

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of—

(1) *Hemchand Devchand v. Azam Sakarlal Chhotamlal, from the Court of the Agent to the Governor, Kathiawar, Bombay Presidency,*

and

(2) *The Taluka of Kotda-Sangani v. The State of Gondal, from the Governor of Bombay in Council ;*

delivered the 18th December 1905.

Present at the Hearing :

THE LORD CHANCELLOR (Earl of Halsbury).

LORD MACNAGHTEN.

LORD DAVEY.

LORD JAMES OF HEREFORD.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[Delivered by Sir Arthur Wilson.]

The first of these Appeals arises out of a suit instituted in the Court of the Assistant Political Agent of Sorath Prant in Kathiawar (the term Prant meaning an administrative district). The grounds of the Plaintiff's claim, so far as it has now to be noticed, were that in February 1893 he had advanced money to the late Darbar Shri Vala Naja Mamaiya, a shareholder in the Chiefship or Talukdari of Jetpur Chital in Kathiawar, for the purpose of paying off debts due by the latter, who was a talukdar of the 6th class, and that the Plaintiff had acquired possession ; that Vala Naja died in May 1901 ;

and that the Plaintiff's rights as mortgagee had been interfered with or threatened by the nominal Defendant as Manager for the substantial Defendants, the successors of the deceased Chief. The Plaintiff prayed for a declaration of his rights and an injunction. In effect therefore the suit was one to enforce a mortgage made by a deceased Chief against his successors. The Assistant Political Agent dismissed the suit, basing his decision upon a notification of the Government of India, in the Foreign Department, of the 22nd June 1900 which laid down, for the guidance of the Agency Courts in Kathiawar, the rule that:—"No suit shall lie against a tributary Chief or Talukdar . . . in respect of any debt contracted by the predecessor of such Chief or Talukdar or sub-sharer unless (a) the claim has been admitted by the tributary Chief or Talukdar or sub-sharer; or (b) the debt has received the written approval of the Political Agent."

Against that decision the Plaintiff appealed to the Political Agent, who on the 22nd February 1902 dismissed the Appeal. On the 8th September 1902 the Political Agent dismissed another Appeal by the Plaintiff against an Order of the Assistant Political Agent awarding the Defendants possession of the property in dispute. By a third Order of the 22nd September 1902 the Political Agent dismissed two applications of the Plaintiff, one for a certificate that the case fulfilled the conditions necessary to support an appeal to His Majesty in Council, the other for leave to bring such an appeal. Against these three Orders of the Political Agent the present Appeal has been brought.

The Plaintiff being dissatisfied with these Orders of the Political Agent, his ordinary and regular course would have been to appeal to the

Governor of Bombay in Council. But he made an application to His Majesty in Council for special leave to appeal without going first to the Governor in Council, and in accordance with their Lordships' advice, His Majesty in Council granted special leave so to appeal, but with leave to the Secretary of State for India to intervene, and put in a case and appear; in the result the India Office acted for the Respondent. The Appellant having been thus allowed to come before this Board without first going to Bombay, their Lordships think that the leave so given cannot have the effect of placing the Appellant in any better position than he would have been in if he had followed the usual course and had a decision against him by the Governor in Council. So that in this respect, the case stands on the same footing as the second of the present Appeals.

The second Appeal arises out of a suit instituted by the Thakor of Kotda-Saugani (a Kathiawar State) in the Court of the Assistant Political Agent, Halar Prant, against the State of Gondal, a State of the first class, to redeem and recover possession of a village said to have been transferred by way of mortgage to the latter State by the former. The suit was dismissed by the first Court, and that dismissal was upheld by the Political Agent, Kathiawar. Upon appeal the Governor of Bombay in Council reversed that decision, and gave a decree for redemption. A further appeal was brought to the Secretary of State in Council who reversed the decision of the Governor in Council.

After various proceedings before the tribunals in Kathiawar, in which the Plaintiff sought unsuccessfully to execute the decree of the Governor in Council notwithstanding its having been reversed by the Secretary of State, he appealed to the Governor in Council, and asked him to order the execution of his own decree.

By an Order of the 14th January 1904 the Governor in Council refused the application. And against that Order the Plaintiff has brought the second of the present Appeals, having obtained special leave to do so, granted upon the same terms as the leave granted in the first case.

These two Appeals were heard together. The question common to both cases, and the only question which has been argued, is whether an appeal lies to His Majesty in Council. And the answer to that question depends mainly upon the true relation of the Kathiawar States and their people to the British Crown, and upon the nature and character of the control exercised by the British Indian authorities over the administration of justice in those States.

Prior to the year 1802 Kathiawar consisted of a large number of States, independent of one another, each governed by its own Chief, but paying tribute in part to the Peshwa and in part to the Gaikwar of Baroda. It is necessary to review certain events that have occurred since that date, but they can be dealt with very briefly; the more so because Kathiawar in its relations with the British Indian Government has commonly been dealt with as a whole; and it may be so dealt with on the present occasion, for the cases presented by the present Appellants do not depend upon any circumstances peculiar to the particular States which, or whose rulers or people, are affected, or upon any consideration not applicable to the whole province.

The time under consideration divides itself naturally into two periods, that of the Government of British India by the East India Company down to 1858, and that of the direct government by the Crown after that date.

The legal and constitutional position of the Company during the former of these periods was

established in a series of judicial decisions, and was finally and fully defined in *The Secretary of State in Council v. Kamachee Boye Sahaba* (7 Moo. I.A. 476.) The Company exercised a delegated sovereignty over the territories under its government, with all the powers in connection with the external relations of those territories incidental to the exercise of that sovereignty, subject, of course, to such restrictions as were imposed by charter or by statute.

It is obvious that the sovereign power thus delegated to the Company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 (13 Geo. III., c. 63) the three Presidencies in India were wholly independent of one another; in the government of each, and in the dealings of each with the Native States in its neighbourhood, the Company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Governments of Madras and Bombay were placed under the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or peace or concluding treaties without the approval of the Central Government. Subsequent statutes expressed with greater clearness the subordination of the lesser governments, and repeated the restrictions upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away those powers, but, on the contrary, repeatedly recognised their existence. And accordingly in *The East India Company v. Syed Ally* (7 Moo. I. R. 555) this Board held that a treaty entered into by the Government of Madras, after compliance with

the statutory conditions, was a valid exercise of sovereignty. It is well to notice this point, because much that has now to be considered has to do with the action of the Government of Bombay. And as no question has been raised as to the Bombay Government having at all times obtained all necessary sanction, the distinction between the two Governments need not be further noticed.

By the Government of India Act, 1858, the delegation of sovereign power to the Company was determined, and it has since been exercised directly on behalf of the Crown, in India (speaking generally) through the same authorities as before, in England through the Secretary of State.

Under the sovereign power thus delegated for so long to the Company, and since 1858 exercised directly on behalf of the Crown, the British Empire in India has been built up. Under it new territories have been added to the actual dominions of the Crown; and under it many and various powers, rights, and jurisdictions have been acquired and exercised over territories which yet remain outside the King's dominions. Of the divers ways in which new lands have been brought under the King's allegiance it is unnecessary here to speak. As to the rights and powers of control possessed and exercised over the Native States in India with the corresponding restrictions upon the independent action of those States, some, no doubt, are the necessary consequence of the suzerainty vested in the predominant power. Thus, as is recited in 39 & 40 Vict. c. 46, the Indian States in alliance with the Crown, have "no connexions, engagements, or communications with foreign powers." But apart from and beyond the consequences, whatever they may be, flowing from this general source, rights of very varying kinds have been established in

connection with the several States. They have different historical origins. The Indian Foreign Jurisdiction and Extradition Act, XXI. of 1879 (following the language of the Imperial Act) recites that "by treaty, capitulation, agreement, grant, usage, sufferance, and other lawful means the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India." And that Act proceeded to regulate the exercise of that jurisdiction so far as it was competent for the Indian legislature to do so, that is to say, so far as it affected persons for whom that legislature could make laws. The present cases are outside the scope of that legislation.

Such rights over foreign territory differ not only in origin but in kind and in degree in the cases of different States; so that in each instance in which the nature or extent of such rights becomes the subject of consideration, inquiry has to be made into the circumstances of the particular case. In accordance with this, in *Muhammad Yusuf-ud-din's* case, 24 I. A. 137, in which the question was as to the nature and extent of the railway jurisdiction vested in the British Indian authorities within the dominions of the Nizam, the case was decided upon the construction of the correspondence in which the cession of the jurisdiction was embodied. In the present cases the inquiry is as to the relation of the Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Governments over those States, and particularly with relation to the administration of justice.

It has already been said that, prior to 1802, the numerous States of Kathiawar were independent of one another, but paid tribute in part to the Peshwa and in part to the Gaikwar.

By treaties of 1802 and 1817 the Peshwa's rights were ceded to the East India Company. In 1820 the Gaikwar's rights were ceded.

What the nature of the power of the Peshwa and of the Gaikwar was, regarded as a matter of right, and what therefore they ceded to the East India Company, was the subject of frequent and anxious inquiry on the part of the Board of Directors and the Government of Bombay, but no satisfactory result was ever arrived at; and it would be almost hopeless at the present time to attempt to answer that question upon the basis of contemporary evidence. Perhaps the whole truth is told in a sentence of a despatch of the Court of Directors of the 8th November 1831:—"It can scarcely be doubted, however, " that the rights of the Maratta Governments " were whatever they found it convenient to " claim and had power to enforce." Their Lordships are happily not called upon to enter into any inquiry so difficult as this. The control of the British Indian Government over Kathiawar has been in operation without controversy for a very long series of years. And the nature and character of that control must be ascertained from the manner in which, and the principles upon which, it has, in fact, been exercised. The history of this is therefore of primary importance.

In 1807, at a time when the rights of the Peshwa had been partially, but not completely ceded, and when those of the Gaikwar were still in full force, Colonel Walker was sent to Kathiawar for the purpose of putting an end, as far as might be possible, to the disorders prevailing in the province. In a later despatch of the Court of Directors, of the 15th September 1824, it is said: "The objects of the Company's " interference in Kathiawar in 1807 were to " induce the Chiefs to enter into a permanent

“engagement for the payment of the claims of “the Guicowar Government” (the Peshwa’s tribute was at that time farmed to the Gaikwar) “without the periodical Mooluckgerry “Circuit, which devastated the country in its “progress and absorbed the tribute in its “expense, and at the same time to obtain “security for the discontinuance of mutual “aggression and predatory excursions.” Colonel Walker brought about a settlement to which the Gaikwar’s Government and the Chiefs were parties, of which it is enough to say that it provided for a fixed tribute from each State, secured by a system of mutual guarantees, that tribute to be received by the Company which should account to the Gaikwar for what was due to him, for the cessation of the Mooluckgerry invasions, and for the maintenance of peace and order between the States themselves.

The next period which it is necessary to consider is 1819 and the few following years. The arrangements made by Colonel Walker for securing the tribute had not been completely successful. Two different officers were instructed to investigate the conditions of the problem. Amongst the subjects of inquiry prescribed one was: “In whom do the Chiefs of Kattywar “conceive the sovereignty of their country to “reside; in the Chiefs themselves, the King “of Delly, or the Governments to whom they “pay tribute?” with a number of other inquiries bearing on the same question. Reports were received, the Government of Bombay expressed its views, and the subject came before the Court of Directors in 1824, who in the despatch to Bombay already referred to of the 15th September 1824, dealt thus with the subject: “In your 49th paragraph, Colonel “Walker’s opinion that the Chiefs were other- “wise independent, though paying a forced

"tribute, is questioned, and an inquiry is
 "intimated into the general rights of the
 "British and Gaicowar Governments over the
 "Chiefs of Kathiawar. . . . The right of
 "preserving the peace of the country, which you
 "assumed in paragraph 48, appears here to be
 "questionable, and is made to rest on question-
 "able precedents. If Colonel Walker acted on a
 "supposed right he did not thereby make it a real
 "one. But it is at least doubtful if the Maratha
 "Governments in point of fact ever claimed
 "more than tribute. There is no evidence
 "that they ever interfered to maintain the peace
 "of the country, or that they ever sequestered
 "talooks for means of tribute. The proposed
 "inquiry must therefore resolve itself into this,
 "whether we have derived from them the right
 "of doing the same precise things which they
 "did and nothing more, or the right of directing
 "the same general power to different specific
 "objects according to the difference of our
 "policy."

In 1825 further difficulties had arisen, which
 the Government of Bombay dealt with as best it
 could; and on the 23rd November 1825 the
 Government addressed to the Court of Directors,
 a letter in which the constitutional position of
 Kathiawar was very cautiously dealt with.
 The reply to this and other letters was
 contained in a despatch of the Court of
 Directors of the 20th July 1830, in which they
 said: "All the rights which we possess in
 "Kattywar were acquired from the Peshwa
 "and the Guicawar, from the former by con-
 "quest, from the latter by mutual arrangements.
 "These rights we considered as limited to the
 "exaction of a tribute with the power of taking
 "such measures as might be essential to the
 "security of that tribute. Beyond this we did
 "not propose to interfere, and we determined to

“ treat the Kattywar tributaries as independent
 “ chieftains entitled to the uncontrolled exercise
 “ of the power of Government within their own
 “ territories, and subject only to the obligation
 “ of not molesting our subjects, our allies, or one
 “ another, and of paying the stipulated tribute
 “ to the Guicawar and to ourselves.”

By the year 1830 it was found that disorders still prevailed in Kathiawar, due apparently to the weakness of some of the Chiefs. And the Bombay Government instructed the Political Commissioner to visit Kathiawar twice annually, and try persons guilty of capital crimes in the territories of those petty States whose Chiefs might be too weak to punish them. The Court of Directors in 1834 approved this plan, adding :
 “ We are glad to find that it has the complete
 “ concurrence of the Chiefs themselves.”

In 1847 it appears that questions arose as to whether offences committed in Kathiawar by sepoy in the Company's service, and by camp followers, were to be tried by Court-martial as offences committed in foreign territory, and the decision of the Bombay Government was in the affirmative.

In a despatch of the 31st March 1858, the Court of Directors, referring to an opinion expressed by the then Resident of Baroda, said :
 “ We cannot dismiss the correspondence which
 “ has arisen out of these questions of jurisdiction
 “ without expressing our surprise that an officer
 “ in the high political position occupied ” (by the officer in question) “ should have declared his
 “ opinion that the whole Province of Kattewar,
 “ with the exception of the districts of the
 “ Gaekwar, is British territory, and its
 “ inhabitants British subjects.”

In and before the year 1863 a further re-organisation was found to be necessary, and, as might be expected, the question as to the status

of Kathiawar again arose. In 1863 the Members of the Bombay Government, in carefully reasoned Minutes, maintained the proposition that Kathiawar was British territory. The Government of India did not endorse this view, but in a despatch of the 14th April 1864 to the Secretary of State, while discussing the proposed new arrangements, they said: "The next question refers to the law and the system which should be applied to Katteewar. For the due solution of this question it is necessary first to decide whether Katteewar is foreign or British territory; and until we receive an expression of the views of Her Majesty's Government on the question discussed in our separate despatch, the law as at present in force must remain." On the point thus submitted the reply of the Secretary of State, in a despatch of the 31st August 1864, was this: "I have read with interest and attention all the arguments which have been adduced on either side by the several Members of the Government of India and of Bombay. It is not necessary that I should examine in detail these conflicting arguments, or record an opinion with respect to their relative weight. It is sufficient to say that the Chiefs of Katteewar have received formal assurances from the British Government that their rights will be respected, and that the Home Government of India, so lately as 1858, repudiated the opinion that the Province of Katteewar was British territory, or its inhabitants British subjects." The arrangements then made will be considered later.

During the period which has hitherto been under consideration, and in subsequent years, the political control exercised over Kathiawar has been very complete, but it has been exercised

in different degrees in different classes of Kathiawar States. The question of judicial administration will be more fully considered hereafter; at present it may be convenient first to notice a few other points.

It has never been claimed that British Indian law, as such, is operative in Kathiawar; nor, on the other hand, have the Kathiawar States been included in the Scheduled Districts Act, XIV. of 1874, which enumerates certain of the districts forming part of British India, but to which the general law is not necessarily to apply. The British Indian Legislature has never purported to legislate directly for Kathiawar or its inhabitants; but, on the contrary, in the Indian Act, XX. of 1876, it is expressly recited, with regard to an important territory in Kathiawar, that "the British Government
 " have exercised certain powers of government
 " over the said territory, but such territory has
 " never been treated as being British territory,
 " nor as having been vested in the East India
 " Company nor in Her Majesty the Queen of
 " Great Britain and Ireland and Empress of
 " India, and the said Kathiawar villages have
 " consequently never been subject to the laws
 " in force in the Presidency of Bombay." The Chiefs, at least in the larger States, have exercised the power of making laws for their own subjects. The police administration has been in their hands. The general revenues have been received and applied by the Chiefs, and it appears from a work of high authority (6 Aitcheson, pp. 191 *sqq.*) that in many cases the revenue is a sum many times as great as the tribute.

As to the course pursued with regard to judicial administration it has already been stated that under the arrangement sanctioned by the Court of Directors in 1834, authority was given to the Political Commissioner to try persons guilty of

capital crimes committed in States whose Chiefs were too weak to punish them. It may be added that under that scheme sentences passed by the Political Commissioner were subject to the approval of the Bombay Government.

In all subsequent arrangements, the first thing to be noticed is, that they were all carried out, not by any legislative action, but by orders or resolutions of the Executive Government, a course of proceeding which was appropriate if Kathiawar was foreign territory, but quite irregular if it formed part of the dominions of the Crown.

A fairly complete organisation of the Province was carried out in 1863. The general nature of that settlement is very concisely described in 6 Aitcheson, p. 183: "The Administration was re-organised by arranging in seven classes all the Chiefs in Kathiawar, and defining their powers and the extent of their jurisdiction. The country was divided into four districts, or 'Prants,' corresponding to the ancient divisions of Kathiawar, and European officers were appointed to those districts to superintend the administration generally, and more particularly to try inter-jurisdictional cases and offenders who had no known Chief, or who were under such petty landholders as might be unable to bring them to trial."

Under the arrangement then made, modified as it has been in some respects by subsequent orders, the Chiefs of the first class, who are not many in number but who rule over wide areas, can try any person except a British subject, even for a capital offence, without any permission from the Political Agent, and their civil jurisdiction is unlimited. The jurisdiction of the Chiefs in the second class, who also rule wide areas, is very nearly the same as that of those in the first. The Chiefs in the third and the fourth classes have still very wide powers. These

are much less in the following classes, down to the seventh in which the Chiefs have very trifling criminal and no civil jurisdiction. In the cases which fall within the power of the Chiefs their decision is final, and no judicial appeal lies to any British authority.

British officers have been appointed to deal with the classes of cases withdrawn from the jurisdiction of the Chiefs themselves. Those officers and their tribunals are of three classes: (1) Subordinate Courts—which need not be further noticed in dealing with these Appeals; (2) Assistant Political Agents' Courts; (3) The Court of the Political Agent. To the latter officer is attached a Judicial Assistant, whose Court forms part of that of his chief. The titles of the Political Agent and of the Assistant Political Agents have now been altered; but the change appears to have been only one of name, and need not be further noticed. The Assistant Political Agents have jurisdiction in all classes of cases; but an appeal lies to the Political Agent, who, according to circumstances, hears it himself or refers it to his Judicial Assistant.

The cases that come before the Assistant Political Agents, and on appeal from them before the Political Agent, are divided into two classes, political and civil. This division has long been maintained. It is clearly recognised in Rules laid down by the Governor in Council in 1874 and in 1883. A fresh set of Rules was issued in 1902 in which express instructions are laid down as to what cases should be regarded as political. In this the Rules seem, on the face of them, to go beyond their predecessors. But in the despatch of the 5th August 1902, which communicated the new Rules to the Secretary of State, the Government of Bombay said: "The " Rules are simply an issue in authoritative

“ form of existing orders, and contain no new “ matter ” except certain points not now material.

What is laid down in the Rules of 1902 is as follows:—

“ 2. The following suits should ordinarily be considered “ political:—

“ (i) Suits to which a Chief of any of the first four classes is a “ party.

“ (ii) Cases affecting the interest of the tributary Chiefs, of “ whatever class, in regard to sovereign rights, “ jurisdiction, tribute or allied payments, main- “ tenance to members of the Chief's family, “ compensation for injury done by outlaws or “ highway robbers, territory, boundaries, political “ status or prerogative.

“ *Explanation.*—Claims for inheritance or parti- “ tion of estates in the families of Chiefs below the “ fourth class should ordinarily be heard as civil “ suits, but this does not include cases which raise “ the issue of a right of succession to a Chiefship to “ which jurisdictionary powers are attached, or an “ issue of an inheritance to, or partition of, any “ estates in which a jurisdictional Chief or tribute- “ paying Talukdar has an interest direct or “ indirect.”

In political cases the Political Agent hears the appeals himself. He is to regard his function as “ diplomatic or controlling,” and to dispose of the cases “ as he thinks proper.” Civil appeals he is ordinarily to refer to the Judicial Assistant.

Of the two Appeals now before their Lordships, the first arises out of a case classed as civil, the second out of one classed as political.

From the Court of the Political Agent appeals lie, subject to certain rules, to the Governor of Bombay in Council. And since as far back as their Lordships have been able to trace the matter, a further appeal has been entertained by the Secretary of State in Council.

The first ground upon which it was sought to maintain the competence of the present Appeals was that the Province of Katbiawar is British

Indian territory, and its people within the King's allegiance, and that an appeal lies from the Courts of that province, and from those within the King's Dominions, who hear appeals from that province, as from other Courts within British territory.

In support of this contention reliance was placed, first upon the case of *Damodhar Gordhan v. Deoram Kanji* (L. R., 1 A. C. 332), the judgment in which was said to suggest an opinion that Kathiawar was British territory. It is true that there are passages in that judgment which may fairly be cited as favourable to the contention of the Appellants. But in that case the question did not arise for decision, and their Lordships neither decided it nor expressed any opinion upon it. Nor were the materials for a decision which are now before their Lordships then before this Board. That case, too, was one between private persons, in which the Secretary of State was not represented. Reliance was further placed upon opinions expressed by persons of high authority to the effect that Kathiawar was British territory. But the opinions so expressed were overruled by higher authority. Stress was laid lastly upon the great extent of the control exercised by the British Indian Governments over the administration of the Kathiawar territories, which it was argued amounted to an actual assumption of sovereignty.

On the other hand there are the repeated declarations by the Court of Directors and of the Secretary of State that Kathiawar is not within the Dominions of the Crown. Those declarations were no mere expressions of opinion. They were rulings by those who were for the time being entitled to speak on behalf of the sovereign power, and rulings intended to govern the action of the authorities in India, by determining the

principle upon which they were to act in dealing with Kathiawar.

Those rulings have in fact been acted on. Many and various as have been the forms of intervention by the British Indian powers in the affairs of Kathiawar, and large as has been the political control exercised over the province, any assertion of territorial sovereignty has been avoided. No legislative power over it has ever been claimed. The intervention has never been carried further than was judged necessary, in the emergency, for the maintenance of peace, good order, and security. The position of the Chiefs has always been respected; and, at least in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was. And in the first of the Appeals now before their Lordships Counsel for the Secretary of State disclaimed the view that Kathiawar is within the King's dominions, and maintained that it is not so.

Their Lordships are of opinion that Kathiawar is not, as a whole, within the King's dominions, and it has not been shown, or indeed contended, that the particular territories out of which these Appeals arise are in a different position in this respect from the province generally. The first ground therefore upon which it has been sought to sustain these Appeals fails.

The second ground upon which it was sought to base the competency of these Appeals was that, assuming Kathiawar not to be a part of the King's dominions, still the Courts of the Assistant Political Agents, that of the Political Agent, and that of the Governor in Council, are

all the King's Courts, and that the decisions of those tribunals in the present cases were judicial decisions by those Courts, and therefore subject to review by His Majesty in Council.

In the Court of the Political Agent this contention was disposed of in the first of the present cases upon the short ground that the Appellant is not a British subject, and that the right of appeal to the King in Council "is a birthright and appertains only to British subjects, unless specially conferred by legislative enactment." Their Lordships are unable to concur in the view thus expressed. They think that if a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject.

The real question is whether in cases like those now before their Lordships the action of the tribunals in Kathiawar, and of the Governor in Council on appeal from those tribunals, is properly to be regarded as judicial or as political. And at this point a distinction arises between the two cases under appeal; because the first of them has been disposed of as a civil, the second as a political, case.

As to the cases classed as political, their Lordships think there is no room for doubt. The Rules issued from time to time for the guidance of the Political Agent treat the disposal of such cases as falling within his "diplomatic or controlling function," and direct him to dispose of them "as he thinks proper." And all the other provisions relating to such cases indicate purely political and not judicial action.

The question relating to cases classed as civil gives rise to more difficulty, but, upon the whole, their Lordships are of opinion that no substantial distinction can be drawn for the present purpose between the two kinds of cases.

There is not necessarily any inherent distinction between the nature of political cases and of those treated as civil. It depends in some cases solely upon who are parties to the suit. The two cases now before their Lordships illustrate this. The first of them was a suit brought to enforce a mortgage, the second was a suit to redeem a mortgage, yet one of the cases is civil and the other political, because in the latter a talukdar above the fourth class is a party.

The Political Agent is empowered to transfer political cases to the civil class, and dispose of them as such, and this power he is encouraged, and indeed directed to exercise freely.

The instructions from time to time issued by Government as to the disposal of cases suggests strongly that the exercise of jurisdiction both by the Political Agent, and by the Courts below him, is to be guided by policy rather than by strict law. This is illustrated by the notification of Government of the 22nd June 1900 already referred to, on the strength of which the first of the present cases (a civil case) was decided. That notification appears to follow upon a series of earlier instructions substantially to the same effect. It lays down that "no suit shall lie against a tributary Chief or Talukdar, or against any sub-sharer of a tributary Chief or Talukdar, in respect of any debt contracted by the predecessor of such Chief, or Talukdar, or sub-sharer unless" one or other of two conditions is complied with, one of which con-

ditions is the approval of the Political Agent. In the grounds of appeal before their Lordships questions are raised as to the construction and effect of the notification just cited. But quite irrespective of those questions, there is no doubt as to its validity as a direction by the Executive Government to its own political officers in a Foreign State, and it may be used as an example of the kind of rules by which the exercise of jurisdiction is to be governed.

The Appeal from the Kathiawar Courts to the Governor of Bombay in Council might perhaps be regarded as a neutral circumstance. But the mode in which such Appeals have been disposed of has been political rather than judicial. That disposal is described in a Minute (dated the 11th October 1877) of the then Governor of Bombay, as being "done in the Political Department of the Government itself; that is by the Secretary to Government in that Department under the responsible supervision of the Member of Council to whom . . . the Political business is assigned."

The further Appeal to the Secretary of State in Council is a fact of clearer import. In Lord Salisbury's despatch of the 23rd March 1876, the practice of such appeals is dealt with as a thing at that date already fully established, and it continues to the present day in civil as well as in political cases. This system of Appeal to the Secretary of State affords strong evidence that the intention of Government is and always has been that the jurisdiction exercised in connection with Kathiawar should be political and not judicial in its character.

What occurred in and after 1876 points to the same conclusion. In the despatch of the 23rd March in that year, already referred to, the Secretary of State, Lord Salisbury, suggested that an Act should be passed, general in character

but intended specially for the case of Kathiawar, enabling the Governor in Council, when dealing with Appeals, to refer any state of facts or law to the High Court for its opinion. The Bombay Government opposed the suggestion, and in an official letter of the 22nd August 1878 stated their grounds of objection. After distinguishing between "a system of government according to the will of the ruler," and "a system of government according to law," it was said: "The cases which come before this Government for adjudication are cases which have arisen in States still administered on the former principle." "Such cases can only be justly disposed of on principles of equity in the fullest sense of the term, and not in the circumscribed sense which is familiar to the practice of the High Courts; and sometimes consideration must be given to the political expediency which underlies the relation in which the Government stands to the protected States." The objections so stated prevailed. In 1879 Lord Cranbrook renewed the suggestion of his predecessor, but effect has never been given to it.

Their Lordships will humbly advise His Majesty that each of these Appeals should be dismissed.

There will be no order as to the costs of these Appeals.
