayer was forbidden but the slaughter of kine was not. The Paramount Power would not be justified in proceeding in the ordinary course against the whole group of the Moslem population for the removal of this restriction, nor against the ruler personally: but suppose some unusual outrage was perpetrated, or some unusual oppression suddenly introduced against the Hindus, and the ruler was unwilling or unable to intervene, then the Paramount Power proceeding against the ruler only and not against any of his subjects would be justified in intervening to remedy the situation and to see that he did and was able to do justice. This is, by way of example, as far as we can go with Lee-Warner in regard to religious toleration. Suppose again a state in which a single class—

perhaps a class of nobles—possessed a set of special rights and privileges oppressive to the rest of the population. The Paramount Power could not proceed against that whole class and the posterity of its actual members to restrict those privileges, unless a situation had arisen where it was necessary to prevent a chronic state of misrule and disorder as a result of such privileges: even then the intervention would be through or against the ruler, and would take the form of the mediation of a new statute between him and his nobles followed by a withdrawal of the Paramount Power when the remedy had been applied. On the other hand, where the minor age of a ruler gives unusual occasion for disorder, then the Paramount Power may take measures of the requisite duration and nature to prevent this, but again proceeds against an individual in view of his situation: and the case is quite similar where the smallness of a State leaves the individual who from time to time is the ruler of it in a situation where he cannot perform the obligations of government in it; thereupon permanent measures of prevention may be taken, as in Kathiawar and other groups of minor states.

Two points may next be noticed. In the first place, the necessity of maintaining the immunity from foreign law is met by the use of the executive authority of the Viceroy in the establishment of courts and other remedial measures. As already observed, the legality of such acts depends, from the point of view of the society formed by the Indian States and the Paramount Power, upon the rights subsisting between those parties: it is only in order to legitimate such acts from the point of view of the law of England that acts of Parliament, such as Government of India Acts or Foreign Jurisdiction Acts, have to be invoked.

In the second place, some measure of uncertainty is inevitably left in regard to the right of intervention now under consideration. As the Butler Report has it "Paramountcy must remain Paramount": and, limiting that phrase for the moment to the particular right in question, it is certainly true. It is impossible to say exactly in what instances the Paramount

Power will or will not intervene: apparently very similar instances may receive different treatment. The Paramount Power must remain the master of its actions and the arbiter of the penalties to be exacted. This rests on a very good reason. The right of intervention is referable to an association between itself and subordinate governments which are as a general rule arbitrary and absolute: it is therefore perfectly just, and indeed the only course consonant with the nature of the association in question, that there should be some degree of arbitrariness in the powers vested in the Paramount Power. This is the consideration to which we referred in discussing the right of the Paramount Power to decide disputes between itself and an Indian State.

One point may finally be referred to. The Butler Committee, speaking of the duty of the Paramount Power to protect the ruler of an Indian State against attempts to eliminate him and to substitute another form of Government, says that if such attempts were due not to misgovernment, but to a widespread popular demand for change, the Paramount Power would be bound to maintain the ruler's rights, privileges and dignities but also to suggest such measures as would satisfy this demand without eliminating the ruler. It will be obvious from what has already been said that in our opinion this statement goes too far: we cannot see anything in the true nature of this or any of the general rights of the Paramount Power to justify this pronouncement. Changes in the internal constitution of an Indian State must depend solely for their rate and nature on the will of the ruler (subject to any law or rule special to a state). In consequence the Paramount Power ought in this as in a case of rebellion to stand by the ruler in the exaction of his rightful allegiance nor would it be legitimate even where a demand for change was provoked by misgovernment for the Paramount Power, in intervening to correct such misgovernment, to introduce changes in the *form* of government: for in that case it would do more than proceed against an individual whose acts or situation endanger the general order for which it is responsible.

6. Appointment of Residents and Political Officers.

It might appear to be no more than a corollary from the possession of general rights by the Paramount Power that it has the right to appoint officers to exercise and watch over those rights. This would not, however, strictly follow. Conceivably other methods might have been found to attain this end and in that case, if later a demand had been made to appoint such officers, it might legitimately have been resisted as an infringement of some right or immunity. It is therefore necessary to enumerate the right to make such appointments among other general rights. It undoubtedly exists and has existed since the beginning of the association between the Paramount Power and the Indian States; it is thus a right by ancient custom. It may be of an adjective nature, while other general rights are substantive: but it was adjective to the rights subsisting between the Paramount Power and the Indian States from the first moment of that association's existence. The barest glance at historical records will establish this. The exercise and surveillance of its general rights by the Paramount Power through Residents and Political Officers appointed for the purpose is thus a general right of the Paramount Power.

7. British Jurisdiction, and Extradition.

A. BRITISH JURISDICTION.

The British jurisdiction which we now have to consider is not the jurisdiction which has been in various times and places introduced into Indian States in pursuance of the general right of intervention already described. It is the jurisdiction over particular places and things which is claimed to be vested in the Paramount Power at all times and in all Indian States.

A good deal has been written on this subject and it is regarded as somewhat complicated: but it has usually been treated from the angle of English domestic law, that is to say for the purpose of showing how the exercise of such jurisdiction has become vested by English law in the British Indian

Legislature or the Governor General in Council. In our view, however, such matters are not relevant to the enquiry which we are making. We desire to find out whether there is any basis in the constitutional rights subsisting between the Paramount Power and the Indian States for the exercise of the jurisdiction claimed. As to that, Acts of Parliament have no importance: we can only examine the rights claimed on the same basis as other like rights and see if they derive from any of the proper sources of such rights.

Such rights of jurisdiction are not claimed against any one State as special rights; they are claimed universally as general rights. If it should be found that they were not thus primarily general rights, they might still be claimed as adjective to or an element in some general right of the Paramount Power. We have therefore to ask in respect of any such jurisdiction whether it is (1) a general right, based on ancient custom or of a resultant nature, (2) if not, then whether it is a right which must be attached to some general right of the Paramount Power.

The kinds of jurisdiction claimed under this head are—

- (a) Railway jurisdiction;
- (b) Cantonment jurisdiction;
- (c) Residency jurisdiction;
- (d) Civil Station jurisdiction;
- (e) Personal jurisdiction over European British subjects and foreigners generally in Indian States.

(a) *Railway jurisdiction.*

We have already indicated our view of the right of the Paramount Power in the matter of railway construction. The right to exact a cession of jurisdiction over railway lands depends also on the general rights of the parties in regard to protection and defence. With a view to defence of India against external invasion and also against internal disturbance, it is undoubtedly necessary that railways which cross the frontiers of several jurisdictions should be placed under the unified control of the power responsible for defence. It appears

that the changing necessities of adequate defence are thus a sufficient basis for the claim to this right. It is in fact attached to a general right of the Paramount Power. In just the same way some new element in the right of the Paramount Power in regard to defence may in due time appear as a result of the development of air power. We have to allow not only for the growth of the relationship between the Paramount Power and the Indian States in examining general rights: but changes in external circumstances necessitate also alteration and adaptation in the elements of such rights. This is another kind of growth which ought to have its force admitted in a body of living constitutional rights.

The subsidiary nature of this right is demonstrated by the well-known judgment in the case of *Muhammad Yusuf-ed-din v. Queen-Empress* (1897), L. R. 24 Ind. Ap. 137, which decided that such a cession of jurisdiction was limited by the terms embodying it, and in that case was a cession for railway purposes only which did not allow the execution upon railway lands against a subject of an Indian State of a warrant for an offence committed in British India..

The same point may equally be gathered from the mere nature of the right—which is a right to claim and receive a cession of jurisdiction, not to exercise the desired powers proprio motu upon the construction of all railways.

(b) *Cantonment jurisdiction.*

(c) *Residency jurisdiction.*

(d) *Civil Station jurisdiction.*

The right to jurisdiction is in each of these cases justifiable as a necessity for the full enjoyment of a general right or an element of a general right by the Paramount Power. We have found that the establishment of cantonments is an element in the general right of the Paramount Power correlative to its duty of defence. The establishment of a residency and the jurisdiction claimed as residency jurisdiction depend on the general right to appoint Political Officers. Civil station jurisdiction depends on that branch of the right of intervention

which relates to the establishment of permanent administrative systems in areas where the power of the State government or governments is permanently disabled. In each case the enjoyment of jurisdiction is obviously necessary to the enjoyment of the right in question.

What is more the right to jurisdiction within the area selected is, as a rule, the substance of what the Paramount Power obtains for the purpose of implementing its general right. Two cases are to be found in the Indian Law Reports, Bombay Series, which illustrate this point. Curiously enough they both occurred in 1885 and the decisions in them were diametrically opposed. The first was *Triccam Panachand v. Bombay Baroda and Central India Railway Company*, I. L. R. 9 Bom. 244, and it was decided by a single judge sitting as a civil court of first instance that the cantonment of Wadhwan was within British India. The second case was the *Queen-Empress v. Abdul Latif*, I. L. R. 10 Bom. 186, in which two judges sitting to revise criminal cases decided, without referring to the previous case, that the civil station of Rajkot was not within British India so that a theft committed there would be committed within British territory. Both the cantonment of Wadhwan and the civil station of Rajkot are the subject of agreements identical in substance by which "a spot of land" is assigned in perpetuity to the British Government with a proviso for reverter. In the Wadhwan case the judge held that such assignment was equivalent to the cession in full sovereignty which was made in the case of the cantonment of Morar: in the Rajkot case the judges held that having regard to all the terms of the agreement it dealt with jurisdiction and not with sovereignty. The latter view is doubtless correct. The other view would give rise to just the same difficulties as was felt in taking cessions of railway lands, namely that if the land became British territory by cession any subsequent change or re-arrangement would be a matter of much greater moment and difficulty. It must be remembered that these judgments declare the point of view of English domestic law. This does not affect the right of the Paramount Power to establish cantonments and

civil stations and to exact such jurisdiction as may be necessary for its effective enjoyment. It then results that such terms as may be necessary in each case are embodied in an agreement with the State concerned and stand as special rights between the Paramount Power and such State (and in a given case as apparently at Morar there might be a cession of sovereignty).

The nature of the general right on which all these transactions are founded must be constantly borne in mind in order to limit the jurisdiction claimed to proper proportions. Thus the right of residency jurisdiction is really a right to immunity of the residency premises and of the Resident and the staff of the residency from the jurisdiction of the Indian State, and a correlative vesting of the jurisdiction over them in the person deputed by the Paramount Power (i.e., the Resident himself): but, bearing in mind the true nature and extent of such a right of jurisdiction, it ought not to be insisted on or extended with the result of withdrawing a really extensive area from the jurisdiction of the Indian State and enabling a considerable population really unconnected with the residency to go into that area and immunise itself, for instance, in fiscal matters, from the jurisdiction of the Indian State, as is reported to have happened in Indore.

On the other hand, these jurisdictions will properly extend to all those whose duties place them in such cantonments or civil stations, and to all officers deputed by the Paramount Power on any duty in an Indian State, and to their families and staffs.

(e) *Personal jurisdiction over European British subjects and foreigners.*

The claim to this jurisdiction differs from the claim to the jurisdictions above enumerated in that it cannot be attached to any of the general rights already examined, and therefore it must stand by itself as a distinct general right or else fail.

If it were sought to attach it to any of the foregoing general rights, none could be suggested except the right of allegiance, which might be argued to be confined in each Indian State to

the subjects of it, and therefore to demonstrate a similar limit in the ruler's jurisdiction: but it would be a very novel principle to make jurisdiction dependent on allegiance, and so this may be rejected. In any case, it is, anomalously enough, not claimed in respect of Indian British subjects nor subjects of the other Indian States, nor probably in the case of oriental foreigners, e.g., an Afghan or a Gurkha.

Again, it may be regarded as similar to the capitulatory systems existing from time to time in some oriental countries, but these have a very special history of their own and belong, of course, to a different sphere of law.

It is possible that this right might occur in a number of cases as a special right; and in establishing in each case such special right, the usual rules would apply. We are otherwise thrown back on the necessity of regarding this right, in the form in which it is claimed, as a distinct general right, and of referring to the sources of general rights in order to justify or refute the claim.

It cannot be said to result from the character of the association between the Paramount Power and the Indian States. There is no element in that, as we have described and envisaged it, which could grow into such a right as this. It depends therefore whether it can be shown that this right was enjoyed by ancient custom, that is to say, whether it was enjoyed from those times when the association between the parties came into being between 1820 and 1830. It is probable that it was not. It was not until 1833 that the laws of British India were (from the point of view of British India) extended to servants of the East India Company outside British India. No instances of old usage are given by Lee-Warner in this connection: he relies upon arguments of expediency and convenience. It is also suggested that, at least as regards foreigners, the isolation of the Indian States imposes a duty on the Paramount Power to protect foreign nationals in Indian States: but we think any such duty is sufficiently discharged by the Paramount Power in maintaining good and orderly government up to a standard which is commonly known; and such an argument would put

British subjects in a worse position than foreigners which would be hard to admit. In a case of flagrant injustice, the general right of intervention would be a ground for action, but we are inclined to think that in its general extent the claim to exercise this jurisdiction has no basis in right. The Indian States have been preserved with their jurisdictions as separate entities subject to the right of the Paramount Power to enforce a certain level of good government: but it would not be right to withdraw a certain class of persons altogether from their jurisdiction on the ground that even at their best the administration of the Indian States was not worthy to control the rights of such persons. Such jurisdiction having been preserved subject to the measure of control described, those who go voluntarily within such jurisdiction ought to accept the consequences. Those whose duties take them there are immune under other rights of jurisdiction already described in this section.

B. EXTRADITION.

At one time a few extradition treaties were concluded with Indian States, but it has been stated that the practice was soon discontinued and such treaties are virtually obsolete. Rights under them are saved, however, by the Indian Extradition Acts, and the power to make them by the Extradition Acts of the Imperial Parliament, as far as the domestic law of British India or Imperial law are concerned.

As regards extradition to Native States from British India, this is governed by Chapter III. of the Indian Extradition Act, 1903, which provides for the extradition of all persons accused of extradition offences who are not European British subjects. The exemption thus accorded to European British subjects rests naturally on the claim to jurisdiction over them, and as we reject the one we cannot maintain the right to the other. It should be observed that extradition is always the matter of an arrangement between two units of jurisdiction. We are thus not concerned here with rights between the Paramount Power and the Indian States, for the Paramount Power is not a unit of jurisdiction into whose grasp an offender could be delivered

up. It might be argued that the Paramount Power, in exercise of its responsibility for general order, might demand the surrender of offenders in certain respects: but we do not think this is so, for there is no organ of the Paramount Power to which they could be given up. Its proper right in this case would be a right to their apprehension and punishment. This is not mere hair-splitting, for otherwise we shall find ourselves forced to confuse the Paramount Power and the Government of India, which we must not do. As regards, therefore, extradition between the Indian States and other parts of the British Empire the matter is merely another case of current arrangement between the parties, and it lies with them to accord each other by agreement such rights as they think fit, and to accomplish their wishes by the passage and application of such laws, whether Extradition or Fugitive Offenders Acts or otherwise, as they choose from time to time.

Nevertheless we may be led back to the intervention of the Paramount Power in this complex of rights in the following way. The external relations of the Indian States are conducted by the Paramount Power, with British India or other parts of the Empire as well as with foreign states. If the Paramount Power grants rights of extradition then these are binding on the States. It is probable that a general right has been granted to British India by the Paramount Power to the apprehension of and surrender from Indian States of fugitives accused of offences comprised in the Indian Extradition Acts as extradition offences. This would be the proper form of such a right, and in the circumstances the grant of it by the Paramount Power may safely be presumed. The frame and wording of Chapter III. of the Indian Extradition Act of 1903 indicate the acknowledgment of similar right to all Indian States by British India.

The strict lines of this situation may in time be modified by the gradual waiver by the Paramount Power of its right to isolate completely each Indian State.

Two of the general rights of the Paramount Power impose further and wider duties on the Indian States in respect of

extradition. In the first place, by virtue of the right of the Paramount Power to conduct their foreign relations, they are bound to assist in carrying out obligations assumed under extradition treaties with states outside the British Empire. In the second place, the duty of defence assumed by the Paramount Power carries with it a right to the apprehension and surrender of deserters from the Imperial Forces who take refuge in Indian States.

CONCLUSION.

Having thus examined and enumerated the rights subsisting between the Paramount Power and the Indian States, it will be desirable to recapitulate in summary form the conclusions reached. The heads of such a summary must of course be read with reference to the extended discussions of each point in the previous chapter. Such conclusions are as follows:

1. The relationship between the Paramount Power and the Indian States is intended and admitted to comprise rights and duties of a binding nature.

Rider. It is impossible to consider as a body of rights what is merely collected from actual practice or held loosely equitable in the particular circumstances: there is therefore no peculiar or special set of rules (such as the rules of so-called "Indian Political Law") which embodies the said rights and duties.

2. Rights and duties of a binding nature must derive their force from law and be determined according to law.

Rider. Law comprises various branches and the said rights and duties cannot be determined without first deciding to which branch of law it is appropriate to refer.

3. When all the relevant circumstances both of past history and of the present situation are taken into account, it is plain that the relationship between the Paramount Power and the Indian States is a constitutional relationship and the rights and

duties claimed must be examined according to the principles of constitutional law.

Rider. Constitutional law embraces rights of four kinds:

- (i) Rights dependent on written instruments.
- (ii) Conventions designed to secure that written constitutional rights shall not be perverted or set at naught.
- (iii) Rights derived from ancient custom or common law, which are recognised to exist from the earliest time that a given society is actually in being.

Rider. The earliest time that the society between the Paramount Power and the Indian States was actually in being was the Governor-Generalship of Lord Hastings.

- (iv) Resultant Rights, which result at various times in the existence of a given society from the nature of such society and its growth.

4. The constitutional statute, determined on the principles of the foregoing paragraph, prevailing between the Paramount Power and the Indian States is as follows:

A. Definitions.

(i) A general right is a right capable of being enjoyed by the Paramount Power against every Indian State or by every Indian State against the Paramount Power.

(ii) A special right is a right capable of being enjoyed by the Paramount Power only against a particular Indian State or several States or only by a particular Indian State or several States against the Paramount Power.

(iii) The Paramount Power is the Crown of England and is an entity distinct from the Government of British India.

General Rights.

1. *Allegiance.*

a. The Paramount Power has a right to the allegiance of the rulers of Indian States.

b. The Paramount Power is the fount of honour and titles for the rulers of Indian States.

c. The rulers of Indian States have a right to the assistance of the Paramount Power in exacting the allegiance of their subjects, to which they have an inherent right, as sovereigns within their own territories.

d. The rulers of Indian States enjoy the status of foreign sovereigns as regards the laws of England.

2. *Isolation.*

The Paramount Power has the right to conduct the whole external relations of every Indian State, and to the assistance of the rulers of Indian States in performing obligations towards foreign powers assumed by it in this connection.

Rider. The Paramount Power has relaxed its right to isolate the Indian States completely from each other and has created a Chamber of Princes.

3. *Protection and Defence.*

a. The Indian States have a right to be protected and defended by the Paramount Power, without rendering themselves any active assistance (subject in each case to any special right of the Paramount Power in this respect).

Rider. In order to perform the duty correlative to this right the Paramount Power has the right:

- (i) To move troops through the Indian States.
- (ii) To establish cantonments and military posts in its discretion throughout the Indian States and to exercise jurisdiction within such cantonments and posts.
- (iii) To insist on the construction of a railway for imperative reasons of strategy and to exact a cession of jurisdiction in an Indian State over every railway which crosses the frontier of such State.
- (iv) To extend its system of telegraphs and telephones throughout Indian States and administer such systems therein,

and generally to adapt its rights consequent upon its duty of defence and protection to changes in material circumstances and requirements.

b. The Paramount Power has a right to limit the military establishments of the Indian States.

4. *Exclusion from the King's Dominions.*

The Indian States have a right to be excluded from the King's Dominions in the sense that no Act of the British Parliament or of any British Indian legislative authority has any force within their borders.

5. *Intervention.*

The Paramount Power has the right to proceed by temporary or permanent measures against any individual whose acts or situation imperil the general order, for the maintenance of which at certain standards the Paramount Power has assumed responsibility in India, and to correct the abuses which spring from the acts or situation of such a person.

6. *Appointment of Residents and Political Officers.*

The Paramount Power has the right to appoint Residents and Political Officers and other officials in Indian States to exercise the general rights vested in it.

Rider. The Paramount Power has the right:

- (i) to establish residences and civil stations;
- (ii) to exercise jurisdiction therein;
- (iii) to exercise jurisdiction over all officers deputed by it to duties in Indian States (while engaged in such duties), their families and staffs.

7. *Extradition.*

(i) The Indian States are bound by and have the benefit of all arrangements, whether mutual or otherwise, entered into directly or through the Paramount Power with other parts of the British Empire on their behalf and or with foreign states

on behalf of the British Empire for the extradition of fugitive offenders, and must render assistance in carrying these out.

(ii) The Indian States have a general duty to arrest and surrender deserters from the Imperial Forces who take refuge in their territories.

B. Special Rights.

A special right enjoyed against or by an Indian State, though no more a matter of agreement than a general right, is normally embodied in a written instrument *but its acquisition may be proved by other means.* It must, however, in every case be proved by *direct and unimpeachable evidence, and no evidence of mere enjoyment or of its existence in the case of another Indian State can suffice to establish such a right.*

C. Contractual rights and obligations of the Indian States.

The Indian States have contractual rights and obligations in respect of (i) matters of current and common interest (not covered by express agreement) with parties other than the Paramount Power, (ii) matters the subject of express agreements with such parties.

Rider 1. The other party in regard to such questions and agreements is most frequently the Government of British India.

Rider 2. (a) Such matters should be dealt with on the basis of the freest agreement.

(b) In as far the Paramount Power does in practice bind the Indian States by agreements on such questions or the solution of disputes concerning them, it should do so without any view to the interests of British India or to considerations extraneous to the question at issue.

Rider. Such matters are properly justiciable before a judicial tribunal.

D. General Riders.

1. The treaties, engagements, and sanads existing between the Paramount Power and the Indian States:

- (a) are fully binding where they express a special right;
- (b) are not fully binding where they conflict with a general right.

2. There is no means except the consent of all the Indian States by which the rights of the Paramount Power can be vested elsewhere than they are at present, (for the Paramount Power has no general right enabling it to compass such a change and no Act of Parliament affects the Indian States).

3. The Indian States ought not to be subordinated in any way to British India: it is, in particular, quite improper:

- (i) for the rights of the Paramount Power to be used to forward any interests of British India or any so-called "all India" interests, or for any purpose except those which they specifically comprise;
- (ii) for any burdens to be imposed on the Indian States by reason of their geographical position through the acts of the Government of British India within British India.

The relations of the Indian States and British India may be adjusted by agreement in any way that is found most convenient or acceptable to the parties, and such adjustment is a matter of administration subject to the relative constitutional position of either party, which conditions all administrative acts and cannot be affected by them.

4. The fact that the Indian States do not themselves possess effective systems of popular government, limiting the powers of their rulers, comports the existence of an element of arbitrariness in any action taken by the Paramount Power under its general rights against them.

