

disputed it. It may be that Government could have done so; but in fact it never did. For a period very much exceeding thirty years it continued to recognize the validity of those rules. It had by its Regulation told the holders of the oarts that they were proprietors. It never asserted that they had ceased to be proprietors. They continued to regard themselves and to be regarded as proprietors. Consequently, in the words of Section 1, Regulation V. of 1827 (which was in force when this suit was brought), they held their lands as proprietors, and such possession for a longer period than thirty years must, according to the provisions of that section, be received as proof of a sufficient right of property.

For these reasons we are of opinion that the plaintiff has, under Section 1 of Regulation V. of 1827, acquired a right of property in his oart, subject only to the payment of assessment to the Government; that the land is not Government land, within the meaning of Section 35 of Bombay Act I. of 1865; that the plaintiff is not liable to pay any fine or penalty for building in the said oart without the Collector's permission; and that, consequently, the attachment of the oart by the Collector is illegal, and must be set aside.

We reverse the decree of the Court below, and restore that of the Assistant Judge, placing all costs on the Collector throughout.

PRIVY COUNCIL.

July 13, 15, 20, 1875.

February 16, March 28, 1876.

PRESENT:

The Lord CHANCELLOR (Lord CAIRNS).
 Lord SELBORNE.
 Sir JAMES W. COLVILLE.

Sir BARNES PEACOCK.
 Sir MONTAGUE E. SMITH.
 Sir ROBERT P. COLLIER.

IN APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

DA'MODAR GORDHAN, DEFENDANT, *v.* DEORAM KANJI*

(DECEASED, BY HIS SONS AND HEIRS), PLAINTIFF.

British territory in India, Power to cede—Proof of cession—Transfer of jurisdiction—Re-arrangement of jurisdiction within British territory—Statutes 3 & 4 Will.

*On account of the very great importance and interest of the point of Constitutional Law discussed in this case, and the circumstance that it is not the point on which the judgment turns, it has been thought more instructive to give a very full report of the arguments of Counsel and interpellations of the Committee.

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IV., Cap. 85, Section 43; 24 & 25 Vic., Cap. 67, Section 22; and 24 & 25 Vic. Cap. 104, Section 9—The Indian Evidence Act of 1872, Section 113—Territorial jurisdiction of British Court ceases on cession.

Semble that the general and abstract doctrine laid down by the High Court at Bombay that it is beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of India purporting to transfer certain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in India by the exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will. IV., Cap. 85, Section 43, 24 and 25 Vic., Cap. 67, Section 22, and 24 and 25 Vic., Cap. 104, Section 9.

The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67; Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act (*e.g.* by "The Evidence Act of 1872," Section 113) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Where the foundation of the jurisdiction of a British Court over the subject matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised whatever be the stage or condition of the litigation at the time of such cession.

The facts of the case in which this appeal was brought are as follows:—

On the 3rd September 1864, Deorám Kánji, whose representatives are the respondents in this appeal, an inhabitant of the village of Gangli, filed a plaint in the Court of the Munsif of Gogo against Dámodar Gordhan and others to redeem certain land, situated in the village of Gangli, which he alleged he had mortgaged in the year 1812 to one Hárnath, the father of Dámodar, to secure a debt of Rs. 60. At the date of the institution of this suit, the village of Gangli formed part of the purgunnah of Gogo,

in the zillah of Ahmedabad, in the Bombay Presidency, and was admittedly subject to the jurisdiction of the Ordinary Civil Courts of that Presidency. The defendants denied the mortgage, maintaining the transaction to have been one of absolute sale; but the Munsif, holding the mortgage to be proved, on the 19th April 1865 gave a decree for the plaintiff. The defendant appealed, and on the 18th January 1866 the Munsif's decree was reversed by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the Bombay High Court, the case was on the 12th December 1866 remanded to the Court of Ahmedabad for re-trial; and the Judge of Ahmedabad having re-heard the case, by a decree dated the 11th August 1869, affirmed the original decree of the Gogo Munsif. From this decision the defendant preferred a special appeal to the High Court, contending that the Judge of Ahmedabad had no jurisdiction to deal with the case on remand, inasmuch as the village of Gangli, in which the land in dispute lay, had previously been removed from the Ordinary Civil Courts of the Bombay Presidency. In support of this contention the defendant relied on the following notification dated the 29th January 1866, and published at page 197 of the *Bombay Government Gazette* of that year:—

“ Revenue Department.

“It is hereby notified that, in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhaunagar, the undermentioned villages belonging to the Thakore of Bhaunagar, and situated in the pargunnah of Dhandhuka, Ranpore and Gogo, Zillah Ahmedabad, are from and after the 1st of February 1866, Samvat 1922 Magha Vadya 2nd, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywad, on the same conditions as to jurisdiction as the villages of the taluka of the Thakore of Bhaunagar heretofore in that province.

By order,

F. S. CHAPMAN,

Chief Secretary to Government.

Bombay Castle, 29th January 1866.”

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The village of Gangli was one of the "undermentioned villages" referred to in this notification. On the 2nd December 1870 the defendant's appeal was rejected by the High Court. The Court observed that, under Act VI. of 1859, the village of Gangli was within the purgunnah of Gogo, which purgunnah, under Section 16, Regulation II. of 1827, forms a part of the zillah of Ahmedabad in the Bombay Presidency, and that no law had been shown by which power was conferred on the Governor in Council to remove any part of the territory of the Bombay Presidency from the jurisdiction of the Ordinary Courts, or to interfere with the jurisdiction of the High Court established by Section 1, Regulation II. of 1827, and 24 and 25 Vic., Cap. 104, Section 9. That, assuming that the Governor in Council had power under Clause 2, Section 16, Regulation II. of 1827, to cede territory, he had no authority in the face of Section 6, Regulation I. of 1827, summarily to abrogate any law in force in such territory; and, consequently, that the notification relied on by the defendant was of no effect whatever to destroy the jurisdiction of the Ahmedabad Court.

The defendant subsequently applied to the High Court to review their judgment on the grounds: (1).—That the Court had been wrong in holding that the Ahmedabad Judge had jurisdiction to decide the case. (2). That since the decision of the case the petitioner had obtained from Government additional evidence to show that the village in question was removed from the jurisdiction of the Civil Courts, and transferred to Bhaunagar by the Government of Bombay, with the consent and sanction of the Governor-General of India in Council and the Secretary of State, and, consequently, that the Bombay Government had authority to do as it had done.

With the petition of review the following documents were filed:—

1. Copy of a letter from the Secretary of the Foreign Department of the Government of India to the Acting Secretary of the Government of Bombay, dated the 31st May 1865, in these terms:—

"I have the honour to acknowledge the receipt of your letter dated 10th instant, No. 80, forwarding copy of a communication from the Thakore of Bhaunagar, asking for an early settlement of the arrangements entered into with him by Sir George Clerk.

"2.—The Thakore's present application is understood to refer to the contemplated transfer of the town of Bhaunagar, of the district of Sehoré, and of the villages in Dhandhuka and Gogo, to the supervision, laws, and regulations of the Kattywad Political Agency.

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"3.—His Excellency in Council observes that this matter, in common with the general question of the future administration of Kattywad, was referred for the final consideration of the Bombay Government in my predecessor's letter No. 132, dated 13th February 1865. As Her Majesty's Secretary of State for India has decided that Kattywad is not British territory, the projected transfer will have been legalized by the agreement concluded between Sir George Clerk and the Thakore, which subsequently received the sanction of the Secretary of State, with the reservation that, in the event of gross misconduct on the part of the Thakore, these territories shall revert.

"4.—His Excellency in Council authorizes the contemplated arrangement being at once carried into effect. The Government of Bombay will be judges of what shall constitute gross misconduct, and will be careful to append to the original agreement a stipulation embodying the Secretary of State's reservation upon that point."

2. Copy of a Resolution of the Revenue Department of the Government of Bombay, dated 28th January 1871 :—

"RESOLUTION.—Her Majesty's Government, in concurrence with the opinions of the Law Officers of the Crown, have decided that the Government of India has power to cede territory to Native States, and 'is the sole judge of the considerations of State policy by which grants of territory must be determined.' The cession of certain villages in the Gogo, Dhandhuka, and Ránpur purgunnahs, from British territory to the jurisdiction of the Thakore of Bhaunagar, was directed to be made by the Government of India. Amongst these is the village of Gangli, situated in the Purgunnah of Gogo of the Ahmedabad Zillah."

3. An extract from the proceedings of the Government of Bombay in the Revenue Department, dated 14th April 1870 :—

"The Viceroy and Governor-General in Council has considered with much attention the important papers forwarded with the

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Resolution of the Bombay Government in the Revenue Department, No. 3, dated 3rd January 1870, and desires me to convey to you the following observations for the information of His Excellency the Governor of Bombay in Council.

“2.—The Governor-General in Council, as at present advised, is of opinion that a legislative Act of the Government of India is not required to give effect to the arrangements made between the Bombay Government and the State of Edar and sanctioned by the Secretary of State.

“3.—Her Majesty's Government, in concurrence with the opinion of the Law Officers of the Crown, have decided that the Government of India has power to cede territory to Native States, and 'is the sole judge of the consideration of state policy by which grants of territory must be determined.' It is a necessary inference from the possession of this power that no act of any Legislature is necessary to give effect to such a fact. The jurisdiction of British Courts must cease as soon as the territory over which it was exercised ceases to be British territory.

“4.—The only question which can possibly arise is whether the Indian Courts would recognize the validity of the arrangement if it ever came before them; and on this point His Excellency in Council does not see how the question of the validity of such a cession of territory could come before the Courts, or, in the event of their refusal to recognize it, how any decree which they might issue as to land or property could be executed outside of British territory.

“5.—The arrangements with the Edar State, however, of which the first intimation received by the Governor-General in Council was in the copy of the despatch from the Bombay Government to the Secretary of State, No. 21, dated 6th July, 1869, forwarded to the Home Department with your No. 2784, dated 8th idem, are such as ought not to have been made without the previous sanction of the Government of India. They are in substance a treaty by which each party transfers to the other certain rights and certain portions of territory. But it is provided by 33 George III., Chapter 52, Section 43, that the Governor of Bombay shall not negotiate or conclude any treaty with any Indian prince

of State without the authority of the Governor-General of India in Council or of the Court of Directors, for which that of the Secretary of State is now substituted.

“6.—The defect arising from the want of previous sanction may be considered as cured by the subsequent sanction which the Secretary of State has extended to the transaction in his Revenue despatch to the Bombay Government, No. 67, of 16th September 1869. But I am to point out that it would have been more in accordance with the requirements of the law, if the proposed arrangements had been previously submitted for the orders of His Excellency the Viceroy and Governor-General in Council, and I am to request that this course may in future be pursued before any such negotiations are entered on with any Indian Prince or any Foreign State or Power.”

On the 1st September 1872 “The Indian Evidence Act” came into operation, Section 113 of which contains the following provision :—

“A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.”

On the 4th January 1873 a notification appeared in the *Gazette of India* in these terms :—

“The Governor-General in Council hereby notifies the fact that the villages mentioned in the schedule here below appended, were, on the 1st of February 1866, ceded to the State of Bhaunagar.” Gangli was among the villages mentioned in the schedule:

On the 16th December 1872 the Bombay High Court passed an order admitting the application for review on the ground that it had been shown that a transfer of the village of Gangli from British to foreign territory had been made by order of the Government of India, with the sanction of the Secretary of State, under powers conferred by the Statute 21 and 22 Vic., Cap. 106, Section 3. After re-hearing the case the High Court, on the 24th March 1873, pronounced the following judgment, in which they confirmed their original decision of the 2nd December 1870 :—

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“ The question of jurisdiction has now been formally argued before us.

“ The appellant's arguments, put shortly, amount to this : that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for India succeeded under the provisions of Section 3, Chap. 106, of 21 and 22 Victoria ; that this Court, under Section 57, Chap. 106, of the Indian Evidence Act, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette*, and further that this Court, being bound by the law, cannot but hold the cession to be valid under Section 113 of the same Evidence Act, coupled with a notification in the *Gazette of India*, 4th January 1873, as follows :—‘ The Governor-General of India in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st February 1866, ceded to the State of Bhaunagar ’ (the village of Gangli being included in the same schedule).

“ Whereas on behalf of the respondent it was urged with much force and ability that the power to cede territory, and therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and, therefore, could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone ; that, therefore, the cession was invalid, and the recent notification in the *Gazette of India*, made for the purposes of Section 113 of the Evidence Act, was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament ; that the Legislature had no power to make retrospective laws ; and, lastly, that, even though the question of jurisdiction be decided against the respondent, the appellant, having already attorned to the jurisdiction, cannot now be heard to object.

“ With regard to attorning to the jurisdiction, the respondent's argument appears altogether untenable ; it is advisable, therefore, at the outset, to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on, within British jurisdiction, as regards land in foreign territory, but none of those cases go to the length of

showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction not before possessed over the subject-matter in dispute; and it is also manifest that, if the legal effect of the cession of territory notified was to remove the village of Gangli out of the jurisdiction of the District Court of Ahmedabad, Sections 3 and 37, Act XXIII. of 1861, provided an absolute bar to the Judge's hearing this appeal.

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“Two main questions arise in this case: one, as to the effect of the declaration in the *Gazette of India*, in January last, that territory has been ceded; and the other as to the validity and legality of the cession itself.

“The power of the Indian Legislature to create such a statutory presumption having been challenged on the ground that it affects the authority of Parliament, we find that the first of these questions involves an enquiry into the very serious one of the Crown's prerogative to cede territory.

“We prefer, then, first to consider, with regard to the second question, what rights for cession of territory were vested in the East India Company; for it is clear that only those powers which the Company possessed, ‘either alone or by the direction and with the sanction of the Commissioners of the affairs of India,’ devolved upon Her Majesty's Secretary of State.

“We know that from the time of their first charter, granted by Queen Elizabeth in 1600, down to 1767 the Company were merely recognized as traders; but as their struggles with the French Company left them, at the peace of 1763, masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a Committee to enquire into the nature of the Company's charters, the enquiry resulting in their being continued by 7 George III., Ch. 57, Section 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February 1869, on condition of the payment of a certain annual sum.

“From this date the Company's exclusive trade and Government were renewed from time to time, until by 3 and 4 William IV.,

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Ch. 35, their trade was suspended, except in so far as it might be carried on for purposes of government, their term of government being continued until the 30th of April 1854; and, finally, this term was renewed 'until Parliament should otherwise provide,' until in fact the passing of 21 and 22 Victoria, Ch. 106, which transferred the Government of India to Her Majesty.

"We see, then, that from the year 1767, when the East India Company's territorial acquisitions were first recognized as British territory, they were, from time to time, continued in possession of them, subject to the authority of Parliament.

"It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed, were derived from Parliament. All the charters from 1767 expressly entrust the Company with possession and government of the British territories, and appropriation of the revenues (as a necessary means of governing) for the Crown; and the Board of Commissioners was created with 'full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to or concern the Civil and Military Government and Revenues of the said territories and acquisitions in the East Indies.' And though it may be inferred that the Company and Board had power to levy war or make peace and to make treaties with Native princes and states in India for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power, under the direction and control of the Board of Commissioners, to 'declare and appoint what part or parts of any of the territories under the Government of the Company should from time to time be subject to the Government of each of the several Presidencies then subsisting or to be established, and to alter from time to time the limits of the Presidencies and Lieutenant-Governorships.' If, therefore, special enactments were necessary to enable the Government of the country to make internal arrange-

ments and distributions of British territories, *à fortiori* would it appear that without such special enactment they were incompetent to cede any portion of them.

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“Mr. Forsyth in his ‘Cases and Opinions on Constitutional Law,’ page 185, gives two instances of cession (not under treaty of peace) by the East India Company to a foreign state previous to 1858 :—

“1.—In 1817, a cession by treaty in full sovereignty to the Sikhumputtee Rajah of a part of territory formerly possessed by the Rajah of Nepal, but ceded to the East India Company by a treaty of peace.’

“2.—In 1833, a cession by treaty to Rajah Uoorunder Singh of a portion of Assam, lying on the south of the Brahmaputra River, by which the Rajah bound himself, ‘in the administration of justice in the country now made over to him, to abstain from the practices of former Rajahs of Assam as to cutting off ears and noses, extracting eyes, and otherwise mutilating and torturing.’”

“Alluding to the latter case, Mr. Forsyth adds : ‘This is not a very satisfactory precedent, and it shows the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous Power.’”

“And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company’s status and powers.

“Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of India to Her Majesty, we turn to consider the effect of the *Gazette of India* notification.

“Section 113 of the Evidence Act, which received the assent of the Governor-General on the 15th March 1872, runs thus : ‘A Notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such Notification.’”

“This section was first introduced in the amended Bill presented, on the 30th of January 1872, to the Legislative Council of the Governor-General, with these remarks by the Select Committee :

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'A conclusive presumption is a direction by the law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided in Sections 112 and 113,' and 'we have provided in the chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native Prince, shall be conclusive proof of a valid cession at the date mentioned in the Notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.'

"Our judgment in this case was passed on the 2nd December 1870, when there existed only the notification of the Bombay Gazette, dated 29th January 1866, and we granted the review on the 16th December 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession.

"But on the 4th of January 1873 appeared in the *Gazette of India* the notification that the village of Gangli, with several others, had been ceded seven years before; and we are now told that, even though the approval by the Secretary of State of the cession be not all-sufficient, we cannot consider that question. No doubt this would be the effect of Section 113, provided that it lay within the power of the Legislative Council to make such a law.

"What, then, are the powers of the Council of the Governor-General? By Section 43, 3 and 4 William IV., Chapter 85, the Governor-General in Council was 'empowered' to legislate for India, except that he 'shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament. . . . or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or to the sovereignty and dominion of the said Crown over any part of the said territories.'

"This section was repealed by Section 2, 24 and 25 Vic., Ch. 67, 'The Indian Councils' Act'; but, by Section 22 of this Act, it was again provided "that the Governor-General in Council shall not have the power of making any laws or regulations which may affect the authority of Parliament

. or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty and dominion of the said Crown over any part of the said territories.' Further on, in Section 24 of the same Act, we find that 'no Law or Regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogative of the Crown.'

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"It is a notable circumstance that the wording of the repealed section, of 3 and 4 William IV., Ch. 85, and of Section 22, of the Councils' Act, substituted for it, differs only in one particular, *i.e.*, that in the latter the words 'prerogative of the Crown' are omitted, nor is it easy to understand the reason for this omission. Prior to this Act no general power was given to the Crown to disallow laws made by the Legislative Council.

"Section 26 of 16 and 17 Victoria, Chapter 95, declared that 'no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown, signified in a prescribed form,' and the Councils' Act, which repealed this, made express provision for the transmission to the Secretary of State for India of copies of all laws and regulations assented to by the Governor-General, and for their disallowance by Her Majesty.

"In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that, before the passing of the Councils' Act, the Crown had previously sanctioned it, or that, after that period, it had not been disallowed.

"But the law, expressly prohibiting the Legislative Council of India from making any law affecting the authority of Parliament, is in no way varied or altered by the Indian Councils' Act.

"The value, therefore, of Section 113 of the Evidence Act depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the

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authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its powers, and that Section 113 was and must continue to be bad law.

“ On this point we have been referred to the opinions of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore, and Twiss, who all appear to support the proposition that no power resides in the Crown to cede territory save under circumstances of necessity. Most of these writers are referred to by Mr. Forsyth in the work to which we have alluded above, and the conclusion at which he appears to arrive is, that while the Crown can, by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. Vattel, Puffendorf, and Grotius may or may not be accepted as authorities, but Mr. Forsyth strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative—the case of the Orange River Territory, and the sale of Dunkirk by Charles II.; and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the Orange River Territory, we have been unable to consult the correspondence to which reference is advised; but, as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which it had enacted by its letters patent without reference to Parliament. The cases, moreover, are not analogous, for the British territories in India have been the subject of Parliamentary legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body, of the State. It appears to be considered by some, (*vide* Lord Palmerston's speech in the debate on the Relinquishment by the British Crown of the Protectorate of the Ionian Islands,) that a distinction exists between cessions of British freehold and of territory acquired by conquest during war, and not by treaty, or ceded by treaty and held as possessions of the British Crown; but the cases he quoted were all, observes Mr. Forsyth, cessions at the close of a war. On what principle can such a distinction rest?

“All subjects of the Crown possess the same rights, and incur the same obligations. Allegiance by the English law is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

“That Her Majesty’s subjects in India have the same rights with all her other subjects, is clear from the Queen’s proclamation of 1858; the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty’s dominions.

“Vattel’s arguments on the principles involved commend themselves to our reason. In his Book I., Ch. 21, Section 263, he says: ‘A nation ought to preserve itself, it ought to preserve all its members, it cannot abandon them, and it is under an engagement to support them in their rank as members of the nation. It has not then a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it. They submit to the authority of the state for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body if the public safety requires.’ In considering further whether the prince has power to dismember the State, he says that ‘this depends on whether he has received full and absolute authority from the nation,’ and proceeds:—

“‘The nation ought never to abandon its members, but in a case of necessity or with a view to the public safety, and to preserve itself from total ruin, and the prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the state requires.’

“We have no knowledge of the reasons which induced the transfer of Gangli and other villages to the State of Bhaunagar, but it is certain that there existed no such necessity as is recognized by the publicists.

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"If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction a law having for its object the dismemberment of the state in times of peace.

"Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law, as the one we are contemplating, must of necessity affect the authority of Parliament and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

"This being so, Section 113 of the Indian Evidence Act, though not disallowed, is not protected by Section 24, 24 and 25 Victoria, Chapter 67, and we cannot, therefore, follow its directions. For these reasons we decline to alter our decision, which will, therefore, stand."

In pursuance of leave specially granted by the High Court, the appellant appealed against this decision to Her Majesty in Council.

Sir William Vernon Harcourt, Q.C., Mr. FitzJames Stephen, Q.C., and Mr. E. Macnaghten, appeared for the appellant.

Mr. Forsyth, Q.C., and Mr. J. D. Bell for the respondent.

Sir W. V. Harcourt, Q.C. :—Reading the notification published in the *Gazette of India*, of the 4th January 1873, in connection with Section 113 of the Indian Evidence Act, the Bombay High Court was bound, under Section 57 of that Act, to accept, as a fact, the territorial alterations therein notified. Such notification must be taken to determine that a cession had been made by the authority which professed to make it. If that authority was competent, the cession was valid. We do not, however, rely on the Indian Evidence Act as making valid, as of right, a cession which without the Act would not have been valid. In contending that the authority by which the cession was made was competent to make it, we do not rest our argument on the view that the rights vested by Act of Parliament in the Directors of the old East India Company and in the Board of Control were

transferred to the Crown under the Statute 21 and 22 Vic., Cap. 106. That seems to have been the view accepted by the High Court. Their judgment proceeds on the assumption that the prerogative and title of the Crown in the Government of India is a derivative title through the East India Company confirmed by Parliament. That, we submit, is a proposition without any foundation whatever.

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Lord Selborne :—I do not understand the Judges to say that the authority of the Crown is derived from the Company, but that the special direct powers given to the Secretary of State, under the Statute 21 and 22 Victoria, are only those which applied to the East India Company. If they mean that, they are probably right. The original power of the Crown stands on another basis.

Sir W. Harcourt :—The Judges, referring to certain cases of cession cited by Mr. Forsyth in his “Cases and Opinions on Constitutional Law,” made previous to the year 1858 by the East India Company to a foreign state, expressly say that these cases “furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company’s status and powers.”

The Lord Chancellor :—In the case of *The Secretary of State v. Kamachee Boye Saheba* ⁽¹⁾ in which Lord Kingsdown delivered the judgment of this Board, it was determined that the powers of the East India Company were delegated from the Crown, and the judgment of Chief Justice Tindal in *Gibson v. The East India Company* ⁽²⁾ is to the same effect.

Mr. Forsyth, Q.C. :—I do not dispute that the authority of the Crown, in a matter of this kind, as distinct from the authority of the Governor-General in Council, is not derived from any Act of Parliament.

The Lord Chancellor :—That raises another question, whether what was done here by way of cession was done with the full authority of the Crown, or was done by some subordinate of the Crown without sufficient authority.

(1) 7 Moore's L. A. 476.

(2) 5 Bing. N. C. 273.

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Mr. Forsyth :—On that point I shall contend that the cession was not made by the Crown, but by the Secretary of State and the Governor-General in Council under authority defined by Act of Parliament.

Sir W. Harcourt :—It would frustrate the object of the appeal if this question were decided on any side issue.

The Lord Chancellor :—The judgment of the High Court does not, I think, turn upon the distinction between an act of the Crown and an act of a subordinate authority; for, in speaking of Section 113 of the Indian Evidence Act, the Judges say: "If the Crown alone has power to cede territory, then this provision of the Law is valid and binding."

Sir W. Harcourt :—The judgment certainly proceeds on the grounds that the Crown alone had not that power. The distinction now sought to be raised is nowhere noticed in the judgment.

Sir Montague Smith :—But you must have a decision on the question whether this particular cession is valid.

Sir James Colville :—Mr. Forsyth may contend that the Crown without Parliament cannot cede territory. But he may also contend that this cession was not an act of the Crown, but of the Secretary of State, whom he considers an authority subordinate to and distinct from the Crown.

Lord Selborne :—Have we before us the materials on which a question of that sort can be raised? So far, we only know that the thing was done by the authority of the Governor-General in Council with the assent of the Secretary of State, which implies *primâ facie* the assent of the Crown, and that it was gazetted in the manner required by the Evidence Act. Are we not bound on those facts to consider that the assent of the Secretary of State was the assent of the Crown, and that whatever power the Crown had, from whatever source derived, it might be exercised in that manner?

Sir W. Harcourt :—That is my contention. The only issue which we desire to be tried is whether the Crown can by its sole prerogative cede territory, or whether the consent of Parliament is necessary. The first proposition which I propose to establish is that the title of the Crown as Sovereign of India is a

paramount title, arising from the fundamental relation between sovereign and subject; that it is in no sense derivative; that it did not come from the East India Company, and has nothing to do with the Transfer Act of 1858, but rests on the broad principle that a subject who acquires territory, acquires for the sovereign and not for himself. This principle applies to all territorial acquisitions, whether made in time of peace or war. The East India Company acquired territory and ceased to be a purely commercial corporation. All the rights of sovereignty over the territory so acquired, at once accrued to the Crown. The paramount title of the Crown was in no respect modified or affected by the restrictions, regulations, or legislation which affected the puisne title of the East India Company. At the time when the government of India was taken from the Company, Parliament might have attached restrictions to the prerogative. This was not done. The only effect of the Transfer Act of 1858 was simply to determine the trust administration of the Company, not to create the title of the Crown. It is, therefore, beside the question to investigate the rights of the East India Company; although, were it necessary, it might be shown that the power of cession was, in fact, possessed and exercised by the Company.

My next proposition is that the right of cession resides in the sovereign power, and the only question that can arise is, where, in any particular state, the sovereign power for this purpose is vested. It is said by Mr. Justice Kent in his 'Commentaries'⁽¹⁾ that "the power competent to bind the nation by treaty, may alienate the public domain and property by treaty." The power of making treaties involves the power to cede, and in England the power to make treaties is in the Crown. The present is a case of cession under treaty. In many treaties a reservation is made that what is done, is done subject to the approval of Parliament, and terms may be introduced into a treaty which cannot effectually be made without the assent of Parliament. But this is not a case of this kind.

The Lord Chancellor :—As regards the right to cede territory, is not there a distinction between territories which, belonging to the Crown, are governed without the assistance of any local legis-

(1) Kent's Commentaries, Vol. I., pp. 165-166.

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lature, and territories which belong to the Crown, but are governed with the co-operation of a local, possibly a representative legislature?

Sir W. Harcourt :—I have no doubt there is such a distinction, but it is not necessary to advert to it here.

Sir Barnes Peacock :—Is this a case of cession at all? The proclamation in the Bombay Gazette does not say that territory is ceded, but merely that certain villages have been removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattywad.

Mr. Forsyth :—We admit that there was, in point of fact, a cession to the Thakore of Bhaunagar, and that nothing turns on the words of the proclamation to which Sir Barnes Peacock directs attention.

Lord Selborne :—If in truth there was no cession, are we to decide an important question of law on imaginary facts? It is suggested that what in fact was done was nothing more or less than to remove particular villages from one British jurisdiction to another.

[A discussion here arose as to whether what had taken place amounted, in fact, to a cession from British territory to a foreign state.]

Sir W. Harcourt.—The Court below has satisfied itself on the documents before it that there has *de facto* been such a cession. I cannot carry the case further on that point. As to the reference made by the High Court to the authority of Grotius, Vattel, and Puffendorf, this was a question of municipal and not of international law, a constitutional question as to the prerogative of the British Crown, in respect of which the opinions of foreign lawyers could have no weight. See the speech of Lord Thurlow, in the debate in the House of Lords, on the cessions made in 1783 at the Peace of Versailles⁽¹⁾. If there is, as the respondent appears to admit, full power in the Crown to cede territory by treaty in time of war, or at the conclusion of war, is there any difference of principle which should apply in time of peace? Circumstances of con-

(1) Parl. Hist., Vol. XXII., p. 430.

venience and public policy may often require a cession to be made during peace ; as, for instance, to avert a war, or for consolidation of territory, or the rectification of boundaries. Territory in the occupation and possession of the Crown has been surrendered in time of peace in conformity with the adjudication of an arbitrator. By a treaty with the Netherlands in 1824, Great Britain in time of peace ceded Sumatra and with it the Settlement of Bencoolen. There are stipulations in this treaty, recommending " to the friendly and paternal protection of the Netherlands Government the interests of the natives and settlers subject to the ancient factory of England at Bencoolen " (1). The factory at Bencoolen had formed a part of the dominions of the East India Company in the same way as the Presidencies of Madras and Bombay. It had been recognized and regulated by many Acts of Parliament. And yet it was ceded in time of peace, and the allegiance of its inhabitants transferred to a foreign state. By another treaty, made in 1859-60, the Bay Islands, which had been erected into a British colony with a representative Government and power to legislate, were transferred with their inhabitants to the Republic of Honduras (2). By another treaty with the Netherlands in 1867 an interchange of territory on the Gold Coast of Africa was carried out in time of peace. Under that treaty Her Britannic Majesty (without authority from Parliament) ceded to His Majesty the King of the Netherlands certain " British forts, possessions, and rights of sovereignty or jurisdiction " (3). Again, the Orange River Territory, which had been recognized as British territory by letters patent, was abandoned under an order in Council in 1854, notwithstanding the vehement protests of the inhabitants (4).

Lord Selborne :—The peculiarity of that case is that the inhabitants of the territory were simply released from their allegiance, and authorized to form an independent Government for themselves. In principle it is a stronger case than the case of a cession.

Sir W. Harcourt :—The cases cited illustrate the different ways in which the Crown has always assumed and exercised this right of

(1) British and Foreign State Papers, Vol. II., p. 370.

(2) *Ibid.*, Vol. XLIX., p. 13.

(3) Hertslet's Commercial Treaties, Vol. XII., p. 1194.

(4) See " Forsyth's Cases and Opinions," p. 185.

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cession in territories outside of India. In India the Crown, in addition to its own inherent authority, represents the authority of the Emperor of Delhi over all the Indian princes. These princes with various forms of sovereignty are none of them absolutely independent of the Crown. The recent case of the Gaikwar might be cited to show the manner in which the Queen as Suzerain of India exercises a summary and supreme jurisdiction over the princes of India. In this delicate relationship it is absolutely necessary to attribute to the Crown the fullest powers for dealing with territory by cession, exchange, settlement, or re-adjustment of boundaries. If the authority of Parliament were required in every case in which territory is dealt with, it would be impossible to govern India. That the East India Company and the Crown had from the earliest time of their acquiring sovereignty in India exercised the right to cede territory in time of peace, could be proved by a *catena* of instances, of which the following more particularly deserve attention :—

1st.—A grant made in 1872 to Maharajah Madha Rao Scindiah, in reward of his services to the English, of all right, title, and possession in the Fort, Town and Purgunnah of Broach. See *Aitchison's Treaties*, Vol. IV., p. 214.

2nd.—The cession in 1803, by the Government of Madras, of the Fort and District of Kulanelly in Tanjore to Tondiman, Chief of the Poodoocottah State.—*Aitchison's Treaties*, Vol. V., p. 331.

3rd.—The restoration, in 1806, of the territory of Sumbalpur and Pátna to the Maharajah of Nagpur.—*Aitchison's Treaties*, Vol. III., p. 99.

4th.—The restoration of territory, in 1806, to the Chief of Jalaon.—*Aitchison's Treaties*, Vol. III., p. 150.

5th.—Sunnud of rent-free villages, in 1812, to Rajah Kissonj Singh of Jaitpur.—*Aitchison's Treaties*, Vol. III., p. 174.

6th.—The cession in 1816, to the Nawab of Oudh, of the Purgunnah of Nabobgunge in exchange for the Purgunnah of Handia.—*Aitchison's Treaties*, Vol. II., p. 164.

- 7th.—The cession in 1817, to Anund Rao Gaikwar, of the Purgunnahs Dubbooy, Báhádarpur, and Sowli.—*Aitchison's Treaties*, Vol. VI., p. 331.
- 8th.—Transfer in 1818, to Maharajah Dowlut Rao Scindiah, of lands in Gwalior, Málwa, and elsewhere, in exchange for Ajmere and other districts.—*Aitchison's Treaties*, Vol. IV., p. 253.
- 9th.—The cession, in 1831, of lands on the banks of the river Baramputer to the Rajah of Assam on his undertaking to pay tribute.—*Aitchison's Treaties*, Vol. I., p. 132.
- 10th.—Restoration in 1846, to the Rajah of Nálágurh, of the Fort of Málwa.—*Aitchison's Treaties*, Vol. II., p. 333.
- 11th.—Restoration in 1856, to Holkar, of the Fort of Sindwa.—*Aitchison's Treaties*, Vol. IV., p. 294.
- 12th.—Restoration in 1860, to the Ruler of Nepal, in full sovereignty of certain lands in the north of Oudh.—*Aitchison's Treaties*, Vol. II., p. 223.
- 13th.—The cession in 1871, to Scindiah, of certain villages in Jhansi.

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The cases cited show that the Government of India, as representing the Crown, has power to cede territory to Native states, princes, and rulers, and is the sole judge of the considerations of state policy by which such grants of territory must be determined. The proposition that it could not so alienate territory without the assent of Parliament was without authority, and was, moreover, unreasonable and impolitic. The present transfer appeared on the face of it to be an act of state, such as the British Crown, representing the nation in its executive capacity, and the East India Company, invested with the authority of the Crown, had always exercised. If it were to be held otherwise, there was no Native sovereign in India whose title would not be attacked and shaken. To establish such a doctrine would be to invite a fresh mutiny.

Mr. J. F. Stephen, Q.C. :—The question is whether the effect of the cession made during the pendency of the suit, was not to oust the jurisdiction of the Ahmedabad Court to adjudicate upon the claim after the remand. The clause in the Indian Evidence Act, which makes a notification in the Gazette evidence of the fact of a cession, was not introduced with a view to enable the

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Government of India to do by indirect means what it could not lawfully do directly. It assumes that a valid cession of territory in India to a Native state, is a legal possibility. If that is a mistaken assumption, the section is without operation. The section relies upon the correctness of the view expressed in the resolution communicated in the letter of the Chief Secretary to the Bombay Government in the Revenue Department of the 28th July 1871. If such a cession is legal, it was incumbent in framing the Evidence Act to set forth the means by which it might be proved. If a Court had to satisfy itself by actual inspection of documents that a cession had been made by the Governor-General in Council, and that his Act had been authorized or ratified by the Crown, it would be launched upon an enquiry which it would be most improper and inconvenient for it to enter into, since it would necessitate the publication of official correspondence relating to matters of great delicacy, and expressed in language of less than legal precision. It was, therefore, necessary, especially in dealing with Courts like those in India, to cut short the proof, by making the public declaration by the Government that a cession had been made, evidence of the fact. If it be rightly assumed that the Crown, or the Governor-General in Council, has legal authority to make cessions, the effect of the notification provided by the Evidence Act is to put an end to all the various miscellaneous questions and side issues which might otherwise be raised.

According to the law of England a cession of territory is valid without the interposition of an Act of Parliament. In England the sovereign power to make treaties, binding on the whole community, with foreign princes is vested in the person of the king or queen. (See *Stephen's Blackstone*, Vol. II., p. 512.) The power to make treaties involves the power to make such concessions as are required to effectuate the treaty, *e.g.*, the power to cede territory. That the Crown possesses this general power is seen by considering the particular instances in which the right has been exercised. For this purpose treaties might be distributed into three classes: those made at the end of a war, those made elsewhere than in India in time of peace, and those made in India in time of peace. With regard to the first of these divisions, it seemed to be admitted in the respondent's case that the Crown

has power to cede territory by a treaty of peace made at the end of a war. But what reason is there for thus limiting the power of the Crown? In almost every conceivable case the cession of territory has some relation, direct or indirect, to war. A cession is made under the direct pressure of war, or under the apprehension that, unless made, war will ensue. There is no real distinction in principle between the case of a cession of territory made with a view to terminate a war and a cession made to avert a war, or to avert a state of things likely to bring about a war. In both cases the cession is made under a necessity or *vis major*. On what principle is the executive power to be the judge of the necessity in the one case, and the legislative power to be the judge in the other? If the regular and proper condition of a cession of territory is the assent of Parliament, and the power of the Crown to cede territory at the termination of war rests merely on necessity and *vis major*, the Crown would require to obtain from Parliament an Act of Indemnity for a cession made in time of war as well as for a cession made in time of peace. In almost all the great treaties to which this country has been a party, the negotiations have extended over a considerable period. Ample time has been given to consult Parliament if that were the constitutional course to follow. Yet in framing these treaties the opinion of Parliament never has been taken.

It has been suggested that if the power of the Crown to cede territory in time of peace is as wide as I assert it to be, it would be competent for the Crown in time of peace, and without the consent of Parliament, to alienate an integral part of the territory of the United Kingdom—for instance, the Isle of Wight. It is not necessary to my argument to say that the Crown has such a power. The case put is an extreme one. That the power of the Crown might be grossly abused, is no argument against its existence. The constitutional theory that the king can do no wrong breaks down if we imagine the ease of the king committing murder. Similarly the Houses of Parliament might wickedly and corruptly abuse the powers entrusted to them. But the theory of Government does not contemplate the existence of such a state of things. It must be assumed, therefore, that, in making such a sacrifice as the cession of the Isle of Wight, the Crown was not

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acting wantonly or wickedly, but was moved thereto by adequate and weighty reasons. A security for this would be the responsibility of the ministers of the Crown.

The Lord Chancellor :—Though the minister were to lose his head, that would not restore the Isle of Wight. But the country after punishing its minister might be justified in saying that no engagement had been entered into by which it was legally or morally bound.

Mr. Stephen :—Supposing the Isle of Wight to have been ceded to Louis XIV. by Charles II. at the time he was pensioned by the French King, and that possession had been taken under that cession by the French without any war, and that they remained in possession, could the Court of King's Bench have held that a person born in the Isle of Wight after the cession was capable of inheriting lands in England? In such a case the maxim, not unknown in India, "*fieri non debet, factum valet*," would apply.

Lord Selborne :—That illustration does not help you, because supposing the argument on the law is assumed against you, still the *de facto* possession of a country by a foreign Government would suspend while it lasted the Government which it had displaced.

Mr. Stephen :—Would your Lordship say that a person born in that country while the foreign possession continued, was a foreigner?

Lord Selborne :—I shall wait till the identical case arises.

Mr. Stephen :—Assuming that the Isle of Wight would not be ceded except under urgent necessity, it would seem from all analogy and from the precedents of existing treaties that the right to judge of the necessity would belong to the executive and not to the legislative power. Unless, therefore, when the case arose, some distinction were suggested turning on the peculiar character of the territory, which is a point I am not concerned to argue, I would say that the duty of making the sacrifice would fall on the Crown, and not upon Parliament. The public safeguard against the abuse of the authority of the Crown, which lies in the punishment of ministers by Parliamentary impeachment, may not be in theory

an adequate check ; but, in practice, no more stringent limitation has been found necessary.

One difficulty in ascertaining under what conditions cessions are lawful, arises from the circumstance that this country has been more in the habit of receiving than making them. Those we have made, have been chiefly by way of restorations of territory taken. At the treaty of Breda, in 1667, Nova Scotia, then termed Acadia, was restored to France, and Surinam to Holland. See *Koch and Schæell, Histoire des Traités de Paix*, Vol. II., p. 131. By the treaty of Ryswick, in 1697, certain English possessions in the Hudson's Bay territory which had been taken by the French and recovered by the English, were given back to the French. See *Dumont's Corps Diplomatique*, Vol. VII., Part 2, p. 400. This went beyond the ordinary case of restoring conquests. By the treaty of Aix la Chapelle in 1748, Cape Breton, which had for some time been in the possession of the English, was ceded to the French. See *Koch and Schæell, Histoire des Traités de Paix*, Vol. I., pp. 314, 315. By the treaty of Paris, in 1763, the islands of St. Pierre and Nicolan on the coast of Newfoundland, and dependencies of one of the oldest English colonies, were ceded to the French.

By the treaty of Versailles in 1783, which recognized the independence of the United States of America, Minorca and Florida were ceded to Spain, and other cessions were made to France and Holland ; but the most important incident of this disastrous treaty was the cession of a great portion of the Continent of North America to persons who by a series of Acts of Parliament had been declared rebels and guilty of high treason. In this case Parliamentary authority was given to treat, and authority to treat was considered to carry with it authority to cede.

The Lord Chancellor :—Authority to treat, under the circumstances of the case, would mean authority to cede.

Mr. Stephen :—There was no express power given to the Crown to cede.

Lord Selborne :—After the matter was at an end there were acts of the Legislature which were in substance confirmatory.

Mr. Stephen :—During the conflict with America, Acts were passed treating the Americans as rebels, forbidding all inter-

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course with them, making their ships lawful prize, and providing for their offences elsewhere than in America. The existence of such Acts of Parliament rendered it necessary that as the whole war was in fact carried on under the authority of Parliament, that authority should be had to bring the war to an end. That led to the passing of the Acts 18 Geo. III., Chap. 13, and 22 Geo. III., Chap. 46, under the latter of which peace was made. The intervention of Parliament was required in this case because Parliament had declared the persons with whom the treaty was to be made, criminals, with whom no sort of intercourse was to be maintained. It was necessary before negotiations could be opened that the effect of previous legislation should be suspended. But when the authority to treat was given, the authority to cede, to renounce sovereignty, and recognize independence, did not require separate sanction.

By a treaty made at Stockholm in 1813 between England, Russia, and Sweden, the island of Guadaloupe, which was then an English colony, was ceded to Sweden. This was, in fact, a cession made in time of peace, peace with Sweden having been declared a year before.—*Hertslett's Commercial Treaties*, Vol. II., pp. 337-340, and *Koch and Schæell*, Vol. III., p. 267.

In none of these cases can it be said (unless, perhaps, in the case of the war with America) that this country had been so subjected to a *vis major*, that the cessions made were made of necessity. Yet in all these cases, which go far to make up the body of the International law of Europe as it exists at present, the Crown acted without interference of Parliament. Not one of these cases affords the least support to the contention that the authority of Parliament is necessary to validate a cession by the Crown.

As to the case of cessions made during peace, it may be said in respect of the sale of Dunkirk by Charles II. to Louis XIV., that it is a transaction which no one would defend as legal or proper. The minister who advised the sale was impeached and driven into exile, and the cession was completed in the face of the most vehement opposition on the part of the nation. But, so far as I know, there was never any question in the Courts of law that they were bound to recognize the cession when it was completed. So,

likewise, the abandonment of Tangier, in the circumstances under which it occurred, was open to blame, but it has never been said that it was not within the competence of the Crown.

The cession of Sumatra with Bencoolen to the Dutch, to which attention has already been directed, was a case entirely in point, since it was a cession in time of peace of a part of the dominions of the East India Company, made directly by the Crown in exercise of its own sovereign powers, and not of any power derived through the Company, and without reference to Parliament. A single act of this kind done publicly and deliberately by a great statesman (Mr. Canning), is in itself a precedent which cannot be disregarded. The renunciation in favour of Nicaragua of the Protectorate of the Mosquito Shore (Hertslet's Commercial Treaties, Vol. XI., p. 447), and the renunciation of the Protectorate of the Ionian Islands in 1863 were also instances of cessions made in time of peace.

As to cessions of treaty made by the East India Company in time of peace, in addition to the cases cited by Sir William Harcourt, reference may be made to the cession, in 1803, of certain territory to Maha Rao of Ulnur, for services rendered against the Mahrattas, and to the exchange of territory made with him for purposes of mutual convenience in 1805. See *Aitchison's Treaties*, Vol. IV., p. 143. As to these treaties made by the Company, it has been suggested that they have been ratified by Parliament, and that the fact of their having been so ratified implies defective validity without such ratification. The Government of India Act of 1858 (Stat. 21 and 22 Vic., Ch. 106, S. 67), provides that "all treaties made by the said (*i.e.* The East India) Company, shall be binding on Her Majesty." This provision, it is said, deprives these early treaties of any weight as precedents, because it shows they stood in need of confirmation and derive their validity from Parliament. That is a very forced construction of the Act, in which no reference is made to the cession of territory, and the object of which is simply, so far as is possible, to place the Government of India as administered by the Crown on the same footing as when administered by the Company.

Lord Selborne :—Treaties are put by the Act on apparently the same footing with contracts, covenants, liabilities and engagements.

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The Act recognizes the Company as a competent treaty-making power, and if the treaties made by the Company involve cessions, then, by implication, it recognizes the power of the Company to make treaties involving cessions.

Mr. Stephen :—Had there been any doubt as to the validity of the long series of treaties of the East India Company, or of the lawfulness of the cession of territory publicly made under them, they would not have been confirmed in the general and vague terms used in the Act. The Act, as I read it, does not render valid treaties which originally were invalid, but recognizes the original validity of the treaties, and accepts them as binding on the Crown. In the Charter Act of 1793 (33 Geo. III., C. 52, SS. 42, 43,) there is an explicit recognition of the power of the Governor-General in Council and also of the Governors of Madras and Bombay to make war and to make treaties. What restriction is there to prevent their making treaties of cession ?

Sir Barnes Peacock :—The first section of the Act says the territories shall remain and continue in the possession of the East India Company. There is no permission to estrange them.

Mr. Stephen :—Taking that in connection with the subsequent Act of 1858, I understand it merely to mean that the Company are to remain in possession of these territories for the purposes and with the powers of Government. It is not meant to exclude the power of ceding under certain circumstances.

Sir Barnes Peacock :—The territorial debt is charged on these territories.

The Lord Chancellor :—Perhaps it is only a matter of curiosity ; but do you say that the East India Company could have ceded territory without the consent of the Crown ?

Mr. Stephen :—It is quite unnecessary for me to contend that the Company could cede of their own right and independently of the Crown. I say that the Crown had substantially entrusted to them, among other powers, the right of making treaties on its behalf. I regard Section 68 of the Act of 1858 as putting all the treaties made by the Company on the footing of treaties made by the Crown.

And the noticeable matter is that after the passing of the Act of 1858 other cessions of the greatest importance have been made by the Government of India. Mr. Forsyth in his 'Cases and Opinions' has referred only to two instances of Indian cession, and these made before the Mutiny; but after the Mutiny many of the Native chiefs who had taken our side, and had distinguished themselves for their courage and fidelity, were rewarded with grants of territory. If the Court below are right in their view, the whole of the grants made to the great Indian Chiefs of Hyderabad, Gwalior, etc., as the reward of their invaluable services at a time of extreme peril to the British Empire in India, are invalid. What would be the effect of a declaration to that effect?

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Lord Selborne :—The effect would probably be that an Act of Parliament would be passed before the end of the present session.

Mr. Stephen :—That might be so, but the immediate effect would be to teach every chief of every state in India to look not to the Government immediately placed over him, but to the views which might possibly be entertained by Parliament. It might be possible to set up a particular grant to a particular state by Act of Parliament, but it would not be so easy to restore the prestige of the Government of India, or of the Governor-General to whom all these chiefs are accustomed to look as Her Majesty's representative. Instances of cession subsequent to the Transfer Act of 1858 are:—

1st.—The cession of territory made on the 26th December 1860 to the Nizam. See *Aitchison's Treaties*, Vol. V., p. 114.

2nd.—Restoration of territory by treaty of the same date to Scindiah.—*Aitchison's Treaties*, Vol. IV., p. 272.

3rd.—Territory conferred in full sovereignty on the Bhopal State under treaty of the 27th December 1860.—*Aitchison's Treaties*, Vol. IV., p. 322.

4th.—Sunnud granting villages in Bareilly to the Nawab of Rampur.—*Aitchison's Treaties*, Vol. II., pp. 29, 30.

5th.—Sunnuds according full sovereignty over his ancestral possessions to the Maharaja of Puttiala, and conferring other territories upon him to be enjoyed on the same terms as his

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ancestral possessions.—*Aitchison's Treaties*, Vol. II., pp. 293, 297.

6th.—Surnuds in similar terms and making similar grants.
—*Aitchison's Treaties*, Vol. II., pp. 304, 306-309.

The fact that all these grants were made with extreme publicity, and to that end were clothed with every solemnity and formality which could be given to them at a time when the attention of the public was strongly interested in the matter, without any objection being taken in Parliament, was in itself a guarantee to those to whom the grants were made that they were absolutely valid and binding. That great public transactions like these regularly carried out in the face of the world should be set aside because some petty question as to the rights of parties under a mortgage deed happens to turn up in a Court of Justice, would be a most dangerous doctrine subversive of all confidence in the acts of our Executive Government. In this point of view the matter which is strictly a question as to whether this cession was valid according to the municipal law of England, has also a relation to International Law. A treaty between nation and nation, which, according to the ordinary custom of nations, is and ought to be regarded as valid and binding, must be accepted as valid and binding by the Courts of law of these nations. If the contrary were the case, it would lead to a conflict between the Courts of Justice and the Executive Government such as would render the conduct of affairs impossible. If, therefore, this cession is one which International Law would regard as valid between nation and nation, it must be recognized as valid by the Courts of law.

As to the authority of those writers on International Law to which reference has been made in the judgment of the Court below as being opposed to the right of ceding territory to a foreign state, it will be seen that the substance of their remarks is rather of an ethical than of a legal character. They simply say it is wrong to cede territory without grave reason. The speculations of Grotius (*de Jure Belli et Pacis*, B. II., Cap. 6, Sec. 3, 4,) turn on the theory of a social contract and have no practical bearing on the matter in hand. Sir R. Phillimore, in his work on International Law (Vol. I., p. 313), lays down the broad principle that "a nation which allows its ruler either in his own person or

through his minister to enter into negotiations respecting the alienation of property with other nations, must be held to have consented to the act of the ruler, unless it can be clearly proved that the other contracting party was aware at the time that the ruler in so doing was transgressing the fundamental laws of his state." Passages from Vattel are cited by Sir R. Phillimore in support of this position, which further recommends itself as being in accordance with ordinary and obvious common sense. See *Kent's Commentaries*, 12th ed., Vol. I., p. 285, and *Wheaton on International Law*, Part 3, Cap. 2.

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On this view the English nation is bound to regard as valid those acts of cession which were solemnly made to Native princes without objection at the time. These were acts of state done by the sovereign in respect of independent sovereign powers, and it would be a breach of public faith to question them or allow them to be questioned in a Court of Justice.

Sir Barnes Peacock :—If the President of the United States were by himself, without the concurrence of the Senate, to make a treaty, and the Senate did not impeach him, do you contend that that treaty would be binding, and would warrant his making future treaties without the Senate's concurrence?

Mr. Stephen :—In America the constitution is defined in express terms by a written document which provides that the Senate is to concur in making treaties. In England we have no written constitution, but leave such matters to be determined as the circumstances of the case may require, in accordance with precedent.

Sir Barnes Peacock :—Is not the constitution reduced to writing by 21 and 22 Vic., Ch. 106?

Mr. Stephen :—Certainly not. The power of the Crown in no way depends on that Act. The Queen acts by virtue of her prerogatives. In the Tanjore case⁽¹⁾ already referred to, it was decided that the Crown, exercising its sovereign power through the East India Company, could acquire and retain territory, and that such an act of the Crown was not subject to the control of the Municipal Courts either in India or in this country. The present is the converse case. Here the Crown cedes territory. But the

¹⁾ 7 Moore's L. A. 476.

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same principle applies. The act of the Crown is an act of State, and cannot be questioned in a Court of law. By the English Constitution the executive government is the prerogative of the Crown. Parliamentary control, which may take the form of refusing supplies or impeaching ministers, is exercised actively only in rare cases. Acts falling within the sphere of the Executive Government when once done must be accepted as valid, though they should subject the minister who does them to punishment. It is conceded by the other side that to terminate a war cessions may be made by the Crown without authority from Parliament.

Sir Barnes Peacock :—A cession of territory made to terminate a war, is in fact, conquest.

Mr. Stephen :—It is buying peace. But that is a different thing from conquest. By conquest, I should understand the actual occupation of the country by force.

Sir Barnes Peacock :—But cession is a thing forced upon you.

Mr. Stephen :—It may be an act of necessity, no doubt. What I say is that the Executive Government is to decide when the necessity has arisen.

Sir Barnes Peacock :—Would you contend that the Governor-General could have given up Bengal with all its revenues to the King of Delhi?

The Lord Chancellor :—The question is whether the Imperial Government with the Governor-General could not have given up Bengal.

Mr. Stephen :—I say certainly they could, subject to their constitutional responsibility.

Sir Barnes Peacock :—That is in the case of war.

Mr. Stephen :—I say, there is no real distinction between the case of war and the case of peace. If it be granted that the Crown has power to cede in time of war without authority from Parliament, then, as the Crown has undisputed power to make war, it is conceivable that a bad king might declare war simply with the view of effecting a cession. He might, indeed, be dethroned; but if the cession were actually effected, a Court of Justice,

according to the admission of the other side, would be bound to recognize it.

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Sir Montague Smith :—If we are to look to consequences, the consequences of declaring an unjust war might be infinitely more disastrous than a mere cession of territory.

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Mr. Stephen :—Unquestionably. In carrying out the acknowledged privileges of the Crown, we may have results as alarming as the cession of the Isle of Wight or of Bengal.

Sir Barnes Peacock :—I only put it to you to test your proposition which, it is important, we should have clearly placed before us. You contend that the Crown has the power to cede the sovereignty of any part of its dominions to a foreign state, in the exercise of its prerogative in a constitutional manner.

Mr. Stephen :—That is my contention generally; but I am not prepared to deny that there may be a distinction, though at this moment it does not occur to me, between different parts of Her Majesty's dominions.

Lord Selborne :—What I understand you to mean is, that, as a general rule, this power rests in the sovereign, and that the burden of proof would be on the other side.

Mr. Stephen :—Quite so; that is the sum and substance of my argument.

The Lord Chancellor :—You say that the power of cession is part of the Crown's *plenum dominium* over its possessions, but that it may be limited, curtailed, or taken away, and checks put on its exercise. So far, however, as that has not been done, it remains in full force.

Mr. Stephen :—That is entirely what I have been endeavouring to express in my answers to your Lordships. The cases indicate a sort of graduated scale in which the right of cession has been exercised. The simplest form is precisely that with which we are now dealing. A second step is such a case as that of Bencoolen which had been recognized in various Acts of Parliament as a part of the British possessions. The third step is illustrated by the case of the Bay Islands, which had been provided with a constitution and constitutional Government, and which were a settled and not a conquered colony.

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The Lord Chancellor :—In the case of the Bay Islands very possibly the Legislature there were consenting parties.

Mr. Stephen :—In an Empire such as ours, having so many dependencies with institutions of such infinite variety, it is impossible to make any general proposition as to what may or may not be done, which might not require qualification when applied to some particular territory. Taking the case of Canada, let us suppose that there are islands in Lake Superior belonging to Canada, and that there are reasons for ceding these islands to the Government of the United States. If I were asked who could make that cession, I should answer that Her Majesty's ministers, who would be responsible for the transaction, would do well to consult the Governor-General of Canada and the Dominion Parliament.

Lord Selborne :—If the Dominion Parliament were not consulted, it would, no doubt, be regarded as a very great outrage.

The Lord Chancellor :—In the *Bishop of Natal's case*⁽¹⁾ this Board had occasion to lay down, what may have seemed a self-evident proposition, that where once representative institutions have been conceded to a colony, the Crown stands to that colony in the same position as it stands to the United Kingdom.

Mr. Stephen :—My illustration was intended to show that there were limits to the authority of the British Parliament, and that in dealing with cases of cession you have to consider each case with reference to its own particular circumstances.

The Lord Chancellor :—If the question had arisen before Canada had any Parliament, then, if your argument in the case of India is right, the Crown would have had the right to cede.

Mr. Stephen :—While Canada was a Crown colony, there could have been no question about it. Seeing it has a Parliament, it would be unwise and impolitic for the Crown to exercise its right without reference to those interested in the matter.

Lord Selborne :—An argument which might be used as to the territory of the United Kingdom might have no application to the Fiji Islands.

(1) *In re The Lord Bishop of Natal*, 3 Moore's P. C. Cases, N. S., p. 115.

Sir Barnes Peacock :—What do you say to the “ Act of Settlement ” which entails the sovereignty of the whole of the British dominions on the heirs of the body of the Princess Sophia? Can the sovereign by treaty part with the dominion settled under that statute?

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Lord Selborne :—You would say that the powers and rights of the Crown are not affected by that statute, but only the devolution of them.

Mr. Stephen :—The Princess Sophia and her heirs will take the sovereignty with all its powers and rights, including the power of cession if that belongs to it. There is nothing in the case of the present cession which makes it necessary for the Crown to refer the matter to Parliament.

Sir Barnes Peacock :—Parliament has legislated for the territory ceded.

Mr. Stephen :—And so it had legislated for Bencoolen and the Gold Coast, and the other places which have been referred to.

Sir Barnes Peacock :—What do you say was the act of the Crown in parting with this territory under its prerogative? What do you say was, in fact, done by the Crown?

Mr. Stephen :—I say that whatever was necessary to be done to make a valid cession was done.

Sir Barnes Peacock :—You contend that we are bound by the notification of the Governor-General, which appeared in the *Gazette of India* on the 4th January 1873, and which under the provisions of the Evidence Act is to be deemed conclusive proof of a valid cession. But the High Court in pronouncing its original judgment had not that proof before it, for that notification had not then been published, and the Evidence Act had not been passed. Then an application is made to review that judgment on the ground that the law has been altered, and that proof is supplied by this notification. But if, in the absence of such proof, the original judgment of the Court was right, are we entitled to declare that the High Court was wrong in refusing to reverse that judgment on review, because the law had been altered in the meanwhile?

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Lord Selborne :—If it be true that the Indian Courts must take judicial notice of the territories of the Queen in India, then, if there has been a cession of territory, they must take notice of that, and they must do so independently of this Gazette, which is no part of the cession but only evidence of it.

Mr. Stephen :—They ought to have taken judicial notice of the cession. If we are to work out the matter on such minute grounds, I think that what Lord Selborne suggests is an answer to the question, whether they should have taken notice of the cession originally; but, at any rate, when they got special and statutory notice they were bound by that.

Sir Barnes Peacock :—Then the Court had originally to see whether there had been a valid cession. What is a valid cession? Apart from the proclamation, what is the truth of the case? Was there, or was there ever intended to be a cession?

Mr. Stephen :—The object of the section in the Evidence Act is entirely to settle that question.

Sir Barnes Peacock :—I only want to know what you say the cession is, putting the notification in the Gazette entirely out of the question.

Mr. Stephen :—I cannot put it out of the question.

Lord Selborne :—We seem to be fully in possession of the facts.

Sir M. Smith :—I thought the argument was to proceed on the assumption that there was *de facto* a cession by the Crown through its agents, and that the only question was whether the Crown could make such a cession without the assent of Parliament.

Lord Selborne :—As I understand it, the Court below was satisfied that, as a matter of fact, this had become foreign territory, that there had been *de facto* a cession by the concurrence of the Indian and the Home authorities.

The Lord Chancellor :—There was a *de facto* cession; the only question is, was it *de jure*?

Mr. Stephen :—I desire to add a word or two to what Sir William Harcourt has said in regard to the judgment of the High Court.

The Lord Chancellor :—That part of the judgment which relates to the Evidence Act is hardly of importance now.

Mr. Stephen :—I shall not touch on that point further. I would direct attention to the concluding part of the judgment, where after citing passages from Vattel to the effect that a nation ought not to abandon its members, except in cases of extreme necessity, the Judges go on to say that they have no knowledge of the reasons which led to the present cession, but that there certainly existed no such necessity as is recognized by the publicists. This implies that the Court considered that they had a right to enter into the question of whether there was a necessity or not, and to determine that the cession was valid if made under necessity, and not otherwise.

Lord Selborne :—The High Court seems to have thought that necessity meant either war, or some similar *vis major* of the existence or non-existence of which they might take cognizance.

Mr. Stephen :—That would be a most dangerous view.

Sir M. Smith :—A question of necessity would be one of policy, not of law.

Mr. Stephen :—Here we have the Court, many years after the thing has been done, going into the question of whether it was necessary. That shows the absurdity. If necessity justifies cession, the sovereign who makes the cession must judge of the necessity, and the necessity must be assumed as a matter of law. The High Court has said that there was no necessity. But necessity is a relative term, and things unimportant in themselves may lead to important results.

The Lord Chancellor :—It cannot be contended that the validity of a cession is to depend on the judgment which a Court of law may form as to its necessity.

Mr. Stephen :—And yet that seems to be the inference from the language of the High Court. The whole judgment of the High Court turns on what they pronounce to be a fundamental principle of the law of England, viz., that allegiance is indefeasible. Now the doctrine of the English law concerning allegiance, as laid down in *Calvin's Case*, is that on the birth of the subject allegiance attaches to the person of the sovereign, and follows him, and is not dependent on the place where the subject may reside, but is a personal relation between him and the sovereign. *Coke's Rep*, Part 7, p. 1. *Hales' Pleas of the Crown*, Vol. I., p. 68.

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The Lord Chancellor :—How does that doctrine bear on this question? Let it be granted that a subject cannot get rid of his allegiance, that does not advance us in considering whether the sovereign can cede territory.

Mr. Stephen :—I am merely answering an objection to which the High Court seems to attach great importance. They say allegiance is indefeasible; I say that may be so, but since allegiance is merely a personal relation between sovereign and subject, the fact of it being indefeasible is no argument that the sovereign cannot cede the territory in which the subject lives.

Lord Selborne :—The view that a subject cannot by any act of his own absolve himself from his allegiance, is not inconsistent with the view that he may be so absolved by some authority in the state.

Mr. Stephen :—The Court below seems to think that there was some sort of marriage tie between the Crown and its subjects.

Sir M. Smith :—And no Divorce Court.

Mr. Forsyth, Q.C., for the respondent :—The question is whether a British subject, having brought a suit in a British Court of Justice, within British territory, and established under the authority of Regulations themselves authorized by Acts of Parliament, and having obtained a decree, can be deprived of the fruits of that decree by an act of the Executive, which in the present instance I will admit was the Crown. I call attention to these facts, because, in considering the question as to the power of the Crown to cede territory, it may appear that there is a sound distinction between the power of the Crown to alienate, in certain emergencies, territory which has never been made the subject of Parliamentary legislation, in which there exist no municipal institutions created by Act of Parliament, as, for instance, in the case of a country taken by conquest in war, and restored when peace is made, and its power to alienate territory which has been legislated for by Parliament. To attribute such a power to the Crown in the latter case is to authorize it by its Executive act to repeal the Acts of the Legislature. This, I submit, is beyond the prerogative powers of the Crown.

The district of Gogo was ceded to us by the Peishwa, and became British territory under the treaty of Bassein in 1802. It

belongs to the Presidency of Bombay. By 47 Geo. III., c. 68, legislative powers were conferred on the Governor of Bombay, under which powers the Bombay Regulations were passed. By Bombay Regulation II. of 1827, Gogo is made part of the Zillah Ahmedabad, and authority is given to the Judge of Ahmedabad to administer justice in the district of Gogo.

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Lord Selborne :—If the power of cession existed in the Crown before that Regulation, what is there in the Regulation to take it away ?

Mr. Forsyth :—The Regulation being passed under authority of an Act of Parliament and municipal institutions being thereby established, the Crown cannot by its prerogative give away the territory to a foreign power, and so deprive the inhabitants of rights guaranteed by Act of Parliament.

Lord Selborne :—I do not perceive that any rights were guaranteed by Act of Parliament.

Mr. Forsyth :—I say that the three estates of the realm having sanctioned the creation of a Court of Justice within this territory, the rights of the inhabitants to the benefit of the Court's administration of justice cannot be taken away by the Act of the Crown alone.

Lord Selborne :—Will not the same argument apply to all those cessions in India to which reference has been made ?

Mr. Forsyth :—I shall presently attempt to show that these cessions were of territories not touched by any Act of Parliament.

The Lord Chancellor :—Do you say that if an Act of Parliament were passed this session to authorize a particular Court to be set up in Fiji for the benefit of the inhabitants, that would deprive the Crown of any right it might before have had to cede Fiji ?

Mr. Forsyth :—I think so. The Crown would be a party to the Act of Parliament.

The Lord Chancellor :—Being a party to the Act would be nothing. That would not terminate the right to cede, supposing it existed before. Take the case of the Crown, by its own letters

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patent, setting up a Court of Justice in a conquered or ceded territory for the benefit of the inhabitants. Would that destroy a right of cession which before existed?

Mr. Forsyth :—Perhaps not. But where Parliament has interfered, then the Crown's prerogative to cede, if there be such a prerogative, is gone.

The Lord Chancellor :—Parliament interfering is too vague an expression. It might interfere in a variety of ways. I want to know what interference you think would limit the power of the Crown. Supposing that to provide for the expenses of the Court an Act of Parliament had to be obtained, would that put an end to the Crown's right to cede? Have you any authority for saying that it would?

Mr. Forsyth :—I shall endeavour in the course of my argument to show that there is such authority, particularly with regard to the case of the American Colonies in 1783. It is difficult, however, to find any distinct judicial authority, dictum, or decision which is in point. I believe this is the first time the question has been raised in a Court of Justice.

Lord Selborne :—If that be so, and there are so many instances of cessions having been made, does not it tell strongly against you?

Mr. Forsyth :—I shall deal with these instances and distinguish them so as to show that, with perhaps one exception, they are not in point. But I do not wish to anticipate the argument which I shall go into.

The Lord Chancellor :—I do not ask you to change the course of your argument, but I should be glad to know what are the conditions of your argument. Do you or do you not admit that where Parliament has not interfered there is a right of cession in the Crown? In the case of a conquered or ceded territory, for example, does the right to cede exist before Parliament has legislated in respect of such territory?

Mr. Forsyth :—I will admit that at the conclusion of a war, for the purpose of making peace, the Crown has power to cede conquered territory which has not been made the subject of Imperial legislation.

The Lord Chancellor :—Apart from any question of war, is there that right in the Crown ?

Mr. Forsyth :—I contend not. I will examine the cases cited, and show that they do not establish such a right.

The Lord Chancellor :—That is a question on which, independently of precedents, constitutional writers might be expected to pronounce an opinion.

Mr. Forsyth :—I venture to say that no constitutional writer, lawyer, or jurist has ever asserted that the Crown has the power.

The Lord Chancellor :—I should doubt that ; but can you cite any authority, any constitutional writer whose opinion on such subjects is generally received, who says that the Crown has not this power ?

Mr. Forsyth :—I hope by-and-by to quote several.

The Lord Chancellor :—Would it not be well to see how the matter stands on that point first ; for if there is such antecedent authority in your favour, it may not be necessary to go further. On the other hand, if there is no such authority, we must proceed by degrees.

Mr. Forsyth :—If the authorities were against me, then of course the burthen would be on me to get rid of them.

The Lord Chancellor :—Vattel, who has been treated as an authority by the Court below, if you read the whole of his chapter on the subject, and not selected sentences as to what may be the moral duty of a Government, seems to me a strong authority in favour of there being a right of cession in the Crown. I should like to hear how it strikes you.

Mr. Forsyth :—I will deal with that presently. I was distinguishing between territory which had been legislated for and territory which had not, and I was urging that the Crown could not alter the provisions of an Act of Parliament.

Lord Selborne :—Is not that begging the question ? Is it not for you to show that there is something in the Act of Parliament which necessarily takes away the Crown's right to cede ? It is not inconsistent with that right that provision should be made for the good government of the country.

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Mr. Forsyth :—As an illustration of the effect of Parliamentary interference I would say that the effect of the Act of Union between Great Britain and Ireland in 1801 was so to unite these countries that the Crown could never afterwards by any Executive act separate them, or give up any part of them to a foreign state, and the same would apply to Scotland after the union with that country. The prerogative of the British Crown, I conceive, to rest on the Common Law. If the Crown has unlimited power to cede territory, there should be some authority to show it. In support of every other prerogative of the Crown, authority might be cited. But I have searched in vain for any opinion of the text writers, or any decision of a Court of Justice which even hints at an unlimited power in the Crown to cede British territory.

The Lord Chancellor :—You are now speaking rather of the territories of the United Kingdom. I want to hear your views as to the power of the Crown in respect of what are known as Crown colonies, colonies which have not been legislated for by Parliament, and which have not been provided with a legislation of their own. Take the case of Fiji.

Mr. Forsyth :—I say that in time of peace the Crown has no power to cede Fiji.

The Lord Chancellor :—On what principle do you say so?

Mr. Forsyth :—To see what power the Crown has, I must look at what the Crown has done. I cannot attribute a power to the Crown which I do not find recognized by any text writer, or any Court of Justice.

The Lord Chancellor :—Surely the text-writers will assist you if the case is as you say. Could not an absolute sovereign part with the territories over which he is absolute sovereign?

Mr. Forsyth :—But the Queen is not an absolute sovereign, not even of Fiji. She could not, to suppose an extreme case, introduce trial by torture into Fiji. She is controlled by the law, and is not absolute in the sense in which an Oriental despot is absolute, who can deal with his subjects like herds of cattle.

The Lord Chancellor :—She must govern according to the fundamental rules of English law. But the dominion she has

acquired appears otherwise unlimited, unless you can show some limitation.

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Mr. Forsyth :—I contend that in time of peace the Queen could not alienate Fiji, but it is not necessary to my argument to say so.

The Lord Chancellor :—It will assist your argument very much if you could establish that.

Sir M. Smith :—Has she power to accept the cession of Fiji?

Mr. Forsyth :—That is different. You may accept many things which you cannot give away.

Sir M. Smith :—Does not the Crown represent the State for both purposes?

Mr. Forsyth :—The Crown no doubt represents the State in dealing with foreign countries in so far as making treaties is concerned. But that power is limited by constitutional usage.

The Lord Chancellor :—We shall come to usage afterwards. At present we should wish you to refer us to any passage in any constitutional writer, who commands respect, declaring that the Crown has not that power.

Mr. Forsyth :—In Wheaton's International Law, 8th. ed., Section 542, it is said :—" In Great Britain the treaty-making power as a branch of the legal prerogative has in theory no limits, but it is practically limited by the general controlling authority of Parliament, whose approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the Empire are altered."

The Lord Chancellor :—That opinion seems rather against you. He says that in theory there is no limit to the power of the Crown, though practically there is a control by Parliament. If a treaty involves arrangements which require the interference of Parliament, Parliament will interfere, but theoretically the power is with the Crown.

Mr. Forsyth :—In discussing the power of the sovereign to surrender territory the foreign jurists assume the case, not of a constitutional monarch like the sovereign of this country, but of an absolute prince. Puffendorf in his 'Law of Nature and

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Nations,' B. VIII., Ch. 5, Section 9, nevertheless says that where a prince alienates a part of his kingdom, he requires the consent both of those of his people who are to continue under his Government and of those who are to be transferred.

Lord Selborne :—Puffendorf would require not only the assent of the Imperial Parliament, but also the assent of the people of Gogo to validate the cession.

The Lord Chancellor :—Puffendorf recognizes elsewhere the moral right of those whose territories are to be given up to constitute themselves an independent state if they are strong enough to assert the right. That implies that an absolute sovereign may abandon them.

Mr. Forsyth :—No doubt. An absolute prince may do what he likes, for aught I know.

The Lord Chancellor :—I do not mean absolute in the sense of of a despot. I am speaking of a sovereign in whom the *plenum dominium* over territory is deposited, as in the case of the Crown over a Crown colony.

Mr. Forsyth :—An absolute prince may withdraw his troops from a part of his territories, and so abandon them. He does not care whether the inhabitants are under his allegiance.

Lord Selborne :—You say he may do that, but not cede.

Mr. Forsyth :—I say an absolute prince may, but that a constitutional monarch cannot.

The Lord Chancellor :—His constitutional advisers would be called before the tribunal of Parliament to answer for what they had done.

Mr. Forsyth :—That is merely an impeachment, an entirely insufficient remedy. Could the Crown withdraw itself from the Isle of Man, and say that it shall henceforth be independent?

The Lord Chancellor :—The Isle of Man has representative institutions.

Mr. Forsyth :—They might go with the island. I say that whatever may be done by an absolute power, the English Crown cannot renounce the allegiance of its subjects. The case of the Dukedom of Guienne, referred to by Puffendorf, of which the

particulars are given in the 4th volume of Rapin's History of England, is in point. Richard II. tried to make a grant of Guienne in full sovereignty to the Duke of Lancaster. The people took up arms, and refused to be transferred from their allegiance. The grant had consequently to be revoked, and Guienne remained part and parcel of the realm of England.

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Lord Selborne :—The fact of all our French possessions having been ceded without any Act of Parliament being passed to authorize the cession, is rather against you.

Mr. Forsyth :—We were driven from them. There was no treaty of cession. It was a case of conquest.

Lord Selborne :—Some of them certainly were ceded. But that is not material.

Mr. Forsyth :—Grotius (de Jur. Bell. et Pac., B. II., Cap. VI., Sections 8, 9,) disputes the right of a state, and still more of a king, to alienate, even on the grounds of public utility or necessity, without consent. Wheaton seems to me to take the same view, and I think that the opinions of Kent and Phillimore refer only to the power of the Crown in making a treaty of peace at the conclusion of a war. In neither of the last-named writers is there the least hint of any power existing in the Crown to alienate British territory in time of peace. The passage in Phillimore to which I particularly refer is in Cap. XIV., para. 262, where he discusses the views of Grotius, Puffendorf, and Vattel.

The Lord Chancellor :—Vattel (B. I., Cap. 21, Sections 262, 265,) expressly repudiates the view of Grotius and Puffendorf that there is a general presumption against the power of the sovereign to alienate without the consent of his subjects.

Mr. Forsyth :—He is speaking of what may take place in time of war.

Lord Selborne :—He speaks of a cession to a neighbour as distinct from a cession to an enemy.

Mr. Forsyth :—He says that where the fundamental laws of a state forbid its dismemberment, the prince cannot dismember without the concurrence of the nation or its representatives. But where the laws are silent, or where a nation has given its sovereign,

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without reserve, the full right to treat and contract with other states, it is considered to have invested him with all powers necessary to make a valid contract, and to have made him judge of the necessity of the case, and what the safety of the state requires. If these views be correct as applied to this country, and the English Crown has such absolute authority, then the Crown might cede Dover to France to-morrow.

The Lord Chancellor :—Is that so? If in respect of the United Kingdom the *plenum dominium* is not in the Crown alone, but in the Crown and Parliament together, then a cession cannot take place without the authority of both Crown and Parliament. But in the case of a Crown colony, the *plenum dominium* is in the Crown alone, and the cession will not require the assent of Parliament. Unless you assume that the case of a Crown colony and of the United Kingdom are identical, the answer to the one case is not the same as to the other.

Mr. Forsyth :—Mr. Stephen put the two cases on the same footing. He was bold enough to say that the Crown could cede the Isle of Wight.

The Lord Chancellor :—He carried his argument to that extent, but at the same time he said it was not necessary for his case.

Mr. Forsyth :—It was the logical sequence of his argument and, as I think, a *reductio ad absurdum*. I can understand that a Crown colony may be supposed to stand on a distinct footing. But here we are dealing with the case of British territory which has been legislated for, and to which institutions have been given under the authority of Acts of Parliament.

The Lord Chancellor :—That is the second branch of the argument. In dealing with the first branch we had to see whether, generally speaking, the Crown had the right of cession. You are now to show that, assuming the general right, that right is lost where Parliament has legislated.

Mr. Forsyth :—At the conclusion of war and to purchase peace the Crown has the right to restore conquered territory. It has exercised that right constantly, uniformly, and without challenge. But there is no instance (with the exception of the case of Bencoolen, to which reference will presently be made) of the

Crown having so dealt with territory for which Parliament has legislated. Such territory becomes a part of the British Empire in the same way as the Isle of Wight. I ask attention to what took place when we made peace with America in 1783, after the War of Independence.

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The Lord Chancellor :—You must remember that was not a question of cession.

Mr. Forsyth :—The very word cession is used in the treaty.

The Lord Chancellor :—It was not a case of cession in the sense we have been using the word. A portion of the territories of the Crown had revolted. The Crown recognized them as successful; and dealt with them, not as ceding to a foreign power but as relinquishing rights as against its own subjects. There was an absolute necessity in a proceeding of that kind that Parliament should intervene.

Mr. Forsyth :—I doubt whether Parliament would have intervened, but for the cession.

Lord Selborne :—During the progress of the war, Acts of the Imperial Parliament had been passed which rendered it impossible for the Crown to bring the war to a termination without consulting Parliament. The Crown could not repeal the Acts which required that the Americans should be treated as rebels and pirates.

Mr. Forsyth :—The terms of the treaty with the Americans, which involved the cession of portions of Canada and Nova Scotia, were discussed in Parliament, and were defended on the ground that they were in accordance with the powers conferred by Parliament for the purpose.

Lord Selborne :—As to these cessions of portions of Canada and Nova Scotia, did they prevail, or not? They were not authorized by the Act of Parliament which enabled the Crown to treat. These were territories which had not participated in the rebellion.

Mr. Forsyth :—I cannot find whether these cessions prevailed or not.

Lord Selborne :—There was, at any rate, no Act of Parliament to authorize them.

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Sir William Harcourt :—This treaty included not only the recognition of American Independence and the cessions of territory in Canada and Nova Scotia, but also large cessions to France and Spain. The House of Commons, while it approved of the recognition of Independence, passed a vote of censure on the ministers in respect of the cessions.

Mr. Forsyth :—There were in fact three treaties of peace made at the same time. One with France. One with Spain. And one with America. Florida and Minorca were ceded to Spain. When the articles of the treaties came to be discussed by the House of Lords, Lord Loughborough contended that no prerogative existed in the Crown to cede, without the authority of Parliament, any part of the dominions of the Crown, in the possession of subjects under the allegiance and at the peace of the king. Lord Thurlow dissented from that assertion in a declamatory speech which has been referred to by Sir William Harcourt. In the course of the debate Lord Carlisle cited the case of Dunkirk, and observed that the difficulty in impeaching Lord Clarendon for advising the Crown to sell Dunkirk, was to prove that Dunkirk had ever become annexed to the Crown. Had that been shown, the Crown could not have parted with it without the assent of Parliament.

The Lord Chancellor :—These are such arguments as may be expected to be used in party warfare. If the Government of the present day were to cede Gibraltar, without previous communication to Parliament, we should hear the same expressions used in Parliament, that it was an act deserving of censure, for which the minister should be impeached. But such language does not imply that the Crown has not got the power. It rather assumes that it has the power, but that it is criminal to exercise it in a matter of the gravest importance without consulting Parliament.

Mr. Forsyth :—That is not what Lords Loughborough and Carlisle say.

The Lord Chancellor :—I take it that if a minister communicated to Parliament that a cession had been made, or was to be made, and Parliament approved of it, without any statute being passed, the cession would take place by virtue of the prerogative of the Crown, and not under any Parliamentary power.

Mr. Forsyth :—Lord Loughborough and Lord Carlisle say that the right of cession is no part of the prerogative of the Crown.

The Lord Chancellor :—Then the whole thing is invalid.

Mr. Forsyth :—They say the thing is unlawful.

The Lord Chancellor :—They say, having done what you should not have done without the assent of Parliament you deserve to be impeached. The same might, perhaps, be said, though it could hardly be truly said, in respect of the cession of Gogo.

Mr. Forsyth :—Lord Loughborough was a lawyer, and should be credited with having understood the meaning of his words when he said “no prerogative exists in the Crown to cede the Crown dominions without the authority of Parliament.”

Lord Selborne :—And yet the cessions of which he spoke were made without the authority of Parliament.

Mr. Forsyth :—No doubt. But at the end of a war and to purchase peace.

The Lord Chancellor :—Then Lord Loughborough was not right in what he said.

Mr. Forsyth :—I do not go so far as Lord Loughborough. I put it in this way. If so eminent a lawyer in discussing the right of the Crown to cede, went so far as to deny that a cession could lawfully be made by the Crown alone, even at the end of a war, and in the case of a desert and almost uninhabited country like Florida which had only recently been acquired by conquest, there is stronger ground for doubting whether such an act can be done in time of peace in respect of territory which has been long in our hands and which has been legislated for by Parliament. If Gogo can be so ceded, the whole Bombay Presidency may be ceded, and the only remedy would be impeachment. The right which I admit the Crown has to cede at the close of a war, and which I deny that it has in time of peace, rests on the exigencies of the case. These are clear after war has once been waged; till then they are speculative and contingent. Admitting the full power of the Crown to cede territory at the close of a war, there is, I think, no instance of a cession by the mere prerogative of the Crown of a territory operated upon by Parliamentary legislation.

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The Lord Chancellor :—Here is a convention between Her Majesty and the King of the Netherlands, by which we cede a portion of our territory on the Coast of Africa. That has nothing to do with a war, and that is territory upon which Parliament has operated by legislation, because there were two Acts of Parliament passed with reference to this very territory on the Gold Coast.

Mr. Forsyth :—I shall come to that case afterwards. I am speaking at present of treaties made at the close of wars.

The Lord Chancellor :—I thought you admitted that at the close of a war there might be a right of cession.

Mr. Forsyth :—Yes. But I say it is a remarkable fact that there is no instance of a cession at the close of a war of territory operated on by Parliament.

Sir William Harcourt :—There are dozens.

Lord Selborne :—We have heard of one case at least, Florida.

Mr. Forsyth :—I have dealt with the case of Florida.

Lord Selborne :—Still it is a remarkable instance, and all the more so from its not having been the subject of conquest or reconquest during the particular war at the end of which it was ceded.

Mr. Forsyth :—It had not been made the subject of any Act of Parliament.

Sir James Colville :—There must have been Acts of Parliament which applied to Newfoundland, and yet we seem to have ceded two islands on its coast, St. Pierre and Miguelon, first under the treaty of Paris in 1763, and again under the treaty of Versailles in 1783.

Mr. Forsyth :—I do not know how far Newfoundland has been affected by Acts of Parliament passed before the year 1763. An Act passed after 1763, when these cessions were made, would not touch the question. Assuming that the Crown's prerogative to cede territory at the end of a war does not extend to territory legislated for by Act of Parliament, *a fortiori* it has no power to cede such territories in time of peace. Of all the instances of cession which have been cited by the other side, that of Bencoolen

alone seems at first sight strongly against me. As to Bencoolen, it requires to be explained, though styled a Presidency, it was in fact a fort. In the treaty of cession the name Bencoolen is not used; it is spoken of as the Factory of Fort Marlborough. In 13 Geo. III., C. 63, it is mentioned as a Presidency in connection with the Presidencies of Bombay and Madras, and is no doubt thus recognized as a possession of the British Crown. That Act gave power to the Governor-General to make laws for these Presidencies, and prohibited them from engaging in war without his consent. I do not, however, find that, under the power thus given, any law or regulation was passed by the Governor-General, establishing institutions in Bencoolen.

The Lord Chancellor :—What institutions do you refer to ?

Mr. Forsyth :—Municipal institutions. A Court of Justice for instance.

Lord Selborne :—Surely if there is anything in your argument, it is the Act of Parliament, and not the Regulations made under its authority, which is of importance.

Mr. Forsyth :—Quite so. But I say that the mere naming a place in an Act of Parliament is a different thing from giving it institutions by Act of Parliament, or under Regulations having the authority of an Act of Parliament. Merely to name the place is not to legislate for it, and does not affect the power of the Crown to cede.

The Lord Chancellor :—I observe that the Act which gives power to the Governor of Bombay to make rules and regulations, gives an appeal against these to the King himself in Council who might repeal or alter them in any way he thought fit. That leaves the matter as it was. It is the prerogative of the sovereign to make rules and regulations, not of Parliament.

Mr. Forsyth :—What I say is that in respect of Bencoolen no such rules or laws have been made. Another case which has been referred to is that of the Bay Islands. These were outlying islands forming part of our territory of Honduras. They do not seem to have been made the subject of Parliamentary legislation, and were simply in the position of a Crown colony. As to Hon-

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duras itself, of which these islands formed a part, it appears (see "Cases and Opinions," p. 59) that in the year 1851, on a question arising whether the territory of British Honduras was a colony, island, plantation, dominion, fort or factory of Her Majesty within the Statute 13 and 14 Vic., C. 96, the Crown lawyers thought that the point was *not free from doubt*, though they eventually expressed an opinion that Honduras had then become part of the dominions of Her Majesty.

The Lord Chancellor :—The Bay Islands were not the same as British Honduras.

Mr. Forsyth :—I think they were included in the term Honduras.

Mr. Stephen :—They are entirely distinct. The islands are far to the south of Honduras. The letters patent recognize them as a separate settlement.

Mr. Forsyth :—That does not alter my argument. They were a settlement, but they had not been the subject of legislation. The next case is that of the Gold Coast. In respect of this territory there had been a sort of exchange between ourselves and the Dutch.

The Lord Chancellor :—You are not going to make another distinction—that there is a power by way of exchange but not otherwise.

Mr. Forsyth :—Oh, no. I say that no constitution was provided for the Gold Coast by Act of Parliament. Again, in respect of the Orange River Settlement, there was, in fact, no cession. The Crown merely revoked letters patent, by which it had a short time before established a form of government. The Settlement was purely and simply a Crown colony, and had not been legislated for by Parliament.

The Lord Chancellor :—There are Acts of Parliament relating to the Gold Coast. By the Statute 6 and 7 Vic., C. 113, to enable Her Majesty to provide for her settlements on the Coast of Africa, it is declared that Her Majesty may delegate to three or four persons, within any of these settlements, power and authority to make regulations. This is not a constitution, but for the matter of that Bombay has no constitution. This Act was passed in 1843, and in 1867 a large cession was made of these very territories. In the

8th article of the treaty relating to this cession it is said that the convention shall be ratified after receiving, so far as may be necessary, the approval of the legislative authority. Has there been any approval by the legislative authority of the terms of this treaty?

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Sir William Harcourt :—There has been no Act of Parliament.

Mr. Forsyth :—The treaty, at all events, indicates that it might be necessary to have an Act. I do not understand why Parliament should have intervened by the Statute 6 and 7 Vic., C. 13, to give the Crown power to provide for the civil government of these settlements. I should have thought that the Crown had such power without authority from Parliament.

Sir William Harcourt :—The Statute 1 and 2 Geo. IV., C. 28, had vested the African possessions in the Crown. The territory having been vested in the Crown by Act of Parliament, it might require an Act of Parliament to enable the Crown to deal with it.

Lord Selborne :—There are two Acts of George II. relating to the African Company and expressly authorizing the establishment of Courts of Justice.

The Lord Chancellor :—The Act 6 and 7 Vic., C. 13, was probably required in respect of the rights which had been conferred by these other Acts on the African Company. It gave the Crown power to do what, but for the African Company's rights, the Crown might have done of its own prerogative.

Mr. Forsyth :—As to the other cases which have been referred to. It seems doubtful whether Dunkirk was ever annexed to the British Crown. See the impeachment of Lord Clarendon in the 6th Vol. of the State Trials. Tangier, again, was undoubtedly foreign territory, and was untouched by any Act of Parliament. The cession of Banca to the Netherlands in 1814 falls within the case of cessions made at the close of a war. We were not at war with the Netherlands; but a general war, in which both contracting parties were concerned, had just been concluded. The French, who had taken the island from the Dutch, held it up to the close of the war. It stood in the position of a conquest which we chose to restore. It had not been legislated for by Parliament. The cession of Guadaloupe to Sweden in 1813 under the treaty of Stock-

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holm was a similar transaction. It had been wrested by us from France in the course of the war. We held it as a conquest, and in 1813, as a part of a general arrangement in respect of the war, we ceded it to Sweden.

Sir James Colvile :—It was not ceded at the close of the war, but as part of the consideration whereby we induced Sweden to join in the war against France.

Mr. Forsyth :—The object was to bind Sweden to the coalition against France, and so prepare the way to peace. As to the case of the Ionian Islands, our relinquishment of the protectorate of these islands has really no analogy to a cession of territory.

The Lord Chancellor :—The case of the Ionian Islands is not in itself much to the point. But as you have cited opinions delivered in Parliament in the last century, it deserves attention that Lord Palmerston, whose knowledge of these matters is well known, in speaking of the Ionian Islands, stated broadly in the House of Commons that the Crown had the right to cede any territory of which it was the possessor.

Sir Barnes Peacock :—He distinguishes, however, between those possessions which have been acquired by conquest or treaty and those settled by British subjects who carry with them the laws of their own country. The former may, the latter may not, be alienated.

Mr. Forsyth :—If that is his meaning, I agree with him, for I draw the same distinction.

Sir Barnes Peacock :—India is conquered territory.

Mr. Forsyth :—Not all of it. Our title in India is of a very mixed character.

The Lord Chancellor :—The territory we are now dealing with was ceded to us by the Peishwa under the treaty of Bassein.

Sir Barnes Peacock :—The Peishwa wanted our assistance against Scindiah and Holkar.

The Lord Chancellor :—Have you any instance of an application having been made to Parliament to authorize a cession of territory? If you find on the one hand certain instances in which cession has been made without the assent of Parliament, and on the other

hand can show no instance in which Parliament has been asked for or given its assent, that is a strong argument against you.

Mr. Forsyth :—For a cession of conquered territory at the close of a war, I should not expect authority from Parliament. As to territory which has been legislated for, I say no such territory has been ceded. Instances of Parliamentary interference are, therefore, hardly to be looked for.

The Lord Chancellor :—Well, there are the two instances of Bencoolen and the Gold Coast.

Mr. Forsyth :—I admit the case of Bencoolen to be exceptional.

Sir William Harcourt :—There is another case which deserves notice. The cession of a large extent of territory in Canada to the Americans by the treaty of 1783. Canada was then under 14 Geo. III., C. 78, an Act for making more effectual provision for the government of the Province of Quebec in North America.

The Lord Chancellor :—It may be said that the cession was part of an arrangement at the close of a war.

Sir William Harcourt :—But the territory had undoubtedly been legislated for.

Mr. Forsyth :—In adjusting our differences with the Americans it was necessary to settle a boundary line between them and our Canadian possessions.

Sir Barnes Peacock :—Do not these questions of boundary depend on the same principle as cessions, viz., upon the right of the Crown to cede? Otherwise it might be contended in a Court of Justice that the boundary had been wrongly fixed.

Mr. Forsyth :—A boundary treaty implies a dispute as to what are the proper geographical limits of our dominions. Until the boundary is fixed it is a matter of doubt.

Sir Barnes Peacock :—Your argument would seem to imply that, if the territory has been legislated for by Parliament, the treaty to determine its boundaries should be authorized by Parliament; where that authority has not been obtained, it would be always open to a subject to say in a Court of Justice that the boundary had been wrongly determined.

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Mr. Forsyth :—I think that the case of the Crown being uncertain of its own right and, therefore, consenting that commissioners should be appointed to settle a line of boundary, is plainly distinguishable from the case of the Crown ceding territory which it knows to be British.

As to the question of allegiance. - If the Crown has the prerogative to cede, what becomes of the allegiance of the transferred subjects of the Crown? The question of allegiance was considered in the case. *Doe dem. Thomas v. Acland*,⁽¹⁾ in which the question arose whether the child of a person born in the United States of America, after the declaration of independence, was an alien.

Lord Selborne held that he was an alien.

Sir M. Smith :—The same question arises whether the cession be made by Parliament, or by the Crown.

Mr. Forsyth :—No doubt, but you must have the supreme power somewhere. Parliament may, but the Crown cannot absolve me from my allegiance. That is the view expressed by Abbott, C.J., in the case cited.

The Lord Chancellor :—If the Crown can cede, it can absolve from allegiance.

Mr. Forsyth :—In the case of the Orange River Settlement, the Duke of Newcastle says, in his despatch, that the Crown cannot absolve the transferred subjects from their allegiance, and that an Act of Parliament would be needed for the purpose. He adds, that he does not think the people of the territory will raise the question.

Lord Selborne :—The fact of cession *ipso facto* absolves from allegiance. In the case you cite it was held that there could not be a double allegiance.

Mr. Forsyth :—That was not the case of a person born in British territory. I submit that the Crown has no more right to absolve the subject, than the subject had, until the passing of the Naturalization Act, to absolve himself. Again, the argument from the maxim "*fieri non debuit factum valet*" that acts done by the Crown as representing the nation, in the face of the

(1) 2 B. and C. 779.

world, are binding on the nation, seems to beg the question. If the Crown has no power to cede without authority from Parliament, a foreign state, which treats with the Crown as possessing a prerogative which it has not, does so at its own risk. A state taking territory on such terms may have to defend it by the strong hand. If we obtained a cession of territory from the President of the United States without the concurrence of the Senate, the Senate would most probably repudiate the transaction. If the Crown does possess a plenary right in all cases to cede, it follows that it has it in India, but I do not admit that it has a fuller prerogative to cede in India than elsewhere. As to danger from holding that the Crown has no authority to cede in India, an Act of Parliament could be passed at once either to give it the power, or to give validity to past cessions. Assuming that the Crown has in itself no such power, has the Secretary of State, or the Government of India, a power to cede distinct from the power of the Crown?

The Lord Chancellor :—It is not so contended.

Lord Selborne :—Do you admit that this cession was intended to be made by virtue of an exercise of the Crown's prerogative?

Mr. Forsyth :—No, I do not admit that. I believe it to have been made by the Secretary of State and the Governor-General in Council, in the exercise, as they thought, of the powers which had been possessed by the old East India Company.

Lord Selborne :—We need not consider what they thought if the necessary authority exists.

Mr. Forsyth :—If your Lordships are satisfied that the Secretary of State acted in this matter as representing the Crown, and not under the powers given by 21 and 22 Vic., C. 106, I shall not trouble you further on that point.

Sir M. Smith :—I understood you to admit, that if the Crown could do it, the Crown had done it by exercise of its prerogative.

Sir Robert Collier :—I think it must be taken that the full power of the Crown has been exercised here. The only question is, had the Crown the power?

Sir Barnes Peacock :—I understand you to be instructed by the Secretary of State to argue the question of the Crown's right to

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cede; but you are not instructed by the respondent to give up any point which might entitle him to our judgment, which may depend on, whether there was, in fact, a cession. Do you admit that there was a cession?

Mr. Forsyth :—I say that the transfer was not a transfer of territory at all, but only a transfer of jurisdiction.

Sir William Harcourt :—The agreement for the transfer contained a reservation that, in the event of gross misconduct on the part of the Thakore of Bhaunagar, the territories should revert. How could they revert if they had not been given over? But I protest against this argument being raised, because it was understood that the fact of a cession was not to be disputed. But for that understanding I could easily have shown that there was an absolute transfer.

Sir Barnes Peacock :—Mr. Forsyth admits a transfer of the villages, but not of the sovereignty.

Sir William Harcourt :—I was prepared to show your Lordships, but for the agreement to which I have referred, the facts on that part of the case.

Mr. Forsyth :—I protest against it being supposed that I have departed from any pledge given by me. I was not going to say a single word as to whether there had, in fact, been a cession; but I am bound to reply to the questions put to me by your Lordships. The letter of the 31st May 1865, from the Secretary of the Government of India in the Foreign Department, to the Secretary to the Government of Bombay, shows the nature of the transfer contemplated.

The Lord Chancellor :—How do you account for the language used in the “Resolution” of the 28th January 1871?

Mr. Forsyth :—That is a mere statement on the part of the Bombay Government. It has not even the authority of the Governor-General in Council. But if your Lordships hold that what was done, was done by the Crown in exercise of its prerogative, I need not go into the question of the power of the Secretary of State, or of the Governor-General in Council, nor into an enquiry into the Acts of Parliament under which the Secretary of State exercised the power. None of the alleged acts of cession of terri-

tory in India prior to 1858, profess to have been made by the Crown. They are made by the Governor-General in Council. I have to challenge the existence of such a power.

Lord Selborne :—No one questioned it at the time.

Mr. Forsyth :—That does not prove that the power existed. The Acts of Parliament giving power to the Governments of the various presidencies to make treaties, are, 13 Geo. III., C. 63, and 33 Geo. III., C. 52. It is to be remembered that, from the year 1770 down to the year 1820, the East India Company were almost continuously engaged in warfare. Several of the cessions, which have been referred to, were made at the conclusion of wars, and are governed by the principle applicable to such cases. In other instances the territory ceded has not formed part of the Regulation Provinces.

Lord Selborne :—Do you say that the power to cede exists in respect of Non-Regulation Provinces? Could the Punjab be ceded?

Mr. Forsyth :—I think there is a distinction between Regulation and Non-Regulation Provinces. I do not say that the Punjab could be ceded; but I say, admitting that it might, it does not follow that Bengal could. Gogo is on a different footing from the Punjab. Besides being mentioned in the Regulation of 1827, it is dealt with in Act VI. of 1859, which empowers the Governor of Bombay to appoint magistrates for specified districts within the zillah of Ahmedabad. The second section of the Act provides that nothing in the preceding section shall be held to remove the said districts from the jurisdiction of the Sessions Judge of Ahmedabad. There is a series of eight Acts of Parliament beginning with 7 George III., C. 57, and coming down to 3 and 4 Will. IV., C. 85, which successively vest the territories acquired in the East Indies in the East India Company. If the appellant is right in his contention, the Crown might repeal all these Acts of Parliament, by giving away all these territories to a foreign power.

Lord Selborne :—The Company might consent.

Sir James Colville :—The cessions actually made, were made through the instrumentality of the Company.

Mr. Forsyth :—I do not deny that there was an acquiescence. I find no instance of protest.

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Lord Selborne :—Where a cession takes place without objection, the jurists lay it down that the necessary consent is implied.

Mr. Forsyth :—That may be so, though I am not aware of any passage in which it is expressly said. I find that on two occasions, when it was thought desirable to cede territory in India, recourse was had to the Indian Legislature. Regulation XXII. of 1812 was passed to authorize the restoration of territory to the Bondelah Chieftains.

The Lord Chancellor :—The terms of the Regulation presuppose the power of cession, and that it had been exercised, though for some purpose it was thought expedient to have a legislative declaration.

Mr. Forsyth :—There was no cession before the Regulation was passed.

Lord Selborne :—The recital shows that it had, at any rate, been decided on.

Mr. Forsyth :—What is done, is done by the Regulation. Again, Regulation VII. of 1816 recites that a tract of land in Bundelcund has been granted as an independent jaghir to Amrut Rao, and declares that it is consequently necessary that the operation of the laws and regulations of the British Government and the jurisdiction of the Civil and Criminal Courts of Judicature should cease to extend to that jaghir, and then proceeds to enact certain rules.

Lord Selborne :—Is the grant of a jaghir equivalent to the cession of territory ?

Mr. Forsyth :—I think the jaghir would cease to be British territory if the grant is to an independent prince.

Lord Selborne :—An independent prince might hold territory within the British dominions ?

Mr. Forsyth :—That is for your Lordships to decide. As to the case cited by Sir William Harcourt of cessions of territory in India, the cession of Broach to Scindiah in 1782 was made before the date of any Regulation. The Act of Parliament under which Bombay was authorized to make Regulations had not then been passed, and was not passed till 1807.

The Lord Chancellor :—Do you admit that before the passing of that Act of Parliament there was this power of cession ?

Mr. Forsyth :—Cessions took place. Whether under any legitimate authority, is the question to be determined.

The Lord Chancellor :—We cannot take it for granted that all these cessions were *ultra vires*. We must regard them as the results of a constitutional power, defined and exercised in this way. To have full power over any territory includes the power of giving it up; otherwise the power is not full. You must establish the limitations to this full power. You may find them in Acts of Parliament, or in constitutional practice long continued, and never challenged, or in some original contract, such as the constitution of the United States of America, regulating the distribution of power. Where are we to find these limitations here? Looking at the thing as it stood in 1802, when Gogo first became British territory, do you say that at that time it could not have been ceded by the Crown and the East India Company?

Mr. Forsyth :—Distinctly not.

The Lord Chancellor :—Where are we to find that at that time there was any limitation upon the absolute power of the Crown to cede this territory? The Act of Parliament to which you have just referred, had not been passed, and the territory, as you admit, had not then been brought under any Regulation.

Mr. Forsyth :—I fall back on what I have throughout contended, that the Crown has not the power to cede; that there is no authority for assuming that it has such a power; and that the mere fact of things being done in times of war and disturbance, without scrutiny, is no ground on which to build so important a prerogative.

Lord Selborne :—Then you would say that Broach and the other places ceded are British territory still?

Mr. Forsyth :—If there be doubt, nothing can be easier than to pass an Act of Parliament to validate all cessions.

Sir Barnes Peacock :—Is not all doubt removed by Section 67 of 21 and 22 Vic., C. 106?

Mr. Forsyth :—All treaties were made binding.

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The Lord Chancellor :—Any treaty that was invalid as against the Company would still be invalid as against the Crown.

Lord Selborne :—The obligations of the Company are taken over by the Crown. But here, you say, there is no obligation.

Mr. Forsyth :—The observation as to the effect of the Act of 1858 was not mine. To return to the instances of cession which have been referred to by Sir William Harcourt in his argument, or which have been printed as part of the appellant's case. No Regulation applied to the fort and district of Kulanelly ceded by the Madras Government to the Chief of Poodocotah in 1803, and the same may be said of the territory restored to the Maharajah of Nagpore in 1806.

Sir M. Smith :—That was a gift made in time of peace. There was no pressure arising from any war at that time. The territory ceded had been for three years under British Government.

Mr. Forsyth :—There was no Regulation. The case of Jeytpore in 1809 (*Aitchison's Treaties*, Vol. III., p. 174,) was simply a jaghir grant. The Rajah had handed in an obligation of allegiance, and was in fact a British subject. The case of Behree in 1811 (*Ibid.*, Vol. III., p. 329) seems also to be a case of jaghir.

Sir M. Smith :—It rather looks as if these villages were withdrawn from the Regulations of the British Government.

Mr. Forsyth :—It is somewhat obscure. Pergunnah Nababgunge, which we gave up to Oudh in 1816 (*Ibid.*, Vol. II., p. 164), had been acquired by us in 1801 as part of the district of Goruckpore. It does not seem to have been made the subject of any Regulation up to the time when it was ceded. The cession to Sikkim in 1817 of territory taken from Nepaul (*Ibid.*, Vol. II., p. 205) was made shortly after the close of a war, and as part of an arrangement entered into in consequence of that war. It is not pretended that the Regulations applied there. The cessions to the Gaikwar in 1817 (*Ibid.*, Vol. VI., pp. 331-339,) were the result of a settlement of boundaries at the close of a war.

Lord Selborne :—It would seem rather from the words of the treaty with the Gaikwar, that the adjustment made was not in the sense of a settlement of disputed boundaries, but of a consolidation of territory under the British Government, to effect which certain

British territories were given up. I do not understand that these were conquered territories, or that there was any dispute about them.

Mr. Forsyth :—The war was over. We wished to settle matters with the Peishwa and the Gaikwar who had assisted us.

Lord Selborne :—But this territory does not seem to have been in contest during the war.

Mr. Forsyth :—I cannot say. It seems to me to be a case of adjustment of territory following the close of the war with the Mahratta power. The treaty with Scindiah in 1818 (*Aitchison's Treaties*, Vol. IV., p. 253,) appears from its preamble to have been made for the purpose of adjusting boundaries at the close of a war by an exchange of territory. The sunnud granted in 1820 to the Rajah of Gurhwal (*Ibid.*, Vol. II., p. 59) restored to him territory of which he had been deprived by the Goorkhās, and which we had conquered in our war with Nepaul. The territories given to the Nizam in 1822 (*Ibid.*, Vol. VI., p. 92) were granted in recognition of the services rendered by his army in the Pindari and Mahratta wars of 1817; exchanges were at the same time made to secure a well-defined frontier.

Lord Selborne :—Some of the territories ceded had been held by the English Government for more than four years.

Mr. Forsyth :—They were territories recently conquered, and in which the authority of the British Government had never been practically established.

Lord Selborne :—You have presented us with no facts to lead to that conclusion, except that these were not Regulation Districts.

Mr. Forsyth :—In 1822 we restored to the Rao of Cutch (*Ibid.*, Vol. VI., p. 444,) the town and district of Anjar, which had been given up to us in 1816, and which we had held from that date without bringing it under any Regulation. Exchanges of territory with the Kolāba State in 1827 (*Ibid.*, Vol. VI., p. 183,) had been provided for by a treaty entered into with the Chief of that state in 1822, at the close of the war with the Peishwa, and were made with the object of defining the boundary. In 1829, in exchange for certain land required for a station at Cherra Punji, we gave up to the Rajah of Cherra Punji an equal quantity of

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land in Sylhet (*Ibid.*, Vol. I., p. 89). It does not, however, appear that the land had a single village on it. The case may resemble that of the Crown lands in this country which the Crown may do as it likes with. As to the cession in 1829 of the British village of Kundla to the Rajah of Satara (*Ibid.*, Vol. VI., p. 20.) in exchange for lands required for a sanatorium in the Mahableshwar hills, I think I may make my learned friends a present of that village.

Lord Selborne :—You are generous at the expense of the principle of your argument. Where is Kundla?

Mr. Forsyth :—In the map it is close to Konkan, and Konkan was obtained from the Mahrattas in 1818.

Lord Selborne :—If so, we had held it for eleven years. It can hardly be presumed that for eleven years it was without Courts of Justice.

Mr. Stephen :—It is in the District of Wai in the District of Konkan, which is expressly subject to Regulations.

The Lord Chancellor :—It seems to be a clear case of cession.

Mr. Forsyth :—I do not deny the fact. Again, in the year 1830, the hill-station of Simla was obtained from the Rajah of Puttiala in exchange for three villages in the Purgannah Burrowli. No treaty was recorded. Is it contended that the Crown can cede without treaty?

Sir William Harcourt :—Yes.

Lord Selborne :—It was a transaction.

Mr. Forsyth :—A transaction, but not a treaty. I do not say that Burrowli was not under Regulations. I say there was no treaty.

Lord Selborne :—The possession of the hill-station of Simla was of great importance to British India, and our title to it depends on that cession.

Mr. Forsyth :—I shall say nothing of the agreement made in 1830 for an exchange of territory with the Punt Sarchie (*Ibid.*, Vol. VI., p. 43;) for I have no means of ascertaining what territory was transferred under that agreement. Nor can I find any treaty or other authority for the restoration of Bairsea to Dhar in the year

1831. Assam was conquered from the Burmese in the war of 1825-26. In 1831 a portion of the conquered territory was ceded to Rajah Purunder Singh (*Ibid.*, Vol. I., p. 132). The management of the country was afterwards resumed by the British, the Rajah having failed to meet his engagements. At the time the cession was made the country had not been made the subject of legislation. The first legislative measure passed for settling the Province and Government of Assam was Act II. of 1835.

Sir William Harcourt :—This case is referred to in Mr. Forsyth's "Cases and Opinions" as a case of cession.

Mr. Forsyth :—In 1833 we restored to the Rajah of Nahun, territory known as the Kearda Doon (*Aitchison's Treaties*, Vol. II., p. 325). We had retained Kearda Doon in our possession for 18 years, but I am not aware that we had made it the subject of any Regulation. The restoration in 1846, to the Rajah of Nalá-gurh, of the fort of Malown with six villages, which had been received from him in 1815 (*Aitchison's Treaties*, Vol. II., p. 333,) and the restoration in 1856 to Holkar of the fort of Sindwa, which had been ceded to us in 1818 (*Aitchison's Treaties*, Vol. IV., p. 294,) are much on the same footing as the restoration to the Rajah of Nahun.

With respect to cessions since the great Indian Mutiny, I do not dispute that since that time the Indian Government has over and over again made gifts of territory to Native chiefs in reward of their fidelity. That is the very thing I am here to challenge. Neither the Governor-General in Council nor the Crown can, by a mere exercise of the executive power, give away territory which has been under Regulations, or under an Act of Parliament establishing municipal institutions or Courts of Justice. I admit that the principle of such cessions has never been questioned in a Court of law till it came to be considered in the present case. Having to consider it now, the Court has decided against the prerogative claimed. The Crown can only cede conquered territory at the close of a war, and as the price of peace.

The Lord Chancellor :—Suppose the termination of a war in which we have been completely victorious, and there is no price to pay for peace, but the Crown is minded to restore some part of territories which it has conquered. Can it do so?

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Mr. Forsyth :—Certainly, in the case of conquered territory.

The Lord Chancellor :—But that would not be the price of peace.

Mr. Forsyth :—It is the prerogative of the Crown to make war and peace, and to judge of the reasons for war, and the terms on which peace shall be made. In the exercise of these powers the Crown may, I think, give up conquered territory at the close of a war. I will not add as the price of peace, but say simply for the purposes of peace.

Lord Selborne :—In your argument on some of these cases you go a step further, and admit that at the close of a war the Crown may deal with territory in favour of persons who have not been opposed to it in the war.

Mr. Forsyth :—I do not dispute that we may impose on our enemies cessions to our allies, or that we may cede directly to our allies territory which we have taken from the enemy.

Sir J. Colvile :—If you admit that the Crown may give up British territory, you give up the whole case.

Mr. Forsyth :—I do not make that admission.

Sir Barnes Peacock :—The Crown after conquest has power to make laws for conquered territories, and possibly so long as it has that power, the Crown may cede these territories. Can the Crown make laws for the country after Parliament has legislated for it and given it a constitution? If the Crown can no longer make laws, can it cede?

Mr. Forsyth :—Certainly not. That is the point I am coming to.

The Lord Chancellor :—What is meant by a constitution?

Mr. Forsyth :—If Parliament has established laws, it does not seem to matter whether it has given a constitution or not. It is enough that it has legislated.

The Lord Chancellor :—Is there any magic in legislation? According to our constitution when the two Houses of Parliament express their desire that a certain measure should be passed, the sovereign is in the habit of acceding to that desire and passing the measure. Assume the sovereign to be in possession of con-

quered territory with all the absolute powers resulting from conquest, including the power of cession. The Houses of Parliament address the sovereign, and say "we are anxious, with your assent, to pass an Act to establish Courts of Justice and appoint Judges for administering the law in this territory." The sovereign assents and says "let there be Courts, Justice, and Judges." What does this take away from the sovereign?

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Mr. Forsyth :—The concurrence of the estates of the realm with the sovereign declare the will of the nation which is above the Crown.

The Lord Chancellor :—The Crown assents to the request of the Houses of Parliament that so long as these territories are held by the Crown there shall be Courts of Justice to administer the law. But that does not advance your argument. If you have absolute power in the Crown, you must get it out of the Crown, otherwise it remains absolute.

Sir M. Smith :—Can you contend that after an Act of Parliament has passed, establishing Courts of Justice in a certain territory, that territory could not be ceded by the Crown, even at the close of a war?

Mr. Forsyth :—That is my second proposition. I say there is no instance of a cession by the Crown, at the close of a war, of territory for which Parliament has legislated by granting institutions.

Lord Selborne :—You mean to say that although there are instances, they are invalid; because Bencoolen and the Coast of Africa are distinct instances.

Mr. Forsyth :—I am now dealing with the case of the close of a war. These were not cases of that kind.

Lord Selborne :—Then Canada is a case in point. Districts of Canada which we had held for a considerable time, were ceded at the close of the war in 1783. Is there any doubt that Canada had been legislated for by Imperial Acts?

The Lord Chancellor :—Then there was the cession of Florida. That was at the close of a war, and legislative power had been applied there.

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Mr. Forsyth :—I cannot find that there was any legislation with regard to Florida. The country was almost a desert.

Lord Selborne :—It being a desert, would make no difference.

Mr. Forsyth :—Had it been a flourishing community, we should have given it Courts of Justice. We held it only for three years, and gave it over to Spain in the same state we received it.

Lord Selborne :—It is provided by the statute of Elizabeth, commonly known as the Supremacy Act, not only as to all existing dominions of the Crown, but also as to all future dominions, that no foreign prince, prelate, or potentate shall have authority therein. Has that any bearing on your argument? Would you say that the moment territory becomes British, it is touched by that statute?

Mr. Forsyth :—I have never used that argument. That statute seems to me to be directed only against the Pope's authority, to prevent his exercising jurisdiction within the realm of England. We must look to the object of the Act.

Sir M. Smith :—If we look to the object of Acts establishing Courts of Justice, can we say that these were intended to interfere with the prerogative of the Crown?

Mr. Forsyth :—When Parliament has given to the subjects of the Crown certain rights, the Crown cannot take them away.

The Lord Chancellor :—Suppose these rights to have been given directly by the Crown itself to the inhabitants of conquered territory, could not the Crown take them away?

Mr. Forsyth :—I submit not. But my argument does not require me to deny that it might. I say, when Parliament has intervened, the Crown is in a different position.

Sir William Harcourt :—With respect to Florida, it appears from a passage in the "Annual Register" that at the time it was ceded, it had a provincial assembly which had addressed the king in terms of the strongest attachment and with professions of abhorrence for the American rebels and the Spanish Government.

Mr. Forsyth :—No doubt Florida had some kind of Government of its own when it was ceded to us. It did not get it from Parliament.

Sir M. Smith :—When we got Florida we must in some way have ratified the government.

Mr. Forsyth :—Things remained as they were. The territory changed hands two or three times. If the Crown grant representative institutions to what has been a Crown colony, it is admitted that it cannot afterwards cede it. Why should not the same be the case with regard to territory in which Courts of Justice have been established? The nature of the internal government of the colony cannot alter its external relations.

The Lord Chancellor :—The difference, according to some writers, lies in the effect of the representative institutions in altering the distribution of power. After the grant of a constitution power is differently distributed. The plenary dominion of the Crown is affected. But the establishment of Courts for the due administration of justice does not in any degree alter the distribution of power.

Mr. Forsyth :—It is not clear to me why the rights of the Crown should be affected, and its plenary power diminished by the grant of a constitution which it might give or withhold at pleasure, and yet should not be affected by the establishment of Courts of Justice. But, at any rate, India is not a Crown colony, since it has been legislated for by over seventy Acts of Parliament in less than hundred years.

Lord Selborne :—You do not mean to say that a Crown colony may not be legislated for by any number of Acts of Parliament. Most of them are so more or less. We have instances in the Gold Coast, Bencoolen, and Canada. The case of the Gold Coast seems exactly parallel with the present case. The African Company was on the same footing with the East India Company, the action of Parliament was similar, and the action of the Crown was similar.

The Lord Chancellor :—In one way it is a stronger case. The African settlements were treated as settlements, and not as ceded or conquered territory; and it was necessary for the Crown to have power from Parliament to make laws to bind the settlers.

Mr. Forsyth :—If a territory or colony for which Parliament has legislated can be ceded by the Crown, no sound distinction can be drawn between the present cession and that of any part

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of the British dominions. This was admitted by Mr. Stephen, when on being pressed by your Lordships he said that the Crown could cede the Isle of Wight. The prerogative of the Crown in India is not different from or greater than in Great Britain, or any other part of the Queen's dominions. As regards the power of the Crown to make treaties, the limitation is that there must be nothing therein contrary to the standing laws of the realm. These, as I have endeavoured to show, forbid the alienation of territory for which Parliament has legislated. If the Crown's prerogative to cede were as wide as it is here claimed to be, Parliamentary impeachment would be a poor guarantee against its abuse. It is, perhaps, desirable that in India power should be given by Act of Parliament to be exercised by a responsible authority for making exchanges and even cessions of territory. By such an Act proper limitations to the exercise of the power would be imposed.

Mr. J. D. Bell, on the same side :—Mr. Forsyth has dealt with the treaties entered into by the East India Company before the year 1858. I propose to direct attention to the effect of the Act, 21 and 22 Vic., Cap. 106, by which the Government of India was in that year re-transferred to the Crown. Section 1 of that Act vests the territories of India in Her Majesty absolutely, and provides for their government through certain officers for whose appointment it provides.

Lord Selborne :—At that time there was a charter of Government to the East India Company, which had been granted or confirmed by Parliament. Therefore, what is transferred to the Crown, is what Parliament had vested in the East India Company.

Mr. Bell :—I think the charter had expired.

Sir J. Colvile :—The charter of 1834 had expired, but then it had been renewed by the charter of 1855.

The Lord Chancellor :—You must bear in mind the effect of 55 Geo. III., Cap. 155, Section 95, which provides that nothing in the Act contained shall prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom over territories acquired in India.

Mr. Bell :—Quite so. What I would point out is that the Act of 1858 gives to Her Majesty the sole Government of the East

India territory, but subject, as I submit, to the terms of the Act itself. The next step taken was to give (in 1861) by the 24 and 25 Vic., Cap. 104, power to Her Majesty to create, by letters patent, Courts of Justice in India, and by her orders in Council, from time to time to transfer any territory or place from the jurisdiction of one High Court to another. Under the powers conferred by this Act Her Majesty was pleased to grant the charter of 1862, by the 15th Clause of which jurisdiction was given to the High Courts in India to entertain appeals from all Courts which previous to that time were under the Sudder Courts of the Presidencies. In 1865 a new Act of Parliament was passed, 28 Vic., Cap. 15, by which (Section 3) Her Majesty was authorized to grant fresh letters patent, but which took away and made over to the Governor-General the power, which had before been given to Her Majesty, of transferring, by order in Council, territory from the jurisdiction of one High Court to another. A new charter in accordance with the powers contained in this last-mentioned Act was issued in the same year (1865). The cession of territory now under consideration took place on the 1st February 1866.

Sir Barnes Peacock :—That was the date of the notification. The agreement entered into by Sir George Clerk was dated in 1860.

Mr. Bell :—The notification in the *Gazette* fixes the 1st February 1866 as the date when the cession took place. Consequently it dates subsequent to the last charter issued by Her Majesty. I submit that when power is given by Act of Parliament to Her Majesty to legislate in this way, and she has accordingly by charter placed a particular district under the superintendence and control of a particular High Court, she has no further powers, except under authority given by Parliament, to transfer that district to any other jurisdiction, whether within or without her own dominions. The case of *Campbell v. Hall* ⁽¹⁾ supports this view. It was there held that where the king had, by letters patent, given the people of British Granada authority to conduct the government of their colony, he could not afterwards, by an order in Council, impose a tax.

The Lord Chancellor :—What was the form of the constitution of British Granada?

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Mr. Bell :—A Governor was appointed with power to summon an Assembly, who, with the assent of the Governor, should make laws.

The Lord Chancellor :—That was held by the Court to be a grant by the Crown of a right to legislate, and to legislate with regard to the imposition of taxes.

Mr. Bell :—And then His Majesty by an order in Council imposed a tax.

The Lord Chancellor :—And that was held to be opposed to the power which the Crown had granted.

Mr. Bell :—So here I contend that Parliament having given Her Majesty power to create particular Courts, and having taken from her the power which she had before to transfer territory from these Courts, she having exercised the power of creating Courts is debarred from exercising the farther power of transferring them, by an order in Council, or an order of the Secretary of State, which amounts to the same thing.

Lord Selborne :—You argue as if this were a case of transferring territory from the jurisdiction of one High Court to that of another. The Act you refer to has nothing to do with a transfer to the jurisdiction of a foreign Court. The jurisdiction spoken of is British jurisdiction.

Mr. Bell :—I say that if legislative authority is needed to authorize the transfer of territory from the jurisdiction of one British Court to that of another, much more is it needed to authorize a transfer away from British jurisdiction altogether. The relinquishment of the Government of a country is a relinquishment of authority over its inhabitants: *Doed. Thomas v. Acland* ⁽¹⁾. Can the Crown deprive the inhabitants of a territory, which Parliament has placed under its charge, of the protection and other advantages which it derives from its position? If it should be held that the Crown has power to alienate without the consent of Parliament, the question as to the operation of the Evidence Act is not material. But if the Crown has no such power, it

(1) 2 B. and C. 779.

is important to notice that the effect of the judgment of the lower Court is to decide that a notification published, as this has been, in the *Gazette of India* does not debar Courts of Justice from enquiring whether or not there has in fact been a cession.

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The Lord Chancellor :—Is the Evidence Act of any materiality here except as a means of arriving at a knowledge of the fact whether there has been a cession? It has not been argued for the appellant, either here or in India, that the Court is debarred by the Evidence Act from looking into the cession.

Sir J. Colville :—The Court held that if the Crown has no power to cede without authority from Parliament, it follows that Section 113 of the Evidence Act is *ultra vires* of the Indian Legislature, and then *cadit questio*. But that if the Crown possesses the power, the Evidence Act supplies a valid means of proving its exercise.

Mr. Bell :—I understood Mr. Stephen to say that the effect and object of the Evidence Act was to close all enquiry into the facts of the case.

Sir William Harcourt :—That is not our contention.

The Lord Chancellor :—We are not technically concluded by evidence of this kind.

Mr. Bell :—It is then unnecessary for me to refer to the case of *Biddell v. Taraniichurn Bonnerjee*⁽¹⁾. If the Queen has power without authority from Parliament to dismember her Indian dominions, why was the Statute 29 and 30 Vic., Cap. 115, passed? That was an Act to provide for the Government of the Straits Settlements. It recites that the Straits Settlements, the Island of Singapore, the Town and Fort of Malacca and their dependencies, were heretofore part of the territories in the possession and under the Government of the East India Company, and became vested in Her Majesty as a part of India by virtue of the Act of 1858. It then goes on to say that it is expedient that these territories should cease to form part of India, and should be placed under the Government of Her Majesty as part of the colonial possessions of the Crown.

(1) 1 Taylor and Bell.

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The Lord Chancellor :—By the Act of 1858, Parliament had declared that the Queen's Indian dominions, including the Straits Settlements, should be governed under that Act by the Indian Government. To enable these settlements to be governed by a different department, namely, the colonial, it was necessary that Parliament should authorize the change. That is not a question of cession, but a matter of departmental government.

Mr. Bell :—I should have thought that, if the Crown could cede territory by an order in Council, it might, by a similar exercise of its power, transfer territory from the control of one department to that of another, without requiring the consent of Parliament.

Lord Selborne :—The Act of 1858 expressly regulates the mode in which Her Majesty's Indian Government is to be carried on. The Straits Settlements would necessarily be governed under the Act, until taken out of it.

The Lord Chancellor :—If the Act of 1858 had expressly enacted that, so long as the Indian territories of Her Majesty shall not be ceded to any other power, they shall be governed in a way named, and afterwards you wanted to have them governed in a different way, clearly you would require another Act of Parliament. As to the right of cession itself, the question is whether it is not paramount to the provisions of the Act of 1858? If so, it is necessary to express it in the Act.

Mr. Bell :—If Her Majesty can cede a portion of her Indian territories she might transfer the whole territory of India to a foreign power, although in doing so she would sweep away the whole administration provided by this Act of Parliament.

Lord Selborne :—You say that a power of cession is incompatible with the Act of 1858. May it not equally be said that it is incompatible with the Act of Parliament constituting the East India Company? I see no distinction. In both cases the Government of India is the subject of Parliamentary regulation.

Mr. Bell :—I think a distinction may be perceived in the fact of the whole sovereignty being vested in the Crown under the peculiar terms of the Act of 1858.

Sir William Harcourt, in reply :—In addition to the authorities already cited reference may be made to Mr. Justice Story's "Constitution of the United States," Book III, Cap. 37, Sections 1503, 1504, where he gives reasons why the power of making treaties should not be vested in the Legislature. Another American constitutional writer, Alexander Hamilton, in a treatise in which he contrasts the prerogative of the King of England with the power given to the President of the United States by the American Constitution, observes that the King of England is the sole and absolute representative of the nation in all foreign transactions and treaties, and that his conventions are neither subject to the revision, nor stand in need of the ratification of Parliament, although Parliament has sometimes to co-operate to make the working of the treaty practicable by altering existing laws. This explanation of the action of Parliament is more precise than Wheaton's loose expression as to treaties requiring "the approbation of Parliament." These words are not intended to imply "legislative sanction," but merely a vote of approval of the conduct of ministers in making a treaty.

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The question as to whether the present was a case of cession at all, has arisen from the words used in the "notification" of the Bombay Government, wherein the transaction is spoken of as a transfer from the ordinary jurisdiction of the Court to the supervision of the Political Agent. A Political Agent is a diplomatic officer. If it were said that the people of Jersey had been transferred to the supervision of the British Ambassador at Paris, it would be implied that Jersey had been given over to France. The office of the Political Agent does not connect itself in any way with British territory. He represents the Government of India at the Courts of Native sovereigns, and although, from our peculiar relations to the Native sovereigns, of India, the Political Agent has larger powers than the ordinary Ambassadors of European states, the statement that territory has been handed over to his supervision is merely equivalent to saying that it has been ceded to the state in which he is placed as agent. The transfer of jurisdiction is the natural and inevitable consequence of a cession, and could not take place without a cession, because, without ceding, the Crown has no power whatever to transfer

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territory from the jurisdiction of the ordinary Courts of Justice to that of the Political Agent. In the case of this cession to Bhavnagar, it may be taken that British subjects complaining of ill-usage would have a sort of political and diplomatic appeal to the Political Agent. This in itself involves the idea of cession. Why is recourse had to the Agent, but because the territory has ceased to be British, and the ordinary jurisdiction has in consequence ceased to be exercised ?

As to the right of the Crown to make treaties involving cession, it has been admitted on behalf of the respondent that the Crown may make such treaties where there is a *vis major*, but not otherwise. But it has been pointed out that such treaties are made by victorious as well as by vanquished states, and that the victors have constantly ceded territory. Thus in 1763, after the great triumphs of Lord Chatham, England ceded to France territories which need not have been ceded. And so, in 1814, France received back all her colonies, and Java and Sumatra were restored to the Netherlands. These restorations were not made under the pressure of superior force, but voluntarily and for reasons of state policy on the part of England. *Vis major*, therefore, is not the test, and cessions made at the close of a war are on no different footing from cessions made in time of peace, but are equally regulated by considerations of policy. A change of allegiance is recognized to be the natural result of cessions of territory, and is specially provided for in the treaty of 1815, which, like the treaty of 1814, was concluded and proclaimed on the sole authority of the Crown, without waiting for the approval of Parliament.

There are, indeed, certain treaties in which the assent of Parliament is asked for, and in these cases it is stated in the treaty itself that it shall not take effect without the consent of Parliament. Thus, the approval of Parliament is essential in all treaties relating to money, as in the case of loans. That the consent of Parliament is invariably required in money treaties, and is never stipulated for in treaties of cession, is a strong argument that such consent is not essential to give validity to treaties of the latter class. Extradition treaties are also made subject to the consent of Parliament, and in various instances

Parliament has refused its consent, and the treaties have been rejected. In various treaties of commerce the ratification of Parliament has been made a condition, and in some instances ratification has been withheld. That no treaty for a cession has been broken down by reason of Parliament refusing its approval, is a strong argument that Parliament has no authority to reject such treaties.

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No doubt, where a constitutional Government exists in the territory to be ceded, the representative body ought to be consulted. But here the appellant contends, not merely that the representative body should be consulted, but that its authority is to be given in the shape of legislation. That is not the form in which Parliament acts when consulted in respect of treaties. The only case in which Parliament might, at first sight, appear to have interfered by legislation in respect of a treaty, is the case of the treaty in 1783 at the close of the war for American Independence. But it interfered then, not on the ground that territory was to be ceded, but because the persons with whom the convention was to be made, had by previous Acts of Parliament been declared rebels, and liable to every kind of penalty. The Crown stood to the rebels much in the same position as it stood to the Pope before the Act of 1848. If, for any reason, it had been desired, before the passing of that Act to transfer territory to the Pope, the cession could not have been made by the Crown because dealing with the Pope was forbidden by *premunire*. To enable the Crown to negotiate a treaty with the Americans, an Act of Parliament was necessary. But that Act gave no authority for the cessions to Spain and France; and these cessions, so far from being approved by Parliament, were condemned by Parliament as unnecessary. No one, however, has contended for a moment that these cessions were not valid.

The difficulty with regard to allegiance arises in all cases of cession of territory which has once been British, whether such cession be made under the pressure of a *vis major* or not.

If effect were given to the contention that all the numerous cessions made in India since the Mutiny have been *ultra vires*, the result might be disastrous. These cessions had been made to

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reward the loyal and to punish the rebellious, in accordance with those considerations of public policy which ought always to determine the exercise of the Crown's prerogative, and which must be attended to in time of peace as well as in time of war. Rearrangements, exchanges, and cessions of territory may be expected, for the most part, to be made after a war, and not in times of continued peace. Yet we do find instances of treaties of cession made in times of peace, as in the cases of Bencoolen, Florida, and the Gold Coast. The case of Bencoolen is absolutely *in pari materia* with Bombay, since in an Act of Parliament, which has been referred to, the three Presidencies of Madras, Bombay, and Bencoolen are named together. Bencoolen was legislated for as Bombay was; and when it is asked could the Crown cede Bombay? it may be answered, if it cannot, how could it cede Bencoolen?

Florida, which has been represented by Mr. Forsyth as a desert, was in our possession for nearly 20 years, and possessed a Provincial Assembly. It is not likely that it received this form of government from Spain. My impression is that the Provincial Assembly was the creation of England, and that Florida came under the same rule as the other plantations. With reference to the Indian cases, there is no force in the distinction that territory which has not been dealt with by Regulations, *can*, while territory which has been so dealt with, *cannot* be ceded. The inhabitants of the British territories in India are under the Government of the Crown, and it is immaterial what particular form that Government may assume. The British Parliament is in no way representative of Gogo. In territories without representative institutions the Crown represents the inhabitants, and there can be no question of any other authority, save that of the Crown, being brought into action. Mr. Bell has argued that as certain statutes have been passed to authorize the Crown to change the jurisdiction of the High Courts of the different Presidencies *inter se*, it must, *a fortiori*, be necessary to have Parliamentary sanction to a cession the effect of which is to exclude the jurisdiction of all the High Courts. This does not follow. The Crown by itself could cede Minorca, although it cannot, without an Act of Parliament, change the assizes from Yorkshire to Cambridge. While territory remains British, it may be that, without authority from Parliament,

the Crown cannot change a rule as to jurisdiction which has been authorized by Parliament, or transfer to one department of Government territory which Parliament has entrusted to the government of another department. The Crown could not alter the boundaries of Yorkshire, or give a part of Yorkshire to Cumberland.

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Sir Barnes Peacock :—If the Crown could not give it to Cumberland, could it give it to France ?

Sir William Harcourt :—England has been so happy in her history that we have no examples of a cession of an integral part of the territories of the United Kingdom. But as to possessions of the Crown out of the United Kingdom, there is a series of examples. Of all the hundreds of cessions made in India, no single instance is pointed out in which the assent of Parliament was asked for or given. Can any constitutional argument be more completely established ? The present question is entirely a constitutional one, and I submit that all the constitutional authorities are agreed in holding that the right to cede is the prerogative of the Crown.

Sir Barnes Peacock :—There are one or two points on which I feel a difficulty,—*first*, as I understand your argument, Gangli as a part of Gogo has become foreign territory and has passed in full sovereignty to the Thakore of Bhaunagar.

Sir William Harcourt :—I would omit the word “full,” because no Native prince, as I think, has full sovereignty in India.

Sir Barnes Peacock :—Well, the sovereignty of the British Crown has ceased to exist, and with it British Courts of Justice have ceased to exist.

Sir William Harcourt :—The sovereignty of the Crown has no more existence in Gogo than it has in the territory of Scindiah or Holkar or of the Gaikwar of Baroda. The Queen exercises a general suzerainty over the Native princes of India.

Sir M. Smith :—She keeps an eye on them.

Sir Barnes Peacock :—Has the Crown given up such prerogatives as that of coining money in, or of passing troops through, Bhaunagar ?

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Sir William Harcourt :—I say that the Crown's power to legislate for Gogo has ceased. The Indian Legislative Council, which before the cession could have made laws for Gogo, can do so no longer. The authority of the ordinary British Courts of Justice has also ceased, and those who before might have sought remedy or redress in these Courts, must now have recourse to the Native Courts, or, in the event of any gross or glaring act of injustice, may apply for the protection of the Political Agent. The British Crown has now only such authority in Gogo as it has, through its Political Agent, in Baroda.

Sir Barnes Peacock :—At the time of the passing 21 and 22 Vic., C. 106, Gogo was territory in possession of the East India Company. By Section 1 of that Act it was transferred to Her Majesty. By Section 2 it is provided that territory thus transferred shall be governed by and in the name of Her Majesty. Can it now be governed by and in the name of the Thakore of Bhaunagar ?

Sir William Harcourt :—The original title to all this territory was in the Crown, but prior to 1858 it was subject to authority vested in the East India Company. The real effect of the Act of 1858 was to abolish the authority of the East India Company, and to restore and re-instate the original title of the Crown. The Queen, therefore, did not take Gogo under the Act of 1858. It was a part of her territories before, but subject to the Government of the Company, which that Act put an end to. The position of the Crown may be compared to that of a minor whose guardianship terminates, and who comes into full possession of his estate when he comes of age. While the Company existed, the Crown was under a kind of disability. On the abrogation of the Company, it came into full possession.

Sir Barnes Peacock :—Another question which occurs to me is this. You say this is foreign territory, and, consequently, that the jurisdiction of the High Court had ceased. If we reverse the decision of the High Court, what judgment ought we to give ? All that the High Court say in that judgment is that they refuse to interfere with their former judgment. Are we to affirm the former judgment ? If the jurisdiction of the British Courts of India has ceased, has not the jurisdiction of the Queen by way of appeal over these Courts also ceased ? Has the Queen in Council

jurisdiction by way of appeal with regard to foreign territory ?
Are we to affirm the judgment of the Zillah Court ?

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Sir William Harcourt :—Your Lordships may give the judgment which the Court ought, in your opinion, to have given.

Sir James Colville :—The cession was on the 29th January 1866. The last judgment prior to that date was pronounced by the Zillah Judge on the 18th January 1866. Would not the result of holding that there is no jurisdiction, be to stay all subsequent proceedings, and to let the party, in whose favour that judgment was passed, get the benefit of it in the Bhaunagar Court if they can give effect to it ?

Sir Barnes Peacock :—After the cession, any other judgment given by a British Court would be void. Are we to confirm the judgment of the 18th January 1866, which was reversed on remand ? Are we to admit that to be a just judgment on the merits ?

Mr. Forsyth :—That would be monstrous !

Sir William Harcourt :—The respondents must take what remedy they can get in Bhaunagar. From the period of the cession we have nothing more to do with Bhaunagar, any more than we had with Minorca after we ceded it to Spain, unless the Political Agent can be induced to interfere.

Sir Barnes Peacock :—There is another point which should be noticed. The plaintiff sued to redeem a mortgage. The defendant set up a sale to him. The Munsif held that the transaction was one of mortgage, and not of sale. That judgment was reversed by the Zillah Judge ; but the case was remanded by the High Court, and on remand the Zillah Judge held, with the Munsif, that the transaction was one of mortgage, and he affirmed the judgment of the Munsif, that on payment of the mortgage money the plaintiff might have the land back. Now the defendant was within the jurisdiction of the Munsif at the time the suit was commenced. If he had been within the jurisdiction of the High Court of Chancery in this country, notwithstanding the cession of the territory, even if it passed her sovereignty, the High Court of Chancery would have had jurisdiction in the case.

The Lord Chancellor :—If the land were under its jurisdiction,

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Sir Barnes Peacock :—Though the land were in foreign territory. See the case in 1 Salkeld, page 404, and see *Ramkissen v. Barker*.

The Lord Chancellor :—You could not file a bill in Chancery for foreclosure of a mortgage in France, unless one person, against whom you went, happened to be within the jurisdiction at the time.

Sir William Harcourt :—The High Court advert to the point now taken. They say “ English cases have been cited in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory, but none of these cases goes the length of showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory.” This, I take it, would dispose of the cases referred to by *Sir Barnes Peacock*.

The Lord Chancellor :—There would be no means of enforcing the decree.

Sir William Harcourt :—Which is the foundation of jurisdiction.

Sir Barnes Peacock :—If the defendant refused to give up the land on the payment of the mortgage money, the Munsif might compel him by arrest.

Their Lordships at the conclusion of the argument took time to consider their decision. Subsequently in a letter from the Clerk of the Council, dated the 3rd December 1875, it was intimated that, in the opinion of their Lordships, the High Court of Bombay was mistaken in holding that there was a want of power in the Crown to cede territory in full sovereignty to Native states and rulers ; but that as doubts had suggested themselves to the minds of their Lordships as to the nature of the particular transfer to which the appeal related, their Lordships were willing to hear further argument as to whether the cession to the Thakore of Bhaunagar was in fact a cession of territory in full sovereignty by the Government of India.

The case was accordingly argued on this issue on the 16th February 1866, *Sir William Harcourt*, Q.C., and *Mr. FitzJames Stephen*, Q.C., again appearing for the appellant, and *Mr. Forsyth*, Q.C., and *Mr. J. D. Bell* for the respondent.

Their Lordships' judgment was delivered as follows on the 28th March 1876 by

LORD SELBORNE :—In this suit, which was instituted in the British Court of Gogo for the recovery or redemption of certain land situate in the village of Gangli, on the footing of mortgage, a decree for the plaintiff (whose representatives are the respondents here) was made by the Munsif of Gogo, but was reversed on appeal by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the High Court of Bombay the case was remanded to the Court of Ahmedabad for re-trial.

So far there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the appellant to have ceased by reason of the cession by the British Government of certain territory, within which Gangli was included, to a Native potentate, the Thakore of Bhaunagar. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, appeared in the *Bombay Government Gazette* of the 29th January 1866. The District Judge of Ahmedabad proceeded, nevertheless, to re-hear the appeal, and, on such re-hearing, he restored the original judgment of the Munsif of Gogo in favour of the plaintiff. Thereupon the defendant brought another special appeal to the High Court of Bombay, alleging the notification in the Gazette of the 29th January 1866 as proof that the re-hearing had been *coram non judice*; but the High Court, on the 2nd December 1870, rejected this special appeal, holding that notification to be insufficient to show that the jurisdiction of the Court of Ahmedabad had ceased before the re-hearing. On a petition, however, by the defendant for a review of that order, accompanied by some further documentary evidence, the High Court appears to have considered (Record, p. 191) that a transfer of lands from British territory to the jurisdiction of a Native prince, by the authority of the Secretary of State for India, might have been authorized by the Statute 21 and 22 Vic., Cap. 106, Sec. 3, and a review of the order of the 2nd December 1870 was, therefore, directed. On the review the Judges of the High Court held that it was beyond

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the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power; and on that ground they made the order of the 24th March 1873, now under appeal, confirming their former order of the 2nd December 1870. The question, whether the law thus laid down by the High Court of Bombay is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But, having arrived at the conclusion that the present appeal ought to fail, without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of Bombay as to be unable to advise Her Majesty to rest her decision on that ground.

Before, however, the judgment, rejecting the special appeal to the High Court of Bombay, can be reversed, their Lordships must be satisfied that there was, in this case, an actual cession of territory, which had the effect, before the re-hearing by the District Judge of Ahmedabad, of depriving Gangli of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of Bombay as their Lordships think it deserved to be. It has now (on the 17th of February last) been the subject of a separate argument at this Bar.

The facts, material to the determination of this question, may be thus stated.

There are, in the Province of Kattywad, one or more talooks, of large extent and value, belonging to the Thakore of Bhavnagar, which (whether that province ought, or ought not, to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Government in India. The Thakore is also the proprietor of other

large talooks (the town and port of Bhaunagar, and many other villages and places, including Gangli), forming part of the districts of Dhundooka and Gogo, &c., which, having previously been part of Kattywad, were ceded by the Peishwa to the British Government in 1802, by the Treaty of Bassein. The territory so ceded was left, till 1815, under Native administration; but in that year it was brought under the ordinary jurisdiction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to those latter estates, the Thakore, and all his dependants, residing thereon, were (beyond controversy) subject to British law and jurisdiction.

Before 1802 the whole Province of Kattywad was divided between the Peishwa and the Gaikwar, who claimed over it sovereign rights, chiefly consisting in the exaction of tribute. A small number of estates in the province were held rent-free; but for the greater part the chieftains paid tribute, of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority, referred to on both sides at the Bar ("Treaties," Vol. VI., p. 366), states that the sovereignty of the country was understood by the chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa, in those parts of Kattywad which had not been transferred to the British Government by the Treaty of Bassein, were ceded to Great Britain in 1817.

With respect to the Gaikwar, (leaving out of consideration one or more talooks of which that prince is at the present day the direct proprietor,) it appears that in 1807 a settlement was made between the Gaikwar and chiefs tributary to him, through the intervention, and under the guarantee, of the British Government; engagements being then taken for the payment of a fixed revenue by those chiefs whose estates were not held rent-free. The amount of tribute then fixed for the Kattywad estates of the Thakore of Bhaunagar was 74,000 rupees; and, as it was thought expedient to consolidate the whole of the claims over all the Thakore's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Gaikwar for

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his Kattywad estates to the British Government, as part of the consideration for certain arrangements, which were at the same time made for the support of a contingent force. In 1820, by further agreement, the Gaikwar engaged to send no troops into Kattywad and to make no demands upon the province except through the British Government. Since that date the supreme authority in Kattywad, (as far as it had been previously vested in the Peishwa, or in the Gaikwar,) has been exercised solely by the British Government. The tribute payable by the different chiefs has been collected by the British authorities; the Gaikwar receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakore of Bhaunagar, (in respect of the aggregate of his Kattywad estates included in the alleged cession of 1866,) is stated in the "Kattywad Local Calendar and Directory" of that year, (a book referred to during the last argument as containing correct information on public matters relating to the province,) as amounting in the whole to 1,54,917 rupees per annum: of which 1,28,060 rupees were collected in right of, and retained by, the British Government; 3,999 rupees were collected in right of, and paid over to, the Gaikwar; and the sum of 22,858 rupees was a customary sub-tribute, paid, under the name of "Zortullubee," to the Nawab of Junághar, one of the chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the judicial administration of Kattywad. Down to 1831 this appears to have been left, without any regular control, in the hands of the chiefs. But in that year, (a "Political Agency" having been established at Rájkot in 1820,) the British Government constituted a Criminal Court of Justice in Kattywad, under the presidency of the Political Agent, with three or four chiefs as assessors, for the trial of capital crimes in the estates 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 exercise of their recognized authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the Bombay Government for their approval. (Aitchison, Vol. VI., p. 367.) In 1862 the whole of this administration was reorganized. The

province was then divided into four districts (the eastern district including all the talooks belonging to the Thakore of Bhaunagar), in each of which were placed officers, called "Political Assistants," with other British Magistrates under them, all under the control of the Political Agent. The entire number of Kattywad States under separate chiefs (large and small) is 188; of whom 96 pay tribute to or in right of the British Government only; 70 to or in right of the Gaikwar only; and nine (of whom the Thakore of Bhaunagar is one) to or in right of both Governments ("Kattywad Directory," pp. 54-56). These chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakore of Bhaunagar is one), unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects," (however that expression ought to be interpreted), was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted, in criminal matters, to limited powers of fine and imprisonment, and, in civil matters, to the cognizance of suits of limited amount; the greatest powers (those of the chiefs of the third class) being to imprison for seven years, to impose fines of 10,000 rupees, and to decide civil suits of 20,000 rupees' value; while the sixth class could only imprison for three months, impose fines of 200 rupees, and decide civil suits of 500 rupees' value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction; but, in criminal cases, might imprison for not more than fifteen days, and impose fines not exceeding 25 rupees. All other jurisdiction, both civil and criminal, throughout the province, beyond the limits of that allowed to the chiefs, was reserved to the British Officers and Magistrates, under the authority of the Political Agent; and, in 1871, there was an establishment of thirty-one such Officers and Magistrates in the whole. ("Directory," pp. 520-527.)

In 1863 two elaborate Codes of Regulations (based upon the Indian and other Codes) were promulgated, with the sanction of the Indian Government, for the guidance of the British Judicial Officers and Magistrates in Kattywad. ("Directory," pp. 176-

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253.) These Codes established, both in name and in substance, regular and fully-organized Courts of Justice, with powers to execute warrants and issue commissions throughout the province, and to take security from suspected persons in the name of the Queen. (Articles 39, 55, 154 of the Criminal, and Article 104 of the Civil, Code.) It may be added that, on the face of these Codes (especially by Article 10 of the Civil Code, which pointedly distinguishes the Chiefs of Kattywad from "Sovereign Powers" and "Independent Chiefs"), and by several later Circular Letters of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of 1869, and that of the 7th May 1868,) the whole jurisdiction exercised by the chiefs of all the seven classes is treated as conferred upon them by the British Government.

These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Government and the Thakore of Bhaunagar, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the Thakore in his Kattywad estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which, since 1815, he had been subject to ordinary British laws, was (in the language of Mr. Aitchison, Vol. VI., p. 374), "very irritating to him." With a view (among other things) to remove or diminish this source of discontent, an agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416-420 of the same volume of Mr. Aitchison's work.

It is entitled "Settlement, framed according to Resolutions of the Bombay Government, Nos. 3826 and 3829, dated 23rd October, 1860:"—a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a sovereign state and a foreign or independent power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th Articles the Thakore of Bhaunagar and the British Government reciprocally agreed to cancel, from and

after the 1st May 1861, "the lease of the villages of the Thakore's talooks in the districts of Dhundooka, Ránpur, and Gogo, which was executed in A.D. 1848," and, "instead thereof, the Thakore agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of 52,000 rupees yearly for ever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the Thakore's right of possession, in any part of the said talooks; nor shall the said estates (excepting Bhaunagar, with Wudwa, Sehore, and the ten villages thereof, about to be attached to Kattywad) be exempted on account of this payment from any general taxation, not coming under the head of land-tax or rental, which Government may impose on their districts under the Regulations."

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It appears, therefore, that the talooks in Gogo, including Gangli, which were "about to be attached to Kattywad," had been included in the lease of 1848, which was then to be cancelled; and that, although the Government did not reserve, as to those particular talooks, the same right of "general taxation" which they expressly reserved as to the residue of the Thakore's British estates, which were intended to continue subject to the Bombay Regulations, still those talooks were included in the estates, in respect of which a fixed jumma of 52,000 rupees was to be paid in perpetuity by the Thakore.

By the 2nd Article the Thakore agreed, (certain questions of account between himself and the British Government being thereby adjusted,) "to pay up 'his Kattywad tribute,' (*i.e.*, the jumma for his Kattywad property,) which had been fixed in perpetuity in 1807, yearly in full, according to settlement."

By the 3rd and 9th Articles it was reciprocally agreed that the port dues and customs of the port of Bhaunagar should continue to be collected at British rates, and by the British Government; but that, when collected, the whole net produce of the port dues, and three-fifths of the net produce of the customs, (as "the share of the Thakore,") should be paid over to the Thakore by the Government, who were to retain, as "the share of Government," the other two-fifths of those customs.

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The town and port of Bhaunagar were part of the territory to which the 7th Article, (that directly bearing upon the present question,) relates. That article is in these words:—"Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favour, and not as a right, the transfer of Bhaunagar itself, with Wudwa, Schore, and ten subordinate villages, from the district of Gogo, subject to the Regulations, to the Kattywad Political Agency."

This is not the language of cession. It is *prima facie* nothing more than an engagement for the transfer of the places mentioned (including Gangli), which were then, beyond question, British territory, from a Regulation Province to an extraordinary jurisdiction. The other articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th Article; "owing" (as Mr. Aitchison states, Vol. VI., p. 374) "to some doubts as to the precise status of Kattywad with respect to British laws." In 1865, however, the Thakore pressed for the completion of the arrangement. In the letter from the Secretary to the Government of India of the 31st of May 1865, to the Acting Secretary of the Government of Bombay (printed at page 181 of the Record), the measure is described as "the contemplated transfer of the town of Bhaunagar, of the District of Schore, and of the villages in Dhundooka and Gogo, to the supervision, laws, and regulations of the Kattywad Political Agency." By that letter the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect; with the reservation, however, (for which the Government of Bombay were directed carefully to provide), that, "in the event of gross misconduct on the part of the Thakore" (of which the Government of Bombay were to be the judges), "these territories should revert." A reason was added for holding that "the projected transfer would have been legalized" by the agreement of 1860, viz., that "Her Majesty's Secretary of State for India had decided that Kattywad was not British territory."

Their Lordships think that, if such an opinion had been expressed by the Secretary of State for India (of which no direct

evidence is found in the papers before them), and if that opinion could be proved to be well-founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the Kattywad Political Agency," into a cession of British territory to a Native state. Such a cession would be a transaction too important in its consequences, both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

Their Lordships assume, (though the precise language used does not seem to be quite apt for that purpose,) that what was intended was to confer upon the Thakore of Bhaunagar, within the "transferred" districts, as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the Kattywad Political Agency, subject only to the same supervision and control of the Kattywad Political Agent to which he was subject in respect of those estates.

But such a grant of jurisdiction, (if the Government of India or the Crown, without a legislative Act, had been able to grant it,) would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done, (concerning which their Lordships will only observe that the documents of 1870 and 1871, printed at pp. 185 and 184 of the Record, take it for granted that a cession of territory to a Native state had been made, which is the point to be determined,) their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the Bombay *Government Gazette* of the 29th January 1866, (issued, no doubt, in obedience to the directions of the Indian Government, contained in the letter of the 31st May 1865), which merely declared that, "in accordance with the Convention, &c.," (*i.e.*, with the agreement of 1860,) the villages in question were, "from and after the 1st of February 1866, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay

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Presidency, and transferred to the supervision of the Political Agency in Kattywad, on the same conditions as to jurisdiction as the villages of the Talooka of the Thakore of Bhaunagar heretofore in that province." (Record, p. 176.)

Their Lordships agree in the reasons given by the Judges of the High Court of Bombay, on the 2nd December 1870, for holding this notification insufficient for the purpose intended; and they are unable to find, in any of the other documents afterwards submitted to that Court on the application for a review, any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th January 1873, which appeared in the *Indian Gazette* after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the villages, mentioned in the Schedule, "were, on the 1st February 1866, ceded to the State of Bhaunagar." The nature and effect of the act, so described as a "cession to the State of Bhaunagar," remains (as it was before) a proper subject for judicial inquiry. What was attempted was, in their Lordships' judgment, neither more or less than a re-arrangement of jurisdictions within British territory, by the exclusion of a certain district from the Regulations and Codes in force in the Bombay Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed. By the Imperial Statute, 3rd & 4th Wm. IV, Cap. 85, Section 43, a general power of legislation (with certain exceptions not material for this purpose) was given to the Governor-General in Council as to (among other things) "all Courts of Justice, whether established by Her Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 and 25 Vic., Cap. 67, Section 22, though the particular clause of the former statute is thereby repealed. By the 24th and 25th Vic., Cap. 104, Section 9, the High Courts of the several Presidencies were established with such jurisdiction as Her Majesty should, by her Letters Patent, confer upon them; and, under the same statute, each of those Courts was also to have and to exercise, "save as by Her Majesty's Letters Patent

might be otherwise directed, and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General in Council," all jurisdiction, power, and authority previously vested in any of the East India Company's Courts within the same Presidency, which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the Bombay Presidency over Gangli rested, in 1866, upon British statutes, and could not be taken away or altered, (as long as Gangli remained British territory,) so as to substitute for it any Native or other extraordinary jurisdiction, except by legislation, in the manner contemplated by those statutes.

Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of Bombay.

Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, Section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in a *Government Gazette* conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession. And with respect to the competency of the Courts of the Bombay Presidency to proceed with the suits between these parties, if Gangli had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court, that the foundation of the jurisdiction of those Courts over the subject-matter of this suit, and the parties thereto, was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time) after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

Messrs. Lawford and Waterhouse were agents for both parties.