PATNA HIGH COURT

Gopal Marwari

Vs

Emperor (Patna)

(Meredith, J.)

20.04.1943

JUDGMENT

Meredith, J.

1. I propose to deal with these applications in the order in which they have been argued. In the interests of brevity, and in view of the fact that so much has been already said in other decisions of this and other High Courts, I assume a knowledge of the terms of the Ordinance, its amendments, and the circumstances of its promulgation.

2. I take first a batch of cases, Criminal Revisions Nos. 654, 662, 663 and 770 of 1942, which all arise out of the same decision of Mr. N. Huda, Special Magistrate, who is also Sub-divisional Magistrate of Samastipur in the Darbhanga district. These applications have been argued upon different points by Mr. Manuk and Mr. S.C. Chakraverty.

3. The first point argued by Mr. Manuk is one which has already been dealt with by a Division Bench of which I was a member. The present petitioners were arrested by the police on 3rd September 1942, under Rule 132, Defense of India Rules, and sent in custody to the Sub-divisional Officer, who remanded them to hajat up to 17th September. On the 17th the police report had not been received, and the Magistrate postponed the case to the 25th, asking the investigating officer to produce the prosecution witnesses on the date fixed. Similar orders were passed on 25th and 28th September and on 3rd October. On 5th October, the Magistrate recorded this order:

> Police report received. The case is ready. To my tile. Two prosecution witnesses present. Examined and cross-examined two prosecution witnesses. Charge framed. To-morrow for detence.

4. Next day he examined the accused and 1 some defense witnesses, and on the 7th he delivered his judgment, convicting the accused persons under Rule 56(4), Defense of India Rules, and sentencing them to rigorous imprisonment for two years and a fine of ₹ 500/- each. The orders on the order-sheet up to and including the order of 3rd October were signed "N. Huda" over the initials "S.D.O." Prom 5th October onwards the orders were simply signed "N. Huda." The judgment was signed "N. Huda, Special Magistrate."

5. Special Magistrates are constituted under Section 9 of the Ordinance. The Ordinance came I into force in Bihar on 21st August and the order of Government constitutiong Mr. Huda, amongst others, Special Magistrate was made on 22nd August.

6. Section 10 of the Ordinance deals with the jurisdiction of Special Magistrates and runs:

> A Special Magistrate shall try such offences or classes of offences, or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct.

7. To this by Ordinance No. 61 of 1942 were subsequently added the words "or as may be transferred to him for trial under the provisions of Section 25(a)." On 22nd August the Governor of Bihar empowered all District t Magistrates to direct within their respective districts by general or special order in writing which offences or classes of offences, or cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death should be tried by Special Magistrates.

8. On 31st August Mr. R.N. Lines, District Magistrate, Darbhanga, passed an order purporting to be one under Section 10 in pursuance of this delegation of power. This order ran:

> Mr. S.D.A. Bilgrami and Mr. H.C. Chakravarti, Deputy Magistrates, will act as Special Magistrates under the Special Criminal Courts Ordinance, for all cases in the Sadar Sub-division of the district. All cases will be made over to Mr. Bilgrami, who will make over such cases as he may consider necessary to Mr. Chakravarti for disposal.
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> The Sub-divisional Officer of Samastipur and Madhubani will act as Special Magistrates under the Act, within their respective jurisdiction. Mr. Muhammad Usman, Deputy Magistrate, will try such cases under the Ordinance as may be made over to him by the Sub-divisional Officer of Samastipur. Babu Rajeshwari Prasad Varma and Babu Ram Tahal Sinha, Sub-Deputy Magistrate, will act as Summary Courts under the Ordinance in respect of such oases as may be made over to them for disposal by their respective Sub-divisional Officers.

9. Subsequently, on 4th October, Mr. Lines passed a formal order strictly complying, with the provisions of Section 10 and specifying in detail the offences which Special Magistrates could try.

10. Mr. Manuk's point is based upon the Full Bench decision of this Court in ***Banwari Gope v. Emperor A.I.R. 1943 Pat. 18.*** In this decision it was held that the Ordinance was not. retrospective. It could not take away from the subject vested rights which had come-into existence before the Ordinance came into force. Where criminal proceedings had been initiated against any person before the Ordinance came into force, such person had thereby acquired vested rights including, inter alia, the right of appeal in case of conviction, and including the right to be tried in the ordinary criminal Courts under the ordinary procedure, which alone existed at

the time the proceedings were initiated. The promulgation of the Ordinance couldi not, the Full Bench held, affect such rights, and the provisions of Section 26 of the Ordinance could not operate to bar interference by the High Court under Section 491, Criminal P.C., since the Ordinance having no application at all to such a case Section 26 itself could not apply to it. According to Mr. Manuk, the Full Bench further held that the taking of cognizance by a Magistrate of a case against any person marked the initiation of proceedings against that person and consequently gave that person the vested rights in question.

11. It is conceded by Mr. Manuk that this ruling is not directly applicable, since the Ordinance was declared to be in force some time before cognizance had been taken, or indeed any steps had been taken against the petitioners. He seeks, however, to apply the principle of the ruling by way of analogy. His argument is this: No person could be tried under the Ordinance until Special Magistrates or Special Judges had been actually appointed and orders had been passed directing what cases they could try. Therefore until those orders were passed, the Ordinance was not in full operation, and that, he says, should be regarded as the same thing as the Ordinance not being in force. The order of 31st August was so defective that it was no order and could give Mr. Huda no jurisdiction to try any case as Special Magistrate. Mr. Huda could try no case as such until 4th October when proper orders were passed. Therefore the Ordinance was not properly in force in Darbhanga until 4th October. Cognizance had, however, been taken of the case against the petitioners prior to 4th October in the ordinary Courts. Therefore the petitioners had acquired a vested right to be tried in the ordinary Courts by ordinary procedure, and Mr. Huda had no jurisdiction to try them as Special Magistrate, even though on 5th October, when the trial began, Mr. Huda was duly empowered as Special Magistrate.

12. Clearly the success of Mr. Manuk's argument involves four findings in his favour: (1) that the Ordinance was not in force in Darbhanga until 4th October, (2) that prior to 4th October criminal proceedings were initiated against the petitioners, giving them vested rights, (3) that the proceedings initiated were in the ordinary Courts, and not in the Special Courts, and (4) that the order of 31st August could not confer jurisdiction under Section 10. Should any of these points be decided against the petitioners, the contention put forward on their behalf must fail.

13. When dealing with a similar argument by Mr. Manuk in the Criminal Bench in the case to which I have referred *Ram Pratap Mandal v. Emperor*[1] said:

> The argument from analogy is always a dangerous one, and the danger is increased by the fact that it generally presents an appearance of plausibility. There is a wide difference between the coming into force of the Ordinance and its coming into operation. The Ordinance became the law on 21st August when the Governor declared it to be in force in the province. What happened subsequently was merely the, setting up the machinery for its operation, and could not affect the legal position. The reason for the rule of construction that a statute shall not be held to operate retrospectively unless the language is compelling in that regard, is that it shocks the conscience for a new law to affect the subject adversely in respect of something already over and done with. That reason does not apply in a case like the present. After a law has come into existence, whether or not the machinery for its operation has been set up once that law is declared to be in force and the subjects of the province are put upon notice of that fact by official publication--no one

> can have any just grievance if his acts and rights thereafter are to be determined in accordance with that law. Not only was the Ordinance declared to be in force on 21st August, but on the 22nd Special Courts were constituted. They were in existence before any steps at all were taken against the petitioners. It may be that they could not function. Nevertheless, the petitioners-must be deemed to have known that these Courts existed, and that in due course orders would be passed enabling them to function. That was a natural consequence upon promulgation of the Ordinance in. the province.

To put the matter differently, at the time the proceedings were initiated against the petitioners the ordinary Courts were not the only criminal Courts existing in the province. The Special Courts were also in existence. Power had already been delegated g to the District Magistrates to determine which cases should be tried by which Courts. In such circumstances no person could acquire any vested right to be tried in any particular Court, or under the procedure applicable to one set of Courts in preference-to that applicable to the other. Before any steps had been taken against the petitioners which could give rise to any rights the law of the land was that they were liable to be tried either in the ordinary Courts or in Special Courts as the District Magistrate might in his discretion decide. The law stood so, and the petitioners must be deemed to have known that it so stood. No change in the law took place at the moment when the District Magistrate passed orders regarding the trial of particular cases. That being the position, then whatever view be taken with regard to the date of initiation of proceedings, and whatever the nature of the Court in which the proceedings were actually initiated, the petitioners acquired no vested right of trial in the ordinary Courts. There is, therefore, no question of the Ordinance having taken such vested rights away.

14. Having heard further argument and having fully re-considered the matter, I am still of the same opinion, and I think I correctly set out the legal position in the passage quoted.

15. The incorrectness of Mr. Manuk's analogy may, I think, be made more clearly apparent by considering the position where, as has happened in some districts, for example Gaya, no general order under Section 10 has been passed at all, and the District Magistrate has simply passed a specific order in each particular ease. That is a procedure also contemplated by the Ordinance. In such an eventuality it is clear that the competence of each Special Magistrate to try each particular case will depend upon a special order under Section 10 passed in that ease. The order cannot be passed in each case until after the initiation of proceedings. Therefore, the position contemplated by Mr. Manuk must arise in every case, and simply because special orders are passed in each case instead of a general order, an alter, native provided for in Section 10, no Special Magistrate could ever have jurisdiction to try any case, for in every case a vested right of trial in the ordinary Courts would necessarily arise before the special order under Section 10 could be passed. This is surely a reduction ad absurdum of the argument, which is thereby shown to involve the pro-position that in such a district the Ordinance comes into force separately for each particular case upon the date when the sipecial order under Section 10 in respect of that case is passed by the District Magistrate.

16. There is a further ground for holding that Mr. Manuk's contention has no force. An examination of the Ordinance as a whole shows that it sets up new Courts and prescribes a new procedure for trial of cases in those Courts. The procedure it sets up is only for the trial of cases.

It lays down no new procedure for dealing with cases in the preparatory stages up to the point when the case becomes ready for trial. It clearly contemplates that the taking of cognizance and all preliminary orders, such as orders for inquiry, shall be made by the Sub-divisional Officer or the District Magistrate as the case may be in the ordinary way under the provisions of the Code of Criminal Procedure. Section 27 provides that:

> The provisions of the Coda and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by Special Criminal Courts constituted under this Ordinance.

17. It will be noticed, moreover, that there is no provision anywhere in the Ordinance empowering special Magistrates to take direct cognizance of cases. On the contrary, Section 11(2) provides:

> In matters not coming within the scope of Sub-section (1), the provisions of the Code, so far as they are not inconsistent with this Ordinance, shall apply to the proceedings of a Special Magistrate; and for the purposes of the said provisions the Special Magistrate shall be deemed to be a Magistrate of the first class.

18. Direct cognizance of cases is taken by Magistrates under Section 190(1), Criminal P.C. The Magistrates who can take cognizance under that Section are "any Chief Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf." Thus a First Class Magistrate cannot take cognizance direct, unless specially empowered. The Special Magistrate is deemed to be a First Class Magistrate as regards the application of the provisions of the Code, and he is not specially empowered. Therefore, he cannot take direct cognizance under Section 190, nor does the Ordinance anywhere appear to contemplate that he should. This being so, the fact that cognizance is in the first instance taken by the Sub-Divisional Officer, and preliminary orders are passed by him, can be no indication that trial in the ordinary Courts is contemplated, and obviously the fact that such steps are taken in the Court of the Sub-Divisional Officer can give rise to no right to be tried in his Court or under ordinary procedure. No doubt, in the present instance, Mr. Huda passed orders not as Special Magistrate but as Sub-Divisional Officer up to the stage when on 5th October he said: "The case is ready. To my file," but the fact is quite irrelevant. His procedure was what the Ordinance contemplates, and he rightly acted as Sub-Divisional Officer while getting the case ready for trial, and rightly passed an order transferring the case for trial from himself as Sub-Divisional Officer to himself as Special Magistrate. We don't know and can't know at what stage he made up his mind that the case should be tried under the Ordinance. The Ordinance was in force on 21st August. He had been constituted Special Magistrate on 22nd August. His first order in this case was passed on 3rd September. He may well; have contemplated from the beginning the trial of the case under the Ordinance. Nevertheless, he quite rightly under Section 27 of the Ordinance passed his preliminary orders as Sub-Divisional Officer and the fact that he did so could give rise to no right of trial either in one set of Courts or in the other set of Courts. The procedure would be the same in either case.

19. This being the position, the question whether judicial proceedings against the petitioners

should be taken to have been initiated on 5th October upon the receipt of the charge sheet, or earlier, and whether the taking of cognizance marks the initiation of proceedings does not really arise. I should like, however, to make some observations on the subject, because there seems to be considerable confusion at the Bar as to what really was laid down in the Full Bench case in *Banwari Gope v. Emperor* [2]and by the Full Bench in *Sheo Baran Singh v. Emperor*[3] and the question becomes of importance since the point is raised, as it is, in numerous applications that the taking of cognizance is the critical point when vested rights accrue.

20. It is true that in the judgment in Ban. wart Gope's case A.I.R. 1943 Pat. 18 there occurs a passage:

> As soon as the Magistrate takes cognizance of an offence there is a criminal case against the accused person, and at that point of time he acquires such right of appeal or revision as the case may be as the law confers upon him.

21. But this isolated passage taken alone and out of its context, in my judgment, gives a wholly misleading impression of what the Full Bench really held. The judgment must be read as a whole, and elsewhere in the judgment my Lord the Chief Justice says:

> There can be no doubt that where a Magistrate takes cognizance of an offence upon a complaint, the proceeding before him is commenced as soon as the process is issued. Similarly, when the cognizance is taken upon a charge sheet the proceeding must be deemed to commence as soon as the Magistrate makes up his mind to act upon the charge sheet. In such cases if the accused has appeared before the police, he is sent up for trial, and if he does not appear before the police, a prayer is usually made by the police for warrant or some other process. In the former case the Magistrate has to pass some order as to bail or otherwise, and in the latter case he generally issues a warrant and sometimes has to issue process under Sections 87 and 88, Criminal P.C. These steps, in my opinion, definitely mark the beginning of a criminal proceeding against the accused.

22. Reading the judgment as a whole, it is clear that what the Full Bench laid down was merely that such rights as accrue to an accused person become vested in him at the point when judicial proceedings are commenced against him.

23. What is that point? There is no charm in the word "cognizance." It is nowhere defined in the Code of Criminal Procedure. It is a word of somewhat indefinite import. It is perhaps not always used in exactly the same sense. It is argued upon the basis of *Emperor v. Sonrindra Mohan Chuckerbutty*[4] that taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.

24. That indeed expresses my own view. In my judgment, the word "cognizance" is used in the Code to indicate the point when a Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate. Cognizance is taken of cases, not of persons, and there seems to be nothing in theory to prevent a Magistrate from taking cognizance of a case

even where the offenders are unknown. The fact that a Magistrate has taken cognizance does not necessarily mean that there will be judicial proceedings against any one.

25. For example, where cognizance is taken upon a complaint, the complaint may be summarily dismissed, or may be dismissed after inquiry, under Section 203. The accused may never be summoned, or made a party to the proceedings. In fact the person complained against may never become an accused person in the technical sense. Nevertheless, having regard to the terms of Section 200 it is clear that in such a case cognizance has been taken. Section 200 seems to regard the taking of cognizance as something prior even to the examination of the complainant upon oath, since the Section says: "a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath."

26. Similarly, where cognizance is taken upon a police report, the Code seems to contemplate that it shall be taken upon the preliminary report which is sent up by the police with the first information under Section 157, since that Section says:

> If...an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report.

27. I emphasise the words italicised by me. Section 159 says:

> Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner prescribed in this Code.

28. It is obvious that the Code contemplates that the Magistrate may take cognizance upon this preliminary report, and need not wait for the charge sheet, and it is significant that having regard to a conflict of judicial opinion with regard to whether the words "a police report" in the old Section 190(1)(b) referred only to the charge sheet or otherwise, the Section was amended by Act 18 of 1923, and for the words "a police report" were substituted the words "upon a report in writing of such facts made by any police officers."

29. Thus, cognizance may be taken upon the preliminary report under Section 157, yet there may eventually be no judicial proceedings, since the police may submit final report false, or true, mistake of fact, or law, instead of submitting a charge sheet. And here again it seems that cognizance is something prior to and does not necessarily mean the commencement of judicial proceedings against any one.

30. It is also to be noted that Section 190 is the first Section under chap. 14-B which is headed "conditions requisite for initiation of proceedings," and the marginal note is "cognizance of offences by Magistrates." It may then clearly be held that the law regards the taking of cognizance as the first condition requisite for the initiation of proceedings. It is after he has first taken cognizance that the Magistrate initiates proceedings should he think that course proper. He need not, however, do so at all. Cognizance, in my view, is merely the mental decision of the

Magistrate to take judicial notice of a case. This view of what the law regards as taking cognizance is in accord with the ordinary dictionary meaning of the word. "Cognizance" is defined as "knowledge or notice, judicial or private."

31. Reverting again to complaint cases, it is clear from the wording of the Code that it is only when the stage is reached of an order under Section 204, that is for issue of process, that proceedings before the Magistrate can be said to commence, for Section 204 is the first Section in the chapter headed "Of the commencement of proceedings before Magistrate."

32. Two things follow from the above examination of the meaning of the expression "cognizance" as used in the Code of Criminal Procedure. The first is that if the word "cognizance" is used in this sense, then the Full Bench in Banwari Gope's case A.I.R. 1943 Pat. 18 never meant to decide that the mere taking of cognizance in itself could give rise to any vested rights in any one. The word "cognizance," I think, was used in the judgment as illustrative, not definitive, and the true effect of the decision is that vested rights accrue upon the commencement of magisterial proceedings against the person in question and not before.

33. The second thing is that such proceedings commence only when the accused person is made a party before the Court. That clearly follows, from the position of Section 204 and the heading of the chapter of which it forms the first section. In police cases judicial proceedings cannot necessarily be said to have commenced merely because a person is sent up and remanded to custody. The proceedings at that stage are still administrative. There may still. be no judicial case against the accused. It is significant that under Section 167 the police may obtain an order for a remand to custody from a person who is not empowered to take cognizance of the case. A remand to custody if it does not exceed fifteen days certainly does not mean cognizance has been taken. If it exceeds fifteen days it may mean that cognizance has been taken, but does not necessarily mean that any judicial proceedings have been commenced against any one, giving him vested rights in any particular mode of trial. At that stage, the police may have sent up a man in custody. He may have been remanded to custody pending police investigation, but his prosecution has not started, and does not start, in my judgment, until the Magistrate makes up his mind to act upon a charge, sheet, and takes some overt action to implement his decision. Such an order may be an order to produce the accused from custody on a particular date to stand his trial. Such an order is the order corresponding to the order for issue of process where the accused is not in custody; to the order under Section 204 which marks the commencement of judicial proceedings. That is the point at which vested rights, such as a right of appeal or right of trial by jury, may accrue to a person proceeded against if the law as it stands at that date gives them to him. No doubt prior to that stage a person detained in custody may have certain rights. He may have a right to apply for bail, he may have a right to come up to the High Court for a writ of habeas corpus under Section 491. But these rights, however valuable they may be, are not rights appertaining to any pending judicial proceedings against him.

34. In a case of illegal detention, where Section 491 may be applicable, there might well be no question of any judicial proceedings. The mere fact that a man may have been put in peril does not make him a party to any judicial case. He may be merely a detenue, he may be illegally detained in private custody Section 491 refers to illegal or improper detention in public or private custody. The fact, therefore, that such rights as these may have accrued to a person cannot in themselves involve also the accrual of a vested right in any particular form and manner of trial,

appeal, or punishment. It must be remembered that we are in these cases considering the rights of the individual not against any other individual who may have complained against him, who may have given information to the police against him, but against the State which has signified its intention of prosecuting him.

35. The view which I take finds, I think, support in the case of *Golap Jan v. Bholanath Khettry*[5] a decision of so distinguished a Judge as Sir Lawrence Jenkins. It was there held where a complaint had been laid before a Magistrate for criminal breach of trust, and the Magistrate had referred the matter to the police under Section 202, Criminal P.C., for enquiry and report and finally dismissed the complaint under Section 203, Criminal P.C., without issuing process, that the prosecution had not commenced, and no suit for malicious prosecution was maintainable. Their Lordships referred to a series of decisions on the Code as showing that since process was not issued, Golap Jan, the person in question, never became an accused. Ho was not a party to the investigation hold under Section 202, Criminal P.C., nor was he entitled to claim under Section 304 the right to be represented by a pleader at that investigation. Their Lordships also referred to the observations of Cotton L.J. in *Yates v. The Queen*[6] "how can it be said that a prosecution is commenced before a person is summoned to answer a complaint." It is noteworthy that in *Kamini Kumar Basu v. Birendra Nath Basu*[7], the Privy Council referred to this case, and, while their Lordships made it clear that they were not expressing any opinion on the point, they said: "It may quite well be that a prosecution only commences after a summons is issued." The point then at which the right to any particular form of trial first accrues is, in my judgment, the point when the prosecution commences, and that is the point whoa the accused person is first made party to judicial proceedings.

36. Apart from any other consideration, Mr. Manuk's whole contention falls to the ground if the order of 8ist August could operate to give Mr. Huda, Sub-divisional Officer Samastipur, jurisdiction to try the case as a Special Magistrate. That point arose before the Criminal Bench in the case of *Pratul Chandra Banerji v. The King-Emperor*[8] The Criminal Bench of which I was a member, held that the order, though very defective, would operate to give the Sub-divisional Officers jurisdiction. In my judgment, in that case I said:

> This order was passed under conditions of stress and haste. In construing it is necessary to make allowance for this circumstance, and to take a fair and commonsense view of it. Reading it as a whole I have no doubt in my mind that what the District Magistrate meant was to empower the Sub-divisional Officers of Samastipur and Madhubani, like Mr. Bilgrami and Mr. Chakravarty at Sadr, to try all cases arising during the time of the disturbances. The District Magistrate by the order could not have meant merely to appoint the Sub-divisional Officers as Special Magistrates, because that had already been done by Government on 22nd August, and it is impossible to suppose that the District Magistrate merely meant unnecessarily to repeat the Government order; In para. 1 relating to the Sadr Courts he used the expression 'for all cases.' It seems to me clear that he meant that expression to apply to para. 2 of his order also.
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> This construction finds support also in the fact that after referring to the Sub-divisional officers the order goes on to say that a Deputy Magistrate at Samastipur would try such oases under the Ordinance as might be made over to him by the Sub-divisional Officer of

> Samastipur, and similarly that certain Sub-Deputy Magistrates as summary Courts would try such cases as might be made over to them by their respective Sub-divisional Officers. I am quite satisfied that upon a fair construction, though very badly drafted and open to serious criticism upon the ground of form, this was in substance an order empowering, inter alia, the Sub-divisional Officer of Samastipur to try all cases within his own Subdivision under the Ordinance.Next, however, it is said that the order was in any case a bad order, because it was not open to the District Magistrate to empower the Special Magistrates to try all cases since under Section 10 they cannot be empowered to try offences punishable with death. That is certainly another defect in the order, but it would not make the order wholly void. Upon ordinary principles of construction, the order must be deemed to be a good order so far as it could legally go. When the District Magistrate says 'all cases' he must be deemed to have meant 'all oases which such Magistrates could legally be empowered to try.' If a Court exceeds its jurisdiction, its order is good to the extent of its jurisdiction. The offence under Section 56(4), Defense of India Rules, was one which a Special Magistrate could be empowered to try, and the order of 31st August must, in my judgment, be construed as an order legally empowering the Special Magistrates to try that offence.

37. What I said then still represents my view. My Lord the Chief Justice, however, and my learned brother, Manohar Lall J. are of opinion that the order would not give jurisdiction, and the decision of the Full Bench must, of course, be in accordance with their view. Nevertheless, upon the other grounds which I have stated it must be held that Mr. Manuk's first contention fails.

38. Mr. Manuk's second argument is based on the provisions of the Defense of India Act, 1939 (Act 35 of 1939). His contention in brief is that that Act provided the machinery for the trial of offences created by the Act, and provided that, in the absence of special tribunals set up under that Act, the ordinary criminal Courts wore to continue to exercise jurisdiction. This Act, he says, is not re-pealed or suspended by Ordinance 2 of 1942, either expressly or by necessary intendment. Therefore, it continues in force, and the petitioners could be tried for an offence under K. 56 only in accordance with the provisions of the Act, that is to say, by a special tribunal or in the ordinary Courts.

39. Mr. Manuk has referred to a Calcutta case where a similar argument was put forward. That is the case of *Santosh Kumar Bhatacharjee v. King-Emperor*[9], There the argument was put in a slightly different form. It was pointed out that Section 72 of Schedule 9, Government of India Act 1935, tinder which the Ordinance was promulgated, lays down that the power of making ordinances under the Section is subject to the like restrictions as the power of the Indian Legislature to make laws; and any ordinance made under the Section is subject to the like disallowance as an Act passed by the Indian Legislature, and may be controlled or superseded by any such Act. Reliance was placed on the words "and may be controlled or superseded by any such Act" to support a contention that the ordinance must be regarded as controlled by the Defense of India Act 1939.

40. This argument was rejected by Derbyshire C.J., and Lodge J. on the ground that the words in question referred only to a subsequent Act, an Act passed for the purpose of controlling or

superseding the ordinance, and could not refer to an Act passed previous to the ordinance in a wholly different situation.

41. It is unnecessary to say anything more about this, beyond the fact that I am in complete agreement with what was said by Derbyshire C.J., because Mr. Manuk has frankly said that he is not enamoured of that particular argument and does not rely upon it.

42. Mr. Manuk puts his argument like this: the preamble to Act 35 of 1939 shows that it was enacted to provide, inter alia, for the trial of certain offences. Section 8 says that the. Provincial Government may for the whole or any part of the province constitute, special tribunals which shall consist of three members appointed by the Provincial Government. Section 9 provides that the Provincial Government, by general or special order, direct that a special tribunal shall try any offence (a) under any rule made under Section 2, or (b) punishable with death, transportation or imprisonment for a term which may extend to seven years triable by any Court having jurisdiction within the local limits of the jurisdiction of the special tribunal and may in any such order direct the transfer to the special tribunal of any particular case from any other special tribunal, or any other criminal Court not being a High Court. Section 10 lays down the procedure for trial by the special tribunal. Such a tribunal, he says, should have tried the petitioners. The answer is that Section 8 does not say that such tribunals shall be set up. It says the Provincial Government may set them up. It is thus a matter for the discretion of the Provincial Government, and in fact the Provincial Government has never passed any order under Section 9 directing that any offences should be tried by a special tribunal, nor have special tribunals been set up under Section 8.

> But in that case, Mr. Manuk argues, the provisions of Section 14 must come into operation. Section 14 says:
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> Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.

43. Here, again, there is, in my judgment, a clear answer. It is obvious that Section 14 merely means that in the absence of the special tribunals the ordinary Courts shall have jurisdiction. It must have been enacted to shut out the possibilities of any contention that, unless and until special tribunals had been set up, no Court could try a person for offences under the Act. The Section merely means that the Defense of India Act does not necessarily take away the jurisdiction of the ordinary Courts. It could never mean to bar the Legislature in perpetuity from setting up other Courts, or suspending jurisdiction of the ordinary Courts. Section 14 merely preserves the jurisdiction of the ordinary Courts in certain circumstances, so far as the Defense of India Act itself is concerned, not so far as subsequent Acts are concerned. It indicates that the Defense of India Act (and that Act only) does not take away the ordinary Courts' jurisdiction, except in the manner specifically indicated.

44. Mr. Manuk meets this objection by saying that the ordinance does not repeal or suspend the Defense of India Act. The Ordinance does, however, constitute Special Courts, and in certain respects take away the jurisdiction of the ordinary Courts. The Defense of India Act, 1939, obviously could not pre-vent it from doing so, and if the provisions of the Ordinance are in any way inconsistent with those of the Defense of India Act, those of the Ordinance), which is

equivalent to a subsequent Act, must prevail. Section 27 of the Ordinance, Mr. Manuk points put, says:

> The provisions of the Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent ?with the provisions of this Ordinance, shall apply to all matters connected with, arising from or consequent upon a trial by special criminal Courts constituted under this Ordinance.

45. The very important words "in so far as they are not inconsistent with the provisions of this Ordinance" cannot be ignored. They provide, in my opinion, a complete answer to Mr. Manuk's argument.

> Lastly, Mr. Manuk urged that his clients had been convicted for holding public meetings and taking out processions in contravention of an order of the District Magistrate, not of the Provincial Government, whereas what rule 56 provides is that:
>
> The Central Government or the Provincial Government, may for the purpose of securing the defense of British India, the public safety, the maintenance of public order or the efficient prosecution of war, by general or special order, prohibit, restrict or impose conditions upon, the holding of or taking part in public processions, meetings or assemblies.

46. This argument was based upon a misapprehension. Rule 56 was made by the Central Government under Section 2 of the Act. Section 2(5) provides:

> A Provincial Government may, by order direct that any power or duty which by rule made under Sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under Sub-section (4) to be exercised or discharged i by the Provincial Government, shall in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being, except in the case of a Chief Commissioner's Province, an officer or authority subordinate to the Central Government.

47. The learned Advocate-General drew Mr. Manuk's attention to the fact that on 19th October 1940, in Gazette Extraordinary No. 2949-C the Governor of Bihar delegated the powers of the Provincial Government under Sub-rule (1) of Rule 56 to all District Magistrates within their respective jurisdictions. On this being brought to his notice, Mr. Manuk frankly abandoned this point.

48. I have now dealt with all the points put Jorward by Mr. Manuk. Mr. S.C. Chakarverty, however, stepped into the breach and argued that the whole Ordinance was ultra vires under Section 100, Sub-section (3), Government of India Act, which provides that:

> Subject to the two preceding sub-sections the Provincial Legislature has, and the Federal

> Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List 2 in the said schedule (hereinafter called the 'Provincial Legislative List).

49. Mr. Chakravarty's contention is that the Ordinance essentially relates to matters in List 2, the Provincial Legislative List. Item 1 of that List is:

> Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) ; the administration of justice; Constitution and organisation of all Courts, except the. Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subject to such detention.

Item 2 is:

> Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in> this list; procedure in rent and revenue Courts.

50. Item 1 of List III, the Concurrent Legislative List, is

> Criminal law including all matters included in the Indian Penal Code, at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II, and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.
>
> Item 2 is "Criminal procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act."

51. Mr. Chakravarty, no doubt, out of delicacy, did not contend that the Ordinance related to the administration of justice, constitution and organization of all Courts, except the Federal Court, or jurisdiction and powers of all Courts except the Federal Court, since the argument on these premises had been previously considered and rejected by a Full Bench of this Court in Banwari Gope's case A.I.R. 1943 Pat. 18 But what he has contended is that the Ordinance deals essenj tially with the subject of "public order" in Item I of List II. This argument I must reject. Public order is not really the subject of the Ordinance, though public disorder is its occasion, which is a different matter. It could, however, with much force, be contended that in pith and substance the Ordinance relates to administration of justice, constitution and organization of Courts, jurisdiction and powers of Courts. The learned Advocate-General has argued that the Ordinance substantially comes within Items 1 and 2 of the Concurrent List, since it relates to criminal law and criminal procedure. Speaking for myself, I find difficulty in accepting this contention, because, while criminal law is no doubt included, in the Concurrent List, there is an express exclusion of offences against laws with respect to any of the matters specified in List I and List II. The Ordinance deals with offences against laws in respect of public order, a matter in List II.

52. Then as to Item 2, criminal procedure, it cannot be denied that the Ordinance, while procedural in form, takes away many of the eights of the subject, and moreover constitutes new Courts. If I had to decide the matter, I should probably hold that in pith and substance the.

Ordinance comes under items 1 and 2 of the Provincial Legislative List, and, in particular constitution and organization of Courts, and jurisdiction and powers of Courts with respect to offences involving public order, a subject itself in List II and therefore, brought in by the words "with respect to any of the matters in this List," which occur in Item 2 of List II. It is noteworthy that item 15 of the Concurrent List is "jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this List." The words "with respect to any of the matters in this List" here again occur and will, in my judgment, operate to bring in the exclusion in Item I. of List III of offences against laws with respect to any of the matters specified in List II, e.g., public order.

53. However, it is unnecessary finally to decide this point, because even if the Ordinance essentially deals with matters in List ill, Mr. Chakravarty's argument must fail upon another ground. It ignores the provisions of Section 102, Government of India Act. I will not cumber this judgment by setting out the provisions of Section 102 in full. Essentially it provides that if the Governor. I General has in his discretion declared by proclamation that a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance, then the Federal Legislature shall have power to make laws for a province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List. There are conditions. The proclamation shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament, and shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. The proclamation regarding the emergency has been made and both these conditions have been satisfied. On 3rd September 1939, under Notification Nos. 221 and 223-M the Governor-General proclaimed a state of grave emergency. It was duly placed before Parliament and was approved by both Houses in February 1940: see Hansard, House of Lords Debates, 1989-40 at page 459 and House of Commons Debates, 1939-40 at page 1079.

54. The proclamation under Section 102 empowers the Federal Legislature, but until the establishment of the Federal Legislature the powers conferred by the Act on the Federal Legislature shall be exercisable by the Indian Legislature, and references to the Federal Legislature, and Federal laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature. This is provided by Section 316. Moreover, under Section 311, Sub-section (6), any reference in the Act to Federal Acts or laws, or to Acts or laws of the Federal Legislature shall be construed as including a reference to an ordinance made by the Governor-General.

55. Mr. Chakravarty's argument rests on the fact already referred to that Section 72 of Schedule 9 makes the Ordinance of the Governor. General subject to the like disallowance as an Act passed by the Indian Legislature, and so renders the Ordinance subject to Section 100, Sub-section (3). But this restriction relied upon is expressly taken away by the provisions to which I have referred, and the provisions of Sections 102, 316 and 311(6) provide a complete answer to Mr. Chakravarty's argument. Mr. Chakravarty contends that Section 102 relates only to the power of the Legislature, and not of the Governor-General to make Ordinances. That is not correct. But even if it were, it would make no difference, because Section 72 merely subjects the ordinance power to such restrictions as there may be upon the Legislature. Section 102 and the proclamation thereunder remove the restriction on the power of the Legislature upon which Mr. Chakravarty relies. Therefore upon the wording of Section 72 that restriction disappears also so far as the ordinance powers are concerned. The position is so clear that it is unnecessary to say

anything further upon this matter, and it is unnecessary to consider to what extent in the absence of Section 102, the principles adumbrated in the cases of the Board of Commerce Act 1919 A.I.R. 1921 P.C. 205 and *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd*[10]. by Lord Haldane, could be invoked in this country.

56. In the four cases under consideration all the points urged must fail, and the applications must be rejected.

57. Next come two more Samastipur cases (Criminal Revision Nos. 785 and 786 of 1942), which have been argued by Mr. G.P. Das. The petitioners in these cases were convicted by Mr. Huda as Special Magistrate under Rules 56(4) and 38(5) of the Defense of India Rules, on 10th October 1942. It is contended that cognizance was taken at least on 16th September, if not earlier, by Mr. Huda as Sub-divisional Officer, and Mr. Manuk's arguments are repeated. For the reasons already given, they must be rejected, and these applications must fail.

58. Next comes a case argued by Mr. Baldeva Sahay (criminal Revision No. 669 of 1942). The petitioner was produced in custody on 9th September 1942. On 18th September, Mr. Huda as Sub-divisional Officer of Samastipur passed this order: "Police report, received. The case is ready. To Mr. Mohammad Usman ior favour of disposal."

59. Mr. Mohammad Usman was the second officer at Samastipur and was also a Special Magistrate under the Ordinance. This officer began the trial the same day, and on 22nd September he convicted and sentenced the petitioner under B. 08 of the Defense of India Rules. Mr. Usman framed the charge as Special Magistrate, and convicted as Special Magistrate.

60. The first argument put forward is that the Ordinance on 18th September contained no provisions for transfer. Therefore, the order was an ordinary order of transfer by the Sub-divisional Officer to his second officer as such under Section 192, Criminal P.C. Mr. Usman therefore received the case merely as a First Class Magistrate, and had no jurisdiction to charge and convict as a Special Magistrate. It is unnecessary to deal with this point at length, because the answer follows directly from what I have already said in another connexion. The Ordinance does not abrogate the provisions of the Criminal Procedure Code so far as preliminary orders, including orders of transfer for trial, are concerned. On the contrary, in Section 27 it expressly preserves them. There was nothing to prevent the Sub-divisional Officer from transferring the case to Mr. Usman as Special Magistrate for trial. On the contrary, that was the course contemplated by the Ordinance, which, as I have said, makes no provisions for the Special Magistrate to take direct cognizance himself.

61. This argument, which has been raised in several cases, is, I think, based upon a misapprehension. It was only on 21st November 1942 by ordinance 61 of 1942, (the Special Criminal Courts Third Amendment Ordinance) that Section 25A was added to the Ordinance. This Section 25A, inter alia, provides that the District Magistrate may transfer a case at any stage from one Special Magistrate within the district to another, and provides further that, notwithstanding anything contained in the Code, in the case of such transfer no rehearing will be necessary. This has been taken to mean that the Government realised there was a hiatus in the Ordinance as regards power of transfer. There was a hiatus, but it was in regard to transfer from a Special Magistrate, not transfer to one. The fact seems to have been that in Section 26 the law had over-reached itself. That Section provided, inter alia, that no other Court should have any

authority to transfer any case from a Court constituted under the Ordinance. This Section was designed to prevent interference by other Courts with the proceedings of the Ordinance Courts, but its terms were so wide that its effect would obviously be that when once a Special Magistrate or a Special Judge had seisin of a case, then in no circumstances could any authority take it from him; an awkward state of affairs should he happen to be transferred, become ill, or go off his head. Hence some provision had to be made for transfer from the Special Courts, and Section 25A had to be inserted and consequential amendments were necessary in Section 5 and Section 10. The amendment has nothing whatever to do with the question of transfer to a Special Magistrate in the first instance. The point is thus without substance.

62. Secondly, however, it is argued that since Mr. Usman convicted the petitioner before 4th October, he acted without jurisdiction, because though he was a Special Magistrate from 22nd August it was not until 4th October that he was empowered by the District Magistrate under Section 10 to try any particular cases or offences. It will be seen that this argument involves the treating of the order of 3ist August as a nullity. I have already expressed my own opinion that that order could operate to give jurisdiction so far as the Sub-divisional Officer was concerned. But my opinion is different as regards Mr. Usman, the second officer. What Mr. Lines provided in the order of 3lst August was "Mr. Mohammad Usman, Deputy Magistrate, will try such cases under the Ordinance as may be made over to him by the Sub-divisional Officer of Samastipur." In substance this amounted to a delegation of the power to pass the necessary order under Section 10 from the District Magistrate to the Sub-divisional Officer. This the District Magistrate could not do. Section 10 provides that the Provincial Government may delegate its power to any servant of the Crown. There is no provision for a double delegation, for delegation of power by any one other than the Provincial Government. The Provincial Government never delegated power to the Sub-divisional Officer of Samstipur. The District Magistrate had no jurisdiction to do so. In so far as the order related to Mr. Mohammad Usman, it was, therefore, a complete nullity, and it must be held that on 22nd September Mr. Usman had no jurisdiction to convict the petitioner under the Defense of India Rules as a Special Magistrate. He could perhaps have convicted the petitioner under the ordinary procedure as a First Class Magistrate, but that he did not purport to do.

63. It must now be considered whether in such circumstances, having regard to the provisions of Section 26 of the Ordinance, this Court has any jurisdiction to interfere either under Section 491 of the Code, or otherwise. In Banwari Gope's case A.I.R. 1943 Pat. 18 the Full Bench held that the Court could interfere under Section 491 where the case was one to which the Ordinance as a whole, including Section 26, was not applicable. The point here however is not quite the same. The petitioner had no vested right of trial in the ordinary Courts. He could and can be tried under the Ordinance. It is merely a case where the particular Special Magistrate who tried him had not power to do so. Section 26 of the Ordinance expressly provides against interference by any other Court with the proceedings of a Court constituted under the Ordinance. There is an express reference to Section 491, and since only High Courts can act under Section 491, Section 26 must have been designed to exclude interference by all other Courts including the High Courts.

64. The position is however that Mr. Usman's proceedings were wholly void, being without jurisdiction. Under Section 530, Criminal P.C.:

> If any Magistrate, not being empowered by law in this behalf, does any of the following

things, viz. (p) tries an offender, his proceedings shall be void.

65. Section 530 is in no way inconsistent with the provisions of the Ordinance, and its operation is therefore preserved by Section 27 thereof. This being so, there is no question of any interference with Mr. Usman's proceedings. The position is that in the eye of the law, the petitioner's trial and conviction being void, he has not been tried and convicted. There is no conviction to set aside. It is merely & question of indicating the position, and nothing in the provisions of Section 26 can prevent the High Court from indicating that position. It is that the petitioner is being detained in custody by the executive authorities as a convicted prisoner, when they have no legal authority to do so (though, of course, his detention as an under-trial prisoner might be quite lawful). Therefore, the High Court can and should interfere to put a stop to that detention under the provisions of Section 491. It is not a case of revising the order of the Special Magistrate, or assuming any jurisdiction to interfere with his proceedings under Section 491, a jurisdiction which Section 26 takes away. It is interfering only with the act of the executive authorities in detaining in custody as a convict a person who has not been convicted. The High Court, if it did not interfere in such a case upon a proper application, would be neglecting its duty of preserving the liberty of the subject against arbitrary or illegal acts of the executive authorities. Looking at the matter from another aspect, and using the language used in *Colonial Bank of Australasia v. Willan*[11] with reference to certiorari, the inferior Court, having acted, without jurisdiction, has not brought itself within the terms of the statute taking away the right. I am of opinion therefore that in. this case the application of the petitioner, Radha Krishna Prasad, should be allowed, and the rule should be made absolute, and under the provisions of Section 491(1), Clauses (b) and (e), Criminal P.C., I would direct that the petitioner must be forthwith set at liberty, or brought to trial according to law.

66. The next case, Criminal Revision No. 717 of 1942, argued by Mr. Awadhesh Nandan Sahay, is a peculiar one. It comes from the Hajipur Sub-division of the District of Muzaffarpur. On 22nd September 1942, the petitioners were convicted under Section 56(4) of the Defense of India Rules and sentenced to imprisonment for three years and to pay a fine of ₹ 50/- each, by Mr. M.K. Chatterji, signing himself "Sub-divisional Magistrate and Special Magistrate under Ordinance 2 of 1942."

67. The petitioners appealed to the Special Judge. The latter set aside the conviction, and sent back the case for retrial, after taking further evidence, as he held that the evidence adduced was quite insufficient to support the conviction.

68. Mr. Awadhesh Nandan Sahay points out that in the charge the trying Magistrate described himself as Sub-divisional Officer and at the examination of the accused as first class Magistrate, while in the decision he described himself in both capacities. He argued on this that they were really tried by Mr. Chatterji as Sub-divisional Officer. The sentence was one which he had as such no power to pass, nor had the Special Judge power to entertain the appeal and order a re-trial.

68. The case as presented before the Magistrate does seem to have been a very flimsy one, and whether the Special Judge was wise in directing a re-trial, and giving an opportunity for the prosecution to adduce fresh evidence may well be questioned. The question, however, is whether this Court has any jurisdiction to interfere. There can be no ground for interference with the order

of the Magistrate, for the conviction has been set aside. As for the order of the Special Judge, it is not contended that that was without jurisdiction. The petitioners themselves went to him in appeal. The Special Judge had been properly appointed under the Ordinance and empowered to hear such appeals. That being so, it appears to me that Section 26 operates as a complete bar to interference with his order by this Court. I would therefore reject this application, and discharge the rule.

69. The next ease, Criminal Revision No. 73 of 1943, is another Samastipur case. The petitioners were arrested on 6th October. On 28th October the case was transferred to Mr. Mohammad Usman, who began the trial the same day and who eventually as Special Magistrate convicted the petitioners under the Defense of India Rules on 17th December.

70. The argument regarding transfer was put forward. I have already given my reasons for rejecting this argument. Mr. Manuk argues that the Sub-divisional Officer under Section 192 could not transfer a case to a Special Magistrate, because the latter is not subordinate to him. The answer is that, having regard to the terms of Section 11(2) of the Ordinance, the Special Magistrate must for purposes of Section 192 be deemed to be a first class Magistrate. Under Section 17(2) of the Code every Magistrate exercising powers in the subdivision shall be subordinate to the Sub-divisional Magistrate.

71. A further point was made by Dr. J.N. Banerji. The petitioners were convicted for contravening the provisions of Rule 38, Defense of India Kules. The charge was that they had done a prejudicial act by doing the acts mentioned in (6)(e), (6)(k) and (6)(p) of Rule 34, Defense of India Rules, and thereby committed an offence punishable under Rule 38 read with Rule 34. It is pointed out that in the order under Section 10 of 4th October, reference was made only to Sub-rule (5) of Rule 38 read with Clauses (b), (d), (g), (k) of Clauses (5) and (6) of Rule 34. There was no reference to Rule 34(6)(e) or (p).

72. The answer is that Rule 34 (6) does not constitute any offence. It merely defines various classes of prejudicial acts. It is R. 38 that constitutes the offence, inter alia, the offence of doing a prejudicial act. The ques-tion is whether the Special Magistrate was ever authorised to try a person for doing prejudicial act under the provisions of B. 38. The answer is that he was, because the order authorised him to try offences punishable under Rule 38 read with such clauses as, amongst others, (6)(k) of Rule 34, and (6)(k) was mentioned in connexion with Rules 34 and 38 in the charge against the petitioners. It is true that 6(e) and 6(p) were not men-tioned in the order, but the important thing is that Sub-rule (5) of Rule 38 was mentioned. Nothing further was needed. The reference to various clauses defining prejudicial acts was a mere superfluity, and was in any case merely illustrative. Even were it otherwise, reference to (k) in the charge would give the Special Magistrate jurisdiction, and interference by this Court would be prevented by Section 26 of the Ordinance. This application must therefore fail, and I Would discharge the rule.

73. The next two cases (Criminal Revisions Nos. 664 and 666 of 1942) were argued by Mr. Section C. Chakravarty. They are Samastipur cases. It is argued that cognizance was taken on 4th October the very day when the order under Section 10 was passed, but it has not been shown that it had been communicated. There is a short answer. The only order' passed on 4th October was "seen police report. Pat up tomorrow. N. Huda, S.D.O." Apart from the fact that I have already rejected Mr. Manuk's argument based upon the taking of cognizance before 4th October, there is

nothing in the order of 4th October to show that cognizance was taken that day. On the contrary, it is clear that on that day the Sub-divisional Officer did not apply his mind to the matter, and postponed consideration. There is nothing in these two cases. The applications must be rejected, and the rules discharged.

74. We next come to three more Samastipur cases (Criminal Revisions Nos. 655, 715 and 716). In No. 655 the petitioner, Gopi Kant Jha, was arrested on 6th September. The charge sheet was received on 21st September. On 28th September, the Sub-divisional Officer, Mr. Huda, took it to his own file and began the trial, and on 7th October he convicted the petitioner under Section 56(4), Defense of India Rules. If the order under Section 10, dated 31st August was a good order, there is no point at all in this case. But, as I have said, the majority view is that it is not so. There, fore, we are dependent on the order of 4th October. The point argued is that as the trial began before 4th October, Mr. Huda had no jurisdiction to try the case as a Special Magistrate. That may have been the position when he began the trial, but on 7th October when he convicted as a Special Magistrate Mr. Huda had unquestionably full jurisdiction to do so. It might possibly be said that he acted illegally in convicting in part at least upon evidence which he had not recorded as Special Magistrate. That, however, is not enough. As long as the conviction was made with full jurisdiction, Section 26 of the Ordinance comes into operation to bar interference by this Court, and the application must, therefore, fail. I would accordingly reject it, and discharge the rule.

75. In No. 715 the petitioner, Ram Bahadur Rai, was not received in custody until 18th October, after which Mr. Huda tried and convicted him. In No. 716 the petitioner, Deonarayan Chaudhury, was arrested on 7th October, and again Mr. Huda tried and convicted him as Special Magistrate. There is obviously no point in either of these cases. The rules must, therefore, be discharged, and the applications rejected.

76. The next case (Criminal Revision No. 701 of 1942) also a Samastipur case, was argued by Mr. D.L. Nandkoolyar. The petitioners were arrested on 26th September. On 27th September Mr. Huda took the case to his own file as Special Magistrate, and on 28th September he convicted the petitioners. Thus, the petitioners were convicted before 4th October. For the reasons already stated, it must be held that the trial and conviction by a Special Magistrate was in the circumstances without jurisdiction, and that this Court can and should interfere under Section 491 of the Code. I would accordingly make the rule absolute, allow the application, and direct under Section 491 that the petitioners must be forthwith released, or brought: to trial according to law.

77. The next case (criminal Revision No. 72 of, 1943) comes from the Bihar Sub-division of the Patna District. On 24th September a charge sheet was received against the petitioners, whereupon the Sub-divisional Officer passed an order: "To Second Officer for disposal as Special Magistrate." The latter tried, and on 2nd October convicted the petitioner under Section 395, Penal Code, and imposed sentences of six or four years' rigorous imprisonment. In this case there are two orders under Section 10, which must be considered. On 23rd August, before the charge sheet was received, Mr. Archer, the District Magistrate, had authorised all Special Magistrates in the district of Patna to try certain specified offences but the offence under Section 395 of the Code does not figure in the list. It is conceded, therefore, by the learned Advocate-General that this order could not confer jurisdiction upon the Special Magistrate to convict the petitioners in

the manner he did.

78. On 27th August, however, there was a second order in these terms:

> In exercise of the powers conferred on me by Notification No. 395-C(P), dated 22nd August 1942, I hereby direct that all offences not punishable under the Indian Penal Code with death and which in the event of their resulting in a conviction, a sentence of not more than seven years' rigorous imprisonment will meet the ends of justice, shall be tried by Special Magistrates. (2) Offences punishable under the Indian Penal Code with death or which in the event of their resulting in a conviction, a sentence of more than seven years' rigorous imprisonment will be necessary for the ends of justice, shall be referred to me by the Sub-divisional Officers for orders.

79. It is argued by Mr. N.C. Ghosh for the petitioners that this order was so defective that it could confer no jurisdiction upon the Special Magistrates. The order is certainly a very badly drafted one. Apart from anything else, it ignores the fact that in many cases it might be impossible for the Special Magistrate to decide whether a sentence of seven years' imprisonment would meet the ends of justice until he had heard all the evidence. In other words, the Special Magistrate might well have to try the case before he could decide whether or not he had jurisdiction to try it.

80. There is, however, an even more serious defect. The order makes the Special Magistrates themselves judges of their own jurisdiction. It leaves them to decide in each case whether they have jurisdiction to try it. This amounts to no less than a delegation to the Magistrates themselves of the power of passing the necessary order under Section 10. This, as I have already, indicated, the District Magistrate had no power to do. It must be held, therefore, that every Special Magistrate purporting to assume jurisdiction and try a case under this order really did so without any valid order under Section 10 by the District Magistrate. This being so, the conviction of the petitioners by the Special Magistrate was without jurisdiction. It is quite true that in this particular instance it was the Sub-divisional Officer who actually selected the case for trial by a Special Magistrate, and directed the Second Officer to try it as such. That, however, makes the position worse, not better. I would accordingly allow this application, make the rule absolute, and under Section 491 direct that the petitioners must forthwith be released, or brought to trial in accordance with law.

81. I now come to a batch of cases argued by Mr. M.N. Pal, namely, Criminal Revisions Nos. 670, 718, 752 and 802 of 1942 and 71 of 1943.

82. Mr. M.N. Pal has in the first instance argued and in support of his argument he has treated us to a most learned and painstaking discussion--that we should hold gene-rally that this Court has the power to issue writs of certiorari, and accordingly to call up the proceedings of Special Magistrates under the Ordinance to this Court for examination and, if necessary, for quashing. Interesting as it would be to follow Mr. M.N. Pal into a detailed examination of the question of certiorari, I consider I would not be justified in cumbering this judgment by doing so, because the position is actually very clear. There can, in my judgment, be no doubt that this Court has no power at all to issue any such writ. But if it has the power, then Section 26 of the Ordinance has certainly taken it away, except possibly in cases where this Court could more suitably act under Section 491 upon the ground of lack of jurisdiction.

83. Considerable light upon the question is thrown by the decision of the Privy Council in . I need hardly point out that under Section 212, Government of India Act, 1935, the law declared by the Privy Council is absolutely binding on this Court. When the Privy Council has spoken, it would be profitless to examine the question further. In the case just cited, speaking of certiorari, their Lordships say:

> It would seem that at any rate the three High Courts of Calcutta, Madras and Bombay possessed the power of issuing this writ. See Be the Justices of the Supreme Court of Judicature at Bombay (1829) 1 Kna 1, 49, 51, 55 and *Nundo Lal Bose v. Calcutta Corporation*[12] Whether any of the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question.

84. We may, therefore, take it that, though the Chartered High Courts have the power to issue the writ, it does not follow that that power has descended to any other High Court. Mr. Pal argues that the Patna High Court has inherited for this province all the powers of the Calcutta High Court. That proposition does not appeal to me to be correct. Clause 21 of the Charter of the Supreme Court of Judicature at Port William conferred expressly upon the old Supreme Court, inter alia, the power to award and issue writs of certiorari. The High Courts Act of 1861, 24 & 25 Vic. Cap. 104 continued that power in the Calcutta High Court though subject to the legislative power of the Governor-General of India in Council. Section 9 of that Act gave the High Courts thereunder established all such powers as might be granted by their Letters Patent, and moreover save as by the Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General of India in Council, it gave to the High Court to be established in each Presidency a power to exercise all jurisdiction whatsoever in any manner vested in any of the Courts in the same presidency at the time of the abolition of those Courts.

85. In this manner the power to issue the writ descended to the Calcutta High Court; but it was never similarly conferred upon the Patna High Court as successor of the Calcutta High Court. The Patna High Court, like other High Courts in India, is a creature of statute. We must not make the mistake of assuming that there is any common law power of certiorari as opposed to a statutory power. The powers of the Patna High Court are those conferred upon it by its Letters Patent, or by any subsequent legislation. I have examined the Letters Patent most carefully to ascertain if there is anything therein to support the argument that it inherited the power of certiorari from the Calcutta High Court. Mr. Pal sought to rely upon Clause 15 of the Letters Patent, but that merely conferred ordinary original criminal jurisdiction over all such persons as had formerly been subject to the similar jurisdiction of the Calcutta High Court, within the province of Bihar and Orissa. Certiorari is certainly no part of ordinary original criminal jurisdiction. Mr. Pal was unable to point to any other provision of the Letters Patent upon which he could rely in this regard.

86. Before the establishment of the Patna High Court, the Act of 1861 had been superseded by the Government of India Act, 1915. Section 106 of that Act specified what jurisdiction each High Court should have, and laid down in clear terms:

> The several High Courts shall have such jurisdiction and all such powers and authority over or in relation to the administration of justice as vested in them by Letters Patent, and subject to the provisions of any such Letters Patent all such jurisdiction, powers and

authority as vested in them respectively at the commencement of this Act.

87. That Section might preserve the power of certiorari for the High Courts then existing, but at the commencement of the Act of 1915 the Patna High Court did not exist, and no powers were vested in it. Therefore, there is no question of it receiving anything not conferred by the terms of its Letters Patent. I need not deal with Section 107, because if the power of superintendence thereby conferred included any power of judicial interference that is no longer the case since the enactment of Section 224, Government of India Act, 1935.

88. I have stated my own opinion, but actually we are bound by the authority of the Full Bench decision of five Judges of this Court in *Surajmull Brijlal v. Commissioner of Income Tax, Bihar and Orissa*[13] There, it is true, the Court was directly concerned with another prerogative right, that of mandamus; but the question was examined with regard to the prerogative writs including certiorari. At p. 229 occurs the following passage in the judgment of Fazl Ali J. (now my Lord the Chief Justice):

> It is, however, clear from Clause 9, Letters Patent of ' the Patna High Court that on 1st March 1916, whatever jurisdiction the Calcutta High Court had over these tracts ceased. The question, therefore, which is to be considered now, is whether thereis anything in the Letters Patent of the Patna High Court to indicate that this High Court was also invested with the power of issuing prerogative writs in the same way as the Calcutta High Court had the power. Mr. Bose frankly concedes that beyond the recitals which precede the operative portion of the Letters Patent, there is nothing to show that the Patna High Court was invested with the powers which were formerly possessed by the Calcutta High Court. In my opinion, these recitals are no more than mere historical allusions to certain provisions of the High Courts Act of 1861 which was enacted just before the establishment of the High Court of Calcutta, and of the two successive Letters Patent under which the Calcutta High Court was established and its powers defined. In fact in the recitals there is not merely a reference to the Calcutta High Court but also a reference to the establishment of the High Court at Allahabad in the year 1866 and this is quite enough to show that the allusions were merely historical. Besides the Letters Patent of the Patna High Court clearly define the civil, criminal, admiralty, testamentary, matrimonial and other jurisdictions of the High Court and if it was intended that the Patna High Court should possess the power of issuing prerogative writs similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras, there seems to be no reason why this could not have been provided by an express clause to that effect.

89. Thus, there is clearly no power to issue the writ. But assuming that there is power, Section 26 of the Ordinance has unquestionably taken it away. Mr. Pal argues that Section 26 was meant merely to refer to Courts other than the High Court, but the reference therein to Section 491, a power exclusively enjoyed by the High Courts, is conclusive against him on this point.

90. Next, however, Mr. Pal relies upon the well-known principle established in relation to the issue of the writ by King's Bench, that the power could be taken away by express negative words alone:

> Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior Court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court. (Halsbury's Laws of England, Edn. 2, Vol. 9, para. 1455, p. 861).

91. Certainly as regards certiorari there are no express words in Section 26. There is no reference to certiorari. But here the decision of the Privy Council in Annie Besant's case A.I.R. 1919 P.C. 31, to which I have already referred, is conclusive.

Their Lordships say (pp. 190-191):

> But assuming that the power to issue the writ remains, and that it might be exercised notwithstanding the existence of procedure by way of revision, Section 22 (of the Indian Press Act, 1 of 1910) has still to be considered. By that section 'Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done, or in good faith intended to be done, under this Act.' It was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away-by the section, the right to it remained, notwithstanding the very express, but still general words, used.
>
> However that might be according to English law where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act....
>
> Even were it to be said that the order was of that quasi judicial kind to which certiorari has sometimes been applied in England or in India, the Press Act may quite reasonably have intended to take it away, and there is no reason why full effect should not be given to its language.

92. Upon this reasoning full effect must equally be given to the words of Section 26 of the Ordinance, which are perfectly clear and definite and include the words: "no Court shall...have any jurisdiction of any kind in respect of any proceedings of any such Court." Mr. Pal has not challenged the competence of the Indian Legislature to enact a provision like this. He could not well do so having regard to the decision of the Full Bench of this Court, which is binding upon us, in the case of *Sheonandan Prasad Singh v. King-Emperor*[14]

93. Lastly, however, Mr. Pal relies upon *Colonial Bank of Australasia v. Willan*[15] as paraphrased in Halsbury, volume already cited, page 862, para. 1458:

> Although certiorari is taken away, it may be granted, even on the application of the

defendant, where the inferior Court has acted without or in ?excess of jurisdiction; for in such a case the Court has not brought itself within the terms of the statute taking away certiorari.

94. This is the principle upon which I have already relied in holding that this Court can interfere under Section 491 in proper cases. It is enough to say that wherever this principle can be applied at all it can be applied to invoke Section 491. Section 491 gives a complete and more suitable remedy in such eases. Even assuming, therefore, though not agreeing, that we have the power of certiorari, and we could use it where there is no jurisdiction in the Court below, despite its being taken away, there could never arise any occasion for its use.

95. I now come to the details of Mr. Pal's cases. In Criminal Revision No. 71 two boys were convicted on 16th September by the Special Magistrate, Dinapore, for an offence under Section 412, Penal Code, and sentenced to 16 months' rigorous imprisonment each. Section 412 is not included in Mr. Archer's order under Section 10, dated 23rd August. I have already held that the second 'order of 27th August was a bad order. Therefore, the trial was without jurisdiction. I would allow the application, make the rule absolute, and direct under Section 491 that the petitioners must be forthwith released, or retried in accordance with law.

96. In Criminal Uevision No. 670, a Samastipur case, the trial began before Mr. Huda on 25th September, and concluded on 5th October. Even if Mr. Huda had no jurisdiction on 25th September to begin the trial as Special Magistrate he had full jurisdiction to convict on 5th October when he did so. For the reasons already given in connexion with another case it must, therefore, be held that this Court cannot interfere. The application must be rejected, and the rule discharged.

97. In criminal Revisions Nos. 718, 752 and 802 there was no special point which Mr. Pal could argue as invoking the jurisdiction of this Court under Section 491. These applications also must, therefore, fail.

98. It remains only to consider two cases (Criminal Revisions Nos. 707 and 753 of 1942) argued by Mrs. Dharmashila Lall. They are Samastipur cases tried by Mr. Huda as Special Magistrate. In one case he convicted on 10th September, in the other on 16th September. In both cases everything was concluded before 4th October. Having regard to the view of the majority of this Full Bench with regard to the order of 31st August it must be held that the trial was without jurisdiction. I would, therefore, allow both these applications, make the rules absolute, and direct under Section 491 of the Code that the petitioners must be forthwith released, or brought to trial in accordance with law.

For convenience of reference I now summarise the decision of the Court.

Out of the 23 applications before us the following are successful:

99. Numbers 669, 701, 707, 753 of 1942, 71, 72 of 1943, while the remainder, namely the following, fail: of 1942 Nos. 654, 655, 662, 663, 664, 666, 670, 715, 716, 717, 718, 752, 770, 785, 786, 802; of 1943 No. 73.

Fazl Ali C.J.

100. These are a number of applications arising out of convictions by Special Magistrates constituted under Ordinance 2 of 1942. Owing to the number of such applications that are coming before the Court and the fact that many points keep arising over and over again, I thought it desirable that there should be, so far as this Court is concerned, an authoritative decision once and for all upon the important points common to many such applications. I have, therefore, constituted this Special Bench. The applications though argued by various lawyers, have been heard continuously. As I have already indicated, the same points are common to many of them, and it is, therefore, in my opinion, the most convenient course to deal with all of them in the same judgment. Owing to the fact that this must inevitably involve a somewhat lengthy order and the fact that so much has already been said about this Ordinance and the points arising in connexion with it, in various Indian High Courts, I desire to be as brief as possible consistently with dealing adequately with the principal points which have been urged.

101. I take first a batch of cases, Criminal Revisions Nos. 654, 662, 663 and 770 of 1942, which all arise out of the same decision of Mr. N. Huda, Special Magistrate, who is also Sub-divisional Officer of Samastipur in the Darbhanga district. The petitioners in these cases have been convicted for having committed an offence under Rule 56(4) of the Defense of India Rules and sentenced to undergo rigorous imprisonment for two years and to pay a fine of ₹ 500/- each. They preferred an appeal before the Special Judge of Darbhanga, but the learned Judge held that the appeal was not maintainable. They have now applied to this Court in revision and they also pray in the alternative for an order directing their release under Section 491, Criminal P.C., on the ground that their trial by the Special Magistrate was without jurisdiction and their detention in prison is illegal and unwarranted by law. These petitioners were sent up cm 3rd September 1942 under police custody by the Sub-Inspector of Rossera, a police station within the jurisdiction of the Sub-divisional Officer of Samastipur in the district of Darbhanga with a report to the following effect:

> I have the honour to forward herewith in custody the following accused persons who have been arrested under Defense of India Bules Under Section 132.
>
> I pray they may be remanded to hajat until 17th September 1942 by which date report for their prosecution will be submitted.
>
> * * * *

102. The Magistrate remanded the petitioners to hajat on that day and passed no further orders. On 17th September 1942, however, he recorded the following order:

> Police report not received. Takid and put up on 25th September 1942. Ask the I/O to produce P.Ws. on 25th September 1942 and issue production warrant for the aocused for the date fixed.
>
> The police report was not received until 5th October 1942 and in the meantime the Magistrate passed orders on 28th September and 3rd October 1942 which are almost in the same terms as his order of 17th September 1942. On 5th October after the police report was received he noted in the order-sheet that the case was ready and then

> proceeded to try it and after examining some prosecution witnesses he framed a charge against the petitioners. On 6th October he examined the petitioners and also recorded the statements of certain defense witnesses and on 7th October he delivered his judgment convicting and sentencing the petitioners as aforesaid.

103. On these facts two principal points are urged by Mr. Manuk, Counsel for the petitioners: (1) that the Special Courts constituted under ordinance 2 of 1942 had no jurisdiction to try offences committed under the Defense of India Rules, inasmuch as the Defense of India Act which is still in force is a self-contained Act containing its own provisions as to the constitution of the Courts by which the offences under that Act are to be tried. It is contended that inasmuch as it is not expressly stated in the Ordinance that the tribunals specifically provided for in the Defense of India Act have been abrogated, the mere fact that the District Magistrate of Darbhanga has issued an order under Section 10 of the Ordinance directing certain offences under the Defense of India Rules to be tried by Special Magistrates is not sufficient to give jurisdiction to such Magistrates to try those offences. (2) That inasmuch as the District Magistrate of Darbhanga did not issue an order under Section 10 of the Ordinance until 4th October 1942, the Ordinance cannot, properly speaking be said to have been brought into force in that district until that date. The proceedings against the petitioners in these cases, however, commenced long before that date and inasmuch as the Ordinance is not retrospective, the petitioners cannot according to the rule laid down by the Full Bench of this Court in A.I.R. 1943 Pat. 24 and A.I.R. 1943 Pat. 18 be deprived of the right of appeal which accrued to them by reason of the commencement of the proceedings against them before the Special Magistrate who had tried them acquired jurisdiction to hold the trial by virtue of an order properly made under Section 10 of the Ordinance. In order to understand the first point it is necessary to refer to some of the provisions of the Defense of India Act. chapter ill of the Act deals with "Special Tribunal" and Section 8 which is one of the Sections under that Chapter provides that:

> The Provincial Government may for the whole or any part of the Province constitute Special Tribunal which shall consist of three members appointed by the Provincial Government.

104. Sub-section (2) of this Section provides that no person shall be appointed as member of the Special Tribunal, unless he is qualified for appointment as a Judge of the High Court or has for a total period of not less than three years exercised, whether continuously or not, the powers of a Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, District Magistrate or Additional District Magistrate. Sub-section (3) makes some further provisions as to the qualification of the members of the tribunal and Section 9 provides that the Provincial Government may by general or special order direct that the Special Tribunal shall try any offence under any rule made under Section 2 of the Act as well as other offences of a particular description. Sections 10 to 13 are provisions as to the procedure to be followed by the Special Tribunal and the powers to be exercised by it. Section u which is the first Section in chap, IV states that save as otherwise expressly provided by or under this Act the ordinary criminal and civil Courts shall continue to exercise jurisdiction. In pressing his contention, Mr. Manuk lays special stress on the fact that the only qualification which the Ordinance requires a Special Magistrate to possess is that he should have exercised the powers of a First Class Magistrate for at least two years which falls far short of the qualifications of the

member of the Special Tribunal as set out in Section 8(2), Defense of India Act.

105. It is to be noted that Section 8 of the Defense of India Act is not mandatory, but merely enables the Provincial Government to constitute a Special Tribunal composed of persons possessing the qualifications set out in Sub-clause (2). The use of the word "may" in this Section as well as in Section 9 clearly shows that it is for the Provincial Government to decide whether a Special Tribunal should be constituted and whether any general or special order should be passed directing it to try the offences mentioned in Section 9. That the word "may" cannot be read as meaning "must" is clear from Section 14 which provides that in the absence of the Special Tribunal the ordinary criminal and civil Courts shall continue to exercise jurisdiction. Besides, the fact remains that no Special Tribunal has been created by the Provincial Government of Bihar and there was none in existence at the date when the Ordinance came into force in the province. At the time when the Ordinance came into force the ordinary criminal Courts were exercising jurisdiction over all cases including those under the Defense of India Rules and a reference to certain provisions of the Ordinance will show that what was intended was to substitute special Courts in place of the ordinary Courts and the choice of offences to be tried by the Special Courts was left entirely to the Provincial Government or such Crown. Officer as was chosen by the Provincial Government to act on their behalf in the matter.

106. The Ordinance recites that an emergency having arisen, it was necessary to provide for the setting up of Special Criminal Courts. By Section 3 Courts of criminal jurisdiction were constituted as follows: (1) Special Judges, (2) Special Magistrates and (3) Summary Courts. Then follow specific provisions dealing with the qualifications of the Special Judges and Special Magistrates, their appointment by the Provincial Government and the powers which they were to exercise and the procedure to be followed by them in trying offences which were made triable by them. Section 5 provides that a Special Judge shall try such offences or classes of offences, or such cases-or classes of cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing direct. Section 10 makes similar provisions as regards the jurisdiction of the Special Magistrates. Both Sections 5 and 10 are couched in very general terms and there is nothing in either of these Sections to justify the view that the offences under the Defense of India Rules were intended to be placed outside the jurisdiction of the Special Criminal Courts to be constituted under the Ordinance. These offences were triable by the ordinary criminal Courts on the date when the Ordinance came into force and as the Ordinance imposes no limits upon the power to be exercised by the Provincial Government or its delegates under Section 10, I do not see how they can be held to be debarred from including the offences under the Defense of India Rules in the order issued under that section. The force of Mr. Manuk's argument lies in the emphasis which is laid therein upon the anomaly of a trial by a Special Magistrate of offences for the trial of which the Defense of India Act contemplates the constitution of a Special Tribunal of three highly qualified persons, but that is merely an argument directed against the policy of the new law which is a question with which we are not primarily concerned. What we are concerned with is the construction of the Ordinance which in my opinion does not give rise to any difficulty whatsoever. There is nothing in the Defense of India Act to suggest that the ordinary Courts which could try the offences under that Act as well as other offences could not be replaced by other Courts if the legislative authority considered it necessary to do so. I think that it will be wrong to suggest that the Defense of India Act should control the Ordinance though the Ordinance came long after it and was passed under quite different circumstances. This last point

is directly covered by the observations made by Derbyshire C.J., in AIR 1943 Calcutta 224 in rejecting an argument which though slightly different in form from that advanced by Mr. Manuk before us was also in substance directed against the competence of the Courts created under the Ordinance to try offences under the Defense of India Act. The learned Chief Justice observed as follows:

> Apart from matters of strict legal construction, it is clear to me that Ordinance 2 of 1942 was passed to meet a situation vastly different from and never contemplated in 1939 when the Defense of India Act was passed. Tinder those circumstances, in my view, it is impossible to say that Section 14, Defense of India Act, controls in any way Ordinance 2 of 1942 which, as far as it goes, is of equal authority and arose from circumstances' quite different from those of 1939. In my opinion the making of Ordinance 2 of 1942 was within the legislative competence of the Governor-General and the contention of ultra vires must fail.

107. Thus I am unable to hold that the Special Magistrates appointed under the Ordinance had no jurisdiction to try offences under the Defense of India Rules. I will now deal with Mr. Manuk's second contention which is sought to be supported with reference to the Full Bench decisions in A.I.R. 1943 Pat. 24 and A.I.R. 1943 Pat. 18. In these cases it was held that the Ordinance cannot be given retrospective operation and is not applicable to those cases in which legal proceedings against the accused had started before it came into force. A perusal of the judgment delivered in A.I.R. 1943 Pat. 18 will show that the view expressed there was based mainly upon *Colonial Sugar Refining Co. v. Irving*[16] and *Sadar Ali v. Dalimuddin*[17], The point which has been emphasised in these two cases is that though a new Act which relates merely to a matter of procedure will generally operate retrospectively, yet an Act which touches a right in existence at the passing of the Act cannot affect that right, unless it is made retrospective in operation either expressly or by necessary intendment. In both these cases it was held that a right of appeal is one of the rights which cannot be affected by new legislation unless expressly taken away and this right of appeal accrues at the date of the suit, even though the filing of the appeal might on that date have been in the nature of a mere remote contingency. A question then arose as to when the right of appeal is acquired by an accused person and it was pointed out in A.I.R. 1943 Pat. 18 that that right must be conceded to him at the date when the criminal proceedings are instituted against him. The final conclusion which was arrived at after an examination of the varij ous provisions of the Code of Criminal Procedure was expressed in these terms:

> There can be no doubt that where a Magistrate takes cognizance of an offence upon complaint the proceeding before him is commenced as soon as the process is issued. Similarly, when the cognizance is taken upon a charge-sheet, the proceeding must be deemed to commence as soon as the Magistrate makes up his mind to act upon the charge-sheet.... There can be no doubt therefore that either the summoning of the accused person or any other step which is equivalent to it must be held to mark the initiation of the criminal proceedings against him and as these steps follow automatically, after a Magistrate has taken cognizance of a particular offence, it may be safely laid down that there is a criminal case against the accused person as soon as a Magistrate has taken cognizance.

108. Now, as the passage which has been underlined (here in italics) has been misunderstood in some cases on account of the use of the word "cognizance" it is necessary to state once more when criminal proceedings in Court can be properly said to commence. So far as civil proceedings are concerned the question as to when they begin cannot present any difficulty; they cannot begin earlier than the institution of the suit. The question however, does not admit of such a simple answer in criminal eases. In this country the criminal law is in the majority of cases set in motion in one of two ways, namely either by laying an information before the police under Section 154, Criminal P.C., relating to the commission of a cognizable offence or by a direct complaint to the Magistrate. Section 190, Clause (c), Criminal P.C., refers to a third alternative according to which a proceeding in prosecution may be started by a Magistrate upon information received from any person other than the police officer or from his knowledge or suspicion that an offence has been committed but comparatively speaking such cases are not frequent. Now the real difficulty arises in those cases which begin with an information to the police, because it is sometimes argued that the true analogy of the commencement of a civil suit is to be found in the commencement of an investigation by the police beginning with the first information. This argument seems to have been raised before this Court in A.I.R. 1943 Pat. 24 but it was negatived as will appear from the following observations:

> From the dates to which reference has been made it is clear that no legal proceeding had started against the petitioners before the Ordinance came into operation and until any specific legal proceeding was started it could not be said definitely that the petitioners would have any right of appeal or otherwise.
>
> All that had happened was that the police had received certain information against the petitioners and had started an investigation. It is obvious that until the police investigation was completed and a charge-sheet was submitted against the petitioners it was premature to say whether the petitioners would be placed on trial or whether the police would send up the final report stating that the case against the petitioners had not been made out. The question of procedure or the right of appeal could have arisen only after the submission of a charge-sheet and after the accused had been placed on trial. Until then it could not be said whether the accused would be tried by a Magistrate holding first class powers or second class powers or whether they were to be tried by a Magistrate empowered to try summary cases, or by a Court of Session or they would be tried at all.

109. Again in A.I.R. 1943 Pat. 18 it was stated that:

> When cognizance is taken upon a charge-sheet the proceeding must be deemed to commence as soon as the Magistrate makes up his mind to act upon the charge-sheet. In such cases if the accused person has appeared before the police, he is sent up for trial and if he has not appeared before the police, a prayer is usually made by the police for warrant or some other process. In the former case the Magistrate has to pass some order as to bail or otherwise and in the latter case he generally issues a warrant and sometimes has to issue process under Sections 87 and 88, Criminal P.C. These steps in my opinion-definitely mark the beginning of the criminal proceeding against the accused.

110. This Bench is bound by the decisions pronounced in both the cases and in view of the observations quoted above, there cannot, in my opinion, be any difficulty in deciding as to when a legal proceeding commences when a case is brought; to a Magistrate upon a charge sheet. Again the observation made in A.I.R. 1943 Pat. 18 in regard to cases where the Magistrate takes cognizance of an offence upon complaint is as follows:

> There can be no doubt that where a Magistrate takes cognizance of an offence upon complaint the proceeding before him is commenced as soon as the process is issued.

111. This view is fully in consonance with the scheme of the Code of Criminal Procedure, because Section 204 of the Code which enables the Magistrate who takes cognizance of an offence to issue summons or warrant against the accused is the first Section in Chap. 17 which deals with the "commencement of proceedings before Magistrates." These words, in my opinion, are very important, because they show when and how according to the authors of the Code of Criminal Procedure legal proceedings before Magistrates should be deemed to commence. Section 204 is quite general and may apply to all cases irrespective of whether the cognizance is taken under Clauses (a)(b) or (c) of Section 190. In those cases where a charge sheet is submitted by the police, Section 170 of the Code provides that if upon investigation it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report, etc. etc.

112. In the majority of cases therefore an accused person is sent by the police under custody when a charge-sheet is submitted and therefore it becomes unnecessary to issue a process under Section 204 to procure the attendance of the accused. In those cases, however, where one or more of the accused persons are found to be absconding, there is nothing to prevent the Magistrate from issuing a summons or warrant to secure his or their attendance. Thus, a proceeding must be deemed to commence when either a process is issued or the accused being present in Court for trial he can be proceeded against forthwith. This view is, I think, supported to some extent by the decision of Jenkins C.J. in (11) 38 Cal. 880 wherein he cites with approval the following observation of Cotton L.J. in (1885) 14 Q.B.D. 648 which was also cited by me in A.I.R. 1943 Pat. 18. "How can it be said that the prosecution commenced before a person is summoned to answer the complaint?" The case in which Jenkins C.J. expressed this view appears to have been relied on before the Privy Council in 571. A. h ill1 and their Lordships referring to that case observed as follows:

> It may quite well be that a prosecution only commences after a summons is issued, and that before that stage is reached a complainant cannot be said to have dropped a prosecution under the Code: (11) 38 Cal. 880.

113. The observations in A.I.R. 1943 Pat. 18 which are said to have caused some difficulty run as follows:

> It may be safely laid down that a criminal case commences against a person as soon as a Magistrate has taken cognizance.

114. It must be remembered that this observation was intended merely to provide a rough and

ready test and it is obvious that the test can be correctly applied only if the words quoted above are not torn or severed from their context. The entire passage where those words occur runs as follows:

> There can be no doubt therefore that either the summoning of the accused person or any other step which is equivalent to it must be held to mark the initiation of the criminal proceedings against him and as these steps follow automatically after a Magistrate has taken cognizance of a particular offence, it may be safely laid down that there is a criminal case against the accused person, as soon as a Magistrate has taken cognizance.

115. Obviously, the underlined (here italicized) words in this passage refer only to those cases where the Magistrate having taken cognizance of an offence decides to proceed against the accused either by summoning him or taking such step as is equivalent to the issuing of summons. It is true that there may be some difficulty in applying the remark to those cases where the Magistrate takes some intermediate step between taking cognizance and the summoning of the accused or when the accused is not summoned at all. Section 200 of the Code provides that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath. Section 202 provides that a Magistrate on receipt of a complaint may postpone the issue of process, and either enquire into the case himself or direct any enquiry by another officer for the purpose of ascertaining the truth or falsity of the complaint. Section 208 provides that the Magistrate may dismiss the complaint if after considering the statement on oath of the complainant and the result of the investigation or enquiry, if any, under Section 202, there is in his judgment no sufficient ground for proceeding. It is clear that the action taken by the Magistrate under Sections 202 and 203 follows upon his taking cognizance and a question of some nicety arises as to whether when the Magistrate has decided to hold an enquiry under Section 202, legal proceedings against the accused can be said to have commenced. Now, if the action taken by the Magistrate under Section 204 marks the commencement of the proceedings, then strictly speaking there are no proceedings against the accused until such action is taken. But in my opinion after making due allowances for a special group of cases the statement that there is a criminal case against the accused as soon as the Magistrate has taken cognizance may be found to be a useful test in a large majority of eases. It is to be noted that Section 190 occurs in part B of chap. 15 which is headed "conditions requisite for initiation of proceedings." Section 190 is not the only Section in this part, but there are other Sections, viz., 195, 196, 196A, 196B, 197, 198 and 199 which state that a Court can take cognizance of certain offences only upon a complaint made by certain specified persons. The heading of Part B which is "condition requisite for initiation of proceedings" shows that there is an intimate connexion between cognizance and initiation of proceedings and the importance of the cognizance test has therefore been emphasised in the decisions of other Courts also. *Salig Ram v. Emperor*[18], which is the latest pronouncement of the Allahabad High Court on the subject Iqbal Ahmad C.J. after referring to sub-heading B in chap. 15, Criminal P.C., and the provisions of Section 190 of the Code observes as follows:

> It is clear that a judicial proceeding begins before a Magistrate only after he has taken cognizance of an offence and such judicial proceeding must in my opinion be regarded by the law in force at the time that the proceeding was initiated.

116. Again in *Sitao Jholla Dhimar v. Emperor*[19] Grille C.J. after referring to *The King v. Timothy Patrick O'Connor*[20] observed as follows:

> Where the learned Counsel for the applicants is in error is in claiming this as an authority for the proposition that as in England so in India proceedings begin in criminal matters with the first information report made to the police. The case in fact supports the contention of the Crown that they do not begin until a Magistrate has taken cognizance of the proceedings. The information mentioned in *The King v. Timothy Patrick O'Connor*[21] is an information laid before a Magistrate or a Justice of the Peace and on such information a summons or a warrant is issued. That is analogous to the procedure laid dowd in Section 190, Criminal P.C.... Any activity on the part of the police previous to cognizance being taken by a Magistrate or a Justice of the Peace is completely out of the picture....
>
> On the analogy of *The King v. Timothy Patrick O'Connor (1913) 1 K.B. 557(Supra)* it may be conceded that judicial proceedings in a criminal case may be said to begin when cognizance is taken of the case by a Court but it cannot refer back to a time before cognizance is taken either directly on a complaint received or upon the report of a police officer.

117. Similarly Digby J., with whom Grille C.J. agreed, observed:

> I do not consider that it is correct to apply the ruling relating to 'proceedings' in Court dating from the time when an action is brought in Court, to proceedings in prosecution when a Court has not taken cognizance of the case under Section 190(b), Criminal P.C. No doubt the police send a police report under Section 157, Criminal P.C., at once to a Magistrate empowered to take cognizance, obtain a remand order from the nearest Magistrate under Section 167, Criminal P.C., and may take a person before a Magistrate having jurisdiction in the case under Section 60 on arrest, but the time which I think is really material for accrual of right as to the mode of trial is when the investigation is made and the challan produced in Court under Section 170, Criminal P.C., and I do not think it is necessary to enter into a discussion of case law as to the point of time when cognizanoe has been held to be taken in particular cases.

118. Again in *Emperor v. Sajiwan Mahton*[22] Rowland J. referring to Section 167, Criminal P.C., observed as follows:

> The Section itself shows that production under this Section need not be before a Magistrate having jurisdiction to try the case and all that can be done under the Section is to authorise detention of the accused. This does not amount to taking cognizance of a case or, in my opinion, to the institution of judicial proceedings.

119. In all these cases "taking cognizance" has been described as the step which marks the initiation of criminal proceedings, but strictly speaking cognizance is merely a condition requisite

for the initiation of such proceedings and they actually commence when the Magistrate after taking cognizance issues summons against the accused person, or, if he is in attendance, passes some order or takes some step signifying that there is a criminal case against him which requires to be heard and determined according to law. The Ordinance was brought into force in this Province on 21st August 1942 and whatever proceedings were taken against the petitioners were taken after that date. These cases therefore do not fall within the rule laid down in A.I.R. 1943 Pat. 18 wherein it was held that if the judicial proceedings against the accused had commenced before the date of the Ordinance, the Ordinance could not affect such rights of appeal or revision as the accused had at the date of the commencement of those proceedings. But it is contended that though the proceedings commenced after the Ordinance was declared to be in force in the province, yet the rule laid down in A.I.R. 1943 Pat. 18 will apply in principle, because the Ordinance was not operative in Darbhanga so far as the Special Magistrates were concerned in the absence of a proper order by the District Magistrate under Section 10 of the Ordinance. It is urged 4hat the District Magistrate did not issue a proper order under that Section until 4th October 1942, but before this order was made proceedings had commenced against the petitioners and an order had been made by the Sub-divisional Officer on 17th September 1942 directing the Sub-Inspector to produce a the prosecution witnesses and the accused on 25th September 1942.

120. The argument put forward on behalf of the petitioners is based on two assumptions, firstly, that legal proceedings against them had commenced at least on 17th September 1942 and secondly, that no order under Section 10 of the Ordinance was made by the District Magistrate prior to 4th October 1942. It is contended on behalf of the Crown that both these assumptions are incorrect. It is said in the first place that the legal proceedings against the accused did not commence until 5th October 1942 and that secondly, that the District Magistrate of Darbhanga had issued an order under Section 10 as early as Slat August 1942. The order of 31st August 1942 is a very peculiar one and it will have to be discussed later in connexion with certain other cases; but assuming for the purpose of the present cases that it was not meant to be an order under Section 10, it seems to me even then that these petitions must fail on the ground that the legal proceedings against the accused did not commence until 5th October 1942, that is to say until after the date on which the District Magistrate had passed an order which was undoubtedly an order under Section 10.

121. As already noticed, on 3rd September 1942 when the petitioners were sent up under custody to the Sub-divisional Officer by the Sub-Inspector of Rossera, all that the Sub-Inspector stated in his report of that date was that these persons would be prosecuted. There was no statement as to the circumstances under which the alleged offence had been committed or the actual acts done by the accused persons. It is clear that on such report the Magistrate could not take cognizance of the offence and he could not take any step against the accused until a complete police report was received. That being so, on 17th September 1942 as well as on several subsequent dates he urged the police to send the report. The learned Counsel for the petitioners lays great emphasis on the. fact that in several order sheets it is noted that the police officer should be asked to produce the prosecution witnesses and the accused also on the dates fixed. On 17th September 1942 the Magistrate also noted in the order sheet, "Issue production warrant for the accused for the date fixed." But it is clear that these orders were passed merely to prevent the trial being unduly delayed and to ensure that the witnesses, if any, as well as the accused might be in attendance on the date on which the final police report was received so that, if necessary, the trial may be

proceeded with forthwith. Ultimately on 3rd October the police submitted a report to the following effect:

> I have the honour to submit that the following accused persons committed an offence under Section 56, Defense of India Rules. They took prominent part in holding public meetings and congress processions on 14th to 18th August 1942, they shouted Congress slogans. I therefore pray that they may be prosecuted under Section 56, Defense of India Rules.

122. This report sets out the nature of the offence committed by the accused and prays that they might be prosecuted under Section 56, Defense of India Rules. If the Magistrate had already taken cognizance of the case and instituted proceedings against the accused it was not necessary for the police to pray that they might be prosecuted. There can be no doubt that the report on which the Magistrate took cognizanco was that of 3rd October and the proceedings did not commence until 5th October 1942. The Special Magistrate had therefore complete jurisdiction to try these cases because in any event the legal proceedings before him commenced after a proper order had beon made by the District Magistrate under Section 10.

123. Mr. Chakravarty, who appeared as the junior Counsel, in some of these Cases, also argued that the Ordinance is ultra vires. Section 72 of Schedule 9, Government of India Act, under which the Ordinance has been made and promulgated by the Governor-General runs as follows:

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

124. Mr. Chakravarty lays stress on the words which have been italicized and contends that the power of the Governor. General to issue an Ordinance is subject to the restriction which has been imposed on the legislative power of the Federal Legislature by Section 100, Sub-clause (3) which provides that subject to the two preceding sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a province or any part thereof with respect to any of the matters enumerated in List 2 in the said schedule (hereinafter called the 'Provincial Legislative List').

> List 1 of Schedule 7 is called the Federal Legislative List and Section 100, Sub-section (1) provides that Federal Legislature has and the Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in this List. Item 53 of this List is "Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List." List 2 is the Provincial Legislative List to which reference is made in Sub-section (8) of Section 100 and items 1 and 2 of this List are as follows:

Item 1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organisation of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention.

Item 2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; Procedure in Bent and Revenue Courts.

List 3 is the Concurrent Legislative List referred to in Sub-section (2) of Section 100 which reads. as follows:

Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said schedule (hereafter called the Concurrent Legislative List).

Items 1, 2 and 15 of this List are as follows:

Item 1. Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with, respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

Item 2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.Item 15. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List.

125. It is contended by Mr. Chakravarty that the constitution of new Courts within a province falls exclusively within item 1 of the h Provincial Legislative List which includes among other matters constitution and organisation of all Courts except the Federal Courts; arid therefore assuming that the Governor-General had all the powers of the Federal or the Indian Legislature he could not legislate or make an Ordinance in respect of any matter which falls exclusively within the Provincial Legislative List. It is further pointed out that item 53 of the Federal Legislative List and item 15 of the Concurrent Legislative List which deal with, the jurisdiction and power of all Courts except the Federal Court have a limited scope on account of the qualifying words "with respect to any of the matters in this List." Thus, it is contended that the Federal Legislature or any legislative authority having the same power as the Federal Legislature have no jurisdiction to constitute or organise Special Courts for dealing with offences within the provinces and if they do so, it will be an encroachment on an occupied field. To meet this argument, the learned Advocate-General has adopted in the first instance the view expressed by Iqbal Ahmad C.J. in *Salig Ram v. Emperor, AIR 1943 Allahabad 26 : 1942 AWR (H.C.) 11 392(supra)* which is to the effect that the constitution of new Courts is a matter which is included in item 2 of the Concurrent Legislative List. That item, as I have already said, is criminal procedure including all matter included in the Code at the date of the passing of this Act. It is pointed out that part II of the Code deals with "constitution and powers of criminal Courts" and

this subject is comprehensive enough to include the constitution of Special Courts. In my opinion it is unnecessary to pursue the question as to whether the constitution of Special Courts falls within the Concurrent List, because the point raised by Mr. Chakravarty can be conclusively met by referring to Section 102, Constitution Act. That Section provides:

> (1) Notwithstanding anything in the preceding Sections of this Chapter, the Federal Legislature shall if the Governor-General has in his discretion declared by proclamation (in this Act referred to as a "Proclamation of Emergency") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List: Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction, unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency....
>
> (3) A proclamation of emergency.... (b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

126. It appears that the proclamation of emergency which has been referred to in this Section was duly made by the Governor-General, on 3rd September 1939, and that proclamation was placed before and approved by both the Houses of Parliament in February 1940 (see Hansard, House of Lords Debates, 1939-40, at p. 459 and the House of Commons Debates, 1939-40, at p. 1079). Thus the requirements of Sub-section (3), Clause (b) of Section 102 that a proclamation of emergency shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament has been fully satisfied. Now Section 816 which occurs in Part 13 containing transitional provisions, that is to say, the provisions with respect to the period elapsing between the establishment of provincial autonomy and the establishment of the federation, runs as follows:

> The powers conferred by the provisions of this Act for the time being in force on the Federal Legislature shall be exercised by the Indian Legislature and accordingly reference in those provisions to the Federal Legislature and Federal Laws-shall be construed as references to the Indian Legislature and laws of the Indian Legislature, and references in those provisions to Federal taxes shall be construed as references to taxes imposed by laws of the Indian Legislature.

127. It follows therefore that during the transitional period the words "Federal Legislature" which occur in Section 102 must be read as meaning the Indian Legislature and Section 72 (of Schedule 9) which provides that an emergency ordinance promulgated by the Governor-General shall have the like force of law as an Act passed by the Indian Legislature is to be read along with this provision. Reference may also be made to Section 811, Clause (6), which provides as follows:

> Any reference in this Act to Federal Acts or laws or Provincial Acts or laws, or to Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference

to an ordinance made g by the Governor-General or a Governor General's Act or, as the case may be, to an ordinance made by a Governor or a Governor's Act.

128. Section 72 of Schedule 9 which has already been quoted must therefore be read along with these provisions and the following points should also be noted, (1) That under the Section as it reads the Ordinance promulgated by the Governor-General can-remain in force only for six months from the date of its promulgation, but the words "for the space of not more than six months from its promulgation" have been deleted by The India and Burma (Emergency Provision) Act of 1940, 3 and 4 Geo. VI chap. 33. (2) Assuming that the Ordinance relates to a matter which falls within List 2, that is to say, the Provincial List, the restriction imposed by Section 100, Sub-section (3) cannot invalidate the Ordinance because such a restriction having been named by Section 102, Section 72 is to be read in the present cases as if there was no restriction on the power of the Governor-General to prevent him from legislating in. regard to matters enumerated in the Provincial Legislative List. (3) The third point arises upon the language used in the proviso to Section 102 which runs as follows:

> Provided that no bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

129. In the present case, the proviso cannot come into play and the question of the previous sanction of the Governor-General does not arise, because the Ordinance is issued by the Governor-General himself in the exercise of the power vested in him under Section 72 read with Sections 102 and 316. Thus the Ordinance cannot be held to be ultra vires of the Governor-General and the Special Magistrates by whom the petitioners have been tried were quite competent to try them. A similar conclusion was arrived at in A.I.R. 1943 Pat. 24 but as the case was not fully argued the point was decided merely with reference to Section 100, Clause (4). It appears, however, on further examination that in view of Section 46 of the Act Section 100(4) has no application to Governor's provinces. Thus, my conclusion is that because the Ordinance was validly made and promulgated Section 26 of the Ordinance bars the jurisdiction of this Court to interfere with the conviction and the sentence of the petitioners and their application must accordingly be dismissed.

130. Before passing on to the next case, I wish to add a few words about the Full Bench decisions of this Court in A.I.R. 1943 Pat. 24 and A.I.R. 1943 Pat. 18. From the judgment delivered in the first case, it will appear that one of the points raised before the Full Bench was that the Ordinance, even if intra vires, could affect those cases only in which the offence is alleged to have been committed after the Ordinance came into operation and because the offences in the cases which were before the Bench were alleged to have been committed prior to that date, it did not affect the right of the accused to be tried under the normal procedure by the Courts which would have tried the offences in question under the Code of Criminal Procedure. This argument was definitely overruled and it was held that the Ordinance applied even to those cases where the date of the alleged offence was prior to the date when the Ordinance came into force. In dealing with this point, the Bombay and Allahabad High Courts have observed that a person by committing an offence cannot acquire any vested rights and must submit himself to the machinery of justice as it exists on the date he stands his trial. This reasoning has been criticised

on the ground that it is based on the assumption that an accused person has committed the offence of which he is accused though the law requires that he should be presumed to be innocent until his guilt is established.

131. There is something to be said for this argument, but in my opinion in whatever way we look at the matter the accused can acquire no right on the alleged date of offence. If he in fact committed the offence, then all that is necessary to say is that he could not acquire a right by breaking the law. If, on the other hand, it be assumed that no offence was committed by him on the alleged date, then that date ceases to have any significance and no vested right can obviously accrue on a date on which nothing happened. Eights, if they accrue at all, can vest only when legal proceedings are started against a person j claiming to be innocent and his liberty is put in jeopardy and on this principle it has been held in the two Full Bench cases that there being no provision in the Ordinance to show that it was intended to be retrospective in operation, it was not applicable to those cases where criminal proceedings had started against an accused person before it came into force. I find that in a case decided by a Special Bench of the Bombay High Court See A.I.R. 1943 Bom. 169 the learned Chief Justice and another learned Judge of that Court have expressed the view that the ordinary presumption that a statute is not intended to interfere with vested rights has no application to the construction of this Ordinance; but as at present advised I am unable to subscribe to that view which even the Crown lawyers appearing in some of the High Courts which have had to deal with this point do not seem to have seriously urged. The Ordinance must undoubtedly be construed with a view to the fact that it is an emergency measure. I do not think however that there is any clear authority to support the view that it must be construed to have retrospective operation even though it does not say so. If the Ordinance was intended to override a presumption which is firmly established by legal precedents and has been jealously guarded by the Courts of justice there could have been nothing simpler or easier than to insert an express provision therein to the effect that it was intended to be retrospective and was to be applied at any stage of criminal proceedings. I do not think that even the learned Judges of the Bombay High Court could have meant to go so far as to hold that the Ordinance should be applied even to those cases where the actual trial had commenced before the Ordinance came into force and was proceeding according to the ordinary law of procedure at the time it came into force. If this cannot be held, then the Ordinance is not retrospective in the proper sense of the term and if it is not retrospective then in determining the stage at which it becomes applicable we are bound to follow the decision of the Privy Council in *Colonial Sugar Refining Co. v. Irving (1905) 1905 A.C. 369* (supra)which has been consistently followed in a long line of cases in this country.

Criminal Bevision No. 73 of 1943.

132. The petitioners in this case are four in number and they have been convicted by Mr. M. Usman, Special Magistrate of Samastipur, for having committed an offence under Section 38 read with Section 34 of the Defense of India Rules and have been sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of ₹ 100/- each. These four persons were sent up in custody to the Sub-divisional Officer of Samastipur on 6th October 1942 and the Sub-divisional Officer noted in the order sheet on that date that the Police Sub-Inspector must submit charge-sheet against them by 16th October 1942. The report was not received until 24th October 1942, but as prosecution witnesses were not present, the case was adjourned till 28th October 1942. On 28th October 1942, the case was made over by the Sub-divisional Magistrate to Mr.

Usman for disposal. Mr. Usman then proceeded with the trial of the petitioners and passed an order of conviction on 17th December 1942. The only point which has been raised on behalf of the petitioners is that the Sub-divisional Magistrate had no power under the Ordinance to transfer the case to Mr. Usman and therefore Mr. Usman had no jurisdiction to try it. Learned Counsel for the petitioners relies in support of his argument upon Section 25A, Clause (2) and Section 26 of the Ordinance. Section 25A, Clause (2) provides as follows:

> The District Magistrate of the district within which a Special Magistrate's Court is situated may, at any stage of the proceedings before that Special Magistrate, transfer a case from him to another Special Magistrate within the district.

133. Section 26 provides among other things that no Court shall have authority to transfer any case from any Court constituted under the Ordinance. Learned counsel's contention is that the Sub-divisional Officer was not competent to transfer the case to another Magistrate because there is no provision in the Ordinance authorising any person other than a District Magistrate to transfer a case to a Magistrate. In my opinion, this argument is based upon a misconception. The object of the Ordinance as its preamble shows was to provide for the setting up of Special Criminal Courts and its provisions relate mainly to the constitution of Special Courts, their powers and the procedure to be a followed by them at the trial and the powers of the Courts of appeal and review constituted under the Act. Section 27 of the Ordinance provides that the provisions of the Criminal Procedure Code and of any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of the Ordinance shall apply to all matters connected with, arising from or consequent upon a trial by Special Criminal Courts constituted under this Ordinance.

134. On reading the Ordinance as a whole, it is quite clear that though the trial under the Ordinance is to be governed by such rules of procedure as are laid down therein, every* thing which happens in the case before the trial begins is to be governed by the Criminal Procedure Code. Thus those parts of the Code which relate to giving information to the police and their power to investigate offences remain unaffected by the Ordinance. Similarly, the Magistrates' power to receive the complaint or the charge-sheet, to summon the accused, and to order an inquiry under Section 202 remain equally unaffected. In the present case the Sub-divisional Magistrate had transferred the case to Mr. Usman under Section 192, Criminal P.C., which specifically provides that a Sub-divisional Magistrate g may transfer a case of which he has taken cognizance for inquiry or trial to any Magistrate subordinate to him. The Ordinance does not affect this power either expressly or by implication; on the other hand, the words of Section 27 are wide enough to suggest that Section 192 as well as a number of other provisions, specially those relating to matters which precede the commencement of a trial, were never intended to be abrogated. The Ordinance itself contains no provision for the stages which precede the trial and the order under Section 192 which is passed before the trial begins must necessarily be governed by the Code of Criminal Procedure.

135. There are certain provisions in the Code of Criminal Procedure which provide for the transfer of a case from one Court to another after the Court is in seisin of it, for the purpose of trial. The High Court, for example, can direct the transfer of a case from one Court to another under Section 526, Criminal P.C., and similarly the District Magistrate and the Sub-divisional Magistrate can transfer it under Section 528 from one Magistrate to another within their

respective jurisdictions. In the Ordinance, however, as it originally stood there was no such provision and to supply this omission, Section 25A was enacted. Sub-section (1) of Section 25A now enables a Sessions Judge to transfer a case from one Special Judge to another Special Judge and Sub-section (2) enables the District Magistrate to transfer a case from one Special Magistrate to another. This Section is evidently intended to come into operation only after a Special Court created under the Ordinance is in seisin of a case. Section 192 of the Code is in no way inconsistent with it, because it comes into play before that stage and because it deals with a different kind of transfer which really means the distribution of cases among the Magistrates within a particular sub-division or a district. Section 26 of the Ordinance does not affect Section 192, because all that it provides is that no Court shall have authority to transfer any case from a "Court" constituted under the Ordinance. This Section evidently applies only after a Court constituted under the Ordinance is in seisin of the case. In other words, the jurisdiction which ;s contemplated in this Section is the jurisdiction which is contemplated by Section 526, Criminal P.C., and does not affect the power of distributing cases with which the Sub-divisional Officer is invested by Section 192. The contention raised by the learned counsel must, therefore, fail and as no other substantial point has been urged in this case, this Court is debarred under Section 26 of the Ordinance from interfering with either the conviction or the sentence of the petitioners. The application of these petitioners must therefore be dismissed.

Criminal Revisions Nos. 701, 707 and 753.

136. The petitioners in Criminal Revision No. 701 were sent up by the police under custody to Mr. Hoda, the Sub-divisional Magistrate of Samastipur who was also a Special Magistrate under the Ordinance, on 27th September 1942. On 28th September the learned Magistrate noted in the order sheet: "to my file" and proceeded with the trial and on the same day ho convicted the petitioners under Section 56(4), Defense of India Rules, and sentenced them to undergo rigorous imprisonment for 18 months and to pay a fine of ₹ 200/- each. The petitioner Pasupati Tewari in criminal Revision No. 707 was sent up by the police on 9th September 1942 and on 10th September 1942 Mr. Hoda made the following note in the order sheet:

> To my file. I will try the case as Special Magistrate. Five prosecution witnesses present. Examined in chief five prosecution witnesses. Charge under Rule 56(4), D.I. Rules, framed against the accused who pleads not guilty. Cross-examined P. Ws. and discharged them. Examined the accused. The accused had filed a petition stating that adjournment be given for adducing defence. I am not satisfied from the petition that it is necessary in interest of justice and hence disallowed. Judgment delivered. Accused convicted and sentenced to R.I. for two years and a fine of ₹ 250/- in default R.I. for one year under Rule. 56, D.I. Rules.

137. The petitioners in criminal Revision No. 753 were sent up before Mr. Hoda, Sub-divisional Officer of Samastipur on 15th September and the learned Magistrate convicted them on 16th September 1942 under Section 56(4), Defense of India Rules, and sentenced them to two years rigorous imprisonment and a fine of ₹ 300/- each.

138. The common feature of these cases is that in all of them Mr. Hoda tried the accused persons

as a Special Magistrate and in each case the trial was concluded before 4th October. The point raised in all these cases is that Mr. Hoda had no jurisdiction to try the petitioners as a Special Magistrate, inasmuch as the District Magistrate of Darbhanga issued no order under Section 10 of the Ordinance until 4th October 1942. It appears that several orders were issued by the District Magistrate of Darbhanga relating to the Ordinance and one of the orders which was issued on 31st August was in these terms:

> Mr. S.W. Bilgrami, Mr. H.C. Chakravarty, Deputy Magistrates, will act as Special Magistrates, under the Special Criminal Courts Ordinance, for all cases in the Sadar Sub-division of this district. All cases will be made over to Mr. Bilgrami, who will make over such cases as he may consider necessary to Mr. Chakravarty for disposal.
>
> The Sub-divisional Officers of Samastipur and Madhubani will act as Special Magistrates under the Act, within their respective jurisdiction. Mr. Muhammad Usman, Deputy Magistrate, will try such cases under the Ordinance as may be made over to him by the Sub-divisional Officer of Samastipur. Babu Rajeshwari Prasad Varma and Babu Ramtahal Sinha, Sub-Deputy Magistrates, will act as Summary Courts under the Ordinance in respect of such cases as may be made over to them, for disposal by their respective Sub-divisional Officers.

139. We are concerned here with the second part of the order which has been underlined (here italicized). The next order was issued on 4th October and runs as follows:

> Whereas under Ordinance 2 of 1942 the Government of Bihar in exercise of their power under Section 4 of the said Ordinance have appointed a Special Judge for the district of Darbhangha, and whereas under Section 9 of the said Ordinance the said Government have invested certain Magistrates in this district with powers of a Special Magistrate to try such offences or classes of offences or such cases or classes of cases the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf, may, in general or special order in writing direct, I.R.N. Lines, I.C.S., District Magistrate of Darbhanga in exercise of the powers conferred on me as a servant of the Crown under Sections 5 and 10 of the said Ordinance do hereby by a general order direct as follows: (a) All offences mentioned in Schedule (A) to this order will be tried by the Special Judge of this district, (b) All offences mentioned in Schedule (B) to this order will be tried by the Special Magistrates in this district.
>
> It should also further be noted that the Special Magistrates shall try the offences mentioned in Schedule (B) committed in the jurisdiction of the subdivision where they are ordinarily posted, unless otherwise directed by me by an order in writing.

140. Then follow two long schedules. Schedule (A) is headed "Offences triable by a Special Judge" and contains five clauses which set out specifically the offences which were intended to be tried by the Special Judges. Schedule (B) is headed "Offences triable by a Special Magistrate" and contains four clauses which also set out with great precision the offences intended to be tried

by the Special Magistrates. The question which arises in these oases is whether the order issued by the District Magistrate on 3lst August can be treated as an order under Section 10 giving jurisdiction to Mr. Hoda, one of the Special Magistrates, to hold trials of any and every offence under the Ordinance. It appears that a Bench of this Court of which my brother Meredith was a member has held that inasmuch as the District Magistrate had to act in great haste and under great stress the order of 81st August though it was undoubtedly a defective order may be construed to be an order under Section 10: see Cri. Rev. No. 20 of 1943. The contention put forward on behalf of the petitioners on the other hand is that this order, cannot be construed to be an order under Section 10, because it does not specify what offences or classes of offences or cases or classes of cases were to be tried by the Special Magistrates. It is said that this order was merely an order which was preliminary to or a precursor of the subsequent order of 4th October which was in every sense an order under Section 10. The order in question, it is said, merely defined the jurisdiction of the various Magistrates within the Sadar and the Samastipur and Madhubani sub-divisions of the district and these Magistrates had evidently to await further orders which were to be issued after it had been decided by the District Magistrate as to what class of cases or offences should be tried by them under the Ordinance.

141. It is urged that unless this view was taken one would be forced to the conclusion that the District Magistrate intended that every kind of offence including even the offences which were wholly unconnected with the disturbances such as adultery, criminal misappropriation, etc., should also be tried by Special Magistrates; but if that was the intention it could have been clearly expressed e by stating in so many words in the order that all offences under the Penal Code and other laws were to be tried by the officers nominated in that order. In my opinion, the contention put forward on behalf of the petitioner is a serious one and cannot be lightly brushed aside. The order of 3lst August could not have been intended to mean that all criminal cases without any exception were to be tried by the Special Magistrates under the Ordinance firstly because the language of the order and especially used in the second part of it which relates to Samastipur sub-division is inept and not quite clear and secondly because Section 10 clearly implies that offences punishable with death cannot be tried by Special Magistrates. There is no such exception made in this order, and if the interpretation which is sought to be put on it is correct, then we must hold that the District Magistrate had directed the Special Magistrates to try even offences punishable with death. I do not, however, see any justification for putting such a construction upon the order as would constrain us to hold that the District Magistrate had directed something which he had no power to direct and that he had acted g without due care. In the order of 4th October it is definitely stated that it was issued by the District Magistrate under Sections 5 and 10 by virtue of the power vested in him by the Government of Bihar under Section 9 of the Ordinance and a list of offences was also given. If the order of 31st August was in-tended to be an order under Section 10, then there should have been something in the order of 4th October to show that the previous order had been superseded and that the Magistrates concerned were no longer competent to try all cases but only offences mentioned in the later order. This view is confirmed by h another order which was issued by the District Magistrate on 26th October and which runs as follows:

> I.R.N. Lines, I.C.S., District Magistrate of Darbhanga, in exercise of the powers conferred on me as a servant of the Grown, under Sections 5 and 10 of Ordinance No. 2 of 1942 promulgated by the Government of Bihar, hereby direct that the following amendment shall be made in my order dated 4th October 1942....

142. If the order of 4th October was intended to amend the order of 3lst August, one would have expected some such words as those underlined (italicized) to have been used in that order also, but no such words are to be found there. However that may be, even apart from these subsequent orders it seems to me that the order of 31st August which is conceded to be a very defective order and which has to be construed on its own terms cannot be construed to be an order under Section 10. It is suggested that the order was drawn up in an imperfect form, because the District Magistrate had to act in haste and under great stress, but we have looked at the orders passed by the District Magistrates of a number of other districts such as Manbhum, Monghyr, Bhagalpur, Ranchi, Motihari, Palamau, Saran, etc., who had to act under similar circumstances and in all these orders we find a complete classification of the offences which were made triable by the Special Magistrates. A comparison of these orders with the order issued by the learned District Magistrate of Darbhanga on 4th October does lend*support to the argument that the order which was really intended by him to be an order under Section 10 was issued on 4th October. Upon this view I am constrained to hold that Mr. Hoda had no jurisdiction to try the offences committed by the petitioners as a Special Magistrate because, on the dates he tried the offences, he had not been empowered to try them by an order under Section 10. I accordingly direct under Section 491, Criminal P.C., that the petitioners should be released at once or brought to trial in accordance with law.

Criminal Revisions Nos. 71, 670, 718, 752 and 802.

143. The facts of these cases are fully set out in the judgment of my brother Meredith and I entirely agree with the order proposed by him in the individual cases of this group. Out of deference, however, to Mr. Pal, counsel for the petitioners, I feel bound to deal with one of the points raised by him which is undoubtedly an important point and 1 which has been urged by him with unusual ability and learning. The learned advocate has referred us to the Letters Patents of the Calcutta and Patna High Courts as well as to a number of authorities and statutes for the purpose of showing that the Calcutta High Court always had and still has the power of issuing a writ of certiorari like the old Supreme Court and that the Patna High Court must be deemed to have inherited those powers from the Calcutta High Court at the time when it was created to exercise jurisdiction over part of the territory which was formerly under the jurisdiction and that the Patna High Court must be held to possess the power to issue a writ of certiorari. Mr. Pal has cited a number of authorities to show that the power to issue this writ e cannot be taken away by a statute, unless express words are used to that effect and it is further argued by him that Section 26 of the Ordinance cannot bar the right to issue the writ, because this right has not been expressly taken away by that section.

144. From this brief summary of the very elaborate and learned arguments of Mr. Pal it will be clear that the points raised by him are really two in number: First, that this High Court has the power to issue a writ of certiorari and secondly, that this power has not been taken away by Section 26 of the Ordinance. Neither of these points however appear to me to require very elaborate treatment in view of two Full Bench decisions of this Court, and at any rate, if the second point can be answered against Mr. Pal, the answer to the first point becomes wholly immaterial. In A.I.R. 1919 P.C. 31 their Lord, ships of the Privy Council have expressed the view in very clear language that the Courts of Calcutta, Madras and Bombay possess the power of issuing the writ of certiorari independently of the provisions of Section 435, Criminal P.C., and Section 115, Civil Procedure Code But while expressing this view they have added, whether any

of the other High Courts which are by definition High Courts have the powers of issuing the writ of certiorari is another question.

145. In A.I.R. 1930 Pat. 538, which was a decision of five Judges of this Court and is, therefore, binding on this Bench, it was definitely laid down that the Patna High Court had no power to issue the prerogative writ of mandamus and one of the reasons given for this view is set out in the following passage which, in my opinion, has a direct bearing on the point before us:

> The question, therefore, which is to be considered now is whether there is anything in the Letters Patent of the Patna High Court to indicate that this High Court was also invested with the power of * issuing prerogative writs in the same way as the Calcutta High Court had the power. Mr. Bose frankly concedes that beyond the recitals which precede the operative portion of the Letters Patent there is nothing to show that the Patna High Court was invested with the powers which were formerly possessed by the Calcutta High Court. In my opinion these recitals are no more than mere historical allusions to certain provisions of the High Courts Act of 1861 which was enacted just before the establishment of the High Court of Calcutta, and of the two successive Letters Patent under which the Calcutta High Court was established and its powers defined. In fact in the recital there is not merely a reference to the Calcutta High Court, but also a reference to the establishment of the High Court at Allahabad in the year 1866 and this is quite enough to show that the allusions were merely historical. Besides, the Letters Patent of the Patna High Court clearly define the civil, criminal, admiralty, testamentary, matrimonial and other jurisdiction of the High Court and if it was intended that the Patna High Court should possess the power of issuing prerogative writs similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras, there seems to be no reason why this could not have been provided by an express clause to that effect.

146. The reasons given in this passage not only cover the writ of mandamus, but also other prerogative writs including the writ of certiorari and the reference to the observation made by the Privy Council suggesting that it was at least debatable whether the High Courts other than those of Calcutta, Madras and Bombay possessed the power of issuing the writ of certiorari strengthens that conclusion. Thus, if the decision of the Full Bench can be taken to cover the writ of certiorari, no further question arises. But assuming that the observations in that case with regard to that writ are mere obiter dicta, there still remains the question as to whether this Court can issue such a writ in the cases before us now notwithstanding the provisions of Section 26 of the Ordinance. It appears that the Defense of India Act, 1915, (Act 4 of 1915) contained a provision which was identical in terms with Section 26 of the Ordinance. That was Section 8 of the Act and it ran as follows:

> (1) Notwithstanding the provisions of the Code of Criminal, Procedure, 1898, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of commissioners appointed under the Act and no Court shall have authority to revise any such order or sentence, or to transfer any case from such commissioners, or to make any

order under Section 491, Criminal P.C., 1898, or have any jurisdiction of any kind in respect of any proceedings under this Act.

147. In A.I.R. 1918 Pat. 103, Mullick J. in construing this provision expressed the following opinion:

> It is contended on behalf of the petitioner that the power of superintendence is similar to the power of interference by a writ of certiorari and that the Court will not assume that the power is taken away without an express statute to that effect: *Rex v. Moreley*[23] The answer to this is that here there is a statute which by its eighth Section clearly enacts that no Court shall have any jurisdiction of any kind in respect of any proceedings under this Act, in other words, the exclusion of jurisdiction is express.
>
> Again Imam J., another learned Judge of this Court after quoting Section 8 (already referred to), observed as follows:
>
> A perusal of this Section shows that the following powers have been expressly excluded from all Courts in India with reference tc commissioners appointed under the Act: (1) to hear an appeal, (2) to exercise any powers of revision, (3) to transfer any case, (4) to make any directions of the nature of habeas corpus and (5) to have any jurisdiction of any kind in respect of any proceedings under this Act.
>
> It is contended for the petitioner that exclusion of interference under this Section though extensive is not exhaustive. The words "or have any jurisdiction of any kind in respect of any proceedings under this Act" have been the subject of much discussion in the hearing of this rule. A possible construction of these words has been suggested to be in the nature of ejusdem generis and that the words under notice should be construed to limit the exclusion to powers of such character as are enumerated in the rest of the section. This might have been a possible view if the concluding passage in the Section were less unambiguous than it is. The use of the word "any" in the three places in this passage governing jurisdiction and character of jurisdiction with reference to all proceedings under the Act leaves no room to doubt that the framers of this Act intended the Section and have in fact so worded it as to be exhaustive.

148. In view of this decision which is binding upon us no further question arises, but I think I should state that even apart from what was held in that case I am of the opinion that even if this Court had the power to issue the writ of certiorari, that power has been taken away by the language of Section 26 of the Ordinance. It has undoubtedly been held in a number of cases that the power to issue the writ of certiorari unless expressly taken away must be deemed to have been left intact: see *Rex v. Moreley (1760) 2 Burr. 10419Supra)*, *Rex v. Plowright (1686) 8 M.R 94(Supra), R. v. Jukes (1800) 8 T.R. 542(Supra)*, *Rex. v. Cahiobury Justices (1823) 3 Dowl. & R. 35(Supra)* and (1874) L.R. 5 P.C. 417. But I gather that though there may be no reference to the writ of certiorari in so many words, yet if the language used in the statute is clear and unmistakable so as to show that the power to issue this writ has been taken away the effect is the same as if it has been expressly taken away. In A.I.R. 1919 P.C. 31 the Privy Council held that

the language used in Section 22, Press Act of 1910, was general enough to take away the right of issuing the writ of certiorari though no express negative words were used. The material words used in Section 22 were these:

> No proceeding purporting to be taken under this Act shall be called in question by any Court except the High Court on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done, or in good faith intended to be done under this Act.

149. With reference to this provision their Lordships observed as follows:

> It was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away by the section, the right to it remained, notwithstanding the very express, but still general, words used.
>
> The words of Section 26 of the Ordinance are so general that it is difficult to hold that notwithstanding this section, the High Court still has the power to interfere with trials under the Ordinance by issuing a writ of certiorari. In my opinion, the words "have no jurisdiction of any kind" which occur in Section 26 are comprehensive enough to cover the power to issue the writ of certiorari if such power existed. It was contended by Mr. Pal that the word "Court" does not mean the High Court and reference was made to *Narsinghdas Tansukdaa v. Chogemull*[24], where three out of five Judges held that the expression "civil Court" as used in the Agricultural Debtors Act should be interpreted as not including the High Court. In my opinion that case can be of no help to us here, because Section 26 contains a reference to Section 491, Criminal P.C., and an order under that Section can be made only by the High Court. It follows therefore that the expression "Court" as used in Section 26 must include the High Court. Mr. Pal contended that the expression "Court" may include Courts like the Chief Court of Oudh or the Judicial Commissioners of Sind who have also the power to make an order under Section 491 but, in my opinion, there can be no justification for this view. In my judgment, therefore, this Court -cannot issue a writ of certiorari in those cases which properly fall within the Ordinance. As to the other matters arising in these cases I am of the same opinion as my brother Meredith, and I agree with the order which ho proposes to make in regard to them in his judgment.

150. Criminal Revisions Nos. 785, 786, 669, 717, 664, 666, 655, 715, 716, 72: So far as these revisions are concerned I agree with the conclusions of my brother Meredith as well as with the orders proposed by him.

Manohar Lall, J.

151. I have had the advantage of seeing in advance the judgments prepared by my lord the Chief Justice and by Meredith J. As I agree entirely with the reasonings and the conclusions of the

judgment of my lord the Chief Justice, and also in view of the great length to which these two judgments have already reached, I think it is undesirable that I should pronounce a judgment of my own which may, owing to the necessity of dealing fully with the numerous points raised, occupy an equally large space. But I would like to make two observations only.

152. The first is that in my opinion it is unnecessary to decide whether this High Court has power to issue a writ of certiorari because as shown by my lord the Chief Justice even if we have the power this power has been taken away by Section 26 of the Ordinance under consideration.

153. The second observation I wish to make is that in the cases where we have held that the trial was without jurisdiction the accused should be released forthwith unless the authorities, after taking into consideration the nature of the offence said to have been committed by a particular accused and the nature of the evidence adduced by the prosecution, think it desirable that this accused should still be J put upon trial before a Special Magistrate with jurisdiction.

Cases Referred.

1A.I.R. 1943 Pat. 239
2A.I.R. 1943 Pat. 18
3A.I.R. 1943 Pat. 24
4(10) 37 Cal. 412
5(11) 38 Cal. 880
6(1885) 14 Q.B.D. 648
7AIR 1930 PC 100 : 1930-31-LW 811
81943 Cri. RN 20
9AIR 1943 Cal224
10(1923) 1923 A.C. 695
11(1874) L.R. 5 P.C. 417
12(85) 11 Cal. 275
13A.I.R. 1930 Pat. 538
14A.I.R. 1918 Pat. 103
15(1874) L.R. 5 P.C. 417
16(1905) 1905 A.C. 369
17AIR 1928 Cal 640 : (1929) ILR 56 Cal 512
18AIR 1943 All 26 : 1942 AWR (H.C.) 11 392
19A.I.R. 1943 Nag. 36
20(1913) 1 K.B. 557
21(1913) 1 K.B. 557
22(42) 23 P.L.T. 684
23(1760) 2 Burr. 1041
24AIR 1939 Cal 435 : 1942 AWR (H.C.) 11 392