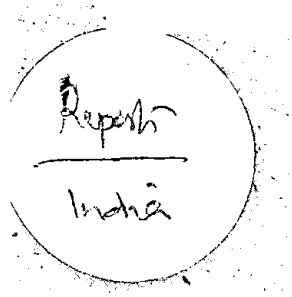
1942

The Federal Court Reports

1942—Vol. IV



The Federal Court Reports

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

1942—Vol. IV.

[1942] F.C.R.

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JUDGES

OF THE

FEDERAL COURT

DURING THE PERIOD OF THESE REPORTS.

THE HON'BLE SIR MAURICE GWYER, *Chief Justice of India.*
THE HON'BLE SIR SRINIVASA VARADACHARIAR.
THE HON'BLE SIR MUHAMMAD ZAFRULLA KHAN.
THE HON'BLE SIR JOHN BEAUMONT (*Acting Judge*).

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

MEMORANDA.

1942.

Apr. 21. THE HON'BLE SIR JOHN BEAUMONT, *Chief Justice of Bombay, was appointed an Acting Judge of the Federal Court and held the office up to 31st May.*

The mode of Citation of this the Fourth Volume of the Federal Court Reports, ending December 31st, 1942, will be as follows :—

[1942] F. C. R.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

HULAS NARAIN SINGH AND OTHERS

v.

THE PROVINCE OF BIHAR.

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Feb. 2, 3, 4, 5, 23.

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

Bihar Agricultural Income-tax Act, 1938 (Bihar Act No. VII of 1938)—Validity—Definition of "Income-tax"—Comparison with definition in Indian Income-tax Act, 1922 (Central Act No. XI of 1922)—Road Cess collected under Bengal Cess Act, 1800, for District Board—Whether assessed and collected by "Officers of the Crown as such"—Permanent Settlement Regulation (Regulation I of 1793) not an Act of Parliament—Powers of Provincial Legislature—Government of India Act, 1935, ss. 108(2)(a), 299(3), 311(2); Seventh Schedule, List I, entry No. 54, List II, entry No. 41.

The Bihar Agricultural Income-tax Act, 1938, is not *ultra vires* the Bihar Legislature on the ground only that it levies income-tax on "agricultural income" arising from permanently settled land.

The Indian Income-tax Act, 1922, *inter alia*, defines "agricultural income" as meaning "any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such". The corresponding definition in the Bihar Act was "any rent or income derived from land which is used for agricultural purposes and is either assessed to land revenue in Bihar or subject to a local cess or rate assessed and collected under any Bengal Act, or under any Bihar and Orissa Act, or under any Bihar Act":

Held, that most of the variations between the two definitions were either necessary variations or immaterial, though income from revenue-free land within municipal limits which are used for agricultural purposes may fall within the purview of the Bihar Act, while not falling within the definition of agricultural income in the Indian Income-tax Act. The definition in the Bihar Act must be so read as to confine its operation to income properly classified as agricultural income within the meaning of the Income-tax Act and in respect of which alone the Bihar Legislature was competent to legislate: *In re The Hindu Women's Rights to Property Act*, [1941] F. C. R. 12.

Cesses levied upon land outside municipal limits under the authority of the relevant Acts in force in Bihar are "assessed and collected by officers of the Crown as such", although the rate at which they are to be assessed and levied may be determined in each year by the District Board.

Regulation I of 1793 is not an Act of Parliament within the meaning of s. 108 (2) of the Constitution Act, and therefore, even if the Bihar Act were repugnant to the Regulation, it did not require the previous sanction of the Governor-General before it could be introduced in the Bihar Legislature.

The Bihar Act does not derogate from the assurances given to zamindars and landlords by Regulation I of 1793 on the ground only that it brings into charge for the purposes of agricultural income-tax all agricultural income derived from land situate in the Province of Bihar (subject to the exemptions set out in the Act), whether permanently settled or not: *Prabhat Chandra Barua* v. *King Emperor* (1930) I. L. R. 58 Cal. 430, applied.

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APPEAL from the High Court at Patna.

The appellants were zamindars holding a permanently settled estate in Bihar, and a notice was served on them by the agricultural income-tax authorities of the Province under ss. 17(2), 30 and 7 of the Bihar Agricultural Income-tax Act (Bihar Act No. VII of 1938) calling upon them to make a return of their agricultural income for the previous year in order that assessment to agricultural income-tax might be made upon them. The appellants then instituted a suit against the Province in which they challenged the validity of the Act and prayed for a declaration that it was *ultra vires* the Bihar Legislature. The suit was dismissed by the High Court on April 17, 1941. The plaintiffs appealed.

P. R. Das (*Raj Kishore Prasad* and *R. J. Bahadur* with him) for the appellants. Parliament has given power to the Bihar Legislature to impose taxes on agricultural income, but it has been careful to define the term "agricultural income", and if the Bihar Act has defined it in a manner different from the Constitution Act, the whole definition must go; and if the definition goes the whole Act goes too. Secondly, Regulation I of 1793 is in effect an Act of Parliament, and as the Bihar Act is repugnant to it and no previous sanction of the Governor-General was obtained, before it was introduced into the Bihar Legislature, the Act is *ultra vires*. They referred to *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada*(1), *Macleod* v. *Att.-Gen. for New South Wales*(2), *Gilbert* v. *Corporation of Trinity House*(3), and *Metropolitan Meat Industry Board* v. *Sheedy*(4).

Baldev Sahay, A.-G. of Bihar (*P. P. Varma* with him) for the respondents. Two points have been raised by the appellants. So far as their second point is concerned, the question of repugnancy will not arise, unless Regulation I of 1793 is held to be an Act of Parliament. As for the first point, according to the Constitution Act, agricultural income means agricultural income as defined by the Indian Income-tax Act, and there is no essential difference between the definition in the Bihar Act and that in the Indian Income-tax Act. There has been no change in meaning or extension of the scope of taxable income. It is conceded that the Bihar Legislature has no power to impose taxes upon income from land used for agricultural purposes within the municipal limits and to that extent the definition of the Bihar Act is wider than the definition of the Indian Income-tax Act; but this is of no importance in this case because in the plaint there is no mention of the existence in the Province of Bihar of any such land. In any event the only reasonable construction of the definition is so to interpret it as to limit its operation to income in respect of which

(1) [1937] A. C. 377.
(2) [1891] A. C. 455.
(3) (1886) 17 Q. B. D. 795.
(4) [1927] A. C. 899.

the Bihar Legislature was competent to legislate: *Hindu Women's Rights to Property Act*(1).

The appellants' main contention with regard to the definition of the Bihar Act was that it essentially differed from the definition of the Indian Income-tax Act inasmuch as under the Bihar Act, unlike the Indian Income-tax Act, so far as the cess was concerned, it was not assessed by the Collector but by the District Board, and the Collector functioning under the Cess Act was not an officer of the Crown as such. The reply is that the scheme of the Cess Act makes it clear that in this respect there is no difference in effect between the two definitions, because under the Cess Act also the actual assessment and collection are made by the Collector, although the rating is done by the District Board, which is a different process altogether according to the scheme of the Act; see ss, 38, 40, 41, 98, 105(b) and 109 of the Bengal Cess Act.

It is impossible to conceive that the Collector in assessing and collecting the cess is not acting as an officer of the Crown as such but as an agent of the District Board. There is no other capacity in which the Collector could act except as an officer of the Crown. He is not responsible to the District Board nor is he under their supervision, but under the supervision of higher government authorities.

Regulation I of 1793 is not an Act of Parliament, and there is no substance in the contention that, as it was enacted by the Governor-General in Council in pursuance of the directions given in Pitt's India Act, it became part of the latter Act. Regulation I of 1793 was enacted by the Governor-General in Council, who was empowered by s. 36 of the East India Company Act, 1773, to make and issue rules, ordinances and regulations for good government. The Regulation was an enactment of a subordinate legislative authority which derived its powers from Parliament, but the enactments of such an authority cannot for that reason only be called Acts of Parliament. Acts of Parliament are those Acts which are passed by both the Houses and receive the assent of His Majesty. Even assuming that Regulation I of 1793 was a part of Pitt's India Act, since that Act has been repealed by the Government of India Amendment Act, 1916, without any saving or reservation, the argument has no force at all. It may also be contended that, even if Regulation I of 1793 were an Act of Parliament, it was not an Act "extending to British India" within the meaning of section 108 (2)(*a*) of the Constitution Act, because the Regulation does not apply to the whole of British India but only to the Provinces of Bengal, Bihar and Orissa.

[At this stage the Court announced that they were unable to accept the contention that Regulation I of 1793 was an Act of Parliament and that therefore it was not necessary to discuss

(1) [1941] F. C. R. 12.

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the question whether the Bihar Act repealed or was repugnant to it].

P. R. Das in reply.

The Judgment of the Court was delivered by

ZAFRULLA KHAN J.—This is an appeal from a judgment of a Special Bench of the High Court of Judicature at Patna, which was constituted to hear a suit on the Original Side, the suit having been filed in the first instance in the court of the First Subordinate Judge, Patna, and subsequently transferred by the High Court to its own file for hearing and disposal. The appellants are zamindars holding a permanently settled estate in the district of Patna in the Province of Bihar. On the 17th March 1939, a notice was served on them by the agricultural income-tax authorities of Bihar under ss. 17(2), 30 and 7 of the Bihar Agricultural Income-tax Act (Bihar Act No. VII of 1938) (hereinafter referred to as the impugned Act) calling upon them to make a return of their agricultural income for the previous year in order that an assessment to agricultural income-tax might be made upon them. On the 7th October 1939, they instituted this suit against the Province of Bihar calling in question the validity of the impugned Act and praying for a declaration that the Act was *ultra vires* of the Bihar Legislature and that the notice served upon them was invalid and ineffective. The plaint also referred to an amending Act (Bihar Act No. V of 1939) but as nothing turns on the provisions of that Act, it is unnecessary to refer to it separately in this judgment.

The suit was dismissed by the High Court on the 17th April 1941, and the plaintiffs have come up in appeal to this Court.

The grounds set out in the plaint, on the basis of which the validity of the impugned Act is questioned, are—

(a) that the impugned Act repeals, amends or is repugnant to an Act of Parliament extending to British India within the meaning of s. 108 (2)(*a*), or a Governor-General's Act within the meaning of s. 108(2)(*b*) of the Constitution Act, that is to say, Regulation I of 1793 (the Bengal Permanent Settlement Regulation), and therefore required the previous sanction of the Governor-General, which was not obtained;

(b) that it constitutes a direct invasion of the Permanent Settlement Regulation inasmuch as it seeks to augment the *jama* on permanently settled estates which the Regulation had made unalterable for ever, and therefore required the previous sanction of the Governor under s. 299(3) of the Constitution Act, which had not been obtained; and

(c) that entry No. 41 in List II of the Seventh Schedule to the Constitution Act was intended to be made applicable to agricultural incomes derived from estates settled otherwise

than under the Permanent Settlement Regulation, and that the impugned Act therefore cannot operate in respect of incomes derived from permanently settled estates.

In the course of the argument before the High Court objection was also taken to the validity of the impugned Act on the ground that the definition of "agricultural income" adopted by the impugned Act was in some respects wider and in other respects narrower than the definition of that expression imported by s. 311(2) of the Constitution Act, and that consequently the whole of the impugned Act was invalid. It would be convenient to deal with this last matter first.

By s. 311(2) of the Constitution Act "agricultural income", unless the context otherwise requires, means agricultural income as defined for the purposes of the enactments relating to Indian income-tax. To appreciate the argument based upon the difference in the definition of "agricultural income" in s. 2(1) of the Indian Income-tax Act (Central Act No. XI of 1922) and in s. 2(a) of the impugned Act, we set out the former showing the alterations made in it by the latter. The words in brackets are omitted in the Bihar Act and those in italics added.

(1) "Agricultural income" means—

(a) any rent or [revenue] *income* derived from land which is used for agricultural purposes, and is either assessed to land revenue [in British India] *in Bihar* or subject to a local *cess or* rate assessed and collected [by officers of the Crown as such] *under any Bengal Act, or under any Bihar and Orissa Act, or under any Bihar Act.*

(b) any income derived from such land by

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);

[(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent in kind, of any land with respect to which any operation mentioned in sub-clauses (ii) and (iii) of clause (b) is carried on:

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of rent or revenue or the cultivator or the receiver of rent in kind by reason of his connexion with the land requires as a dwelling-house, or as a store-house, or other out building.]

It will be observed that the whole of paragraph (c) has been omitted in the impugned Act.

It has been brought to our notice that by Bihar Act No. I of 1942, paragraph (a) of the definition of "agricultural income" in the impugned Act has been so amended as to bring it into complete verbal conformity (except for the necessary

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distinction between land in British India and land in Bihar) with the definition of that expression in the Income-tax Act. This however does not affect the determination of the question that arises for decision in the present case.

It was argued before the High Court that the omission of paragaph (c) of the Income-tax Act definition rendered the impugned Act invalid, as the definition in that Act was narrower than that laid down in the Income-tax Act. This contention was not pressed before us and the short answer to the argument urged before the High Court is that entry No. 41 of List II empowers the Provincial Legislature to make laws with respect to "taxes on agricultural income" generally; and a Provincial Legislature is clearly entitled to impose a tax on some categories of agricultural income and not impose it on others.

The contention advanced before us with reference to the departures made in the impugned Act from the language of paragraph (a) of the definition of "agricultural income" in the Income-tax Act may be summarized as follows. The definition in the Income-tax Act requires that the land should be subject to a local rate "assessed and collected by officers of the Crown as such". Local cesses and rates imposed upon land in Bihar under the authority of the various statutes in operation in that Province (so runs the argument), even where they are "assessed and collected" by officers of the Crown, are not assessed and collected by officers of the Crown "as such", but only as delegates and functionaries of the local bodies for whose benefit the cess or rate is imposed and collected. Hence the definition of "agricultural income" adopted by the impugned Act embraces rent or income derived from agricultural land subject to a local cess or rate even when the cess or rate is not assessed and collected by officers of the Crown as such. That income accordingly is not "agricultural income" within the meaning of the definition in the Income-tax Act, and the departure from that definition renders the impugned Act invalid. It was conceded that the variations from "rent or revenue" to "rent or income" and from "local rate" to "local cess or rate" were immaterial, and that the restriction of the definition in the impugned Act to rent or income derived from land in Bihar was necessary.

It is common ground between the parties that local cesses or rates imposed upon lands within municipal limits which are used for agricultural purposes are not assessed and collected in the Province of Bihar by officers of the Crown as such and that the income, if any, derived from such of these lands as are revenue free would fall within the purview of the impugned Act, though such income is not "agricultural income" within the definition of that expression in the Income-tax

Act. To this extent therefore it is admitted that the definition of "agricultural income" in the impugned Act is wider than the definition of that expression in the Income-tax Act. That being so, it was contended that the whole of the impugned Act must be held to be *ultra vires* of the Provincial Legislature.

There is no mention in the plaint of the existence in the Province of Bihar of revenue-free land within municipal limits which is used for agricultural purposes and is assessed to a local rate. No evidence was led in the suit, as it was assumed that after certain admissions had been made on behalf of the defendant, the remaining questions that arose for decision were all pure questions of law. The first answer to the appellants' contention on this point therefore is that the existence of any such land in the Province of Bihar is not established and we are unable to hold that in fact the definition of "agricultural income" in the impugned Act embraces within its ambit anything which would not be covered by the definition of that expression in the Income-tax Act. Nor would the Provincial Legislature consider it necessary to provide for the specific exclusion of such land from the definition if no such land was in fact in existence.

Assuming however the existence of such land in the Province of Bihar the most reasonable construction of sub-paragraph (1) of the definition in the impugned Act would make it read as follows:—

(1) any rent or income derived from land which is used for agricultural purposes, and is

(a) either assessed to land revenue in Bihar, or

(b) subject to a local cess or rate assessed and collected by officers of the Crown as such under any Provincial Act in force in Bihar, or

(c) subject to a local cess or rate assessed and collected by any municipality under any Provincial Act in force in Bihar.

On this construction it is obvious that paragraph (c) would be inoperative inasmuch as it relates to income which would not be "agricultural income" as defined by the Income-tax Act. This however would not affect the validity of the rest of the Act, if it is found to have been otherwise validly enacted.

The appellants relied upon the *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada*(1) in support of the proposition that the inclusion in s.s. (1) of that part of the definition which we have set out above as paragraph (c) renders the whole of the impugned Act invalid. In that case the validity of a statute of the Dominion Parliament of Canada was questioned on the ground that the statute in substance invaded the provincial field. It was contended on behalf of the Dominion

(1) [1937] A. C. 377.

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that such parts of the statute as were within the competence of the Dominion Parliament should be upheld and should be separated from such of the provisions of the statute as had been held to be beyond such competence. Their Lordships held that the whole texture of the Act was inextricably interwoven and that the portions within the competence of the Dominion Parliament could not be contemplated as existing independently of the rest of the Act which had been found to be beyond such competence. They were also of the opinion that as the main legislation was invalid as being in pith and substance an encroachment upon provincial rights, the rest of the Act must fall with it as being in part ancillary to it. We are here faced with no such contingency. The definition of "agricultural income" in the impugned Act does not in terms include income derived from land situate within a municipality, and paragraph (c) of s.s. (1) of the definition as construed by us above is a very minor part of it. The definition in the impugned Act should, in our opinion, be so read as to confine its operation to income which can be properly classified as "agricultural income" within the meaning of the definition in the Income-tax Act, and in respect of which alone the Provincial Legislature was competent to legislate: see the recent opinion of this Court *In re The Hindu Women's Rights to Property Act*(1). The relevant authorities have been noticed at length in that judgment and it is unnecessary for us to refer to them here.

In his reply counsel for the appellants conceded that as the definition in the impugned Act did not in terms specify income derived from land situate within municipal limits the case was governed by the principle of *Macleod* v. *Att.-Gen. for New South Wales*(2) and that he could not therefore contend any longer that the whole of the impugned Act was rendered invalid on account of this part of the definition being wider than the definition in the Income-tax Act.

Counsel's main contention on this part of the case was that the road cess levied even upon land outside municipal limits was not assessed by the Collector but by the District Board, the latter not being an officer of the Crown. On that basis he argued that as the definition in the impugned Act did not specify that the cess or rate should be assessed and collected by officers of the Crown as such, this part of the definition also travelled beyond the scope of the definition in the Income-tax Act inasmuch as it embraced a wider category of land than was contemplated in that definition. It was argued on behalf of the respondent that land in Bihar outside municipal limits is subject to local cesses under the Bengal Cess Act (Bengal Act No. IX of 1880), as amended and modified by subsequent Bihar legislation, and under the provisions of this

(1) [1941] F. C. R. 12. (2) [1891] A. C. 455.

Act as so amended and modified, the road cess leviable is assessed and collected not by the District Board but by the Collector as such. The Collector is admittedly an officer of the Crown, and therefore the definition in the impugned Act is in this respect identical in its effect with the definition in the Income-tax Act. We consider that this contention of the respondent is well founded.

The whole scheme of the Bengal Cess Act makes it quite clear that, though the general rate of the road cess is determined in each year by the District Board, the actual assessment and collection are made by the Collector. Section 38 says: "The road cess for each year shall be assessed and levied in each district as provided in s. 6, and (subject to the maximum rate mentioned in that section) at such rate as may be determined for such year by the District Board". This section clearly treats the assessment and levy of the cess as processes distinct from the determination of the general rate which is to be done by the District Board. Assessment may be described as comprising the process of valuation of land and the determination in respect of each estate of the amount of cess payable by the estate on the basis of the valuation at the rate determined by the District Board. The valuation of land is dealt with in Chapter II of the Act, and has throughout to be carried out by the Collector. On the basis of this valuation the determination of the amount in respect of each estate has also to be done by the Collector (s. 38). It is not disputed that the cess is collected by the Collector. There can therefore be no doubt that the road cess leviable under the Bengal Cess Act is assessed and collected by the Collector. The question, however, is whether the Collector in performing these functions acts as an officer of the Crown as such or merely as a delegate or functionary of the District Board. In this connexion our attention was drawn to s. 9 of the Cess Act which provides that the proceeds of the road cess in each district shall be paid into the District Road Fund of such district as thereinafter provided. It was said that as the cess is levied for the benefit of the District Board and is to be paid into the District Road Fund and not into the provincial exchequer, the Collector in assessing and collecting the cess must be presumed to be acting as the agent of the District Board and not as an officer of the Crown.

We do not think that the capacity in which the Collector assesses and levies the cess can in any manner be affected by the destination of the proceeds of the cess when collected. The definition in the Income-tax Act itself refers in this context to a "local rate" which clearly implies that rates to be levied for the benefit of a local body were intended to be comprised in that definition. Counsel for the appellants was unable to suggest any "local rate" other than those levied for the benefit of local bodies. "Collector" is defined for the purposes of the

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Act in s. 4, and in effect means the officer in charge of the revenue administration of a district, and includes any person specially invested with the powers of a Collector for the purposes of the Act. He is ordinarily an officer of the Indian Civil Service or a senior officer of the Provincial Civil Service, and is admittedly an officer of the Crown.

There can be no doubt that the duties of assessment and collection are part of a Collector's official duties under the Cess Act and in performing these duties he acts as an officer of the Crown. He is subject in the performance of them to the general control and supervision of the Commissioner and of the Board of Revenue (s. 105), and appeals from his orders lie to the Commissioner (ss. 102, 103 and 104). He is not in any manner subject to the control of the District Board.

Our conclusion is reinforced by the consideration that the Cess Act provides for the levy and collection of two cesses, a road cess and a public works cess (s. 5), and whereas the proceeds of the road cess are to be paid into the District Road Fund (s. 9) the proceeds of the public works cess are to be paid into the public treasury (s. 10). The general rate of the public works cess for each year is determined by the Provincial Government (s. 39). The provisions with respect to the assessment and collection of both cesses are, however, the same, and so also the provisions with respect to the powers and authority of the Collector. It cannot be denied that the Collector in assessing and collecting the public works cess does function as an officer of the Crown as such. That being so, it would not be reasonable to hold that in respect of the assessment and collection of the road cess under the same statutory provisions he functions in any other capacity.

Gilbert v. *Corporation of Trinity House*(1) and *Metropolitan Meat Industry Board* v. *Sheedy*(2) which were cited to us do not seem to give any support to the appellants. The question at issue in the first case was whether the Corporation of Trinity House and in the second whether the Metropolitan Meat Industry Board were or were not servants of the Crown. The question that we have to consider here is not whether the District Board or its officers can be regarded as officers of the Crown, but whether the Collector, who is admittedly an officer of the Crown, acts as such in the performance of the duties assigned to him under the Cess Act. We have no doubt that he does.

It was also argued that by virtue of s. 100 of the Cess Act which authorizes the Board of Revenue to invest at any time any person with the powers of a Collector, a person who is not the officer in charge of the revenue administration of a district may be entrusted with the assessment and collection

(1) (1886) 17 Q. B. D. 795.

(2) [1927] A. C. 899.

of cesses under the Act. That undoubtedly is so, but s. 100 itself provides not only that such a person must be appointed by the Board of Revenue but that the powers of a Collector are to be exercised by him under the control and supervision of the Collector, or independently of such control and supervision as the Board may direct All his proceedings are subject to the general control and supervision of the Commissioner and of the Board of Revenue (s. 105), and appeals from his orders would lie to the Collector or the Commissioner (ss. 102, 103 and 104). For the purposes of the Act he is in exactly the same position as a Collector and would act as an officer of the Crown as such.

We now turn to the contention that since the impugned Act was repugnant to an Act of Parliament extending to British India within the meaning of s. 108(2) (*a*) of the Constitution Act, that is Regulation I of 1793, it required the previous sanction of the Governor-General before it could be introduced into the Bihar Legislature, and that as such sanction was not obtained, it is altogether invalid and ineffective. It was argued that the Governor-General in Council, who purported to enact this Regulation, possessed no legislative authority in 1793, and the Regulation was enacted by him as a delegate of the British Parliament by virtue of s. 39 of 24 Geo. III c. 25, commonly known as Pitt's India Act, and it thus became a part of that Act.

In elaborating this part of his case counsel cited passages from authoritative books dealing with the Permanent Settlement such as Field's Regulations of the Bengal Code, Phillips' Land Tenures of Lower Bengal, Cowell's History and Constitution of Courts and Legislative Authorities in India, and Harington's Analysis. He also quoted from the Minutes of Lord Cornwallis and Sir John Shore, and drew our attention to various sections of 13 Geo. III c. 63, commonly known as the Regulating Act, and 24 Geo. III c. 25. We do not think that for the determination of the question under consideration we are called upon to enter into a detailed examination of these authorities and statutes. It is sufficient to note that after the East India Company had obtained the Diwani of the Provinces of Bengal, Bihar and Orissa in 1765, annual settlements of the *jama* were the rule and settlements for any longer period the exception. These annual settlements caused great hardship to and resulted in grave dissatisfaction among the landholders and zamindars of these Provinces. In many cases they were dispossessed of their estates as a consequence of failure to accept a settlement or of default in the payment of the *jama* settled. The situation deteriorated to such a degree that Parliament was compelled to take note of it, and s. 39 of Pitt's India Act laid a duty upon the Court of Directors of the Company to carry out an investigation into

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the complaints of landholders and zamindars and effectively to redress the same, and also to give orders and instructions to the several Governments and Presidencies in India for the settling and establishing "upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall in future be rendered and paid" to the Company. Lord Cornwallis was sent out as Governor-General with instructions to carry out the investigation and to afford the necessary relief and redress. Elaborate inquiries were made and Regulations were promulgated in 1789 and 1790, which converted the then current Settlement into a Decennial Settlement. It was also notified that the *jama* assessed under these Regulations would continue after the expiration of ten years and would remain unalterable for ever, provided this course should meet with the approval of the Court of Directors. This approval was forthcoming and the *jama* assessed under these Regulations was declared fixed for ever by a Proclamation of the Governor-General, dated the 22nd March 1793. This Proclamation was subsequently enacted into Regulation I of 1793 on the 1st May of that year, and was given force and effect from the 22nd March previous, the date of the Proclamation. A number of other Regulations were enacted on the same date all of which, including the Permanent Settlement Regulation, were formed into a Code and the courts of justice in the Provinces of Bengal, Bihar and Orissa were directed to regulate their decisions by the rules and ordinances contained in it (See s. 8 of 37 Geo. III c. 142, East India Company Act, 1797).

The Regulation purports to be enacted by the Governor-General in Council, who by virtue of s. 36 of the Regulating Act had authority to "make and issue rules, ordinances and regulations for the good order and civil Government of the Company's settlement at Fort William and other factories and places subordinate or to be subordinate thereto", subject to the conditions and restrictions prescribed in that section. There was some argument at the Bar with regard to the meaning to be attached to "places subordinate or to be subordinate thereto", but we do not think that it is necessary for us to come to a definite conclusion upon that point. We may, however, invite attention to s. 7 of the Regulating Act which made provision for the appointment of a Governor-General and four Councillors in whom "the whole civil and military Government of the said Presidency and also the ordering, management and government of all the territorial acquisitions and revenues in the Kingdoms of Bengal, Bihar and Orissa" was vested. It was argued on behalf of the respondent that the territorial limits of the legislative authority conferred upon the Governor-General by s. 36 of the Act were the same as

those of the executive authority conferred upon him by s. 7. If that was indeed so, as well may have been the case, the Governor-General in Council possessed adequate legislative authority for the enactment of the Regulation. But even if there were some doubt as to the extent of his legislative authority it must be presumed to have been set at rest by the direction given that all courts in these Provinces must give effect to the provisions of these Regulations (see s. 8 of 37 Geo. III c. 142). In either case the Regulation was an enactment of a subordinate legislative authority which no doubt derived its own authority from an Act of Parliament, but whose enactments did not thereby become Acts of Parliament.

Reliance was placed upon the observations of Sir Richard Garth C. J. in *Empress* v. *Burah and Book Singh*(1) and upon the judgment of the Privy Council in the same case on appeal reported as *The Queen* v. *Burah*(2). In that case Their Lordships had to deal with a question which bears no analogy whatsoever to the question now before us. An Act of the Indian Legislature passed in 1869 had vested in the Lieutenant-Governor of Bengal the power to apply certain provisions of the Act to certain areas at such time as he might think fit. Their Lordships held that the Act of 1869 was a familiar instance of conditional legislation and that the vesting of certain powers in the Lieutenant-Governor did not amount to the creation of a new legislative authority.

We are unable to accept the contention that s. 39 of Pitt's India Act was conditional legislation within the meaning of that expression as used by Lord Selborne in delivering Their Lordships' judgment in *The Queen* v. *Burah*. Section 39 fulfilled its purpose by giving directions to the Court of Directors on certain matters and left it to that body to give effect to those directions through the Governments and Presidencies in India, which were no doubt to employ their own executive and legislative machinery for the purpose. The Permanent Settlement Regulation was thus an Indian law enacted like any other Indian law by the legislative machinery then in operation in India. In our opinion the expression "Act of Parliament" has been used in s. 108(2) (*a*) of the Constitution Act in the sense of enactments actually passed by Parliament and not of laws passed by a subordinate legislative body under authority conferred upon it by an Act of Parliament. The Regulation stands in this respect on no different footing from any other Indian enactment.

The Queen v. *Walker*(3), *Powell* v. *Apollo Candle Company*(4); *Willingale* v. *Norris*(5); *National Telephone Company* v. *Baker*(6), were also cited in support of the appellants'

(1) (1877) I.L.R. 3 Cal. 63, at p. 140.
(2) (1878) 5 Ind. Ap. 178.
(3) (1875) 10 Q. B. 355, at p. 358.
(4) (1885) 10 App. Cas. 282, at p. 291.
(5) (1909) 1. K. B. 57, at p. 64.
(6) (1893) 2 Ch. 186, at p. 203.

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contention. Broadly speaking the proposition to be extracted from these cases is that where in pursuance of an Act of Parliament by-laws or regulations are made, the sanction behind these by-laws or regulations is the Act of Parliament under the authority of which they are framed. That applies in the last resort to the legislative acts of all subordinate Legislatures.

The contention that Regulation I of 1793 had somehow become textually a part of Pitt's India Act was met by the retort that the Act had been repealed *in toto* by the Government of India (Amendment) Act, 1916 (6 & 7 Geo. V, c. 37), s. 7(2), read with the 2nd entry in the Second Schedule, without any saving or reservation, and was no longer in operation when the impugned Act was passed.

It was argued on behalf of the respondent that even assuming that Regulation I of 1793 was an Act of Parliament, it was not an Act "extending to British India" within the meaning of s. 108 (2) (*a*) of the Constitution Act, inasmuch as "British India" means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces [s. 311 (1)], and the Regulation applies only to the Provinces of Bengal, Bihar and Orissa. In the view taken by us of the meaning of the expression "Act of Parliament" in s. 108 (2) (*a*), it is not necessary for us to decide whether "extending to British India" in that section means extending to the whole of British India, or extending to the whole or any part of British India, and we accordingly express no opinion on this point.

When counsel for the appellants had concluded his reply on this part of the case, we intimated to him that we were unable to accept his contention that Regulation I of 1793 was an Act of Parliament, within the meaning of s. 108 (2) (*a*) of the Constitution Act. He admitted that in that case the further question, whether the impugned Act was or was not repugnant to the Regulation, did not arise; and that therefore he did not propose to address us on that point.

The other points argued before the High Court having reference to the validity of the impugned Act, *e.g.*, that the Regulation was a Governor-General's Act, that the Governor's consent under s. 299 (3) of the Constitution Act was necessary, and that the Governor should have reserved the Bill for consideration by the Governor-General, were not raised before us.

It was finally argued on behalf of the appellants that in any event the impugned Act cannot on its true construction apply to income derived from permanently settled estates, and that its operation should therefore be confined to income from estates settled otherwise than under the Permanent Settlement Regulation. This contention is based on the rule of construction that general words in a later statute should not be held

to repeal earlier legislation upon a particular matter as laid down by Lord Selborne in *Seward* v. "*Vera Cruz*"(1), which finds support in other judgments of the House of Lords as well as of the Judicial Committee of the Privy Council. Before, however, any question of the applicability of this rule can arise, it must be found that both pieces of legislation deal with the same subject-matter. We are unable to hold that that condition is satisfied in this case. Regulation I of 1793 relates to the subject of the *jama* to be settled in respect of each estate, while the impugned Act operates upon the net income derived from land used for agricultural purposes. The *jama* is imposed directly upon the land, and is, so to speak, attached to the land, while income-tax imposed upon the net income of an individual derived from land used for agricultural purposes has no direct reference to the *jama* imposed upon that land whether under a permanent or a non-permanent settlement.

Sections 3 to 5 of the impugned Act bring into charge for the purposes of the agricultural income-tax all agricultural income derived from land situated in the Province of Bihar, subject to the exemptions set out in the Act; but we are clearly of the opinion that the Act does not thereby in any manner whittle down or derogate from the assurances given to zamindars and landholders by Regulation I of 1793. This question was dealt with by Their Lordships of the Privy Council in *Prabhatchandra Barua* v. *King Emperor*(2), where Lord Russell of Killowen, who delivered the judgment of Their Lordships observed: "In Their Lordships' opinion, while the Regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the *zamindari* income, they contain no promise that a *zamindar* shall in respect of the income which he derives from his *zamindari* be exempt from liability to any future general scheme of property taxation, or that the income of a *zamindari* shall not be subjected with other incomes to any future general taxation of incomes" (p. 447). With these observations we find ourselves in respectful agreement.

It was contended that the impugned Act was not a general measure of taxation of incomes but was confined to agricultural income which in the Province of Bihar was derived mainly from permanently settled estates. This contention loses sight of the fact that owing to the division of the fiscal field between the Centre and the Provinces, which is an essential feature of the Constitution Act, the power to levy income-tax has been parcelled out between the Centre and the Provinces, the Centre having authority to legislate with regard to "taxes on income other than agricultural income" (entry No. 54 of List I) and the Provinces having authority to legislate with

(1) (1884) 10 App. Cas. 59.

(2) (1930) I L. R. 58 Cal. 430.

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regard to "taxes on agricultural income" (entry No. 41 of List II). These two entries are complementary to each other, and there can be no doubt that the tax imposed by the impugned Act is, within the limits of the power vested in the Provinces, a general measure of property taxation.

Reference may also be made to *Nova Scotia Steel and Coal Company* v. *Minister of Finance and Customs*(1). The appellants in that case carried on in Newfoundland the business of exporting ore. Under an agreement with the Government, confirmed by a statute of 1910, they paid a tax on each ton of ore exported by them, and were exempted from paying any further charge or tax "upon or in respect of the said ore". By the Newfoundland Business Profits Tax Act, 1917, an annual tax was imposed on the net profits of businesses. The appellants claimed that the agreement of 1910 exempted them from paying the profits tax. Their Lordships of the Privy Council held that the tax upon profits was not a tax "upon or in respect of" the ore exported, and that the appellants were liable to pay it. Lord Sumner delivering the judgment of Their Lordships said: " . . . but in general a tax on profits and an export tax on commodities are different imposts, financially and economically, and cannot be identified even by the indefinite expression 'in respect of'. Taxes or charges 'in respect of' the ore, to which the provisions of the earlier Act would apply, may easily be suggested, as for example stamp duties or registration fees. These provisions can therefore be satisfied without extending them to the Business Profits Tax, and no question arises of reading two Acts together, so as to involve the subordination of the terms of the one to the provisions of the other, because both apply to the same subject-matter, the one generally and the other particularly " (p. 179).

The contention that the impugned Act should be so construed as not to affect agricultural income derived from permanently settled estates overlooks the contingency, which is bound to arise in at least some Provinces, that if this argument were to prevail, agricultural income derived from estates settled otherwise than under the Permanent Settlement Regulation would be equally exempt from liability to agricultural income-tax during the period of a current settlement, and entry No. 41 in List II would in such Provinces be reduced to a nullity. We have in mind Provinces where the period of a settlement is by legislation fixed not permanently but for a number of years. For instance, by virtue of s. 53A of the Punjab Land Revenue Act (Central Act No. XVII of 1887), the normal period of time for which an assessment under the Act shall remain in force is forty years. Could it be argued

(1) [1922] 2 A. C. 176.

that Provincial legislation imposing agricultural income-tax in that Province should not operate in respect of agricultural income derived from estates assessed under the provisions of the Punjab Land Revenue Act till after the expiry of the period of the then current settlement? This would leave practically nothing on which such a measure could operate and we could not accept a construction of the provisions of a statute which would lead to such a result, unless the language employed by the legislature left us no possible alternative.

For these reasons we are of the opinion that the Bihar Agricultural Income-tax Act (Bihar Act No. VII of 1938) is not *ultra vires* of the Bihar Legislature and was validly enacted. The appellants are bound to obey the notice served upon them on the 17th March, 1939, by the Agricultural Income-tax Officer, Patna, under ss. 17(2), 30 and 7 of the Bihar Agricultural Income-tax Act. Their suit was rightly dismissed by the High Court and this appeal is dismissed with costs.

Appeal dismissed.

Agent for Appellants: *Tarachand Brijmohanlal.*

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

BHOLA PRASAD

v.

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Feb. 9, 10; Mar. 4.

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

Bihar Excise (Amendment) Act, 1940 (Bihar Act VIII of 1940)—Amendment of s. 19(4) of Bihar and Orissa Excise Act, 1915 (B. & O. Act No. II of 1915)—Validity —Government of India Act, 1935, ss. 100(3), 108, 207 (1), Seventh Schedule, List II, entry No. 31—Powers of Provincial Legislature—Regulation of sale of intoxicating liquors—Governor-General's Acts—Meaning of.

By a notification, dated the 26th March 1939, under s. 19(4) of the Bihar and Orissa Excise Act, 1915, the Government of Bihar purported to prohibit the possession by any person, of country liquor and of certain drugs in the areas specified in the notification. In an appeal, *Kanhai Sahu* v. *King-Emperor* (1), arising out of a prosecution and conviction under the notification, the High Court at Patna held that the Provincial Legislature had no power, as the law then stood, to make a notification prohibiting the public generally within the Province or any part thereof from possessing intoxicating liquor. In consequence of this decision the Governor of Bihar in exercise of the powers he had assumed by his Proclamation under s. 93 of the Constitution Act, enacted a Governor's Act, the Bihar Excise (Amendment) Act, 1940, which amended s. 19(4) of the Bihar and Orissa Excise Act, 1915. The amending Act was followed by a fresh notification, dated the 18th November 1940, in the same terms as the notification which the High Court had held to be invalid, and on a charge under this notification the Magistrate's order of acquittal was

(1) (1940) I. L. R. 20 Pat. 181.

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reversed by the High Court, who held that in view of the amending Act, the appellant had no defence in law. On appeal:—

Held, that the Bihar Excise (Amendment) (Governor's) Act of 1940, which amended s. 19(4) of the Bihar and Orissa Excise Act of 1915, is a valid Act and is within the powers conferred upon the Provincial Legislature by s. 100(3) of the Constitution Act and entry No. 31 of the Provincial Legislative List. The power to legislate "with respect to intoxicating liquors", unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, includes a power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province.

The United Provinces v. *Atiqa Begum*, [1940] F. C. R. 110, applied.

The Bihar Excise (Amendment) Act, 1940, is not invalid as being repugnant to s. 297(1) of the Constitution Act. The Governor-General's Act of 1915 that the Legislature had no intention of dealing with the Governor-General is empowered to enact under s. 44 of the Constitution Act.

The Bihar Excise (Amendment) Act, 1940, did not require the previous sanction of the Governor-General.

Quaere, whether it can rightly be inferred from the language of the Act of 1915 that the Legislature had no intention of dealing with the temperance question by s. 19(4) of that Act.

APPEAL from High Court at Patna.

The material facts appear sufficiently from the Judgment.

S. C. Chakravarty (*Kanwal Kishore Raizada* with him) for appellant. The first question is whether or not the Bihar Excise (Amendment) Act, 1940 is within the powers conferred upon the Provincial Legislature by the Constitution Act. If the Act is held to be *ultra vires* the notification issued thereunder also becomes void and inoperative. The Act aims at total prohibition, that is to say, prohibition of the manufacture, production, sale, purchase, export and import of intoxicants. When a Court has to consider whether this Act is within List II of Schedule VII of the Constitution Act or not, it is its duty to consider the Act as a whole and decide whether in pith and substance the Act is with respect to any of the items enumerated in List II. Under s. 100(3) of the Constitution Act a Provincial Legislature has power to make laws for the Province or any part thereof "with respect to" any of the matters enumerated in List II, and by s. 49(2) this power extends to the executive authority of the Province of Bihar. The words "with respect to" in s. 100(3) are not words of enlargement but of indication. This is an expression which occurs in a similar context in s. 51 of the Australian Constitution Act. They are not necessarily the exact equivalent of "relating to" or "connected with". When taken in conjunction with entry No. 31 of List II it must be admitted that the words "with respect to" precede "intoxicating liquors and narcotic drugs". If the Constitution Act had stopped there and did not proceed to specify the zones of legislation, it would have been possible for the Bihar Government to contend that they had complete legislative authority regarding intoxicating liquors and narcotic drugs—just as in the case of entry No. 22,

Forests, or entry No. 24, Fisheries. But the words "that is to say" are significant. A glance at List II would show that these words appear in entries Nos. 7, 13, 18, 19, 21 and 31. In the British North America Act, 1867, the words are used in a similar context regarding the distribution of legislative powers: ss. 91 and 92.

On a close scrutiny of the entries in the Indian Legislative List it appears that every general word in these entries is amplified and explained by specific words so as to limit the scope of legislation under those entries. By wording entry No. 31 of List II as they have done the framers of the Constitution Act seem to have had in view that the subject-matter of the legislation, *viz.*, intoxicating liquors and narcotic drugs, must be kept alive; that the Provincial Legislature has power to legislate with respect to the articles only in regard to their manufacture, production, sale, purchase and possession, but not to prohibit the sale, etc., altogether and destroy the subject-matter.

Even the Government of India (Adaptation of Indian laws) Order, 1937, which in Schedule VII thereof made so many alterations and amendments in the Bihar and Orissa Excise Act 1915, left s. 19(4) untouched. It must be presumed that this was done deliberately and with the view that prohibition should not be introduced. It is clear that the moment all persons are prohibited from possessing, etc., any intoxicant, the entire Excise Act is destroyed. No intoxicant, no excise; and the whole Act II of 1915, in effect, stands repealed. Again entries Nos. 31 and 40 appear in the same list and the legislative power is derived equally in both cases from the same s. 100(3) and it is the rule of interpretation that in a body of codified law no one enactment should be so construed as to nullify the express provisions of another enactment and make it absolutely nugatory. The impugned Act, though it purports to amend excise laws, in effect cancels the power given under entry No. 40. It is submitted therefore that prohibition, total or partial, of intoxicants and narcotic drugs is not authorized by the Constitution Act and as such Bihar Act No. VIII of 1940 is *ultra vires* the Provincial Legislature.

Secondly, the question arises whether or not s. 3 of the impugned Act is repugnant to s.s. (1)(*a*) of s. 297 and as much invalid under s.s. (2) of that section of the Constitution Act. Under s. 297(1)(*a*) it is provided that the Provincial Legislature or Government shall not, by virtue of the entry in the Provincial Legislative List *relating to* "trade and commerce within the Province", or the entry in that list *relating to* the "production, supply and distribution of commodities", make any law or take any executive action prohibiting or restricting the entry into or export from the Province of goods of any class or description. The words *"relating to"* used in this section

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have a wider application than the words "*with respect* to" used in s. 100(3), and any law which relates to trade and commerce within the Province comes within its purview. The Amending Act VIII of 1940, though purporting to be a legislation with respect to intoxicants, relates to trade and commerce within the province, and accordingly contravenes the provisions of this section. Since the Bihar Act by s. 3 prohibits the production, supply, and distribution of intoxicants in the Province, it amounts also to the prohibition or restriction of the entry into or export from the Province of goods of any class or description. Under s. 311 of the Constitution Act "goods" includes "all materials, commodities and articles".

Thirdly, Bihar Act VIII of 1940 is invalid since it did not have the sanction of the Governor-General. The Bihar and Orissa Excise Act, 1915, required for its validity the previous sanction of the Governor-General according to s. 5 of the Indian Councils Act, 1892, and the Act was assented to by the Governor-General on 31st December 1915. An Act which for its validity required the assent of the Governor-General ought to be deemed to be a "Governor-General's Act" within the meaning of s. 108(2)(*b*). Section 44 which defines a Governor-General's Act is not exhaustive. The Bihar Act VIII of 1940 which amended the Act of 1915 is therefore a Governor-General's Act and since the previous sanction of the Governor-General was not obtained for its passing the amending Act is illegal and void. [This point was ultimately given up.]

It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights, without compensation. With the introduction of prohibition in the Province of Bihar, the entire toddy-tapping community of the "dry area" became out of employment, because tapping and selling toddy was their only source of income. This had led to serious difficulties. If Parliament had contemplated that total prohibition could be introduced by virtue of entry No. 31 of List II of Schedule VII of the Constitution Act, surely one should have found in the Act a provision relating to compensation. When such a provision is absent in the Constitution Act, it must not be presumed that the Constitution Act ever intended by entry No. 31 to introduce prohibition in the Provinces.

The following cases were relied on:—*Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.*(1); *Att.-Gen.* v. *Horner*(2); and *Bond* v. *Norman*(3).

Baldeva Sahay, A.-G. of Bihar (*P. P. Varma* with him) for the respondent. To the argument of the other side that

(1) (1882) 7 App. Cas. 178, at pp. 188-189. (2) (1884) 14 Q. B. D. 245, at pp. 256-7.
(3) [1939] Ch. 847, at p. 855.

by virtue of entry No. 31 of the Provincial Legislative List, the Provincial Legislature has no power to introduce either total or partial prohibition in the absence of a specific power of prohibition, our reply is that entry No. 31 empowers the Provincial Legislature to legislate on the entire subject and there is nothing in the Act to restrict or control such power. The power to legislate with respect to production, manufacture, etc., of intoxicating liquors includes the power to prohibit also. This Court has held in *The United Province* v. *Atiqa Begum*(1) that power to legislate with regard to collection of rent by virtue of entry No. 21 in the Provincial List includes the power to legislate with regard to remission of rent. This Court has also held that the phrase "that is to say" is explanatory and illustrative. The phrase has no restrictive significance. The authorities relied on by counsel for the appellant are not relevant because they were concerned with interpreting the powers "to regulate": *Dick* v. *Badart*(2) or *Municipal Corporation of City of Toronto* v. *Virgo*(3) or *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*(4). Power "to regulate" may not include power to prohibit. In the Provincial Legislative List, where merely power to regulate has been given, the word regulation has been used as in entries Nos. 23 and 33. There is no specific power of prohibition so far as entry No. 36 (betting and gambling) is concerned; it cannot be therefore urged that the Legislature has no power to prohibit betting and gambling, but that it has power only to encourage or control it. There is a fundamental distinction between the powers of a municipal body exercising delegated powers and the powers of a Legislature having plenary powers.

As regards the second contention of the appellant that the Bihar Act VIII of 1940 is invalid as it offends against s. 297(1)(*a*) of the Constitution Act, if one reads that section along with entry No. 27 and entry No. 29 in the Provincial Legislative List, it should be absolutely clear that s. 297(1)(*a*) refers to those entries and not to entry No. 31. It is also contended that intoxicating liquors and narcotic drugs are not usually dealt with as ordinary commodities of trade and commerce. They are regarded in other countries also as dangerous articles requiring strict control.

As regards the third contention that the amending Act of 1940 is invalid because it did not receive the previous sanction of the Governor-General as required by s. 108(2)(b) of the Constitution Act, our reply is that the Governor-General's Act to which s. 108 refers is an Act which the Governor-General has enacted under s. 44 of the Constitution Act.

(1) [1940] F. C. R. 110, at p. 135.
(2) (1883) 10 Q. B. D. 387.
(3) [1896] A. C. 88.
(4) [1896] A. C. 348.

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For these reasons it is submitted that the Bihar Excise (Amendment) Act, 1940, has been validly enacted.

Sir Alladi Krishnaswami Ayyar, A.-G. of Madras (*N. Rajagopala Iyengar* with him). The Abkari legislation in the several Provinces was all at about the same time, in or about the year 1886. The object of the legislation was to regulate the consumption of liquor by licences and incidentally to raise revenue in the process. The aim was maximum revenue and minimum consumption. In 1913 or 1914 there was an Excise Enquiry Committee and possibly as a result of its recommendations there were inserted in the various Abkari Acts provisions like s. 13A of the Madras Act(1) and s. 19(2) of the Bihar Act(2), with a view to achieve complete prohibition in any particular local area. The interpretation put upon the amended section by the Patna High Court in *Kanhai Sahu* v. *King-Emperor*(3) and on the corresponding Bombay provision by the Bombay High Court in *Chinubhai Lalbhai* v. *Emperor*(4) is wrong. The expression "any person" must in the context mean "all" or "any". It cannot possibly mean a designated individual. It is inconceivable that the Government should issue a notification against a named person prohibiting him from drinking. The use of the preamble of an Act to interpret the terms of the section is fallacious, particularly since the operative part to be construed was enacted long after the preamble, and in pursuance of a different policy. The explanatory note to the amending clause makes the point clear.

Since the decision of the High Court on the proper construction of the section of the Abkari Act, referred to in *Kanhai Sahu* v. *King-Emperor*, did not involve any constitutional question, it could not be brought up before this Court, nor could it be taken up to the Privy Council since the matter arose in a criminal case. The Bihar Government therefore had no alternative but to amend s. 19(4)—Act VIII of 1940. The constitutionality of the amended section is beyond doubt. The language of entry No. 31 of the Provincial List is absolute and unqualified. There is no conflict with any entry in the Federal List or with any Federal power and there is nothing to prevent full effect being given to the provincial item. The entire subject of intoxicating liquor is within the provincial power, and not merely a power to "regulate" its consumption. The Court is not called upon to construe any such expression as regulation which has been held not to include the right to prohibit (see *Municipal Corporation of City of Toronto* v. *Virgo*)(5). Unless words of limitation are read into the item, the power to prohibit cannot be denied. The Provincial Legislatures in Canada and in Australia have power to

(1) Madras Act No. I of 1886.
(2) B. & O. Act No. II of 1915.
(3) (1940) I. L. R. 20 Pat. 181.
(4) I. L. R. (1940) Bom. 587.
(5) [1896] A. C. 88.

enact prohibition legislation, cf. s. 113 of the Australian Constitution Act. There is no reason why such a power had been denied to the Provincial Legislature, especially when India is more wedded to the policy of prohibition than other Dominions.

Section 297 has no bearing on this question since the entries in the Provincial List which are to be subject to the qualification therein enacted are specified in the section and entry No. 31 is not one of them. Section 108(2) has nothing to do with existing Indian legislation, which has received the assent of the Governor-General before the Government of India Act, 1935. The section refers to legislation under s. 44.

S. C. Chakravarty in reply.

Cur. adv. vult

The Judgment of the Court was delivered by

GWYER C. J.—In this case the appellant appeals against an order of the High Court at Patna setting aside an acquittal in a Magistrate's Court and convicting the appellant of an offence under s. 47(a) of the Bihar and Orissa Excise Act, 1915(1) and a Government Notification dated 18th November, 1940, issued under the power conferred by s. 19(4) of that Act. To understand the issues involved in the appeal, it is necessary to give some account of the history of the legislation under which the appellant was charged and has now been convicted.

The Bihar and Orissa Excise Act, 1915 (Act No. II of 1915), was a consolidating and amending Act, replacing in Bihar and Orissa an earlier Bengal consolidating and amending Act, the Bengal Excise Act, 1909(2). Section 19 of the Act of 1915 prohibits unlicensed persons (with certain exceptions) from having in their possession, without a permit granted by the Collector, any excisable article in excess of such quantity as the Board of Revenue may, under the powers given to it by the Act, have declared to be the limit of a retail sale. Licensed vendors are similarly prohibited from having in their possession at any place other than that authorized by their licence any quantity of excisable liquor in excess of the same amount. Sub-section (4) of the section then provides as follows:—

> "(4) Notwithstanding anything contained in the foregoing sub-sections, the local Government may, by notification, prohibit the possession by any person or class of persons, either in the Province of Bihar and Orissa or in any specified local area, of any excisable article either absolutely or subject to such conditions as it may prescribe."

By s. 47 of the Act, any person who, in contravention of the Act, or of any notification made under it, "imports, exports, transports, manufactures, possesses or sells any excisable article" is liable to be imprisoned or to be fined, or to be both imprisoned and fined.

By a Notification dated March 26th, 1939, and made under the sub-section quoted above, the local Government purported

(1) B. & O. Act No. II of 1915. (2) Bengal Act No. V of 1909.

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to prohibit the possession of country liquor and of certain drugs in the areas specified in the Notification. One Kanhai Sahu was prosecuted and convicted under this Notification on a charge of illegal possession of country liquor in a prohibited area; but the High Court at Patna on appeal set aside the conviction on the ground that the Provincial Government had no power, as the law then stood, to make a notification prohibiting the public generally within the Province or any part thereof from possessing intoxicating liquor: *Kanhai Sahu* v. *King-Emperor*(1). The main ground of the decision was that on the true construction of the sub-section the local Government only had power to impose prohibition on specified persons or classes of persons, and that the words "any person or class of persons" could not be interpreted as meaning "all persons or any class of persons". The High Court also laid stress on the fact that, as it appeared to them, the Act of 1915 was an Excise Act, designed mainly for the benefit of the provincial fisc, and that it did not appear from the preamble to the Act or its provisions generally that the Legislature had intended that the Act should be used for the purpose of introducing the policy of what is commonly known as Prohibition.

As a consequence of this decision of the High Court, the Governor of Bihar, in the exercise of the legislative powers which he had assumed by his Proclamation of 3rd November, 1939, under s. 93 of the Constitution Act, enacted a Governor's Act entitled the Bihar Excise (Amendment) Act, 1940(2). By s. 2 of this Act a paragraph was inserted in the preamble to the original Act of 1915 to the following effect:—

> "Whereas in order to promote, enforce and carry into effect the policy of prohibition, it is necessary to prohibit the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs in the Province of Bihar or any specified areas thereof:"

Then by s. 3 of the Act, it was provided that s. 19(4) of the Act of 1915 should be so amended as to prohibit the possession of intoxicating liquor "by any person or class of persons *or, subject to such exceptions, if any, as may be specified in the Notification, by all persons* either in the Province of Bihar or in any specified local area". The words in italics are those added by the amending Act to the sub-section. The amending Act was followed by a fresh Notification dated November 18, 1940, in the same terms as the Notification which had been held by the High Court to be invalid, and it was on a charge under this Notification that the Magistrate's order of acquittal was subsequently reversed by the High Court, who held that in view of the amending Act the appellant had no defence in law.

Counsel for the appellant first contended that the amending Act of 1940 was in any case *ultra vires* the Provincial

(1) (1940) I. L. R. 20 Pat. 181. (2) Bihar Act. No. VIII of 1940.

Legislature, and therefore equally *ultra vires* the Governor of Bihar, exercising the powers of the Legislature by virtue of a proclamation under s. 93 of the Constitution Act. He contended also that the Act was invalid because it contravened the provisions of paragraph (*a*) of s. 297(1) of the Constitution Act. His third contention was that the Act of 1915 was a Governor-General's Act within the meaning of paragraph (*b*) of s. 108(2) of the Constitution Act and that therefore the Act of 1940 which amended it ought to have had the previous sanction of the Governor-General under that sub-section, the omission not having been made good by the subsequent assent of the Governor-General to the Act, to which the Governor had alone assented: see s. 109 of the Constitution Act. It will be convenient to deal with each of these contentions separately and in the same order.

In support of his first contention, counsel boldly argued that s. 100(3) of the Constitution Act, which gives a Provincial Legislature power to make laws for a Province or any part thereof "with respect to" any of the matters enumerated in the Provincial Legislative List, has not given power to introduce either total or partial prohibition in the Province by reason only that among the matters in the List with respect to which a Provincial Legislature is empowered to legislate are those set out in entry No. 31: "intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs". A power to legislate "with respect to intoxicating liquors" could not well be expressed in wider terms, and would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province. This Court has already held in *The United Provinces* v. *Atiqa Begum*[1] that the power to legislate with respect to the collection of rents (List II, entry No. 21) includes the power to legislate with respect to the remission of rents as well as their collection, and there is a dictum in one of the judgments in that case that the power to legislate with respect to "fisheries" (List II, entry No. 24) would include the prohibition of fishing altogether in particular places or at particular times. But, it is said, the context does in fact require a more restricted meaning to be given to the general words at the beginning of entry No. 31, inasmuch as "intoxicating liquors and narcotic drugs" is followed by the words "that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic

(1) [1940] F. C. R. 110, at p. 135.

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drugs". In our opinion these words are explanatory or illustrative words, and not words either of amplification or limitation. It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture, possession, transport, purchase or sale; and these words seem apt to cover the whole field of possible legislation on the subject. We were however referred to three English authorities which, it was alleged, justified a different conclusion. These authorities do not seem to us to be relevant, for they were concerned with the meaning and effect of a statutory power to "regulate"; and it was held in all three cases that a power to regulate does not include a power to prohibit. The first case was *Dick* v. *Badart*(1). In that case a dock company, who were undertakers under a special Act, had made by-laws prohibiting workmen of a specified class from working on board any vessel in the dock, unless authorized by the company or unless permission in writing had previously been obtained from the superintendent of the dock. The company had statutory powers to make by-laws (among other purposes) for regulating shipping, unshipping and removing of all goods within the limits of the dock and for regulating the duties and conduct of all persons, whether the servants of the undertakers or not, employed in the dock. It was held that the by-law excluding that particular class of workmen was beyond the powers conferred by the Act: first, because s. 33 of the Harbours, Docks and Piers Clauses Act, 1847, which was incorporated in the Special Act, had declared that, subject to certain specified conditions in any special Act authorizing the construction of any dock, the harbour, docks and pier should be open to all persons for the shipping and unshipping of goods, and secondly, because a power to make by-laws for regulating the duties and conduct of persons employed in the docks could not authorize a by-law excluding a specified class of persons. In the *Municipal Corporation of City of Toronto* v. *Virgo*(2), an Act of the Ontario Legislature had given local authorities the power to make by-laws for licensing, regulating and governing hawkers and petty chapmen; and this was held not to authorize a by-law prohibiting hawkers from plying their trade at all in a substantial and important portion of the city, Lord Davey observing:—"Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed the power to regulate and govern seems to imply a continued existence of that which is to be regulated or governed". Attention was also drawn to other sections of the Act, which gave power to make by-laws "preventing or regulating", or "preventing or regulating and

(1) (1883) 10 Q.B D. 387.

(2) [1896] A. C. 88.

licensing", thus indicating that a power to prohibit, when it was intended that it should be given, was always given by express words. The observations of Lord Davey were quoted with approval by Lord Watson, delivering the judgment of the Judicial Committee in *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*(1), in which it was decided that the power given to the Dominion Parliament by s. 91(2) of the British North America Act to make laws for the regulation of trade and commerce did not enable the Dominion Legislature to enact legislation to prohibit the traffic in intoxicating liquors. We see no reason to dissent from the view that a power to regulate does not include a power to prohibit; but since neither the word "regulation" itself nor any other comparable expression appears in entry No. 31, it does not appear necessary to pursue the argument further. A power to regulate may well imply the continued existence of the thing to be regulated; but no such implication can arise from the words in the entry which, as we have said, only explain or illustrate the more concise expression which immediately precedes them.

We must again refer to the fundamental proposition enunciated in *The Queen* v. *Burah*(2), that Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. If that was true in 1878, it cannot be less true in 1942. Every intendment ought therefore to be made in favour of a Legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the by-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations. It was even contended on behalf of the appellant that the specifying of a particular subject-matter of legislation necessarily indicated the intention of Parliament that that subject-matter should be preserved, since, unless it were preserved, there would be no subject-matter about which to legislate. This argument is sufficiently refuted by the presence in List II of such legislative subjects as "unemployment" in entry No. 32 or "gambling" in entry No. 36.

The second point raised on behalf of the appellant was that s. 19(4) of the Act of 1915, as amended by the Act of 1940, is invalid because repugnant to s. 297(1)(*a*) of the Constitution Act. We confess that we have difficulty in appreciating this argument. Section 297(1)(*a*) enacts that no Provincial Legislature or Government shall, by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in the List relating to the production, supply and distribution of commodities,

(1) (1896) A. C. 348, at p. 363. (2) (1878) 3 App. Cas. 859.

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have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description. It is plain beyond words that this provision only refers to legislation with respect to entry No. 27 and entry No. 29 in the Provincial Legislative List; it has no application to legislation with respect to anything in entry No. 31. A Provincial Legislature, if it desires to pass a law prohibiting export from, or import into, the Province, must therefore seek for legislative authority to do so in entries other than entry No. 27 or entry No. 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged under s. 297(1)(*a*). There is no substance at all in the appellant's argument on this point.

The appellant's third point is no less unsubstantial. The Act of 1915 required, as the law then stood, and in fact received, the assent of the Governor-General. This, according to the appellant, made it a Governor-General's Act within the meaning of s. 108(2)(*b*) of the Constitution Act, and therefore the introduction of any Bill amending it required the previous sanction of the Governor-General. The amending Act of 1940 did not receive this previous sanction, and since it received the Governor's assent only, the defect was not cured by the provisions of s. 109(2) of the Constitution Act. The Governor-General's Act however to which s. 108 of the Constitution Act refers means, and can only mean, an Act such as the Governor-General is empowered to enact under s. 44 of the Constitution Act. The appellant seems to have forgotten that all Acts required the Governor-General's assent before the present Constitution Act came into force; and that therefore, if his argument is sound, this strange result would follow, that every Act passed by the Central or any local Legislature before April 1st, 1937, would be a Governor-General's Act, and no Bill repealing or amending it could be introduced without the previous sanction of the Governor-General. It is preposterous to suppose that Parliament intended to place fetters of this kind on the general legislative powers of Legislatures in India.

It was faintly suggested that, in the absence of any provision for compensating those whose livelihood might be taken away by the enactment of Prohibition, it ought to be assumed that the Legislature had not intended to enact it. Where a statute is ambiguous, the presumption that a Legislature does not intend to interfere with vested rights is no doubt reinforced by the absence of provisions for compensation; but where the language is clear and there is no ambiguity, as we hold to be the case here, there is no room for such arguments.

For the above reasons we are of opinion that the Bihar Excise (Amendment) Act, 1940, which amended s. 19 (4) of the Bihar and Orissa Excise Act, 1915, was a valid Act and was within the powers conferred upon the Provincial Legislature by s 100 (3) of the Constitution Act and entry No. 31 of the Provincial Legislative List.

Having regard to the view which we have taken of the effect of the Act of 1940, it is not necessary for us to consider, as we might otherwise have found ourselves compelled to do, the earlier judgment of the Patna High Court to which we have already referred and which followed a judgment of the High Court of Bombay in which similar questions were raised: *Chinubhai Lalbhai* v. *Emperor*(1). We do not therefore express any opinion with regard to those two judgments, except in respect of one matter on which we think it desirable to say a few words, because it was also the foundation of part of the argument addressed to us in the present case. Both the Bombay and Patna High Courts seem to have been a good deal influenced by the view that the Acts they were considering were exclusively excise or revenue Acts and that nothing was to be found in them indicating the intention of the Legislature that they were to be, or could be, used for the purpose of promoting a policy of total or partial Prohibition. In the case of Bihar, it was sought to overcome this difficulty at a later date by the insertion in the amending Act of 1940 of the additional paragraph in the preamble to the original Act of 1915, which we have already cited. The purpose for which resort may be had to the preamble of a statute has been stated in a well-known passage: "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress' ": *Commissioners for Special Purposes of Income-tax* v. *Pemsel*(2). But we doubt very much whether a preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at by the Court for the purpose of discovering what the true intention of the Legislature was at the earlier date. A Legislature can always enact that the law is, and shall be deemed always to have been, such and such; but that is a wholly different thing from imputing to dead and gone legislators a particular intention merely because their successors at the present day think that they might or ought to have had it.

It is however by no means clear to us that the Legislature of Bihar and Orissa (as the Province then was) in 1915 never had in mind the possible use of the Bihar and Orissa Excise

(1) I. L. R. [1940] Bom. 287. (2) [1891] A. C. 531, *per* Lord Halsbury, L. C., at p. 542.

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Act, 1915, for the promotion of a policy of total or partial prohibition. The Act of 1915 was, as we have said, a consolidating and amending Act which replaced an earlier consolidating and amending Act, the Bengal Excise Act, 1909. An examination of the statutes which were consolidated in the latter Act shows that the provision which is now s. 19 (4) of the Act of 1915, and which the Act of 1940 amended, first made its appearance on the statute-book in 1909; that is, it never formed part of the original Excise Code. A sub-section similarly expressed is to be found in the legislation of other Provinces; and, so far as we can ascertain, it was in every case an addition to the original Code. Thus, in Madras, where it now appears as s. 13-A of the Madras Abkari Act, 1886(1), it was inserted as a separate and substantive section by the Madras Abkari (Amendment) Act, 1913. In Bombay it appears as s. 14-B (2) of the Bombay Abkari Act, 1878(2) but it was inserted in that Act for the first time by the Bombay Abkari (Amendment) Act, 1912. Its history in other Provinces also will be found to be the same.

There is no reason in theory or principle why an Excise Act should not have a double object, the benefit of the revenue and the improvement of public health or morals by a greater control of the liquor trade; the Licensing Acts in England are an example. We find it not easy to understand the purpose or object of s. 19 (4), if it were not intended for the purpose of promoting the cause of temperance, whether by means of the policy which used to be known as local option or by means of total Prohibition; and its appearance on the statute book in so many Provinces in the course of the same generation is a proof that temperance doctrines were, as indeed is common knowledge, attracting public notice at that period over a considerable part of India. The only novelty about more recent legislation is that it goes further and is more radical in character.

If it were necessary for us to do so, we should not hesitate, in construing the Bihar Act of 1915, to reject the argument sought to be based on the assumed absence of any intention on the part of the Legislature to deal with the question of Prohibition in its excise legislation. For the reasons which we have given, we should be disposed rather to draw from the language of the Act a different inference altogether; but the view we take in the present appeal makes the question no longer important.

The appeal must be dismissed. There will be no order as to costs.

Appeal dismissed

Agent for Appellant: *B. Banerji.*
Agent for Respondent: *T. K. Prasad.*

(1) Madras Act No. I of 1886. (2) Bombay Act No. V of 1878.

ADMINISTRATOR, LAHORE MUNICIPALITY,

v.

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Feb. 23; Mar. 4.

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

Punjab Municipal Act, 1911, s. 61 (2)—Attempt by Municipality to levy octroi duty on salt—Power of the Provincial Legislature to impose tax or duty on salt—Government of India Act, 1935, Schedule VII, entries Nos. 44, 45 and 47 of List I and entry No. 49 of List II—Effect of s. 100 (1) of the Government of India Act.

Whether the power of the Central Legislature to impose duties or taxes on salt be derived from entry No. 47 of List I of the Seventh Schedule to the Constitution Act or from entries Nos. 44 and 45, the effect of the combined operation of entry No. 47 of List I and of section 100(1) of the Constitution Act is to deny to the Provincial Legislature the power to make laws with respect to salt.

Section 61(2) of the Punjab Municipal Act, 1911, does not empower a Municipality in the Punjab to levy an octroi duty on salt, since it only authorizes the Municipality to impose any tax which a Provincial Legislature has power to impose in the Province under the Constitution Act.

APPEAL from the High Court at Lahore.

The material facts are stated in the opening paragraph of the Judgment.

Rai Bahadur Harish Chandra (*Radhe Mohan Lal* with him) for the respondent.—There is a preliminary objection to the form of the appeal. A party to the proceedings in the Court below can alone appeal to the Federal Court and that party being the Municipal Committee, Lahore, it is not open to the Administrator in his own name now to prefer the appeal. While it is admitted that the Municipal Committee, Lahore, had been suspended by the Local Government, the Committee having been constituted, under s. 18 of the Punjab Municipal Act, as a body corporate with perpetual succession, the supersession of the Committee did not terminate the corporation as such and consequently all proceedings should be taken in the name of the corporation only. He referred to *Sadhu Mal-Khazana Mal* v. *Devi Chand*(1), and relevant sections of the Punjab Municipal Act, particularly s. 238. When another Committee was constituted in place of the superseded Committee it would mean the revival of the old corporation only and not the creation of a new one. Consequently the appeal should have been lodged by the Municipal Committee of Lahore and in the name of the Municipal Committee alone.

[The Court over-ruled the objection and stated that they would give their reasons later.]

M. Sleem, A.-G. of the Punjab (*Kanwal Kishore Raizada* with him) for the appellant.—In the Legislative Lists the taxing entries always figure separately from the other entries and therefore the Federal Legislature could only tax

(1) A. I. R. 1937 Lah. 347.

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salt under the taxation entries and not under the entry "salt". If this view is correct, the Federal Legislature has no power to levy a cess on the entry of salt into a local area for consumption, use or sale therein. As the expression "goods" is comprehensive enough to include salt, the Provincial Legislature is competent under entry No. 49 to levy on salt the duty in question. It is clear from the chapter in which s. 140 figures and from the language of s. 140 that this is not a charging section and, therefore, no power had been conferred on the Federal Legislature under this section to levy any duty on salt. Also, that the expression "duties on salt" which figures in s. 140 was used because at that time under the Salt Act the Central Government was levying a duty both on salt manufactured in any part of British India and on salt imported by land into any part of British India.

Rai Bahadur Harish Chandra (*Radhe Mohan Lal* with him) for the respondent. On the main appeal reference is made to passages in Craies' Statute Law, pp. 68, 107 and 110, and to the following cases: *Barrell* v. *Fordree*(1); *Pakala Narayana Swami* v. *Emperor*(2); *Oriental Bank Corporation* v. *Wright*(3); and *Whiteley* v. *Burns*(4).

The provisions of s. 100 of the Constitution Act are mandatory. Under s.s. (1) of that section a Provincial Legislature has no power to make laws with respect to any of the matters enumerated in List I. In view of entry No. 47 in the said List, it is not open to a Provincial Legislature to legislate in respect of salt. In answer to the arguments of the Advocate-General of the Punjab, that entry No. 49 in List II covers the present case, it is urged that that entry cannot be read as being applicable to salt as salt is wholly included in List I. Reference may be made to certain other entries in List I to show that Parliament adopted different language wherever it allowed the Provincial Legislature to legislate about matters covered in List I. Section 140 further clarifies the position. As far as duties, of any kind whatsoever, on salt are concerned, they can only be levied and collected by the Centre and not by the Province. Counsel also gave a historical survey of the duties on salt, and referred to the agitation against attempts in the past by the Central Legislature to enhance the duty on salt.

Sir Brojendra Mitter, A.-G. of India (*H. R. Kazimi* with him) for the Government of India.—Section 140 does not deal with legislative power at all. "Federation" in that section means the Executive or the Governor-General in Council. Where is the legislative power in respect to taxation on salt? The contention that it is in entries Nos. 45 and 46 in List I, *i.e.*, customs and excise, is not valid, because, then, the expression "duties on salt" in s. 140 would have been

(1) [1932] A. C. 676, at p. 682.
(2) A. I. R. 1939 P. C. 47, at p. 51.
(3) (1880) 5 App. Cas. 842, at p. 856.
(4) [1908] I. K. B. 705, at p. 709.

qualified by the word "Federal" or some such words as used in s. 137. The word "salt" in entry No. 47 in List I should be interpreted to include all taxation. Indian legislative practice has been to use the word "salt" as a source of central revenue, as including duties on salt: see Devolution Rules under the 1919 Act, Section I, Pt. I, entry No. 11. In Indian legislative practice taxation on salt, whether customs, excise or octroi, has always been the business of the Centre. On all these grounds the Provincial Legislature is incompetent to impose any duty on salt. Reference was made to the Salt Duties Act (Act No. X of 1908) and to the following cases: *Croft* v. *Dunphy*(1) and *Gallagher* v. *Lynn*(2).

M. Sleem, A.-G. of the Punjab, in reply.

Cur. adv. vult

The Judgment of the Court was delivered by

VARADACHARIAR J.—This appeal arises out of proceedings taken by the respondent to challenge the validity of an octroi duty on salt imposed by the municipal administration of Lahore. Under s. 61(2) of the Punjab Municipal Act, 1911(3), the municipal administration is empowered, with the previous sanction of the Provincial Government, to impose any "tax which the Provincial Legislature has power to impose in the Province under the Government of India Act, 1935". In April, 1938, the appellant who, under s. 238 of the Municipal Act, had been exercising the powers of the superseded Municipality of Lahore published a notification imposing octroi duties at varying rates on goods imported into Lahore, and salt was one of the commodities specified in the schedule under the heading "articles of food and drink". In October 1939, the respondent brought two maunds of salt into the municipal limits and, with the evident object of making it a test case, he paid the duty under protest and later applied for refund of the amount. When the matter was taken on appeal to the Deputy Commissioner, under s. 84 of the Punjab Municipal Act, he referred to the High Court the question whether the notification above referred to was authorized by law so far as it related to the impost on salt. The learned Judge who heard the reference held that in imposing a tax on salt the appellant had transgressed the limits of his authority under the law. The appellant now appeals to this Court.

On behalf of the respondent, a preliminary objection was taken to the form of the appeal. It was contended that only a party to the proceedings in the court below could appeal to this Court and that the Municipal Committee, and not the Administrator, was the party in the High Court. It was also urged that as the Municipal Committee had been constituted by s. 18 of the Municipal Act a body corporate with perpetual succession, its supersession did not put an end to the

(1) [1933] A. C. 156.

(2) [1937] A. C. 863.

(3) Punjab Act No. III of 1911.

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corporation and that all legal proceedings by or against the corporation must, as provided in that section, be instituted only in the name of the corporation. These objections seem to us devoid of substance. The proceedings before the Deputy Commissioner and the reference by him to the High Court were not framed on the lines of formal pleadings; but taking them as a whole it would appear that it was the Administrator who was treated therein as the opposite party though in the title of the judgment of the High Court the "Municipal Committee, Lahore" is described as the respondent. The provisions of s. 18 of the Punjab Municipal Act relating to the corporate character of the Committee and the manner of suing must be read subject to the provisions of s. 238(2) which lays down the consequences of a supersession. It may be (as held in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*[1]), that a supersession has not the effects of a dissolution and that when another Committee is constituted in the place of the superseded Committee, it is a revival of the old corporation and not the creation of a new one. But during the period when the order of supersession is in force, the statute makes it clear that all the members of the Committee vacate their seats and that all the powers and duties of the Committee are to be exercised and performed by the Administrator. It seems to us that we should be carrying the legal fiction to a needless length if we insisted that, even in this state of facts, proceedings must be taken only in the name of the dormant corporation. It has not been disputed that the person competent to take proceedings is the Administrator; and even if the true view should be that he should take proceedings in the name of the Committee, the defect is one purely of a formal character which can be cured by amendment.

The decision of the question of law arising in the case turns on the combined effect of entry No. 47 of List I and entry No. 49 of List II of the Seventh Schedule to the Constitution Act. Under the latter, a Provincial Legislature is entitled to levy "cesses on the entry of goods into a local area for consumption, use or sale therein"; and the appellant claims that the octroi duty in question falls within this description. The respondent contends that this entry must be interpreted in the light of entry No. 47 in List I which makes salt a subject within the exclusive control of the Federal Legislature. One way of putting the respondent's argument is to say that, reading the two Lists together, the general description "goods" in entry No. 49 of List II must be understood as referring to goods other than salt. It is also contended that under s. 100(1) of the Constitution Act, the Provincial Legislature has expressly been denied the power to make laws with respect to salt, since "salt" is one of the matters enumerated

(1) (1906) I. L. R. 29 Mad. 539.

in List I. Both these contentions were upheld by the learned Judge who dealt with the case in the High Court and he was also of the opinion that s. 140(1) of the Constitution Act lent some support to this view.

In support of this appeal, it has been contended by the Advocate-General of the Punjab that the learned Judge erred in treating entry No. 47 in List I as the source of the Central Legislature's authority to impose any duty or tax on salt, and that he also erred in relying upon s. 140 as though it were a charging section. By a reference to various entries in Lists I and II counsel attempted to show that, whenever a power to tax was intended to be conferred, it was expressly given; and he urged that a general mention of a subject as in entry No. 47 was only meant to give a general power of control and had no relation to powers of taxation. He invited attention in this connection to entries Nos. 19, 26, 28 and 33 of List I and compared them with entries Nos. 44, 58, 57 and 46. He likewise compared entries Nos. 21 and 36 of List II with entries Nos. 43 and 50 in the same List, and entry No. 52 of List II with entry No. 32 of List III. On this footing he argued that so far as the levy of tax or duty on salt was concerned, the subject must be deemed to be provided for only in entries Nos. 44 and 45 of List I and that, as the impost now in question was not in the nature of a customs duty or excise duty, there was no reason for restricting the scope of the general language used in entry No. 49 of List II or for bringing into operation the prohibition enacted in s.s. (1) of s. 100 of the Constitution Act.

An examination of the entries in the three Lists lends some support to counsel's contention as to the lines on which the Lists have been framed. But we are not prepared, nor do we think it necessary for the purpose of this case, to accept that contention in its generality. We hesitate at any rate to say that the powers of the Central Legislature to impose duties or taxes on salt must be limited to those derivable under entries Nos. 44 and 45 of List I. It is true that s. 140 of the Constitution Act is not a charging section and that it occurs in a chapter dealing with the distribution of revenues between the Federation and the federal units. But the express mention in that section of "duties on salt" separately from "federal duties of excise" and "export duties" rather suggests that duties on salt were not contemplated as falling under entries Nos. 44 and 45 of List I. Counsel suggested that the separate reference to duties on salt might have been made with a view to include import duties thereon under the heads of revenue divisible among the federal units. This is a possible explanation; but it is nevertheless difficult to get rid of the impression that duties on salt were regarded as a category by themselves not comprised under the headings of excise or customs duties. Such separate treatment would indeed seem to be justified by the fact that, unlike other goods which may form the subject

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of excise or customs duties, salt is in a sense a state monopoly in this country and its manufacture, transport and sale are subject to state control. It was for this reason clearly that entry No. 47 of List I included salt in the exclusive jurisdiction of the Central Legislature.

Assuming however for the sake of argument that the Central Government's power to levy any impost on salt must be derived only from entries Nos. 44 and 45 of List I and that entry No. 47 was not intended to include the power of levying taxes or duties, the objection based upon s. 100(1) of the Constitution Act would nevertheless remain, so long as salt is an entry specifically included in the exclusive Federal List. The appellant's counsel would read entry No. 47 as though it said. in terms, "salt except taxation". We do not think that this is legitimate or permissible. It is one thing to say that the entry does not authorize taxation, but it is a different thing to say that taxation is excluded, as that will make a material difference in the operation of s.s.(1) of s. 100. If taxation is specifically excluded from entry No. 47 in List I, the effect will be to take away *pro tanto* the prohibition against provincial legislation imposed by s. 100(1). It is on the other hand quite conceivable that, even without the power of taxation, Parliament should have desired that the Central Government and the Central Legislature should retain exclusive control over salt and to prohibit any kind of interference with it by Provincial Legislatures. It is, for instance, common knowledge that public opinion in this country has always insisted that salt should be made available to the people at the lowest possible price; but the recognition of a power in the Provincial Legislature to impose duties on salt, whether for the benefit of provincial revenues or for the benefit of local authorities, might materially affect the policy of the Central Government in this respect.

It is noteworthy that in respect of opium and petroleum, the exclusive jurisdiction of the Centre is limited by the words "so far as regards cultivation and manufacture or sale for export" in entry No. 31 and the words "so far as regards possession, storage and transport" in entry No. 32. Such a limitation justifies the view (confirmed by entry No. 40 of List II) that the Provincial Legislatures are not wholly deprived of jurisdiction with reference to these goods. But the reference to salt in entry No. 47 is unqualified; and therefore it is not possible to put any limitation upon the extent of exclusion of provincial interference, so far as this item is concerned. A comparison of entry No. 2 in List I with entry No. 10 of the same List is instructive in this connection, as showing an instance of the total exclusion of provincial jurisdiction in respect of naval, military and air force works while recognizing the possibility of provincial legislation even in respect of works, lands and buildings belonging to the Federation, if and

so far as they are not naval, military or air force works. In the view above stated, it is unnecessary to discuss the distinction sought to be drawn between cesses and taxes, because, if the Provincial Legislature is wholly precluded from dealing with salt, it is immaterial whether the proposed impost is one by way of tax or one by way of cess.

It may be a question whether, notwithstanding the generality of entry No. 47 in List I, a Provincial Legislature may not enact legislation which only incidentally affects salt (see *Gallagher* v. *Lynn*(1), and see also observations in *Att.-Gen. for the Dominion of Canada* v. *Atts.-Gen. for the Provinces of Ontario, Quebec and Nova Scotia*(2)). But that question does not arise in the present case. When taxes are imposed specifically upon a number of items, only some of which are within the jurisdiction of the Legislature which imposes them, the validity of each impost can be dealt with by itself and there is no question of the one affecting the other. The situation is not parallel to one in which legislation whose main object or pith and substance is legitimate is sought to be invalidated merely on the ground that it incidentally affects something outside the sphere permitted to the Legislature which has enacted it.

The appeal fails and is dismissed with costs

Appeal dismissed.

Agent for Appellant: *B. Banerji.*
Agent for Respondent: *Ganpat Rai.*
Agent for Government of India: *K. Y. Bhandarkar.*

(1) [1937] A. C. 863.

(2) [1898] A. C. 700, at p. 716.

Mar. 4, 6, 25, 27; Apr. 10.

NIHARENDU DUTT MAJUMDAR

v.

THE KING EMPEROR.

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

Defence of India Act, 1939 (Central Act No. XXXV of 1939)—Rules under—Validity of Government of India Act, 1935, ss. 102, 316—Powers of existing Indian Legislature—Resolutions of Parliament—Proof of—Evidence Act, 1872 (Central Act No. I of 1872), s. 78—Sedition—Gist of Offence—Indian Penal Code, 1860 (Central Act No. XLV of 1860), s. 124-A—Duty of Courts in India.

The powers conferred by s. 102 of the Constitution Act are properly exercisable by the existing Indian Legislature, and therefore the Defence of India Act, 1939, is not *ultra vires* on the ground only that it was enacted by that Legislature.

The volumes of the official Parliamentary Debates, published under the authority and control of the Houses of Parliament, afford adequate proof of the passing of the resolutions approving the Proclamation of Emergency mentioned in s. 102 of the Constitution Act by the Houses of Parliament.

Though the question is one of the method of proving an event which occurred in England, the law applicable is the Indian and not the English law of evidence.

The proceedings of Parliament fall under either the second or the fourth of the categories in s. 78 of the Indian Evidence Act, 1872. The expression "Journals" in that section is not to be confined to the official Journals of the two Houses of Parliament but includes also the official Parlimentary Debates which are printed under the authority of Parliament.

Since the "prejudicial act" which is made an offence by Rule 34 (6) of the Defence of India Rules is defined in language similar to the definition of sedition in s. 124-A of the Indian Penal Code, the law relating to the latter is equally applicable to the former notwithstanding the difference in nomenclature.

The gist of the offence of sedition is the promotion of public disorder or the reasonable anticipation or likelihood that public disorder will be promoted. The acts or words complained of must either incite to disorder or must be such as to satisfy a reasonable man that that is their intention or tendency.

Held, on the facts of the case, that the speech which was the subject of the proceedings giving rise to the appeal did not exceed the legal limits of comment or criticism and therefore did not amount to sedition or to a prejudicial act within the meaning of Rule 34(6)(e) of the Defence of India Rules.

Observations on the offence of sedition generally.

APPEAL from the High Court at Calcutta.

In consequence of a speech made on April 13, 1941, at Calcutta, the appellant was convicted by the Additional Chief Presidency Magistrate at Calcutta on July 21, 1941, of offences under sub-paragraphs (e) and (k) of paragraph (6) of Rule 34 of the Defence of India Rules and was sentenced to be detained till the rising of the Court and to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for six months. This conviction and sentence was upheld, on appeal, by the

Calcutta High Court (Bartley and Lodge, JJ.) on November 29, 1941.

Aswini Kumar Ghose for the appellant. The Defence of India Act and the Rules made under that Act are *ultra vires* the present Indian Legislature. Section 316 of the Constitution Act does not in terms refer to s. 102 of the Act. Therefore the legislative powers conferred by s. 102 can only be exercised by the Federal Legislature and not by the existing Indian Legislature.

The Proclamation of Emergency issued by the Governor-General on September 3, 1939, was never approved by Parliament; in any case the prosecution did not give any legal proof of such an approval. Even if Parliament had approved the Proclamation on the first occasion, a further Proclamation was required after the lapse of six months, see ss. 43, 89 and 93 of the Constitution Act.

Lastly it is submitted that the speech complained of did not amount to an offence under law and therefore the appellant has been wrongly convicted.

Sir Asoka Roy, A.-G. of Bengal (*Hamidul Haq Chaudhuri* with him) for the respondent. There is no substance in the constitutional questions raised by the appellant. The real question in this appeal is whether the High Court was justified in proceeding on the basis that the Proclamation of Emergency had been approved by resolutions of both Houses of Parliament. It is submitted that the High Court was justified in so proceeding because (1) the High Court was entitled under s. 5 of the Indian Evidence Act, 1872, to take judicial notice of what had been done by Parliament in regard to the Proclamation of Emergency, and alternatively (2) there was sufficient proof of the fact of approval under s. 78 of the Evidence Act.

Under s. 57(1) of the Evidence Act it was the duty of the Court to take judicial notice of all Indian laws. The appellant was being prosecuted under the Defence of India Act and it having been contended that there was no such law as the Defence of India Act in operation at the material date, it became the duty of the Court to ascertain whether the necessary resolutions of Parliament had been passed or not for the purpose of noticing the law. A party is not required to produce any book or document in support of a fact of which the Court has to take judicial notice unless the Court requires him to do so. If the Court from its general knowledge was aware of the fact that resolutions had been passed by Parliament proving the Proclamation of Emergency it could take judicial notice of that fact. If the Court wished to resort for its aid to Hansard, the Court was entitled to do so. That Hansard is an appropriate book of reference cannot be disputed: see *"The Englishman" Ltd.* v. *Lajpat Rai*(1). If the resolutions of Parliament cannot be treated as a matter coming within the

(1) (1910) I. L. R. 37 Cal. 760, at p. 789.

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purview of item (1) of the *Explanation* in s. 57, the High Court was entitled to take judicial notice of what had been done by Parliament as a matter of great public notoriety or as a historical fact. A fact of such a public character as the resolutions of Parliament approving of the Proclamation of Emergency by the Governor-General is a matter of which the Court could and should take judicial notice. Section 57 of the Evidence Act gives a list of certain facts of which the Court shall take judicial notice. The list however is not exhaustive or complete. *"The Englishman" Ltd.* v. *Lajpat Rai*; Woodroffe's Evidence, 9th Ed., p. 489; Sarkar's Evidence, 6th Ed., pp. 504-505, 514-515; Taylor on Evidence—Sections 4 to 21; Best on Evidence—Sections 253-254; Roscoe's Evidence, 20th Ed., Vol. I pp. 82—86; 13 Halsbury, Paras. 679 to 695; and Phipson's Evidence, p. 19, were referred to.

As to how far a Judge can import his personal knowledge, see Woodroffe's Evidence, 9th Ed., p. 485; Sarkar's Evidence, 6th Ed., p. 516; *Lakshmayya* v. *Sri Raja Varadaraja Apparow Bahadur*(1).

The resolutions of Parliament have been sufficiently proved under s. 78. Section 78(2) is the appropriate provision in this case and not s. 78(4), though for the purposes of the argument it would not make any substantial difference. The reasons for applying s. 78(2) in this case are: (1) s. 78 is to be read in the light of s. 74 which defines public documents; (2) s. 74(1) (iii) shows that a foreign country is contra-distinguished from British India or any other part of His Majesty's Dominions; (3) a comparison of ss. 78(3) and 78(4) will show that the Acts of the Executive of a foreign country would not include proclamations, orders etc., issued by the Executive of His Majesty's Government in the United Kingdom; (4) s. 86 (marginal notes) also gives some indication as to what is meant by 'foreign' in the Evidence Act. Hansard comes within the words of s. 78(2)—"copies purporting to be printed by order of the Government concerned". Hansard is printed by authority of His Majesty's Stationery Office and therefore by order of the Government concerned: see also Evidence Act, 1845, and Documentary Evidence Act, 1882. For the history of Hansard, see Gilbert Campion's "Introduction to the Procedure of the House of Commons". The expression "Journals" in s. 78 should be given a broad meaning.

Regarding the argument that the Defence of India Rules go beyond the scope of the Act, it is submitted that there is no substance in that point. Section 2(1) is wide enough to cover the rules in question. *Emperor* v. *Meer Singh*(2); *Ramanuja Ayyangar, In re*(3); *Rex* v. *Halliday*(4); and *Hodge* v. *The Queen*(5) were referred to.

(1) (1912) I. L. R. 36 Mad. 168, at pp. 178, 180-181, 183-184.
(2) I. L. R. [1941] All. 617.
(3) I. L. R. [1941] Mad. 169.
(4) [1917] A. C. 260.
(5) (1883) 9 App. Cas. 117.

On the merits of the appeal, the Courts below have held that the speech offends against the Defence of India Rules and it is for the appellant to satisfy the Court that the High Court was wrong in the view that it took. It is true that a portion of the speech is missing but the point for consideration is whether or not there is enough of the speech before the Court to come to a finding that it offends against the law. The law we are concerned with is not the Indian Penal Code, but the Defence of India Act and the Rules made thereunder. The question is whether the appellant by making the speech complained of was guilty of doing a "prejudicial act" within the meaning of the Defence of India Rules or in other words whether the appellant by making the speech did something which was intended or was likely to bring into hatred or contempt or to excite disaffection towards His Majesty or the Government established by law in British India. Taking the speech as a whole, it is submitted that the High Court was right in the view it took that the speech offended against the law.

Sir Brojendra Mitter, A.-G. of India (*H. R. Kazimi* with him). It has long been recognized that the list in s. 57 of the Indian Evidence Act, 1872, is not exhaustive. Section 57 (1) should be given a liberal interpretation and not confined to the text of an Act. Act means an Act in force. The old form of the section, which has been adapted into the present form, expressly said so. Therefore, the fact whether an Act is in force or not is well within the scope of judicial notice. The Court should know or inform itself whether an Act is in force. The prosecution called upon the Court to take judicial notice of the fact that Resolutions of Parliament kept the Defence of India Act alive, and the relevant volume of Hansard was produced. The Court was satisfied. This is quite enough for the case. That section 57(1) should be liberally interpreted can be illustrated by the recognition, without proof, of the Declaration that India was at war with Germany, of the Proclamation of Emergency, of Notification bringing an Act into force, of Rules made under the Defence of India Act, and so on. These are all matters outside the text of the Act. There is no reason, therefore, why Resolutions of Parliament, which prolonged the proclaimed emergency and kept the Defence of India Act in force should not be similarly recognized, provided appropriate books are produced. The Act purports to be in force for the duration of the war and for six months thereafter. On the raising of the issue whether the Act was in force, it was the business of the Court to know whether it was in force or had lapsed. It was entitled to get the information from Hansard.

Secondly, the facts that there was a declaration of war by the Governor-General, that a Proclamation of Emergency

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was issued, that, as a consequence, legislative power in India was centralized and the Defence of India Act was passed and that Parliament, by exercise of the statutory function under s. 102 of the Constitution Act, passed Resolutions approving the Proclamation, are all matters of public history which a future historian may record. Public history should not be limited to ancient history. Hence Courts should take judicial notice, under s. 57, of these matters of public history.

Thirdly, Government has, from time to time, been making Rules under the Defence of India Act. These are official acts and Courts should presume, under s. 114, Evidence Act, that such official Acts have been regularly performed. They could not be regularly performed if Parliament had not passed the Resolutions. In the absence of evidence to the contrary, the presumption stands. Hence, no proof of the Resolution is necessary.

Aswini Kumar Ghose in reply.

Cur. adv. Vult

The Judgment of the Court was delivered by

GWYER C. J.—In this case the appellant was convicted by the Additional Chief Presidency Magistrate at Calcutta on the 21st of July, 1941, of offences under sub-paragraphs (e) and (k) of paragraph (6) of Rule 34 of the Defence of India Rules, and was sentenced to be detained till the rising of the Court and to pay a fine of Rs. 500, and in default to undergo six months' rigorous imprisonment. This conviction and sentence was upheld on appeal by the High Court, and the appellant now appeals to the Federal Court. He has taken a number of points in his appeal, but those argued before us were only three in number. There was first of all a constitutional point, secondly, a point on the law of evidence, and lastly, the point whether the speech which formed the basis of the charge against him justified a conviction at all. The last two matters would not ordinarily be within the competence of this Court to determine; but, since a certificate has been given by the High Court under s. 205 (1) of the Constitution Act, the appellant is entitled with the leave of this Court to raise any point in his own defence.

The constitutional matter is of such minute dimensions as not to be readily discerned; but, if we have been able to understand it, it is this. By s. 102 of the Constitution Act, if the Governor-General has issued a Proclamation declaring that a grave emergency exists, whereby the security of India is threatened, whether by war or internal disturbance, the Federal Legislature has power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List. Such a Proclamation was in fact issued by His Excellency on Sep-

tember 3rd, 1939, on receipt of information from His Majesty's Government in the United Kingdom that a state of war existed between His Majesty and Germany; and on September 29th, 1939, the Defence of India Act, 1939(1), was enacted. Before that date however the Governor-General had promulgated the Defence of India Ordinance, 1939, under the powers given him by s. 72 of the former Government of India Act, one of the sections of the Act continued for the time being by s. 317 and the Ninth Schedule of the present Act. An Ordinance promulgated under this power ceases to operate at the expiration of six months from its promulgation; but in the present case it was superseded by the Act to which reference has been made; and s. 21 of that Act provided that any rules made in exercise of any power conferred by or under the Ordinance should be deemed to have been made in exercise of powers conferred by or under the Act, as if the Act had commenced on September 3rd, 1939. The Defence of India Rules therefore, though originally made under powers conferred by the Ordinance, have now been given statutory authority; and it was under those Rules that the appellant was convicted.

It will be observed that s. 102 of the Constitution Act confers powers upon the "Federal Legislature", which has not yet come into existence. Section 316 of the Act however provides that during the transitional period the powers conferred by the provisions of the Act for the time being in force on the Federal Legislature shall be exercisable by the "Indian Legislature", and that accordingly references in those provisions to the Federal Legislature and Federal laws are to be construed as references to the Indian Legislature and laws of the Indian Legislature. The "Indian Legislature" thus referred to is the Indian Legislature constituted under the last Government of India Act, the provisions of which relating to the Indian Legislature are also among the provisions continued by s. 317 and the Ninth Schedule of the Constitution Act until the Federation of India contemplated by the Act comes into existence. The appellant, as we understand it, says that, since s. 316 does not in terms refer to s. 102 of the Constitution Act, and the powers conferred by s. 102 can only be enacted by the Federal Legislature, the Defence of India Act, 1939, and as a necessary consequence all rules made under it, are *ultra vires* the present Indian Legislature. We confess that we are totally unable to appreciate the appellant's contention, unless it be that the powers conferred by s. 102 are powers of a special kind, as indeed in a sense they are, to which the general provisions of s. 316 cannot be intended to apply; or that the reference in s. 316 to the powers conferred by "the provisions of this Act for the time being in

(1) Central Act No. XXXV of 1939.

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force" must be read as excluding powers which only come into existence after the issue of a Proclamation of Emergency; but s. 316 is in our opinion quite unambiguous, and we have no doubt that the legislative powers conferred by s. 102 are properly exercisable by the existing Indian Legislature.

There was also a suggestion that, even if Parliament had approved the Proclamation on the first occasion, a further Proclamation was required after the lapse of another six months. Counsel for the appellant endeavoured to support this suggestion by references to ss. 43, 89 and 93 of the Act, which deal with a totally different subject-matter, and even by a reference to the provisions of the United Kingdom Defence of the Realm Act which relate to the date on which that Act comes to an end. There is no substance of any kind in the suggestion; and the sections of the Act cited in support of it, and still more the United Kingdom Act, are utterly irrelevant.

The appellant's next contention involves a question of the law of evidence. A Proclamation of Emergency issued under s. 102 ceases to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament. The Proclamation was, as we have said, issued on September 3rd, 1939, and it would therefore have ceased to operate on March 3rd, 1940, unless before that date Parliament had approved it; and, if that approval had been withheld, the result would have been that any law made by the Legislature which the Legislature would not have been competent to make but for the issue of the Proclamation, would have ceased to have effect on the expiration of a period of six months after the Proclamation had ceased to operate, that is to say, on September 3rd, 1940, except as respects things done or omitted to be done before the expiration of that period: s. 102 (4). The appellant made the speech complained of on April 13th, 1941, long after the Defence of India Act would have ceased to have effect, if the Proclamation of Emergency had not in fact been approved by Parliament.

The appellant says that the Proclamation was never approved by Parliament, or, alternatively, that the prosecution never gave legal proof of that approval; and that therefore he was wrongly convicted. It is, at any rate today, common knowledge that Parliament did approve the Proclamation; but if legal proof of that approval was necessary at the time to establish that an offence had been committed, the appellant is of course entitled to complain of the omission to give it, and to assert that no proper proof of his guilt was ever tendered to the Court which convicted him.

The relevant volumes of the "Parliamentary Debates", as they are called, the official report of the debates in Parlia-

ment, were in fact produced to the High Court and accepted by them as proof that Parliament had passed the necessary Resolutions; but the appellant contends that this proof was not adequate, and that only copies of the official Journals of the two Houses will suffice. The Advocate-General of Bengal contends in the first place that the Court are entitled, and indeed ought, to take judicial notice of the fact that the Resolutions were passed; and that in any event the volumes of the Parliamentary Debates were all that was necessary in the way of legal proof. This then is the question of law which we have now to consider.

It is to be observed that though the question is one of the proper method of proving an event which occurred in England, the law applicable is the Indian, and not the English, law of evidence. The Indian Evidence Act, 1872(1), is no doubt mainly based upon the English law; but it is by no means an exact reproduction of it. The English law of evidence also has never been codified, and judicial decisions may well have developed or expanded some of its principles since 1872. Caution is therefore necessary in the application of English authorities on the subject in an Indian Court.

In our opinion the volumes of the official Parliamentary Debates afforded adequate legal proof of the passing of the two Resolutions by the Houses of Parliament. Section 78 of the Indian Evidence Act sets out certain categories of public documents and the manner in which they may be proved. The first four categories (as amended by the Adaptation of Indian Laws Order, 1937) are these:— "(1) Acts, orders or notifications of the Central Government in any of its departments, or of any Provincial Government or any department of any Provincial Government"; "(2) The proceedings of the Legislatures", which may be proved "by the journals of those bodies respectively, or by published Acts or abstracts, or by copies, purporting to be printed by order of the Government concerned"; "(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government"; "(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country", which may be proved "by journals published by their authority, or commonly received in that country as such", and in certain other ways not here material. In our opinion the proceedings of Parliament fall under either the second or fourth of the categories set out above. It may be said that the reference in the second category to proceedings of "the Legislatures", following immediately upon the first category which is confined to acts, orders or notifications of Governments in British India, is to be taken as a reference to the Legislatures of British India

(1) Central Act No. I of 1872.

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only. We find it difficult however to believe that s. 78 excludes any reference whatsoever to the proceedings of Parliament, especially when the executive acts of the Government of the United Kingdom are given a category to themselves, and we should find ourselves compelled, if we adopted that construction, to hold that proceedings in Parliament fell into the fourth category, that is to say, "the proceedings of the Legislature of a foreign country"; but it would perhaps be even more difficult to suppose that Parliament can have been so described by the Indian Legislature in 1872. The explanation may be that "the legislatures" to which the second category refers are intended to include all the legislatures which have the power to make laws for British India or for any part thereof; but we have no doubt that the present case must fall within either the one category or the other.

The official Parliamentary Debates are not the Journals of the two Houses of Parliament in the narrower sense of that expression. Each House publishes its own Journals, which contain a formal record of the business done and may be described as the minutes of their proceedings; and these Journals may in an English Court be proved by copies thereof purporting to be printed by the printers to the Crown or by printers to either House of Parliament: Evidence Act, 1845(1), s. 3 (the Documentary Evidence Act, 1882(2), puts documents purporting to be printed under the superintendence or authority of His Majesty's Stationery Office on the same footing as documents purporting to be printed by the Government printer, or the King's printer, or the printer authorized by His Majesty, or otherwise under His Majesty's authority). The expression "journals" however in s. 78 of the Indian Act is plainly to be given a broad and general meaning, since it is not confined to the Journals of the Houses of Parliament, but includes journals of other legislatures also; and we see no reason therefore why, in its application to Parliament, it should necessarily be confined to the particular kind of journals of which we have spoken above, if it can be shown that the Houses have authorized the publication of other official records of their proceedings and that these records are printed "by order of Government". We cannot doubt that the official Parliamentary Debates are such a record. Up to 1909 the publication of the debates in Parliament was the private venture of one Hansard (though assisted in later years by a Government grant); but in 1909 it was taken over from the original Hansard or his successors in title, and the volumes have ever since been published under the authority of the two Houses and are printed at the present day by His Majesty's Stationery Office. An account of the

(1) 8 & 9 Vict. C. 113. (2) 45 & 46 Vict. C. 9.

matter will be found in "An Introduction to the Procedure of the House of Commons", by Sir Gilbert Campion, the present Clerk of the House, at pp. 72-3. There is, so far as we can ascertain, nothing, or practically nothing, in the Journals of each House which does not appear in the Parliamentary Debates, the difference between the two being that the latter include the text of the speeches made by members of the Houses. We have ascertained by inquiry from the Legislative Department of the Government of India that the Official Reports of the Council of State and of the Legislative Assembly, which follow very closely the form and manner of presentation of the official Parliamentary Debates in England, are the only record of the proceedings of the two Houses, no other record similar to that of the Journals of the two Houses of Parliament in England being made. The proceedings of the Indian Legislature could clearly be proved by tendering in evidence copies of these Official Reports; and we can see no reason why the proceedings of Parliament cannot be proved by an exactly similar English publication, issued with a similar authority.

Having regard to the view which we take on this point, we need not consider the other contention urged by the Advocate-General of Bengal, that the passing of the two Resolutions by Parliament was a matter of which the Court were entitled to take judicial notice. In *"The Englishman" Ltd.* v. *Lajpat Rai*(1) the question at issue was concerned with the proof of debates or speeches in the House of Commons, not with proof of resolutions passed by the House itself, and Hansard was still an unofficial publication, which had not yet been taken over by Parliament. Reference was made to this case in the course of the argument before us; but in the circumstances it is not necessary to discuss it, though we are not to be taken as necessarily agreeing with all the observations in the judgments of the learned Judges who decided it.

The last question we have to determine is whether the appellant committed an offence at all. By Rule 38 (1) (a) of the Defence of India Rules "no person shall without lawful authority or excuse do any prejudicial act". These acts are defined in Rule 34 (6) of the Defence of India Rules, and the prejudicial acts which the appellant is said to have done are those described in sub-paragraphs (e) and (k), that is to say, acts which are intended or are likely—

> "(e) to bring into hatred or contempt, or to excite disaffection towards, His Majesty or the Crown Representative or the Government established by law in British India or in any other part of His Majesty's dominions", or
>
> "(k) to influence the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or the efficient prosecution of war".

(1) (1912) I.L.R. 37 Cal. 760.

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It will be observed that the first of these acts is described in precisely the same language as is used to describe the offence of sedition in s. 124A of the Indian Penal Code(1). We were invited to say that an offence described merely as a "prejudicial act" in the Defence of India Rules ought to be regarded differently from an offence described as "sedition" in the Code, even though the language describing the two things is the same. We cannot accept this argument. Sedition is none the less sedition because it is described by a less offensive name; and in our opinion the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules. We do not think that the omission in the Rules of the three "Explanations" appended to the section of the Code affects the matter. These are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the Rules ought to be interpreted as if they had been explained in the same way.

"The words, as well as the acts, which tend to endanger society", it has been observed, "differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings and processions are held lawful which 150 years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before" (Lord Sumner in *Bowman* v. *Secular Society, Ltd*(2)). The right of every organized society to protect itself against attempts to overthrow it cannot be denied; but the attempts which have seemed grave to one age may be the subject of ridicule in another. Lord Holt was a wise man and a great Judge; but he saw nothing absurd in saying that no Government could subsist, if men could not be called to account for possessing the people with an ill opinion of the Government; since it was necessary for every Government that the people should have a good opinion of it *The Queen* v. *John Tutchin*(3). Hence many judicial decisions in particular cases which were no doubt correct at the time when they were given may well be inapplicable to the circumstances of today. The time is long past when the mere criticism of governments was sufficient to constitute sedition, for it is recognized that the right to utter honest and reasonable criticism is a source of strength to a community rather than a weakness. Criticism of an existing system of government is not excluded, nor even the expression of a desire for a different system altogether. The language of s. 124A of the Penal Code, if read literally, even with the

(1) Central Act No. XLV of 1860. (2) [1917] A.C., 406, at p. 466.
(3) (1704) 14 How. St. Tr. 1095.

explanations attached to it, would suffice to make a suprising number of persons in this country guilty of sedition; but no one supposes that it is to be read in this literal sense. The language itself has been adopted from English law, but it is to be remembered that in England the good sense of jurymen can always correct extravagant interpretations sought to be given by the executive government or even by Judges themselves; and if in this country that check is absent, or practically absent, it becomes all the more necessary for the Courts, when a case of this kind comes before them, to put themselves so far as possible in the place of a jury, and to take a broad view, without refining overmuch, in applying the general principles which underlie the law of sedition to the particular facts and circumstances brought to their notice.

What then are these general principles? We are content to adopt the words of a learned Judge, which are to be found in every book dealing with this branch of the criminal law: "Sedition...embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government, and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder": Fitzgerald J. in R. *v. Sullivan*(1). It is possible to criticize one or two words or phrases in this passage; "loyalty" and "disloyalty", for example, have a non-legal connotation also, and it is very desirable that there should be no confusion between this and the sense in which the words are used in a legal context; but, generally speaking, we think that the passage accurately states the law as it is to be gathered from an examination of a great number of judicial pronouncements.

The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of government that in our opinion the offence of sedition stands related. It is the answer of the

(1) (1868) 11 Cox. C. C. 44, at p. 45.

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State to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.

Such appear to us to be the broad principles underlying the conception of sedition as an offence against the State; and it is obvious that occasions may arise when it will not be easy to draw a distinction between certain aspects even of a constitutional agitation and acts which are admittedly seditious. The Courts however know no such thing as a political offence, as it is sometimes called, and must administer the law as they find it. There will always be borderline cases where the line between what is lawful and what is unlawful is hard to define; but we believe that, if the essential principles which we have sought to enunciate above are borne in mind, and if the Courts, as we have suggested, assume in part the functions of jurymen when they hear these cases, they will generally be able to come to a decision not only in harmony with the true principles of the law, but also not obnoxious to commonsense and the circumstances of the time. And in holding the scales evenly between Government and citizen they will be forgetful neither of the obligations of the one towards the public at large nor of the individual and private rights of the other; for the preservation of order is a thing in which all citizens have an interest no less than in the maintenance of freedom of speech and the right to criticise all matters of public interest.

Having thus stated what we conceive to be the principles of law applicable to the case, we turn now to the speech itself on which the appellant's conviction was based. It was delivered at a meeting held to commemorate an unhappy incident which occurred 23 years ago, and which was referred to in a manner not uncommon in utterances of this kind. But it is plain that the occasion was used by the speaker not so much to commemorate the incident in question as to launch an attack upon the then Fazlul Huq Ministry and the Governor of Bengal for their acts or omissions in the matter of the Dacca

riots. This was the main theme of the speech, which upbraided the Ministry for their alleged use or misuse of the Police forces, and the Governor himself for his alleged disregard of the special responsibility for the maintenance of law and order in the Province imposed upon him by the Constitution Act; and which demanded that Ministry and Governor should pay compensation to the sufferers at Dacca out of their own pockets. The High Court were impressed by a passage in which they say that the appellant "suggested to his audience that the Governor of Bengal in person and the Ministers of the Bengal Government were encouraging communal disturbances and were discouraging all persons who sought to put an end to communal disturbances" but, though we have searched diligently, we cannot find this passage. The appellant's complaint, as we read the speech, is that the Government took no steps, or took inadequate steps, because they were an inefficient Government, not because they were anxious for some reason or other themselves to promote communal riots and disturbances. It is true that in the course of his observations the appellant indulged in a good deal of violent language and seems to have worked himself up to such a state of excitement that the sequence of his argument is in places very difficult to follow. The speech was, we feel bound to observe, a frothy and irresponsible performance, such as one would not have expected from a member of the Bengal Legislature; but in our opinion to describe it as an act of sedition is to do it too great honour.

There is an English saying that hard words break no bones; and the wisdom of the common law has long refused to regard as actionable any words which, though strictly and literally defamatory, would be regarded by all reasonable men as no more than mere vulgar abuse. Abusive language, even when used about a Government, is not necessarily seditious, and there are certain words and phrases which have so long become the stock in trade of the demagogue as almost to have lost all real meaning. The speech now before us is full of them, and, if we hesitate to indicate those which we have in mind, it is only because we are unwilling to increase further the circulation of a debased or counterfeit currency. But we cannot regard the speech, taken as a whole, as inciting those who heard it, even though they cried "shame, shame" at intervals, to attempt by violence or by public disorder to subvert the Government for the time being established by law in Bengal or elsewhere in India. That the appellant expressed his opinion about that system of government is true, but he was entitled to do so; and his references to it were, we might almost say, both commonplace and in common form, and unlikely to cause any Government in India a moment's uneasiness. His more violent outbursts were directed against the then Ministry in

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Bengal and against the Governor in Bengal in his political capacity, but we do not feel able to say that his speech, whatever may be thought of the form in which it was expressed, exceeded the legal limits of comment or criticism.

We do not wish it to be supposed that we treat lightly the offence of sedition in the sense in which we have endeavoured to define it. It is a grave offence, a prosecution for which is a formidable weapon in the hands of a Government; but for that very reason it is all the more necessary to remember that opinions, and even the violent expression of opinions, do not necessarily fall within it. No doubt the occasion and circumstances of a speech are to be taken into consideration; a speech addressed to excitable and perhaps ignorant men may have results which would not follow in the case of an educated audience. We think that the appellant, as a member of an important Legislature, was under the greater obligation to choose his words with discretion, and though we do not think that his speech amounted to sedition, we do not say that it may not have been open to criticism on other grounds. Nor, we hope, are we exceeding our functions, if we observe that in grave times like the present, with the enemy at the gate, language which might not attract attention at other times may to-day or to-morrow bear a very different significance.

It only remains to say a few words about the alternative charge under sub-paragraph (k) of Rule 34 (6) of the Defence of India Rules. In the Judgment of the High Court there is no separate reference to this charge, or to that portion of the speech which can at all be said to fall under sub-paragraph (k), as distinguished from sub-paragraph (e), and the finding is limited to the offence under sub-paragraph (e). We are not able to say whether it is to be inferred from this omission that the learned Judges thought that the charge under sub-paragraph (k) was not sustainable or that they felt it unnecessary to deal with this part of the case in view of their confirmation of the conviction under sub-paragraph (e). As there was no conviction of the appellant by the High Court under sub-paragraph (k), the appellant's counsel did not deal with it, when he opened the appeal before us. The Advocate-General of Bengal could of course have pressed the charge under this sub-paragraph as an alternative to the charge under sub-paragraph (e), but he too made no reference to it and did not invite us to convict the appellant under sub-paragraph (k). The Additional Chief Presidency Magistrate seems to have devoted his attention mainly to the question of "bringing upon the Government the hatred and contempt of the audience" and it is only towards the end of his Judgment that he mentions the passage in the speech which refers to the possibility of Germany and Japan dropping bombs on India. Even this

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passage the Magistrate only interprets as further accentuating the feeling of hatred against the Government established by law and regards it as 'a language of disaffection'. It is difficult to read his judgment as discussing the charge under sub-paragraph (k) independently of the charge under sub-paragraph (e), or as recording a conviction of the appellant under sub-paragraph (k), apart from the conviction under sub-paragraph (e). In these circumstances we do not think it necessary or proper to deal with the charge under sub-paragraph (k).

Accordingly, having regard to the conclusion at which we have arrived with regard to the conviction under sub-paragraph (e), we are of opinion that the appeal should be allowed and the appellant acquitted.

Appeal allowed.

Agent for Appellant: *Ganpat Rai.*
Agent for Respondent: *B. Banerji.*
Agent for the Government of India: *K. Y. Bhandarkar.*

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

Punjab Restitution of Mortgaged Lands Act, 1938 (Punjab Act No. IV of 1938)—Validity and operation of—Interpretation of entry No. 21 in List II of the Seventh Schedule to the Government of India Act, 1935, and entries Nos. 7, 8 and 10 in List III—Costs of intervener.

Punjab Act IV of 1938 sets aside the normal procedure for redemption in the case of mortgages of land with possession effected before 8th June, 1901, and subsisting at the date of the Act, and authorizes the mortgagor or his representatives to apply to the Collector for restitution of possession of the mortgaged land. The Collector is empowered to extinguish the mortgage and to direct restitution of possession, if he finds that the mortgagee has while in possession enjoyed benefits equalling or exceeding in value twice the amount of the sum originally advanced under the mortgage. Where the value of the benefits enjoyed is found to be less than twice the sum advanced, possession is to be returned on payment of compensation to the mortgagee according to a scale fixed in the Act. The Act debars the civil court from entertaining any claim to enforce any right under a mortgage declared extinguished under the Act or to question the validity of any proceedings under the Act.

Certain mortgagors having presented petitions to the Collector under the Act, the mortgagees sued for a declaration of their right to continue in possession and for an injunction restraining the mortgagors from prosecuting their petitions before the Collector, the main ground urged in the plaint being that Punjab Act IV of 1938 was *ultra vires* the Provincial Legislature:

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Held, that the provisions of the impugned Act (1) do not contravene s. 298 (1) of the Constitution Act; (2) are not, within the meaning of s. 107 (1) of the Constitution Act, repugnant to s. 37 of the Indian Contract Act, since that section permits the performance of contracts to be dispensed with or excused under the provisions of any other law; and (3) cannot be said to be repugnant to the provisions of the Civil Procedure Code, since s. 9 of the Code itself excludes from the jurisdiction of civil courts suits of which the cognizance is either expressly or impliedly barred and by s. 4, in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force.

The test of repugnancy under s. 107 (1) of the Constitution Act considered.

The scope of the expression "agricultural land" in entry No. 21 of List II discussed.

The Court will not, in the absence of special circumstances, make an order for costs in favour of a Government intervening in a suit between private persons.

APPEAL from the High Court of Judicature at Lahore.

The suits out of which the appeals arise were instituted in the Court of the Senior Subordinate Judge, Muzaffargarh, on the 16th April 1940, claiming relief against respondents 1 to 4 in the form of a declaration that the said respondents were not competent to obtain restitution of lands which had been mortgaged with the plaintiffs' predecessors from the Collector of the district under the Punjab Restitution of Mortgaged Lands Act, alleging *inter alia* that the said Act was *ultra vires* the Provincial Legislature. Before these suits came on for trial in the ordinary course, they were, on the application of the mortgagees-plaintiffs, transferred to the High Court by a special order of the Court on the ground that they involved an important and difficult point of law, namely, "whether the Restitution of Mortgages Act is *ultra vires* or *intra vires* of the Punjab Legislature". In the High Court, the Punjab Government applied to be impleaded as a party to the suits, and accordingly was impleaded as a defendant "subject to just exceptions". The question came up before a Full Bench of the Lahore High Court, who by their decision, dated the 27th February 1941, held that the Punjab Restitution of Mortgaged Lands Act was *intra vires* the Provincial Legislature. Only the Punjab Government (respondent No. 5) contested the appeals in the Federal Court.

Sir Brojendra Mitter, A.-G. of India, and *Sardar Sant Singh* for the appellants. The Act applies to subsisting mortgages of land. Land, as defined in s. 3 of the impugned Act, includes (a) agricultural land, and (b) property other than agricultural land. The power regarding mortgage of property other than agricultural land comes from entry No. 8 of the Concurrent List (List III), while in regard to contractual or *quasi*-contractual rights of the mortgagee, *e.g.*, covenants, it comes from entry No. 10, of the same List. Accordingly

extinguishment of mortgages of property other than agricultural land comes under entry No. 8, while extinguishment of contractual or *quasi*-contractual rights of the mortgages comes under entry No. 10. The former proposition is repugnant to Order 34 of the Civil Procedure Code, while the latter is repugnant to ss. 69 and 70 of the Indian Contract Act.

The barring of the jurisdiction of Civil Courts (s. 12 of the impugned Act) applies to all rights under a mortgage. This is repugnant to s. 9 of the Civil Procedure Code. Entry No. 2 of List II is confined to matters in List II. By virtue of s. 107 of the Constitution Act all repugnant portions of the Provincial Act are void.

M. Sleem, A.-G. of the Punjab (Khan Sahib Mohammad Ameen with him), for the Punjab Government. The Provincial Legislature is competent under entry No. 21 of the Provincial List to extinguish rights in land. As the subject-matter of the transaction had been extinguished, there is no question of there being any conflict with the existing law with reference to contracts or with any other law. The impugned Act is not repugnant to any provision of any existing law as the test of repugnancy is whether this law and other laws could stand together. In so far as agricultural land is concerned, no question of conflict could arise because contracts relating to agricultural land had been expressly excluded. The impugned Act only dealt with agricultural land because in the Punjab agricultural land meant land which is regarded as "agricultural land" according to the definition given in the Punjab Alienation of Land Act (Act No. XIII of 1900).

Cur adv. vult

The Judgment of the Court was delivered by

VARADACHARIAR J.—These two appeals have been preferred by certain mortgagees, challenging the correctness of the judgment of a Special Bench of the Lahore High Court which held that the Punjab Restitution of Mortgaged Lands Act (Punjab Act No. IV of 1938) was *intra vires* the Provincial Legislature. The suits out of which the appeals arise were instituted in a subordinate Court in the Province; but, before they came on for trial in the ordinary course, they were, on the application of the mortgagees-plaintiffs, transferred to the High Court by a special order of the Court, on the ground that they involved an important and difficult point of law, namely, "whether the Restitution of Mortgages Act is *ultra vires* or *intra vires* of the Punjab Legislature". In the High Court, the Punjab Government applied to be impleaded as a party to the suits, on the ground that it was interested in the decision of the question involved. It was accordingly impleaded as a defendant "subject to just exceptions", and is thus a party respondent in the appeals before this Court, though in the Memorandum of Appeal it is the Advocate-General of the Punjab

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who is stated to be the respondent. As soon as the High Court pronounced its opinion on the point of law, the suits were remitted to the subordinate Court for decision on the merits; but on a certificate granted by the High Court under s. 205 of the Constitution Act, the appeals to this Court have been preferred and the proceedings in the subordinate Court have in the meanwhile been stayed.

The impugned Act of the Punjab Legislature purports to make certain special provisions in respect of mortgages with possession effected before June 8, 1901. Dealing with such of them as "subsist", the Act sets aside the normal procedure for redemption, and authorizes the mortgagor to apply to the Collector for restitution of possession of the mortgaged land. If the Collector finds that the value of the benefits enjoyed by the mortgagee while in possession have equalled or exceeded twice the amount of the principal sum originally advanced under the mortgage, he is authorized to extinguish the mortgage and direct the mortgagee to put the mortgagor in possession. If the value of the benefits enjoyed is less than twice the amount of the principal sum originally advanced, the Collector is authorized to restore possession of the land to the mortgagor on payment of compensation to the mortgagee according to a scale fixed in the Act; and on the compensation amount being desposited in court, the Collector is authorized to declare the rights of the mortgagee extinguished. The Collector is further authorized in all cases to carry out the order for possession by ejecting the mortgagee; and the civil court is debarred from entertaining "any claim to enforce any right under a mortgage declared extinguished under this Act or to question the validity of any proceedings under this Act".

It was when the mortgagors presented petitions to the Collector under the Act, praying for restitution of possession, that the present suits were instituted by the mortgagees. The plaints prayed for a declaration of the plaintiffs' right to continue in possession until their mortgage claims were satisfied in the ordinary course, and for a perpetual injunction restraining the defendants from prosecuting their petitions before the Collector. The main ground urged in the plaint was that Punjab Act IV of 1938 was *ultra vires* the Provincial Legislature. It may be convenient to point out at this stage that though the arguments before the High Court and before this Court were mainly based on s. 107 of the Constitution Act, the plaintiffs' plea and even the decision of the High Court are expressed in terms of *ultra vires* and *intra vires* and are not limited in the manner in which a question of "repugnancy" of certain provisions within the meaning of s. 107 of the Constitution Act may be expected to be limited. This is probably due to the fact that the plaintiffs also contend-

ed that the impugned Act was void as contravening the provisions of s. 298 of the Constitution Act.

From the judgment of the High Court, it would appear that some argument was urged before that Court based on s. 299 of the Constitution Act, but as no such argument has been advanced before us, it is unnecessary to say anything about it. The argument based on s. 298 was repeated before us, but it may be briefly disposed of. It has not been suggested that there is anything in the provisions of the impugned Act which is discriminatory in its nature. All that was relied on was that the date (June 8, 1901) fixed in s. 2 of the Act was the date on which the Punjab Alienation Act, 1900, came into force and it was said that that Act was discriminatory, and that this Act was part of the same policy, discriminating between agriculturist communities and non-agriculturist communities in the Punjab. It was also said that in fact and in effect the working of Act IV of 1938 would benefit members of the agriculturist communities at the expense of the non-agriculturists because the mortgagors in the province generally belonged to the agriculturist class and the mortgagees to the non-agriculturist class. No question arises in this case with reference to the Punjab Alienation Act and we do not propose to say anything with reference to the objections urged against it. When a particular piece of legislation is impeached as contravening s. 298 of the Constitution Act, the Court has to consider the provisions of the impugned Act and to determine whether directly or in effect it prohibits any person from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession, on grounds only of religion, place of birth, descent, etc. Descent was the only basis of discrimination suggested in the case, and it was said that the impugned Act in effect prohibited persons of a particular descent (communities classed as non-agricultural) from *holding* property. It is impossible to uphold this objection, when once it is admitted, as it was before us, that under the provisions of the Act agriculturist mortgagees, though they may be fewer in number, were as much liable to be dispossessed by order of the Collector as non-agriculturist mortgagees.

Proceeding now to the main arguments urged in the case, namely, those based on s. 107 of the Constitution Act, the points for determination are—

(1) whether the subject-matter of the impugned Act is wholly within the Provincial Legislative List or the Act covers to any extent matters enumerated in the Concurrent Legislative List, and

(2) whether any and, if so, which of the provisions of the impugned Act are repugnant to any provision of an "existing

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Indian law" with respect to one of the matters enumerated in List III, the Concurrent Legislative List.

In the judgment of the High Court there is some discussion of the question of the "pith and substance" of the Act; but that question does not arise when objection is taken not under s. 100 of the Constitution Act, but under s. 107 (1). Counsel for the appellant made it clear that it was not his contention that any of the provisions in the impugned Act were beyond the competence of the Provincial Legislature, because he recognised that it made no difference on the question of competence, whether the subject-matter fell under List II or under List III of the Seventh Schedule. But he contended that the High Court erred in holding that the subject-matter of the Act was *wholly* covered by List II. He admitted that the opening words of entry No. 21 in List II, namely, "land, that is to say, rights in or over land", were very wide and quite general. But he urged that in respect of certain topics, namely, "transfer, alienation and devolution" the scope of that entry must be restricted to "agricultural land" as indicated lower down in the entry itself; and he maintained that the propriety of such a restriction was confirmed by the fact that by entries Nos. 7, 8 and 10 in List III, wills, intestacy and succession, and transfers and contracts were placed within the concurrent jurisdiction of the Central and Provincial Legislatures, except as regards agricultural land. If entry No. 21 in List II were thus limited, it would follow, according to him, that the provisions of the impugned Act, in so far as they applied to property other than agricultural land, would be inoperative to the extent to which they were repugnant to any existing Indian law: see s. 107 (1) of the Constitution Act. On this footing, he attempted to show that the impugned Act is not limited in its operation to agricultural land, and that some of its provisions are repugnant to certain provisions of the Contract Act and of the Civil Procedure Code. It will be convenient to take up the latter question first, as it seems easier to reach a definite conclusion thereon.

In Australia, where the Constitution Act contains a provision (s. 109) similar to s. 107 (1) of the Indian Constitution Act, difficulty has sometimes been felt in precisely defining the test of repugnancy or inconsistency. In the American Constitution there is no corresponding provision. In the British North America Act, there is no express declaration of the supremacy of Dominion over Provincial laws; but it has been laid down in a number of cases that where there is a conflict between Dominion and Provincial legislation, the former is paramount: see Wynes, "Legislative and Executive Powers in Australia", pp. 91 and 92. The same author accordingly

observes at p. 94 that "American cases are to be applied with caution, while Canadian cases may lay down a principle too narrow for application" to cases where there is express statutory provision of the kind now under consideration. There however appears to be no serious difficulty in the class of cases (referred to by Wynes on p. 102) of which *Stock Motor Ploughs* v. *Forsyth*(1) is an illustration. The principle of that decision is that where the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provision made in it, it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law. *Hume* v. *Palmer*(2) furnishes another illustration of this principle. By s. 2 of the Colonial Laws Validity Act, 1865, "any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which any such law may relate" was declared to be void and inoperative to the extent of such repugnancy. The Commonwealth Legislature had passed a Navigation Act and it was contended that some of its provisions were repugnant to the United Kingdom Merchant Shipping Act, 1894. This objection was answered by a reference to s. 735 of that Act; which provided for the Legislature of any British Possession repealing any provisions of that Act relating to ships registered in that Possession.

Section 37 of the Indian Contract Act, which lays down that parties to a contract must either perform or offer to perform their respective promises, qualifies this statement by the words "unless such performance is dispensed with or excused under the provisions of . . . any other law". When the statement of the general rule itself is so qualified, it is difficult to see how a law which excuses performance of any particular kind of contract can be said to be inconsistent with the section, which must be taken as a whole. The impugned law will only be one of the special cases contemplated or saved by the main or paramount Act. Likewise, s. 9 of the Civil Procedure Code, which postulates the jurisdiction of the ordinary civil courts to try all suits of a civil nature, excepts "suits of which their cognizance is either expressly or impliedly barred"; and s. 4 lays down that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force. As held by this Court in *The United Provinces* v. *Atiqa Begum*(3), these qualifying or saving words preclude the contention that an Act which bars a civil remedy in certain cases is repugnant to the provisions of the Code of Civil Procedure.

(1) (1932) 48 Com. L. R. 128.
(2) (1926) 38 Com. L. R. 441.
(3) [1940] F. C. R. 110, at pp. 137, 145.

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The position will be even more obvious, if another test of repugnancy which has been suggested in some cases is applied, namely, whether there is such an inconsistency between the two provisions that one must be taken to repeal the other by necessary implication. For the application of this test, it will be immaterial whether the Central law is earlier or later in date than the Provincial law. If, for the sake of argument, we assume that the Contract Act or the Civil Procedure Code was passed after the impugned Punjab Act, it will be impossible to contend that the provisions already referred to in these subsequent enactments will have the effect of repealing by necessary implication the earlier Punjab law, when they expressly save the operation and effect of other laws dealing with matters, which in the absence of such special law will undoubtedly be governed by the general Central enactment. In this view, the objection based on s. 107 (1) of the Constitution Act will not avail the appellants, so far as either the Civil Procedure Code or s. 37 of the Contract Act is concerned. If however it should be found that the substantive provisions of an impugned Act are to any extent void or inoperative, any attempt to exclude attack on them by barring the jurisdiction of civil courts will be open to criticism as "an attempt to do by indirect means" something which the Provincial Legislature was not entitled to do directly (see *Board of Trustees of Lethbridge* v. *Independent Order of Foresters*(1)).

It was pointed out by counsel for the appellants that under ss. 69 and 70 of the Contract Act, a mortgagee will be entitled to be reimbursed in respect of certain payments made by him for the benefit of the mortgagor and it was suggested that, on a strict interpretation of ss. 7, 8 and 12 of the impugned Act, the mortgagee might be deprived of his right to such reimbursement. To this it was said by way of answer that on a proper interpretation of the relevant sections of the Punjab Act no such consequence would follow, and that rights of this kind belonging to the mortgagee would be saved either by holding that the extinction under the Act and the exclusion of the civil court's jurisdiction related only to his rights *qua* mortgagee or by taking such disbursements into account when calculating the "value of the benefits enjoyed by the mortgagee while in possession" as directed in s. 7. We do not feel called upon at this stage to express any opinion on these questions relating to the interpretation of the Act. It is sufficient to say that the Act does not clearly or in terms take away any rights which a mortgagee may have under ss. 69 and 70 of the Contract Act, and that no particular provision in the Act can accordingly be said to be repugnant to those provisions of the Contract Act.

In the argument before the High Court, a passing reference seems to have been made in this connection to the Limita-

(1) [1940] A. C. 513, at pp. 533, 534.

tion laws and to the Transfer of Property Act (Central Act No. IV of 1882). There is no provision in the impugned Act which conflicts with the Indian Limitation Act (Central Act No. IX of 1908), and even if there were any, the saving of special or local laws in s. 29 (2) of the Limitation Act would preclude the argument of repugnancy, for the reasons above indicated. No argument was urged before us with reference to the Transfer of Property Act for the obvious reason that a plea of repugnancy under s. 107 (1) of the Constitution Act could be raised only on the strength of statute law or statutory rules and the Transfer of Property Act is not *as such* in force in most of the Punjab.

This conclusion is sufficient to dispose of the appeal; but as the other question was discussed at some length in the arguments before us and we do not wish to be understood as wholly accepting the view expressed in the judgment of the High Court as to the scope of entry No. 21 in the Provincial List, we think it right to make a few observations on that aspect of the case.

The expression "agricultural land" has not been defined in the Constitution Act. It must accordingly be understood in the sense which it ordinarily bears in the English language. In the judgment of the High Court, the definition of "land" in the English Interpretation Act, 1889, has been quoted. It is unnecessary to refer to it here, because it was conceded before us on both sides that in the Constitution Act "land" comprises both corporeal and incorporeal rights and interests. This is indeed clear from the words "rights in or over land" in the opening portion of entry No. 21. The discussion before this Court related to the significance of the term "agricultural". In the impugned Act s. 3 (1) provides as follows:—

> "The expression 'land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes—
>
> (a) the sites of buildings and other structures on such land;
> (b) a share in the profits of an estate or holding;
> (c) any dues or any fixed percentage of the land revenue payable by an inferior land owner to a superior landowner;
> (d) a right to receive rent;
> (e) any right to water enjoyed by the owner or occupier of land as such;
> (f) any right of occupancy; and
> (g) all trees standing on such land."

It was contended on behalf of the appellant—

(1) that lands occupied or let for pasture could not *always* be regarded as agricultural land, and likewise the sites of buildings and other structures on agricultural or pasture land;

(2) that "holding" in paragraph (b) was not always limited to agricultural land; and

(3) that in paragraph (d) the right to receive rent was not limited even by reference to "such land" as in some of the

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other paragraphs, and might well include rent from non-agricultural property.

Objection was lastly taken to the inclusion in paragraph (g) of "trees standing on such land" in the definition of land. It was pointed out that in *Bhagwana* v. *Gopi*(1) it had been held by the Lahore High Court that trees would not fall within the corresponding definition of "land" in the Punjab Alienation Act and that paragraph (g) in the definition was added to meet this decision. We do not propose to express any definite opinion on the several steps involved in this part of the argument. It may however be observed that there is force in the contention that entry No. 21 in List II should be read and interpreted as a whole and in the light of entries Nos. 7, 8 and 10 of List III.

As regards the connotation of the word "agricultural", it may be pointed out that "agriculture" has been variously defined in several English and Indian statutes for the purposes of these statutes and it is neither useful nor legitimate to attempt to draw any inference from these statutory definitions for the purpose of determining the ordinary connotation of the word in the English language. In some decisions, the Court has thought it right to place a restricted interpretation on the expression "agricultural purpose" in view of indications afforded by the particular Act which had to be considered by the Court: see *Chandrasekhara Bharati Swamigal* v. *Duraisami Naidu*(2), where all the prior decisions are reviewed. In *Murugesa* v. *Chinnathambi*(3) a Division Bench of the Madras High Court had to discuss the meaning of the expression "agricultural purposes" in s. 117 of the Transfer of Property Act. It was pointed out in that case that "agriculture" was used in a narrow sense as well as in a more general sense, and that the latter comprehended not merely the raising of grain or food crops but also the cultivation of the ground for the purposes of procuring vegetables and fruits for the use of man and beast, including gardening or horticulture and the raising or feeding of cattle and other stock. One of the learned Judges who had held in an earlier case that land used for a coffee garden was not used for an "agricultural purpose" stated in this later judgment that on further consideration he was of the opinion that his earlier view was wrong. The view thus expressed by the learned Judge in his later judgment is in accord with the decision of the Judicial Committee in *Kaju Mal* v. *Saligram*(4), where, dealing with a definition in the Punjab Alienation Act practically identical in its terms with the definition in the impugned Act, Their Lordships confirmed a decision of the Punjab Chief Court to the

(1) A. I. R. 1935 Lah. 202.
(2) (1931) I. L. R. 54 Mad. 900.
(3) (1901) I. L. R. 24 Mad. 421.
(4) (1923) I. L. R. 5 Lah. 50.

effect that land used as a tea garden was used for "agricultural purposes". In the judgment of the Chief Court (which was generally approved by Their Lordships) it was observed that "the term 'agricultural land' is used in the Act of 1905 in its widest sense to denote all land which is tilled"; see *Kaju Mal* v. *Saligram*(1). The Chief Court had held that land covered by a natural forest was not agricultural land, and this view also would seem to have been confirmed by the Judicial Committee: see also *Province of Bihar* v. *Pratap U. N. S. Deo*(2), and for further discussion of the question reference may be made to *Deen Muhammad Mian* v. *Hulas Narain Singh*(3).

No reason has been suggested by counsel for the appellant why "agricultural land" mentioned in entry No. 21 of List II of the Seventh Schedule should be limited to what has been described in the cases as the narrower meaning of the expression. But the view indicated in *Murugesa* v. *Chinnathambi*(4), by its approval of *Venkayya* v. *Ramasami*(5), *viz.*, that land used for a cocoanut garden must be deemed to be used for an "agricultural purpose" has not gone unchallenged, and even more so the view taken in *Panadi Pathan* v. *Ramaswami Chetti*(6) that a lease of land for growing casuarina trees to be used for fuel was a lease for agricultural purposes: see *Chandrasekhara Bharati Swamigal* v. *Duraisami Naidu*(7). In the last cited case, Reilly J. observed that "agriculture cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on". The learned Judge then proceeded: "When the land is covered with trees which have to stand on it for a number of years, sometimes as long as a century, during most of which period the land itself is untouched, to describe that as agriculture appears to me inappropriate". The decision of the Judicial Committee in *Kesho Prasad Singh* v. *Sheo Prakash Ojha*(8) would at first sight seem to lend some support to this view, as Their Lordships (without any discussion) confirmed the view of the High Court that s. 79 of the Agra Tenancy Act which related to "land held for agricultural purposes" had no application to the "grove" in question in that case. It is stated in the judgment of the High Court in *Kesho Prasad Singh* v. *Sheo Prakash Ojha*(9) that the grove had been planted on land granted by the zamindar for the purpose of planting a grove, on condition of the grantee agreeing to deliver one-half of the fruit to the zamindar. Following a line of authority in the Allahabad High Court, the learned Judges held that "land held for the purpose of a grove is not

(1) Punjab Record 1919, case No. 91.
(2) (1941) 22 Pat. Law Times 483.
(3) (1942) 25 Pat. Law Times 143.
(4) (1901) I. L. R. 24 Mad. 421.
(5) (1898) I. L. R. 22 Mad. 39.
(6) (1922) I. L. R. 45 Mad. 710.
(7) (1931) I. L. R. 54 Mad. 930.
(8) (1921) I. L. R. 46 All. 831.
(9) (1921) I. L. R. 44 All. 19, at p. 33.

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land held for agricultural purposes". From the judgment of Sir Sundar Lal in *Habibullah* v. *Kalyandas*(1), it would however appear that the decisions on the point in that Province had not been uniform, and the cases which took the view above stated proceeded mainly on the supposed intention of the Agra Tenancy Act and the prevailing *custom* according to which "a grove-holder only owns the trees and has no right as a rule in the land after the trees have been cut". It does not therefore seem right to treat *Kesho Prasad Singh's Case* as laying down any principle or test of general application. In this state of the authorities, it seems to us best to refrain from deciding the precise scope of the expression "agricultural land" or the propriety of excluding "land on which a grove has been planted" from the category of agricultural land. It may on a proper occasion be necessary to consider whether for the purposes of the relevant entries in Lists II and III of the Constitution Act it will not be right to take into account the general character of the land (as agricultural land) and not the use to which it may be put at a particular point of time. It is difficult to impute to Parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to laws framed under List II, but that when the same parcel of land is used to produce something else (as often happens in this country), it should be governed by and descend according to laws framed under List III.

The decision in *Bhagwana* v. *Gopi*(2) was, as stated in the judgment, concerned only with the trees and not with the land occupied by those trees; and there was no occasion therefore to discuss the meaning of the word "agriculture". According to the principle recognised in s. 8 of the Transfer of Property Act, trees on land are ordinarily regarded as an incident thereof, though it is permissible to deal with the trees independently of the land. Whether paragraph (g) of the definition in the impugned Act is intended to refer only to cases where the land and the trees thereon have been dealt with together, or also to cases where the trees have been dealt with independently of the land they stand on, and whether even in the latter case paragraph (g) can be said to deal with "agricultural land" within the meaning of entry No. 21 in List II of the Constitution Act, are questions which we prefer to leave alone as unnecessary to be considered for the purposes of this case.

If the general meaning of "agriculture" is to be adopted, even land used for pasture may in many cases fall within the definition of "agricultural land" (see *King Emperor* v.

(1) (1914) 12 A. L. J. 1080.

(2) A. I. R. 1935 Lah. 202.

Alexander Allen(1), and it is unnecessary to decide whether there may not be at least some instances in which pasture land cannot in any sense be described as "agricultural land". We shall only add that if paragraphs (b) and (d) of the definition in the impugned Act are to be regarded as not limited to "such land" as is referred to in the previous paragraphs, though these words are not reproduced in paragraphs (b) and (d), they may possibly cover cases not relating to "agricultural land" and to that extent fall under List III and not under List II.

Our attention was drawn to some of the provisions in the Act with reference to which it was stated that their language was not by any means very clear or definite; and that as the working of the Act was left in the hands of the Collector, the Commissioner and the Financial Commissioner and the jurisdiction of the civil courts had been excluded, parties might run the serious risk of some of these provisions being misinterpreted or misapplied. It was, for instance, said that already the expression "subsisting mortgages" in s. 2 and the expression "sum originally advanced" in s.s. (2) of s. 7 had given rise to difficulty. It was also pointed out that paragraph (a) of s.s. (1) of s. 7 provides for the "mortgage" being extinguished, while s. 8 speaks of the "rights of the mortgagee" being extinguished, and that s. 12 prohibits "any right under a mortgage" being enforced; and it was argued that it was not clear whether the scope of these three provisions was identical or whether they differed in their scope and effect. It does not seem to us right to express any opinion on these hypothetical questions; and though the discussion revealed the possibility of some of the provisions in the Act being so interpreted (or misinterpreted) as to cause unnecessary or unmerited loss to mortgagees, it will not be reasonable to assume that the tribunals to which the Legislature has entrusted the working of the Act will not properly interpret these provisions. Under s. 13 of the Act, power is conferred on the Provincial Government to make rules for the purpose of giving effect to the provisions of the Act, and paragraph (c) of s.s. (2) of that section refers in particular to the principles by which the Collector shall assess the amount due under the mortgage and the value of the benefits accruing to the mortgagee while in possession. Any obscurity or difficulty arising out of the wording of any provisions in the Act can be met by the insertion of definite and appropriate provisions in the rules to be thus framed.

In the view we have taken on the question of "repugnancy" within the meaning of s. 107(1) of the Constitution Act, the appeals must fail, even if it can be said that the provisions of the impugned Act affect "property other than agricultural

(1) (1901) I. L. R. 25 Mad. 627.

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land". The appeals are accordingly dismissed, except to the extent indicated below.

In both the cases, the plaintiffs-mortgagees have been directed by the High Court to pay costs to the Punjab Government in that Court. As already stated, the Government intervened in this litigation by its own choice and no reasons have been suggested in the High Court's judgment nor was any shown before us to justify a departure from the usual rule that the intervener is not entitled to costs. The orders as to costs in both the cases are accordingly set aside. In this Court, the appellants will pay the costs of the Punjab Government in the first of these two appeals.

Appeals dismissed.

Agent for Appellants (in both cases): *Ganpat Rai.*

Agent for Respondent No. 5 (in both cases): *Tarachand Brijmohanlal.*

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THE NORTH-WEST FRONTIER PROVINCE.

v.

SURAJ NARAIN ANAND.

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

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

The appellant having established to the satisfaction of the Court the right of members of the Police force to certain statutory safeguards, the existence of which the Provincial Government had denied, the Court was of the opinion that the Government should be content with the legal position thus determined and therefore refused leave to appeal to His Majesty in Council.

The fact that one of the parties is of the opinion that a decision of the Court was wrong is not itself a reason for granting leave to appeal to His Majesty in Council.

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 *Suraj Narain Anand* v. *The North-West Frontier Province*, reported [1941] F. C. R. 37.

Sardar Bahadur Raja Singh, A.-G. of the North-West Frontier Province (*Kanwal Kishore Raizada* with him) for the applicant.

Respondent in person.

The Judgment of the Court was delivered by

GWYER C. J.—We are not disposed to give leave to appeal in this case. The appellant has succeeded in establishing to our satisfaction the right of members of the Police force to certain statutory safeguards, the existence of which was denied by the North-West Frontier Province Government. We think that the Government should be content with the legal position as established by the Judgment of this Court

and should not seek to prolong the litigation. The case might be different if any fundamental principle of far-reaching importance had been involved in our decision, or if great administrative inconvenience was likely to arise from it; but that is not so, and the fact that the Government think that our decision was wrong is not itself a reason for granting leave to appeal.

The application is dismissed.

Application dismissed.

Agent for Applicant: *B. Banerji.*

PUNJAB PROVINCE

v.

DAULAT SINGH AND OTHERS.

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

Punjab Alienation of Land Act, 1900 (Central Act No. XIII of 1900), and Punjab Alienation of Land (Second Amendment) Act, 1938 (Punjab Act No. X of 1938)—Contravention of s. 298 (1) of the Government of India Act, 1935, —Prohibition against holding or acquiring property on ground only of descent—Operation and validity of the Punjab Acts.

The Punjab Alienation of Land Act, 1900 (Central Act No. XIII of 1900), imposes certain restrictions on the "permanent alienation" of land by a member of "an agricultural tribe" in favour of persons who are not members of such tribes, empowering the Provincial Government to determine by notification "what bodies of persons in any district or group of districts are to be deemed agricultural tribes or groups of agricultural tribes for the purposes of the Act". Sub-section (3) of s. 2 defines "land" in wide terms for the purposes of the Act; ss. 6 to 13 contain certain provisions in respect of "temporary alienations" such as mortgages and leases; and s. 14 provides that any "permanent alienation" which under s. 3 cannot take effect as such until the sanction of the Deputy Commissioner is given thereto shall, until sanction is given or if sanction has been refused, take effect as a usufructuary mortgage for such term not exceeding 20 years and on such terms as the Deputy Commissioner may consider reasonable. According to the notifications issued by the Provincial Government from time to time, a person will not be included in an "agricultural tribe" unless (1) he is descended from members of particular tribes and (2) unless he resides or holds property in a particular place.

By s. 298 (1) of the Constitution Act, "no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.".

By s. 298 (2), "nothing in this section shall affect the operation of any law which prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class.".

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In 1938, the Punjab Legislature enacted Act No. X of 1938 which purported to insert certain provisions in the Alienation of Land Act of 1900. The principal provision which was inserted as s. 13-A in the Act of 1900 runs as follows:—"When a sale, exchange, gift, will, mortgage, lease or farm purports to be made either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act, 1938, by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act.". The heirs of a mortgagor applied under the provisions of this Act for recovery of possession of mortgaged land alleging that the mortgagee was only a benamidar for a non-agriculturist. The mortgagee sued for a declaration that he was himself the real mortgagee and for an injunction restraining the mortgagor's representatives from taking possession of the land. He also contended that Punjab Act No. X of 1938 was *ultra vires* the Punjab Legislature. The High Court held that the Act would be valid only *qua* "sales or mortgages effected after the commencement of the Act" but it could not affect the validity of such transactions entered into before the commencement of the Act. It was also held that the Act "would not be valid *qua* exchanges, gifts, wills, leases and farms whether before or after the commencement of the Act.".

On appeal, held by VARADACHARIAR J., GWYER C. J. concurring:—

(1) That the provision in s. 13-A. is clearly discriminatory; but as it will contravene s. 298(1) of the Constitution Act only if and in so far as the discrimination is on the ground of descent alone, the Court must determine on the evidence in the case whether the beneficiary under the benami transaction fell outside the terms of the notifications under s. 4 of Central Act No. XIII of 1900 on the ground that he was not descended from members belonging to the specified tribes. If he was disqualified on the ground that he did not reside or hold property in a particular place, s. 298(1) would have no application;

(2) That the fact that the impugned enactment relates only to alienations of "agricultural land" and to benami transactions alone in respect of such land will not make it any the less discriminatory, in so far as it makes a distinction between such transactions in favour of "agriculturists" and similar transactions in favour of "non-agriculturists";

(3) That the objection under s. 298(1) cannot be obviated by relegating the offending provision to a statutory notification without embodying it directly in the statute itself;

(4) That prohibition against a person acquiring or holding property as a beneficiary offends s. 298 (1) of the Constitution Act quite as much as prohibition against his obtaining a transfer of the legal title;

(5) That Punjab Act No. X of 1938, though purporting to insert certain provisions in the Act of 1900, must be regarded as an enactment subsequent to the Constitution Act of 1935 and as such subject to the restrictions imposed by s. 298(1) of the Constitution Act, independently of any question as to whether and how far these restrictions can be held to render the original provisions in Act III of 1900 inoperative;

(6) That so far as Punjab Act No. X of 1938 invalidates titles or rights acquired before the passing of the Act, its operation cannot be held to be saved by s.s. (2) of s. 298 of the Constitution Act, since the word "prohibit" in s. 298(2) can only refer to transactions to take place subsequently to the legislative prohibition.

Per BEAUMONT J., *dissenting*.—Though descent has been made an element in determining the persons who fall within the description of "agricultural tribes", the prohibition against alienation would seem to be

based as much on the character of the land and the occupation of the holder as on his descent and neither of the Punjab Acts can therefore be said to involve a prohibition against the acquiring or holding of land on the ground of descent only.

Section 298(1) of the Constitution Act was deliberately confined to cases in which there was no other ground for discrimination than one or more of those specified in the section. To construe the section as avoiding an Act one effect of which is to discriminate on the ground of descent, though that appears from the terms of the Act itself, not to have been the only ground on which the discrimination was based, seems to impose a very serious and possibly dangerous limitation on the powers of Provincial Legislatures which the language of the section does not warrant.

In applying the terms of s. 298(1) it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. If the only basis of the Act is discrimination on one or more of the grounds specified in s. 298(1), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination.

APPEAL from the High Court at Lahore.

The material facts are stated in the following passage taken from the Judgment of BEAUMONT J :—

One Jumman mortgaged certain lands in the Punjab, which are agricultural lands in the ordinary sense of the term, to one Daulat Singh for Rs. 1,500 on the 4th July, 1933, the mortgage being with possession. The intention of the impugned Act, to the exact terms of which I will refer later, is to render void *benami* transactions in which the ostensible owner is a member of an agricultural tribe, but the beneficial owner is not. The sons of Jumman applied under the terms of that Act to the Deputy Commissioner asking that the mortgage might be declared void and possession restored to themselves, on the ground that Daulat Singh was not the beneficial mortgagee, but that one Gopal Das was the real beneficiary under the mortgage of the 1st July, 1933, and that Gopal Das was not a member of an agricultural tribe, though Daulat Singh was. The Deputy Commissioner held these facts proved, and accordingly declared the mortgage void and directed possession of the land to be restored to the legal representatives of the alienor. Daulat Singh then brought the present suit asking for a declaration that he was a mortgagee of the land and that the impugned Act was *ultra vires* the Punjab Legislative Assembly, and for an injunction restraining the defendants from taking proceedings under the impugned Act to obtain possession of the land from him.

The trial Court impleaded the Punjab Province as a defendant and held that the impugned Act was *ultra vires* the Punjab Legislative Assembly both under s. 292 and s. 298 (1) of the Government of India Act, 1935. In appeal to the High Court it was admitted that the objection to the impugned Act based on the terms of s. 292 of the Government of India Act could not be supported in view of the decision of this Court in the case of *The United Provinces* v.

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Atiqa Begum(1). But the High Court upheld the decision of the trial Court that the impugned Act was invalid by virtue of s. 298 (1) of the Government of India Act."

M. Sleem, A.-G. of the Punjab (*Khan Sahib Mohammad Ameen* with him) for the appellant. The Punjab Alienation of Land Act did not contain any prohibition against acquiring, holding or disposing of property on the ground of descent, because not only persons not belonging to an agricultural tribe were affected by that Act, but also persons who belong to an agricultural tribe but who did not either reside or hold property in any particular area. The Punjab Act No. X of 1938 prohibited only those persons from holding property who had entered into a particular kind of transaction, namely, a *benami* transaction the effect of which was to pass the beneficial interest to a person not belonging to an agricultural tribe and that, therefore, it was the nature of the transaction and not their descent which prohibited those persons from holding property. Under this Act not only persons who did not belong to an agricultural tribe were affected but also persons who did belong to an agricultural tribe but did not reside or hold property in a particular area. In any case, even if descent did come in indirectly into the question, there was no prohibition on the ground only of descent. It is also contended that s. 298 (1) deals with future legislation and further that, as the presumption is against a repeal by implication, the language of the section does not warrant the interpretation that it is intended by this section to repeal any part of the existing law. It is urged that this section only applies to those subjects of His Majesty who are domiciled in India and it could not have been the intention of Parliament that while certain laws should be repealed with reference to those subjects of His Majesty who are domiciled in India, they should continue in force as regards those subjects who are domiciled in the United Kingdom, because it is clear from s. 111 that as regards those subjects it is only future legislation under which they cannot be subjected to certain disqualifications. Section 117 is also cited to show that it has been specifically mentioned there that the existing law will continue to apply to them. It is further contended that even if s. 298 does apply, the impugned Act will be good as regards sales and mortgages of agricultural land whether the *benami* transaction has been entered into before or after the passing of that Act, because the prohibition against holding is a future prohibition, namely, that those persons who are affected will not be able to hold land after the passing of the Act in question.

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

Rai Bahadur Badri Das and *Sardar Sant Singh* for the first respondent. Section 298 (1) of the Constitution Act confers a privilege on British Indian subjects of His Majesty entitling them to all posts under the Crown and also to acquire property. In other words it removes disabilities depriving them of the right to acquire property for reasons of descent, religion, place of birth, and colour, whether the disability is imposed by an old or a new enactment. No law debarring a person from acquiring or holding property on account of his descent can be enforced, nor can a new measure having that effect be enacted by the Legislature.

Under the Punjab Alienation of Land Act, 1900, a person not belonging to certain tribes cannot permanently acquire land from a person belonging to those tribes even though he resides in the same district as the alienor. To this extent the provision goes against s. 298 (1) unless the alienation is covered by the exception in s. 298 (2) of the Constitution Act. The Punjab Alienation of Land Act, however, gives certain rights to the transferee. Under s. 3 of the Act a sale can be validated by the consent of the Deputy Commissioner. Failing this the transfer takes effect as a mortgage of the type allowed by s. 6. A mortgage not complying with s. 6 will be converted by the Deputy Commissioner under s. 9, so as to bring it in conformity with s. 6. All this shows that certain well-defined rights in land passed to the transferee even under irregular transfers. The impugned Act deprives the holders of such rights merely because the transferee is not descended of parents belonging to the privileged tribes.

Section 298 (2) confines the prohibition to sales and mortgages but does not permit the extinction of rights already held by a British Indian subject no matter how he is descended. Transactions where land was transferred to a person belonging to one of the privileged tribes have all along been held by the highest Court of Appeal in the Province to be valid even though the beneficial interest belonged to a non-agriculturist. As soon as the agriculturist *benamidar* attempts to pass the property on to the real owner, the provisions of s. 9 or s. 14 of the Act, as the case may be, will apply and the mortgage or the sale will be converted into a mortgage in one of the forms prescribed by s. 6. It was further held that there was nothing wrong in a creditor seeking the help of a friend belonging to one of the privileged tribes for obtaining a mortgage so as to enable the creditor to realise his debt. The impugned Act prevents the transferee from holding these rights. Such a measure is not within the exception of s. 298 (2).

In the case of a *benami* mortgage the beneficial interest was the realisation of the debt. This was regarded as a perfectly legitimate object by the Lahore High Court and, therefore, no question of evasion of law and its consequent penal-

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ties arose. Reference to the Constitution Act would not help the appellant. On the contrary, the Constitution Act supported the respondents' case inasmuch as it did not confine itself to future transactions.

All transactions conferred rights and imposed liabilities on individuals, without which they were meaningless, and any enactment which avoided a transaction struck at the very root of individual rights and liabilities. The Punjab Act, which invalidated past transactions, deprived in effect the holders of beneficial interests in the property of their vested interests and to that extent offended against the Constitution Act if the deprivation was based on descent alone. The *benamidars* who were being deprived of their property under the Punjab Act belonged to the non-agricultural tribes. The disqualification was due to the fact that they were not descended from an ancestor who was included in the agricultural tribe by a notification under the Punjab Land Alienation Act. Two people might be carrying on the same vocation in life but one who was descended from an agricultural tribe possessed the right to acquire agricultural land, while the other was prevented from holding certain property because of his descent from a non-agricultural ancestor. This was a clear violation of the fundamental right embodied in the Constitution Act.

M. Sleem in reply.

Cur. adv. vult

Gwyer C. J.

GWYER C. J.—I have had an opportunity of reading the judgment which is about to be delivered by my brother Varadachariar and I concur both in its reasoning and its conclusions. In these circumstances I do not think it necessary to deliver a separate judgment of my own.

Varadachariar J.

VARADACHARIAR J.—The question for decision in this appeal is whether a law (Act No. X of 1938) enacted by the Punjab Legislature in the form of an amendment to an earlier Act (the Punjab Alienation of Land Act, 1900—Central Act No. XIII of 1900) is inoperative to any, and if so to what, extent. The provision mainly discussed is that directed by the later Act to be inserted as s. 13-A in the earlier Act. Some of the other provisions in the Act of 1938 are only ancillary to or consequential upon this main provision. The High Court held this provision to be inoperative to the extent described in its judgment, on the ground that it contravened s. 298 (1) of the Constitution Act. Hence this appeal by the Punjab Government which got itself impleaded as a party defendant even when the litigation was pending in the trial court.

The Punjab Alienation of Land Act (Central Act No. XIII of 1900) was (in the words of the Joint Select Committee,

para. 368 of their Report(1)) "designed to protect the cultivator against the moneylender"; but the Act goes much farther. Section 4 empowers the Provincial Government to determine by notification "what bodies of persons in any district or group of districts are to be deemed to be agricultural tribes or groups of agricultural tribes" for the purposes of the Act. Section 2 (3) of the Act defines "land" for the purpose of the Act; and s. 3 in effect declares that no permanent alienation of land by a member of an agricultural tribe shall take effect as such unless the alienee also is a member of the same tribe or of a tribe in the same group, except when sanction is given thereto by the Deputy Commissioner. Subsection (3) of s. 3 leaves it to the discretion of the Deputy Commissioner to grant or refuse sanction, and one of the provisos to s.s. (2) declares that sanction may be given even after the act of alienation has otherwise been completed. There are two exceptions to the prohibition enacted in the section, namely, (a) the sale of a right of occupancy by a tenant to his landlord, and (b) a gift made in good faith for a religious or charitable purpose whether *inter vivos* or by will. Sections 6 to 13 contain certain provisions in respect of temporary alienations of land (such as mortgages and leases) by a member of an agricultural tribe, and s. 14 provides that any permanent alienation which under s. 3 is not to take effect as such until the sanction of the Deputy Commissioner is given thereto shall, until sanction is given or if sanction has been refused, take effect as a usufructuary mortgage in the form permitted by s. 6, for such term not exceeding 20 years and on such conditions as the Deputy Commissioner considers to be reasonable. Section 21 excludes the jurisdiction of civil courts in very comprehensive terms; and s. 20 provides that no legal practitioner shall appear on behalf of any party interested in any proceedings before a Revenue Officer under the Act. The Act was in the first instance made applicable to all the territories for the time being administered by the Lieutenant-Governor of the Punjab; but s. 24 empowers the Provincial Government, by notification in the Official Gazette, to exempt any district or part of a district or any person or class of persons from the operation of the Act or of any of the provisions thereof.

A practice has long been common in this country for intending alienees of land to take the document of transfer in the names of their friends or relatives, sometimes with a view to defeat the claims of creditors, sometimes with a view to avoid claims by other members of their own family, and sometimes to escape restrictions imposed upon them by Government Servants Conduct Rules, etc. In the Punjab, a practice seems to have grown up after the enactment of the Alienation

(1) H. L. 6 and H. C. 5, 1934.

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of Land Act, 1900, for transferees from members of agricultural tribes to take documents in the names of friends belonging to the same tribe or a tribe in the same group as the alienor, though the transfer was meant for the benefit of one who was not such a member. In many cases it may reasonably be presumed that this was done with a view to avoid rights under the transfer being cut down in the manner provided for in s. 14 of the Act. A notion has sometimes prevailed in this country that all *benami* transactions must be regarded as reprehensible and improper, if not illegal; but as late as in 1915 Sir George Farwell, delivering the judgment of the Judicial Committee in *Bilas Kunwar* v. *Desraj*(1), spoke of them as, "quite unobjectionable" and as having their analogues in the English law; and Mr. Ameer Ali, delivering the judgment of the Committee in *Gur Narayan* v. *Sheo Lal Singh*(2), observed that "there is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people". As indicated by the qualifying words "within its legitimate scope", Their Lordships' observations were clearly not meant to countenance transactions entered into for fraudulent or illegal purposes.

In view of the scheme and the policy of the Alienation Act, questions seem to have been raised before the courts in the Punjab as to the effects of *benami* transfers of the kind above indicated. It may be useful to refer to a few reported decisions as indicating the types of questions raised. In *Jahan Khan* v. *Dalla Ram*(3), *Haidar* v. *Fatteh Khan*(4) and *Ladha Singh* v. *Ahmad Yar*(5), the Punjab Chief Court overruled the contention that a mortgage by an agriculturist to another agriculturist would be invalid if it had been made on the footing that the mortgagee should pay off a debt due from the mortgagor to a non-agriculturist. Nevertheless, in *Wasinda Ram* v. *Bahadur Khan*(6), a Tahsildar Magistrate thought fit to frame a charge under s. 417 of the Penal Code against a non-agriculturist creditor for having brought about a mortgage of the above kind; but the High Court quashed the charge on revision. In *Shamas-ud-din* v. *Allah Dad Khan*(7) the High Court held that as between the vendor and the ostensible vendee, the latter was entitled to recover possession of the property, whatever the legal position as between the ostensible vendee and the alleged non-agriculturist beneficiary might be. In *Qadir Baksh* v. *Hakam*(8), the High Court overruled a contention advanced by the ostensible mortgagee that in a proceeding between himself and the non-agriculturist beneficiary the latter could not plead the true facts

(1) (1915) I. L. R. 37 All. 557.
(2) (1918) I. L. R. 46 Cal. 566.
(3) (1908) 33 Ind. Cas. 474.
(4) (1916) 37 Ind. Cas. 93.
(5) (1921) 60 Ind. Cas. 463.
(6) A. I. R. 1934 Lah. 434.
(7) A. I. R. 1925 Lah. 65.
(8) (1932) I. L. R. 13 Lah. 713.

and defeat a claim put forward by the former in his own right.

The last of the above decisions was given in 1932 by a Full Bench of five Judges of the Lahore High Court, and the impugned Act was passed in 1938 to deal with the situation created by that decision. The mortgage transaction out of which this litigation has arisen was one of those entered into during the interval, on July 4, 1933, presumably on the strength of the High Court's decision. I may add that in *Bahadur* v. *Mohammad Din*(1), a learned Judge of the same High Court held that when a non-agriculturist took a sale pretending to be an agriculturist, the transaction was not void *ab initio*, since the defect could be remedied by the Deputy Commissioner's sanction, and in any event the permanent alienation would at least have effect as a usufructuary mortgage under s. 14. He further held that in such cases the vendee was entitled to be reimbursed under s. 65 of the Contract Act(2).

The impugned Act is in form an addition of a few sections to the Alienation Act of 1900. Its principal provision is that contained in s. 5, which directs the following to be read as s. 13-A of the principal Act:

> "When a sale, exchange, gift, will, mortgage, lease or farm purports to be made either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act, 1938, by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act."

Then follow consequential provisions enabling the Deputy Commissioner to eject persons in occupation of land under such alienations and allowing the order of the Deputy Commissioner to be set aside on appeal or revision by the higher revenue authorities. Except for a limited measure of compensation for the value of improvements effected by a *bona fide* transferee for value, the Act makes no provision for refund or re-imbursement either in favour of the ostensible alienee or of the beneficiary or even *bona fide* transferees for value from them, and not even in cases where the transaction thus avoided has been completed many years before the enactment of the measure. The new law is thus much more drastic than the principal Act of 1900; but I refrain from dealing with the arguments urged at the Bar in condemnation or justification of it, because the Court is only concerned with its legality and not with its reasonableness or with the policy underlying it. The difference, as will be presently seen, has

(1) A. I. R. 1934 Lah. 979. (2) Central Act No. IX of 1872.

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some bearing on the discussion even of the question of the extent of the operation of the enactment.

Section 298 (1) of the Constitution Act provides that—

> "no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India."

It was urged on behalf of the plaintiffs-respondents that the Act of 1900 and the impugned Act of 1938 must be held to be inoperative in so far as they prohibit persons from acquiring or holding property on grounds of descent only; no question arises in this case of any disability founded on religion, place of birth or colour. The appellant contended that there is nothing in the Acts contravening s. 298 (1). Alternatively, it was argued on his behalf that the operation of all provisions in these Acts was saved by s.s. (2) of s. 298. It will thus be necessary to consider the precise effect of this subsection also.

To follow the argument based on s.s. (1) of s. 298, it will be necessary to take note of the tenor of the notifications issued by the Punjab Government under s. 4 of the Act of 1900, because the persons or groups of persons against whom the restrictions or disabilities imposed by the main Act and by the impugned Act operate and the grounds on which the disabilities rest can be determined only by reference to the terms of these notifications. Several notifications seem to have been issued from time to time; but, for the purposes of the present Judgment, it will be sufficient to take one of the earliest of these notifications, No. 63, dated April 18, 1904, as typical (see pp. 67-68 of the 5th Edition of Sir Shadi Lal's Commentaries on the Act). Without attempting to be exhaustive, it may be generally said that a person will not be included in an agricultural tribe within the meaning of the Act unless (1) he is descended from members of a particular tribe, and unless (2) he resides or holds property in a particular place. I leave alone for the moment the further limitation in the Acts requiring alienor and alienee not merely to be members of agricultural tribes, but to be members of the same tribe or of a tribe in the same group. As the notifications require the co-existence of both the qualifications as to descent and residence (or possession of property) before a person can claim to fall within the terms of the notifications, the non-fulfilment of either condition will effectually exclude him. To put the matter in the form of illustrations: A may, as regards his descent, satisfy the condition of descent from a particular community; but he may fail to satisfy the condition as to residence or the holding of property in a particular place. B may hold property or reside in the prescribed place; but not being descended from a member of the community

specified in the notification, he may not satisfy the requisite conditions. C may fail in respect of both qualifications. The Acts in question impose certain disabilities on these three classes of persons. In the first of the illustrations above given, it cannot be said that the prohibition of acquisition or holding of property by such a person is on the ground of descent, and in the third it cannot be said to be on the ground of descent alone; but in the second, it is clearly on the ground of descent alone. Subject to the other arguments to be presently noticed, it seems to me to be reasonably clear that the impugned Act contravenes s. 298 (1) of the Constitution Act, so far as it makes it impossible for persons standing in the same position as B in the illustrations given above to acquire or hold any interest in land (of the kind included in the definition in the principal Act) as beneficiaries under a *benami* transfer in favour of a qualified transferee, while the Act of 1900 makes it impossible for such persons to acquire a permanent interest in such land by a direct transfer to themselves. It has not been contended by the Advocate-General of the Punjab that such is not the effect of the enactments in question; but he contends—

(1) that the provision in the impugned Act which is numbered as s. 13-A of the principal Act is not in terms discriminatory, and

(2) that the discrimination, if any, is not based on descent *alone*, because the prohibition is based on the *benami* character of the transaction.

It is not easy to follow these arguments.

The provision in s. 13-A is clearly discriminatory, because it draws a distinction between transactions in which the beneficial interest belongs to an agriculturist and those in which it belongs to a non-agriculturist; and it declares the latter void. But this discrimination will not by itself amount to a contravention of s. 298 (1) of the Constitution Act, and the question will still remain whether it is discrimination on the ground of descent and of descent alone. The answer to this must be found in the terms of the notifications under s. 4, which this section incorporates when it uses the expressions "member of an agricultural tribe" and "a person not a member of the same tribe or of a tribe in the same group". That is why I have analysed the notifications and discussed their effect in the last preceding paragraph. The objection under s. 298 (1) cannot be obviated merely by relegating the offending provision to a statutory notification instead of embodying it directly in the statute itself. As regards the second of the arguments above set out, I must state that it is not and it cannot be the contention of the Advocate-General that all *benami* transactions are as such avoided by the Act, that is, even if they be in favour of persons falling under paragraph

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(c) of s.s. (1) of s. 3 of the principal Act. If a *benami* sale of land for the benefit of a member of a notified agricultural tribe is good, but a similar transfer is bad if made for the benefit of one like B in the illustrations given in the preceding paragraph, that is, one who does not fall within the notification because he is not descended from a member of an agricultural tribe, it is clearly a case of discrimination on the ground of descent alone. It was pointed out that under the Act *benami* transfers for the benefit even of persons like A and C in the above illustrations are void; but this will not help the appellant, because though even these are cases of discrimination, the discrimination is not on the ground of descent *alone* and the case will not therefore to that extent fall under s. 298(1). In considering this question, it ought not to be forgotten that qualifications as to residence in a particular place or the ownership of property there can at any time be acquired by act of parties; but qualification or disqualification based on descent is not one that parties can by any act of theirs obtain or escape from. Hence, I take it, is the importance attached to it in s. 298 (1). One of the other grounds specified there, namely, religion, is no doubt sometimes changeable at the will of parties; but it is hardly to be expected that parties will change their religion merely to obtain a qualification or escape from a disqualification for the purposes mentioned in the section, and certainly the law will not drive them to do so.

It has next been suggested that the discrimination, if any, is based on the character of the land, that is, on its being land as defined in the principal Act. I find it difficult to follow this argument as well. To take illustrations similar to those given above, if in respect of land of that kind, the law declares that the alienation will be good if in favour of a member of a notified agricultural tribe, but bad if made in favour of one who is not a member of such a tribe, it is difficult to see how the discrimination is one based on the character of the land or that it is not one based on the status of the transferee. It has been said that it may be a matter of policy or public interest in certain parts of the country that certain kinds of lands should be secured to certain classes of people and be prevented from going into the hands of other classes of people. It is in recognition of this need that Parliament has taken care to enact the saving provision contained in s.s. (2) of s. 298. But this will not justify the view that this is not a discrimination prohibited by s.s. (1) of the section; otherwise the saving clause would not have been necessary. As will be presently seen, the appellant in this case finds that the saving under s.s. (2) does not go the whole length required to sustain his contention, and he is therefore obliged to attempt to take the case out of s.s. (1) itself; but, for the reasons

above given, I am unable to accede to this contention. It is true that a saving clause cannot be used to *extend* the scope of the prohibition contained in the main or enacting clause, because a saving clause may often be added by way of abundant caution. But if, as I have endeavoured to show, the language of s.s. (1) of s. 298 clearly covers one class of alienees on whom disabilities have been imposed by the impugned Act, it is not without significance to note that (as explained in the Joint Select Committee's Report, para. 369) s.s. (2) was inserted to save "legislation such as the Punjab Land Alienation Act" from being invalidated by reason of the declaration in subsection (1). This confirms me in the view that such legislation clearly contravenes s.s. (1) of s. 298 to the extent that I have above indicated; but to a certain extent its operation is nevertheless saved by s.s. (2).

It is perhaps desirable to observe in passing that a prohibition of the kind so far discussed is entirely different from restrictions arising out of the nature of the "legal interest" possessed by an alienor. To take a familiar instance, it is well established in this country that an office like that of a trustee of a religious institution or the office of a religious service holder (with the emoluments attached thereto) is not alienable at all, but some decisions have recognised that by the custom of particular institutions even such offices may be alienated within a very limited circle, *e.g.*, members of the family or persons in the line of descent. It has also been held that religious offices may be delegated to proxies if they belong to the same religion. In such cases, the question is not one of placing a discriminatory restriction on the alienation of an interest which is ordinarily alienable but of permitting alienation within limits of what is normally inalienable. Again, when lands were held on service tenures or under special state grants, the condition of service or the terms of the grant limited the nature of the legal interest possessed by the holders and (as in the case of the Watandars Act[1] referred to by my brother) the Legislature has sometimes continued some of these limitations, even when the tenure was placed on a statutory basis.

The contention that the discrimination in the Punjab Acts is based on the character of the "land" has another aspect which requires to be further considered. It was not clear to me whether the Advocate-General was prepared to go so far as to maintain that even a discrimination on the ground of descent would not offend s. 298(1), unless the prohibition in respect of acquiring, holding or disposing of property was absolute in extent, that is, it placed it beyond the man's power to acquire an inch of land anywhere in British India. An illustration with reference to eligibility for office, which

(1) Bombay Hereditary Offices Act, 1874 (Bom. Act. No. III of 1874).

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is another of the subjects dealt with in the same sub-section, will perhaps help to throw light on this point. Can it reasonably be maintained that persons of a particular religion, colour or descent can without offending the section be declared ineligible for 95 per cent. of the offices under the Crown in India? To my mind such a contention seems scarcely permissible. If so, why should the position be different in respect of the acquisition or holding of property? Even if one had better avoid extreme positions at either end and deal with what may be called substantial freedom or substantial disqualification in respect of acquisition, holding or disposing of property, I have little hesitation in coming to the conclusion that the prohibitions enacted by the Acts of 1900 and 1938 are quite substantial in extent. An examination of the definition of "land" in s. 2 (3) of the principal Act of 1900 is sufficient to establish this. Broadly speaking, that definition takes in all land in the Province, except buildings and building sites in a town or village and except perhaps forests. I leave mining land out of account, because I do not know how much of that kind of land exists in the Punjab, but I do know that it is not the kind of land which Indians ordinarily desire to possess. All land falling within this wide definition is placed beyond possibility of acquisition by persons not belonging to the notified tribes, except of course with the sanction of the Deputy Commissioner. There can be little doubt that the disability imposed upon this class of people by the legislation under consideration is very substantial and covers nearly all kinds of property (other than house property) which Indians ordinarily desire to hold or acquire.

A doubt was raised in the course of the argument whether, having regard to the nature of a beneficiary's interest under the Indian law, the deprivation of his rights by the impugned Act can be said to amount to a prohibition from acquiring or holding property, within the meaning of s. 298(1). An examination of the provisions of the Indian Trusts Act(1) will show that this doubt is baseless. It is true that the Indian law does not recognise an equitable ownership in the sense known to the English law, because we here do not, as in England, have two kinds of law or jurisdiction, *viz.*, common law and equity; but on an analysis of the legal incidents involved, it will be found that for all practical purposes there is little or no difference between a beneficiary under the English law and a beneficiary under the Indian Trusts Act, so far as the substance of their rights is concerned. I may first point out that so far as rights and privileges are concerned, there is little or no difference between a beneficiary under an express trust and a beneficiary under a resulting or

(1) Central Act No. II of 1882.

constructive trust, if we leave alone questions arising under the Indian Limitation Act(1). Section 82 of the Indian Trusts Act, which deals with *benami* transfers, occurs in the chapter beginning with s. 80, which provides that an obligation in the nature of a trust is created in certain specified cases; and s. 82 enacts that the transferee must hold the property for the benefit of the person paying or providing the consideration. Section 95 reaffirms the provision implied in s. 80. In the case of express trusts, the Act describes the beneficiary's rights against the trustee as "beneficial interest or interest of the beneficiary". Under s. 55, the beneficiary has, subject to the provisions of the instrument of trust, a right to the rent and profits of the trust property and under s. 56 the beneficiary, if there is only one and he is competent to contract, may require the trustee to hand over possession of the trust property to himself. This is almost a matter of course where, as in *benami* transactions, the holder of the legal title is only a bare trustee. Under s. 58, the beneficiary, if competent to contract, may transfer his interest, and under s. 69, every person to whom a beneficiary transfers his interest has the rights of the beneficiary in respect of such interest at the date of the transfer. Section 8 no doubt departs from the English law in declaring that a "merely beneficial interest under a subsisting trust" cannot be made the subject-matter of another trust. This exceptional provision can have no significance for the present purpose. The theory that there can be no trust upon a trust (similar to the earlier English doctrine that there cannot be a use upon a use) is based upon the circumstance that so long as the original trust subsists, the title to the trust property continues to vest in the trustee under the trust, and that in such cases the second trustee is not in a position to convey a title to the second beneficiary. There can in my opinion be no doubt that a prohibition against a person acquiring or holding property as a beneficiary offends s. 298 (1) of the Constitution Act quite as much as a prohibition against his obtaining a transfer of the legal title; but all possible doubts on this score must disappear when one considers the combined effect of the Act of 1900 and the amendment of 1938, because under the former he cannot acquire a legal interest permanently and under the latter he cannot acquire a beneficial interest either.

It will be convenient at this stage to refer to one argument of the learned Advocate-General, only in order to state that it is unnecessary for the purposes of this case to express any opinion upon it. He contended that, even if it should be assumed that the provisions of the Act of 1900 offended in any measure the principle of s. 298 (1) of the Constitution Act, it would not be reasonable to hold that this declaration by Parliament in 1935 affected the validity of the Provincial

(1) Central Act No. IX of 1908.

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Act passed nearly thirty-five years before. On behalf of the respondents, it was urged that the effect of s. s. (1) was thenceforward to remove even such disabilities as had been imposed by earlier legislation. This question was raised by the Advocate-General to serve two purposes: (1) to make up for the gap, in the saving of the operation of such enactments, arising from the fact that s. s. (2) is limited to laws prohibiting sale or mortgage of agricultural land, and (2) to use it as a step towards the argument that even Act No. X of 1938 should be regarded not as a new enactment passed subsequently to the Constitution Act, but only as an amendment to and therefore standing on the same footing as the principal Act of 1900 and, as such, not affected by the declaration in s. s. (1). The first of the above aspects assumes importance by reason of the fact that while the Act of 1900 makes provision against *all* permanent alienations (which will include those by way of gift, bequest, exchange, etc.) and a variety of temporary alienations including leases, s. s. (2) of s. 298 saves the operation of such laws so far as they prohibit "the sale or mortgage of agricultural land". Whatever be the reason that led Parliament thus to limit the scope of the saving clause, this difference in language has made it possible for the critics of the Punjab Acts to contend that the prohibitions enacted in the Act of 1900, so far as they relate to land not falling within the category of "agricultural land" and so far as they relate to alienations other than sales and mortgages, are not saved in their operation, if they contravene s. s. (1) of s. 298. It is unnecessary to express any opinion on this question in the present case, because the transaction which forms the subject-matter of this litigation is a mortgage of agricultural land and is thus saved in terms by s. s. (2) of s. 298. Respondents' counsel endeavoured to maintain that while s. s. (1) removes disabilities imposed even by earlier enactments, s. s. (2) saves only laws made after the Constitution Act comes into effect. I see no sufficient warrant or justification for making this differentiation between subsections (1) and (2).

The second of the appellant's contentions above noted, namely, that if the disabilities created by the Act of 1900 are not removed by s. s. (1) the provisions of the Act of 1938 must also be held to be unaffected by s. s. (1) is obviously untenable. The Act of 1938 was passed after the Constitution Act had come into force, and would be hit by s. 298 (1) even if it should be held that that subsection had no retrospective operation. The mere fact that the Legislature directed the Act of 1938 to be treated as an amendment to the Act of 1900, or that in many respects it adopted the frame-work of the older Act, cannot place the later enactment, for the present purpose, on the same footing as the earlier enactment.

Further, whatever the form or the underlying policy, the Act of 1938 deals with a class of cases not provided for in the Act of 1900 and makes provisions substantially different in nature and effect from those contained in the earlier enactment. If for the reasons already stated it offends in any degree the declaration contained in s. s (1) of s. 298, it must to that extent be held inoperative, save in so far as its operation may be saved by s. s. (2).

It remains to consider the scope and effect of s.s. (2) of s. 298. As already stated, it only saves laws prohibiting sales and mortgages, and even that only so far as such transactions relate to agricultural land. The other kinds of alienations prohibited by the combined operation of the Act of 1900 and the impugned Act will fall outside the scope of the saving clause. In the judgment of this Court in *Megh Raj* v. *Allah Rakhia*[1], the question has been discussed how far the definition of "land" contained in the Act of 1900 includes property which cannot be comprised in the ordinary connotation of the expression "agricultural land". The question arose there on account of the doubt as to whether certain provincial legislation related to a matter specified in the Provincial List or to a matter falling within the Concurrent List. The question does not arise under the same circumstances in the present case; but as s. s. (2) of s. 298 is limited in terms to "agricultural land", the same question may become material in cases of the present kind. The transaction involved in this suit is however one by way of mortgage and also relates to agricultural land; these questions need not therefore be further discussed in the present case.

It is however material to note that s. 298 (2) purports to save the operation of any law which *prohibits* the sale or mortgage of agricultural land, etc. What the impugned Act purports to do is not merely to prohibit such transactions being entered into after the date of the Act, but to vacate or nullify even titles or rights acquired before the passing of the Act; and as already stated, the suit transaction is one of 1933, *i.e.*, five years before the passing of the Act. As held by the High Court, the word "prohibit" can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction. The word cannot include an attempt to reopen or set aside transactions already completed, or to vacate titles already acquired. The High Court was therefore justified in holding that the benefit of s.s. (2) of s. 298 cannot be claimed for the impugned enactment so far as it purports to avoid transactions entered into or titles acquired before the impugned Act became law. It seems to

(1) *Antea*. P. 53.

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have been contended before the High Court, on behalf of the Punjab Government, that the provisions in the impugned Act in so far as they relate to prior transactions are only in the nature of retrospective legislation and as such within the competence of the Provincial Legislature. This contention was rightly not pressed before us, for the obvious reason that the question for consideration here is not the extent to which an admitted power can be exercised by the Legislature, but the extent to which legislation which would be inoperative as contravening s.s. (1) of s. 298 is saved by s.s. (2), and the answer to this question must turn only on the interpretation of s.s. (2).

In the view above indicated, the language in which the conclusion of the High Court has been stated as also the form of the decree passed in the case will require modification. Dalip Singh J., in his judgment, with which the other two learned Judges concurred, said: "The Act is valid only *qua* sales or mortgages effected after the commencement of the Act and *qua* such transactions is valid only with respect to agricultural land. It would not be valid *qua* exchanges, gifts, wills, leases and farms whether before or after the commencement of the Act". Words to the like effect will also be found in the penultimate paragraph of the judgment. If I may make a verbal correction, the question is not exactly one as to the validity or invalidity of the Act, but whether the prohibitions contained in it are operative or inoperative in certain cases. That is why s.s. (2) of s. 298 saves the operation of such laws (see also the language of s. 111 (1), which says that a British subject domiciled in the United Kingdom shall be exempt from the operation of certain kinds of laws that may be passed by the Federal or Provincial Legislature). The terms in which the conclusion has been stated by the High Court fail to take note of the fact that s.s. (1) of s. 298 of the Constitution Act can be invoked only in cases where the disability is imposed on the ground of descent alone. To revert for a moment to the illustrations given in an earlier part of this judgment, a person may be descended from a community classified as agricultural, but he may not satisfy the notifications under s. 4 of the principal Act, because he may not reside or hold property in a particular place. Again, the disqualification may arise in certain cases, because a person neither fulfils the requirement of descent nor the requirement as to residence or possession of property in the locality. In these two cases it cannot be said that the Act of 1900 or the impugned Act prohibits the acquisition or the holding of property by such a person on the ground of descent alone; and if s.s. (1) of s. 298 cannot be invoked in such cases, it is immaterial whether the case is saved by s.s. (2) or not, because except under s.s. (1) there can be no exclusion of the operation of the law according to its tenor. The conclusion

above extracted from the judgment of the High Court as to the circumstances in which the provisions of the impugned Act will be inoperative must accordingly be limited to cases where the beneficiaries under the *benami* transactions fall outside the terms of the notifications under s. 4 of the principal Act only on the ground that they are not descended from members belonging to the specified tribes. In this view, the decree dismissing the appeal to the High Court cannot stand. The trial court decreed the plaintiff's suit on the strength of its findings on the preliminary issues framed by it. As the allegations of fact made in the pleadings were not gone into, the attention of the courts has not been directed to the question of the ground on which Gopal Das, the alleged beneficiary under the suit mortgage, was said to be a non-agriculturist. Without an investigation of this question, in the light of the observations above made, it cannot be finally decided whether or not the suit transaction is void under the Act of 1938. The decree of the High Court must be set aside and the case sent back to the High Court with a direction that proper issues are to be framed in the case in the light of the observations contained in this judgment, and the case remitted to the trial court for further trial and decision.

The only point which has so far been dealt with in all the courts is the constitutional question. As neither party has wholly succeeded on that question, the parties should bear the costs respectively incurred by them up to this date, in all the courts.

BEAUMONT J.—This appeal raises a question as to the validity of the Punjab Alienation of Land (Second Amendment) Act, 1938 (Punjab Act No. X of 1938) (hereinafter referred to as the impugned Act) which came into force on the 1st June, 1939.

The facts giving rise to the case are not in dispute. [After stating the facts of the case as set out on pp. 69-70, *supra*, the learned Judge continued :—]

In order to appreciate the provisions and effect of the impugned Act, it is necessary to consider the terms of the Punjab Alienation of Land Act, 1900, (hereinafter referred to as the principal Act), to which the impugned Act was an amendment.

By s. 2 (3) of the principal Act, "land" is defined as meaning land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and as including certain interests which it is not necessary to specify. "Permanent alienation" is defined as including sales, exchanges, gifts, wills and grants of occupancy rights. Subsection (1) of s. 3 provides that a person who desires to make a permanent alienation of his land shall be

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at liberty to make such alienation where the alienor is not a member of an agricultural tribe; or the alienor is a member of an agricultural tribe and the alienee is a member of the same tribe or of a tribe in the same group. Subsection (2) provides that except in the cases provided for in s.s. (1) a permanent alienation of land shall not take effect as such unless and until sanction is given by a Deputy Commissioner. Section 4 provides that the Provincial Government shall by notification in the Official Gazette determine what bodies of persons in any district or group of districts are to be deemed to be agricultural tribes or groups of agricultural tribes for the purposes of the Act. Section 6 provides that a mortgage by a member of an agricultural tribe to a mortgagee not a member of the same tribe, or of a tribe in the same group, shall be made in one of the forms specified. Section 9 enables a Deputy Commissioner to revise a mortgage not made in the permitted form, so as to bring it into accordance with such form. Section 14 provides that any permanent alienation which under s. 3 is not to take effect until a sanction by the Deputy Commissioner is given thereto, shall, until such sanction is given or if such sanction is refused, take effect as a usufructuary mortgage in form (a) permitted by s. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers reasonable. Section 24 enables the Provincial Government by notification in the Official Gazette to exempt any district or part of district or any person or class of persons from the operation of the Act or any of the provisions thereof.

By a notification dated the 18th April, 1904, the then Government of the Punjab, under the powers conferred by s. 4 of the principal Act, and with the previous sanction of the Governor-General in Council determined that for the purpose of the said Act in each district of the Punjab mentioned in column 1 of the Schedule annexed to the notification, all persons, either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district in column 2, should be deemed to be an agricultural tribe within that district, and that all the agricultural tribes within any one district should be deemed to be a group of agricultural tribes. The original list has been modified from time to time by subsequent notifications and it is only necessary to observe that the tribes included as agricultural tribes embrace all communities. Muslims, Hindus, Sikhs and Indian Christians.

After the passing of the principal Act a practice grew up under which a member of an agricultural tribe used to transfer his land to another member of the same tribe, as *benamidar* for a person who was not a member of an agricultural tribe, and the High Court of Lahore had held that this practice was not illegal.

The impugned Act was directed to this practice and inserted in the principal Act s. 13-A, under which the present difficulty arises, and which is in the following terms:—

> "13-A. (1) When a sale, exchange, gift, will, mortgage, lease or farm purports to be made either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act, 1938, by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act.
>
> *Explanation.*—Any alienation made in consequence of a transaction rendered void by this subsection shall also be deemed void for all purposes."

The argument of the plaintiffs-respondents is that the impugned Act is invalid, first because it extends the operation of the principal Act which deprived certain classes of His Majesty's subjects of the right to acquire land on the ground only of descent, and secondly because it destroys the beneficial title of persons not members of an agricultural tribe, their non-membership being based solely on lack of a particular descent.

The validity of the principal Act, which was passed long before the coming into operation of the Government of India Act, is not directly raised in this appeal, but in considering the first ground urged against the impugned Act, it is necessary to see how far the principal Act would have come within the mischief aimed at by s. 298 (1), if it had been passed after that section came into operation.

Section 298 (1) is in the following terms:—

> "No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India."

I feel no doubt that the word "only" which occurs in the first paragraph of the section is incorporated into the second paragraph by the use of the word "such", and that to attract the operation of the second paragraph the prohibition must be based only on the grounds specified. The section therefore confers upon all subjects of His Majesty domiciled in India the right not to be rendered ineligible for office under the Crown in India, and not to be prohibited from acquiring, holding or disposing of property on grounds only of religion, place of birth, descent and colour. For the purposes of the present appeal, descent is the only relevant consideration. It is argued by the respondents that inasmuch as nobody who

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does not claim a particular descent can be a member of an agricultural tribe, and therefore eligible to acquire a permanent interest in agricultural land in the Punjab, the effect of the Act is to prohibit all the other inhabitants of British India from acquiring such land, and this argument found favour in the High Court. The conclusion seems to me a startling one. It is one thing for s. 298 to recognize the fundamental right of His Majesty's Indian subjects not to be prohibited from holding land on the ground only of descent; it is quite another thing to affirm that each one of His Majesty's Indian subjects has a fundamental right to acquire any piece of land to which he may take a fancy and which the owner is willing to transfer to him, but which Government thinks should be held by someone of different descent.

The policy of the principal Act appears to be to ensure that agricultural land in the Punjab shall not be allowed to pass permanently out of the hands of the agricultural classes, in whom it was vested at the date of the Act, without the sanction of Government; a policy which has appealed to many Governments besides that of the Punjab, and which has been applied in countries other than India. It is true that descent has been made an element in determining the persons who fall within the description of agricultural tribes, but the prohibition against alienation would seem to be based quite as much on the character of the land and the occupation of the holder, as on his descent. In every Province in India the population is divided into different communities, who profess different religions, and some legislation must inevitably take account of these distinctions. This position was well known to Parliament when the Government of India Act was passed, and to my mind s. 298 (1) was deliberately confined to cases in which there was no other ground for discrimination except one or more of those specified in the section. To construe the section as avoiding an Act one effect of which is to discriminate on the ground of descent, though that appears from the terms of the Act itself not to have been the only ground on which the discrimination was based, seems to me to impose a very serious and possibly dangerous limitation on the powers of Provincial Legislatures which the language of the section does not warrant. To illustrate my meaning I should say that an Act like the Bombay Hereditary Offices Act, 1874(1), under which *watan* property, that is property held as remuneration for the performance of the duty appertaining to an hereditary office, cannot be alienated beyond the life of the *watandar* to a person not a *watandar* of the same *watan*, would not come within the mischief aimed at by s. 298 (1). The Act undoubtedly has the effect of prohibiting anyone not of a particular descent from acquiring *watan* property much of which had been

(1) Bom. Act No. III of 1874.

granted originally without any restriction on alienation, but the real purpose of the Act is not to discriminate against all those not of *watan* descent, but to endow an office, and to secure that the holder of the office has the means to carry out the duty appertaining to it.

In my judgment therefore the principal Act is not open to criticism on the basis that it involves a prohibition against the acquiring or holding of land on the ground of descent only, and the impugned Act cannot be impeached merely on the ground that it fortifies the provisions of the principal Act. If this view is right it is not necessary to consider the effect of s.s. (2) of s. 298.

I have noticed, however, that the impugned Act is also impeached on the ground that, taken by itself, it comes within the mischief of s. 298 (1) because it destroys the beneficial title of persons who are not members of an agricultural tribe. It is to be noticed that s. 13-A is not in terms discriminatory. It purports to render void all transactions in which the beneficial owner is not a member of the same tribe or of a tribe in the same group as the *benamidar*, and it is quite impartial as to the community or religion of the beneficial owner. Equitable estates in land, such as are familiar in English law, are not recognized in India, and the only actual interest in property which is affected by the impugned Act is the title of the *benamidar*, whose descent is not in question. It is however true that under s. 56 of the Trusts Act(1) the beneficial owner can call upon the *benamidar* to transfer the property to him, and this right to acquire property is destroyed by the Act. But as the learned Advocate-General pointed out, the beneficial owner struck at by s. 13-A may come within one of three classes. First, he may be a member of an agricultural tribe, but may not hold land in the district. Secondly, he may be a member of an agricultural tribe, but may not be a resident in the district. And thirdly, he may not be a member of an agricultural tribe. It is only in relation to the third class that the element of descent is introduced. Although I would not deny that an Act of the Legislature may be void in so far as it comes within the mischief of s. 298 (1), but valid in other respects, I find a difficulty in holding that an Act which in terms makes void the title of all beneficial owners under *benami* transactions of a particular character, can be said to be based only on the ground of descent, when the title of some of such beneficial owners has nothing to do with descent.

I would however rest my judgment that s. 13-A of the impugned Act is not *ultra vires* the Punjab Legislative Assembly on the wider ground that in applying the terms of s. 298 (1) it is necessary for the Court to consider the scope and object

(1) Central Act No. II of 1882.

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of the Act which is impugned, so as to determine the ground upon which such Act is based. If the only basis of the Act is discrimination on one or more of the grounds specified in s. 298 (1), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination. In my opinion, in the present case the true object of the impugned Act is to avoid a method of evading the principal Act, which itself is unobjectionable, and although some of the rights avoided by the Act may be vested in persons whose only disqualification is lack of a particular descent, such lack of descent is not the only, or even the primary, ground on which the rights are avoided.

I regret therefore that I am unable to agree with the Judgment of my brother Varadachariar.

I would allow the appeal and dismiss the plaintiff's suit with costs throughout.

GWYER C. J.—In accordance with the opinion of the majority of the Court, the decree of the High Court is set aside and the case sent back to the High Court with a direction that proper issues are to be framed in the case in the light of the observations contained in the judgment of Varadachariar J. and the case remitted to the trial Court for further trial and decision.. We think that in all the circumstances of the case the parties should bear their own costs both in the Courts below and in this Court.

Case remitted to High Court.

Agent for Appellant: *Tarachand Brijmohanlal.*
Agent for the first Respondent: *Ganpat Rai.*

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v.
MESSRS. BODDU PAIDANNA AND SONS.

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Apr. 22, 23, 24, 25; May 8.

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

Madras General Sales Tax Act, 1939 (Madras Act No. IX of 1939)—Government of India Act, 1935, Seventh Schedule, List I, entry No. 45, List II, entry No. 48—Tax on first sale by manufacturer of goods—Whether a "duty of excise"—Power of Provincial Legislature—Interpretation of Constitution Act.

The respondents, whose business consisted of the purchase of groundnuts for the purpose of extracting oil from the kernels of the nuts and the making of groundnut cake out of the residue, were assessed to tax under the Madras General Sales Tax Act, 1939, both in respect of their purchases of groundnuts and of their sales of oil and cake. The District Munsif at Vizianagram and the High Court of Madras held that a tax on the first sale of goods manufactured in the Province was a duty of excise which the Provincial Legislature was not competent to impose. On appeal by the Government of Madras:—

Held, that the power of a Provincial Legislature to levy a tax on the sale of goods extends to sales of every kind, whether first sales by the manufacturer or producer, or not, and the provisions of the Madras General Sales Tax Act, 1939, imposing such a tax are not *ultra vires* the Provincial Legislature.

A tax levied on the first sale by the manufacturer or producer is levied on him *qua* seller and not *qua* manufacturer or producer.

The expression "duty of excise" is wide enough to include a tax on sales, but where power is given expressly to the Provincial Legislatures to levy a tax on sales, the expression must necessarily be given a more restricted meaning.

It may be reasonable in considering the ambit of an express power in relation to an unspecified residuary power to give a broad interpretation to the former at the expense of the latter, but where, as in the Indian Constitution Act, there are two complementary powers, each expressed in precise and definite terms, there can be no reason in such a case for giving a broader interpretation to one power rather than to the other.

In re Central Provinces and Berar Act No. XIV of 1938 [1939], F. C. R. 18, applied.

APPEAL from the High Court at Madras.

The material facts are stated in the opening paragraphs of the Judgment.

Sir Alladi Krishnaswami Ayyar, A.-G. of Madras (N. Rajagopala Iyengar with him) for appellants. The main contentions of the plaintiffs were: (1) that on a proper construction of the Madras General Sales Tax Act the oil and the cake sold by them must be treated as the same commodity and that therefore they were entitled to the benefits of the second proviso to s. 3 of the impugned Act. On this question a point was raised by the Crown that the final authority to decide on the construction of the enactment was the specially constituted tribunals created under the Act and that the respondents could not invoke the jurisdiction of the ordinary civil courts for the purpose of the determination of this point. In the view which the High Court took of the constitutional question no decision was rendered on this point. (2) Assuming that the oil and the cake were different commodities from the kernel a tax on the sale of the cake and the oil by the plaintiffs was an excise within entry No. 45 of the Federal List and was not within entry No. 48 of the Provincial List.

A further point was raised in the court of the first instance that a tax on sales could not be levied on the buyer. This point was found against the plaintiffs by the trial court and though raised by the respondent in the memorandum of cross objections in the High Court, it was not pressed and was abandoned in the court below. One other point was raised by the Crown that the tax levied by the impugned enactment being a tax on the turnover of a dealer it was not a tax on the sale of any specified goods and so could in no circumstances fall within entry No. 45 of the Federal List.

There is no ambiguity in the expression "taxes on the sale of goods". There is nothing in it to confine it to a tax on sales

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other than the first sales. That this power of the Provincial Legislatures includes a right to tax retail sales is supported by the judgment of the Federal Court in an earlier case (*In re the Central Provinces and Berar Act No. XIV of 1938*(1)). The only question for consideration is whether there is anything in the Federal List to warrant this differentiation between the first sales and the subsequent sales. If the contention is that irrespective of the question of any ambiguity in the expression "taxes on the sale of goods" a sales tax is an excise, every species of sale tax would be within the Federal List and there would be nothing on which entry No. 48 could operate. It is the duty of the Court to reconcile the two Lists and give effect to both if possible. Even if every species of sale is brought within entry No. 48, full effect can be given to entry No. 45 of the Federal List. A sale is a distinct and different transaction from manufacture or production. The fact that a tax on manufacture is collected as a matter of administrative convenience at the time of the first sale is irrelevant for the consideration of the true nature of the tax—*vide* the judgment of Sulaiman J. in the *Central Provinces Case* (at pp. 76-77). There is nothing to prevent both the taxes, *viz.*, an excise tax on production and a sales tax on the sale of goods existing side by side: see *Forbes* v. *Att.-Gen. for Manitoba*(2). The Australian decisions do not furnish any guidance. Even a tax on retail sales would be an excise according to the Australian cases. The recent tendency there has been to extend the term to include every species of internal tax on goods from the stage of manufacture up to the stage of consumption and one or two of the later cases even go to the extent of including within the term "excise" a land tax. All the cases recognize that the term "excise" is one of indefinite import and would include any taxation on goods.

The distinction in the Canadian law in regard to taxation is between direct and indirect taxes, and, according to the decisions there, every species of taxation of goods except a tax on the ultimate consumer would be an indirect tax not open to the Provinces to levy. The Indian Constitution is unique in this respect that it specifically includes a power to levy a tax on the sale of goods in the Provincial List, a feature which is absent in the Australian and Canadian Constitutions. The Australian decisions therefore cannot be used as if they are authorities for the decision of the question in this country. The reliance which the High Court of Madras has placed upon the decision in *Commonwealth Oil Refineries Ltd.* v. *South Australia*(3) is misconceived. If the analogy or the observations of the Australian decisions were

(1) [1939] F. C.R. 18.
(2) [1937] A. C. 260.
(3) (1926) 38 Com. L. R. 408.

out of my way there is no independent reasoning on which the decision of the lower court could be justified.

Some confusion has been introduced into the consideration of this question by the importation of a purely American doctrine, the doctrine of "original package". Some observations of the Federal Court in the *Central Provinces Case* have been used in support of the theory that manufactured goods become subject to the taxing power of the provinces only when they leave the manufactory and that up to that time they are not part and parcel of the "mass of goods within the state" subject to provincial control or taxation. It is submitted that the American theory based as it is on considerations peculiar to the American Constitution regarding the conflict between the State and Congressional regulation of inter-Statal trade has no application to the state of affairs under the Government of India Act. Secondly, even the American "package" doctrine applies only to imported goods, and goods manufactured in the State become part of the mass of goods within the State—immediately they are produced even though they may be intended or destined for export beyond the limits of the State—See *Coe* v. *Errol*(1) and *Heisler* v. *Thomas Colliery Co.*(2).

The power therefore of the Province to levy a tax even on the first sale of goods is thus clear and the appeal has to be dismissed.

Sir Asoka Roy, A.-G. of Bengal (*H. K. Bose* with him), and *Dr. Narain Prasad Asthana, A.-G. of the United Provinces* (*Sri Narain Sahai* with him) were also heard in support of the case of the Province of Madras.

Sir Asoka Roy. After the opinion given by this Court in the *Central Provinces Case* and particularly after the observations made therein by the Chief Justice, the Madras Court should have had no difficulty in upholding the contentions put forward on behalf of the Province of Madras. From the judgment of the Chief Justice in that case it follows that a tax levied by the Provincial Legislature by virtue of the provision contained in entry No. 48 of List II on the sale of goods, whether it is the first sale or not, does not impinge entry No. 45 of List I. Entry No. 48 of List II makes it clear that a tax levied on the sale of goods is within the exclusive legislative sphere of Provinces. A tax on the sale of goods has no concern with the manufacture or production of the goods but is a levy on the transaction of sale. It affects goods sold within the Province whether those goods have been manufactured or produced in the Province or whether they have been imported into the Province.

(1) (1885) 116 U. S. 517, at p. 525.

(2) (1922) 260 U. S. 245, at p. 261.

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There is no reason for limiting or curtailing the plain meaning of entry No. 48. Under the scheme of the Constitution Act legislative power to impose taxes on the sale of goods is specifically conferred on the Provincial Legislature exclusively. The express power to impose taxes on sales under entry No. 48, List II, should be construed according to the plain and ordinary meaning of the words and that would cover taxes on all sales irrespective of whether the sale be a first sale or a subsequent sale. The tax is a tax on the transaction of sale

There is no conflict or repugnancy with the provision in entry No. 45 of List I which gives the Federal Legislature exclusive power to impose duties of excise in connection with the manufacture or production of goods in India. There is no definition of the words "duties of excise" in the Constitution Act and those words must be interpreted in such a way as to exclude taxes which can be described as "taxes on the sale of goods". The proper meaning to be given to entry No. 45 of List I is that given by the Chief Justice in the *Central Provinces Case*(1). The Centre may levy a tax in connection with the production or manufacture of the goods irrespective of any question of sale and a Province may impose a tax in respect of the same goods when there is a sale. There is no reason why the two taxes cannot co-exist. A tax on the sale of goods may be imposed on the sale of indigenous goods as well as on the sale of imported goods. Excise is with reference to indigenous goods what customs is in respect of imported goods and if a tax on the first sale of indigenous goods by the manufacturer is held to be a duty of excise, there can be no good reason why a tax on the first sale of imported goods by the importer should not be treated as a further duty of customs. In that case. Parliament should have added in entry No. 48 the words, "except taxes on first sales".

If the decision of the Madras High Court is upheld, it will have a very far reaching effect in curtailing the powers of the Provinces. At the moment there are numerous dealers—big and small—who sell the goods they manufacture direct to the consumers, *e.g.*, manufacturers of leather goods, like Batas, manufacturers of steel trunks, sanitary fittings, electric fans, musical instruments and various other commodities, who are also retail sellers of the goods manufactured by them.

It is submitted that the decision of the High Court of Madras on the constitutional question is clearly wrong and should be reversed.

Dr. Narain Prasad Asthana. The Government of the United Provinces support the Madras Government in their contention that a tax on the first sales of goods produced or manufactured in the Province is not an "excise"

(1) [1939] F. C. R. 68, at P. 47.

and it is unnecessary to repeat all the reasons which have been advanced by the learned Advocate-General of Madras. In the United Provinces, an Act has been passed called the Sugar Factories Control Act (U. P. Act I of 1938) and by s. 29 of that Act a tax on the sale of sugarcane as well as a cess on the entry of sugarcane in a sugar factory have been imposed. The former tax has not yet been levied, while the cess was imposed more than a year ago. The cess imposed by the Government was recently attacked in a case before the Allahabad High Court as falling within the term "excise". But the contention was overruled and it was held that the cess so imposed was *intra vires* the Provincial Legislature: *Emperor* v. *Manna Lal*(1). The Provincial Governments are interested in having an authoritative decision as to the meaning and limitations of the word "excise" as used in entry No. 45 of List I of the Seventh Schedule to the Constitution Act, as any wider meaning of that term will seriously hamper the taxation powers of the Provincial Governments.

If a tax on the first sale of a commodity is held to be excise, any taxation by way of octroi on raw materials produced beyond municipal limits or on goods manufactured beyond the municipal limits will become impossible. It will also be inequitable to an importer who carries on his business in the Province as compared with the manufacturer of that very article within the Province. It is submitted that the word "excise" should be so interpreted as to avoid all such inequities and distinctions.

T. R. Venkatarama Sastri and *C. Krishnaswami* for the respondents. The levy of excise duty under entry No. 45 of List I of the Seventh Schedule to the Constitution Act is within the exclusive competence of the Central Government. Excise duty is leviable on goods produced or manufactured in the country.

As a matter of legislative practice as well as in law "excise" duty is payable in respect of goods produced or manufactured in the country at the time of the issue of the article produced or manufactured from the factory or warehouse. Delivery in pursuance of first sale after production or manufacture is the time or occasion when goods produced or manufactured are issued after such production or manufacture. A tax on first sales partakes of the nature of excise duty falling under entry No. 45 of List I. A tax therefore on first sales is an excise duty not merely according to legislation and legislative practice in India but also in accordance with authority. (See *The Commonwealth Oil Refineries Ltd.* v. *South Australia*(2)).

Entry No. 48 in List II of the Seventh Schedule no doubt empowers the Provincial Government to levy a tax on the sale of goods, but this entry has to be reconciled with entry No.

(1) (1942) A. L. J. 112.

(2) (1926) 38 Com. L. R. 408.

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45 in List I. A tax on the manufacturer or producer before it leaves his hand is a tax on production or manufacture. Such levy cannot therefore fall under entry No. 48 without infringing the exclusive competence of the Centre in regard to duties of excise under entry No. 45 in List 1. The Provincial Legislature cannot do indirectly what it cannot do directly.

The Reports dó not provide any direct authority on the point. The only authorities that throw light on the question are the *Commonwealth Oil Refineries Case*(1) and the *Central Provinces Case*(2).

In the *Central Provinces Case* the Chief Justice left the question open. Sulaiman J. expressed a leaning in favour of holding that a tax on first sales would be in the nature of an excise duty falling within entry No. 45 of List I. Jayakar J. held that a tax on all sales except the last retail sale would amount to a levy of excise duty and therefore would not be within the competence of the Provincial Government. It is not necessary in the present case to contend for the wide proposition laid down by Jayakar J.

The following cases were also referred to in the course of the arguments: *Att.-Gen. for British Columbia* v. *Kingcome Navigation Co.*(3), *Gallagher* v. *Lynn*(4); *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.*(5); *Peterswald* v. *Bartley*(6); *John Fairfax & Sons Ltd., and Smith's Newspapers Ltd.* v. *New South Wales*(7); *Att.-Gen. for N. S. W.* v. *Brewery, Employes Union of N. S. W.*(8), *Att.-Gen. for N. S. W.* v. *Homebush Flour Mills Ltd.*(9); *Matthews* v. *Chicory Marketing Board (Vict)*(10); *Leisy* v. *Hardin*(11).

Sir Brojendra Mitter, A.-G. of India (*H. R. Kazimi* with him) for the Government of India. "Sale of goods" in entry No. 48 of List II means sale of existing articles of trade. Goods produced or manufactured in the country become existing articles of trade after the producer or manufacturer has sold and released them. In entry No. 45 of List I, "duties of excise on goods produced or manufactured in the country", the word "duties" is qualified by the word "excise". "Excise" means an indirect tax on goods connected with production and payable by the producer: *Central Provinces Case*(12): The two entries are to be so interpreted as to be mutually exclusive. If necessary, the language may have to be modified: *Central Provinces Case* (page 39); *Citizens' Insurance Co. of Canada* v. *Parsons*(13).

(1) (1926) 38 Com. L. R. 408.
(2) [1939] F. C. R. 18.
(3) [1934] A. C. 45.
(4) [1937] A. C. 863.
(5) [1927] A. C. 934.
(6) (1904) 1 Com. L. R. 497.
(7) (1927) 39 Com. L. R. 139.
(8) (1908) 6 Com. L. R. 469.
(9) (1936-37) 56 Com. L. R. 390.
(10) (1938) 60 Com. L. R. 263.
(11) (1890) 135 U. S. 100.
(12) [1939] F. C. R. 18, at pp. 50,52.
(13) (1881) 7 App. Cas. 26, at pp. 108-9.

The Indian legislative practice has been to levy excise duty on production and issue *i.e.*, on first sale: *Central Provinces Case* (pages 53, 55); Central Acts Nos. XIV, XVI & XXIII of 1934.

"Excise" is connected with production. The tax is so imposed as in effect to be a method of taxing the production of the article: *Central Provinces Case, per* Gwyer C. J. at page 50 and *per* Sulaiman J. at pages 81-2; *Peterswald* v. *Bartley*(1) *Commonwealth Oil Refineries Case*(2). First sale is intimately connected with production and therefore a tax on it is an excise duty: *Commonwealth Oil Refineries Case; John Fairfax & Sons Ltd., and Smith's Newspapers Ltd.*, v. *New South Wales*(3).

The point of time when goods become part of the general mass of property is not when produced but when the producer has so acted upon them that they had become incorporated in the general mass, which happened when he has sold the goods and issued them from the factory. The following American case, though on duty of customs and not duty of excise, is helpful: *Leisy* v. *Hardin*(4).

The power of the Centre to levy duty of excise ends when the producer has released the goods upon sale by him, and the power of the Provinces commences when the goods are incorporated in the general stock of the Provinces.

Sir Alladi Krishnaswami Ayyar in reply.

Cur. adv. vult

The Judgment of the Court was delivered by

GWYER C. J.—In this case the appellants are the Province of Madras, who appeal against a Judgment of the Madras High Court dated September 5, 1941, in which it was held that certain taxes which had been levied on the respondents under the Madras General Sales Tax Act, 1939(5) (to which for convenience we refer hereafter as the Madras Act) were in the nature of duties of excise and therefore beyond the competence of the Madras Legislature to impose. In view of the importance of the question to the Provinces generally, in more than one of which legislation similar to the Madras Act has already been enacted, we acceded to the application of the Advocates-General of Bengal and the United Provinces to be allowed to appear at the hearing and to support the arguments of the Advocate-General of Madras. The Advocate-General of India, to whom we had caused notice of the proceedings to be sent, also appeared and addressed arguments to us in support of the Judgment of the High Court. We therefore had the advantage of a very full

(1) (1904) 1 Com. L. R. 497, at p. 509.
(2) (1926) 38 Com. L. R. 408, at pp. 419, 426.
(3) (1927) 39 Com. L. R. 139.
(4) (1890) 135 U. S. 100, at pp. 110, 111.
(5) Madras Act No. IX of 1939.

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discussion of all points which arise in the case and we are indebted to counsel for the assistance which they have afforded us.

The respondents carry on business at Vizianagram in the Province of Madras. Their business consists of the purchase of groundnuts for the purpose of extracting oil from the kernels of the nuts and the making of groundnut cake out of the residue. They sell this oil and cake, and, since they are themselves the manufacturers, it follows that each sale which they effect is the first sale of the commodity after its manufacture or production.

The Madras Act provides that, subject to the provisions of the Act, every dealer, that is to say, every person who carries on the business of buying and selling goods, is to pay in each year a tax on his turnover, if that turnover is not less than Rs. 10,000, the tax being at a flat rate of five rupees (afterwards reduced to four) on a turnover between Rs. 10,000 and Rs. 20,000 and varying with the amount of the turnover on a turnover of more than Rs. 20,000. The expression "turnover" is defined as meaning the aggregate amount for which goods are either bought or sold by a dealer, whether for cash or for deferred payment or other valuable consideration, with certain exceptions not here material. The expression "goods" is defined as meaning all kinds of movable property, other than actionable claims, stocks and shares and securities, and includes all materials, commodities and articles. The Act further provides that the buyer and seller are not both to be taxed in respect of the same transaction of sale, but only one of them, as determined by rules made under the Act; and that, when the amount for which any goods have been bought by a dealer has been included in his turnover, the amount for which the same goods are sold by him is not to be included in his turnover for the purposes of the Act. The turnover for all purposes of the Act is to be determined in accordance with, and the tax is to be assessed, levied and collected in such manner and in such instalments as may be prescribed by, rules made for the purpose by the Provincial Government. There are various other provisions in the Act, mostly dealing with the machinery of assessment and collection, but nothing turns upon them in the present appeal.

The assessing authority under the Act assessed the respondents to tax both in respect of their purchase of groundnuts and of their sales of oil and cake, holding that the purchase of groundnuts was a business distinct from the business of manufacturing oil and cake. Accordingly the sum of Rs. 160-11-0 was demanded from the respondents by way of tax, and was paid by them under protest. The respondents then took proceedings in the Court of the District Munsif at Vizianagram for a declaration that the Madras

Act and certain rules made thereunder were *ultra vires* the Madras Legislature and for an order directing a refund of the sum of Rs. 160-11-0, together with Rs. 3 interest thereon. The learned Munsif gave judgment in favour of the respondents on both points, holding that a tax on the first sale of goods manufactured in the Province was a duty of excise which the Madras Legislature were not competent to impose. There was an appeal to the District Court at Vizagapatam, but, on the application of the Advocate-General of Madras, the appeal was transferred to the High Court. A Bench of the High Court, composed of the Chief Justice and Chandrasekhara Ayyar J., upheld the judgment of the lower Court; and it is from the High Court's decision that the appeal now comes to us.

Under the Constitution Act the Federal Legislature has an exclusive power to impose duties of excise (List I, entry No. 45) and the Provincial Legislature an exclusive power to impose taxes on the sale of goods (List II, entry No. 48). The relation of a duty of excise to a tax on sales was much discussed in the *Central Provinces Case*(1), in which the Court delivered an advisory opinion on the question whether an Act imposing a tax on retail sales of petrol was within the competence of the Central Provinces Legislature. All the members of the Court were of opinion that the Legislature was competent to impose such a tax, though their reasons differed. Jayakar J. held that all taxes on the sale of goods "for purposes of consumption", by which he presumably meant taxes on retail sales, ought to be regarded as exclusively within the competence of the Provincial Legislature, provided that they were in no way connected with the production or manufacture of the goods within the Province; but that all other taxes on the sale of goods were duties of excise and therefore exclusively within the competence of the Central Legislature. The other two members of the Court were not prepared to go to these lengths, and in effect drew the dividing line between the Central and Provincial spheres at the point of manufacture or production. They were of opinion that, on the true construction of entry No. 45 in List I and entry No. 48 in List II, the power of the Central Legislature to impose duties of excise was a power to impose duties on the manufacturer or producer of the goods and did not extend further, the power to impose a tax upon the sale of goods after manufacture or production being reserved to the Provinces. They left open however the question on which side of the line a tax upon the first sales of goods manufactured or produced in the Province was to be regarded as falling. Thus one judgment would confine the power of the Central Legislature

(1) [1939] F. C. R. 18.

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to the imposition of duties "on the manufacturer or producer of the excisable articles, *or at least at the stage of, or in connection with, manufacture or production*". In the other this sentence is to be found: "For all practical purposes, it [that is, a tax on first sales] is a tax on the manufacturer or producer, and the burden is in the first instance imposed on him, though of course, it being an indirect imposition, he could pass it on; but the essence is that the tax is imposed on a sale by the producer or manufacturer and not on a sale by any subsequent vendor". The learned Judge who used these words, the late Sulaiman J., added that, though it was not necessary to decide the question, there might be some difficulty in upholding a provincial tax on first sales. In the present appeal we have to answer the question which was thus left open in the earlier case.

We may here refer to a contention raised by counsel on behalf of the appellants that a turnover tax such as is imposed by the Madras Act is not a tax on specific goods and that therefore the expression "duty of excise" could never in any circumstances be appropriate to it. It may be conceded that a duty of excise is a duty leviable with respect to specific goods; but where a turnover tax is leviable at a specified rate on the aggregate sum produced by the sale of a number of different articles or commodities, then it seems to us that it is a tax levied at the specified rate on each sale of those goods or commodities. A system of turnover taxation is conceivable where it may not be easy, or even possible, to identify the tax on a particular sale; but no such difficulty arises in a case under the Madras Act, at least if the turnover exceeds Rs. 20,000 per annum, as that of the respondents does. We do not think therefore that there is any substance in the appellants' contention.

In the *Central Provinces Case* the Opinions expressed were advisory Opinions only, but we do not think that we ought to regard them as any less binding upon us on that account. We accept therefore the general division between the Central and Provincial spheres of taxation which commended itself to the majority of the Court in that case. They did not reach their conclusions by assigning any particular technical meaning to the expressions "duty of excise" or "tax on the sale of goods", but rather by construing the language in which the taxing powers of the Centre and Provinces respectively are conferred in such a way as to give effect to what appeared to them to be the scheme of the Act and to reconcile the conflict which might otherwise arise between two independent taxing authorities. They recognized that the expression 'duty of excise' is wide enough to include a tax on sales; but where power is expressly given to another authority to levy a tax on sales, it is clear that 'duty

of excise' must be given a more restricted meaning than it might otherwise bear. On the other hand the fact that 'duty of excise' is itself an expression of very general import is no reason at all for refusing to give to the expression 'tax on sales' the meaning which it would ordinarily and naturally convey. In these circumstances the question at issue in the present appeal appears to us to lie within a very small compass.

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to the *Central Provinces Case*, duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him *qua* seller and not *qua* manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit; but so is the taxpayer in Canada who has to pay income-tax levied by the Province for provincial purposes and also income-tax levied by the Dominion for Dominion purposes: see *Caron* v. *The King*(1); *Forbes* v. *Att.-Gen. for Manitoba*(2). If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax, the liability to tax

(1) [1924] A. C. 999.

(2) [1937] A. C. 260.

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arises on the occasion of a sale, and a sale has no necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory.

In our opinion the power of the Provincial Legislatures to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not; and we regret that we are unable to agree with the contrary opinion which has been expressed by the High Court. The gist of the judgment of the High Court is to be found in the following passage:— "What the Court has to decide in the first instance is whether a tax on the sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise duty. The High Court of Australia has said that a tax imposed on the first sale of goods is so connected with their production that it is an excise duty, and no reason has been advanced in the course of the argument in this case to induce us to think otherwise. The tax operates on the goods themselves and it is imposed before they leave the hands of the manufacturer or producer. In the normal course he is certainly not going to part with his goods until a contract of sale has been entered into. This being the case, it seems to us that the tax is intimately connected with the manufacture or production of the goods. We hold that a Provincial Legislature in India has no power to tax a sale by the manufacturer or producer, as for the reasons given this would mean the imposition of an excise duty and the assumption of a power vested only in the Centre". We do not think, for reasons which we give hereafter, that the Australian case referred to has any bearing on the question which we are now called on to determine. That question is this: assuming the right of the Central Legislature to tax the production of a commodity and the right of the Provincial Legislature to tax its sales, can a good reason be shown for excluding a particular category of sales on the ground only that they are sales by the producer? According to the High Court a tax on the first sale of goods is so connected with their production that it is an excise duty; but, with great respect to the Court, that appears to us to be hardly the question. Every tax on the sale of goods produced in India is in a sense an excise duty, whether the sale is the first, second or third, though an excise duty is not necessarily a tax on sales; and the High Court should have formulated their proposition thus: a tax on the first sale of goods is so connected with their production that it cannot properly be described as, and is not in fact, a tax on sale. Stated in this way, the

proposition is surely difficult to sustain. We may recall that in 1935, when the Constitution Act was passed, the distinction between a producer's or manufacturer's sales tax and sales taxes (including retail sales taxes) of other kinds was familiar to economists and those concerned with public finance (see Findlay Shirras: Science of Public Finance, Vol. II, Ch. 25); and it is therefore not without significance that Parliament did not think fit to confine the provincial taxing power in terms to sales taxes other than taxes on first sales. It is also material, even if not necessarily conclusive, to point out that the judgment of the High Court would deprive the Provincial Legislature of the whole yield of taxes on first sales, and not merely of the tax on the first sale of commodities which are also subject to a duty of excise; and it would do so without in practice conferring any corresponding benefit on the Central fisc, since for plain reasons of convenience the number of commodities on the production of which it is administratively worth while to impose an excise duty will always be very limited.

Our attention was drawn to a number of Canadian, Australian and American decisions which were alleged to throw light upon the principles applicable to this appeal, and it is desirable that we should say something about them. They are not of course binding on us; but, as was said in the *Central Provinces Case*, such decisions, if relevant, will always be listened to in this Court with attention and respect.

The Canadian cases which were cited do not seem to afford any assistance, since analogous problems in Canada are always concerned with questions of direct and indirect taxation; and if a Provincial tax is held to be an indirect tax, it is unnecessary for the Court to consider whether it may not also be a duty of excise: see, for example *Att.-Gen. for British Columbia* v. *The Canadian Pacific Railway Co.*(1), where a tax on every person purchasing within the Province fuel oil for the first time after its manufacture in, or importation into, the Province was held to be invalid as an indirect tax, and the question whether it might not also be bad as an excise duty was left unanswered. In contrast to the case just cited we may refer to *Att.-Gen. for Britisih Columbia* v. *Kingcome Navigation Co.*(2), in which a fuel oil tax imposed by a Province upon every consumer of fuel oil according to the quantity which he had consumed was held to be valid as a direct tax, because it was demanded from the very persons who it was intended or desired should pay it.

The Australian cases are rather more in point, and in particular the High Court has laid great stress on *Commonwealth Oil Refineries Ltd.* v. *South Australia*(3), which was

(1) [1927] A. C. 934. (2) [1934] A. C. 45.
(3) (1926) 38 Com. L. R. 408.

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also discussed at length in the *Central Provinces Case*. In this Australian case the validity of a so-called income-tax of three pence per gallon imposed by a State on vendors of motor spirit was considered, a vendor being defined as a person selling or delivering motor spirit within the State to persons within the State for the first time after its entry into, or its manufacture in, the State. This was held to be a duty of excise and therefore not within the competence of the State Legislature, the power of the Commonwealth Parliament to impose duties of customs and excise being an exclusive one. Some of the learned Judges who decided the case, it is true, were of opinion that it was an excise duty because it was connected with the production of the commodity, but others took a wider view: see especially the judgment of Higgins J. (at p. 435), where he says: "For the purpose of s. 90 and our Constitution as a whole, customs duty is a duty on importation or exportation whether by land or by sea; whereas excise duty means a duty on the manufacture, production, etc., in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption." In *Matthews* v. *The Chicory Marketing Board*(1), a levy of £1 on producers for every half acre of land planted with chicory was held by a majority of the Court to be a duty of excise. A very full account of the history of excise duties is given by Dixon J. in his judgment in that case, and the learned Judge observes: "It should not be overlooked that so far there is no direct decision (*i.e.*, by the Australian Courts) inconsistent with the view that a tax on commodities may be an excise although it is levied not upon, or in connection with, production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production (*cf.* the judgment of Rich J. in *The Commonwealth Oil Refineries Ltd.* v. *South Australia; John Fairfax & Sons, Ltd., and Smith's Newspapers Ltd.* v. *New South Wales*(2)). What is decided is that to be an excise the tax must be imposed in respect of commodities". And then later: "The basal conception of an excise in the primary sense which the framers of the Constitution are regarded as having adopted is a tax directly affecting commodities...To be an excise the tax must be levied 'upon goods', but those apparently simple words permit of much flexibility in application. The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods, and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce" (pp. 303, 304).

(1) (1938) 60 Com.L. R. 263.

(2) (1927) 39 Com. L. R. 139.

Having regard to the above opinions, we find it impossible to say that the expression "duties of excise" even in Australia is limited to duties imposed in connection with the production of a commodity alone. We should be disposed to say on the contrary that in Australia all taxes on the sale of commodities are, or may be regarded as, duties of excise; but whether this be so or not, it is clear that the *Commonwealth Oil Refineries Case* cannot be treated as having the conclusive authority which the High Court of Madras seem to have attributed to it. We should be unwilling also for another reason to follow blindly the Australian decisions. Under the Australian Constitution power to impose duties of excise is, as we have said, the exclusive right of the Commonwealth Parliament; the residuary taxing power remains in the States. In the Indian Constitution Act the whole of the taxing power in this particular sphere is expressly apportioned between the Centre and the Provinces, to the one being assigned the power to impose duties of excise, to the other taxes on the sale of goods. It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter; and this indeed is the principle upon which the Judicial Committee have for the most part interpreted ss. 91 and 92 of the British North America Act. The case however is different where, as in the Indian Act, there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods.

Lastly, the wellknown American case of *Brown* v. *The State of Maryland*(1) was cited to us. The State of Maryland had passed an Act prohibiting the importers of foreign goods from selling their goods without taking out a licence, for which fifty dollars had to be paid. This Act was held to be repugnant to the provision in the Constitution which provides that "no State shall, without the consent of Congress, allow any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws". In the course of his judgment, Marshall C. J., after observing that whatever might be the motive which had induced the prohibition against duties on imports or exports, said: "It is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering

(1) (1827) 12 Wheat. 419.

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the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer." If a licence to sell is invalid for the above reasons, a tax on the first sale must be no less invalid; and it follows from the judgment of Marshall C. J., and has ever since been held to be the law of the United States, that a duty of this kind is to be regarded as so intimately connected with the act or transaction of importation as to be itself an impost or duty on imports and therefore beyond the power of any State in the Union to impose. We should be temerarious indeed, if we expressed any opinion upon the reasoning of that great Judge, even though we might find it easier to follow the reasoning of Thompson J. in his dissenting judgment; but we have no occasion to do so. The provisions which were being considered in *Brown* v. *Maryland* were very different from those which are before us in the present appeal. There is in the first place, as in the Australian Constitution, a specific reservation of certain taxing powers to Congress, with the residuary powers left to the States; and what we have already said on this point in connection with the Australian decisions is equally applicable here. Next, it is to be observed that the American Constitution also provides that Congress alone has power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes"; and it was held that the Maryland tax was no less repugnant to this provision also. Marshall C. J. asked: "To what purposes should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Congress has a right, not only to authorize importation, but to authorize the importer to sell . . . What does the importer purchase, if he does not purchase the privilege to sell?" On this view of the Commerce Clause, it would indeed be difficult to recognize the right of the State to impose a tax upon the first sale of the commodity, at any rate so long as it remained in the importer's hands. In the Indian Constitution Act no such question arises; and the right of the Provincial Legislatures to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government. Lastly, the prohibition in the American Constitution is against the laying of "any imposts or duties on imports or exports"; the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wider terms; and it does not appear to us

that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of licence or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in the *Maryland Case* and it was a view adopted and argued before us. The analogy with the American case is an attractive one; but for the reasons which we have given we are wholly unable to accept it.

Some of the confusion which seems to have arisen may have been caused by the suggestion which I myself made in the *Central Provinces Case* that the Central Legislature should be regarded as having power "to impose duties on excisable articles before they become part of the general stock of the Province, that is to say, at the stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter". In using these words I intended to do no more than suggest a convenient dividing line between the two spheres of jurisdiction; but I certainly did not mean to elevate the dividing line into a legal principle, the application of which might attract those numerous American authorities, of which perhaps *Brown* v. *Maryland* was the first, where the question has been considered at what point commerce ceases to be inter-state or foreign commerce and becomes the domestic commerce of a State and taxable by it. I should much regret if any contribution of mine to the elucidation of the problems which come before this Court were thought to have included the introduction of some kind of "original-package" doctrine and all the refinements and complications which that doctrine has brought in its train in the Courts of America.

We should add that neither the appellants nor the respondents desired to adduce arguments on certain issues in the case which the High Court left undecided, because on the view which they (the High Court) took of the matter it was unnecessary to decide them. We do not in these circumstances think it obligatory upon us to express any opinion upon those issues.

The appeal will be allowed and the case remitted to the High Court of Madras with directions to substitute a decree dismissing the respondents' suit. We think that the appellants are entitled to their costs in this Court and in the

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two Courts below.

Case remitted to High Court.

Agent for Appellants: *B. Banerji.*
Agent for Respondents: *Ganpat Rai.*
Agent for the Government of India: *K. Y. Bhandarkar.*
Agent for the Government of Bengal: *B. Banerji.*
Agent for the Government of the United Provinces: *Sumair Chand Jain Raizada.*

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Oct. 20, 21. 1942

Megh Raj v. Allah Rakhia

Punjab Province v. Daulat Singh.

Hulas Narain v. The Province of Bihar

Boddu Paidanna and Sons v. The Province of Madras.

MEGH RAJ AND ANOTHER
v.
ALLAH RAKHIA AND OTHERS.

PUNJAB PROVINCE
v.
DAULAT SINGH AND OTHERS.

HULAS NARAIN SINGH AND OTHERS.
v.
THE PROVINCE OF BIHAR.

MESSRS. BODDU PAIDANNA AND SONS
v.
THE PROVINCE OF MADRAS.

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

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

The Court will not lay down rules by which the discretion of the Court in granting or withholding of leave to appeal to His Majesty in Council is to be governed; but it will not be disposed to encourage Indian litigants to seek for the determination of constitutional questions elsewhere than in their own Supreme Court.

Observations of Lord Haldane in *Hull* v. *M'Kenna* [1926] I. R. 402, applied.

APPLICATIONS for leave to appeal to His Majesty in Council.

These were applications for leave to appeal under s. 208(b) of the Constitution Act from the Judgments of the Court in the following cases, respectively :—*Megh Raj* v. *Allah Rakhia*, reported *antea* p. 53; *Punjab Province* v. *Daulat Singh*, reported *antea* p. 67; *Hulas Narain Singh* v. *The Province of Bihar*, reported *antea* p. 1, and the *Province of Madras* v. *Messrs. Boddu Paidanna and Sons*, reported *antea* p. 90.

The following were the counsel who appeared in the above-named cases :—

1. *Rai Bahadur Harish Chandra* (*Radhe Mohanlal* with him) for the applicants.

M. Sleem, A.-G. of the Punjab (*Khan Sahib Mohammad Ameen* with him) for the opposite party.

2. *Kripa Narain* (*Radhe Mohanlal* with him) for the applicants.

Jafer Imam, A.-G. of Bihar (*C. P. Sinha* with him) for the opposite party.

3. *M. Sleem, A.-G. of the Punjab* (*Khan Sahib Mohammad Ameen* with him) for the applicants.

Rai Bahadur Harish Chandra (*Radhe Mohanlal* with him) for the opposite party.

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Megh Raj
v.
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Punjab Province
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4. *C. Krishnaswami* for the applicants.

Sir Alladi Krishnaswami Ayyar, A.-G. of Madras (*N. Rajagopala Iyenger* with him) for the opposite party.

The Judgment of the Court was delivered by

GWYER C. J.—These are four applications for leave to appeal to His Majesty in Council from decisions of this Court. The cases concerned all dealt with important issues. In the first, the validity of the Punjab Restitution of Mortgaged Lands Act (No. IV of 1938) was challenged. In the second, it was contended that the Punjab land alienation legislation offended against those provisions of the Constitution Act which prohibit certain kinds of discriminatory legislation. In the third case, from Patna, the Bihar Agricultural Income-tax Act (No. VII of 1938) was said to conflict with the principles underlying the Permanent Settlement. And in the fourth, which came from Madras, the question whether the Provincial Legislature and Government had the right to levy a sales tax on the first sale by a manufacturer of goods manufactured by him (which had been left open in a previous decision of this Court) was finally determined in favour of the Province. It may be conceded that the decision in all four cases will affect a large number of persons and substantial interests, and that important questions of law were involved in them.

We were invited to lay down rules by which our discretion in granting or refusing leave to appeal would be governed. We must decline thus to fetter the exercise of it. We shall continue to treat each case on its own merits, but we repeat what we have said before, that we will not entertain an application for leave to appeal on the ground only that the applicant is of opinion that our decision was wrong, and still less for the purpose of enabling him, in the phrase used by counsel in one of the cases, to "try his luck" before yet one more tribunal. On general grounds of public policy litigation in the form of appeals to several Courts should be restricted rather than extended; but other considerations also have weighed with us.

Sir Alladi Krishnaswami Ayyar, who opposed the application in the Madras case and to whose argument as well as to that of Mr. Krishnaswami, counsel for the applicants, we are much indebted, based his contention upon the analogy of s. 74 of the Australian Constitution, which forbids an appeal to His Majesty in Council from a decision of the High Court of Australia on certain constitutional issues, unless the High Court certifies that the question is one which ought to be determined by His Majesty in Council, and empowers the High Court so to certify, "if satisfied that for any special reason the certificate should be granted". So far as we are aware, in one case only has a certificate been granted under this section

by the High Court: *Att.-Gen. for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.*(1), a case in which the Judges were equally divided in opinion, so that the Court in effect gave no decision and an authoritative pronouncement by some other tribunal became necessary. We have in an earlier case uttered a word of warning on the danger of applying decisions on one constitutional enactment to the interpretation of another; but an examination of the Australian decisions shows how strongly the High Court of Australia holds the view that since the primary responsibility for determining the constitutional cases which fall under s. 74 lies upon itself it ought not without grave reason to attempt to shift that responsibility on to others. In view of the similarity between s. 74 and s. 208 (*b*) of the Indian Constitution Act, we think it right to take note of the principle of the Australian decisions, even though we may be less rigid in applying it.

The Federal Court has not as yet the wide jurisdiction of the High Court of Australia, nor does India, whatever her hopes may be, yet possess the same political status as the Australian Commonweatlh. But this Court is the first court sitting on Indian soil whose jurisdiction, limited though it may be at present, extends to the whole of British India. Its establishment marked a new stage in India's constitutional evolution; and the evolution of Indian political thought, of which we cannot pretend to be unaware, even since we last heard an application for leave to appeal, has served only to increase and emphasize the significance of its authority. It is not subordinate to any other court; and it is plain that this conception of its status was present in the minds of those who framed the present constitution when they gave to the Court itself the right to say whether it would permit any cases which came before it on appeal to be reviewed elsewhere. The ancient prerogative right of His Majesty to grant special leave to appeal, though it has now been made statutory by s. 208(*b*), does not affect this aspect of the matter.

Mr Krishnaswami in the course of his argument referred to certain observations which fell from Lord Haldane in *Hull* v. *M'Kenna*(2), an application for special leave to appeal from the High Court of the Irish Free State to His Majesty in Council. Lord Haldane pointed out that though the Judicial Committee act in a strictly judicial capacity in advising the Crown whether or not special leave to appeal should be granted, nevertheless in the case of appeals from the Dominions the general sense of the Dominion is taken into account and the Judicial Committee, in Lord Haldane's phrase, "go upon the principles of autonomy on this question of exercisng the discretion as to granting leave to appeal". No doubt a distinction

(1) (1913) 17 Com. L. R. 644.

(2) [1926] I. R. 402.

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Megh Raj v. *Allah Rakhia.*

Punjab Province v. *Daulat Singh.*

Hulas Narain Singh v. *The Province of Bihar.*

Boddu Paidanna and Sons. v. *The Province of Madras.*

Judgment.

is to be drawn between the functions of the Judicial Committee in advising His Majesty and the functions of this Court in granting leave to appeal; but Lord Haldane's observations have a more general application, and for the reasons given above we are not disposed to encourage Indian litigants to seek for the determination of constitutional questions elesewhere than in their own Supreme Court. We do not and indeed we cannot lay down a rule that we will never grant leave to appeal, for that would be to alter the provisions of the Act and to usurp legislative functions, but we shall grant it sparingly and only in exceptional cases.

Applying the above considerations to the cases which are now before us, there can be no reason for the grant of leave to appeal in the cases from Patna and Madras, where the questions at issue were clear-cut and straightforward and we entertained no doubts on any one of them. The two cases from the Punjab were of greater complexity. The defects in the Act under consideration in the first of them, to some of which we drew attention in our Judgment, certainly do not diminish the difficulties of interpretation with which we were faced; and the lack of unanimity among the members of the Court may itself be taken to indicate the existence of similar difficulties in the second. Nevertheless it does not seem to us that these circumstances by themselves justify the grant of leave to appeal. The Court had, in the words of the High Court of Australia, to accept the responsibility of deciding the two appeals, however difficult it may have found its task; and there is no reason why it should suggest that it feels any lack of confidence in the correctness of the decisions at which it has arrived.

The four applications are dismissed. The applicant must in each case pay the costs of the application.

Applications dismissed.

Agents:—

1. For applicants: *Ganpat Rai.*

   For the opposite party: *Tarachand Brijmohanlal.*

2. For applicants: *Tarachand Brijmohanlal.*

   For the opposite party: *Ganpat Rai.*

3. For applicants: *Tarachand Brijmohanlal.*

   For the opposite party: *T. K. Prasad.*

4. For applicants: *Ganpat Rai.*

   For the opposite party: *B. Banerji.*

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Oct. 21.

SURAJ NARAIN ANAND

v.

THE NORTH-WEST FRONTIER PROVINCE

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

Practice—Remand by Federal Court—Decree of lower Court after further trial—Appeal against—Applicability of s. 205 of the Government of India Act, 1935.

When an appeal before the Federal Court has terminated in an order of remand directing the lower court to try other issues in the case and pass the appropriate decree, the decree passed by that court after the remand can be questioned before the Federal Court only by a new and independent appeal, which must itself fulfil the requirements of s. 205 of the Constitution Act.

PETITION.

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

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

The Judgment of the Court was delivered by

VARADACHARIAR J.—The petitioner was the appellant in an appeal which was before this Court (*Suraj Narain Anand* v. *The North-West Frontier Province*(1)). On 4th December, 1941, this Court disposed of that appeal, holding that the plaintiff was entitled to a declaration that he had not been effectively dismissed from office, and that he was entitled to his costs in this Court. As the suit had not been tried on the merits, the Court had to remit the case to the Judicial Commissioner's Court for such "further directions as the circumstances of the case may require"; it was also left to the Judicial Commissioner's Court to deal with the costs of the proceedings in the courts below. On receipt of this Court's judgment, the Judicial Commissioner's Court remanded the case to the trial court to hear and determine the plaintiff's claim to arrears of pay. The trial court passed a decree for Rs. 1,648 for arrears of pay and gave certain directions as to payment of costs, court fee, etc. The plaintiff carried the matter again on appeal to the Judicial Commissioner's Court and that Court increased by a few hundreds the amount awarded to the plaintiff. It has made clearer and more specific the directions in the decree as to costs and payment of court fee.

The petitioner has now filed in this Court what purports to be an application under Order XLIII of the Federal Court Rules and he therein asks this Court to vary the decree of the Judicial Commissioner's Court in certain particulars. This, he prays, should be done in exercise of the inherent powers of

(1) [1941] F. C. R. 37.

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Suraj Narain Anand v. The North-West Frontier Province.

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this Court. We are unable to hold that this Court has any jurisdiction to entertain the application. It is true that when this Court is properly seized of an appeal on a certificate granted under s. 205 of the Constitution Act, it will also have jurisdiction to deal with other questions arising in the case; and in dealing with an appeal properly before it, it may have certain inherent powers. But before these powers can be exercised there must be an appeal validly instituted in this Court. In the present case, there was no doubt at one time an appeal before us properly preferred under s. 205; but that appeal has been finally disposed of so far as this Court was concerned. The petitioner suggested that the Judicial Commissioner's Court has not properly understood or given effect to the directions contained in the judgment of this Court. We see no basis for this suggestion. Any complaint against the decree passed by the Judicial Commissioner's Court after the remand can, in our opinion, be entertained by this Court only on an independent appeal under s. 205 of the Constitution Act; and such an appeal must satisfy the requirements of that section. In this case no certificate under that section has been given or obtained. We may also add that it has not been shown to us that any constitutional question arises at this stage at all.

The petitioner's principal objections to the decree of the Judicial Commissioner's Court relate—

(1) to the amount awarded to him for arrears of pay, and

(2) to the directions as to costs and payment of court fee.

There appears to be some force in his complaint that arrears of pay should have been awarded to him not merely up to the date of the institution of the suit, but to the date of a valid order of dismissal. We are, however, not in a position to say whether this point was urged before the Judicial Commissioner or why the award has been so limited. As the claim relates to a period subsequent to the institution of the suit, the petitioner may have a separate remedy in respect of the same. But this involves no constitutional question and we do not see how this Court is entitled to deal with it at this stage. The direction as to costs is within the discretion of the Court and the direction as to the payment of the court fee has not even been shown to be improper except as to the method of calculating the amount payable. Though it is not open to this Court to give the plaintiff any relief on the question of court fee, we think it right to point out that the calculation of the court fee, so far as we are able to gather from the papers before us, is open to exception. The plaint claimed a declaration and a decree for damages for Rs. 75,000; alternatively, a claim for arrears of pay was made. In the courts below, court fee seems to have been calculated on the footing that the case fell under s. 17 of the Court Fees Act(1) as one

(1) Central Act No. VII of 1870.

embracing two distinct causes of action. On a correct reading of the plaint, it seems to us that the case was one in which alternative reliefs were claimed on the same cause of action, either for Rs. 75,000 by way of damages on the ground of wrongful dismissal, or for Rs. 2,500 for arrears of pay on the footing that there had been no effective dismissal. On this interpretation of the plaint, the court fee payable would only be a fixed fee for the declaratory relief and an *ad valorem* fee on the higher of the alternative reliefs, namely, the claim for Rs. 75,000. We have no doubt that the plaintiff's grievance in respect of the arrears of pay for the period between the date of the institution of the suit and the date of his valid dismissal as well as the excess court fee charged against him will be remedied by the Government now that we have drawn their attention to it.

With these observations the petition is dismissed.

Petition dismissed.

GIPD—L80FC—9-9-43—500.

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