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Containing cases determined by the Federal Court of India and by the Judicial Committee of the Privy Council on appeal from that Court.

1941—Vol. III.

[1941] F.C.R.

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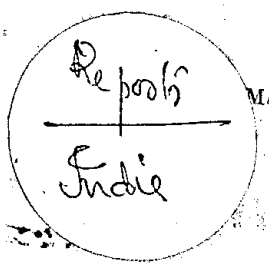

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OF THE

FEDERAL COURT

DURING THE PERIOD OF THESE REPORTS.

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THE HON'BLE SIR SHAH MUHAMMAD SULAIMAN.

THE HON'BLE SIR SRINIVASA VARADACHARIAR.

THE HON'BLE SIR JOHN BEAUMONT (*Acting Judge*).

THE HON'BLE SIR MUHAMMAD ZAFRULLA KHAN.

SIR BROJENDRA LAL MITTER, *Advocate-General of India.*

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The Federal Court Reports.

PROCEEDINGS AT THE SITTING OF THE FEDERAL COURT ON APRIL 15, 1941.

[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADACHARIAR AND SIR JOHN BEAUMONT, JJ.]

GWYER C. J.—Mr. Advocate-General of India, since this Court last sat, we have had to mourn the sad and untimely death of our colleague, Sir Shah Muhammad Sulaiman; and before we begin our business today I should like to take this opportunity of testifying to our sense of the loss which not only my brother and myself but the whole legal profession in India has sustained. Sir Shah Muhammad Sulaiman, after a short but brilliant career as an Advocate, was appointed a Judge of the High Court at Allahabad at an exceptionally early age, and presided over the Court as Chief Justice from 1932 to October, 1937, when he was appointed one of the first Judges of this Court; and by a sad and unhappy coincidence his own death followed a few days after his successor in that high office had himself passed away by a stroke of fate no less sad and unexpected.

Sir Shah Sulaiman had taken part in every case which has come before this Court, and his Judgments are remarkable examples of his power of analysis and of his immense knowledge of case law. He maintained tenaciously his own view of the law and the facts which the Court was considering and was never prepared to acquiesce in a contrary opinion, merely because it happened to be that of the majority of the Court. His agile and fertile mind led him at times to attempt to convince counsel that the arguments for which they were contending before the Court were unsound, forgetting, it may be, that it is not the business of counsel to be thus convinced; but this was itself a manifestation of his keen desire to arrive at the truth and of his instinct to reject any argument which seemed to him irrelevant or unsound. But he was always the soul of courtesy and patience in his relations with the Bar,

as in his relations with his own colleagues. He listened patiently to every argument and he never attempted to cut it short, no matter how fallacious he might think it to be.

The breadth of his intellectual interests outside his legal work is well known; and he brought to the mathematical studies in which he delighted an imagination and a freshness of outlook which might have elevated him to the higher ranks of scientists, if he had been able to devote all his time and energies to them. He found time also to display a very practical interest in educational problems, as Chairman of the Anglo-Arabic College in Delhi and as Vice-Chancellor for five years of the University of Aligarh, which benefited greatly by his guidance and advice during a difficult period. Nor did he stand aside from any of the activities of the University, and when at his invitation I attended the annual Convocation of the University nearly 18 months ago I remember seeing him in the uniform of a Private in the University Training Corps taking his place with others in its ranks.

He had a singularly equable and gentle temperament; and neither my brother nor myself can ever recall any difference of opinion outside this Court which marred our friendship with him. His simple and unaffected manners attracted friends in every sphere, and it would not be easy to reckon the number of those who were indebted to him for kindness and help.

We have lost a learned, just and upright Judge, and gentlemen of the Bar will, I am sure, desire to associate themselves with the Bench in conveying an expression of heartfelt sympathy to his bereaved family.

Sir Brojendra Mitter, A.-G. of India.—The sudden death of Mr. Justice Sulaiman came as a great shock to the members of the Bar. When the Court last sat, he was in the best of health with many years of brilliant work in front of him. Little did we think that he would be struck down so soon. Not only has the Court lost a great Judge, but the country has lost a great son. He was a man of

versatile talent who achieved distinction in many fields. The universal expression of sorrow testifies to the love and esteem in which he was held by his countrymen. It is not for me to appraise his qualities as a Judge, but I wish to say that he was an erudite lawyer with absolute intellectual integrity, a profound scholar and a distinguished educationist. Notwithstanding a natural shyness and detachment, he had great charm of manners. He treated the Bar with uniform courtesy and patience. I respectfully subscribe to all that has fallen from Your Lordship. The deepest sympathy of the Bar goes out to Lady Sulaiman and other members of the bereaved family in their great sorrow.

1941.

Apr. 17.

A. L. S. P. P. L. SUBRAHMANYAN CHETTIAR

v.

MUTTUSWAMI GOUNDAN.

[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADACHARIAR AND SIR JOHN BEAUMONT, JJ.]

Federal Court—Appeal to Privy Council—Grant of leave to appeal—Practice—Government of India Act, 1935, s. 208 (b).

The Federal Court will not formulate in advance any code of rules for the granting or withholding of leave to appeal to His Majesty in Council, and will deal with each case on its merits as it comes before it. But the Court will not be disposed to grant leave to appeal, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved.

APPLICATION for leave to appeal to His Majesty in Council.

This was an application for leave to appeal under s. 208 (b) of the Constitution Act from the Judgment of the Court in *Subrahmanyan Chettiar* v. *Muttuswami Goundan*, reported [1940] F. C. R. 188.

Mohammad Taqi (*Raghbir Singh* with him) for the applicant.

The respondent did not appear.

The Judgment of the Court was delivered by

GWYER C. J.—This is an application for leave to appeal under s. 208 (b) of the Constitution Act. The case was one in which the appellant had sued the respondent for a sum due under a promissory note and had obtained a decree. After the decree had been obtained, the Madras Agriculturists Relief Act(1) became law. That Act gave agriculturist debtors the right to have their debts drastically scaled down, and s. 19 empowered the courts to apply its provisions to a decree for the payment of a debt obtained against an agriculturist before the commencement of the Act. This Court, when the case came before it, heard arguments on a variety of questions, including the question whether the Act

(1) Madras Act No. IV of 1938.

conflicted with the Negotiable Instruments Act(1), which is an Act within the exclusive competence of the Central Legislature; but a majority of the Court were of opinion that questions relating to the Negotiable Instruments Act were irrelevant for the purposes of the case, holding that the original debt had merged in the decree and that the scaling down was of a liability evidenced by a decree and not by a negotiable instrument at all(2).

Counsel for the appellant has cited to us a number of decisions in which the Judicial Committee itself has indicated the principles on which it will act when advising His Majesty to grant or withhold special leave to appeal to His Majesty in Council. This Court will not attempt to formulate in advance any code of rules which it will take for its guidance in granting or withholding leave to appeal to the Judicial Committee, and will deal with each case on its merits as it comes before it. But it will not be disposed to grant leave to appeal, save in cases of real importance, cases which are likely to affect a large number of interests hereafter or cases in which difficult questions of law are involved.

In the present case the decision of the Court dealt only with the scaling down of decrees obtained before the Madras Act came into force. The number of such decrees must necessarily be limited, and there can be no addition to their number. In a case(3), which was before us in May, 1939, and in which we had refused leave, the applicant afterwards petitioned the Judicial Committee for special leave to appeal. The Judicial Committee, in refusing special leave, emphasized the fact that the decision of this Court was concerned with the construction of a section which would have no application in the future: *Hori Ram Singh* v. *King-Emperor*(4). It appears to the Court that this is a sufficient reason for refusing leave in the present case. It should be added that the amount in dispute in the case appears on the figures which were given

(1) Central Act No. XXVI of 1881.
(2) [1940] F. C. R. 188.
(3) *Hori Ram Singh* v. *The Crown* [1939] F. C. R. 159.
(4) (1940) 47 Ind. Ap. 122.

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Subrahmanyan Chettiar v. Muttuswami Goundan.

Judgment.

to us not to have exceeded Rs. 3,000 or Rs. 4,000 at the outside.

The majority of the Court declined to enter into any of the other questions which were raised at the Bar and reserved their opinion upon all of them. There is therefore nothing to prevent these matters being raised and determined at any future time in an appropriate case.

The application is dismissed.

Application dismissed.

Agent for applicant: *B. Banerji.*

MST. ATIQA BEGUM AND OTHERS

1941.

Apr. 17.

v.

THE UNITED PROVINCES AND OTHERS.

[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADACHARIAR AND SIR JOHN BEAUMONT, JJ.]

Federal Court—Leave to appeal to Privy Council—Practice—Government of India Act, 1935, s. 208 (b).

An applicant for leave to appeal to His Majesty in Council must satisfy the Court that the matter is one of importance and that there is really a substantial question to be determined: *Valin* v. *Langlois* (1879) 5 App. Cas. 115 applied.

APPLICATION for leave to appeal to His Majesty in Council.

This was an application for leave to appeal, under s. 208 (b) of the Constitution Act, from the Judgment of the Court in *The United Provinces* v. *Atiqa Begum*, reported [1940] F. C. R. 110.

Shiva Prasad Sinha (*Prem Mohanlal Verma* and *Lakshmi Saran* with him) for the applicants.

Dr. Narayan Prasad Asthana, A.-G. of the United Provinces, (*Sri Narain Sahai* with him) for the opposite party.

The Judgment of the Court was delivered by VARADACHARIAR J.—This is an application asking for leave, under s. 208 (b) of the Constitution Act, to appeal to His Majesty in Council, from a decision of this Court given in December last(1). The constitutional question raised in the case related to the interpretation of s. 292 of the Constitution Act.

In the special circumstances described in the Judgment in that case, the Government of the United Provinces had to direct remission of rent for certain years in the zamindaris in the United Provinces; and when the validity of the remission was

(1) [1940] F. C. R. 110.

1941.

Atiqa Begum
v.
The United Provinces.

Judgment.

successfully questioned in judicial proceedings in the High Court, the United Provinces Legislature passed the impugned Act (No. XIV of 1938), entitled the United Provinces Regularization of Remissions Act, 1938. The validity of this enactment was in turn questioned by the present applicants when the matter was pending before the High Court at Allahabad; and a Full Bench of the High Court held that this Act was *ultra vires* the Provincial Legislature on various grounds. One ground on which alone all the three learned Judges who constituted the Full Bench agreed was that s. 292 of the Constitution Act precluded Legislatures in India from enacting any law with retrospective effect, so as to affect rights accrued before the date of the enactment. The tenant affected by the decree of the High Court did not appeal to this Court, but the Government of the United Provinces, which had taken steps to get itself impleaded as a party just before the case was finally disposed of by the High Court, preferred the appeal to this Court.

At the hearing of the appeal objection was taken to the maintainability of the appeal by the United Provinces Government, on the ground that there was no decree against the Government and that the Government was not a proper party to the litigation at all. On the merits, the conclusion of the learned Judges of the High Court that the Act contravened the limitation imposed upon the Legislature by s. 292 of the Constitution Act was contested on behalf of the appellant, but it was sought to be supported on various grounds by the learned counsel who appeared for the plaintiffs-respondents. This Court, by a majority, held that the appeal was competent; and it unanimously held that the impugned Act was *intra vires* the Provincial Legislature and that s. 292 of the Constitution Act did not on its true construction deprive Legislatures in India of the power to pass legislation with retrospective effect. It is against this decision that the applicants now seek to appeal to His Majesty in Council.

The amount of the disputed remission is very small, not even a hundred rupees; and even as to

that amount, this Court did not (for the reasons given in the Judgment) disturb the *decree* passed by the High Court in the petitioners' favour. The application for leave is supported on three grounds: (1) that the constitutional question involved is of general public importance; (2) that the impugned enactment, namely, Act XIV of 1938 of the United Provinces Legislature, affects the claim of the zamindars of the United Provinces as a body to a large amount of rent remaining in arrears; and (3) that the decision of the majority of this Court on the question of the right of the United Provinces Government to maintain the appeal to this Court is open to criticism.

It is true that the learned Judges of the Allahabad High Court interpreted s. 292 of the Constitution Act as depriving Legislatures in India of the power to legislate with retrospective effect. But, with all deference to them, this Court is unable to hold that there is room for such serious doubt on the point as to justify it in holding that that is a substantial question on which leave to appeal to His Majesty in Council is to be granted. When dealing with an application of this kind, the Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined: *Valin* v. *Langlois*(1). As observed by the Judicial Committee in that case, "it is not to be presumed that the Legislature of a Dominion has exceeded its powers unless upon grounds really of a serious character". After giving anxious consideration to the arguments advanced in support of the High Court's view, this Court unanimously came to the conclusion that s. 292 of the Constitution Act could not reasonably bear the construction sought to be put upon it by the plaintiffs. It will be observed from the Judgment of this Court that many other questions which would have been relevant to the decision of the case had to be left open in the special circumstances in which this Court had to deal with the case. If therefore the matter is to be permitted to go on appeal to His Majesty in Council at all, it will be much more satisfactory that

(1) (1879) 5App. Cas. 115.

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Atiqa Begum v. The United Provinces.

Judgment.

it should go in a case which is properly constituted so as to give Their Lordships an opportunity of dealing with all the points arising in a litigation of this kind.

In considering the extent of interest indirectly affected by the United Provinces Act XIV of 1938, it must be pointed out that the operation of that Act was only temporary, as it sought to regularize certain remissions of rent which according to the opinion of the High Court in another case had been granted in violation of certain provisions of the then existing Rent Act. Those sections in the Rent Act have themselves been repealed by another Act of the United Provinces Legislature passed in the year 1938, and the question is hardly likely to arise in the same form in respect of claims for rent accruing due after 1938. Claims to rent accrued due before 1938 can hardly be enforced in any future litigation, as nearly three years have now elapsed. The Court asked for information whether any large number of suits relating to rent accrued due before 1938 and likely to be affected by Act XIV of 1938 were pending; but no specific information on the point was available. Reference has been made in paragraph 13 of the petitioners' petition to certain circumstances bearing upon the indirect consequences of the decision of this Court, but even there no information on the above question is available. It cannot therefore be said that any decision to be obtained from Their Lordships, if this appeal should be permitted to go to them, is likely to have a material bearing upon future litigation and that in that sense the question is of general public importance.

The only other point raised is the procedural question as to the maintainability of the appeal to this Court by the United Provinces Government. That is a matter of importance only to the clients in the particular case and as this Court did not, even while entertaining the appeal, disturb the decree of the High Court in the plaintiffs' favour, it is not possible to accept the contention that this procedural

question is one which will justify the grant of leave to appeal. The application is accordingly dismissed. There will be no order as to costs.

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Judgment.

Application dismissed.

Agent for applicants: *T. K. Prasad.*

Agent for the opposite party: *G. Sahay.*

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Apr. 15, 16, 22.

IN RE THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937, AND THE HINDU WOMEN'S RIGHTS TO PROPERTY (AMENDMENT) ACT, 1938,

and

IN RE A SPECIAL REFERENCE UNDER SECTION 213 OF THE GOVERNMENT OF INDIA ACT, 1935.

[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADACHARIAR AND SIR JOHN BEAUMONT, JJ.]

The Hindu Women's Rights to Property Act, 1937 (Central Act No. XVIII of 1937), and the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act No. XI of 1938)—Whether applicable to agricultural land—Whether regulate devolution by survivorship of property other than agricultural land—Validity of Act—Meaning of "Property", "Devolution", "Succession" and "Survivorship"—Government of India Act, 1935, Seventh Sch., List II, entry no. 21, List III, entry no. 7; Ninth Sch., para. 68 (2)—Interpretation of Statutes.

The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, (a) do not operate to regulate succession to agricultural land in the Governors' Provinces, and (b) do operate to regulate devolution by survivorship of property other than agricultural land.

The subject of devolution by survivorship of property other than agricultural land is included in entry no. 7 of List III of the Seventh Schedule to the Government of India Act, 1935.

No objection can be taken to the validity of an Act, on the ground only that it was introduced into the Legislature before, and received the Governor-General's assent after, Part III of the Constitution Act came into force, nor is it material that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which a Court is concerned is the date on which the assent of the Governor-General was given, and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and none other.

When a Legislature with limited and restricted powers makes use in an Act of a word of such wide and general import as "property", the presumption must be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The word "property" in the Hindu Women's Rights to Property Act must accordingly be construed as referring to property other than agricultural land.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction.

A remedial Act seeking to remove or mitigate what the Legislature presumably regarded as a mischief ought to receive a beneficial interpretation.

SPECIAL REFERENCE.

This was a Special Reference made by His Excellency the Governor-General under s. 213 of the Constitution Act. The questions referred were:—

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on February 4, 1937, and by the Council of State on April 6, 1937, and which received the Governor-General's assent on April 14, 1937,

or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after April 1, 1937, operate to regulate—

(a) succession to agricultural land?

(b) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935?

Sir Brojendra Mitter, A.-G. of India, (Asadullah Khan with him) for the Government of India.—The Reference, taken as a mere matter of construction of the two Acts in question, presents little difficulty. The answer to question (1) (a) is 'No' in Governors' Provinces and 'Yes' in centrally

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administered areas. Schedule 7, List III, entry no. 7, of the Constitution Act excludes agricultural land in the Governors' Provinces: s. 100 (4). The answer to question (1) (b) is 'Yes'. In Indian legislative practice "survivorship" has always been included in the connotation of the word "succession". The answer to question (2) is 'Yes': List III, entry no. 7.

The words "operate to regulate" in the Reference, however, raise the more important question of the validity of the Acts. By reason of the curtailment of the powers of the Central Legislature by the Constitution Act, after the Bill had been passed by the Legislative Assembly, the Act of 1937 became different from what the Legislature had intended. When the Bill was passed by the Legislative Assembly, the intention was "to give better rights to women in respect of property" (see preamble). The word "property" in the body of the Act clearly meant all kinds of property, including agricultural land, for at that time the Central Legislature had power to deal with succession to all kinds of property. The Council of State passed the Bill without amendment. It is reasonable to infer that it intended to confirm what the Assembly did and that its own intention was not different from that of the other House. Does the fact that the powers of the Legislature had been curtailed in the meantime make any difference as to its intention? Did the Council of State intend to exclude agricultural land? It appears that in Act XXVI of 1937, when the Legislature intended to exclude agricultural land from the connotation of the word "property", it did so in express terms "save questions relating to agricultural land" (s. 2). But in Act XVIII of 1937, it retained the word "property" without any qualification. Nor did it introduce any qualification in the amending Act of 1938. Therefore, the word "property" should be given its natural meaning and full content without exclusion of agricultural land. The presumption that a Legislature does not intend to exceed its jurisdiction is rebutted by the undoubted intention of the Assembly to use the word in its natural wide sense and by the Council of State

refraining from making any change. If the Council of State had a different unexpressed intention, then, the two Houses were not *ad idem*. The rule that a Court may not look at the proceedings of a Legislature to find out its intention, cannot apply to a case where the powers of the Legislature are changed during the passage of a Bill. In such a case it is the duty of the Court to find out the real intention of the Legislature from its proceedings, and not to presume an intention by the test of legislative competency at a later date when the Act was completed. If both the Houses had passed the Bill before the 1st April 1937 and the Governor-General's assent came later, could it be said that the Legislature intended to use the word "property" in the limited sense of property other than agricultural land? Looking at the object of the Act, which was "to give better rights to women in respect of property" it is extremely unlikely that the Legislature intended to exclude agricultural land in a predominantly agricultural country and thereby largely frustrate the object of the Act. Again, in some respects, the Act, on a true interpretation, made the position of a widow governed by the Mithila school worse than under the ordinary law. Under the ordinary law, she takes her husband's moveables absolutely, whereas under this Act she takes only a widow's interest: *Sureshwar Misser* v. *Maheshrani Misrain*(1). The Act is thus prejudicial to the Mithila widow, which might be counterbalanced by her getting a share in her husband's entire property including agricultural land. Further, a widow getting a share of her husband's property under the Act, would probably forfeit her right to maintenance. It is unreasonable to suppose that the Legislature intended to deprive her of a share in her husband's agricultural land also. In the majority of cases, there would be nothing left for her to inherit, if agricultural land was intended to be excluded. From all these circumstances, the true position is that although the Legislature intended to give the widow a share in all her husband's property in all parts of British India, the effect of the changes made by the Government of

(1) (1920) 47 Ind. Ap. 233.

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India Act was that that intention was largely defeated, except in centrally administered areas. In other words, the Act of 1937 is a different enactment from what the Legislature intended. In such a case the whole Act is invalid, see *Rex* v. *Commonwealth Court of Conciliation and Arbitration* (1), *Owners of S. S. Kalibia* v. *Wilson*(2), *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation*(3), and *Vacuum Oil Co. Pty. Ltd.* v. *Queensland [No. 2]*(4).

Sir Alladi Krishnaswami Ayyar, A.-G. of Madras, (*N. Rajagopala Iyengar* with him) and *Dr. Narayan Prasad Asthana, A.-G. of the United Provinces,* (*Sri Narain Sahai* with him) were also heard by the Court.

Sir Alladi Krishnaswami Ayyar.—It is now practically conceded that the expression "succession" in entry no. 7 of List III includes "survivorship". The Provinces are interested only in that question. The word "succession" used in the Constitution Act was also used in the previous Government of India Acts, *c.f.* s. 112 of the Act of 1919. It could not have been the intention of Parliament to give a more restricted meaning to the entry now. In the previous Government of India Acts and in the various Acts and Regulations providing for their personal law being applied to Hindus in matters of succession, the expression has been used in the widest and most comprehensive sense. "Succession" must therefore include "survivorship". The expression occurring in conjunction with "inheritance" leads to the inference that it includes "survivorship". Inheritance and survivorship have been designated as two modes of succession: *Katama Natchiar* v. *The Rajah of Shivagunga*(5). The Judicial Committee calls them two modes of devolution or succession: *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari*(6), *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(7);

(1) (1910) 11 Com. L. R. 1.
(2) (1910) 11 Com. L. R. 689.
(3) (1925) 35 Com. L. R. 422.
(4) (1935) 51 Com. L. R. 677.
(5) (1863) 9 Moo. Ind. Ap. 539.
(6) (1875) 2 Ind. Ap. 263.
(7) (1890) 17 Ind. Ap. 128.

also *Baijnath Prasad Singh* v. *Tej Bali Singh*(1). In the cases decided under the Succession Certificate Acts there are some High Court decisions holding that a person claiming by survivorship is not a "successor"; but these cases are of no assistance in determining the import of the expression in a constitutional enactment. Under the Hindu Law there is authority for the view that even in regard to self-acquired property a son takes it as unobstructed heritage, though during the father's lifetime he has no alienable interest: *Venkateswara Pattar* v. *Mankayammal*(2); Mayne's Hindu Law, 10th Edition, pp. 348-351. To construe "devolution" and "succession" in a narrow sense would render the power almost nugatory. It must therefore be held that the expressions are comprehensive enough to include survivorship.

The next question is whether the Hindu Women's Rights to Property Act has been validly enacted. The Bill was passed by the Legislative Assembly constituted under the Government of India Act, 1919, and by the Council of State after the Act of 1935 came into force and assented to by the Governor-General under the Government of India Act, 1935. Not having received the assent before the 1st April 1937, it is not an "existing Indian law" within the definition of the expression in s. 311, which alone is preserved by s. 292. If it is not "an existing Indian law", the only other Central Indian law known to the Government of India Act. 1935, is a Federal law. This cannot fall within that description, because it was not passed by the Legislative Houses constituted under the Act of 1935. There is no third type of law known.

Incomplete legislation, in the form of a pending Bill, is not within the saving clause of s. 292. The Existing Laws Act, 1937, and the language of s. 292 itself favour the conclusion that if the legislative process is not completed by assent prior to 1st April 1937, its efficacy is not preserved. It is therefore submitted that the Bill lapsed on the repeal of the Government of India Act, 1919. The new

(1) (1921) I. L. R. 43 All. 228. (2) (1935) 69 M. L. J. 410.

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Legislature constituted under the Act of 1935 is one endowed with absolutely different powers. Section 317 cannot be read as preserving the continuity for this purpose.

If the enactment were construed as a valid Federal law, it is certainly invalid as to agricultural land and cannot operate to regulate the succession to or devolution of such property.

If the enactment fails as to a part, the question next arises whether the invalid part is severable from the valid portion. As regards the test of severability, the American subjective test "would the Legislature have passed this truncated enactment" is not one that has been adopted by the English cases. To embark upon the theory as to what the Legislature would have done is not a correct method of approaching the problem. If on analysing the Act a single scheme is disclosed and the valid and the invalid portions are interwoven into it, then the two portions cannot be separated and the whole enactment must be pronounced invalid. An application of the test adopted in the Australian cases would lead to the conclusion that the valid and the invalid portions of the enactment in question are inseparable.

The cases in which Courts have cut down the territorial operation of enactments where a wider construction would have led to the legislation being *ultra vires*, are distinguishable from cases of invalidity arising from the subject-matter not being within the competence of the Legislature and may not be of much assistance in the present case,—*vide* Wynes: Legislative and Executive Powers in Australia, p. 46.

There is one other point to consider in dealing with the subject under the scheme of the Government of India Act. Though inheritance is a single scheme, the Legislature seems to proceed on the footing that it is possible to treat it in two parts, that is, succession in regard to agricultural land and succession in regard to non-agricultural properties, whereas the law of succession under the Hindu

law is single and entire in its character both in relation to agricultural and non-agricultural property. The only safe test is to examine the particular provisions of the Act. Does the Act disclose a single scheme, or is it possible to give effect to it in part? See *Owners of S. S. Kalibia* v. *Wilson*(1), *Vacuum Oil Co. Pty. Ltd.* v. *Queensland [No. 2]*(2), *Shyamkant Lal* v. *Rambhajan Singh*(3), *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada*(4), In re *the Initiative and Referendum Act*(5), and *Toronto Corporation* v. *York Corporation*(6). Applying that test, the entire enactment might be regarded as invalid.

Dr. Narayan Prasad Asthana.—In my statement of the case, I submitted that the Provinces were interested in the Reference to the extent whether the Act encroached on the Provincial field and whether "succession" included "survivorship".

Three views have been held about the validity of the Hindu Women's Rights to Property Act. One view is that the Act was entirely invalid. In some cases in Madras and the United Provinces it had been contended that the assent given by the Governor-General on 16th April 1937 was invalid inasmuch as the functions and powers of the Central Legislature had undergone a vast change after 1st April 1937. The second view is that the Act was entirely valid. The High Court of Allahabad has held the Act as valid because the functions and powers of the Central Legislature were continued after April 1, 1937, under s. 317 of the Government of India Act. The third view is that the Act was valid in some respects and invalid in others. My submission is that the Act passed by the Central Legislature is a distinct encroachment on the powers of the Provincial Legislature. The *powers* of the Central Assembly and its juridical existence expired on April 1, 1937, when the new Act came into force, although the *personnel* of the House remained unchanged. When on 6th April 1937, the Council of State was considering the Bill passed by the

(1) (1910) 11 Com. L. R. 689.
(2) (1935) 51 Com. L. R. 677.
(3) [1939] F. C. R. 193, at p. 213.
(4) [1925] A. C. 561.
(5) [1919] A. C. 935.
(6) [1938] A. C. 415.

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Assembly on 4th February 1937, it was considering something which was not a proper Bill. Consequently, the Bill was never considered by the two Chambers of the Legislature and it could not, therefore, have received the valid assent of the Governor-General on 16th April 1937. The Council of State was considering the Bill in a mistaken belief or, it may be, negligently, without realising that its powers under the new Act did not extend to agricultural property. This was possible because only a few days had passed after the new Government of India Act had come into force, and no one thought of the substantial curtailment of the powers of the Central Legislature. I made the point clear by quoting s. 65 of the old Act and ss. 100, 316 and 317 and entries no. 21 of List II and no. 7 of List III of the Seventh Schedule, and the Ninth Schedule of the Government of India Act, 1935.

My answer, therefore, to question no. (1) (a) is:

"If the Act is held to be valid, then it cannot regulate succession to agricultural land. The reply is in the negative so far as the Governors' Provinces are concerned, as it amounts to distinct encroachment on the powers of the Provincial Legislature".

As to question no. (1) (b), my reply is in the affirmative. From the definitions of the words "survivorship" and "devolution" given in law dictionaries, particularly Black's Law Dictionary, I submit that a certain property devolves, whereas a certain person succeeds. The difference is only this much and no more; for, otherwise the sense of the two words was the same, namely, that the property descends from the deceased to his heirs. "Succession" as used in entry no. 7 of List III includes "survivorship" as well as "devolution" which occurs in entry no. 21 of List II. Reading the two entries together, the words are used in identical sense. The word "devolution" includes "succession by survivorship" in a joint Hindu family, otherwise it would amount to ignorance on the part of the framers of the Government of India Act of well-known principles of the Hindu law. Hindu law also recognizes survivorship between co-widows and the daughters.

My answer to question no. (2) is also in the affirmative in view of my reasoning given above.

Cur. adv. vult.

The Opinion of the Court was delivered by GWYER C. J.—This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under s. 213 of the Constitution Act. The questions referred are:—

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act XVIII of 1937), which was passed by the Legislative Assembly on February 4, 1937, and by the Council of State on April 6, 1937, and which received the Governor-General's assent on April 14, 1937,
or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act XI of 1938), which was passed in all its stages after April 1, 1937,
operate to regulate—

(a) succession to agricultural land?

(b) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in the Seventh Schedule to the Government of India Act, 1935?

There being no "opposite party" properly so called to this Reference, it was not considered necessary or useful to serve any parties with notice of the Reference. But, as the Court desired to hear the various possible viewpoints presented and argued, it suggested to the Advocate-General of India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that each of them wished to present and arguments in support thereof. The Advocate-General of India has filed a statement on behalf of the Government of India, and he has also placed on the file statements from the Advocates-General of

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seven of the Provinces. As the Court further intimated that besides hearing the Advocate-General of India it would be prepared to hear two more counsel, the Advocates-General of Madras and the United Provinces appeared and took part in the argument. The Court is indebted to all the learned counsel for the assistance which they have afforded it.

The doubts which have led to the Reference arise from the fact that the Bill which became the Hindu Women's Rights to Property Act, 1937 (Central Act No. XVIII of 1937), which for convenience is hereafter referred to as Act No. XVIII, was passed by the Legislative Assembly of the Indian Legislature on the 4th of February, 1937, that is, before Part III of the Constitution Act came into operation and at a time when the powers of the Legislature were plenary, but was passed by the Council of State only on the 6th of April, 1937, that is, after Part III had come into operation, and received the Governor-General's assent only on the 14th of April, 1937. After the 1st April, 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of the Seventh Schedule to the Constitution Act, so far as the Governors' Provinces were concerned. Laws with respect to the "devolution of agricultural land" could be enacted only by the Provincial Legislatures (entry no. 21 of List II), and "wills, intestacy, and succession, save as regards agricultural land" appeared as entry no. 7 of List III, the Concurrent List. Act No. XVIII, read with the amending Act of 1938 (Central Act No. XI of 1938), endeavoured to improve the position of Hindu widows in two classes of case: (a) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other coparceners; and (b) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great-grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in cases where her husband had pre-deceased the last male

owner (s. 3 (1), first proviso). The Act purports to deal in quite general terms with the "property" or "separate property" of a Hindu dying intestate, or his "interest in joint family property"; it does not distinguish between agricultural land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred have already been discussed in one or two cases (see, for instance, *Janak Dulari* v. *Sri Gopal*(1)), on the assumption that the Bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present Reference it will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Central Act No. XI of 1938) call for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous year.

Of the questions referred, Question (2) will in effect be answered by the views to be expressed in the course of the discussion of Question (1); and it is therefore not separately considered. In the statements filed before the hearing and in the course of the arguments, the following contentions were raised with respect to Question (1):—

(i) That Act No. XVIII was never properly passed at all, in view of the stage at which it was taken up and dealt with by the Council of State and the Governor-General.

(ii) That the Act was in any view *ultra vires* the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces.

(iii) That if the Act should be held to be only in part *ultra vires*, it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces.

(1) I.L.R. [1939] All. 912.

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(iv) That even if it were permissible to uphold the Act to a limited extent, the provision in s. 3 (2) relating to the interest of the deceased in Hindu joint family property would be *ultra vires* the Indian Legislature, on the ground that the mention of "succession" in entry no. 7 of List III of the Seventh Schedule does not include or authorize legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship.

In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confer on the widow a right by survivorship, though it gives her the same interest in the joint property as her deceased husband had. This does not seem to be tenable. It is true that s. 3 of the Act does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers; but there can be no doubt that in the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining coparceners. The Reference must therefore be dealt with on the footing that so far as its effect goes, the Act does legislate "with respect to" the law of survivorship. It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from another the benefit of survivorship.

On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part III of the Constitution Act came into force. Part XIII of the Constitution Act contains

certain provisions entitled "Transitional Provisions", which are to apply "with respect to the period elapsing between the commencement of Part III of this Act and the establishment of the Federation". It is then enacted by s. 317 that the provisions of the Government of India Act, 1919, set out (with certain amendments consequential on the passing of the Constitution Act) in the Ninth Schedule, are to continue to have effect, that is, during the transitional period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of Part III of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been.

One of the provisions included in the Ninth Schedule is that a Bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act (Ninth Schedule, para. 68 (2)). Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor-General's assent. But it does not appear to the Court that the form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by, either Chamber of a Legislature is a matter with

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which any Court of law is concerned. The question whether either Chamber has the right to discuss a Bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its Speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a Bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the Bill after it has become an Act.

In the opinion of this Court therefore it is immaterial that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is April 14th, 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

It is convenient to consider the second and third contentions together, *viz.* that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces; and that, if it were held to be in part beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it: and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind

of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts. *viz.* the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction: see cases cited in Maxwell on the Interpretation of Statutes (8th Ed.), p. 126: and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it. "It seems to me", said Lord Esher M. R. in *Colquhoun* v. *Heddon*(1), "that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction". Where the expression "personal estate" occurred in a Victorian statute imposing duties on the estates of deceased persons, it was held by the Judicial Committee that it must be

(1) (1890) 25 Q.B.D. 129, at p. 134.

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construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the personal representatives to administer, whatever the domicile of the testator might be, that is to say, personal estate situate within the Colony, in respect of which alone the Supreme Court of Victoria had power to grant probate: Their Lordships thought that "in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction". And they held that "the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under s. 7 (2) of the Act should be confined to that property which the probate enables him to administer": *Blackwood* v. *The Queen*(1). In the well known case of *Macleod* v. *Att.-Gen. for New South Wales*(2), the Legislature of New South Wales had enacted a law providing that "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years". The appellant, who had during the lifetime of his wife married another woman in the United States of America and had in a New South Wales Court been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be *ultra vires*. Lord Halsbury, delivering the Judgment of the Judicial Committee, observed that if Their Lordships construed the statute as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be

(1) (1882) 8 App. Cas. 82, at p. 98. (2) [1891] A.C. 455.

caught in that Colony. "That seems to Their Lordships", he continued, "to be an impossible construction of the statute; the Colony can have no such jurisdiction, and Their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and Their Lordships take it that the words 'Whosoever being married' mean 'Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales' " (at p. 457). And again in a later passage: "It appears to Their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony" (at p. 459). The principle is the same for all law-making bodies with limited powers: "Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad, and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law": *Collman* v. *Mills*(1).

(1) [1897] 1 Q. B. 396, at p. 399.

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In *D'Emden* v. *Pedder*(1), the High Court of Australia held that they would not be justified in assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth: "It is, in our opinion, a sound principle of construction that Act of a sovereign legislature, and indeed of subordinate legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative . . . It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or in the more restricted sense according to the general scope and object of the enactment" (at pp. 119, 120).

There is this also to be said. The underlying purpose of Act No. XVIII is plainly stated in its preamble: "Whereas it is expedient to amend the Hindu Law to give better rights to women in respect of property". It is therefore a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation: "If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit": *Gover's Case*(2). It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that the "better rights" which it sought to give to Hindu women should extend to agricultural land as well as to other property; but it cannot be supposed that when, after restriction of its powers, it passed an Act with the above preamble, it did not intend to make the enactment as effective as it was within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India were by no means conclusive, and it should not be assumed that the Court

(1) (1904) 1 Com. L.R. 91. (2) (1875) 1 Ch. D. 182, at p. 198.

accepts the contention; but even if it were true that an Act intended to be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.

The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that the construction which has commended itself to the Court leaves no room for the application of the principle of non-severability of subject-matter. It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of S. S. Kalibia* v. *Wilson*(1); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland [No. 2]*(2); *Rex.* v. *Commonwealth Court of Conciliation and Arbitration*(3); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation*(4). If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself": Wynes: Legislative and Executive Powers in Australia, p. 51, citing *Presser* v. *Illinois*(5). These words appear to the Court apt to describe Act No. XVIII,

(1) (1910) 11 Com. L.R. 689.
(2) (1935) 51 Com. L.R. 677.
(3) (1910) 11 Com. L.R.1.
(4) (1925) 35 Com. L.R. 422.
(5) (1886) 116 U.S. 252.

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if construed as the Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

It remains to deal with the fourth contention, that is, with regard to the import of the term "succession" in entry no. 7 of List III and of the word "devolution" in entry no. 21 of List II. The question raised is whether these words which *prima facie* imply the passing of an interest from one person to another can include the change which takes place under the Mitakshara law in the extent of the interest possessed by the male members of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English law, this change has been described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh*[1], as to the use of the terms "coparcenery" and "coparceners" in relation to a Mitakshara joint family is equally applicable to the use of the terms "joint-tenancy" and "survivorship"; for the incidents associated with joint ownership under the Mitakshara law are not identical with those known to the English law of joint-tenancy. There is however this degree of resemblance between the *jus accrescendi* and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors,—whose pre-existing interest extended over the whole property,—are increased only because of the diminution in the number of sharers. The argument therefore is that words like "devolution" and "succession" cannot be held to include cases where the deceased person's interest does not pass to another but is merely extinguished or lapses. There are at least two answers to this argument.

Whatever may be the position under the English law, the theory of extinction does not exactly describe the position which arises on the death of a

[1] (1921) I.L.R. 43 All. 228.

member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a member of a joint family and during the latter's life-time attaches his undivided interest in the family property, the creditor will be entitled to proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by reason of the death of the judgment-debtor. In some of the Provinces there have also been decisions recognising a right of voluntary alienation in each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have been held not to be defeated by the death of the alienor, though no suit for partition be instituted during his lifetime. Results of this kind are wholly inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was recognised as early as *Nanomi Babuasin* v. *Modhun Mohun*[1], that the application of the theory of the son's "pious obligation" to pay the father's debts has practically resulted in the *pro tanto* extinction of the son's independent rights in the family property; and s. 53 of the Civil Procedure Code provided that to the extent to which joint family property remained liable for the father's personal debts even after his death, it "shall be deemed to be property which has come to the hands of the son as his legal representative".

It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a

(1) (1886) I.L.R. 13 Cal. 21.

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connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of rights which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words "inheritance" and "succession" in juxtaposition, justifying the inference that succession is either another category from or a wider category than "inheritance" (see some of these enactments referred to in Ilbert's Government of India, Chapter IV, and in Mulla's Hindu Law, 9th Edn. pp. 4-5). If in these enactments "succession" should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view the continued administration of that part of the Hindu law by the British Indian courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists II and III Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well.

A line of cases in the High Courts dispensing with the production of a succession certificate when title to a "debt" is claimed by survivorship may seem to support the restricted interpretation of the word "succession" (cf. *Sheetalchandra Datta* v. *Lakshimanee Dasee*[1]). But taking this class of decisions as a whole they must be understood to rest not so much on the connotation of the word "succession" as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" *prima facie* due

(1) (1935) I.L.R. 63 Cal. 15, at p. 16.

to a deceased person. (See *Vairavan Chettiar* v. *Srinivasachariar*[1]). In any event, the two enactments not being *in pari materia*, such observations as may be found in these cases in support of the limited interpretation of the word "succession" cannot be held to be sufficient to override the cumulative effect of the considerations referred to above.

In one or two instances, eminent writers have employed language suggesting that "devolution" may comprehend cases of survivorship but not the word "succession" (see Mayne's Hindu Law, 10th Edn. para. 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a "death" (see O. 22, r. 10, C. P. C.), but that is immaterial for the present purpose; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship.

The Court is therefore of opinion that the answers to the questions comprised in the Special Reference are as follows:—

(1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938,—

(*a*) do not operate to regulate succession to agricultural land in the Governors' Provinces; and

(*b*) do operate to regulate devolution by survivorship of property other than agricultural land.

(2) The subject of devolution by survivorship of property other than agricultural land is included in entry no. 7 of List III, the Concurrent List.

(1) (1921) I.L.R. 44 Mad. 499.

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The Court will report to His Excellency accordingly.

Agent for the Government of India: *K. Y. Bhandarkar.*

Agent for the A.-G. of Madras: *Ganpat Rai.*

Agent for the A.-G. of the United Provinces: *G. Sahay.*

SURAJ NARAIN ANAND

v.

THE NORTH-WEST FRONTIER PROVINCE.

1941.

Nov. 25, 26; Dec. 4.

[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADACHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.]

Government of India Act, 1935, ss. 240 and 243—Interpretation and effect of—Subordinate ranks of police forces—Power of Crown to dismiss police officer—Dismissal by authority subordinate to the authority who appointed—Wrongful dismissal—Remedy by civil action—"Conditions of service"—Scope of Rules relating to.

By sub-section (1) of s. 240 of the Constitution Act, except as expressly provided by the Act, every person who is a member of the civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure. By sub-section (2), no such person shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. By sub-section (3), no such person shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

By s. 241 provision is made with regard to appointments to the civil services of, and civil posts under, the Crown in India, and for prescribing the conditions of service of persons serving His Majesty in a civil capacity in India. By s. 242 provision is made with respect to the application of the preceding section to certain specified services.

By s. 243, notwithstanding anything in ss. 240, 241 and 242, the conditions of service of the subordinate ranks of the various Police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively.

Held that, on the true construction of these sections, the provisions of s. 240 are mandatory and over-riding provisions, and cannot be qualified or restricted in the case of the subordinate ranks of the police forces in India by any conditions of service determined by or under the Acts relating to those forces. A distinction is to be drawn between the tenure on which an office is held and the incidents relating to service in the office.

The appellant, having been appointed a sub-inspector in the Police force of the North-West Frontier Province by the

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Inspector-General of Police of the Province, was subsequently dismissed by the Deputy Inspector-General:—

Held, that the dismissal was void and inoperative by reason of the provisions of s. 240 of the Act, notwithstanding that rules made by the Provincial Government under s. 7 of the Indian Police Act, 1861, provided that a sub-inspector could be dismissed by the Deputy Inspector-General.

The rejection by a higher authority of an appeal against dismissal is not equivalent to a dismissal by that authority itself, so as to satisfy the provisions of sub-section (2) of s. 240.

Semble, that the appellant, who was appointed at a time when the Government of India Act, 1919, was in force, was also entitled to rely on the provisions of s. 96B of that Act, since no change made in the rules in 1934 could prevail against those provisions, and his right not to be dismissed by any officer subordinate in rank to the officer by whom he was appointed was a privilege saved to him by Art. 15 (2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, and by s. 38 of the Interpretation Act, 1889.

Rangachari v. *Secretary of State for India*, (1936) 64 Ind. Ap. 40, applied.

APPEAL from the Court of the Judicial Commissioner, North-West Frontier Province.

The appellant was a Sub-Inspector in the police force of the North-West Frontier Province. On the 25th April, 1938, he was dismissed from service on certain charges by the Deputy Inspector-General of Police. The appellant appealed to the Inspector-General of Police and to the Provincial Government, and, failing to get any relief, instituted a suit in the Court of the Senior Subordinate Judge, Peshawar. The Subordinate Judge dismissed the suit as being unsustainable, on the 3rd March 1940. This decision was upheld by the Court of the Judicial Commissioner, North-West Frontier Province, on the 19th September 1940, but the Court granted, on the 15th October 1940, a certificate under s. 205 (1) of the Constitution Act. On the 11th November, 1940, the appellant applied to the Court of the Judicial Commissioner praying that he may be excused from compliance with the provisions of O. XLV, r. 7, of the Civil Procedure Code, but the Court dismissed the application on the 3rd March 1941, on the ground that the appellant had not complied with the provisions of the Code relating to the deposit of security for the costs of the respondent and the amount required for printing the record.

The appellant originally began proceedings in this Court *in forma pauperis*, but withdrew his application in the course of a preliminary hearing on 22nd April, 1941. The appellant then filed an application under O. XXXVII, r. 1, of the Federal Court Rules for exemption from compliance with the provisions of O. X., rr. 1, 2 & 3 of the Rules. Notice was given to the Government of the North-West Frontier Province and the application was heard by the Court on the 7th October, 1941. The applicant appeared in person. The respondent Province was represented by the Advocate-General of the North-West Frontier Province. The Court made the following order:

"In the course of discussion it has become clear and it is agreed both by the appellant and by the Advocate-General for the respondents that the only questions in issue in the proposed appeal are constitutional questions and the petitioner has informed us that he is going to confine himself when the appeal is heard to constitutional questions only. In these circumstances, the question of granting the appellant exemption from giving security for costs will not arise and it is therefore not necessary to go into the question whether any rules are *ultra vires* or not. So far as the question of printing is concerned, the Court is of opinion that the appellant ought to be excused from compliance with so much of Order X. rules 1, 2 and 3 of the Federal Court Rules, as requires him to have the record printed in the Judicial Commissioner's Court and to lodge his petition of appeal in this Court within sixty days of the admission of the appeal by the Judicial Commissioner's Court. Accordingly, the appellant will be at liberty to lodge his petition of appeal in this Court within twenty-eight days from the date of this order."

The appeal was filed on the 11th October 1941. The original record of the case was transmitted to the Federal Court by the Court of the Judicial Commissioner, North-West Frontier Province.

The Appellant in person.—The Courts below were wrong in holding that they had no jurisdiction to entertain the suit. They ignored altogether that

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the pleasure of the Crown could be expressed only in a certain way. If it is expressed in a way inconsistent with the provisions of a statute, then a dismissal consequent on such an expression will be illegal and civil courts in such cases have jurisdiction. The Courts below erred in applying to this case the ruling in *Venkata Rao* v. *Secretary of State for India*(1); what they should have followed was the decision of the Privy Council in *Rangachari* v. *Secretary of State for India*(2), in which the contravention of a proviso in s. 96-B of the Government of India Act, 1919, was alleged. This proviso corresponds to s. 240(2) of the present Government of India Act. The appellant was appointed by the Inspector-General of Police, N. W. F. P., and his dismissal by the Deputy Inspector-General of Police was in contravention of this provision in the Constitution Act. It is not correct to hold that s. 243 of the Act deprived him of the benefit of s. 240 (2). Even if it were so, there was nothing in the Indian Police Act, 1861, or the rules made thereunder, which authorized the Deputy Inspector-General of Police to dismiss him. Alternatively, the appellant was entitled to the protection afforded by s. 96-B of the old Act, since he was appointed in 1928. In support of this contention, he invited a reference to s. 84 of the 1919 Act, Art. 15(2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, and s. 38 of the Interpretation Act. 1889. The order of dismissal passed against him was therefore void and inoperative.

Sardar Bahadur Raja Singh, A.-G. of the North-West Frontier Province, and *Kanwal Kishore Raizada* for the respondent.—The appellant held his post at the pleasure of the Crown and not by any statutory right: see s. 96-B of the Government of India Act, 1919; s. 240(1) of the Constitution Act, and *Shenton* v. *Smith*(3). While in service the appellant was subject to the statute and the rules applicable to the service to which he belonged as amended and modified from time to time, and this

(1) (1936) 64 Ind. Ap. 55. (2) (1936) 64 Ind. Ap. 40.
(3) [1895] A. C. 229.

was one of the conditions of his service. The argument that the appellant had any vested right under any statutory rule prevailing at the time of his appointment cannot prevail, since otherwise it would be impossible for the Government to maintain the organisation and discipline of the Police Force in the Province. Under s. 243 of the Constitution Act and s. 7 of the Indian Police Act, the dismissal, etc. of police officers is clearly governed by rules made from time to time. The rule under which the appellant was dismissed was valid law at the time. Any inconsistency that that rule may have with s. 240 (2) of the Constitution Act was cured by s. 243 of the Act. So much of s. 240 of the Act as is in conflict with the procedure prescribed in the Police Rules is not applicable to the subordinate ranks of the police force in the Province. The appellant exercised his rights of appeal under the Police Rules and his appeals were justly heard and determined by proper authorities. But it is also submitted that even non-observance of these Rules or of the provisions of s. 240 (3) of the Constitution Act does not give the appellant any right of redress by civil action. The following cases were also referred to: *Venkata Rao* v. *Secretary of State for India*(1); *Rangachari* v. *Secretary of State for India*(2).

The true meaning of ss. 240 and 243 will become clear, if reference is made to the reasons given in their Report for the special recommendations of the Joint Select Committee with reference to the Police in India, following upon the transfer of law and order to the new Provincial Governments, and to the discussions in Parliament on the same subject. A reference for this purpose to the Report of the Joint Select Committee is permissible: see the observations made by His Lordship the Chief Justice in the *Central Provinces Petrol Tax Case*(3).

[GWYER C. J.—It is time that this misapprehension was removed once and for all. It is true that in the passage which has just been cited I observed that it was permissible to refer to the so-called

(1) (1936) 64 Ind. Ap. 55. (2) (1936) 64 Ind. Ap. 40.
(3) [1939] F. C. R. 18, at p. 46.

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White Paper and the Report of the Joint Select Committee upon it as historical facts, that is, as part of that series of events which culminated in the passing of the Government of India Act, 1935. I should not have supposed that this proposition was open to doubt, and there are Judgments of the Judicial Committee in recent years in which the Quebec Resolutions of 1864, on which the British North America Act was founded, and the well-known Report of the Imperial Conference of 1926 are referred to. But in that same passage I pointed out that this Court "is only concerned with what Parliament has in fact said", that is to say, when it is endeavouring to ascertain the meaning of any part of the Act. I should have thought it was clear beyond any doubt that in saying this I was emphasizing the long established rule of construction that for the purpose of interpreting an Act of Parliament a Court is not entitled to go outside the language which Parliament has thought fit to use in the statute itself. I am aware that what I said in the *Central Provinces Case* has been the subject of comment and misinterpretation, and I take this opportunity therefore of putting the matter straight for the future.]

Sir Brojendra Mitter, A.-G. of India, (*Asadullah Khan* with him) was heard by the leave of the Court.—So much of the provisions of s. 240 to 242 of the Constitution Act as relate to conditions of service, do not apply to the subordinate Police forces. "Conditions of service" means from the beginning to the end of service, and, necessarily, includes the manner in which the service terminates, whether by effluxion of time, dismissal or otherwise. Under s. 243, conditions of service which include dismissal are regulated by the Indian Police Act, 1861, and the rules made thereunder. The rule under which the appellant was dismissed was passed in 1934, *i.e.*, before the new Government of India Act came into operation. By virtue of s. 96-B of the Government of India Act, 1919, that rule, which empowers the Deputy Inspector-General of Police to dismiss sub-inspectors, was inapplicable to sub-inspectors appointed by the Inspector-General but

was otherwise applicable to sub-inspectors appointed by the Deputy Inspector-General himself or officers subordinate to him. The repeal of the Government of India Act, 1919, and the exclusion of s. 240 (2) from application to the subordinate Police forces have the effect of extending the operation of that rule to all sub-inspectors irrespective of the appointing authority. It is significant that in the adaptation of s. 7 of the Police Act by the Adaptation Order, all mention of appointment has been omitted. That rule was not hit by s. 84 of the Act of 1919. It was simply inapplicable to a certain class of cases. There was no repugnancy to the Government of India Act or the Police Act. Section 292 of the Act of 1935 kept the rule alive; s. 243 extended its scope.

The contract of service included the implied term that the Crown had the right to dismiss at will: *Rangachari* v. *Secretary of State for India*(1), *Venkata Rao* v. *Secretary of State for India*(2), *Shenton* v. *Smith*(3), *Reilly* v. *The King*(4) and *Fletcher* v. *Nott*(5). The sub-inspector also had rights, but these rights were always subject to rules made under the Police Act, and for the time being in force. Under rule 16(1), the Deputy Inspector General could dismiss sub-inspectors. The appellant was dismissed by the Deputy Inspector-General and the dismissal was therefore valid.

It is not at all certain that, under the N.-W. F. Police Rules which were in force in 1928, the Inspector-General appointed sub-inspectors. Appointing authorities for different classes of officers and men are specifically mentioned; but in the case of sub-inspectors no authority is mentioned. All that the rules provide is that applications are to be made to the Inspector-General and the certificate of appointment is signed by him. It may be admitted that on the pleadings this point is not open, but it should nevertheless be noticed.

Cur. adv. vult.

(1) (1936) 64 Ind. Ap. 40.
(2) (1936) 64 Ind. Ap. 55.
(3) [1895] A. C. 229.
(4) [1934] A. C. 176.
(5) (1938) 60 Com. L. R. 55.

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Judgment.

The Judgment of the Court was delivered by

VARADACHARIAR J.—This is an appeal by a plaintiff whose suit against the North-West Frontier Province Government has been dismissed by the Courts below on a preliminary finding that the suit was not maintainable. The only point for determination by this Court is whether this finding is consistent with the true interpretation and effect of s.s. 240 and 243 of the Constitution Act.

The facts relevant at this stage may be briefly stated. The petitioner was appointed a Sub-Inspector in the police force of the North-West Frontier Province in March, 1928, and in April, 1938, he was dismissed on certain charges by the Deputy Inspector-General of Police of that Province. His appeals to the Inspector-General of Police and to the Provincial Government failed and he instituted this suit praying for a declaration that the order of dismissal was illegal and void and that he ought still to be regarded as continuing in office. He also claimed arrears of pay and, in the alternative, damages for wrongful dismissal. The plaint impugned the validity of the order of dismissal on various grounds; but, in the view we take of the case, it is unnecessary to refer to all of them. It is sufficient to state that one of the grounds urged was that as the plaintiff had been appointed by the Inspector-General of Police, the Deputy Inspector-General, who was only a subordinate authority, was not competent to dismiss him. Though the papers relating to the appointment are not on the record (as the suit has been disposed of on a preliminary point), it may be pointed out that the plaint alleged that the plaintiff had been appointed by the Inspector-General of Police and the written statement admitted the correctness of this allegation. It is common ground that the order of dismissal dated April 25, 1938, was passed by the Deputy Inspector-General of Police. The Provincial Government contested the suit, maintaining that the dismissal was valid and proper and that in any event the plaintiff had no remedy by way of suit. They asked for and obtained a preliminary decision on the question of the maintainability of the suit.

Founding himself on the declaration in s. 240(1) of the Constitution Act and the decision of the Judicial Committee in *Rangachari* v. *Secretary of State for India*(1) and *Venkata Rao* v. *Secretary of State for India*(2), that every person who holds any civil post under the Crown in India holds office during His Majesty's pleasure, the learned Subordinate Judge proceeded to hold that there was nothing in s. 243 of the Constitution Act, or in the provisions of the Indian Police Act (Central Act V of 1861) or the rules framed thereunder to restrict the Crown's unrestricted power of dismissal, so as to give the aggrieved officer a remedy by civil action. The appellate Court confirmed this decision, with the following observation: "Our interpretation of s. 243 of the Government of India Act is that if anything were contained in the Indian Police Act, then s. 240 of the Government of India Act would not apply to that extent. There is however nothing in the Indian Police Act which restricts the power of the Government to dismiss a police officer at its pleasure". It is apparent that the bearing of s.s. (2) of s. 240 of the Constitution Act on the case was not sufficiently realised in the Courts below, though the plaint and the grounds of appeal laid stress on the circumstance that the plaintiff had been dismissed not by the authority that appointed him, but by a subordinate authority. The argument before this Court mainly rested on this ground.

It may be convenient to mention at this stage how the order of dismissal came to be passed by the Deputy Inspector-General. Under s. 7 of the Indian Police Act (Central Act V of 1861), as it stood before its adaptation by the Adaptation of Indian Laws Order, 1937, the appointments of all police officers below a certain grade were (under such rules as the Local Government should from time to time sanction) made to rest with the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police; and the section further provided that these officers "may, under such rules as aforesaid, at any time

(1) (1936) 64 Ind. Ap. 40. (2) (1936) 64 Ind. Ap. 55.

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dismiss, suspend or reduce any police officer". Though a number of superior officers are specified in the section, the intention apparently was that the rules should provide for different grades of officers in the subordinate police service being appointed and dismissed by specified grades of officers in the superior ranks of the service and not that the power should be exercised by any of them indiscriminately. The rules in force in the North-West Frontier Province at the time of the plaintiff's appointment provided that a Sub-Inspector of Police could be dismissed by the Inspector-General of Police, and, as already stated, the appointment of the plaintiff was also made by the Inspector-General of Police. It is only as regards officers below a Sub-Inspector in rank that the rules provided for appointment and dismissal by officers subordinate in rank to the Inspector-General of Police. In 1934 however the Provincial Government modified these rules and provided that a Sub-Inspector could be dismissed by the Deputy Inspector-General. The rule did not differentiate between Sub-Inspectors appointed before the date of this modification and those who might be appointed later. We do not know whether at the same time a change was made to the effect that even the appointment of Sub-Inspectors could be made by the Deputy Inspector-General, though we have been told that some such rule is now in force in that Province. We presume that it was on the strength of the modified rule that the order dismissing the plaintiff was passed by the Deputy Inspector-General.

Sub-section (2) of s. 240 of the Constitution Act contains a statutory prohibition to the effect that no office-holder shall be dismissed from service by any authority subordinate to that by which he was appointed. Referring to the corresponding provision in s. 96-B of the Government of India Act, 1919, Their Lordships of the Judicial Committee observed in *Rangachari's Case* that the protection thus afforded to the office-holder could not be permitted to be destroyed by a delegation purporting to be made under the rules. Emphasizing the distinction between a safeguard enacted in the section itself

and one merely contained in the rules, Their Lordships expressed it as their clear opinion that the dismissal by an authority subordinate in rank to the officer who made the appointment "was by reason of its origin bad and inoperative". In this respect, the position under s. 240 of the Act of 1935 is, if anything, stronger than it was under the Act of 1919. In the latter, s. 96-B opened with the words "Subject to the provisions of . . . . rules made thereunder", and this afforded some room for the argument (accepted by the High Court at Madras in *Rangachari* v. *Secretary of State for India*(1)) that the declaration contained in the section could be qualified by the rules to be made under the Act. In the Act of 1935, s. s. (2) of s. 240 has been enacted in unqualified terms, and there is accordingly no scope for the contention that this provision can be qualified or taken away by statutory rules. Unless the plaintiff is for any reason precluded from relying on this declaration, his dismissal by the Deputy Inspector-General of Police must, on the authority of the decision in *Rangachari's Case*, be held to be inoperative as one "made by an official who is prohibited by statute from making it".

It was accordingly contended on behalf of the respondent that in view of the terms of s. 243 of the Constitution Act, the plaintiff was not entitled to rely upon s. 240. Section 243 provides that the "conditions of service" of the subordinate ranks of the police forces in India shall be determined by or under the Acts relating to those forces respectively, and the section opens with the words "Notwithstanding anything in the foregoing provisions of this chapter". The plaintiff's office admittedly fell under the category of subordinate ranks of the police force, and the rule authorising the dismissal of Sub-Inspectors by the Deputy Inspector-General of Police must have been made either under the Indian Police Act of 1861 or under the Devolution Rules (as appears from the High Court's Judgment in *Rangachari's Case*). We are however unable to hold that s. 243 of the Constitution Act has the effect of depriving the plaintiff of the benefit of s. s. (2) of s. 240. It

(1) (1933) I. L. R. 57 Mad. 857, at p. 864.

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was argued that the expression "conditions of service" in s. 243 was wide enough to comprehend a provision as to the authority competent to terminate an officer's tenure of office and that it was clearly the intention of the section that even this should be provided for by Indian legislation or rules made thereunder. It was also urged that the opening words "Notwithstanding anything in the foregoing provisions of this chapter" had the effect of *totally* excluding the application of ss. 240 and 241 to the subordinate ranks of the police force in India. These contentions do not seem to us warranted by the context.

The extent to which the opening words of s. 243 will exclude or modify the general words contained in the preceding section or sections in the chapter will depend upon the nature of the positive provision which follows, and it is only to the extent to which that positive provision is inconsistent with the preceding general provision that the operation of the general provision will be excluded. The real question therefore is whether the provision relating to "conditions of service" in s. 243 should be understood to include a rule relating to the authority by whom the Crown's pleasure to terminate an officer's tenure of his office is to be signified. It may be that as a matter of etymology, the expression "conditions of service" can be given a very comprehensive meaning; but, reading the four sections of the chapter together, it seems to us that the Act clearly intended to draw a distinction between the tenure on which an office is held on the one hand and the incidents relating to service in the office on the other and that the duration of the office as well as the authority by which the Crown's pleasure to terminate it is to be signified were treated as fundamental matters standing on a different footing from the incidents of service. The former were, in our opinion, regarded as of such importance as to justify a declaration by the Act itself, while the latter were considered to be a proper subject for the rules. This interpretation will be consistent with the grounds of the decision in *Rangachari's Case*. It seems to us clear that in ss. 241 and 242, the "conditions of

service" left to be provided for by rules could not have been intended to comprise the matters dealt with in s. ss. (1) and (2) of s. 240. It seems to us reasonable to hold that the same restricted meaning should have been intended when the same expression was used in s. 243.

We may also point out that the respondent's reading of s. 243 would also exclude the declaration in s.s. (1) of s. 240 as to these offices being held during His Majesty's pleasure. It may be that the Government will not be prejudiced thereby, because, even without the statutory declaration contained in s.s. (1), they may fall back on the common law rule (as stated in *Shenton* v. *Smith*(1) and *Gould* v. *Stuart*(2)) that all public servants hold office only during His Majesty's pleasure. But it does not seem to us reasonable to assume that when passing the Act of 1935 Parliament intended to place this principle on a statutory basis as regards some offices, but allowed it to remain on a common law or implied contract basis as regards the rest. It will be more reasonable to hold that the statutory declaration as to the nature of the tenure contained in s.s. (1) of s. 240 was intended to apply as much to the offices referred to in s. 243 as to the offices referred to in ss. 241 and 242; and for the same reason the protection afforded by s.s. (2) must equally be held to have been intended for the benefit of both. We see no justification in the reason of the thing for drawing a distinction for this purpose between one set of public officers and another.

The Advocate-General of India, to whom we had directed that notice of the proceedings should be given and to whose argument we are indebted, invited our attention to a decision of the High Court of Australia (*Fletcher* v. *Nott*(3)) in what he described as a similar case. That case no doubt bears some resemblance in its facts to the present case, but the Judgment affords little guidance on the point now under consideration. The main attempt of the appellant there was to bring his case under the exception recognised in *Gould* v. *Stuart*, but in this

(1) [1895] A. C. 229. (2) [1896] A. C. 575.

(3) (1938) 60 Com. L. R. 55.

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he did not succeed. The argument based upon the rank of the dismissing authority in that case was different from that arising here. There was an order of dismissal by the Commissioner of Police on the 2nd of December, 1936, and an order of dismissal by the executive government of the State on the 5th of February, 1937. Under the law of the State, the Commissioner (who had been substituted by an Act of the Legislature for the Inspector-General) was competent to dismiss the plaintiff. If the matter had rested with the dismissal by the Commissioner, the plaintiff would have had a right to appeal to a Board with a District Court Judge sitting on it. But the supervening dismissal by the executive government deprived him of this right of appeal, because no appeal was provided against a dismissal by the executive government. The plaintiff's complaint in the case therefore was against the dismissal by a higher authority and not against a dismissal by an authority subordinate in rank to the appointing authority. The Judges who dealt with this argument answered it by holding that the executive government had a power of dismissal independently of the provisions of the statute.

It was next contended on behalf of the respondent that as the plaintiff in the present case had appealed to the Inspector-General of Police against the Deputy Inspector-General's order dismissing him, the rejection of that appeal was equivalent to a dismissal from office by the Inspector-General himself and as such sufficient to satisfy s.s. (2) of s. 240 of the Act. We cannot accede to this contention. In theory as well as in practice, there is a well-marked difference between a decision given by an officer who acts in the consciousness that he is primarily responsible for the investigation and decision of the case and the act of one who is expected only to satisfy himself that another officer who had the primary responsibility has properly dealt with the case. The distinction seems to us one of substance and is not merely formal or technical. The pre-existing rules provided, and s. 241 of the Act of 1935 also contemplates, that appeals may be preferred by the dismissed officer, and it is common

knowledge that in most cases such appeals are in fact preferred. As these appeals would ordinarily be heard and decided by an authority superior in rank to the dismissing officer, the protection intended to be afforded by s.s. (2) of s. 240 would have been almost illusory if it were sufficient that, no matter by what authority the order of dismissal was made, the appellate authority was not subordinate in rank to the appointing authority. We are accordingly of opinion that the plaintiff is entitled to invoke the aid of s. s. (2) of s. 240 of the Constitution Act.

There is an alternative aspect of the case which also requires consideration, though, in the view we have above taken, we do not propose to deal with it at length. The plaintiff was appointed at a time when the Government of India Act of 1919 was in force. The provision in s. 96-B of that statute was not qualified by anything corresponding to s. 243 of the Act of 1935; nor was there anything in the police rules in force at the time authorizing his dismissal by an officer subordinate in rank to the Inspector-General. The change made in 1934 in the rules cannot prevail against section 96-B of the Government of India Act, 1919. Under s. 84 of that Act, any law made by any authority in British India would be void so far as it was repugnant to this provision of the statute. What then was the effect of the passing of the Act of 1935 on the plaintiff's position, even if it should be assumed that s. 243 of the new Act should be construed as excluding the application of s. s. (2) of s. 240 to the subordinate ranks of the Indian police? If the police rule of 1934 was void at its inception, so far as it authorized or could be construed as authorizing the dismissal of existing sub-inspectors of police by an officer lower in rank than the Inspector-General, could it be said that that rule became valid and operative as against them merely by reason of the enactment of s. 243 of the new Act? Article 15(2) of the Government of India (Commencement and Transitory Provisions) Order, 1936, dated 3rd July, 1936, provided as follows:—"Until other provision is made under the new Act, the conditions of service applicable to any person or any class of persons

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appointed, or to be appointed, to serve His Majesty in a civil capacity in India shall be the same as were applicable to that person or, as the case may be, to persons of that class immediately before the commencement of Part III of the new Act". Even if the expression "conditions of service" should be understood in the comprehensive sense contended for on behalf of the respondent, the plaintiff was, on April 1, 1937, entitled to the benefit of s. 96-B of the Government of India Act, 1919, notwithstanding the change made in the Police Rules in 1934, so far as the same was inconsistent with the provision in the Act, and nothing has since happened to deprive him of that benefit. Further, it may reasonably be contended that the benefit of s. 96-B of the Act of 1919 is a right or privilege which has been saved to the plaintiff by s. 38 of the Interpretation Act (52 and 53 Vict., ch. 63.), because there is nothing in the language of s. 243 of the Act of 1935 indicating an intention to deprive officers already in service of their existing rights and privileges. The Government of India (Adaptation of Indian Laws) Order, dated March 18, 1937, slightly recast the language of s. 7 of the Indian Police Act, 1861, but it does not seem to us to have affected the substance of the section. Even if it did, the argument based on "pre-existing" rights and privileges will still remain unaffected, because art. 11 of that Order saved them in terms almost identical with s. 38 of the Interpretation Act. In this connection, the Advocate-General of India drew our attention to the Judgment in *Reilly* v. *The King*(1); we find nothing in it adverse to the plaintiff's contention. Their Lordships only observed that, on the facts of that case, there was nothing to be saved by this principle of interpretation, because the pre-existing right itself was one "subject to be determined by the office being abolished by statute", and that was what actually happened.

It remains to consider what relief the plaintiff is entitled to, on the footing that the order of dismissal passed by the Deputy Inspector-General in April, 1938, was void and inoperative. The plaintiff

(1) [1934] A. C. 176.

claims that he is entitled to a declaration to that effect. The decision in *Rangachari's Case* seems to us to support this contention, though a declaration was in fact refused in that case on other grounds. The plaintiff is obviously not entitled to any relief by way of damages for wrongful dismissal. As the case has been disposed of by the Courts below on the preliminary issue, we are not in a position to say what other questions remain to be tried before the nature of the reliefs to be awarded to the plaintiff can be finally determined. It seems to us best in the circumstances to say that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void and inoperative, and that the Courts below were not justified in dismissing the suit as wholly unsustainable.

We accordingly set aside the decree of the Judicial Commissioner's Court and remit the case with a declaration that there shall be substituted for the decree appealed against a declaration in the terms above stated, with such further directions as the circumstances of the case may require in the light of the observations in this Judgment. The plaintiff will be entitled to the costs of this appeal. The Judicial Commissioner's Court will deal with the costs of the proceedings in the Courts below.

Case remitted

Agent for respondent: *B. Banerji.*

Agent for the Advocate-General of India: *K. Y. Bhandarkar.*

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[SIR MAURICE GWYER, C. J., SIR SRINIVASA VARADCHARIAR AND SIR MUHAMMAD ZAFRULLA KHAN, JJ.]

Government of India Act, 1935, ss. 205, 210 and 212—Withholding of certificate by High Court—Refusal cannot be questioned by Federal Court—Jurisdiction of Federal Court.

No appeal lies to the Federal Court in the absence of a certificate under s. 205 of the Constitution Act; a certificate is a condition precedent to every appeal.

The Federal Court cannot question the refusal of a High Court to grant a certificate or investigate the reasons which prompted the refusal, if the High Court has given none.

Pashupati Bharti v. *Secretary of State for India in Council*: [1939] F. C. R. 13, applied.

PETITION.

The Applicant in person. The application was heard *ex-parte*.

The facts and arguments in the case sufficiently appear from the Judgment.

Cur. adv. vult.

The Judgment of the Court was delivered by GWYER, C. J.—In this case the petitioner, Mr. K. L. Gauba, has filed a petition praying that the respondents, the Hon'ble the Chief Justice and other the Judges of the High Court of Judicature at Lahore, may be ordered to transmit the records of a certain case to this Court, and that this Court after perusing the same may adjudge the respondents to have acted in contempt of this Court, on the ground that they have refused to grant a certificate to the petitioner under s. 205 of the Constitution Act, and that the refusal was perverse, deliberate, illegal and oppressive, and for the purpose of

preventing the petitioner from having a hearing before this Court.

In view of the unusual nature of the petition and of the relief sought, we thought it right to invite the petitioner at a preliminary hearing to satisfy us that we had jurisdiction to entertain such proceedings. Mr. Gauba accordingly appeared before us and argued his case in person.

It appears that Mr. Gauba has for some time past been involved in litigation at Lahore of various kinds, including litigation connected with his insolvency. It is unnecessary to go into the details of this litigation, and it is sufficient to say that in the course of certain proceedings Mr. Gauba raised two points which according to him involved the interpretation of the Constitution Act; that is, whether a particular Special Bench of the High Court was validly constituted and whether a particular Judge was any longer qualified to sit upon the Bench at all. In each case the point of law raised by Mr. Gauba was decided against him and a certificate under s. 205 of the Act was refused. Such very briefly are the facts which have given rise to the present petition.

Mr. Gauba, who argued with ability and moderation, admitted that in face of the decisions of this Court in *Pashupati Bharti* v. *Secretary of State for India in Council*(1), *Lakhpat Ram* v. *Behari Lal Misir*(2), and *Kishori Lal* v. *Governor in Council, Punjab*(3), he could not seek to appeal from the refusal of the High Court to grant the certificate. But, he said, that does not conclude the matter; and he contended that if it is possible to show that the refusal was perverse or malicious, that is to say, that no reasonable man could have come to such a decision or that the refusal was inspired by wicked or improper motives, then the High Court has deliberately deprived this Court of a jurisdiction which Parliament has entrusted to it and is therefore guilty of a contempt of this Court.

(1) [1939] F. C. R. 13. (2) [1939] F. C. R. 121.

(3) [1940] F. C. R. 12.

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If we assume for the moment that a High Court can in such circumstances be guilty of a contempt of this Court, what follows? Even Mr. Gauba does not suggest punishment by fine or imprisonment; he would be content that the High Court should be served with an order to grant the certificate hitherto perversely or maliciously withheld. But what is that but to ask this Court to do by indirect means what it is admitted that it cannot do directly? The law of contempt of Court has at times been stretched very far in British India; but no one has ever contended that a Court could use its power to punish for contempt for the purpose of extending its jurisdiction in other matters.

This Court being the creation of statute, it is to the statute which created it that we must look for a definition of its jurisdiction, original or appellate. It is not suggested, nor could it be, that its original jurisdiction could be invoked for the purpose of Mr. Gauba's petition; and it is to the provisions relating to its appellate jurisdiction that reference must be made. These are contained in ss. 205 and 207 of the Act; but since s. 207 has no effect until the Federation is established, we are only concerned with s. 205. We have had occasion more than once to construe the provisions of s. 205, and we repeat what we have already said, that no appeal lies to this Court in the absence of the certificate prescribed by that section; a certificate is the necessary condition precedent to every appeal. We cannot question the refusal of a High Court to grant a certificate or investigate the reasons which have prompted the refusal: we cannot even inquire what those reasons were, if the High Court has given none. The matter is one exclusively for the High Court; and, as this Court observed in an earlier case, it is not for us to speculate whether Parliament omitted *per incuriam* to give a right of appeal against the refusal to grant a certificate or trusted the High Courts to act with reasonableness and impartiality: *Pashupati Bharti* v. *Secretary of State for India in Council*(1). The jurisdiction of the Court being thus limited by the statute in this way, how could it be extended by a

(1) [1939] F. C. R. 13, at p. 16.

High Court acting even perversely or maliciously in withholding the certificate?

Mr. Gauba however stated that he based his petition, not on s. 205, but on ss. 210 and 212, These sections do not help him. Section 210(1) requires all authorities, civil and judicial, to act in aid of the Federal Court. If, as is plain, they could not by giving it their assistance extend its jurisdiction, surely still less could they extend it by refusing that assistance, as Mr. Gauba in effect contends. Section 210(2) confers powers, not jurisdiction; and unless in any given case the Court has jurisdiction it has no powers to exercise. Mr. Gauba laid stress upon the words of the sub-section which refer to the investigation or punishment of contempt of court. This Court being a Court of Record has all the powers which belong to such a Court, including the power to punish for contempts of itself: and s. 210(2) does no more than give it the same machinery for making that power effective as the High Courts themselves possess. Section 212, which enacts that the law declared by this Court shall be recognized as binding on all Courts in British India, does not appear to us to have any relevance for the purpose of the present case.

The petition thus fails *in limine* and must be dismissed; but we think it right to add two things. It has not been necessary for us to go into all the facts alleged in the petition, but we must not be taken as assenting to the proposition that proceedings by way of contempt of court could ever be the appropriate remedy against a High Court, even if all the facts alleged were true. Secondly, whether the High Court was right or wrong in withholding the certificates (on which it is not for us to express any opinion), we see no reason to suppose that it did in fact act either perversely or maliciously in doing so; and it is only just to the High Court that we should state this.

Application dismissed.

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