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is correct according to such mode of estimate. The claim is based upon the lower rate of freight mentioned in the charterparty; and I must find the second issue in favour of the plaintiffs, and make a decree in favour of the plaintiffs for Rs. 2,337-8-0, being the amount (Rs. 2,363) claimed, less the sum of Rs. 25-8-0 paid into court, and that the sum so paid into court be paid out to the plaintiffs, if not already paid, and costs.

Attorneys for the plaintiffs: *Rimington, Hore, and Langley.*

Attorneys for the defendants: *Dallas and Lynch.*

Dec. 23.

Suit No. 179 *of* 1865.

LA'DKUVARBA'I, widow .....*Plaintiff.*
GHOEL SHRI' SARSANGJI PRATA'BSANGJI .....*Defendant.*

Independent Sovereign Prince—Privilege from Suit—International Law—Pálitáná, Thákur of — Káttiávád, Chiefs of — Misdescription of Defendant—Decree made by mistake—Execution, Stay of.

An independent Sovereign Prince is privileged from suit in the Courts of British India.

The Thákur of Pálitáná is an independent sovereign prince.

A suit was brought against the Thákur of Pálitáná (his title being omitted from the plaint), and an *ex parte* decree was obtained against him. An application on the part of the Thákur to have the decree set aside was dismissed, and the plaintiff then sued out an attachment, but, failing to execute it within a year, was compelled to apply to the Court, under Sec. 216 of the Code, for leave to execute it. The defendant at the same time applied to have the attachment and all proceedings under it declared null and set aside.

The Court (without expressing an opinion as to whether the order dismissing the application to have the decree set aside would have prevented it from declaring the decree void *ab initio*) *held* that, as the decree was made erroneously and without jurisdiction, it would not, when apprised of the error, assist the plaintiff in carrying it into execution in a case in which lapse of time made it incumbent on the plaintiff specially to invoke the aid of the Court for that purpose.

THE plaintiff in this suit sued as widow and executrix of Ratanji Rupji Modi. She was described in the plaint as formerly residing in a house No. 18 in Báláji Shámseț Street

in Bombay, but as residing at the time the suit was brought at Gogo, in the zillá of Ahmedábád, and carrying on business in Bombay under the name of Ratanji Rupji Modi by means of her *munim*, Bhagvándás Visandás.

The defendant was described as "Ghoel Shrí Sarsangji Pratábsangji, Hindú inhabitant of Pálitáná, in the zillá of Rájkoṭ, but now residing in a house No. 4 on the Breach Candy Road."

The plaintiff claimed to recover Rs. 16,091 1 qr. 62 reas upon the common counts for goods sold and moneys lent, &c., and upon an account adjusted and signed by the defendant's agent in Bombay, with interest at nine per cent. upon the amount of the adjusted account from the 12th of November 1863 (the date of the adjustment) till payment.

The items of the account, which was a long one and extended over a space of about three years, were principally small sums of money paid in cash, and charges for miscellaneous articles such as lamps, cloth, pearls, gold paper, &c. The writ of summons first taken out by the plaintiff was not served. A second writ, tested the 30th of October 1865 and sealed on the 31st of that month, was sent to the Magistrate at Gogo to be served on the defendant, but was returned by him unserved, as the defendant did not reside within his jurisdiction. It was then, on the 6th of December 1865, in accordance with the provisions of Sec. 66 of the Civil Procedure Code, forwarded by the Prothonotary through the Post Office in a registered cover addressed to the defendant at Pálitáná, and was received by the defendant on the 11th of December 1865. The summons was made returnable on the 23rd of December.

The case, having been set down as a long cause, came on for hearing before Sir Joseph ARNOULD on the 14th of April 1866, when an *ex parte* decree was passed in favour of the plaintiff for the amount claimed by her, with interest and costs. On the 10th of December 1868 a rule *nisi* was granted by Sir Joseph Arnould, calling upon the plaintiff to show cause why the decree of the 14th of April 1865 should not be set aside. The material portions of the affidavit of Sarupchand

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Máṇikchand, upon which the rule *nisi* was granted, and of the affidavits filed in reply, are set forth in the judgment of the Court (see *post*, p. 159).

Cause was shown against the rule *nisi* on the 20th and 22nd of December 1868, when it was adjourned, and leave to file additional affidavits was granted, and finally, on the 2nd of February 1869, the rule was discharged with costs, apparently on the ground that the application to set aside the decree on account of the misdescription of the defendant in the proceedings was too late.

Subsequently an order in chambers was made by WESTROPP, J., on the application of the plaintiff's attorney, directing the decree of the 14th of April 1868 to be transmitted for execution to the District Court at Ahmedábád.

As more than a year had elapsed from the date of the decree, the plaintiff applied to the court at Ahmedábád to issue a notice to the defendant, under Sec. 216 of the Code to show cause why the decree should not be executed against him. The Court at Ahmedábád referred the plaintiff to the High Court as the proper court to which such application should be made. Accordingly, on the 12th of February 1870, Sir Charles SARGENT granted a summons, under Sec. 216, calling on the defendant to show cause why execution should not issue; but before the summons came on for hearing, on the 7th of March 1870, WESTROPP, J., granted the defendant a rule *nisi* calling upon the plaintiff to show cause why the decree of the 14th of April 1866, and the execution issued thereon, should not be set aside, or why an order should not be made by the court directing that the execution and the proceedings thereunder should not be sent for, for the purpose of being set aside or suspended, or why the petitioner should not have leave to present an appeal from the order of Sir Joseph Arnould of the 2nd of February 1869, or why such other order should not be made as to the court might seem fit.

The last-mentioned rule *nisi* was made on the petition of the defendant, verified by his agent, Sarupchand Máṇik-

chand, in which it was stated that the petitioner was an independent prince or ruler of the State of Pálitáná, owing no allegiance to Her Majesty, and that he was, and always had been, domiciled at and resident within his State, and beyond the jurisdiction original and appellate of the High Court.

That the independence of the State of Pálitáná and of the Thákur or Rájá thereof for the time being had never been denied or questioned by the British Crown, but had, on the contrary, always been, by public records and other acts of State of the British Crown, admitted and acknowledged, and especially by the treaties subsisting between the Crown and the State of the petitioner, whereby they were reciprocally entitled, the former to tribute, and the latter to protection. That the petitioner and his predecessors had always been, and were properly, described not only by their personal and proper names and the names of their family, but also by the prefixes and affixes employed amongst Hindús generally and Rájputs to denote the royal rank of Thákur or Rájá, and that the proper name and title of the petitioner was "Thákur Ghoel Shrí Sarsangji Pratábsangji."

That the petitioner had never consented to be sued in the present suit, and had never in any way attorned to the jurisdiction of the court. The petition then set out the proceedings had in the suit, and prayed for the relief mentioned in the rule *nisi*.

It was arranged between the parties that the hearing of the summons granted by Sir Charles Sargent on the 12th of February 1870, and of the cause to be shown against the rule *nisi* made upon the above petition, should come on together.

The hearing of the above matter first came on before COUCH, C.J., and WESTROPP, J., in March 1870, but, the hearing not having been then completed, the case finally was argued before WESTROPP, C.J., and MELVILL, J., on the 27th of June and 4th of July 1870.

The Honorable A. R. Scoble (Acting Advocate General), with him *Macpherson*, showed cause:—The order of Sir Joseph

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Arnould made in this matter is binding upon this court, which is not sitting as a court of appeal. The time for asking for a review of that order has long since elapsed, and the delay has not in any way been accounted for. On the substantial question raised by the petition, we contend (I.) that in respect of such a cause of action as the present a sovereign prince is liable to be sued in the courts of a foreign country. (II.) That the Thákur of Pálitáná is not an independent sovereign prince in such a sense as to exempt him from liability to be sued in Her Majesty's Courts.

Sovereign princes have been brought before the courts in England with varying results: *see The Duke of Brunswick v. The King of Hanover* (*a*); and we contend that where an act in respect of which a sovereign is sued is not a political one, and is unconnected with the government of the State of that sovereign, and has not been done by him in his sovereign capacity, but acting merely as a private individual, in respect of such act that sovereign is liable to be sued in the same way as a private individual, if in other respects he is within the jurisdiction of the court in which he is sued. Thus H. H. the Holkar, who used to carry on trade in Bombay, has frequently sued and been sued in this court. [WESTROPP, C J., pointed out that H. H. the Holkar had never objected to the jurisdiction, but had in fact attorned to it.] On this point the following authorities were also referred to:—*Taylor* v. *Best* (*b*); *Magdalena Steam Navigation Company* v. *Martin* (*c*); *In re Wadsworth* v. *Queen of Spain*, and *DeHaber* v. *Queen of Portugal* (*d*); *Munden* v. *Duke of Brunswick* (*e*); *Secretary of State for India* v. *Kamachu Boye Sahaba* (*f*); *King of Spain* v. *Hullet* (*g*); *The Emperor of Austria* v. *Day* (*h*).

We also contend that the Thákur of Pálitáná is not an independent sovereign prince. He is habitually obedient to the British Crown, represented by the Political Agent for the

(*a*) 6 Beav. I.; 2 Ho. Lo. Ca. 1.
(*b*) 23 L. J. C. P. 89.
(*c*) 28 L. J. Q. B. 310.
(*d*) 17 Q. B. 171.
(*e*) 10 Q. B. 656.
(*f*) 10 Moo. P. C. C. 22.
(*g*) 1 Cl. & F. 333.
(*h*) 30 L. J. Ch. 690.

time being. He pays tribute to the Crown, to which also he owes allegiance. He has by the Crown been deprived of the right to inflict capital punishment within his own nominal dominions. The following records and authorities were referred to in support of the above propositions :—Austin on Jurisprudence, Vol. I., Ch. VI,, pp. 226, 227 (ed. of 1870); Aitchison's Treaties, pp. 361, 365, 366, 369; Thomas's Treaties, pp. 232, 234; Colonel LeGrand Jacob's Report and Captain Barr's Report, Bombay Selections XXXVII., N. S., *passim*. The case of *Jwala Pershad* v. *The Rana of Dholapore* (*i*) is in a different position from this. See Aitchison's Treaties, Vol. IV., pp. 106, 108; *Raja of Jipperah's case*, cited at p. 16 of Macpherson's Code. Public policy does not require the Chiefs of Káṭṭiáváḍ to be exempt from Civil jurisdiction; on the contrary their great numbers and the smallness of their States render it desirable that they should not be so exempt. 6 Aitchison, 363. They cited also Selden's Table Talk.

Anstey (with him *McCulloch*), in support of the rule:—The order of Sir Joseph Arnould is not a bar to the present application of the defendant. That order was one refusing to set aside an *ex parte* decree, on the ground that the application was too late. We now ask that the decree may be declared void *ab initio*, as having been made without jurisdiction. The nature of the two applications is wholly distinct. The courts will always declare void a decree which has been obtained by fraud or misrepresentation, as in the present case : *Duchess of Kingston's case* (*j*), *Sheddon* v. *Patrick* (*k*); or will not give effect to it : *Philipson* v. *The Earl of Egremont* (*l*); *Bradley* v. *Eyre* (*m*); *Earl of Bandon* v. *Becher* (*n*). If there is any provision in the Civil Procedure Code which would give effect to a decree against an independent sovereign, it is void as being *ultra vires*. If an act is *ultra vires* the courts will treat it as a nullity : *Bonham's Case* (*o*); *City of London* v. *Wood* (*p*); *Earl of Lincoln* v. *Heyden* (*q*); Forsyth's Opinions on Constitutional Law, p. 31.

(*i*) S. D. A. (N. W. P.) 1863, p. 579.
(*j*) 2 S. L. Ca. 679. (*k*) 1 Macqueen, 535. (*l*) 6 Q. B. 587.
(*m*) 11 M. & W. 432. (*n*) 3 Cl. & F. 479. (*o*) 8 Rep. 118 (*a*).
(*p*) 12 Mod. 687. (*q*) Plow. 398.

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He also cited *Forbes* v. *Cochrane* (*r*); *The Fox* (*s*); *The Queen* v. *Serva* (*t*); *Heathfield* v. *Chitton* (*u*); *Trickett* v. *Bath* (*v*); *Barbini's Case* (*w*); *The Sussex Peerage Case* (*x*); 4 Blk. Com. 67.

A sovereign prince is absolutely exempted from suit in the courts of foreign nations. This is shown by the cases, cited for the plaintiff, *Taylor* v. *Best*; *The Magdalena*; *The Duke of Brunswick* v. *The King of Hanover*; Phillimore on International Law, Vol. II., pp. 118, 119.

And this doctrine has been recognised and acted upon in the courts in India: *Jwala Pershad* v. *H. H. the Rana of Dholapore* (*y*); *Balkrishna Purshotum* v. *The Rajah of Juvan*, a case decided in the Small Cause Court by the Chief Judge, Mr. Hore, reported in the *Bombay Gazette*, 25th February 1864; *The Queen* v. *Vencanna* (*z*).

The defendant has been acknowledged as an independent sovereign prince by the British government; if he had not been so acknowledged it might be necessary to prove the fact by evidence: *City of Berne* v. *The Bank of England* (*a*); *Yrisarri* v. *Clement* (*b*); Taylor on Evidence, Pt. I., Ch. II., para. 4; Goodeve on Evidence, p. 309; *Le Louis* (*c*). The correct definition of a State (Civitas) is given by Mr. Phillimore in his work on International Law, Vol. I., p. 77. His definition coincides with that of Vattel, lib. i., c. i., ss. 4 and 7; *see* too Grotius, Bk. I., Ch. III., s. 1. The definition of Mr. Austin is that of a philosopher, not that of a practical jurist. Besides, he subsequently qualifies his definition. The Thákur of Pálitáná is not a feudatory of the British Crown. If he owes homage it is only liege homage, and he is not, therefore, a subject: I. Hale, Pleas of the Crown, pp. 68, 70, 74. He is one of a confederacy of princes of which the Queen is the chief. He pays tribute, but is not the less independent on that account. The kings of England prior to

(*r*) 2 B. & C. 444, 470.
(*s*) Edward's Rep. 312.
(*t*) 1 Den. Cr. Ca. 104.
(*u*) 4 Burr. 2016.
(*v*) 3 *Ibid.* 1480.
(*w*) Forrester 282.
(*x*) 11 Cl. & F. 85, 137.
(*y*) S. D. Rep., N. W. P. 1863, Pt. I. 579.
(*z*) 3 Mad. H. C. Rep. 354.
(*a*) 9 Ves. 347.
(*b*) 3 Bing. 432; 2 Car. & P. 223.
(*c*) 2 Dodson 201, 393.

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Edward III. did homage to the kings of France and paid tribute to the Pope: Rymer's Fœdera, 9, 24, 33, 35 *et passim*: Acta Regia. Her Majesty may afford him protection, but allegiance and protection are not reciprocal: *Calvin's case* (*d*); Grotius, lib. 1, c. 3, s. 7. The Report of Colonel Walker shows clearly the position of the defendant: Bombay Selections, Vol. XXXIX., also Colonel Jacob's Report, Bombay Selections XXXVII., Colonel Barr's Report, *ibid.* He also referred to Thomas's Treaties, p. 232; Thornton's Gazetteer, tit. Talooka, and Wilson's Glossary. A Prince bearing the title of Thákur must not be denied his title: Phil. In. Law, Vol. II. pp. 118, 119; Act III. of 1864; and 21 & 22 Vict., c. 106, were also referred to.

Cur. adv. vult.

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WESTROPP, C.J.:—The first writ of summons in this suit was never served. A fresh writ of summons, tested 30th and sealed 31st October 1865, was issued, returnable on the 23rd of December 1865. The plaintiff made an attempt to cause it to be served through the Magistrate of Gogo, but it was returned by him unserved, as the defendant did not reside within his district. It eventually was served through the Post Office, under Sec. 60 of the Civil Procedure Code, upon the defendant at Pálitáná. The defendant, in his petition filed on the 7th of March 1870, states, too unfavourably to himself, that this service was had upon him on the 6th of December 1865. It was, however, upon that day only despatched from the Prothonotary's Office by post, and did not reach the defendant until the 11th of December 1865, as appears by the letter of the Postmaster of Bombay, dated 20th December 1865, and appended to the affidavit of Jagjivan Hemji, made on behalf of the plaintiff. From the 11th to the 23rd December 1865, the day on which the summons was returnable, was not a sufficient period to allow to a defendant residing in Káṭṭiáváḍ to appear and defend a suit brought against him in Bombay. The plaintiff, therefore, was blameable in deferring the service of a summons issued in

(*d*) 7 Rep. 1.

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October until December 11th, twelve days before it expired. True, this was a long cause, and being such could not in the usual course, in consequence of the arrear of long causes in our lists, have come on for hearing upon the day of return, and Her Majesty's subjects are expected to know this. But it would be highly unreasonable to expect that an independent Native Chief, residing in his own territory, should know it. The plaintiff does not appear to have sent him any notice that the cause would come on upon a day subsequent to that named in the summons. The cause was heard by Sir Joseph Arnould on the 14th of April 1866, and a decree then made against the defendant. Putting aside the delay in the service of the writ of summons, there is, in the conduct of the plaintiff, a point calling for much more serious animadversion. She, in the writ of summons and plaint, and all of the proceedings in the suit, has described the defendant simply as "Ghoel Shrí Sarsangji Pratábsangji, Hindú inhabitant of Pálitáná, in the zillá of Rájkoṭ, but now residing in a house No. 4 on the Breach Candy Road in Bombay." She has wholly omitted to state that he is Thákur or Chief of Pálitáná. There was nothing in the description which she caused to be given of him to distinguish him from any ordinary individual, or to warn the court that the suit was brought against a Native Chief. Had the true description of him been given in the plaint, the Judge to whom it was presented would in all probability have rejected the plaint, or at least deferred the acceptance of it until he had ascertained whether such an action could properly be entertained by the High Court. It is difficult to believe that the plaintiff has not intentionally concealed from the court the rank and position of the defendant, in order to enable her to obtain a decree against him. There is not any evidence before the court to show that the defendant ever resided, as described in the plaint, at Breach Candy, or elsewhere in the island of Bombay, and it was not contended by the plaintiff's counsel that the defendant ever did reside in Bombay.

On the 10th of December 1868 the defendant obtained from Sir Joseph Arnould a rule *nisi*, calling upon the plain

tiff to "appear and show cause, if any she hath, why the decree passed in this cause on the 14th of April 1866 should not be set aside." That rule was founded upon an affidavit by Sarupchand Máṇikchand, in which it was stated that the action had been brought in respect of goods sold and delivered, and moneys lent to, and paid for, the defendant in Bombay by the plaintiff, and money due to her from the defendant upon accounts settled, adjusted, and signed by the agent of the defendant in Bombay. The same affidavit also stated, on information and belief, that the plaintiff fraudulently described the defendant in the plaint as an inhabitant of Pálitáná, instead of Rájá or Thákur of Pálitáná, with a view to his being made amenable to British courts of justice, and that the writ of summons did not reach him sufficiently soon to admit of his appearance in the High Court on the day on which that writ was returnable; and that the account sued upon was not adjusted by a constituted attorney of the defendant, and that he had a good defence to the action; and alleged that the defendant, being a Native independent Chief of the second grade in Káṭṭiávád, is not amenable to British courts of justice.

To these allegations the plaintiff's assistant in business, Jagjivan Hemji, by affidavit replied that the defendant had in Pálitáná requested him to cause the plaintiff to lend to Rámkrishṇa Jairám, the defendant's agent in Bombay, such moneys as he might from time to time require in Bombay on behalf of the defendant; and that for that reason, and on the faith of a letter to the same effect addressed by the defendant to the plaintiff, and delivered to her by Rámkrishṇa Jairám, she had paid moneys to Rámkrishṇa Jairám and purchased goods as required by him from time to time on account of the defendant, and that he (Rámkrishṇa Jairám) adjusted with the plaintiff's *munim*, and signed, an account of these transactions in her book, whereby a balance of Rs. 16,091 1 q. 62½ reas was found due to the plaintiff by the defendant, to recover which sum this action was brought. In the same affidavit it was in effect denied that the defendant was fraudulently described as an inhabitant of Pálitáná,

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instead of Thákur of Pálitáná, in the plaint, and averred that he was so described because he was residing there and dealing in Bombay by means of his agent. It then, after referring to the service of the writ of summons on the defendant at Pálitáná on the 11th of December 1865, and to the fact that the decree was not made until the 14th of April 1866, and asserting that Rámkrishṇa Jairám was the lawfully constituted agent in Bombay of the defendant, stated that the defendant was served through the post with the warrant to tax the plaintiff's costs, and had not, until the obtaining of the rule *nisi* of the 10th of December 1868 from Sir Joseph Arnould, made any objection to the decree, and that for the foregoing reasons, the defendant was amenable to British courts of justice. This affidavit lastly stated that the defendant was about to visit Broach to be present at the Exhibition, and that the plaintiff intended to apply for execution of her decree through the District Court at Broach, and that the defendant had no property within the jurisdiction of this court, and unless the plaintiff were allowed to enforce her decree through the Broach court when the defendant should "come within its jurisdiction, the plaintiff would be left without any remedy or means of recovering her money." This showed plainly that it was the intention of the plaintiff, if she could, to have the defendant arrested immediately upon his setting foot on British territory. Rámkrishṇa Jairám made an affidavit on behalf of the plaintiff nearly to the same effect as that of Jagjivan Hemji, and added that he (Rámkrishṇa) had been examined *vivâ voce* as a witness for the plaintiff at the hearing of this cause on the 14th of April 1866, when Sir Joseph Arnould made a decree for the amount claimed.

Sarupchand Mánikchand, by another affidavit, asserted that the defendant is the reigning Thákur of Pálitáná, belongs to the Ghoel Rájput tribe, a branch of the Bháunagar family, and has been always addressed by the Government as Chief of Pálitáná. It then stated that he was son of the late Thákur Pratábsang, who was eldest son of Noganji, Thákur of Pálitáná in 1854, mentioned in Captain Barr's

Report,* and that the defendant pays tribute to the British government *on behalf of the Nawáb of Junágaḍ and the Gáikváḍ,* and enjoys second class jurisdiction as an independent Native Chief, in support of which the affidavit referred to the following certificate :—

"Certified that Ghoel Shri Sarsangji Pratábsangji is a Native Chief of Káṭṭiávád, having a second class jurisdiction.

(Sd.) "W. W. ANDERSON, Political Agent.

"*Káṭṭiávád, Political Agent's Office, Camp, Broach, 26th December* 1868."

Upon these affidavits, Sir Joseph Arnould, on the 2nd February 1869, discharged with costs the rule *nisi* of the 10th of December 1868 to set aside the decree. We have not any note of his judgment on that occasion, but are inclined to believe that he must have chiefly rested his decision on the lateness of the defendant's application, and upon his not having excused his delay, or shown that he had a good defence on the merits to the claim of the plaintiff. Notwithstanding some of the passages in the affidavits referred to, we cannot think that the learned Judge's attention was as fully directed to the question of the jurisdiction of the High Court over the defendant as that of my brother Melvill and myself has been upon the present occasion.

Subsequently, an order in chambers was, by the plaintiff's attorney, obtained from myself, as sitting judge, that the decree of the 14th of April 1868 should be transmitted by the Prothonotary to the District Court at Ahmedábád, to enable the plaintiff to apply to the proper court in that district for execution against property of the defendant alleged to be within its jurisdiction. The plaintiff's attorney did not inform me of the attempt which had been made before Sir Joseph Arnould to set aside the decree, nor that the defendant was Thákur of Pálitáná or a Native Chief of *Káṭṭiávád.* Had I been then informed of the political status of the

* Se Bombay Government Records, Printed Selections, No. XXXVII. N. S., p. 135.

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defendant, I should have declined, on the ground of our want of jurisdiction to entertain the suit, to give any aid to the plaintiff towards obtaining execution of her decree.

Afterwards it would appear that, in consequence of the lapse of more than a year since the date of the decree, and of no execution having issued upon it, the plaintiff applied to the court at Ahmedábád to issue a notice, under Sec. 216 of the Civil Procedure Code, to the defendant, to show cause why the decree should not be executed against him. That court properly held that such a notice can be issued only by the court which made the decree.

On the 12th of February 1870, the plaintiff, accordingly, applied in chambers to Sir Charles Sargent, as sitting judge of this court, for, and obtained, a summons to the defendant to show cause on the 5th of March why the decree should not be executed against him, and why he should not pay the costs of that summons and of such execution. The matter came before our brother Bayley on the 5th of March, and, it being then stated to him that the defendant was immediately about to make a further application to the court to set aside the decree or stay the execution of it, it was agreed that the summons should be adjourned into court to be heard and disposed of together with that application.

In pursuance of that arrangement, the defendant's agent, Sarupchand Máṇikchand, on the 5th of March, by solemn affirmation, verified a petition on behalf of the defendant. Its prayer was moved before myself in court, and upon the 8th of March I made upon it, in the terms of its prayer, an order *nisi*, that the plaintiff should show cause why the plaint, proceedings, orders, and the decree of the 14th of April 1866, and the execution process, if any, issued thereon, should not be declared null and void, or set aside or stayed, and the proceedings, if any, towards execution, at Ahmedábád, should not be sent for and set aside or suspended, or why the defendant should not have liberty to appeal against the order of Sir Joseph Arnould of the 2nd of February 1869, &c.

About the end of March, counsel on behalf of the plaintiff commenced to show cause, before Sir Richard Couch, C.J.,

and myself, against that order, and to support the summons granted on the 12th of February by Sir Charles Sargent; but it having been alleged that there was a treaty or agreement between the East India Company, or British Government, and the Chief of Pálitáná, we adjourned the case for the production of that Treaty. Eventually, Sir Richard Couch having been transferred to the High Court at Calcutta, cause was shown, on behalf of the plaintiff, against the rule *nisi* of the 8th of March, before my brother Melvill and myself, and at the same time, on behalf of the defendant, against the summons of the 12th of February. Neither party has produced any such Treaty or Agreement with the defendant or his ancestors, and we must ascertain from such other sources as are available to us the relation in which the defendant stands to the British government.

The order of the 1st of February 1869 by which Sir Joseph Arnould refused to set aside the decree, may perhaps be sufficient to prevent us from setting it aside, even although we may be of opinion that the High Court had not jurisdiction to entertain the suit, and we must recollect that, although we may disapprove of that order, we are not sitting as a Court of Appeal. The rule *nisi* granted by me, it is true, goes further than the rule *nisi* discharged by him, and contemplates other active measures besides setting aside the decree, such as declaring it null and void, or staying the execution of it, &c. Whether, if we cannot set the decree aside, we should be at liberty to declare it to be null and void, or to stay the execution of it, we do not think it incumbent upon us to give any opinion, because the order, which we shall make upon the summons sued out by the plaintiff from Sir Charles Sargent, will render it unnecessary for us so to do.

Although undoubtedly the ordinary rule is that a Court of Equity will assume its own decrees and orders to be correct and binding until duly reversed on rehearing, appeal, or review, and will carry them into execution; *Daly* v. *Daly* (*a*); *Clanmorris* v. *Clanmorris* (*b*); *In re St Sepulchre's Vicar*

(*a*) 2 Jo. & La. 752. (*b*) 14 Ir. Ch. Rep. 420.

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(c); yet where lapse of time or other circumstances render it necessary for the party seeking execution specially to invoke the aid of the court for that purpose, it has refused to carry out decrees and orders which manifestly appeared to be erroneous, and has declined, as Lord St. Leonards phrases it, to perpetuate error: *White* v. *Parnther* (d); *O'Connell* v. *Macnamara* (e); *Hamilton* v. *Houghton* (f); *West* v. *Skip* (g); *Roberts* v. *Hughes* (h); *Noble* v. *Stow* (i); *Moore* v. *Walter* (j); *Stamer* v. *Nesbitt* (k).

We think that there are equally strong reasons for a court's declining to carry into execution a decree or order which it had not any jurisdiction to make, and that this is the more especially so where the fact that would have shown to the court its want of jurisdiction in the particular case has been throughout the previous proceedings suppressed by the plaintiff.

The defendant, if originally privileged from suit in this court, has not in any wise waived that privilege by acquiescence in the jurisdiction of the court. Every step which he has taken has been in denial of that jurisdiction. He has, therefore, avoided the predicament in which the defendant in *Taylor* v. *Best* (l) placed himself, by acts which were held to amount to such an attornment to the jurisdiction as precluded him from applying to the court to stay proceedings, on the ground of privilege as an ambassador or foreign minister.

Was then the present defendant originally privileged from suit here? If he be an independent sovereign prince, it is, we think, clear that he was so privileged. Speaking of a sovereign prince, Lord Langdale, M. R., in *The Duke of Brunswick* v. *The King of Hanover*, said—"Remaining in his own dominions, or in the dominions of any other prince to whom he is not a subject, he would, as I presume, be

(c) 11 W. Rep. 456.
(d) 1 Knapp P. C. C. 179, 221, *per Lord Wynford.*
(e) 3 Dr. & War. 411.
(f) 2 Bligh O. S. 169.
(g) 1 Ves. Sen. 245, 246.
(h) Beat. R. 417; *et vide ibid.* 121.
(i) 5 Jur. N. S. 1115.
(j) 8 L. T., N. S., 448.
(k) 3 Jo. & La. 447.
(l) 14 C. B. 487.

exempt from all forensic jurisdiction" (6 Bevan, 56). Lord Langdale had previously said—"After giving to the subject the best consideration in my power,—it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must in all ordinary cases, in which orders or declarations of right may be made, end in requests for justice, which might be made without any suit at all; that even failure of justice, in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations,—I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts there" (*Ibid.* 50, 51). He then proceeded to show that a sovereign prince who was also a subject of the Crown of England, though exempt from all liability to be sued in the courts of justice in England for any acts done by him in his character of sovereign prince, would be liable to suit in those courts in respect of acts and transactions in which he may have been engaged as such subject of the Crown of England; and that in respect of acts done out of the realm of England, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject, it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject.

That case, which was decided in 1844, has ever since been regarded as the leading authority on the subject of the immunity of sovereign princes from suit. The international doctrine there laid down is quite as applicable to the independent sovereign of a petty State as to the ruler of a great State, and has been, as we think, properly so applied by the Ṣadr Diváni Adálat N. W. P., in a suit against an

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independent Native Chief, which was dismissed for want of jurisdiction in the British Court: *Jivala Pershad and another* v. *H. H. the Rana of Dholepore* (*m*).

But it is said that there are various degrees of independence; that the defendant pays tribute to the British Government, owes allegiance to the British Crown, and, therefore, is liable to suit in the British courts of justice.

The Táluká or State of Pálitáná is situated in Gohelwár, one of the ten *pránts* or districts into which the province of Káṭṭiávád is divided. Colonel LeGrand Jacob says—"The present name of Kattywar, for the peninsula, has without due reason been suffered to usurp its correct appellation, Soorásh-trá, by which it was known to the Greeks, and is still so to almost every native of Goozerat who can read and write." And again—"It is strange that the Káttys who are greatly inferior to the Rájput communities in numbers, territory, wealth, and rank, should have the honour of conferring their name on the peninsula; and it is to be regretted that its more appropriate and classical name of Sooráshtrá should not have been reverted to by its new governors, instead of its present incorrect designation, which has the further disadvantage of giving rise to mistakes whenever its subordinate province (*pránt*) of Kattywar is alone referred to:" Bombay Government Records, Printed Selections, N. S., No. XXXVII., p. 6; and see 3 Grant Duff's Hist. Mahrattas, p. 260 (Bombay reprint, 1863), where it is further observed that "the whole region is inhabited by a warlike people, chiefly Járejá Rájpoots, who are under separate chiefs." The inhabitants of the *pránt* Gohelvar have been always noted for their steady, and often successful, resistance of Maráthá violence: Bombay Government Records, Printed Selections, No. XXXVII., N. S., pp. 287, 288.

It is true that the British Government receives tribute from the Thákur of Pálitáná,—not so, however, for itself, but for the Gáikvád of Barodá and the Nawáb of Júnágad; the proportions, settled by the British Resident, Colonel Walker,

(*m*) S. D. Rep. N. W. P. for 1863, Pt. I., 579.

A.D. 1807-8, being, when reduced into our currency, Rs. 7,874 to the Gáikvád, and Rs. 2,490 (Zurtulubi) to the Nawáb. *See* Aitchison's Treaties, Vol. 7, Appx. No. IX. (Colonel Keatinge's Report of 27th July 1864), p. lxvi., which also shows that the State of Pálitáná has one "independent tribute-payer" (viz., the Thákur), "contains one hundred villages, yields a gross annual revenue of two lákhs of rupees, and that the Thákur enjoys second class jurisdiction." *See* also Bombay Government Records, No. XXXVII., N. S., pp. 74, 75, 107, 135. The rule of primogeniture prevails as to this principality, partition not being allowed (*Ibid.*, 250, 251), a prohibition indicative, though not conclusively so, of a *Ráj*: 7 Moo. Ind. App. 476; 5 *Ibid.*, 169; 6 *Ibid.*, 164; 1 Bom. H. C. Rep., 2nd ed., App., pp. xlii.—xlvii.; 1 Strange, H. L., 235, 236.

The tribute, as originally collected by the Gáikvád in Káṭṭiávád was very much in the nature of black-mail, and was levied by an annual raid or foray of what was styled a *mulkgiri* army. The history of the substitution for it in 1807-8 of the present pacific system, by which the tribute is collected by the British Government in Káṭṭiavád on behalf of the Gáikvád and the Nawáb of Junágád, is to be found in Vol. VI. of Aitchison's Treaties, pp. 361—366, 370, 371, 399, and 400. The chiefs of Kaṭṭiávad then also entered into engagements with sureties, providing for the general peace of the country. (*Ibid.*, 364.) Specimens of these engagements with the State of Limdi are given at pp. 500—503 of the Bombay Government Records, No. XXXVII. N. S., and at p. 503 it is stated that similar engagements were at the same time concluded with various other tálukás which are named, and (p. 505) include Pálitáná. Whether those engagements were precisely the same does not appear. "But," continues Mr. Aitchison, "it was soon discovered that the Kattywar chiefs, partly from their pecuniary embarrassments and partly from their weakness and the subdivision of their jurisdictions, were incapable of acting up to the engagements which bound them to preserve the peace of the country and suppress crime. On the other hand, the British government was fettered in

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its efforts to effect an improvement in the administration by these very engagements, which it had mediated when the country was under the authority of the Peishwá and the Gáikvád, and when the substitution of the direct control of the British supremacy for that of the Native governments had not been contemplated. *These engagements, besides considerations of financial and political expediency, prevented the subjection of the chiefs to ordinary British rule,* and no course of reform was left open save to introduce *a special authority* suited to the obligations of the British government, the actual condition of the country, and the usage and character of its inhabitants. Inquiries which had been instituted in 1825 showed that the Kattywar chiefs believed the sovereignty of the country to reside in the power to whom they paid tribute; that before the British government assumed the supreme authority, the Gáikvád had the right of interfering to settle disputed successions, to punish offenders seized in chiefships of which they were not subjects, to seize and punish indiscriminate plunderers, to coerce chiefs who disturbed the general peace, and to interfere in cases of flagrant abuse of power or notorious disorder in the internal government of the chiefs. Based, therefore, upon these rights of the supreme power, the British government in 1831 established a criminal court of justice in Kattywar, to be presided over by the Political Agent, aided by three or four chiefs as assessors, for the trial of capital crimes in the states of chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the legitimate exercise of authority over their own dependants. Until the year 1853 every sentence passed by this court was submitted to the Bombay Government for approval; but now sentences not exceeding imprisonment for seven years do not require the sanction of superior authority. There are five chiefs in Kattywar, viz., Joonaghur, Nowanuggur, Bhownuggur, Poorbunder, and Drángdrá, who exercise first-class jurisdiction, that is to say, have power to try for capital offences, without permission from the Political Agent, any persons except British subjects; and eight, viz., Wankaneer, Morvee, Rájkot, Gondal, Dherel, Limdi, Wudwán, and *Pálitáná,* who exercise second-

class jurisdiction—that is to say, have power to try for capital offences, without permission of the Political Agent, their own subjects only:" Aitchison's Treaties, Vol. VI., pp. 366, 367. A somewhat different definition of second-class jurisdiction is given in Captain Barr's Report of 31st August 1854, Bombay Government Records, No. XXXVII., N. S., p. 136, where, as to the Thákur of Pálitáná, it is said—"The Chief has jurisdiction of crimes committed within his own territories by his own subjects; but he has not the power of life and death." Taking this to be so, and that to a certain extent the criminal jurisdiction of the Thákur of Pálitáná has been circumscribed; and that the Gáikvád heretofore exercised, and the British government now exercise, a superintending and controlling power over him and the other chiefs of Káṭṭiávád, far more substantial than that of the Emperor of Delhi over Calcutta A.D. 1800, when Lord Stowell, in his judgment in *The Indian Chief* (*n*), described the latter as the empyrean sovereignty of the Moghal, occasionally brought from the clouds for purposes of policy, but which hardly existed otherwise than as a phantom; yet the authorities to which we have referred with respect to the political status of the chiefs of Káṭṭiávád show that the Thákur of Pálitáná is no ordinary subject, is a prince, and has subjects of his own, is styled by British political officers an independent tribute-payer, and that certain international arrangements have been entered into between the chiefs of Káṭṭiávád and the British Government, and do not afford a trace of any civil jurisdiction having been exercised over the Thákur of Pálitáná or the other chiefs of Káṭṭiávád by the Gáikvád formerly, or by our courts since the British Government became the controlling power. Those governments may have interfered politically in cases of disputed succession to the principalities of Káṭṭiávád, but that is very different from an exercise of ordinary civil jurisdiction. The learned counsel for the plaintiff, indeed, admitted that he was unable to mention any instance of our courts having assumed civil jurisdiction over any chief of

(*n*) 3 C. Rob. 31.

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Káttiávád. Were there, however, any doubt as to the nature of the relations subsisting between those chiefs and Her Majesty's Government, it has been put an end to by the State paper which I shall now read, and which was not—nor, so far as we know, were the authorities relating to Káṭṭiávád already mentioned—brought to the attention of Sir Joseph Arnould. That document is an official extract (paras. 1 to 5) from a despatch from Her Majesty's Secretary of State for India to His Excellency the Right Honourable the Governor General of India in Council, dated 31st August 1864, No. 54, Political:—

"'1. I have taken into consideration in Council the important question submitted to Her Majesty's Government in the letter of your Excellency's Government No. 70, of 14th April 1864, respecting the political position of Kattyawar.

"'2. I have read with interest and attention all the arguments which have been adduced on either side by the several members of the Governments 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 Kattyawar have received formal assurance 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 Kattyawar was British territory, or its inhabitants British subjects.

"'3. At the same time, there is no doubt that the British Government have for a lengthened period exercised powers which are unquestionably of a sovereign character, with the full recognition and acquiescence of the chiefs and people, and have interfered at all times, when occasion required, for the preservation of peace and maintenance of order.

"'4. But we have never exercised the right to apply our civil and criminal codes of procedure to Kattyawar, and whatever reforms we have introduced have been made in such a manner as to ensure the coöperation and support of the chiefs. It has been our aim not to undermine their authority

and independence, nor to undertake the internal administration of the province.

"'5. Her Majesty's Government have no desire to claim any more direct and formal sovereignty than has thus been exercised ever since our first connection with Kattyawar, nor to impose British laws and regulations on the chiefs of the province.'

" (True extract, given to Pálitáná Vakíl).

" (Signed) S. C. LAW,
" Acting Political Agent.

" *Rajkote, 17th June* 1870."

For these reasons, and although the causes of action in this suit may have accrued in the island of Bombay, we are satisfied that this court had not any jurisdiction to entertain this suit against the Thákur of Pálitáná. We shall not interfere with Sir Joseph Arnould's order, whereby he declined to set aside the decree, and we, therefore, stay no rule upon the motion of the defendant to make absolute the order *nisi* of the 8th of March 1870, which contemplated that the decree and other proceedings should be set aside or declared null and void, &c.; but, on the other hand, we dismiss the Judge's summons, obtained by the plaintiff in chambers, calling upon the defendant to show cause why the decree should not be executed against him, and we allow the cause shown by the defendant. This order, though not in form a stay of execution, will no, doubt, operate as a permanent order to that effect. Looking on the one side at the suppression of the defendant's rank by the plaintiff, and on the other at the defendant's delay in impeaching the decree, and at the apparent absence of merits on his part so far as regards the causes of action, we must say no costs of these proceedings to either party.

Attorney for the plaintiff: *Shámráv Pánḍurang.*

Attorneys for the defendant: *Rimington, Hore, and Langley.*