1951

May 23

In re THE DELHI LAWS ACT, 1912, THE AJMER-MERWARA (EXTENSION OF LAWS) ACT, 1947

AND

THE PART C STATES (LAWS) ACT, 1950.

[SHRI HARILAL KANIA, C. J., FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA, DAS AND BOSE JJ.]

Delhi Laws Act, 1912, *s.* 7—*Ajmer-Merwara (Extension of Laws) Act,* 1947, *s.* 2—*Part C States (Laws) Act,* 1950—*Laws giving power to Government to extend to Delhi and Ajmer-Merwara with such restrictions and modifications as it thinks fit any law in force in any other part of India—Law empowering Government to extend to Part C States any law in force in a Part A State and to repeal existing laws —Validity—Rule against delegation of legislative powers—Scope and basis of the rule—Applicability to India—Difference between delegation of legislative power and conditional legislation—Powers of Indian Legislature under the Indian Councils Act,* 1861, *the Government of India Act,* 1935, *and the Indian Constitution,* 1950.

Section 7 of the Delhi Laws Act, 1912, provided that "The Provincial Government may by notification in the official gazette extend, with such restrictions and modifications as it thinks fit, to the Province of Delhi, or any part thereof, any enactment which is in force in any part of British India at the date of such notification". Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, provided that "The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara, with such restrictions and modifications as it thinks fit, any enactment which is in force in any other Province at the date of such notification. Section 2 of the Part C States (Laws) Act, 1950, provided that "The Central Government may, by notification in the official gazette extend to any Part C State .....or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law .... which is for the time being applicable to that Part C State. As a result of a decision of the Federal Court, doubts were entertained with regard to the validity of laws delegating legislative powers to the executive Government and the President of India made a reference to the Supreme Court under Art. 143(1) of the Constitution for considering the question whether the above-mentioned sections or any provisions thereof were to any extent and if so to what extent

1951

In re The Delhi Laws Act, 1912, etc.

and in what particulars, *ultra vires* the legislatures that respectively passed these laws, and for reporting to him the opinion of the Court thereon :

Held, (1) *per* FAZL ALI, PATANJALI SASTRI, MUKHERJEA, DAS and BOSE JJ. (KANIA C. J., *and* MAHAJAN J., *dissenting*).—Section 7 of the Delhi Laws Act, 1912, and s. 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, are wholly *intra vires*. KANIA C. J.—Section 7 of the Delhi Laws Act, 1912, and s. 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, are *ultra vires* to the extent power is given to the Government to extend Acts other than Acts of the Central Legislature to the Provinces of Delhi and Ajmer-Merwara respectively inasmuch as to that extent the Central Legislature has abdicated its functions and delegated them to the executive government, MAHAJAN J.—The above-said sections are *ultra vires* in the following particulars : (i) inasmuch as they permit the executive to apply to Delhi and Ajmer-Merwara, laws enacted by legislatures not competent to make laws for those territories and which these legislatures may make within their own legislative field, and (ii) inasmuch as they clothe the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India.

(2) *Per* FAZL ALI, PATANJALI SASTRI, MUKHERJEA, DAS and BOSE JJ.—The first portion of s. 2 of the Part C States (Laws) Act, 1950, which empowers the Central Government to extend to any Part C State or to any part of such State with such modifications and restrictions as it thinks fit any enactment which is in force in a Part A State, is *intra vires*. *Per* KANIA C. J. MAHAJAN, MUKHERJEA *and* BOSE JJ.—The latter portion of the said section which empowers the Central Government to make provision in any enactment extended to a Part C States, for repeal or amendment of any law (other than a Central Act) which is for the time being applicable to that Part C States, is *ultra vires*. *Per* FAZL ALI, PATANJALI SASTRI and DAS JJ.—The latter portion of s. 2 of the Part C States (Laws) Act, 1950, is also *intra vires*.

KANIA C. J.—To the extent that s. 2 of the Part C States (Laws) Act, 1950, empowers the Central Government to extend laws passed by any Legislature of a *Part A State* to a Part C State it is *ultra vires*.

MAHAJAN J.—Section 2 of the Part C States (Laws) Act, 1950, is *ultra vires* in so far as it empowers the Central Government (i) to extend to a Part C State laws passed by a legislature which is not competent to make laws for that Part C State and (ii) to make modifications of laws made by the legislatures of India and (iii) to repeal or amend laws already applicable to that Part C State.

KANIA C. J.—(i) The essentials of a legislative function are the determination of the legislative policy and its formulation as a rule of conduct and these essentials are the characteristics of a legislature by itself. Those essentials are preserved when the legislature specifies the basic conclusions of fact upon the ascertainment of which from relevant data by a designated administrative agency it ordains that its statutory command is to be effective. The legislature having thus made its laws, every detail for working it out and for carrying the enactment into operation and effect may be done by the legislature or may be left to another subordinate agency or to some executive officer. While this is also sometimes described as delegation of legislative powers. In essence it is different from delegation of legislative powers as this does not involve the delegation of the power to determine the legislative policy and formulation of the same as a rule of conduct. While the so called delegation which empowers the making of rules and regulations has been recognised as ancillary to legislative power, the Indian Legislature had no power prior to 1935 to delegate legislative power in its true sense. Apart from the sovereign character of the British Parliament whose powers are absolute and unlimited, a general power in the legislature to delegate legislative powers is not recognised in any state. The powers of the Indian Legislature under the Constitution Acts of 1935 and 1950 are not different in this respect (ii) An "abdication" of its powers by a legislature need not necessarily amount to complete effacement of itself. It may be partial. If full powers to do everything that the legislature can do are conferred on a subordinate authority, although the legislature retains the power to control the action of the subordinate authority by recalling such power or repealing the Acts passed by the subordinate authority, there is an abdication or effacement of the legislature conferring such power.

FAZL ALI J.—(i) The legislature must formally discharge its primary legislative function itself and not through others. (ii) once it has been established that it has sovereign powers within a certain sphere, it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law and it may utilise any outside agency to any extent it finds necessary for doing things, which it is unable to do itself or finds it inconvenient to do. (iii) It cannot however abdicate its legislative functions and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (iv) As the courts of India are not committed to the doctrine of separation of powers and the judicial interpretation it has received in America, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to

1951

In re The Delhi Laws Act, 1912, etc.

'abdication and self-effacement.' (v) The power to introduce necessary restrictions and modifications is incidental to the power to adapt or apply the law. The modifications contemplated are such as can be made within the framework of the Act and no such as to affect its identity or structure or the essential purpose to be served by it.

PATANJALI SASTRI J.—(i) It is now established beyond doubt that the Indian Legislature, when acting within the limits circumscribing its legislative power, has and was intended to have plenary powers of legislation as large and of the same nature as those of the British Parliament itself and no constitutional limitation on the delegation of legislative power to a subordinate unit is to be found in the Indian Councils Act, 1861, or the Government of India Act, 1935, or the Constitution of 1950. It is therefore as competent for the Indian Legislature to make a law delegating legislative power, both quantitatively and qualitatively, as it is for the British Parliament to do so, provided it acts within the circumscribed limits (ii) Delegation of legislative authority is different from the creation of a new legislative power. In the former, the delegating body does not efface itself but retains its legislative power intact and merely elects to exercise such power through an agency or instrumentality of its choice. In the latter, there is no delegation of power to subordinate units but a grant of power to an independent and co-ordinate body to make laws operative of their own force. For the first, no express provision authorising delegation is required. In the absence of a constitutional inhibitation, delegation of legislative power, however extensive, could be made so long as the delegating body retains its own legislative power intact. For the second, however, a positive enabling provision in the constitutional document is required. (iii) The maxim *delegatus non protest delegare* is not part of the constitutional law of Indian and has no more force than a political precept to be acted upon by legislatures in the discharge of their function of making laws, and the courts cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent. (iv) however wide a meaning may be attributed to the expression "restrictions and modification," it would not affect the constitutionality of the delegating statute.

MAHAJAN J.—(i) It is a settled maxim of constitutional law that a legislative body cannot delegate its power. Not only the nature of the legislative power but the very existence of representative government depends on the doctrine that legislative powers cannot be transferred. The legislature cannot substitute the

judgment, wisdom, and patriotism of any other body, for those to which alone the people have been seen fit to confide this sovereign trust. The view that unless expressly prohibited a legislature has a general power to delegate its legislative functions to a subordinate authority is not supported by authority or principle. The correct view is that unless the power to delegate is expressly given by the constitution, a legislature cannot delegate its essential legislative functions. As the Indian Constitution does not give such power to the legislature, it has no power to delegate essential legislative functions to any other body. (ii) Abdication by a legislative body need not necessarily amount to complete effacement. There is an abdication when in respect of a subject in the Legislative List that body says in effect that it will not legislate but would leave it to another to legislate on it.

MUKHERJEA J.—As regards constitutionality of the delegation of legislative powers, the Indian Legislature cannot be in the same position as the omnipotent British Parliament and how far delegation is permissible has to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case.

DAS J.—(i) The Principle of non-delegation of legislative powers founded either on the doctrine of separation of powers or the theory of agency has no application to the British Parliament or the legislature constituted by an Act of the British Parliament; (ii) in the even present complexity of condition is with which governments have to deal, the power of delegation is necessary for, and ancillary to, the exercise of legislative power and is a component part of it; (iii) the operation of the act performed under delegated power is directly and immediately under and by virtue of the law by which the power was delegated and its efficacy is referable to that antecedent law; (iv) if what the legislature does is legislation within the general scope of the affirmative words which give the power and if it violates no express

1951

In re The Delhi Laws Act, 1912 etc.

condition or restriction by which that power is limited, then it is not for the court to enquire further or enlarge constructively those conditions or restrictions; (v) while the legislature is acting within its prescribed sphere there is, except as hereinafter stated, no degree of, or limit to, its power of delegation of its legislative power, it being for the legislature to determine how far it should seek the aid of subordinate agencies and how long it shall continue them, and it is not for the court to prescribe any limit to the legislature's power of delegation; (vi) the power of delegation is however subject to the qualification that the legislature may not abdicate or efface itself, that is, it may not, without preserving its own capacity intact, create and endow with its own capacity a new legislative power not created or authorised by the Act to which it owes its own existence. (vii) The impunged laws may also be supported as instances of conditional legislation within the meaning of the decision in *Queen* v. *Burah*.

Bose J.—The Indian Parliament can legislate along the lines of *Queen* v. *Burah*, that is to say, it can leave to another person or body the introduction or application of laws which are, or may be, in existence at that time in any part of India which is subject to the legislative control of Parliament, whether those laws are enacted by Parliament or by a State Lagislature set up by the constitution. But delegation of this kind cannot proceed beyond that; it cannot extend to the repealing or altering in essential particulars laws which are already in force in the area in question.

Special Jurisdiction : Special Reference No. 1 of 1951. The circumstances which led to this Special Reference by the President and the questions referred appear from the full text of the reference dated 7th January, 1951, which is reproduced below :—

"Whereas in the year 1812 the Governor-General of India in Council acting in his legislative capacity enacted the Delhi Laws Act, 1812, section 7 of which conferred power on the Central Government by notification to extend to the Province of Delhi (that is to say, the present State of Delhi) or any part thereof, with such restrictions and modifications at it thought fit, any enactment which was in force in any part of British India at the date of such notification;

"And Whereas in 1947 the Dominion Legislature enacted the Ajmer-Merwara (Extension of Laws) Act, 1947, section 2 of which conferred power on the Central Government by notification to extend to the Province of Ajmer-Merwara (that is to say, the present State of Ajmer), with such restrictions and modifications as it thought fit, any enactment which was in force in any other Province at the date of such notification;

"AND WHEREAS, by virtue of the powers conferred by the said sections of the said Acts, notifications were issued by the Central Government from time to time extending a number of Acts in force in the Governors' Provinces to the Province of Delhi and the Province of Ajmer-Merwara, sometimes with, and sometimes without, restrictions and modifications, and the Acts so extended and the orders, rules, by-laws and other instruments issued under such Acts were and are regarded as valid law in force in the Province (now State of Delhi and in the Province of Ajmer-Merwara (now State of Ajmer), as the case may be, and rights and privileges have been created, obligations and liabilities have been incurred and penalties, forfeitures and punishments have been incurred or imposed under such Acts and instruments;

"AND WHEREAS Parliament with the object *inter alia* of making a uniform provision for extension of laws with regard to all Part C States except Coorg and the Andaman and Nicobar Islands enacted the Part C States (Laws) Act, 1950, section 2 of which comes power on the Central Government by notification to extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and also confers the power on the Central Government to make provision in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State;

"AND WHEREAS section 4 of the Part C States (Laws) Act, 1950 has repealed section 7 of the Delhi Laws Act, 1912, and the Ajmer-Merwara (Extension of Laws) Act, 1947, but the effect of the provisos to the said section is, notwithstanding the said repeals, to continue, *inter alia* in force the Acts extended to the Provinces of Delhi and Ajmer-Merwara or the States of Delhi and Ajmer under the provisions repealed by the said section;

"AND WHEREAS notifications have been issued by the Central Government from time to time under section 2 of the Part C States (Laws) Act, 1950, extending Acts in force in Part A States to various Part C States sometimes with, and sometimes without, restrictions and modifications;

"AND WHEREAS the Federal Court of India in *Jatindra Nath Gupta* v. *Province of Bihar*(1) held by a majority that

(1) [1949] F.C.R. 595.

1951

In re The Delhi Laws Act, 1912, *etc.*

the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, was *ultra vires* of the Bihar Legislature *inter alia* on the ground that the said proviso conferred power on the Provincial Government to modify an Act of the Provincial Legislature and thus amounted to a delegation of legislative power;

"AND WHEREAS as a result of the said decision of the Federal Court, doubts have arisen regarding the validity of Section 7 of the Delhi Laws Act, 1912, Section 2 of the Ajmer-Marwara (Extension of Laws) Act, 1947, and Section 2 of the Part C States (Laws) Act, 1950, and of the Acts extended to the Provinces of Delhi and Ajmer-Merwara and various Part C States under the said sections respectively, and of the orders and other instruments issued under the Acts so extended:

"AND WHEREAS the validity of Section 7 of the Delhi Laws Act, 1912, and section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and of the Acts extended by virtue of the powers conferred by the said section has been challenged in some cases pending at present before the Punjab High Court, the Court of the Judicial Commissioner of Ajmer, and the District Court and the Subordinate Courts in Delhi;

"AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such nature and of such public importance that it is expedient that the opinion of the Supreme Court of India should be obtained thereon;

"NOW THEREFORE, in exercise of the powers conferred upon me by clause powers (1) of Article 143 of the Constitution, I, Rajendra Prasad, President of India, hereby refer the said questions to the Supreme Court of India for consideration and report thereon, namely:—

"(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?

"(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?

"(3) Is section 2 of the Part C States (Laws) Act, 1950 or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Parliament?"

Arguments were heard on the 9th, 10th, 11th, 12th, 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th, 27th and 30th days of April 1951.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi,* with him) for the President of India.

C. K. Daphtary, Advocate-General of Bombay (*G. N. Joshi,* with him) for the State of Bombay.

R. Ganapathy Iyer, for the State of Madras.

M. L. Saxena, for the State of Uttar Pradesh.

A. R. Somanatha Iyer, Advocate-General of Mysore (*R. Ganapathy Iyer,* with him) for the State of Mysore.

P. S. Safeer, for Captain Deep Chand.

N. S. Bindra, for Pt. Amarnath Bharadwaj.

M. M. Gharakhan, for the Ajmer-Electric Supply Co. Ltd.

N. C. Chatterjee, (*G. C. Mathur, Basant Chandra Ghose,* and *Tilak Raj Bhasin,* with him), for the Maiden's Hotel.

Jessaram Banasingh, for Runglal Nasirabad.

Jyoti Sarup Gupta and *K. B. Asthana,* for the Municipal Committee, Ajmer.

Din Dayal Kapur, for Shri Munshilal and two others.

1951, May 23. The following judgments were delivered.

Kania C. J.

KANIA C. J.—This is a reference made by the President of India under article 143 of the Constitution asking the Court's opinion on the three questions submitted for its consideration and report. The three questions are as follows :—

"(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act ?".

Section 7 of the Delhi Laws Act, mentioned in the question, runs as follows :—

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

"(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act?"

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, runs as follows :—

"*Extension of Enactments to Ajmer-Merwara.*—The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

"(3) Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Parliament ?"

Section 2 of the Part C States (Laws) Act, 1950, runs as follows :—

"*Power to extend enactments to certain Part C States.*—The Central Government may, by notification in the Official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

The three sections referred to in the three questions are all in respect of what is described as the delegation of legislative power and the three particular Acts are selected to raise the question in respect of the three main stages in the constitutional development of India.

The first covers the legislative powers of the Indian Legislature during the period prior to the Government of India Act, 1915. The second is in respect of its legislative power after the Government of India Act, 1935, as amended by the Indian Independence Act of 1947. The last is in respect of the power of the Indian Parliament under the present Constitution of 1950. It is therefore necessary to have an idea of the legislative powers of the Indian Legislature during those three periods. Without going into unnecessary details, it will not be out of place to know the historical background. The East India Company first started its operations as a trading company in India and gradually acquired political influence. The Crown in England became the legislative authority in respect of areas which had come under the control of the East India Company. The Indian Councils Act of 1861, section 22, gave power to the Governor-General in Council, with additional nominated members, to make laws. The constitutional position therefore was that the British Parliament was the sovereign body which passed the Indian Councils Act. It gave the Governor-General in Council in his legislative capacity powers to make laws over the territories in India under the governance of the Crown. Under the English Constitution the British Parliament with its legislative authority in the King and the two Houses of Parliament is supreme and its sovereignty cannot be challenged anywhere. It has no written Charter to define or limit its power and authority. Its powers are a result of convention but are now recognised as completely absolute, uncontrolled and unfettered. Sir Cecil Carr in his book on English Administrative Law at page 15 observes : "A more basic difference between the Constitutions of the United States and Britain is the notorious fact that Britain has to written Constitution, no fundamental statute which serves as a touchstone for all other legislation and which cannot be altered save by some specially solemn and dilatory process. In Britain the King in Parliament is all powerful. There is no Act which cannot be passed and will not be valid within

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

the ordinary limits of judicial interpretation ..... Even Magna Carta is not inviolate.....The efficient secret of the English Constitution was the close union and nearly complete fusion of the executive and legislative powers. In other words by the system of Cabinet Government the executive authority is entrusted to a committee consisting of members of the dominant party in the legislature and in the country:"

In Halsbury's Laws of England, Vol. VI, Article 429, it is further stated that it is for this reason that there is no law which the King in Parliament cannot make or unmake whether relating to the Constitution itself or otherwise; there is no necessity in as States whose Constitutions are drawn up in a fixed and rigid from and contained in written documents for the existence of a judicial body to determine whether any particular legislative Act is within the constitutional powers of Parliament or not and laws affecting the Constitution itself may be enacted with the same ease and subject to the same procedure as ordinary laws. In England, when occasions of conferment of powers on subordinate bodies became frequent and assumed larger scope, questions about the advisability of that procedure were raised and a Committee on the Minister's Powers, what is generally described as the Donoughmore Committee was appointed. The Committee recommended that certain cautions should be observed by the Parliament in the matter of conferment of such powers on subordinate bodies. This is natural because of the well-recognised doctrine of the English Constitution that Parliament is supreme and absolute and no legislation can control its powers.

Such a legislative body which is supreme has thus certain principal characteristics. It is improper to use the word "constitutional" in respect of laws passed by such a sovereign body. The question of constitutionality can arise only if there is some touchstone by which the question could be decided. In respect of a sovereign body like the British Parliament there is no

touchstone. They are all laws and there is no distinction in the laws passed by the Parliament as constitutional or other laws. Such laws are changed by the same body with the same ease as any other law. What follows from this is that no court or authority has any right to pronounce that any Act of Parliament is unconstitutional. In Dicey's Law of the Constitution, 9th Edition, in considering the Constitution of France, it was observed that the supreme legislative power under the Republic was not vested in the ordinary Parliament of two Chambers, but in a National Assembly or Congress composed of the Chamber of Deputies and the Senate sitting together. The Constitutions of France which in this respect were similar to those of Continental polities exhibited as compared with the expansiveness or flexibility of English institutions that characteristic which was described by the author as rigid. A flexible constitution was one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. The flexibility of the British Constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever. They can modify or repeal in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. Therefore, in England laws are called constitutional because they refer to subjects proposed to affect the fundamental institutions of the State and not because they are legally more sacred or difficult to change than other laws. Under the circumstances the term "constitutional law or enactment" is rarely applied to any English statute to give a definite description to its character. Under a rigid constitution, the term "constitutional" means that a particular enactment belongs to the articles of the constitution and cannot be legally changed with the same ease and in the same manner as ordinary laws, and it is because of this characteristic that courts are invested with powers to determine whether a particular legislation is permitted or not by the constitution. Such a question can

1951

In re The Delhi Laws Act, 1912 etc.

Kania C. J.

never arise in respect of an enactment of the British Parliament.

As against this, the Governor-General in Council with legislative powers established under the Indian Councils Act stood in a different position. Its charter was the Indian Councils Act. Its powers were there necessarily defined and limited. That power, again, at any time could be withdrawn, altered and expanded or further curtailed. Moreover, as the powers were conferred by an Act of the British Parliament, the question whether the action of the Governor-General in Council in his legislative capacity was within or without its legislative power was always capable of being raised and decided by a court of law. In Dicey's Law of the Constitution, 9th Edition, the author has distinguished the position of a sovereign legislature and a subordinate law-making body. The distinction is drawn from the fact that the subordinate legislatures have a limited power of making laws. At page 99, he has specifically considered the position of the legislative Council of British India prior to 1915 and stated as follows :—"Laws are made for British India by a Legislative Council having very wide powers of Legislation. This Council, or, as it is technically expressed, 'the Governor-General in Council', can pass laws as important as any Acts passed by the British Parliament. But the authority of the Council in the way of law-making is as completely subordinate to, and as much dependent upon. Acts of Parliament as is the power of the London and North Western Railway Company to make byelaws.....Now observe, that under these Acts the Indian Council is in the strictest sense a non-sovereign legislative body, *and this independently of the fact the laws or regulations made by the Governor-General in Council can be annulled or disallowed by the Crown;* and note that the position of the Council exhibits all the marks or notes of legislative subordination. (1) The Council is bound by a large number of rules which cannot be changed by the Indian legislative body itself and which can be changed by the superior power of the Imperial Parliament.

(2) The Acts themselves, from which the Council derives its authority, cannot be changed by the Council and .....they stand in marked contrast with the laws or regulations which the Council is empowered to make. These fundamental rules contain, it must be added, a number of specific restrictions on the subjects with regard to which the Council may legislate....(3) The courts in India.....may, when the occasion arises, pronounce upon the validity or constitutionality of laws made by the Indian Council." It is therefore clear that the Indian Legislature in 1861 and up to 1915 was a subordinate legislature and not a sovereign legislature.

At this stage it may again be noticed that the Government was unitary and not federal. There was no distribution of legislative powers as between the Centre and the different Provinces. Another important factor to be borne in mind is that while the British Parliament was supreme, its executive Government came into power and remained in power so long only as the Parliament allowed it to remain and the Parliament itself was not dissolved. The result is that the executive government was a part of the legislature and the legislature controlled the actions of the executive. Indeed, the legislature was thus supreme and was in a position effectively to direct the actions of the executive government. In India the position was quite different if not the reverse. The Governor-General was appointed by the Crown and even after the expansion of the legislative body before the Government of India Act of 1915 in numbers, it had no control over the executive. In respect of the Indian Legislature functioning prior to the Government of India Act of 1915 the control from the Secretary of State was justified on the ground that the Provincial Legislatures were but an enlargement of the executive government for the purpose of making laws and were no more than mere advisory bodies without any semblance of power. The executive Government of India was not responsible to the Indian Legislature and the composition of the Indian Legislature was such that the executive officers

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

together with the nominated members constituted the majority in the Legislature. The result was that the Legislative Council was practically a creature of the executive Government of India and its functions were practically limited to registering the decrees of the executive government. It would not be wrong, according to Mr. Cowell in his lecture on "Courts and Legislative Authorities in India," to describe the laws made in the Legislative Councils as in reality the order of Government. Every Bill passed by the Governor-General's Council required his assent to become an Act. The Indian Councils Act of 1892 empowered the Governor-General in Council, with the approval of the Secretary of State in Council, to make regulations as to the conditions under which nomination of the additional members should be made. The word 'election' was carefully avoided. The existence of a strong official block in the Councils was the important feature of the Act. As noticed by a writer on Indian Constitution, the Government maintained a tight and close control over the conduct of official members in the Legislature and they were not allowed to vote as they pleased. They were not expected to ask questions or move resolutions or (in some Councils) to intervene in debate without Government's approval. Their main function was to vote—to vote with the Government. However eloquent the non-official speakers might talk and however reasonable and weighty their arguments might be, when the time for voting came the silent official flanks stepped in and decided the matter against them. All these factors contributed to the unreality of the proceedings in the Council because the number of elected members was small and the issue was often known beforehand. Speaking in the House of Lords in December 1908 on the Bill which resulted in the Government of India Act of 1909, Lord Morley, the then Secretary of State for India, declared : "If I were attempting to set up a Parliamentary system in India, or if it could be said that this chapter of rules led directly or necessarily up to the establishment of a Parliamentary system in India. I for one would have

nothing at all to do with it.....A Parliamentary system is not at all the goal to which I would for one moment aspire." The constitution of the Central Legislative Council under the Regulation of November, 1909, as revised in 1912, was this :

Ordinary members of the Governor-General's Council, The Commander-in-Chief and the Lt.-Governor ..	8
Nominated members of whom not more than 28 must be officials ..	33
Elected members, ..	27
and	
The Governor-General ..	1
..	69

The executive government was thus supreme and was not bound to obey or carry out the mandates of the legislature. Instances where Finance Bills were rejected and other Bills were backed by the popular feeling and which decisions the Governor-General overruled, are well known. The Indian Legislature was powerless to do anything in the matter. Without the consent of the executive government no Bill could be made into an Act nor an Act could be amended or repealed without its consent. The possibility of the Legislature recalling the power given under an Act to the executive against the latter's consent was therefore nil. Once an Act giving such power (like the Delhi Laws Act) was passed, practically the power was irrevocable. In my opinion, it is quite improper to compare the power and position of the Indian Legislature so established and functioning with the supreme and sovereign character of the British Parliament.

The legislative power of the Indian Legislature came to be changed as a result of the Act of 1915 by the creation of Provincial legislatures. I do not propose to go into the details of the changes, except to the extent they are directly material for the discussion of the questions submitted for the Court's opinion. Diarchy

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

was thus created but there was no federation under the Act of 1915. Under the Government of India Act, 1935, the legislative powers were distributed between the Central legislature and the Provincial legislature, each being given exclusive powers in respect of certain items mentioned in Lists I and II of the Seventh Schedule. List III contained subjects on which it was open to the Centre or the Province to legislate and the residuary power of legislation was controlled by section 104. This Act however was still passed by the British Parliament and therefore the powers of the Indian Central legislature as well as the Provincial legislatures were capable of being altered, expanded or limited according to the desire of the British Parliament without the Indian legislature or the people of India having any voice in the matter. Even under this Act, the executive government was not responsible to the Central Legislature or the Provincial Legislature, as the case may be. I emphasize this aspect because it shows that there was no fusion of legislative and executive powers as was the case with the Constitution in England. The result of the Indian Independence Act, 1947, was to remove the authority of the British Parliament to make any laws for India. The Indian Central Legislature was given power to convert itself into a Constituent Assembly to frame a Constitution for India, including the power to amend or repeal the Government of India Act, 1935, which till the new Constitution was adopted, was to be the Constitution of the country. Even with that change it may be noticed that the executive government was not responsible to the Central Legislature. In fact with the removal of the control of the Parliament it ceased to be responsible to anyone.

Under the Constitution of India as adopted on the 26th of January, 1950, the executive government of the Union is vested in the President acting on the advice of the Ministers. A Parliament is established to make laws and a Supreme Court is established with the powers defined in different articles of the Constitution. The executive, legislative and judicial

functions of the Government, which have to be discharged, were thus distributed but the articles giving power to these bodies do not *vest* the legislative or judicial powers in these bodies expressly. Under the Constitution of India, the Ministers are responsible to the legislatures and to that extent the scheme of the British Parliament is adopted in the Constitution. While however that characteristic of the British Parliament is given to the Indian Legislature, the Principal point of distinction between the British Parliament and the Indian Parliament remains and that is that the Indian Parliament is the creature of the Constitution of India and its powers, rights, privileges and obligations have to be found in the relevant articles of the Constitution of India. It is not a sovereign body, uncontrolled with unlimited powers. The Constitution of India has conferred on the Indian Parliament powers to make laws in respect of matters specified in the appropriate places and Schedules, and curtailed its rights and powers under certain other articles and in particular by the articles found in Chapter III dealing with Fundamental Rights. In case of emergency where the safety of the Union of India is in danger, the President is given express power to suspend the Constitution and assume all legislative powers. Similarly in the event of the breaking down of the administrative machinery of a State, the President is given powers under articles 257 to assume both legislative and executive powers in the manner and to the extent found in the article. There can be no doubt that subject to all these limitations and controls, within the scope of its powers and on the subjects on which it is empowered to make laws, the Legislature is supreme and its powers are plenary.

The important question underlying the three questions submitted for the Court's consideration is what is described as the delegation of legislative powers. A legislative body which is sovereign like an autocratic ruler has power to do anything. It may, like a Ruler, by an individual decision, direct that a certain person may be put to death or a certain property may be

1951

In re The Delhi Laws Act, 1912, et c.

Kania C. J.

taken over by the State. A body of such character may have power to nominate someone who can exercise all its powers and make all its decisions. This is possible to be done because there is no authority or tribunal which can question the right or power of the authority to do so.

The contentions urged on behalf of the President of India are that legislative power carries with it a power of delegation to any person the legislature may choose to appoint. Whether sovereign or subordinate, the legislative authority can so delegate its function if the delegation can stand three tests. (1) It must be a delegation in respect of a subject or matter which is within the scope of the legislative power of the body making the delegation. (2) Such power of delegation is not negatived by the instrument by which the legislative body is created or established. And (3) it does not create another legislative body having the same powers and to discharge the same functions which it itself has, if the creation of such a body is prohibited by the instrument which establishes the legislative body itself. It was urged that in the case of an unwritten constitution, like the British Parliament there can be no affirmative limitation or negative prohibition against delegation and therefore the power of delegation is included to the fullest extent within the power of legislation. The British Parliament can efface itself or even abdicate because it has a power to pass the next day a law repealing or annulling the previous day's legislation. When the British Parliament established legislative bodies in India, Canada and Australia by Acts of the British Parliament, the legislatures so established, although in a sense subordinate, because their existence depended on the Acts of the British Parliament and which existence could be terminated or further fettered by an Act of the British Parliament, nevertheless are supreme with plenary powers of the same nature as the British Parliament, on the subjects and matters within their respective legislative authority. As the power of delegation is

included in the power of legislation, these legislative bodies have also, subject to the three limitations mentioned above, full power of delegation in their turn. These legislative bodies were not agents of the British Parliament. Not being agents or delegates of the British Parliament, the doctrine *delegata potestas non potest delegare* cannot apply to their actions and if these legislatures delegate powers to some other authority to make rules or regulation, or authorise the executive government to enforce laws made by them or other legislatures wholly or in part and with or without restrictions or modifications, the legislatures are perfectly competent to do so. The history of legislation in England and India and the other Dominions supports this contention. It is recognised as a legislative practice and is seen in several Acts passed by the legislatures of the Dominions and in India. Such delegation of the legislative functions has been recognised over a series of years by the Judicial Committee of the Privy Council and it is too late to contest the validity of such delegation. It was lastly contended that the observation of the Federal Court in *Jatindra Nath Gupta* v. *Province of Bihar*(1), tending to show that delegation was not permissible, required to be reconsidered.

Before considering these arguments in detail, I think it is essential to appreciate clearly what is conveyed by the word "delegation". That word is not used, either in discussions or even in some decisions of the courts, with the same meaning. When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are the characteristics of a legislature by itself. It has nothing to do with the principle of division of powers found in the Constitution on the United States of America. Those essentials are preserved, when the legislature specifies the basic conclusions of fact, upon ascertainment of which, from relevant data, by a designated administrative agency

(1) [1949] F.C.R. 595.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

it ordains that its statutory command is to be effective. The legislature having thus made its laws, it is clear that every detail for working it out and for carrying the enactments into operation and effect may be done by the legislature or may be left to another subordinate agency or to some executive officer. While this also is sometimes described as a delegation of legislative powers, in essence it is different from delegation of legislative power which means a determination of the legislative policy and formulation of the same as a rule of conduct. I find that the word "delegation" is quite often used without bearing this fundamental distinction in mind. While the so-called delegation, which empowers the making of rules and regulations, has been recognised as ancillary to the power to define legislative policy and formulate the rule of conduct, the important question raised by the Attorney-General is in respect of the right of the legislature to delegate the legislative functions strictly so called.

In support of his contention that the legislative power of the Indian Legislature carried with it the power of delegation, the Attorney-General relied on several decisions of the Judicial Committee of the Privy Council and decisions of the Supreme Court of Canada and Australia. The first is *The Queen* v. *Burah*(1). Act XXII of 1869 of the Council of the Governor-General of India for making laws and regulations was an Act to remove the Garo Hills from the jurisdiction of the tribunals established under the General Regulations and Acts passed by any legislature in British India and provided that "no Act hereafter passed by the Council of the Governor-General for making laws and regulations shall be deemed to extend to any part of the said territory unless the same was specifically named therein." The administration of civil and criminal justice within the said territory was vested in such officers as the Lieutenant-Governor may from time to time appoint. Sections 8 and 9 of the said Act provided as follows :—

(1) 5 I. A. 178.

"Section 8. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers of duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation."

"Section 9. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India.

Every such notification shall specify the boundaries of the territories to which it applies."

The Lieutenant-Governor of Bengal issued a notification in exercise of the power conferred on him by section 9 and extended the provisions of the said Act to the territory known as the Khasi and Jaintia Hills and excluded therefrom the jurisdiction of the ordinary civil and criminal courts. By a majority judgment the Calcutta High Court decided that the said notification had no legal force or effect. In the Calcutta High Court, Mr. Kennedy, counsel for the Crown, boldly claimed for the Indian Legislative Council the power to transfer legislative functions to the Lieutenant-Governor of Bengal and Markby J. framed the question for decision as follows: "Can the Legislature confer on the Lieutenant-Governor legislative power?" Answer : "It is a general principle of law in India that any substantial delegation of legislative authority by the Legislature of this country is void."

Lord Selbourne after agreeing with the High Court that Act XXII of 1869 was within the legislative

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

power of the Governor-General in Council, considered the limited question whether consistently with that view the 9th section of that Act ought nevertheless to be held void and of no effect. The Board noticed that the majority of the Judges of the Calcutta High Court based their decision on the view that the 9th section was not legislation but was a delegation of legislative power. They noticed that in the leading judgment of Markby J. the principle of agency was relied upon and the Indian Legislature seemed to be regarded an agent delegate, acting under a mandate from the Imperial Parliament. They rejected this view. They observed : "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. *If what has been done is legislation,* within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited.....it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions.

"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India and arm with general legislative authority, a new legislative power not created or authorised by the Councils Act. *Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case.* What has been done is this. The Governor-General in Council has determined, *in the*

due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary courts and offices, and to place it under new courts and offices, to be appointed by and responsible to the Lieut.-Governor of Bengal; leaving it to the Lieut.-Governor to say at what time that change shall take place; and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, *in force by proper legislative authority, in the other territories subject to his government.* The legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time and the manner of carrying it into effect to the discretion of the Lieut.-Governor; and also, that the laws which were or might be in force in the other territories *subject to the same Government* were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient on that point also, to entrust a discretion to the Lieut.-Governor. This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing courts and brought under the same provisions with the Garo Hills.....if and when the Lieut.-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district; and accordingly the legislature entrusted for these purposes also a discretionary power to the Lieut.-Governor."

The important part of the decision dealing with the question before them was in these terms :—"Their Lordships think that it is a fallacy to speak of the

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

powers thus conferred upon the Lieut.-Governor (large as they undoubtedly are) as if, when they were exercised the *efficacy of the acts done under them would be due to any other legislative authority* than that of the Governor-General in Council. Their whole operation is directly and immediately under and by virtue of this Act (XXII of 1869) itself. The *proper legislature has exercised its judgment as* to place, person, laws, powers and *the result of that judgment has been to legislate conditionally* as to all these things. The conditions having been fulfilled, *the legislation is now absolute.* Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it : and it cannot be supposed that the Imeprial Parliament did not, when constituting the Indian Legislature, contemplate *this kind of conditional legislation as within the scope of the legislative powers* which is from time to time conferred. It certainly used no words to exclude it." (The italics are mine). They then mentioned by way of illustrations the power given to the Governor-General in Council (not in his legislative capacity) to extend the Code of Civil Procedure and Code of Criminal Procedure by section 385, Civil Procedure Code, and section 445 Criminal Procedure Code, to different territories. They held that a different conclusion will be casting doubt upon the validity of a long series of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must therefore be presumed to have been known to and in the view of, the Imperial Parliament, when the Councils Act of that year was passed. For such doubt their Lordships were unable

to discover any foundation either in the affirmative or in the negative words of the Act before them.

I have quoted in extenso extracts from this judgment because it is considered the foundation for the argument advanced by the learned Attorney-General. In my opinion this judgment does not support the contention as urged. The Privy Council noted the following : (1) That the Garo Hills were removed by the Act from the jurisdiction of the ordinary courts. (2) That in respect of the Khasi and Jaintia Hills the same position had been arrived at. (3) That the power was to be exercised over areas which, notwithstanding the Act, remained under the administrative control of the Lieut.-Governor. (4) That the authority given to the Lieut.-Governor was not to pass new laws but only to extend Acts which were passed by the Lieut-Governor or the Governor-General in respect of the Province both being competent legislatures for the area in question. He was not given any power to modify any law. (5) They rejected the view of the majority of the Judges of the Calcutta High Court that the Indian Legislature was a delegate or an agent of the British Parliament. (6) That within the powers conferred on the Indian Legislature it was supreme and its powers were as plenary and of the same nature as the British Parliament. (7) That by the legislation the Indian Parliament had not created a legislative body with all the powers which it had. (8) The objection on the ground of delegation was rejected because what was done was not delegation at all but it was conditional legislation. Throughout the judgment it is nowhere suggested that the answer of Markby J. to the question framed by him (and quoted earlier in this judgment) was incorrect. (9) It emphasized that the order of the Lieut-Governor derived its sanction from the Act of the Govenor-General and not because it was an order of the Lieut.-Governor. (10) That in the legislation of the Governor-General in Council (legislative) all that was necessary to constitute legislation was found. This applied equally to future laws as the appropriate legislative body for the area was

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

the same. This decision therfore carefully and deliberately did not endorse the contention that the power of delegation was contained in the power of legislation. The Board after affirming that what was done was no delegation at all held that the legislation was only conditional legislation.

In *Emperor* v. *Benoari Lal Sarma and others*(1), the question arose about the Special Criminal Courts Ordinance II of 1942, issued by the Governor-General under the powers vested in him on the declaration of an emergency on the outbreak of war. The validity of that Ordinance was challenged in India either (1) because the language of the section showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or (2) else because the section amounted to what was called delegated legislation by which the Governor-General without legal authority sought to pass the decision as to whether an emergency existed, to the Provincial Government instead of deciding it for himself. The relevant provision of the Government of India Act, 1935, was in these terms :

"72. The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act."

In rejecting this second objection, their Lordships observed that under paragraph 72 of Schedule 9, *the Governor-General himself must discharge the duty of*

(1) 72 I. A. 27.

legislation and cannot transfer it to other authorities. But the Governor-General had not delegated his legislative powers at all. After stating again that what was done was not delegated legislation at all, but was merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity, their Lordships disagreed with the majority view of the Federal Court that what was done was delegation of legislative functions. If the power of delegation was contained in the power of legislation as wide as contended by the Attorney-General, there appears no reason why the Privy Council should have rejected the argument that the Act was an act of delegation and upheld its validity on the ground that it was conditional legislation. Moreover they reaffirmed the following passage from *Russell* v. *The Queen*(1) : "The short answer to this objection (against delegation of legislative power) is that the Act does not delegate any legislative powers whatever. *It contains within itself the whole legislation on the matters with which it deals.* The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate. *Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled.* Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency." (The italics are mine). Support for this last mentioned statement was found in the decision of the Privy Council in *The Queen* v. *Burah*(2). It is clear that this decision does not carry the matter further. Even though this was a war measure the Board emphasized that the Governor-General must himself discharge the duty of legislation and cannot transfer it to other authorities. They examined the impugned Act and

(1) 7 App. Cas. 629. (2) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

came to the conclusion that it contained within itself the *whole* legislation on the matters with which it dealt and there was no delegation of legislative functions.

A close scrutiny of these decisions and the observations contained therein, in my opinion clearly discloses that instead of supporting the proposition urged by the Attorney-General impliedly that contention is negatived. While the Judicial Committee has pointed out that the Indian Legislature had plenary powers to legislate on the subjects falling within its powers and that those powers were of the same nature and as supreme as the British Parliament, they do not endorse the contention that the Indian Legislature except that it could not create another body with the same powers as it has or in other words, efface itself had unlimited powers of delegation. When the argument of the power of the Indian Legislature to delegate legislative powers in that manner to subordinate bodies was directly urged before the Privy Council in each one of their decisions the Judicial Committee has repudiated the suggestion and held that what was done was not delegation but was subsidiary legislation or conditional legislation. Thus while the Board has reiterated its views that the powers of the Indian Legislature were "as plenary and of the same nature as the British Parliament" no one, in no case, and in no circumstances, during the last seventy years, has stated that the Indian Legislature has power of delegation (as contended in this case) and which would have been a direct, plain, obvious and conclusive answer to the argument. Instead of that, they have examined the impugned legislation in each case and pronounced on its validity on the ground that it was conditional or subsidiary legislation. The same attitude is adopted by the Privy Council in respect of the Canadian Constitution. The expressions "subsidiary" or "conditional legislation" are used to indicate that the powers conferred on the subordinate bodies were not powers of legislation but powers conferred only to carry the enactment into operation and effect, or that the Legislature having discharged legislative functions had specified the basic conclusions of fact upon

ascertainment of which, from relevant data by a designated administrative agency, that body was permitted to bring the statute into operation. Even in such cases the Board has expressly pointed out that the force of these rules, regulations or enactments does not arise out of the decision of the administrative or executive authority to bring into operation the enactment or the rules framed thereunder. The authoritative force and binding nature of the same are found in the enactment passed by the legislature itself. Therefore, a correct reading of these decisions does not support the contention urged by the Attorney-General.

Some decisions of the Privy Council on appeal from the Supreme Court of Canada and some decisions of the Supreme Court of Canada, on the point under discussion, on which the learned Attorney-General relied for his contention, may be noticed next. In *Honge* v. *The Queen*(1), which was an appeal from the Court of Appeal, Ontario, Canada a question about the validity of the Liquor Licences Act arose. After holding that the temperance laws were under section 92 of the British North America Act for "the good government" their Lordships considered the objection that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners. In other words, it was argued that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body and by that body alone. The maxim *delegata potestas non potest delegare* was relied upon to support the objection. Their Lordships observed : "The objection thus raised by the appellants was founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under mandate from, the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters

(1) 9 App. Cas. 117.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

enumerated in section 92 it conferred powers, not in any sense to be exercised by delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample with in the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits *of subjects and area* the local legislature is supreme and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had *under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.*

It is obvious that such authority, 'is ancillary to legislation' and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail....It was argued at the Bar that a legislature committing important *regulations* to agents or delegates effaces itself. That is not so. It retains its power intact and can whenever it pleases destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them are matters for the legislature and not for the courts of law to decide." (The italics are mine). As regards the creation of new offences, their Lordships observed that if bye-laws or resolutions are warranted the power to enforce them seemed necessary and equally lawful.

This case also does not help the Attorney-General. It recognises only the grant of power to make regulations which are "ancillary to legislation".

In *In re The Initiative and Referendum Act*(1), the Act of the Legislative Assembly of Manitoba was held outside the scope of section 92 of the British North America Act inasmuch as it rendered the Lieut.-Governor powerless to prevent the Act from becoming actual law, if approved by the voters, even without his consent. Their Lordships observed; "Section 92 of the

(1) 1919] A. C. 935.

Act of 1867 intrusts the legislative power in a Province to its legislature and to that legislature only. No doubt a body with power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada could, while preserving its own capacity intact, seek the assistance of subordinate agencies as had been done in *Hodge* v. *The Queen*(1) but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

In *In re George Eduin Gray*(2), the question of delegation of powers in respect of the War Measures Act, 1914, came for consideration. The provisions there were very similar to the Defence of India Act and the Rules made thereunder in India during the World War I. In delivering judgment Sir Charles Fitzpatrick C. J. observed as follows :—"The practice of authorising administrative bodies to make regulations *to carry out the object of an Act instead of setting out all the details of the Act itself* is well known and its legality is unquestioned." He rejected the argument that such power cannot be granted to the extent as to enable the express provisions of a statute to be amended or repealed, as under the Constitution, Parliament alone is to make laws under the Canadian Constitution. He observed that Parliament cannot indeed abdicate its function but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament. He observed : "I cannot however find anything in that Constitutional Act which would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament is not subject." Against the objection that such wide discretion should not be left to the executive he observed that this objection should have been urged when the regulations were submitted to Parliament for its approval or better still when the War Measures Act was being discussed. The Parliament was the delegating authority and it was for that body to put any

(1) 9 App. Cas. 117. (2) 57 S. C. R. Canada 150.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

limitations on the powers conferred upon the executive. He then stated : "Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country was the supreme law against which no other law can prevail. It is clearly our duty to give effect to their patriotic intentions."

In the *Chemical Reference* case(1), Duff C. J. set out the true effect of the decision in the War Measures Act. He held that the decision of the Privy Council in the *Fort Frances'* case (2) had decided the validity of the War Measures Act and no further question remained in the respect. He stated : "In *In re Gray*(3) was involved the principle, which must be taken in this Court to be settled, that an Order-in-Council in conformity with the conditions prescribed by, and the provisions of, the War Measures Act may have the effect of an Act of Parliament." The Court considered that the regulations framed by the Governor-General in Council to safeguard the supreme interests of the State were made by the Governor-General in Council "who was conferred subordinate legislative authority." He stated : "The judgment of the Privy Council in the *Fort Frances'* case(2), laid down the principle that in an emergency, such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, disable or over-bear the authority of the Provinces in relation to a vast field in which the Provinces would otherwise have exclusive jurisdiction. It must not however be taken for granted that every matter within the jurisdiction of the Parliament of Canada even in ordinary times could be validly committed by Parliament to the executive for legislative action in the case of an emergency." Unlike the Indian Constitution, in the British North America Act there is no power to suspend the Constitution or enlarge the legislative powers in an emergency like war. The Courts therefore stretched the language of the sections to meet the emergency in

(1) [1943] S. C. R. Canada 1.

(2) [1923] A. C. 695.

(3) [1918] 57 S. C. R. Canada 150.

the highest interest of the country but it also emphasized that such action was not permissible in ordinary times.

The War Measures Acts were thus considered by the Supreme Court of Canada on a different footing. The question was of competence but owing to the unusual circumstances and exigencies what was stated in the legislation was considered a sufficient statement of the legislative policy. It appears to be thought that the same test cannot be applied in respect of legislation made in normal times, in respect of a permanent statute which is not of limited duration. The discussion in *Benaori Lal Sarma's* case (1) in the judgment of the Privy Council mentioned above may be usefully noted in this connection as the legislation in that case was also a war measure but was held valid as conditional legislation. In so far as the observations in the Canadian decisions go beyond what is held in the Privy Council decisions, with respect, I am unable to agree. It appears that the word "delegation" has been given an extended meaning in some observations of the Canadian courts beyond what is found in the Privy Council decisions. It is important to notice that in all the judgments of the Privy Council, the word "delegation" as meaning conferment of legislative functions strictly, is not used at all in respect of the impugned legislation and has been deliberately avoided. Their validity was upheld on the ground that the legislation was either conditional or subsidiary or ancillary legislation.

An important decision of the Supreme Court of Australia may be noticed next. In the *Victorian Stevedorina and General Contracting Company Proprietary Ltd.* v. *Dignan*(2), the question whether delegation of legislative power was according to the Constitution came to be examined by the High Court of Australia. It was argued that section 3 of the Act in question wat *ultra vires* and void in so far as it purported to authorise the Governor-General to make regulations which (*notwithstanding anything in any other Act*) shall have

(1) 72 I. A. 27. (2) 46 Com. L. R. 73.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

the force of law. In the judgment of Gavan Duffy C.J. and Starke J. it was stated : "The attack upon the Act itself was based upon the American Constitutional doctrine that no legislative body can delegate to another department of the Government or to any other authority the power either generally or specially to enact laws. This high prerogative has been entrusted to its own wisdom, judgment and patriotism and not to those of other persons and it will act *ultra vires* if it undertakes to delegate the trust instead of executing it. (Cooley's Principles of Constitutional Law, 3rd Edition, p. 111). *Roche* v. *Kronheimer*(1) was an authority for the proposition that an authority of subordinate law-making may be invested in the executive. Whatever may be said for or against that decision I think we should not now depart from it." Mr. Justice Dixon considered the argument fully in these terms : "The validity of this provision is now attacked upon the ground that it is an attempt to grant to the executive a portion of the legislative power vested by the Constitution in the Parliament *which is inconsistent with distribution made by the Constitution of legislative executive and judicial powers.* In support of the rule that Congress cannot invest another organ of government with legislative power a second doctrine is relied upon in America but it has no application to the Australian Constitution. Because the powers of Government are considered to be derived from the authority of the people of the Union no agency to whom the people have confided a power may delegate its exercise. The well-known maxim *delegata potestas non potest delegare* applicable to the law of agency in the general and Common Law is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private laws. No similar doctrine has existed in respect of British Colonial legislatures whether erected in virtue of the prerogative or by Imperial Statute....It is important to observe that in America the intrusion of the doctrines of agency into Constitutional interpretatior

(1) [1921] 29 Com. L. R. 329.

has in no way obscured the operation of the separation of powers. In the opinion of the Judicial Committee a general power of legislation belonging to a legislature constituted under a rigid Constitution does not enable it by any form of enactment to create and arm with general legislative authority a new legislative power not created or authorized by the instrument by which it is established." In respect of the legislation passed during the emergency of war and where the power was strongly relied upon, Dixon J. observed : "It might be considered that the exigencies which must be dealt with under the defence power are so many, so great and so urgent and are so much the proper concern of the executive that from its very nature the power appears by necessary intendment to authorise a *delegation* otherwise generally forbidden to the legislature .....I think it certain that such a provision would be supported in America and the passage in *Burah's* case appears to apply to it in which the Judicial Committee deny that in fact any delegation there took place.....This does not mean that a law confiding authority to the executive will be followed, however extensive or vague the subject-matter may be if it does not fall outside the boundaries of federal power. Nor does it mean that the distribution of powers can supply no considerations or weight affecting the validity .....It may be acknowledged that the manner in which the Constitution accomplishes the separation of power itself logically and theoretically makes the Parliament the executive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorise subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.....Such subordinate legislation remains under Parliamentary control and is lacking in the independent and unqualified authority which is an attribute of true legislative power." He concludes : "But whatever it may be, we should now adhere to the interpretation

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

which results from the decision of *Roche* v. *Kronheimer*(1).

This whole discussion shows that the learned Judge was refuting the argument that because under the Constitution of U. S. A. such conferment of power would be invalid it should be held invalid under the Canadian Constitution also. He was not dealing with the question raised before us. Ultimately he said that *Roche* v. *Kronheimer*(1) was conclusive.

Mr. Justice Evatt stated that in dealing with the doctrine of the separation of legislative and executive powers "it must be remembered that underlying the Commonwealth frame of government there is the notion of the British system of an executive which is responsible to Parliament. That system is not in operation under the United States' Constitution. He formulated the larger proposition that every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the executive government or some such authority, is itself a grant-of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves as a part of its content power to confer law-making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the executive or other agencies an increase in the extent of such power cannot of itself invalidate the grant. It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant." In this paragraph the learned Judge appears certainly to have gone much beyond what had been held in any previous decision but he seems to have made the observations in those terms because (as he himself had stated just previously) in his view every conferment of power—whether it was by conditional legislation or ancilary legislation—was a delegation of legislative power. He concluded however as follows : "On final analysis therefore the

(1) [1921] 29 Com. L. R. 329.

Parliament of the Commonwealth is not competent to abdicate its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions for it may elect not to do so; and not because the doctrine of the separation of powers prevents Parliament from granting authority to other bodies to make laws or byelaws and thereby exercise legislative power for it does so in almost every statute but because each and every one of the laws passed by Parliament must answer the description of law upon one or more of the subject-matters stated in the Constitution. *A law by which Parliament gives all its law-making authority to another body would be bad* merely because it would fail to pass the test last mentioned." Read properly, these judgements therefore do not support the contention of the learned Attorney-General.

The decisions of the Privy Council on appeal from Canada do not carry the matter further. In the Judgements of the two decisions of the Supreme Court of Canada and the decisions of the Supreme Court of Australia there are observations which may appear to go beyond the limit mentioned above. These observations have to be read on the light of the facts of the case and the particular regulation or enactment before the court in each case. These decisions also uniformly reiterate that the legislature must perform its functions and cannot leave that to any other authority. More over the word "delegation" as stated by Evatt. J. in his judgment is understood by some Judges to cover what is described as subsidiary or conditional legislation also. Therefore because at some places in these judgments the word "delegation" is used it need not be assumed that the world necessarily means delegation of legislative functions, as understood in the strict sense of the word. The actual decisions were on the ground that they were subordinate legislation or conditional legislation. Again, in respect of the Constitutions of the Dominions of Canada and Australia I may observe that the legislatures of those Dominions were not packed, as in India, and their Constitution was

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

on democratic lines. The principle of fusion of powers between the Legislature and Executive can well be considered in operation in those Dominions, while as I have pointed out above there was no such fusion at all so far as the Indian Constitution in force till 1935 was concerned. Conclusions therefore based on the fusion of legislative and executive powers are not properly applicable to the Indian Constitution. In my opinion therefore to the extent the observations in the Canadian and Australian decisions go beyond what is clearly decided by the Privy Council in respect of the Indian Legislature, they do not furnish a useful guide to determine the powers of the Indian Legislature to delegate legislative functions to administrative or executive authorities.

The Canadian and Australian Constitutions are both based on Acts of the British Parliament and therefore are creatures of written instruments. To that extent they are rigid. Moreover in the Australian Constitution in distributing the powers among the legislative and executive authorities, the word "vest" is used as in the Constitution of the U.S.A. To that extent the two Constitutions have common features. There is however no clear separation of powers between the legislature and executive so as to be mutually and completely exclusive and there is fusion of power so that the Ministers are themselves members of the legislature.

Our attention was drawn to several decisions of the Supreme Court of the United States of America mostly to draw a distinction between the legislative powers of the Congress in the United States of America and the legislative powers of the legislature under Constitutions prepared on the British Parliament pattern. It was conceded that as the Constitution itself provided that the legislative and executive powers were to vest exclusively in the legislature and the executive authority mentioned in the Constitution, it was not permissible for one body to delegate this authority and functions to another body. It may be noticed that several decisions of the Supreme Court of U.S.A.

are based on the incompetence of the delegate to receive the power sought to be conferred on it. Its competence to function as the executive body is expressly set out in the Constitution, and it has been thought that impliedly the Constitution has thereby prevented such body from receiving from the legislative body other powers. In view of my final conclusion I shall very briefly notice the position according to the U. S. A. Constitution.

In Crawford on Statutory Construction, it is stated as follows : "So far however as the delegation of any power to an executive official or Administrative Board is concerned, the legislature must declare the policy of the law and fix the legal principles which are to control in given cases and must provide a standard to guide the official or the Board, empowered to execute the law. This standard must not be too indefinite or general. It may be laid down in broad general terms. It is sufficient if the legislature will lay down an intelligible principle to guide the executive or administrative official.....From these difficult criteria it is apparent that the Congress exercises considerable liberality towards upholding legislative delegations if a standard is established. Such delegations are not subject to the objection that the legislative power has been unlawfully delegated. The filling in mere matters of details within the policy of, and according to, the legal principles and standards, established by the Legislature, is essentially ministerial rather than legislative in character, even if considerable discretion is conferred upon the delegated authority."

In *Hampton & Co.* v. *United States*(1), Taft C. J. observed : "It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President or to the judicial branch or if by law it attempts to invest itself or its members with either executive or judicial power. This is not to say that the three branches are not co-ordinate parts of one Government and that each in the field of duties

(1) [1928] 276 U. S. 394, 406 and 407.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

may not invoke the action of the two other branches in so fas as the action invoked shall not be an assumption of the constitutional field of action of another branch.....The field of Congress involves all and many varieties of legislative action and Congress has found it frequently necessary to use officers of the executive branch within defined limits to secure to exact effect intended by its act of legislation by vesting discretion in such officers to make public regulations, interpreting a statute and directing the details of its executive even to the extent of providing for penalizing a breach of such regulations.....Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive." He agreed with the often cited passage from the judgment of Ranny J. of the Supreme Court of Ohio in *Cincinnati W. & Z. R. Co.* v. *Clinton County Commissioners*(1), viz "The true distinction therefore is between the delegation of power to make the law which necessarily involves a discretions as to what it shall be and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In *Locke's Appeal*(2), it is stated : "The proper distinction in this. The legislature cannot delegate its power to make a law but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which useful legislation must depend, which cannot be known to the law-making power and must therefore be a subject of enquiry and determination outside the halls of legislature."

In *Panama Refining Co.* v. *Ryan* (3), it was observed by Hughes C.J. : "The Congress is not permitted to

(1) 1 Ohio St. 88.

(2) 72 P. A. 491.

(3) 293 U. S. 388.

abdicate or transfer to others the essential legislative functions with which it is vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the National Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establish standards, while leaving to selected instrumentalities making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorisations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility but the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been declared by means of them cannot be allowed to obscure the limitations of the authority to delegate if our constitutional system is to be maintained. Similarly, in *Schechter* v. *United States*(1), it is stated : "So long as the policy is laid down and standard established by a statute no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

The complexity of this question of delegation of power and the consideration of the various decisions in which its application has led to the support or invalidation of Acts has been somewhat aptly put by Schwartz on American Administrative Law. After quoting from *Wayman* v. *Southend* (2) the observations of Marshall C. J. that the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and powers given to those who are to

(1) 295 U. S. 459. (2) 10 Wheat 1 U. S. 1825.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

act under such general provision to fill up details, the author points out that the resulting judicial dilemma, when the America courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the word "delegated power". The authority transferred was, in Justice Holmes' felicitous phrase, "softened by a quasi", and the courts were thus able to grant the fact of delegated legislation and still to deny the name. This result is well put in Prof. Cushman's syllogism :

"Major premise : Legislative power cannot be constitutionally delegated by Congress.

Minor premise : It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusions : Therefore the powers thus delegated are not legislative powers.

They are instead administrtaive or quasi-legislative powers."

It was argued on behalf of the President that the legislative practice in India for over eighty years has recognised this kind of delegation and as that is one of the principles which the court has to bear in mind in deciding the validity of Acts of the legislature, this Court should uphold that practice. In support of this contention a schedule annexed to the case field on behalf of the President, containing a list of Acts, is relied upon. In my opinion out of those the very few Acts which on a close scrutiny may be cited as instances do not establish any such practice. A few of the instances can be supported as falling under the description of conditional legislation or subsidiary legislation. I do not discuss this in greater detail because unless the legislative practice is overwhelmingly cleor, tolearance or acquiescence in the existence of an Act without a dispute about its validity being raised in a court of law for some years cannot be considered binding, when a question about the validity of such practice is raised and comes for decision before the Court. In my opinion, therefore, this broad

contention of the Attorney-General that the Indian Legislature prior to 1935 had power to delegate legislative functions in the sense contended by him is neither supported by judicial decisions nor by legislative practice.

A fair and close reading and analysis of all these decisions of the Privy Council, the judgments of the Supreme Courts of Canada and Australia without stretching and straining the words and expressions used therein lead me to the conclusion that while a legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a legislature has power to lay down the policy and principles providing the rule of conduct, and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. In cases of emergency, like war where a large latitude has to be necessarily left in the matter of enforcing regulations to the executive, the scope of the power to make regulations is very wide, but even in those cases the suggestion that there was delegation of "legislative functions" has been repudiated. Similarly, varying according to the necessities of the case and the nature of the legislation, the doctrine of conditional legislation or subsidiary legislation or ancillary legislation is equally upheld under all the Constitutions. In my opinion, therefore, the contention urged by the learned Attorney-General that legislative power carries with it a general power to delegate legislative functions, so that the legislature may not define its policy at all and may lay down no rule of conduct but that whole thing may be left either to the executive authority or administrative or other body, is unsound and not supported by the authorities on which he relies. I do not think that apart from the sovereign character of

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

the British Parliament which is established as a matter of convention and whose powers are also therefore absolute and unlimited, in any legislature of any other country such general powers of delegation as claimed by the Attorney-General for a legislature, have been recognised or permitted.

It was contended by the learned Attorney-General that under the power of delegation the legislative body cannot abdicate or efface itself. That was its limit. It was argued that so long as the legislature had power to control the actions of the body to which power was delegated, that so long as the actions of such body were capable of being revoked there was no abdication or effacement. In support of this argument some reliance was placed on certain observations in the judgments of the Privy Council in the cases mentioned above. It should be noticed that the Board was expressing its views to support the conclusion that the particular piece of legislation under consideration was either a conditional legislation or that the legislation derived its force and sanction from what the legislature had done and not from what the delegate had done. I do not think that those observations lead to the conclusion that up to that limit legislative delegation was permitted. The true test in respect of "abdication" or "effacement" appears to be whether in conferring the power to the delegate, the legislature, *in the words used to confer the power,* retained its control. Does the decision of the delegate derive sanction from the act of the delegate or has it got the sanction from what the legislature has enacted and decided ? Every power given to a delegate can be normally called back. There can hardly be a case where this cannot be done because the legislative body which confers power on the delegate has always the power to revoke that authority and it appears difficult to visualise a situation in which such power can be irrevocally lost. It has been recognised that a legislative body established under an Act of the British Parliament by its very establishment has not the right to create another legislative body with the same functions and

powers and authority. Such power can be only in the British Parliament and not in the legislature established by an Act of the British Parliament. Therefore, to say that the true test of effacement is that the authority which confers power on the subordinate body should not be able to withdraw the power appears to be meaningless. In my opinion, therefore, the question whether there is "abdication" and "effacement" or not has to be decided on the meaning of words used in the instrument by which the power is conferred on the authority. Abdication, according to the Oxford Dictionary, means abandonment, either formal or virtual, of sovereignty. Abdication by a legislative body need not necessarily amount to a complete, effacement of it. Abdication may be partial or complete. When in respect of a subject in the Legislative List the legislature says that it shall not legislate on that subject but would leave it to somebody else to legislate on it, why does it not amount to abdication or effacement ? If full powers to do anything and everything which the legislature can do are conferred on the subordinate authority, although the legislature has power to control the action of the subordinate authority, by recalling such power or repealing the Acts passed by the subordinate authority, the power conferred by the instrument, in my opinion, amounts to an abdication or effacement of the legislature conferring such power.

The power to *modify* an Act in its extension by the order of the subordinate authority has also come in for considerable discussion. Originally when power was conferred on the subordinate authority to apply existing legislation to specified areas it was given only to apply the whole or a portion thereof. That power was further expanded by giving a power to restrict its application also. In the next stage power was given to modify "so as to adapt the same" to local conditions. It is obvious that till this stage the clear intention was that the delegate on whom power was conferred was only left with the discretion to apply who was considered suitable, as a whole or in part,

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

and to make adaptations which became necessary because of local conditions and nothing more. Only in recent years in some Acts power of modification is given without any words of limitation on that power. The learned Attorney-General contended that the word "modify" according to the Oxford Dictionary means "to limit, restrain, to assuage, to make less severe, rigorous, or decisive; to tone down." It is also given the meaning "to make partial changes in; to alter without radical transformation." He therefore contended that if the donee of the power exceeded the limits of the power of modification beyond that sense, that would be exceeding the limits of the power and to that extent the exercise of the power may be declared invalid. He claimed no larger power under the term "modification". On the other hand, in Rowland Burrows' "Words and Phrases", the word "modify" has been defined as meaning "vary, extend or enlarge, limit or restrict." It has been held that modification implies and alteration. It may narrow or enlarge the provisions of the former Act. It has been pointed out that under the powers conferred by the Delhi Laws Act, the Central Government has extended the application of the Bombay Debtors' Relief Act to Delhi. The Bombay Act limits its application to poor agriculturists whose agricultural income is less than Rs. 500. Under the power of modification conferred on it by the Delhi Laws Act, the Central Government has removed this limit on the income, with the result that the principles, policy and machinery to give relief to poor peasants or agriculturists with an income of less than Rs. 500 is made applicable in Delhi to big landowners even with an income of 20 lakhs ! ! This shows how the word "modification" is understood and applied by the Central Government and acquiesced in by the Indian Legislature. I do not think such power of modification as actually exercised by the Central Government is permitted in law. If power of modification so understood is permitted, it will be open to the Central Legislature in effect to change the whole basis of the legislation and the reason for making the

law. That will be a complete delegation of legislative power because in the event of the exercise of the power in that manner the Indian legislature has not applied its mind either to the policy under which relief should be given nor the class of persons not the circumstances nor the machinery by which relief is to be given. The provisions of the Rent Restriction Act in different Provinces are an equally good example to show how dangerous it is to confer the power of modification on the executive government.

Having considered all the decisions which were cited before us and giving anxious consideration to the elaborate and detailed arguments advanced by the learned Attorney-General in the discussion of this case, I adhere to what I stated in *Jatindra Nath Gupta's* case(1) that the power of delegation, in the sense of the legislature conferring power, on either the executive government or another authority, "to lay down the policy underlying a rule of conduct" is not permitted. The word "delegation", as I have pointed out, has been somewhat loosely used in the course of discussion and even by some Judges in expressing their views. As I have pointed out throughout the decision of the Privy Council the word "delegation" is used so as not to cover what is described as conditional legislation or subsidiary or ancillary legislation, which means the power to make rules and regulations to bring into operation and effect the enactment. Giving "delegation" the meaning which has always been given to it in the decisions of the Privy Council, what I stated in *Jatindra Nath Gupta's* case as the legislature not having the power of delegation is, in my opinion correct.

Under the new Constitution of 1950, the British Parliament, *i.e.*, an outside authority, has no more control over the Indian Legislature. That Legislature's powers are defined and controlled and the limitations thereon prescribed only by the Constitution of India. But the scope of its legislative power has not become

(1) [1949] F. C. R. 595.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

enlarged by the provisions found in the Constitution of India. While the Constitution creates the Parliament and although it does not in terms expressly vest the legislative powers in the Parliament exclusively, the whole scheme of the Constitution is based on the concept that the legislative functions of the Union will be discharged by the Parliament and by no other body. The essential of the legislative functions, *viz.*, the determination of the legislative policy and its formulation as a rule of conduct, are still in the Parliament or the State Legislatures as the case may be and nowhere else. I take that view because of the provisions of article 357 and article 22(4) of the Constitution of India. Article 356 provides against the contingency of the failure of the constitutional machinery in the States. On a proclamation to that effect being issued, it is provided in article 357(1) (a) that the power of the legislature of the State shall be exercisable by or under the authority of the Parliament, and it shall be competent for the Parliament to confer on the President the power of the legislature of the State to make laws "and to authorise the President to delegate, subject to such conditions as he may think fit to impose the powers so conferred to any other authority to be specified by him in that behalf." Sub-clause (b) runs as follows :—"For Parliament, or for the President or other authority in whom such power to make laws is vested under sub-cl. (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof." It was contended that on the breakdown of such machinery authority had to be given to the Parliament or the President, firstly, to make laws in respect of subjects on which the State Legislature alone could otherwise make laws and, secondly, to empower the Parliament or the President to make the executive officers of the State Government to act in accordance with the laws which the Parliament or the President may pass in such emergency. It was argued that for this purpose the word "to delegate" is used. I do not think this argument is sound. Sub-clause (2) relates to the power

of the President to use the State executive officers. But under clause (a) Parliament is given power to confer on the President the power of the *legislature* of the State *to make laws*. Article 357 (1) (a) thus expressly gives power to the Parliament to authorise the President *to delegate his legislative powers*. If powers of legislation include the power of delegation to any authority there was no occasion to make this additional provision in the article at all. The wording of this clause therefore supports the contention that normally a power of legislation does not include the power of delegation.

Article 22(4) again is very important in this connection. It deals with preventive detention and provides that no law shall be valid which will permit preventive detention of a person for a period over three months, unless the conditions laid down in article 22(4) (a) are complied with. The exception to this is in respect of an Act of the Parliament made on the conditions mentioned in article 22(4) (b). According to that, the Parliament has to pass an Act consistently with the provisions of article 22(7). The important point is that in respect of this fundamental right given to a person limiting the period of his detention up to three months, an exception is made in favour of the Parliament by the article. It appears to me a violation of the provisions of this article on fundamental rights to suggest that the Parliament having the power to make a legislation within the terms of article 22(7) has the power to delegate that right in favour of the executive government. In my opinion, therefore the argument that under the Constitution of 1950 the power of legislation carries with it the power of delegation, in the large sense, as contended by the Attorney-General cannot be accepted.

Having regard to the position of the British Parliament, the question whether it can validly delegate its legislative functions cannot be raised in a court of law. Therefore from the fact that the British Parliament has delegated legislative powers it does not follow that the power of delegation is recognised in law as necessarily included in the power of legislation. Although

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making laws is primarily cast on the legislatures? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies, executive or judicial, are not intended to discharge legislative functions? I am unable to read the decisions to which our attention has been drawn as laying down that once a legislature observes the procedure prescribed for passing a bill into an Act, it becomes a valid law, unless it is outside the Legislative Lists in the Seventh Schedule prescribing its respective powers. I do not read articles 245 and 246 as covering the question of delegation of legislative powers. In my opinion, on a true construction of articles 245 and 246 and the Lists in the Seventh Schedule, construed in the light of the judicial decisions mentioned above, legislation delegating legislative powers on some other bodies is not a law on any of the subjects or entries mentioned in the Legislative Lists. It amounts to a law which states that instead of the legislature passing laws on any subject covered by the entries, it confers on the body mentioned in the legislation the power to lay down the policy of the law and make a rule of conduct binding on the persons covered by the law.

As a result of considering all these decisions together it seems to me that the legislature in India, Canada, Australia and the U.S.A. has to discharge its legislative functions, *i.e.*, to lay down a rule of conduct. In doing so it may, in addition, lay down conditions, or state facts which on being fulfilled or ascertained according to the decision of another body or the executive authority, the legislation may become applicable to a particular area. This is described as conditional legislation. The legislature may also, in laying down the rule of conduct, express itself generally if the conditions and circumstances so require. The extent of the

specific and detailed lines of the rule of conduct to be laid down may vary according to the circumstances or exigencies, of each case. The result will be that if, owing to unusual circumstances or exigencies, the legislature does not choose to lay down detailed rules or regulations, that work may be left to another body which is then deemed to have subordinate legislative powers.

Having regard to the distinction noticed above between the power of delegation of legislative functions and the authority to confer powers which enables the donee of the power to make regulations or rules to bring into effect or operation the law and the power of the legislature to make conditional legislation, I shall proceed to consider the three specific questions mentioned in the Reference. It may be noticed that occasions to make legislation of the type covered by the three sections mentioned in the three questions began in the early stages of the occupation of India where small bits of territories were acquired and in respect of which there was no regular legislative body. It was thought convenient to apply to these small areas laws which were made by competent legislature in contiguous areas. That practice was adopted to avoid setting up a separate, sometimes inconvenient and sometimes costly, machinery of legislation for the small area. Nor might it have been considered possible for the Governor-General in Council to enact laws for the day to day administration of such bits of territory or for all their needs having regard to different local conditions. As local conditions may differ to a certain extent, it appears to have been considered also convenient to confer powers on the administrator to apply the law either in whole or in part or to restrict its operation even to a limited portion of such newly acquired area. This aspect of legislation is prominently noticed in Act XXII of 1869 discussed in *The Queen* v. *Burah*(1). Under section 22 of the Indian Councils Act of 1861, the Governor-General in Council was given power to make laws for all persons and for all places and things whatever within British India. The Province of Delhi was carved out of the Province of Punjab and was put

(1) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

under a Chief Commissioner and by section 2 of the Delhi Laws Act the laws in force in the Punjab continued to be operative in the newly created Province of Delhi. The Province of Delhi had not its legislative body and so far as this Chief Commissioner's Province is concerned it is not disputed that the power to legislate was in the Governor-General in Council in his legislative capacity. The first question as worded has to be answered according to the powers and position of the legislature in 1912. Section 7 of the Delhi Laws Act enables the Government (executive) to extend by notification with such restrictions and modifications as it thinks fit, to the Province of Delhi or any part thereof. any enactment which is in force in any part of British India, at the date of such notification, *i.e.*, a law which was in force not necessarily in the Province of Punjab only, from which the Province of Delhi was carved out, but *any* Central or *provincial* law in force in *any* Province. Again, the Government is given power to extend any such law with such restrictions and modifications as it thinks fit. Moreover it enables the Provincial Government to extend an Act which is in force "at the date of such notification." Those words therefore permit extension of future laws which may be passed either by the Central or any Provincial legislature, also with such restrictions and modifications as the Provincial Government may think fit. At this stage, sections 8 and 9 of Act XXII of 1869 under which powers were given to the Lieut.-Governor in *The Queen* v. *Burah*(1) may be compared. They permitted the extension of Acts which were or might be made by the Governor-General in Council (legislative) or the Lieut.-Governor, both of whom were the competent legislative authorities for the whole area under the administrative jurisdiction of the Lieut.-Governor. The power was confined to extend only those Acts over the area specified in Act XXII of 1869, although that area was declared by Act XXII of 1869 as not subject to the laws of the Province, unless the area was specifically mentioned in the particular Act. On

(1) 5 I. A. 178.

the authority of that decision therefore, so far as section 7 of the Delhi Laws Act gives power to the executive (Central) Government to extend Acts passed by the Central Legislature to the Province of Delhi, the same may be upheld.

The question then remain in respect of the power of the executive government to extend Acts of other Provincial legislatures (with or without restrictions or modifications) to the Chief Commissioner's Province. It is obvious that in respect of these Acts the Central Legislature has not applied its mind at all. It has not considered whether the Province of Delhi requires the rule of conduct laid down in those Acts, as necessary or beneficial for the welfare of the people of the Province or for its government. They are passed by other Provincial legislatures according to their needs and circumstances. The effect of section 7 of the Delhi Laws Act therefore in permitting the Central Government to apply such Provincial Acts to the Province of Delhi is that, instead of the Central Legislature making up its mind as to the desirability or necessity of making laws on certain subjects in respect of the Province of Delhi, that duty and right are conferred on the executive government. For example, the question whether a rent act, or an excise act, or what may be generally described as a prohibition act, or a debt relief act is desirable or necessary, as a matter of policy for the Province of Delhi is not considered and decided by the Central Legislature which, in my opinion, has to perform that duty, but that duty and function without any reservation is transferred over to the executive government. Section 7 of the Delhi Laws Act thus contains an entirely different quality of power from the quality of power conferred by sections 8 and 9 of Act XXII of 1869.

All the decisions of the Privy Council unequivocally affirm that it is not competent for the Indian Legislature to create a body possessing the same powers as the Central Legislature itself. It is stated that the legislature cannot efface itself. One may well ask, if section 7 of the Delhi Laws Act has done

1951

In re The Delhi Laws Act, 1912, c.

Kania C. J.

anything else. The Privy Council decisions emphasize two aspects in respect of this question. The first is whether the new body is empowered to make laws. The second is, does the sanction flow from the legislation made by the legislature or from the decision of the newly created body. As regard the first, it is obvious that in principle there is no difference if the newly created body itself writes out on a sheet of paper different sections of an Act or states that the Act will be what is written or printed on another clearly identifiable paper. Therefore if such new body says that the law in Delhi will be the same as Bombay or Madras Act so and so of such and such year it has made the law. Moreover it may be remembered that in doing so the new body may restrict or modify the provisions of such Act also. On the second aspect the sanction flows clearly from the notification of the newly created body that Bombay or Madras Act so and so with such modifications as may be mentioned, will be the law. That has not been the will or decision of the legislature. The legislature has not applied its mind and said "Bombay Act.....is the law of this Province". In my opinion, it is futile to contend that the sanction flows from the statement of the legislature that the law will be what the newly created body decides or specifies, for that statement only indicates the new body and says that we confer on it power to select a law of another province.

The illustrations of the extension of the Civil and Criminal Procedure Codes, mentioned in the judgment in *The Queen* v. *Burah* (1) have to have to be considered along with the fact that at that time the Governor-General in Council, in its legislative capacity, had power of legislation over the whole of India on all subjects. The Civil and Criminal Procedure Codes were enacted by the Central Legislature and it could have made the same applicable at once to the whole of India. But having passed the laws, it laid down a condition that its application may be referred to certain areas until the particular Provincial Government (executive) considered it convenient for these Codes to be made

(1) 5 I. A. 178.

applicable to its individual area. A Provincial Government, *e.g.*, of Bombay, was not empowered to lay down any policy in respect of the Civil Procedure Code or the Criminal Procedure Code nor was it authorised to select, if it liked, a law passed by the Legislature of Madras for its application to the Province of Bombay. If it wanted to do so, the Legislature of the Province of Bombay had to exercise its judgment and decision and pass the law which would be enforceable in the Province of Bombay. It may be noticed that the power to extend, *mutatis mutandis*, the laws as contained in sections 8 and 9 of Act XXII of 1869 brings in the idea of adaptation by modification, but so far only as it is necessary for the purpose. In my opinion, therefore, to the extent section 7 of the Delhi Laws Act permits the Central executive government to apply any law passed by a Provincial legislature to the Province of Delhi, the same is *ultra vires* the Central Legislature. To that extent the Central Legislature has abdicated its functions and therefore the Act to the extent is invalid.

Question 2 relates to Ajmer-Merwara (Extension of Laws) Act. Till the Government of India Act, 1915, there was unitary government in India. By the Act of 1915, Provincial legislatures were given powers of legislation but there was no distribution of legislative powers between the Centre and the Provinces. That was brought about only by the Government of India Act, 1935. Section 94 of that Act enumerates the Chief Commissioner's Provinces. They include the Provinces of Delhi and Ajmer-Merwara. Under sections 99 and 100 there was a distribution of legislative powers between Provinces and Centre, but the word "Province" did not include a Chief Commissioner's Province and therefore the Central Legislature was the only law-making authority for the Chief Commissioner's Provinces. The Ajmer-Merwara Act was passed under the Government of India Act as adapted by the Indian Independence Act. Although by that Act the control of British Parliament over the Government of India

1951

In re The Delhi Laws Act, 1912, etc.

Kania C. J.

and the Central Legislature was removed, the powers of the Central Legislature were still as those found in the Government of India Act, 1935. The Independence Act therefore made no difference on the question whether the power of delegation was contained in the legislative power. The result is that to the extent to which section 7 of the Delhi Laws Act is held *ultra vires,* section 2 of the Ajmer-Merwara Act, 1947, should also be held *ultra vires.*

This brings me to Question 3, Section 2 of the Part C States (Laws) Act, 1950, is passed by the Indian Parliament. Under article 239 of the Constitution of India, the powers for the administration of Part C States are all vested in the President. Under article 240 the Parliament is empowered to create or continue for any State specified in Part C, and administered through a Chief Commissioner or Lieutenant Governor;

(a) a body whether nominated or elected, or partly nominated or partly elected, to function as a legislature for the State, or

(b) a Council of Advisers or Ministers.

It is common ground that no law creating such bodies has been passed by the Parliament so far. Article 246 deals with the distribution of legislative powers between the Centre and the States but Part C States are outside its operation. Therefore on any subject affecting Part C States, Parliament is the sole and exclusive legislature until it passes an Act creating a legislature or a Council in terms of article 240. Proceeding on the footing that a power of legislation does not carry with it the power of delegation (as claimed by the Attorney-General), the question is whether section 2 of the Part C States (Laws) Act is valid or not. By that section the Parliament has given power to the Central Government by notification to extend to any part of such State (Part C State), with such restrictions and modifications as it thinks fit, *any* enactment which is in force *in Part A State* at the date of the notification. The section although framed on the lines of the Delhi Laws Act and the Ajmer-Merwara Act is restricted in

its scope as the executive government is empowered to extend only an Act which is in force in any of the Part A States. For the reasons I have considered certain parts of the two sections covered by Questions 1 and 2 *ultra vires,* that part of section 2 of the Part C States (Laws) Act, 1950, which empowers the Central Government to extend laws passed by *any* Legislature of *Part A State,* will also be *ultra vires.* To the extent *the Central Legislature* or Parliament has passed Acts which are applicable to Part A States, there can be no objection to the Central Government extending, if necessary, the operation of those Acts to the Province of Delhi, because the Parliament is the competent legislature for that Province. To the extent however the section permits the Central Government to extend laws made by any legislature of Part A State to the Province of Delhi, the section is *ultra vires.*

In view of my conclusion in respect of the first part of section 2 of the Part C States (Laws) Act, 1950, I do not think it necessary to deal with separately the other part of the section relating to the power to repeal or amend a corresponding law for the time being applicable to that Part C State.

Before concluding, I must record the appreciation of the Court in the help the learned Attorney-General and the counsel appearing in the Reference have rendered to the Court by their industry in collecting all relevant materials and putting the same before the Court in an extremely fair manner.

My answers to the questions are that all the three sections mentioned in the three questions are *ultra vires* the Legislatures, functioning at the relevant dates, to the extent power is given to the Government (executive) to extend Acts other than Acts of the Central Legislature as mentioned in the judgment.

Fazl Ali J.

FAZL ALI J.—The answer to the three questions which have been referred by the President under article 143 of the Constitution of India, depends upon the proper answer to another question which was the

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

subject of very elaborate arguments before us and which may be stated thus: Can a legislature which is sovereign or has plenary powers within the field assigned to it, delegate its legislative functions to an executive authority or to another agency, and, if so, to what extent it can do so?

In dealing with this question, three possible answers may be considered. They are :—

(1) A legislature which is sovereign in a particular field has unlimited power of delegation and the content of its power must necessarily include the power to delegate legislative functions;

(2) Delegated legislation is permissible only within certain limits; and

(3) Delegated legislation is not permissible at all by reason of certain principles of law which are well-known and well-recognised.

I will first consider the last alternative, but I should state that in doing so I will be using the expressions, "delegated legislation," and "delegation of legislative authority," in the loose and popular sense and not in the strict sense which I shall explain later.

One of the principles on which reliance was placed to show that legislative power cannot be delegated is said to be embodied in the well-known maxim, *delegatus non potest delegare,* which in simple language means that a delegated authority cannot be redelegated, or, in other words, one agent cannot lawfully appoint another to perform the duties of agency. This maxim however has a limited application even in the domain of the law of contract or agency wherein it is frequently invoked and is limited to those cases where the contract of agency is of a confidential character and where authority is coupled with discretion or confidence. Thus, auctioneers, brokers, directors, factors, liquidators and other persons holding a fiduciary position have generally no implied authority to employ deputies or sub-agents. The rule is so stated is Broom's Legal Maxims, and many other books, and it is also stated that in a number of cases the authority to employ

agents is implied. In applying the maxim to the act of a legislative body, we have necessarily to ask "who is the principal and who is the delegator". In some cases where the question of the power of the Indian or a colonial legislature came up for consideration of the courts, it was suggested that such a legislature was a delegate of the British Parliament by which it had been vested with authority to legislate. But this view has been rightly repelled by the Privy Council on more than one occasion, as will appear from the following extracts from two of the leading cases on the subject :—

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself." : *Reg.* v. *Burah*(1).

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in section 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament." : *Hodge* v. *The Queen*(2).

(1) 3 App Cas. 889. (2) 9 App. Cas. 117.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

It has also been suggested by some writers that the legislature is a delegate of the people or the electors. This view again has not been accepted by some constitutional writers, and Dicey dealing with the powers of the British Parliament with reference to the Septennial Act, states as follows :—

"That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty."(1)

The same learned author further observes :—

"The Judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors."(2)

There can be no doubt that members of a legislature represent the majority of their electors, but the legislature as a body cannot be said to be an agency of the electorate as a whole. The individual members may and often do represent different parties and different shades of opinion, but the composite legislature which legislates, does so on its own authority or power which it derives from the Constitution, and its acts cannot be questioned by the electorate, nor can the latter withdraw its power to legislate on any particular matter. As has been pointed out by Dicey,—

"the sole legal right of electors under the English Constitution is to elect memebrs of Parliament. Electors have no legal right of initiating, of sanctioning, or of repealing the legislation of Parliament."(3)

It seems to me therefore that it will not be quite accurate to say that the legislature being an agent of

(1) Dicey's : "Law of the Constitution", 8th edn., p. 45.

(2) *Ibid*, p. 72.

(3) Dicey's "Law of the Constitution", 8th edn., p. 57.

its constituents, its powers are subject to the restrictions implied in the Latin maxim referred to. I shall however advert to this subject again when I deal with another principle which is somewhat akin to the principle underlying the maxim.

The second principle on which reliance was placed was said to be founded on the well-known doctrine of "separation of powers." It is an old doctrine which is said to have originated from Aristotle, but, as is well-known, it was given great prominence by Locke and Montesquieu. The doctrine may be stated in Montesquieu's own words :—

"In every government there are three sorts of power, the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.....When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may rise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There should be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."(1)

The doctrine found many enthusiasts in America and was virtually elevated to a legal principle in that country. Washington, in his farewell address, said :—

"The spirit of enroachment tends to consolidate the powers of all governments in one, and thus to

(1) Montesquieu's Spirit of Laws. Vol. 1 by J. V. Pritchard, 1914 edn., pp. 162-3.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

create, whatever the form of government, a real despotism."

John Adams wrote on similar lines as follows :—

"It is by balancing one of these three powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained and any degree of freedom preserved."(1)

These sentiments are fully reflected in the Constitutions of the individual States as well as in the Federal Constitution of America. Massachusetts in her Constitution, adpoted in 1780, provided that "in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise legislative and judicial powers or either of them; the judicial shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men."(2) The Constitutions of 39 other States were drafted on similar lines, and so far as the Federal Constitution of the United States was concerned, though it does not expressly create a separation of governmental powers, yet from the three articles stating that the legislative power vests in Congress, the judicial power in the Supreme Court and the executive power in the President, the rule has been deduced that the power vested in each branch of the Government cannot be vested in any other branch, nor can one branch interfere with the power possessed by any other branch. This rule has been stated by Sutherland J. in *Springer* v. *Government of the Phillipine Islands*(3) in these words :—

"It may be stated then, as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the Executive

(1) Vide, Works, Vol. I, P. 186.

(2) Willoughby's Constitution of the United States, Vol. III, 1616.

(3) 277 S. 189 at 201.

cannot exercise either legislative or judicial power; the Judiciary cannot exercise either executive or legislative power."

From the rule so stated, the next step was to deduce the rule against delegation of legislative power which has so often been stressed in the earlier American decisions. It was however soon realized that the absolute rule against delegation of legislative power could not be sustained in practice, and as early as 1825, Marshall C.J. openly stated that the rule was subject to limitations and asserted that Congress "may certainly delegate to others powers which the Legislature may rightfully exercise itself"(1). In course of time, notwithstanding the maxim against delegation, the extent of delegation had become so great that an American writer wrote in 1916 that "because of the rise of the administrative process, the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight".(2) This is in one sense an over-statement, because the American Judges have never ceased to be vigilant to check any undue or excessive authority being delegated to the executive as will appear from the comparatively recent decisions of the American Supreme Court in *Panama Refining Co.* v. *Ryan*(3) and *Schechter Poultry Corp.* v. *United States*(4). In the latter case, it was held that the National Industrial Recovery Act, in so far as it purported to confer upon the President the authority to adopt and make effective codes of fair competition and impose the same upon members of each industry for which such a code is approved, was void because it was an unconstitutional delegation of legislative power. Dealing with the matter, Cardozo J. observed as follows :—

"The delegated power of legislation which has found expression in this code is not canalized within

(1) *Wayman* v. *Southard* (1825) 23 U. S. 43.

(2) 41 American Bar Assen. Reports, 356 at 368.

(3) 293 U.S. 388. (4) 295 U.S. 495.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

banks that kept it from overflowing. It is unconfined and vagrant..... Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils upon discovery to correct them.....This is delegation running riot. No such plenitude of power is capable of transfer."(1)

The fact however remains that the American courts have upheld the so-called delegated legislation in numerous instances, and there is now a wide gulf between the theoretical doctrine and its application in practice. How numerous are the exceptions engrafted on the rule will appear on a reference to a very elaborate and informing note appended to the report of the case of *Panama Refining Co.* v. *Ryan* in 79, Lawyer's Edition at page 448. In this note, the learned authors have classified instances of delegation upheld in America under the following 8 heads, with numerous sub-heads :—

1. Delegation of power to determine facts or conditions on which operation of statute is contingent.

2. Delegation of non-legislative or administrative functions.

3. Delegation of power to make administrative rules and regulations.

4. Delegation to municipalities and local bodies.

5. Delegation by Congress to territorial legislature or commission.

6. Delegation to private or non-official persons or corporations.

7. Vesting discretion in judiciary.

8. Adopting law or rule of another jurisdiction.

The learned American Judges in laying down exceptions to the general rule from time to time, have offered various explanations, a few of which may be quoted as samples :—

(1) 295 U.S. 495 at 551.

".....however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires." [Per Holmes J. in *Spinger* v. *The Government of Philippine Islands*(1)]

.....

".....too much effort to detail and particularize, so as to dispense with the administrative or fact-finding assistance, would cause great confusion in the laws, and would result in laws deficient in both provision and execution." [*Mutual Film Corporation* v. *Industrial Commission*(2)]

.....

"If the legislature were strictly required to make provision for all the minutiae of regulation, it would in effect, be deprived of the power to enact effective legislation on subjects over which it has undoubted power."

.....

"The true distinction.....is this. The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend—To deny this would be to stop the wheels of government."(3).

.....

"The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [Per Ranney J. in *Cincinnati W. & Z. R. Co.* v. *Clinton County Commissioners*(4)].

(1) 277 U.S. 189.
(2) 236 U.S. 230.
(3) Locke's Appeal, 1873 72 Pa. 491.
(4) I Ohio St. 88.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

.....

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of law." [*Moore* v. *Reading*(1)]

.....

"Congress may declare its will and, after fixing a primary standard, devolve upon administrative officers the power to fill up the details by prescribing administrative rules and regulations." [*United States* v. *Shreveport Grain & E. Co.*(2)]

.....

"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within the prescribed limits, the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort, we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." [Per Hughes C. J. in *Panama Refining Co. Ryan*(3)]

.....

"This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch." [Per Taft C.J. in *J. W. Hampton Jr. & Co.* v. *U.S.* (4)]

I have quoted these extracts at the risk of encumbering my opinion for 2 reasons : firstly, because they

(1) 21 Pa. 202.
(2) 287 U.S. 77.
(3) 293 U.S. 388.
(4) 276 U.S. 394.

show that notwithstanding the prevalence of the doctrine of separation of powers in America, the rule against delegation of legislative power is by no means an inelastic one in that country, and many eminent Judges there have tried to give a practical trend to it so as to bring it in line with the needs of the present-day administration, and secondly, because they show that the rule against delegation is not a necessary corollary from the doctrine of separation of powers.

It is to be noted that though the principle of separation of powers is also the basis of the Australian Constitution, the objection that the delegation of legislative power was not permissible because of the distribution of powers contained in the Constitution has been raised in that Commonwealth only in a few cases and in all those cases it has been negatived. The first case in which this objection was raised was *Baxter* v. *Ah Way*(1). In that case, the validity of section 52 of the Customs Act, 1901, was challenged. That section after enumerating certain prohibited imports provided for the inclusion of "all goods the importation of which may be prohibited by proclamation." Section 56 of the Act provided that "the power of prohibiting importation of goods shall authorise prohibition subject to any specified condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports." The ground on which these provisions were challenged was that they amounted to delegation of legislative power which had been vested by the Constitution in the Federal Parliament, Griffth C. J. however rejected the contention and in doing so relied on *Queen* v. *Burah*(2) and other cases, observing :—

".....unless the legislature is prepared to lay down at once and for all time, or for so far into the future as they may think fit, a list of prohibited goods, they must have power to make a prohibition depending upon a condition, and that condition may be the coming into existence or the discovery of some fact

(1) (1909) 8 C.L.R. 626. (2) 3 App. Cas. 889.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

.....And if that fact is to be the condition upon which the liberty to import the goods is to depend, there must be some means of ascertaining that fact, some person with power to ascertain it; and the Governor-in-Council is the authority appointed to ascertain and declare the fact."

The other cases in which a similar objection was taken, are :—*Welebach Light Co. of Australasia Ltd.* v. *The Commonwealth*(1), *Roche* v. *Kronheimer*(2), and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan*(3). In the last mentioned case in which the matter has been dealt with at great length, Dixon J. observed thus :—

"....the time has passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character."(4).

In England, the doctrine of separation of powers has exercised very little influence on the course of judicial decisions or in shaping the Constitution, notwithstanding the fact that distinguished writers like Locke and Blackstone strongly advocated it in the 17th and 18th centuries. Locke in his treatise on Civil Government wrote as follows :—

"The legislature cannot transfer the power of making laws to any other hands; for it being a delegated power from the people, they who have it cannot pass it over to others. (§141).

Blackstone endorsed this view in these words :—

Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."(5).

Again, Montesquieu, when he enunciated the doctrine of separation of powers, thought that it represented the

(1) (1916) 22 C.L.R. 268.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 46 C.L.R. 73.
(4) Ibid., p. 100.
(5) Commentaries on the Laws of England, 1765.

quintessence of the British Constitution for which he had great admiration. The doctrine had undoubtedly attracted considerable attention in England in the 17th and 18th centuries, but in course of time it came to have a very different meaning there from that it had acquired in the United States of America. In the United States, the emphasis was on the mutual independence of the three departments of Government. But, in England, the doctrine means only the independence of the judiciary, whereas the emergence of the Cabinet system forms a link between the executive and the legislature. How the Cabinet system works differently from the so-called non-parliamentary system which obtains in the United States, may be stated very shortly. In the United States, the executive power is vested in the President, to whom, and not to the Congress, the members of the Cabinet are personally responsible and neither the President nor the members of the Cabinet can sit or vote in Congress, and they have no responsibility for initiating bills or seeking their passage through Congress. In England, the Cabinet is a body consisting of members of Parliament chosen from the party possessing a majority in the House of Commons. It has a decisive voice in the legislative activities of Parliament and initiates all the important legislation through one or other of the Ministers, with the result that "while Parliament is supreme in that it can make or unmake Government, the Government once in power tends to control the Parliament."

The conclusion which I wish to express may now be stated briefly. It seems to me that though the rule against delegation of legislative power has been assumed in America to be a corollary from the doctrine of separation of powers, it is strictly speaking not a necessary or inevitable corollary. The extent to which the rule has been relaxed in America and the elaborate explanations which have been offered to justify departure from the rule, confirm this view, and it is also supported by the fact that the trend of decisions in Australia, notwithstanding the fact that its Constitution

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

is at least theoretically based on the principle of separation of powers, is that the principle does not stand in the way of delegation in suitable circumstances. The division of the powers of Government is now a normal feature of all civilised constitutions, and, as ponited out by Rich J. in *New South Wales* v. *Commonwealth*(1), it is "well-known in all British communities"; yet, except in the United States, nowhere it has been held that by itself it forbids delegation of legislative power. It seems to me that the American jurists have gone too far in holding that the rule against delegation was a direct corollary from the separation of powers.

I will now deal with the third principle, which, in my opinion, is the true principle upon which the rule against delegation may be founded. It has been stated in Cooley's Constitutional Limitations, Volume I at page 224 in these words :—

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

The same learned author observes thus in his well-known book on Constitutional Law (4th Edition, page 138) :—

"No legislative body can delegate to another department of the government, or to any other authority, the power, either generally or specially, to enact

(1) 20 C.L.R. 54 at 108.

laws. The reason is found in the very existence of its own powers. This high prerogative has been intrusted to its own wisdom, judgment, and patriotism, and not to those of other persons, and it will act *ultra vires* if it undertakes to delegate the trust, instead of executing it."

This rule in a broad sense involves the principle underlying the maxim, *delegatus non potest delegare*, but it is apt to be misunderstood and has been misunderstood. In my judgment, all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duty with which it has been entrusted. This rule has been recognized both in America and in England, and Hughes C. J. has enunciated it in these words :—

"The Congress mainfestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."(1).

The matter is again dealt with by Evatt J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Neakes* v. *Dignan*(2), in these words :—

"On final analysis therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so ; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or bye-laws and thereby exercise legislative power, for it does so in almost every statute ; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."

(1) 293 U.S. 421.

(2) 46 Com. L.R. 73 at 121.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

I think that the correct legal position has been comprehensively summed up by Lord Haldane in *In re the Initiative and Referendum Act*(1) :—

"No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as has been done when in *Hodge* v. *The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

What constitutes abdication and what class of cases will be covered by that expression will always be a question of fact, and it is by no means easy to lay down any comprehensive formula to define it, but it should be recognized that the rule against abdication does not prohibit the Legislature from employing any subordinate agency of its own choice for doing such subsidiary acts as may be necessary to make its legislation effective, useful and complete.

Having considered the three principles which are said to negative delegation of powers, I will now proceed to consider the argument put forward by the learned Attorney-General that the power of delegation is implicit in the power of legislation. This argument is based on the principle of sovereignty of the legislature within its appointed field. Sovereignty has been variously described by constitution writers, and sometimes distinction is drawn between legal sovereignty and political sovereignty. One of the writers describes it as the power to make laws and enforce them by means of coercion it cares to employ, and he proceeds to say that in England the legal sovereign, *i.e.*, the person or persons who according to the law of the land legislate and administer the Government, is the King in Parliament, whereas the political

(1) [1919] A.C. 935 at 945.

or the constitutional sovereign, *i.e.*, the body of persons in whom power ultimately resides, is the electorate or the voting public(1). Dicey states that the legal conception of sovereignty simply means the power of law-making unrestricted by any legal limit, and if the term "sovereignty" is thus used, the sovereign power under the English Constitution is the Parliament. The main attribute of such sovereignty is stated by him in these words :—

"There is no law which Parliament cannot change (or to put the same thing somewhat differently, fundamental or so-called constitutional laws are under our Constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character) and any enactment passed by it cannot be declared to be void."

According to the same writer, the characteristics of a non-sovereign law-making body are :—(1) the existence of laws which such body must obey and cannot change ; (2) the formation of a marked distinction between ordinary laws and fundamental laws ; and (3) the existence of some person or persons judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body. Dealing with the Indian or the colonial legislature, the learned writer characterizes it as a non-sovereign legislature and proceeds to observe that its authority to make laws is as completely subordinate to and as much dependent upon Acts of Parliament as is the power of London and North-Western Railway Co. to make bye-laws. This is undoubtedly an overstatement and is certainly not applicable to the Indian Parliament of today. Our present Parliament, though it may not be as sovereign as the Parliament of Great Britain, is certainly as sovereign as the Congress of the United States of America and the Legislatures of other independent countries having a Federal Constitution. But what is more relevant

(1) Modern Political Constitutions, by Strong.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

to our purpose is that Dicey himself, dealing with colonial and other similar legislatures, says that "they are in short within their own sphere copies of the Imperial Parliament, they are within their own sphere sovereign bodies, but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom." These remarks undoubtedly applied to the Legislative Council of 1912 which passed the Delhi Laws Act, 1912, and they apply to the present Parliament also with this very material modification that its freedom of action is no longer controlled by subordination to the British Parliament but is controlled by the Indian Constitution.

At this stage, it will be useful to refer to certain cases decided by the Privy Council in England in which the question of the ambit of power exercised by the Indian and colonial legislatures directly arose. The leading case on the subject is *Queen* v. *Burah*(1), which has been cited by this court on more than one occasion and has been accepted as good authority. In that case, the question arose whether a section of Act No. XXII of 1869 which conferred upon the Lieutenant-Governor of Bengal the power to determine whether a law or any part thereof should be applied to a certain territory was or was not *ultra vires*. While holding that the impugned provision was *intra vires*, the Privy Council made certain observations which have been quoted again and again and deserve to be quoted once more. Having held that the Indian Legislature was not a delegate of the Imperial Parliament and hence the maxim, *delegatus non potest delegare*, did not apply (See ante for the passage dealing with this point), their Lordships proceeded to state as follows :—

"Their Lordships agree that the Governor-General in Council could not by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the

(1) 5 I.A. 178.

present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices to be appointed by and responsible to the Lieutenant-Governor of Bengal, leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, 'in the other territories subject to his government'."

Then, later they added :—

"The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred."

The next case on the subject is *Russell* v. *The Queen*(1). In that case, the Canadian Temperance Act, 1878, was challenged on the ground that it was

(1) 7 App. Cas .829.

1951

In re The Delhi Laws Act, 1912,

Fazl Ali J.

ultra vires the Parliament of Canada. The Act was to be brought into force in any country or city if on a vote of the majority of the electors of that county or city favouring such a course, the Governor-General in Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. The passage in which this is made clear, runs as follows :—

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate, Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency.....If authority on this point were necessary, it will be found in the case of *Queen* v. *Burah*, lately before this Board."

The same doctrine was laid down in the case of *Hodge* v. *The Queen*(1), where the question arose as to whether the legislature of Ontario had or had not the power of entrusting to a local authority—the Board of Commissioners—the power of making regulations with respect to the Liquor Licence Act, 1877, which among other things created offences for the breach of those regulations and annexed penalties thereto. Their Lordships held that the Ontario Legislature had that power, and after reiterating that the Legislature which passed the Act was not a delegate, they observed as follows :—

"When the British North America Act enacted that there should be a legislature for Ontario, and that

(1) 9 App. Cas. 117.

its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

Another case which may be usefully cited is *Powell* v. *Apollo Candle Co.*(1). The question which arose in that case was whether section 133 of the Customs Regulations Act of 1879 of New South Wales was or was not *ultra vires* the colonial legislature. That section provided that "when any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article." Having repelled the contention that the colonial legislature was a delegate of the Imperial Parliament and having held that it was not acting as an agent or a delegate, the Privy Council proceeded to deal with the question raised in the following manner :—

(1) 10 App. Cas. 282.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

"It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these cirmumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring section 133 of the Customs Regulations Act of 1879 to be beyond the power of the Legislature."

Several other cases were cited at the Bar in which the supremacy of a legislature (which would be non-sovereign according to the tests laid down by Dicey) within the field ascribed to its operation, were affirmed, but it is unnecessary to multiply instances illustrative of that principle. I might however quote the pronouncement of the Privy Council in the comparatively recent case of *Shannon* v. *Lower Mainland Dairy Products Board*(1), which runs as follows :—

"The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act."

I must pause here to note briefly certain important principles which can be extracted from the cases

(1) [1938] A.C 708 at 722.

decided by the Privy Council which I have so far cited, apart from the principle that the Indian and colonial legislatures are supreme in their own field and that the maxim, *delegatus non protest delegare,* does not apply to them. In the first place, it seems quite clear that the Privy Council never liked to commit themselves to the statement that delegated legislation was permissible. It was easy for them to have said so and disposed of the cases before them, but they were at pains to show that the provisions impugned before them were not instances of delegation of legislative authority but they were instances of conditional legislation which, they thought, the legislatures concerned were competent to enact, or that the giving of such authority as was entrusted in some cases to subordinate agencies was ancillary to legislation and without it "an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail." They also laid down: (1) that it will be not correct to describe conditional legislation and other forms of legislation which they were called upon to consider in several cases which have been cited as legislation through another agency. Each Act or enactment which was impugned before them as being delegated legislation, contained within itself the whole legislation on the matter which it dealt with, laying down the condition and everything which was to follow on the condition being fulfilled; (2) that legislative power could not be said to have been parted with if the legislature retained its power intact and could whenever it pleased destroy the agency it had created and set up another or take the matter directly into its own hands; (3) that the question as to the extent to which the aid of subordinate agencies could be sought by the legislatures and as to have long they should continue them were matters for each legislature and not for the court of law to decide; (4) that a legislature in committing important regulations to others does not efface itself; and (5) that the legislature, like the Governor-General in Council, could not by any form of enactment create, and arm with legislative

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

authority, a new legislative power not created or authorised by the Councils Act to which it (the Governor-General in Council) owes its existence.

I have already indicated that the expressions "delegated legislation" and "delegating legislative power" are sometimes used in a loose sense, and sometimes in a strict sense. These expressions have been used in the loose or popular sense in the various treaties or reports dealing with the so-called delegated legislation; and if we apply that sense to the facts before the Privy Council, there can be no doubt that every one of the cases would be an instance of delegated legislation or delegation of legislative authority. But the Privy Council have throughout repelled the suggestion that the cases before them were instances of delegated legislation or delegation of legislative authority. There can be no doubt that if the legislature completely abdicates its functions and sets up a parallel legislature transferring all its power to it, that would undoubtedly be a real instance of delegation of its power. In other words, there will be delegation in the strict sense if legislative power with all its attributes is transferred to another authority. But the Privy Council have repeatedly pointed out that when the legislature retains its dominant power intact and can whenever it pleases destroy the agency it has created and set up another or take the matter directly into its own hands, it has not parted with its own legislative power. They have also pointed out that the act of the subordinate authority does not possess the true legislative attribute, if they efficacy of the act done by it is not derived from the subordinate authority but from the legislature by which the subordinate authority was entrusted with the power to do the act. In some of the cases to which reference has been made, the Privy Council have referred to the nature and principles of legislation and pointed out that conditional legislation simply amounts to entrusting a limited discretionary authority to others, and that to seek the aid of subordinate agencies in carrying out the object of the legislation is ancillary to legislation and properly

lies within the scope of the powers which every legislature must possess to function effectively. There is a mass of literature in America also about the so-called delegated legislation, but if the judgments of the eminent American Judges are carefully studied, it will be found that, though in some cases they have used the expression in the popular sense, yet in many cases they have been as careful as the Privy Council in laying down the principles and whenever they have upheld any provision impugned before them on the ground that it was delegation of legislative authority they have rested their conclusion upon the fact that there was in law no such delegation.

The learned Attorney-General has relied on the authority of Evatt J. for the proposition that "the true nature and scope of the legislative power of the Parliament involves as part of its content power to confer law-making power upon authorities other than Parliament itself"(1). It is undoubtedly true that a legislature which is sovereign within its own sphere must necessarily have very great freedom of action, but it seems to me that in strict point of law the dictum of Evatt J. is not a precise or an accurate statement. The first question which it raises is what is meant by law-making power and whether such power in the true sense of the term can be delegated at all. Another difficulty which it raises is that once it is held as a general proposition that delegation of law-making power is implicit in the power of legislation, it will be difficult to draw the line at the precise point where the legislature should stop and it will be permissible to ask whether the legislature is competent to delegate 1, 10 or 99 per cent of its legislative power, and whether the strictly logical conclusion will not be that the legislature can delegate the full content of its power in certain cases. It seems to me that the correct and the strictly legal way of putting the matter is as the Privy Council have put it in several cases. The legislature in order to function effectively, has to call for sufficient data, has to

(1) See the *Victorian Stevedoring* case ; 46 Com. L. R. 73.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

legislate for the future as well as for the present and has to provide for a multiplicity of varying situations which may be sometimes difficult to foresee. In order to achieve its object, it has to resort to various types and forms of legislation, entrusting suitable agencies with the power to fill in details and adapt legislation to varying circumstances. Hence, what is known as conditional legislation, an expression which has been very fully explained and described in a series of judgments, and what is known as subordinate legislation, which involves giving power to subordinate authorities to make rules and regulations to effectuate the object and purpose for which a certain law is enacted, have been recognized to be permissible forms of legislation on the principle that a legislature can do everything which is ancillary to or necessary for effective legislation. Once this is conceded, it follows that the legislature can resort to any other form of legislation on the same principle, provided that it acts within the imits of its power, whether imposed from without or conditioned by the nature of the duties it is called upon to perform.

The conclusions at which I have arrived so far may now be summed up :—

(1) The legislature must normally discharge its primary legislative function itself and not through others.

(2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.

(3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside

agency, it must see that such agency, acts as a subordinate authority and does not become a parallel legislature.

(4) The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive delegation but the courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principal that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

I will now deal with the three specific questions with which we are concerned in this Reference, these being as follows:—

(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the legislature which passed the said Act?

(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the legislature which passed the said Act?

(3) Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Parliament?

Before attempting to answer these questions, it will be useful to state briefly a few salient facts about the composition and power of the Indian Legislature at the dates on which the three Acts in question were passed. It appears that formerly it was the executive Government which was empowered to make regulations and ordinances for "the good government of the factories and territories acquired in India", and up to 1833, the laws used to be passed by the Governor-General in Council or by the Governors of Madras and

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

Bombay in Council, in the form of regulations. By the Charter Act of 1833, the Governor-General's Council was extended by the inclusion of a fourth member who was not entitled to sit or vote except at meetings for making laws and regulations. The Governor-General in Council was by this Act empowered to make laws and regulations for the whole of India and the legislative powers which vested in the Governors of Madras and Bombay were withdrawn, though they were allowed to propose draft schemes. The Acts passed by the Governor-General in Council were required to be laid before the British Parliament and they were to have the same force as an Act of Parliament. In 1853, the strength of the Council of the Governor-General was further increased to 12 members, by including the fourth member as an ordinary member and 6 special members for the purpose of legislation only. Then came the Councils Act of 1861, by which the power of legislation was restored to the Governors of Madras and Bombay in Council, and a legislative council was appointed for Bengal; but the Governor-General in Council was still competent to exercise legislative authority over the whole of India and could make laws for "all persons and all places and things", and for legislative purposes the Council was further remodelled so as to include 6 to 12 members nominated for a period of 2 years by the Governor-General, of whom not less than one-half were to be non-officials. In his Council, no measure relating to certain topics could be introduced without the sanction of the Governor-General, and no law was to be valid until the Governor-General had given his assent to it and the ultimate power of disallowing a law was reserved to the Crown. Further, local legislatures were constituted for Madras and Bombay, wherein half the members were to be non-officials nominated by the Governors, and the assent of the Governor as well as that of the Governor-General was necessary to give validity to any law passed by the local legislature. A similar legislative was directed to be constituted for the lower Provinces of Bengal

and powers were given to constitute legislative councils for certain other Provinces. In 1892, the Indian Councils Act was passed, by which the legislative councils were further expanded and certain fresh rights were given to the members. In 1909, came the Morley-Minto scheme under which the strength of the legislative council was increased by the inclusion of 60 additional members of whom 27 were elected and 33 nominated. Soon after this, in 1812, the Delhi Laws Act was passed, and the points which may be noticed in connection with the legislature which functioned at that time are: firstly, within its ambit, its powers were as plenary as those of the legislature of 1861, whose powers came up for consideration before the Privy Council in *Burah's* case, and secondly, considering the composition of the legislative council in which the non-official and the executive elements predominated, there was no room for the application of the doctrine of separation of power in its full import, nor could it be said that by reason of that doctrine the legislature could not invest the Governor-General with the powers which we find him invested with under the Delhi Laws Act. It should be stated that in section 7 of that Act as it originally stood, the Governor-General was mentioned as the authority who could by notification extend any enactment which was in force in any part of British India at the date of such notification. The "Provincial Government" was substituted for the "Governor-General" subsequently.

Coming to the second Act, namely, the Ajmer-Merwara (Extension of Laws) Act, 1947, we find that when it was enacted on the 31st December, 1947, the Government of India Act, 1935, as adapted by the India (Provincial Constitution) Order, 1947, issued under the Indian Independence Act, 1947, was in force. Under that Act, there were three Legislative Lists, called the Federal, Provincial and Concurrent Legislative Lists. Lists I and II contained a list of subjects on which the Central Legislature and the Provincial Legislature could respectively legislate, and List III contained subjects on which both the Central and the

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

Provincial Legislatures could legislate. Section 100(4) of the Act provided that "the Dominion Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof." Section 46 (3) stated that the word "Province", unless the context otherwise required, meant a Governor's Province. Therefore, section 100 (4) read with the definition of "Provinces", empowered the Dominion Legislature to make laws with respect to subjects mentioned in all the three Lists for Ajmer-Merwara, which was not a Governor's Province. The Central Legislature was thus competent to legislate for Ajmer-Merwara in regard to any subject, and it had also plenary powers in the entire legislative field allotted to it. Further, at the time the Act in question was passed, the Dominion Legislature was simultaneously functioning as the Constituent Assembly and had the power to frame the Constitution.

The third Act with which we are concerned was passed after the present Constitution had come into force. Article 245 of the Constitution lays down that "subject to the provisions of this Constitution, Parliament may make laws from the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." On the pattern of the Government of India Act, 1935, Lists I and II in the Seventh Schedule of the Constitution enumerate the subjects on which the Parliament and the State Legislatures can respectively legislate, while List III enumerates subjects on which both the Parliament and the State Legislatures can legislate. Under article 246(4), "Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B of the First Schedule nothwithstanding that such matter is a matter enumerated in the State List." The points to be noted in connection with the Part C States (Laws) Act, 1950, are :—

(1) The present Parliament derives its authority from the Constitution which has been framed by the

people of India through their Constituent Assembly, and not from any external authority, and within its own field it is as supreme as the legislature of any other country possessing a written federal Constitution.

(2) The Parliament has full power to legislate for the Part C States in regard to any subject.

(3) Though there is some kind of separation of governmental functions under the Constitution, yet the Cabinet system, which is the most notable characteristic of the British Constitution, is also one of the features of our Constitution and the doctrine of separation of powers, which never acquired that hold or significance in this country as it has in America cannot dominate the interpretation of any of the Constitutional provisions.

I may here refer to an argument which is founded on articles 353 (b) and 357 (a) and (b) of the Constitution. Under article 353 (b), when a Proclamation of Emergency is made by the President,—

"the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List."

Under article 357, when there is a failure of constitutional machinery in a State, "it shall be competent—

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested 1833, the laws used to be passed by the Governor-General in Council or by the Governors of Madras and

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

powers and the imposition of duties, upon the Union or officers and authorities thereof."

In both these articles, the power of delegation is expressly conferred, and it is argued that if delegation was contemplated in normal legislation, there would have been an express power given to the Parliament, similar to the power given in articles 353(b) and 357(a) and (b). In other words, the absence of an express provision has been used as an argument for absence of the power to delegate. It should however be noticed that these are emergency provisions and give no assistance in deciding the question under consideration. So far as article 353(b) is concerned, it is enough to say that a specific provision was necessary to empower the Parliament to make laws in respect of matters included in the State List upon which the Parliament was not otherwise competent to legislate. When the Parliament was specially empowered to legislate in a field in which it could not normally legislate, it was necessary to state all the powers it could exercise. Again, article 357(a) deals with complete transfer of legislative power to the President, while clause (b) is incidental to the powers conferred on the Parliament and the President to legislate for a State in case of failure of constitutional machinery in that State. These provisions do not at all bear out the conclusion that is sought to be drawn from them. Ineed, the Attorney-General drew from them the opposite inference, namely, that by these provisions the Constitution-makers have recognized that delegation of power is permissible on occasions when it is found to be necessary. In my opinion, neither of these conclusions can be held to be sound.

I will now deal with the three provisions in regard to which the answer is required in this Reference. They are as follows :—

Section 7 of the Delhi Laws Act, 1912.

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in

force in any part of British India at the date of such notification."

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947.

"The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

Section 2 of the Part C States (Laws) Act, 1950.

"The Central Government may, by notification in the official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification; and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

At the first sight, these provisions appear to be very wide, their most striking features being these :—

1. There is no specification in the Act by way of a list or schedule of the laws out of which the selection is to be made by the Provincial or the Central Government, as the case may be, but the Government has been given complete discretion to adopt any law whatsoever passed in any part of the country, whether by the Central or the Provincial Legislature.

2. The provisions are not confined merely to the laws in existence at the dates of the enactment of these Acts but extend to future laws also.

3. The Government concerned has been empowered not only to extend or adopt the laws but also to introduce such restrictions and modifications as it thinks fit; and in the Part C States (Laws) Act, 1950, power has been given to the Central Government to make a provision in the enactment extended under the Act for the repeal or amendment of any corresponding law

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

(other than Central Act) which is for the time being applicable to the Part C State concerned.

There can be no doubt that the powers which have been granted to the Government are very extensive and the three Acts go farther than any Act in England or America, but, in my judgment, notwithstanding the somewhat unusual features to which reference has been made, the provisions in question cannot be held to be invalid.

Let us overlook for the time being the power to introduce modifications with which I shall deal later, and carefully consider the main provision in the three Acts. The situation with which the respective legislatures were faced when these Acts were passed, was that there were certain State or States with no local legislature and a whole bundle of laws had to be enacted for them. It is clear that the legislatures concerned, before passing the Acts, applied their mind and decided firstly, that the situation would be met by the adoption of laws applicable to the other Provinces inasmuch as they covered a wide range of subjects approached from a variety of points of view and hence the requirements of the State or States for which the laws had to be framed could not go beyond those for which laws had already been framed by the various legislatures, and secondly, that the matter should be entrusted to an authority which was expected to be familiar and could easily make itself familiar with the needs and conditions of the State or States for which the laws were to be made. Thus, everyone of the Acts so enacted was a complete law, because it embodied a policy, defined a standard, and directed the authority chosen to act within certain prescribed limits and not to go beyond them. Each Act was a complete expression of the will of the legislature to act in a particular way and of its command as to how its will should be carried out. The legislature decided that in the circumstances of the case that was the best way to legislate on the subject and it so legislated. It will be a misnomer to describe such legislation as amounting to abdiction of powers, because from the very nature of the legislation

it is manifest that the legislature had the power at any moment of withdrawing or altering any power with which the authority chosen was entrusted, and could change or repeal the laws which the authority was required to make applicable to the State or States concerned. What is even more important is that in each case the agency selected was not empowered to enact laws, but it could only adapt and extend laws enacted by responsible and competent legislatures. Thus, the power given to the Governments in those Acts was more in the nature of ministerial than in the nature of legislative power. The power given was ministerial, because all that the Government had to do was to study the laws and make selections out of them.

That such legislation is neither unwarranted on principle nor without precedent, will be clear from what follows :—

1. The facts of the case of *Queen* v. *Burah*(1) are so familiar that they need not be reproduced, but for the purpose of understanding the point under discussion, it will be necessary to refer to section 8 of Act XXII of 1869 and some of the observations of the Privy Council which obviously bear on that section. The section runs as follows :—

"The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation."

In their judgment, the Privy Council do not quote this section but evidently they had it in mind when they made the following observations :—

(1) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

"The legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor."

The language used here can be easily adapted in the following manner so as to cover the laws in question :—

"The legislature determined that.....the laws which were or might be in force in the other territories ....(omitting the words "subject to the same Government" for reasons to be stated presently) were such as it might be fit and proper to apply to this State also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Central or Provincial Government."

It seems to me that this line of reasoning fully fits in with the facts before us. The words "territories subject to the same Government" are not in my opinion material, because in *Burah's* case only such laws as were in force in the other territories subject to the same Government were to be extended. We are not to lay undue emphasis on isolated words but look at the principle underlying the decision in that case. In the Delhi Laws Act as originally enacted, the agency which was to adapt the laws was the Governor-General. In the other two Acts, the agency was the Central Government. In 1912, the Governor-General exercised jurisdiction over the whole of the territories the laws of which were to be adapted for Delhi. The same remark applies to the Central Government, while dealing with the other two Acts. Is I have already

stated, *Burah's* case has been accepted by this Court as having been correctly decided, and we may well say that the impugned Acts are mere larger editions of Act XXII of 1869 which was in question in *Burah's* case.

2. It is now well settled in England and in America that a legislature can pass an Act to allow a Government or a local body or some other agency to make regulations consistently with the provisions of the Act. At no stage of the arguments, it was contended before us that such a power cannot be granted by the legislature to another body. We have known instances in which regulations have been made creating offences and imposing penalties as they have been held to be valid. It seems to me that the making of many of these regulations involves the exercise of much more legislative power and discretion than the selection of appropriate laws out of a mass of ready-made enactments. The following observations in a well-known American case, which furnish legal justification for empowering a subordinate authority to make regulations, seem to me, pertinent :—

"It is well settled that the delegation by a State legislature to a municipal corporation of the power to legislate, subject to the paramount law, concerning local affairs, does not violate the inhibition against the delegation of the legislative function.

It is a cardinal principle of our system of government that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make the laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject, of course, to the interposition of the superior in cases of necessity." (Per Fuller J. in *Stoutenburgh* v. *Hennick*(1)).

(1) (1889) 129 U.S. 141.

1951

In re The Delhi Laws Act, 1912 etc.

Fazl Ali J.

3. A point which was somewhat similar to the one raised before us arose in the case of *Sprigg* v. *Sigcau*(1). In that case, section 2 of the Pondoland Annexation Act, 1894, was brought into question. That section gave authority to the Governor to add to the existing laws in force in the territories annexed, such laws as he shall from time to time by Proclamation declare to be in force in such territories. Dealing with this Provision, the Privy Council observed as follows :—

"The legislative authority delegated to the Governor by the Pondoland Annexation Act is very cautiously expressed, and is very limited in its scope. There is not a word in the Act to suggest that it was intended to make the Governor a dictator, or even to clothe him with the full legislative powers of the Cape Parliament. His only authority, after the date of the Act, is to add to the laws, statutes and ordinances which had already been proclaimed and were in force at its date, such laws, statutes and ordinances as he 'shall from time to time by proclamation declare to be in force in such territories'. In the opinion of their Lordships, these words do not import any power in the Governor to make "new laws" in the widest sense of that term; they do no more than authorise him to transplant to the new territories, and enact there, laws, statutes and ordinances which already exist, and are operative in other parts of the Colony. It was argued for the appellant that the expression "all such laws made" occurring in the proviso, indicates authority to make new laws which are not elsewhere in force; but these words cannot control the plain meaning of the enactment upon which they are a proviso; and, besides that enactment is left to explain the meaning of the proviso by the reference back which is implied in the word "such". (pp. 247-8).

Following the line of reasoning in the case cited, it may be legitimately stated that what the Central or the Provincial Government has been asked to do under the Acts in question is not to enact "new laws" but "to transplant" to the territory concerned laws operative

(1) [1897] A.C. 238.

in other parts of the country. I notice that in section 2 of the Pondoland Annexation Act, 1894, there was a proviso requiring that "all such laws made under or by virtue of this Act shall be laid before both Houses of Parliament within fourteen days after the beginning of the Session of Parliament next after the proclamation thereof as aforesaid, and shall be effectual, unless in so far as the same shall be repealed, altered, or varied by Act of Parliament." This provision however does not affect the principle. It was made only as a matter of caution and to ensure the superintendence of Parliament, for the laws were good laws until they were repealed, altered or varied by Parliament. If the Privy Council have correctly stated the principle that the legislature in enacting subordinate or conditional legislation does not part with its perfect control and has the power at any moment of withdrawing or altering the power entrusted to another authority, its power of superintendence must be taken to be implicit in all such legislation. Reference may also be made here to the somewhat unusual case of *Dorr* v. *United States*(1), where delegation by Congress to a commission appointed by the President of the power to legislate for the Philippine Islands was held valid.

4. There are also some American cases in which the adopting of a law or rule of another jurisdiction has been permitted, and one of the cases illustrative of the rule is *Re Lasswell*(2), where a California Act declaring the existence of an emergency and providing that where the Federal authorities fixed a Code for the government of any industry, that Code automatically became the State Code therefor, and fixing a penalty or violation of such Codes, was held to be constitutional and valid, as against the contention that is was an unlawful delegation of authority by the State legislature to the Federal Government and its administrative agencies. This case has no direct bearing on the points before us, but it shows that application of laws made

(1) (1904) 195 U.S. 138. (2) (1934) 1 Cal. Appl (2d), 183.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

by another legislature has in some cases been held to be permissible.

5. There are many enactments in India, which are not without their parallel in England, in which it is stated that the provisions of the Act concerned shall apply to certain areas in the first instance and that they may be extended by the Provincial Government or appropriate authority to the whole or any part of a Province. The Transfer of Property Act, 1882, is an instance of such enactment, as section 1 thereof provides as follows :—

"It (the Act) extends in the first instance to all the Provinces of India except Bombay, East Punjab and Delhi.

But this Act or any part thereof may by notification in the official Gazette be extended to the whole or any part of the said Provinces by the Provincial Government concerned."

It is obvious that if instead of making similar provisions in 50 or more Acts individually, a single provision is made in any one Act enabling the Provincial Governments to extend all or any of the 50 or more Acts, in which provision might have been but has not been made for extension to the whole or any part of the Provinces concerned there would be no difference in principle between the two alternatives. It was pointed out to us that in the Acts with which we are concerned, power has been given to extend not only Acts of the Central Legislature, which is the author of the Acts in question, but also those of the Provincial Legislatures. But it seems to me that the distinction so made does not affect the principle involved. The real question is : Can authority be given by a legislature to an outside agency, to extend an Act or series of Acts to a particular area? This really brings us back to the principle of conditional legislation which is too deeply rooted in our legal system to be questioned now.

6. Our attention has been drawn to several Acts containing provisions similar to the Acts

which are the subject of the Reference, these being :—

1. Sections 1 and 2 of Act I of 1865.

2. Sections 5 and 5A of the Scheduled Districts Act, 1874 (Act XIV of 1874).

3. The Burma Laws Act, 1898 (Act XIII of 1898), section 10 (1).

4. Section 4 of the Foreign Jurisdiction Act, 1947 (Act XLVII of 1947).

5. The Merchant Shipping Laws (Extension to Acceding States and Amendment) Act, 1949 (Act XVIII of 1949), section 4.

The relevant provisions of two of these Acts, which were passed before the Acts in question may be quoted, to bring out the close analogy.

The Scheduled Districts Act, 1874.

5. "The Local Government, with the previous sanction of the Governor-General in Council, may, from time to time, by notification in the Gazette of India and also in the local Gazette (if any), extend to any of the Scheduled Districts, or to any part of any such District, any enactment which is in force in any part of British India at the date of such extension."

5A. In declaring an enactment in force in a Scheduled District or part thereof under section 3 of this Act, or in extending an enactment to a Scheduled District or part thereof under section 5 of this Act, the Local Government with the previous sanction of the Governor-General in Council, may declare the operation of the enactment to be subject to such restrictions and modifications as that Government think fit."

The Burma Laws Act, 1898.

10(1). "The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the Burma Gazette, extend, with such restrictions and modifications as it thinks fit, to all or any of the Shan States, or to any specified local arta in the Shan States, any enactment which is in force

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

in any part of Upper Burma at the date of the extension."

It is hard to say that any firm legislative practice had been established before the Delhi Laws Act and other Acts we are concerned with were enacted, but one may presume that the legislature had made several experiments before the passing of these Acts and found that they had worked well and achieved the object for which they were intended.

I will now deal with the power of modification which depends on the meaning of the words "with such modifications as it thinks fit." These are not unfamiliar words and they are often used by careful draftsmen to enable laws which are applicable to one place or object to be so adapted as to apply to another. The power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law, and in the context in which the provision as to modification occurs, it cannot bear the sinister sense attributed to it. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes. The provision empowering an extraneous authority to introduce modifications in an Act has been nicknamed in England as "Henry VIII clause", because that monarch is regarded popularly as the personification of executive autocracy. Sir Thomas Carr, who had considerable experience of dealing with legislation of the character we are concerned with, refers to "Henry VIII clause" in this way in his book "Concerning English Administrative Law" at page 44 :—

"Of all the types of orders which alter statutes, the so-called 'Henry VIII clause' sometimes inserted in big and complicated Acts, has probably caused the greatest flutter in England. It enables the Minister

by order to modify the Act itself so far as necessary for bringing it into operation. Any one who will look to see what sort of orders have been made under this power will find them surprisingly innocuous. The device is partly a draftsman's insurance policy, in case he has overlooked something, and is partly due to the immense body of local Acts in England creating special difficulties in particular areas. These local Acts are very hard to trace, and the draftsman could never be confident that he has examined them all in advance. The Henry VIII clause ought, of course, to be effective for a short time only."

It is to be borne in mind that the discretion given to modify a statute is by no means absolute or irrevocable in strict legal sense, with which aspect alone we are principally concerned in dealing with a purely legal question. As was pointed out by Garth C.J. in *Empress* v. *Burah*(1), the legislature is "always in a position to see how the powers, which it has conferred, are being exercised, and if they are exercised injudiciously, or otherwise than in accordance with its intentions, or if, having been exercised, the result is in any degree inconvenient, it can always by another Act recall its powers, or rectify the inconvenience." The learned Chief Justice, while referring to the Civil Procedure Code of 1861, pointed out that it went further than the Act impugned before him, because "it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so as to introduce a different law into their respective Provinces from that which was in force in the Regulation Provinces." Nevertheles, the Privy Council considered the Civil Procedure Code of 1861 to be a good example of valid conditional legislation. In the course of the arguments, we were supplied with a list of statutes passed by the Central and some of the Provincial Legislatures giving express power of modification to certain authorities, and judging from the number of instances included in it, it is not an unimpressive list. A few of the Acts which may be mentioned by

(1) I.L.R. 5 Cal. 63 at 140.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

way of illustration are:—The Scheduled Districts Act, 1874, The Burma Laws Act, 1898, The Bombay Prevention of Prostitution Act, 1923, The Madras City Improvement Trust Act, 1945, The Madras Public Health Act, 1939, U. P. Kand Revenue Act, 1901. There are also many instances of such legislation in England, of which only a few may be mentioned below to show that such Acts are by no means confined to this country.

In 1929, a Bill was proposed to carry out the policy of having fewer and bigger local authority in Scotland. During the debate, it was suddenly decided to create a new kind of body called the district council. There was no time to work out details for electing the new district councillors, and the Bill therefore applied to them the statutory provisions relating to the election of country councillors in rural areas "subject to such modifications and adaptations as the Secretary of State may by order prescribe."

In 1925, the Parliament passed the Rating and Valuation Act, and section 67 thereof provided that if any difficulty arose in connection with its application to any exceptional area, or the preparation of the first valuation list for any area, the Minister "may by order remove the difficulty." It was also provided that "any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the order into effect."

In 1929, a new Local Government Bill was introduced in Parliament, and section 120 thereof provided that "the Minister may make such order for removing difficulties as he may judge necessary.....and any such order may modify the provisions of this Act."

Section 1(2) of the Road Transport Lighting Act, 1927, provided that "the Minister of Transport may exempt wholly or partially, vehicles of particular kinds from the requirements of the Act," and sub-section (3) empowered him to "add to or vary such requirements" by regulations.

By section 1 of the Trade Boards Act, 1918, "the Minister of Labour may, by special order, extend the provisions of the Trade Boards Act, 1909, to new trades.....and may alter or amend the Schedule to the Act."

The Unemployment Insurance Act, 1920, by section 45 provided that "if any difficulty arises with respect to the constitution of special or supplementary schemes.....the Minister of Labour.....may by order do anything which appears to him to be necessary or expedient.....and any such order may modify the provisions of this Act.....".

Similar instances may be multiplied, but that will serve no useful purpose. The main justification for a provision empowering modifications to be made, is said to be that, but for it, the Bills would take longer to be made ready, and the operation of important and wholesome measures would be delayed, and that once the Act became operative, any defect in its provisions cannot be removed until amending legislation is passed. It is also pointed out that the power to modify within certain circumscribed limits does not go as far as many other powers which are vested by the legislature in high officials and public bodies through whom it decides to act in certain matters. It seems to me that it is now too late to hold that the Acts in question are *ultra vires,* merely because, while giving the power to the Government to extend an Act, the legislatures have also given power to the Government to subject it to such modifications and restrictions as it thinks fit. It must, however, be recognised that what is popularly known as the "Henry VIII clause" has from time to time provoked unfavourable comment in England, and the Committee on Ministers' Powers, while admitting that it must be occasionally used, have added: ".... we are clear in our opinion, first, that the adoption of such a clause ought on each occasion when it is, on the initiative of the Minister in charge of the Bill, proposed to Parliament to be justified by him upto the essential. It can only be essential for the limited purpose of

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machinery arrangements vitally requisite for that purpose; and the clause should always contain a maximum time limit of one year after which the powers should lapse. If in the event the time limit proves too short—which is unlikely—the Government should then come back to Parliament with a one clause Bill to extend it." It may also be stated that in England "delegated legislation" often requires the regulations or provisions made by the delegate authority to be laid before the Parliament either in draft form or with the condition that they are not to operate till approved by Parliament or with no further direction. The Acts before us are certainly open to the comment that this valuable safeguard has not been observed, but it seems to me that however desirable the adoption of this safeguard and other safeguards which have been suggested from time to time may be, the validity of the Acts, which has to be determined on purely legal considerations, cannot be affected by their absence.

I will now deal with section 2 of the Part C States (Laws) Act, 1950, in so far as it gives power to the Central Government to make a provision in the enactment extended under the Act for the repeal or amendment of any corresponding law which is for the time being applicable to the Part C State concerned. No doubt this power is a far-reaching and unusual one, but, on a careful analysis, it will be found to be only a concomitant of the power of transplantation and modification. If a new law is to be made applicable, it may have to replace some existing law which may have become out of date or ceased to serve any useful purpose, and the agency which is to apply the new law must be in a position to say that the old law would cease to apply. The nearest parallel that I can find to this provision, is to be found in the Church of England Assembly (Powers) Act, 1919. By that Act, the Church Assembly is empowered to propose legislation touching matters concerning the Church of England, and

the legislation proposed may extend to the repeal or amendment of Acts of Parliament including the Church Assembly Act itself. It should however be noticed that it is not until Parliament itself gives it legislative force on an affirmative address of each House that the measure is converted into legislation. There is thus no real analogy between that Act and the Act before us. However, the provision has to be upheld, because, though it goes to the farthest limits, it is difficult to hold that it was beyond the powers of a legislature which is supreme in its own field; and all we can say is what Lord Hewart said in *King* v. *Minister of Health*(1), namely, that the particular Act may be regarded as "indicating the high water-mark of legislative provisions of this character," and that, unless the legislature acts with restraint, a stage may be reached when legislation may amount to abdication of legislative powers.

Before I conclude, I wish to make a few general observations here on the subject of "delegated legislation" and its limits, using the expression once again in the popular sense. This form of legislation has become a present-day necessity, and it has come to stay—it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details, and sometimes the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again, when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self-contained and complete Act straightaway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Thus, some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enable the delegate authority

(1) [1927] 2 K.B. 229 at 236.

1951

In re The Delhi Laws Act, 1912, etc.

Fazl Ali J.

to consult interests likely to be affected by a particular law, make actual experiments when necessary, and utilize the results of its investigations and experiments in the best way possible. There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with the various situations as they arise. There are examples in the Statute books of England and other countries, of laws, a reference to which will be sufficient to justify the need for delegated legislation. The British Gold Standard (Amendment) Act, 1931, empowered the Treasury to make and from time to time vary orders authorising the taking of such measures in relation to the Exchanges and otherwise as they may consider expedient for meeting difficulties arising in connection with the suspension of the Gold Standard. The National Economy Act, 1931, of England, empowered "His Majesty to make Orders in Council effecting economies in respect of the services specified in the schedule" and proved that the Minister designated in any such Order might make regulations for giving effect to the Order. The Foodstuffs (Prevention of Exploitation) Act, 1931, authorised the Board of Trade to take exceptional measures for preventing or remedying shortages in certain articles of food and drink. It is obvious that to achieve the objects which were intended to be achieved by these Acts, they could not have been framed in any other way than that in which they were framed. I have referred to these instances to show that the complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. But while emphasizing that delegation is in these days inevitable, one should not omit to refer to the dangers attendant upon the injudicious exercise of the power of delegation by the legislature. The dangers involved in defining the delegated power so loosely that the area it is intended to cover cannot be clearly ascertained, and in giving

wide delegated powers to executive authorities and at the same time depriving a citizen of protection by the courts against harsh and unreasonable exercise of powers, are too obvious to require elaborate discussion.

For the reasons I have set out, I hold that none of the provisions which are the subject of the three questions referred to us by the President is *ultra vires* and I would answer those questions accordingly.

Patanjali Sastri J.

PATANJALI SASTRI J.—The President of India by an order, dated the 7th January, 1951, has been pleased to refer to this Court, under article 143(1) of the Constitution, for consideration and report the following questions :

1. Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the legislature which passed the said Act?

2. Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the legislature which passed the said Act?

3. Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Parliament?

The reasons for making the reference are thus set out in the letter of reference :

"And whereas the Federal Court of India in *Jatindra Nath Gupta* v. *The Province of Bihar*(1) held by a majority that the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, was *ultra vires* the Bihar Legislature *inter alia* on the ground that the said proviso conferred power on the Provincial Government to modify an act of the Provincial Legislature and thus amounted to a delegation of legislative power;

And whereas as a result of the said decision of the Federal Court, doubts have arisen regarding

(1) [1949-50] F.C.R. 595.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

the validity of section 7 of the Delhi Laws Act, 1912, section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and section 2 of the Part C States (Laws) Act, 1950, and of the Acts extended to the Provinces of Delhi and Ajmer-Merwara and various Part C States under the said sections respectively, and of the orders and other instruments issued under the Acts so extended;

And whereas the validity of section 7 of the Delhi Laws Act, 1912, and section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and of the Act extended by virtue of the powers conferred by the said sections has been challenged in some cases pending at present before the Punjab High Court, the Court of the Judicial Commissioner of Ajmer, and the District Court and the Subordinate Courts in Delhi."

The provisions referred to above are as follows :—

Section 7 of the Delhi Laws Act, 1912 :

The Provincial Government may, by notification in the official Gazette, extend with such restrictions and modifications as it thinks fit to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947 :

"*Extension of enactments to Ajmer-Merwara.*—The Central Government may, by notification in the official Gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification.

Section 2 of the Part C States (Laws) Act, 1950 :

"*Power to extend enactments to certain Part C States.*—The Central Government may, by notification in the official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any

enactment which is in force in a Part A State at the date of the notification; and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

The Central Legislature, which enacted these provisions, had, at all material times, the power to make laws itself for the designated territories. But, instead of exercising that power, it empowered the Provincial Government in the first-mentioned case, and the Central Government in the others, to extend, by notification in the official Gazette, to the designated territories laws made by Provincial Legislatures all over India for territories within their respective jurisdiction. The principal features of the authority thus delegated to the executive are as follows :

(1) The laws thus to be extended by the executive are laws made not by the delegating authority itself, namely, the Central Legislature, but by different Provincial Legislatures for their respective territories.

(2) In extending such laws the executive is to have the power of restricting or modifying those laws as it thinks fit.

(3) The law to be extended is to be a law in force at the time of the notification of extension, that is to say, the executive is empowered not only to extend laws in force at the time when the impugned provisions were enacted, which the Central Legislature could be supposed to have examined and found suitable for extension to the territories in question, but also laws to be made in future by Provincial Legislatures for their respective territories which the Central Legislature could possibly have no means of judging as to their suitability for such extension.

(4) The power conferred on the executive by the enactments referred to in Question No. 3 is not only to extend to the designated territories laws made by other legislatures but also to repeal or amend any corresponding law in force in the designated territories.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

The question is: Was the delegation of such sweeping discretionary power to pick and choose laws made by other legislatures to operate elsewhere and to apply them to the territories in question within the competence of the Central Legislature?

In *Jatindra Nath Gupta* v. *The Province of Bihar*(1), which has led to this reference, the Federal Court of India held by a majority (Kania C. J., Mahajan and Mukherjea JJ.) that the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1937, purporting to authorise the Provincial Government, on certain conditions which are not material here, to extend by notification, the operation of the Act for a further specified period after its expiry with or without modifications amounted to a delegation of legislative power and as such was beyond the competence of the legislature. The decision proceeded to some extent on the concession by counsel that delegation of legislative power was incompetent though it must be admitted there are observations in the judgments of their Lordships lending the weight of their authority in support of that view. Fazl Ali J. in a dissenting judgment held that the power to extend and the power to modify were separate powers and as the Provincial Government had in fact extended the operation of the Act without making any modification in it, the proviso operated as valid conditional legislation. While agreeing with the conclusion of the majority that the detention of the petitioners in that case was unlawful, I preferred to rest my decision on a narrower ground which has no relevancy in the present discussion. In the light of the fuller arguments addressed to us in the present case, I am unable to agree with the majority view.

The Attorney-General, appearing on behalf of the President vigorously attacked the majority view in *Jatindra Nath Gupta's case*(1) as being opposed alike to sound constitutional principles and the weight of authority. He cited numerous decisions of the Privy

(1) [1949-50] F.C.R. 595.

Council and of the American, Australian and Canadian Courts and also called attention to the views expressed by various writers on the subject in support of his contention that legislative power involves as part of its content a power to delegate it to other authorities and that a legislative body empowered to make laws on certain subjects and for a certain territory is competent, while acting within its appointed limits, to delegate the whole of its legislative power to any other person or body short of divesting itself completely of such power.

It is now a commonplace of constitutional law that a legislature created by a written constitution must act within the ambit of its powers as defined by the constitution and subject to the limitations prescribed thereby and that every legislative act done contrary to the provisions of the constitution is void. In England no such problem can arise as there is no constitutional limitations on the powers of Parliament, which in the eye of the law, is sovereign and supreme. It can, by its *ordinary* legislative procedure, alter the constitution, so that no proceedings passed by it can be challenged on constitutional grounds in a court of law. But India, at all material times,—in 1912, 1947 and 1950 when the impugned enactments were passed—had a written constitution, and it is undoubtedly the function of the courts to keep the Indian legislatures within their constitutional bounds. Hence, the proper approach to questions of constitutional validity is "to look to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the affirmative words which gave the power and if it violates no express condition or restriction by which the power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it) it is not for any court of justice to inquire further or to enlarge constructively those conditions and restrictions.": *Empress* v. *Burah*(1). We

(1) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

have, therefore, to examine whether the delegation of authority made in each of the impugned enactments is contrary to the tenor of the constitution under which the enactment itself was passed. No provision is to be found in the relevant constitutions authorising or prohibiting in express terms the delegation of legislative power. Can a prohibition against delegation be derived inferentially from the terms of the constitution and, if so, is there anything in those terms from which such a prohibition can be implied?

Before examining the relevant constitutions to find an answer to the question, it will be useful to refer to the two main theories of constitutional law regarding what has been called delegated legislation. Though, as already explained, no question of constitutionality of such legislation could arise in England itself, such problems have frequently arisen in the British commonwealth countries which have written constitutions, and British Judges, trained in the tradition of parliamentary omnipotence, have evolved the doctrine that every legislature created by an Act of Parliament, though bound to act within the limits of the subject and area marked out for it, is while acting within such limits, as supreme and sovereign as Parliament itself. Such legislatures are in no sense delegates of the Imperial Parliament and, therefore, the maxim *delegatus non potest delegare* is not applicable to them. A delegation of legislative functions by them, however extensive, so long as they preserve their own capacity, cannot be challenged as unconstitutional. These propositions were laid down in no uncertain terms in the leading case of *Hodge* v. *Queen*(1) decided by the Privy Council in 1883. Upholding the validity of an enactment by a Provincial Legislature in Canada whereby authority was entrusted to a Board of Commissioners to make regulations in the nature of bylaws or municipal regulations for the good government of taverns and thereby to create offences and annex penalties thereto, their Lordships observed as follows:

(1) 9 App. Cas. 117.

"It was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on. It appears to their Lordships, however, that the objection thus raised by the appellant is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme .....It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it can seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."(1)

Here is a clean enunciation of the English doctrine of what may be called "supremacy within limits" that is to say, within the circumscribed limits of its legislative power, a subordinate legislature can do what the Imperial Parliament can do, and no constitutional limit on its power to delegate can be imported

(1) 9 App. Cas. 117, 131.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

on the strength of the maxim *delegatus non potest delegare,* because it is not a delegate. The last few words of the quotation are significant. They insist, as does the passage already quoted from *Burah's* case(1), that the scope of the enquiry when such an issue is presented to the court is strictly limited to seeing whether the legislature is acting within the bounds of its legislative power. The remarks about "authority ancillary to legislation" and "abundance of precedents for this legislation entrusting a limited descretionary authority to others" have, obviously, reference to the particular authority delegated on the facts of that case which was to regulate taverns by issuing licences, and those remarks cannot be taken to detract from or to qualify in any way the breadth of the general principles so unmistakably laid down in the passages quoted.

The same doctrine was affirmed in *Powell* v. *Apollo Candle Co. Ltd.*(2), where, after referring to *Burah's* case(1) and *Hodge's* case(3), their Lordships categorically stated: "These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate." An objection that the legislature of New South Wales alone had power to impose the tax in question and it could not delegate that power to the Governor, was answered by saying "But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him"(4).

If *Hodge's* case(3) did not involve an extensive delegation of legislative power, *Shannon's* case(5) did.

(1) 5 I.A. 178.
(2) 10 App. Cas. 282.
(3) 9 App. Cas. 117
(4) 10 App. Cas. 282, 291.
(5) [1938] A.C. 708.

A provincial legislature in Canada had passed a compulsory Marketing Act providing for the setting up of Marketing Boards but leaving it to the Government to determine what powers and functions should be given to those Boards. One of the objections raised to the legislation was that it was only a "skeleton of an Act" and that the legislature had practically "surrendered its legislative responsibility to another body." Lord Haldane's dictum in what is known as the *Referendum* case(1) (to which a more detailed reference will be made presently) suggesting a doubt as to a provincial legislatures power to "create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence" was cited in support of the objection. The objection, however, was summarily repelled without calling upon Government counsel for an answer. Their Lordships contended themselves with reiterating the English doctrine of "plenary powers of delegation within constitutional limits" and said: "This objection appears to their Lordships subversive of the rights which the provincial legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the provincial legislature is as supreme as any other parliament .....Martin C. J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he there said." What Martin C. J. said is to be found in *Re Natural Products Marketing (B.C.) Act*(2). He said "I shall not, however, persue at length this subject (delegation of legislative powers) because, to use the language of the Privy Council in *Queen* v. *Burah*(3), 'The British Statute book abounds with examples of it' and a consideration for several days of our early and late 'statute book' discloses such a surprising number of delegations to various persons and bodies in all sorts of subject-matters that it would

(1) [1919] A.C. 935. (3) 3 App. Cas. 889, 906.
(2) (1937) 4 D.L.R. 298, 310.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

take several pages even to enumerate them, and it would also bring about a constitutional debacle to invalidate them. I must, therefore, content myself by selecting four statutes only." The learned Judge then proceeded to refer, among others, to a statute whereby "*carte blanche* powers were delegated over affected fruit lands areas to cope with a pest", and to another "whereby power was conferred upon the Lieutenant-Governor in Council to make rules of the widest scope" and the first importance in our system of jurisprudence whereby our whole civil practice and procedure, appellate and trial, are regulated and constituted to such an extent that even the sittings we hold are thereto subjected".

This recent pronouncement of the Privy Council on the English view of the delegability of legislative power is, in my opinion, of special interest for the following reasons :—

(1) The case involved such an extensive delegation of legislative power—counsel thought the "limit" had been reached—that it squarely raised the question of the constitutional validity of surrender or abdication of such power and Lord Haldane's dictum in the *Referendum* case(1) was relied upon.

(2) Nevertheless, the objection was considered so plainly unsustainable that Government counsel was not called upon to answer, their Lordships having regarded the objection as "subversive" of well-established constitutional principles.

(3) Martin C.J.'s instances of "*carte blanche* delegation" were approved and were considered as disposing of the objection "very satisfactorily."

(4) All that was considered necessary to repeal the objection was a plain and simple statement of the English doctrine, namely, within its appointed sphere the provincial legislature was as supreme as any other Parliament, or, in other words, as there can be no legal limit to Parliament's power to delegate, so can there

(1) [1919] A.C. 935.

be none to the power of the provincial legislature to delegate legislative authority to others.

Thus, the English approach to the problem of delegation of legislative power is characterised by a refusal to regard legislation by a duly constituted legislature as exercise of a delegated power, and it emphatically repudiates the application of the maxim *delegatus non potest delegare*. It recognises the sovereignty of legislative bodies within the limits of the constitutions by which they are created and concedes plenary powers of delegation to them within such limits. It regards delegation as a revokable entrustment of the power to legislate to an appointed agent whose act derives its validity and legal force from the delegating statute and not as a relinquishment by the delegating body of its own capacity to legislate.

On the other hand, the American courts have approached the problem along wholly different lines, which are no less the outcome of their own environment and tradition. The American political scene in the eighteenth century was dominated by the ideas of Montesque and Locke that concentration of legislative executive and judicial powers in the hands of a single organ of the State spelt tyranny, and many State constitution had explicitly provided that each of the great departments of State, the legislature, the executive and the judiciary, shall not exercise the powers of the others. Though the Federal Constitution contained no such explicit provision, it was construed, against the background of the separatist ideology, as embodying the principle of separation of powers, and a juristic basis for the consequent non-delegability of its power by one of the departments, to the others was found in the old familiar maxim of the private law of agency *delegatus non potest delegare* which soon established itself as a traditional dogma of American constitutional law. But the swift progress of the nation in the industrial and economic fields and the resulting complexities of administration forced the realisation on the American Judges of the unavoidable necessity for

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

large-scale delegation of legislative powers to administrative bodies, and it was soon recognised that to deny this would be "to stop the wheels of government." The result has been that American decisions on this branch of the law consist lergely of attempts to disguise delegation "by veiling words" or "by softening it by a *quasi*" (per Holmes J. *in Springer* v. *Government of the Philipine Islands*(1). "This result", says a recent writer on the subject, "is well put in Prof. Cushman's syllogism—

Major premise : Legislative power cannot be constitutionally delegated by Congress.

Minor premise : It is essential that certain powers be delegated to administrative officers and regulatory commissions.

Conclusion : Therefore the powers thus delegated are not legislative powers."

They are instead "administrative" or "quasi-legislative"—(American Administrative Law by Bernard Schwartz, p. 20). After considerable confusion and fluctuation of opinion as to what are "essentially" legislative powers which cannot be delegated and what are mere "administrative" or "ancillary" powers, the delegation of which is permissible, the recent decisions of the Supreme Court would seem to place the dividing line between laying down a policy or establishing a standard in respect of the subject legislated upon the one hand and implementing that policy and enforcing that standard by appropriate rules and regulations on the other : (*vide Schechter Poultry Corpn.* v. *United States*(2) *and Panama Refining Co.* v. *Ryan*(3), a test which inevitably gives rise to considerable divergence of judicial opinion as applied to the facts of a given case.

I will now turn to the questions in issue. The first question which relates to the validity of section 7 of the Delhi Laws Act, 1912, has to be determined with reference to the competency of "the legislature which

(1) 277 U.S. 189.
(2) 295 U.S. 495.
(3) 293 U.S. 388.

passed the said Act", that is, with reference to the constitution then in force. It may be mentioned here that the Delhi Laws Act, 1912, as well as the Ajmer-Merwara (Extension of Laws) Act, 1947, to which the second question relates, were repealed by section 4 of the Part C States (Laws) Act, 1950, but the Acts already extended under the repealed provisions have been continued in force, and hence the necessity for a pronouncement on the constitutional validity of the repealed provisions.

In 1912 the Indian Legislature was the Governor-General in Council, and his law-making powers were derived from section 22 of the Indian Councils Act, 1861 (24 and 25 Vic. Ch. 7) which conferred power "to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty and to make laws and regulations for all persons whether British or native, foreigners or others, and for all courts of justice whatever and for all places and things whatever within the said territories," subject to certain conditions and restrictions which do not affect the impugned provisions. The composition and powers of the Governor-General in Council were altered in other respects by the Councils Acts of 1892 and 1909, but his law-making powers remained essentially the same in 1912. The question accordingly arises whether section 7 of the Delhi Laws Act, 1912, was within the ambit of the legislative powers conferred on him by section 22 of the Indian Councils Act, 1861. As the power is defined in very wide terms—"for all person....and for all places and things whatever"—within the Indian territories—the issue of competency reduces itself to the question whether section 7 was a "law" within the meaning of section 22 of the Indian Councils Act of 1861. This question is, in my opinion, concluded by the decision of the Privy Council in *Empress* v. *Burah*(1).

(1) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, *etc.*

Patanjali Sastri J.

That was an appeal by the Government from a judgment of the majority of a Full Bench of the Calcutta High Court holding that section 8 and 9 of Act XXII of 1869 were *ultra vires* the Governor-General in Council as being an unauthorised delegation of legislative power to the Lieutenant-Governor of Bengal. The combined effect of those provisions was to authorise the Lieutenant-Governor to extend to certain districts by notification in the Calcutta Gazette "any law or any portion of any law now in force in the other territories subject to his government or which may hereafter be enacted by the Council of the Governor-General or of the said Lieutenant-Governor, for making laws and regulations.....". Markby J., who delivered the leading judgment of the majority, held (1) that section 9 amounted to a delegation of legislative authority to the Lieutenant-Governor by the Indian Legislature which, having been entrusted with such authority as a delegate of the Imperial Parliament, had no power in the turn to delegate it to another, and (2) the Indian Legislature could not "change the legislative machinery in India without affecting the provisions of the Acts of Parliament which created that machinery and if it does in any way affect them, then *ex consensu omnium* its Acts are void." The learned Judge referred to the argument of Government counsel, namely, "where Parliament has conferred upon a legislature the general power to make laws, the only question can be 'Is the disputed Act a law'. If it is, then it is valid unless it falls within some prohibition." The learned Judge remarked that this argument was "sound", but met it by holding that "it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, that is, to the making of laws, which (to use Blackston's expression) are rules of action prescribed by a superior to an inferior or of laws made in furtherance of those rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body.....The Legislative Council, when it merely grants permission

to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority"(1). The learned Judge rejected the argument based on previous legislative practice as the instances relied on were not "clear and undisputed instances of a transfer of legislative authority." Garth C.J. in his dissenting opinion pointed out that "by the Act of 1833 the legislative powers which were then conferred upon the Governor-General in Council were in the same language, and (for the purposes of the present case) to the same effect, as those given by the Councils Act in 1861; and from the time when that Act was passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose."(2) It could not therefore be supposed that "the Imperial Parliament would have renewed in the Councils Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing. The fact that with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in the Councils Act renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment that the course of action which had been pursued by the legislature in the exercise of those powers was one which the Act had authorised."(3) The learned Chief Justice accordingly came to the conclusion that Act XXII of 1869 was a law "which the legislature was justified in passing." I have referred at some length to the reasoning and conclusions of the learned judges in the High Court as I think they will be helpful in understanding the full import of the judgment of the Privy Council.

It will be seen, in the first place, that the line of approach adopted by Government counsel in the High

(1) I.L.R. 3 Cal. 63 at 90, 91.

(2) *Ibid*, 140.

(3) *Ibid* 144.

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

Court was endorsed by their Lordships as the correct approach to the problem, that is to say, the court has to see whether "what has been done is *legislation* within the general scope of affirmative words which give the power, and if it violates no *express* condition by which that power is limited it is not for any court to inquire *further* or to enlarge *constructively* those conditions and restrictions" (italics mine). This passage clearly lays down [what we have already seen was reiterated in *Hodge's* case(1)] : (1) that the scope of judicial review in such cases is limited only to determining whether the impugned enactment is within the law-making power conferred on the legislature and whether it violates any express condition limiting that power, and (2) that in determining the latter question the court should have regard only to *express* conditions and should not enlarge them inferentially by a process of interpretation. In the second place, their Lordships repudiated the doctrine [as they did also in respect of a provincial legislature in Canada in *Hodge's* case(1)] that the Indian Legislature is in any sense an agent or delegate of the Imperial Parliament, and that the rule against delegation by an agent applies to the situation. Thirdly, the distinction made by Markby J. between Parliament and the Indian Legislature that the latter is "restricted to the..... making of laws" in the sense defined by Blackstone, while Parliament was not so restricted, or, in other words, that while Parliament could make a "law" delegating its legislative power, the Indian Legislature could not make such a "law" was rejected, and the English doctrine of supremacy within limits was laid down specifically in regard to the Indian Legislature, which when acting within the limits circumscribing its legislative power "has and was intended to have *plenary* powers of legislation as large and of the *same nature* as those of Parliament itself" (italics mine). It must follow that it is as competent for the Indian Legislature to make a law delegating legislative power, both quantitatively and qualitatively, as it is for

(1) 9 App. Cas. 117.

Parliament to do so, provided, of course, it acts within the circumscribed limits. Fourthly, their Lordships "agree that the Governor-General in Council could not by any form of enactment create in India and arm with general legislative authority a new legislative power not created or authorised by the Councils Act. Nothing of that kind has in their Lordships' opinion been done or attempted in the present case."

Mr. Chatterjee, on behalf of the opposite party, submitted that the remark regarding the incompetency of the Governor-General in Council to create in India a new legislative power had reference to the subordnate agency or instrumentality to which the legislative authority was to be delegated and thus negatived the legislature's right to delegate. The context, however, makes it clear that their Lordships were expressing agreement on this point with Markby J. who, as we have seen, had stated that the Indian Legislature could not "change the legislative machinery in India without affecting the provisions of the Acts of Parliament which created that machinery." This shows that their Lordships were envisaging the setting up of a new legislative machinery not authorised by the Councils Act, that is, a new legislature in the sense in which the Central and Provincial Legislatures in the country were legislatures. While they agreed that that could not be done (because it would be a contravention of the Act of Parliament which confers no power to create such legislatures) their Lordships proceeded to point out that that was not what was done by the impugned Act and that Markby J. fell into an error in thinking that it was. Their Lordships gave two reasons, first, because "it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (No. XXII of 1869) itself." Here, indeed, their Lordships touch the core of the problem by indicating

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

the true nature of delegated legislation as distinct from creating a new legislative body. The point is developed to its logical consequence in later cases as will be seen presently, but here they expose to view the not uncommon "fallacy" of treating the one as of the same nature and as having constitutionally the same consequence as the other, a fallacy which perhaps accounts for much of the confusion of thought on the subject. It will be recalled that in *Hodge's* case(1) it was made clear that in delegated legislation the delegating body does not efface itself but retains its legislative power intact and merely elects to exercise such power through an agency or instrumentality of its choice. There is no finality about this arrangement, the delegating body being free to "destroy the agency it has created and set up another or take the matter directly into its own hands." In *Burah's* case(2) their Lordships emphatically stated one consequence of that view, namely, that the act done by the authority to which legislative power is delegated derives its whole force and efficacy from the delegating legislature, that is to say, when the delegate acts under the delegated authority, it is the legislature that really acts through its appointed instrumentality. On the other hand, in the creation of an new legislative body with general legislative authority and functioning in its own right, there is no delegation of power to subordinate units, but a grant of power to an independent and co-ordinate body to make laws operating of their own force. In the first case, according to English constitutional law, no express provision authorising delegation is required. In the absence of a constitutional inhibition, delegation of legislative power, however extensive, could be made so long as the delegating body retains its own legislative power intact. In the second case, a positive enabling provision in the constitutional document is required.

The second reason why their Lordships regarded the majority view as erroneous was that Act XXII of 1869 was, in truth, nothing more than conditional legislation

(1) 9 App. Cas. 117. (2) 5 I.A. 178

and there was no question of delegating legislative power. Their Lordships were of opinion that neither in fixing the time for commencement of the Act nor in enlarging the area of its operation was the Lieutenant-Governor exercising "an act of legislation." "The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

Their Lordships finally proceeded to refer to the legislative practice in this country of delegating to the executive government a discretionary power of extending enactments to new territories subject in certain cases to such "restriction, limitation or proviso" as the Government may think proper, and they expressed their approval of the reasoning of Garth C.J. based on such practice. "If their Lordships," they said "were to adopt the view of the majority of the High Court they would (*unless distinction were made on grounds beyond the competency of the judicial office*) *be casting* doubt upon the validity of a long course of legislation appropriate, as far as they can judge to the peculiar circumstances of India.....For such doubt their Lordships are unable to discover any foundation either in the affirmative or the negative words of that Act"

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

(Indian Councils Acts, 1861). The parenthetic remarks (which I have italicised) is significant. It is not competent for the court, according to their Lordships, to discriminate between degrees of delegation. It might be extensive in some cases and slight in others. Its validity must, however, be founded "on the affirmative or the negative words" of the Constitution Act.

Another logical consequence of the British theory of delegation has been worked out in *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*(1), where the question arose as to whether an order made by the Governor in Council pursuant to authority delegated by the Parliament of Canada was a law made by the Parliament of Canada within the meaning of the Statute of Westminster and, if so, whether it was such a law made after the passing of that Statute. The delegation of authority to the Governor was made before that Statute was passed but the Governor's order was promulgated after the Statute. Holding that the order was a "law" made by the Parliament of Canada *after* Statute of Westminster their Lordships observed: "Undoubtedly, the law as embodied in an order or regulation is made at the date when the power conferred by the Parliament of the Dominion is exercised. Is it made after that date by the Parliament of the Dominion? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor in Council has no independent status as a law-making body. The legislative activity of Parliament is still present at the time when the orders are made and these orders are "law". In their Lordships' opinion they are law made by the Parliament at the date of their promulgation."(2)

Mr. Chatterjee has urged that in *Burah's* case(3) the Privy Council did no more than hold that the type of legislation which their Lordships there called conditional legislation was within the competence of the

(1) [1947] A.C. 87.
(2) *Ibid.* 106-107.
(3) 5 I.A. 178.

Indian legislature and was valid, and that the considerations adverted to by their Lordships in upholding such legislation have no relevancy in determining the validity of the provisions impugned in the present case. It is true that the kind of legislation here in question does not belong to that category, for the operation of the impugned Acts is not made to depend upon the exercise of a discretion by an external authority, but it is not correct to say that *Burah's* case(1) has application only to facts involving conditional legislation. As I have endeavoured to show, it lays down general principles of far-reaching importance. It was regarded in *Powell's* case(2) referred to above as "laying down the general law" and as "putting an end" to the false doctrine that a subordinate legislature acts as an agent or a delegate.

Mr. Chatterjee next relied on the dictum of Lord Haldane in the *Referendum* case.(3) In that case their Lordships held that the Initiative and Referendum Act of Manitoba (Canada) was, in so far as it compelled the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he was the constitutional head and rendered him powerless to prevent it from becoming an actual law if approved by those voters, *ultra vires* the Provincial Legislature, as the power to amend the Constitution of the Province conferred upon that Legislature by the British, North America Act, 1867, excluded from its scope "the office of the Lieutenant-Governor". Lord Haldane, however, proceeded to make the following observations: "Section 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature and to that Legislature only. No doubt, a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*(4) the Legislature of Ontario was

(1) 5 I.A. 178.
(2) 10 App. Cas. 282.
(3) [1919] A.C. 935.
(4) 9 App. Cas. 117.

1951

In re The Delhi Laws Act, 1912 etc.

Patanjali Sastri J.

held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."(1)

Mr. Chatterjee submitted that the grave constitutional question, to which Lord Haldane drew attention, arose in the present case. I do not think so. The dictum, like the observation of Lord Selborne in *Burah's* case(2) regarding the power of the Governor-General in Council "to create in India and arm with general legislative authority a new legislative power," to which reference has been made, seems to envisage the unauthorised creation of a new legislature with an independent status as a law-making body, which, for reasons already indicated, is quite different from delegation of legislative power, and my remarks in connection with that observation equally apply here.

The only other decision of the Privy Council to which reference need be made is *King Emperor* v. *Benoari Lal Sarma.*(3) It was an appeal from a judgment of the majority of the Federal Court of India (reported in [1943] F.C.R. 96) holding, *inter alia,* that sections 5, 10 and 16 of the Special Criminal Courts Ordinance (No. II of 1942) passed by the Governor-General in exercise of his emergency powers were *ultra vires* and invalid. The ground of decision was that although the powers of the High Court were taken away in form by section 26 of the Ordinance, they were, in fact, taken away by the order of the executive officer to whom it was left by sections 5, 10 and 16 to direct what offences or classes of offences and what cases or classes of cases should be tried by the special courts established under the Ordinance. In so far as these sections thus purported to confer on the executive officers absolute and uncontrolled discretion without any legislative provision or direction laying down

(1) [1919] A.C. 935, 945. (2) 5 I.A. 178. (3) 72 I.A. 57.

the policy or conditions with reference to which that power was to be exercised, they were beyond the competence of the Governor-General. Varadachariar C.J., with whom Zafrulla Khan J. concerned, went elaborately into the whole question of delegation of legislative powers, and while conceding, in view of the Privy Council decisions already referred to, that the Governor-General (whose legislative power in emergencies was co-extensive with that of the Indian Legislature) could not be regarded as a delegate of the Imperial Parliament and that, therefore, the maxim *delegatus non potest delegare* had no application, nevertheless expressed the opinion that "there is nothing in the above decisions of their Lordships that can be said to be inconsistent with the principle laid down in the passage from the American authority which the Advocate-General of India proposed to adopt as his own argument." That principle was this: The true distinction is between the delegation of power to make the law, which necessarily involves a decretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done, to the latter no valid objection can be made" (per Judge Ranney of the Supreme Court of Ohio, often cited in American decisions). The learned Chief Justice then proceeded to examine the American decisions bearing upon the delegation of powers and the opinions expressed by writers on administrative law and came to the following conclusion :—

"As we have already observed, the considerations and safeguard suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under Constitutions like the Indian and the American. where the constitutionality of legislation is examinable in a court of law, these considerations are, in our opinion, an integral and essential part of the limitation on the extent of delegation of responsibility by the legislature to the executive. In the present case, it is impossible to deny that the Ordinance-making

1951

In re The Delhi Laws Act, 1912 etc.

Patanjali Sastri J.

authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary criminal courts and to the special courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the law—as counsel for the Crown would make it appear —but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the executive authorities by sections 5, 10 and 16 of the Ordinance."(1)

I have set out at some length the reasoning and conclusion of the learned Chief Justice because it summarises and accepts most of what has been said before us by Mr. Chatterjee, in support of his contention that the American rules as to delegation of legislative powers should be followed in this country in preference to views of English Judges on the point and that the delegation of a too wide and uncontrolled power must be held to be bad. The Privy Council, however, rejected the reasoning and conclusion of the majority of the Court in a clear and emphatic pronouncement. Their Lordships scouted the idea that what might be no more than considerations of policy or expediency under the British Constitution could, in India, as in America, become constitutional limitations on the delegation of legislative responsibility merely because the constitutionality of legislation was open to judicial review under the constitution of this country. They said: "With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the ordinance by which he is purporting to exercise that authority"—the old traditional approach. "It

(1) [1943] F.C.R. 96, 139-140.

may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame as a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime ; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian constitution to render invalid a statute, whether passed by the Central legislature or under the Governor-General's emergency powers, which does not accord with this principle..... There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of courts should rest with an executive authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India."(1)

The English doctrine of supremacy within limits is here asserted once again, and its corollary is applied as the determining test: "What the British Parliament could do, the Indian legislature and the Governor-General legislating within their appointed sphere could also do." There was here a delegation of an "unguided and uncontrolled" discretionary power affecting the liberty of the subject. In the language of an American Judge, it was "unconfined and vagrant" and was not "canalised within banks that kept it from over-flowing :" (per Cardozo J. in *Panama Refining Co. v. Ryan.*(2) Yet, the delegation was upheld. Why? Because "their Lordships are unable to find any such constitutional limitation is imposed."

There is, however, a passage in the judgment of their Lordships, which, torn from its context, may appear, at first blush, to accept the maxim of *delegatus non potest delegare* as a principle of English constitutional law, notwithstanding its consistent repudiation by the same tribunal in the previous decisions already

(1) 72 I.A. 57, 70-72. (2) 293 U.S. 388.

1951

In re The Delhi Laws Act, 1912 *etc.*

Patanjali Sastri J.

referred to, and Mr. Chatterjee was not slow to seize on it as making a veering round to the American point of view. I do not think that their Lordships meant anything so revolutionary. The passage is this: "It is undoubtedly true that the Governor-General, *acting under* section 72 of Schedule IX, must himself discharge the duty of legislation *there cast on him*, and cannot transfer it to other authorities"(1) (italics mine). This was said, however in answering the "second objection" which was that section 1 (3) of the Ordinance "amounted to what was called delegated legislation by which the Governor-General, without legal authority, sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself." Now, the opening words of section 72 of Schedule IX of the Government of India Act declare: "The Governor-General may, in case of an emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof." The ordinance was thus passed avowedly in exercise of a special power to legislate to meet an emergency, and the argument was that the very basis of this ordinance-making power must be an exercise of personal judgment and discretion by the Governor-General which he could not delegate to the Provincial Government or its officers. Their Lordships accepted the major premise of this argument but went on to point out that there was no delegation of his legislative power by the Governor-General at all and that "what was done is only conditional legislation." It was with reference to this special ordinance-making power to meet emergencies that their Lordships said that the Governor-General must himself exercise it and could not transfer it to other authorities. The words "acting under section 72 of Schedule IX" and "there cast on him" make their meaning clear, and the passage relied on by Mr. Chatterjee lends no support to his argument regarding the non-delegability of legislative power in general.

In the light of the authorities discussed above and adopting the line of approach laid down there, I am

of opinion that section 7 of the Delhi Laws Act, 1912, fell within the general scope of the affirmative words of section 22 of the Indian Councils Act, 1861, which conferred the law-making power on the Governor-General in Council and that the provision did not violate any of the clauses by which, negatively, that power was restricted.

The same line of approach leads me to the conclusion that section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, was also constitutional and valid. This Act was passed by the Dominion Legislature of India, and the governing constitutional provision was section 99(1) of the Government of India Act, 1935. The Indian Independence Act, 1947, authorised the removal of certain restrictions on the law-making powers of the Central Legislature and section 108 of the Constitution Act was omitted; but the material words in section 99 (1) which granted the legislative power remained the same, namely, "may make laws for the whole or any part of the Dominion." No doubt, as between the Dominion and the Provinces there was a distribution of legislative power according to the Lists in Schedule VII, but such distribution did not affect the power of the Dominion Legislature to make laws for what are known as Chief Commissioners' Provinces, of which Ajmer-Merwara is one. This was made clear by section 100 (4) read with section 46. Section 2 of the impugned Act was, therefore a "law" which the Dominion Legislature was competent to make and the restrictive words "subject to the provisions of this Act" had no application to the case, as no provision was brought to our notice which affected the validity of the law.

There was some discussion as to the scope and meaning of the words "restrictions" and "modifications". It was suggested by Mr. Chatterjee that these words occurring in the impugned provisions would enable the executive authority to alter or amend any law which it had decided to apply to the territories in question and that a power of such undefined amplitude could not be validly delegated by the legislature. On

1951

In re The Delhi Laws Act, 1912 etc.

Patanjali Sastri J.

the other hand, the Attorney-General submitted that in such context "modification" was usually taken to connote "making a change without altering the essential nature of the thing changed," and that the use of the word would make no difference to the delegability or otherwise of the legislative power. He drew attention to an instance mentioned by the Privy Council in *Burah's* case, where their Lordships thought that the power given to the local government by Act XXIII of 1861 to extend the Civil Procedure Code of 1859 "subject to any restriction, limitation or proviso" which it may think proper was not bad. In the view I have expressed above, however wide a meaning may be attributed to the expression, it would not affect the constitutionality of the delegating statute, because no constitutional limitation on the delegation of legislative power to a subordinate unit is to be found in either of the constitutions discussed above. That, I apprehend is also the reason why the Privy Council too attached no importance to the words in section 39 of Act XXIII of 1861 referred to above.

Turning next to section 2 of the Part C States (Laws) Act, 1950, it is framed on the same lines as the other two impugned provisions save for the addition of a clause empowering repeal or amendment of any corresponding law (other than a Central Act) which is for the time being in force in the State. This additional clause, however, need not detain us, for, if there is no constitutional inhibition against delegation of legislative power under the present Constitution, delegation can as well extend to the power of repeal as to the power of modification and the Court cannot hold such delegation to be *ultra vires*. The Constitutional validity of the additional clause thus stands or falls with that of the first part of the section and the only question is: What is the position in regard to delegated legislation under the present Constitution? Here we do not have the advantage of Privy Council decisions bearing on the question as we had in *Burah's* case(1) on the Indian Councils Act, 1861, and *Benoari Lal*

(1) 5 I.A. 178.

Sarma's case(1) on the Government of India Act, 1935. But the line of approach laid down in those cases and in numerous others, to which reference has been made, must be followed, not because of the binding force of those decisions, but because it is indubitably the correct approach to problems of this kind. Indeed, there is no difference between the English and the American decisions on this point. In both countries it is recognised that the correct way of resolving such problems is to look to the terms of the constitutional instrument, and to find out whether the impugned enactment falls within the ambit of the law-making power conferred on the legislature which passed the enactment and, if so, whether it transgresses any restrictions and limitations imposed on such power. If the enactment in question satisfies this double test, then it must be held to be constitutional.

We therefore begin by looking to the terms of the Constitution and we find that article 245 confers law-making power on Parliament in the same general terms as in the other two cases discussed above. The article says "subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India....." Then we have the scheme of distribution of legislative powers worked out in article 246 as between Parliament and the legislatures of the States specified in Part A and Part B of the First Schedule, which, however, does not affect the question we have to determine, for article 246(4), like section 100 (4) of the Government of India Act, 1935, provides that Parliament has power to make laws with respect to any matter for any part of the territory of India not included in Part A or Part B notwithstanding that such matter is a matter enumerated in the State List.

The position, therefore, is substantially similar to that under the Indian Councils Act, 1861, and the Government of India Act, 1935, so far as the words conferring law-making power are concerned. Is then this impugned enactment, which merely purports to

(1) 72 I.A. 57.

1951

In re The Delhi Laws Act, 1912, etc.

Patañjali Sastri J.

delegate law-making power to the Central Government for Part C States, a "law" within the meaning of article 245(1) ? There can be no question but that the Act was passed by Parliament in accordance with the prescribed legislative procedure, and I can see no reason why it should not be regarded as a law. It will be recalled that the restricted interpretation which Markby J.(1) put on the word in section 22 of the Indian Councils Act in accordance with Blackstone's definition (formulation of a binding rule of conduct for the subject) was not accepted by the Privy Council in *Burah's* case. Even if a mere delegation of power to legislate were not regarded as a law "with respect to" one or other of the "matters" mentioned in the three Lists, it would be a law made in exercise of the residuary powers under article 248.

The question next arises whether there is anything in the Constitution which prohibits the making of such a law. The main restrictions and limitations on the legislative power of Parliament or of the States are those contained in Part III of the Constitution relating to Fundamental Rights. Our attention has not been called to any specific provision in that Part or elsewhere in the Constitution which prohibits or has the effect of prohibiting the making of a law delegating legislative power to a subordinate agency of Parliament's choice. What Mr. Chatterjee strenuously urged was that, having regard to the Preamble to the Constitution, whereby the people of India resolved, in exercise of their sovereign right, "to adopt, enact and to give to themselves the Constitution," Parliament, which is charged with the duty of making laws for the territories of the Union, must, as in the American Constitution, be deemed to be a delegate of the people, and that this fundamental conception, which approximates to the conception underlying the American Constitution, attracts the application of the maxim *delegatus non potest delegare,* and operates as an implied prohibition against the delegation of legislative power by Parliament or, for that mater, by any other legislature

(1) I.L.R. 3 Cal. 63, 91.

in the country. It is true to say that, in a sense, the people delegated to the legislative, executive and the judicial organs of the State their respective powers while reserving to themselves the fundamental rights which they made paramount by providing that the State shall not make any law which takes away or abridges the rights conferred by that Part. To this extent the Indian Constitution may be said to have been based on the American model, but this is far from making the principle of separation of powers, as interpreted by the American courts, an essential part of the Indian Constitution or making the Indian Legislatures the delegates of the people so as to attract the application of the maxim. As already stated, the historical background and the political environment which influenced the making of the American Constitution were entirely absent here, and beyond the creation of the three organs of the State to exercise their respective functions as a matter of convenient governmental mechanism, which is a common feature of most modern civilised governments, there is not the least indication that the framers of the Indian Constitution made the American doctrine of separation of powers, namely, that in their absolute separation and vesting in different hands lay the basis of liberty, an integral and basic feature of the Indian Constitution. On the contrary, by providing that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions and that the Council shall be collectively responsible to the House of the People, the Constitution following the British model has effected a fusion of legislative and executive powers which spells the negation of any clear cut division of governmental power into three branches which is the basic doctrine of American constitutional law. Without such a doctrine being incorporated in the Constitution and made its structural foundation, the maxim *delegatus non potest delegare* could have no constitutional status but could only have the force of a political precept to be acted upon by legislatures in a

1951

In re The Delhi Laws Act, 1912, etc.

Patanjali Sastri J.

democratic policy consisting of elected representatives of the people in the discharge of their function of making laws, but cannot be enforced by the court as a rule of constitutional law when such function is shirked or evaded. The American courts are able to enforce the maxim because it has been made by the process of judicial construction an integral part of the American Constitution as a necessary corollary of the doctrine of separation of powers. But the position in India, as pointed out above, is entirely different, and the courts in this country cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence, or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent.

Mr. Chatterjee also attempted to spell out an implied prohibition against delegation on the strength of article 357 (1) (a) which provides specifically for delegation by the President of the law-making powers conferred on him by Parliament in case of failure of constitutional machinery in States. This express provision, it is claimed, shows that whenever the makers of the Constitution wanted to authorise delegation of legislative powers they have made specific provision in that behalf and, in the absence of any such provision in other cases, no delegation of such powers is permissible. I see no force in this argument. Merely because in a particular instance of rare and extraordinary occurrence an express provision authorising the President to delegate to another the law-making powers conferred on him by Parliament is made in the Constitution, it is not reasonable to infer that it was intended to prohibit the delegation of powers *in all other cases.* The maxim *expressio unius est exclusio alterius* is not one of universal application, and it is inconceivable that the framers of the Constitution could have intended to deny to the Indian Legislatures

a power which, as we have seen, has been recognised on all hands as a desirable, if not, a necessary concomitant of legislative activity in modern States. America, having started with a rule against delegation as a necessary corollary of the constitutional doctrine of separation of powers, has made and is making numerous inroads on the rule, and English constitutional law has allowed, as we have seen, even to subordinate legislatures, the widest latitude to delegate their legislative powers so long as they retain their own law-making capacity intact. In such circumstances, a provision for express delegation in a remote contingency is far too flimsy a ground for inferring a general prohibition against delegation of legislative power in all other cases. In this connection, it will be useful to recall Lord Selborne's observation in *Burah's* case that all that the court has to see in adjudging an enactment constitutional is "that it violates no *express* condition or restriction by which the law-making power conferred on the legislature is limited, and that it is not for the court to enlarge *constructively* those conditions and restrictions," and as recently as 1944, the Privy Council, as we have seen in *Benoari Lal Sarma's* case referred to what has always been regarded as an established doctrine of English constitutional law, namely, that the Indian legislature could do, in the matter of delegating its legislative powers, what the British Parliament could do. It would indeed be strange if, in framing the constitution of the Independent Republic of India at the present day, its makers were to ignore the experience of legislative bodies all the world over and to deny to Parliament a power which its predecessors unquestionably possessed. I have no hesitation in rejecting this argument.

In the result, I hold that section 7 of the Delhi Laws Act, 1912, section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and section 2 of the Part C States (Laws) Act, 1950, are in their entirety constitutional and valid and I answer the reference accordingly.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

MAHAJAN J.—In exercise of the powers conferred by clause (1) of article 143 of the Constitution the President of India has referred the following questions to this Court for its opinion :—

(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars and to what extent *ultra vires* the legislature which passed the said Act?

(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars and to what extent *ultra vires* the legislature which passed the said Act ?

(3) Was section 2 of Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars and to what extent *ultra vires* the Parliament ?

The reference raises questions of great importance concerning the administration of the affairs of the Republic and is the first one of the kind since the inauguration of the new constitution. The only point canvassed in the reference is as to the *vires* of the laws mentioned therein. It was contended by the learned Attorney-General that legislative power without authority or power to delegate is a futility and that unless legislative power includes the power to delegate, power to administer will be ineffective. It was suggested that the true nature and scope of the legislative power of Parliament involves as part of its content power to confer law-making powers upon authorities other than Parliament itself and that this is a natural consequence of the doctrine of the supremacy of Parliament. It was said that the Indian legislature when acting within the ambit of its legislative power has plenary powers of legislation as large and of the same nature as the British Parliament and unless the prescribed limits are exceeded, no question of *ultra vires* can possibly arise, that the proper approach to the question is "Look at the terms of the instrument by which affirmatively the legislative powers are created and by which negatively they are restricted. If what

has been done is legislation within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which the power is limited, it is not for any court of justice to enquire or to enlarge constructively those conditions and restriction."(1) Reliance was also placed on the legislative practice in India and other countries of the Commonwealth sanctioning constitutionality of statutes drawn up in the same form as the impugned enactments.

The questions referred cover three distinct periods of legislation in the constitutional and political history of this country. The first question relates to the period when the government of this country was unitary in form and was constituted under the Indian Councils Act, 1861, as amended from time to time up to the stage of the introduction of the Morley-Minto Reforms, when the Indian Legislature achieved the status of a political debating society and when as a result of the undoing of the partition of Bengal the capital of India was transferred from Calcutta to Delhi. The unitary form of government was changed after the different Round Table Conferences in London into a Federation by the Constitution Act of 1935. This Act with certain adaptations, remain in force till 26th January 1950, when the new constitution was inaugurated. Under the Independence Act, 1947, India became a Dominion of the British Empire but the legislative power of the Parliament of the Dominion remained within the ambit of the Constitution Act of 1935, though the Parliament as a Constituent Assembly was conferred unlimited powers like that of a sovereign. The federal form of government that had been adopted by the Constitution Act of 1935 was also adopted by the framers of the new constitution. The second question relates to the period when India had attained the status of a dominion under the Indian Independence Act, while the last question concerns the legislative competency of Parliament under the new constitution of the Republic of India.

(1) *Queen* v. *Burah*, 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

It is futile to ask in the year of grace 1951 whether delegated legislation is necessary or not. This kind of legislation is only a special aspect of the problem of administrative discretion. The necessity of delegating rule-making power on the largest scale of administrative authorities is as much a basic fact of modern industrial society as the assumption by the State of certain obligations of social welfare. The problem, however, is how delegated legislation and administrative discretion are confined and controlled so as to comply with the elementary principles of law in a democratic society. The answer to the problem has to be found within the ambit of the constitution of the country concerned and on the construction that a lawyer or a jurist would place on it with a constructive and not a purely legalistic approach. In this background it is instructive to see how the question has been solved in other countries.

It was customary for the mother of Parliaments to delegate minor legislative power to subordinate authorities and bodies. Some people took the view that such delegation was wholly unwise and should be dispensed with. Prof. Dicey, however, pointed out that it was futile for Parliament to endeavour to work out details of large legislative changes and that such an endeavour would result in cumbersome and prolix statutes. Blackstone remarked that powers of this kind were essential to the effective conduct of the government. Constitutional practice grew up gradually as and when the need arose in Parliament, without a logical system, and power was delegated by Parliament for various reasons: because the topic required much detail, or because it was technical, or because of pressure of other demands on parliamentary time. The Parliament being supreme and its power being unlimited, it did what it thought was right. The doctrine of *ultra vires* has no roots whatever in a country where the doctrine of supremacy of Parliament holds the field. The sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern inflexible and rigid constitutions existing in countries

which have adopted any scheme of representative government. In England supremacy of law only means the right of judges to control the executive and it has no greater constitutional value than that. The basis of power in England is the legal supremacy of Parliament and its unrestricted power to make law. In the words of Coke, "It is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds," or again, as Blackstone put it, "An act of Parliament is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto, belonging; nay, even the King himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended or repealed, but in the *same forms and by the same authority of Parliament.*"(1).

The Parliament being a legal omnipotent despot, apart from being a legislature simpliciter, it can in exercise of its sovereign power delegate its legislative functions or even create new bodies conferring on them power to make laws. The power of delegation is not necessarily implicit in its power to make laws but it may well be implicit in its omnipotence as an absolute sovereign. Whether it exercises its power of delegation of legislative power in its capacity as a mere legislature or in its capacity as an omnipotent despot, it is not possible to test it on the touchstone of judicial precedent or judicial scrutiny as courts of justice in England cannot inquire into it. The assertion therefore that this power Parliament exercises in its purely legislative capacity has no greater value than that of an *ipse dixit*. For these reasons I am in respectful agreement with the view of that eminent judge and jurist, Varadachariar J., expressed in *Benoari Lal Sarma's* case(2) that the constitutional position in India approximates more closely to the American model than to the English model and on this subject the decisions of the United States so far as they lay down any principle are a valuable guide on this question.

(1) Vide Allen "Law in the Making", 3rd End., p. 367.
(2) [1934] F. C. R. 96.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

This view finds support also from the circumstance that the constitutions of the two countries are fundamentally different in kind and character. They fall in two district classes having different characteristics. England has a unitary form of government with a flexible constitution, while in India we have always had a rigid constitution and since 1935 it is federal in form. It is unsafe, therefore, to make any deductions from the legislative power exercised under a system of government which is basically different in kind and not merely in degree from the other on the question of its legislative competency and reach conclusions on the basis of such deductions. In my opinion, search for a solution of the problem referred to us in that direction is bound to produce no results. I have, therefore, no hesitation in rejecting the contention of the learned Attorney-General that the answer to the questions referred to us should be returned by reference to the exercise of power of Parliament in the matter of delegation of legislative power to the executive.

It may, however, be observed that in spite of the widest powers possessed by the British Parliament, it has adopted a policy of self-abnegation in the matter of delegated legislation. A committee was appointed to report on the Ministers' powers, popularly known as the Donoughmore Committee. It made its recommendations and stated the limits within which power of delegated legislation should be exercised. Means were later on adopted for keeping a watchful eye on such legislation. The Donoughmore Committee discovered a few instances of cases where delegation had gone to the extent of giving a limited power of modifying Parliamentary statutes. One of these instances was in section 20 of the Mental Treatment Act, 1930 (20 & 21 Geo. V, c. 23). It empowered the Minister of Health by order to modify the wording of an enactment so far as was necessary to bring it into conformity with the provisions of the section. The whole section related to terminology, its intention being to replace certain statutory expressions in previous use by others which at the moment were regarded less

offensive. The other instance was found in section 76 of the Local Government Scotland Act, 1929, (19 & 20 Geo. V, c. 25). By this section the Secretary of State was empowered between 16th May, 1929, and 31st December, 1930, by order to make any adaptation or modification in the provisions of any Act necessary to bring these provisions in conformity with the provisions of other Acts. Such a clause in a statute bore the nickname "Henry VIII clause". Concerning it the Committee made the following recommendations: "The use of the so-called Henry VIII clause conferring power on a Minister to modify the provisions of Acts of Parliament (hitherto limited to such amendments as may appear to him to be necessary for the purpose of bringing the statute into operation) should be abandoned in all but most exceptional cases and should not be permitted by Parliament except upon special grounds stated in a ministerial memorandum to the bill. Henry VIII clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year."

The language in which this recommendation is couched clearly indicates that even in a country where Parliament is supreme the power of modifying Parliamentary statutes has never been exercised except in the manner indicated in the above recommendation, and even as regards that limited power the recommendation was that the exercise of it should be abandoned. It is significant that since then Henry VIII clause has not been used by Parliament.

The Dominion of Canada has a written constitution, The British North America Act (30 & 31 Vict., c. 31). It is not modelled on the doctrine of exclusive division of power between the departments of State, legislative executive and judicial. It does not place them in three water-tight compartments and it is somewhat similar in shape in this respect to the British constitution where the King is still a part of the legislature, the House of Lords still a part of the judicial as well as legislative and where all parts of government form

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

a mutual check upon each other. This similarity, however, does not mean that the legislature in Canada is of the same kind as the British Parliament. It falls in the class of non-sovereign legislatures, like all colonial parliaments.

The decisions of Canadian courts are by no means uniform on the power of the Canadian Parliament to delegate legislative power. Those cited to us of recent date seem to have been given under the pressure of the two world wars and under the provisions of the War Measures Act. With great respect and in all humility, I am constrained to observe that in these decisions, to establish the *vires* of the powers delegated, arguments have been pressed into service which are by no means convincing or which can be said to be based on sound juristic principles. They can only be justified on the ground that during a period of emergency and danger to the State the dominion parliament can make laws which in peace time it has no competency to enact. There are a number of Privy Council decisions which have concerned themselves with the *vires* of legislative enactments in Canada which purported to transfer legislative power to outside authorities and it seems to me that these decisions furnish a better guide to the solution of the problem before us than the later decisions of the Supreme Court of Canada which seemingly derive support from these Privy Council decisions for the rules stated therein.

The first of these decisions is in the case of *Russell* v. *The Queen*(1) decided in 1882. Two questions were raised in the appeal. The first was as to the validity of the Canada Temperance Act, 1878. It was urged that having regard to the provisions of the British North America Act, 1867, relating to the distribution of legislative powers it was not competent for the Parliament of Canada to pass the Act in question. The second question was that even if the Dominion Parliament possessed the powers which it assumed to exercise by the Act, it had no power to delegate them

(1) 7 App Cas. 829.

and to give local authorities the right to say whether the provisions of the Act should be operative or not. It is the second question which is relevant to the present enquiry. The mode of bringing the second part of the Act into force, stating it succinctly, was as follows :—

"On a petition to the Governor in Council, signed by not less than one-fourth in number of the electors of any country or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such country or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the country or city, named in it, the Governor-General in Council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the Gazette, declare that the second part of the Act shall be in force and take effect in such country or city, and the same is then to become of force and take effect accordingly."

It was urged before their Lordships that assuming that the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of countries and cities. Their Lordships' answer to the counsel's contention was in these words :—

"The short answer to this objection is that the Act does not delegate any legislative powers *whatever*. It contains within itself the whole legislation on the matters with which it deals. The provision that *certain parts of the Act* shall come into operation only

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power *so to legislate* cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of *Queen* v. *Burah*(1), lately before this Board."

It seems to me that their Lordships acquiesced and assented in the proposition urged by the learned counsel that delegation of legislative power was not permissible when they combated his arguments with the remarks that the Act does not delegate any legislative power whatever. Otherwise, the short answer to the objection was that delegation of legislative power was implicit within the power of legislation possessed by the legislature. It was not necessary to base the decision on the ground of conditional legislation.

Though *Queen* v. *Burah*(1) was an appeal from the High Court of Bengal, a reference was made to it and the decision therein was mentioned as laying down an apposite rule for the decision of cases arising under the British North America Act, 1867. In order to appreciate and apprehend the rule to which their Lordships gave approval in the above mentioned case, it seems necessary to state precisely what *Queen* v. *Burah*(1) decided. Act XXII of 1869 of the Council of the Governor-General of India which is entitled "An Act to remove the Garo Hills from the jurisdiction of the tribunals established under the General Regulations and Acts, and for other purposes" among other things provided as follows :—

"Sec. 4. Save as hereinafter provided, the territory known as the Garo Hills....is hereby removed from the jurisdiction of the Courts of Civil and

(1) 5 I.A. 178

Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code and the Acts passed by any legislature now or heretofore established in British India, as well as from the law prescribed for the said courts and offices by the Regulations and Acts aforesaid. And no Act hereafter passed by the Council of the Governor-General for making laws and Regulations shall be deemed to extend to any part of the said territory, unless the same be specially named therein.

Sec. 5. The administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may for the purpose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall in the matter of the administration and superintendence aforesaid, be subject to the direction and control of the said Lieutenant-Governor and be guided by such instructions as he may from time to time issue.

Sec. 8. The said Lieutenant-Governor may from time to time by notification in the Calcutta Gazette, extend to the said territory any law, or *any portion of any law,* now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sec. 9. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette extend *mutatis mutandis all or any of the* provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India."

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

Under the provisions of the Act the Lieutenant-Governor of Bengal on the 14th October, 1871, issued a notification and in exercise of the powers conferred upon him by section 9, he extended the provisions of the said Act to the territory known as the Khasi and Jaintia Hills and excluded therefrom the jurisdiction of the Courts of Civil and Criminal Judicature, and specified in the notification the boundaries of the said territory. The notification extended all the provisions of the Act to the districts of Khasi and Jaintia Hills. The Lieutenant-Governor did not exercise the power of selecting parts of these Acts for purposes of local application. Section 9 of the Act did not empower the Lieutenant-Governor to modify any of the provisions of the Act. The High Court of Bengal by a majority judgment held that the notification had no legal force or effect in removing the said territories from the jurisdiction which the High Court had previously possessed over it, inasmuch as the Council of the Governor-General of India for making laws and regulations had under its constitution, by the Councils Act, 1861, no power to delegate such authority to the Lieutenant-Governor as it had by Act XXII of 1869 in fact purported to delegate. The Indian Councils Act, 1861, 24 & 25 Vict. c. 67, by section 22, gave the Governor-General in Council power for the purpose of making laws and regulations, power for repealing, amending or altering any laws or regulations whatever then in force or thereafter to be in force and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all courts of justice, whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of princes and states, provided always that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of the Act. As regards section 9 of the Act their Lordships made the following observations :—

"The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section *was not legislation, but was a delegation of legislative power.* In the leading judgment of Mr. Justice Markby, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

"Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *a fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

"But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and *indeed of the nature and principles of legislation.* The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

The learned Attorney-General placed considerable reliance on these observations in support of his proposition that if the legislation is within the ambit of the field prescribed for exercise of legislative power, then from it it follows that within that field power can be exercised to delegate to the widest extent. This quotation, however, cannot be torn off from the context and read by itself. Meaning can only be given to these observations in the light of the observations that follow the quotation cited above and which are in these terms :—

"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the

jurisdiction of the ordinary Courts and offices and to place it under new courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and *also enabling him, not to make what law he pleases for that or any other district,* but to apply by public notification to that district any law, or *part of law,* which either already was, or from time to time might be, in force, by proper *legislative authority,* in the other territories subject to his government. The legislature *determined* that, so far, a *certain change should take place;* but that it was expedient to leave the time, and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor.....

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII of 1869) itself. *The proper legislature has exercised its judgment* as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

Towards the close of the judgment certain illustrations were mentioned of legislation in India described as conditional legislation. Reference was made to the Codes of Civil and Criminal Procedure and particularly, section 39 of Act XXIII of 1861 which authorised the Local Government with the previous sanction of the Governor-General in Council (not in his legislative capacity) to extend the provisions of the Act "subject to any restriction, limitation or proviso which the Local Government may think proper."

In my opinion, in this case their Lordships did not affirmatively assent to the proposition that the Indian Legislature had full power of delegation within the ambit of its legislative field and they did not dissent from the conclusion of Markby J. in the concluding part of the judgment that under general principles of law in India any substantial delegation of legislative power by the legislature of the country was void. On the other hand, they remarked that legislation of this kind was conditional legislation and it only becomes complete on the fulfilment of those conditions and that the determination of those conditions could be left to an external authority. In spite of expressing their disapproval of the view of the majority of the Full Bench in applying the principles of the doctrine of agency and in treating the Indian Legislature as an agent of the Imperial Parliament, their Lordships clearly expressed the opinion that the exercise of the legislative will and judgment could not be transferred to an external authority and that it was for the proper legislature to exercise its *own* judgment as to the

place, persons, *laws* and powers. It seems to me that though their Lordships were not prepared to assent to the proposition that the matter should be dealt with on principles deducible from the doctrine of the law of agency, they were also not prepared to depart from the rule that apart from the doctrine of the law of agency a person to whom an office or duty is assigned or entrusted by reason of a special qualification cannot lawfully devolve that duty upon another unless expressly authorised so to do. Public functionaries charged with the performance of public duties have to execute them accordingly to their own judgment and discretion except to the extent that it is necessary to employ ministerial officers to effectively discharge those duties.

For the reasons given above presumably the Privy Council was not prepared to lay down that delegation of legislative power was a content of the power itself. It contended itself by holding the law valid under the name and style of conditional legislation. It is difficult to conceive that the Privy Council would have hesitated in saying so if it felt that delegation of legislative power was a content of the power itself. Reference in this connection may be made to a passage in the judgment of Markby J. which reads thus :—

"The various Parliamentary statutes nowhere confer any express power upon the Indian Legislature to change the machinery of legislation in India. But they do confer that power subject to important restrictions upon the executive government. Mr. Kennedy boldly claimed for the Indian Legislative Council the power to transfer legislative functions to the Lieutenant-Governor of Bengal. Indeed as I understand him, the only restriction he would attempt was that the Legislative Council could not destroy its own power to legislate though I see no reason why he should stop there. The Advocate-General did not go so far. There are no words in the Acts of Parliament upon which the legislative authority could be made transferable in one class of cases and not in others because I do not

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

for a moment suggest that every time a discretion is entrusted to others there is the transfer of legislative authority. Every Act of the legislature abounds with examples of discretion entrusted to judicial and executive officers of government, the legality of which no one would think of questioning. The broad question, however, is 'Can the legislature confer on the Lieutenant-Governor legislative power?' Answer: 'It is a general principle of law in India that any substantial delegation of legislative authority by the legislature of this country is void'."

It was then contended that the illustration cited in the concluding part of the judgment of their Lordships suggests their approval of the proposition that the legislative power could be delegated conferring power to modify a statute passed by the legislature itself. This contention seems to be based on a misapprehension of what their Lordships decided. In the Full Bench decision of the Calcutta High Court in *Empress* v. *Burah & Book Sing*(1) Markby J. made the following observations while dealing with these illustrations :—

"Lastly it was argued that the Indian Legislature had done so (delegated power) for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authority and Act XXII of 1869 should be so treated. The Acts contained in the list do not appear to me to afford (as was asserted) so many clear and undisputed instances of transfer of legislative authority. I may observe that as to the provisions which these and many other Acts contain for the making of rules by executive government in conformity with the Act we have the highest authority in *Biddle* v. *Tariney Churn Banerjee*(2) that the power to make such rules may be conferred without delegation of legislative authority.....The list of Acts does not seem to me to show any clear practice of transferring legislative authority."

(1) I.L.R. 3 Cal. 63. (2) 1 Tay. & Bell, 390.

Ainslie J. specifically considered the provisions of section 39 of Act XXIII of 1861 and the meaning of the words "reservations", "limitations" and "provisos" and said as follows :—

"The provisions of section 39, Act XXIII of 1861, do not affect my view of this matter. This section allows a local Government, with the previous sanction of the Governor-General in Council, to annex any restriction, limitation, or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still, because the extension is *pro tanto*, a carrying out of the intention of the superior legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, *no power is given to amend the law itself;* it is only a power to keep some portion in abeyance or to make its operation contingent on something external to it, which again is only another form of postponing its full operation."

No doubt was cast on this construction of the language of section 39 either in the minority judgment of the High Court or in the judgment of their Lordships of the Privy Council. In view of this clear expression of opinion of Ainslie J. as to the meaning of the language used in section 39 and not disapproved by their Lordships of the Privy Council it cannot with any force be contended that their Lordships in *Burah's* case(1) gave approval to the proposition that the power of conditional legislation included the power of amendment or modification of the Act of the legislature itself. In my opinion, the result of the decision in *Burah's* case(1) is that it was decided that the Indian Legislature had power to conditionally legislate. This case is no authority for the proposition that it could delegate the exercise of its judgment on the question as to what the law should be to an external agency. This case does not support the

(1) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

proposition that amendment of a statute of the legislature itself is a matter which could form the subject of delegated legislation. The expression that Indian Legislature could not arm with legislative power a new legislative body not created by the Indian Councils Act only means that it must function itself in making laws and not confer this power on any other body. In other words, it could not create a person having co-extensive power of legislation and could not clothe it with its own capacity of law making, that is in laying down principles and policies. The possession of plenary powers within the ambit laid down only means that within that particular field it can make any laws on those subjects, but it does not mean that it can shirk its duty in enacting laws within the field by making a law that it shall not itself operate on that field but somebody else will operate on its behalf. In my opinion, their Lordships' judgment amounts to saying that though within the field prescribed it has the largest power of legislation, yet at the same time it is subject to the condition that it cannot abandon formally or virtually its high trust.

Hodge v. *The Queen*(1) was the next Canadian case decided by the Privy Council in 1883. The appellant Hodge, was the holder of a liquor licence issued on 25th April, 1881, by the Board of Licence Commissioners for the City of Toronto under the Liquor Licence Act of the Province of Ontario in respect of the St. James Hotel. He was also the holder of a licence under the authority of the Municipal Act, authorising him to carry on the business or calling of a keeper of a billiard saloon with one table for hire. The appellant did on the 7th May, 1881, unlawfully permit and suffer a billiard table to be used and a game of billiards to be played thereon, in his tavern during the time prohibited by the Liquor Licence Act for sale of liquor therein. It was urged that the Ontario Assembly was not competent to legislate in regard to licences for the sale of liquor and that even if the Ontario legislature could, it could not delegate its power to Licence Commissioners.

(1) 9 App. Cas. 117.

The local legislature had assigned to three officials the power to define offences and impose penalties. This contention was met with the plea that there was no delegation of legislative authority but only of the power to make by-laws. The Court of the King's Bench Division held that the local legislature had no power to delegate in the matter and that such power could be exercised by the legislature alone. The Court of Appeal reversed this decision and it was upheld by their Lordships of the Privy Council. It was found that sections 4 and 5 of the Liquor Licence Act were *intra vires* the constitution. In the course of their judgment their Lordships made the following observations :—

"It appears to their Lordships, however, that the objections thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to *confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.*

It is obvious that such an authority is *ancillary* to legislation, and without it an attempt for varying details and machinery to carry them out might

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a *limited* discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."

This case, in my opinion, decided the following points :—(1) Power to make by-laws or regulations as to subjects specified in the enactment and with the object of carrying that enactment into operation and effect can be transferred to municipal institutions or local bodies. (2) Such an authority is ancillary to legislation. (3) Giving such power of making regulations to agents and delegates does not amount to an effacement of the legislature itself. The case does not sanction the proposition that power to amend or to modify a statute passed by the legislature itself can be delegated. Power of amending a statute or altering it cannot be described as ancillary to legislation, nor is such a power within the ambit of the doctrine of subsidiary legislation. It is significant that their Lordships of the Privy Council never gave their approval to the wide proposition that what the legislature itself can do, it can employ an agent with co-extensive powers for doing the same. They have been careful in saying to what extent and in what measure delegation was permissible. All that they sanctioned was delegation of authority ancillary to legislation or delegation to municipal institutions to make regulations and by-laws and no more. It was not held by their Lordships that power to declare what the law shall be could ever be delegated or that such delegation will be *intra vires* the Parliament of Canada or of the

Indian Legislature. It was contended that by implication their Lordships held in this case that short of effacing itself the legislature could delegate. In my opinion, there is no justification for placing such a construction on the language used by their Lordships while they were combating an argument that was placed before them by the learned counsel.

In re The Initiative and Referendum Act(1) is the third Canadian case decided by the Privy Council. By the Initiative and Referendum Act of Manitoba the Legislative Assembly sought to provide that the laws of the province will be made and repealed by the direct vote of the electors instead of only by the Legislative Assembly whose members they elect. It was held that the powers conferred on a provincial legislature by section 92 include the power of amendment of the constitution of the province except as regards the office of the Lieutenant-Governor and that the Initiative and Referendum Act of Manitoba excludes the Lieutenant-Governor wholly from the new legislative authority set up and that this was *ultra vires* the provincial legislature. The Act was therefore held void. Lord Haldane who delivered the opinion of the Privy Council, after having found that the Act was *ultra vires* the legislature, made the following observations :—

"Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the court below, to advert to it. Section 92 of the Act of 1867 *entrusts the legislative power in a province to its legislature and to that legislature only*. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a provincial legislature in Canada, could, while preserving its own capacity intact, seek

(1) [1919] A.C. 935.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

the assistance of *subordinate agencies* as had been done when in *Hodge* v. *The Queen*(1) the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."

These observations reiterate the ratio of the decision in *Hodge* v. *The Queen*(1) and they do not amount to saying that power to amend or modify Acts of the legislature itself could be given by delegation of legislative power. It is, however, important that their Lordships in clear and unambiguous language laid it down that section 92 *entrusts* legislative power to its legislature and *to that legislature only* and to no other. The principle underlying Lord Haldane's remarks is thus stated in Street's book on the Doctrine of Ultra Vires, at page 430:—

"The decision in this case, that the statute was *ultra vires*, did not turn precisely on the ground of delegation, but these remarks suggest that a legislature will not ordinarily be permitted to shift the onus of legislation, though it may legislate as to main principles and leave details to subordinate agencies."

Reference may also be made to the case of *King* v. *Nat Bell Liquors Ltd.*(2) The Liquor Act (6 Geo. V, c. 4, Alberta) was held *intra vires* the power of the province under the British North America Act, 1867, and it was found that it was not *ultra vires* by reason of being passed pursuant to a popular vote under the Direct Legislation Act (4 Geo. V, c. 3, Alberta). Here the law was made by the provincial legislature itself and it was passed in accordance with the regular procedure of the Houses of Legislature. This case is no authority for the contention raised by the learned Attorney-General.

(1) 9 App. Case 117. (2) [1922] 2 A. C. 128.

The next Canadian case decided by the Privy Council is reported in *Croft* v. *Dunphy*(1). Anti-smuggling provisions enacted operating beyond territorial limits which had long formed part of Imperial customs legislation and presumably were regarded as necessary for its efficacy were held valid and within the ambit of the constitutional powers. This case does not suggest any new line of thought, not already considered in *Queen* v. *Burah*(2), or *Hodge* v. *The Queen*(3). *Shannon* v. *Lower Mainland Dairy Products Board*(4) is a case in which the question arose whether Natural Products Marketing Legislation Scheme of control or regulation and imposition of licence fees were *intra vires* the provincial legislation. It was argued that it was not within the powers of the provincial legislature to delegate legislative power to the Lieutenant-Governor in Council or to give him further power of delegation. This contention was met with the following observations :—

"The objection seems subversive of the rights which the provincial legislature enjoys while dealing with matters within its ambit. It is unnecessary to enumerate the innumerable occasions on which legislature has entrusted similar powers to various persons and bodies. On the basis of past practice the delegation was upheld."

So far as I have been able to ascertain, the past practice was in respect of conferring necessary and ancillary powers to carry on the policy of a statute.

Reference was also made to *Powell* v. *Apollo Candle co.*(5) decided in the year 1885. There the question arose as to the validity of section 133 of the Customs Regulating Act of 1879 which authorities the levy of certain duties under an Order in Council. The section was held *intra vires* the constitution. It was argued that the power given to the colonial legislature to impose duties was to be executed by themselves

(1) [1933] A.C. 156.
(2) 5 I.A. 178.
(3) 9 App. Cas. 117.
(4) [1938] A.C. 708.
(5) 10 App. Cas. 282.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

only and could not be entrusted wholly or in part to the Governor or anybody else. This objection was answered in the following way :—

"The duties levied under the Order in Council are really levied by authority of the Act under which the order was issued. The legislature has not parted with its perfect control of the Governor and has the power of withdrawing or altering the power entrusted."

On this construction of the power delegated, that what the delegate was doing was done under the authority of the Act no question of delegation of law-making power arises.

Fort Frances Pulp & Power Co. v. *Monitoba Free Press*(1), *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*(2), and *Co-operative Committee* v. *Attorney-General of Canada*(3) cited at the Bar are not helpful in giving an opinion on the present matter.

Four recent Canadian cases were cited for the extreme view that short of effacing itself Parliament or a legislature has the widest power of delegation and that it acts *intra vires* the constitution in doing so. The first of these cases is *In re George Edwin Gray*(4). The case was under section 6 of the War Measures Act, 1914, which conferred very wide powers on the Governor-General in Council for the efficient prosecution of the war. The decision was given by a majority of four to two and in the majority judgment the following observations occur :—

"The practice of authorizing administrative bodies to make regulations to carry out the objectives of an act instead of setting out all details in the Act itself is well-known and its legality is unquestioned but it is said that the power to make such regulations could not constitutionally be granted to such an extent as to enable the express provisions of the statute to be amended or repealed; that under the constitution

(1) [1923] A.C. 695.
(2) [1947] 1 D.L.R. 577.
(3) [1947] A.C. 87.
(4) 57 S.C.R. (Canada) 150.

Parliament alone is to make laws, the Governor-General to execute them and the court to interpret them, then it follows that no one of the fundamental branches of government can constitutionally either delegate or accept the function of any other branch. In view of *Rex* v. *Halliday*(1), I do not think this broad proposition can be maintained. Parliament cannot indeed abdicate its functions, within reasonable limits at any rate it can delegate its power to execute government orders. Such powers must necessarily be subject to determination at any rate by Parliament and needless to say that the acts of the executive under its delegated authority must fall within the ambit of the legislative pronouncement by which this authority is measured. It is true that Lord Dunedin in *Rex* v. *Halliday*(1) said that the British Constitution has entrusted to the two Houses of Parliament subject to assent by the King an absolute power untrammelled by any other circumstance, obedience to which may be compelled by a judicial body. That undoubtedly is not the case in this country. Nothing in the Act imposes any limitations on the authority of the Parliament."

To the proposition stated in the opening part of the quotation there can be no possible objection. But when the learned Judges proceed to lay down the rule that in the absence of any limitations in the constitution Parliament can delegate the power to amend and repeal laws made by itself to an external authority unless it amounts to an abdication of its functions does not in my humble opinion seem to be sound. In the first instance, these observations seem inconsistent with the fundamental proposition that a duty entrusted to a particular body of persons and which is to be performed according to certain procedure by that body can be entrusted to an external agency which is not controlled by any rules of procedure in the performance of that duty and which would never have been entrusted to perform it. Moreover, abdication by a legislative body need not necessarily amount to a

(1) [1917] A.C. 260.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

complete effacement of it. Abdication may be partial or complete. It would certainly amount to abdication when in respect of a subject of legislative list that body says it shall not legislate on that subject but would leave it to somebody else to legislate on it. That would be delegation of the law-making power which is not authorised. There is no justification for the assumption that the expression "abdication" is only applicable when there is a total effacement or a legal extinction of such a body. In my opinion, it is the abdication of the power to legislate when a legislature refuses to perform its duty of legislating on a particular subject and entrusts somebody else to perform that function for it. "Abdication" according to the Oxford Dictionary means abandonment, either formal or virtual of sovereignty or other high trust. It is virtual abandonment of the high trust when the person charged with the trust says to somebody else that the functions entrusted to him in part or whole be performed by that other person. Be that as it may, the point of view contained in the above quotation cannot be supported on the decisions of their Lordships of the Privy Council discussed in the earlier part of this judgment. Duff J. stated his view in the following way :—

"The true view of the effect of this type of legislation is that the subordinate body in which a law-making authority is vested by it is intended to act as the agent or the organ of the legislature and that the acts of the agent take effect by virtue of the antecedent declaration that they shall have the force of law."

These observations, in my opinion,—and I speak with great respect—cannot again be justified on any juristic principle. In the matter of making law there cannot be an anticipatory sanction of a law not yet born or even conceived. Moreover, an organ of the legislature for making laws can only be created by the constitution and not by the legislature which is itself bonafided with that power by the constitution. The learned dissenting Judge in this case observed that a wholesale surrender of the will of the people to any

autocratic power would not be justified either in constitutional law or by the past history of their ancestors. These observations were made in respect of the power of amendment or repeal conferred on the delegate. As I have pointed out earlier in this judgment, such a power has not even been exercised by the British Parliament and the Donoughmore Committee recommended that its exercise as far as possible should be abandoned. The decision in this case, in my opinion, is not an apposite authority for arriving at a correct conclusion on the question involved in the reference.

The next case to which our attention was drawn is *Ref. re Regulations (Chemicals)*(1). This case arose in connection with the regulations respecting chemicals made pursuant to powers conferred by the Department of Munitions and Supply Act and by the War Measures Act. The question was whether these regulations were *ultra vires* the constitution. It was held that except in one part the regulations were *intra vires,* and it was observed that the War Measures Act does not attempt to transform the executive government into a legislature in the sense in which the Parliament of Canada and the legislatures of provinces are legislatures and that the regulations derive legal force solely from the War Measures Act. Reliance was placed on *Queen* v. *Burah*(2) *and Hodge* v. *The Queen*(3). One of the learned Judges observed that the maxim *delegatus non potest delegare* is a rule of the law of agency and has no application to Acts of a legislature, that the power of delegation being absolutely essential in the circumstances for which the War Measures Act has been enacted so as to prove a workable Act, power must be deemed to form part of the powers conferred by Parliament in that Act. Another learned Judge observed that the maximum was not confined to the law of agency alone but that it had no application to legislation. A third learned Judge, however, said that the maxim quoted above also had application to grants of legislative power but that the Parliament has not

(1) [1943] S.C.R. (Canada) 1.
(2) 5 I.A. 178.
(3) 9 App. Cas. 117.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

effaced itself, in the ultimate analysis it had full power to amend or repeal the War Measures Act. In my opinion, for the reasons already stated, the observations in this case also go beyond the rule laid down by their Lordships of the Privy Council in *Queen* v. *Burah*(1) and *Hodge* v. *The Queen*(2), and are not a true guide to the solution of the problem.

Our attention was also drawn to *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*(3). This case does not lend full support to the view taken in the cases cited above. Therein it was laid down that neither the Parliament of Canada nor the legislature of any province can delegate one to the other any of the legislative authority respectively conferred upon them by the British North America Act, especially by sections 91 and 92 thereof. The legislative authority conferred upon Parliament and upon a provincial legislature is exclusive and in consequence, neither can bestow upon or accept power from the other, although each may delegate to subordinate agencies. On the question of delegation of legislative power, the learned Chief Justice remarked that "delegations such as were dealt with in *In re George Edwin Gray*(4) and in *Ref. re Regulations (Chemicals)*(5) under the War Measures Act were delegations to a body subordinate to Parliament and were of a character different from the delegation meant by the bill now submitted to the courts.". In this case on the general question of delegation the Supreme Court did not proceed beyond the rule enunciated in *In re The Initiative and Referendum Act*(6), or what was stated in *Hodge* v. *The Queen*(7).

Lastly reference may also be made to the case of *Oimuit* v. *Bazi*(8). The learned Attorney-General placed reliance on certain *obiter dicta* of Davies J. to the effect that the Parliament of Canada could delegate its legislative power and such delegation was within its power. The learned Chief Justice did not express

(1) 5 I.A. 178.
(2) 9 App. Cas. 117.
(3) [1950] 4 D.L.R. 369.
(4) 57 S.C.R. 150.
(5) [1943] 1 D.L.R. 248.
(6) [1919] A.C. 935.
(7) 9 App. Cas. 117.
(8) 46 S.C.R.L. (Canada) 502.

any opinion on the point; while Indington J. was not prepared to subscribe to this view. The other Judges did not consider the point at all. In my opinion, these remarks, the soundness of which was doubted by other Judges, are not of much assistance to us in this case.

Having examined the Canadian cases on this subject it seems pertinent at this stage to refer to a passage from Street on the Doctrine of Ultra vires, which states the true position of colonial legislatures and appositely brings out the meaning of the language used by the Privy Council in the cases that the legislatures are not the agents of the Imperial Parliament :—

"However true it may be that colonial legislatures are not mere agents of the Imperial Government, it is also true that they are not unfettered principals. Within the terms of their constitution they are limited at least as to subjects, and area, and, to the extent suggested, perhaps also as to power of delegation. If an *ultra vires* colonial statute may be ratified by the Imperial Parliament, there is an implication of agency. To do anything outside the scope of their constitution, as when the Dominion of Canada established the Province of Manitoba(1), and imperial statute is required. It would appear that a legislature cannot, as an ordinary principal, ratify acts purporting to be done under its authority(2). Taking a broad view, non-sovereign legislatures are, and so long as they do not repudiate their constitutions must remain, delegates of the Imperial Parliament. They have been so regarded by the Privy Council(3). But just as in the case of the prerogative it would be impolitic to apply a formula too strictly, so also the law of agency must be accommodated to meet the solid fact that the colonies, or the most important of them, enjoy real independence."

The decisions of American courts on the constitutionality of delegation of legislative power are, as in

(1) 34 Vict. c. 28.

(2) *Commonwealth* v. *Colonial Ammunition Co.* 34 C.L.R. 198. 221.

(3) [1906] A.C. 542, [1914] A.C. 237, 254.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

the case of other countries, by no means uniform. Judicial opinion has sometimes taken a strict view against the validity of such delegation and on other occasions it has liberally upheld it as constitutional on grounds which again by no means are based on logical deductions from any juristic principle, but generally on grounds of convenience or under the doctrine of "determining conditions" and sometimes on historical considerations. The Supreme Court of America, has however, never departed from the doctrine that legislative power cannot be delegated to other branches of government or to independent bodies or even back to the people. The rule against delegation of legislative power is not based merely on the doctrine of separation of powers between the three state departments, legislative, executive and judicial, evolved by the constitution. This doctrine puts a restraint on delegation to other branches of government. Prohibition against delegation to independent bodies and commissions rests on Coke's maxim, *delegatus non potest delegare*. The maxim, though usually held applicable to the law of agency embodies a sound juristic principle applicable to the case of persons entrusted with the performance of public duties and the discharge of high trusts. The restraint on delegation back to the people is tied up with some notion of representative democracy.

Reference was made to a number of decisions of the Supreme Court during the arguments and quotations from several books on constitutional law were cited. It is not useful to refer to all of them in my opinion, but a few important ones may be mentioned.

The first American case that needs mention is *Waman* v. *Southard*(1), a decision of Marshall C.J., given in the year 1925. The question concerned the validity of certain rules framed by the courts. The learned Chief Justice observed that it could not be contended that Congress could delegate to courts or to any other tribunal powers which are strictly or exclusively legislative.

(1) 6 Law Edn. 262.

In *Kilbourn* v. *Thompson*(1), it was held that judicial power could not be exercised by the legislative department. *Field* v. *Clark*(2) is one of the leading cases in America on this subject. In this case power had been delegated to the executive to impose certain duties. Delegation of power was upheld on the ground that the policy of the law having been determined by the legislature, working out of the details could be left to the President who could not be said to be exercising any legislative will but was merely authorised to execute the law as an agent of the legislature in executing its policy. It was asserted that it was a principle universally recognised as vital to the maintenance of the system of government that Congress could not delegate legislative power to the President.

In *Springer* v. *Phillipine Islands*(3), the same view was expressed. On similar lines is the decision in *U.S.* v. *Gravenport etc. Co.*(4). It was observed that after fixing a primary standard, power to fill up details could be devolved by appropriate legislation. The provision attacked there was held as not delegation of legislative power but merely giving power to make administrative rules. *O'Donouhue* v. *U.S.*(5) concerned the question of compensation payable to Judges of the Supreme Court and it was held that it could not be lawfully diminished. It was remarked that the object of the creation of the three departments of government was not a mere matter of convenience but was basic to avoid commingling of duties so that acts of each may not be called to have been done under the coercive influence of the other departments.

The decision in *Hampton & Co.* v. *U.S.*(6) is the oft quoted judgment of Taft C.J. The following extracts from that judgment may be quoted with advantage :—

"It is a breach of the national fundamenal law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or, if by

(1) 103 U.S. 168.
(2) 143 U.S. 649.
(3) 277 U.S. 186.
(4) 287 U.S. 77.
(5) 289 U.S. 516.
(6) 276 U.S. 394.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of duties may not invoke the action of the other two branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to commonsense and the inherent necessities of governmental co-ordination. The field of Congress involves all and many varieties of legislative action and Congress has found it frequently necessary to use officers of the executive branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting direction in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.....Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of State legislation, it may be left to a popular vote of the residents of a district to be affected by legislation."

Panama Refining Co. v. *U.S.*(1) is another leading decision of the Supreme Court on this subject. In *Benoari Lal Sarma's case*(2) considerable reliance was placed by Varadachariar J. on this decision for arriving at his conclusion against non-delegation of power in India. The following observations from the judgment of Hughes C.J. may appositely be cited :—

"The Congress is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Undoubtedly legislation must often be adapted to complex conditions involving

(1) 293 U. S. 388. (2) [1943] F.C.R. 96.

a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

Cardozo J. observed as follows :—

"An attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to standards is in effect a roving commission."

In Opp Cotton Mills v. *Administrator*(1), it was said that essential legislature power could not be delegated but fact finding agencies could be created. *Yakus* v. *U.S.*(2) is to the same effect. In *Lichter* v. *U.S.*(3) it was held that a constitutional power implies a power of delegation of authority under it sufficient to effect its purpose. This power is especially significant in connection with war powers under which the exercise of discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise specification.

These decisions seem to indicate that judicial opinion in America is against delegation of essential powers of legislation by the Congress to administrative bodies or even to independent commissions. It is unnecessary to refer to all the passage that were quoted from the different text-books which apart from the opinions of the text-books writers merely sum up

(1) 312 U.S. 126.
(2) 321 U.S. 414.
(3) 334 U.S. 742.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

the result of the decisions given by the various courts on this point. This result has been, in my opinion, very accurately summarized by Crawford in his book on Construction of Statutes at pages 25, 26 in the following words and represents the present state of constitutional law in that country on this subject :—

"Legislative power has been delegated, as a general rule, not so often as an effort to break down the triparte theory of the separation of powers, but from necessity and for the sake of convenience. More and more with a social system steadily becoming increasingly complex, the legislature has been obliged in order to legislate effectively, efficiently and expeditiously, to delegate some of its functions, not *purely legislative in character,* to other agencies, particularly to administrative officials and boards. *Most prominent among the powers thus delegated have been the power to ascertain facts, and the power to promulgate rules and regulations.* Many of the other delegated powers, upon analysis, fall within one of these two major or basic classifications.

"So far, however, as the delegation of any power to an executive official or administrative board is concerned, the legislature must declare the policy of the law and fix the legal principles which are to control in given cases and must provide a standard to guide the official or the board empowered to execute the law. This standard must not be too indefinite or general. It may be laid down in broad general terms. It is sufficient if the legislature will lay down an intelligible principle to guide the executive or administrative official.....From these typical criterions, it is apparent that the courts exercise considerable liberality towards upholding legislative delegations, if a standard is established. *Such delegations are not subject to the objection that legislative power has been unlawfully delegated. The filling in of mere matters of detail within the policy of, and according to the legal principles and standards established by the legislature is essentially ministerial rather than legislative in character,* even if considerable

discretion is conferred upon the delegated authority. In fact, the method and manner of enforcing a law must be left to the reasonable discretion of administrative officers, under legislative standards."

On one point, however, there is uniformity of judicial decisions in the American courts and even amongst the text-book writers. Delegation of general power to make and repeal laws has uniformly been held as unconstitutional: [vide observations of Dixon J. in *Victoria etc. Co. & Meakes* v. *Dignam*(1)]. It was there pointed out that no instance could be cited of a decision of the Supreme Court of America in which Congress had allowed or empowered the executive to make regulations or ordinances which may overreach existing statutes.

In Moses v. *Guaranteed Mortgage Co. of New York*(2) a section of the Emergency Banking Law of 1933 was held unconstitutional delegation of power. There a banking board was given power to adapt, rescind, alter or amend rules and regulations inconsistent with and in contravention of any law. In his second edition on Administrative Law, at p. 110, Walter Gellhorn states as follows :—

"Delegations of powers to alter or modify statutes are, in effect, nothing more than delgations of the dispensing, suspending or rule-making powers, or a combination thereof. Yet the mere use of the terms 'alter' or 'modify' in the statute, has brought unexpected repercussions from courts and commentators."

In a number of decisions mentioned in this book the courts have held that delegation of power to alter or modify a statute is unconstitutional delegation of power. As observed by Prof. Salmond (Jurisprudence 10th Edn. p. 159), a legislative Act passed by the supreme legislature cannot be amended by any other body than the supreme legislature itself. In Rowland Burrow's Words and Phrases, the word "modify" has been defined as meaning "vary, extend or enlarge, limit or restrict." In Oxford Dictionary one of the

(1) 46 C.L.R. 73. (2) 239 App. Div. 703.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

meanings of this word is "the making of partial changes or altering without radical transformation." The same dictionary gives the following meaning to the word "modification" : "the result of such alteration a modified form or variety." In *Stevens* v. *General Steam Navigation Co. Ltd.*(1) it was stated that modification implies an alteration. It may narrow or enlarge the provisions of a former Act. In my opinion, the view taken in American decisions that delegation of authority to modify an Act of the Congress is unconstitutional is fully borne out by the meaning of the expression "modify" though this view is not liked by Walter Gellhorn. Before concluding, it is opposite to quote a passage from Baker's Fundamental Law which states the principle on which the American decisions are based and which coincides with my own opinions in respect of those decisions. The passage runs thus :

"The division of our American government into three co-ordinate branches necessarily prevents either of the three departments from delegating its authority to the other two or to either of them, but there are other reasons why the legislative power cannot be delegated. Representative government vests in the persons chosen to exercise the power of voting taxes and enacting laws, *the most important and sacred trust known to civil government.* The representatives of the people are required to exercise wise discretion and sound judgment, having due regard for the purposes and needs of the executive and judicial departments, the ability of the tax-payers to respond and the general public welfare. It follows as a *self-evident proposition* that a representative legislative assembly must exercise its own judgment; that in giving its consent to a tax levied it must distinctly and affirmatively determine the amount of the tax by fixing a definite and certain rate or by fixing an aggregate amount on the tax-payers and that in enacting a law it must so far express itself that the Act when it leaves the legislative department is a complete law. It is therefore *a maxim of constitutional law that a legislative body*

(1) [1903] 1 K.B. 890.

cannot delegate its power. If it was competent for a representative legislative body to delegate its power it would be open to make the delegation to the executive which would be destructive of representative government and a return to despotism. Not only the nature of the legislative power but the very existence of representative government depends upon the doctrine that this power cannot be transferred."

The Australian Constitution follows the American model (63 & 64, Vic., c. 12, passed in July 1900). The legislative power of the Commonwealth is vested in a Federal Parliament. The executive power is vested in the Queen, while the judicial power is vested exclusively in the courts. The extent of the legislative power is stated in sections 51 and 52 of the Constitution Act. The residuary powers vest in the States.

The first Australian case cited to us is *Baxter* v. *Ah Way*(1). This was decided in the year 1909. It was held that section 52, sub-section (g), of the Customs Act of 1901, which provides that all goods the importation of which shall be prohibited by proclamation shall be prohibited imports, is not a delegation of legislative power but conditional legislation and is within the power conferred on Parliament by section 51 of the Constitution. It was further held that prohibition of importation is a legislative act of the Parliament itself, the effect of sub-section (g) being to confer upon the Governor-General in Council the discretion to declare to what class of goods the prohibition will apply. In the course of his judgment the learned Chief Justice observed as follows :—

"The foundation of the argument that this power cannot be delegated by the legislature is to be found in the case of..... It is of course obvious that every legislature does in one sense delegate some of its functions.....Nor is it to the purpose to say that the legislature could have done the thing itself. Of course, it could. In one sense this is delegation of authority because it authorizes another body to do

(1) 8 C.L.R. 626.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

something which it might have done itself. It is too late in the day to contend that such a delegation, *if it is a delegation,* is objectionable in any sense..... The objection cannot be supported on the maxim *delegatus non potest delegare* or on any other ground .....There being no objection to conditional legislation being passed, this is a case of that sort."

O'Connor J. said as follows :—

"Power is given in section 51 in respect of trade and commerce with other countries on taxation and there is also power to make laws incidental to the exercise of any power vested in Parliament. It is a fundamental principle of the constitution that everything necessary to the exercise of a power is included in the grant of a power. Everything necessary to the effective exercise of the power of legislation must be taken to be conferred by the constitution with that power.....Exercise of such discretion cannot be said to be making of the law."

Higgins J. said :—

"According to my view, there is not here in fact any delegation of the law-making power."

This case rests on the principle that legislative power cannot be delegated and it was for that reason that the impugned statute was justified on the ground of conditional legislation. If delegation of legislative power was permissible, it was wholly unnecessary to justify the enactment as a form of conditional legislation.

Roche v. *Kronheimer*(1), decided in the year 1921, was argued by Dixon (as he then was). The question in that case concerned the validity of the Treaty of Peace Act, 1919, which by section 2 authorized the making of regulations conferring the delegation of powers on certain persons. The legislation was held constitutional. In the argument by Mr. Dixon, its validity was attacked on the following grounds: "It is not conditional legislation as in the case of *Baxter* v. *Ah Way*(2), but it bestows in the executive full

(1) 29 C.L.R. 329. (2) 8 C.L.R. 626.

legislative power upon a particular subject. Vesting of legislative power to any other hands than Parliament is prohibited. *The making of a law that another body may make laws upon a particular subject matter is not making a law on that subject.*" The decision was given in these terms :—

"It was said that if Parliament had authority to legislate, it had no power to confer that authority on the Governor-General. On this topic we were referred to *Hodge* v. *The Queen*(1) and *Rex* v. *Halliday*(2) and *In re The Initiative and Referendum Act*(3), and much interesting argument was devoted to the real meaning and effect of the first of those cases. It is enough to say that the validity of legislation in this form has been upheld in *Farey* v. *Burvett*(4); *Pankhurst* v. *Kiermany*(5); *Ferrando* v. *Pearce*(6); and *Sickerdich* v. *Ashton*(7), and we, do not propose to enter into any inquiry as to the correctness of those decisions."

This case therefore was decided on the ground of *cursus curiae,* and the point raised by Mr. Dixon remained unanswered.

In the year 1931 two cases came before the Supreme Court, one of which was decided in February, 1931, and the other in November, 1931. The first of these is the case of *Huddart Parker Ltd.* v. *The Commonwealth*(8), in which Dixon J. was one of the presiding Judges. The question in that case concerned the validity of section 33 of the Transport Workers Act which empowered the Governor-General to make regulations in respect of transport workers. The learned Judge observed that *Roche* v. *Kronheimer*(9) had decided that a statute conferring on the executive power to legislate upon some matters, is law with respect to that subject. On this construction of the decision in *Roche* v. *Kronheimer*(9) the case was decided

(1) 9 App. Cas. 117.
(2) [1917] A.C. 260.
(3) [1919] A.C. 935.
(4) 21 C.L.R. 433.
(5) 24 C.L.R. 120.
(6) 25 C.L.R. 241.
(7) 25 C.L.R. 506,
(8) 44 C.L.R 492
(9) 29 C.L.R 329.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

So far as I have been able to see, *Roche* v. *Kronheimer*(1) decided nothing and it was based on the rule of *stare decisis.*

Victorian etc. Co. & Meakes v. *Dignan*(2) was decided in November 1931. The question in that case was whether section 3 of the Transport Workers Act was *intra vires* the constitution inasmuch as it delegated power of making regulations *notwithstanding anything else contained in other Acts.* The delegation was under the name and style of conferring "regulative power." The appellants in that case were informed that they were guilty of an offence against the Waterside Employment rights, picking up for work as a waterside worker at Melbournea person not a member of the Waterside workers' Federation, while transport workers who were members of the Federation were available for being picked up for the work at the said port. The attack on the Act itself was based on the American constitutional doctrine that no legislative body can delegate to another department of government or to any other authority the power, either generally or specially, to enact laws. The reason, it was said, was to be found in the very existence of its own powers. This high prerogative having been entrusted to its own wisdom, judgment and patriotism and not to those of other persons, it will act *ultra vires* if it undertakes to delegate the trust instead of executing it. It was, however, said that this principle did not preclude conferring local powers of government upon local authorities. The defence was that the Act did not impinge upon the doctrine because in it the Parliament confined the regulating power on certain specific matters within the ambit of the trade and commerce power and accordingly merely exercised its own legislative power within that ambit, and *did not delegate any part of it.* Reference was made to the decision of Higgins J. in *Baxter* v. *Ah Way*(3), in which it was observed that the Federal Parliament had within its ambit full power to frame its own laws in any fashion using any agent, any agency, any machinery that in its wisdom it thinks

(1) 29 C.L.R. 329. (2) 46 C.L.R. 73. (3) 8 C.L.R. 646.

fit for the peace, order and good government of the Commonwealth. Rich J. held that the authority of *subordinate law making* may be invested in the executive. Reference was made to *Roche* v. *Kronheimer*(1). The learned Attorney-General paced considerable reliance on the judgment of Dixon J. The learned Judge expressed his opinion on the American decisions in these words :—

"But in what does the distinction lie between the law of Congress requiring compliance with direction upon some specified subject which the administration thinks proper to give and a law investing the administration with authority to legislate upon the same subject? The answer which the decisions of the Supreme Court supply to this question is formulated in the opinion of that Court delivered by Taft C.J. in *Hampton & Co.* v. *U.S.*(2).....The courts in America had never had any criterion as to the validity of statutes except that of reasonableness,—the common refuge of thought and expression in the face of undeveloped or unascertainable standards."

The learned Judge then reached the conclusion that no judicial power could be given or delegated, but from that it did not follow that Parliament was restrained from transferring any power essentially legislative to another organ or body. In an earlier decision the learned Judge had expressed the opinion that time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restrain it from reposing in the executive an authority essentially legislative in character and he remarked that he was not prepared to change that opinion or his expression to the effect that *Roche* v. *Kronheimer*(1) did decide that a statute conferring upon the executive a power to legislate, on some matters contained within one of the subjects of the legislative power of Parliament is a law with respect to that subject and the distribution of powers

(1) 29 C.L.R. 329. (2) 276 U.S. 394,406.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

does not restrain Parliament to make the law. The learned Judge then proceeded to say :—

"This does not mean that a law confiding authority to the executive will be valid, however *extensive* or *vague* the subject-matter may be, if it does not fall outside the boundaries of federal power.....Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity.....It may be acknowledged that the manner in which the constitution accomplished the separation of power does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law....Such subordinate legislation remains under Parliamentary control and is lacking in the independent and unqualified authority which is an attribute to true legislative power."

It seems to me that in its ultimate analysis the judgment of the learned Judge proceeded, as pointed out by him, upon the history and the usages of British legislation and theories of English law and not on the strict construction of the Australian Constitution with respect to which the learned Judge frankly conceded that logically or theoretically the power of delegation of the quality held valid in that case could not be justified on the framework of the constitution. I have also not been able precisely to follow the distinction drawn by the learned Judge that delegation held justified by him did not include delegation in the fullest extent of any matter falling within the boundaries of federal power. After a careful consideration of the observations of this very learned and eminent Judge I venture to think that these are not a safe guide for decision of the present reference. Not only were the constitutional limitations of the written constitution over-reached, but the decision was based on the theories of British legislation and English law which could

hardly be applied to a written constitution with a complete separation of power.

Mr. Justice Evatt in this case stated the rule differently. He observed "every grant by the Parliament of authority to make regulations is itself a grant of legislature power and the true nature and quality of legislative power of the Commonwealth Parliament involves as part of its contents power to confer law-making powers upon authorities other than the Parliament itself." The theory that legislative power has a content of delegation in it, to my mind, is not based on any principles of jurisprudence or of legislation and I venture to think that it is inconsistent with the fundamental principle that when a high trust is confided to the wisdom of a particular body which has to be discharged according to the procedure prescribed, such trust must be discharged by that person in whom it is confided and by no other. This decision is moreover inconsistent with the decisions of the Privy Council above mentioned. If the mere existence of power of legislation in a legislature automatically authorized it to delegate that power, then there was hardly any necessity for their Lordships of the Privy Council to justify delegation in the cases referred to above on the ground of conditional legislation and to state affirmatively that the cases considered by them were not cases of delegation of legislative authority. This view is certainly in conflict with the observations of the Privy Council in *Benoari Lal Sarma's* case(1), given under the Government of India Act, 1935, wherein their Lordships said: "It is true that the Governor-General acting under section 72 of Schedule IX himself must discharge the duty of *legislation* there cast on him and cannot transfer it to any other authority." Evatt J. after enunciating the rule discussed above remarked :—

"It is true that the extent of the power granted will often be a material circumstance in the examination of the validity of the legislation conferring the grant.....The nature of the legislative power of the Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the

(1) [1945] F.C.R. 161.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

Parliament that it is a law with respect to one or other of the specific subject-matters mentioned in sections 51 and 52 of the constitution.

After referring to a number of circumstances considered by the learned Judge material in reaching at a result as to the constitutionality of a statute, he observed as follows :—

"As a final analysis the Parliament of the Commonwealth is not competent to abdicate its powers of legislation. This is not because Parliament is bound to perform all or any of its legislative functions though it may elect not to do so, or because of the doctrine of separation of powers, but because each and every one of the *laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the constitution. A law by which Parliament gave all its law-making authority to another body will be bad because it will fail to pass the test last mentioned.*"

Frankly speaking, I have not been able to apprehend on what principles, if any, of construction, the relevancy of the matters considered by the learned Judge as material circumstances in judging the validity of an Act so far as the question of the *vires* of the Act is concerned could be justified.

Another Australian case cited is *Wishart* v. *Fraser*(1). There the attack was on section 5 of the National Security Act, 1939-40, which empowered the making of regulations for securing public safety and defence of the Commonwealth etc. It proceeds on the same line as the earlier case discussed above.

In my opinion, the decision in *Baxter* v. *Ah Way*(2) is based on a correct construction of the provisions of the Australian Constitution and the later decisions cannot be considered as any guide in this country for a decision of the point involved in the reference. The argument pressed by Mr. Dixon, as he then was, in

(1) 64 C.L.R. 470. (2) 8 C.L.R. 626.

Roche v. *Kronheimer*(1) in my opinion, states the principle correctly.

The decisions of their Lordships of the Privy Council from India are not many. The first and the earliest of these is in *Queen* v. *Burah*(2), which has already been discussed at considerable length in the earlier part of this judgment and as stated already, it is no authority for the proposition that the Indian Legislature constituted under the Indian Councils Act, 1861, had power to delegate authority to the executive authorising them to modify or amend the provisions of an Act passed by the legislature itself.

King Emperor v. *Benoari Lal Sarma*(3) is the last Indian decision of the Privy Council on this subject. Conviction of fifteen individuals made by a special magistrate purporting to act under Ordinance II of 1942, promulgated by the Governor-General on the 2nd January, 1942, was set aside by a special Bench of the High Court at Calcutta and this decision was affirmed by the majority of the Federal Court of India. The ground on which the conviction was set aside was that the Ordinance was *ultra vires*. In appeal before their Lordships of the Privy Council it was contended that the Ordinance was valid. The Ordinance did not itself set up any of the special courts but provided by sub-section (3) of section 1 that the Ordinance—

"shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official gazette, declare it to be in force in the Province and shall cease to be in force when such notification is rescinded."

In view of this last provision it was contended that the Ordinance was invalid either because the language showed that the Governor-General notwithstanding the preamble did not consider that an emergency existed but was making provision in case one should arise in

(1) 29 C.L.R. 329. (2) 5 I. 178. (3) [1945] F.C.R. 161.

1951

In re The Delhi Laws Act, 1912 etc.

Mahajan J.

future, or else because the section amounted to what was called "delegated legislation" by which the Governor-General without legal authority sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself. On this last point their Lordships observed as follows :—

"*It is undoubtedly true that the Governor-General acting under s. 72 of Schedule IX, must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all.* His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under s. 102, had power to make laws for a province even in respect of matters which would otherwise be reserved to the Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a special court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the provincial government specially concerned. *This is not delegated legislation at all.* It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the view of the Chief Justice of Bengal and of Khundkar J. on this part of the case. The latter Judge appositely quotes a passage from the judgment of the Privy Council in the well known decision in *Russell* v. *The Queen*(1)."

This case brings out the extent to which conditional legislation can go, but it is no authority justifying delegation of legislative power authorising an external authority to modify the provisions of a legislative enactment. It may be pointed out that the opening part of the passage quoted above seems to approve the view

(1) 7 App. Cas. 829.

of the Federal Court expressed by Varadachariar J. in that case when his Lordship relying on a passage from Street on the Doctrine of Ultra Vires observed that a legislature will not ordinarily be permitted to shift the onus of legislation though it may legislate as to main principles and leave the details to subordinate agencies.

The decision of the Federal Court in *Jatindra Nath Gupta* v. *The Province of Bihar and Others*(1), to which I was a party and wherein I was in respectful agreement with the judgment of the learned Chief Justice and my brother Mukherjea, in my opinion, correctly states the rule on the subject of delegation of legislative power. The Bihar Maintenance of Public Order Act, 1947, in sub-section (3) of section 1 provided as follows :—

"It shall remain in force for a period of one year from the date of its commencement.

Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification."

Acting under the proviso the Provincial Government on the 11th March, 1948, extended by notification the life of the Act by one year. The validity of the proviso to sub-section (v) of section 1 of the Act was attacked on the ground that it amounted to delegation of legislative power by the Provincial Legislature and this it was not competent to do. On the authority of the decision of the Privy Council in *Benoari Lal Sarma's* case(2) I held the proviso void. The question was posed by me in the following way :—

"It may be asked what does the proviso purport to do in terms and in substance? The answer is that it empowers that Provincial Government to issue a notification saying that the Provincial Act shall remain

(1) [1949] F.C.R. 595. (2) [1945] F.C.R. 161

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

in force for a further period of one year with such modifications, if any, as may be specified in the notification. As stated in the earlier part of this judgment, unless the power of the Provincial Government is co-extensive with the power of the Provincial Legislature, it is difficult to see how it can have the power to modify a statute passed by that legislature. Modification of statute amounts to re-enacting it partially. It involves the power to say that certain parts of it are no longer parts of the statute and that a statute with X sections is now enacted with Y sections. In the act of modification is involved a legislative power as a discretion has to be exercised whether certain parts of the statute are to remain law in future or not or have to be deleted from it. The power to modify may even involve a power to repeal parts of it. A modified statute is not the same original statute. It is a new Act and logically speaking, it amounts to enacting a new law. The dictionary meaning of the word 'modify' is to make something existing much less severe or to tone it down or to make partial changes in it. What modifications are to be made in a statute or whether any are necessary is an exercise of law-making power and cannot amount merely to an act of *execution of a power* already conferred by the statute. The extent of changes is left to external authority, *i.e.*, the Provincial Government. Nothing is here being done in pursuance of any law. What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so, what that law will be, whether what was originally enacted or something different. The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legislature than that entrusted with the duty under the Government of India Act, 1935."

I still maintain the view that the question of the life of an Act is a matter for the judgment of the competent legislature. It is a matter of policy whether a certain enactment is to be on the statute

book permanently or temporarily. Such a question does not fall within conditional legislation as it concerns the extension of the life of a temporary Act. Such an Act dies a natural death when the period fixed for its duration expires. It automatically ceases to operate and there is no real analogy between conditional legislation which authorizes a known authority to determine the commencement or termination of an Act and an act done in exercise of any power conferred by the Act itself. It was said by the learned Attorney-General that this decision had created considerable difficulties and that the various High Courts in India on its authority had held certain enactments void, the validity of which had never been questioned before this decision was given. In my humble judgment, there is nothing whatever in that decision which in any way unsettled the law as settled by their Lordships of the Privy Council in *Burah's* case(1). This decision did not lay down that the Indian legislature did not possess power of delegation necessary for effectively carrying out its legislative functions. All that it held was—and I think rightly—that essential legislative function could not be delegated to an external authority and that the legislature could not shirk its own duty and lay the burden of discharging that duty on others. If I was convinced that the decision laid down a wrong rule of law, I would have required no sugar-coated phrases to own the error. Our attention is not drawn to a single decision of their Lordships of the Privy Council during the whole administration of this country by the British in which the highest court in the land upheld the contention urged by the learned Attorney-General. On the other hand, learned Judges in this country of the eminence of Markby J. and Varadachariar J. in very clear and unambiguous terms affirmed the rule that delegation of essential legislative power was not within the competence of the Indian legislatures.

Reference may also be made to the case of *The State of Bombay* v. *Narottamdas*(2), decided recently and to

(1) 5 I.A. 178. (2) [1951] S.C.R. 51.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

which I was a party. Therein it was explained that *Jatindra Nath Gupta's case*(1) was no authority prohibiting delegation of legislative power in case where the principle and policy of the law had been declared in the enactments itself and ancillary power had been delegated to the provincial government for bringing into operation the provisions of an Act.

To sum up, judicial opinion on this subject is still in a fluid state and it is impossible to reconcile all the judgments cited to us on the basis of any rigid principles of constitutional law. In England the Parliament is for the time being following the recommendations of the Donoughmore Committee. In America the doctrine against delegation of legislative power still holds the field. In Canada as well as in India the rule laid down by their Lordships of the Privy Council in *Burah's case*(2) has never been departed from in theory. The same view was maintained in the earlier Australian decisions. Recently Australian decisions however have gone to the length of holding that even essential legislative power can be delegated so long as the principle does not completely efface itself.

In my opinion, the true solution of the problem of delegation of legislative power is to be found in the oft-quoted passage from the judgment of Ranney J. of the Supreme Court of Ohio in *Cincinnati W. & Z. R. Co.* v. *Clinton County Comrs.*(3). This quotation is in these terms :—

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The decision in *Locke's Appeal*(4) is also based on this rule There it was said :—

(1) [1949] F.C.R. 595.
(2) 5 I A. 178.
(3) 1 Ohio St. 88.
(4) 72 Pa. St. 491.

"To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know". The proper distinction the court said was this: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The Federal Court of India in its opinion, expressed by Varadachariar J. in *Benoari Lal Sarma's* case(1) considered a contention of the Advocate-General of India made to it based on the above quotation of Ranney J. and observed as follows:

"We are of the opinion that there is nothing in the above decisions of their Lordships that can be said to be inconsistent with the principle laid down in the passage from the American authority which the Advocate-General of India proposed to adopt as his own argument."

The majority of the court approved the rule stated by Chief Justice Hughes in *Panama Refining Co.* v. *U. S.*(2), and it was stated that the rule therein held had nothing whatever to do with maxim *delegatus non potest delegare,* but was only the amplification of what was referred to by the Judicial Committee in *Burah's* case(3) as "the nature and principles of legislation."

The question can be posed thus: Why is delegation peculiarly a content of legislative power and not of judicial power? In my judgment, it is a content of none of the three State powers, legislative, judicial or executive. It is, on the other hand, incidental to the

(1) [1943] F.C.R. 96. (2) 293 U.S. 388. (3) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

exercise of all power inasmuch as it is necessary to delegate for the proper discharge of all these three public duties. No public functionary can himself perform all the duties he is privileged to perform unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and discretion to others. One may well ask, why is a legislature formed with such meticulous care by all constitution makers? Why do they take pains to lay down the procedure to be followed by an elected legislature in its function of law-making? Why do they define its different functions and lay down the methods by which it shall act? The only answer that reasonably can be given to these queries is: "Because the constitution trusts to the judgment of the body constituted in the manner indicated in the constitution and to the exercise of its discretion by following the procedure prescribe therein." On the same principle the judges are not allowed to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate ancillary powers to others, for instance, in a suit for accounts and in a suit for dissolution of partnership, commissioners can be entrusted with powers authorising them to give decisions on points of difference between parties as to items in the account. Again it may be enquired why cannot other public functionaries entrusted in the matter of appointment of public servants; delegate this particular duty to others. The answer again is found in the same principle. I put this query to the learned Attorney-General but I could not elicit any very satisfactory answer. He contended himself by saying that possibly there was something in the nature of the power itself which requires the personal attention of the authorities concerned and that therefore delegation was there impliedly forbidden. To my mind, the same principle forbids delegation of essential legislative power. It is inherent in the nature of the power that has to be exercised by the legislature elected for the purpose subject to the qualifications already stated. It would be a breach of

the constitutional duty to bestow this power on some one else. In the words of Sir John Salmond, "In general, indeed, the power of legislation is far too important to be committed to any person or body of persons save the incorporate community itself. The great bulk of enacted law is promulgated by the state in its own person. But in exceptional cases it has been found possible and expedient to entrust this power to private hands." In the words of Mr. Dixon (as he then was), the making of a law that another body may make laws upon a particular subject matter is not making a law on that subject. The quotation cited in the earlier part of this judgment from Baker's book appositely states the rule when it says: "It is an axiom of constitutional law that representative legislative bodies cannot delegate legislative power because representative government vests in the persons chosen to exercise the power of voting taxes and enacting laws: the most important and sacred trust known to civil government." In the words of another jurist, "Legislation is the formal utterance by the legislative organ of the society and by *no others*. Its words constitute the law and not the words of the delegate."

In private law the rule is well settled that an arbitrator cannot lawfully devolve his duty on another unless so expressly authorized. The nature of the duty itself is such that it demands exercise of his own judgment and discretion. It is again well settled that fiduciary duties cannot be made the subject of delegation, though trustees in order to discharge certain functions can use machinery or subordinate agencies for effectively carrying on the duties which attach to their constitution. Delegation is permissible in cases where there is a legal or physical necessity to do so because without trusting some person or persons it would be impossible efficiently to discharge the duties. It cannot be denied that municipal and other corporations cannot delegate the by-law making power to the executive officers. It is so because power is entrusted to them in their corporate capacity and has to be exercised in that capacity. I am not able to apprehend

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

why this principle which is well settled in private law cannot appositely be applied to the discharge of duties by public functionaries and by a legislature. It seems to me that the nature of the duty is such that it is implicit within it that it should be discharged by the person entrusted with it and by no others. In other words, the nature of the public duty itself demands it and the principles of legislation require it.

For the reasons given above I cannot accept the proposition contended for by the learned Attorney-General that in the absence of an express or implied provision in the constitution legislative authority can be best owed on other persons. In my opinion, the correct proposition, on the other hand, is that unless expressly or impliedly authorized, such delegation is not permissible. The exceptions to this rule fall in two classes which have been stated in the quotation from Crawford's book earlier cited in this judgment.

It is now convenient to examine the provisions of our Constitution in order to appreciate the contention of the learned Attorney-General that it has been modelled on the British system and that the Parliament of India is as omnipotent as in England and that in the matter of delegation of legislative power it is in an analogous situation. In my opinion, our Constitution is a judicious combination of the American model with the British Parliamentary system. In its main scheme it follows the Government of India Act, 1935, which provides for a federation of States and provides for an executive responsible to the legislature. As a matter of fact, the framers of the constitution, though they have borrowed ideas from other constitutions, have not rigidly adhered to any particular model. Certain provisions in our constitution are such for which there is no precedent in the constitution of any other country. It seems to me that they were as much alive to the doctrine of administrative convenience as to the dangers of a system which permits delegation of unfettered legislative power to the executive. The country had recently emerged from the bonds of a bureaucratic system which had killed

its very soul and they apparently did not wish it to get engulfed again in the rigours of that system. Bureaucratic rule is a necessary corollary to the existence of unfettered delegation of legislative power. To avoid this, the constitution makers made detailed provision in the Constitution on all matters. It has to be emphasized that no country in the world has such an elaborate and comprehensive constitution as we have in this country and it would not be proper to construe such a constitution with the help of decisions given elsewhere on the construction of constitutions shaped differently. It is only after a consideration of all the provisions of the Constitution and its whole scheme that it has to be decided whether delegation of power—legislative, executive or judicial—is implicit in the grant of any of these powers or has been expressly provided for, to the extent it was considered necessary on grounds of administrative convenience in peace or war time and therefore conferment of this power by implication cannot be upheld on its true construction. It has also to be borne in mind that our Constitution is fundamentally different from the British system inasmuch as the doctrine of supremacy of Parliament has its limitations here. The courts are empowered to declare Acts of Parliament unconstitutional if they are inconsistent with Part III of the Constitution or when the trespass on fields demarcated for State legislatures. Obviously, it is implicit in the demarcation of legislative fields that one legislature cannot by delegation of subjects that are exclusively within its field clothe the other with legislative capacity to make laws on that subject as it will amount to an infringement of the Constitution itself. It seems clear, therefore, that delegation of legislative power to that extent is prohibited by the Constitution. Illustratively, defence is a Union subject, while law and order is a State subject. Can it be argued with any reason that by delegation Parliament can arm a State legislature with the law-making power on the subject of defence and that a State legislature can arm Parliament with

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

power to make law of the subject of law and order? In my opinion, any argument on those lines has to be negatived on the ground that the delegation of such power would be contrary to the Constitution itself and that this kind of transfer of power is outside its contemplation. For a similar reason if such transfer of power is not possible in the case of one legislature to the other, it is difficult to justify it if the transfer is made in favour of the executive except to the extent allowed by the Constitution or to the extent that it had already been recognised under the designation "conditional legislation" or "rule-making power", of which presumably the constitution-makers were fully aware. I have again no hesitation in holding that our constitution-makers accepted the American doctrine against delegation of legislative power, and on grounds of administrative convenience and to meet particular circumstances they carefully made express provisions within the Constitution for devolution of power in those eventualities.

Article 53 of the Constitution concerns the executive power of the Union. It is vested in the President and in express terms it is stated in that article that it shall be exercised by him either *directly* or through officers subordinate to him in accordance with this Constitution. The Parliament is authorized by law to confer functions on authorities other than the President. A careful reading of this article shows that an elaborate provision has been made in the Constitution for employing agencies and machinery for the exercise of the executive power of the Union. The President is vested with the supreme command of the Defence Forces and in addition to this power, power of delegation has been conferred on Parliament even in its executive field in article 53(3) (b). Similar provision has been made in regard to the executive power of each State: (vide article 154). In article 77 provision has been made as to how the business of the Government of India has to be conducted. The President has been conferred the power of making rules for the more convenient transaction of the business

of the Government of India and for the allocation among Ministers of the said business. Such a detailed provision regarding the exercise of executive power does not exist in the other constitutions to which our attention was drawn. Article 79 provides that there shall be a Parliament for the Union. Provision has then been made in the various articles how the Parliament has to be constituted and how it has to conduct its business, what officers and secretariat it can employ and with what powers. Articles 107 to 119 relate to legislative procedure. It is implicit in these elaborate provisions that the Constitution bestowed the law-making powers on the body thus constituted by it, and it was this body in its corporate capacity that had to exercise its judgment and discretion in enacting laws and voting taxes and that judgment had to be arrived at by following the rules of procedure expressly laid down therein. Article 123 confers legislative power on the President when Parliament is not in session and this power is co-extensive with the legislative power of the Parliament itself. Article 124 deals with the Union judiciary. It prescribes the number of Judges and the method of their appointment and it lays down the procedure that the President has the power in making the appointments. In article 140 provision has been made under which Parliament can confer on the Supreme Court such supplemental powers as may appear to be necessary for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution. An express provision of this kind, in my opinion, very clearly negatives the proposition which the learned Attorney-General has been contending for. If the power of delegation of legislative powers is implicit in the power of legislation itself, the constitution-makers would not have made an express provision in article 140 bestowing authority on Parliament for conferment of ancillary powers on the Supreme Court Parliament obviously had authority to legislate on "Supreme Court" as it is one of the subjects in the Union List. Article 145(1) (a) again very strongly

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

negatives the proposition of the learned Attorney-General. The Constitution has authorized the Supreme Court to make rules as to the persons practising before the court. This is one of the subjects in the Union List and this conferment of power by the Constitution on the Supreme Court is subject to the provision of any law made by the Parliament. In other words, Parliament has been given express power to take away this power or supplement it by making a law. In my judgment, such a provision is quite foreign to a constitution in which delegation of law-making powers is implicit. Detailed provision has been made for the appointment of High Court Judges in article 217, and rule making powers have been given to the High Courts under article 227. In article 243 the President has been given the power to make regulations for the peace and good government of territories enumerated in Part D of the First Schedule and in exercise of that power he can repeal or amend any law made by Parliament or existing law. The Constitution itself has delegated the powers of the Parliament to the President wherever it thought that such delegation was necessary. Articles 245 and 246 demarcate the field of legislation between the Parliament and the State legislature and in article 248 provision has been made that residuary powers of legislation remain in the Parliament Article 250 makes provision for cases of emergency. Parliament in that event has power to make laws for the whole or any part of the territory of India with respect to any matters enumerated in the State lists. Article 252 is a somewhat peculiar provision. Under it Parliament can legislate for two or more States with their consent. This is a form of exercise of legislative power by Parliament as a delegate of the State as by its consent alone Parliament gets the power of legislation. By article 258 the President has been authorised with the consent of the Government of a State to entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. In that article provision has also been made for

delegation of powers by a law made by Parliament. By article 349 the power of the Parliament to enact laws in respect of language has been restricted. Article 353 states the effect of a proclamation of emergency and provides that the executive power of the Union in such a case shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. Clause (2) of this article requires emphasis. It provides that the power of Parliament to make laws with respect to any matters shall *include* power to make laws conferring powers and imposing duties, or *authorizing the conferring of powers* and the imposition of duties, upon the Union, or officers and authorities of the Union, as respects that matter, notwithstanding that it is one which is not enumerated in the Union List. Parliament in an emergency under article 250 has full power to make laws on subjects within the State List and is certainly entitled to delegate that power if that power is a content of legislative power but the constitution makers thought otherwise and made an express provision for delegation of power in such a situation. Article 357 provides that where by proclamation issued under clause (1) of article 356, it has been declared that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent for Parliament to confer on the President the power of the legislature of the State to make laws, and to authorize the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf. This is the only article by which the Constitution has authorized the delegation of essential legislative power. Possibly it was thought that in that contingency it was necessary that Parliament should have power to confer legislative power on the executive and to clothe it with its own legislative capacity in the State field and further to authorize the President to delegate that legislative power to any other authority specified by him. A reference to the entries in the three Lists of the Seventh Schedule further

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

illustrates this point. Entry 93 of List I is "Offences against laws with respect to any of the matters in this List." Entry 94 is "Inquiries, surveys and statistics for the purpose of any of the matters in this List." Entry 96 is "Fees in respect of any of the matters in this List, but not including fees taken in any court." Entry 95 is "Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List." All these entries are instances of subjects incidental and ancillary to the main subjects of legislation contained in the List. Similar entries are to be found in Lists II and III as well. The Constitution seems to have taken care to confer legislative power in express terms even regarding incidental matters and it is therefore unnecessary to read by implication and introduce by this process within such a constitution any matter not expressly provided therein.

I am satisfied that the constitution-makers considered all aspects of the question of delegation of power, whether executive, legislative or judicial, and expressly provided for it whenever it was thought necessary to do so in great detail. In this situation there is no scope for the application of the doctrine contended for by the learned Attorney-General and it must be held that in the absence of express powers of delegation allowed by the Constitution, the Parliament has no power to delegate its essential legislative functions to others, whether State legislatures or executive authorities, except, of course, functions which really in their true nature are ministerial. The scheme of the Constitution and of the Government of India Act, 1935, is that it expressly entrusted with legislative capacity certain bodies and persons and it also authorised the creation of law-making bodies wherever it thought necessary but gave no authority to create a new law-making body not created by itself. It even created the executive as a legislature in certain contingencies. In these circumstances it is not possible to add to the list of legislative authorities by a process of delegation. As pointed out by Crawford on Statutory

Construction, at page 333. "If a statute enumerates the things upon which it is to operate, everything else must necessarily and by implication be excluded from its operation and effect. So if a statute directs certain acts to be done in a specified manner by certain persons, their performance in any other manner than that specified, or by any other person than is there named, is impliedly prohibited." The ordinary rule is that if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the act authorised under other circumstances than those as defined. Under the Government of India Act, 1935, the executive enjoyed a larger power of legislation than is contained in the new constitution. It seems to have been cut down to a certain extent. The new constitution confers authority on Parliament to make laws for the State of Delhi. It also authorizes it to create a legislature for that State. The Constitution therefore has made ample provision indicating bodies who would be competent to make laws for the State of Delhi. In my opinion, therefore, delegation of legislative power to the executive in matters essentiai is unconstitutional. Any legislative practice adopted during the pre-constitution period for undeveloped and excluded areas can have no relevancy in the determination of this point.

Having examined the provisions of the new constitution, the constitutional position of the Indian legislature under the Indian Councils Act of 1861 and of the Government of India Act, 1935, as subsequently adapted by the Indian Independence Act, 1947, may now be examined.

As already stated, the Government of India Act, 1935, envisaged a federal constitution for India with a demarcation of the legislative field between the Federation and the States and it is the scheme of this Act which has been adopted in the new constitution I have already expressed my respectful agreement with the view expressed by Varadachariar J. in *Benoari Lal Sarma's* case(1) that the constitutional

(1) [1943] F.C.R. 96.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

position in India under this Act approximates more closely to the American model than to the English model and it seems to me that delegation of legislative power in its essentiality is not allowed by its provisions. During a period of emergency the Governor-General could himself under his own proclamation become the executive as well as the legislature and the necessities of administrative convenience were not a compelling circumstance for introducing into the scheme of the Act by implication, authority in Parliament for the delegation of legislative power. This Act also contains detailed provisions authorizing delegation of power both in the executive and legislative field wherever it was considered necessary to confer such power. The Indian Independence Act by section 6 conferred the power of legislation on the Dominion Parliament within the ambit of the Act of 1935. By other provisions of the Indian Independence Act it made the Dominion Parliament a Constituent Assembly for the purpose of making the new constitution for India and it also gave it authority to repeal Acts of Parliament. For the purpose of ordinary law-making it had the same powers as the legislatures in India enjoyed under the Government of India Act, 1935, and the question referred to us in regard to the Ajmer-Merwara Act, 1947, has to be answered on the provisions of the constitution contained in the Constitution Act of 1935.

The constitutional position in India prior to the Act of 1935 may now be briefly stated. Before the Charter Act of 1833 there was a division of legislative power between the Governor-General and the Presidencies. By that Act the power of the Presidencies as legislatures was terminated and the whole law-making power was vested in the Governor-General in Council. Mr. Macaulay was added as a legislative member to the executive council without a right to vote. In substance the executive and the legislative functions were performed, by the same body, of course, with the help and advice of Mr. Macaulay. With slight modifications the situation remained the same till the Indian Councils Act, 1861. Under this Act the

Governor-General in Council in legislative meetings could legislate for the whole of India and local legislatures could also legislate for the provinces. By section 10 of the Act the legislative power was *vested* in the Governor-General in Council. In section 15 it was laid down how that power was to be exercised. For conduct of the legislative business power was given to the Governor-General to make rules in section 18. Section 22 laid down the ambit of the legislative power. Section 23 bestowed power on the Governor-General in emergencies to make ordinances. Section 44 empowered the Governor-General to create local legislatures and confer on them legislative power. It appears that the scheme of the Councils Act was that whenever Parliament wanted the Governor-General in Council to have power to create legislatures or to make rules or regulations, that power was conferred in express terms. By another statute in the year 1870 summary power to make law was conferred on the Governor-General in his executive capacity in respect to less advanced areas, *i.e.*, non-regulation provinces. Another charter would not have been necessary if the Governor-General could arm himself with legislative power by a process of delegation from his own Council. In my opinion, the constitution as envisaged by the Indian Councils Act, 1861, does not authorize the delegation of essential legislative power by any of the legislative authorities brought into existence by that Act to the executive and it was for this reason that their Lordships of the Privy Council in *Burah's* case(1) did not base their decision on this ground but merely upheld the enactment as *intra vires* on the ground of conditional legislation. I am in respectful agreement with the opinion of Markby J. expressed in the year 1877 in these terms : "that any substantial delegation of legislative authority by the legislature of this country is void." The Privy Council on appeal did not dissent from this view.

It was argued that legislative practice in India since a long time has been such as would validate statutes

(1) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912, *etc.*

Mahajan J.

designed on the model of the three statutes under reference to us. Reference was made to the following observations in *U. S.* v. *Curtiss Wright*(1).

"Uniform, long continued and undisputed legislative practice resting on an admissible view of the constitution goes a long way to the direction of proving the presence of unassailable grounds for the constitutionality of the practice."

In my opinion, there is no evidence in this case of any uniform, long continued and undisputed legislative practice for validating statutes which have been drafted on lines similar to the statutes in question. The material on which this argument was based is of a most meagre character and does not warrant the conclusion contended for.

Annexure (A) annexed to the case stated on behalf of the President mentions two instances only before the year 1912 of this alleged long continued legislative practice, but even these instances are not analogous to the statutes which have been given in the reference. The scheme of those enactments in vital matters is different from the enactments in question. The first instance of this legislative practice is said to be furnished by section 5(a) which was added to the Scheduled Districts Act, 1874, by Act XII of 1891. It provided that with the *previous sanction of the Governor-General in Council* in declaring an enactment in force in the scheduled districts or in extending an enactment to a scheduled district the Local Government may declare the application of the Act subject to such restriction and modification as the Government may think fit. It is noticeable that section 7 of the Delhi Laws Act has not been drafted in the same terms as section 5(a) of the Scheduled Districts Act. Though constitutionally speaking, the Governor-General discharged the executive and legislative functions in meetings held separately for the two purposes and with the help of some additional members, for all practical purposes the Governor-General was truly

(1) 299 U.S. 304.

speaking in both executive and legislative matters the real authority in this country, and if previous sanction of this authority was necessary before declaring the law even with modifications, this instance cannot be such as would constitute legislative practice for what has been enacted in section 7 of the Delhi Laws Act.

The second instance cited is of the Burma Laws Act, 1898. In section 10 of this Act it was provided that the Local Government may, with the previous sanction of the Governor-General in Council by notification, with such restrictions and modifications as he thinks fit, extend certain acts in force in any part of Upper Burma at the date of the extension to certain areas. In section 4 a schedule was given of all the Acts that were in force in Upper Burma at the time of the enactment. This instance also does not furnish evidence of legislative practice for the validation of section 7 of the Delhi Laws Act in which there is no provision like the one contained in section 4 of the Burma Laws Act, 1898, and which also contains a provision similar to section 5(a) of the Scheduled Districts Act requiring the previous sanction of the Governor-General in Council. Both these important things are lacking in the Delhi Laws Act. Between 1861, and 1912, a period of over fifty years, two instances of this kind which occurred within seven years of each other cannot fall within the criterion laid down in the case cited above.

After the year 1912 three other illustrations were mentioned. The first of these is in sections 68 and 73 of the Inland Steam Vessels Act, 1917. Section 17 authorised modification of an enactment for the purpose of adaptation. This certainly is no instance of the kind of legislation contained in the Delhi Laws Act, 1912, section 7, or in the Ajmer-Merwara Act, 1947. Section 68 authorized the extension of certain chapters to certain areas with modifications.

The next instance mentioned was the Cantonments Act, 1924. By section 9 of this Act it was provided, that the Central Government may by notification exclude from the operation of any part of this Act the

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

whole or any part of a cantonment or direct that any provisions of this Act shall in the case of any cantonment apply with such modifications as may be so specified.

The third instance mentioned was in section 30 of the Petroleum Act, 1934. Here it was provided that the Central Government may by notification apply all or any of the provisions of this Act with such modifications as it may think fit to any other dangerous inflammable substance. This is an instance of adding certain items to the schedule annexed to an Act.

These three instances show that between the year 1917 and 1934, a period of seventeen years, three instances occurred of legislation, though not of the same kind as contained in the Delhi Laws Act, 1912, but bearing some similarity to that kind of legislation. No conclusion from those instances of any uniform legislative practice can be drawn.

The learned counsel appearing for the Government of Uttar Pradesh submitted a note in which an instance is mentioned of the Uttar Pradesh Land Revenue Act, III of 1901, which in section 1 of subsection (2) provided that the State Government may by notification extend the whole or any part of this Act to all or any of the areas so excepted subject to such exceptions or modifications as it thinks fit. This instance does not materially affect the situation.

After the research of a fortnight the learned Attorney-General gave us a supplementary list of instances in support of his contention. Two instances contained in this list are from sections 8 and 9 of Act XXII of 1869 discussed in *Burah's* case(1). The third instance is from section 39 of Act XXIII of 1861, again considered in that case, and these have already been discussed in an earlier part of this judgment. The only new instance cited is from the Aircraft Act of 1934, which authorized modification in the specification of an aircraft. It confers no authority to modify any law. Two instances in this list are from the Airforce Act, 1950, which was enacted subsequent to

(1) 5 I.A. 178.

the enactment under reference to us and cannot be considered relevant on this subject. The last instance cited is from the Madras Local Boards Act, 1920, which authorizes the Governor to extend the Act with certain modfications to areas to which it originally had not been made applicable. This instance of 1920 bears no relevancy for determining the validity of section 7 of the Act of 1912, enacted eight years before this instance came into existence.

A seemingly similar instance to the enactment contained in section 7 of the Delhi Laws Act is in section 8 of Act XXII of 1869, considered by the Privy Council in *Burah's* case(1). That instance, however, when closely examined, has no real resemblance to section 7 of the Delhi Laws Act. Act XXII of 1869 was enacted to remove the Garo Hills from the jurisdiction of tribunals established under the General Regulations. That was its limited purpose. By section 5 the administration of this part was vested in the officers appointed by the Lieutenant-Governor of Bengal and those officers had to be under his control and were to work under his instructions. The executive administration of this territory was, therefore, vested in the Lieutenant-Governor of Bengal. By section 8 of the Act, already cited, the Lieutenant-Governor was authorized by notification in the Calcutta Gazette to extend to the excluded territories laws in force in the *other territories subject to his government* or laws which might thereafter be enacted by the Council of the Governor-General or the Lieutenant-Governor in respect of those territories. Both these authorities were competent to make laws for the province of Bengal. The validity of section 8 was not questioned in *Burah's* case(2) and no argument was addressed about it. Regarding this section, however, the following observations occur in the judgment of their Lordship which were emphasized before us :—

"The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove

(1) 5 I.A. 178. (2) 72 I. A. 57.

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

a particular district from the jurisdiction of the ordinary courts and offices, and to place it under new courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, *not to make what laws he pleases* for that or any other *district* but to apply by public notification to that *district* any law, or part of a law, which either already was, or from time to time might be, in force, by *proper* legislative authority, *'in the other territories subject to his government.'* The legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject *to the same Government* were such as it might be fit and proper to apply to this district also."

All that these observations mean is that a law having been made by a competent legislature for the territory under his jurisdiction could be made applicable to a district excluded for certain purposes by a notification of the Lieutenant-Governor. As already pointed out, the Lieutenant-Governor could make laws for the whole province of Bengal and similarly, the Governor-General in Council could do so. The law having been made by a competent legislature for the territory for which it had power to legislate, the only power left in the Governor-General was to extend that legislation to an excluded area; but this is not what the Delhi Laws Act had done. As will be shown later, the Delhi Laws Act in section 7 has authorized the Governor-General in his executive capacity to extend to Delhi Laws made by legislatures which had no jurisdiction or competence to make laws for Delhi.

Having stated the principles on which answer has to be given to the questions referred to us, I now proceed to give my opinion on each of the three questions.

The first question relates to section 7 of the Delhi Laws Act, 1912, and concerns its validity in whole or in part. The section as enacted in 1912 was in these terms :—

"The Governor-General in Council may by notification in the official gazette extend with such restrictions and modifications as he thinks fit to the Province of Delhi or any part thereof any enactment which is in force in any part of British India at the date of such notification."

The section gives a *carte blanche* to the Governor-General to extend to the newly formed province any enactment in force in any part of British India at the date of the notification and not necessarily any enactment in force in British India at the date of the passing of the Delhi Laws Act. No schedule was annexed to the Act of the enactments that were in force in any part in British India at the date of the passing of the Act. As regards the enactments that may be in force any part of British India at the date of any notification, there was no knowing what those laws would be. Laws that were to be made after 1912, their principle and policy could not be known to the legislature that enacted section 7 of the Delhi Laws Act. It seems obvious that the legislature could not have exercised its judgment, nor its discretion in respect of those laws. It also conferred on the Governor-General power of modifying existing and future enactments passed by different legislatures in the country. The power of modification implies within it the power of amending those statutes. To use the words of a learned Judge, the section conferred a kind of a vague, wide, vagrant and uncanalised auhtority on the Governor-General. There is no provision within the section by virtue of which the mind of the legislature could ever be applied to the amendment made by the Governor-General in the different statutes passed by different legislatures in India and extended to Delhi.

1951

In re The Delhi Laws Act, 1912, *etc.*

Mahajan J.

Illustratively, it may be pointed out that numerous rent control Acts have been passed by different legislatures in India, laying down basically different policies and principles. The Provincial Government under the Delhi Laws Act is authorised to apply the policy of any one of these Acts to Delhi or the policy which it might evolve by combining different such statutes passed by different State legislatures. Legislative policy in the matter of rent control had not been evolved by the year 1912. Another illustration may be taken from the law of prohibition. Different State governments have adopted a policy of either complete prohibition or of local option. What policy is to be applied to Delhi and who is to decide that policy? Obviously, under section 7 the Provincial Government can without going to the legislature adopt any policy it likes, whether of partial or of complete prohibition and may apply to Delhi any law it thinks fit. It is obvious therefore that within the wide charter of delegated power given to the executive by section 7 of the Delhi Laws Act it could exercise essential legislative functions and in effect it became the legislature for Delhi. It seems to me that by enacting section 7 the legislature virtually abdicated its legislative power in favour of the executive. That, in my judgment, was not warranted by the Indian Councils Act, 1861, or by any decision of the Privy Council or on the basis of any legislative practice. The section therefore, in my opinion, is *ultra vires* the Indian Councils Act, 1861, in the following particulars : (i) inasmuch as it permits the executive to apply to Delhi laws enacted by legislatures not competent to make laws for Delhi and which these legislatures may make within their own legislative field, and (ii) inasmuch as it clothes the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India. If any list of the existing laws passed by the Governor-General in Council in his legislative capacity and of laws adopted by it though passed by other legislatures was annexed to the Act, to that extent the delegation of power, but

without any power of modifications in favour of the executive, might have been valid, but that is not what was enacted in section 7 of the Delhi Laws Act. Power to extend laws made in the future by the Governor-General in Council for the whole of India or adopted by it though passed later by other legislatures would also be *intra vires,* but farther than that the legislature could not go. If one may say so, section 7 declares that the legislature has no policy of its own and that the Governor-General in Council can declare it and can determine what laws would be in force in Delhi.

The second question concerns section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, which provides for extension of enactments to Ajmer-Merwara. It says :

"The Central Government may by notification in the official gazette extend to the province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other province at the date of such notification."

For the reasons given for holding that section 7 of the Delhi Laws Act is *ultra vires* the constitution in two particulars, this section also is *ultra vires* the Government of India Act, 1935, in those particular. The section does not declare any law but gives the Central Government power to declare what the law shall be. The choice to select any enactment in force in any province at the date of such notification clearly shows that the legislature declared no principles or policies as regards the law to be made on any subject. It may be pointed out that under the Act of 1935 different provinces had the exculsive power of laying down their policies in respect to subjects within their own legislative field. What policy was to be adopted for Delhi, whether that adopted in the province of Punjab or of Bombay, was left to the Central Government. Illustratively, the mischief of such law-making may be pointed out with reference to what happened in pursuance of this section in Ajmer-Merwara. The Bombay Agriculutral Debtors' Relief Act, 1947, has been

1951

In re The Delhi Laws Act, 1912, etc.

Mahajan J.

extended under cover of this section to Ajmer-Merwara and under the power of modification by amending the definition of the word 'debtor' the whole policy of the Bombay Act has been altered. Under the Bombay Act a person is a debtor who is indebted and whose annual income from sources other than agricultural and mainly labour does not exceed 33 per cent. of his total annual income or does not exceed Rs. 500, whichever is greater. In the modified statutes "debtor" means an agriculturist who owes a debt, and "agricutlturist" means a person who earns his livelihood by agriculture and whose income from such source exceeds 66 per cent. of his total income. The outside limit of Rs. 500 is removed. The exercise of this power amounts to making a new law by a body which was not in the contemplation of the Constitution and was not authorized to enact any laws. Shortly stated, the question is, could the Indian legislature under the Act of 1935 enact that the executive could extend to Delhi laws that may be made hereinafter by a legislature in Timbuctoo or Soviet Russia with modifications. The answer would be in the negative because the policy of those laws could never be determined by the law-making body entrusted with making laws for Delhi. The Provincial legislatures in India under the Constitution Act of 1935 *qua* Delhi constitutionally stood on no better footing than the legislatures of Timbuctoo and Soviet Russia though geographically and politically they were in a different situation.

The third question concerns section 2 of the Part C States (Laws) Act, 1950, which provides that—

"The Central Government may by notification in the official gazette extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions or modifications as it thinks fit any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

For reasons given for answering questions 1 and 2 that the enactments mentioned therein are *ultra vires* the constitution in the particulars stated, this question is also answered similarly. It might, however, be observed that in this case express power to repeal or amend laws already applicable in Part C States has been conferred on the Central Government. Power to repeal or amend laws is a power which can only be exercised by an authority that has the power to enact laws. It is a power co-ordinate and co-extensive with the power of the legislature itself. In bestowing on the Central Government and clothing it with the same capacity as is possessed by the legislature itself the Parliament has acted unconstitutionally.

In offering my opinion on the questions mentioned in the reference I have approached this matter with great caution and patient attention and having in mind the rule that the benefit of reasonable doubt on questions on the constitutional validity of a statute has to be resolved in favour of legislative action. The legislative action, however, in the enactments which are the subject-matter of the reference has been of such a drastic and wide and indefinite nature considered in its full amplitude that it is not possible to hold that in every particular these enactments are constitutional.

Mukherjea J.

MUKHERJEA J.—This is a reference made by the President of India, under article 143(1) of the Constitution, inviting this Court to consider and report to him its opinion on the three following questions :—

(1) Was section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act ?

(2) Was the Ajmer-Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof, and in what particular or particulars or to what extent *ultra vires* the Legislature which passed the said Act ?

(3) Is section 2 of the Part C States (Laws) Act 1950, or any of the provisions thereof, and in what

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

particular or particulars or to what extent *ultra vires* the Parliament ?

The necessity of seeking the advisory opinion of this Court is stated to have arisen from the fact that because of the decision of the Federal Court in *Jatindra Nath Gupta* v. *The Province of Bihar*(1), which held the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, *ultra vires* the Bihar Provincial Legislature, by reason of its amounting to a delegation of its legislative powers to an extraneous authority, doubts have arisen regarding the validity of the three legislative provisions mentioned above, the legality of the first and the second being actually called in question in certain judicial proceedings which are pending before some of the High Courts in India.

The Delhi Laws Act, 1912, which is the earliest of the enactments referred to above, was passed in 1912 by the Goveronr-General in Council at its legislative meeting, that being the legislature constituted for British India at that time, under the provisions of the group of statutes known as Indian Councils Acts (1861-1909). Delhi, which up till the 17th of September, 1912, was a part of the province of the Punjab, was created a Chief Commissioner's Province on that date and on the following date the Governor-General's Legislative Council enacted the Delhi Laws Act (Act XIII) 1912 which came into force on and from the 1st of October, 1912. Section 7 of the Act, in regard to which the controversy has arisen, provides as follows :—

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit, to the province of Delhi or any part thereof any enactment which is in force in any part of British India at the date of such notification."

The Ajmer-Merwara (Extension of Laws) Act was enacted on the 31st December, 1947, by the Dominion

(1) [1949-50] F.C.R 595.

Legislature of India under the provisions of the Government of Indian Act, 1935 (as adapted under the Indian Independence Act of 1947). Section 2 of the Act is in the following terms :—

"2. *Extension of enactments to Ajmer-Merwara,* —The Central Government may by notification in the official gazette extend to the province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other province at the date of such notification."

Part C States (Laws) Act, 1950, has been enacted by the Indian Parliament after the new Constitution came into force and the provision of section 2 of the Act to which the dispute relates is worded thus :—

"2. *Power to extend enactments to certain Part C States.*—The Central Government may, by notification in the official gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State with such restrictions and modifications as it thinks fit any enactment which is in force in a Part A State at the date of the notification ; and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

It will be noticed that in all the three items of legislation, mentioned above, there has been, what may be described, as conferment by the legislatures which passed the respective enactments, to an outside authority, of some of the powers which the legislative bodies themselves could exercise ; and the authority in whose favour the delegation has been made has not only been empowered to extend to particular areas the laws which are in force in other parts of India but has also been given a right to introduce into such laws, any restrictions or modifications as it thinks fit. The controversy centres round the point as to whether such delegation was or is within the competency of the particular legislature which passed these enactments.

1951

In re The Delhi Laws Act, 1912, *etc.*

Mukherjea J.

The contention of the learned Attorney-General, who represents the President of India, in substance is that a legislature which is competent to legislate on a particular subject has the competence also to delegate its legislative powers in respect of that subject to any agent or external authority as it thinks proper. The extent to which such delegation should be made is entirely a matter for consideration by the legislature itself and a court of law has no say in the matter. There could be, according to the learned Attorney-General, only two possible limitations upon the exercise of such right of delegation by a competent legislative body. One is that the legislature cannot abdicate or surrender its powers altogether or bring into existence a new legislative power not authorised by the constitutional instrument. The second is that if the constitutional document has provided for distribution of powers amongst different legislative bodies, one legislature cannot delegate, to another, powers, which are vested in it, exclusively under the Constitution. It is argued that, save and except these two limitations, the doctrine of inhibition of delegation by legislative authority has no place in a Constitution modelled on the English system which does not recognise the principle of separation of powers as obtains in the American system. These questions are of great constitutional importance and require careful consideration.

In America the rule of inhibition against delegation of legislative powers is based primarily upon the traditional American doctrine of "separation of powers." Another principle is also called in to aid in support of the rule, which is expressed in the well-known maxim of Private Law, *"delegatus non potest delegare"*, the authority for the same, being based on one of the dicta of Sir Edward Coke. The modern doctrine of "separation of powers" was a leading tenet in the political philosophy of the 18th century. It was elaborated by Montesquieu in his "L'esprit des lois" in explanation of the English political doctrine and was adopted, in theory at least in all its fulness and

rigidity by the constitution-makers of America. The constitution of America provides for the separation of the governmental powers into three basic divisions—the executive, the legislative, and the judicial—and the powers appertaining to each department have been vested in a separate body of public servants. It is considered to be an essential principle(1) underlying the constitution that powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers confided to others. As is said by Cooley,(2) "The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others."

The other doctrine that it invoked in support of the anti-delegation rule is the well accepted principle of municipal law, which prevents a person upon whom a power has been conferred, or to whom a mandate has been given, from delegating his powers to other people. The legislature is supposed to be a delegate deriving its powers from the 'people' who are the ultimate repository of all powers, and hence it is considered incapable of transferring such powers to any other authority.

These doctrines, though well recognised in theory, have a restricted and limited application in actual practice. Mr. Justice Story said(3)—

"But when we speak of a separation of the three great departments of Government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon

(1) See Kilbourn v. Thomson, 103 U.S. 168 at p. 190.

(2) See Cooley's "Constitutional Limitations", 7th Edition, page 126.

(3) Story's Constitution, s. 525.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments : and that such exercise of the whole would subvert the principles of free constitution."

As regards the maxim *delegatus non potest delegare,* its origin and theoretical basis are undoubtedly different from those of the doctrine of separation of powers. But, for practical purposes, both these doctrines are linked together and are used as arguments against the Congress attempting to invest any other authority with legislative powers. According to Willis, the disability of the Congress to delegate its legislative powers to the executive, purports to be based upon the doctrine of separation of powers ; while its incapacity to bestow its authority upon an 'independent body like a Board or Commission is said to rest on the maxim *delegatus non potest delegare*(1).

As said above, a considerable amount of flexibility was allowed in the practical application of these theories even from early times. The vast complexities of social and economic conditions of the modern age, and the ever growing amount of complicated legislation that is called for by the progressive social necessities, have made it practically impossible for the legislature to provide rules of law which are complete in all their details. Delegation of some sort, therefore, has become indispensable for making the law more effective and adaptable to the varying needs of society.

Thus in America, despite the theory which prohibits delegation of legislative power, one comes across numerous rules and regulations passed by non-legislative bodies in exercise of authority bestowed on them by the legislature in some shape or other. The legislature has always been deemed competent to create a municipal authority and empower it to make by-laws. In fact, such legislation is based upon the immemorial

(1) Willis on Constitutional Law, p. 136.

Anglo-Saxon practice of leaving to each local community the management and control of local affairs. The Congress can authorise a public officer to make regulations, or the Judges of the Court to frame rules of procedure which are binding in the same way as laws proper. It can authorise some other body to determine the conditions or contingencies under which a statute shall become operative and can empower administrative functionaries to determine facts and apply standards. "The separation of powers between the Congress and the Executive", thus observed Cardozo, J. in his dissenting judgment in *Panama Refining Company* v. *Ryan*(1), "is not a doctrinaire concept to be made use of with pedantic rigour. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of Government which cannot foresee today the developments of tomorrow in their nearly infinite variety". In fact, the rule of non-delegation has so many exceptions engrafted upon it that a well known writer(2) of constitutional law has tersely expressed that it is difficult to decide whether the dogma or the exceptions state the rule correctly.

It does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of government that India has at the present day under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under article 53(1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system, the essential feature of which is the responsibility of the executive to the legislature. The President, as the head of the executive, is to act on the advice of the Council of

(1) 293 U.S. 388 at 440.

(2) See Willis on Consitutionl Law, p. 137.

1951

In re The Delh Laws Act, 1912, etc.

Mukherjea J.

Ministers, and this Council of Ministers, like the British Cabinet, is a "hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part".

There could undoubtedly be no question of the executive being responsible to the legislature in the year 1912, when the Delhi Act XIII of 1912 was passed, but at that time it was the executive which really dominated the legislature, and the idea of a responsible government was altogether absent. It was the Executive Council of the Governor-General which together with sixty additional members, of whom 33 were nominated, constituted the Governor-General's Legislative Council and had powers to legislate for the whole of British India. The local legislatures in the provinces were constituted in a similar manner. The first advance in the direction of responsible government was made by the Government of India Act, 1919, which introduced dyarchy in the provinces. The Government of India Act, 1935, brought in Provincial autonomy, and ministerial responsibility was established in the provinces subject to certain reserved powers of the Governor. In the Centre the responsibility was still limited and apart from the discretionary powers of the Governor-General the Defence and External Affairs were kept outside the purview of ministerial and legislative control. Thus whatever might have been the relation between the legislature and the executive in the different constitutional sets ups that existed at different periods of Indian history since the advent of British rule in this country, there has never been a rigid or institutional separation of powers in the form that exists in America.

The maxim *delegatus non potest delegare* is sometimes spoken of as lying down a rule of the law of agency; its ambit is certainly wider than that and it is made use of in various fields of law as a doctrine which prohibits a person upon whom a duty or office has devolved or a trust has been imposed from delegating his duties or powers to other persons. The

introduction of this maxim into the constitutional field cannot be said to be altogether unwarranted, though its basis rests upon a doubtful political doctrine. To attract the application of this maxim, it is essential that the authority attempting to delegate its powers must itself be a delegate of some other authority. The legislature, as it exists in India at the present day, undoubtedly is the creature of the Indian Constitution, which defines its powers and lays down its duties; and the Constitution itself is a gift of the people of India to themselves. But it is not a sound political theory, that the legislature acts merely as a delegate of the people. This theory once popularised by Locke and eulogized by early American writers is not much in favour in modern times. With regard to the Indian Legislature as it existed in British days constituted under the Indian Councils Act, it was definitely held by the Judicial Committee in the well-known case of *Queen* v. *Burah*(1) that it was in no sense a delegate of the British Parliament. In that case the question arose as to the validity of section 9 of Act XXII of 1869 passed by the Governor-General's Legislative Council. The Act provided that certain special laws, which had the effect of excluding the jurisdiction of the High Court, should apply to a certain district known as Garo Hills, and section 9 empowered the Lieutenant-Governor of Bengal to extend the operation of these laws to certain other areas if and when the Lieutenant-Governor, by notification in the Calcutta Gazette, would declare that they should be so applied. The majority of the Judges of the Calcutta High Court upheld the contention of the respondent, Burah, that the authority conferred on the Lieutenant-Governor to extend the Act in this way was in excess of the powers of the Governor-General in Council, and in support of this view, one of the learned Judges relied *inter alia* upon the principles of the law of agency. This view was negatived by the Judicial Committee, and Lord Selborne, in delivering the judgment, observed as follows :—

(1) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself".

Practically the same observations were reiterated by the Judicial Committee in the case of *Hodge* v. *The Queen*(1) while describing the position of the Provincial Legislature under the Canadian Constitution and stress was laid upon the plenitude of power which such Legislature could exercise when acting within the limits prescribed for it by the Imperial Parliament.

I am quite willing to concede that the doctrine of separation of powers cannot be of any assistance to us in the solution of the problems that require consideration in the present case. In my opinion, too much importance need not also be attached to the maxim *delegatus non potest delegare*, although as an epigrammatic saying it embodies a general principle that it is not irrelevant for our present purpose. But even then I am unable to agree with the broad proposition enunciated by the learned Attorney-General that a legislative power *per se* includes within its ambit a right for the legislative body to delegate the exercise of that power in any manner it likes to another person or authority. I am unable also to accept his contention that in this respect the authority of the Indian Legislature is as plenary as that of the British Parliament, and, provided the subject-matter of legislation is not one outside the field of its legislative competence, the legislature in India is able to do through an agent anything which it could do itself.

It is to be noted that so far as the British Parliament, is concerned, there is no constitutional limitation upon its authority or power. In the words of Sir

(1) 9 App. Cas. 117.

Edward Coke(1), "the Power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds..... It hath sovereign and uncontrollable authority in the making, confirming, enlarging, abrogating, repealing, reviving and expounding of laws.....this being the place where that absolute despotic power which must in all governments reside somewhere is entrusted by the constitution of these kingdoms." The British Parliament cannot only legislate on any subject it likes and alter or repeal any law it likes, but being both "a legislative and a constituent assembly", it can change and modify the so-called constitutional laws and they can be changed by the same body and in the same manner as ordinary laws; and no act of the Parliament can be held to be unconstitutional in a British Court of Law.(2)

This sovereign character was not, and could not be, predicated of the Legislative Council of British India as it was constituted under the Indian Councils Act, even though it had very wide powers of legislation and within the scope of its authority could pass laws as important as those passed by the British Parliament(3). It is not present also in the Indian Parliament of the present day which is a creature of the Indian Constitution and has got to exercise its legislative powers within the limits laid down by the Constitution itself. Acting in its ordinary capacity as a legislative body, the Indian Parliament cannot go beyond the Constitution or touch any of the Constitutional or fundamental laws, and its acts can always be questioned in a court of law. Consequences of great constitutional importance flow from this difference and they have a material bearing on the question before us. The contention of the learned Attorney-General in substance is that the power of delegation of legislative authority without any limitation as to its extent is

(1) See Coke's Fourth Institute, p. 36.

(2) See Dicey's Law of the Constitution, p. 88 (9th Edition).

(3) See Dicey's Law of the Consitution, p. 99 (9th Edition).

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

implicit in the exercise of the power itself, and in support of his contention he refers to the unrestricted rights of delegation which are exercised by the British Parliament. But the validity or invalidity of a delegation of legislative power by the British Parliament is not and cannot be a constitutional question at all in the United Kingdom, for the Parliament being the omnipotent sovereign is legally competent to do any thing it likes and no objection to the constitutionality of its acts can be raised in a court of law. Therefore, from the mere fact that the British Parliament exercises unfettered rights of delegation in respect of its legislative powers, the conclusion does not follow that such right of delegation is an inseparable adjunct of the legislative power itself. The position simply is this that is England, no matter, to whichever department of the powers exercisable by the British Parliament the right of delegation of legislative authority may be attributed—and there is no dispute that all the sovereign powers are vested in the Parliament—no objection can be taken to the legality of the exercise of such right. But in India the position even at the present day is different. There being a written constitutions which defines and limits the rights of the legislature, the question whether the right of delegation, either limited or unlimited, is included within, and forms an integral part of, the right of legislation is a question which must be answered on a proper interpretation of the terms of the Constitution itself. We need not for this purpose pay any attention to the American doctrine of separation of powers; we must look to the express language of our own Constitution and our approcah should be to the essential principles underlying the process of law-making which our Constitution envisages. According to the Indian Constitution, the power of law-making can be exercised by the Union Parliament or a State Legislature which is to be constituted in a particular manner and the process of legislation has been described in detail in various articles(1). Powers have been given to the President

(1) Vide Articles 107 and 111 ; 196 to 200.

in article 123 and to the Governor of a State under article 213 to promulgate Ordinances during recess of the respective legislatures. Specific provisions have also been made for exercise of the legislative powers by the President on proclamation of emergency and in respect of Part D territories. Law-making undoubtedly is a task of the highest importance and responsibility, and, as our Constitution has entrusted this task to particular bodies of persons chosen in particular ways, and not only does it set up a machinery for law-making but regulates the methods by which it is to be exercised and makes specific provisions for cases where departure from the normal procedure has been sanctioned, the *prima facie* presumption must be that the intention of the Constitution is that the duty of law-making is to be performed primarily by the legislative body itself. The power of the Parliament to confer on the President legislative authority to make laws and also to authorise the President to delegate the power so conferred to any other authority has been recognised only as an emergency provision in article 357 of the Constitution. Save and except this, there is no other provision in the Constitution under which the legislature has been expressly authorised to delegate its legislative powers. "It is a well-known rule of construction that if a statute directs that certain acts shall be done in a specified manner or by certain persons, then performance in any other manner than that specified or by any other persons than those named is impliedly prohibited(1)." It has been observed by Baker in his treatise on "Fundamental Laws" that quite apart from the doctrine of separation of powers, there are other cogent reasons why legislative power cannot be delegated. "Representative government" thus observes the learned author,(2) "vests in the persons chosen to exercise the power of voting taxes and enacting laws, the most important and sacred trust known to civil government. The representatives of the people are

(1) Vide Crawford's Statutory Construction, p. 334.

(2) Baker's Fundamental Laws, Vol. I, p. 287.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

required to exercise wise discretion and a sound judgment, having due regard for the purposes and the needs of the executive and judicial department, the ability of the taxpayer to respond and the general public welfare. It follows as a self-evident proposition that a responsible legislative assembly must exercise its own judgment." In the same strain are the observations made by Cooley in his "Constitution Law"(1) that the reason against delegation of power by the legislature is found in the very existence of its own powers. "This high prerogative has been entrusted to its own wisdom, judgment and patriotism, and not to those of other persons, and it will act *ultra vires* if it undertakes to delegate the trust instead of executing it".

The same considerations are applicable with regard to the legislative bodies which exercised the powers of law-making at the relevant periods when the Delhi Laws Act of 1912 and the Ajmer-Merwara Act of 1947 were enacted. Under the Indian Councils Act, 1861, the power of making laws and regulations was expressly vested in a distinct body consisting of the members of the Governor-General's Council and certain additional members who were nominated by the Governor-General for a period of two years. The number of such additional members which was originally from 6 to 12 was increased by the subsequent amending Acts and under the Indian Councils Act of 1909, it was fixed at 60, of which 27 were elected and the rest nominated by the Governor-General. It was this legislative body that was empowered by the Indian Councils Act to legislate for the whole of British India and there were certain local legislatures in addition to this in some of the provinces.

Section 18 of the Indian Councils Act of 1861 empowered the Governor-General to make rules for the conduct of business at meetings of the Council for the purpose of making laws; section 15 prescribed the quorum necessary for such meetings and further provided that the seniormost ordinary member could preside in the absence of the Governor-General. This was

(1) Vide Fourth Edition, p. 138.

the normal process of law-making as laid down by the Indian Councils Act. Special provisions were made for exceptional cases when the normal procedure could be departed from. Thus section 23 of the Act of 1861 empowered the Governor-General to make ordinances having the force of law in case of urgent necessity; and later on under section 1 of the Indian Councils Act of 1870 the executive government was given the power to make regulations for certain parts of India to which the provisions of the section were declared to be applicable by the Secretary of State. Besides these exceptions for which specific provisions were made, there is nothing in the parliamentary Acts passed during this period to suggest that legislative powers could be exercised by any other person or authority except the Legislative Councils mentioned above.

The Ajmer-Merwara Act was passed by the Dominion Legislature constituted under the Government of India Act, 1935, as adapted under the Indian Independence Act of 1947. The provisions of the Constitution Act of 1945 in regard to the powers and functions of the legislative bodies were similar to those that exist under the present Constitution and no detailed reference to them is necessary.

The point for consideration now is that if this is the correct position with regard to exercise of powers by the legislature, then no delegation of legislative function, however small it might be, would be permissible at all. The answer is that delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law-making powers by the proper legislature, and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery. A constitutional power may be held to imply a power of delegation of authority which is necessary to effect its purpose; and to this extent delegation of a power may be taken to be implicit in the exercise of that power. This is on the principle "the everything necessary to the exercise of a power

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

is implied in the grant of the power. Everything necessary to the effective exercise of legislation must, therefore be taken to be conferred by the Constitution within that power."(1). But it is not open to the legislature to strip itself of its essential legislative function and vest the same on an extraneous authority. The primary or essential duty of law-making has got to be discharged by the legislature itself; delegation may be resorted to only as a secondary or ancillary measure.

Quite apart from the decisions of American courts, to some of which I will refer presently, the soundness of the doctrine rests, as I have said already, upon the essential principles involved in our written Constitution. The work of law-making should be done primarily by the authority to which that duty is entrusted, although such authority can employ an outside agency or machinery for the purpose of enabling it to discharge its duties properly and effectively; but it can on no account throw the responsibility which the Constitution imposes upon it on the shoulders of an agent or delegate and thereby practically abdicate its own powers.

The learned Attorney-General in support of the position he took up placed considerable reliance on the observations of the Judicial Committee in the case of *Queen* v. *Burah*(2), which I have referred to already and which have been repeated almost in identical language in more than one subsequent pronouncement of the Judicial Committee. The Privy Council made those observations for the purpose of clearing up a misconception which prevailed for a time in certain quarters that the Indian or the Colonial Legislatures were mere agents or delegates of the Imperial Parliament, and being in a sense holders of mandates from the latter, were bound to execute these mandates personally. This conception, the Privy Council pointed out, was wrong. The Indian Legislature, or for the matter of that the Colonial Parliament could, of course, do nothing beyond the limits

(1) Per O'Connor J. in *Baxter* v. *Ah Way* 8 *C.L.R.* 626 at 637.
(2) I.A. 178.

prescribed for them by the British Parliament. But acting within these limits they were in no sense agents of another body and had plenary powers of legislation as large and of the same nature as those of the Parliament itself. It should be noted that the majority of the Judges of the Calcutta High Court in *Queen* v. *Burah*(1) proceeded on the view that the impugned provision of Act XXII of 1869 was not a legislation but amounted to delegation of legislative power and Mr. Justice Markby in his judgment relied expressly upon the doctrine of agency. This view of Mr. Justice Markby was held to be wrong by the Privy Council in the observations mentioned above and as regards the first and the main point the Judicial Committee pointed out that the majority of the Judges of the High Court laboured under a mistaken view of the nature and principles of legislation, for as a matter of fact nothing like delegation of legislation was attempted in the case at all. It seems to me that the observations relied on by the Attorney-General do not show that in the opinion of the Privy Council the Indian Legislative Council had the same unrestricted rights of delegation of legislative powers as are possessed by the British Parliament. If that were so there was no necessity of proceeding any further and the case could have been disposed of on the simple point that even if there was any delegation of legislative powers made by the Indian Legislative Council it was quite within the ambit of its authority. In my opinion, the object of making the observations was to elucidate the character in which the Indian Legislative Council exercised its legislative powers. It exercised the powers in its own right and not as an agent or delegate of the British Parliament. If the doctrine of agency is to be imported, the act of the agent would be regarded as the act of the principal, but the legislation passed by the Indian Legislature was the act of the Legislature itself acting within the ambit of its authority and not of the British Parliament, although it derived its authority from the latter. This view has been clearly

(1) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, *etc.*

Mukherjea J.

expressed by Rand J. of the Supreme Court of Canada while the learned Judge was speaking about the essential character of the legislation passed by the legislative bodies in Canada(1). The observations of the learned Judge are as follows :—

"The essential quality of legislation enacted by these bodies is that it is deemed to be the law of legislatures of Canada as a self-governing political organization and not law of Imperial Parliament. It was law within the Empire and law within the Commonwealth, but it is not law as if enacted at Westminster, though its source or authority is derived from that Parliament." It should be noted further that in their judgment in *Burah's* case(2) the Privy Council while dealing with the matter of delegated authority was fully alive to the implications of a written constitution entrusting the exercise of legislative powers to a legislature constituted and defined in a particular manner and imposing a disability on such legislature to go beyond the specific constitutional provisions. Just after stating that the Indian Legislature was in no sense a delegate of the Imperial Parliament the Privy Council observed : "The Governor-General in Council could not by any form of an enactment create in India and arm with legislative authority a new legislative power not created and authorised by the Councils Act.

Almost in the same strain were the observations of the Judicial Committee in *In re The Initiative and Referendum Act,* 1919 (3) ; and while speaking about the powers of the Provincial Legislature under the Canadian Act of 1867 Lord Haldane said :

"Section 92 of the Act of 1867 entrusts the legislative power in a province to its legislature and to that legislature only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by the provincial legislature in Canada could, while preserving its own capacity intact, seek

(1) See *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*, (1950) 4 D.L.R., 369 at p. 945.

(2) 5 I.A. 178.

(3) [1919] A. C. 935 at p. 945.

the assistance of subordinate agencies as had been done when in *Hodge* v. *Queen*(1) the legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

It is not correct to say that what these observations contemplate is a total effacement of the legislative body on surrender of all its powers in favour of another authority not recognised by the constitution. Such a thing is almost outside the range of practical consideration. The observations of Lord Haldane quoted above make it quite clear that his Lordship had in mind the distinction between "seeking the assistance of a subordinate agency in the framing of rules and regulations which are to become a part of the law," and "conferring on another body the essential legislative function which under the constitution should be exercised by the legislature itself." The word "abdication" is somewhat misleading, but if the word is to be used at all, it is not necessary in my opinion to constitute legal abdication that the legislature should extinguish itself completely and efface itself out of the pages of constitution bequeathing all its rights to another authority which is to step into its shoes and succeed to its rights. The abdication contemplated here is the surrender of essential legislative authority even in respect of a particular subject-matter of legislation in favour of another person or authority which is not empowered by the constitution to exercise this function.

I will now attempt to set out in some detail the limits of permissible delegation, in the matter of making laws, with reference to decided authorities. For this purpose it will be necessary to advert to some of the more important cases on the subject decided by the highest courts of America, Canada and Australia. We have also a number of pronouncements of the Judicial Committee in appeals from India and the Colonies. I confess that no uniform view can be gathered from

(1) 9 App. Cas. 117.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

these decisions and none could possibly be expected in view of the fact that the pronouncements emanate from Judges in different countries acting under the influence of their respective traditional theories and the weight of opinion of their own courts on the subject. None of these authorities, however, are binding on this court and it is not necessary for us to make any attempt at reconciliation. We are free to accept the view which appears to us to be well-founded on principle and based on sound juridical reasoning.

Broadly speaking, the question of delegated legislation has come up for consideration before courts of law in two distinct classes of cases. One of these classes comprises what is known as cases of "conditional legislation," where according to the generally accepted view, the element of delegation that is present relates not to any legislative function at all, but to the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate. The other class comprises cases of delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body upon what is described as a subordinate agent or authority. I will take up for consideration these two types of cases one after the other.

In a conditional legislation, the law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. "The aim of all legislation", said O'Conner J. in *Baxter* v. *Ah Way*[1] "is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases and therefore legislation from the very earliest times, and particularly in more

(1) 8 C.L.R. 626 at 637.

modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied or to what its operation shall be extended, or the particular class of persons or goods or things to which it shall be applied." In spite of the doctrine of separation of powers, this form of legislation is well-recognised in the legislative practice of America, and is not considered as an encroachment upon the anti-delegation rule at all. As stated in a leading Pennsylvania *case*(1), "the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation."

One of the earliest pronouncements of the judicial Committee on the subject of conditional legislation is to be found in *Queen* v. *Burah*(2). In that case, as said, already, the Lieutenant-Governor of Bengal was given the authority to extend all or any of the provisions contained in a statute to certain districts at such time he considered proper by notification in the official gazette. There was no legislative act to be performed by the Lieutenant-Governor himself. The Judicial Committee observed in their judgment:—

"The proper legislature has exercised its judgment as to place, persons, laws, powers, and the result of that judgment has been to legislate conditionally as to those things. The conditions being fulfilled, the legislation is now absolute."

Just four years after this decision was given, the case of *Russell* v. *The Queen*(3) came up before the

(1) Locke's Appeal, 72 Pa. 491.
(2) 5 I.A. 178.
(3) 7 App. Cas. 829.

1951

In re he Delhi Laws Act, 1912, etc.

Mukherjea J.

Judicial Committee. The subject-matter of dispute in that case was the Canadian Temperance Act of 1878, the prohibitory and penal provisions of which were to be operative in any county or city, only if upon a vote of the majority of the electors of that county or city favouring such a course the Governor-General by Order in Council declared the relative part of the Act to be in force. One of the contentions raised before the Judicial Committee was that the provision was void as amounting to a delegation of legislative authority to a majority of voters in the city or county. This contention was negatived by the Privy Council, and the decision in *Queen* v. *Burah*(1) was expressly relied upon. "The short answer to this question," thus observed the Judicial Committee, "is that the Act does not delegate any legislative power whatsoever. It contains within itself the whole legislation on the matter with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer authority or power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency."

The same principle was applied by the Judicial Committee in *King* v. *Benoari Lal Sarma*(2). In that case, the validity of an emergency ordinance by the Governor-General of India was challenged *inter alia* on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that "this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined

(1) 5 I.A. 178. (2) 72 I.A. 57.

by the judgment of a local administrative body as to its necessity."

Thus, conditional legislation has all along been treated in judicial pronouncements not to be a species of delegated legislation at all. It comes under a separate category, and, if in a particular case all the elements of a conditional legislation exist, the question does not arise as to whether in leaving the task of determining the condition to an outside authority, the legislature acted beyond the scope of its powers.

I now come to the other and more important group of cases where admittedly a portion of the law-making power of the legislature is conferred or bestowed upon a subordinate authority and the rules and regulations which are to be framed by the latter constitute an integral portion of the statute itself. As said already, it is within powers of Parliament or any competent legislative body when legislating within its legislative field, to confer subordinate administrative and legislative powers upon some other authorities. The question is: what are the limits within which such conferment or bestowing of powers could be properly made? It is conceded by the learned Attorney-General that the legislature cannot totally abdicate its functions and invest another authority with all the powers of legislation which it possesses. Subordinate legislation, it is not disputed, must operate under the control of the legislature from which it derives its authority, and on the continuing operation of which, its capacity to function rests. As was said by Dixon J.(1) "a subordinate legislation cannot have the independent and unqualified authority which is an attribute of true legislative power." It is pointed out by this learned Judge that several legal consequences flow from this doctrine of subordinate legislation. An offence against subordinate legislation is regarded as an offence against the statute and on the repeal of the statute the regulations automatically collapse. So far, the propositions cannot, and need not, be disputed. But,

(1) Vide *Victoria Stevedoring and General Contracting Company* v. *Dignan*, 46 C.L.R. 73 at 102.

1951

In re Th Delhi Laws Act, 1912, *etc.*

Mukherjea J.

according to the learned Attorney-General all that is necessary in subordinate legislation is that the legislature should not totally abdicate its powers and that it should retain its control over the subordinate agency which it can destroy later at any time it likes. If this is proved to exist in a particular case, then the character or extent of the powers delegated to or conferred upon such subordinate agent is quite immaterial and into that question the courts have no jurisdiction to enter. This argument seems plausible at first sight, but on closer examination, I find myself unable to accept it as sound. In my opinion, it is not enough that the legislature retains control over the subordinate agent and could recall him at any time it likes, to justify its arming the delegate with all the legislative powers in regard to a particular subject. Subordinate legislation not only connotes the subordinate or dependent character of the agency which is entrusted with the power to legislate, but also implied the subordinate or ancillary character of the legislation itself, the making of which such agent is entrusted with. If the legislature hands over its essential legislative powers to an outside authority, that would, in my opinion amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.

The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. "So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply"(1).

(1) Vide *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495

The Supreme Court of America has held in more cases than one that the policy of the law-making body and the standards to guide the administrative agency may be laid down in very broad and general terms. It is enough if the legislature lays down an intelligible principle which can be implemented by the subordinate authorities for specific cases or classes of cases(1). The Court has been exceedingly loath to find violation of this principle and in fact there are, only two cases, *viz., Panama Refining Co.* v. *Ryan*(2) and *Schechter Poultry Corp.* v. *U.S.*(3) where the federal legislation was held invalid on the ground that the standard laid down by the Congress for guiding administrative discretion was not sufficiently definite. In *Panama Refining Co.* v. *Ryan*(2) Chief Justice Hughes very clearly stated "that the Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is invested." "In every case," the learned Chief Justice continued, "in which the question has been raised the court has recognised that there are limits of delegation which there is no constitutional authority to transcend.....We think that section 9(c) goes beyond those limits; as to transportation of oil production in excess of state permission the Congress has declared no policy, has established no standard has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." Mr. Justice Cardozo differed from the majority view in this case and held that a reference express or implied to the policy of Congress as declared in section 1 was a sufficient definition of a standard to make the statute valid. "Discretion is not unconfined and vagrant" thus observed the learned Judge. "It is confined within banks that keep it from overflowing."

It is interesting to note that in the latter case of *Schechter Poultry Corporation*(3), where the legislative power was held to be unconstitutionally delegated by the provision of section 3 of the National Industrial

(1) Vide *J. W. Hampton* v. *U.S.* 276 *U.S.* 394.

(2) 293 U.S. 388. (3) 295 U.S. 495.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

Recovery Act of 1933 as no definite standard was set up or indicated by the legislature, Cardozo J. agreed with the opinion of the Court and held that the delegated power of legislation which had found expression in that Code was not canalised within banks but was unconfined and vagrant. "Here in the case before us" thus observed the learned Judge, "is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. This is delegation running riot. No such plenitude of powers is capable of transfer". As said above, these are the only two cases up till now in which the statutes of Congress have been declared invalid because of delegation of essential legislative powers. In the later cases the court has invariably found the standard established by the Congress sufficiently definite to satisfy the prohibition against delegation of legislative powers, and in all such cases a most liberal construction has been put upon the enactment of the legislature(1).

We are not concerned with the actual decisions in these cases. The decisions are to be valued in so far as they lay down any principles. The manner of applying the principles to the facts of a particular case is not at all material. The decisions referred to above clearly lay down that the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity

(1) See *Opp Cotton Mills* v. *Administrator of Wages*, 312; U.S. 126; *Yakus* v. *United States*, 321 *U.S.* 414; *American Pr. & Lt. Co.* v. *Securities and Exchange Commission*, 329 *U.S.* 90.

for delegation or not, the exercise of such discretion is not to be disturbed by the court except in clear cases of abuse. These I consider to be the fundamental principles and in respect to the powers of the legislature the constitutional position in India approximates more to the American than to the English pattern. There is a basic difference between the Indian and the British Parliament in this respect. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament *qua* legislative body is fettered by a written constitution and it does not possess the sovereign powers of the British Parliament. The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete. It is said by Schwartz in his work on American Administrative Law "that these doctrines enable the American courts to ensure that the growth of executive power necessitated by the rise of the administrative process will not be an uncontrollable one. Delegation of powers must be limited ones—limited either by legislative prescription of ends and means, or even of details or by limitations upon the area of the power delegated. The enabling legislation must, in other words, contain a framework within which the executive action must operate"(1).

It would be worthwhile mentioning in this connection that the report of the Committee on Ministers' Power recommended something very much similar to this American doctrine as a proper check on delegated legislation. The report says that "the precise limits of a law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it, when discretion is conferred its limits should be defined with

(1) Schwrtz's American Administrative Law, p. 22.

1951

In re he Delhi Laws Act, 1912, etc.

Mukherjea J.

equal clearness"(1). It is true that what in America is a question of *vires* and is subject to scrutiny by courts, in the United Kingdom it is a question of policy having a purely political significance. But the recommendation of the Committee would clearly indicate that the rules laid down and acted upon by the American Judges particularly is later years can be supported on perfectly clear and sound democratic principles.

I will now advert to the leading Canadian and Australian cases on the subject and see how far these decision lend support to the principles set out above. Many of these Canadian cases, it may be noted, went up on appeal to the Judicial Committee.

I will start with the case of *Hodge* v. *The Queen*(2) which came up before the Judicial Committee on appeal from the decision of the Court of Appeal for Ontario in the year 1883. The facts of the case are quite simple. The appellant was convicted for permitting and suffering a billiard table to be used and a game of billiard to be played thereon in violation of a resolution of the License Commissioners who were authorised by the Liquor License Act of 1877 to enact regulations regulating the use of taverns, with power to create offences and annex penalties thereto. One of the questions raised was whether the Ontario Legislature could delegate powers to the License Commissioners to frame regulations by which new offences could be created. The Privy Council agreed with the High Court in holding that the legislature for Ontario was not in any sense exercising delegated authority from the Imperial Parliament and it had full authority to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subject specified in the enactment and with the object of carrying the enactment into operation and effect. It was observed :—

"Such an authority is ancillary to legislation; .....the very full and very elaborate judgment of the

(1) Vide Report, page 65. (2) 9 App. Cas. 117.

Court of Appeal contains abundance of precedents for the legislature entrusting a limited discretionary authority to others and as many illustrations of its necessity and convenience."

It will be seen that what was delegated by the Ontario Legislature to the Licensé Commissioners was simply the power to regulate tavern licenses. There was no question of parting with substantial legislative powers in this case. But although the Privy Council stated clearly that the Ontario legislature was quite supreme within its own sphere and enjoyed the same authority as the Imperial or the Dominion Parliament, they described the power delegated as authority ancillary to legislation and expressly referred to the "abundance of precedents for the legislature entrusting a limited discretionary authority to others." There was no necessity for the Privy Council to use the guarded language it used if in fact the Ontario legislature had the same right of delegating its powers as the British Parliament. It would be pertinent to note that Davey, Q.C., who appeared for the Crown in support of the judgment appealed against, did not contend before the Privy Council that the Ontario legislature had full rights of delegation like the British Parliamentary and consequently its acts could not be challenged as unconstitutional. His argument was that in this case there was no delegation of legislative authority and what was delegated was only the power to make by-laws. By legislative authority the learned Counsel apparently meant the essential legislative function as distinguished from the power to make rules and regulations and the arguments implied that the essential legislative powers could not be delegated at all.

The case of *Powell* v. *Appollo Candle Co.*(1) is the next case in point of time which has a bearing on the question before us. That case came up on appeal from a decision of the Supreme Court of New South Wales and the question arose whether section 133 of

(1) 10 App. Cas. 232.

1951

In re The Delhi Laws Act, 1912 *etc.*

Mukherjea J.

the Customs Regulation Act of 1879 of the Colony, was or was not *ultra vires* the Colonial legislature. The attack on the validity of the legislation was *inter alia* on the ground that it conferred upon the Government power to levy duty on certain articles which in the opinion of the Collector were substituted for other dutiable articles. The question was whether such power could be validly conferred. The Privy Council had no difficulty in holding that the provision was perfectly valid and it was quite within the competence of the Colonial legislature which was in no sense a delegate of the Imperial Parliament, to confer a discretion of this character on the executive for the purpose of making the statute properly effective. The policy of the law as well as the main principles were laid down in the Act itself. What was left to the executive was a power to enforce the provisions of the Act more properly and effectively by levying duties on articles which could be used for similar purposes as the dutiable articles mentioned in the statute. The legislature itself laid down the standard and it was sufficiently definite to guide the executive officers.

I now come to the decision of the Supreme Court of Canada in *In re Gray*(1) which was decided during the first world war. The Dominion War Measures Act, 1914, passed by the Dominion Parliament of Canada empowered the Governor-General to make "such regulations as he may, by reason of the existence of real or apprehended war.....deem necessary or advisable for the security, defence, peace, order and welfare of Canada"; and the question arose whether such transfer of power was permitted by the British North America Act. The Supreme Court decided by a majority of four to two that the Act was valid, though the Judges who adopted the majority view were not unanimous regarding the reasons upon which they purported to base their decision. The Chief Justice was of the opinion that there was nothing in the Constitutional Act which so far as material to the question

(1) 57 C. C. R. 150.

under consideration would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament was not subject Anglin J. referred to the decision in *Hodge* v. *The Queen*(1) (supra) in the course of his judgment. He seemed to think that the British North America Act did not contemplate complete abdication of its legislative powers by the Dominion Parliament, but considered such abdication to be something so inconceivable that the constitutionality of an attempt to do anything of that kind was outside the range of practical consideration. Apparently the learned Judge gave the expression "abdication" a very narrow meaning. The opinion of Duff J. was much the same, and he considered that there was no abandonment of legislative powers in this case, as the powers granted could at any time be revoked and anything done thereunder nullified by the Parliament. Idington and Brodeur JJ. dissented from this majority view. This decision was followed in the "*Reference in the Matter of the Validity of the Regulations in Relation to Chemicals Enacted by the Governor-General of Canada under the War Measures Act*", which is to be found reported in 1943 S.C.C. 1.

In this case the question raised related to the validity of certain regulations made by an Order in Council in terms of the powers conferred upon the Governor in Council by the War Measures Act and the Department of Munitions and Supply Act. It was held that with the exception of paragraph 4 of the Order in Council the rest of the Order was no *ultra vires*. It appears from the report that in this case it was not disputed before the court that powers could be delegated by the legislature to the Governor in Council under the War Measures Act. The question raised was whether the Governor in Council could further delegate his powers to subordinate agencies. The question was answered in the affirmative, the reason given being that the power of delegation being absolutely essential in the circumstances for which the War Measures Act has been designed so as to have a workable Act, the power,

(1) 9 App. Cas. 117.

In re The Delhi Laws Act, 1912 etc.

Mukherjea J.

delegated must be deemed to form part of the powers conferred by Parliament in the Act.

These are war time decisions and it is apparent that the doctrine of delegation has been pushed too far in the Chemical Reference case. In *In re Gray*(1) the learned Chief Justice at the conclusion of his judgment expressly stated that the security of the country was the supreme law against which no other law could prevail. I agree with the Attorney-General that the competency of the Parliament to legislate could not be made dependent upon the fact as to whether the law was a war time or a peace time measure. But on the other hand, it is possible to argue that in a legislation passed by a Parliament in times of war when the liberty and security of the country are in jeopardy, the only policy which the legislature can possibly formulate is the policy of effectively carrying on the war and this necessarily implies vesting of all war operations in the hands of the executive. There appears to be considerable substance in the observations made by Dixon J.(2) that "it may be considered that the exigencies which must be dealt with under the defence powers are so many, so great and so urgent and so much the proper concern of the executive that from its very nature the power appears by necessary intendment to authorise delegation otherwise generally forbidden by the legislature." It may be mentioned here that the decision in *In re Gray*(1) was sought to be distinguished in a subsequent Canadian case on the ground that in case of emergency it was possible to pass legislation of this sort by taking recourse to the residuary powers conferred on the Dominion Parliament by section 91 of the North America Act(3).

In point of time, the case of *In re The Initiative and Referendum Act*(4) comes immediately after that of *In re Gray*(1). The dispute in this case related to an Act

(1) 57 S. C. R. 150.

(2) Vide *Victoria Stevedoring and General Contracting Co.* v. *Dignan*, 46 C. L. R. 73 at p. 99.

(3) Vide *Cedit Froncier* v. *Ross*, (1937) 3 D.L.R. 365.

(4) [1919] A. C. 935.

passed by the Legislative Assembly of Manitoba, which provided that laws may be made and repealed by the direct vote of the electors of the Province at large. The Privy Council held the Act to be *ultra vires* primarily on the ground that it would compel the Lieutenant-Governor of the Province to submit a proposed law to a body of voters totally different from the legislature of which he is the constitutional head and render him powerless to prevent it from becoming an actual law if approved of by the voters. Towards the end of the judgment, Lord Haldane made the observation which I have referred to already, and it clearly shows that in the opinion of the Judicial Committee, while it was open to the Provincial Legislature in Canada to seek the assistance of subordinate agencies in the matter of enacting regulations it did not follow from that that it could create and endow with its own capacity a new legislative power not created by the Act to which it owed its existence. This observation unmistakably indicates that in Canada where there is a written constitution, the legislature, though it has otherwise plenary authority, is not entitled to confer unfettered legislative capacity on other bodies although it can take the help of subordinate agencies in the matter of framing regulations.

The case that next demands our attention is that of *Credit Froncier* v. *Ross*(1). The controversy in this case centered round the validity of section 12 of the Alberta Reduction and Settlement of Debts Act, and the legality of the section was impeached on the ground that it conferred upon the Lieutenant-Governor the power to declare from time to time that any kind or description of debt was a debt to which the Act would not apply. The Court of Appeal held the provision to be *ultra vires* as it constituted an unwarranted delegation of legislative authority to the Lieutenant-Governor Harvey C.J. after quoting a passage from the judgment of the Privy Council in *Hodge* v. *The Queen* (supra), observed as follows :—

(1) (1937) 3 D.L.R .365.

1951

In re The Delhi Laws Act, 1912 etc.

Mukherjea J.

"It is apparent that the authority to make regulations in order to make legislation enacted by the legislaure completely effective is quite a different thing from authority to make an independent enactment. This is not ancillary to legislation but is legislation itself." Referring next to the case of *In re Gray*, the learned Judge further observed:—

"It is urged that the decision of the Supreme Court in *In re Gray* (42 D.L.R. 1) supports the view that the section is *intra vires*. In that case, there had undoubtedly been legislative authority to the Governor-General in Council. But, as pointed out, that was a case of emergency and urgency. It was war measure and it has more than once been pointed out by the Judicial Committee that in such a case the residuary power conferred by section 91 upon the Dominion Parliament may be resorted to. This is neither a war-time measure nor is it Dominion legislation. So, the case cited would appear to have no application."

This decision, if I may say so, fully bears out the view that I have indicated above. It would be seen that in this case the power conferred on the Lieutenant-Governor could be recalled at any time and yet the delegation of powers was held to be bad.

The only other Canadian case which should be mentioned in this connection is that of *Re Natural Products Marketing Act* 1937(1), which went up for final decision before the Judicial Committee. The Natural Products Marketing Act, which was passed by the legislature of British Columbia conferred upon the Lieutenant-Governor in Council the power to establish marketing boards for the control and regulation of transportation, packing and marketing of natural products within the Province. It was a sort of skeleton legislation, moulded on an analogous English statute. Manson J. declared the impugned provision to be *ultra vires* but his decision was set aside by the Court of Appeal. The argument that the legislature illegally delegated its function to the Lieutenant-Governor in

(1) (1937) 4 D.L.R. 298.

Council because it passed only the skeleton of an Act leaving it to the Lieutenant-Governor to clothe it with flesh and blood and thereby abdicating its function was repelled by the appellate court and Martin C.J. observed: "the answer to the submission depends upon the language of the statute and all that I can say is that after reading the whole statute it does not support the argument."

Thus, in substance what was decided was that there was no delegation of real legislative powers, and what was conferred upon the Lieutenant-Governor in Council was the authority to make rules and regulations in conformity with the standard and policy which the statute itself laid down and for the purpose of making the law complete in all its aspects. An appeal was taken from this decision to the Privy Council(1), and the Privy Council dismissed the appeal agreeing with the reasons given by Martin C.J. in his judgment in the Court of Appeal. "Within its appointed sphere." thus observed the Judicial Committee, "the Provincial Legislature is as supreme as any other Parliament, and it is unnecessary to try to enumerate the innumerable occasions in which legislatures, both Provincial and Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in the Act." The Judicial Committee, though reiterating its previous decision about the supremacy of the Dominion Parliament, did really base their decision on the reasons given by Martin C.J. in the Court of Appeal. The conclusion must therefore necessarily be that there is a rule against grant of essential legislative power but the rule was not violated in the present instance.

It remains to notice two more devisions which are of the High Court of Australia. The first of these is the case of *Baxter* v. *Ah Way*(2) and the point raised there related to the validity of certain provisions of the Customs Act, 1901. The Act specifically prohibited

(1) Vide *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A. C. 708.

(2) 8 C. L. R. 626.

1951

In re The Delhi Laws Act, 1912 etc.

Mukherjea J.

the importation of certain goods and gave a power to the Governor-General in Council to include, by proclamation, other goods in the category of prohibited imports. It was held that although prohibition of imports was a legislative act, there was no delegation of legislative authority and the power given to the Governor-General in Council was in the nature of conditional legislation. The Chief Justice observed in his judgment that unless the legislature was prepared to lay down once and for all a list of prohibited goods, they must have power to make prohibition depending upon a condition and the condition may be the coming into existence or discovery of some fact. The duty of ascertaining such fact can very well be left to an outside body.

It may be stated here that the legislation in this case did not fully comply with the requirements of a conditional legislation. What was left to the executive was not to determine any condition or contingency upon the happening of which the legislation was to be operative, but they were to add to the list of prohibited imports in the exercise of their own judgment. The decision, however, can be supported certainly on the principle of subordinate legislation as discussed already. The policy was declared with sufficient clearness and the standard was also laid down by enumeration of certain specified articles. The executive officer was simply to make additions to the list of prohibited imports by applying the same standard.

The other case is that of *Victoria Stevedoring and General Contracting Company* v. *Dignan*(1). The controversy in this case was in regard to the validity of section 3 of the Transport Workers Act, 1928-29, which purported to confer upon the Governor-General the power of making regulations not inconsistent with the Act with respect to the employment of transport workers and in particular for regulating the engagement, service and discharge of such workers, and the licensing of persons engaged as transport workers and several

(1) 46 C. L. R. 73.

other matters. It was held by the High Court that it was within the legislative power of the Commonwealth Parliament to confer upon the Governor-General the power to make such regulations. There could be no doubt about the correctness of this decision, for the power that was conferred upon the Governor-General was only to make regulations not inconsistent with the provisions of the Act and in regard to matters which were fully described in the legislation itself. That the Governor-General was given large discretion in the matter of initiating industrial policy was really immaterial so long as the regulations were within the policy chalked out by the legislature. The case was actually decided on the authority of a prior decision of the Court in *Roche* v. *Kronheimer*(1). There are observations of diverse character in the judgment of the learned Judges, though all of them concurred in holding that the case was concluded by earlier authorities. The Chief Justice and Mr. Justice Starke seem to be of opinion that there was no real delegation of legislative powers in this case and even if there was, no prohibition against such delegation could be urged on the ground of separation of powers which was not accepted in its rigidity in the Australian Commonwealth except in regard to the judiciary. The learned Judges referred in course of their judgment to the decision of *Baxter* v. *Ah Way*(2) though that case was decided on a different principle altogether. Rich J. regarded *Roche* v. *Kronheimer*(1) as authority for the proposition that an authority of subordinate law-making might be invested in the executive. Dixon J. discussed the doctrine of separation of powers and also the maxim of *delegatus non potest delegare* in an elaborate manner and his conclusion was that delegation was permissible, though he did not speak of any limits within which such right was to be exercised. The learned Judge observed, however, that "this does not mean that a law confiding authority to the executive will be valid, however, extensive or vague

(1) 29 C.L. R.329. (2) 8 C.L.R. 626.

1951

In re The Delhi Laws Act, 1912 etc.

Mukherjea J.

the subject-matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject-matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power." Evatt J. seemed to be doubtful as to whether this power of law-making in respect of a particular item in the legislative list carries with it the power of delegating legislative powers in respect of the same. Thus "section 51 (1) of the Constitution," observed the learned Judge "operates as a grant of power to the Commonwealth Parliament to regulate the subject of inter-state trade and commerce but the grant itself would not be truly described as being a law with respect to inter-state trade and commerce." It was said further "the greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject-matter assigned to the Commonwealth Parliament." It is difficult to gather any uniform or consistent principle from the discussions appearing in the judgments of the several learned Judges. But the actual decision, as I have said already, can be supported on the principle which I have attempted to formulate.

In my opinion, barring a few exceptions the decisions of the various courts set out above do lend a fair measure of support to the view I have taken. The exceptions really relate to cases where under War Measures Acts delegation of almost unlimited powers of legislation to the executive has been upheld by courts of law. I have already said how these decisions have been sought to be justified on exceptional grounds. At any rate, there is no necessity of introducing this strained interpretation of law in our country, for under the Indian Constitution adequate provisions have been made in express terms to meet the emergencies of war and other extraordinary circumstances and not only the President has been empowered to make law after a proclamation of emergency has been issued, but he can be given authority to delegate such powers to his subordinate officers

also(1). On a consideration of all these decisions I have no hesitation in holding that as regards constitutionality of the delegation of legislative powers the Indian Legislature cannot be in the same position as the omnipotent British Parliament and how far delegation is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to be statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case. These, in my opinion, are the limits within which delegated legislation is constitutional provided of course the legislature is competent to deal with and legislate on the particular subject-matter. It is in the light of these principles that I propose to examine the constitutional validity of the three legislative provisions in respect to which the reference has been made.

I will begin with section 7 of the Delhi Laws Act and the first thing for consideration is whether the subject-matter of this legislation is one upon which the Governor-General's Legislative Council, as it existed in the year 1912, was competent to legislate under the terms of the Indian Councils Acts from which it

(1) Vide Article 357 of the Constitution.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea

derived its powers. As has been stated already, Delhi, which was a part of the Province of Punjab, was detached from the latter and became, as the Imperial enclave, a separate province by a notification issued on the 17th of September, 1912. This small area was placed under a Chief Commissioner. The existing laws were continued under section 2 of the Delhi Laws Act and section 7, as it stood originally, was worded as follows :—

"The Governor-General in Council may by notification in the Gazette of India extend, with such restrictions and modifications as he thinks fit, to the territory mentioned in Schedule A or any part thereof any enactment which is in force in any part of British India at the date of such notification."

Now, the powers of the Governor-General in Council are exercised by the Provincial Government which, so far as a Chief Commissioner's Province is concerned, means the Central Government and the words "Province of Delhi" have been substituted for the expression "territory mentioned in Schedule A" which was the description of the Delhi Province at that time. The position, therefore, is that the section conferred upon the Governor-General in Council the power to make suitable choice out of the enactments which were actually in force in any other part of British India at the time when the notification was issued and extend the same with such restrictions and modifications as it thought fit to the Province of Delhi or any part of it. In 1912 the Government in India was unitary in its character and there was nothing like distribution of powers between the Central and the Provincial Legislatures or an enumeration of the topics in respect to which legislation could be made. Section 22 of the Indian Councils Act, 1861, provided that "the Governor-General in Council shall have power at meetings for the purpose of making laws and regulations.....to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now

under the Dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others for all courts of justice whatever, and for all places and things whatever within the said territories....." There were certain conditions annexed to the exercise of these powers by means of a number of provisos but these conditions are not material for our present purpose. It seems, therefore, that the legislative powers given to the Governor-General's Legislative Council were couched in the widest language possible, and as no specific subject-matter of legislation was mentioned legislation could extend to all subjects touching any person, place or thing within the Indian territory. The Delhi Laws Act obviously related to a particular place or area, namely, the Province or Delhi and affected persons who were residents within that area; and as to its subject-matter it must be held to comprise everything that formed the subject-matter of any enactment in force in British India at the time when any notification under section 7 was issued. Having regard to the language of section 22 of the Indian Councils Act, 1861, and the almost unlimited powers conferred on the Governor-General's Legislative Council, it is, I think not possible to say that the legislature was incompetent to legislate on the matter. To quote the language of the Judicial Committee in *Queen* v. *Burah*(1) what was done was legislation within the scope of the affirmative words used by the constitutional instrument which gave the power and it violated no express condition or restriction by which that power was limited. The question now arises whether there was an unwarrantable delegation of legislative powers to the executive government. If the competent legislature had framed a statute and left it to an outside authority to extend the operation of the whole or any part of it, by notification, to any particular area, it would certainly be an instance of conditional legislation as discussed above and no question of delegation would really arise. The position

(1) 5 I. A. 178 at p. 194.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

would not be materially different, if instead of framing a statute, the legislature had specified one or more existing statutes or annexed them by way of a schedule to the Act and had given authority to a subordinate or administrative agency to enforce the operation of any one of them at any time it liked to a particular area. It could still be said, in my opinion, that in such circumstances the proper legislature had exercised its judgment already and the subordinate agency was merely to determine the condition upon which the provisions already made could become operative in any particular locality. The difficulty in applying the principle of conditional legislation to the present case is in reality created by two circumstances. In the first place, the Central Government was given the power to extend to the Province of Delhi not only any enactment which was in force at the time when the Delhi Laws Act was passed, but any law which might come into force in future, although at the time when the Act was passed the legislature could not possibly apply its mind to such future legislation. The other circumstance is that the Central Government was given the right not merely to extend either wholly or in part the provisions of any enactment in force in any other part of India to the Province of Delhi but it could introduce these provisions with such modifications and restrictions as it considered proper. The question is whether these facts indicate a surrender of the essential powers of legislation by the legislature. The point does not seem to be altogether free from difficulty, but on careful consideration I am inclined to answer this question in the negative. As I have already said, the essential legislative power consists in formulating the legislative policy and enacting it into a binding rule of law. With the merits of the legislative policy, the court of law has no concern. It is enough if it is defined with sufficient precision and definiteness so as to furnish sufficient guidance to the executive officer who has got to work it out. If there is no vagueness or indefiniteness in the formulation of the policy, I do not think that a court of law has got any say in the matter. The

policy behind the Delhi Laws Act seems to be that in a small area like Delhi which was constituted a separate province only recently and which had neither any local legislature of its own nor was considered to be of sufficient size or importance to have one in the near future, it seemed to the legislature to be quite fit and proper that the laws validly passed and in force in other parts of India should be applied to such area, subject to such restrictions and modifications as might be necessary to make the law suitable to the local conditions. The legislative body thought fit that the power of making selection from the existing statutes as to the suitability of any one of them for being applied to the Province of Delhi, should rest with the Governor-General in Council which was considered to be the most competent authority to judge the necessities and requirements of the Province. That this was the policy is apparent from several other legislative enactments which were passed prior to 1912 and which would show that with regard to areas which were backward or newly acquired or extremely small in size and in which it was not considered proper to introduce the regular legislative machinery all at once, this was the practice adopted by the legislature at that time.

Act XXII of 1869, which was the subject-matter of controversy before the Judicial Committee in *Queen* v. *Burah*(1) may be mentioned as one of the earliest instances of this type of legislation. This Act was passed by the Governor-General's Legislative Council and the primary object, as laid down in section 4 of the Act, was to remove a district known as Garo Hills which was peopled by aboriginal tribes from the jurisdiction of the Courts of Civil and Criminal Judicature and from the control of the offices of revenue constituted by the regulations of the Bengal Code and other Acts of the legislature then or theretofore established in British India and from the law prescribed for such Courts and offices by such regulations and Acts. Section 5 provided that the administration of civil and

(1) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

criminal justice within the same territory was to vest in such officers as the Lieutenant-Governor of Bengal might from time to time appoint. Section 8, which is the section material for our present purpose, further laid down that the Lieutenant-Governor "may from time to time, by notification in the Calcutta Gazette, extend to the said territory any law, or any portion of any law now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed." Then came section 9 which enabled the Lieutenant-Governor to extend these provisions to the Jaintia and Naga Hills and to so much of the Khasi Hills as formed part of British India.

The Privy Council held, as stated already, that the 9th section of the Act conferring power upon the Lieutenant-Governor to determine whether the Act or any part of it should be applied to a certain district, was a form of conditional legislation and did not amount to delegation of legislative powers. In course of their judgment the Judicial Committee referred also to the provision of section 8 set out above and observed that the provision did not enable the Lieutenant-Governor to make what legislation he pleased, but he was only to apply by public notification to that district any law or part of law which either already was or from time to time might be in force by proper legislative authority in the other territories subject to his Government. The implication clearly is that section 8 also did not amount to conferring of any legislative power upon the Lieutenant-Governor. Section 8, it is to be noted, not only authorised the Lieutenant-Governor to extend any existing legislation into the territories specified in the Act, but also any legislation which might come into existence in future. It can be said, therefore, that a policy could be enunciated with regard to the extension

of future legislation also. The provision of section 8 of Act XXII of 1869 was, however, not on all fours with that of section 7 of the Delhi Laws Act and there are two material points of difference between them. In the first place, there was no power of modification given to the Lieutenant-Governor under Act XXII of 1869 and in the second place, the laws to be extended under the provision of section 7 of that Act were laws which were in force in the other territories subject to the administration of the Lieutenant-Governor himself.

In 1874 an Act known as the Scheduled District Act was passed by the Governor-General's Legislative Council. The expression "Scheduled District" or "backward tracts" corresponds to what were subsequently described as "excluded" or "partially excluded areas" in Chapter V of the Government of India Act, 1935, and there being a substantial element of aboriginal population in these areas the policy pursued by the Government was not to make the general rules of law and procedure obtaining in other parts of the country applicable to them. Under section 5 of this Act, the local government with the previous sanction of the Governor-General in Council was authorised from time to time by notification in the official gazette to extend to any of the scheduled districts or to any part of any such district any enactment which was in force in any part of British India at the date of such extension. Section 5 (a) further provided as follows :—

"In.....extending an enactment to a scheduled district or part thereof under section 5 of this Act the local government with the previous sanction of the Governor-General in Council may declare the operation of the enactment to be subject to such restrictions and modifications as that Government thinks fit." Thus the two sections taken together would be almost identical with the provision of section 7 of the Delhi Laws Act, and the power of extension conferred on the local government applied to statutes prevailing in any part of British India and not only in the

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

territories subject to the administration of that local government.

Another instance of this class of legislation is furnished by the Burma Laws Act, 1898, and section 10 (1) of that Act ran as follows :—

"The local government with the previous sanction of the Governor-General may, by notification in the Burma Gazette, extend with such restrictions and modifications as it thinks fit to all or any of the Shan Estates or to any specified local area in the Shan Estate any enactment which is in force in any part of Upper Burma at the date of the extension."

This legislation also is on all fours with the Delhi Laws Act, though the choice of the executive government in the matter of extending the laws was confined to the statutes in force in Upper Burma alone.

Though the instances are not many, yet they do furnish evidence of a legislative practice which is also noticed in a number of instances subsequent to the passing of the Delhi Laws Act. At any rate, it gives an indication of the policy which underlines such enactments, and it would be no unconstitutional delegation if the executive government is entrusted to do any act within the framework of that policy. Of course the delegate cannot be allowed to change the policy declared by the legislature and it cannot be given the power to repeal or abrogate any statute. This leads us to the question as to what is implied in the language of section 7 of the Delhi Laws Act which empowers the Central Government to extend any statute in force in any other part of British India to the Province of Delhi wih such "modifications and restrictions" as it thinks fit. The word "restrictions" does not present much difficulty. It connotes limitation imposed upon a particular provision so as to restrain its application or limit its scope. It does not by any means involve any change in the principle. It seems to me that in the context, and used along with the word "restriction" the word "modification" has been employed also in a cognate sense and it does not involve any

material or substantial alteration. The dictionary meaning of the expression "to modify" is to "tone down" or "to soften the rigidity of the thing" or "to make partial changes without any radical alteration." It would be quite reasonable to hold that the word "modification" in section 7 of the Delhi Laws Act means and signifies changes of such character as are necessary to make the statute which is sought to be extended suitable to the local conditions of the province. I do not think that the executive government is entitled to change the whole nature or policy underlying any particular Act or take different portions from different statutes and prepare what has been described before us as "amalgam" of several laws. The Attorney-General has very fairly admitted before us that these things would be beyond the scope of the section itself and if such changes are made, they would be invalid as contravening the provision of section 7 of the Delhi Laws Act, though that is no reason for holding section 7 itself to be invalid on that ground.

In the case of *Jatindra Nath Gupta* v. *The Province of Bihar*(1), I held in concurrence with some of my learned colleagues that to "modify" as statute amounts to performing a legislative act and this was not disputed by the learned Counsel appearing for the Province of Bihar. I held also that the conferring of a power to modify an Act cannot be supported on the principle of conditional legislation, and I see no reason to differ from the opinion which I expressed on that occasion. Although modification of a Statute is an exercise of legislative function, whether conferring of such power could, in the circumstances of a particular case and having regard to the provisions of a particular statute regarding the nature of the modification to be made, be regarded as delegation of ancillary authority to a subordinate agency was not a question raised before us in *Jatindra Nath Gupta's case*(1) and was not considered at all. It is not profitable to discuss for purposes of this case whether my own decision would have been different if that point had been raised and

(1) [1949] F.C.R. 596.

1951

In re Delhi Laws Act, 1912, etc.

Mukherjea J.

properly considered, for, after all, the decision would depend upon the language of the particular statute. I do not think that it is necessary for me to state anything further in regard to the judgment in *Jatindra Nath Gupta's* case which was referred to by both sides in course of their arguments.

As the word "modification" occurring in section 7 of the Delhi Laws Act does not, in my opinion, mean or involve any change of policy but is confined to alteration of such a character which keeps the policy of the Act intact and introduces such changes as are appropriate to local conditions of which the executive government is made the judge, I have come to the conclusion that there is no unwarrantable delegation of legislative powers in section 7 of the Delhi Laws Act.

I now come to the Ajmer-Merwara (Extension of Laws) Act, 1947, section 2 of which authorises the Central Government to extend, by notification in the official gazette, with such restrictions and modifications as it thinks fit to the Province of Ajmer-Merwara any enactment which is in force in any other province at the date of such notification. This Act was passed by the Dominion Legislature of India, functioning under section 18 of the Government of India Act, 1935 (as adapted by the Indian Independence Act, 1947); and it is not disputed that Ajmer-Merwara not being a province within the meaning of section 46 of the Government of India Act, the Dominion Legislature under section 100 (4) of the Act had the right to legislate with respect to all matters specified in the three legislative lists attached to the Seventh Schedule of the Constitution Act. The policy of this legislation seems to be almost the same as that which underlies section 7 of the Delhi Laws Act and the intention of the Dominion Legislature apparently was that until a local legislative body was set up in this territory, the Central Government should be given the right to select such enactments as were already in force in any other province and introduce them to this territory by public notification with such modifications and restrictions as

it thought proper. In my opinion, the grounds which could be urged in support of the validity of section 7 of the Delhi Laws Act can, with equal force, be put forward in support of this legislative provision also. There is no want of definiteness of the policy which the legislature has declared and the word "modification," as explained already, is to be confined to alterations of such character which do not involve any radical change of policy and are made only for the purpose of making the transplanted legislation suitable to the local conditions of the particular area. If these limitations are transgressed, that would constitute a violation of section 2 of the Ajmer-Merwara Act, and on that ground the extended legislation could be impeached; but the section itself cannot be held to be invalid on that ground.

As to the competency of the Dominion Legislature to pass an enactment of this character, it may be pointed out that under the Government of India Act, 1935, there was distribution of legislative powers between the Central and the Provincial Legislatures and all the different subjects of legislation were enumerated in the three legislative lists. It is obviously necessary that a law passed by the legislature should relate to one or more of the legislative topics which are specified in the list. It is true that on the face of it a legislation of this kind does not seem to be covered by any particular item or items enumerated in the list. But there would be no impropriety in saying that it relates to the various subject-matters in respect to which there are laws in force in other provinces the right to extend which has been conferred upon the Central Government by this Act. The subject-matter of all these legislations must necessarily be comprised within one or other of the legislative items and if they are not, and a particular legislation is invalid on that ground, the fact that such legislation is extended under section 2 of the Ajmer-Merwara Act would not make it valid. In my opinion, section 2 of the Ajmer-Merwara Act is not *ultra vires* by reason of its transgressing the limits of permissible delegation.

1951

In re The Delhi Laws Act, 1912, etc.

Mukherjea J.

The third and the last item for consideration is section 2 of the Part C States (Laws) Act, 1950. The Part C States comprise some of the old Indian States and also some of the Chief Commissioners' Provinces. Under article 239 of the Constitution, these States are to be administered by the President acting, to such extent as he thinks proper, through a Chief Commissioner or a Lieutenant-Governor or through the Government of a neighbouring State. Power is given to the Parliament to create a legislature, a Council of Ministers and High Court for such a State(1). There is no distribution of legislative powers in regard to these Part C States and the entire legislative powers (including the residuary power under article 248 of the Constitution) are vested in the Parliament. Section 2 of the Part C States (Laws) Act, 1950, authorises the Central Government to extend, by notification in the official gazette, to any Part C State excluding Coorg and the Andaman and Nicobar Islands or to any part of such State with such restrictions and modifications as it thinks fit any enactment which is in force in a Part A State at the date of the notification. The section further lays down that "provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

It will be noticed that the powers conferred by this section upon the Central Government are far in excess of those conferred by the other two legislative provisions, at least in accordance with the interpretation which I have attempted to put upon them. As has been stated already, it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws, validly passed by a competent legislature and actually in force in other parts of the country to such area, with such modifications and restrictions as the authority thinks proper, the modifications being limited to local

(1) *Vide* articles 240 and 241.

adjustments or changes of a minor character. But this pre-supposes that there is no existing law on that particular subject actually in force in that territory. If any such law exists and power is given to repeal or abrogate such laws either in whole or in part and substitute in place of the same, other laws which are in force in other areas, it would certainly amount to an unwarrantable delegation of legislative powers. To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such acts must be the policy of the legislature itself. If the legislature invests the executive with the power to determine as to which of the laws in force in a particular territory are useful or proper and if it is given to that authority to replace any of them by laws brought from other provinces with such modifications as it thinks proper, that would be to invest the executive with the determination of the entire legislative policy and not merely of carrying out a policy which the legislature has already laid down. Thus the power of extension, which is contemplated by section 2 of Part C States (Laws) Act, includes the power of introducing laws which may be in actual conflict with the laws validly established and already in operation in that territory. This shows how the practice, which was adopted during the early British period as an expedient and possibly harmless measure with the object of providing laws for a newly acquired territory or backward area till it grew up into a full-fledged administrative and political unit, is being resorted to in later times for no other purpose than that of vesting almost unrestricted legislative powers with regard to certain areas in the executive government. The executive government is given the authority to alter, repeal or amend any laws in existence at that area under the guise of bringing in laws there which are valid in other parts of India. This, in my opinion, is an unwarrantable delegation of legislative duties and cannot be permitted. The last portion of section 2 of Part C States (Laws) Act is, therefore, *ultra vires* the

1951

In re The Delhi Laws Act, 1912, *etc.*

Mukherjea J.

powers of the Parliament as being a delegation of essential legislative powers in favour of a body not competent to exercise it and to that extent the legislation must be held to be void. This portion is however severable; and so the entire section need not be declared invalid.

The result is that, in my opinion, the answer to the three questions referred to us would be as follows :—

(1) Section 7 of the Delhi Laws Act, 1912, is in its entirety *intra vires* the legislature which passed it and no portion of it is invalid.

(2) The Ajmer-Merwara (Extension of Laws) Act, 1947, or any of its provisions are not *ultra vires* the legislature which passed the Act.

(3) Section 2 of Part C States (Laws) Act 1950, is *ultra vires* to the extent that it empowers the Central Government to extend to Part C States laws which are in force in Part A States, even though such laws might conflict with or affect laws already in existence in the area to which they are extended. The power given by the last portion of the section to make provisions in any extended enactment for the repeal or amendment of any corresponding provincial law, which is for the time being applicable to that Part C State, is therefore, illegal and *ultra vires*.

DAS J.—The answers to the questions referred to this Court by the President under article 143 of our Constitution depend upon the scope and ambit of the power of legislation of the Indian Legislature during the three periods to which the questions relate. A correct appreciation of the fundamental principles of the British Constitution and those that owe their origin to the British Parliament and of our present Constitution is a pre-requisite for such purpose.

It is common knowledge that in the British Constitution the King in Parliament is the sovereign power in the State. It was after considerable struggle that the concentration of power in the King, which was a feature of the British Constitution of by-gone days,

ceased and the supremacy of Parliament was fully established. As to the nature of parliamentary sovereignty Dicey in his Law of the Constitution, 9th Edition, at page 68 says:

"Parliamentary sovereignty is, therefore, an undoubted legal fact.

It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which under the English Constitution, can come into rivalry with the legislative sovereignty of Parliament."

In Chapter II, Dicey points out the characteristics of Parliamentary sovereignty. There is no law which Parliament cannot change. There is, under the English Constitution, no distinction between fundamental or constitutional laws and ordinary laws. There does not exist any person or body or persons which can pronounce void any enactment passed by the British Parliament on the ground that it is opposed to the constitution or on any other ground. He refers to the flexibility of the British Constitution every part of which may be expanded, curtailed, amended or abolished with equal ease.

To the same effect are the observations of Sir Cecil Carr in his lectures concerning English Administrative Law, page 15:

"In Britain the King in Parliament is all-powerful. There is no Act which cannot be passed and will not be valid within the ordinary limits of judicial interpretation.....and there is no Act of the British Parliament which cannot be repealed like any other Act.....Even Magna Carta is not inviolate .....though many Englishmen suppose it cannot be touched. Coke, you remember, said that if any statute be made to the contrary of Magna Carta, it is void. Actually, about two-thirds of it has been repealed already."

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

Parliament being supreme and its power to legislate being unlimited, there is nothing to prevent Parliament from delegating its legislative power to the executive officers or other subordinate bodies. Sir Cecil Carr in his "Delegated Legislation" quoted in the Report of the Committee on Ministers' Powers, usually referred to as the Donoughmore Committee, said :

"The first and by far the smallest part is made by the Crown under what survives of the prerogative. The second and weightiest part is made by the King in Parliament and consists of what we call Acts of Parliament. The third and bulkiest part is made by such persons or bodies as the King in Parliament entrusts with legislative power."

The power of delegation is a necessary incident to the exercise of legislative power and the practical reasons for such delegation have been stated to be :—

"(a) Parliaments' lack of time to shape all legislative details:

(b) lack of technical knowledge and aptitude of a miscellaneous assembly such as Parliament;

(c) the occurrence of conditions which require immediate attention at a time when Parliament is not in session or is otherwise incapable of giving immediate attention;

(d) a desire to preserve the essential elasticity of laws affecting peoples' lives so closely."

(See Carr on English Administrative Law, page 23 and also Kennedy on the Constitution of Canada, 2nd Edition, page 461).

As observed by Sir Cecil Carr, "the truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires." In England, the practice of delegating legislative power has certainly been facilitated by the close fusion of the legislative and executive power resulting from the development of the cabinet system of government in England.

Delegated legislation has been divided in the Donoughmore Committee's Report into two classes, (i) normal and (ii) exceptional. The normal type is said to have two distinguishable characteristics, one positive and the other negative. In the normal type of delegation the "positive characteristic is that the limits of the delegated power are defined so clearly by the enabling Act as to be made plainly known to Parliament, to the executive and to the public and to be readily enforceable by the judiciary." The negative characteristic is that the powers delegated are stated not to include the power to do certain things. The exceptional type of delegation has been classified by the Donoughmore Committee under four heads, namely—

(i) power to legislate on matters of principle and even to impose taxation;

(ii) power to amend Acts of Parliament, either the Act by which the powers are delegated or other Acts (nicknamed as Henry VIII clause);

(iii) power conferring so wide a discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;

(iv) instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control of the Courts.

Kennedy in his book on the Constitution of Canada, 2nd Edition, page 463, also gives the instances of delegated legislative powers in Canada more or less on the same lines. The above heads clearly show the wide sweep of the power of delegation exercised by the British Parliament. The Donoughmore Committee has nowhere questioned the strict legality of these exceptional types of delegated legislation. The Committee has not even said that the exceptional types of delegated legislation should be done away with altogether. All that it has recommended is that the most pronounced kinds of them should be abandoned in all but the most exceptional cases and except

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

upon special grounds to be stated in the Ministerial memorandum attached to the bill. A Select Committee on Statutory Instruments has since been appointed in England for considering and reporting on every bill proposing to delegate law-making power and for considering and reporting on every regulation and rule made in exercise of the power. Thus, in England, while the power of Parliament to legislate is unlimited and consequently the power of delegation is also without limits, the Parliament, through the Select Committee above referred to, is keeping a watchful eye on the activities of the persons or bodies to whom the power of legislation is delegated so as to preserve its control over such delegated legislation. The characteristic principles of the British Constitution referred to above have not been disputed before us.

Turning now to the American Constitution we find a different principle in operation. The framers of the American Constitution were imbued with the political theories propagated by John Locke and Montesquieu. Said John Locke, in his Civil Government, article 141 :

"The legislature cannot transfer the power of making laws to any other hands : for it being but a delegated power from the people, they who have it cannot pass it over to others."

According to Locke "the legislature neither must, nor can, transfer the power of making laws to anybody else, or place it anywhere but where the people have." (Civil Government, Article 142). Montesquieu in his Esprit Des Lois developed this doctrine of separation of powers. While after 1688 England definitely departed from the rigid doctrine of separation of powers and has never come back to it, the framers of the American Constitution adopted the doctrine in its full force because, as explained by Professor Willis at page 168, "the fathers undoubtedly were so afraid of despotism and tyranny that they intended to establish a separation of the powers of government in order to prevent the exercise of all the powers of government by any single branch of government." Indeed, forty State Constitutions expressly

provided for the separation of powers and it was only the remaining eight State Constitutions that, like the Federal Constitution did not expressly create a separation of governmental powers, although they "vested" the powers separately in the three departments of government. Reference may be made to the following provisions of the Federal Constitution :

Art. 1, section 1. All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives.

Art. 2, section 1. The executive power shall be vested in a President of the United States of America.

Art. 3, section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.

In view of this separate enumeration of the three powers and the vesting of each in separate bodies, the United States Supreme Court in *Springer* v. *Government of Philippine Islands*(1) said that the separation of power "is implicit in all, as a conclusion logically following from the separation of the several departments." The correct position, as stated by Professor Willis at p. 134, is "that the doctrine of the separation of governmental powers in an American doctrine and an implied doctrine of the United States Constitution, and of those State Constitutions which do not expressly set it forth."

Alongside this doctrine of separation of powers the American constitutional law had another doctrine which also negatived the delegation of power. In Sutherland's Statutory Construction, 3rd Edn., Vol. 1, p. 56, we read that "incident to the separation-of-powers doctrine was the corollary that legislative power could not be exercised by any agency of the government save the legislature." The application of this corollary is thus explained by Willis at p. 137 :—

"The rule against the delegation of legislative powers, if there is such a rule, is broader than any

(1) (1927) 277 U.S. 189 ; 72 L. Ed. 845.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

doctrine of separation of powers. That part of it which forbids the delegation of powers to other branches of the government comes within the doctrine of separation of powers. That part of it which forbids the delegation of powers to independent boards or commissions rests upon the maxim *delegata potestas non potest delegare.*"

The doctrine of separation of powers is founded on the incapacity of one government department to receive or exercise the powers of the other two, while the maxim *delegata potestas non potest delegare* is based on the incapacity of any of the government departments to pass on to other non-governmental bodies the powers expressly confided to its care and charge. As, in practice, the delegation of power is generally and in the main made to the executive officers, the doctrine of separation of powers has, in the American constitutional law, been kept throughout in the forefront and has been regarded as the principal rule, whereas the maxim *delegata potestas non potest delegare* has, in its application in the field of constitutional law, been relegated to a somewhat subordinate role. Both these doctrines, however, are regarded as, to a certain extent, founded on a theory of trust. The argument is that the people of the United States have, by their Constitution, distributed the governmental functions amongst "the three grand departments" of the State and specifically confided the legislative power to Congress, the executive power to the President and the judicial power to the Supreme Court and other courts, and therefore, in view of such separation of power each department of the State must alone perform and carry out its duties so specifically entrusted to them respectively and that this solemn obligation cannot be discharged by or through any other person or agency. This theory of trust or agency has not, as we have seen, been adopted by the British constitutional law and practice. The British people do confide the utmost trust in their Parliament, even to the extent of making it a supreme and sovereign authority, but that fact has never

prevented Parliament from exercising the widest power of delegation. As Dixon J. points out in his article "The Law and the Constitution" published in 1935 in 51 Law Quarterly Review at p. 590, this doctrine of separation of powers is a departure from and, indeed, a violation of the British constitutional practice and theory.

The American doctrines, pushed to their logical conclusion, must necessarily prevent any the least delegation of power. Cushman in his "Independent Regulatory Commissions", p. 427, said :

"If the legislative power is vested in the Congress then it logically follows that that power cannot be framed out to anybody else."

The following passage from the judgment in *Locke's Appeal*(1) also illustrates this view with particular reference to the maxim of non delegation :

"That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence, it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority."

The theory against delegation of legislative powers was epitomised by Judge Cooley in his "Constitutional Limitations." At p. 224 of Vol. III of the 8th Edn. of his work the following oft-quoted passage occurs :—

"One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been instrusted cannot relieve itself of the responsibility by choosing

(1) (1873) 72 Pa. 491.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

We have now to see how far the American judges and jurists have been able to preserve the pristine purity of these doctrines.

After quoting the above passage Willoughby in his "Constitutional Law of the United States", 2nd Ed. Vol. III, Art. 1075, at p. 1636 adds :

"The principle as thus absolutely stated is subject to one important exception, and to several qualifications, or at least explanations."

The learned Professor proceeds in the next Article :

"The exception is with reference to the delegation of powers to local governments. The courts have held as to this, the giving by the Central legislative body of extensive law-making powers with reference to local matters to subordinate governing bodies being an Anglo-Saxon practice antedating the adoption of the Constitution, and the right of local self government being so fundamental to our system of politics, our constitutions are, in the absence of any express prohibitions to the contrary, to be construed as permitting it".

It should be noted that in the above passage Willoughby recognises this delegation of power to local bodies as "the giving by the Central legislative body of extensive law-making powers with reference to local matters". This is clearly an inroad on the absolute doctrine of separation of powers or the maxim of non-delegation. This, however is not the limit of such inroad, for the pressure of necessity of practical government has compelled the American judges and jurists to yield further concessions. It will now be necessary to refer to some of the American decisions.

Professor Corwin in his book entitled "The President; Office and Powers", 3rd Ed., Chapter IV, p. 151 refers to the case of *Brig Auroro* v. *U. S.*(1)

(1) (1812) 7 Cr. 382.

as the earliest case bearing upon the relation of the legislative power of Congress to national executive powers. That case was concerned with the Non-intercourse Acts of 1909-1910. Section 4 made it unlawful to import any goods from any port in Great Britain or France. Section 11 authorised the President, in case either France or great Britain revoked her edicts violating the neutral commerce of the United States, to declare the same by Proclamation and provided that after such Proclamation trade might be renewed with the nation so doing. There was also provision for the revival of the operation of the Act on Proclamation by the President. The President issued his Proclamation declaring that Great Britain had revoked her edicts against the United States and consequently the Act ceased to operate against her. Subsequently, however, the President revoked the Proclamation. Aurora had sailed with a cargo from Liverpool before the revocation of the Proclamation and the cargo was seized. The argument was that Congress could not transfer legislative power to the President. To make the revival of a law depend upon the President's Proclamation was to give that Proclamation the force of law. This argument was repelled by Johnson J. who delivered the opinion of the Court which included Chief Justice Marshall with the following words :—

"On the second point, we can see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of March 1st, 1807, either expressly or conditionally, as their judgment should direct."

The Practical difficulties in a literal application of the maxim against delegation were seen at an early time by John Marshall C. J. in *Wayman* v. *Southard*(1). The question in that case was whether, by the Constitution of the United States, the Congress had the power to regulate the proceedings of the Federal Courts.

(1) (1825) 16 Wheaton 1; 6 L. Ed. 253.

1951

In re The Delh Laws Act, 1912, etc.

Das J.

The Process Act adopted the system as it then stood "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same." Counsel for the defendants contended that this clause, "if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which Congress could never be supposed to intend and had not the power to make." This objection was disposed of by Marshall C. J. in the following words :—

"It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."

Further down the learned Chief Justice proceeded :—

"The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. To determine the character of the power given to the courts by the Process Act, we must enquire into its extent."

It will be observed that the learned Chief Justice avoided the rigours of the doctrine by making a distinction between powers which were "strictly and exclusively legislative" and other powers which he designated as only power "to fill up the details". This practice of paying homage to the doctrine of separation of powers and at the same time making inroads upon the doctrine for giving effect to the urgent necessity of practical government and the use of expressions qualifying the legislative power will be apparent in the subsequent decisions of the American Courts.

The case *Field* v. *Clark*(1) was concerned with the validity of the third section of the Tariff Act, 1890. The objection was that the impugned section tranferred the legislative treaty-making power to the President and authorised him to suspend the provisions of the Act relating to the free introduction of sugar, molasses, coffee, tea and hides. At p. 310 of the Lawyers' Edition, after reiterating that the doctrine that Congress could not delegate legislative power to the President was a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution, Harlan J. said :—

"Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of the Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congres that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea and hides, from particular countries should be suspended, in a given contingency, and that in case of such suspension certain duties should be imposed."

The learned Judge then quoted the following well known passage from the judgment of Judge Ranney of the Supreme Court of Ohio in *Cincinnati W. & Z. R. Co.* v. *Clinton County Commissioners*(2) :—

"The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

(1) (1891) 143 U.S. 649; 36 L Ed. 294.

(2) Ohio St. 88.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

Then the learned Judge quoted from *Locke's Appeal*(1) :—

"To assert that law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to be fully known."

Again :

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside the halls of legislation".

The validity of section 3 was upheld on the basis that it did not really delegate any legislative power and, therefore, did not offend the doctrine of separation of powers but was only an instance of conditional legislation. It will be seen hereafter that on strict analysis a conditional legislation does involve a delegation of legislative power, however small it may be.

Buttfield v. *Stranahan*(2) was concerned with an Act which authorised the Secretary of the Treasury to fix "uniform standards of purity, quality and fitness for consumption of all teas" to be imported into the United States. Delivering the judgment of the Court, White J. observed at p. 494 :—

"The Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount to declaring

(1) 72 Pa. 491. (2) (1904) 192 U. S. 471.

that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exercised." This passage amounts to saying that "in short Congress may delegate its powers when it is necessary to do so in order to achieve the results which it desires." (Corwin, President, p. 153).

Webb-Kenyon Act of 1913 came up for discussion in *Clark Distilling Company* v. *West Maryland Railway Co.*(1). The Act prohibited shipment or transportation of any intoxicating liquor from one State to another in violation of any law of such State. One of the arguments raised was that by the Webb-Kenyon Act the Congress unconstitutionally delegated its legislative power to the States. This was disposed of by White C.J. at p. 338 of Lawyers' Edition as follows :—

"The argument as to delegation to the States rests upon a mere misconception. It is true the legislation which the Webb-Kenyon Act contains permits State prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibition to be applicable is that of Congress, since the application of State prohibitions would cease the instant the Act of Congress ceased to apply."

The above passage echoes the observations of the Privy Council in *Hodge* v. *The Queen*(2) and other cases to which reference will be made hereafter. Referring to the maxim against delegation Professor Corwin said that in this case "the Court seemed to be on the verge of chucking the maxim entirely."

In *J. W. Hampton Jr. & Co.* v. *U.S.*(3) the question was whether the Tariff Act in so far as it authorised the President to issue a proclamation fixing a tariff rate was invalid for unconstitutional delegation of legislative power to the President. After referring to the division of the governmental power into three branches and referring to the well-known maxim of non-delegation Taft C. J. at page 629 observed :—

(1) (1917) 242 U.S. 311.
(2) (1883) L.R. 9 App. Cas. 117.
(3) (1927) 276 U. S. 394; 72 L. Ed. 624.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

"The field of Congress involves all and many varieties of legislative action and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalising a breach of such regulations."

The reasons for permitting these exceptions to the rule are stated by the learned Chief Justice at page 630 :—

"If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, commonsense requires that in the fixing of such rates Congress may provide a commission, as it does, called the Interstate Commerce Commission to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory."

The following quotation is made from the judgment of Day J. in an earlier decision of the Court in *Inter-State Commerce Commission* v. *Goodrich Transit Company*(1).

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigations of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

In *U.S.* v. *Shreveport Grain and Elevator Co.*(2) the respondent was indicted for having misbranded certain sacks containing corn meal contrary to the provisions of the Food and Drugs Act of 1906. The

(1) 224 U.S. 194 at p. 214 ; 56 L. Ed. 729 at p. 737.

(2) (1932) 287 U.S. 77 ; 77 L. Ed. 175.

respondent moved for quashing the indictment on the ground, *inter alia*, that the Act was unconstitutional for delegation of power contrary to the provisions of Articles 1, 2 and 3 of the Federal Constitution. Sutherland J. said :—

"That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers of the "power to fill up the details" by prescribing administrative rules and regulations.....The effect of the provision assailed is to define an offence, but with directions to those charged with the administration of the Act to make supplementary rules and regulations allowing reasonable variations, tolerances and exemptions which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe."

It is thus clear that the doctrine of non-delegation has been constantly shrinking in content until it came to be confined to "strictly and exclusively legislative powers" or "purely legislative power" or "essential legislative function." But there was a swinging back of the pendulum in 1934 in the *Panama Refining Co.* v. *Ryan*(1) in which the National Industrial Recovery Act of 1933 passed during the administration of President Roosevelt was assailed on the ground of unconstitutionality. After analysing the provision and effect of section 9(c) and section 1, Chief Justice Hughes concluded :—

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly, legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards,

(1) (1934) 293 U.S. 388; 79 L. Ed. 446.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorisations of that sort we should have the anomally of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

The majority of the Court held, in spite of the definite and express language of sections 1 and 9 (c) that they had not laid down any policy or set up any standard and, therefore, the delegation permitted by section 9(c) was unconstitutional. Cardozo J. in a dissenting judgment held that the Act had sufficiently declared a policy and the discretion delegated was "not unconfined and vagrant" but was "canalised within banks that keep it from overflowing."

The case of *Schechter* v. *U. S.* (1) is on the same lines and it carries the matter no further.

The two last mentioned cases, however, did not deter Congress from passing other Acts, *e.g.*, Agricultural Marketing Act, 1937, giving equally extensive powers to the executive including the power to fix prices. These later Acts have not been challenged as unconstitutional. Referring to these two cases Professor Corwin says :—

"Neither of these precedents materially influenced congressional policy even at the time, and both have been subsequently relegated by the Court to its increasingly crowded cabinet of juridical curiosities."

The later cases of *Opp Cotton Mills* v. *Administrator*(2) and *Yakus* v. *U. S.*(3) indicate the possibility in

(1) (1934) 295 U.S. 496 ; 79 L. Ed. 1570.
(2) (1940) 312 U.S. 126 ; 85 L. Ed. 624.
(3) 321 U.S. 414 ; 88 L. Ed. 834.

the near future of another swing of the pendulum. In the former, Stone J. conceded at page 145 that although fact finding often was a step in the legislative process it could nevertheless be left by the Congress to administrative officers or boards whose aid could be resorted to by Congress.

Holmes J. in his dissenting judgment in *Springer* v. *The Government of Philippine Islands*(1) said :—

"It is said that the powers of Congress cannot be delegated, yet the Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a quasi ....."

The learned Judge then concluded :—

"It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into water-tight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires."

The following observations of Sir Cecil Carr in his book concerning English Administrative Law, at page 15 clearly bring out the bewilderment of a non-American student at the way the doctrine of separation of powers has been treated in American Constitutional law :—

"A visitor to the United States is frankly afraid of discussing the value of that doctrine. He has found it emphatically, incorporated in the constitutions of various states; he finds it indirectly asserted in the Federal Constitution. An absolute insistence upon the separation of legislative, executive, and judicial power must, he feels rule out any delegation of legislative power to the executive. He finds definite opinions like that of Mr. Justice Harlan that "that Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity

(1) (1927) 277 U.S. 189 ; 72 L. Ed. 845.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

and maintenance of the system of Government ordained by the Constitution." Yet he is told that from the earliest years of the United States some such delegation occurred. He reads that 'it used to be said that "Congress may not delegate its powers" but the rule now-a-days has become that Congress may not delegate its powers unless it is convenient to do so.' (E. S. Corwin, The Constitution and what it means to-day.) High authority tells him that the Supreme Court of the United States has not treated the separation of powers as a technical legal doctrine, that the doctrine was not intended to divide the branches into water-tight compartments, and that your country has achieved the control of navigation, the regulation of rail road rates, the administration of the Pure Food and Drugs Act, the allocation of wave lengths and so forth by refusing to be the slave of a sterile dogma. (Frankfurter : The Public and its Government, page 76). He is given to understand that it was not till 1935 in the *Panama Refining Co.* v. *Ryan*(1) that an Act was declared invalid because it failed to separate the powers."

Schwartz in his American Constitutional Law concludes at page 20 :—

"But there were few who, like the great Chief Justice, could openly admit that the constitutional maxim was not inflexible. The resulting judicial dilemma, when the American Courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the delegated power. The authority transferred was in, Justice Holmes' felicitous phrase, 'softened by a quasi, and the Courts were thus able to grant the fact of delegated legislation and still deny the same.

This result is well put in Professor Cushman's syllogism :—

Major Premise : Legislative power cannot be constitutionally delegated by Congress.

Minor Premise : It is essential that certain powers be delegated to administrative officers and regulatory commissions.

1) (1934) 293 U.S. 388 ; 79 L. Ed. 446.

Conclusion: Therefore the powers thus delegated are not legislative powers.

They are instead "administrative" or "quasi-legislative powers.

In spite of the maxim against delegation, then, the American Legislature has been able to confer very great authority upon the executive. The extent of delegation had, indeed, become so great that Elihu Root could conclude in 1916 that, because of the rise of the administrative process, "the old doctrine of prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."

According to Professor Willis, at page 135 :—

"It is, therefore, an open question whether or not we now have this doctrine at all under the United State Constitutional Law."

Again, at page 136, we find the following passage :—

"It is a dogma (in harmony with our definition) that legislative power cannot be delegated either to the other branches of the government or to independent boards or commissions, or even back to the people; but the rule of the dogma has so many exceptions that it is difficult to decide whether the dogma or the exceptions state the rule."

The exceptions are summarised by Professor Willis at pp. 137-138 :—

(a) "The rule does not forbid delegation of powers of local self-government :

(b) The legislature may delegate the power to determine the conditions or contingencies under which a statute shall be operative;

(c) The legislature may delegate the power to make regulations, as to boards of health, the heads of departments :

(d) Legislature may delegate the power to ascertain facts and to apply rules of law in controversies, *i.e.* to administer standards, as in the case of the commerce department, land department, Industrial

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

Commissions, public utility commissions, tax commissions, and even in case of the President, in connection with the flexible provisions of the tariff and the sale of alien property."

After referring to these exceptions, Professor Willis concludes at page 141 :—

"Yet when all of these exceptions to the rule against the delegation of legislative power are observed, one cannot help wondering whether the rule is not honoured more in the breach than in the observance, and whether or not, so far as this matter is concerned, we have a doctrine of separation of powers."

To sum up : the cases and text books referred to above make it quite clear that the framers of the American Constitution were so afraid of tyranny of despotic power that they adopted the political theories of Locke and Montesquieu in their Constitution and provided for separation of powers. The American Courts interpreting the Constitution held that the separation of powers which was expressly adopted in most of the State Constitutions was also implicit in the Federal Constitution. Logically, the doctrine would not permit any delegation at all. They, however, soon realised that the necessities of practical government required delegation of legislative powers to the President or other persons or bodies but such was the fear in the minds of the American people of the tyranny that may result from the concentration of power in despotic hands that the American judges and jurists felt bound to uphold, in theory, the sanctity of the doctrine against delegation while, in practice, to permit large delegations of legislative powers on the pretence that the power delegated was not really legislative power. Thus the doctrine against delegation came to be confined to "strictly and exclusively" (per Marshall C.J.) or "purely" (per Day J.) or "essential" (per Hughes C. J.) legislative power and the rest of the content of the legislative power were permitted to be delegated under the pretence that they were not really legislative power but were only power "to fill up the

details" (per Marshall C. J.), or "to ascertain and declare facts" (per Harlan J.), or were only "administrative powers to make rules and regulations" (per LLamar J. and Hughes C.J.), or "minor matters" (per Lamar J.). It cannot be denied that the functions so permitted to be delegated could be performed by the legislature itself and that when so performed such performance would only be the exercise of legislative power. The functions which, when exercised by the legislature are legislative powers, cannot cease to be so when performed by the person to whom it is entrusted by the legislature. By delegation the legislative power cannot become transmuted into executive power. It is due to the anxiety of the American Courts to reconcile the doctrine against delegation with the practical necessities of government that they have had to take recourse to such verbal subterfuge. In point of fact, the content of the doctrine has been shrinking fast and although the American Judges and Jurists do not openly acknowledge it, Congress has been exercising the power of delegation of legislative power in an ever increasing measure. The truth is that whatever powers are delegated by Congress are in reality parts of the content of its legislative powers. In the picturesque language of Professor Corwin in his "President: Office & Powers", p. 154, in the ever present complexity of conditions with which governments have to deal "the Lockian aphorism has fought a losing rearguard action." The protagonists of the separation of powers who contend that these exceptions do not constitute delegation of legislative power overlook the fact that the legislature having only legislative power cannot delegate anything but what forms part of the legislative power. The power delegated by Congress, call it by what name you will, must necessarily be a part of the content of its legislative power, for Congress has nothing but legislative powers. The matter is put very tersely by Professor Corwin in his "President: Office and Powers", at p. 150 :—

"By the strict logic of the principle of the separation of powers, the only power which the legislature

1951

In re The Delh L Act 1912, etc

Das J.

possesses to delegate is legislative power; yet by the maxim just quoted it is this power precisely which the legislature cannot delegate. Conversely, by the principle of the separation of powers the executive should be incapable of receiving or exercising anything but executive power, from which it must follow either that the executive can never receive any power from the legislature or that when power passes it is automatically transmuted from legislative into executive power. But the former alternative is obviously contrary to fact, and the latter opens the way to delegation by the legislature of all its power to the executive."

The net result is that even in the land of separation of powers all that now remains of the doctrine is simply that the legislature itself must lay down the policy (per Hughes C. J.) or fix a primary standard (per Sutherland J.). What will amount to sufficiently laying down policy or setting up a primary standard will, of course, vary with the length of the foot of the learned Judges who deliver the opinion of the Supreme Court of the United States. The elaborate formulation of policy purported to be made by Congress in section 1 of the National Industrial Recovery Act did not appear to the American Supreme Court which decided the *Panama Refining Co.'s* case to be sufficient laying down of policy so as to be constitutional whereas, as will be seen hereinafter, the mere enumeration of the different subjects with respect to which the Governor-General was given power to make rules by the Canadian Parliament in the War Measures Act, 1914, and by the Australian Parliament in the National Security Act, 1939, for the defence and effectual prosecution of the war, without laying down any specific policy with regard to any of those subjects, was accepted as perfectly constitutional.

I now pass on to the law-making power of the legislatures established by or under the authority of the British Parliament. It will be useful at this stage to set out briefly the provisions of the instruments by which the important dominion legislatures were brought into existence.

Canada. The relevant provisions of the British North America Act, 1867 (30 Vic. C 3) are as follows :—

"Section 9. The executive government and authority of and over Canada is hereby declared to continue and to be vested in the Queen.

Section 17. There shall be one Parliament for Canada consisting of the Queen and Upper House styled "The Senate" and the "House of Commons."

Section 96. The Governor-General shall appoint the Judges of the superior, district and county Courts in each province except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada."

Australia. The Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vic. C. 12) provides as follows :—

Part I, Sec. 1. The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate and a House of Representatives, and which is hereinafter called the Parliament or the Parliament of the Commonwealth.

Ch. 2, Sec. 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

Ch. 3, Sec. 71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called "The High Court of Australia, and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction."

India. The constitution of India has varied during the three relevant periods with which we are concerned in this reference. The provisions of the statutes or

1 5

In re The Delhi Laws Act, 1912, etc.

Das J.

other instruments governing the constitution of India will be set out in detail hereafter. Suffice it, for the present, to say that in India there was, at no time, separate vesting of power in the three departments as in America or in Australia.

It will be noticed that under the British North America Act only the executive power is "vested" in the Queen and that provisions are simply made for a Parliament and a Judiciary without expressly vesting the legislative and judicial powers in any person or body. As will be seen more fully hereafter, there was no strict separation of powers in the Indian Constitution at any time. On the other hand, the Commonwealth of Australia Constitution Act follows the American pattern and in terms causes the legislative, executive and judicial powers to be 'vested' in the three departments of the State. As will be presently seen, neither Canada nor Australia has accepted the principle of non-delegation of powers founded either on a doctrine of separation of powers or on any theory of agency except that in Australia the non-delegation of power is recognised only in its application to the Judiciary. In the *Victorian Stevedoring and General Contracting Company* v. *Dignan*(1) to which detailed reference will be made hereafter Gavan Duffy C. J. referred to the passage in Judge Cooley's work regarding the doctrine of non-delegation of legislative power and proceeded at p. 83 as follows :—

"Assuming, however, that the Act does impinge upon the doctrine, still such a restriction has never been implied in English law from the division of powers between the several departments of government."

Dixon J. in his judgment in the same case referring to the maxim *delegata potestas non potest delegare* observed at pp. 94-95 that it had no application to Australia and that no similar doctrine had existed in respect of British Colonial Legislatures whether erected in virtue of the prerogative or by the Imperial Statute. Evatt J. in the same case expressed the view at p. 114 :—

(1) (1931) 46 C.L.R. 73.

"In dealing with the doctrine of "separation" of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution."

In his Article "The Law and the Constitution" published in 1935 in 51 Law Quarterly Review, p. 590, Mr. Justice Dixon, after referring to the American doctrine of separation of powers, stated at p. 605 as follows :—

"This artificial and almost impracticable classification was opposed to British practice and theory. The frame of our constitution in this respect follows the American plan. The notion that all law-making was confined to the legislature which, therefore, could not authorise the executive to complete its work was so foreign to the conceptions of English law that the Australian Courts ignored, or were unaware of, the full consequences of the American plan we had adopted. In a series of decisions here, the power of the Commonwealth Parliament to authorise the executive to legislate by regulation was recognised and thus, in effect, established, although the logical difficulty created by the frame of the constitution was no adverted to."

The result, according to Dixon J., was that notwithstanding the language of the Australian Constitution "legal symmetry gave way to commonsense." The very fact that a Dominion legislature was brought into being by the British Crown by a commission issued in exercise of its prerogative or by the British Parliament under an Act prevented the legislature so created from being a supreme sovereign legislature in the sense in which the British Parliament is supreme and sovereign for, of necessity, the scope and ambit of the Dominion legislature's power was circumscribed by the Instrument creating it and it could not go beyond it. But, nevertheless, the concept of a supreme,

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

sovereign legislature was so vivid and deep-rooted in the minds of the British people that they imputed even to such a subordinate legislature, within its own field, all the attributes of the Imperial Parliament. In the words of Dicey in his Law of the Constitution, 9th Edn., at page 112, these legislatures "are, within their own sphere, copies of the Imperial Parliament." I lay considerable importance to this aspect of the matter which, I find, had also been emphasised in numerous judicial decisions which I now proceed to consider.

With reference to the powers of the House of Assembly of New Foundland which was established by a commission issued by King William IV in exercise of his prerogative right "with the full power to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of the Island....." Baron Parke in *Kielly* v. *Carson*(1) observed :—

".....nor has it been disputed in the argument before us, and therefore we consider it as conceded, that the sovereign had not merely the right of appointing such magistrates and establishing such corporations and Courts of Justice as he might do by the common law at home, but also that of creating a local legislative assembly with authority subordinate, indeed, to that of Parliament, but supreme within the limits of the colony for the government of its inhabitants."

In *Phillips* v. *Eyre*(2) in which the powers of the legislature of Jamaica to pass an Indemnity Act after the Rebellion of 1865 came into question, Willes J., after quoting the above passage from the judgment of Baron Park, observed at page 20 :—

"We are satisfied that it is sound law, and that a confirmed Act of the local legislature lawfully constituted, whether in a settled, or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign

(1) (1841) 4 Moo. P.C. 84 (2) (1870) L.R. 6 Q.B. 1.

legislation, though subject to be controlled by the imperial Parliament."

A good deal of argument has been founded on *Burah's* case(1).. The proceedings in that case before the High Court are reported *sub nom. The Empress* v. *Burah*(2). Its was concerned with the validity of Act XXII of 1869 passed by the Governor-General in Council. By section 2, the Act was to come into operation "on such date as the Lieutenant-Governor of Bengal shall, by notification in the Calcutta Gazette, direct." By section 4, the territories called Garo Hills were removed from the jurisdiction of Courts and from control of the offices of revenue in the territories under the Lieutenant-Governor of Bengal as well as from the law prescribed for the said Courts and offices. Sections 8 and 9 were as follows :

"Section 8. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extended to the said territory any law or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

"Section 9. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills and to such portion of the Khasi Hills as for the time being forms part of British India.

"Every such notification shall specify the boundaries of the territories to which it applies."

On October 14, 1871, the Lieutenant-Governor, in exercise of the powers conferred on him by section 9,

(1) (1878) 5 I.A. 178. (2) (1877) I.L.R. 3 Cal. 63.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

extended the Act to Khasi and Jaintia Hills and excluded therefrom the jurisdiction of the counts. In 1876, Burah was convicted of murder and sentenced to death by the Deputy Commissioner of Khasi and Jaintia Hills. The death sentence was in April, 1876 commuted to transportation for life. On July 9, 1876, Burah sent a petition of appeal from the jail to the Calcutta High Court. Two questions were raised in that case, namely, (i) whether the Governor-General had power to remove the district from the jurisdiction of the High Court, and (ii) if the Governor-General had such power, whether, by the Act, he could authorise the Lieutenant-Governor by notification to extend the provisions of the Act to the Khasi and Jaintia Hills. On the first point the Full Bench held unanimously that the Governor-General in Council had the power to remove the district from the jurisdiction of the High Court. On the second question the majority of the High Court (Markby, Kemp, Ainslie and Jackson JJ.) held that Act XXII of 1869 was invalid as the Governor-General in Council had no power to delegate its legislative functions to the Lieutenant-Governor in the way it had done. Garth C. J. and Macpherson and Pontifex JJ. took a different view. Markby J. delivered the leading judgment of the majority of the Court. He expressed the view that the Act did not evince "a final determination on the part of the legislature that the jurisdiction of the High Court should be taken away" from the Khasi and Jaintia Hills. According to him, the legislature, when it determined it to be expedient to remove the Garo Hills, from the jurisdiction of the Courts, only contemplated the possibility of its being expedient to remove the Khasi and Jaintia Hills from this jurisdiction also but this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal. He pointed out (pages 81-83) the difference between the language of section 2 and that of section 9. At page 85, the learned Judge stated that the legislature did not decide that in Khasi and Jaintia Hills the jurisdiction of the ordinary courts

should be excluded and it did not express any opinion but left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor. Then his Lordship pointed out at page 86 that the Indian Legislature was not itself sovereign but exercised sovereign powers by delegation only. After referring to the distinction between written and unwritten constitution and the duty of the Court, the learned Judge dealt with the theory of agency and the delegation of legislative power by Parliament to the Indian Legislature and came to the conclusion at page 98 that the Indian Legislature could not change the legislative machinery without affecting the provisions of the various Acts of Parliament which created that machinery and that if it did in any way affect them then *ex consensu omnium* its Acts were void. Of the dissentient Judges, the leading judgment was that of Garth C.J. At page 139 the learned Chief Justice observed :—

"No doubt, as soon as the fact is once established, that an Act of the legislature which has been duly passed is within the scope of their powers, the court has no right to inquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the Legislature may pass which can legally be considered as a law. Thus to bring the argument nearer home to our present purpose, suppose the legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General. That, in my opinion, would not be a law at all within the meaning of the statute. It would simply be an abdication of their legislative powers in favour of the Governor-General directly at variance with the language and plain meaning of the Councils Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire."

After referring to the legislative practice and the necessity for the power of delegation, Garth C. J. at p. 140 said :—

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

"Moreover, it must be borne in mind, that whatever important trusts are thus created by the legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve, and the Government here are always in a position to see how the powers which they have conferred are being exercised, and if they are exercised injudiciously, or otherwise than in accordance with their intentions, or if, having been exercised, the result is in any degree inconvenient, they can always by another Act recall their powers, or rectify the inconvenience."

Then his Lordship referred to some of the Acts conferring upon, the Local Governments of Non-Regulation Provinces same kind of power, placing in their hands the right of abolishing, at their pleasure, old systems of procedure and of introducing a new system and in some cases also giving power to alter or modify the Act in any way they might think proper and so to introduce a different law into their respective provinces. The learned Chief Justice at p. 143 made the following observations :—

"Now all these Acts amount in one sense to a transfer of legislative power, because in each of them the legislature entrusts to some other person or body of persons the making of law and regulations which it might have made itself."

The Crown took the matter on appeal to the Judicial Committee and the proceedings will be found reported *sub nom. The Queen* v. *Burah*(1). It was urged that the decision of the Privy Council in this case impliedly but quite clearly negatived the power of delegation of legislative authority by the Indian Legislature. It is, therefore, necessary to examine and scrutinise the observations of the Privy Council. After stating the facts and disposing of some questions which are not material for our purpose, Lord Selborne, in delivering the judgment of the Privy Council, referred at p. 192

(1) (1878) 5 I.A. 178.

to the ground of the majority decision that the 9th section was not legislation but was a delegation of legislative power and to the doctrine of agency relied upon by the majority. At p. 193 his Lordship refuted the alleged distinction made by the majority between section 2 and section 9 of the Act of 1869, and observed :—

"But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

His Lordship at pp. 193-194 laid down the test for ascertaining the validity of an impugned Act and the extent of the authority of the Court in that behalf in the following words :—

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

1951

In re The Delh Laws Act, 1912, etc.

Das J.

Having disposed of the grounds on which the judgment of the majority of the High Court was founded, his Lordship proceeded to say :—

"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorised by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case."

Lord Selborne thereafter explained what had really been done by Act XXII of 1869 which I may now pass over but to which I shall revert at a later stage. At p. 195 his Lordship stated :—

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII of 1869) itself. The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial legislature, they may, (in their Lordships' judgment) be well exercised, either absolutely or conditionally."

Then his Lordship referred to the legislative practice of entrusting such powers to persons in whom the legislature places confidence and actually gave several instances of such legislation which he held to be good but which according to the view of the majority of the High Court would be illegal.

The majority of the High Court had held that section 9 of Act XXII of 1869 and the notification thereunder were bad on the ground of delegation of

legislative power. This argument could be refuted in one of these ways, namely, by saying (1) that the Legislature was not an agent of Parliament, or (2) that it had not in fact delegated its powers, or (3) that it had full power to delegate. The Privy Council preferred to base their decision on grounds (1) and (2). This does not mean that the Privy Council negatived the third ground. Indeed, the language of Lord Selborne indicated just the contrary. If Privy Council intended to negative the power of delegation, why was any comparison made between the powers of the Indian Legislature and those of the Imperial Parliament? Why was any reference made to the affirmative terms of the instrument by which the legislature was constituted and the negative conditions or restrictions on its powers as tests for ascertaining the validity of the Act and why was it said that it was not for the Court to inquire further? If delegation of power was denied why did the Privy Council take the trouble of agreeing that the Governor-General in Council could not create and arm with general legislative authority a new legislative power. If there was no question of delegation, why was it laid down that the efficacy of the act of the Lieutenant-Governor was referable to the authority of the Governor-General in Council? It seems to me that after refuting the grounds on which the majority of the High Court had based their decision, the Privy Council conceded the power of delegation but only set out the limit of such power. In my opinion the Privy Council expressed, in a different language, what Chief Justice Garth had said regarding the abdication of the legislative powers by the Indian legislature without retaining control over the acts of the person to whom the power was delegated. At this time the Indian legislature, *i.e.*, the Governor-General in Council, was not a legislature responsible to the people but was completely dominated by the executive and was subservient to the British Parliament but nevertheless the English Judges imbued with their constitutional notions of supremacy of the legislature

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

imputed to it, within the ambit and scope circumscribed for it by the Parliament, the attributes of the supreme and sovereign British Parliament and regarded it within its own sphere as an image of that Parliament. This position will be made clearer in subsequent decisions of the Privy Council to which some of their Lordships who decided *Burah's* case were also parties.

Russell v. *The Queen*(1) was concerned with the Canadian Temperance Act, 1878. The procedure for bringing Part I of that Act into force was as follows :—

(a) A petition signed by not less than one-fourth of the voters of a country or city praying that the Act should be applied to the county or city was to be submitted;

(b) the Governor-General was then to issue a proclamation directing that a poll be taken; and

(c) on adoption of the petition by the voters, the Act was to become applicable to that county or city.

It was contended by the appellants' counsel that assuming that Parliament of Canada had authority to pass a law for prohibiting and regulating the sales of intoxicating liquors, it could not delegate the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties or cities. This contention was repelled by Sir Montague E. Smith at page 835 as follows :—

"The short answer to this objection is that the Act does not delegate any legislative powers whatsoever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada,

(1) (1880) L.R. 7 App. Cas. 829.

when the subject of legislation is within its competency."

Two things are to be noted. In the first place the Privy Council did not treat conditional legislation as involving delegation of legislative power. Conditional legislation, as will be seen hereafter, does in a sense amount to a delegation of power and, therefore, it is clear that the Privy Council used the expression "delegation" in a stricter sense than its ordinary popular meaning. In the next place, his Lordship laid stress on the subject of legislation being within the competency of the legislature as the correct test for ascertaining the validity of a law and referred to the case of *The Queen* v. *Burah*(1) as authority on the point. On an examination of the scheme of the British North America Act with regard to the distribution of legislative powers and the general scope and effect of sections 91 and 92 of that Act his Lordship came to the conclusion that the Temperance Act did not fall within the subjects exclusively assigned to the Provincial legislatures and was, therefore, *intra vires* the Parliament of Canada.

The Liquor Licence Act, 1877, of Ontario authorised the Licence Commissioners to make regulations, create offences and annex penalties. It was contended that the local legislature had no power to delegate such powers to the Commissioners and that the maxim *delegata potestas non potest delegare* applied. This argument was repelled by the Privy Council in Hodge *v. The Queen*(2). The following observations from the judgment of Lord Fitz-Gerald who delivered the judgment of the Privy Council are of great importance :—

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislature. They are in no sense delegates of, or acting under any mandate from, the Imperial Parliament. When the British North

(1) (1880) L.R. 7 App. Cas. 829.
(2) (1883) L.R. 9 App. Cas. 117.

1951

In re The Delh Laws Act, 1912, *etc.*

Das J.

America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

"It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail."

A little further down his Lordship observed :—

"It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy, the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for the Courts of law, to decide."

To the argument that the Provincial legislature had no power to confer authority on the License Commissioners to impose imprisonment with hard labour for breach of newly created rules or by-laws, his Lordship gave the following reply at page 132 :—

"The Provincial legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar

authority to the municipal body which it created, called the License Commissioners."

The result of the above observations naturally was that "if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawfull." Nobody can deny that the Act in question actually delegated real legislative power to the License Commissioners, for the power to create offences and to annex penalties cannot but be a part of real legislative power. Indeed, the Privy Council in judgment proceeded on the footing that it was a delegation of legislative power but held that it was ancillary to legislation, that such power of delegation was co-extensive with the power of legislation itself, that as long as the legislature had not effaced itself, such delegation was permissible and that it was for the legislature to decide how much power should be delegated and for how long such delegation should continue and that these were not questions for the Court to decide. The above passages clearly uphold the views expressed by Garth C.J. in *Empress* v. *Burah* (*supra*) and state explicitly what was somewhat cryptically said by the Privy Council in *Queen* v. *Burah* (*supra*) at page 194 about the legislature not having the power to set up, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act. It is interesting to note that Sir Barnes Peacock and Sir Robert P. Collier who were among the members of the Board which decided *The Queen* v. *Burah* were also members of the Board which decided *Hodge* v. *the Queen*.

The question raised in *Powell* v. *Apollo Candle Company, Limited*(1) was whether section 133 of the Customs Regulation Act, 1879, of New South Wales which authorised the Governor to levy a duty upon an article which, in the opinion of the Collector, possessed properties similar to those of a dutiable article, was invalid on the ground that the Colonial legislature had exceeded the powers conferred on it by section 45 of

(1) (1885) L. R. 10 App. Cas. 282.

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

the Constitution Act of New South Wales which authorised only the legislature to impose and levy customs duty. Sir Robert P. Collier in delivering the judgment of the Privy Council referred to *The Queen* v. *Burah* and *Hodge* v. *The Queen* to both of which he was a party. He observed at page 290 :—

"These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial legislature is a delegate of the Imperial Legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted and not acting as an agent or a delegate."

At page 291, after indicating that the duties levied under the Order in Council were really levied by the authority of the Act under which the Order was issued, his Lordship concluded :—

"The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him."

This is nothing but a reiteration of the principle that short of self-effacement the legislature can freely delegate its legislative power. As long as the legislature retains its own power of control, there can be no objection to delegation, for if the delegatee does anything foolish or wrong the same may at once be put right by the legislature by removing the delegatee and appointing another in his place or taking up the matter in its own hands. The observations of Lord Selborne in *The Queen* v. *Burah* (*supra*) as to the legislature setting up a new legislative power should, therefore, be read in the light of these later decisions, and in the way I have suggested above.

The principle that even a provincial legislature of a Dominion is supreme within the limits assigned by section 92 of the Act of 1867 was also reiterated by Lord Watson when delivering the judgment of the Privy Council in *The Liquidators of the Maritime Bank of Canda* v. *Receiver-General of New Brunswick*(1).

(1) L. R. [1892] A. C. 438 at p. 442.

Baxter v. *Ah Way*(1) is an illustration of the application of the principle of conditional legislation. Section 50 of the Australian Customs Act of 1901 provided that no "prohibited imports" should be imported. Section 52 enumerated the prohibited imports in a series of sub-sections of which sub-section (g) was as follows :—

"All goods, the importation of which may be prohibited by proclamation."

The defendant was prosecuted for an offence against sections 50 and 52 (g) for importing prohibited imports, *i.e.,* opium suitable for smoking. At the trial, before the High Court, the Prosecutor tendered in evidence the Commonwealth Gazette containing a proclamation by the Governor-General in Council under section 52 (g) declaring opium in that condition to be a prohibited import. Objection was taken to the validity of the proclamation on the ground that sub-section (g) of section 52 was *ultra vires* the Commonwealth Parliament. The matter was referred to the Full Court and the Court held that section 52(g) was not a delegation of legislative power but was conditional legislation. Griffith C.J. said at page 632 :—

"It is of course obvious that every legislature does in one sense delegate some of its functions. It is too late in the day to say that the legislature cannot create, for instance, a municipal authority and give it power to make by-laws, or create a public authority with power to make regulations that shall have the force of law, or confer upon the Governor-in-Council power to make regulations having the force of law, or upon the Judges of the Court power to make rules of Court having the force of law. Nor is it to the purpose to say that the legislature could have done the thing itself. Of course it could. In one sense this is a delegation of authority because it authorises another body which it specifies to do something that it might have done itself. It is too late in the day to contend that such a delegation, if it is a delegation, is objectionable in any sense."

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

His Lordship then referred to *The Queen* v. *Burah* and held that this was a conditional legislation. The objection that under Chapter I, Part I, section 1 legislative power was vested in the Federal Parliament and could not be delegated was disposed of by the learned Chief Justice by saying that "that section is merely introductory to the provisions of the Constitution which deal with the legislature." To the contention that the power of the Commonwealth Parliament was less than the power exercised by the British Parliament the following answer was given by O'Connor J. at page 639 :—

"Can it be seriously contended that, in creating a legislature such as that of the Commonwealth with plenary powers, and in giving it power to deal with this particular subject-matter, the power is to be denied it which is necessary and essential, and has been always treated as necessary and essential, for the exercise of that legislative power in England and in several of the Australian States. To read the gift of power to the Parliament of the Commonwealth in that limited way would, it seems to me, be altogether to deny full force and effect to the words of the Constitution itself."

Isaacs J. referred to the legislative practice and on the principles laid down in *Hodge* v. *The Queen, The Queen* v. *Burah* and *Powell* v. *Apollo Candle Co.* and concluded that the position in the case before him was exactly covered by the decisions in those cases. Higgins J. concluded his judgment with the following observations :—

".....that the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order and good government of Australia."

The next case to be referred to is that of *In re George Edwin Gray*(1). Section 6 of War Measures Act, 1914, of the Parliament of Canada provided :—

(1) (1918) 57 S. C. C. 150; 42 D.L.R. 1.

"The Governor-General in Council shall have the power to do and authorise such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or adviseable for the security, defence, peace, order and welfare of Canada. For greater certainty but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-General in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say....."

Here followed several clauses. It will be noticed that in the body of the section there was only an enumeration of certain subjects with respect to which the Governor-General in Council was authorised to make regulations but that the legislature itself did not formulate any policy with respect to any of the said subjects. The section gave a *carte blanche*, as it were, to the Governor-General in Council. In exercise of the powers thus conferred, the Governor-General in Council on April 20, 1918, passed an Order in Council containing various regulations. The regulations had the effect of amending and modifying some parts of the Military Services Act, 1917. Grey, who had been granted exemption under the Act of 1917, was ordered to report for duty. On his failure to do so, he was arrested. Then an application for a writ of *habeas corpus* was taken out. The practice of authorising administrative bodies to make regulations to carry out the objects of an Act instead of setting out all the details in the Act itself was not seriously questioned, but it was said that the power to make regulations could not constitutionally be granted to such an extent as to enable the express provisions of a Statute to be amended or repealed. Fitzpatrick C. J., in repelling the above argument, said at page 156 :—

"In view of *Rex* v. *Halliday*, [1917] A. C. 269, I do not think that this broad proposition can be maintained. Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

delegate its power to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured."

Even Idington J. who delivered a dissenting judgment conceded that delegation of legislation by regulations could be very well resorted to in such a way as to be clearly understood as such, but his objection was that "a wholesale surrender of the will of the people to an autocratic power is exactly what we are fighting against." Duff J. at page 170 said :—

"It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor in Council the whole legislative authority of Parliament..... The powers granted could at any time be revoked and anything done under them nullified by Parliament, which Parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law."

Anglin J., after referring to *Powell* v. *Apollo Candle Company*, (*supra*) proceeded :—

"A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by....."

His Lordship here quoted passages from *Hodge* v. *The Queen* and *The Queen* v. *Burah*.

Section 92(1) of British North America Act, 1867, empowered the Provincial Legislature to amend the constitution "excepting as regards the office of the Lieutenant-Governor." The Initiative and Referendum Act passed by the legislature of Manitoba required the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature and rendered him powerless to prevent its becoming an actual law if approved by the voters. The validity of the Act passed by the Legislature of Manitoba was called into question in *In re The Initiative and Referendum Act*(1). On a consideration of the provisions of the British North America Act, 1867, the Privy Council held that the impugned Act was *ultra vires* the Manitoba Legislature. This was enough to dispose of the appeal. But Lord Haldane proceeded to say, but without finally deciding :—

"Section 92 of the Act of 1867 entrusts legislative power in a province to its legislature, and to that legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence."

In the above passage a distinction is sought to be made between a delegation of power by the legislature while preserving its own capacity intact and a creation and endowment by the Legislature with its own capacity of a new legislative power not created by the Act. According to the earlier authorities as well as to this decision there was no objection to the former whereas the latter could not be done, for the creation and endowment with its own capacity of new legislative power postulated that the legislature in doing so

(1) [1919] A. C. 935.

1951

In re The Delh Laws Act, 1912, etc.

Das J.

had to transfer its own capacity and, therefore, did not preserve its own capacity intact.

The case of *The Victorian Stevedoring and General Contracting Co.* v. *Dignan*(1) was concerned with section 3 of the Transport Workers Act, 1928-29, of Australia which provided :—

"The Governor-General may make regulations, not inconsistent with this Act, which, notwithstanding anything in any other Act, but subject to the Acts Interpretation Act, 1901—1918, and the Acts Interpretation Act, 1904—1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

In exercise of the powers conferred by this section the Governor-General on June 26, 1931, issued the "Waterside Employment Regulations." These regulations provided, amongst other things, that transport workers of certain kinds should be given priority in employment. This ran counter, to a certain extent, to an award of the Court of Conciliation and Arbitration made under a previous Act. The appellants were convicted of an offence under the regulations. The question was whether section 3 was *ultra vires* on the ground that it delegated legislative power to the Governor-General. This objection was overruled. The Court felt itself bound by its earlier decision in *Roche* v. *Kronheimer*(2), which was taken as an authority for the proposition that an authority of subordinate law-making may be invested in the Executive. Dixon J. at p. 100 observed :—

"I, therefore, retain the opinion which I expressed in the earlier case that *Roche* v. *Kronheimer*(2) did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within

(1) (1931) 46 C.L.R. 73. (2) (1921) 29 C.L.R. 329.

one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject-matter may be, if it does not fall outside the boundaries of Federal Power. There may be such a width or such an uncertainty of the subject-matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power."

Further down the learned Judge said :—

"In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorised. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature."

Then his Lordship referred to "the emphasis laid in *Apollo's* case and in *Hodge's* case upon the retention by the legislature of the whole of its power of control and of its capacity to take the matter back into its own hands." Evatt J. referring to the duty of the Judiciary to recognise the needs of the nation and not to act as a clog upon the legislative and executive departments, expressed himself at p. 118 as follows :—

"Such authority always extended beyond the issue by Parliament itself of binding commands. Parliament could also authorise the issue of such commands by any person or authority it chose to select or create. 'Legislative power' connoted the power to deposit or delegate legislative power because this was implied in the idea of parliamentary sovereignty itself. It was of course, always understood that the power of the delegate or depository could be withdrawn by the Parliament that had created it, and in

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

this sense Parliament had to preserve 'its own capacity intact'. (In re *Initiative and Referendum Act*)".

His Lordship after stating the view that, if Parliament passed a law within its powers, it might, as part of its legislation, endow a subordinate body with power to make regulations for the carrying out of the scheme described in the statute, posed the question—Does the Constitution impliedly prohibit Parliament from enlarging the extent of the powers to be conferred on subordinate authorities? The learned Judges gave the answer :—

"In my opinion, every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive government or some other authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the Executive or other agencies, an increase in the extent of such power cannot of its invalidate the grant. It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant. But this is for a reason quite different and distinct from the absolute restriction upon parliamentary action which is supposed to result from the theory of Separation of Powers."

Again, his Lordship said at page 119 :—

"The nature of the legislative power of the Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject-matters mentioned in sections 51 and 52 of the Constitution."

Evatt J. then indicated the matters which were material for the purpose of ascertaining the validity of an Act. He classified them under seven heads which

it is not necessary to set out in detail. Under heads (5) and (6) Evatt J. made a distinction between a law with respect to a subject and a law with respect to the legislative power to make a law with respect to that subject. According to him, a statute was valid if it was a law with respect to granted subject-matter, although it was also a law with respect to the exercise of legislative power. His conclusion is set out at page 121 :—

"On final analysis, therefore, the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."

I entirely agree with the learned Judge that the legislature must not abdicate but must retain its control so as to be able to withdraw the legislative power conferred on the subordinate authority whenever it may become necessary. The reported decisions to which reference has been made above clearly establish that, short of such abdication or effacement, the legislature may freely delegate its legislative powers and it is not for the Court to decide how much authority should be delegated or for how long such delegation should continue. I also agree that the law made by the legislature must be within the ambit of its legislative power and it cannot go beyond that ambit. But I can find no justification, either in principle or authority for the fanciful distinction between a law with respect

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

to a subject and a law with respect to the exercise of legislative power with respect to that subject. Indeed, it is opposed to the observations of Lord Fitz-Gerald in *Hodge* v. *The Queen* to which I have already referred. In my opinion, the power to make law with respect to a subject includes the power to make a law delegating the power to make a law with respect to that subject. Further it should be noted (i) that the Transport Workers Act was not an emergency measure passed during or on the eve of a war but was a peace time legislation passed in 1928-1929 and (ii) that the impugned section of the Act only enumerated the subjects with respect to which power was given to the Governor-General to make regulations and, to use the language of the American decisions, did not itself lay down any policy with respect to any of the said subjects or set up any standard to which the regulations so authorised were to conform. And yet the High Court of Australia found no difficulty in upholding the validity of that section. Evatt J. could not deny, at page 123, that the section was what he described as a law with respect to the legislative power of the Commonwealth but on an examination of the circumstances came to the conclusion that the section could also be described as a law with respect to trade and commerce with other countries or among the States. With great respect to the learned Judge, the circumstances referred to by him could only be the occasion and perhaps some justification for the delegation of power made by the section. The section did nothing but delegate the power to make regulations. It did not lay down any policy or standard at all. It was purely and simply what he called a law with respect to the exercise of legislative power and nothing else and according to his classification, if that were correct, should have been held to be invalid. It was a straining of language to say that section 3 was a law with respect to any of the subjects mentioned therein. In my opinion, section 3 could only be supported on the simple and logical ground that short of self-effacement delegation was permissible.

Croft v. *Dunphy*(1) reiterated the principle that the Colonial legislature was sovereign within its own ambit and that if the legislation was within its legislative competence no further enquiry was necessary. At page 163 Lord Macmillan said :—

"Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in section 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State."

The case of *Shannon* v. *Lower Mainland Dairy Products Board*(2) was concerned with the Natural Products Marketing (British Columbia) Act, 1936, which enabled the Lieutenant-Governor in Council to set up a Central Marketing Board to establish or approve schemes for the control and regulation of transportation, packing, storage and marketing of any natural products and to constitute marketing boards to administer the schemes and to vest in those boards the power to fix and collect licence fees. It should be noted that the Act permitted even sub-delegation of legislative power by the Lieutenant-Governor in Council. The appellants were dairy farmers and were affected by a milk marketing scheme. They, however, declined to obtain a licence from the board. They filed a suit for a declaration that the Act was *ultra vires* the Provincial Legislature. In the Privy Council the validity of the Act was questioned on the ground of delegation of legislative power to the Lieutenant-Governor in Council and by the latter to the Marketing Boards. Lord Atkin who delivered the judgment of the Board said at p. 722 :—

"The third objection is that it is not within the powers of the Provincial Legislature to delegate

(1) [1933] A.C. 156; A.I.R. 1933 P.C. 16.
(2) [1938] A.C. 708; A.I.R. 1939 P.C. 36.

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act."

It is worthy of note that the Privy Council not only upheld the validity of a single delegation but also upheld the validity of a sub-delegation of power.

In *Wishart* v. *Fraser*(1) the appellant had been convicted of an offence under reg. 41 of the National Security (Central) Regulations 1939-1940 made by the Governor-General in Council of Australia under section 5 of the National Security Act, 1933. That section conferred power on the Governor-General in Council to make regulations for securing the public safety and the defence of the Commonwealth and the territories of the Commonwealth and for prescribing all matters which were necessary or convenient to be prescribed for the more effectual prosecution of the war. It will be noticed that the section only enabled the Governor-General in Council to make regulations for securing the public safety etc., but did not lay down any policy at all or set up any standard to which the Regulations were to conform. The section was more general than even section 6 of the Canadian War Measures Act, 1914, which, besides referring to public safety etc., did enumerate several specific subjects with respect to which regulations had to be made. Rich A. C. J., with whom Starke J. agreed, held that the matter was concluded by the decisions of the Court in the *Victorian Stevedoring & General Contracting*

(1) (1941) 64 C.L.R. 470.

Company v. *Dignan*(1). To the suggestion that in section 5 there was such a width or uncertainty of the subject-matter that the enactment could not be said to be a law with respect to the naval and military defence or with respect to any other head of legislative power, Dixon J. at p. 485 gave the following answer :—

"This suggestion cannot be sustained. The defence of a country is peculiarly the concern of the Executive, and in war the exigencies are so many, so varied and so urgent that width and generality are a characteristic of the powers which it must exercise. Section 5 is clearly directed to the prosecution of the war and is valid exercise of the defence power."

The other learned Judges took the same view. The circumstances that the subejct of defence power needs greater latitude for delegation of legislative power is no answer to the supposed requirement that the statute must lay down the policy.

In the matter of a Reference as to Validity of Regulations in Relation to Chemicals etc.(2) arose out of the War Measures Act, (Ch. 286 of the Revised Statutes of Canada, 1927). Section 3 of the revised statute was almost in the same terms as section 6 of the War Measures Act which was considered in *George Edwin Gray's* case(3). This section gave power to the Governor-in-Council to do and authorise such acts and things and to make such orders and regulations as he might by reason of the existence of real or apprehended war deem necessary for the security, defence, peace, order and welfare of Canada. Without prejudice to the generality of the foregoing provisions, the section set out several specific matters on which regulations could be made. In this case the validity of the War Measures Act, 1914, itself was not questioned because that was upheld in *George Edwin Gray's* case(3). The questions raised were whether the chemical regulation was *ultra vires* the power given to the Governor-General in Council and whether the

(1) (1931) 46 C.L.R. 73.

(2) (1943) S.C.C. 1; (1943) 2 D.L.R. 248.

(3) 57 S.C.R. 150.

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

latter could sub-delegate the powers to subordinate bodies. Duff C. J. at page 12 said :—

"As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the State to appoint such subordinate agencies and to determine what their powers shall be.

"There is always, of course, some risk of abuse when wide powers are committed in general terms to anybody of men. Under the War Measures Act the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional."

Rinfret J. at page 17 observed :—

"The powers conferred upon the Governor-in-Council by the War Measures Act constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor-in-Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself: (Lord Selborne in *The Queen* v. *Burah*). Within the ambit of the Act by which his authority is measured, the Governor-in-Council is given the same authority as is vested in the Parliament itself. He has been given a law-making power."

After quoting the passage from *Hodge* v. *The Queen*,(1) the learned Judge proceeded at page 18 :—

"Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament for the continuance of its official existence."

(1) (1883) L.R. 9 App. Cas. 117.

The learned Judge disposed of the doctrine of agency as follows :—

"The maxim *delegatus non potest delegare* is a rule of the law of agency. It has no reference to an authority to legislate conferred by statute of Parliament. Indeed, the power of delegation being absolutely essential, in the circumstances for which the War Measures Act has been designed, so as to have a workable Act, that power of delegation must be deemed to form part of the powers conferred by Parliament in the Act. The Governor-in-Council, within the ambit of the Act, is not a delegate. The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative."

Davis J. reiterated the same principle at pp. 25-26 :—

"But the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself. In the ultimate analysis the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal the War Measures Act or to make ineffctive any of the orders in Council passed in pursuance of its provisions."

To the same effect are the following observations of Kerwin J. at p. 30 :—

"If at any time Parliament considers that too great a power has been conferred upon the Governor-in-Council the remedy lies in its own hands."

We have seen that in *Shannon's* case(1) the power given to the Lieutenant-Governor in Council expressly included a power of further delegation. And yet the Privy Council upheld the enactment. If power of legislation contains within itself the power of delegation then logically the donee of the legislative power must also have the power of delegation as part of the content of the power delegated to him. The reasoning adopted by the learned Judges in the last Canadian case appears to me to be perfectly logical.

(1) [1938] A.C. 708, A.I.R. 1939 P.C. 36.

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

The case of *King-Emperor* v. *Benoari Lal Sarma*(1) requires careful consideration. Section 72 as set out in the Ninth Schedule to the Government of India Act, 1935, read with the India and Burma (Emergency Provisions) Act, 1940, authorised the Governor-General "in cases of emergency" to "make and promulgate ordinances for the peace, order and good government of British India or any part thereof" and further provided that "any ordinance so made shall.....have the like force of law as an Act passed by the Indian Legislature....." In exercise of the powers conferred upon him by this section the Governor-General on January 2, 1942, promulgated Ordinance No. II of 1942 called the Special Criminal Courts Ordinance. The preamble to the Ordinance recited that "an emergency has arisen which makes it necessary to provide for the setting up of special Criminal Courts." By section 1(3) the Act was to come into force in any Province "only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder with the Province.....by notification in the Official Gazette, declares it to be in force in the Province and shall cease to be in force when such notification is rescinded." Broadly speaking, sections 5, 10 and 16 provided that a special Judge, a special Magistrate and a Summary Court should try such offences or classes of offences or such cases or classes or cases as the Provincial Government or a servant of the Crown authorised in this behalf might by general or special order direct. Section 26 took away the right of appeal or revision in respect of an order made by any of these Courts. The respondents, who were all policemen, had been convicted by the Special Magistrate at Jessore and sentenced to 2 years' rigorous imprisonment on charges of rioting, assault and committing prejudicial acts tending to cause disaffection in the Police force. They came up to High Court on petitions for revision and contended that the Ordinance was *ultra vires* the powers of the Governor-General. It was overlooked in the Courts below that

(1) (1944) 72 I.A. 57; [1945] F.C.R. 161.

if the Ordinance was *ultra vices* then the Court of the Special Magistrate was not a Court at all and, therefore, there could be no question of revising the order made by such an illegal body. The proper course was certainly to proceed under section 491 of the Code of Criminal Procedure. The High Court held that the Ordinance was *ultra vires*. The majority of the Federal Court of India affirmed the decision of the High Court. The Crown went up to the Privy Council. Although Ordinance No. II of 1942 was, after the decision of the High Court, replaced by Ordinance No. XIX of 1943, the Privy Council, in view of the importance of the questions raised, decided the question of the validity of Ordinance No. II of 1942. The Ordinance was attacked on several grounds. Two of the objections related to the question of emergency. They are set out at p. 65. It was contended that the Ordinance was invalid either because the language of section 1 (3) showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision for a future emergency or else because the section amounted to what was called "delegated legislation" by which the Governor-General, without legal authority, sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it himself. Their Lordships held that there was no valid ground for either of these contention. Viscount Simon, who delivered the judgment of the Privy Council, disposed of the first objection at pp. 65 and 66. The second objection, be it remembered, was that the Governor-General had by section 1 (3) delegated the question as to whether an emergency existed to the decision of the Provincial Government instead of deciding it himself. Therefore, the objection was not that any legislative power was, by section 1 (3), delegated but that the obligation to decide the question of emergency on which depended the power of making the Ordinance had been delegated to the Provincial Government. This objection is dealt with at pp. 66-67. It is with reference to this particular objection that Viscount Simon observed :—

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

"It is undoubtedly true that the Governor-General, acting under Section 72 of Schedule IX, must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under section 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a special court under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity."

Then his Lordship referred to *Russell* v. *The Queen*(1). Learned counsel for the interveners relied on the above passage, and particularly on the opening sentence in support of his contention that legislative power could not be delegated at all. I do not think the above passage, properly understood, supports that contention. In the first place the above observations should be read in the light of the context. The Privy Council in that passage was repelling the particular objection. I have mentioned and that objection related to the delegation of the decision as to the existence of emergence and not to any delegation of legislative power. In the next place it must be remembered that section 72 gave a very special or limited power of legislation to the Governor-General and the existence of that power of legislation was made conditional upon the existence of an emergency of which the Governor-General was the

(1) (1880) L.R. 7 App. Cas. 829.

sole judge. As the decision as to the existence of emergency was not an exercise of legislative power and could not be delegated the ordinance-making power also could not be delegated. This circumstance explains the opening sentence and I cannot read that passage as upsetting all that had been said in a series of earlier decisions about the delegability of legislative power. This decision, therefore, throws no light on the question which is now before us, namely, whether legislative power may be delegated at all and if yes, to what extent it may be done.

I have at the risk of prolixity quoted at length several passages from the different decisions of the Privy Council and other Courts bearing on the question now before us not because any of them is binding on us but because I believe they enable us to appreciate the true legal principles. I think it is possible to deduce from them the following principles :—

(a) that a legislature etstablished by or under an Act of the British Parliament is in no sense an agent or delegate of the British Parliament ;

(b) that the power of such a legislature is circumscribed by the Act by which it is constituted and the legislature cannot go beyond it, but within its ambit it is supreme and its power is as large and of the same nature as that of the British Parliament ;

(c) that the principle of non-delegation, founded either on the doctrine of separation of powers or on the theory of agency, has no application to the British Parliament or the legislatures constituted by an Act of the British Parliament ;

(d) that in the ever present complexity of the conditions with which governments have to deal, the power of delegation is necessary for and ancillary to the exercise of legislative power and is a component part of its content ;

(e) that the operation of the act performed under the delegated power is directly and immediately under and by virtue of the law by which the power was delegated and its efficacy is referable to that antecedent law ;

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

(f) if what the legislature does is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, then it is not for the Court to enquire further or to enlarge constructively those conditions or restrictions ;

(g) that while the legislature is acting within its prescribed sphere there is, except as hereinafter stated, no degree of or limit to its power of delegation of its legislative power, it being for the legislature to determine how far it should seek the aid of subordinate agencies and how long it shall continue them and it is not for the Court to prescribe any limit to the legislature's power of delegation ; and

(h) that the power of delegation is, however, subject only to the qualification that the legislature may not abdicate or efface itself, that is to say, may not, without preserving its own capacity intact, create and endow with its own capacity a new legislative power not created or authorised by the Act to which it owes its own existence.

Of the above propositions, (a) and (b) have not been seriously questioned before us but the controversy has centred round (c) to (h).

It is conceded that the British Parliament may transfer the whole of its legislative powers to any other person or body, legislative or executive, and may thereby efface itself, but it is contended that it can do all that because it is a supreme omnipotent and sovereign legislature. A Dominion Legislature, it is pointed out, is a non-sovereign body and, therefore, cannot claim to possess all the attributes of sovereignty that the British Parliament possesses. No less than eight several points of dissimilarity between the sovereign British Parliament and a non-sovereign Dominion Legislature have been brought to our notice and a number of text books and judicial decisions have been cited before us. There can be no doubt that a Dominion Legislature cannot be sovereign in the sense in which the British Parliament is sovereign, for the powers of the former, unlike those of

within its own sphere the Dominion Legislature is supreme and its power, mark the words, "is as large and of the same nature" as that of the British Parliament. Professor Dicey, it is true, at pages 149-150 of the authorities quoted above clearly establish that the British Parliament, are circumscribed by the instrument by which it is constituted. It cannot do anything outside the area or ambit fixed for it. But his Law of the Constitution, 9th Edition, described a legislative assembly under a federal constitution as "merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the Constitution but invalid or unconstitutional if they go beyond the limits of such authority." He, no doubt, classified such a legislature as a non-sovereign body and likened its laws to the by-laws of a railway company. But in the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*(1) to which reference has already been made, Lord Watson plainly asserted that the status of a colonial legislature was "in no way analogous to that of a municipal institution." Indeed Dicey himself at page 112 acknowledged that the "colonial legislatures, in short, are, within their own sphere, copies of the Imperial Parliament." Jennings and Young in their Constitutional Laws of the British Empire (1938 Edition), at page 30 say :—

"It has been said that a colonial legislature is 'sovereign within its powers.' To a political scientist this phrase is nonsense. But it is a convenient way of stating the legal rule that a power to legislate for the peace, order and good government of a colony is a power to enact any kind of legislation, reasonable or unreasonable, desirable or undesirable."

According to these authors "the most important application of this principle that a colonial legislature is 'sovereign within its powers' is, however, in relation to the delegation of legislative powers." They say that "a colonial legislature, within its powers, can pass the same kind of legislation as the Imperial Parliament and it can, therefore, empower subordinate

(1) [1892] A.C. 437.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

authorities to legislate." In short, the English Judges regarded a colonial legislature as replica or image of the Imperial Parliament itself and imputed to it, within its own sphere, all the attributes of the supreme and sovereign British Parliament including the power of delegation of its law-making functions. Thus in *Hodge* v. *The Queen* (*supra*) Lord Fitz-Gerald regarded the power of delegation as "ancillary to legislation," and indeed co-extensive with the law-making power itself. This power of delegation was conceded in *Powell* v. *Apollo Candle Company* (*supra*). *In re George Edwin Gray*(1), delegation which was "short of abdication" was upheld. Evatt J. in *Victorian Stevedoring & General Contracting Company* v. *Dignan* (*supra*), acknowledged that legislative power connoted the power to delegate legislative power. The objection against delegation or sub-delegation was regarded by Lord Atkin in *Shannon's* case(2) "as subversive of the rights" of the Provincial Legislature. *In the matter of a Reference as to the Validity of Regulations in Relation to Chemicals etc.*(3), a sub-delegation of legislative power was also upheld. If the legislature had no power of delegation, how could the legislature authorise any local authority or any other person or body to make rules, regulations and by-laws ? There can be no doubt that real law is often made by and through subordinate instrumentalities regulating the conduct of the people, imposing taxes, creating offences and providing penalties. Sir Cecil Carr describes the rules and regulations made by subordinate authorities as "the bulkiest part" of English law. Even in the land of the doctrine of the separation of powers where the legislative powers of Congress are not sovereign but circumscribed by the Constitution exceptions to the rule against delegation have had to be recognised and allowed by the American judges and jurists. The Indian legislature, dominated as it was by the executive, was regarded in the same light as the colonial legislature. Therefore, one cannot but concede the existence of the power of delegation in the legislative power itself of the Indian Legislature even

(1) 57 S.C.R. 150.

(2) [1938] A.C. 708.

(3) (1943) S.C.R. (Canada) 1.

though it was not a sovereign legislature like the British Parliament.

This concession, however, is not openly acknowledged by some people and they seek to camouflage it by the dogmatic pretence that the matters which are frequently found to be delegated are not really legislative powers at all but are only minor functions which can be delegated. In the first place, assuming that these are not legislative powers in the real sense, even so where does the power of delegation of even those minor matters come from ? The answer must be that this power of delegation is "ancillary to legislation" as said by Lord Fitz-Gerald and, therefore, is a part of the content of the law-making power itself. In the next place, there can be no doubt that the legislature may itself do the minor things, *i.e.*, make the rules, regulations and by-laws etc. instead of entrusting any other persons or body with the power of doing them. When the legislature itself make the rules etc., it cannot be denied that the legislature exercises its legislative power, for, as I have already said, the legislature has only legislative power and nothing else. If, however, the legislature gives that power to a subordinate authority, why should the power, in the process of delegation, be transmuted into something other than what it was, lose its original intrinsic attributes and cease to be a part of the legislative power ? The delegated power may be of a minor nature or only a fractional part of the legislative power possessed by the legislature but it is, nevertheless, a legislative power. Every grant of power to make rules etc. was stated by Evatt J. in *Dignan's* case(1) to be "itself a grant of legislative power." Even what in *Burah's* case(2) was called conditional legislation is, on strict analysis, nothing but a delegation of a fractional legislative power. Indeed, Professor Kennedy in his Constitution of Canada, 2nd Edition, at page 463 refers to conditional legislation as "this form of delegation." Referring to several Acts containing provisions similar to those of Act XXII of 1869 which were described later on by the Privy Council as instances of

(1) [1931] 46 C.L.R. 73. (2) (1878) 5 I.A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

conditional legislation, Garth C. J. in *Burah's* case(1) said that they amounted "in one sense to a transfer of legislative power, because in each of them the legislature entrusts to some other person or body of persons the making of law and regulations which it might have made itself." In *Gray's* case(2) Anglin J. regarded conditional legislation as "a very common instance" of limited delegation. In *Choitram* v. *Commissioner of Income-tax, Bihar*(3), the Federal Court expressed the view that when the Governor made a notification under section 92(1) of the Government of India Act he exercised a legislative power. It cannot, therefore, be denied that every legislature must, in any event, have some power of delegation of its law-making power and seeing that this power of delegation may be exercised by a Dominion Legislature which, *ex concessis,* is not sovereign, it must be conceded that this power of delegation is implicit in or ancillary to the legislative power itself and is not an attribute of the overall sovereignty which the British Parliament does, and the Dominion Legislature does not, possess.

Dogma dies hard. It falls back upon a second line of defence and contends that although the legislature may delegate the minor parts of its legislative powers, yet it cannot delegate its essential legislative powers. This is nothing but the doctrine of American Constitutional law which makes a distinction between "strictly and exclusively", or "purely" or "essential" legislative power and the power "to fill up the details", "to ascertain and declare facts and events" or "minor matters." I find no logical basis for such distinction when once I concede the power of delegation. In *Burah's* case(1) Markby J. referring to Mr. Kennedy's arguments said at p. 98 :—

"He boldly claimed for the Indian Legislative Council of India the power to transfer its legislative functions to the Lieutenant-Governor of Bengal. Indeed, as I understand him, the only restriction he would admit was that the Legislative Council could not

(1) I.L.R. 3 Cal. at p. 143.

(2) 57 S.C.R. 150.

(3) [1947] F.C.R. 116.

destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the learned counsel put and which I have considered. There are no words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases and not in others."

To the same effect are the following observations of Anglin J. in *In re George Edwin Gray*(1) at p. 176 :—

"Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction....."

If once the power of delegation is let in, where is the line of its termination to be drawn and who is to draw the line ? Lord Fitz-Gerald said in *Hodge* v. *The Queen*(2) :—

"How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature and not for the Courts of law to decide."

In *Baxter* v. *Ah Way*(3), Higgins J. said that the legislature had "within its ambit, full power to frame its laws in any fashion, using any agency, any machinery that in its wisdom it thinks fit." On the other hand in the United States the Judges under the due process clause took upon themselves the power to draw this line but, as we have seen, in 1825 Marshall C. J. acknowledged that "the line has not been exactly drawn", and Lamar J. in 1914 had to admit that "it is difficult to define the line." Who can tell when and where, if ever or at all, the line shall be drawn ? I find it much easier to appreciate the simpler principles enunciated by the Privy Council as I have explained above than to follow the everchanging and elusive American doctrine. Indeed, it is impossible logically to restrict delegation in the way suggested by the American decisions, the principles of which learned counsel for the interveners would like us to adopt. If

(1) 57 S.C.R. 150. (2) 9 App. Cas. 117. (3) (1909) 9 C.L.R. 626.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

by "essential" legislative power is meant the power to lay down policy and if it is to be held that this "essential" power cannot be delegated, then it will be difficult to explain some of the statutes and decisions referred to above. I shall not refer to the English Emergency Powers (Defence Act) 3 & 4 Geo. VI, C. 20 or to cases like *R.* v. *Halliday*(1), for the drastic powers there delegated to the executive and upheld by the Court may be explained on the theory that the British Parliament as a sovereign legislature could do what it pleased and was not bound to lay down any principle whatever but might give a blank cheque to the executive in times of emergency. I shall, however, find it difficult to explain the decisions in *In re George Edwin Gray*(2), *Wishart* v. *Fraser*(3) and in *In the matter of a Reference as to the Validity of Regulations in Relation to Chemicals*(4), all of which dealt with Dominion statutes conferring the widest powers of delegation to the executive, except upon the basis of the legal existence of a very wide power of delegation. In the relevant Acts, which came up for discussion the legislature laid down no policy at all but enumerated certain matters with respect to which the Governor-General was authorised to make regulations. This difficulty is sought to be resolved by the learned counsel for the Interveners by saying that those cases dealt with war measures and that in case of national emergency the legislature is permitted to delegate all its powers to the executive for the defence of the country. The argument that an emergency can enlarge the competency of a legislature which is fixed by the instrument constituting the legislature is entirely untenable and opposed alike to principle and authority. Said Markby J. in *Burah's* case(*supra*) at p. 101 :—

"In extreme cases the executive may suspend the operation of all laws. But I am not aware that such emergencies in any way affect the powers of the legislature; certainly not unless the legislature were actually overawed."

(1) [1917] A.C. 260.
(2) 57 S.C.R. 150.
(3) (1941) 64 C.L.R. 470.
(4) (1943) S.C.R. (Canada).

Even the American cases do not support the contention urged by counsel for the interveners. Thus in *Schechter* v. *U. S.*(1) to which reference has already been made Hughes C. J. at p. 1579 said :—

"Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."

To the like effect are the observations of Viscount Simon in *Attorney-General for Ontario* v. *Canada Temperance Federation*(2) :—

"True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not." Usually, in times of emergency, the legislature exercises its power of delegation extensively and entrusts its law-making powers to the executive almost without limit but this it can do only because it has the power of delegation irrespective of the existence of any emergency and it by no means follows that the legislature cannot exercise its power of delegation as widely as it chooses in peace time or with respect to any subjects other than public security or the defence of the nation. There can be no logical reason for any such distinction. Indeed, without conceding the widest power of delegation the decision in *Victorian Stevedoring and General Contracting Company* v. *Dignan*(3), to take only one instance, cannot be explained, for section 3 of the Transport Workers Act which was considered in that case was a peace time legislation enacted in 1928-29 and only enumerated the subjects with respect to which the power to make regulations was given to the Governor-General. In my judgment there cannot logically be any limit to the power of delegation of the Indian Legislature acting within its sphere.

(1) 265 U.S. 495. (2) [1946] A.C. 193 at p. 206. (3) 46 C.L.R. 73.

1951

In re The Delhi Laws Act, 1912, *etc.*

Das J.

The only rational limitation upon the exercise of this absolute power of delegation by the Indian Legislature as by any Dominion Legislature is what has been laid down in the several privy council and other cases from which relevant passages have been quoted above. It is that the legislature must not efface itself or abdicate all its powers and give up its control over the subordinate authority to whom it delegates its law-making powers. It must not, without preserving its own capacity intact, create and arm with its own capacity a new legislative power not created or authorised by the instrument by which the legislature itself was constituted. In short, it must not destroy its own legislative power. There is an antithesis between the abdication of legislative power and the exercise of the power of legislation. The former excludes or destroys the latter. There is no such antithesis between the delegation of legislative power and the exercise of the legislative power, for however wide the delegation may be, there is nothing to prevent the legislature if it is so minded, from at any time, withdrawing the matter into its own hands and exercising its law-making powers. The delegation of legislative power involves an exercise of the legislative power. It does not exclude or destroy the legislative power itself, for the legislative power is not diminished by the exercise of it. A power to make law with respect to a subject must, as we have seen, include within its content, the power to make a law delegating that power. Having regard to entry No. 97 in the Union List and article 248 of our Constitution, the residuary power of our Parliament is wide enough to include delegation of legislative power of a subject-matter with respect to which Parliament may make a law. Apart from that consideration, if a statute laying down a policy and delegating power to a subordinate authority to make rules and regulations to carry out that policy is permissible then I do not see why an Act merely delegating legislative power to another person or body should be unconstitutional if the legislature does not efface itself or abandon its control over the subordinate

authority. If the legislature can make a law lying down a bare principle or policy and commanding people to obey the rules and regulations, made by a subordinate authority, why cannot the legislature without effacing itself but keeping its own capacity intact, leave the entire matter to a subordinate authority and Command people to obey the Commands of that subordinate authority? The substance of the thing is the command which is binding and the efficacy of the rules of conduct made by the subordinate authority is due to on other authority than the command of the legislature itself. Therefore, short of self-effacement, the legislative power may be as freely and widely delegated as the Dominion Legislature, like the British Parliament, may think fit and choose.

The difficulties in the way of the American judges and jurists are quite understandable. Forty of the State Constitutions had expressly adopted the doctrine of separation of powers by providing that one department of the government shall never exercise the powers assigned to the other two departments. The remaining eight State Constitutions as well as their Federal Constitution impliedly accepted the doctrine. The American Constitutions having thus adopted the doctrine of Locke and Montesquieu as to the separation of powers in its full force, the American judges and jurists could not, openly and without doing violence to their constitutions, give the go-bye to that doctrine and acknowledge the principle of delegation of legislative power to its fullest extent and had, therefore, to make a compromise between dogma and practical necessity by confining the doctrine of separation of powers to merely laying down policy. In Australia, in spite of the identity of the language of its Constitution with the American pattern, "legal symmetry gave way to commonsense." Canadian Supreme Court has found no difficulty in even permitting sub-delegation of legislative power. When in reference to conditional legislation the Privy Council in *Burah's* case and in *Russell's* case said that there was no delegation they obviously used the expression "delegation" in the

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

sense of effacement or abdication by the legislature, which sense has been made more explicit and clear in *Hodge's* case and other subsequent cases. In *Benoari Lal's* case, as I have shown, there was no question of delegation of legislative power at all. When referring to section 4 of the Bombay City Civil Court Act, 1948, I said in my judgment in *The State of Bombay* v. *Narottamdas*(1) that the section was an instance of conditional legislation and that there was no delegation of legislative power to the executive, I only adopted the language used by the Privy Council in *Burah's* case in the sense I have explained above. It was not necessary in that case to examine or express any opinion on the larger question as to the scope or ambit of the power of delegation or as to whether conditional legislation was a species of delegation of legislative power. In England the power of delegation of legislative power has never been and cannot be successfully challenged in Court and nobody has ever thought of questioning the validity of the drastic Emergency Powers (Defence) Act, 1939, nicknamed as the "Everything and Everybody Act." In India the doctrine of separation of powers was at no stage of her constitutional history under the British Crown accepted as the governing principle and now that in our Constitution we have made a fusion of the legislative and executive powers by definitely adopting the principle of the joint responsibility of the Council of Ministers to Parliament on the same lines as the system of joint responsibility of the British Cabinet to the British Parliament there is no compelling necessity whatever for importing into our law the elusive American doctrine of non-delegation which has not yet succeeded in defining its own limit. I see no cogent reason why the "artificial and almost impracticable classification" of governmental powers laid down by the American decisions in a haphazard and illogical manner should be magnified into and epitomised as laying down a sound principle of legislation, and be adopted by us. In my opinion, the true tests of the validity of a law enacted by the Indian

(1) [1951] S.C.R. 51.

Legislature conferring legislative power on a subordinate authority are: (1) Is the law within the legislative competency fixed by the instrument creating the legislature? and (ii) Has the legislature effaced itself or abdicated or destroyed its own legislative power? If the answer to the first is in the affirmative and that to the second in the negative, it is not for any Court of Justice to enquire further or to question the wisdom or the policy of the law.

It is said that it will be dangerous if the legislature is permitted to delegate all its legislative functions without formally abdicating its control or effacing itself, for then the legislature will shirk its responsibility and go to sleep and peoples' life, liberty or property may be made to depend on the whims of the meanest police officer in whom, by successive delegation, the legislative power may come to be vested. I do not feel perturbed. I do not share the feeling of oppression which some people may possibly entertain as to the danger that may ensue if the legislature goes to sleep after delegating its legislative functions, for I feel sure that the legislators so falling into slumber will have a rude awakening when they will find themselves thrown out of the legislative chamber at the next general election. I have no doubt in my mind that the legislature after delegating its powers will always keep a watchful eye on the activities of the persons to whom it delegates its powers of legislation and that as soon as it finds that the powers are being misused to the detriment of the public, the legislature will either nullify the acts done under such delegation or appoint some more competent authority or withdraw the matter into its own hands. There is and will always remain some risk of abuse whenever wide legislative powers are committed in general terms to a subordinate body, but the remedy lies in the corrective power of the legislature itself and on ultimate analysis, in the vigilance of public opinion and not in arbitrary judicial fiat against the free exercise of law-making power by the legislature within the ambit fixed by the instrument of its constitution.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

It is not for the Court to substitute its own notions of expediency for the will of the legislature. This, I apprehend, is the correct position in law. In my judgment, if our law is not to be completely divorced from logic and is not to give way and surrender itself to sterile dogma, the widest power of delegation of legislative power must perforce be conceded to our Parliament. A denial of this necessary power will "stop the wheels of government" and we shall be acting "as a clog upon the legislative and executive departments."

The observations of Varadachariar C. J. in *Emperor* v. *Benoari Lall*(1) were strongly relied on by learned counsel for the interveners. The opinion of that eminent Chief Justice is always entitled to the highest respect and one must, therefore, carefully consider the same. It will be seen from the report that the learned Advocate-General of India appearing for the Governor-General in Council definitely adopted the observations of Judge Ranney, which I have already quoted, as his argument without conceding that American decisions could offer a safe guidance on the point. This concession and the reference in *Burah's* case to "the nature and principles of legislation" appear to have induced and led the learned Chief Justice to adopt the principles of the American decisions regarding the non-delegation of legislative powers. After referring to the several Privy Council cases, the learned Chief Justice opined that there was nothing in those cases which could be said to be inconsistent with the principles laid down by Judge Ranney. Then his Lordship discussed various American decisions and referred to the safeguards against delegated legislation suggested by Sir Cecil Carr and concluded :—

"As we have already observed, the considerations and safeguards suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under Constitutions like the Indian and the American, where the constitutionality of legislation is examinable in a court of law, these considerations are, in our

(1) [1943] F.C.R. 96, A.I.R. 1943 F.C. 36.

opinion, an integral and essential part of the limitation on the extent of delegation of responsibility by the legislature to the executive. In the present case, it is impossible to deny that the ordinance-making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary criminal Courts and to the Special Courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the law—as counsel for the Crown would make it appear —but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the executive authorities by sections 5, 10 and 16 of the Ordinance."

The learned Chief Justice overlooked the fact that underlying the frame of Indian legislation there was always the notion firmly established by the Privy Council that within the ambit fixed by the Act of Parliament the Indian Legislature was as supreme and had as plenary powers of legislation as the British Parliament itself, and that "the nature and principles of legislation" referred to in *Burah's* case was the English concept of legislation and not the American variety. With the utmost respect to the learned Chief Justice, I find myself unable to accept as correct his view that the pronouncements of their Lordships of the Privy Council in the several cases referred to by him did not authorise "every kind of delegation by the legislature." On the contrary, for reasons I have already explained, I read the passages I have quoted from the different Privy Council cases as indicating in unmistakable terms that the Privy Council approved of the widest power of delegation of legislative power which was short of abdication or effacement of the legislature itself. Further, the view of the learned Chief Justice on this point was expressly overruled by Viscount Simon who delivered the judgment of the Privy Council in the appeal from that decision in the following words :—

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

"With the greatest respect to these eminent judges, their Lordships feel bound to point out that the question whether the ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime; but that in a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle."

Further, whatever was the cogency of the view that under the Government of India Act our Constitution approximated more nearly and closely to the American Constitution than it does the British Constitution, that view cannot possibly hold good now in view of the provisions of our new Constitution under which the Executive is responsible to the Legislature, and the Parliament has been given the residuary power of legislation in the widest terms. In the premises, I am unable to accept the correctness of the observations of the learned Chief Justice of the Federal Court.

Reliance was placed by learned counsel for the interveners on the judgment of the Federal Court in *Jatindra Nath Gupta* v. *Province of Bihar*(1). The learned Attorney-General on behalf of the President has strenuously challenged the correctness of the decision of the majority of the Federal Court in that case. Indeed, the present reference has in a way been occasioned by that decision. That case was concerned

(1) [1949] F.C.R. 595, A.I.R. 1949 F.C. 175.

with the question of the validity of the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act (V of 1947). Section 1 (3) provided that the Act should remain in force for a period for one year from the date of the commencement. The relevant part of the proviso was in the following terms :—

"Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, dircet that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification."

Three of the learned Judges held that the proviso and the notification there under were *ultra vires* and void. They laid particular emphasis on the power given to the Provincial Government to make any modification in the Act when extending its life as indicating that it was a delegation of legislative power. Another learned Judge did not decide this point but agreed to set aside the order of detention on another ground not material for our present purpose and the remaining learned Judge took a different view of the effect of the proviso and held that it was a conditional legislation within the meaning of the decision in *The Queen* v. *Burah* (supra). On a perusal of the judgment of the majority of the Federal Court in that case it appears to me that the important questions were not convassed before them half so strenuously and fully as they have been done before us on this occasion. Indeed, I am led to believe that learned counsel appearing for the Province of Bihar practically conceded that the delegation of the power of modification was not permissible and that his whole case was that that part of the provision was severable and the rest was conditional legislation which came within the principle laid down in *Burah's* case. The majority of the Court, however, held that the power of modification included in the proviso to section 1 (3) was not severable as suggested by counsel

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

and, therefore, the whole of the proviso was *ultra vires* and consequently the notification issued thereunder was illegal. I feel bound to say, with the utmost humility and for reason given already, that the observations of the majority of the Federal Court in that case went too far and, in agreement with the learned Attorney-General, I am unable to accept them as correct exposition of the principles relating to the delegation of legislative power. In my judgment, the power of delegation is inherent in the legislative power itself and that, short of self-effacement, the legislature may exercise the widest power of delegation. In the light of the principles discussed above I now proceed to discuss the question referred to us.

Re Question 1 : The Delhi Laws Act, 1912, came to be passed in the circumstances recited in the preambles to the Act. By notification No. 911, dated September 17, 1912, the Central Government, with the sanction of the Secretary of State for India, took under its immediate authority and management the territory mentioned in Schedule A, which was formely included in the Province of the Punjab and provided for the administration thereof by a Chief Commissioner as a separate Province to be known as the Province of Delhi. The separation of Delhi from the Province of the Punjab and its constitution as a separate Province required immediate provision for the making of laws for the new Province. Accordingly, Delhi Laws Act, 1912, was passed by the Governor-General in Council on September 18, 1912. Section 2 of the Act saved the territorial application of all the then existing laws which were in force there prior to such separation. Section 7 provided as follows :—

"The Provincial Government may, by notification in the official gazette, extend with such restrictions and modifications as it thinks fit, to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India at the date of such notification."

In order to determine the validity of this Act it is necessary to ascertain the scope and ambit of the legislative power of the Governor-General in Council in the year 1912. This has to be done, as said by Lord Selborne in *Burah's* case by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively, they are restricted.

The first Parliamentary Act to be noted is the Charter Act, 1833 (3 & 4 Will. IV C. 85). By section 39 the superintendence, direction and control of the whole civil and military government was vested in a Governor-General and Counsellors, to be styled "The Governor-General of India in Council." The Council was, under section 40, to be composed of three members who were or had been servants of the Company, and one member who was not a servant of the Company. This fourth member was not entitled to sit or vote in the said Council except at meetings thereof for making law and regulations. Section 43 empowered the Governor-General in Council "to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice, whether established by His Majesty's Charters or otherwise, and the jurisdiction thereof, and for all places and things whatsoever....." save and except as therein specified. Section 44 reserved power to the Court of Directors to disallow any law made by the Governor-General in Council. Section 45 provided that all laws and regulations so made should be of the same force and effect within and throughout the said territories as any Act of Parliament would be within the same territories and should be taken notice of by all Courts in the same manner as an Act of Parliament would be taken notice of. Section 66 enabled the Governors or Governors in Council of Bengal, Madras, Bombay and Agra to propose to the Governor-General in Council drafts or projects of any law and the latter was to consider the same. The former legislative powers of the Governors in Council appear to have been taken away by this Act. The Charter Act of 1853 (16 and

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

17 Vice. C. 95) by section 22 enlarged the Governor-General's Council but the scope of the legislative powers under section 43 of the Act of 1833 remained intact. By the Government of India Act, 1858 (21 & 22 Vic. C. 106) the British Crown took over the government of the territories theretofore vested in the East India Company. Then came the Indian Councils Act, 1861 (24 & 25 Vic. C. 67). Section 2 repealed sections 40, 43, 44, 50, 66 and 70 of the Act of 1833 and provided that all other enactments whatsoever then in force with relation to the Council of the Governor-General or to the Councils of the Governors should continue in force. This meant that section 45 of the Act of 1833 which gave to the laws made by the Governor-General in Council the force of an Act of Parliament continued, so that the laws made under the Act of 1861 by the Governor-General in Council also had in British India the force of an Act of Parliament. Section 3 dealt with the composition of the Governor-General in Council. Section 22 substantially re-enacted the provisions of section 43 of the Act of 1833 subject to the proviso that the Governor-General in Council should not have power to repeal or affect the provisions of this Act of 1861 or other Acts therein specified. The power of the Governors in Council of the Presidencies to make laws was restored. This Act was subsequently amended from time to time but those modifications related principally to the composition of the Governor-General in Council. The Council was enlarged but all the time it was dominated by the executive and official block of members so that the laws made by the Governor-General in Council were tantamount to executive fiat. There was, thus, a sort of fusion in which the executive power dominated over the legislative power and, therefore, a delegation of legislative power to the executive made no difference in practice. The ambit and scope of the legislative power remained as wide and vague as in 1833. Therefore, the legislative power of the Governor-General in Council in 1912 when the Delhi Laws Act was passed was the same as in 1869 when Act XXII

of 1869 which was considered in *Burah's* case was passed.

It will be interesting to compare the language of section 7 of the Delhi Laws Act with section 8 of Act XXII of 1869 which was considered by the Privy Council in *Burah's* case. Section 9 of that Act authorised the Lieutenant-Governor, by notification in the Calcutta Gazette, to extend *mutatis mutandis* all or any of the provisions contained in the other sections of the Act to certain places mentioned therein. The Lieutenant-Governor did, by notification, extend all the provisions of that Act to the district of Khasi and Jaintia Hills. That means that section 8 was also extended to that district. On a close analysis it will be noticed that section 8 authorised the Lieutenant-Governor to extend to that place any law or any portion of any law (i) now in force in the other territories subject to his government or (ii) which may hereafter be enacted by the Council (a) of the Governor-General or (b) of the said Lieutenant-Governor. Note the points of similarities. By section 7 of the Delhi Laws Act, as by section 8 of Act XXII of 1869, all existing laws could be extended. No serious objection has been taken to the propriety of giving power to the executive to apply the existing laws because the existing laws were all known to the Governor-General in Council and the latter might, conceivably, be presumed to have applied its legislative mind to the desirability of extending those laws to the territories in question. The real objection to section 7 of the Delhi Laws Act is that it gave power to the executive to extend future laws, because, it is said, the Governor-General in Council could not possibly anticipate what laws it or any provincial legislative authority would make in future. The force of this objection with regard to laws to be made in future by the Governor-General in Council is negligible but the objection certainly is of considerable force in the case of the future laws to be made by any Provincial authority. But section 8 of Act XXII of 1869 authorised the Lieutenant-Governor to extend to the districts in question the future laws to be made, not

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

only by the Governor-General in Council, but also made by the Lieutenant-Governor in Council. After those districts were, by notification, separated from the other territories under the Lieutenant-Governor, the laws made by the Lieutenant-Governor in Council (legislative) after such separation did not *ipso facto* apply to those districts, for otherwise there would be no point in authorising the Lieutenant-Governor (executive) to extend those future laws to those districts. Therefore, when laws were made after such separation by the Lieutenant-Governor in Council (legislative) for the other parts of the territories under the charge of the Lieutenant-Governor (executive) the former could not be assumed to have applied its legislative mind to the suitability or necessity of such laws for those districts, for there was no knowing then that those laws would later on be extended to those districts by the Lieutenant-Governor (executive). Further and what is more important is that at any rate the Governor-General in Council while enacting sections 8 and 9 of Act XXII of 1869 could not possibly have applied its legislative mind to the suitability of those future laws to be made by the Lieutenant-Governor in Council for the new districts. Therefore, in this respect section 7 of the Delhi laws Act stood exactly on the same footing as section 8 of Act XXII of 1869.

It is said that under latter section the Lieutenant-Governor had no power to modify the law before extending the same whereas under the former section the Provincial Government had that power and such a power involved a law-making power. Section 9 of Act XXII of 1869 authorised the Lieutenant-Governor to extend *mutatis mutandis* all or any of the provisions of the Act to certain territories and section 8 authorised the Lieutenant-Governor to extend any law or any portion of any law. The power to extend an Act *mutatis mutandis* certainly involved some modification however small it may be. The power to extend a part of an Act necessarily included the power to omit some sections or parts of some sections, or the important

qualifications and provisos to any sections. A power of modification was thus involved in this process also. The illustrations given by the Privy Council at the end of their judgment in *Burah's* case clearly indicate that the extension of a law "subject to any restrictions, limitation, or proviso which the Local Government may think proper" was considered by their Lordships to be quite permissible. It may well be argued that the intention of section 7 of the Delhi Laws Act was that the permissible modifications were to be such as would, after modification, leave the general character of the enactment intact. One of the meanings of the word "modify" is given in the Oxford Dictionary Vol. I, page 1269, as "to alter without radical transformation." If this meaning is given to the word "modification" in section 7 of the Delhi Laws Act, then the modifications contemplated thereby were nothing more than adaptations which were included in the expressions "*mutatis mutandis*" and the "restrictions, limitations or proviso" mentioned in the several instances of conditional legislation referred to by the Privy Council. It would, therefore, seem quite clear, on this construction, that section 7 of the Delhi Laws Act stood on the same footing as section 8 of Act XXII of 1869 and had the same effect as the latter section.

What the effect of sections 8 and 9 of Act XXII of 1869 was had better be said in the language of Lord Selborne in *Burah's* case at pp. 194-195 :—

"The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be in force by proper legislative

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

authority, "in the other territories subject to his government." The legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also : but that, as it was not certain that all those laws and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily and at all events but if and when the Governor-General should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor."

If section 8 of Act XXII of 1869 could, on the above reasoning and construction be upheld as in instance of "good and valid conditional legislation" I do not see why section 7 of the Delhi Laws Act should not be so upheld on the same reasoning. Adapting the language of Lord Selborne to the Delhi Act it may be said with equal force that, when the new Province of Delhi was set up, the legislature, *i.e.*, the Governor-General in Council which enacted the Delhi Laws Act, had decided that it was expedient to enable the Provincial Government, not to make what law it pleased for the new Province, but to apply, by notification, to that Province any enactment which either already was or from time to time might be in force by proper legislative authority in the other Provinces and also

the laws which were or might be in force in the other Provinces were such as it might be fit and proper to apply to this new Province but as it was not certain that all those laws, and every part of them could with equal convenience be so applied, it was expedient on that point to entrust a discretion to the Provincial Government to apply such of those laws or such part of such laws as it thought fit. If the use of the word "modification" in the Delhi Laws Act is regarded as having given wider power to the Provincial Government, than what was given to the Lieutenant-Governor by section 89 of Act XXII of 1869, even that fact can make no difference, for such a power of modification can also be easily brought within the principle of conditional legislation. It may be said that the appropriate legislature, *i.e.*, the Governor-General in Council, which enacted the Delhi Laws Act applied its legislative mind and decided that the laws which were or might be in force in any other part of British India were such that it might be fit and proper to apply it to the new Province of Delhi but as it was not certain that all those laws could with equal convenience be so applied *in toto*, it was, therefore, expedient on that point also to entrust a discretion to the Provincial Government to apply such law with such restrictions or modifications as would make it more suitable to the new Province before actually extending it. This reasoning will immediately bring the Delhi Laws Act, in spite of the power of modification, within the four corners of the decision in *Burah's* case. I am, therefore, prepared to hold that question No. 1 is concluded by the decision of the Privy Council in *Burah's* case.

The matter does not, however, rest on the foregoing ground alone, for, assuming that the power of modification given to the Provincial Government took section 7 of the Delhi Laws Act out of the ambit and scope of conditional, legislation I reach the same conclusion as to its validity, on the alternative ground of the lawful exercise of the inherent power of delegation of legislative power by the Governor-General in Council

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

to the Provnical Government. The principles deducible from the judicial decisions make it clear that the legislature, by enacting the Delhi Laws Act, did not efface itself or abdicate all power or destroy its own capacity or set up and arm with its own capacity a new legislative power. I discern no such intention in the Act. It is said that the Provincial Government might have decided questions of principle or policy, *e.g.,* as regards prohibition, and extended the prohibition laws of some other Province to Delhi which might not have been suitable for Delhi at all. I do not think the Provinical Government did, in practice, do any such drastic thing. In any case there was no need to feel perturbed by the possibility of the executive doing something wrong by mistake or even by design, for if it did it was easy enough for the legislature to put its foot down, rectify the mistake or nullify the wrong doing or, if need be, to withdraw the matter into its own hand. This being the position, the only other thing to ascertain is whether the Governor-General in Council in 1912 had the legislative capacity to enact the Delhi Laws Act. I have already said that section 22 of the Act of 1861 substantially re-enacted section 43 of the Charter Act of 1833 and authorised the Governor-General in Council to make laws for all persons, for all Courts, and for all places and things whatsoever. It is difficult to imagine any wider law-making power given to a subordinate legislature. Its laws were given the same force and effect within British India as were given to an Act of Parliament. The only limitation was that the Governor-General in Council could not make any laws affecting the Act of 1861 itself and certain other Acts mentioned therein. The Delhi Laws Act was certainly law for the "persons" of the "place" called the Province of Delhi. Apart from this the judicial decisions, as I apprehend them, quite clearly establish that the power of delegation is a component part of the content of legislative power and once this power of delegation is conceded, there is no limit to it except what I have mentioned. Therefore, there remains no

doubt in my mind that the Governor-General in Council acted well within its power to delegate to the Provincial Government the power of selection of laws suitable for the new Province of Delhi and to extend the same to that Province with such restrictions and modifications as the latter thought fit. I am, therefore, satisfied that in enacting section 7 of the Delhi Laws Act in 1912 the Governor-General in Council acted within the ambit of the legislative power then vested in him and no part of the section was *ultra vires* the powers of the Governor-General in Council.

Re Question 2: The Ajmer-Merwara (Extension of Laws) Act was enacted on December 31, 1947. The Constitution of India was then governed by the Government of India Act, 1935, as adapted under the Indian Independence Act, 1947. Under section 7 of the Act of 1935 the executive authority of the Dominion was to be exercised on behalf of His Majesty by the Governor-General. According to section 46 "Province" meant a Governor's Province. Under section 49 the executive authority of a Province was to be exercised on behalf of His Majesty by the Governor. Section 18 as adapted provided that the powers of the Dominion Legislature should be exercised by the Constituent Assembly. Section 42 which was in Chapter IV of Part II gave legislative powers to the Governor-General in certain circumstances. Section 60 provided that there should for every Province be a Provincial Legislature consisting of His Majesty represented by the Governor and two Chambers in some Provinces and one in the others. Section 94 enumerated the Chief Commissioners' Provinces. Delhi and Ajmer-Merwara were included within the section. Sections 99 and 100 distributed legislative powers between the Dominion Legislature and the Provincial Legislatures and confined their respective law-making powers within the appropriate Legislative Lists set out in the Seventh Schedule. Sub-section (4) of section 100 was as follows :—

"The Dominion Legislature has power to make laws with respect to matters enumerated in the

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

Provincial Legislative List except for a Province or any part thereof."

Applying the definition of "Province" to this sub-section, it meant that the Dominion Legislature was empowered to make laws for the Chief Commissioners' Provinces on all subjects in all the three Lists. Part IX dealt with the Judiciary. Section 200 provided that there should be a Federal Court. Section 219 enumerated the different High Courts. From what I have stated it is clear that in the Government of India Act, 1935, there was no "vesting" of powers in the Executive, Legislature or the Judiciary as in the American Constitution.

Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, was as follows :—

"The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enactment which is in force in any other Province at the date of such notification."

I see no difficulty in treating this Act as a piece of conditional legislation within the meaning of *Burah's* case on the same line of reasoning as I have employed in the case of section 7 of the Delhi Laws Act. The language of Lord Selborne may equally be applied to this Act *mutatis mutandis*. I also think, alternatively, that the Ajmer-Merwara Act may also be supported as a valid delegation of legislative power by the legislature without effacing itself in the sense I have explained above. It is true that the powers of the Dominion Legislature to make laws for the Chief Commissioners' Provinces were circumscribed by the entries in the three Lists and did not include the residuary power of legislation which, under our present Constitution, Parliament has under entry 97 in the Union List and under article 248, nevertheless the power of the Dominion Legislature to make laws extended to all the three Lists and, therefore, included a power of delegation with respect to each of the subjects in each of the three Lists. Out of that the Dominion Legislature by

section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, delegated to the Central Government the power to extend, by notification, to Ajmer-Merwara only the laws which were in force in any other Province at the date of such notification. The law made by the Dominion Legislature, of course, applied to every part of the Dominion and there was no question of the Central Government extending them to Ajmer-Merwara. In any case, the Dominion Legislature while enacting a law did actually apply its mind to it. In effect, therefore, by section 2 of the Ajmer-Merwara Act the Dominion Legislature delegated to the Central Government legislative power with respect to the Provincial and Concurrent Lists. This was quite clearly within the ambit of its power and no part of that Act was *ultra vires.*

Re Question 3 : Part C States (Laws) Act, 1950, was enacted on April 16, 1950, after our Constitution came into force. In order to answer this question we have to ascertain what the legislative power of our Parliament is under the Constitution. By article 53 the executive power of the Union shall be "vested" in the President. Article 74 requires that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President. Under article 73(3) the Council of Ministers are to be collectively responsible to the House of the People. Article 79 requires that there shall be a Parliament for the Union consisting of the President and two Houses. The distribution of legislative powers between the Parliament and State Legislatures is done by articles 245 and 246. Under article 245 Parliament may make laws for the whole or any part of India. The subject-matters with respect to which Parliament may make laws are enumerated in the Union List set out in the Seventh Schedule to our Constitution. The State Legislature may make laws with respect to matters set out in the State List. Both Parliament and the State Legislature may also make laws with respect to the Concurrent List. Entry 97 of the Union List as well as article 248 however give the residuary power of legislation to

1951

In re The Dhe Laws Act, 1912, etc.

Das J.

Parliament to make laws with respect to any matter not enumerated in the Concurrent or State Lists. Chapter IV of Part V deals with the Union Judiciary. Article 124 provides that there shall be a Supreme Court of India. There are similar provisions with regard to the Executive, Legislature and Judiciary of the State.

It is to be noticed that it is only the executive authority that is "vested" in the President or the Governor as the case may be. There is no vesting of the legislative or judicial power as in the American Constitution. In this respect our Constitution follows the pattern of the Canadian Constitution. Further, our Constitution has adopted the British Cabinet system and provided for the collective responsibility of the Council of Ministers to the House of the People. There is thus a fusion of executive and the legislative power as in England. Although ours is a federation, we have nevertheless adopted the main features of the British Constitution.

The next thing to notice is that the power of both Parliament and the State Legislature to make laws is "subject to the provisions of this Constitution." Article 13(2) provides that the Union or the State shall not make any law which takes away or abridges any of the fundamental rights guaranteed in Part III by the Constitution. Again, the exclusive demarcation of the legislative field may possibly imply a limitation that Parliament cannot delegate its legislative powers to a State Legislature as such and *vice versa,* for that would run counter to the Constitution itself. [See *Attorney-General of Nova Scotia* v. *Attorney-General of Canada*(1)] Whether the Parliament or the State Legislature has in any way overstepped the limits prescribed by the Constitution is certainly justiciable and in this matter the Court has supremacy over the legislature. But within their respective sphere, our Parliament and the State Legislatures are supreme and the Court cannot question the wisdom or propriety of any law made within their respective competence.

(1) [1950] 4 D.L.R. 369.

On this question I adhere to what I said in *Gopalan's* case(1).

Part C of the First Schedule enumerates and includes 10 States. Each of these States, under article 239, is administered by the President through a Chief Commissioner or a Lieutenant-Governor or through the government of a neighbouring State. Article 240 empowers Parliament to create or continue local legislature or Council of Advisers for any of these States and article 241 empowers Parliament to constitute a High Court for any of these States. Under article 246(4) Parliament is given power to make laws with respect to any matter in the State List for any of these States. Under article 245, Parliament may make laws for the whole or any part of the territory of India. Therefore, Parliament has power to make laws for the Part C States with respect to any matter in any of the three Lists as well as any other matter in exercise of its residuary legislative power. In other words, the legislative power of Parliament with respect to the Part C States is much wider than the legislative power the Dominion Legislature had under the Government of India Act. It is in exercise of this wide power that Parliament has enacted Part C States (Laws) Act, 1950, section 2 of which runs thus :—

"The Central Government may, by notification in the official gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification; and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act), which is for the time being applicable to that Part C State."

The only difference between this section and section 7 of the Delhi Laws Act, 1912, or section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, is that

(1) [1950] S.C.R. 88.

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

this section gives power to the Central Government, while extending an Act of a Part A State to a Part C State, to provide for the repeal or amendment of any corresponding law which is in force in that Part C State. I do not think even this difference prevents this section from being regarded as a piece of conditional legislation within the meaning of *Burah's* case. The language of Lord Selborne fits in with the first part of section 2 of the Part C States (Laws) Act just as it did with section 8 of Act XXII of 1869 or section 7 of the Delhi Laws Act, 1912, or section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947. That language may equally be applied to the latter part of section 2 of the Part C States (Laws) Act, for it may be said with equal plausibility that the appropriate legislature, *i.e.,* Parliament, has, as regards the second part of the section, also applied its mind and decided that it is expedient to enable the Central Government not to make what law it pleases, but to apply, by notification, to a Part C State the laws which were or may be in force in a Part A State and also that such law having been enacted by a competent legislature will be such that it may be fit and proper to apply to any of these Part C States but as such a law may be inconsistent with a similar law already in force in such State it will be necessary and desirable to repeal or amend the last mentioned law so as to enable the more suitable law to be extended and applied to such State and that it is, therefore, expedient, on that point also, to entrust a discretion to the Central Government to repeal or amend the law in force. So put, the matter comes directly under the principle of conditional legislation established in *Burah's* case. Alternatively if section 2 of the Part C States (Laws) Act is for any reason outside the ambit of conditional legislation, the section may, nevertheless, be upheld as an instance of permissible delegation of legislative power on two grounds, namely, first that a power of delegation is inherent in the law-making power itself and, secondly, that this delegation is within its legislative power as expressly given by Entry 97 of the Union List as well

as by article 248. To make a law with respect to the delegation of its legislative power may easily be regarded as matter not enumerated in the Concurrent or State List. Parliament has not effaced itself. The law is within the legislative competency of Parliament and is, therefore, valid.

The learned Attorney-General also relied on Indian legislative practice in support of the validity of these three enactments. He has relied on several instances of such enactments appended to the President's statement of case. During the time of the expansion of the British possessions in India, small bits of territories in outlaying parts of India were being constantly annexed by the British but on account of the smallness of such territories or the undesirability of their immediate merger with the established Provinces it was not found to be practically possible to provide legislative Councils for these enclaves. Nor was it possible for the Governor-General in Council to enact laws for the day to day administration of these bits of territories or for all their needs. The practice, therefore grew up for the Governor-General in Council, by a simple legislation, to confer power on the Lieutenant-Governor to extend to such territories such of the laws as were or might be in force in other parts of the territories under the Lieutenant-Governor which were considered siutable for these territories. Such practice was certainly convenient, and even since *Burah's* case does not appear to have been seriously questioned. I do not say that the argument has no merit, but in the view I have taken and expressed above, I do not find it necessary, on the present occasion to base my opinion on this argument.

Before I conclude, it is necessary to take note of one argument based on article 353 and article 357. Those Articles are in Part XVIII of the Constitution and are emergency provisions. Article 362 empowers the President, if he is satisfied that a grave emergency of the specified kind exists, to make a proclamation declaring

1951

In re The Delhi Laws Act, 1912, etc.

Das J.

such emergency. While such proclamation is in operation, the executive power of the Union shall extend to giving directions to any State as to the manner in which the executive power of the State is to be exercised and the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter. Article 356 provides for breakdown of the constitutional machinery in the States and empowers the President by proclamation to assume to himself the powers of the State government and to declare that the powers of the State Legislature shall be exercisable by or under the authority of Parliament. Article 357 declares that in case of such proclamation it shall be competent for Parliament to confer on the President the power of the State Legislature to make laws and to authorise the President to delegate the power so conferred to any other authority. The argument is that if legislative power contains within itself a power of delegation then why was express power of delegation provided for in articles 353 and 357. The conclusion is sought to be drawn that grant of legislative power, without more, does not carry a power of delegation and that is why in these two Articles power of delegation was given expressly. This argument does not appear to me to be sound. In the first place, it should be noted that these two Articles were providing for the exercise of the powers of the State government or the State Legislature by the Union government or Parliament. Therefore it was considered necessary to expressly include the power of delegation. Further in view of the emergency or other stress of circumstances it may well have been expedient to expressly provide for this power of delgation *ex abundanti cautela*. I am not prepared to say that the provisions of these two Articles can possibly negative the power *cauteld*. I am not prepared to say that the provisions of delegation of legislative power which is incidental and ancillary to the power of legislation and which

is, up to a point, conceded, even in the land of separation of powers.

The result, therefore, is that I answer the questions as follows :—

Question 1 : Section 7 of the Delhi Laws Act, 1912, was valid and no part thereof was *ultra vires* the legislature that passed it.

Question 2 : Ajmer-Merwara (Extension of Laws) Act, 1947, was valid and no part thereof was *ultra vires* the legislature that passed it.

Question 3 : Section 2 of the Part C States (Laws) Act, 1950, is valid and no part thereof is *ultra vires* the Parliament.

Bose J.

Bose J.—I will deal with the Delhi Laws Act of 1912 first. The question is whether section 7, or any of its provisions, is *ultra vires*. To determine that, it will be necessary to forget the present Constitution of India and project our minds back to the year 1912 when India was still under British rule.

Delhi was originally part of the province of Punjab but it was constituted into a separate province under a Chief Commissioner on the 17th September 1912. When that was done legislation was required to determine what laws were to apply in this new province. Instead of starting afresh by bringing in a whole series of new Acts, the Delhi Laws Act was enacted. Under section 2 the entire body of law which was in force in this area just before it was taken out of the Punjab was continued in force and under section 7 the Provincial Government of the new province, that is to say, the executive authority, was authorised to extend to this area, by notification, with or without restrictions or modifications, any enactment in force in any part of British India at the date of the notification. It is not disputed that this Act was passed by a legislations or modifications, any, enactment in force in any it is contended by those impugning the Act that that legislature had no power to confer on the Provincial Government, which is not a legislative body, what in

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

essence is legislative power, namely authority to introduce into the province new laws which were not there before.

The legislature which enacted the Delhi Laws Act 1912 was the legislative section of the Governor-General in Council or, what for convenience may be termed, the Governor-General in Legislative Council. This body was constituted by an Act of the British Parliament, originally the Charter Act of 1833. Its composition and powers were altered from time to time, as, for example, by the Charter Act of 1853 and the Indian Councils Acts of 1861, 1892 and 1909, but essentially that was the legislative authority in India in the 1912. In that year its powers were derived from section 22 of the Indian Councils Act of 1861. That being the case, the scope and ambit of these powers are naturally to be gathered from that Act, but unfortunately that does not help us here because these powers were of necessity conferred in general terms and the whole question is what do the words mean. It was conceded that there is no provision which in express terms empowered this new legislative body the Governor-General in Legislative Council, to confer on any other authority the wide powers embodied in section 7 of the Delhi Laws Act of 1912, but it was contended that the right to do that is inherent in the power to legislate and inasmuch as the Governor-General in Legislative Council was empowered to legislate for, among other areas, the Province of Delhi, it had the right to do what it did in the Delhi laws Act was as part of its normal legislative functions.

That brings us to the question, of what does the legislative power in a State, or a portion of a State, consist? There is a great divergence of opinion about this and we were taken elaborately through the views of many eminent judicial authorities and jurists in Great Britain, Canada, Australia, India, the United States of America and the continent of Europe. I do not think it will be profitable to examine them at length because in the end it all comes to this. The

concept of legislative power varies in different countries and indeed often from mind to mind in the same country. There is no universally accepted definition. We have therefore to reach our own conclusions and choose between them. But in doing that I conceive it to be proper to lean towards what I may term the British point of view for the following reasons.

We are concerned here, at the source, with an Act of the British Parliament and with a country which at that time was governed by the British. The legislative authority in India was derived from Britain. The Governor-General in Legislative Council was a creation of the British Parliament. When, therefore, Parliament endowed it with the power to legislate, we have necessarily to determine what that Parliament intended to do and what matters that body considered lay within the ambit of legislative power. The only way to do that is to examine the usage and practice of the British Parliament in similar cases and see how its Acts in this behalf were interpreted by British Courts of law. I do not of course mean by this that we are to examine the power of the British Parliament because everyone concedes that its powers are legislatively absolute and that no court of law can question anything it does: I mean examine the nature of the powers conferred by it upon other legislature, like the Governor-General in Legislative Council, which have been created from time to time by the British Parliament in various parts of the British Empire. In doing this I wish to avoid, as far as I can, the use of words and phrases which have acquired technical significance but about whose meaning no two minds seem to agree. I have in mind words such as sovereign, abdication, delegated authority, separation of powers and so forth. I do not think it is necessary to enter upon the wide field of enquiry which an analysis of these terms would entail because, in my view, what we have to determine here lies within a much narrower compass.

Projecting ourselves back to the position in 1912 we will have to consider the position as British Courts

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

would have done and in particular the Judicial Committee of the Privy Council. In *Croft* v. *Dunphy*(1) the Judicial Committee said, in a Canadian case :—

"In these circumstances, it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of the Imperial customs legislation and which presumably were recognised as necessary to its efficacy."

That, to my mind, justifies the approach that in construing section 22 of the Indian Councils Act of 1861 and the subsequent Acts of 1892 and 1909, we must take into consideration the fact that the British Parliament had present to its mind a number of judicial pronouncements regarding the scope and ambit of the legislative authority conferred upon legislatures which were the creation of the Imperial Parliament. But so far as the Delhi Laws Act is concerned, one case will be enough, namely *The Queen* v. *Burah*(2).

That was a decision of the Judicial Committee given in the year 1878. The case came from India. Their Lorsdhips made several observations of a general and far-reaching nature, but far the present purpose I will confine myself to a somewhat narrower point which, in my opinion, is more germane to the present case. Their Lordships were concerned with an Act of the Governor-General in Legislative Council of the year 1869 which was being impugned. At that date a slice of territory known as the Khasi Hills was governed by Act VI of 1835 and Bengal Regulation X of 1822; so also another piece of territory known as the Garo Hills. Section 3 of the impugned Act repealed these laws (except on matters which do not concern us) so far as they related to the Khasi Hills and section 4 excluded the Garo Hills from their operation. Section 8 enacted that :—

"The said Lieutenant-Governor (Bengal) may from time to time, by notification in the Calcutta Gazette,

(1) [1933] A.C. 156 at 161. (2) 5 I.A. 178.

extend to the said territory (Garo Hills) *any law*, or any portion of any law, now in force in the other territories subject to his Government, *or which may hereafter be enacted* by the Council of the Governor-General or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation." (page 180).

Section 9 empowered the Lieutenant-Governor to do the same thing for the Khasi Hills by applying section 8 (among others) to the Khasi Hills (page 180). These provisions were attacked as *ultra vires*. See page 190 where their Lordships say :—

"The next question is whether the *whole* Act of 1869 is void." Two grounds of attack were, (1) that this was not legislation but a delegation of legislative power (page 192) and (2) that the Governor-General in Legislative Council was here attempting to create a new legislature (page 194). Both contensions were refuted, the first on the ground that the Indian Legislature was in no sense an agent or delegate of the British Parliament and the second, because this did not have the effect of creating a new legislative body.

At the moment I wish to concentrate attention on the second point. This is how the Judicial Committee dealt with it. Their Lordships said, refuting the argument about the creation of a new legislature :—

"Nothing of that kind has, in their Lordships opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and

1951

In re Delhi Laws Act, 1912, etc.

Bose J.

also enabling him, *not to make what laws he pleases* for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or *from time to time might be,* in force, by proper, legislative authority 'in the other territories subject to his government.' The legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lietenant-Governor; and also, that the laws which were or *might be* in force in the other territories *subject to* the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor."

Now I do not intend, at the moment, to enquire into the juristic principles on which that decision is based because in my opinion, it is direct authority for this, namely, that a legislative body which I shall call A, created by the British Parliament to enact laws for an area X+Y+Z, has authority to do the following things :—

(1) to repeal all laws existing in a particular area X which has been carved out of the whole X+Y+Z and which is subject to A's legislative jurisdiction;

(2) to authorise a purely executive authority B who is in subordinate executive and legislative control of Y and who is now placed in executive charge of X as well, to pick and choose for X any law which are then in existence in Y or Z, whether made by legislature A or by a subordinate legislature in Y for Y, and apply them either in whole or in part, as he pleases to X; further,

(3) to authorise B to pick and apply, either in whole or in part, any law *which might hereafter be made* either by legislature A for Y or Z, or by another subordinate legislature which is not A but which is under B for Y.

Now the application of that to the present case (the Delhi Laws Act) is this. The legislature which enacted the Delhi Laws Act was the same legislature as the one in *Burah's* case, though of course its composition was different. In *Burah's* case, the powers were derived from the Acts of 1833, 1853 and 1861. In the present case, the powers are derived from the same series of Acts coupled with those of 1892 and 1909. The later Acts altered the composition of the legislature and effected certain alterations in the mode of its legislation but its overall power to leigslate was based on section 22 of the Imperial Act of 1861, as in *Burah's* case. Therefore, in my illustration, A remains A but B becomes the Provincial Government of the new province of Delhi and X becomes the area embraced by the new province. Y+Z are the remaining provinces having none. Section 7 of the Delhi Laws Act enacted by legislature A empowers an executive authority B in charge of area X—

(1) to apply to X, with or without restrictions or modifications, any law then in existence made by A for Y or Z;

(2) similarly to apply to X any laws made by a Provincial Legislature in Y for Y;

(3) in the same way to apply to X any law which might hereafter be made by A for either Y or Z; and

(4) to apply, as before, to X any law which might hereafter be made by a Provincial Legislature in Y *not in charge of B,* for Y.

It will be seen that the only difference between this and *Burah's* case lies in items (2) and (4). The Privy Council upheld the legislation which empowered B to choose for X any laws made by A. Therefore, to that extent at any rate section 7 would have to be upheld and the question in every case would be whether the Provincial Government had selected a Central or a Provincial law. But the Privy Council went further and permitted B to choose a *Provincial* law as well,

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

though the area of selection was restricted to Provincial laws in territories of which B was Lieutenant-Governor and which were under his executive and legislative control. In the Delhi case, the field of selection is wider and extends to provinces which are not in charge of B. Does that make any difference in principle? I cannot see that it does so as A is concerned. It is true the Judicial Committee said that the laws which the Lieutenant-Governor was entitled to apply were "laws which were or might be in force in other territories *subject to the same Government.*" Reading that in the light of section 8 from which the words were culled, I think that means other territories under the Lieutenant-Governor (not the Governor-General), and of course the Lieutenant-Governor's area of choice was restricted in that way in that case but that was because such a limitation was placed in the Act of 1869 which applied there. There is no similar limitation in the Delhi Laws Act of 1912.

Whatever the true ground of decision in *Burah's* case may be the fact remains that the Privy Council upheld a law made by Legislature A empowering an executive authority B, which bears the same relation to A as the Provincial Government of Delhi, to select and apply to an area X within the legislative jurisdiction of A, laws made by a Provincial Legislature in another part of India, also legislatively under A. That is the exact position here.

The only other point of difference between this case and *Burah's* case is that the Lieutenant-Governor was permitted to select "any law, or any portion of any law" whereas, here, the Provincial Government is empowered to extend the specified enactments "with such restrictions and modifications" as it thinks fit. I do not think this makes any difference of substance. Consequently, placing myself in the position of a British Court of the year 1912 bound by decisions of the Privy Council, I would hold on this narrow ground that section 7 of the Delhi Laws Act of 1912 is *intra vires*. I can hardly think that the Privy Council bound by its own precedents would have decided otherwise.

I turn next to the Ajmer-Merwara (Extension of Laws) Act, 1947. Section 2 is the portion impugned. It is worded much the same as the other, only in this case the Central Government (against an executive body) has been given the power to introduce laws (with restrictions and modifications) instead of the Provincial Government. Here also, the laws which can be introduced are not only those made by the Central Legislature but also those enacted by Provincial Legislatures, and the laws which can be selected are both those in being at the date of the Act and those which may be made in the future. But by this time the character of the Indian Legislature had undergone a radical change and the question is whether that made any difference. I do not think it did.

The Government of India Act, 1935, introduced a federal element into the government of the country and gave it a constitution. It divided the ambit of legislative authority and created legislative spheres of interest between the Centre and the Provinces and gave residuary power to the Centre. But except for that, it did not alter the basic concept of the legislative power. Under section 22 of the Indian Councils Act of 1861 the Governor-General in Legislative Council was empowered to "*make laws*" for all persons and things within British India though within certain prescribed limits, For instance, it could not make any law altering or affecting an Act of the Imperial Parliament unless expressly authorised but, as we have seen, such power as was conferred included the power to do what was done under the Delhi Laws Act. The Government of India Act of 1915 which consolidated the previous Acts touching the government of the country, made no alteration regarding this though Parliament had *The Queen* v. *Burah* before it. In 1935, despite the division of power between the Centre and the Provinces, the essential concept of the power was not altered, only its method of functioning. If anything, the sphere of authority was enlarged because the Federal Legislature was empowered to make law having extra-territorial application, a right which the Indian

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

Legislature did not up till then possess. Section 99 authorised the Federal Legislature to "make laws" for the whole or any part of British India subject, however, to the other provisions of the Act. The other provisions merely divided the subjects on which legislation is permissible. They say nothing about the essential elements which go to make up the legislative power. The language, it will be seen, is the same as the language in the Government of India Act of 1915. But, to my mind, the really fundamental fact is that we are here still dealing with an Act of the British Parliament enacting a law for India. It is reasonable to conclude that that Parliament's concept of the essentials of legislative power had not altered, particularly when we find it employing the same language as in 1861 and in 1915.

Next comes the Indian Independence Act of 1947. That converted India into a Dominion and conferred even wider powers upon its legislatures. The limitations on legislation which section 108 of the Act of 1935 imposed were removed. But, so far as the essential content of the legislative power was concerned, the position remained the same and the same language was employed namely, the Dominion Legislature "may make *laws* etc." No fresh limitation on its law-making powers was imposed.

Now here again, though India was given independence and was given the right to frame a constitution for itself until it did so the old constitution which was framed by the British Parliament remained. The position at this juncture is much as it was in Canada. See the observations of Viscount Haldane in *Attorney-General for the Commonwealth of Australia* v. *The Colonial Sugar Refining Company Limited*(1). Therefore, at bottom, we are still construing an Act of the British Parliament. We are still looking at these legislatures through British eyes. We still have to consider what answer the Privy Council would have given regarding the validity of this law in the year 1947 when it was enacted. In the face of *The Queen*

(1) [1914] A.C. 237 at 253.

v. *Burah* I have no doubt in my mind that this legislation would have been upheld. I need not therefore enquire further because, though there was a large volume of litigation about this kind of legislation subsequent to that date, no single decision of the Judicial Committee has thrown any doubt upon the soundness of *Burah's* case. On the contrary, the decision has been relied on in case after case from the Dominions and the widest amplitude of its terms has been endorsed. Therefore, I would uphold the validity of this Act also. But I wish to emphasise that I do so on the same narrow ground as before and that I have not attempted to define what the legislative power consists of. I am only concerned in these two cases with the narrow question whether these two Acts are *intra vires*. My answer is that they are in British eyes because, whatever else the legislative power may or may not contain, the Privy Council has decided that this type of Act is valid and that when the British Parliament creates another legislature for the proper governance of a country it envisages this type of legislation as being within its competence. That is enough in these two cases.

The third Act we are asked to examine is the Part C States (Laws) Act, 1950. Section 2 is the provision which has been called in question.

The first part of the section follows the now familiar pattern. The Central Government is given power to extend by notification any Act which is in force in a Part A State at the date of the notification to any Part C State (except three) "with such restrictions and modifications as it thinks fit." Power is also given to the Central Government, when extending any such enactment, to make provision in it.

"for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

This latter portion goes a good deal further than before. But that apart. This was in the year 1950 after the Indian Constitution came into force. We are

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

therefore here treading on virgin soil. The legislature which passed this Act was the Indian Parliament, a body created, not by the British Parliament with its British concept of legislative power, but by the Constituent Assembly of India which drew not only on the British model but culled from all the world that which in its wisdom it considered best fitted for this country and after adding bits of its own, produced an amalgam which adheres to non of its models but is something fresh and in that sense unique. We can, on analysis, find traces in it of the British model, of the American, the Canadian, the Australian and the Japanese. It seems to me therefore that it is useless to try and look at this through the eyes of another country or of their Courts. We have to try and discover from the Constitution itself what the concept of legislative power looked like in the eyes of the Constituent Assembly which conferred it. When that body created an Indian Parliament for the first time and endowed it with life, what did *they* think they were doing? What concept of legislative power had they in mind? To answer this it will be necessary to envisage the various facts which were at their disposal at that time.

First and foremost, they had the British model in view where Parliament is supreme in the sense that it can do what it pleases and no Court of law can sit in judgment over its Acts. That model it rejected by introducing a federation and dividing the ambit of legislative authority. It rejected by enacting fundamental laws. It rejected by drawing a distinction between the exercise of constituent powers and ordinary legislative activity. It rejected by expressly envisaging the incompetency of Parliament to act in certain cases as in article 249(3). It rejected by fashioning an elaborate Constitution within the ambit of which alone Parliament could function. We have therefore next to consider what material the Constituent Assembly had to draw on regarding restricted types of legislatures.

On the one hand, they had before them the flexible British concept favouring the widest devolution of

authority short of creating a new legislature. I say short of creating a new legislature because the Privy Council said in *The Queen* v. *Burah*(1) at page 194 that—

"the Governor-General in Council could not *by any form of enactment* create in India, and arm *with general legislative authority,* a new legislative power, not created or authorised by the Councils Act."

This was repeated in other cases which I do not intend to examine because I am now searching for principles and not considering whether I am bound by this authority or that. I am treading on virgin soil.

As against this, they had before them the American model with its rigid doctrine of the separation of powers; and in between they had the Canadian and Australian models which were neither wholly one thing nor the other but something in between.

Now in endeavouring to discover from the Constitution what the Constituent Assembly thought of this grave problem, I consider it proper to take the following matters into consideration. First, it has been acknowledged in all free countries that it is impossible to carry on the government of a modern State with its infinite complexities and ramifications without a large devolution of power and delegation of authority. It is needless to cite authority. The proposition is self-evident. Next, the practical application of that principle has been evident through the years both in India and in other parts of the British Empire and in England itself. In the third place, even in America Judges have had to veer away from the rigidity of their earlier doctrine and devise ways and means for softening its rigour and have not always been able, under a barrage of words, to disguise the fact that they are in truth and in fact effecting a departure because compelled to do by the force of circumstances.

I next consider it relevant to take into consideration the fact that this country has for close

(1) 5 I. A. 178.

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

on a century been governed along British lines and that the present Constitution is very like that of the year 1935 where it deals with the powers of legislation. The concept of those powers is therefore something to which the peoples of India and those who govern them have been accustomed for nearly a hundred years. It is consequently something which must have been thought good, otherwise it would have been expressly negatived in the Constitution as have been other things which were not considered proper in this country.

As against this, we have the fact that Parliament has not been left free except when it exercises constituent powers. Fetters have been placed upon it under the Constitution. Certain things have been made fundamental. Certain guarantees have been given. The people of India have been given a gift of the free way of life. The country has been constituted into a Sovereign *Democratic* Republic. As, however, was inevitable, fetters have been placed upon the freedoms. That had to be because there is no such thing as absolute liberty. If every man did just as he liked there would be chaos; also the safety of the State would be imperilled. In some cases, the fetters are to be found ready forged in the Constitution itself. But in others the Constitution has merely envisaged the possibility that further restrictions may be necessary in the future and has entrusted to Parliament that duty of determining within fixed limits when, were and how, and their extent. I am of opinion that in these cases Parliament is not free to delegate its authority. It cannot leave to another something which has been entrusted to its own particular care. The people of India are entitled in that particular class of case to the fruits of Parliament's own mature deliberations, to its patriotism and to its collective wisdom. I would draw the distinction in this way. Where Parliament has been left free to legislate in a general way on a particular topic, I consider it can legislate in the manner which has been a common place in this land over the years. I do not think it desirable to lay down general rules. Each

case will have to be considered on its own facts as it arises. The only limitation is that what is done must be legislation. But when Parliament has been directed to do a particular and specific thing under the Constitution, and particularly under the Chapter on Fundamental Rights, as for example, to fix a maximum period of detention under article 22(7)(b), that sort of duty cannot, in my opinion, be delegated. I am not prepared in this case to go any further than that in either direction.

My reasons for so holding are these. Article 245(1) of the Constitution states :—

"Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

This is word for word the same as section 99(1) of the Government of India Act, 1935, except for the changes consequential on the altered status of the country. But when we turn to other portions of the Constitution we find certain things which are new. There is, for example, the Chapter on Fundamental Rights. Now when a thing is made fundamental and its ambit indicated except to the extent that it may be altered in a particular way, it can, in my judgment, only be altered in that way and no other. To hold otherwise would be to derogate from the solemnity of the guarantee and place it on a par with any other law. I am clear that that was not the intention. The whole point of the guarantees regarding fundamental rights was to afford relief against arbitrary executive action restraining a man's liberties; and it is no guarantee against an improper exercise of power by A to say that A shall not detain you unless he wants to and that he shall have no right to detain you beyond a specified period unless he so desires. It *is* a guarantee to say that A shall not detain you for longer than three months unless the

1951

In re The Delhi Laws Act. 1912

Bose J.

chosen representatives of the people after the deliberation think it proper to fix a longer period. But when that is done there can be no delegation to A or indeed to any other. I am clear that a departure was intended from the normal methods of legislation (normal, that is to say, to this country) in this class of case. This is particularly so when we find express provision setting out the incompetency of Parliament to make certain laws as in article 249(3) and when we find express provision for delegation of authority in particular cases. I have in mind, for example, article 357.

Article 356 envisages the possibility of failure of constitutional machinery in a State. In that event the President is empowered to "declare that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament." When that is done, article 357(1)(a) empowers Parliament to confer on the President the power of the legislature of the State to make laws and to authorised the President to delegate the powers so conferred to any other authority he chooses to specify. I am clear that this power cannot be delegated and that only Parliament can confer the requisite authority on the President. It cannot leave the decision to somebody else and authorise him to do it though that would have been the case had it not been for this express authorising.

This article was referred to in the arguments and it was contended that the Constitution does not envisage the right to delegate except when it is expressly auhorised. It was argued that if the right to delegate authority was inherent in the right to legislate, then this part of article 357 would be otiose. Therefore, the fact that the Constitution expressly authorises delegation in particular cases indicates that no general power of delegation exists. There is force in this but, with respect, I do not think it is sound. Article 357(1)(a) is not dealing with what the Privy Council has decided is not a delegation of legislative power at all but is empowering that which the Privy Council held an Indian Legislature could not do before the Constitution, namely, create a new legislature and arm it with

general legislative authority. I do not seek to enter the lists and joust with those who dispute the true meaning of "delegation" and of "essential legislative power" because it is enough for me to say that whatever other authorities may have thought, the Privy Council held that in *Burah's* case there was no delegation of the legislative power but an ordinary and normal exercise of it. They also held that the creation of a new legislature was beyond the competence of the Indian Legislature as then constituted. I am clear that in enacting article 357(1)(a) the Constituent Assembly was of opinion that Parliament was not to have an inherent right to create a new legislature. It could only do that when expressly empowered. But that in itself does not import the idea that the Constituent Assembly was also of opinion that Parliament would have no power to do that which had been accepted as the normal function of an Indian legislature ever since *The Queen* v. *Burah* in 1878. That particular concept of legislative power has not been altered or abrogated by the Constitution except in particular cases. I prefer therefore to hold that that which *The Queen* v. *Burah* authorised, whatever you may choose to call it, was not abrogated except in special cases.

I so hold for another reason as well namely, that to decide otherwise would make the government of India an exceedingly difficult matter and would put back the hands of the clock. I prefer therefore to hold—and that has the logic of history behind it—that the concept of legislative power which had hitherto been accepted in India continued to hold goods but that this limitation was placed upon it by the Constitution, namely that wherever the Constitution employers Parliament to do a particular thing as opposed to legislating generally on a particular topic, there can be no delegation. Parliament must itself act.

But even that is not the full picture because it has been held from the earliest times, even when viewed through purely British eyes, that a legislature created by the British Parliament (1) cannot act beyond the ambit of its powers the extent of which must be

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

gathered from the document which brings it into being (2) it cannot create a new legislature for the purpose of legislating generally and (3) it cannot abdicate. These limitations are to be gathered from a series of cases to which I shall presently refer. I am of opinion that the same limitations exist in the case of the Indian Parliament because that, unlike the British Parliament, is not free to do as it likes; it is bound by the Constitution.

I do not here wish to enter into questions of sovereignty because the concept of sovereignty varies. It may be that looked at from one point of view Parliament is fully sovereign because it can by the requisite majority and following the prescribed procedure amend the Constitution and confer what powers it pleases upon itself. But viewed from another angle it is evident that the framers of the Constitution elected to put into the Constiution restrictions on change and we have in each case to interpret a compact made between the Union and the States and the people of India. To use the language of Viscount Haldane in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company Ltd.*(1) :—

"Their Lordships are called upon to interpret the legislative compact made between the Commonwealth and the States.....It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion."

To enquire whether this imports full sovereignty is to my mind mere playing with words. I do not doubt that Parliament has powers of amendment but equally I am clear that until it chooses to alter the Constitution it is bound by it and by the implications which follow therefrom. What you choose to label a body, however august, having powers of this kind and hedged in by such limitations, hardly matters. The only

(1) [1914] A.C. 237 at 256.

question is what is the ambit of those powers and what the extent of the limitations.

So far as the British concept goes, the following limitations upon a legislature which is the creation of a written instrument and which is bound by its terms, whether an Act of the British Parliament or otherwise, have been indicated from time to time. The earliest pronouncement is one of 1871, *The Queen* v. *Burah*(1) to which I have already referred. That case set out the three limitations which I have just enumerated. In addition, their Lordships said at page 194 that the powers conferred on the Lieutenant-Governor in that case were not to make what laws he pleased but to apply to the new territory any law which already was, or might from time to time be, in force, by proper legislative authority, in the other territories subject to his government.

The same principle was repeated in 1882 in *Russell* v. *The Queen*(2), a case from Canada. The Privy Council said at page 835 :—

"The provisions that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled."

In 1883 the Judicial Committee described this sort of authority as "ancillary to legislation." (See *Hodge* v. *The Queen*(3) a case from Canada).

In 1919, *In re The Initiative and Referendum Act*(4), another Canadian case, the Judicial Committee indicated that a legislature of the type we are considering cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

In 1944 there was another case from India, *King-Emperor* v. *Benoarilal Sarma*(5). Their Lordships

(1) 5 I.A. 178.
(2) 7 App. Cas. 829.
(3) 9 App. Cas. 117 at 132.
(4) [1919] A.C. 935 at 945.
(5) 72 I.A. 57.

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

again stated that the Indian Legislature cannot transfer its duty of legislation to any other authority.

Two years later (1946) there was another case from Canada, *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*(1). Their Lordships said there that when an executive authority (the Governor in Council in that case) acts under the authority conferred on him by this kind of legislature, he has no independent status as a law-making body and though his orders are "law" they are in reality laws made by Parliament at the date of their promulgation. Their Lordships stressed the fact that Parliament (the Canadian Parliament in that case) "is the only legislative authority for the Dominion as a whole." That, in my opinion, holds good for India too.

I have confined myself to British precedents and have not travelled further than the Privy Council. I have done this of set purpose partly because the British Courts have on the whole gone further than any other in countenancing this kind of legislation, but mainly because I am at the moment concerned with the concept of legislative power with which this country has been familiar for a hundred years prior to the present Constitution. That, to mind, was the most powerful and important factor on which our Constitution makers had to ponder—whether and how far a thing which had been planted and taken deep root in the soil should be uprooted, pruned, restrained or left alone.

An anxious scrutiny of all the many authorities and books which were referred to in the arguments, and of the decisions which I have analysed here, leads me to the conclusion that it is difficult to deduce any logical principle from them. In almost every case the decision has been *ad hoc* and in order to meet the exigencies of the case then before them, judges have placed their own meaning on words and phrases which might otherwise have embodied a principle of general application I have therefore endeavoured, as far as I possibly

(1) [1947] A.C. 87 at 107.

could, to avoid the use of these disputable terms and have preferred to accept the legacy of the past and deal with this question in a practical way. My conclusion is that the Indian Parliament can legislate alone the lines of *The Queen* v. *Burah,* that is to say, it can leave to another person or body the introduction or application of laws which are or may be in existence at that time in any part of India which is subject to the legislative control of Parliament, whether those laws were enacted by Parliament or by a State Legislature set up by the Constitution. That has been the practice in the past. It has weighty reasons of a practical nature to support it and it does not seem to have been abrogated by the Constitution.

But I also consider that delegation of this kind cannot proceed beyond that and that it cannot extend to the repealing or altering in essential particulars of laws which are already in force in the area in question. That is a matter which Parliament alone can handle.

I see no reason for extending the scope of legislative delegation beyond the confines which have been hallowed for so long. Had it not been for the fact that this sort of practice was blessed by the Privy Council as far back as 1878 and has been endorsed in a series of decisions ever since, and had it not been for the practical necessities of the case, I would have held all three Acts *ultra vires.* But, so far as the latter portion of the third Act is concerned, no case was cited in which the right to repeal the existing laws of the land and substitute others for them has been upheld. That was tried in a South African case, *Sir John Gorden Sprigg* v. *Sigcau*(1), but the Privy Council held it could not be done, not indeed on any ground which is material here but that is the only case I know where the attempt was made and the right litigated. It is one thing to fill a void or partial vacuum. Quite another to throw out existing laws enacted by a competent authority. It is bad enough to my mind to hold that the first is not a delegation

(1) [1897] A. C. 238.

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

of legislative power. But as that has been held by an authority which it is impossible now to question so far as the past is concerned, I bow to its wisdom. But as to the future, I feel that a body which has been entrusted with the powers of legislation should legislate and not leave the decision of important matters of principle to other minds. I am therefore of opinion that the power upheld by *The Queen* v. *Burah* does not extend as far as the latter portion of section 2 of the Part C States (Laws) Act of 1950 endeavours to carry it.

I am also clear that when Parliament has been entrusted by the Constitution with the right to enact a particular kind of legislation, as opposed to legislating generally on a particular topic, there can be no delegation.

I realise that this does not draw an exact line and that each case will have to be decided on its own facts as and when it arises. I also realise that this is not strictly logical. But that is because I have to make what I can of a legacy from the past which is based more on practical necessity than on abstract logic. I find myself obliged to steer a middle course between two conflicting principles which have been handed down from the past and which have been woven into the Indian concept of legislative power prior to the present Constitution. One permits very wide powers of delegation for sound and practical reasons despite the attempts made to disguise that fact by placing a special meaning on words like "delegation" "legislation", "sovereignty" and "abdication". The other holds that new legislative bodies cannot be set up by fettered legislatures like ours (I mean of course when they are not exercising constituent powers) and, as a corollary to that, that essentially law-making powers cannot be transferred. Both principles are sound, and there are weighty reasons for retaining both, as indeed the Privy Council has been at pains to do ever since 1878. But I find it difficult to keep them side by side and at the same time be strictly logical. I have therefore endeavoured to give effect to both in a practical way,

as best I could. I realise that this will lead to differences of opinion among judges in individual cases. But that, to my mind, is the only feasible and practical way of dealing with a situation in which much confusion of thought already exists. In any event, these are the lines along which British jurisprudence has functioned for centuries and our legal and juristic foundations lie there. It has this much merit. It helps to keep legislation and executive action on an even keel for, so long as the powers are used sparingly and with moderation, no court is likely to interfere. It is only when advantage is taken of a doctrine based on sound practical considerations and an endeavour is made to push it further and further till the dividing line between permissible delegation of authority and virtual abdication of legislative functions, as a commonsense man in the street would understand it, devoid of legal subtleties, becomes dangerously thin that trouble is likely to arise.

I confess I am not enamoured of this kind of legislation. I do not like this shirking of responsibility, for, after all, the main function of a legislature is to legislate and not to leave that to others. Its primary duty is to weigh and consider the desirability or otherwise both of introducing new laws and of abolishing or modifying old ones in essential particulars. But, speaking judicially, I am unable to hold, in view of our past history and in view of the necessities of a modern State, that the matters I have set out above, subject to the limitations I have indicated, are beyond the competence of Parliament. I trust however, that these powers will be used sparingly both on grounds of principle as well as of practical expediency, for the experience of this case and the lessons of the past show only too clearly the risks involved. Legislation of this kind is liable to be called in question at any time and it is always a gamble which way the dice will fall. This is the sort of case in which a stitch in time saves many nines. Even in England, where Parliament is unfettered, a Committee set up to examine the desirability of this type

1951

In re The Delhi Laws Act, 1912, etc.

Bose J.

of legislation has recommended that the powers of Parliament in this behalf be sparingly used. The reasons given apply with much greater force in India.

My answers to the reference are as follows :—

(1) Section 7 of the Delhi Laws Act, 1912, is *intra vires* of the legislature which passed it and so, also section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947.

(2) Section 2 of the Part C States (Laws) Act, 1950, is also *intra vires* except for the concluding sentence which runs as follows :—

"and provision may be made in any enactment so extended, for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

In my judgment, this portion is *ultra vires* but as it can be separted from the rest of the Act, the remainder is good.

My answers are, however, subject to this qualification. The power to "restrict and modify" does not import the power to make essential changes. It is confined to alterations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area. To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely the power to legislate, all authorities are agreed, cannot be delegated by a legislature which is not unfettered.

OPINION OF THE COURT.

The Court held by a majority that the provisions contained in Questions 1 and 2 are not *ultra vires* the legislatures which passed the Act containing those provisions. As regards the section mentioned on Question 3, the first part was held to be *intra vires, but* the second portion, which is in the following terms :

"provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State," is *ultra vires* the Indian Parliament which passed the Act.

Agent for the President of India, the State of Bombay, the State of Madras and the State of Mysore : *P. A. Mehta.*

Agent for the State of Uttar Pradesh : *C. P. Lal.*

Agent for Capt. Deep Chand and Pt. Amarnath Bhardwaj : *R. S. Narula.*

Agent for the Ajmer Electric Supply Co. Ltd. : *M. S. K. Sastri.*

Agent for the Municipal Committee of Ajmer, the Maiden's Hotel and Runglal Nasirabad : *Rajinder Narain.*

Agent for Shri Munshi Lal and others : *Shankar Das.*

ANGURBALA MULLICK

v.

DEBABRATA MULLICK.

[SAIYID FAZL ALI, MEHAR CHAND MAHAJAN,

MUKHERJEA AND CHANDRASEKHARA AIYAR JJ.]

Hindu Women's Rights to Property Act (XVIII of 1937), s. 3—Right to shebaitship—Whether "property"—Applicability of Act—Widow's right to joint shebaitship with son—Construction of deeds—"Heirs of A," meaning of.

The word "property" as used in s. 3 (1) of the Hindu Women's Rights to Property Act, 1937, includes shebaitship which is a recognised form of property under Hindu law, and there is nothing in any of the provisions of the said Act which excludes from the scope and operation of the Act succession to shebaitship. Even assuming that the word "property" in Act XVIII of 1937 is to be interpreted in a narrower sense, inasmuch as succession to shebaitship follows succession to property in its ordinary or secular sense and the Hindu Women's Rights to Property Act,