1951 INSC 41

SUPREME COURT OF INDIA

In Re the Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947

Vs.

Part C States (Laws) Act, 1950

(H.J.Kania,CJ, Saiyid Fazal Ali, M.Patanjali Sastri, M.C.Mahajan, B.K.Mukherjea, S.R. Dass, Vivian Bose JJ)

23.05.1951

JUDGMENT

H.J.Kania,C.J.,

1. 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 ?"

2. Section 7 of the Delhi Laws Act, mentioned in the question, runs 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."
> "(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. 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 ?"

4. 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 no 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 of Parliament is all powerful. There is no Act which cannot be passed and will not be valid within 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."

5. In Halsbury's Laws of England, Vo. 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 as in 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 of 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.

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

7. 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 that the laws or regulations made by the Governor-General in Council can be annulled or 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.

8. 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 Legislature were but 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 together with the nominated numbers 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 was attempting to set up a Parliamentary system in India, or if it could be said that this chapter or 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 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 .... 8Nominated members of whom not more than 28 must beofficials .... 33Elected members, ... 27 andThe Governor-General 1
> -- 69
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9. 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.

10. 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 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 interns 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 Indian 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 of 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 haves to be discharged, were thus distributed but the articles giving power to theses bodies do not vest the legislative or judicial powers in these bodies expressly. Unher 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 article 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.

11. 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 of a certain property may be 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.

12. 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-protest delegare cannot apply to their actions and if these legislatures delegate powers to some other authority to make rules or regulations, 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 recognized 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 observations of the Federal Court in Jatindra Nath Gupta v. Province of Bihar [[1949] F.C.R. 595], tending to show that delegation was not permissible, required to be reconsidered.

13 . 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 of 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 designed administrative agency 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 affect 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.

14. 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 [5 I.A. 178]. 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 names 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 :-

> "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 court. 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."

15. Lord Selbourne after agreeing with the High Court that Act XXII of 1969 was within the legislative 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 officer, 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 Jainita 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."

16. 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 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 supported 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 is from time to time conferred. It certainly used no words to exclude it." 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.

17. 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 position had been arrived at. (3) That the power 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 is 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 Governor-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 the same. This decision therefore 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.

18. In Emperor v. Benoari Lal Sarma and others [72 I.A. 27], 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 restriction 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."

19. In rejecting this second objection, their Lordships observed that under paragraph 72 of Schedule 9, the Governor-General himself must discharge the duty of 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 whey 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 [7 App. Cas 629] : "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." Support for this last mentioned statement was found in the decision of the Privy Council in The Queen v. Burah [5 I.A. 178]. 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 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.

20. 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.

21. 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 Hodge v. The Queen [9 App. Cas. 117], 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 protest 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 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.

22. 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." 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".

23. In In re The Initiative and Referendum Act [[1919] A.C. 935], 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 Act of 1867 entrusts 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 [9 App. Cas. 117] 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."

24. In In re George Edwin Gray [57 S.C.R. Canada 150], 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 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."

25. In the Chemical Reference case [[1943] S. C. R. Canada 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 [[1923] A.C. 695] had decided the validity of the War Measures Act and no further question remained in that respect. He stated : "In In re Gray [[1918] 57 S. C. R. Canada 150] 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 in 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 Councils in the Fort Frances' case [[1923] A.C. 695], 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 the highest interest of the country but it also emphasized that such action was not permissible in ordinary times.

26. 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 the 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 [72 I.A. 27] 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 decision,

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.

27. An important decision of the Supreme Court of Australia may be noticed next. In the Victorian Stevedoring and General Contracting Company Proprietary Ltd. v. Dignan [46 Com. L.R. 73], 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 was 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 the force of law. In the judgment of Gavan Duffy C.J. and Strake 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 [(1921) 29 Com. L.R. 329] 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 the 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 protest 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 interpretation 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. Not 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 which results from the decision of Roche v. Kronheimer [(1921) 29 Com. L.R. 329].

28. 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 [(1921) 29 Com. L.R. 329] was conclusive.

29. 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 be conditional legislation or ancillary legislation - was a delegation of legislative power. He concluded however as follows : "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 to; 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 judgments therefore do not support the contention of the learned Attorney-General.

30. The decisions of the Privy Council on appeal from Canada do not carry the matter further. In the Judgments of the two decisions of the Supreme Court of Canada and the decision of the Supreme Court of Australia there are observations which may appear to go beyond the limit mentioned above. There 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 word 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 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.

31. 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.

32. 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 exercise 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."

33. In Hampton & Co. v. United States [(1928) 276 U.S. 394, 406 and 407], 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 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....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 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 Ohio St. 88], viz. "The true distinction therefore is between the delegation of power to make the law which necessarily involves a discretion 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."

34. In Locke's Appeal [72 P.A. 491], it is stated : "The proper 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 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."

35. In Panama Refining Co. v. Ryan [293 U.S. 388], it was observed by Hughes C.J. : "The Congress is not permitted to abdicate or transfer to others the essential legislature 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 [295 U.S. 459], 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 [10 Wheat 1 U.S. 1825] 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 power given to those who are to act under such general provision to fill up details, the author points out that 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 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 administrative or quasi-legislative powers."

36. 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 filed 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 clear, tolerance 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.

37. 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 date 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 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.

38. 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 irrevocably 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 sub-ordinate authority, the power conferred by the instrument, in my opinion, amounts to an abdication or effacement of the legislature conferring such power.

39. 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 what was considered suitable, as a whole or in part, 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 limit 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 Barrows' "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 marrow 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 given relief to poor peasants or agriculturists with an income of less than Rs. 500 is made applicable in Delhi to big land-owners 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 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 nor 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.

40. 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 [[1949] F.C.R. 595] 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 view. 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 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 no where 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 contingence 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.

41. 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 larger 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 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. It is 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.

42. 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 function, 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 execution 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 chose to lay down detailed rules or regulations, that work may be left to another body which is then deemed to have subordinate legislative powers.

43. 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 [5 I.A. 178]. 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 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 [5 I.A. 178] 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 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.

44. The question then remain in respect of the power of the executive government to extend Acts of other Provincial legislatures (with or without restrictions of 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.

45. 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 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 regards 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.

46. The illustrations of the extension of the Civil and Criminal Procedure Codes, mentioned in the judgment in The Queen v. Burah [5 I.A. 178] 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 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 which would be enforceable in the Province of Bombay. It may be noted 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.

47. 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 Center, 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 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.

48. 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.

49. 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 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 extends 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 cab 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.

50. 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.

51. 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.

Saiyid Fazl Ali J.,

52. 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 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 ?

53. 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.

54. 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.

55. 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 delegater". 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 [3 App. Cas. 889].

> "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 [9 App. Cas. 117].

56. 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." [Dicey's : "Law of the Constitution", 8th edn., p. 45] The same learned author further observes :-

57. 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." [Ibid., p. 72]

58. 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 members of Parliament. Electors have no legal right of initiating, of sanctioning, or of repealing the legislation of Parliament." [Dicey's "Law of the Constitution", 8th edn., p. 57]

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

60. 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." [Montesquieu's Spirit of Laws. Vol. 1 by J. V. Pritchard, 1914 edn., pp. 162-3]

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

62. 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 toward tyranny can alone be checked and restrained and any degree of freedom preserved." [Vide, Works, Vol. I, p. 186]

63. 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, adopted in 1780, provided that "in the government of this common-wealth 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." [Willoughby's Constitution of the United States, Vol. III, 1616] 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 [277 S. 189 at 201] 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 cannot exercise either legislative or judicial power; the Judiciary cannot exercise either executive or legislative power."

64. 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" [Wayman v. Southard (1825) 23 U.S. 43]. 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". [41 American Bar Asscn. Reports, 356 at 368] 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 [293 U.S. 388] and Schechter Poultry Corp. v. United States [295 U.S. 495]. 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 banks that keep 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." [295 U.S. 495 at 551]

65. 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.

66. 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 :-

> ".....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 Springer v. The Government of Phillipine Islands [277 U.S. 189]]
>
> ".....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."
> "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." [Locke's Appeal, 1873, 72 Pa. 491].
> # .....##
> "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 [I Ohio St. 88]].
> # .....##
> "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 [21 pa. 202]]
> # .....##
> "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. [287 U.S. 77]]
> # .....##
> "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 [293 U.S. 388]]
> # .....##
> "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. [276 U.S. 394]]

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

68. 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 [(1969) 8 C.L.R. 626]. 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 [3 App. Cas. 889] 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..... 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."

69. The other cases in which a similar objection was taken, are :- Welebach Light Co. of Australasia Ltd. v. The Commonwealth [(1916) 22 C.L.R. 268], Roche v. Krondeimer [(1921) 19 C.L.R. 329], and Victorian Stevedoring and General Contracting Co. Pty. Ltd.

and Meakes v. Dignan [(1931) 46 C.L.R. 73]. 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." [Ibid, p. 100].

70. 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 legislative 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." [Commentaries on the Laws of England, 1765].

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

72. 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 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 pointed out by Rich J. in New South Wales v. Commonwealth [20 C.L.R. 54 at 108], 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.

73. 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."

74. 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 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."

75. 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 manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." [293 U.S. 421].

76. The matter is again dealt with by Evatt J. in Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Neakes v. Dignan [46 Com. L.R. 73 at 121], 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."

77. I think that the correct legal position has been comprehensively summed up by Lord Haldane in In re the Initiative and Referendum Act [[1919] A.C. 935 at 945] :-

> "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."

78. 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.

79. 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 or the constitutional sovereign, i.e., the body of persons in whom power ultimately resides, is the electorate or the voting public [Modern Political Constitutions, by Strong]. 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 out Constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character) and may enactment passed by it cannot be declared to be void."

80. 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 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.

81. 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 [5 I.A. 178], 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 legislature power, not created or authorized 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 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 hand territories subject to his government'."

82. 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 power of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may (in their Lordship's judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or 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 legislations as within the scope of the legislative powers which it from time to time conferred."

83. The next case on the subject is Russell v. The Queen [7 App. Cas. 829]. In that case, the Canadian Temperance Act, 1878, was challenged on the ground that it was ultra vires the Parliament of Canada. The Act was to be brought into force in any county or city if on a vote of the majority of the electors of that country 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."

84. The same doctrine was laid down in the case of Hodge v. the Queen [9 App. Cas. 117], 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 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."

85. Another case which may be usefully cited is Powell v. Apollo Candle Co. [10 App. Cas. 282]. 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 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 :-

> "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 circumstances 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."

86. 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 [[1938] A.C. 708 at 722], 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."

87. I must pause here to note briefly certain important principles which can be extracted from the cases 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 potest 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) than 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 Governor-General

in Council, could not by any form of enactment create, and arm with legislative authority, a new legislative power not created or authorised by the Councils Act to which it (the Governor-General in Council) owes its existence.

88. 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 treatises 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 the 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 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, through 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 uphelp any provision impugned before them on the ground that it was delegation of legislature authority they have rested their conclusion upon the fact that there was in law no such delegation.

89. 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" [See the Victorian Stevedoring case; 46 Com. L.R. 73]. 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 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 limits of its power, whether imposed from without or conditioned by the nature of the duties it is called upon to perform.

90. 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 sub-ordinate 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 principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

92. 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 date 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 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 legislature 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 Morely-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 1912, the Delhi Laws Act was passed, and the points which may be noticed at 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 rooms for the application of the doctrine of separation of powers 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 extended 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."

93. 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 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 "Province", 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.

94. 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. List 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 notwithstanding 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.

95. I may here refer to an argument which is founded on article 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."

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

97. 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 of 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. Indeed, 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.

98. 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, extended 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 think 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 restriction 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 to 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."

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

100. 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.

101. 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 Act 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 Act, applied their mind and decided firstly, that the situation would be met by the adoption of law applicable to the other Provinces inasmuch as they covered a wide range of subject 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 abdication 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 Act 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.

102. That such legislation is neither unwarranted on principle nor without precedent, will be clear from that follows :-

1. The facts of the case of Queen v. Burah [5 I.A. 178] 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 :-

"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 under 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. As 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 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 [(1889) 129 U.S. 141]).

3. A point which was somewhat similar to the one raised before us arose in the case of Sprigg v. Sigcau [[1897] A.C. 238]. 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 terms; 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 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 a 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 Door v. United States [(1904) 195 U.S. 138], where delegation by Congress to a commission appointed by the President of the power to legislate for the Phillipine 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 [(1934) 1 Cal. Appl. (2d), 183], 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 therefore, and fixing a penalty for violation of such Codes, was held to be constitutional and valid, as against the contention that it 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 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 provisions 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 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 as 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. Section 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.

103. 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.

104. 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 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."

105. The Burma Laws Acts, 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 area in the Shan States, any enactment which is in force in any part of Upper Burma at the date of the extension."

106. 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.

107. 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 further 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 particulars areas. These local Acts are very hard to trace, the draftsmen 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 there only."

108. 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 [I.L.R. 5 Cal. 63 at 140], 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." Nevertheless, 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 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.

109. 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 county councillors in rural areas "subject to such modifications and adaptations as the Secretary to State may by order prescribe."

110. 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."

111. 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."

112. 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.

113. 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."

114. 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...."

115. 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 occassion when it is, on the initiative of the Minister in charge of the Bill, proposed to Parliament to be justified by him up to the essential. It can only be essential for the limited purpose of 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 power 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 approval by Parliament or with no further direction. The Acts before us are certainly open to 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.

116. 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 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 measures 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 held 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 [[1927] 2 K.B. 229 at 236], 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.

117. 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 necessarily, 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 enables the delegate authority 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 prompts action and the entrustment of large powers to authorities who have to deal with the various situation 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 provided 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 injunctions 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.

M.Patanjali Sastri,J.,

118. 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 ?

119. 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 [[1949-50] F.C.R. 595] 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 amonted 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-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 Acts extented 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 Court in Delhi."