Izhar Ahmad Khan

Vs

Union of India

Petitions Nos. 101 and 136 of 1959 and 88 of 1961

(P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo, K. C. Das Gupta, N. Rajgopala Ayyangar JJ)

16.02.1962

JUDGMENT

GAJENDRAGADKAR, J. -

These three Writ Petitions are filed by the three respective petitioners under Art. 32 of the Constitution for the enforcement of their fundamental right under Article 19(1)(e). They were heard separately but it would be convenient to deal with them by one common judgment because they raise for our decision the same constitutional questions. In all the petitions, the constitutional validity of section 9(2) of the Citizenship Act, 1955, (Act LVII of 1955) (hereinafter called the Act) and of rule 3 in Schedule III of the Citizenship Rules, 1956, is challenged. It would also be convenient to set out briefly at the outset material facts on which the three petitions are based.

Izhar Ahmad Khan, the petitioner in Writ Petition No. 101 of 1959, claims to be a citizen of India and was a resident of Bhopal. He was enrolled as a voter in the Parliamentary as well as State Legislative Assembly Electoral Roll. On the 20th August, 1952, he was taken into custody by the police from the restaurant which he used to run at Bhopal and was told that he had been arrested under an order from the then Bhopal Government under section 7 of the Influx from Pakistan (Central) Act. He was then removed by train the very next day and left at the Pakistan border and was asked to go to Pakistan despite his protests. Thereafter, his elder brother, Iqbal Ahmad moved the Court of the Judicial Commissioner, Bhopal, under Art. 226 of the Constitution for the issue of a writ in the nature of Habeas Corpus. In February, 1953, the learned Judicial Commissioner pronounced his judgment in the said writ petition. He found in favour of the petitioner that he was born in India and was a citizen of India. Even on the question of migration, the Judicial Commissioner made a finding in his favour. He, however, observed that the petitioner was in Pakistan in May and June, 1952, and he came to the conclusion that since he had contravened the provisions of section 3 of the Influx from Pakistan (Central) Act, he was liable to be removed physically from India under section 7 of the said Act.

Having gone to Pakistan much against his will, the petitioner tried to obtain the help of the High Commissioner of India for returning of India but he failed and so he had to sign an application form in order to secure a passport to come to India. With the passport thus obtained he came back to India on the 13th August, 1953. Soon after his return to India, he applied for permission to stay in India permanently and his visa for stay in India was accordingly extended from time to time pending the final decision of his application for leave to stay in India permanently. Meanwhile, on the 15th February, 1954, section 7 of the Influx act was declared void by this Court. In consequence, the

petitioner began to press his application for permanent settlement in India and a long term visa was granted to him by the Government of India pending the decision of his application. Thereafter, the Act was passed in 1955 and under advice, the petitioner applied for registration as a citizen. The said application was, however, rejected and his application for leave to stay in India permanently met with the same fate. The petitioner was then directed by the District Superintendent of Police, Bhopal, to leave India within seven days by an order dated the 16th June, 1959, served on the petitioner. This order was passed under section 3(2)(c) of the Foreigners Act, 1946 (No. XXXI of 1946). It was against this order that the petitioner came to this Court by his present writ petition on August 13, 1959. In the petition originally filed by him, the petitioner's contention was that he was not a foreigner within the meaning of the Foreigners Act and he challenged the validity of the relevant operative sections of the said Act.

After notice was served on the Union of India, the State of Madhya Pradesh and the District Superintendent of Police, Bhopal, who were impleaded as respondents 1, 2 & 3 to the petition, the matter came on for hearing before this Court on January 22, 1960. After hearing counsel for some time, the Court delivered an interlocutory judgment in which it pointed out that the crucial question which falls to be considered in the writ petition is whether the petitioner is a citizen of India or not. This question can be decided only under section 9(2) of the Act. Therefore, this Court observed that an enquiry should be made by an appropriate authority in that behalf and the result of the enquiry intimated to this Court as early as possible. On receipt of the result of the enquiry by this Court, the petition will be listed for final hearing. Meanwhile, stay of deportation of the petitioner was continued.

In accordance with this interlocutory judgment, an enquiry was held under s. 9(2) after serving a notice about the said enquiry on the petitioner. On September 11, 1961, the Central Government recorded its conclusion that the petitioner had voluntarily acquired the citizenship of Pakistan after January 26, 1950; and before July 29, 1953. This conclusion was reached substantially by the application of the impugned R.No. 3.

After the enquiry had thus terminated and its result communicated to this Court, the petitioner applied for permission to take additional grounds and amongst the grounds which he thus wanted to raise, are the two questions which we have already indicated. That, in brief, is the background of facts in Petition No. 101 of 1959.

Syed Abrarul Hassan, the petitioner in petition No. 136 of 1959, claims to be a citizen of India and was a resident of Bhopal. In 1951, his family received the news from Pakistan that his elder brother Syed Hassan was seriously ill. That is why the petitioner with his mother and younger sisters and one younger brother went to Pakistan. Thereafter, the petitioner stayed there for some years. Then they tried to come back to India and with that object applied for a Pakistan passport to travel to India and after the passport was thus obtained, he returned to India in May, 1954. After he came to India, he applied to the Government of India for permission to settle down in India permanently and pending the said application, he was granted long term visas. In 1959, however, the District Superintendent of Police, Bhopal, served an order on him directing him to leave India by the 22nd August, 1959. This order was issued under section 3(2)(c) of the Foreigners Act. Like petition No. 101 of 1959, this petition also was originally filed to challenge the validity of the said order and to impugn the validity of the relevant provisions of the Foreigners Act on the ground that the petitioner was not a foreigner and that the relevant provisions could not be invoked against him.

Subsequently, this petition as well as Petition No. 101 of 1959 were heard together on January 22,

1960, and the course of events in this petition was similar to that in the earlier petition. The result was that after an enquiry was held under s. 9(2) of the Act and the petitioner was informed that the central Government had come to the conclusion that the petitioner had voluntarily acquired the citizenship of Pakistan after January 26, 1950, and before November 20, 1952, he applied for leave to take additional grounds, including the two grounds, to which we have already referred. Thus, the material facts in these two petitions are substantially similar.

Habib Hidayatullah, the petitioner in petition No. 88 of 1961, claims to be a citizen of India and complains that his fundamental rights under Art. 19 of the Constitution are being infringed because he is about to be deported out of India on the ground that he has acquired the citizenship of Pakistan. It appears that the petitioner sailed from Bombay for Basra (Iraq) in April, 1950, and stayed there for three years in connection with business. Then he accompanied his brother to Karachi in May, 1963, for his treatment. On arrival at Karachi, the Pakistan authorities took away his Indian travel documents. Then he tried to obtain the assistance of Indian High Commission for returning to India but failed and so he applied for and obtained a Pakistani passport on December 14, 1957. According to him, he obtained his passport with a view to return to India. On returning to India with this passport, the petitioner made several representations to the Indian authorities for his recognition as a citizen of India and even tried to obtain registration as such. His efforts in that direction, however, failed and so he stood the risk of being deported from India. That is how the petitioner filed the present petition on February 20, 1961. By his petition, he claimed a direction against the respondents the Union of India and the State of Maharashtra restraining them from taking any steps to deport him from India.

While admitting the petition, this Court passed an order stating that it would be open to the petitioner to move the Government under section 9(2) of the Citizenship Act or the Government to act suo motu in that behalf. After the petition was thus admitted, the respondents entered appearance and opposed grant of stay on the ground that the petitioner had ceased to be a citizen of India. The Government of India then took action under section 9(2) of the Act and has held that the petitioner has voluntarily acquired the citizenship of Pakistan after 26th January, 1950, and before the 14th December, 1957. After this order was communicated to the petitioner, he took additional grounds and amongst them, are the two points which have been already indicated. It is in the background of these respective facts that the three petitioners resist their deportation from India on the grounds that section 9(2) of the Act is ultra vires and that Rule 3 in Schedule III of the Citizenship Rules, 1956, is also constitutionally invalid.

Before dealing with the points thus raised by the three petitions, it would be useful to refer briefly to the relevant constitution and statutory provisions. Part II of the Constitution, consisting of Arts. 5 to 11, deals with citizenship. Article 5 provides that every person specified in cl. (a), (b) and (c) shall be a citizen of India. Article 6 lays down that notwithstanding anything contained in Art. 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of the Constitution if he satisfies the tests prescribed by clauses (a) and (b). Under Art. 7, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India, notwithstanding anything contained in Arts. 5 and 6. This Article is subject to the proviso to which it is unnecessary to refer. Art. 8 deals with the rights of citizenship of a person who or either of whose parents or any of whose grand-parents were born in India as defined in the Government of India Act, 1935, and who ordinarily resides in any country outside India as so defined. The next three articles are important. Art. 9 provides that no person shall be a citizen of India by virtue of Art. 5, or be deemed to be a citizen of India by virtue of Art. 6 or Art. 8, if he has

voluntarily acquired the citizenship of any foreign State. In other words, if prior to the commencement of the Constitution, a person had voluntarily acquired the citizenship of any Foreign State, he is not entitled to claim the citizenship of India by virtue of Art. 5 or Art. 6 or Art. 8. This article thus deals with cases where citizenship of a foreign State had been acquired by an Indian citizen prior to the commencement of the Constitution. Article 10 guarantees the continuance of the rights of citizenship and provides that every person who is or as deemed to be a citizen of India under any of the foregoing provisions of Part II shall continue to be such citizen; but this guarantee is subject to the important condition that it would be governed by the provisions of any law that may be made by Parliament. The Proviso introduced by Art 10, therefore, makes it clear that any law made by Parliament may affect the continuance of the rights of citizenship subject to its terms. That takes us to Art. 11 which empowers the Parliament to regulate the right of citizenship by law. It provides that nothing in the foregoing provisions of Part II shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship It would thus be noticed that while making provisions for recognising the right of citizenship in the individuals as indicated by the respective articles, and while guaranteeing the continuance of the said rights of citizenship as specified by Art. 10, Art. 11 confers and recognises the power of the Parliament to make any provision with respect to not only acquisition but also the termination of citizenship as well as all matters relating to citizenship. Thus, it would be open to the parliament to affect the rights of citizenship and the provisions made by the Parliamentary statute in that behalf cannot be impeached on the ground that they are inconsistent with the provisions contained in Art. 5 to 10 of Part II. In this connection, it is important to bear in mind that Art. 11 has been included in Part II in order to make it clear that the sovereign right of the Parliament to deal with citizenship and all questions connected with it is not impaired by the rest of the provisions of the said Part. Therefore, the sovereign legislative competence of the Parliament to deal with the topic of citizenship which is a part of Entry 17 in List I of the Seventh Schedule is very wide and not fettered by the provisions of Articles 5 to 10 of Part II of the Constitution. This aspect of the matter may have relevance in dealing with the contention raised by the petitioners that their rights under Article 19 are affected by the impugned provisions of section 9(2) of the Act.

In exercise of its legislative authority conferred by Entry 17 and in the pursuance of the provisions of the Art. 11 of the Part II, the Parliament passed the Act which came into force on December, 30, 1955. As its preamble shows, it has been passed to provide for the acquisition and termination of the Indian citizenship. Acquisition of citizenship is provided for by ss. 3 to 7. Section 3 deals with acquisition of citizenship by birth, section 4 with acquisition by descent, s. 5 with acquisition by registration, s. 6 with acquisition by naturalisation and s. 7 with acquisition by incorporation of territory. Having dealt with the acquisition of citizenship by these five sections, termination of citizenship is dealt with by ss. 8, 9 and 10. Section 8 deals with renunciation of citizenship, s. 9 with the termination of citizenship and s. 10 with its deprivation. We are concerned with s. 9 which deals with the termination of citizenship. This section provides :

> "(1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act voluntarily acquired, the citizenship of another country, shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India :
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> Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner and having regard to such rules of evidence as may be prescribed in this behalf."

There is no ambiguity about the effect of this section. It is clear that the voluntary acquisition by an Indian citizen of the citizenship of another country terminates his citizenship of India, provided the said voluntary acquisition has taken place between the 26th January, 1950 and the commencement of the Act, or takes place thereafter. It would thus be seen that whereas Art. 9 of the Constitution dealt with the acquisition of citizenship of a foreign State which had taken place prior to the commencement of the Constitution, s. 9 of the Act deals with acquisition of foreign citizenship subsequent to the commencement of the Constitution. There is, therefore, no doubt that the Constitution does not favour plural or dual citizenship and just as in regard to the period prior to the Constitution, Art. 9 prevents a person who had voluntarily acquired the citizenship of foreign country from claiming the status of an Indian citizen, so does s. 9(1) make a similar provision in regard to the period subsequent to the commencement of the Constitution. Section 9 provides that the acquisition of foreign citizenship can be the result either of naturalisation or registration or any other method of voluntarily acquiring such citizenship. Just as the citizenship of India can be acquired by naturalisation or registration, or registration, so can the citizenship of a foreign country be similarly acquired by naturalisation or registration. If it is shown that the person has acquired foreign citizenship either by naturalisation or registration, there can be no doubt that he ceases to be a citizen of India in consequence of such naturalisation or registration. These two classes of foreign citizenship present no difficulty. It is only in regard to the last category of cases where foreign citizenship is acquired otherwise than by naturalisation or registration that difficulty may arise. But the position in respect of the last category of cases is also not in doubt and that is that if it is shown that by some other procedure foreign citizenship has been voluntarily acquired. Indian citizenship immediately comes to an end. The proviso to sub-section (1) need not detain us because we are not concerned with the cases falling under that proviso.

That takes us to sub-cl. (2) of s. 9. This clause provides that if any question arises as to the acquisition by an Indian citizen of foreign citizenship, it shall be determined by such authority, in such manner, and having regard to such rules of evidence as may be prescribed in this behalf. In other words if any dispute arises as to whether foreign citizenship has been acquired voluntarily by an Indian citizen, or if it has been so acquired, when or how the power to decide this question has been delegated to the authority as may be prescribed in that behalf. Likewise, the manner in which the enquiry should be held and the rules subject to which the enquiry should be held have also to be prescribed in that behalf. The result of this sub-section is that rules are to be framed prescribing the authority by which the said questions should be tried, the manner in which they should be tried and the rules of evidence subject to which they should be tried.

Section 18(1) provides that the said power to make rules may be exercised to carry out the purposes of the Act, and sub-section (2) provides that in particular and without prejudice to the generality of the foregoing power, the rules may provide for the topics covered by cls. (a) to (k) of the said sub-section. Section 18(3) authorises the Central Government to provide that a breach of any rule shall be punishable with fine which may extend to one thousand rupees and s. 18(4) requires that all the rules made under the said section shall, as soon as may be after they are made, be laid for not less than 14 days before both Houses of Parliament and shall be subject to such modifications as Parliament may make during the session in which they are so laid. This rule is intended to enable the Parliament to exercise control over the rules made by the Central Government in pursuance of

its delegated authority.

In 1956, the Central Government purported to make Rules in exercise of the powers conferred upon it by section 18 of the Act. We are concerned with Rule 30 in the present case. It prescribes the authority to determine acquisition of citizenship of another country. 30(1) provides that if any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority, to determine such question shall, for the purposes of s. 9(2), be the Central Government. Sub-rule (2) provides that the Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III.

That takes us to Schedule III which prescribes the rules of evidence under which the enquiry under section 9(2) would be held. Under Rule I, it is provided that if it appears to the Central Government that a citizen of India has voluntarily acquired the citizenship of any other country, it may require proof within the specified time that he has not so acquired the citizenship of that country, and the burden of proving this shall be upon him. Under r. 2, the Central Government is empowered to make a reference in respect of any question, which it has to decide in the enquiry, to its Embassy in the country concerned or to the Government of the said country and it authorises the Central Government to act on any report or information received in pursuance of such reference. Then follows r. 3 the validity of which is challenged before us. This rule reads thus :

> "The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before that date."

To the rest of the rules it is unnecessary to refer. The scope and effect of r. 3 are absolutely clear. If it is shown that a citizen of India has obtained a passport from a foreign Government on any date, then under rule 3 an inference has to be drawn that by obtaining the said passport he has voluntarily acquired the citizenship of that country before the date of the passport. In other words, the proof of the fact that a passport from a foreign country has been obtained on a certain date, conclusively determines the other fact that before that date, he has voluntarily acquired the citizenship of that country. The question which arises for decision is whether this rule is constitutionally valid and if it is, whether s. 9(2) under which the power to hold the enquiry subject to the relevant rules, has been delegated to the Central Government is itself constitutionally valid.

We will first deal with the challenge to the validity of r. 3. The principal ground on which the validity of r. 3 is challenged is that whereas s. 9(2) authorises the Central Government to prescribe rules of evidence subject to which the relevant enquiry should be held, what the Central Government has purported to do in framing rule 3 is to prescribe a rule of substantive law. The argument is that when s. 9(2) refers to rules of evidence, it refers obviously to rules of evidence, properly so-called and since the impugned rule is in substance, not a rule of evidence but a rule of substantive law, it is outside the purview of the delegated authority conferred by s. 9(2) and as such, is invalid. It is true that s. 18(1) confers on the Central Government power to make rules to carry out the purposes of the said Act, but this general power to make rules will not taken within its scope the power to make a rule of substantive law and so if the impugned rule is a rule of substantive law and if the expression "rules of evidence" in s. 9(2) does not include such a rule, then clearly the challenge to the validity of the rule will have to be upheld.

In appreciating the merits of this argument it is essential to bear in mind the genesis of the Law of Evidence and the function which its enactment is intended to discharge. The division of law into

two broad categories of substantive law and procedural law is well-known. Broadly stated, whereas substantive law defines and provides for rights, duties, liabilities, it is the function of the procedural law to deal with the application of substantive law to particular cases and it goes without saying that the law of Evidence is a part of the law of procedure. The law of the evidence deals with the question as to what facts may, and what may not, be proved what sort of evidence may or may not be given and by whom and in what manner such evidence may or may not be given. Consistently, with the broad functions of the law of evidence, the Indian Evidence Act also deals with the topics that usually fall within the purview of such law. It prescribes the rules of relevance, it provides for the exclusion of some evidence, as for instance, exclusion of hearsay evidence or of parole evidence in some cases; it deals with onus of proof, with the competence of witnesses, with documentary evidence and its proof, with presumptions and with estoppel. "Evidence", observes Best (The Principles of the Law of Evidence Twelth Edition Pages 6, 23, 25 and 267.) "has been well defined as any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative of the existence of some other matter of fact." Judicial evidence with which the Evidence Act deals is a species of the genus "evidence", and, according to Best, is for the most part nothing more than natural evidence, restrained or modified by rules of positive law. The statutory provisions contained in the Law of Evidence may be said to be based on the doctrine that that system of law is best which leaves least to the Judges' discretion. That is why "the laws of every well-governed State have established rules regulating the quality, and occasionally the quantity, of the evidence necessary to form the basis of judicial decision." It is in its attempt to regulate the production of and proof by evidence in a judicial enquiry that the rules of evidence refer to certain presumptions either rebuttable or irrebuttable. The term "presumption" in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. Thus, according to Best, when the rules of evidence provide for the raising of a rebuttable or irrebuttable presumption, they are merely attempting to assist the judicial mind in the matter of weighing the probative or persuasive force of certain facts proved in relation to other facts presumed or inferred. The whole scheme of the Evidence Act is thus intended to serve the objective of regulating the proof of facts by subjecting the production of evidence to the rules prescribed in that behalf. It is in the light of this function and objective of the Evidence Act that the argument of the petitioners has to be judged.

It has been strenuously urged before us that when the impugned rule makes it obligatory on the enquiring authority to infer the acquisition of citizenship of foreign country from the fact that the passport of foreign country has been obtained by an Indian citizen, it is really not a rule of evidence properly so called but it is a part of the rule of substantive law in relation to the acquisition or termination of citizenship. In support of this argument, opinions of jurists have been pressed into service. We must, therefore, briefly refer to the said opinions and decide whether they lead to the conclusion for which the petitioners contend. Holdsworth observes that "the difficulty of proving the facts needed to establish legal liability under the older modes of trial, the slow growth of our modern mode of trial, the same difficulties even under our modern procedure, and sometimes the wish to modify an inconvenient law, have all at different periods led both legislators and courts to adopt the expedient of inventing a presumption of law which is some times rebuttable and sometimes irrebuttable. These rebuttable presumptions of law no doubt belong primarily to those particular branches of the substantive law with which they are concerned; but they are all connected with that part of the adjective law which is concerned with evidence; for they direct the court to deduce particular inferences from particular facts till the contrary is proved. Irrebuttable presumptions of law, on the other hand belong at the present day more properly to the substantive

law than to the law of evidence. (Holdsworth on 'A History of English Law' 1926 Vol. IX, Pages 143-144.)." Holdsworth then draws a distinction between estoppel which is a rule of evidence and irrebuttable presumption by observing that "while an irrebuttable presumption is in effect a rule of substantive law, to the effect that when certain facts exist a particular inference shall be drawn an estoppel is a rule of evidence that when, as between two parties to a litigation, certain facts are proved, no evidence to combat those facts can be received." Thus, according to Holdsworth, irrebuttable presumptions are always a matter of substantive law, not so rebuttable presumptions, and estoppel is a rule of evidence and not a rule of substantive law.

Wigmore expresses the same opinion about the character of irrebuttable presumptions, for he says that "wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second facts existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence (Wigmore on Evidence IX Edition P. 292, Para. 2492.)" With respect, it is doubtful whether it is correct to say that in drawing a conclusive presumption from one fact proved about the existence of another fact, the rule renders the second fact's existence wholly immaterial. What the rule provides is that the probative or persuasive value of the proved fact in relation to the fact not proved is so great that the fact not proved should always be taken to be proved once the other fact is proved. In any case, the opinion of Wigmore is in favour of the contentions raised by the petitioners.

Phipson puts the proposition in somewhat guarded and qualified terms "In many cases" he observes, "these so called conclusive presumptions are rules which belong properly speaking, to the various branches of substantive law and not to the law of evidence, such as the presumption that an infant under seven is incapable of committing a felony or that all men know the law (i.e., that ignorance of the law is no excuse for crime)". (Phipson on Evidence, Ix Edition P. 698.). It would thus be noticed that according to Phipson, it is not true as a general inflexible rule that all conclusive presumptions pertain to the branch of substantive law and he has illustrated his statement by taking two instances of conclusive presumptions to show that the said presumptions are really matters of substantive law. Therefore, if the test laid down by Phipson is reliable then the question as to whether a conclusive presumption in a given case is a part of the substantive law or forms a part of the rule of evidence, properly so called. Will have to be decided in the light of the content of the rule and its implications.

Stephen also has considered this problem. "Conclusive presumptions", he says, "appear to me to belong to different branches of the Substantive Law, and to be unintelligible except in connection with them. Take for instance the presumption that every one knows the law. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way, numerous presumptions as to rights of property (in particular easements and incorporal hereditaments) belong not to the Law of Evidence but to the Law of Real Property'. Having said so, the learned author adds that 'the only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to facts merely as facts and apart from the particular rights which they constitute (Stephens Digest of the Law of Evidence, page xvii.). That is how in his Digest, he has included certain presumptions under Arts. 98 to 105. These are respectively, presumption of legitimacy, presumption of death from seven years' absence, presumption of lost grant, presumption of regularity and of deeds to complete title estoppel by conduct, estoppel of tenant and licensee, estoppel of acceptor of bill of exchange and estoppel of bailee, agent and licensee. It would thus be seen that estoppel of the four kinds just indicated

constitutes a branch of rule of evidence, according to Stephen.

Dicey seems to take the view that even for purposes of domestic law, irrebuttable presumptions of law are rules of substance, and he adds that "rebuttable presumptions of law must, for the present purpose, be further sub-divided. First, there are those which only apply in certain contexts, such as the presumptions of advancement, satisfaction and ademption. It is submitted that these are so closely connected with the existence of substantive rights that they ought to be classified as rules of substance. Secondly, there are those which apply (though not always in precisely the same way) to all types of cases, such as the presumptions of legitimacy, marriage and death. It is uncertain whether such presumptions are rules of substance or rules of procedure." (Diecy's Conflict of Laws, Seventh Edition, page 1098.) According to Dicey, for the purposes of English domestic law, estoppel is generally treated as a rule of evidence. In dealing with this topic, Dicey has observed that : "in order to determine whether presumptions are rules of substance or rules of procedure, it is necessary to distinguish between three kinds of presumptions." (Thayer's 'A Preliminary Treatise on Evidence at the Common Law' page 314.) Then he refers to presumptions of fact, rebuttable presumptions of law and irrebuttable presumptions of law. As to presumptions of facts, he thinks that, strictly speaking, they have no legal effect, at all; they are merely common inferences and, as such, will be applied alike to cases governed by English and foreign law.

It is no doubt true that in dealing with the question about the character of the rule prescribing irrebuttable presumptions, we must attach due importance to the opinions expressed by jurists. But, as we have just seen, the views expressed by jurists on this topic do not disclose an identify of approach and their conclusions show different shades of opinion. That is why, bearing in mind the juristic opinion to which we have just referred, we will proceed to examine the merits of the argument that the rule of irrebuttable presumption prescribed by the impugned rule is a part of the substantive law and does not form part of the law of evidence properly so-called.

It is conceded, and we think, rightly, that a rule prescribing a rebuttable presumption is a rule of evidence. It is necessary to analyse what the rule about the rebuttable presumption really means. A fact A which has relevance in the proof of fact B and inherently has some degree of probative or persuasive value in that behalf may be weighed by a judicial mind after it is proved and before a conclusion is reached as to whether fact B is proved or not. When the law of evidence makes a rule providing for a rebuttable presumption that on proof of fact A, fact B shall be deemed to be proved unless the contrary is established, what the rule purports to do is to regulate the judicial process of appreciating evidence and to provide that the said appreciation will draw the inference from the proof of fact A that fact B has also been proved unless the contrary is established. In other words, the rule takes away judicial discretion either to attach the due probative value to fact A or not and requires prima facie the due probative value to be attached in the matter of the inference as to the existence of fact B, subject, of course, to the said presumption being rebutted by proof to the contrary. As Thayer has observed : "presumptions are aids to reasoning argumentation, which assume the truth of certain matters for the purpose of some given inquiry. The exact scope and operation of these prima facie assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence, on the particular point to which they relate. They are thus closely related to the subject of judicial notice; for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine". (Thayer's 'A Preliminary Treatise on Evidence at the Common Law, page 314.) According to the same author, legal presumptions of the rebuttable kind are definitions of the quantity of evidence or the state of facts sufficient to make out a prima facie case; in other words, of the circumstances under which the burden of proof lies on the opposite party. Thus, the rule of rebuttable presumption adds statutory

force to the natural and inherent probative value of fact A in relation to the proof of the existence of fact B and in adding this statutory value to the probative force of fact A, the rule, it is conceded, makes a provision within the scope and function of the law of evidence. If that is so, how does it make a difference in principle if the rule adds conclusive strength to the probative value of the said fact A in relation to the proof of the existence of fact B ? In regard to the category of facts in respect of which an irrebuttable presumption is prescribed by a rule of evidence, the position is that the inherent probative value of fact A in that behalf is very great and it is very likely that when it is proved in a judicial proceeding, the judicial mind would normally attach great importance to it in relation to the proof of fact B. The rule steps in with regard to such facts and provides that the judicial mind should attach to the said fact conclusiveness in the matter of its probative value. It would be noticed that as in the case of a rebuttable presumption, so in the case of an irrebuttable presumption, the rule purports to assist the juridical mind in appreciating the existence of facts. In one case the probative value is statutorily strengthened but yet left open to rebuttal, in the other case, it is statutorily strengthened and placed beyond the pale of rebuttal. Considered from this point of view, it seems rather difficult to accept the theory that whereas a rebuttable presumption is within the domain of the law of evidence, irrebuttable presumption is outside the domain of that law and forms part of the substantive law.

In D. B. Heiner v. John H. Donnan ((1932) 76 aw. Ed. 772, 780.), the Supreme Court of the United States of America had occasion to consider the validity of the provision of a Federal statute imposing a death transfer tax in respect to transfers at the time of or in contemplation of death, that any transfer made within two years prior to the death of decendent shall be deemed to have been made in contemplation of death within the meaning of the statute and it was held that the said provision violated the due process clause of the 5th Amendment. The argument partly turned upon the question as to whether the irrebuttable presumption authorised to be drawn by the impugned section of statute was a part of the law of evidence or of the substantive law. In support of the statute, it was urged that the conclusive presumption created by the statute was a rule of substantive law. The Court, however, rejected the plea and held that the rule was a rule of evidence and as such violated the constitutional guarantee provided by the 5th Amendment. In rejecting the plea urged by the State that the rule was a rule of substantive law, Mr. Justice Sutherland observed that a rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof and in support of this conclusion, he referred to the earlier decisions of the Court. The Learned Judge then added that "it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof and in the other conclusive." We ought to add that the learned Judge made it clear that "whether the presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative flat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to over-rule the Schlesinger Case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization." Thus, the observations made by Mr. Justice Sutherland in regard to the character of the rule of irrebuttable presumption afford assistance to the contention raised before us on behalf of the Union of India.

But it is said that a conclusive presumption prevents the party against whom it is drawn from disproving the inference about the existence of fact B which is required to be drawn from the proof of fact A. This circumstance, however, does not affect the character of the rule as falling within the domain of the law of evidence. Take the case of estoppel which is admitted to be a part of the law of evidence. In the case of estoppel where the essential ingredients of the rule are satisfied, a party is

precluded from denying the truth of the thing covered by his declaration, act or omission. In other words, where estoppel is pleaded against a party on the strength of his declaration, act or omission, whereby he intentionally caused or permitted another person to believe a thing to be true, that party is not permitted to say that the thing itself was not true and yet the rule which puts this bar against the party and precludes him from proving that the thing in question is untrue, is treated as a rule of evidence. Therefore, the fact that a bar is created preventing a party from proving the truth or falsity of a thing the existence of which is inferred, does not show that the rule itself is a part of the substantive law.

Then it is argued that the conclusive rule in the present case extinguishes the status of citizenship and as such, is a part of the rule of substantive law. We are not impressed by this argument either. What the rule really provides is that when one fact in established, another fact shall be deemed to have been established. The fact established is that an Indian citizen has obtained a passport from a foreign Government on a certain date. From this fact, an irrebuttable presumption is required to be drawn that the obtaining of the passport from the foreign Government establishes the acquisition of the citizenship of the said foreign State. This is a case where from the proof of fact A an inference as to the existence of fact B is required to be drawn. As to the inherent probative and persuasive value of fact A in relation to the existence of fact B in this context, we will have occasion to discuss it later on. The argument that the application of the rule may in some hypothetical cases conceivably lead to hardship and injustice, is not relevant or material in dealing with the constitutional validity of the rule.

In deciding the question as to whether a rule about irrebuttable presumption is a rule of evidence or not, it seems to us that the proper approach to adopt would be to consider whether fact A from the proof of which a presumption is required to be drawn about the existence of fact B, is inherently relevant, in the matter of proving fact B and has inherently any probative or persuasive value in that behalf or not. If fact A is inherently relevant in proving the existence of fact B and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact B, then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf would be a rule of evidence. On the other hand, if fact A is inherently not relevant in proving the existence of fact B or has no probative value in that behalf and yet a rule is made prescribing of a rebuttable or an irrebuttable presumption in that connection that rule would be a rule of substantive law and not a rule of evidence. Therefore, in dealing with the question as to whether a given rule prescribing a conclusive presumption is a rule of evidence or not, we cannot adopt the view that all rules prescribing irrebuttable presumptions are rules of substantive law. We can answer the question only after examining the rule and its impact on the proof of facts A and B. If this is the proper test it would become necessary to enquire whether obtaining a passport from a foreign Government is or is not inherently relevant in proving the voluntary acquisition of the citizenship of that foreign State.

It has been fairly conceded before us that a passport obtained by the petitioners from the Pakistan Government would undoubtedly by relevant in deciding the question as to whether by obtaining the said passport they have or have not acquired the citizenship of Pakistan. Some-times the argument appears to have been urged and accepted that a passport in question would not be relevant to the enquiry as to whether citizenship of Pakistan has been acquired or not. That view, in our opinion, is clearly erroneous.

The definition of a passport given by Lord Alverstone, C. J., in R. v. Brailsford ((1905) 2 K.B. 730.) has been adopted by the House of Lords in the joyce case ((1946) A.C. 347.) and it is of some assistance in dealing with the point with which we are concerned. "It is a document", says Lord

Alverstone, "issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries". As P. Weis observes : "a passport is considered in Great Britain and the United States to be Prima facie evidence of the national status of the holder, but it is not conclusive evidence". He adds that "the United States has on many occasions insisted that foreign authorities were not entitled to ignore an American passport, i.e., to refuse to regard it as sufficient proof of the holder's nationality". (P. Weis on 'Nationality and Statelessness in International Law' p. 225-226.).

It appears that in support of the view that a passport is not relevant in an enquiry as to the citizenship of a person holding a passport, reliance is sometimes placed on the observations made by Mr. Justice Thompson in Domingo Urtetiqui v. John N. D'arcy, Henry Didier and Domingo D'Arble : ((1935) 9 Law. Ed., 692.) "Upon the general and abstract question," observes Thompson J., in delivering the decision of the Supreme Court of the United States, "whether the passport per se, was legal and competent evidence of the fact of citizenship, we are of the opinion that it was not." It would, however, be seen on looking at the whole of the judgment that the learned Judge made it perfectly clear during the course of the latter portion of his judgment that on that issue, the court was divided in opinion, and the point was of course undecided. So, the general observation made in the earlier part of the Judgment is really of no assistance in the matter. That case shows that the plaintiff had produced a passport granted by the Secretary of States of the United States, in order to show that he was the citizen of the State of Maryland. The defendant, on the other hand, offered in evidence the record of the District Court of the United States for the District of Louisiana which contained proceedings in a suit which had been originally instituted against the plaintiff to the effect that he was an alien and it appears that of the two pieces of evidence, the latter was held to be more reliable. Therefore, in our opinion, the learned counsel for the petitioners were quite right in conceding that the passports obtained by the petitioners were relevant in the enquiry as to the question whether they had acquired the citizenship of Pakistan or not. If that be so, applying the test which, we think, is appropriate in such cases, it must be held that the impugned rule of evidence and not a rule of substantive law. The fact of obtaining the passport from Pakistan on which a conclusive presumption is drawn as to the voluntary acquisition of the citizenship of Pakistan is relevant and the rule merely makes its probative value conclusive. Therefore, we are not disposed to uphold the objection raised by the petitioners that the impugned rule is a rule of substantive law and as such, falls outside the purview of section 9(2). If it is a rule of evidence properly so called, it would be within the scope of the authority conferred on the Central Government by s. 9(2) and its validity cannot be successfully challenged.

There is one decision to which we ought to refer before we part with this topic. The petitioners in support of their argument that impugned rule is a rule of substantive law, have placed reliance on the decision In re KOHN ((1945) Ch. D. 5.). In that case, a mother and a daughter, who were German nationals and at all times domiciled in Germany, were killed in an air raid in London as a result of the same explosion, and it could not be proved which of them had died earlier. The daughter was entitled to movable property under her mother's will, if she survived her mother. On these facts, it was held that the question of survivorship depended on the provision of the German Civil Code under which the deaths were presumed to have taken place simultaneously and so she was not a person living at the time when the succession to her mother's estate opened and, therefore, was not entitled to the property. The provision contained in section 184 of the English Law of Property Act, 1925, however, was to the contrary. It provided that where two or more persons have died circumstances rendering it uncertain which of them survived the other or others, such deaths shall, (subject to any order of the Court) for all purposes affecting the title to the property, be

presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. It was held that the two relevant statutory provisions both of English and German Law were rules of substantive law. In fact, the relevant English section occurred in the Law of Property Act and its setting and context import that it was a rule of substantive law. So was the rule contained in Article 20 of the Civil Code of Germany treated as a rule of substantive law. The main reason given in support of the conclusion that the two rules were rules of substantive law appears to be that each one directed a certain presumption to be made in all cases affecting the title to property. It would be noticed that the scope, purport and effect of the two rules is substantially different from the scope, purport and effect of the rule with which we are concerned. In the rules with which the court was concerned in re-Cohn, there is no question about the probative value of one fact being judged or appreciated under statutory rule in regard to the proof of the existence of another fact. Like the rule that ignorance of law is no excuse, the rules with which the court was concerned were clearly rules of substantive law. Therefore, in our opinion, not much assistance can be drawn from the judgment of Uthwatt, J., in the case of re-Cohn. It is clear that the simultaneous deaths of two persons is neither rationally or inherently relevant to, nor has it any inherent probative value in, the proof the question as to the sequence of the two deaths and, therefore, the provisions in the two sections being purely arbitrary, were rightly held to be matters of substantive law.

In dealing with this question, it may also be relevant to consider the practical aspect of the rule; and that takes us to the procedure which has to be followed in Pakistan in obtaining a passport from the Government of that country for travel to India. One of the objects which the Act was incidentally intended to achieve was to meet the emergency which arose as a result of the partition of the country into India and Pakistan, and the relevant rules are also primarily applicable to Indian nationals who on going to Pakistan obtained passport from the Government of that country. Now, it is not disputed that according to the laws prevailing in Pakistan, a person is not entitled to apply for or obtain a passport unless he is a citizen of Pakistan under its Citizenship Act. Besides, the prescribed form of the application requires that the applicant should make a declaration to the effect that he is a citizen of Pakistan and the said declaration has to be accepted by the Pakistan authorities before a passport is issued. In the course of the enquiry as to the citizenship of the Applicant, declaration by officials of Pakistan about the truth of the statement of the applicant are also required to be filed. Thus, the procedure prescribed by the relevant Pakistan laws makes it abundantly clear that the application for the passport has to be made by a citizen of Pakistan, it has to contain a declaration to that effect and the truth of the declaration has to be established to the satisfaction of the Pakistan officials before a passport is granted. When a passport is obtained under these circumstances, so far as the Pakistan Government is concerned, there can be no doubt that it would be entitled to claim the applicant as its own citizen. The citizen would be estopped from claiming against the Pakistan Government that the statement made by him about his status was untrue. In such a case, if the impugned rule prescribes that the obtaining of a passport from the Pakistan Government by an Indian national, (which normally would be the result of the prescribed application voluntarily made by him) conclusively proves the voluntary acquisition of Pakistani citizenship, it would be difficult to hold that the rule is not a rule of evidence. In our opinion, it would be pendantic and wholly unrealistic to contend that the rule in question dos not purport to assess the probative value of fact A and in the matter of proving fact B but imports considerations which are relevant to substantive law. Our conclusion, therefore, is that the impugned rule of evidence and falls within the scope prescribed by s. 9(2). The challenge to its validity on the ground that it is rule of substantive law must, therefore, fail.

But quite apart from this theoretical or jurisprudential aspect of the matter, there is another independent consideration which supports the same conclusion. The question raised before us is one

of construing the words "rules of evidence" used in s. 9(2) of the Act, and in construing the said words, it would obviously be necessary to bear in mind the legislative history of the content of the words "rules of evidence" in India. The Evidence Act (Act No. I of 1872) was passed as early as 1872 and by section 4 it recognised as rules of evidence the rules which prescribe for a presumption which may be drawn, for a presumption which shall be drawn subject to rebuttal and for a presumption which shall be conclusively drawn. Sections 41, 112 and 113 are illustrations of conclusive presumptions. It will be recalled that similar provisions were included by Stephen in his draft of the Law of Evidence after expressing the opinion that the said presumptions form part of the Law of Evidence. Therefore, from 1872 onwards, it has been accepted in India that a conclusive presumption is a part of the law of evidence.

Bearing this fact in mind, we have to consider what the denotation of the expression "evidence" would be in the relevant entries to the Seventh Schedule in the Government of India Act of 1935 as well as the Constitution. Entry 5 in List III of the Seventh Schedule of the earlier Act was : "Evidence and oaths; recognition of laws, public acts and records and judicial proceedings." Similarly Entry 12 in the concurrent List of the 7th Schedule to the Constitution reads in the same way. It is well settled that "when a power is conferred to legislate on a particular topic, it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power ((1933) A.C. 156, 165.) (Croft Dunphy). A relevant instance in point of this rule of construction is afforded by the decision of the Federal Court in The Central Provinces and Berar Act No. XIV 1938 ((1939) F.C.R. 18, 3.) Dealing with the content of the expression "excise", Gwyer, C.J., observed :

> "Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

There can, therefore, be no doubt that the expression "rules of evidence" construed in the light of the Indian legal and legislative history would include some rules of conclusive proof and if that is so, it would be idle to contend that the impugned rule is a part of substantive law merely because it prescribes a conclusive presumption. If that be the true position, we do not think we would be justified in contouring the words "rules of evidence" to adopt the academic or pedantic approach suggested by the petitioners. The expression "rules of evidence" would certainly include a rule as to conclusive presumption like the one with which we are concerned in the present petitions. Therefore, on this construction of s. 9(2), the impugned rule must be held to be intra vires.

The question about the validity of this rule has been considered by some of the High Courts in India. The Andhra Pradesh (A.I.R. 1957 Andh. 1047.) and Allahabad High Courts (A.I.R. 1960 All. 637.) have held that the rule is invalid, whereas the Bombay (A.I.R. 1958 Bom. 1422.), the Rajasthan (A.I.R. 1958 Raj. 172.) and the Madras High Courts (A.I.R. 1961 Mad. 129.) have held that the rule is valid.

The next point to consider is about the validity of s. 9(2) itself. It is argued that this rule is ultra vires because it affects the status of citizenship conferred on the petitioners and recognised by the relevant Articles of the Constitution, and it is urged that by depriving the petitioners of the status of citizenship, their fundamental rights under Art. 19 generally and particularly the right guaranteed by Art. 19(1)(e) are affected. It is not easy to appreciate this argument. As we have already observed,

the scheme of the relevant Articles of Part II which deals with citizenship clearly suggests that the status of citizenship can be adversely affected by a statute made by the Parliament in exercise of its legislative powers. It may prema facie sound somewhat surprising, but it is never the less true, that though the citizens of India are guaranteed the fundamental rights specified in Art. 19 of the Constitution, the status of citizenship on which the existence or continuance of the said rights rests is itself not one of the fundamental rights guaranteed to anyone. If a law is properly passed by the Parliament affecting the status of citizenship of any citizens in the country, it can be no challenge to the validity of the said law that it affects the fundamental rights of those whose citizenship is thereby terminated. Article 19 proceeds on the assumption that the person who claims the rights guaranteed by it is a citizen of India. If the basic status of citizenship is validly terminated by a Parliamentary statute, the person whose citizenship is terminated has no right to claim the fundamental rights under Art. 19. Therefore, in our opinion, the challenge to s. 9(2) on the ground that it enables the rule-making authority to make a rule to deprive the citizenship rights of the petitioners cannot be sustained.

That leaves only one point to be considered in the petitioners' attack against the validity of s. 9(2). It is urged that s. 9(2) confers on the Central Government uncanalised and arbitrary power to make rules without any guidance and as such it amounts to excessive delegation. In our opinion, there is no substance in this argument. Section 9(1) has itself provided that if an Indian Citizen applies for naturalisation in a foreign State and obtains such naturalisation, he will be deemed to have lost the citizenship of India. The same provision is made in regard to registration. The Legislature knew that the acquisition of the citizenship of a foreign State may be made voluntarily even otherwise than by naturalisation or registration and so it has provided for the third category of acquisition of foreign citizenship under the last clause "otherwise voluntarily acquires" so that rule-making had to be confined primarily to this last category of acquisition of foreign citizenship. The basic principle on which the Act proceeds and which has been recognised by Art. 9 of the Constitution itself is that no Indian citizen can claim a dual or plural citizenship. The acquisition of foreign citizenship can be made by naturalisation or registration and as soon as it is so made, the prior Indian citizenship is terminated. It is in the light of these principles which are writ large on the provisions of the Act that the rule making power had to make rules about the class of cases falling under the last category of acquisition of foreign citizenship, and the rules show how the task has been attempted. We have already referred to r. 1 to 3. Rules 4 and 5 which deal with cases other than those where passport has been obtained by an Indian citizen, prescribe the relevant factors which have to be considered in each case before deciding whether foreign citizenship has been acquired by an Indian or not and the impugned r. 3 itself proceeds on the basis that the conditions prescribed by the Pakistan Law for obtaining a passport from the Pakistan Government take the case of the obtaining of the passport very near to the case of registration or naturalisation. Therefore, having regard to the scheme of the Act and the principles enunciated in its relevant sections, we do not think that it can be held that in enacting section 9(2), the Legislature has abdicated its essential legislative function in favour of the rule making authority. That is why our conclusion is that section 9(2) is valid.

In the result, the petitions fail and are dismissed, there would be no order as to costs.

DAS GUPTA, J. -

These three petitions raise common questions of law and have therefore been heard together. As the questions that arise are of law and the facts are not in dispute and substantially the same, it would be convenient to deal with the facts of one of those petitions only. We propose to take for this purpose W.P. No. 88 of 1961.

The petitioner Habib Hidayatullah claims to be a citizen of India and has filed this petition for protection of his fundamental right under Act 19 of the Constitution which he says is threatened by the action of the Union of India and the State of Maharashtra. It is not disputed that the petitioner was on January 26, 1950, a citizen of India and obtained a Haj passport for pilgrimage in that capacity. According to him he sailed from Bombay for Basra (Iraq) on April 5, 1950, and stayed there for three years in connection with some business and then went to Karachi on May 2, 1953, with his brother for the latter's treatment. On his arrival at Karachi the Pakistan authorities took away his Indian travel documents. During the years 1954, 1955, 1956 and 1957 he made several attempts to obtain facilities from the Indian High Commission at Karachi for his return to India. But having failed to get any assistance there he obtained a Pakistan passport and travelled to India on the basis of the same. This was obtained on December 14, 1957 and the petitioner's case is that he obtained it as this was the only possible way for him to return home to India with his ailing brother and without any intention to renounce his Indian citizenship or to acquire Pakistan citizenship. After his return to India the petitioner made several representations to the Indian authorities asking them "to recognize him as a citizen of Indian and/or register him as such and/or to permit him to stay permanently in India." But ultimately the Indian authorities refused to recognise him as a citizen of India and/or to permit him to stay permanently in India.

Faced now with the risk of being deported from India the petitioner has approached this Court for an order directing the respondents, the Union of India and the State of Maharashtra to refrain from taking any steps to deport or remove him from India and to recognise him as a citizen of India by birth under Art. 5(1)(a) of the Constitution.

When admitting his writ petition after the preliminary hearing this Court made an order stating that it would be open to the petitioner to move the Government under s. 9(2) of the Citizenship Act or the Government suo motu to take action under it.

Thereafter both the respondents have entered appearance and oppose the petition for stay on the ground that the petitioner has ceased to be a citizen of India. The Government of India then took action under s. 9(2) of the Citizenship Act and has determined that the petitioner has voluntarily acquired the citizenship of Pakistan after January 26, 1950, and before December 14, 1957.

The order made by the Government of India shows that in reaching the above conclusions it took into consideration, among other things, the fact that "the petitioner by declaring himself to be a citizen of Pakistan before the Pakistan authorities ..... obtained a passport on the 14th December, 1957."

Section 9 of the Citizenship Act runs thus :-

> "Any citizen of India who by naturalization registration or otherwise voluntarily acquires, or has at any such time between the 26th January, 1950 and the commencement of this Act voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India :
>
> Provided that nothing in this sub-section shall apply to a citizen of India who during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

> (2) If any question arises as to whether when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner and having regard to such rules of evidence, as may be prescribed in this behalf."

Rules 30 of the Citizenship Rules 1956, framed by the Central Government under Section 18 of the Citizenship Act, 1955, (Act, No. 57 of 1955) provides : (1) that if any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purposes of s. 9(2) be the Central Government; and (2) the Central Government shall in determining any such question have due regard to the rules of evidence specified in Sch. III. Schedule III contains five rules of which r. 3 runs thus :-

> "The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date."

There can be no dispute that if the order of the Central Government determining that the petitioner has voluntarily acquired the citizenship of Pakisthan after the 26th January, 1950, is a valid order in accordance with s. 9(2) the petitioner has under the provisions of 9(1) of the Citizenship Act ceased to be a citizen of India and his petition must accordingly fail. It has been urged before us however that this determination of the Government has no legal force inasmuch as it was made on the basis of Rule 3 of Sch. III of the Citizenship Rules, which Rule itself is invalid.

The principal question canvassed before us is as regards the validity of this rule; The main attack against the rule is that while s. 9(2) empowers the Government to prescribe rules of evidence, Rules 3 is not a rule of evidence but a rule of substantive law and is therefore beyond the limits of the powers which were delegated to the rule-making authority by the legislature.

The contention on behalf of the petitioner is that a distinction must be drawn between a rule of evidence, properly so called and a rule which though called a rule of evidence lays down a rule of substantive law; and that if that distinction is borne in mind it becomes clear that r. 3 is not a rule of evidence. The other argument is that when any fact is stated by a rule to be conclusive proof of another fact, the rule is in effect laying down that the happening of the first fact will be equivalent in law to the happening of the other fact and so a party interested to prove the falsity of such other fact is being prevented from giving relevant evidence.

Every law has something to do with the function of the State in securing rights to and imposing liabilities on its people. While however some of the laws deal primarily with the creation, modification or extinguishment of rights or liabilities, other laws deal with the further task that then becomes necessary - of ascertaining how for in any particular case, such rights or liabilities have come into existence, or have become, destroyed. For clarity of thought, and convenience of discussion, the laws falling in the former class are called substantive laws while those in the second class are called adjective laws. Adjective laws again have two branches, one dealing with the procedure of the court; and the other (which is also in the strict sense "procedure") rule of evidence. The distinction between substantive law adjective law is well understood in jurisprudence, thought some amount of confusion has occasionally been caused by some writers losing sight of the distinction. As early as the beginning of the nineteenth century Bentham criticised in his Rationale of Judicial Evidence the tendency of many writers to present rules of civil law and criminal law as rules of evidence. "What, therefore the lawyers give us, under the appellation "law of evidence",

says Bentham, "is really, in a great part of it, civil and penal law." Since Bentham's time much progress has been made in this matter and many jurists of eminence have emphasised the distinction between rules of evidence properly so called and rules which in the guise of rules of evidence are really rules of substantive law. Mr. Justice Holmes in this Common Law says - "If the Court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth; rule that such acts or omissions were a ground of liability or prevented a recovery, as the case might be". "It is then fundamental", says Professor Thayer, in his Preliminary Treatise on Evidence. "that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not." "Permitting a fact", says Professor Wigmore in his Treatise on Evidence, "to become a proposition is not an evidentiary process", and gives the following example : "An action of battery upon a plea of not guilty, the defendant offers evidence to prove that the plaintiff used insulting words to the defendant before the attack, and this is rejected; here the ruling is in truth that insults constitute no excuse or no ground for mitigation of damages, a rule of substantive law; or perhaps, that such a defence is not available upon a plea traversing the battery - a rule of pleading. It is certainly not a ruling upon a question of evidence; it is a ruling that the proposition desired to be proved is either not tenable, by the substantive law, or not issuable, by the law of pleading."

This reasoning is obviously at the basis of Wigmore's view in s. 2492, Vol. IX of the same treatise that rules laying down conclusive presumptions are really rules substantive law. "In strictness" says he, "there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is said to be conclusively presumed in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second facts existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."

The same view has been expressed by Prof. Holdsworth in his History of English Law. At page 139, Vol. IX, of this history, he, after tracing how presumptions have been evolved by the Courts or the legislature, proceeds to says :- "In this way the law as to presumptions of different kinds comes to contain a confused and heterogeneous mass of rules, relating to many different legal topics. In so far as the courts or the legislature treat these presumptions as conclusive, they cannot at the present day be regarded as parts of the law of evidence." They are rather rules of substantive law." Again at page 143, the learned author after stating that rebuttable presumptions of law though belonging primarily to those particular branches of the substantive law with which they are concerned, are all connected with that part of the adjective law which is concerned with evidence, observes : "Irrebuttable presumptions of law, on the other hand, belong at a present day more properly to the substantive law than to the law of evidence. But they are rules of substantive law which borrow the terminology and adopt the guise of that branch of the law of evidence which is concerned with presumptions; and, historically, they originate in the period when the law, not having arrived at the conception of a trial by the examination of the evidence produced by the contending parties, aimed at obtaining a conclusive proof which could settle the controversy. It might therefore be said that these irrebuttable presumptions have never been part of the law of evidence, in the sense which we give to the term "law of evidence" in modern systems of law."

While both Wigmore and Holdsworth seem to regard all conclusive presumptions as rules of substantive law, Phipson in his Law of Evidence says, more guardedly, that many of such conclusive presumptions are rules of substantive law. At page 698 of his book the learned author says :- "In

many cases these so-called conclusive presumptions are rules which belong, properly speaking, to the various branches of substantive law and not to the law of evidence, such as the presumption that an infant under seven is incapable of committing a felony, or that all men know the law (i.e., that ignorance of the law is no excuse for crime)." He then gives several instances of matters which are conclusive presumptions or amount to conclusive evidence, either by statute or common law. But unlike Wigmore and Holdsworth, he does not say that all rules of conclusive presumptions are rules of substantive.

The matter has been critically considered again by Sir James Stephen in his Digest of the Law of evidence. After stating first (p. xiii) that all law may be divided into substantive law, by which rights, duties and liabilities are defined, and the law of procedure, by which the substantive law is applied to particular cases. Stephen says that the law of evidence is that part of the law of procedure, which, with a view to ascertain individual rights and liabilities in particular cases, decides : (1) what facts may and what may not be proved in such cases; (ii) what sort of evidence must be given of a fact which may be proved and (iii) by whom and in what manner the evidence must be produced by which any fact is to be proved." Speaking of presumptions, he says at p. xvii : "Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the substantive law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the law of evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal here ditament) belong not to the law of evidence but to the law of Real Property." After saying this, the learned author proceeds to distinguish certain conclusive presumptions which in this opinion, may rightly be considered to form part of the law of evidence and observes :- "The only presumptions, which in my opinion, ought to find a place in the law of evidence, are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of the marriage, an action of ejectment by a reversioner against a tenant pur autre vie, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a Chapter on the subject, and have passed over the rest as belonging to different branches of the substantive law." Rules of conclusive presumptions as regards fact which may help to constitute rights in different branches of substantive law may thus, according to Stephen, be considered as rules of evidence. It is unnecessary for us to decide for the purposes of the present case whether every rule that one fact is conclusive proof of another is a rule of substantive law. It is clear however that whenever question arises to whether a particular rule is one of substantive law, or of evidence, we have to ask ourselves does it seek to create, or extinguish or modify a right or liability or does it concern itself with the adjective function of reaching a conclusion as to what has taken place under the substantive law ? In the first case, the rule is a rule of substantive law; in the other case, it is a rule of evidence.

For, a rule of evidence, can be concerned only with the manner and extent of presentation of facts, for the purpose of persuading the mind of the Judge or jury or other Tribunal of the existence or non existence of facts on which substantive rights or liabilities, civil or criminal arise. It has nothing to do with giving an answer to the question :- What is the right or a liability which arises on the happening of a fact ? If a rule, purporting to be a rule of evidence does in effect give such an answer, it has gone beyond the scope of the law of evidence and has trenched on the domain of substantive law.

On behalf of the respondent it was contended that even though a rule laying down that one fact will be conclusive proof of another might be said to be a rule of substantive law if the former fact was wholly irrelevant in persuading a rational human mind about the existence of the other, the position is different when the former fact is "relevant" in the sense of having some persuasive value on the mind according to ordinary process of reasoning. All that happens, it is urged, when such a "relevant" fact is laid down by a rule to be conclusive proof of the fact to be proved is that its persuasive value is stated by law to be hundred per cent. though otherwise it would have been of a lower percentage. Such a rule according to the respondents ought to be regarded as a rule of evidence just as a rule stating merely that a fact is relevant, i.e., it has some persuasive value, is always regarded as a rule of evidence. The argument appears to us to be wholly misconceived. Indeed, it appears to be based on a misunderstanding of what the law of evidence does. It does not instruct the Judge as to what value an item has or ought to have. Its task is, apart from saying on whom the burden of proof would lie and the mode in which documents and oral evidence will be allowed to be presented to the Tribunal, to select some of the innumerable facts which according to the ordinary process of reasoning have - some more, some less - an effect on the human mind in persuading it of the existence of other facts, which tend to create, extinguish or modify a right or a liability - as matters of which evidence will be allowed to be given. When a rule says that a fact is relevant for proving a fact in issue, it is merely saying that the Court will allow evidence to be given of it. When however the rule goes further and says that this relevant fact will be conclusive proof of a fact in issue so that a specified right or liability may arise from it, what is being done is to directly affect substantive right or liability and is not providing for evidence only. A rule of conclusive presumption made with a view to affect a specified substantive right is a rule of substantive law as it is intended to affect substantive right and does not cease to be so because the conclusive presumption, that is, conclusive proof of the existence of another fact, is rested on a fact which is relevant to it. The point is not relevancy but whether the rule is intended to affect a specified substantive right or to provide a method of proof. Where the purpose of a rule of conclusive presumption is that the Judge should on that basis hold that a specified right or liability exists, or does not exist, the rule is really saying that this particular relevant fact will create, or extinguish or modify the right or liability. The substance of the matter then is that a rule of conclusive presumption as to the existence of a certain fact only for establishing or disestablishing a specified substantive right results in affecting that right and ceases to be a rule of proof.

It was also said that estoppel, which is really a rule of conclusive presumption, has invariably been treated as a branch of the law of evidence. Suppose this is so. Does that prove that all rules of conclusive presumption are rules of evidence ? We have already said that some may be. Estoppels may belong to that class. "There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not"; Halsbury's Laws of England, 3rd Edition Vol. XV, p. 168. It therefore is concerned with a statement of fact; it is not directed to affect any particular right though no doubt ultimately all estoppels do affect some rights as all rules of evidence do. In so far as estoppels, whether treated as rules of conclusive presumption or not, are not intended to affect substantive rights, they are rules of evidence. Therefore it seems to us that the contention that estoppel is a rule of evidence does not establish that all rules of conclusive presumption are rules of evidence.

Let us come now to the impugned rule. It lays down that the fact that a citizen of India has obtained on any date a passport from the Government of another country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date. Section 9 of the Citizenship Act (Act No. 57 of 1955) provides that any citizen of India who by naturalisation registration or otherwise voluntarily acquires or has at any time between the 26th January, 1950, and

the commencement of the Act voluntarily acquired the citizenship of another country shall upon such acquisition or as the case may be, such commencement cease to be a citizen of India. This provision in section 9 is undoubtedly a substantive law laying down inter alia that the fact of voluntary acquisition of citizenship of another country by a citizen of India will extinguish his right of citizenship of India. Under sub section 2 of section 9 the question whether a person has acquired citizenship of another country shall be determined, by a prescribed authority which shall have regard to prescribed rules of evidence. Ordinarily such rules of evidence would, as already indicated above, be dealing with the question of the burden of proof, as to the mode of presentation of evidence, as to the rights of examination and cross-examination and would also select some of the facts which may have a persuasive value as facts of which evidence can be given. In dealing with the question of burden of proof the rules may also legitimately raise a rebuttable presumption, from certain facts, of this fact of voluntary acquisition of citizenship of another country. A rule raising a rebuttable presumption is clearly a rule of evidence for its only effect is to shift the onus of proof and it is not intended to affect nor does it affect any particular substantive right. In determining the question the prescribed authority would then have to consider the facts which tend to persuade the mind that the person has voluntarily acquired the citizenship of another country and also facts which tend to show the other way, provided the presentation of these is not barred by the prescribed rules of evidence. What happens when the rule making authority steps in with the rule that the obtaining of a passport of another country will be conclusive proof of the fact of voluntary acquisition of citizenship of another country ? Under s, 9 the fact of voluntary acquisition of citizenship of another country results in the extinction of his right as an Indian citizen. The rule therefore directly affects a substantive right and, in the context of s. 9, must be taken to have been intended to do so. Such a rule cannot obviously be a rule of evidence; it is clearly a rule of substantive law.

Under the law as laid down in the impugned rule the fact of obtaining a foreign passport will have this result, even though it may very well be that though he has voluntarily acquired such a passport he has not thereby, or for that purpose acquired the citizenship of another country. This may happen for instance, when a person who is a citizen of India by reason of descent, but is at the same time a citizen of another country, says, France by birth, obtains a passport from the French authorities. Again, each county is of course free to make its own laws. Suppose a foreign country makes a law under which it can issue a passport to one who is not its national. If an Indian takes such a passport, he does not under the law of that country become its national but under the rule now being considered, he is to be taken as a foreign national. The obtaining of such a passport in either case cannot under the ordinary process of reasoning have any value whatsoever to show that he has voluntarily acquired foreign citizenship. Yet, under the impugned rule a passport so obtained by an Indian national will extinguish his right of citizenship of India. Clearly, therefore, the impugned rule is a rule substantive law as distinct from a rule of evidence.

As a last attempt to save the rule it was argued on behalf of the respondent that it is not really a rule of irrebuttable presumption. It is pointed out that r. 30(2) lays down that the Central Government shall in determining the question whether, when or how a person has acquired the citizenship of another country "have due regard to" the rules of evidence specified in Scheduled III. The effect of the words "shall have due regard to", it is urged, is that the Central Government would have normally to take these rules into account but was not strictly bound to do so. Reliance was placed for this contention on the observations of Viscount Simon in Ryots of Garabandho v. Zamindar of Parlakimadi ((1943) L.R. 70 I.A. 129, 168.). That authority appears to us to be of no avail for the interpretation of the words "shall have due regard to" in the present case. The effect of the words "shall have due regard to" will necessarily be different in different contexts. The present context is that the deciding authority is directed to have due regard to a rule that one fact will be conclusive

proof of another. It is idle to contend that in this context the deciding authority will or can disregard the rule and in the face of the fact which is said to be conclusive proof of another hold the other fact not to have been proved.

It is really unnecessary however to consider the effect of the words "shall have due regard to", for as soon as it is held that the Rule is void because of its being outside the powers of the rule-making authority any decision in which any regard has been paid to the rule becomes void.

The question of validity of Rule 3 of Schedule III of the Citizenship Act came up for consideration before several High Courts in India. The High Court of Madras is Mohomed Usman v. State of Madras (A.I.R. (1961) Mad. 129.) and the Rajasthan High Court in Ghaural Hasan v. State of Rajasthan (A.I.R. (1951) Raj. 173.) held the Rule to be valid; while the Andhra Pradesh High Court in Mohd. Khan v. Govt. Andhra Pradesh (A.I.R. (1957) Andh. 1047.) and the Allahabad High Court in Sharafat Ali Khan v. State of U.P. (A.I.R. (1960) All. 637.) held the Rule to be void. For the reasons mentioned earlier we are of opinion that the view taken by the Andhra High Court and the Allahabad High Court is correct.

The necessary consequence of our conclusion that r. 3, Sch. III of the Citizenship Rules is void is that the determination of the Central Government that the petitioner has voluntarily acquired the citizenship of Pakistan after the 26th January, 1950 and before the 14th December, 1957, has no legal validity.

Two other contentions have now to be noticed. First, it is said that s. 9 itself offends the Constitution as it takes away rights of citizenship. It is sufficient to dispose of this point to say that, if citizenship is a fundamental right, as to which doubts may legitimately be entertained, Art. 11 authorises Parliament to make any provision with regard to aquisition and termination of citizenship. Section 9 is thus clearly within this Article. It was next said s. 9(2) gives unguided power to the Government and is therefore bad as it really amounts to and abdication of Parliament's power of legislation under Art. 11. We are unable to see that s. 9(2) gives any unguided power. It first gives the Government the power to provide an authority to decide the question whether a person has acquired foreign citizenship. This gives really no power of subordinate legislation but only empowers the Government to constitute an authority for deciding a question which the section itself requires, should be decided. So far as the sub-section gives power to frame rules of evidence, we think there is enough guidance provided. All that the Government is empowered to do is to frame rules of evidence. Whatever difficulty there may be in deciding whether a particular rule is of evidence or not, there is no vagueness about the power given. It is clear cut and limited, for the power is to make rules of evidence and nothing else. If that power is exceeded, then, as in our view has happened in this case, the exercise of the power becomes bad. The difficulty, if any, in deciding what is a rule of evidence, cannot make a power to frame rules of evidence vague or too wide.

For the disposal of the present petitions in the view that we have taken however, it is necessary that the question whether the petitioners have acquired foreign nationality should be considered and determined by the Central Government in accordance with law. We would therefore direct the Central Government to decide the question whether the petitioners have voluntarily acquired the citizenship of Pakistan after the 26th January, 1950, in accordance with law, leaving out of account r. 3 of Sch. III of the Citizenship Rules, 1956, and on receipt of the result to the enquiry we would proceed with the further hearing of these petitions.

BY COURT.

In accordance with the decision of the majority, the petitions fail and are dismissed. There will be no Order as to costs.

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