PATNA HIGH COURT

Kishori Lal Potdar

Vs

Debi Prasad Kejriwal

(Agarwala, C.J. Meredith and Ramaswami, JJ.)

29.10.1949

JUDGMENT

Agarwala, C.J.

1. This appeal is by the plaintiff, and arises out of a suit to eject the defendants, who are members of a joint Hindu family, from a house belonging to the plaintiff. The shop was let to the defendants at a monthly rental of Rs. 415 by a registered lease dated 19th December 1939. The lease was for a period of three years beginning from the date on which the lessees should take possession of the premises. There was, however, a provision that the defendants should be entitled to three months' notice if they should be required to quit. The lessees' occupation of the premises began on 23rd November 1940. On 9th November 1943, plaintiff served on them a notice stating, "I give you 3 months' notice to quit the premises," calling upon them, "kindly to vacate the same on the receipt of this notice." The lessees not having complied with the notice the plaintiff applied to the House-rent Control Officer to eject them, and an order for eviction was made on 17th January 1945 and was later confirmed by the Commissioner on appeal, who, however, gave the lessees three months' time to vacate the premises. The lessees, however, remained in occupation of the premises and instituted title suit No. 52 of 1945, in the Court of the Munsif of Bhagalpur for a decision that the eviction order was ultra vires the House-rent Control Officer on the ground that the House-rent Control Order applied only to monthly tenancies. This contention was accepted by the Munsif, and the suit was decreed on the ground that the lessees were not monthly tenants. An appeal preferred by the lessor was dismissed. The latter then served on the lessees a notice dated 14th December 1946, calling upon them "to vacate the said holding at once." A further notice calling upon them "to quit the house at once" was served on 14th December 1946. These notices not having been complied with, the lessor instituted the suit out of which this appeal has arisen praying for a decision that the defendants are trespassers and for a decree directing them to deliver the premises to the plaintiff. the suit was dismissed by the Additional District Judge of Bhagalpur. An appeal by the plaintiff came before Sinha and Mababir Prasad JJ. who made the following order :

"The main question in controversy between the parties is the application of certain provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, (Bihar Act III [3] of 1947). On this question, the decision of a Division Bench of this Court, consisting of Manohar Lal and Imam JJ. dated sometime in November 1947, Shiveshwar v. Parmeshwar, 27 Pat. 1 : (A. I. R. (36) 1949 Pat. 355) is entirely in favour of the appellant; whereas a later decision of another Division Bench of this Court consisting of Imam and Narayan JJ., Sant Kuer v. Ganesh, A I. R. (36) 1949 Pat. 137 : (27 Pat. 695), seems to favour the respondents' contention. There is thus a conflict of decisions on the main question in controversy between the parties, and it is desirable that this conflict should be resolved as early as possible. Another very important question has been raised by Mr. Das on behalf of the appellant, namely, whether the recent decision of the Federal Court in the case of Jatindra Nath v. Province of Bihar, A. I. R. (36) 1949 F. C. 175 : (50 Cr. L. J. 897), does not render the Act aforesaid ultra vires. This is a question of far-reaching importance to people of this Province, and must also be resolved as early as possible. As the questions referred to above arise in a first appeal, we formulate the following two questions for decision by a larger Bench :

(1) Whether the definition of 'tenant' appearing in the Bihar Buildings (Lease Rent and Eviction) Control Act, 1947 (Bihar Act, III [3] of 1947), or the Bihar Ordinance II [2] of 1946, which it replaced is retrospective in its operation, and protects the defendants in the circumstances of this case and (2) Whether the annual extension of the Act aforesaid by the Provincial Government is ultra vires of the Legislature.

Another question suggested by Mr. De on behalf of the respondents may also be conveniently referred to the same Bench for an authoritative decision: 'Whether the Civil Courts have jurisdiction, in view of the provisions of Section 11 of the Act aforesaid, to make a decree for possession.' As this litigation between the parties has been a protracted one, it is desirable, in the interests of justice, that these questions should be decided as early as possible.

As one of the questions referred to the Full Bench is a question of constitutional importance bearing upon the construction of the Government of India Act, 1935, it is desirable that the learned Advocate General should be asked to represent the views of the Provincial Government.

Let the matter be placed before the Hon'ble the Chief Justice."

2. Before considering these questions I propose to refer to the rule under which the reference has been made. It is Rule 3 of chap. 5 of the Rules of this Court. That rule is as follows:

"If the case is an appeal from an original decree or order, the question of law shall alone be referred, and the Full Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Bench which referred it, and in case of

necessity in consequence of the absence of any or either of the referring Judges, for the ultimate decision of another Division Bench."

This rule, therefore, confines a reference to a Full Bench, in the case of an appeal from an original decree or order, to questions of law. Questions of fact may not be referred to a Full Bench. To add to the questions of law referred the phrase "in the circumstances of this cage", as has been done in the case of the first question referred to us, is to suggest that the Fall Bench take into consideration the facts of the case. It is for the Division Bench which makes the reference to find the facts, and for my part, I should have considered it desirable to find the facts before formulating the question or questions of law which arise from them. I propose, therefore, to treat the first question purely as a question of law, and to ignore the words "in the circumstances of this case."

3. The House-rent Control Order of 1942, which was issued in exercise of powers conferred by Rule 81, Defence of India Rules, was replaced on 1st October 1946, by the Bihar Buildings (Lease, Rent and Eviction Control) Ordinance (II of 1946), which was made in exercise of powers conferred by Section 88 (1), Government of India Act, 1935. This was replaced on 15th March 1947, by the Bibar Buildings (Lease, Rent and Eviction) Control Act (III of 1947). The Act is in pari materia with the Ordinance. Section 11 (1) of the Act provides that :

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, he shall not to be liable to be evicted therefrom, whether in execution of a decree or otherwise, except for some specified reasons."

Sub-section (2) provides, "A landlord who seeks to evict his tenant under Subsection (1) shall apply to the Controller let a direction in that behalf. . . . .."

The remainder of the sub-section prescribes the procedure to be followed by the Controller in dealing with such an application. If this section governs the present case, it follows that the plaintiff is not entitled to eject the defendants in execution of a decree, and that the procedure that he should follow in order to evict the defendants is an application under Sub-section (2) of Section 11. On behalf of the plaintiff, however, it is contended that this Act was entirely ultra vires the Provincial Government. This contention is founded on Sub-section (3) of Section 1, which declares that the Act shall remain in force for such period as the Provincial Government may, by notification fix, provided that the Provincial Government may, from time to time, by notification, extend such period. By notification No. 6208, dated 15th March 1947, the Provincial Government fixed one year as the period for which the Act should remain in force. By notification No. 5641, dated 1st March 1948, the period was extended for a further year, and by

Notification No. 7804, dated 7th March 1949, for a still further period of one year. Sub-section (3) was repealed by the Bihar Buildings (Lease, Rent and Eviction) Control (Amending and Validating) Ordinance, 1949, and in its place was substituted the following : "(3) It shall remain in force for five years . . . .." The contention on behalf of the plaintiff-appellant is that by Sub-section (3) of Section 1 of the Act of 1947, the Provincial Legislature delegated legislative powers to the Provincial Government, and that the result of this is that the entire Act is ultra vires, and, accordingly, that the amendment attempted by the Ordinance of 1949 had nothing to operate upon. In short, the appellant's contention is that the Legislature did not itself fix the period for which the Act was to remain in operation, but left it to the Provincial Government, and this amounted to a delegation of its legislative functions. Prima facie, the contention is a surprising one. But for Sub-section (3) the Act would be an Act of indefinite duration which came into force on the date on which assent to it was published in the official gazette. Sub-section (3) of Section 1, conferred on the Provincial Government the power to curtail the period of its duration, and the proviso to that sub-section empowered the Provincial Government to extend the period of duration after having curtailed it by notification. It is a common feature of legislative Acts in this country for it to be provided in a statute that the statute shall come into operation as from a date to be fixed by the Provincial Government. In such cases, the Provincial Government should never fix a date for the statute to come into operation; it would remain ahead letter. The mere fact that the Legislature empowers the Provincial Government to fix the date from which an Act is to come into operation has, so fact as I am aware, never been urged as a ground for holding that the Legislature had delegated its functions to the Provincial Government. The present is the converse case. The Act of 1947 came into operation without any act of the Provincial Government, and, if the Provincial Government had not, by notification, 'fixed the period during which it was to remain in force, it would have remained in operation indefinitely.

4. It has, however, been sought to make a distinction between a case in which the Legislature confers upon the Provincial Government the power to decide that an Act shall come into operation and a case in which the power is conferred on the Provincial Government to decide how long an Act shall remain in operation. The distinction is a fine one. In the case of The Queen v. Burah, 5 I. A. 178 : (4 Cal, 172 P. C.), the Legislature (in that case the Governor-General in Council) enacted legislation for the removal of a particular area from the jurisdiction of the ordinary Courts and Officers and to place it under the new Courts and Officers to be appointed by and responsible to the Lieutenant Governor of Bengal. It was left to the Lieutenant Governor to decide at what time the change should take place. He was also empowered, by public notification, to apply to the area in question any law or part of a law which was already in force in other territories subject to his Government, or which might, from time to time be brought into force in those territories by proper legislative authorities. The validity of the Act was challenged on the ground that the Governor-General in Council had created a new legislative authority,

namely, the Lieutenant Governor, which was not created or authorised by the Indian Councils Act, 1861. Their Lordships of the Privy Council repelled this contention, observing that the proper Legislature, namely, the Governor. General in Council had exercised its judgment as to place, persons, laws and powers, and that the result of that judgment had been to legislate conditionally as to all those things, the condition being that the Lieutenant Governor of Bengal was to determine the date on which the change should take place. That condition having bean fulfilled, the legislative function had been completely performed. In the course of their judgment in that case their Lordships observed :

"Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect as also the area over which it is to extend,"

4a. The matter was carried somewhat further in the case of Russell v. Queen, (1882) 7 A.C. 829 : (51 L. J. P. C. 77). The Act under consideration in that case was the Canada Temperance Act, 1878, the preamble of which declared :

"It is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors."

The Act was divided into three parts the first of which related to proceedings for bringing the second part of the Act into force, the second part to "prohibition of traffic in intoxicating liquor"; and the third to penalties and prosecutions for offences against the second part. The method of bringing the second part into force was stated thus :

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

This Act, therefore, conferred upon the Governor-General, on being petitioned to do so, not by

the Legislature, but by the electors of any county or city in the Dominion, not only to bring the second part of the Act into force, but also, at the end of three years, to revoke it. The effect of this was to leave it to an authority, other than the Legislature, to determine the period for which the Act should remain in force in any county or city, subject to the restriction that when it had once been brought into operation it had to remain in force for at least three years. The validity of the Act was challenged on the ground that the Legislature had delegated its powers to the electors of counties and cities. Their Lordships of the Privy Council dealt with this contention in the following language ;

"The short answer to this objection la that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency .... If authority on the point were necessary, it will be found in the case of Queen v. Burah, (1678) 3 A. C. 889 : (4 Cal. 172 P. C.) lately before this Board."

5. The Act which we are considering, namely, the Act of 1947, deals with a subject-matter on which the Provincial Legislature is competent to legislate, and it contains within its provisions the whole legislation on the matters with which it deals, and, but for any notification which might be issued by the Provincial Government under Sub-section (3) of Section 1, it would remain in force indefinitely. How, the mere fact that the Provincial Government has been authorised to curtail its period amounts to a delegation of its legislative functions, it is difficult to understand. It seems to follow from the case of Russell v. Queen, (1882) 7 A. C. 829 : (61 L, J. P. C. 77) that if the Provincial Government had been authorized to determine the date from which the Act should cease to operate in a particular area, this would not have amounted to a delegation of the function of the Legislature.

6. The next case to be considered is Powell v. Apollo Candle Co. Ltd., (1885) 10 A. C. 282 : (54 L. J. P. C. 7). The Act under consideration in that case was an Act of the Australian Legislature--The Customs Regulation Act of 1879--and the question was whether Section 183 of that Act was ultra vires the Colonial Legislature. The section provided :

"Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, hut possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it

shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article."

7. The section went on to describe the manner o£ publication of the rate so fixed. The article in question in that case was stearine, which was an article of merchandise unknown to the collector, but which, in his opinion, was apparently a substitute for a known dutiable article, namely, candles, and was apparently designed to evade the duty on candles, and possessed properties in fact which could be used and were intended to be applied for a similar purpose as candles. The Governor General, with the advice of his Executive Council, directed that a duty of one penny per pound weight should be levied on stearine on its importation into the colony. In pursuance of this direction, a collector of customs realised £92 is, 9d. as duty on a consignment of stearine imported into the colony. The plaintiff paid this under protest, and the suit was to recover this sum. The defendant objected that Section 133 of the Act was beyond the competence of the Legislature to enact. The Chief Justice, in delivering the judgment of the Supreme Court, said :

"When the collector says that any article is unknown to him, and that some of its properties can be used in the production of a dutiable article, such as candles, and the Governor in Council ascertains how much it would be necessary to use in the making of a pound of candles, he then fixes the amount of duty to be paid on it, having ascertained this, the new article is there upon saddled with a duty. That is neither more nor leas than the Legislature delegating the power to impose taxes. The Imperial Parliament may so delegate, but it has not given the Eetae power to our Legislature. To make this legislation legal there should have been express power given by the Imperial Parliament, not only to impose taxes on the people of this Colony but also to confer on otheca the power to levy duties. It appears to me, without going into the other points, that under these circumstances the imposition of the duty on stearine was erroneous, and on that ground the demurrer should be sustained."

8. The revenue authorities appealed to His Majesty in Council. Before the Privy Council the validity of the duty was challenged on the game grounds as in the Supreme Court, namely, that the colonial Legislature had defined and limited powers which they could not exceed, that the power given to them to impose duties was to be executed by themselves only, and could not be entrusted by them wholly or in part to the Governor or any other person or body. It was further argued that a provision in the Constitution that all money bills were to originate in the Legislative Assembly of the colony was an indication that the Imperial Legislature assumed that all legislation in the colony with respect to taxation should be by a bill passed through both houses. Their Lordships observed :

"It is argued that the tax in question has been imposed by the Governor, and not by the

Legislature, who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances, their Lordehips are of opinion that the judgment of the supreme Court was wrong in declaring Section 133, Customs Itegulation Act of 1879 to be beyond the power of the Legislature."

This, then, is an instance, not of an external authority being authorized by the Legislature to declare that a statute shall come into operation at a particular time, but an instance of an external authority being authorized by the Legislature to determine whether a particular article or merchandise was dutiable, and to assess the duty on it, although, of course, in accordance with the principles laid down by the Legislature.

9. The next case to which I propose to refer is Hodge v. Queen, (1884) 9 A. C. 117 : (53 L. J. P. C. 1). The statute thereunder consideration was the Liquor License Act of 1877 of the Province of Ontario in the Dominion of Canada. Two questions were raised : first, whether the Legislature of the Province of Ontario had power by legislation to define the conditions and qualifications requisite for obtaining tavern licences for sale by retail of spirituous liquor within a municipality; for limiting the number of licenses; for declaring that a limited number of persons are qualified to have tavern licences, without having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. The second question was whether, if it had such power, the Provincial Legislature could delegate those powers to a Board of Commissioners. The question arose on conviction of a tavern keeper for infringement of a resolution passed by the Commissioners. Their Lordships of the Privy Council observed :

"Assuming that the local Legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local Legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local Legislature should be exercised in full by that body, and by that body, alone. The maxim delegatus non potest delegate was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontrio and that its

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

It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid o! subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law, to decide."

10. Applying these observations to the Act of 1947, what is it that the Legislature entrusted to the Provincial Government by Sub-section (3) of Section I ? To read that sub-section is to answer the question. What was entrusted to the Provincial Government was merely a limited discretion to decide how long the provisions of the Act, which were obviously designed to deal with an unusual state of affairs, would be necessary. The entire legislation for controlling the lease, rent and eviction from buildings in Bihar is contained in the Act itself. No power has been conferred on the Provincial Government to alter the provisions of the Act in any way with regard to these matters. All that the Provincial Government has been empowered to do is to decide when the unusual provisions of this Act shall no longer operate because the changed circumstances no longer require their enforcement.

11. There is one more decision of the Privy Council relevant to this discussion, Emperor v. Benoarilal Sarma, 72 I. A. 67 : (A. I. R. (32) 1946 P. C. 48 : 46 Cr. L J. 589), which raised the question of the validity of the Special Criminal Courts Ordinance (II [2] of 1942). Section 72, Government of India Act, 1935, authorized the Governor-General, in cases of emergency, to make and promulgate ordinances for the peace and good government of British India or any part thereof, and declared that any Ordinance so made should have the like force of law as an Act passed by the Indian Legislature. In exercise of the power thus conferred, the Governor-General promulgated the Special Criminal Courts Ordinance of 1942. The Ordinance recited that an emergency had arisen which made it necessary to provide for the setting up of Special Criminal Courts, and the body of the Ordinance contained the necessary frame-work of Courts of criminal jurisdiction consisting of Special Judges, Special Magistrates and Summary Courts, the

provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal. The Ordinance did not itself, however, set up any of these Courts. Section 1 (3) provided that the Ordinance "shall come into force in any Province only if the Provincial Government, bring satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence a issue an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded."

The case went to the Privy Council on appeal by a person convicted by one of the Special Courts constituted by the Government of Bihar under the Ordinance. The validity of the Ordinance was challenged on two grounds : first, because, it was contended, the language of Section 1 (3) showed that the Governor General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, and secondly, because the section amounted to what was called "delegated legislation" by which the Governor-General without legal authority sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself. Their Lordships rejected both. these contentions. With regard to the second,. they observed :

"It is undoubtedly true that the Governor-General, acting under Section 72 of Schedule 9, must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all ..... Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a Special Court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity."

12. On the basis of the decisions of the Privy Council to which reference has been made there would appear to be no escape from the view that Sub-section (3) of Section l of the Act is intra vires the Provincial Legislature. But it has been strenuously contended that the decision of the Federal Court referred to in the order of reference Jatindra Nath v. Province of Bikar, A. I. R. (36) 1949 F. 0, 175 : (SO Or. L. J. 897) has taken a different view of provisions of this kind in Acts of the Provincial Legislatures in this country. The cases of Queen v. Burah, 5 I. A. 178 ; (4 Gal. 172 P. C.) and Bussell v. Queen, (1882) 7 A. C. 829: (61 L. J. P. C. 77) are both referred to in the judgments in this case, and there is no indication in those judgments of any intended departure from the principles enunciated in the decisions of the Privy Council. It is, therefore, necessary to examine the Federal Court case carefully in order to ascertain exactly and precisely

what that case decided. The facts of that case were that certain persons were arrested in the Chotanagpur Division of Bihar in February, 1949, in consequence of orders for their detention made by the Provincial Government purporting to act under Section 2 (1) (a) of the Bihar Maintenance of Public Order Act, 1947, as amended in 1949. The Chotanagpur Division is a partially excluded area. Therefore Acts of the Bihar Legislature do not apply to it proprio vigare. In order that such an Act shall apply to it, it is necessary for the Governor to issue a direction under Section 92 (1), Government of India Act. The Governor-General's assent to the Act of 1947 was published in the Bihar Gazette on 16th March 1947, and, on the same directing the application of the Act to the Chotanagpur Division.

13. Section 1 (3) of the Act of 1947 declared that it should remain in force for one year only. To this, however, there was the following proviso:

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

By Section 1 (3) and its proviso, therefore, the Bihar Legislature enacted (1) that the operation of the Act should be limited to one year certain, and (2) that in certain circumstances its operation could be extended in its original form, or with modifications for a further period of one year. The circumstances required for the operation of the Act to be continued for a second year were: (a) a resolution passed by the Bihar Legislative Assembly directing that the Act should remain in force for a further period o£ one year; (b) agreement with the resolution by the Bihar Legislative Council; and (c) a noti6cation by the Provincial Government giving effect to the resolution. There having been such a resolution of the Bihar Legislative Assembly, agreed to by the Bihar Legislative Council, that the Act should extend for a further year from 16th March 1948, the Provincial Government issued Notification No. 8734 on 11th March 1948, extending the operation of the Act until 16th March 1949.

14. So far as the Chotanagpur Division was concerned, however, no further notification was issued by the Governor until 7th March 1949, when Notification No. 3430 was issued directing that the Act "shall apply, and shall always be deemed to have applied, to the Chotanagpur Division" with effect from 16th March 1948, that is to say, the Governor, purporting to exercise his powers under Section 92 (1), Government of India Act, directed that the Act of 1947 should be deemed to have applied to the Chotanagpur Division from 16th March 1948, although from that date until 7th March 1949, the Act was not in force in that Division. On a rule issued under Section 491, Criminal P. C., at the instance of the detenus it was contended before a Division Bench consisting of myself and Nageshwar Prasad J., (1) that despite the proviso to Section 1 (3)

the Provincial Government had no power to extend the operation of the Act beyond the period of one year provided in that section; (2) that consequently the Governor also could not so extend it to the Chotaoagpur Division; and (3) that the Notification issued by the Governor on 7th March 1949, did not validate detention orders made in February 1949. The Division Bench was unanimous in negativing the first two of these contentions. With regard to the third contention there was a difference of opinion, I holding that as the Federal Court had held in Chatturam v. Commissioner of Income-tax, 26 Pat. 442 at p. 447; (A, I. E. (34) 1947 P. C. 32), that the Governor's function under Section 92 (1) is legislative, and in United Provinces v. Mt. Atiqa Begum, 1940 F. C. no at p. 133 : (A. I. R. (28) 1941 P. C. 16), that Indian Legislatures are not prohibited from enacting retrospective legislation, the effect of the notification of 7th March 1949, was to validate the orders under which the applicants were detained. Nageshwar Prasad J. took the contrary view. On this difference of opinion, the applications were referred to a Special Bench, of three Judges. The Special Banch upheld the validity of the detentions, but each of the Judges baaed hi3 decision on a different ground. Meredith J. held; (1) that a notification of the Governor under Section 92 (1) cannot operate restrospectively; but (2) that, as a result of the Governor's Notification No. 900 of 16th March 1947, the Act was in operation continuously in the Chotanagpur Division from that date, and therefore, it was not necessary to issue any further notification under Section 92 (1) for the purpose of keeping it in operation on the expiry of one year from that date; (3) that the direction of the Provincial Government in Notification No. 8734 of 11th March 1948, was not a legislative act, but merely a fulfilment of a condition by executive order which had been prescribed by the proviso to Section 1 (3) of the Act. For this conclusion he relied on Burah's case, 5 I. A. 178 : (4 Cal 172 P.C.) Russell's case, (1882) 7 A. C. 829 : (51 L. J. P. C. 77) and Benoarilal Sarma's case, 72 I. A. 67: (A. I. R. (32) 1945 P C. 48; 46 Cr. L. J, 589). He considered that the decision of the Federal Court in Chatturam's czse, 26 Pat. 442 ; (A. I. R. (34) 1947 F. C. 32), was not a binding authority with respect to the construction of this proviso as it was a decision with respect to the construction of Section 92 (1), Constitution Act, Shearer and Imim JJ. agreed with Meredith J. with regard to the first and second points, with the result that the detention of the applicants was upheld although for reasons different from those given by me in the Division Bench.

15. On appeal by the detenus the Federal Court held the detentions to be illegal. There appears to have been no dispute that the power conferred on the Governor by Section 92 (1), Government of India Act is legislative power. Their Lordships, therefore, were not called upon to discuss their own decision in Chatturam's case, 26 Pat. 442: (A.I.R. (34) 1947 P. C. 32). Kania C.J. and Mahajan and Mubherjea JJ., held first, that the power contained in the proviso to Section 1 (3), Bihar Maintenance of Public Order Act, 1947, to extend the operation of the Act beyond the period of one year was legislative power, (2) that the Bihar Legislature, consisting of His Majesty represented by the Governor and the Legislative Assembly and the Legislative Council, was

incompetent to delegate to another authority, viz., the Assembly and Council, the power to extend the period of operation of the Act; and (3) that consequently the Act ceased to operate after 15th March 1948. The proviso to Section 1 (3) was held to be an example of delegated legislation and not of conditional legislation.

16. Kania C.J. did not deal with, and Mahajan and Mukherjea JJ. left open, the question whether a notification by the Governor under Section 92 (1), may operate retrospectively. Sastri J. based his decision on the absence of a notification under Section 92 (1), extending the operation of the Act beyond 15th March 1948, holding that the notification of 7th March 1949, was in-effective for this purpose as the Governor was not empowered, by a notification under Section 92(1), to apply the Act to an excluded or partially excluded area retrospectively. Fazl Ali J, held that, even though the power to modify the Act conferred by the proviso to Section 1 (3), might be invalid, the power to extend the period of its operation on a resolution of the two Houses of the Legislature was valid. He agreed with the Special Bench on the other two questions raised which included the view that the Governor cannot legislate retrospectively under Section 92 (1). As that case arose out of detentions in the Chotanagpur Division, a partially excluded area, it would have been sufficient for the disposal of the application to hold that the Governor has no power to legislate retrospectively under Section 92 (1), Government of India Act. But only two of the learned Judges of the Federal Court, Sastri J. specifically, and Fazl Ali J. by implication, took this view. Shortly stated, what the majority of She learned Judges of the Federal Court decided is that the Bihar Legislature, by the proviso to Section 1 (3) of the Act, purported to empower a body other than the Legislature to modify the provisions of the Act, and that this amounted to a delegation of its authority which it had no power to make. We are bound by that view, which, however, cannot but have far-reaching repercussions. For example, in enacting the Code of Civil Procedure the Legislature prescribed the rules of procedure in Schedule I of the Code. By Section 122, however, the High Courts are empowered to "annul, alter, or add to" any of the rules in Schedule I. Most of the High Courts have in fact exercised the powers conferred by Section 122, and modified the provisions of Schedule I very considerably. There are other provisions in the Statute Book of instances in which the Legislature has conferred on an external authority the power to make, modify and rescind rules. However that may be, it is quite clear that the three learned Judges of the Federal Court, who took the view that the proviso to Section l (3) of the Act of 1947 was ultra vires the Legislature, based their decision on the fact that the Provincial Government had been empowered to modify the Act itself. Kania C.J. observed:

"The power to modify an Act of a Legislature, without any limitation on the extant of the power of modification, is undoubtedly a legislative payer. It is not a power confined subject to any restriction, limitation of proviso (which is the same as an exception) only. It seems to me therefore that the power contained in the proviso is legislative."

Mahajan J. said:

"It may be asked what does the proviso purport to do in terms and in substance? The answer is that it empowers the Provincial Government to issue a notification saying that the Provincial Act shall remain in force for a further period of one year with such modifications, it any, as may be specified in the notification. As stated in the earlier part of this judgment, unless the power of the Provincial Government is co-extensive with the power of the Provincial Legislature, it is difficult to see how it can have the power to modify a statute passed by that Legislature. Modification of statute amounts to re-enacting it partially."

Mukherjea J. observed, with regard to the Act of 1947 :

"It is not a conditional statute which is to take effect on the determination of some fact or condition by an extraneous authority. The Act is to take effect at once, and what is left to the outside authority is to determine at some future date whether the Act should be extended for one year further with or without modifications. . . In the present case the Act does not lay down the condition and everything which is to follow upon the fulfilment of the same. It provides for the determination of the duration as well as the contents of the legislation itaelf by some external authority at a future date."

In another passage His Lordship said:

"The Provincial Government is authorised to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself should be modified in any way or not. To modify a statute is certainly to perform a legislative act. No restrictions have been laid down regarding the nature of the modifications that could be made."

The Act now under consideration does not confer on the Provincial Government any power to modify any of the provisions of the Act. The present case, therefore, is distinguishable from the case that was decided by the Federal Court.

17. The Ordinance of 1949 has now amended the sub-section retrospectively go as to limit its operation to a period of five years certain. This Ordinance was issued in exercise of the power conferred by Section 88 (1), Government of India Act. Sub-section (2) of that section declares that an Ordinance issued under Sub-section (1), shall have the same force and effect as an Act of the Provincial Legislature. It is not disputed that the latter could amend Section 1 (3) in the manner in which it has been amended by the Ordinance. It follows that an ordinance issued under Sub-section (1), may also do go, even retrospectively--see Jnan Prosanna Das Gupta v. The Proving of West Bengal, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 Cr. L. J. I. F. B.), in which it was held that an Ordinance issued under Section 88 (1), may amend or repeal an Act of

the Legislature and may operate retrospectively even for the period during which the Legislature was in session.

18. I would answer the questions referred to us as follows:

1st Question.

19. I must confess that I do not understand the purport of this question. Obviously the definition of "tenant" in the Ordinance of 1946 and the Act of 1947 did not apply to the House-rent Control Order of 1942. Neither the Ordinance nor the Act purports to amend the definition of "tenant" in the Order of 1942, either retroapectively or otherwise. Whether the definition in the Ordinance was a protection for the defendants from eviction otherwise than in accordance with Section 11 (2), while the Ordinance was in force, and whether the Act of 1947 similarly protects the defendants, must necessarily depend on whether the defendants are "tenants", a matter which the Division Bench has neither decided nor referred to us.

2nd Question,

20. What this question is intended to mean is whether the power conferred on the Provincial Government by Section 1 (3) is ultra vires the Provincial Legislature. For the reason stated above, I would answer this question in the negative. If I had felt constrained to take the contrary view, I would also have held that Section 1 (3) is separable from the rest of the Act and, consequently, in the absence of any valid power to curtail its operation, it would remain in force indefinitely.

3rd Qusstion,

21. As Section 11 is quite clearly a bar to the tenants being ejected otherwise than by an application to the Controller, and as a Court of law cannot be expected to make an order to which it is prohibited from giving effect, I would answer this question in the negative.

Meredith, J.

22. On 19th December 1939, the appellant (plaintiff) gave a lease of certain property to the respondents on the terms that it was to run for three years from the date of occupation of the premises, but subject to the condition that the landlord must give three months' notice before evicting the tenants. On 23rd November 1940, the tenants took possession, so that the three years would expire on 22nd November 1943. Shortly before that date, on 9th November 1943, the appellant served a notice to quit on the respondents. This notice contained a statement that three months' notice was being given. But it contained a further inconsistent demand that the premises be vacated directly upon receipt of the notice. Moreover, a fresh notice was served on 3rd

February 1944, calling attention to the fact that the first notice had not been obeyed, and calling on the tenants to vacate at once.

23. Next day, the 4th of February, the appellant made an application before the Rent Controller under the House Rent Control Order of 1942 for eviction of the tenants as he required the premises for his own purposes. On 17th January 1945, an eviction order was passed, and on 2nd March 1945, the tenants, appeal was dismissed by the Commissioner.

24. Then the tenants brought a title suit (T. S. 52 of 1945) for a declaration that the order of the Rent Controller was ultra vires, it being contended inter alia that this was not a case of a monthly tenancy as the lease had not been validly terminated, whereas the Rent Control Order applied only to monthly tenancies, and, secondly, it had no application as the landlord had treated the tenants as trespassers. On 19th September 1946, this suit was decreed on the view that the lease had not been terminated and it was not a case of a monthly tenancy. Meanwhile, on 1st October 1946, Ordinance No. II [2] of 1946 replaced the House Rent Control Order, 1942. It contained new provisions, amongst others a wide definition of "tenant". On 29th January 1947, the decree just spoken of was upheld in appeal. Then, on 15th March 1947, which was the very date that the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III [3] of 1947) replaced Ordinance No. II [2] of 1946, the landlord brought an ejectment suit based on the contention that the defendants were trespassers. The defendants claimed that they were not trespassers but tenants under the wide definition I have referred to, which is contained in Section 2 (h) of the Act of 1947, and, moreover, that the Act of 1947 barred the jurisdiction of the civil Court. The defendants' case succeeded, and the suit was dismissed. Hence the present first appeal.

25. The appeal came before a Division Bench, and that Bench hag referred three questions to this Full Bench. These questions are as follows:

(1) Whether the definition of 'tenant' appearing in the Bibar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bibar Act, III of 1947), or the Bihar Ordinance II of 1946, which it replaced, is retrospeative in its operation, and protects the defendants in the circumstances of this case?

(2) Whether the annual extension of the Act aforesaid by the Provincial Government is ultra vites of the Legislature?

(3) Whether the Civil Courts have jurisdiction, in view of the provisions of Section 11 of the Act aforesaid, to make a decree for possession?

26. The second question is the most important, and I shall deal with it first. The Act received the assent of the Governor General on 14th March 1947 and the assent was first published in the

Bihar Gazette (Extraordinary) of 15th March 1947. The Act specifies no date on which it is to come into farce, and, therefore, under the General Clauses Act, it came into force on 15th March 1947. Nor did the Act specify how long it was to remain in operation. Section 1 (3), however, of the Act was as follows :

"It shall remain in force for such period as the Provincial Government may, by notification fix: Provided that the Provincial Government may, from time to time, by notification, extend such period:"

There is a further proviso with which we are not concerned.

27. By Notification No. 6208 P. C., dated 15th March 1947, the Bihar Government fixed one year as the period for which the Act was to remain in force. By Notification No. 5641 P. C. of 1st March 1948, it fixed a further period of one year for the Act to remain in force, and by Notification No. 7804 Misc. 22/49 P. C. of 7th March 1949 it fixed a second one year's period of extension.

28. The contention that the Act was ultra vires of the Provincial Government is baaed on the decision of the Federal Court, in Jatindra Nath Gupta v. Province of Bihar, 3 A. I. Cr. D. 566 : 1 U. L. J. 274 : (A.I.R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897). In that case the Federal Court considered the question whether the Bihar Maintenance of Public Order Act, 1947 (Bihar Act, V [5] of 1947) had ceased to operate after one year because the provision under which it had been extended was ultra vires, Section l (3) of that Act said :

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

29. The Federal Court by a majority held that this proviso was ultra vires, being a delegation of legislative power by the Provincial Government, such a delegation not being constitutionally permissible.

30. The respondents and the learned Advocate-General, who has appeared for the Government, have attempted to avoid the application of this ruling on three grounds : first, that it is distinguishable; second, that it should not be followed because it is inconsistent with numerous decisions of the Privy Council, and, third, because the observations which would be applicable to the present case were obiter dicta.

31. Having carefully considered the judgments of the Federal Court, I have come to the

conclusion that the ruling cannot be distinguished. The ruling is sought to be distinguished because it was based on the provision for modifications in the provision in Act 5 [v] of 1947, whereas in the present case there was merely a provision for fixing duration without modifications. It is quite true that the learned Judges did rely strongly on that provision for introducing modifications as making the provision ultra vires. But in fact the Provincial Government had extended the Act without any modifications, and three of the learned Judges, that is to say, a majority of the Court, expressly held that apart from any question of modifications, the provision for extension in time was ultra vires,, as being in itself a delegation of legislative power. Kama C. J. expressed himself on this point in very clear terms. He said :

"The power to extend the operation of the Act beyond the period mentioned in the Act yrima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. .... Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, as conditional legislation by the Provincial Government. . . . . For its continued existence beyond the period of one year it had not exercised its volition-or judgment but left the same to another authority,, which was not the legislative authority of the Province."

These observations appear to me directly applicable to the present matter.

32. Mahajan J. said :

"They (legislative authorities) are not allowed to transfer to others the essential legislative functions with which they are invested. It has therefore to be determined whether the proviso offends against the maxim delegatus non potest ddegare. . . . The proviso which has bean assailed in this case, judged on the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void. .... A modified statute is not the same original statute. It is a new Act and logically speaking, it amounts to enacting a new law,... in my opinion, no external body can be delegated with the duty of making modifications in a statute, but that is what the proviso has done. This novel device of defeating the Constitution Act adopted by the Provincial Legislature cannot have the approval of this Court . . . I am farther of the opinion that the power given to extend the life of the Act for another year in the context of the language of Section 1 (3) also amounts to an Act of Legislation and does not fall under the rule laid down in Queen v. Burah, 5 I. A. 178 : (4 Cal. 172 P. C.). The Act in a mandatory form stated that it shall be in force for one year only. That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation, ... The Legislature in doing so acted beyond the powers conferred on it by the Act of Parliament."

33. Mukherjea J. in the course of his judgment says :

"The matter, I think, may be considered ganerally, for if there is actually any delegation of legislative powers, the clause would be invalid whatever the legislative authority might be. Now it is one of the settled maxims of constitutional law that the power conferred on legislative authority to make laws cannot be delegated by it to any other body or department. The authority must remain where it is located and the power to which the prerogative has been entrusted cannot relieve itself from the responsibility by choosing other organs upon which it shall be devolved. ... In my opinion, the validity of the proviso to Section 1 (3), Bihar Maintenance of Public Order Act, cannot be upheld on the ground of its being a piece of contingent legislation. It cannot also be supported on the ground that what it delegates is a mere non-legislative function. The duration of a statute is a matter for determination by the Legislature itself."

These observations also are surely directly applicable to the present case.

34. As for the contention that the observations are obiter, I cannot accept it. When a Court bases its decision, upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is obiter merely because the decision upon the other ground would be itself sufficient. Apart from the question of the power to modify, the Federal Court has in clear terms laid down the principle that it is for the Legislature to state bow long a particular legislation will be in operation, and that cannot be left to the discretion of some other body. That principle has been laid down in direct connection with the actual point which arose for decision.

35. Even had it been possible to regard the observations as obiter, I still think that, where the Federal Court has laid down a principle in clear terms, it is for all the subordinate Courts to follow it. The Federal Court has taken over the functions of the Privy Council. It is the highest Court now existing for India even though the new Constitution has not come into force. It is of the utmost importance at this stage of constitutional development in India, when the foundations are actually being laid for the future sound development of the judiciary, that a tradition should become established of treating the pronouncements of the Federal Court with the utmost respect, so that it may successfully step into the shoes of the Privy Council. The Privy Council has in several cases said that, where it has laid down a principle in clearterms, that principle must be followed. It will suffice to refer to Mata Prasad v. Nageshar Snhai, 52 I. A. 398 : (A.I.R. (12) 1925 P.c. 272), where at p. 417 their Lordehips said;

"It is desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case."

Section 212, Government of India Act, which is still in force, says:

"The law declared by the Federal Court, and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on and shall be followed by all Courts in British India." The words are not "the decisions," but "the law declared."

36. But it is strongly contended that the principle in question enunciated by the Federal Court is wholly inconsistent with the decisions of the Privy Council, and, therefore, cannot be followed. Section 212, which, as I have said, is still in force, makes the law declared both by the Privy Council and the Federal Court equally binding. If they do not declare the same thing, what are the Courts to do? The argument is that the Privy Council being the superior Court, the Privy Council view must be preferred, since in certain circumstances an appeal could lie, at the time the pronouncement was made, from the Federal Court to the Privy Council.

37. It is argued in the first place, that the Privy Council has plainly said, that the maxim delegatus non potest delegars has no application to sovereign bodies, even when their sovereignty is limited as in the case of Indian and Colonial Legislatures, and that there is no double delegation since the Legislatures are in no sense delegates; yet one of the Federal Court Judges at least has expressly applied the maxim delegatus non potest delegare. And the danger is strongly emphasised of relying upon American constitutional decisions and American constitutional writers since under the American Constitution the Legislature is a delegate from the people, as it is provided that sovereignty resides only in the people; and moreover, the American Constitution, based as it is on an exaggeration, of Montesquieu's mistaken views as to the nature of the British Constitution, provides for a rigid separation of the legislative, executive and judicial powers, whereas in the British Constitution delegated legislation is common--some people think all too common. And it is pointed out that such subordinate legislation or quasi legislation, as it may be called, is a common feature of Indian Statutes also; as for example, in Section 122, Civil P. C., wherein it is provided that the High Courts, through the Rule Committee, may annul, alter or add to all or any o£ the rules in the rule portion of that Code.

38. Our attention has been invited to the thorough examination of this question of delegated legislation under the British Constitution, its history and growth, in "Law and Orders" by C. K. Alien (Stevens and Sons Limited, 1947) where in that learned author sets out the bewilderment and dismay on the part of constitutional writers and the numerous impotent protests of the Courts which the developments of the past century have evoked.

39. Dealing first with the maxim delegatus non potest delegare, the learned Advocate-General and counsel for the respondents have drawn our attention to a number of clear pronouncements, the first in Burah's case, 5 I. A. 178 : (4 Cal. 172 P. C.). it p. 193 their Lordships have said:

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

40. Moreover, in Hodge v. The Queen, (1883) 9 A. C. 117: (63 L. J. P. C. 1), occurs this conclusive passage (at pp. 131-32):

"Assuming that the local legislature bad power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment wither without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim delegatus non potest delegare was relied on.

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

It is obvious that such an authority la ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of ita necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another,

or take the matter directly into its own bands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide."

41. This Canadian case was one in which it was held that the local Legislature had power under the British North America Act, 1867, to entrust to a Board of Commissioners authority to enact regulations in the nature of police or municipal regulations of a local character for the good government of taverns.

42. We have also been pressed with Powell v. Apollo Candle Co. Ltd., (1885) 10 A. C. 282 : (54 L. J. P.c. 7), in which their Lordshipa referred to Burah's case: (5 I. A. 178 : 4 Cal. 172 P. C.), and Bodge v The Queen, (1884-9 A. C. 117 : 53. L. J. P. C. 1), and said :

"These two eases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate."

43. This was an Australian case where their Lordships had to consider the Custom Regulation Act of 1879 which contained a section authorising the Governor to direct that audufcy be levied on unspecified articles to be selected by him, and it was argued that the tax on certain articles had been imposed by the Governor, and, not by the Legislature, who alone had power to impose it. But their Lordships said the duties levied under the Order in Council were really levied by the authority of the Act under which the order was issued. The Legislature had not parted with ita perfect control over the Governor, and had the power, of course, at any moment, of withdrawing or altering the power which they had entrusted to the Governor. They held that the provision was not ultra vires.'

44. On these cases and the other well-known cases of Rmsell v. The Queen, (1882) 7 A. C. 829: (81 L. J. P. C. 77) and Benoari Lal Sarma, 72 I. A. 57 : (A. I. R. (82) 1945 P. C. 48 : 46 Cr. L. J. 589), it is argued that the Privy Council has laid down in express terms that these subordinate Legislatures within their own spheres are absolutely sovereign, and can do anything Parliament itself can do, and, therefore, if Parliament can delegate the powtr of subordinate legislation, these bodies can also do go within their own limit spheres. That Parliament can and does habitually make such delegations cannot be for a moment doubted. Nor indeed can it be doubted that the Indian Legislatures also habitually do so without question, as in every case where, under a statute, some subordinate body is empowered to make rules under an Act or bye laws, such rules and bye laws becoming as good law and of the same authority as if they had been enacted in the Act itself.

45. Reliance is placed on the observations of Patanjali Sastri J., in the Federal Court decision which we are considering. That learned Judge did not hold that there had been a delegation of legislative power, and observed further that the question whether the power delegated was legislative was not the true test of ultra mres. He said that neither in Burah's case, (51. A. 178 : 4 Cal. 172 P. C.), nor in subsequent decisions referred to was there any clear indication discernible as to the true dividing line between a "limited discretion" whose delegation is permissible and a legislative power which cannot constitutionally be delegated. "It is not easy," he said, "nor perhaps wise, to attempt tc define the limits beyond which the one broadens into the other. While It may be a satisfactory working test in many cases to Bee whether the power delegated is a legislative power, it may not always be a conclusive test. The trend of modern legislative practice has been in favour of conferring on administrative authorities the power of making rules and bye-laws which may, in a certain sense, be said to be legislative."

It is argued that, wherever those limits may actually lie, there can be no doubt that delegation of the power to modify a statute does not exceed them; because for that, the highest possible authority exists in Section 310, Government of India Act, 1935, itself. In that section power is delegated, where transitional difficulties may arise, to direct by an Order in Council that the Act during such limited period as may be specified in the Order, shall have effect subject to such adaptations and modifications as may be specified.

46. If this then can be done by Parliament, it is urged that, since the subordinate Legislatures have within their own spheres all powers of Parliament, it can be done by them also within those spheres, and, when the Privy Council has clearly said that it can be done, it is not open to the Federal Court to say that it cannot.

47. Thus it is urged that the power to delegate legislative authority does exist to a limited extent, but an extent which undoubtedly includes the power to modify a statute, and it is further strongly argued that the mere fixation of the duration of a statute, the time of its corning into force and going out of force, is not only fully within those powers, but is in fact cot a delegation of legislative power at all. Attention is drawn to the fact that in Section 310, Government of India Act, just referred to, the power is dele, gated not only to "modify" by Order in Council, but also to fix the limits of the periods during which the modifications and adaptations are to have effect, and also to make such other temporary provisions as may be thought fit, for such a period as may be specified in the Order. It is further said that the Privy Council in Burah's case: (5 I. A. 178 : 4 Cal. 17.2 P. C.), has expressly and in plain terms placed extension in space and extension in time on exactly the same basis, and has taken care to emphasise that what applies to the spatial ambit of the legislation applies equally to the temporal ambit. For Section 2 of Act XXII [22] of 1S69. which their Lordships were considering, provided that the Act was to come into operation on such day as the Lieutenant-Governor of Bengal should by notification in the Calcutta Gazette

direct, and Section 9, which was challenged, not only provided that the Lieutenant-Governor could extend all or any of the provisions of the Act to the Jaintia Hills and the Naga Hills, but could also do so "from time to time"; and their Lordships said in speaking of the argument that Section 9 was a delegation of legislative power :

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

48. But, it is replied, the Privy Council deals expressly only with fixing time of commencement, not time of ending. To this it is said that there is obviously no distinction of principle between coming into operation by fiat at one time and going out of operation by fiat at another; and the Privy Council must be taken to have laid down that the determination of the time factor generally is no more delegated legislation than the determination of the space factor. And it is further argued, and very strenuously, by the respondents' learned counsel, that in Russell v. The Queen, 1882-7 A. C. 829 : (51 L. J. P. C. 77), the Privy Council expressly approved not only of a delegation of power to bring the law into operation, but also to determine the duration, and put out of operation. the Canada Temper. and Act, 1878, with which they were dealing, was held to be within the legislative competence of the Dominion Parliament even though it provided that, on a petition to the Governor-in Council, signed by not less than one-fourth in number of the electors of any county or city qualified to vote praying that the second part of the Act should be in force and take effect in such county or city and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General might issue a proclamation with a view to a poll of the electors being taken, and, after the petition had been adopted by the electors, after the expiration of 60 days, he could by Order in Council declare the second part of the Act in force, and could at any time, after the expiry of three years, revoke the Order in Council only on the like petition and procedure. The provision for such action by the Governor on adoption of a petition by the voters is said to be essentially similar to the provision in the Bihar Maintenance of

Public Order Act, 1947, for action by the Government on a resolution of the Legislative Assembly agreed to by the Legislative Council. It is pointed out further that in Benorari Lal Sarma's case: 72 I. A. 57 : (A. I. R. (32) 1945 P. C. 48 : 46 Cr. L. J. 589), the fact of duration equally entered into the picture. Section 1, Sub-section (3) of the Special Criminal Courts Ordinance No. II [2] of 1942 which their Lordships held was not ultra vires ran as follows :

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

Thus the power was delegated not only to bring it into force, but also to fix the duration and put an end to it when the Provincial Government thought it was no longer necessary, exactly as the power was delegated to fix the duration in Bihar Act V [5] of 1947 and Bihar Act III [3] of 1947.

49. I must confess that these arguments have placed me in a most embarrassing position. As I have already said, it seems to me of vital importance at this stage of India's constitutional development that nothing should be done which might impair in any way the authority or the prestige of the Federal Court. It is essential, if the legal institutions of this country- are to develope upon sound lines, and fissiparous tendencies to be avoided, that the Federal Court decisions, even when not unanimous, should be treated with the utmost respect. I am of opinion, therefore, that I should not myself consider or express any opinion upon the validity of the contentions put forward by the learned Advocate-General and counsel for the respondents. It is true that Section 212, Government of India Act, will remain in force for a further short period, but the jurisdiction of the Privy Council has now been taken away, and the Federal Court has already become the final Court of appeal. Therefore, when the Federal Court places an interpretation upon Privy Council decisions after considering them, I think we should accept that interpretation as binding upon us whether it appeals to our reason or not. But then, it is urged, the Federal Court has not even considered Hodge v. The Queen, 9 A. C. 117 : (53 L. J. P. C. I) and Powell v. Apollo Candle Co., 10 A, c, 282 : (54 L. J P. C. 7). It cannot, in my opinion, be imagined that the Federal Court was ignorant of these important constitutional decisions, and, therefore, if it did not refer to them, it can only have been because in its wisdom it did not consider it necessary to do so. In my opinion, the principle laid down by the Federal Court must be accepted, and, in accordance with that principle, I would hold that a. 1, Sub-section (3), Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, must be regarded as ultra vires, 49a. I will make only one observation of my own which, I think, I may and should put forward, The complexities of modern life appear to necessitate some degree of delegation by the Legislatures of quasi-legislative powers to subordinate agencies : to some extent the state bodies have to

confine themselves to laying down general principles, and leaving the details to others. Otherwise they would become so involved in detail as to have no time for policy. But if the Courta can succeed in India in stemming the tide of departmental legislation--frequently arbitrary--which is causing so much anxiety to Constitutionalists in England, then, in my humble opinion, it will be a very good thing for this country. The battle will of course have to be fought out in reference to the Provisions of the new Indian Conatitutioa.

50. Having held that Section 1 (3) is ultra vires what is the effect of so holding? It is, in my judgment, very far from what the appellant ap. pears to expect. The provision is, in my opinion, quite clearly severable and its excision does not involve the destruction of the entire Act. The teat is--can the Act stand without it? Unquestionably it can. If this provision be deleted it means that the Act is, like many other Acts, one in which there is no provision either for commencement or ending. It does not come into force by order of the Provincial Government. It cornea into force independently under the General Clauses Act, and it is to be particularly noticed that this was clearly the intention of the Legislature, because it has cot said that it shall be in force for such period as the Provincial Government may fix, but that it shall remain in force for such period. The use of the word "remain" clearly implies that the Act is to be regarded as being in force not under that provision but otherwise. The notification by the Provincial Government does not bring the Act into operation. Suppose the Provincial Government' had never made any notification, the Act would still have come into force on 15th March 1947, and would remain in force until repealed. If Section 1, Sub-section (3) be deleted, the Act remains as complete as any other Act of unspecified duration such being the form of all Acts where it is contemplated that they shall remain in force indefinitely unless and until repealed.

51. I am, therefore', of opinion that the Act itself, except for the provision in question, is a valid Act, and is in force.

52. Independently of that, a recent Ordinance of the Bihar Governor has been placed before us, namely, Ordinance No. 6 of 1949, published by Notification No. 1715-Leg., dated 12th October 1949, This Ordinance was made and promulgated by the Governor of Bihar under Sub-section (1) of Section 88, Government of India Act, 1935, on 11th October 1949, the Legislature not being in session. It contains the necessary statements in the Preamble to give the Governor jurisdiction under Section 88. The first material provision is Clause 2 which says:

"For Sub-section (3) of Section 1, Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, thereinafter referred to as the said Act), the following Sub-section shall be substituted and shall be deemed always to have been substituted, namely: '(3) It shall remain in force for five years': "

There are provisos with which we are not concerned. Certainly the jurisdiction under Section 88

cannot be questioned, and has not been questioned. It has been argued first that, as the Ordinance has limited duration and ceases to operate at the expiration of six weeks from the reassembly of the Legislature unless replaced by an Act, it cannot provide for the duration of the Act for five years. That argument, in my opinion, is not correct, and ignores the provision in Section 88 (2) that an Ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor. It is clearly open to the Governor by such Ordinance to repeal and amend an existing Indian law. For this the Full Bench decision of the Calcutta High Court in Jnan Prosanna Das Gupta v. Province of West Bengal 53 C. W. N. 27 at pages 70-71: (A. I. R. (86) 1949 Cal. 1: 50 Cr. L. J. 1 F. B.) is a clear authority. Secondly, it is argued that the Ordinance cannot amend retrospectively. But the case just cited is an authority to that effect also. In my opinion, this Ordinance being valid, the Act must now be treated as having been enacted for a period of five years.

53. There is another clause in the Ordinance, Clause 3, which runs as follows:

"Notwithstanding anything contained In Sub-section (3) of Section 1 of the said Act, the said Act shall not be deemed to be invalid on the ground that the duration of the Act was fixed or extended otherwise than by an Act of the Provincial Legislature; and all penalties incurred, orders or rules made, actions or proceedings taken, directions issued ox jurisdictions exercised by any authority under or in accordance with the provisions of the said Act during the period from 15th March 1947, up to the commencement of this Ordinance shall be deemed to be as good and valid in law as if such penalties, orders, rules, actions, proceedings, directions and jurisdictions had been incurred, made, taken, issued or exercised under the said Act as amended by this Ordinance."

54. This provision is, in my opinion, quite clearly ultra vires. But it is also severable and does not affect the validity of Clause 2. It is ultra vires because the Legislature itself could not have made such a provision. Neither Ordinance nor the Legislature can debar the Courts from examining the limits of the Legislature's jurisdiction. In the case of a Legislature whose powers are limited by statute or a written constitution, the question of ultra vires can be determined in the Courts alone. It is patent that the Legislature cannot make something, which is ultra vires of its powers, intra vires merely by the exercise of its own legislative powers. The principle might be loosely expressed by saying that it cannot be a judge in its own case. But that, in my view, savours too much of exploded doctrines regarding separation of powers. The true reason why such a provision is ultra vires is, in my opinion, that when a Legislature enacts something outside its constitutional powers, then a fresh enactment saying that such provision shall be valid is clearly and for the very same reasons outside its constitutional powers; for, if it is outside its powers to make the provision in question, it is a fortiori outside its powers to make a provision validating that provision.

55. So much for question (2), to which my answer is in the affirmative. the remaining two questions maybe briefly dealt with.

56. Question (1)--I find nothing in the definition of "tenant" or anywhere in the Act to make the definition retrospective. the wide definition, in my opinion, only comes into force with the Act. Section 11 of the Act is relied on. The first subjection provides that:

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except."

in certain specified cases. I do not think this should be taken to enact anything more than it expressly says, and what it says in effect is that from 15th March 1947, the tenant cannot be evicted, except under the Act, even in execution of a decree. That is to say, if a landlord has obtained a decree before that date, he cannot execute it after that date. If he has a suit pending on that date, then the Act will be retrospective in this sense only that the Court cannot give a decree for eviction except under the conditions specified in Sub-section (1). That follows from the use of the words "he shall not be liable to be evicted," which may be taken to mean that no decree for eviction shall be passed. If any decree is passed, it is useless because it cannot be executed.

57. It is to be noted that the jurisdiction of the civil Court to terminate the suit and pass a decree for costs and so on, is not taken away, because the only provision which takes away the jurisdiction of the civil Court is Sub-section (2) which says that "a landlord who seeks to evict his tenant under Sub-section (1) shall apply to the Controller for a direction in that behalf." The word used is "shall", and not "may". Therefore, in my opinion, under this provision after 16th March 1947, the landlord must go to the Controller, and cannot go to the civil Court and file a fresh suit. But there is nothing in the words to take away the jurisdiction of a Court already in seisin of the suit to conclude that suit and make such orders for costs as justice may require.

58. In this question we are also asked to may whether the definition of "tenant" protects the defendants in the circumstances of this case. I do not understand why we are asked to say whether it is retrospective, for it appears to me that, independently of whether it is retrospective or otherwise, it does protect the defendants if they can show that they come within its terms, because, as I have already noticed, the suit was only filed on 15th March 1947, the very day the Act of 1947 came into force, and the Ordinance of 1946, which had been in force for some time previously, contained the same definition of "tenant."

59. The last question can be simply answered. Section 11, Sub-section (2), in my opinion, bars any suit for the ejectment of a tenant after 15th March 1947, but it does not and cannot bar a suit based on trespass. If the defendants are able to show that they are not trespassers but tenants of

some sort, then clearly the suit will fail. But that will be because the plaintiff has failed to establish his allegations, and not because the Court has no jurisdiction.

60. I do not think that this Bench can go further in answering questioned) and (3) because to do so would involve expressing something on questions of fact which are still sub judice and which have to be determined not by us, but by the Division Bench.

Ramaswami J.

61. It is advisable at the outset to state the material facts which have led to the reference to this Full Bench. The plaintiff brought the suit for ejectment of the defendants from a shop situated in Sujaganj on the ground that the latter continued to be in possession after the period of lease had expired. It is admitted that defendant 1 had on 19th December 1939 obtained a registered lease of the shop from the plaintiff, The lease stipulated that the. period was to be three years from the date when the defendants occupied the premises. The date of occupation was 23rd November 1940. The plaintiff gave on 9th November 1943 a notice which required the defendants to give up possession of the shop upon the receipt of the notice. The plaintiff gave a second notice on 3rd February 1944, which required the defendants to give up possession of the shop at once. On the next day, the plaintiff applied to the House Rent Control Officer for eviciting the defendants. The application was filed under the Bihar House Rent Control Order, 1944. The application was granted. An appeal preferred to the Commissioner was dismissed. The defendants still refused to vacate the shop. On the contrary, they filed a title. suit (NO. 52 of 1945) for a declaration that the order of eviction made by the House Rent Control Officer was without jurisdiction and ultra vires. The suit was decreed. An appeal pre. ferred against the decree was dismissed. The plaintiff gave a third notice dated 14th December 1946, requiring the defendants to vacate the premises at once. As the defendants still refused to vacate, the plaintiff has instituted the present suit.

62. The main ground of defence was that under the registered lease the tenancy was to continue till the plaintiff had given three months' notice to quit, As the notices served by the. plaintiff were insufficient, the defendants continued to be tenants of the house, and there was no valid termination of the lease. The defendants further asserted that the civil Court had no jurisdiction to entertain the suit.

63. Upon these rival contentions the learned trial Judge held that the defendants continued to be tenants of the plaintiff, and there was no termination of the tenancy created by the registered lease. The learned Judge further held that the civil Court had no jurisdiction, and accordingly dismissed to suit.

64. The plaintiff preferred an appeal which was heard by Sinha and Mahabir Prasad JJ. In view of certain conflicting decisions of this Court the Bench has referred three questions for being

decided by the Full Bench.

65. The first question to be determined is the constitutional validity of the Bihar Buildings Control Act, 1947 (Act III [8] of 1947).

66. The validity of the Act is challenged in this appeal on the ground that in enacting it the Bihar Legislature has exceeded its legislative competence. On behalf of the appellant Mr. Sarjoo Prasad contended that Section 1 (3) of the Act was tantamount to an improper delegation of legislative power to the Executive Government, and hence the entire statute was void and illegal on that account.

67. The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, was passed by the Provincial Legislature, and received assent of the Governor-General on 14th March 1947. The assent was published in the Bihar Gazette on the next date. Section 1 (2) of the Act declares that "it applies to the local areas specified in the schedule and such otbec areas as may be notified by the Provincial Government in the official Gazette or by an authority empowered in this behalf by the Provincial Government."

Section 1 (3) enacts that "it shall remain in force for such period as the Provincial Government may, by notification fix : Provided that the Provincial Government may, from time to time, by notification, extend such period :"

67a. By Notification No. 6208 P. C. dated 15th March 1947, the Provincial Government fixed one year as a period for which the Act shall remain in force. By second Notification No. 5641 P. C., dated 1st March 1948, the Provincial Government fixed a further period of one year as a period for which the Act shall remain in force. A third Notification No. 7804 Misc. 22/ 49 P. C., dated 7th March 1949, was issued by the Provincial Government to a similar effect.

68. The main argument on behalf of the appellant is that Section 1 (3) was an improper delegation of legislative power, and the successive notifications of the Provincial Government were illegal and ultra vires. Learned advocate stressed the argument that the Legislature is not permitted to abdicate or transfer to other agencies the essential legislative functions with which it is invested under the Constitution Act.

69. In my opinion, this argument is untenable. In the present case the legislature has determined the legislative policy and its formulation as a rule of conduct. The Legislature has not delegated any authority or power to make the law, but has merely conferred upon the Provincial Government authority or discretion as to execution of the law enacted. The Legislature has only vested executive discretion regarding application of the law to a situation already in existence. Such a delegation is permissible in the sense that it is not in conflict with any constitutional

principle of delegation of legislative powers.

70. The principle has been recognised in a catena of leading authorities.

71. In Queen v. Burah, 5 I. A. 178 : (4 Cal, 172 P. C.), the Governor-General in Council had passed an Act (Act XXII [22] of 1869) purporting to remove a district called Garo Hills from the jurisdiction of the High Court. Section 2 of that Act conferred upon the Lieutenant Governor of Bengal the power to determine, by notification, when the Act shall come into operation. By Section 9 the Lieutenant Governor was empowered from time to time by notification in the Calcutta Gazette to extend all or any of the provisions to the Jaintia Hills, the Naga Hills and to a portion of the Khasi Hills. The majority of the Judges of the High Court held that Section 9 which purported to authorise the Lieutenant Governor of Bengal to extend the Act to the Khasi and Jaintia Hills was in excess of the legislative powers of the Governor-General in Council, The ground of the decision was that Section 9 was not legislation but was a delegation of legislative power; that the Indian Legislature was an agent or delegate acting under a mandate from the Imperial Parliament which must in all cases be executed directly by itself. On appeal the Judicial Committee held that there was no distinction between the power conferred upon the Lieutenant Governor of Bengal by Sections 2 and 9 of the Act. If it was an act of legislation on the part of the Lieutenant Governor to enlarge the area within which a law actually in operation was to be applied, it was a fortiori an act of legislation to bring the law originally into operation by fixing the time for its commencement. The Judicial Committee expressly held that the doctrine of the High Court was erroneous, and that the Indian Legislature was not in any sense an agent or delegate of the Imperial Parliament, but had or was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself :

"Where plenary powers o£ legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally : in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend."

At p. 194 Lord Selborne also states :

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

72. The same opinion was expressed by the Judicial Committee in Bussell v. The Queen, (1882) 7 A. C. 829 : (51 L. J. P. C. 77). In that case the mode of bringing the second part of the Canada Temperance Act, 1878, into force was as follows :

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

It was contended in that case that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the gale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisional of the Act (the second part of the Act) to a majority of the electors of counties and cities. This contention was rejected on the ground that the Act did not delegate any legislative powers, that it contained within itself the whole legislation and that the provisions that certain parts of the Act shall come into operation on the petition of a majority of electors did not confer on these persons power to legislate.

73. The same doctrine has been laid down by the Judicial Committee in a later cage, Hodge v. The Queen, 9 A. C 117:(53 L. J. P. C. 1), where the question arose whether the Legislature of Ontario had or had not the power of entrusting to a local authority a Board of Commissioners the power of enacting regulations with respect to the Liquor Licence Act of 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. The Judicial Committee held that they had that power. It was argued that the local legislature was in the nature of an agent or delegate, and on the principle delegatus non potest delegare, the local legislature must exercise all its functions itself, and could delegate or entrust none of them to other persons or parties. But the judgment, alter reciting that such had been the contention, goes on to say :

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the

British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in Section 92. it conferred powers, not In any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by Section 92 as the Imperial Parliament In the plenitude of its power possessed or could bestow. Within these limits, of subjects and areas the local legislature is supreme, and has the same authority as the Imperial Parliament."

74. In Powell v Apollo Candle Co. Ltd., (1885) 10 A. C. 282: (54 L. J. P. C. 7), the legislature of New South Wales had enacted a Customs Regulation Act which professed to authorise the Governor to impose and levy customs duties. It was objected that the Legislature had not the power to enact the clause in question. It was argued that the Colonial Legislature had defined and limited powers which they could not exceed; that the power given to the Colonial legislature to impose duties was to be executed by themselves and could not be entrusted by them wholly or in part to the Governor or any other person or body. But the Judicial Committee overruled the contention on the ground that the Colonial Legislature was not a delegate but had plenary powers of legislation. It was a legislature restricted in the area of its powers, but within that area unrestricted and not acting as agent or delegate. At page 291, the Judicial Committee state:

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

75. In the important Australian case, Baxter v. Ahway, (1909) 8 com. L. R. 626, the Governor-General bad issued a proclamation under the authority of the Customs Act, 1901, prohibiting the importation of opium. It was claimed in that case that the proclamation was invalid. The importation of opium, suitable for smoking, was prohibited as being included among a class described as "all goods, the importation of which may be prohibited by proclamation." It was claimed that the power to prohibit was a power that must be exercised by the legislature directly and could not be delegated by the Governor-General in Council. With respect to this argument, Griffith C. J. said at page 632:

"It is of course obvious that every legislature does in one sense delegate some of its functions. It

is too late in the day to say that the legislature cannot create, for instance, a municipal authority and give it power to make bye-laws, or create a public authority with power to make regulations having the force of law, or confer upon the Governor in Council power to make regulations having the force of law, be upon the Judges of the Court power to make Rules of Court having the force of law. Nor is it to the purpose to say that the legislature could have done the thing itself. Of course it could. In one sense this is a delegation of authority because it authorises another body which it specifies to do something which it might have done itself. It is too late in the day to contend that such a delegation if it is a delegation, is objectionable in any sense."

76. Again in Victorian Stevedoring Contracting Co. v. Dignan, 46 com. L. R. 73, the Australian Court decided that an Act of 1828 entitled an Act relating to employment in trade and commerce under other countries which prescribed no rule in relation to such employment but remitted the whole matter to the regulation of Governor-General in Council "extraordinary though this form of legislation is" was not beyond the power of Parliament. At page 114 Evatt J. said:

"In dealing with the doctrine of 'separation' of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of Government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution. Nor, indeed, had it been fully developed in England itself at the time when Montesquieu first elaborated the doctrine or theory of separation of Governmental powers. But, prior to the establishment of the Common wealth of Australia in 1901, responsible Government had become one of the central characteristics of our policy. Over and over again, its existence in the constitutional scheme of the Commonwealth has been recognised by this Court."

77. On behalf of the Provincial Government the learned Advocate-General placed reliance upon Emperor v. Benoari Lal Sarma, 72 I. A. 57 : (A. I. R. (32) 1945 P- C. 48: 46 Cr. L. J. 589). In this case an Ordinance issued under Section 72 of Schedule 9, Government of India Act, 1935, made by the Governor-General, was impugned on the ground that the legislative authority could not be delegated. The Ordinance recited that "an emergency has arisen which makes it necessary to provide for the setting up of special criminal Courts." The Ordinance contained the necessary frame work for Courts of criminal jurisdiction, provisions as to the respective limits of their jurisdiction and procedure together with restrictions on appeal. But the Ordinance did not itself set up any of these Courts but provided by Section 1 (3) that the Ordinance "shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded."

It was contended that the Ordinance was invalid as the Governor-General had illegally delegated to the Provincial Government the authority to decide whether the emergency existed instead of deciding it for himself. Upon this contention the Judicial Committee observed:

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

78. From this review of the authorities it is manifest that Section 1 of the impugned Act in the present case does not improperly delegate legislative power to the Provincial Government. The section has merely vested executive discretion regarding the application of law to a situation already in existence. The duration of the Act as also the area over which it is to operate has been left to the discretion of the Provincial Government. Such a delegation is permissible) and is not in conflict with any constitutional principle.

79. On behalf of the appellant Mr. Sarjoo Prasad referred to the passage quoted in Cooley's Constitutional Limitations, Volume I, at page 224, to the following effect:

"The power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the oonstitutionalsagency alone the laws must be made until the constitution itself is changed."

This American doctrine is founded upon the theory that the powers of government are derived from the authority of the people of the Union and hence no agency to whom the people have confided a power may delegate its exercise. In Hampton & Go, v. United States, 276 U. S. at p. 405, Chief Justice Taft states:

"The well-known maxim 'Delegata potestas nan potest delegari' applicable to the law of agency

in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private laws."

But no such doctrine has existed in respect of British Colonial Legislatures whether erected in virtue of the prerogative or by Imperial statute. It is hence doubtful if the American doctrine quoted in Cooley volume I, p. 224, is applicable to the Legislatures which function under the Government of India Act. In Phillips v. Eyre, (1870) 6 Q. B. 1 : (40 L. J. Q. B. 28), Willes J. delivering the judgment of the Exchequer Chamber emphatically stated :

"A confirmed act of the local Legislature, ... whether in a settled or a conquered colony, baa, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament,"

Reference has already been made to R. v. Burah, (1878) 3 A. C. 889: (4 Cal, 172 P. C.), Hodge v. The Queen (1884) 9 A. C. 117 : (53 L. J. P. C. 1.) and Powell v. Apollo Candle Co., (1885) 10 A. C. 282; (54 L. J. P. C. 7), where the Judicial Committee rejected the doctrine of 'delegate potestas non potest delegari'. On the contrary, the Judicial Committee emphasised that neither the Indian nor Colonial Legislatures were delegates of the Imperial Parliament, but that they had plenary and absolute powers of legislation.

80. It is of great importance to notice that even in the United States the Supreme Court though paying lip service to the supposed constitutional doctrine has in fact sustained each new delegation of powers by the Congress. In the United States v. Brig Aurora, (1812) 7 Cr. 382, the relation of the legislative power of the Congress to national executive power was for the first time considered by the Supreme Court. The Act of 1809, in forbidding trade with Great Britain and France authorised the President to suspend its: provisions when in his judgment certain events had taken place, and likewise to revive them upon the occurremn of certain other events, of which also he was to be the judge. The Aurora was seized for attempting to trade contrary to the provisions of the Act after it had been revived by presidential proclamation. Counsel for claimant argued: "To make the revival of a law dependent upon the presidential proclamation is to give that proclamation the force of a law;" and that "Congress cannot transfer the legislative power to the President." The Court, nevertheless, upheld the Government, saying:

"We see no sufficient reason why the legislature should not exercise its discretion in reviving the Act of 1809 either expressly or conditionally- as its judgment should direct."

81. The precedent thus established was followed in 1891 in the case of Field v. Clark, (143 U. S. 649), in which the point at issue was the validity of a provision of the Tariff Act of 1890 empowering the President to suspend certain other provisions of the Act in described contingencies to be ascertained by him. The Court concluded that both on the basis of precedent

and of principle the provision in question was unassailable. "That Congress cannot delegate legislative power to the President", Harlan J. asserted.

"is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution. The Act of 1st October 1890, in the particular under consideration is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. Nothing involving the expediency or just operation of such legislation was left to the determination of the President. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress."

82. In the recent case, Opp Cotton Mills v. Administrator, (1941) 312 U. S. 126, the Supreme Court sustained the Fair Labour Standard Act o! 1938 against the objection that Congress had delegated its legislative function, In the course of the judgment Stone C. J., observed :

"In an increasingly cemplexsociety Congress faviously could not perform its function if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The constitution, viewed as a continuously operative charter of Government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

83. In Norwegian Nitrogen Products Co. v. United States, 298 U. S. 294, Oadozo J., frankly recognised that executive and administrative officers and boards are in substance exercising a delegated legislative power in exercising their discretionary and rule-making powers but that the delegation involved therein is permissible in the sense that it is not in conflict with the constitutional principle against the delegation of legislative powers.

84. In this context it should be observed that the maxim delegatus non potest delegare is traced to a gloss on a passage in Justinian's Digest, (D. 1. 21. 25 and also D. 2. 1. 5). The maxim was introduced into English law through a misreading of Bractou (vide the learned article by Patrick Duff and H. E. Whiteside 14 Cornell Law Quarterly 168). It was developed as a doctrine of agency and established by Coke in decisions forbidding the delegation of judicial powers. In his second treabise on Civil Government cbap. XI, L'ocke applied the maxim to forbid the transference of the "power of making laws, to any other hands." Under Locke's influence the

maxim found its way into be writing of American publicists in the guise of a fundamental principle of free Government. In the United States partly because of the doctrine that all governmental powers are delegated by sovereign people, partly because of its logical affiliation with the dogma of separation of powers, the maxim became identified with the problem of delegation by legislature or governmental bodies. Appearing as corollary of this fundamental dogma it received the sanction of the constitutional writers and the problem of delegation has been obscured by the doctrine of the trinity of governmental powers.

85. As regards the limit to which legislative discretion may be delegated a learned writer has said :

"The fundamental limitation has to do with the scope of the discretion that may be delegated. All Students of the subject will admit that Congress could not, if it would, transfer in toto to the President or any other agency all or any of its enumerated powers. Thus a statute in general terms that the President be given authority to pay regulations regarding inter state or foreign commerce, would without doubt be held invalid. Nor can Congress delegate the power to regulate even one whole field of inter State commerce. Surely it would not be legitimate for it to authorise the President to pass reasonable regulations with reference to the inter-state railroad problem. Yet Congress has granted the Inter-State Commerce Commission the power to fix maximum railroad ratas, provided they be reasonable; and all admit that this is constitutional. What is the distinction ? Essentially the quantitative one of the scope o£ the discretion." (Jamas Hart, "The Ordinance Making Powers of the President of the United States," p. 146.)

86. The mainstay of the appellant's argument is a recent judgment of the Federal Court, Jatindra, Nath Gupta v. Province of Bihar, 53 C.W.N. (F.R.) 91 : (AIR. (36) 1949 P. C. 175 : 50 Cr. L. J. 897). But the facts of that case are clearly to be distinguished. In that case the question before the Federal Court related to the validity of the Bihar Maintenance of Public Order Act (Act v [5] of 1947). Section 1 (2) of that Act declared that the Act extended to the whole of the Province of Bihar. Section 1 (3) enacted that it shall remain in force for a period of one year from the date of its commencement. There was a proviso to the following effect :

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

The majority of the Federal Court held that the sub-section was ultra vires of the Bihar Legislature on the ground that there was improper delegation of legislative power to Executive Government. But it should be noticed in the first place that the Act was a temporary Act and by

vitrue of Section 1 (3), the Provincial Government had been delegated the power not only to extend but to modify the Act on the resolution of the two Houses of the Bihar Legislature. To quote the words of Mahajan J. :

"What modifications are to be made in a statute or whether any are necessary is an exercise of law-making power and cannot amount merely to an act of execution of a power already conferred by the statute. The extent of change is left to external authority, i. e., the Provincial Government. Nothing is here being done in pursuance of any law. What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if as what that law will be, whether that, what was originally enacted or something different. The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legislature than entrusted with this duty under the Government o£ India Act, 1935 ..... This novel device of defeating the Constitution Act adopted by the Provincial Legislature cannot have the approval of this Court. It is a dangerous device to defeat the clear and unambiguous provisions of the Constitution Act and if encouraged, may lead to the substitution of new law making bodies under cover of so-called conditional legislation."

In the present case, however, the material facts are different. The Bihar Buildings Control Act, 1947, which the Legislature had enacted, is not a temporary Act. Since no time is fixed, the statute is a perpetual Act and continues in force unless it is repealed (vide the definition of Perpetual Act at p. 345 in Craies on Statute Law, Edn. 4). It should be noticed that the Act received the assent of the Governor-General on 14th March 1947, and the assent was published in the Gazette on the next date. Since the statute does not fix a date from which it shall operate, Section 6, Bihar General Clauses Act, would apply and the Act would come into operation on 15th March 1947, when the Governor-General's ascent was published in the Gazette. As already remarked, Section 1 (3) merely enacts that "it shall remain in force for such period as the Provincial Government may, by notification, fix," It is manifest that the Act bad already come into force on 16th March 1947. The Provincial Government was only empowered to restrict the time for which it would remain in force. Even if the Provincial Government have not exercised their powers under Section 1 (3), the Act would obviously remain in force till it is repealed by the Provincial Legislature. It should also be stated that tinder Section 1 (8) the Provincial Government has not been empowered to modify the provisions of the statute. The Provincial Government has only been given discretion to restrict the duration of the statute for such period as they thought fit. No power is granted to the Provincial Government to extend the operation of the Act beyond the period fixed by the legislature. Since the material facts are different, the ratio of the Federal Court decision in Jatindra Nath Gupta v. Province of Bihar, (A, I. R. (36) 1949 F. C. 175 ; 60 Cr. L. J. 897), will not, in my opinion, apply to the present case. It cannot (for the

reasons already fully stated) be held that Section 1 (3) of the Act is illegal and ultra vires on the ground that it is an improper delegation of legislative power to the executive Government.

87. The learned Advocate-General then referred to the fact that on 12th October 1949, the Government of Bihar had promulgated an ordinance amending the .Bihar Buildings Control Act, 1947, Section 2 of the Ordinance states :

"For Sub-section (3) of Section 1, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely :

(3) It shall remain in force for five years : Provided that the expiration of this Act under the operation of this sub-section shall not-

(a) redder recoverable any sum which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which daring the continuance of this Act was recoverable by him thereunder; or

(b) affect any liability incurred under this Act or any punishment incurred in respect of any contravention of this Act or any order made thereunder; or

(c) affect any investigation or legal proceeding in respect of any such liability or punishment as aforesaid; and any such investigation or legal proceeding may be instituted, continued or enforced and any such punishment may be imposed, as if this Act had not expired'."

88. For the appellant the learned advocate maintained that in making the ordinance the Governor of Bihar had acted beyond his legislative competence. It was argued that under Section 88, Government of India Act, the Governor could not promulgate an ordinance for repealing or amending a Provincial Act. The question was explicitly considered by the Judicial Committee in Emperor v. Benoarilal Sarma, 72 I. A. 57 : (A. I. R. (32) 1945 P. C, 48 : 46 Cr. L. J. 589). In that case the Governor-General by ordinance had repealed or amended a number of sections in the Criminal Procedure Code. Nevertheless the Judicial Committee held that the ordinance was valid. At p. 68, Viscount Simon observed :

"Previous to 1935 the High Court had revisional jurisdiction over the Magistrate's Courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an ordinance made by the Governor-General under Section 72, as the Governor-General's ordinance was not an 'Act of the appropriate legislature,' 'Legislature,' it was said, means only the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor, and the Governor-General when making an ordinance in eases of emergency under Section 72 was not either of. these legislatures. The

argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in Section 311, Sub-section (6) of the Act, which says, 'Any reference in this Act to .... Acts or Jaws of the Federal or a Provincial Legislature, shall be construed as including a reference to an Ordinance made by the Governor-General. . . .' There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under Section 72 may repeal or alter the ordinary law as to the revisional jurisdiction of the High Court, just as the Indian legislature itself might do."

In Jnan Prosanna v. Province of West Bengal, 53 C. W. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 Cr. L. J. 1), a Full Bench of the Calcutta High Court has likewise expressed the opinion that an existing legislative Act can be expressly, amended or repealed by the Governor by legislation by ordinance. In my opinion, the Governor is competent in the present case to amend or repeal existing Provincial legislation by pro-mulgating an ordinance under Section 88, Government of India Act.

89. The argument was stressed that even it the Governor could amend the existing Provincial legislation by ordinance, he could not give retrospective effect to the Ordinance. It was pointed out that Section 2 of the Ordinance was clearly retrospective. This section provides that :

"For Sub-section (3) of Section 1, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely :

"(3) It shall remain in force for five years :

Provided that the expiration of this Act under operation of this sub-section shall not. .... ."

90. The argument on behalf of the appellant must fail. For, in United Provinces v. Mt. Atiga Begum, 1940 P. C. R. 110 : (A. I. R. (28) 1941 F. C. 16), the Federal Court held that the right to legislate retrospectively is inherent ins the right to legislate. that being so, if the Governor has a right to legislate, and if such legislation is to have the same effect as if passed by the legislature (as enacted by Section 88 (2)), then, it is manifest that the Governor has right to give retrospective effect to an ordinance he promulgates. This was the view of the Full Bench of the Bombay High Court in Prabhakar Kondaji v. Emperor, A. I. R. (31) 1944 Bom, 119 : (45 Cr. L. J. 604), and of a Full Bench of the Calcutta High Court in Jnan Prosanna v. Province of West Bengal, 53 C. w. N. 27 : (A. I. R. (36) 1949 Cal. 1 : 50 cr. L. J. 1). The same view has been expressed by the Judicial Committee in Kumar Singh v. Emperor, 73 I. A. 199 : (A, I. R. (33) 1946 P. C, 169 : 47 Cr. L. J. 933).

91. On behalf of the appellant the argument was stressed that Section 3 of the ordinance was ultra

vires in any case. Section 3 of the ordinance is to the following effect :

"Notwithstanding anything contained in Sub-section (3) of Section 1 of the said Act, the aaid Act shall not be deemed to be invalid on the ground that the duration of the Act was fixed or extended otherwise than by an Act of the Provincial Legislature ; and all penalties incurred, orders or rules made, action of proceedings taken, directions issued or jurisdiction exercised by any authority under or in accordance with the provisions of the said Act during the period from 15th March 1947, up to the commencement of this Ordinance shall be deemed to be as good and valid in law as if such penalties, orders, mea, actions, proceedings, directions and jurisdictions had been incurred, made, taken, issued or exercised under the said Act as amended by this Ordinance."

92. It was contended that the Legislature cannot compel the Courts to adopt a particular construction of a statute which the Legislature permits to remain in force. It was argued that the Legislature cannot issue a mandate to Court which leaves the law unchanged but seeks to compel the Courts to construe it not according to the judicial but the legislative judgment. But it is not necessary in this case to decide the question whether Section 3 of the Ordinance is invalid, for, in my opinion, Section 3 is clearly severable from the real of the ordinance which would still retain its original character and be intra vires and valid.

93. It is a well established rule of construction that, where the valid provisions are not severable from the ultra vires provisions, the whole statute must be held to be bad. In Re : The Initiative and Referendum Act, 1919 A. C. 935 : (A. I. R, (6) 1919 P, c. 145) and in Attorney General for Commonwealth v. Colonial Sugar Refining Co. Ltd., 1914 A.C.237: (83 L.J.P.c. 154) the Judicial Committee held that the offending provisions were so interwoven into the scheme of legislation that they were not severable, and that in each instance the whole Act was invalid an Act of the Province of Manitoba purporting to establish the Initiative and Referendum and an Act of the Commonwealth Parliament purporting to empower Royal Commissions to conduct enquiries of an unlimited scope, On the other hand, severable portions may be good. In the case of Broolce Bidlake v. Attorney General for British Columbia, 1923 A. C. 450 : (92 L. J. P. C. 124), the appellants claimed the right to employ Chinese and Japanese labour, in apite of a statute to the contrary. It was argued that the statute was ultra vires of a Dominion statute ratifying the treaty of 1911 between Great Britain and Japan. This argument failed on the ground that the provisions were separable, and that at any rate as regards the Chinese the statute could not be questioned.

Bat the teat of severability may not be adequate. In the Australian case R. v. Commonwealth Court of Conciliation, 11 Com. L. R. 1, Griffith C. J, suggested a different test :

"I venture to doubt the accuracy of this teat. What a man would have done is a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portion omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it."

The point is whether the provisions are essentially and unseparably connected in substance. If when the unconstitutional portion is struck out, that which remains is complete in itself and capable of being executed in accordance with the, apparent legislative intent, wholly independent of that which was rejected, it must be sustained.5 In other words, the Court may uphold the valid portion if it is severable from invalid portion and if thereby a different law is not created, To adopt a mataphor (from the Navigation Act case, 29 com, L. R. 357) the test enables the Court to uphold provisions, however interwoven, but it cannot separate the woof from the warp and manufacture a new web.

94. Upon the first question, therefore, I am of opinion that the Bihar Buildings Control Act, 1947, has been validly enacted, that Section 1 (3) of the Act is not ultra viras and that the Ordinance No. VI [6] of 1949 has validly amended Section 1, Sub-section (3) with retrospective effect.

95. The nest question to be decided is whether the definition of the word 'tenant' appearing in the Bihar Buildings Control Act, 1947, or Bihar Ordinance II [2] of 1946, which it replaced, is retrospective in its operation ~and protects the defendants in the circumstances of the case. [96] For the appellant learned advocate referred to Shiveswar v. Parmeshwar, 27 Pat. 1: (A.I.R. (36) 1949 Pat. 355), in which Manohar Lall and Imam JJ., held that the provisions of the Bihar Buildings Control Act, 1947, or the Bibar Buildings Control Ordinance, 1946, were not retrospective. But in a later case, Sm. Sant Kuer v. Ganesh Choudhary, A. I. R. (36) 1949 Pat. 137 : (27 Pat. 695), Imam and Narayan JJ. held that the Act must be construed to have retrospective effect. Narayan J., laid stress in particular upon Section 11 (1), which says that a tenant shall not be liable to be evicted even in execution of a decree. The learned Judge referred to circumstance that a different meaning was given to the word 'tenant' in the Act. The learned Judge also referred to the preamble which said that it was expedient to regulate the letting of buildings, to control the rent of such buildings and to prevent unreasonable eviction of tenants therefrom. For these reasons, Narayau J. thought that the Act was retrospective. Imam J., concurred in a separate judgment. But with the greatest respect, I am constrained to hold, for reasons which I shall shortly state, that neither the Bihar Act III (3) of 1947, nor the Bihar Ordinance II (2) of 1946, which it replaced, is retrospective in its effect. I consider that the decision of the Division Bench in Shiveshwar v. Parmeshwar, 27 Pat, l : (A. I. R. (36) 1949 pat. 355), is correct. It is a fundamental rule that no statute shall be construed to have retrospective

operation unless such a construction appears very clearly in the terms of the statute or arises by necessary and distinct implication. In Young v. Adams, (1898) A, C. 469 : (67 L. J. P. C. 75), Lord Watson stated :

"In the present case the learned Chief Justice was right in saying that the retrospective operation ought not to be given to the statute, unless the intention of the Legislature that it should be eo construed is expressed in a plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him."

Again, in James Gardner v. Edward A. Lucas, (1878) 3 A. C. 582, Lord O'Hagan said:

"Unless there is a declared intention of the legislature clear and unequivocal or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective."

In re Athlumne, (1898) 2 Q. B. 547 : (67 L. J. Q. B. 935), Wright J. restated the rule :

"A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

97. In the present case upon a proper construction of the provisions of the Act it is plain that the definition of the word "tenant" in Section 2 is not retrospective in its operation.

98. It is manifest that the question whether the Bihar Act III [3] of 1947 or Bihar Ordinance II [2] of 1946 "protects the defendants in the circumstances of this case" involves in investigation of facts. It is not competent for the Division Bench to refer such a mixed question of law and fact for the decision of the Full Bench. Rule 3 of chap. 6 of High Court Rules at page 25 is relevant in this context :

"If the case is an appeal from an original decree or order the questions of law shall alone be referred, and. the Full Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Banch which referred it, and in case of necessity in consequence of the absence of any or either of the referring Judges for the ultimate decision of another Division Bench."

It is, therefore, for the Division Bench to examine and decide this question.

99. The third question to be determined is whether the civil Courts have jurisdiction in view of Section 11 of the Act to make a decree for possession in this case. It is well-known rule of construction that in the case of an Act which creates a new jurisdiction, new procedure or new remedies, the procedure, or remedies thus prescribed and no others must be followed until altered by subsequent legislation (Esher M. R., in R. v. Judge of Essex County Court, (1887) 18 Q B. D. 701 : (56 L. J. Q, B. 315). There is also the cognate rule that where the two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed by the earlier. Thus in Dart (1893) probate 33 : (69 L. T, 251), the Court of Appeal held that Section 45, Supreme Court of Judicature Act, 1873, as to appeal from County Courts was repealed by Section 10, County Courts Act, 1875, which came into operation on the day after the Act of 1873, and that the subsequent repeal of the 1875 Act by Section 188, County Courts Act, 1888, did not revive the repealed provisions of the Act of 1873.

100. Where the Summary Jurisdiction Act, 1848, Section 27, empowered justices to enforce the payment of coats given by the Queen's Bench on appeal against convictions, except where the party liable was under recognisances to pay such costs, and the Quarter Sessions Act, 1849, authorised the Quarter Sessions to give costs in 'any appeal', to be recovered in the manner provided by the first Act, it was held that the exception in that Act was impliedly repealed, and that a distress warrant had been properly issued against the party liable, though he was under recognisances, Freeman v. Bead, (1860) 30 L. J. M. C. 123 : (9 W. B. 141). In another case an order made under the authority of the Judicature Act, 1876, enacting that the costs of all proceedings in the High Court shall be in the discretion of the Court and that where an action as tried by a jury the costs shall follow the event unless the Judge at the trial, or the Court, otherwise orders, was held to repeal so much of the Limitation Act, 1623, as deprived a successful plaintiff of costs in an action of a slander when he did not recover as much as 40 shillings damages, House of Lords in Garnett v. Bradley, (1878) 48 L. J. Ex. 186: (3 A. 0. 944).

101. In the present case Section 11 (1) of the Act enacts :

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise, except-

(a) in the case of a month to month tenant, for nonpayment of rent or breach of the conditions of the tenancy, or for sub-letting the building or any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, on his ceasing to be in such employment; and

(b) in the case of any other tenat, on the expiry of the period of the tenancy, or for non-payment of rent, or for breach of the conditions of the tenancy :

Provided that nothing contained in this section shall apply to a tenant whose landlord is the Provincial or the Central Government or any local authority constituted under any enactment for the time being in force."

Section 11 (2) of the Act states :

"A landlord who seeks to evict his tenant under Sub-section (1), shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of Sub-section (1), he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not be satisfied, he shall make an order rejecting the application."

102. It is manifest that the Bibar Buildings Control Act, 1947, creates a new jurisdiction and provides new remedies. Upon a proper construction of a. 11 of the Act in its context it is plain that the civil Courts have no jurisdiction to grant a decree for possession in cases covered by the Act.

103. To conclude, I am of opinion (1) that the Bihar Act III [3] of 1947 is validly enacted; that Section 1 (3) of the Act is intra vires; that it has been legally amended by Bihar Ordinance VI [6] of 1949 ; (2) that the definition of the word "tenant" in the Bihar Act ill [3] of 1947, or the Bihar Ordinance II [2] of 1946 is not retrospective in its operation ; (3) that the civil Courts Shave no jurisdiction in view of the provisions of Section 11 of the Act (Act III [3] of 1947) to make a decree for possession.

104. Such are the answers I should give to this Reference to the Full Bench.

105. Per Full Bench :--Let a certificate issue under Section 205 (1), Government of India Act.