Supreme Court of India

In Re The Delhi Laws Act, 1912, The ... vs The Part C States (Laws) Act, 1950 on 23 May, 1951

Equivalent citations: 1951 AIR 332, 1951 SCR 747

Author: H J Kania

Bench: Kania, Hiralal J. (Cj), Fazal Ali, Saiyid, Sastri, M. Patanjali, Mahajan, Mehr Chand, Mukherjea, B.K. & Das, S.R. & Bose, Vivian

PETITIONER:

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

Vs.

RESPONDENT:

THE PART C STATES (LAWS) ACT, 1950.

DATE OF JUDGMENT:

23/05/1951

BENCH:

KANIA, HIRALAL J. (CJ)

BENCH:

KANIA, HIRALAL J. (CJ)

FAZAL ALI, SAIYID

SASTRI, M. PATANJALI

MAHAJAN, MEHR CHAND

DAS, SUDHI RANJAN

BOSE, VIVIAN

MUKHERJEA, B.K.

CITATION:

1951 AIR 332 1951 SCR 747

CITATOR INFO :

R 1952 SC 75 (29)

RF 1952 SC 123 (9,49)

D 1952 SC 252 (64,110)

R 1953 SC 252 (27)

R	1954	SC 465	(9)
RF	1954	SC 569	(17)
R	1957	SC 414	(13)
RF	1957	SC 510	(9,11)
R	1958	SC 468	(25)
R	1958	SC 682	(11)
R	1958	SC 909	(7)
R	1958	SC 956	(4)
R	1959	SC 512	(7)
E&F	1959	SC 749	(28)
E	1960	SC 833	(8)
RF	1961	SC 4	(15)
R	1961	SC 954	(23)
RF	1961	SC1381	(4)
RF	1961	SC1519	(4)
RF	1962	SC 981	(5,6,12,13)
F	1964	SC 381	(38)
R	1965	SC 745	(17,156,178)
R	1965	SC 845	(30,55)
R	1965	SC1107	(22,79,80)
MV	1966	SC 693	(28)
D	1966	SC1788	(44,45)
RF	1967	SC 212	(26)
RF	1967	SC1048	(20)
R	1967	SC1480	(3,4,9,19)
RF	1968	SC1232	(13,15,49,50,52,75)
RF	1969	SC 549	(2)
RF	1971	SC 454	(6)
RF	1973	SC1461	(227,450,566,1874,1890)
D	1974	SC 669	(12)
R	1974	SC1660	(17,28,48,55)
R	1975	SC1549	(34,35)
RF	1975	SC2299	(46,685)
D	1976	SC 714	(38,41,45,48,51,57,58,62,64,69
RF	1979	SC1475	(18)
R	1980	SC 650	(5)
RF	1980	SC 882	(15)
C	1982	SC 710	(51)

R 1982 SC1126 (9)
R 1984 SC1130 (29)
R 1990 SC 560 (3,12,13,14,17,18,20,21,22,23,
RF 1992 SC 522 (21)

ACT:

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

HEADNOTE:

Section 7 of the Delhi Laws Act, 1912, provided that "The Provincial Government may by notification in the official gazette extend, with such restrictions and modifications as it thinks fit, to the Province of Delhi, or any part thereof, any enactment which is in force in any part of British India at the date of such notification". Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, provided that "The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara, with such restrictions and modifications as it thinks fit, any enactment which is in force in any other Province at the date of such notification. Section 2 of the Part C States (Laws) Act, 1950, provided that "The Central Government may, by notification in the official gazette extend to any Part C

State ..... or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law .... which is for the time being applicable to that Part C State. As a result of a decision of the Federal Court, doubts were entertained with regard to the validity of laws delegating legislative powers to the executive Government and the President of India made a reference to the Supreme Court under Art. 143 (1) of the Constitution for considering the question whether the above-mentioned sections or any provisions thereof were to any extent, and if so to what extent

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

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

(2) Per FAZL ALI, PATANJALI SASTRI, MUKHERJEA, DAS and BOSE JJ.--The first portion of s. 2 of the Part C States (Laws) Act, ;950, which empowers the Central Government to extend to any Part C State or to any part of such State with such modifications and restrictions as it thinks fit any enactment which is in force in a Part A State, is intra vires. Per KANIA C.J., MAHAJAN, MUKHERJEA and Boss JJ.--The latter portion of the said section which empowers the Central Government to make provision in any enactment extended to a Part C State, for repeal or amendment of any law (other than a Central Act) which is for the time being applicable to that Part C State, is ultra vires. Per FAzL ALI, PATANJALI SASTRI and DAS JJ.--The latter portion of s. 2 of the Part C States (Laws) Act, 1950, is also intra vires.

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

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

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KANIA C.J.--(i) The essentials of a legislative function are the determination of the legislative policy and its formulation as a rule of conduct and these essentials are the characteristics of a legislature by itself. Those essentials arc preserved when the legislature specifies the basic conclusions of fact upon the ascertainment of which from relevant data by a designated administrative agency it ordains that its statutory command is to be effective. The legislature having thus made its laws, every detail for working it out and for carrying the enactment into operation and effect may be done by the legislature or may be left to another subordinate agency or to some executive officer.

While this is also sometimes described as delegation of legislative powers, in essence it is different from delegation of legislative power as this does not involve the delegation of the power to determine the legislative policy and formulation of the same as a rule of conduct. While the so called delegation which empowers the making of rules and regulations has been recognised as ancillary to legislative power, the Indian Legislature had no power prior to 1935 to delegate legislative power in its true sense. Apart from the sovereign character of the British Parliament whose powers are absolute and unlimited, a general power in the legislature to delegate legislative powers is not recognised in any state. The powers of the Indian Legislature under the Constitution Acts of 1935 and 1950 are not different in this respect. (ii)An "abdication" of its powers by a legislature need not necessarily amount to complete effacement of itself. It may be partial. If full powers to do everything that the legislature can do are conferred on a subordinate authority, although the legislature retains the power to control the action of the subordinate authority by recalling such power or repealing the Acts passed by the subordinate authority, there is an abdication or effacement of the legislature conferring such power.

FAzL ALl J.--(i) The legislature must formally discharge its primary legislative function itself and not through others. (ii) Once it has been established that it has sovereign powers within a certain sphere, it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law and it may.utilise any outside agency to any extent it finds necessary for doing things, which it is unable to do itself or finds it inconvenient to (iii) It cannot, however abdicate its legislative functions and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (iv) As the courts of India are not committed to the doctrine of separation of powers and the judicial interpreta-

tion it has received in America, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to

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'abdication and self-effacement.'-(v) The power to introduce necessary restrictions and modifications is incidental to the power to adapt or apply the law. The modifications contemplated are such as can be made within the framework of the Act and not such as to affect its identity or structure or the essential purpose to be served by it.

PATANJALI SASTRI J.--(i) It is now established beyond doubt that the Indian Legislature, when acting within the limits circumscribing its legislative power, has and was intended to have plenary powers of legislation as large and of the same nature as those of the British Parliament itself and no constitutional limitation on the delegation of legislative power to a subordinate unit is to be found in the Indian Councils Act, 1861, Or the Government of India Act, 1935, or the Constitution of 1950. It is therefore as competent for the Indian Legislature to make a law delegating legislative power, both quantitatively and qualitatively. as it is for the British Parliament to do so, provided it acts within the circumscribed limits. (ii) Delegation of legislative authority is different from the creation of a new legislative power. III the former, the delegating body does not efface itself but retains its legislative power intact and merely elects to exercise such power through an agency or instrumentality of its choice. In the latter, there is no delegation of power to subordinate units but a grant Of power to an independent and co-ordinate body to make laws operative of their own force. For the first, no express provision authorising delegation is required. In the absence of a constitutional inhibition, delegation of legislative power, however extensive, could be made so long as the delegating body retains its own legislative power intact. For the second, however, a positive enabling provision in the con-

stitutional document is required. (iii) The maxim delegates non potest delegare is not part of the constitutional law of India and has no more force than a political precept to be acted upon by legislatures in the discharge of their function of making laws, and the courts cannot strike down an Act of parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politically undesirable is constitutionally competent. (iv) However wide a meaning may be attributed to the expression "restrictions and modifications," it would not affect the constitutionality of the delegating statute.

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

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

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

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

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

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

JUDGMENT:

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

"WHEREAS in the year 1912 the Governor-General of India in Council acting in his legislative capacity enacted the Delhi Laws Act, 1912, section 7 of which conferred power on the Central Government by notification to extend to the Province of Delhi (that is to say, the present State of Delhi) or any part thereof, with such restrictions and modifications as it thought fit, any enactment which wag in force in any part of British India at the date of such notification;

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

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

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

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

"AND WHEREAS notifications have been issued by the Central (Government from time to time under section 9, of the Part C States (Laws) Act, 1950, extending Acts in force in Part A States to various Part C States sometimes with, and sometimes without, restrictions and modifications;

"AND WHEREAS the Federal Court of India in Jatindra Nath Gupta v. Province of Bihar(1) held by a majority that (1)[1949] F.C.R. 595.

the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, was ultra vires of the Bihar Legislature inter alia on the ground that the said proviso conferred power on the Provincial Government to modify an Act of the Provincial Legislature and thus amounted to a delegation of legislative power; "AND WHEREAS, as a result of the said decision of the Federal Court, doubts have arisen regarding the validity of Section 7 of the Delhi Laws Act, 1912, Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, and Section 2 of the Part C States (Laws) Act, 1950, and of the Acts extended to the Provinces of Delhi and Ajmer-Merwara and various Part C States under the said sections respectively, and of the orders and other instruments issued under the Acts so extended:

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

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

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

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

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

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

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

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

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

(R. Ganapathy lyer, for the State of Madras. M.L. Saxena,for the State of Uttar Pradesh. A.R. Somanatha lyer, Advocate-General of Mysore (R. Ganapathy lyer, with him) for the State of Mysore.

P.S. Safeer, for Captain Deep Chand.

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

M.M. Gharakhan, for the Ajmer-Electric Supply Co. Ltd. N.C. Chatterjee, (G. C. Mathur, Basant Chandra Ghose, and Tilak Raj Bhasin, with him) for the Maidens Hotel. Jessaram Banasingh, for Runglal Nasirabad. Jyoti Sarup Gupta and K.B. Asthana, for the Municipal Committee, Ajmer.

Din Dayal Kapur, for Shri Munshilal and two others. 1951. May 23. The following judgments were delivered. KANIA C.J.--This is a reference made by the President of India under article 143 of the Constitution asking the Court's opinion on the three questions submitted for its consideration and report. The three questions are as fol- lows:-

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

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

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

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

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

"Extension of Enactments to Ajmer-Merwara.--The Cen- tral Government may, by notification in the official ga- zette, extend to the Province of Ajmer-Merwara with such restrictions and modifications as it thinks fit any enact- ment which is in force in any other Province at the date of such notification."

"(3) Is section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particu- lar or particulars or to what extent ultra vires the Parlia- ment ?"

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

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

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

The first covers the legislative powers of the Indian Legis- lature during the period prior to the Government of India Act, 1915. The second is in respect of its legislative power after the Government of India Act, 1935, as amended by the Indian Independence Act of 1947. 'The last is in respect of the power of the Indian Parliament under the present Consti- tution of 1950. It is therefore necessary to have an idea of the legislative powers of the Indian Legislature during those three periods. Without going into unnecessary details, it will not be out of place to know the historical back- ground. The East India Company first started its operations as a trading company in India and gradually acquired politi- cal influence. The Crown in England became the legislative authority in respect of areas which had come under the control of the East India Company. The Indian Councils Act of 1861, section 22, gave power to the Governor-General in Council, with additional nominated members, to make laws. The constitutional position therefore was that the British Parliament was the sovereign

body which passed the Indian Councils Act. It gave the Governor-General in Council in his legislative capacity powers to make laws over the territo- ries in India under the governance of the Crown. Under the English Constitution the British Parliament with its legis- lative authority in the King and the two Houses of Parlia- ment is supreme and its sovereignty cannot be challenged anywhere. It has no written Charter to define or limit its power and authority. Its powers are a result of convention but are now recognised as completely absolute, uncontrolled and unfettered. Sir Cecil Cart in his book on English Admin- istrative Law at page 15 observes: "A more basic difference between the Constitutions of the United States and Britain is the notorious fact that Britain has no written Constitu- tion, no fundamental statute which serves as a touchstone for all other legislation and which cannot be altered save by. some specially solemn and dilatory process. In Britain the King in Parliament is all powerful. There is no Act which cannot be passed and will not be valid within the ordinary limits of judicial interpretation ..... Even Magna Carts is not inviolate ..... The efficient secret of the English Constitution was the close union and nearly complete fusion of the executive and legislative powers. In other words by the system of Cabinet Government the executive authority is entrusted to a committee consisting of members of the dominant party in the legisla- ture and in the country."

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

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

Parliament as constitutional or other laws. Such laws are changed by the same body with the same ease as any other law. What law follows from this is that no court or authority has any right to pronounce that any Act of Parliament is unconstitutional. In Dicey's Law of the Constitution, 9th Edition, in considering the Constitution of France,it was observed that the supreme legislative power under the Republic was not vested in the ordinary Parliament of two Chambers, but in a National Assembly or Congress composed of the Chamber of Deputies and the Senate sitting together. The Constitutions of France which in this respect were similar to those of Continental polities exhibited as compared with the expansiveness or flexibility of English institutions that characteristic which was described by the author as rigid. A flexible constitution was one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. The flexibility of the British Constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever. They can modify or.repeal in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. Therefore, in England laws are called constitutional because they refer to subjects proposed to affect the fundamental institutions of the State and not because they are legally more sacred or difficult to change than other laws. Under the circumstances the term "constitutional law or enactment" is rarely applied to any English statute to give a definite description to its character. Under a rigid constitution, the term "consti- tutional" means that a particular enactment belongs to the articles of the constitution and cannot be legally changed with the same ease and in the same manner as ordinary laws, and it is because of this characteristic that courts are invested with powers to determine whether a particular legislation is permitted or not by the constitution. Such a question can never arise in respect of an enactment of the British Parliament.

As against this, the Governor-General in Council with legislative powers established under theIndian Councils Act stood in a different position. Its charter was the Indian Councils Act. Its powers were there necessarily defined and limited. That power, again, at any time could be withdrawn, altered and expanded or further curtailed. Moreover, as the powers were conferred by an Act of the British parliament, the question whether the action of the Governor-General in Council in his legislative capacity was within or without its legislative power was always capable of being raised and decided by a court of law. In Dicey's Law of the Constitution, 9th Edition the author has distin- guished the position of a sovereign legislature and a subordinate law-making body. The distinction is drawn from the fact that the subordinate legislatures have a limited power of making laws. At page 99, he has specifically considered the position of the legislative Council of British India prior to 1915 and stated as follows:--"Laws are made for British India by a Legislative Council having very wide powers of Legislation. This Council, or, as it is technically expressed, the Governor-

General in Council, can pass laws as important as any Acts passed by the Brit- ish Parliament. But the authority of the Council in the way of law-making is as completely subordinate to, and as much dependent upon, Acts of Parliament as is the power of the London and North Western Railway Company to make bye- laws ..... Now observe, that under these Acts the Indian Council is in the strictest sense a non-sovereign legisla- tive body, and this independently of the fact that the laws or regulations made by the Governor-General in Council can be annulled or disallowed by the Crown; and note that the position of the Council exhibits all the marks or notes of legislative subordination. (1) The Council is bound by a large number of rules which cannot be changed by the Indian legislative body itself and which can be changed by the superior power of the Imperial parliament.

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

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

practically limited to registering the decrees of the executive government. It would not be wrong, according to Mr. Cowell in his lecture on "Courts and Legislative Authorities in India," to de- scribe the laws made in the Legislative Councils as in reality the orders of Government. Every Bill passed by the Governor General's Council required his assent to become an Act. The Indian Councils Act of 1892 empowered the Governor-General in Council, with the approval of the Secre- tary of State in Council, to make regulations as to the conditions under which nomination of the additional members should be made. The word `election' was carefully avoided. The existence of a strong official block in the Councils was the important feature of the Act. As noticed by a writer on Indian Constitution, the Government maintained a tight and close control over the conduct of official members in the Legislature and they were not allowed to vote as they pleased. They were not expected to ask questions or move resolutions or (in some Councils) to intervene in debate without Government's approval. Their main function was to vote--to vote with the Government. However eloquent the non-official speakers might talk and however reasonable and weighty their arguments might be, when the time for voting came the silent official flanks stepped in and decided the matter against them. All these factors contributed to the unreality of the proceedings in the Council because the number of elected members was small and the issue was often known beforehand. Speaking in the. House of Lords in Decem- ber 1908 on the Bill which resulted in the Government of India Act of 1909, Lord Morley, the then Secretary of State for India, declared: "If I were attempting to set up a Parliamentary system in India, or if it could be said that this chapter of rules led directly or necessarily up to the establishment of a Parliamentary system in India. I for one would have nothing at all to do with it ..... A Parliamentary system is not at all the goal to which I would for one moment aspire." The constitution of the Central Legislative Council under the Regulation of November, 1909, as revised in 1912, was this:

Ordinary members of the Governor Gene-

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

The executive government was thus supreme and was not bound to obey or carry out the mandates of the legislature. Instances where Finance Bills were rejected and other Bills were backed by the popular feeling and which decisions the Governor-General overruled, are well known. The Indian Legislature was powerless to do anything in the matter. Without the consent of the executive government no Bill could be made into an Act nor an Act could be amended or repealed without its consent. The possibility of the Legis- lature recalling the power given tinder an Act to the execu- tive against the latter's consent was therefore nil. Once an Act giving such power (like the Delhi Laws Act) was passed, practically the power was irrevocable. In my opinion, it is quite improper to compare the power and position of the Indian Legislature so established and functioning with the supreme and sovereign character of the British Parliament. The legislative power of the Indian Legislature came to be changed as a result of the Act of 1915 by the creation of Provincial legislatures. I do not propose to go into the details of the changes, except to the extent they are di- rectly material for the discussion of the questions submit- ted for the Court's opinion, Diarchy was thus created but there was no federation under the Act of 1915. Under the Government of India Act, 1935, the legis- lative powers were distributed between the Central legisla- ture and the Provincial legislature, each being given exclu- sive powers in respect of certain items mentioned in Lists I and II of the Seventh Schedule. List III contained subjects on which it was open to the Centre or the Province to legis- late and the residuary power of legislation was controlled by section 104. This Act however was still passed by the British Parliament and therefore the powers of the Indian Central legislature as well as the Provincial legislatures were capable of being altered, expanded or limited according to the desire of the British Parliament without the Indian legislature or the people of India having any voice in the matter. Even under this Act, the executive government was not responsible to the Central Legislature or the Provincial Legislature, as the case may be. I emphasize this aspect because it shows that there was no fusion of legislative and executive powers as was the case with the Constitution in England. The result of the Indian Independence Act, 1947, was to remove the authority of the British Parliament to make any laws for India. The Indian Central Legislature was given power to convert itself into a Constituent Assembly to frame a Constitution for India, including the power to amend or repeal the Government of India Act, 1935, which till the new Constitution was adopted, was to be the Constitution of the country. Even with that change it may be noticed that the executive government was not responsible to the Central Legislature. In fact with the removal of the control of the Parliament it ceased to be responsible to anyone. Under the Constitution of India as adopted on the 26th of January, 1950, the executive government of the Union is vested in the President acting on the advice of the Minis- ters. A Parliament is established to make laws and a Su- preme Court is established with the powers defined in dif- ferent articles of the Constitution. The executive, legislative and judicial functions of the Government, which have to be discharged,

were thus distributed but the articles giving power to these bodies do not vest the legislative or judicial powers in these bodies expressly. Under the Constitution of India, the Ministers are responsible to the legislatures and to that extent the scheme of the British Parliament is adopted in the Constitution. While however that characteristic of the British Parliament is given to the Indian Legislature, the principal point of distinction between the British Parliament and the Indian Parliament remains and that is that the Indian Parliament is the creature of the Constitution of India and its powers, rights, privileges and obligations have to be found in the relevant articles of the Constitu- tion of India. It is not a sovereign body, uncontrolled with unlimited powers. The Constitution of India has con- ferred on the Indian Parliament powers to make laws in respect of matters specified in the appropriate places and Schedules, and curtailed its rights and powers under certain other articles and in particular by the articles found in Chapter 111 dealing with Fundamental Rights. In case of emergency where the safety of the Union of India is in danger, the President is given express power to suspend the Constitution and assume all legislative powers. Similarly. in the event of the breaking.down of the administrative machinery of a State, the President is given powers underarticle 257 to assume both legislative and executive powers in the manner and to the extent found in the article. There can be no doubt that subject to all these limitations and controls, within the scope of its powers and on the subjects on which it is empowered to make law% the Legislature is supreme and its powers are plenary.

The important question underlying the three questions submitted for the Court's consideration is what is described as the delegation of legislative powers. A legislative body which is sovereign like an autocratic ruler has power to do anything. It may, like a Ruler, by an individual decision, direct that a certain person may be put to death or a cer- tain property may be taken over by the State. A body of such character may have power to nominate someone who can exercise all its powers and make all its decisions. This is possible to be done because there is no authority or tribunal which can question the right or power of the authority to do so.

The contentions urged on behalf of the President of India are that legislative power carries with it a power of delegation to any person the legislature may choose to appoint. Whether sovereign or subordinate, the legislative authority can so delegate its function if the delegation can stand three tests. (1) It must be a delegation in respect of a subject or matter which is within the scope of the legis- lative power of the body making the delegation. (2) Such power of delegation is not negatived by the instrument by which the legislative body is created or established. And (3) it does not create another legislative body having the same powers and to discharge the same functions which it itself has, if the creation of such a body is prohibited by the instrument which establishes the legislative body it- self. It was urged that in the ease of an unwritten consti- tution, like the British Parliament there can De no

affirm- ative limitation or negative prohibition against delegation and therefore the power of delegation is included to the fullest extent within the power of legislation. The British Parliament can efface itself or even abdicate because it has a power to pass the next day a law repealing or annulling the previous day's legislation. When the British Parliament established legislative bodies in India, Canada and Austra- lia by Acts of the British Parliament, the legislatures so established, although in a sense subordinate, because their existence depended on the Acts of the British Parliament and which existence could be terminated or further let- tered by an Act of the British Parliament, neverthe- less are supreme with plenary powers of the same nature as the British Parliament, on the subjects and matters within their respective legislative authority. As the power of delegation is included in the power of legislation, these legislative bodies have also, subject to the three limitations mentioned above, full power of delegation in their turn. These legis- lative bodies were not agents of the British Parliament. Not being agents or delegates of the British Parliament, the doctrine delegata potestas non potest delegare cannot apply to their actions and if these legislatures delegate powers to some other authority to make rules or regulations, or authorise the executive government to enforce laws made by them or other legislatures wholly or in part and with or without restrictions or modifications, the legislatures are perfectly competent to do so. The history of legislation in England and India and the other Dominions supports this contention. It is recognised as a legislative practice and is seen in several Acts passed by the legislatures of the Dominions and in India. Such delegation of the legislative functions has been recognised over a series of years by the Judicial Committee of the Privy Council and it is too late to contest the validity of such delegation. It was lastly contended that the observations of the Federal Court in Jatindra Nath Gupta v. Province of Bihar(1), tending to show that delegation was not permissible, required to be recon- sidered.

Before considering these arguments in detail, I think it is essential to appreciate clearly what is conveyed by the word "delegation". That word is not used, either in discus- sions or even in some decisions of the courts, with the same meaning. When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are the characteristics of a legislature by itself. It has nothing to do with the principle of division of powers found in the Constitution of the United States of America. Those essentials are preserved, when the legislature specifies the basic conclusions of fact, upon ascertainment of which, from relevant data, by a designated administrative agency, (1) [1949] F.C.R. 595.

it ordains that its statutory command is to be effective. The legislature having thus made its laws, it is clear that every detail for working it out and for carrying the enact- ments into

operation and effect may be done by the legisla- ture or may be left to another subordinate agency or to some executive officer. While this also is sometimes described as a delegation of legislative powers, in essence it is different from delegation of legislative power which means a determination of the legislative policy and formulation of the same as a rule of conduct. I find that the word "delega- tion" is quite often used without bearing this fundamental distinction in mind. While the so-called delegation, which empowers the making of rules and regulations, has been recognised as ancillary to the power to define legislative policy and formulate the rule of conduct, the important question raised by the Attorney-General is in respect of the right of the legislature to delegate the legislative func- tions strictly so called.

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

(1) 51. A. 178, "Section 8. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General ,or of the said Lieutenant-Governor. for making laws and regulations, and may on making such exten- sion direct by whom any powers of duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation."

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

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

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

Lord Selbourne after agreeing with the High Court that Act XXII of 1869 was within the legislative power of the Governor-General in Council, considered the limited question whether consistently with that view the 9th section of that Act ought nevertheless to be held void and of no effect. The Board noticed that the majority of the Judges of the Calcutta High Court based their decision on the view that the 9th section was not legislation but was a delegation of legislative power. They noticed that in the leading judgment Markby J. the principle of agency was relied upon and the Indian Legislature seemed to be regarded an agent delegate, acting under a man.date from the Imperial Parliament. They rejected this view. They observed: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament. which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not. in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they. can properly do. so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirm- ative words which give the power, and if it violates no express condition or restriction by which that power is limited ..... it is not for any court of justice to inquire further, or to enlarge constructively those condi- tions and restrictions.

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

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

The important part of the decision, dealing with the the question before them was in these terms :--"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieut.-Governor (large as they undoubtedly are) as if, when they were exercised the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-Gener- al in Council. Their whole operation is directly and imme- diately under and by virtue of this Act (XXI of 1869) it- self. The proper legislature has exercised its judgment as to place, person, laws powers and the result of that judg- ment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legisla- tion is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships judgment) be well exercised, either absolutely or condition- ally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrust- ed by the legislature to persons in whom it places confi- dence, is no uncommon thing;and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legisla- tion as within the scope of the legislative powers which is from time to time conferred. It certainly

used no words to exclude it." (The italics are mine). They then mentioned by way of illustrations the power given to the Governor-General in Council (not in his legislative capacity) to extend the Code of Civil Procedure and Code of Criminal Procedure by section 385, Civil Procedure Code. and section 445, Criminal Procedure Code, to different territories. They held that a different conclusion will be casting doubt upon the validity of a long series of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must therefore be presumed to have been known to and in the view of, the Imperial Parliament, when the Coun- cils Act of that year was passed. For such doubt their Lordships were unable to discover any foundation either in the affirmative or in the negative words of the Act before them.

I have quoted in extenso extracts from this judgment because it is considered the foundation for the argument advanced by the learned Attorney-General. In my opinion this judgment does not support the contention as urged. The Privy Council noted the following:(1) That the Garo Hills were removed by the Act from the jurisdiction of the ordi- nary courts. (2) That in respect of the Khasi and Jaintia Hills the same position had been arrived at. (:3) That the power was to be exercised over areas which, notwithstanding the Act, remained under the administrative control of the Lieut.-Governor. (4) That the authority given to the Lieut.-Governor was not to pass new laws but only to extend Acts which were passed by the Lieut.Governor. or the Gover- nor-General in respect of the Province both being competent legislatures for the area in question. He was not given any power to modify any law. (5) They rejected the view of the majority of the Judges of the Calcutta High Court that the Indian Legislature was a delegate or an agent of the British Parliament. (6) That within the powers conferred on the Indian Legislature it was supreme and its powers were as plenary and of the same nature as the British Parliament. (7) That by the legislation the Indian Parliament had not created a legislative body with all the powers which it had. (8) The objection on the ground of delegation was rejected because what was done was not delegation at all but it was conditional legislation. Throughout the judgment it is nowhere suggested that the answer of Markby J. to the ques- tion framed by him (and quoted earlier in this judgment) was incorrect. (9) It emphasized that the order of the Lieut- Governor derived its sanction from the Act of the Governor- General and not because it was an order of the Lieut.-Gover- nor. (10) That in the legislation of the Governor-General in Council (legislative) all that was necessary to consti- tute legislation was found. This applied equally to future laws as the appropriate legislative body for the area was the same. This decision therefore carefully and deliberate- ly did not endorse the contention that the power of delega- tion was contained in the power of legislation. The Board after affirming that what was done was no delegation at all held that the legislation was only conditional legislation. In Emperor v. Benoari Lal

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

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

In rejecting this second objection, their Lordships observed that under paragraph 72 of Schedule 9, the Gover- nor-General himself must discharge the duty of (I) 72 I.A. 27.

legislation and cannot transfer it to other authorities. But the Governor-General had not delegated his legislative powers at all. After stating again that what was done was not delegated legislation at all, but was. merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is deter- mined by the judgment of a local administrative body as to its necessity, their Lordships disagreed with the majority view of the Federal Court that what was done was delegation of legislative functions. If the power of delegation was contained in the power of legislation as wide as contended by the Attorney-General, there appears no reason why the Privy Council should have rejected the argument that the Act was an act of delegation and upheld its validity on the ground that it was conditional legislation. Moreover they reaffirmed the following passage from Russell v. The Queen (1): "The short answer to this objection (against delegation of legislative power) is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority electors does not confer on these persons powers to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled.

Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency." (The italics are mine). Support for this last mentioned statement was found in the decision of the Privy Council in The Queen v. Burah(2). It is clear that this decision does not carry the matter further. Even though this was a war measure the Board emphasized that the Governor-General must himself discharge the duty of legislation and cannot transfer it to other authorities. They examined the impugned Act and (1) 7 App. Cas. 629.

(2) 5 I.A. 178.

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

executive authority to bring into operation the enactment or the rules framed thereunder. The authoritative force and binding nature of the same are found in the enactment passed by the legislature itself. Therefore, a correct reading of these decisions does not support the contention urged by the Attorney-General. Some decisions of the Privy Council on appeal from the Supreme Court of Canada and some decisions of the Supreme Court of Canada, on the point under discussion, on which the learned Attorney-General relied for his contention, may be noticed next. In Hodge v. The Queen(1), which was an appeal from the Court of Appeal, Ontario, Canada, a question about the validity of the Liquor Licences Act arose. After hold- ing that the temperance laws were under section 92 of the British North America Act for "the good government", their Lordships considered the objection that the Imperial Parlia- ment had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners. In other words, it was argued that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body and by that body alone. The maxim delegata potestas non potest delegare was relied upon to support the objection. Their Lordships observed: "The objection thus raised by the appellants was founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of, or acting under mandate from, the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario and that its Legislative Assem- bly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters (1) 9 App. Cas.117.

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 Domin- ion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make byelaws or resolutions as to subjects specified the enactment, and with the object of carrying the enactment into operation and effect.

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

ob- served that if byelaws or resolutions are warranted the power to enforce them seemed necessary and equally lawful. This case also does not help the Attorney-General. It recognises only the grant of power to make regulations which are "ancillary to legislation".

In In re The Initiative and Referendum Act(1), the Act of the Legislative Assembly of Manitoba was held outside the scope of section 92 of the British North America Act inas- much as it rendered the Lieut-Governor powerless to prevent the Act from becoming actual law, if approved by the voters, even without his consent. Their Lordships observed: "Section 92 of the (1) [1919] A.C. 935.

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

In In re George Edwin Gray(2), the question of delega- tion of powers in respect of the War Measures Act, 19 14, came for consideration. The provisions there were very similar to the Defence of India Act and the Rules made thereunder in India during the World War I. In delivering judgment Sir Charles Fitzpatrick C.J. observed as follows: - "The practice of authorising administrative bodies to make regulations to carry out the object of an Act instead of setting out all the details of the Act itself is well known and its legality is unquestioned." He rejected the argument that such power cannot be granted to the extent as to enable the express provisions of a statute to be amended or re- pealed, as under the Constitution, Parliament alone is to make laws under the Canadian Constitution. He observed that Parliament cannot indeed abdicate its function but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament. He observed: "I cannot however find anything in that Constitu- tional Act which would impose any limitation on the authori- ty of the Parliament of Canada to which the Imperial Parlia- ment is not subject." Against the objection that such wide discretion should not be left to the executive he observed that this objection should have been urged when the regula- tions were submitted to Parliament for its approval or better still when the War Measures Act was being discussed. The Parliament was the delegating authority and it was for that body to put any

(1) 9 App. Cas. 117.

(2) 57 S.C.R. Canada 150.

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

In the Chemical Reference case(D, Duff C.J. set out the true effect of the decision in the War Measures Act. He held that the decision of the Privy Council in the Fort Frances' case(2) had decided the validity of the War Measures Act and no further question remained in that respect. He stated: "In In re Gray(3) was involved the principle, which must be taken in this Court to be settled, that an Order-in-Council in conformity with the conditions prescribed by, and the provisions of, the War Measures Act may have the effect of an Act of Parliament." The Court considered that the regu- lations framed by the Governor-General in Council to safe- guard the supreme interests of the State were made by the Governor-General in Council "who was conferred subordinate legislative authority." He stated: "The judgment of the Privy Council in the Fort Frances' case(2), laid down the principle that in an emergency, such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, disable or over-bear the authority of the Provinces in relation to a vast field in which the Provinces would otherwise have exclusive jurisdiction. It must not however be taken for granted that every matter within the jurisdiction of the Parliament of Canada even in ordinary times could be validly committed by Parliament to the executive for legislative action in the case of an emergency." Unlike the Indian Constitution, in the British North America Act there is no power to suspend the Constitution or enlarge the legislative powers in an emergency like war. The Courts therefore stretched the langugage of the sections to meet the emergen- cy in (1) [1943] S.C.R. Canada 1.

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

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

the highest interest of the country but it also emphasized that such action was not permissible in ordinary times. The War Measures Acts were thus considered by the z Supreme Court of Canada on a different footing. The question was of competence but owing to the unusual circumstances and exigencies what was stated in the legislation was considered a sufficient statement of the legislative policy. It ap- pears to be thought that the same test cannot be applied in respect of legislation made in normal times, in respect of a permanent statute which is not of limited duration. The discussion in Benaori Lal Sarma's case(1) in the judgment of the Privy Council mentioned above may be usefully noted in this connection as the legislation in that case was also a war measure but was held valid as

conditional legislation. In so far as the observations in the Canadian decisions go beyond what is held in the Privy Council decisions, with respect, I am unable to agree. It appears that the word "delegation" has been given an extended meaning in some observations of the Canadian courts, beyond what is found in the Privy Council decisions. It is important to notice that in all the judgments of the Privy Council, the word "delega- tion" as meaning conferment of_legislative functions strict- ly, is not used at all in respect of the impugned legisla- tion and has been deliberately avoided. Their validity was upheld on the ground that the legislation was either conditional or subsidiary or ancillary legislation. An important decision of the Supreme Court of Australia may be noticed next. In the Victorian Stevedoring and Gener- al Contracting Company Proprietary Ltd. v. Dignan(2), the question whether delegation of legislative power was accord- ing to the Constitution came to be examined by the High Court of Australia. It was argued that section 3 of the Act in question was ultra vires and void in so far as it pur- ported to authorise the Governor-General to make regulations which (nothwithstanding anything in any other Act) shall have (1) 72 I.A. 27. (2) 46 Com. L.R. 73.

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

Statute...It is important to observe that in Ameri- ca the intrusion of the doctrines of agency into Constitu- tional interpretation (1) (1921) 29 Corn. L.R. 329.

has in no way obscured the operation of the separation of powers. In the opinion of the Judicial Committee a general power of legislation belonging to a legislature constituted under a rigid Constitution does not enable it by any form of enactment to create and arm with general legislative authority a new legislative power not created or authorized by the instrument by which it is established." In respect of the legislation passed during the emergency of war and where the power was strongly relied upon, Dixon J. observed: "It might be considered that the exigencies which must be dealt with under the defence power are so many, so great and so urgent and are so much the proper concern of the execu- tive that from its very nature the power appears by neces- sary intendment to authorise a delegation otherwise general- ly forbidden to the legislature ..... I think it certain that such a provision would be supported in America and the passage in Burah's case appears to apply to it in which the Judicial Committee deny that in fact any delega- tion there took place ..... This does not mean that a law confiding authority to the executive will be followed, however extensive or vague the subject-matter may be, if it does not fall outside the boundaries of federal power. Nor does it mean that the distribution of powers can supply no considerations or weight affecting the validity ..... It may be acknowledged that the manner in which the Constitution accomplishes the separation of power itself logically and theoretically makes the Par- liament the executive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorise subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law ..... Such subordinate legislation remains under Parliamentary control and is lacking in the independent and unqualified authority which is an attribute of true legisla- tive power." He concludes: " But whatever it may be, we should now adhere to the interpretation which results from the decision of Roche v. Kronheimer(1). This whole discussion shows that the learned Judge 12,was refuting the argument that because under the Consti- tution of U.S.A. such conferment of power would be invalid it should be held invalid under the Canadian Constitution also. He was not dealing with the question raised before us. Ultimately he said that Roche v. Kronheimer(1) was conclu- sive.

Mr. Justice Evatt stated that in dealing with the doctrine of the-separation of legislative and executive powers "it must be remembered that underlying the Common- wealth frame of government there is the notion of the British system of an executive which is responsible to Parliament. That system is not in operation under the United States' Constitution. He formulated the larger proposition that every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the executive government or

some such authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parlia- ment involves as a part of its content power to confer law- making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the executive or other agencies an increase in the extent of such power cannot of itself inval- idate the grant. It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant." In this paragraph the learned Judge appears certainly to have gone much beyond what had been held in any previous decision but he seems to have made the observations in those terms because (as he himself had stated just previ- ously) in his view every conferment of power--whether it was by conditional legislation or ancillary legislation--was a delegation of legislative power. He concluded however as follows:"On final analysis therefore the (1) (1921) 29 Corn. L.R. 329.

Parliament of the Commonwealth is not competent to abdicate its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions for it may elect not to do so and not because the doctrine of the separation of powers prevents Parliament from granting authority to other bodies to make laws or byelaws and thereby exercise legislative power for it does so in almost every statute but because each and every one of the laws passed by Parliament must answer the description of law upon one or more of the subject-matters stated in the Constitution. A law by which Parliament gives all its lawmaking authority to another body would be bad merely because it would fail to pass the test last mentioned."Read properly, these judgments therefore do not support the contention of the learned Attorney General. The decisions of the Privy Council on appeal from Canada do not carry the matter further. In the judgments of the two decisions of the Supreme Court of Canada and the deci- sion of the Supreme Court of Australia there are observa- tions which may appear to go beyond the limit mentioned above. These observations have to be read in the light of the facts of the case and the particular regulation or enactment before the court in each case. These decisions also uniformly reiterate that the legislature must perform its functions and cannot leave that to any other authority. Moreover the word "delegation" as stated by Evatt J. in his judgment is understood by some Judges to cover what is described as subsidiary or conditional legislation also. Therefore because at some places in these judgments the word "delegation" is used it need not be assumed that the word necessarily means delegation of legislative functions, as understood in the strict sense of the word. The actual decisions were on the ground that they were subordinate legislation or conditional legislation. Again, in respect of the Constitutions of the Dominions of Canada and Austra- lia I may observe that the legislatures of those Dominions were not packed, as in India, and their Constitution was on democratic lines. The principle of fusion of powers between the Legislature and Executive can well be considered

in operation in those Dominions, while as I have pointed out above there was no such fusion at all so far as the Indian Constitution in force till 1935 was concerned. Conclusions therefore based on the fusion of legislative and executive powers are not properly applicable to the Indian Constitu- tion. In my opinion therefore to the extent the observa- tions in the Canadian and Australian decisions go beyond what is clearly decided by the Privy Council in respect of the Indian Legislature, they do not furnish a useful guide to determine the powers of the Indian Legislature to dele- gate legislative functions to administrative or executive authorities.

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

Our attention was drawn to several decisions of the Supreme Court of the United States of America mostly to draw a distinction between the legislative powers of the Congress in the United States of America and the legislative powers of the legislature under Constitutions prepared on the British Parliament pattern. It was conceded that as the Constitution itself provided that the legislative and execu- tive powers were to vest exclusively in the legislature and the executive authority mentioned in the Constitution, it was not permissible for one body to delegate this authority and functions to another body. It may be noticed that several decisions of the Supreme Court of U.S.A, are based on the incompetence of the delegate to receive the power sought to be conferred on it. Its competence to function as the executive body is expressly set out in the Constitution, and it has been thought that impliedly the Constitution has thereby prevented such body from receiving from the legislative body other powers. In view of my final conclusion I shall very briefly notice the position accord- ing to the U.S.A. Constitution.

In Crawford on Statutory Construction, it is stated as follows: "So far however as the delegation of any power to an executive official or Administrative Board is concerned, the legislature must declare the policy of the law and fix the legal principles which are to control in given cases and must provide a standard to guide the official or the ,Board empowered to execute the law. This standard must not be too indefinite or general. It may be laid down in broad general terms. It is sufficient if the legislature will lay down an intelligible principle to guide the executive or administra- tive official ..... From these difficult criteria it is apparent

that the Congress exercises considerable liberali- ty towards upholding legislative delegations if a standard is established. Such delegations are not subject to the objection that the legislative power has been unlawfully delegated. The filling in mere matters of details within the policy of, and according to, the legal principles and stand- ards, established by the Legislature, is essentially minis- terial rather than legislative in character, even' if considerable discretion is conferred upon the delegated authority."

In Hampton & Co. v. United States(1), Taft C.J. ob- served: "It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President or to the judicial branch or if by law it attempts to invest itself or its members with either execu- tive or judicial power. This is not to say that the three branches are not co-ordinate parts of one Government and that each in the field of duties (1) (1928) 276 U.S. 394, 406 & 407.

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

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

In Panama Refining Co. v. Ryan (s), it was observed by Hughes C.J. "The Congress is not permitted to (1) 1 Ohio St. 88. (3) 293 U.S. 388.

(2) 72 P.A. 491, abdicate or transfer to others the essential legislative functions with which it is vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the National Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibil- ity and practicality which will enable it to perform its function in laying down policies and establish standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determi- nation of facts to which the policy as declared by the legislature is to apply. Without capacity to give authori- sations of that sort we should have the anomaly of a legis- lative power which in many circumstances calling for its exertion would be but a futility but the constant recogni- tion of the necessity and validity of such provisions and the wide range of administrative authority which has been declared by means of them cannot be allowed to obscure the limitations of the authority to delegate if our constitu- tional system is to be maintained. Similarly, in Schechter v. United States (1), it is stated: "So long as the policy is laid down and standard established by a statuten no unconstitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determi- nation of facts to which the policy as declared by the legislature is to apply."

The complexity of this question of delegation of power and the consideration of the various decisions in which its application has led to the support or invalidation of Acts has been somewhat aptly put by Schwartz on American Adminis- trative Law. After quoting from Wayman v. Southend (2) the observations of Marshall C.J. that the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to (1) 295 U.S. 459.

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

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

"Major premise: Legislative power cannot be constitu- tionally delegated by Congress.

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

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

They are instead administrative or quasi-legislative powers. " It was argued on behalf of the President that the legis- lative practice in India for over eighty years has recog- nised this kind of delegation and as that is one of the principles which the court has to bear in mind in deciding the validity of Acts of the legislature, this Court should uphold that practice. In support of this contention a sched- ule annexed to the case filed on behalf of the President, containing a list of Acts, is relied upon. In my opinion, out of those, the very few Acts which on a close scrutiny may be cited as instances, do not establish any such prac- tice. A few of the instances can be supported as falling under the description of conditional legislation or subsid- iary legislation. I do not discuss this in greater detail because unless the legislative practice is overwhelmingly clear, tolerance or acquiescence in the existence of an Act without a dispute about its validity being raised in a court of law for some years cannot be considered binding, when a question about the validity of such practice is raised and comes for decision before the Court. In my opinion, there- fore; this broad contention of the Attorney-General that the Indian Legisla- ture prior to 1935 had power to delegate legislative func- tions in the sense contended by him is neither supported by judicial decisions nor by legislative practice. A fair and close reading and analysis of all these decisions of the Privy Council, the judgments of the Supreme Courts of Canada and Australia without stretching and straining the words and expressions used therein lead me. to the conclusion that while a legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a legislature has power to lay down the policy and principles providing the rule of conduct, and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is de- scribed as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. In cases of emergency, like war where a large latitude has to be necessarily left in the matter of enforcing regulations to the executive, the scope of the power to make regulations is very wide, but. even. in those cases the suggestion that there was delega- tion of "legislative functions" has been repudiated. Simi- larly, varying according to the necessities of the case and the nature of the legislation, the doctrine of conditional legislation or subsidiary legislation or ancillary legisla- tion is equally upheld under all the Constitutions. In my opinion, therefore, the contention urged by the learned Attorney-General that legislative power carries with it a general power to delegate legislative functions, so that the legislature may not define its policy at all and may lay down no rule of conduct but that whole thing

may be left either to the executive authority or administrative or other body, is unsound and not supported by the authorities on which he relies. I do not think that apart from the sover- eign character of the British Parliament which is established as a matter of convention and whose powers are also therefore absolute and unlimited, in any legislature of any other country such general powers of delegation as claimed by the Attorney- General for a legislature, have been recognised or permit- ted.

It was contended by the learned Attorney-General that under the power of delegation the legislative body cannot abdicate or efface itself. That was its limit. It was argued that so long as the legislature had power to control the actions of the body to which power was delegated, that so long as the actions of such body were capable of being revoked there was no abdication or effacement. In support of this argument some reliance was placed on certain obser- vations in the judgments of the Privy Council in the cases mentioned above. It should be noticed that the Board was expressing its views to support the conclusion that the particular piece of legislation under consideration was either a conditional legislation or that the legislation derived its force and sanction from what the legislature had done and not from what the delegate had done. I do not think that those observations lead to the conclusion that up to that limit legislative delegation was permitted. The true test in respect of' 'abdication" or "effacement" appears to be whether in conferring the power to the delegate, the legislature, in the words used to confer the power, retained its control. Does the decision of the delegate derive sanc- tion from the act of the delegate or has it got the sanction from what the legislature has enacted and decided ? Every power given to a delegate can be normally called back. There can hardly be a case where this cannot be done because the legislative body which confers power on the delegate has always the power to revoke that authority and it appears difficult to visualize a situation in which such power can be irrevocably lost. It has been recognised that a legisla- tive body established under an Act of the British Parliament by its very establishment has not the right to create anoth- er legislative body with the same junctions and powers and authority. Such power can be only in the British Parliament and not in the legislature established by an Act of the British Parliament. Therefore, to say that the true test of effacement is that the authority which confers power on the subordinate body should not be able to withdraw the power appears to be meaningless. In my opinion, therefore, the question whether there is "abdication" and "effacement" or not has to be decided on the meaning of the words used in the instrument by which the power is conferred on the au- thority. Abdication, according to the Oxford Dictionary, means abandonment, either formal or virtual, of sovereignty. Abdication by a legislative body need not necessarily amount to a complete effacement of it. Abdication may be partial or complete. When in respect of a subject in the Legisla- tive List the legislature says that it shall not legislate on that subject but would leave it to somebody else to legislate

on it, why does it not amount to abdication or effacement ? If full powers to do anything and everything which the legislature can do are conferred on the subordi- nate authority, although the legislature has power to control the action of the subordinate authority, by recall- ing such power or repealing the Acts passed by the subordi- nate authority, the power conferred by the instrument, in my opinion, amounts to an abdication or effacement of the legislature conferring such power.

The power to modify an Act in its extension by the order of the subordinate authority has also come in for considera- ble discussion. Originally when power was conferred on the subordinate authority to apply existing legislation to specified areas it was given only to apply the whole or a portion thereof. That power was further expanded by giving a power to restrict its application also. In the next stage power was given to modify "so as to adapt the same" to local conditions. It is obvious that till this stage the clear intention was that the delegate on whom power was con- ferred was only left with the discretion to apply what was Considered suitable, as a whole or in part, and to make adaptations which became necessary because of local conditions and nothing more. Only in recent years in some Acts power of modification is given without any words of limitation on that power. The learned Attorney-General contended that the word "modify" according to the Oxford Dictionary means to limit, restrain, to assuage, to make less severe, rigorous, or decisive ;to tone down." It is also given the meaning "to make partial changes in;to alter without radical transformation." He therefore contended that if the done of the power exceeded the limits of the power of modification beyond that sense, that would be exceeding the limits of the power and to that extent the exercise of the power may be declared invalid. He claimed no larger power under the term "modification." On the other hand, in Rowland Burrows' "Words and Phrases ", the word "modify" has been defined as meaning" vary, extend or enlarge, limit or restrict." It has been held that modification implies an alteration. It may narrow or enlarge the provisions of the former Act. It has been pointed out that under the powers conferred by the Delhi Laws Act, the Central Government has extended the application of the Bombay Debtors' Relief Act to Delhi. The Bombay Act limits its application to poor agriculturists whose agricultural income is less than Rs. SO0. Under the power of modification conferred on it by theDelhi Laws Act, the Central Government has removed this limit on the income, with the result that the principles, policy and machinery to give relief to poor peasants or agriculturists with an income of less than Rs. 500 is made applicable in Delhi to big landowners even with an income of 20 lakhs. This shows how the word ' 'modification" is understood and applied by the Central Government and acqui- esced in by the Indian Legislature. I do not think such power of modification as actually exercised by the Central Government is permitted in law. If power of modification so understood is permitted, it will be open to the Central Legislature in effect to change the whole basis of the legislation and the reason for making

the law. That will be a complete delegation of legislative power, because in the event of the exercise of the power in that manner the Indian legislature has not applied its mind either to the policy under which relief should be given nor the class of persons, nor the circumstances nor the machin- ery by which relief is to be given. The provisions of the Rent Restriction Act in different Provinces are an equally good example to show how dangerous it is to confer the power of modification on the executive government. Having considered all the decisions which were cited before us and giving anxious consideration to the elaborate and detailed arguments advanced by the learned Attorney- General in the discussion of this case, I adhere to what I stated in Jatindra Nath Gupta's case(1) that the power of delegation, in the sense of the legislature conferring power, on either the executive government or another author- ity, "to lay down the policy underlying a rule of conduct" is not permitted. The word "delegation ", as I have pointed out, has been somewhat loosely used in the course of discus- sion and even by some Judges in expressing their views. As I have pointed out throughout the decisions of the Privy Council the word "delegation" is used so as not to cover what is described as conditional legislation or subsidiary or ancillary legislation, which means the power to make rules and regulations to bring into operation and effect the enactment. Giving "delegation" the meaning which has always been given to it in the decisions of the Privy Council, what I stated in Jatindra Nath Gupta's case, as the legisla- ture not having the power of delegation is, in my opinion, correct.

Under the new Constitution of 1950, the British Parlia- ment, i.e. an outside authority, has no more control over the Indian Legislature. That Legislature's powers are de- fined and controlled and the limitations thereon prescribed only by the Constitution of India. But the scope of its legislative power has not become (1) [1949] F.C.R. 595.

enlarged by the provisions found in the Constitution of India. While the Constitution creates the Parliament and although it does not in terms expressly vest the legislative powers in the Parliament exclusively, the whole scheme of the Constitution is based on the concept that the legisla- tive functions of the Union will be discharged by the Par- liament and by no other body. The essential of the legisla- tive functions, viz., the determination of the legislative policy and its formulation as a rule of conduct, are still in the Parliament or the State Legislatures as the case may be and nowhere else. I take that view.because of the provi- sions of article 357 and article 22 (4) of the Constitution of India. Article 356 provides against the contingency of the failure of the constitutional machinery in the States. On a proclamation to that effect being issued, it is provid- ed in article 357 (1) (a) that the power of the legislature of the State shall be exercisable by or under the authority of the Parliament, and it shall be competent for the Parlia- ment to confer on the President the power of the legislature of the State to make laws "and to authorise the President to delegate, subject to such conditions as he may think fit to impose. the powers so conferred to any other authority

to be specified by him in that behalf." Sub-clause (b) runs as follows :--" For Parliament, or for the President or other authority in whom such power to make laws is vested under sub-cl. (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and author- ities thereof." It was contended that on the breakdown of such machinery authority had to be given to the Parliament or the President, firstly, to make laws in respect of sub- jects on which the State Legislature alone could otherwise make laws and, secondly, to empower the Parliament or the President to make the executive officers of the State Gov- ernment to act in accordance with the laws which the Parlia- ment or the President may pass in such emergency. It was argued that for this purpose the word "to delegate" is used. I do not think this argument is sound. Sub-clause (2) re- lates to the power of the President to use the State executive officers. But under clause (a) Parliament is given power to confer on the President the power of the legislature of the State to make laws. Article 357 (1) (a) thus expressly gives power to the Parliament to authorise the President to delegate his legis- lative powers. If powers of legislation include the power of delegation to any authority there was no occasion to make this additional provision in the article at all. The word- ing of this clause therefore supports the contention that normally a power of legislation does not include the power of delegation.

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

Having regard to the position of the British Parliament, the question whether it can validly delegate its legislative functions cannot be raised in a court of law. Therefore from the fact that the British Parliament has delegated legisla- tive powers it does not follow. that the power of delegation is recognised in law as necessarily included in the power of legislation, Although in the Constitution of India there is no express separation of powers, it is clear that a legislature is created by the Constitution and detailed provisions are made for making that

legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making laws is primarily cast on the legislatures ? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies, executive or judicial, are not intended to discharge legislative functions ? I am unable to read the decisions to which our attention has been drawn as laying down that once a legislature observes the procedure prescribed for passing a bill into an Act, it becomes a valid law, unless it is outside the Legislative Lists in the Seventh Schedule prescribing its respective powers. I do not read articles 245 and 246 as covering the question of delegation of legislative powers. In my opinion, on a true construction of articles 245 and 246 and the Lists in the Seventh Schedule, construed in the light of the judicial decisions mentioned above, legislation delegating legislative powers on some other bodies is not a law on any of the subjects or entries mentioned in the Legislative Lists. It amounts to a law which states that instead of the legislature passing laws on any subject covered by the entries, it confers on the body mentioned in the legislation the power to lay down the policy of the law and make a rule of conduct binding on the persons covered by the law. As a result of considering all these decisions together it seems to me that the legislature in India, Canada, Aus- tralia and the U.S.A. has to discharge its legislative functions, i.e., to lay down a rule of conduct. In doing so it may, in addition, lay down conditions, or state facts which on being fulfilled or ascertained according to the decision of another body or the executive authority, the legislation may become applicable to a particular area. This is described as conditional legislation. The legislature may also, in laying down the rule of conduct, express itself generally if the conditions and circumstances so require. The extent of the specific and detailed lines of the rule of conduct to be laid down may vary according to the circumstances or exigen- cies, of each case. The result will be that if, owing to unusual circumstances or exigencies, the legislature does not choose to lay down detailed rules or regulations, that work may be left to another body which is then deemed to have subordinate legislative powers.

Having regard to the distinction noticed above between the power of delegation of legislative functions and the authority to confer powers which enables the donee of the power to make regulations or rules to bring into effect or operation the law and the power of the legislature to make conditional legislation, I shall proceed to consider the three specific questions mentioned in the Reference. It may be noticed that occasions to make legislation of the type covered by the three sections mentioned in the three ques- tions began in the early stages of the occupation of India where small bits of territories were acquired and in respect of which there was no regular legislative body. It was thought convenient to apply to these small areas laws which were made by competent' legislature in contiguous areas. That practice was adopted to avoid setting up a separate, sometimes inconvenient and sometimes costly,

machinery of legislation for the small area. Nor might it have been considered possible for the Governor-General in Council to enact laws for the day to day administration of such bits of territory or for all their needs having regard to different local conditions. As local conditions may differ to a cer- tain extent, it appears to have been considered also convenient to confer powers on the administrator to apply the law either in whole or in part or to restrict its operation even to a limited portion of such newly acquired area. This aspect of legislation is prominently noticed in Act XXII of 1869 discussed in The Queen v. Burah(1). Under section 22 of the Indian Councils Act of 1861, the Governor-General in Council was given power to make laws for all persons and for all places and things whatever within British India. The Province of Delhi was carved out of the Province of Punjab and was put (1) 5 I.A. 178.

under a Chief Commissioner and by section 2 of the Delhi Laws Act the laws in force in the Punjab continued to be operative in the newly created Province of Delhi. The Province of Delhi had not its legislative body and so far as this Chief Commissioner's Province is concerned it is not disputed that the power to legislate was in the Governor- General in Council in his legislative capacity. The first question as worded has to be answered according to the powers and position of the legislature in 1912. Section 7 of the Delhi Laws Act enables the Government (executive) to extend by notification with such restrictions and modifications as it thinks fit, to the Province of Delhi or any part thereof, any enactment which is in force in any part of British India, at the date of such notification, i.e., a law which was in force not necessarily in the Province of Punjab only, from which the Province of Delhi was carved out, but any Central or provincial law in force in any Province. Again, the Government is given power to extend any such law with such restrictions and modifications as it thinks fit. Moreover it enables the Provincial Government to extend an Act which is in force "at the date of such notification." Those words therefore permit extension of future laws which may be passed either by the Central or any Provincial legis- lature, also with such restrictions and modifications as the Provincial Government may think fit. At this stage, sections 8 and 9 of Act XXII of 1869 under which powers were given to the Lieut.-Governor in The Queen v. Burah(1) may be com- pared. They permitted the extension of Acts which were or might be made by the Governor-General in Council (legisla- tive) or the Lieut.Governor, both of whom were the competent legislative authorities for the whole area under the admin- istrative jurisdiction of the Lieut.-Governor. The power was confined to extend only those Acts, over the area specified in Act XXII of 1869, although that area was declared by Act XXII of 1869 as not subject to the laws of the Province, unless the area was specifically mentioned in the particular Act. On (1) 5 I.A. 178.

the authority of that decision therefore, so far as section 7 of the Delhi Laws Act gives power to the executive (Cen- tral) Government to extend Acts passed by the Central Legis- lature to

the Province of Delhi, the same may be upheld. The question then remains in respect of the power of the executive government to extend Acts of other Provincial legislatures (with or without restrictions or modifications) to the Chief Commissioner's Province. It is obvious that in respect of these Acts the Central Legislature has not ap- plied its mind at all. It has not considered whether the Province of Delhi requires the rule of conduct laid down in those Acts, as necessary or beneficial for the welfare of the people of the Province or for its government. They are passed by other Provincial legislatures according to their needs and circumstances. The effect of section 7of the Delhi Laws Act therefore in permitting the Central Govern- ment to apply such Provincial Acts to the Province of Delhi is that, instead of the Central Legislature making up its mind as to the desirability or necessity of making laws on certain subjects in respect of the Province of Delhi, that duty and right are conferred on the executive government. For example, the question whether a rent act, or an excise act, or what may be generally described as a prohibition act, or a debt relief act is desirable or necessary, as a matter of policy for the Province of Delhi is not considered and decided by the Central Legislature which, in my opinion, has to perform that duty, but that duty and function without any reservation is transferred over to the executive govern- ment. Section 7 of the Delhi Laws Act thus contains an entirely different quality of power from the quality of power conferred by sections 8 and 9 of Act XXII of 1869. All the decisions of the Privy Council unequivocally affirm that it is not competent for the Indian Legislature to create a body possessing the same powers as the Central Legislature itself. It is stated that the legislature cannot efface itself. One may well ask, if section 7 of the Delhi Laws Act has done anything else. The Privy Council decisions emphasize two aspects in respect of this question. The first is whether the new body is empowered to make laws.The second is, does the sanction flow from the legislation made by the legisla- ture or from the decision of the newly created body. As regards the first, it is obvious that in principle there is no difference if the newly created body itself writes out on a sheet of paper different sections of an Act or states that the Act will be what is written or printed on another clear- ly identifiable paper. Therefore if such new body says that the law in Delhi will be the same as Bombay or Madras Act so and so of such and such year it has made the law. Moreover it may be remembered that in doing so the new body may re- strict or modify the provisions of such Act also. On the second aspect the sanction flows clearly from the notifica- tion of the newly created body that Bombay or Madras Act so and so with such modifications as may be mentioned, will be the law.That has not been the will or decision of the legis- lature.The legislature has not applied its mind and said "Bombay Act ..... is the law of this Province".In my opinion, it is futile to contend that the sanction flows from the statement of the legislature that the law will be what the newly created body decides or specifies, for that statement only indicates the new body and says that we confer on it power to select a law of another province.

The illustrations of the extension of the Civil and Criminal Procedure Codes, mentioned in the judgment in The Queen v. Burah(1) have to be considered along with the fact that at that time the Governor-General in Council, in its legislative capacity, had power of legislation over the whole of India on all subjects. The Civil and Criminal Procedure Codes were enacted by the Central Legislature and it could have made the same applicable at once to the whole of India. But having passed the laws, it laid down a condi- tion that its application may be referred to certain areas until the particular Provincial Government (executive) considered it convenient for these Codes to be made (1) 5 I.A. 178, applicable to its individual area. A Provincial Govern- ment, e.g., of Bombay, was not empowered to lay down any policy in respect of the Civil Procedure Code or the Crimi- nal Procedure Code nor was it authorised to select, if it liked, a law passed by the Legislature of Madras for its application to the Province of Bombay. If it wanted to do so, the Legislature of the Province of Bombay had to exer- cise its judgment and decision and pass the law which would be enforceable in the Province of Bombay. It may be noticed that the power to extend, mutatis mutandis, the laws as contained in sections 8 and 9 of Act XXII of 1869 brings in t.he idea of adaptation by modification, but so far only as it is necessary for the purpose. In my opinion, therefore, to the extent section 7 of the Delhi Laws Act permits the Central executive government to apply any law passed by a Provincial legislature to the Province of Delhi, the same is ultra vires the Central Legislature. To that extent the Central Legislature has abdicated its functions and there- fore the Act to the extent is invalid.

Question 2 relates to Ajmer-Merwara (Extension of Laws) Act. Till the Government of India Act, 1915, there was unitary government in India. By the Act of 1915, Provincial legislatures were given powers of legislation but there was no distribution of legislative powers between the Centre and the Provinces. That was brought about only by the Govern- ment of India Act, 1935. Section 94 of that Act enumerates the Chief Commissioner's Provinces. They include the Prov- inces of Delhi and Ajmer-Merwara. Under sections 99 and 100 there was a distribution of legislative powers between Provinces and Centre, but the word "Province" did not in- clude a Chief Commissioner's Province and therefore the Central Legislature was the only law-making authority for the Chief Commissioner's Provinces. The Ajmer-Merwara Act was passed under the Government of India Act as adapted by the Indian Independence Act. Although by that Act the control of British Parliament over the Government of India and the Central Legislature was removed, the powers of the Central Legislature were still as those found in the Govern- ment of India Act, 1935. The Independence Act therefore made no difference on the question whether the power of delega- tion was contained in the legislative power. The result is that to the extent to which section 7 of the Delhi Laws Act is held ultra vires, section 2 of the Ajmer-Merwara Act, 1947, should also be held ultra vires.

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

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

(b) a Council of Advisers or Ministers.

It is common ground that no law creating such bodies has been passed by the Parliament so far.Article 246 deals with the distribution of legislative powers between the Centre and the States but Part C States are outside its operation. Therefore on any subject affecting Part C States, Parliament is the sole and exclusive legislature until it passes an Act creating a legislature or a Council in terms of article 240. Proceeding on the footing that a power of legislation does not carry with it the power of delegation (as claimed by the Attorney-General), the question is whether section 2 of the Part C States (Laws) Act is valid or not. By that section the Parliament has given power to the Central Government by notification to extend to any part of such State (Part C State), with such restrictions and modifications as it thinks fit, any enactment which is in force in Part A State at the date of the.notification. The section although framed on the lines of the Delhi Laws Act and the Ajmer-Merwara Act is restricted in its scope as the executive government is empowered to extend only an Act which is in force in any of the Part A States. For the reasons I have considered certain parts of the two sections covered by Questions 1 and 2 ultra rites, that part of section 2 of the Part C States (Laws) Act, 1950, which empowers the Central Government to extend laws passed by any Legislature of Part A State, will also be ultra vires. To the extent the Central Legislature or Parliament has passed Acts which are applicable to Part A States, there can be no objection to the Central Government extending, if necessary, the operation of those Acts to the Province of Delhi, be- cause the Parliament is the competent legislature for that Province. To the extent however the section permits the Central Government to extend laws made by any legislature of Part A State to the Province of Delhi, the section is ultra vires.

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

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

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

FAZL ALI J.--The answer to the three questions which have been referred by the President underarticle 143 of the Constitution of India, depends upon the proper answer to another question which was the subject of very elaborate arguments before us and which may be stated thus: Can a legislature which is sovereign or has plenary powers within the field assigned to it, delegate its legislative functions to an executive authority or to anoth- er agency, and, if so. to what extent it can do so ?

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

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

(2) Delegated legislation is permissible only within certain limits; and (3) Delegated legislation is not permissible at all by reason of certain principles of law which are wellknown and well-recognised.

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

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

rule is so stated in Broom's Legal Maxims, and many other books, and it is also stated that in a number of cases the authority to employ agents is implied. In applying the maxim to the act of a legislative body, we have necessarily to ask "who is the principal and who is the delegater" In some cases where the question of the power of the Indian or a colonial legislature came up for consideration of the courts, it was sug- gested that such a legislature was a delegate of the British Parliament by which it had been vested with authority to legislate. But this view has been rightly repelled by the Privy Council on more than one occasion, as will appear from the following extracts from two of the leading cases on the subject:-

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

"It appears to their Lordships, however, that the objec- tion thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in section 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament.": Hodge v. The Queen (2). (1) 3 App. Cas. 889. (2) 9 App. Cas. 117.

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

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

"The Judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the elec- tors." (2) There can be no doubt that members of a legislature represent the majority of their electors, but the legisla- ture as a body cannot be said to be an agency of the elec- torate as a whole. The individual members may and often do represent different parties and different shades of opinion, but the composite legislature which legislates, does so on its own authority or power which it derives from the Consti- tution, and its acts cannot be questioned by the electorate, nor can the latter withdraw its power to legislate on any particular matter. As has been pointed out by Dicey,--

"the sole legal right of electors under the English Constitution is to elect members of Parliament. Electors have no legal right of initiating, of sanctioning, or of repealing the legislation of Parliament." (3) It seems to me therefore that it will not be quite accurate to say that the legislature being an agent of (1) Dicey's:"Law of the Constitution", 8th edn., p. 45. (2) Ibid, p. 72.

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

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

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

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

enacting laws, that of executing the public resolu- tions, and of trying the causes of individuals."(1) The doctrine found many enthusiasts in America and was virtually elevated to a legal principle in that country. Washington, in his farewell address, said :-

"The spirit of enroachment tends to consolidate the powers of all governments in one, and thus to (1) Montesquieu's Spirit of Laws, Vol. 1 by J. V. Pritchard, 1914 edn, pp. 162-3.

create, whatever the form of government, a real despotism." John Adams wrote on similar lines as follows:" It is by balancing one of these three powers against the other two that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of free- dom preserved." (1) These sentiments are fully reflected in the Constitu- tions of the individual States as well as in the Federal Constitution of America. Massachusetts in her Constitution, adopted in 1780, provided that "in the govern- ment of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise legislative and judicial powers or either of them; the judicial shall never exercise legislative and executive powers or either of them; to the end that it may be a government of laws and not of men."(2) The Constitutions of 39 other States were drafted on similar lines, and so far as the Federal Constitution of the United States was concerned, though it does not express- ly create a separation of governmental powers, yet from the three articles stating that the legislative power vests in Congress, the judicial power in the Supreme Court and the executive power in the President, the rule has been deduced that the power vested in each branch of the Government cannot be vested in any other branch. nor can one branch interfere with the power possessed by any other branch. This rule has been stated by Sutherland J. in Springer v. Government of the Philiipine Islands(s) in these words :--

"It may be stated then, as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the Executive (1) Vide, Works, Vol. 1, p. 186.

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

(3) 277 U.S. 189 at 201, cannot exercise either legislative or judicial power; the Judiciary cannot exercise either executive or legislative power."

From the rule so stated, the next step was to deduce the rule against delegation of legislative power which has so often been stressed in the earlier American decisions. It was however soon realized that the absolute rule against delegation of legislative power could not be sustained in practice, and as early as 1825, Marshall C.J. openly stated that the rule was

subject to limitations and asserted that Congress "may certainly delegate to others powers which the Legislature may rightfully exercise itself ,,(1). In course of time, notwithstanding the maxim against delegation, the extent of delegation had become so great that an American writer wrote in 1916 that "because of the rise of the admin- istrative process, the old doctrine prohibiting the delega- tion of legislative power has virtually retired from the field and given up the fight".(2) This is in one sense an over-statement, because the American Judges have never ceased to be vigilant to check any undue or excessive au- thority being delegated to the executive as will appear from the comparatively recent decisions of the American Supreme Court in Panama Refining Co. v. Ryan (3) and Schechter Poultry Corp. v. United States(4). In the latter case, it was held that the National Industrial Recovery Act, in so far as it purported to confer upon the President the author- ity to adopt and make effective codes of fair competition and impose the same upon members of each industry for which such a code is approved,-was void because it was an uncon- stitutional delegation of legislative power. Dealing with the matter, Cardozo J. observed as follows :'-

"The delegated power of legislation which has found expression in this code is not canalized within (1) Wayman v. Southard (1825) 23 U.S. 43.

(2) 41 American Bar Asscn. Reports, 356 at 368. (3) 293 U.S. 388. (4) 295 U.S. 495.

banks that keep it from overflowing. It is unconfined and vagrant ..... Here, in the case before us, is an attempt- ed delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils upon discovery to correct them ..... This is delegation running riot. No such plenitude of power is capable of transfer."(1) The fact however remains that the American courts have upheld the so-called delegated legislation in numerous instances, and there is now a wide gulf between the theoret- ical doctrine and its application in practice. How numerous are the exceptions engrafted on the rule will appear on a reference to a very elaborate and informing note appended to the report of the case of Panama Refining Co. v. Ryan in 79, Lawyer's Edition at page 448. In this note, the learned authors have classified instances of delegation upheld in America under the following 8 heads, with numerous sub-heads :--

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

2. Delegation of non-legislative or administrative functions.

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

4. Delegation to municipalities and local bodies.

5. Delegation by Congress to territorial legislature or commission.

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

7. Vesting discretion in judiciary.

8. Adopting law or rule of another jurisdiction. The learned American Judges in laying down exceptions to the general rule from time to time, have offered various expla- nations, a few of which may be quoted as samples:- (1) 295 U.S, 495 at 551.

" ..... however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believ- ing that it is, or that the Constitution requires." [Per Holmes J. in Springer v. The Government of Phillipine Is- lands(1)] " .....too much effort to detail and particularize, so as to dispense with the administrative or fact-finding assist- ance, would cause great confusion in the laws, and would result in laws deficient in both provision and execution." [Mutual Film Corporation v. Industrial Commission(2)] "If the legislature' 'were' strictly required to make provision for all the minutiae of regulation, it would, in effect, be deprived of the power to enact effective legisla- tion on subjects over which it has undoubted power." "The true distinction..... is this. The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government."(3) "The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be. and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [Per Ranney J. in Cincinnati W. & Z.R. Co. v. Clinton County Commissioners(4)]. (1) 277 U.S. 189. (31 Locke's Appeal, 1873, 72 Pa. 491. (2) 236 U.S. 230. (4) 1 Ohio St. 88.

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of law." [Moore v.Reading(1)] "Congress may declare its will and, after fixing a primary standard, devolve upon administrative officers the power to fill up the details by prescribing administrative rules and regulations." [United States v. Shreveport Grain & E. Co.(2)] .....

"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordi- nate rules within the prescribed limits, the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort, we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." [Per Hughes C.J. in Panama Refining Co. Ryan(3)] "This is not to say that the three branches are not co- ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch." [Per Taft C.J. in J.W. Hampton Jr. & Co. v. U. S.(4)] I have quoted these extracts at the risk of encumbering my opinion for 2 reasons:firstly, because they (1) 21 Pa. 202. (3) 293 U.S. 388.

(2) 287 U.S. 77. (4) 276 U.S. 394.

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

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

" ..... unless the legislature is prepared to lay down at once and for all time, or for so far into the future as they may think fit, a list of prohibited goods, they must have power to make a prohibition depending upon a condition, and that condition may be the coming into exist- ence or the discovery of some fact (1) (1909) 8 C.L.R. 626. (2) 3 App. Cas. 889.

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

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

" ..... the time has passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legis- lative power to the Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character."(4) In England, the doctrine of separation of powers has exer- cised very little influence on the course of judicial deci- sions or in shaping the Constitution, notwithstanding the fact that distinguished writers like Locke and Blackstone strongly advocated it in the 17th and 18th centuries. Locke in his treatise on Civil Government wrote as follows :-- "The legislature cannot transfer the power of making laws to any other hands; for it being a delegated power from the people, they who have it cannot pass it over to others. (g

141).

Blackstone endorsed this view in these words :-- Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty."(5) Again, Montesquieu, when he enunciated the doctrine of sepa- ration of powers, thought that it represented the (1) (1916) 22 C.L.R. 268. (3) (1931) 46C.L.R. 73. (2) (1921) 19 C.L.R. 329. (4) Ibid, p. 100.

(5) Commentaries on the Laws of England, 1765.

quintessence of the British Constitution for which he had great admiration. The doctrine had undoubtedly attracted considerable attention in England in the 17th and 18th centuries, but in course of time it came to have a very different meaning there from what it had acquired in

the United States of America. In the United States, the empha- sis was on the mutual independence of the three departments of Government. But, in England, the doctrine means only the independence of the judiciary, whereas the emergence of the Cabinet system forms a]ink between the executive and the legislature. How the Cabinet system works differently from the so-called non-parliamentary system which obtains in the United States, may be stated very shortly. In the United States, the executive power is vested in the Presi- dent, to whom, and not to the Congress, the members of the Cabinet are personally responsible and neither the President nor the members of the Cabinet can sit or vote in Congress, and they have no responsibility for initiating bills or seeking their passage through Congress. In England, the Cabinet is a body consisting of members of Parliament chosen from the party possessing a majority in the House of Com- mons. It has a decisive voice in the legislative activities of Parliament and initiates all the important legislation through one or other of the Ministers, with the result that "while Parliament is supreme in that it can make or unmake Government, the Government once in power tends to control the Parliament."

The conclusion which I wish to express may now be stated briefly. It seems to me that though the rule against delega- tion of legislative power has been assumed in America to be a corollary from the doctrine of separation of powers, it is strictly speaking not a necessary or inevitable corollary. The extent to which the rule has been relaxed in America and the elaborate explanations which have been offered to justi- fy departure from the rule, confirm this view, and it is also supported by the fact that the trend of decisions in Australia, notwithstanding the fact that its Constitutionis at least theoretically based on the principle of separa- tion of powers, is that the principle does not stand in the way of delegation in suitable circumstances. The division of the powers of Government is now a normal feature of all civilised constitutions, and, as pointed out by Rich J. in New South. Wales v. Commonwealth.(1), ,, it is "well-known in all British communities ; yet, except m the United States, nowhere it has been held that by itself it forbids delegation of legislative power. It seems to me that the American jurists have gone too far in holding that the rule against delegation was a direct corollary from the separa- tion of powers.

I will now deal with the third principle, which, in my opinion, is the true principle upon which the rule against delegation may be founded. It has been stated in Cooley's Constitutional Limitations, Volume 1 at page 224 in these words :--

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high

prerogative has been in- trusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be de- volved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

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

"No legislative body can delegate to another depart- ment of the government, or to any other authority, the power, either generally or specially, to enact (1) 20 C.L.R. 54 at 108.

laws. The reason is found in the very existence of its own powers. This high prerogative has been intrusted to its own wisdom, judgment, and patriotism, and not to those of other persons, and it will act ultra vires if it undertakes to delegate the trust, instead of executing it." This rule in a broad sense involves the principle underly- ing the maxim, delegatus non potest delegare, but it is apt to be misunderstood and has been misunderstood. In my judg- ment, all that it means is that the legislature cannot abdicate its legislative functions and it cannot efface itself and set up a parallel legislature to discharge the primary duty with which it has been entrusted. This rule has been recognized both in America and in England, and Hughes C.J. has enunciated it in these words :--

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative func- tions with which it is thus vested."(1) The matter is again dealt with by Evatt J. in Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Neakes v. Dignan(2), in these words :-

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

(1) 293 U.S. 421, (2) 46 Com. L,R. 73 at 121, I think that the correct legal position has been compre- hensively summed up by Lord Haldane in In re the Initiative and Referendum Act(3):--

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

What constitutes abdication and what class of cases will be covered by that expression will always be a question of fact, and it is by no means easy to lay down any comprehen- sive formula to define it, but it should be recognized that the rule against abdication does not prohibit the Legisla- ture from employing any subordinate agency of its own choice for doing such subsidiary acts as may be necessary to make its legislation effective, useful and complete. Having considered the three principles which are said to negative delegation of powers, I will now proceed to consid- er the argument put forward by the learned Attorney-General that the power of delegation is implicit in the power of legislation. This argument is based on the principle of sovereignty of the legislature within its appointed field. Sovereignty has been variously described by constitutional writers, and sometimes distinction is drawn between legal sovereignty and political sovereignty. One of the writers describes it as the power to make laws and enforce them by means of coercion it cares to employ, and he pro-ceeds to say that in England the legal sovereign, i.e., the person or persons who according to the law of the land legislate and administer the Government, is the King in Parliament, whereas the political (1) [1919] A.C. 935 at 945.

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

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

According to the same writer, the characteristics of a non-sovereign law-making body are :-- (1) the existence of laws which such body must obey and cannot change;(2) the formation of a marked distinction between ordinary laws and fundamental laws;and (3) the existence

of some person or persons, judicial or otherwise, having authority to pro- nounce upon the validity or constitutionality of laws passed by such law-making body. Dealing with the Indian or the colonial legislature, the learned writer characterizes it as a non-sovereign legislature and proceeds to observe that its authority to make laws is as completely subordinate to and as much dependent upon Acts of Parliament as is the power of London and NorthWestern Railway Co. to make byelaws. This is undoubtedly an overstatement and is certainly not ap- plicable to the Indian Parliament of today. Our present Parliament, though it may not be as sovereign as the Parlia- ment of Great Britain, is certainly as sovereign as the Congress of the United States of America and the Legisla- tures of other independent countries having a Federal Con- stitution. But what is more relevant (1) Modern Political Constitutions, by Strong.

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

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

"Their Lordships agree that the Governor-General in Council could not by any form of enactment, create in India, and arm with general legislative authority, a new legisla- tive power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the (1) 5 I.A. 178.

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

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

The next case on the subject is Russell v. The Queen (1). In that case, the Canadian Temperance Act, 1878, was challenged on the ground that it was (1) 7 App, Cas. 829.

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

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legis- late. 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 con- venient, and is certainly not

unusual, and the power so to legislate cannot be denied to the Parliament of Canada when he subject of legislation is within its competency...If authority on. this point were necessary, it will be found in the case of Queen v. Burah, lately before this Board. The same doctrine was laid down in the case of lodge v. The Queen (1), where the question arose as to whether the legislature of Ontario had or had not the power of entrust- ing to a local authority--the Board of Commissioners--the power of making regulations with respect to the Liquor Licence Act, 1877, which among other things created offences for the breach of hose regulations and annexed penalties thereto. their Lordships held that the Ontario Legislature had that power, and after reiterating that the Legislature which passed the Act was not a delegate, they observed as follows :--

"When the British North America Act enacted that there should be a legislature for Ontario, and that (1) 9 App. Cas. 117.

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

Another case which may be usefully cited is Powell v. Apollo Candle Co. (1). The question which arose in that case was whether section 133 of the Customs Regulations Act of 1879 of New South Wales was or was not ultra rites the colonial legislature. That section provided that "when any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Gover- nor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article." Having repelled the contention that the colonial legislature was a delegate of the Imperial Parliament and having held that it was not acting as an agent or a delegate, the Privy Council proceeded to deal with the question raised in the following manner :-- (1) 10App. Cas. 282.

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

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

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

I must pause here to note briefly certain important principles which can be extracted from the cases (1) [1938] A.C. 708 at 722.

decided by the Privy Council which I have so far cited, apart from the principle that the Indian and colonial legis- latures are supreme in their own field and that the maxim, delegatus non potest delegare, does not apply to them. In the first place, it seems quite clear that the Privy Council never liked to commit themselves to the statement that delegated legislation was permissible. It was easy for them to have said so and disposed of the cases before them, but they were at pains to show that the provisions impugned before them were not instances of delegation of legislative authority but they were instances of conditional legislation which, they thought, the legislatures concerned were compe- tent to enact, or that the giving of such authority as was entrusted in some cases to subordinate agencies was ancil- lary to legislation and without it "an attempt to provide for varying details and

machinery to carry them out might become oppressive or absolutely fail." They also laid down: (1) that it will be not correct to describe conditional legislation and other forms of legislation which they were called upon to consider in several cases which have been cited as legislation through another agency. Each Act or enactment which was impugned before them as being delegated legislation, contained within itself the whole legislation on the matter which it dealt with, laying down the condition and everything which was to follow on the condition being fulfilled; (2) that legislative power could not be said to have been parted with if the legislature retained its power intact and could whenever it pleased destroy the agency it had created and set up another or take the matter directly into its own hands; (3) that the question as to the extent to which the aid of subordinate agencies could be sought by the legislatures and as to how long they should continue them were matters for each legislature and not for the court of law to decide; (4) that a legislature in committing important regulations to others does not efface itself; and (5) that the legislature, like the Governor-General in Council, could not by any form of enactment create, and arm with legislative authority, a new legislative power not created or authorised by the Councils Act to which it (the Governor-General in Council) owes its existence.

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

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

The learned Attorney-General has relied on the authority of Evatt J. for the proposition that "the true nature and scope of the legislative power of the Parliament involves as part of its content power to confer law-making power upon authorities other than Parliament itself"(1). It is undoubt- edly true that a legislature which is sovereign within its own sphere must necessarily have very great freedom of action, but it seems to me that in strict point of law the dictum of Evatt J. is not a precise or an accurate state- ment. The first question which it raises is what is meant by law-making power and whether such power in the true sense of the term can be delegated at all. Another difficulty which it raises is that once it is held as a general proposition that delegation of lawmaking power is implicit in the power of legislation, it will be difficult to draw the line at the precise point where the legislature should stop and it will be permissible to ask whether the legislature is competent to delegate 1, 10 or 99 per cent of its legislative power, and whether the strictly logical conclusion will not be that the legislature can delegate the full content of its power in certain cases. It seems to me that the correct and the strictly legal way of putting the matter is as the Privy Council have put it in several cases. The legislature in order to function effectively, has to call for sufficient data, has to (1) See the Victorian Stevedoring case: 46 Com L.R. 73.

legislate for the future as well as for the present and has to provide for a multiplicity of varying situations which may be sometimes difficult to foresee. In order to achieve its object, it has to resort to various types and forms of legislation, entrusting suitable agencies with the power to fill in details and adapt legislation to varying circum- stances. Hence, what is known as conditional legislation, an expression which has been very fully explained and described in a series of judgments, and what is known as subordinate legislation, which involves giving power to subordinate authorities to make rules and regulations to effectuate the object and purpose for which a certain law is enacted, have been recognized to be permissible forms. of legislation on the principle that a legislature can do everything which is ancillary to or necessary for effective legislation. Once this is conceded, it follows that the legislature can resort to any other form of legislation on the same principle, provided that it

acts within the limits of its power, whether imposed from without or conditioned by the nature of the duties it is called upon to perform.

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

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

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

(3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outsideagency, it must see that such agency, acts as a subordinate authority and does not become a parallel legislature. (4) The doctrine of separation of powers and the judi- cial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive delegation but the courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdicacation and self-effacement".

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

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

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

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

Before attempting to answer these questions, it will be Useful to state briefly a few salient facts about the compo- sition and power of the Indian Legislature at the dates on which the three Acts in question were passed. It appears that formerly it was the executive Government which was empowered to make regulations and ordinances for "the good government of the factories and territories acquired in India", and up to 1833, the laws used to be passed by the Governor General in Council or by the Governors of Madras and Bombay in Council, in the form of regulations. By the Charter Act of 1833, the Governor-General's Council was extended by the inclusion of a fourth member who was not entitled to sit or vote except at meetings for making laws and regulations. The Governor General in Council was by this Act empowered to make laws and regulations for the whole of India and the legislative powers which vested in the Governors of Madras and Bombay were withdrawn, though they were allowed to propose draft schemes. The Acts passed by the Governor-General in Council were required to be laid before the British Parliament and they were to have the same force as an Act of Parliament. In 1853, the strength of the Council of the Governor-General was further increased to 12 members, by including the fourth member as an ordinary member and 6 special members for the purpose of legislation only. Then came theCouncils Act of 1861, by which the power of legislation was restored to the Governors of Madras and Bombay in Council, and a legislative council was ap- pointed for Bengal; but the Governor-General in Council was still competent to exercise legislative authority over the whole of India and could make laws for "all persons and all places and things", and for legislative purposes the Council was further remodelled so as to include 6 to 12 members nominated for a period of 2 years by the Governor-General, of whom not less than one-half were to be non-officials. In this Council, no measure relating to certain topics could be introduced without the sanction of the Governor-General, and no law was to be valid until the Governor-General had given his assent to it and the ultimate power of disallowing a law was reserved to the Crown. Further, local legislatures were constituted for Madras and Bombay, wherein half the members were to be non-officials nominated by the Governors, and the assent of the Governor as well as that of the Governor- General was necessary to give validity to any law passed by the local legislature. A similar legislature was directed to be constituted for the lower Provinces of Bengal, and powers were given to constitute legislative councils for certain other Provinces. In 1892, the Indian Councils Act was passed, by which the legislative councils were further expanded and certain fresh rights were given to the members. In 1909, came the MorleyMinto scheme under which the strength of the legislative council was increased by the inclusion of 60 additional members of whom 27 were elected and 33 nominated. Soon after this, in 1912, the Delhi Laws Act was passed, and the points which may be noticed in connection with the legislature which functioned at that time are: firstly, within its ambit, its powers were as plenary as those of the legislature of 1861, whose powers came up for consideration before the Privy Council in Bu- rah's case, and

secondly, considering the composition of the legislative council in which the non-official and the executive elements predominated, there was no room for the application of the doctrine of separation of powers in its full import, nor could it be said that by reason of that doctrine the legislature could not invest the GovernorGener- al with the powers which we find him invested with under theDelhi Laws Act. It should be stated that in section 7 of that Act as it originally stood, the Governor-General was mentioned as the authority who could by notification extend any enactment which was in force in any part of British India at the date of such notification, The "Provincial Government" was substituted for the "Governor-General" subsequently.

Coming to the second Act, namely, the Ajmer-Merwara (Extension of Laws) Act, 1947, we find that when it was enacted on the 31st December, 1947, the Government of India Act, 1935, as adapted by the India (Provisional Constitu- tion) Order, 1947, issued under the Indian Independence Act, 1947, was in force. Under that Act, there were three Legis- lative Lists, called the Federal, Provincial and Concurrent Legislative Lists. Lists I and II contained a list of sub- jects on which the Central Legislature and the Provincial Legislature could respectively legislate, and List III contained subjects on which both the Central and the Provincial Legislatures could legislate. Section 100(4) of the Act provided that "the Dominion Legislature has power to make laws with' respect to matters enumerated in the Provin- cial Legislative List except for a Province or any part thereof." Section 46 (3) stated that the word "Province", unless the context otherwise required, meant a Governor's Province. Therefore, section 100 (4) read with the defini- tion of "Province", empowered the Dominion Legislature to make laws with respect to subjects mentioned in all the three Lists for Ajmer-Merwara, which was not a Governor's Province. The Central Legislature was thus competent to legislate for Ajmer-Merwara in regard to any subject, and it had also plenary powers in the entire legislative field allotted to it. Further, at the time the Act in question was passed, the Dominion Legislature was simultaneously functioning as the Constituent Assembly and had the power to frame the Constitution.

The third Act with which we are concerned was passed after the present Constitution had come into force. Article 245 of the Constitution lays down that "subject to the provisions of this Constitution, Parliament may make laws from the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." On the pattern of the Government of India Act, 1935, Lists I and II in the Seventh Schedule of the Constitution enumerate the subjects on which the Parlia- ment and the State Legislatures can respectively legislate, while List 11 enumerates subjects on which both the Parlia- ment and the State Legislatures can legislate. Under article 246 (4), "Parliament has power to make laws with respect to any matter for any part of the territory of India not in- cluded in Part A or Part B of the First Schedule notwith- standing that such matter is a

matter enumerated in the State List." The points to be noted in connection with the Part C States (Laws) Act, 1950, are :--

(1) The present Parliament derives its authority from the Constitution which has been framed by the people of India through their Constituent Assembly, and not from any external authority, and within its own field it is as supreme as the legislature of any other country possess- ing a written federal Constitution.

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

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

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

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

Under article 357, when there is a failure of constitu- tional machinery in a State, "it shall be competent--

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

(b) for Parliament, or for the President or other au- thority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the Conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof.

In both these articles, the power of delegation is ex- pressly conferred, and it is argued that if delegation was contemplated in normal legislation, there would have been an express power given to the' Parliament, similar to the power given in articles 353(b) and 357(a) and (b). In other words, the absence of an express provision has been used as an argument for absence of the power to delegate. It should however be noticed that these are emergency provisions and give no assistance in deciding the question under considera- tion. So far as article 353(b) is concerned, it is enough to say that a specific provision was necessary to empower the Parliament to make laws in respect of matters included in the State List upon which the Parliament was not otherwise competent to legislate. When the Parliament was specially empowered to legislate in a field in which it could not normally legislate, it was necessary to state all the powers it could exercise. Again, article 357(a) deals with complete transfer of legislative power to the President, while clause

(b) is incidental to the powers conferred on the Parliament and the President to legislate for a State in case of fail- ure of constitutional machinery in that State. These provi- sions do not at all bear out the conclusion that is sought to be drawn from them. Indeed, the Attorney-General drew from them the opposite inference, namely, that by these provisions the Constitution-makers have recognized that delegation of power is permissible on occasions when it is found to be necessary. In my opinion, neither of these conclusions can be held to be sound.

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

Section 7 of the Delhi Laws Act, 1912.

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

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

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

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

"The Central Government may, by notification in the official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands) or to any part of such State,

with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification; and provision may be made in any enactment so extended for the repeal or amend- ment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part C State."

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

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

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

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

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

Let us overlook for the time being the power to intro- duce modifications with which I shall deal later, and care- fully consider the main provision in the three Acts. The situation with which the respective legislatures were faced when these Acts were passed, was that there were certain State or States with no local legislature and a whole bundle of laws had to be enacted for them. It is clear that the legislatures concerned, before passing the Acts, applied their mind and decided firstly, that the situation would be met by the adoption of laws applicable to the other Prov- inces inasmuch as they covered a wide range of subjects approached from a variety of points of view and hence the requirements of the State or States for which the laws had to be framed could not go beyond those for which laws had already been framed by the various legislatures, and second- ly, that the matter should be entrusted to an authority which was expected to be familiar and could easily make itself familiar with the needs and conditions of the State or States for which the laws were to be

made. Thus, everyone of the Acts so enacted was a complete law, because it em- bodied a policy, defined a standard, and directed the au- thority chosen to act within certain prescribed limits and not to go beyond them. Each Act was a complete expression of the will of the legislature to act in a particular way and of its command as to how its will should be carried out. The legislature decided that in the circumstances of the case that was the best way to legislate on the subject and it so legislated. It will be a misnomer to describe such legisla- tion as amounting to abdication of powers, because from the very nature of the legislation it is manifest that the legislature had the power at any moment of withdrawing or altering any power with which the authority chosen was entrusted, and could change or repeal the laws which the authority was required to make applica- ble to the State or States concerned. What is even more important is that in each case the agency selected was not empowered to enact laws, but it could only adapt and extend laws enacted by responsible and competent legislatures. Thus, the power given to the Governments in those Acts was more in the nature of ministerial than in the nature of legislative power. The power given was ministerial, because all that the Government had to do was to study the laws and make selections out of them.

That such legislation is neither unwarranted on princi- ple nor without precedent, will be clear from what follows:-

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

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

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

(1) 5 I.A. 178.

"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 territo- ries subject to the same Government were such as it might be fit and proper to apply to this district also; but that,.as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor."

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

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

It seems to me that this line of reasoning fully fits in with the facts before us. The words "territories sub- ject to the same Government" are not in my opinon material, because in Burah's case only such laws as were in force in the other territories subject to the same Government were to be extended. We are not to lay undue emphasis on isolated words but look at the principle underlying the decision in that case. In the Delhi Laws Act as originally enacted, the agency which was to adapt the laws was the Governor General. In the other two Acts, the agency was the Central Govern- ment. In 1912, the Governor-General exercised jurisdiction over the whole of the territories the laws of which were to be adapted for Delhi. The same remark applies to the Central Government, while dealing with the other two Acts. As I have already stated, Burah's case has been accepted by this Court as having been correctly decided, and we may well say that the impugned Acts are mere larger editions of Act XXII of 1869 which was in question in Burah's case.

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

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

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

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

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

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

Following the line of reasoning in the case cited, it may be legitimately stated that what the Central or the Provincial Government has been asked to do under the Acts in question is not to enact "new laws" but to transplant" to the territory concerned laws operative (1) [1897] A.C. 238,in other parts of the country. I notice that in section 2 of the Pondoland Annexation Act, 1894, there was a proviso requiring that "all such laws made under or by virtue of this Act shall be]aid before both Houses of Parliament within fourteen days after the beginning of the Session of Parliament next after the proclamation thereof as aforesaid, and shall be effectual, unless in so far as the same shall be repealed, altered, or varied by Act of Parliament." This provision however does not affect the principle. It was made only as a matter of caution and to ensure the superin- tendence of Parliament, for the laws were good laws until they were repealed, altered or varied by Parliament. If the Privy Council have correctly stated the principle that the legislature in enacting subordinate or conditional legisla- tion does not part with its perfect control and has the power at any moment of withdrawing or altering the power entrusted to another authority, its power of superintendence must be taken to be implicit in all such legislation. Refer- ence may also be made here to the somewhat unusual case of Dorr v. United States(1), where delegation by Congress to a commission appointed by the President of the power to legis- late for the Phillipine Islands was held valid.

4. There are also some American cases in which the adopt- ing of a law or rule of another jurisdiction has been per- mitted, and one of the cases illustrative of the rule is Re Lasswell(2), where a California Act declaring the existence of an emergency and providing that where the Federal author- ities fixed a Code for the government of any industry, that Code automatically became the State Code therefor, and fixing a penalty for violation of such Codes, was held to be constitutional and valid, as against the contention that it was an unlawful delegation of authority by the State legis- lature to the Federal government and its administrative agencies. This case has no direct bearing on the points before us, but it shows that application of laws made (1) (1904) 195 U.S. 138. (2) (1934) 1 Cal. Appl. (2d),

183. 109 by another legislature has in some cases been held to be permissible.

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

"It (the Act) extends in the first instance to all the Provinces of India except Bombay, East Punjab and Delhi. But this Act or any part thereof may by notification in the official Gazette

be extended to the whole or any part of the said Provinces by the Provincial Government concerned."

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

6. Our attention has been drawn to several Acts con- taining provisions similar to the Acts which are the subject of the Reference, these being :--

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

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

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

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

The Merchant Shipping Laws (Extension to Acceding States and Amendment) Act, 1949 (Act XVIII of 1949), section 4. The relevant provisions of two of these Acts, which were passed before the Acts in question, may be quoted, to bring out the close analogy.

The Scheduled Districts Act, 1874.

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

5A. In declaring an enactment in force in a Scheduled District or part thereof under section 3 of this Act, or in extending an enactment to a Scheduled District or part thereof under section 5 of this Act, the Local Government with the previous sanction of the

Governor-General in Coun- cil, may declare the operation of the enactment to be sub- ject to such restrictions and modifications as that Govern- ment think fit."

The Burma Laws Act, 1898.

10(1). "The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the Burma Gazette, extend, with such restrictions and modifications as it thinks fit, to all or any of the Shan States, or to any specified local area in the Shan State any enactment which is in force in any part of Upper Burma at the date of the extension." It is hard to say that any firm legislative practice had been established before the Delhi Laws Act and other Acts we are concerned with were enacted, but one may presume that the legislature had made several experiments before the passing of these Acts and found that they had worked well and achieved the object for which they were intended. I will now deal with the power of modification which de- pends on the meaning of the words "with such modifications as it thinks fit." These are not unfamiliar words and they are often used by careful draftsmen to enable laws which are applicable to one place or object to be so adapted as to apply to another. The power of introducing necessary re- strictions and modifications is incidental to the power to apply or adapt the law, and in the context in which the provision as to modification occurs, it cannot bear the sinister sense attributed to it. The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it. The power to modify certainly involves a discretion to make suitable changes, but it would be useless to give an authority the power to adapt a law without giving it the power to make suitable changes. The provision empowering an extraneous authority to introduce modifications in an Act has been nicknamed in England as "Henry VIII clause", because that monarch is regarded popu- larly as the personification of executive autocracy. Sir Thomas Carr, who bad considerable experience of dealing with legislation of the character we are concerned with, refers to "Henry VIII clause" in this way in his book "Concerning English Administrative Law" at page 44:--

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

It is to be borne in mind that the discretion given to modify a statute is by no means absolute or irrevocable in strict legal sense, with which aspect alone we are princi- pally concerned in dealing with a purely legal question. As was pointed out by Garth C.J. in Empress v. Burah(1), the legislature is "'always in a position to see how the powers, which it has conferred, are being exercised, and if they are exercised injudiciously, or otherwise than in accordance with its intentions, or if, having been exercised, the result is in any degree inconvenient, it can always by another Act recall its powers, or rectify the inconvenience." The learned Chief Justice, while referring to the Civil Procedure Code of 1861, pointed out that it went further than the Act impugned before him, because "it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so as to intro- duce a different law into their respective Provinces from that which was in force in the Regulation Provinces." Nevertheless, the Privy Council considered the Civil Proce- dure Code of 1861 to be a good example of valid conditional legislation. In the course of the arguments, we were sup- plied with a list of statutes passed by the Central and some of the Provincil Legislatures giving express power of modi- fication to certain authorities, and judging from the number of instances included in it, it is not an unimpressive list. A few of the Acts which may be mentioned by (1) I.L.R. S Cal. 63 at 140.

way of illustration are: The Scheduled Districts Act, 1874, The Burma Laws Act, 1898, The Bombay Prevention of Prostitu- tion Act, 1928, The Madras City Improvement Trust Act, 1945, The Madras Public Health Act, 1939, U.P. Kand Revenue Act, 1901. There are also many instances of such legislation in England, of which only a few may be mentioned below to show that such Acts are by no means confined to this coun- try.

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

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

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

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

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

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

Similar instances may be multiplied, but that will serve no useful purpose. The main justification for a provision empowering modifications to be made, is said to be that, but for it, the Bills would take longer to be made ready, and the operation of important and wholesome measures would be delayed, and that once the Act became operative, any defect in its provisions cannot be removed until amending legisla- tion is passed. It is also pointed out that the power to modify within certain circumscribed limits does not go as far as many other powers which are vested by the legislature in high officials and public bodies through whom it decides to act in certain matters. It seems to me that it is now too late to hold that the Acts in question are ultra vires, merely because, while giving the power to the Government to extend an Act, the legislatures have also given power to the Government to subject it to such modifications and restric- tions as it thinks fit. It must, however, be recognised that what is popularly known as the "Henry VIII clause" has from time to time provoked unfavourable comment in England, and the Committee on Ministers' Powers, while admitting that it must be occasionally used, have added:" ..... we are clear in our opinion, first, that the adoption of such a clause ought on each occasion when it is, on the initiative of the Minister in charge of the Bill, proposed to Parliament to be justified by him up to the essential. It can only be essential for the limited purpose of bringing an Act into operation and it should accordingly be in most precise language restricted to those purely machin- ery arrangements vitally requisite for that purpose;and the clause should always contain a maximum time limit of one year after which the powers should lapse. If in the event the time limit proves too short--which is unlikely--the Government should then come

back to Parliament with a one clause Bill to extend it." It may also be stated that in England "delegated legislation" often requires the regula- tions or provisions made by the delegate authority to be laid before the Parliament either in draft form or with the condition that they are not to operate till approved by Parliament or with no further direction. The Acts before us are certainly open to the comment that this valuable safe- guard has not been observed, but it seems to me that however desirable the adoption of this safeguard and other safe-guards which have been suggested from time to time may be, the validity of the Acts, which has to be determined on purely legal considerations, cannot be affected by their absence.

I will now deal with section 2 of the Part C States (Laws) Act, 1950, in so far as it gives power to the Central Government to make a provision in the enactment extended under the Act for the repeal or amendment of any correspond- ing law which is for the time being applicable to the Part C State concerned. No doubt this power is a far-reaching and unusual one, but, on a careful analysis, it will be found to be only a concomitant of the power of transplantation and modification. If a new law is to be made applicable, it may have to replace some existing law which may have become out of date or ceased to serve any useful purpose, and the agency which is to apply the new law must be in a position to say that the old law would cease to apply. The nearest parallel that I can find to this provision, is to be found in the Church of England Assembly (Powers) Act, 1919. By that Act, the Church Assembly is empowered to propose legislation touching matters concerning the Church of England, and the legislation proposed may extend to the repeal or amend- ment of Acts of Parliament including the Church Assembly Act itself. It should however be noticed that it is not until Parliament itself gives it legislative force on an affirma- tive address of each House that the measure is converted into legislation. There is thus no real analogy between that Act and the Act before us. However, the provision has to be upheld, because, though it goes to the farthest limits, it is difficult to hold that it was beyond the powers of a legislature which is supreme in its own field; and all we can say is what Lord Hewart said in King v. Minister of Health(1), namely, that the particular Act may be regarded as "indicating the high water-mark of legislative provisions of this character," and that, unless the legislature acts with restraint, a stage may be reached when legislation may amount to abdication of legislative powers. Before I conclude, I wish to make a few general observa- tions here on the subject of "delegated legislation" and its limits, using the expression once again in the popular sense. This form of legislation has become a present-day necessity, and it has come to stay--it is both inevitable and indispensable. The legislature has now to make so many laws that it has no time to devote to all the legislative details, and sometimes the subject on which it has to legis- late is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again, when complex schemes of reform are to be the subject of legislation, it is difficult to bring

out a selfcontained and complete Act straightaway, since it is not possible to foresee all the contingencies and envisage all the local requirements for which provision is to be made. Thus, some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enables the delegate authority (1) [1927] 2 K B. 229 at 236. 110 to consult interests likely to be affected by a particular law, make actual experiments when necessary, and utilize the results of its investigations and experiments in the best way possible. There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with the var- ious situations as they arise. There are examples in the Statute books of England and other countries, of laws, a reference to which will be sufficient to justify the need for delegated legislation. The British Gold Standard (Amendment) Act, 1931, empowered the Treasury to make and from time to time vary orders authorising the taking of such measures in relation to the Exchanges and otherwise as they may consider expedient for meeting difficulties arising in connection with the suspension of the Gold Standard. The National Economy Act, 1931, of England, empowered "His Majesty to make Orders in Council effecting economies in respect of the services specified in the schedule" and proved that the Minister designated in any such Order might make regulations for giving effect to the Order. The Food- stuffs (Prevention of Exploitation) Act, 1931, authorised the Board of Trade to take exceptional measures for prevent- ing or remedying shortages in certain articles of food and drink. It is obvious that to achieve the objects which were intended to be achieved by these Acts, they could not have been framed in any other way than that in which they were framed. I have referred to these instances to show that the complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legis- lation and to give wide powers to various authorities on suitable occasions. But while emphasizing that delegation is in these days inevitable, one should not omit to refer to the dangers attendant upon the injudicious exercise of the power of delegation by the legislature. The dangers in- volved in defining the delegated power so loosely that the area it is intended to cover cannot be clearly ascertained, and in giving wide delegated powers to executive authorities and at the same time depriving a citizen of protection by the courts against harsh and unreasonable exercise of powers, are too obvious to require elaborate discussion.

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

PATANJALI SASTRI J.--The President of India by an order, dated the 7th January, 1951, has been pleased to refer to this Court, under article 14:3 (1) of the Constitution, for consideration and report the following questions:

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

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

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

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

"And whereas the Federal Court of India in Jatindra Nath Gupta v. The Province of Bihar(1) held by a majority that the proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, was ultra vires the Bihar Legislature inter alia on the ground that the said proviso conferred power on the Provincial Government to modify an act of the Provincial Legislature and thus amounted to a delegation of legislative power; And whereas as a result of the said decision of the Federal Court, doubts have arisen regarding (1) [1949-50] F.C.R. 595.

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

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

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

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

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

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

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

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

(1) The laws thus to be extended by the executive are laws made not by the delegating authority itself, namely, the Central Legislature, but by different Provincial Legis- latures for their respective territories. (2) In extending such laws the executive is to have the power of restricting or modifying those laws as it thinks fit.

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

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

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

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

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

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

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

It is now a commonplace of constitutional law that a legislature created by a written constitution must act within the ambit of its powers as defined by the constitu- tion and subject to the limitations prescribed thereby, and that every legislative act done contrary the provisions of the constitution is void. In England no such problem can arise as there is no constitutional limitation on the powers of Parliament, which, in the eye of the law, is sovereign and supreme. It can, by its ordinary legislative procedure, alter the constitution, so that no proceedings passed by it can be challenged on constitutional grounds in a court of law. But India, at all material times,--in 1912, 1947 and 1950 when the impugned enactments were passed-had a written constitution, and it is undoubtedly the function of the courts to keep the Indian legislatures within their consti- tutional bounds. Hence, the proper approach to questions of constitutional validity is "to look to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restrict- ed. If what has been done is legislation within the general scope of the affirmative words which gave the power and if it violates no express condition or restriction by which the power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it) it is not for any court of justice to inquire further or, to enlarge constructively those conditions and restrictions.": Empress v. Burah(1). We (1) s I.A. 178.

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

Before examining the relevant constitutions to find an answer to the question, it will be useful to refer to the two main theories of constitutional law regarding what has been called delegated legislation. Though, as already explained, no question of constitutionality of such legisla- tion could arise in England itself, such problems have frequently arisen in the British commonwealth countries which have written constitutions, and British Judges, trained in the tradition of parliamentary omnipotence, have evolved the doctrine that every legislature created by an Act of Parliament, though bound to act within the limits of the subject and area marked out for it, is, while acting within such limits, as supreme and sovereign as Parliament itself. Such legislatures are in no sense delegates of the Imperial Parliament and, therefore, the maxim delegatus non potest delegare is not applicable to them. A delegation of legislative functions by them, however extensive, so long as they preserve their own capacity, cannot be challenged as unconstitutional. These propositions were laid down in no uncertain terms in the leading case of Hodge v. Queen(1) decided by the Privy Council in 1883.

Upholding the validity of an enactment by a Provincial Legislature in Canada where- by authority was entrusted to a Boar6 of Commissioners to make regulations in the nature of bylaws or municipal regu- lations for the good government of taverns and thereby to create offences and annex penalties thereto, their Lordships observed as follows:

(1) 9 App. Cas. 117 "It was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim delegatus non potest delegare was relied on. It appears to their Lordships, however, that the objection thus raised by the appellant is founded on an entire misconcep- tion 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 Prov- ince and for provincial purposes in relation to the matters enumerated insection 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 bysection 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme..... It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it can seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."(1).

Here is a clear enunciation of the English doctrine of what may be called "supremacy within limits"; that is to say, within the circumscribed limits of its legislative power, a subordinate legislature can do what the Imperial Parliament can do, and no constitutional limit on its power to delegate can be imported (1) 9 App. Cas. 117 131, on the strength of the maxim delegatus non potest delegare, because it is not a delegate. The last few words of the quotation are significant. They insist, as does the pas- sage already quoted from Burah's case(1), that the scope of the enquiry when such an issue is presented to the court is strictly limited to seeing whether the legislature is acting within the bounds of its legislative power. The remarks about "authority ancillary to legislation" and "abundance of precedents for this. legislation entrusting a limited des- cretionary authority to others " have, obviously, reference to the particular authority delegated on the facts of that case which was to regulate taverns by issuing licences, and those remarks cannot be taken to detract from or to qualify

in any way the breadth of the general principles so unmis- takably laid down in the passages quoted.

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

If Hodge's ease(3) did not involve an extensive dele- gation of legislative power, Shannon's case(5) did. (1) 5 I.A. 178. (4) 10 App. Cas. 282, 291.

(2) 10 App. Cas. 282. (5) [1938] A.C. 708.

(3) 9 App. Cas. 117.

A provincial legislature in Canada had passed a compulsory Marketing Act providing for the setting up of Marketing Boards but leaving it to the Government to determine what powers and functions should be given to those Boards. One of the objections raised to the legislation was that it was only a "skeleton of an Act" and that the legislature had practically "surrendered its legislative responsibility to another body." Lord Haldane's dictum in what is known as the Referendum case(1) (to which a more detailed reference will be made presently) suggesting a doubt as to a provin- cial legislature's power to "create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence" was cited in support of the objection. The objection, however, was summarily repelled without calling upon Government counsel for an answer. Their Lordships contented themselves with reiterating the English doctrine of "plenary powers of delegation within constitu- tional limits" and said: "This objection appears to their Lordships subversive of the rights which the provincial legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitu- tion has granted legislative powers. Within its appointed sphere the provincial legislature is as supreme as any other parliament..... Martin C.J. appears to have disposed of this objection very satisfactorily in his judgment on the reference, and their Lordships find no occasion to add to what he

there said." What Martin C.J. said is to be found in Re Natural Products Marketing (B.C.) Act(2). He said "1 shall not, however, pursue at length this subject (delega- tion of legislative powers) because, to use the language of the Privy Council in Queen v. Burah(3), 'The British Statute book abounds with examples of it' and a consideration for several days of our early and late 'statute book' discloses such a surprising number of delegations to various persons and bodies in all sorts of subject-matters that it would (1) [1919] A.C. 935. (3) 3 App. Cas. 889, 906. (2) (1937) 4 D.L.R. 298, 310.

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

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

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

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

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

(4) All that was considered necessary to repel the objection was a plain and simple statement of the English doctrine, namely, within its appointed sphere the provin- cial legislature was as supreme as any other parliament, or, in other words, as there can be no legal limit to Parliament's power to delegate, so can there (1) [1919] A.C. 935.

be none to the power of the provincial legislature to dele- gate legislative authority to others. Thus, the English approach to the problem of delegation of legislative power is characterised by a refusal to regard legislation by a duly constituted legislature as exercise of a delegated

power, and it emphatically repudiates the application of the maximum delegatus non potest delegate. It recognises the sovereignty of legislative bodies within the limits of the constitutions by which they are created and concedes plenary powers of delegation to them within such limits. It regards delegation as a revocable entrustment of the power to legislate to an appointed agent whose act derives its validity and legal force from the delegating statute and not as a relinquishment by the delegating body of its own capacity to legislate.

On the other hand, the American courts have approached the problem along wholly different lines which are no less the outcome of their own environment and tradition. The American political scene in the eighteenth century was dominated by the ideas of Montesque and Locke that concen- tration of legislative, executive and judicial powers in the hands of a single organ of the State spelt tyranny, and many State constitutions had explicitly provided that each of the great departments of State, the legislature, the executive and the judiciary, shall not exercise the powers of the others. Though the Federal Constitution contained no such explicit provision, it was construed, against the background of the separatist ideology, as embodying the principle of separation of powers, and a juristic basis for the conse- quent non-delegability of its power by one of the depart- ments to the others was found in the old familiar maxim of the private law of agency delegatuts non potest delegare which soon established itself as a traditional dogma of American constitutional law. But the swift progress of the nation in the industrial and economic fields and the result- ing complexities of administration forced the realisation on the American Judges of the unavoidable necessity for large-scale delegation of legislative powers to administra- tive bodies, and it was soon recognised that to deny this would be "to stop the wheels of government." The result has been that American decisions on this branch of the law consist largely of attempts to disguise delegation "by veiling words" or "by softening it by a quasi" (per Holmes J. in Springer v. Government of the Phillipine Islands(1). "This result", says a recent writer on the subject, "is well put in Prof. Cushman's syllogism '-

Major premise: Legislative power cannot be constitu- tionally delegated by Congress.

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

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

They are instead "administrative"or "quasi-legisla- tive"--(American Administrative Law by Bernard Schwartz, p.

20). After considerable confusion and fluctuation of opin- ion as to what are "essentially" legislative powers which cannot be delegated and what are mere "administrative" or

"ancillary" powers, the delegation of which is permissible, the recent decisions of the Supreme Court would seem to place the dividing line between laying down a policy or establishing a standard in respect of the subject legislated upon on the one hand and implementing that policy and en- forcing that standard by appropriate rules and regulations on the other: (vide Schechter Poultry Corpn. v. United States(2) and Panama Refining Co. v. Ryan(3)), a test which inevitably gives rise to considerable divergence of judicial opinion as applied to the facts of a given case.

I will now turn to the questions in issue. The first question which relates to the validity of section 7 of the Delhi Laws Act, 1912. has to be determined with reference to the competency of "the legislature which (1) 277 U.S. 189. (3) 293 U.S. 388.

(2) 295 U.s. 495.

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

In 1912 the Indian Legislature was the Governor General in Council, and his law-making powers were derived from section 22 of the Indian Councils Act, 1861 (24 and 25 Vic. Ch. 7) which conferred power "to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty and to make laws and regulations for all persons whether British or native, foreigners or others, and for all courts of justice whatever and for all places and things whatever within the said territories," subject to certain conditions and restrictions which do not affect the impugned provi- sions. The composition and powers of the Governor-General in Council were altered in other respects by the Councils Acts of 1892 and 1909, but his law-making powers remained essentially the same in 1912. The question accordingly arises whether section 7of the Delhi Laws Act, 1912, was within the ambit of the legislative powers conferred on himbysection 22 of the Indian Councils Act, 1861. As the power is defined in very wide terms--" for all persons..... and for all places and things whatever " within the Indian territories--the issue of competency reduces itself to the question whether section 7 was a "law" within the meaning ofsection 22 of the Indian Councils Act of 1861. This question is, in my opinion, concluded by the decision of the Privy Council in Empress v. Burah(1). (1) 5 I.A. 178.

That was an appeal by the Government from a judgment of the majority of a Full Bench of the Calcutta High Court holding that sections 8 and 9 of Act XXII of 1869 were ultra vires the Governor General in Council as being an unautho- rised delegation of legislative power to the Lieutenant- Governor of Bengal. The combined effect of those provisions was to authorise the Lieutenant-Governor to extend to cer- tain districts by notification in the Calcutta Gazette "any law or any portion of any law now in force in the other territories subject to his government or which may hereafter be enacted by the Council of the Governor-General or of the said Lieutenant-Governor, for making laws and regulations..... "Markby J., who delivered the leading judgment of the majority, held (1) that section 9 amounted to a delegation of legislative authority to the Lieutenant- Governor by the Indian Legislature which, having been en- trusted with such authority as a delegate of the Imperial Parliament, had no power in its turn to delegate it to another, and (2) the Indian Legislature could not "change the legislative machinery in India without affecting the provisions of the Acts of Parliament which created that machinery and if it does in any way affect them, then ex- consensu omnium its Acts are void." The learned Judge referred to the argument of Government counsel, namely, "where Parliament has conferred upon a legislature the general power to make laws, the only question can be 'Is the disputed Act a law'. If it is, then it is valid unless it falls within some prohibition." The learned Judge remarked that this argument was "sound", but met it by holding that "it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, that is, to the making of laws, which (to use Blackstone's expression)are rules of action prescribed by a superior to an inferior or of laws made in furtherance of those rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body..... The Legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority"(1) The learned Judge rejected the argument based on previous legislative practice as the instances relied on were not "clear and undisputed instances of a transfer of legislative authority." Garth C.J. in his dissenting opinion pointed out that "by the Act of 1833 the legislative powers which were then conferred upon the Governor-General in Council were in the same language, and (for the purposes of the present case) to the same effect, as those given by the Councils Act in 1861; and from the time when that Act was passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instru- mentality of high officials and public bodies, in whom a large discretion has been vested for that purpose."(2) It could not therefore be supposed that "the Imperial Parlia- ment would have renewed in the Councils Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing. The fact that with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in

the Councils Actrenew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment that the course of action which had been pursued by the legisla- ture in the exercise of those powers was one which the Act had authorised."(3) The learned Chief Justice accordingly came to the conclusion that Act XXII of 1869 was a law "which the legislature was justified in passing." I have referred at some length to the reasoning and conclusions of the learned Judges in the High Court as I think they will be helpful in understanding the full import of the judgment of the Privy Council.

It will be seen, in the first place, that the line of approach adopted by Government counsel in the High (1)I.L.R. 3 Cal. 63 at 90, 91. (3) Ibid 144.

(2) Ibid, 140.

Court was endorsed by their Lordships as the correct ap- proach to the problem, that is to say, the court has to see whether "what has been done is legislation within the gener- al scope of affirmative words which give the power, and if it violates no express condition by which that power is limited it is not for any court to inquire further or to enlarge constructively those conditions and restrictions" (italics mine). This passage clearly lays down [what we have already seen was reiterated in Hodge's case(1)]: (1) that the scope of judicial review in such cases is limited only to determining whether the impugned enactment is within the law-making power conferred on the legislature and wheth- er it violates any express condition limiting that power, and (2) that in determining the latter question the court should have regard only to express conditions and should not enlarge them inferentially by a process of interpretation. In the second place, their Lordships repudiated the doctrine [as they did also in respect of a provincial legislature in Canada in Hodge's case(1)] that the Indian Legislature is in any sense an agent or delegate of the Imperial Parliament, and that the rule against delegation by an agent applies to the situation. Thirdly, the distinction made by Markby J. between Parliament and the Indian Legislature that the latter is "restricted to the.....making of laws" in the sense defined by Blackstone, while Parliament was not so restricted, or, in other words, that while Parliament could make a "law" delegating its legislative power, the Indian Legislature could not make such a "law,' was rejected, and the English doctrine of supremacy within limits was laid down specifically in regard to the Indian. Legislature, which, when acting within the limits circumscribing its legislative power "has and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself" (italics mine). It must follow that it is as competent for the Indian Legislature to make a law delegating legislative power, both quantitatively and qualitatively, as it is for (1) 9 App. Cas. 117.

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

Mr. Chatterjee, on behalf of the opposite party, submit- ted that the remark regarding the incompetency of the Gover- nor-General in Council to create in India a new legislative power had reference to the subordinate agency or instrumen- tality to which the legislative authority was to be delegat- ed and thus negatived the legislature's right to delegate. The context, however, makes it clear that their Lordships were expressing agreement on this point with Markby J. who, as we have seen, had stated that the Indian Legislature could not "change the legislative machinery in India without affecting the provisions of the Acts of Parliament which created that machinery." This shows that their Lordships were envisaging the setting up of a new legislative machin- ery not authorised by the Councils Act, that is, a new legislature in the sense in which the Central and Provincial Legislatures in the country were legislatures. While they agreed that that could not. be done (because it would be a contravention of the Act of Parliament which confers no power to create such legislatures) their Lordships proceeded to point out that that was not what was done by the impugned Act and that Markby J. fell into an error in thinking that it was. Their Lordships gave two reasons: first, because "it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are)' as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (No. XXll of 1869) itself." Here, indeed, their Lordships touch the core of the problem by indicating the true nature of delegated legislation as distinct from creating a new legislative body. The point is developed to its logical consequence in later cases as will be seen presently, but here they expose to view the not uncommon "fallacy" of treating the one as of the same nature and as having constitutionally the same consequence as the other, a fallacy which perhaps accounts for much of the confusion of thought on the subject. It will be recalled that in Hodge's case(1) it was made clear that in delegated legislation the delegating body does not efface itself but retains its legislative power intact and merely elects to exercise such power through an agency or instrumentality of its choice. There is no finality about this arrangement, the delegating body being free to "destroy the agency it has created and set up another or take the matter directly into its own hands." In Burah's case(2) their Lordships emphatically stated one consequence of that view, namely, that the act done by the authority to which legislative power is delegat- ed derives its whole force and efficacy from the delegating legislature, that is to say, when the delegate acts under

the delegated authority, it is the legislature that really acts through its appointed instrumentality. On the other hand, in the creation of a new legislative body with general legislative authority and functioning in its own right, there is no delegation of power to subordinate units, but a grant of power to an independent and co-ordinate body to make laws operating of their own force. In the first case, according to English constitutional law, no express provi- sion authorising delegation is required. In the absence of a constitutional inhibition, delegation of legislative power, however extensive, could be made so long as the delegating body retains its own legislative power intact. In the second case, a positive enabling provision in the constitutional document is required.

The second reason why their Lordships regarded the majority view as erroneous was that Act XXII of 1869 was, in truth, nothing more than conditional legislation (1) 9 App. Cas. 117.

(2) 5 I.A. 178.

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

Their Lordships finally proceeded to refer to the legis- lative practice in this country of delegating to the execu- tive government a discretionary power of extending enact- ments to new territories subject in certain cases to such "restriction, limitation or proviso" as the Government may think proper, and they expressed their approval of the reasoning of Garth C.J. based on such practice. "If their Lordships," they said, "were to adopt the view of the major- ity of the High Court they would (unless distinction were made on grounds beyond the competency of the judicial of- fice) be casting doubt upon the validity of a long course of legislation appropriate, as far as they can judge to the peculiar circumstances of India.....

For such doubt their Lordships are unable to discover any foundation either in the affirmative or the negative words of that Act"

(Indian Councils Act, 1861). The parenthetic remark (which I have italicised) is significant. It is not com- petent for the court, according to their Lordships, to dis- criminate between degrees of delegation. It might be extensive in some cases and slight in others. Its validity must, however, be founded "on the affirmative or the nega- tive words" of the Constitution Act.

Another logical consequence of the British theory of dele- gation has been worked out in Co-operative Committee on Japanese Canadians v. Attorney-General for Canada(1), where the question arose as to whether an order made by the Governor in Council pursuant to authority delegated by the Parliament of Canada was a law made by the Parliament of Canada within the meaning of the Statute of Westminster and, if so, whether it was such a law made after the pass- ing of that Statute. The delegation of authority to the Governor was made before that Statute was passed but the Governor's order was promulgated after the Statute. Holding that the order was a "law" made by the Parliament of Canada after the Statute of Westminster their Lordships observed: "Undoubtedly, the law as embodied in an order or regulation is made at the date when the power conferred by the Parlia- ment of the Dominion is exercised. Is it made after that date by the parliament of the Dominion ? That Parliament is the only legislative authority for the Dominion as a whole and it has chosen to make the law through machinery set up and continued by it for that purpose. The Governor in Council has no independent status as a law-making body. The legislative activity of Parliament is still resent at the time when the orders are made, and these orders are" law". In their Lordships' opinion they are law made by the Parlia- ment at the date of their promulgation."(2) Mr. Chatterice has urged that in Burah's case(3) the Privy Council did no more than hold that the type of legis- lation which their Lordships there called conditional legis- lation was within the competence of the (1) [1947] A.C. 87. (3) S I.A. 178.

(2) Ibid 106-107.

Indian legislature and was valid, and that the con siderations adverted to 'by their Lordships in upholding such legislation have no relevancy in determining the validity of the provisions impugned in the present case. It is true that the kind of legislation here in question does not belong to that category, for the operation of the impugned Acts is not made to depend upon the exercise of a discretion by an external authority, but it is not correct to say that Burah's case(1) has application only to facts involving conditional legislation. As I have endeavoured to show, it lays down general principles of far-reaching importance. It was regarded in

Powell's case(2) referred to above as "laying down the general law" and as "putting an end" to the false doctrine that a subordinate legislature acts as an agent or a delegate.

Mr. Chatterjee next relied on the dictum of Lord Haldane in the Referendum case. (3) In that case their Lordships held that the Initiative and Referendum Act of Manitoba (Canada) was, in so far as it compelled the Lieutenant- Governor to submit a proposed law to a body of voters total- ly distinct from the legislature of which he was the consti- tutional head and rendered him powerless to prevent it from becoming an actual law if approved by those voters, ultra vires the Provincial Legislature, as the power to amend the Constitution of the Province conferred upon that Legislature by the British North America Act, 1867, excluded from its scope "the office of the Lieutenant-Governor ". Lord Hal- dane, however, proceeded to make the following observations: "Section 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legisla- ture only. No doubt, a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in Hodge v. The Queen(4) the Legislature of Ontario was (1) 5 I.A. 178. (3) [1919] A.C. 935.

(2) 10 App. Cas. 282. (4) 9 App. Cas. 117, held entitled to entrust to a Board of Commissioners au- thority to enact regulations relating to taverns; but it does not follow that it can create and endow with, its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."(1) Mr. Chatterjee submitted that the grave constitutional question, to which Lord Haldane drew attention, arose in the present case. I do not think so. The dictum, like the obser- vation of Lord Selborne in Burah's case(2) regarding the power of the Governor-General in Council "to create in India and arm with general legislative authority a new legislative power," to which reference has been made, seems to envisage the unauthorised creation of a new legislature with an independent status as a law-making body, which, for reasons already indicated, is quite different from delegation of legislative power, and my remarks in connection with that observation equally apply here.

The only other decision of the Privy Council to which reference need be made is King Emperor v. Benoari Lal Sarma. (3) It was an appeal from a judgment of the majority of the Federal Court of India (reported in [1943] F.C.R. 96) holding, inter alia, that sections 5, 10 and 16 of the Special Criminal Courts Ordinance (No. II of 1942) passed by the Governor-General in exercise of his emergency powers were ultra vires and invalid. The ground of decision was that although the powers of the High Court were taken away in form by section 26 of the Ordinance, they were, in fact, taken away by the order of the executive officer to

whom it was left by sections 5, 10 and 16to direct what offences or classes of offences and what cases or classes of cases should be tried by the special courts established under the Ordinance. In so far as these sections thus purported to confer on the executive officers absolute and uncontrolled discretion without any legislative provision or direction laying down (1) [1919] A.C. 935, 945. (2) 5 I.A. 178. (3) 72 I.A. 57.

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

"As we have already observed, the considerations and safeguards suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under Constitutions like the Indian and the American, where the constitutionality of legislation is examinable in a court of law, these consider- ations are, in our opinion, an integral and essential part of the limitation on the extent of delegation of responsi- bility by the legislature to the executive. In the present case, it is impossible to deny that the Ordinance-making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary criminal courts and to the special courts respec- tively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the law--as counsel for the Crown would make it appear --but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the execu- tive authorities by sections 5, 10 and 16 of the Ordinance."(1) I have set out at some length the reasoning and

conclu- sion of the learned Chief Justice because it summarises and accepts most of what has been said before us by Mr. Chatter- jee in support of his contention that the American rule as to delegation of legislative powers should be followed in this country in preference to the views of English Judges on the point and that the delegation of a too wide and uncon- trolled power must be held to be bad. The Privy Council, however, rejected the reasoning and conclusion of the major- ity of the 'Court in a clear and emphatic pronouncement. Their Lordships scouted the idea that what might be no more than considerations of policy or expediency under the Brit- ish Constitution could, in India, as in America, become. constitutional limitations on the delegation of legislative responsibility merely because the constitutionality of legislation was open to judicial review under the constitu- tion of this country. They said: "With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is intra vires or ultra vires does not depend on considerations of juris- prudence or of policy. It depends simply on examining the language of the Government Of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the ordinance by which he is 'purporting to exercise that authority"--the old traditional approach, "It (1) [1943] F.C.R. 96, 139-140, may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may,know in advance before what court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian constitution to render invalid a statute, whether passed by the Central legislature or under the Governor- General's emergency powers, which does not accord with this principle.....There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of courts should rest with an executive authori- ty, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred 'in India by the law-making authority, whether that authority is the legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace order,' and good government of India."(1) The English doctrine of supremacy within limits is here asserted once again, and its corollary is applied as the determining test: "What the British Parliament could do, the Indian legislature and the Governor-General legislating within their appointed sphere could also do." There was here a 'delegation of an "unguided and uncontrolled" discretion- ary power affecting the liberty of the subject. In the lan- guage of an American Judge,it was "unconfined and vagrant" and was not "canalised within banks that kept it from over-flowing :"(per Cardozo J. in Panama Refining Co. v. Ryan.(2) Yet, the delegation was upheld. Why? Because "their Lordships are unable to find any such constitutional limita- tion is imposed."

There is, however, a passage in the judgment of their- Lordships, which, torn from its context, may appear, at first blush, to accept the maxim of delegatus non potest delegare as a principle of English constitutional law, notwithstanding its consistent repudiationby the same tribu- nal in the previous decisions already (1) 72 I.A. 57, 70-72. (2) 293 U.S. 388.

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

In the light of the authorities discussed above and adopting the line of approach laid down there, I am of opinion that section 7 of the Delhi Laws Act, 1912, fell within the general scope of the affirmative words of section 22 of the Indian Councils Act, 1861, which conferred the law-making power on the Governor. General in Council and that the provision did not violate any of the clauses by which, negatively, that power was restricted. The same line of approach leads me to the conclusion that section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, was also constitutional and valid. This Act was passed by the Dominion Legislature of India, and the governing constitutional provision was section 99 (1) of the Govern- ment of India Act, 1935. The Indian Independence Act, 1947, authorised the removal of certain restrictions on the law- making powers of the Central Legislature

and section 108 of the Constitution Act was omitted; but the material words in section 99 (1) which granted the legislative power remained the same, namely, "may make laws for the whole or any part of the Dominion." No doubt, as between the Dominion and the Provinces there was a distribution of legislative power according to the Lists in Schedule VII, but such distribu- tion did not affect the power of the Dominion Legislature to make laws for what are known as Chief Commissioners' Prov- inces, of which Ajmer-Merwara is one. This was made clear by section 100 (4) read with section 46. Section 2 of the impugned Act was, therefore a "law" which the Dominion Legislature was competent to make and the restrictive words "subject to the provisions of this Act" had no application to the case, as no provision was brought to our notice which affected the validity of the law.

There was some discussion as to the scope and meaning of the words "restrictions" and "modifications". It was sug- gested by Mr. Chatterjee that these words occurring in the impugned provisions would enable the executive authority to alter or amend any law which it had decided to apply to the territories in question and that a power of such undefined amplitude could not be validly delegated by the legislature. On the other hand, the Attorney-General submitted that in such context "modification" was usually taken to connote "making a change without altering the essential nature of the thing changed," and that the use of the word would make no difference to the delegability or otherwise of the legislative power. He drew attention to an instance men- tioned by the Privy Council in Burah's case, where their Lordships thought that the power given to the local govern- ment by Act XXIII of 1861 to extend the Civil Procedure Code of 1859 "subject to any restriction, limitation or proviso". which it may think proper was not bad. In the view I have expressed above, however wide a meaning may be attributed to the expression, it would not affect the constitutionality of the delegating statute, because no constitutional limitation on the delegation of legislative power to a subordinate unit is' to be found in either of the constitutions discussed above. That, I apprehend, is also the reason why the Privy Council too attached no importance to the words in section 39 of Act XXIII of 1861 referred to above.

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

on the question as we had in Burah's case (1) on the Indian Councils Act, 1861, and Benoari Lal (1) 5 I.A. 178.

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

We therefore begin by looking to the terms of the Con- stitution and we find that article 245confers lawmaking power on Parliament in the same general terms as in the other two cases discussed above. The article says "subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India..... "Then we have the scheme of distribution of legislative powers worked out in article 246 as between Parliament and the legislatures of the States specified in Part A and Part B of the First Schedule, which, however, does not affect the question we have to determine, for article 246 (4), like section 100 (4) of the Government of India Act, 1935, provides that Parliament has power to make laws with respect to any matter for any part of the.territo- ry of India not included in Part A or Part B notwithstanding that such matter is a matter enumerated in the State List. The position, therefore, is substantially similar to that under the Indian Councils Act, 1861, and the Government of India Act, 1935, so far as the words conferring law- making power are concerned. Is then this impugned enact- ment, which merely purports to

(1) 72 I.A. 57.

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

The question next arises whether there is anything in the Constitution which prohibits the making of such a law. The main restrictions and limitations on the legislative power of Parliament or of the States are those contained in Part III of the Constitution relating to Fundamental Rights. Our attention has not been called to any specific provision in that Part or elsewhere in the Constitution which prohib- its or has the effect of prohibiting the making of a law delegating legislative power to a subordinate agency of Parliament's choice. What Mr. Chatterjee strenuously urged was that, having regard to the Preamble to the Constitution, whereby the people of India resolved, in exercise of their sovereign right, "to adopt, enact and to give to themselves the Constitution," Parliament, which is charged with the duty of making laws for the territories of the Union, must, as in the American Constitution, be deemed to be a delegate of the people, and that this fundamental conception, which approximates to the conception' underlying the American Constitution, attracts the application of the maxim delega- tus non potest delegare, and operates as an implied prohibi- tion against the delegation of legislative power by Parlia- ment or, for that matter, by any other legislature (1) I.L.R. 3 Cal. 63, 91, in the country. It is true to say that, in a sense, the people delegated to the legislative, executive and the judicial organs of the State their respective powers while reserving to themselves the fundamental right which they made paramount by providing that the State shall not make any law which takes away or abridges the rights con- ferred by that Part. To this extent the Indian Constitution may be said to have been based on the American model, but this is far from making the principle of separation of powers, as interpreted by the American courts, an essential part of the Indian Constitution or making the Indian Legis- latures the delegates of the people so as to attract the application of the maxim. As already stated, the historical background and the political environment which influenced the making of the American Constitution were entirely absent here, and beyond the creation of the three organs of the State to exercise their respective functions as a matter of convenient governmental mechanism, which is a common feature of most modern civilised governments, there' is not the least indication that the framers of the Indian Constitution made the American doctrine of separation of powers, namely, that in their absolute separation and vesting in different hands lay the basis of liberty, an integral and basic fea- ture of the Indian Constitution. On the contrary, by provid- ing that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions and that the Council shall be collectively responsible to the House of the People, the Constitution following the British model has effected a fusion of legislative and executive powers which spells the negation of any clear cut division of governmental power into three branches which is the basic doctrine of American constitutional law. Without such a doctrine being incorporated in the Constitution and made its structural foundation, the maxim delegatus non potest dele- gare could nave no constitutional status but could only have the force of a political precept to be acted upon by legis- latures in a democratic polity

consisting of elected representatives of the people in the discharge of their function of making laws, but cannot be enforced by the court as a rule of constitutional law when such function is shirked or evaded. The American courts are able to enforce the maxim because it has been made by the process of judicial construction an integral part of the American Constitution as a necessary corollary of the doctrine of separation of powers. But the position in India, as pointed out above, is entirely differ- ent, and the courts in this country cannot strike down an Act of Parliament as unconstitutional merely because Parlia- ment decides in a particular instance to entrust its legis- lative power to another in whom it has confidence, or, in other words to exercise such power through its appointed instrumentality, however repugnant such entrustment may be to the democratic process. What may be regarded as politi- cally undesirable is constitutionally competent. Mr. Chatterjee also attempted to spell out an implied prohibition against delegation on the strength of article 357 (1) (a) which provides specifically for delegation by the President of the law-making powers conferred on him by Parliament in case of failure of constitutional machinery in States. This express provision, it is claimed, shows that whenever the makers of the Constitution wanted to authorise delegation of legislative powers they have made specific provision in that behalf and, in the absence of any such provision in other cases, no delegation of such powers is permissible. I see no force in this argument. Merely be- cause in a particular instance of rare and extraordinary occurrence an express provision authorising the President to delegate to another the law-making powers conferred on him by Parliament is made in the Constitution, it is not reason- able to infer that it was intended to prohibit the delega- tion of powers in all other cases. The maxim expressio unius est exclusio alterius is not one of universal applica- tion, and it is inconceivable that the framers of the Con- stitution could have intended to deny to the Indian Legisla- tures a power which, as we have seen, has been recognised on all hands as a desirable, if not, a necessary con- comitant of legislative activity in modern States America, having started with a rule against delegation as a necessary corollary of the constitutional doctrine of separation of powers, has made and is making numerous inroads on the rule, and English constitutional law has allowed, as we have seen, even to subordinate legislatures, the widest latitude to delegate their legislative powers so long as they retain their own law-making capacity intact. In such circumstances, a provision for express delegation in a remote contingency is far too flimsy a ground for infer- ring a general prohibition against delegation of legislative power in all other eases. In this connection, it will be useful to recall Lord Selborne's observation in Burah's case that all that the court has to see in adjudging an enactment constitutional is "that it violates no express condition or restriction by which the law-making power conferred on the legislature is limited, and that it is not for the court to enlarge constructively those conditions and restrictions," and as recently as 1944, the Privy Council, as we have seen in Benoari Lal Sharma's case referred to what has always been regarded as an established doctrine of

English consti- tutional law, namely, that the Indian legislature could do, in the matter of delegating its legislative powers, what the British Parliament could do. It would indeed be strange if, in framing the constitution of the Independent Republic of India at the present day, its makers were to ignore the experience of legislative bodies all the world over and to deny to Parliament a power which its predecessors unques- tionably possessed. I have no hesitation in rejecting this argument.

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

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

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

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

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

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

what has been done is legislation within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which the power is limited, it is not for any court of justice, to enquire or to enlarge constructively those conditions and restrictions."(1) Reliance was also placed on the legisla- tive practice in India and other countries of the the Com- monwealth sanctioning constitutionality of statutes drawn up in the same form as the impugned enactments. The questions referred cover'three distinct periods of legislation in the constitutional and political history of this country. The first question relates to the period when the government of this country was unitary in form and was constituted under the Indian Councils Act, 1861, as amended from time to time up to the stage of the introduction of the Morley-Minto Reforms, when the Indian Legislature achieved the status of a political debating society and when as a result of the undoing of the partition of Bengal the capital of India was transferred from Calcutta to Delhi. The unitary form of government was changed after the different Round Table Conferences in London into a Federation by the Consti- tution Act'of 1935.This Act with certain adaptations remained in force till 26th January, 1950, when the new constitution was inaugurated. Under the Independence Act, 1947, India became a Dominion of the British Empire but the legislative power of the Parliament of the Dominion remained within the ambit of the Constitution Act of 1935, though the Parliament as a Constituent Assembly was conferred unlimited powers like that of a sovereign. The federal form of govern- ment that had been adopted 'by the Constitution Act of 1935 was also adopted by the framers of the new constitution. The second question relates to the period when India had at- tained the status of a dominion under the Indian Independ- ence Act, while the last question concerns the legislative competency of Parliament under the new constitution of the Republic of India.

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

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

It was customary for the mother of Parliaments told ele- gate minor legislative power to subordinate authorities and bodies. Some people took the view that such delegation was wholly unwise and should be dispensed with. Prof. Dicey, however, pointed out that it was futile for Parliament to endeavour to work out details of large legislative changes and that such anendeavour would result in cumbersome and prolix statutes. Blackstone remarked that power of this kind were essential to the effective conduct of the government. Constitutional practice grew up gradually as and when the need arose in Parliament, without a logical system, and power was delegated by Parliament for various reasons: because 'the topic required much detail, or because it was technical, or because of pressure of other demands on par- liamentary time. The Parliament being supreme and its power being unlimited, it did what it thought was right. The doctrine of ultra vires has no roots whatever in a country where the doctrine of supremacy of Parliament holds the field. The sovereignty of Parliament is an idea fundamental- ly inconsistent with the notions which govern inflexible and rigid constitutions existing in countries which have adopted any scheme of representative government. In England supremacy of law only means the right of judges to control the executive and it has no greater constitution- al value than that. The basis of power in England is the legal supremacy of Parliament and its unrestricted power to make law. In the words of Coke, "It is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds," or again, as Blackstone put it, "An act of Parliament is the exercise of the highest author- ity that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions there- unto belonging; nay, even the King himself, if particularly named therein. And it cannot be altered amended, dispensed with, suspended or repealed, but in the same forms and by the same authority of Parliament." (1).

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

valuable guide on this question. (1) Vide Allen "Law in the Making " 3rd Edn., p. 367. (2) [1943] F.C.R. 96.

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

It may, however, be observed that in spite of the widest powers possessed by the British Parliament, it has adopted a policy of self-abnegation in the matter of delegated legis- lation. A committee was appointed to report on the Minis- ters' powers, popularly known as the Donoughmore Committee. It made its recommendations and stated the limits within which power of delegated legislation should be exercised. Means were later on adopted for keeping a watchful eye on such legislation. The Donoughmore Committee discovered a few instances of cases where delegation had gone to the extent of giving a limited power of modifying Parliamentary statutes. One of these instances was in section 20 of the Mental Treatment Act, 1930 (20 & 21 Geo. V, c. 23). It empowered the Minister of Health by order to modify the wording of an enactment so far as was necessary to bring it into conformity with the provisions of the section. The whole section related to terminology, its intention being to replace certain statutory expressions in previous use by others which at the moment were regarded less offensive. The other instance was found in section 76 of the Local Government Scotland Act, 1929, (19 & 20 Geo. V, c.

25). By this section the Secretary of State was empowered between 16th May, 1929, and 31st December, 1930, by order to make any adaptation or modification in the provisions of any Act necessary to bring these provisions in conformity with the provisions of other Acts. Such a clause in a statute bore the nickname "Henry VIII clause". Concerning it the Committee made the following recommendation: "The use of the so-called Henry VIII clause conferring power on a Minister to modify the provisions of Acts of Parliament (hitherto limited to such amendments as may appear to him to be neces- sary for the purpose of bringing the statute into operation) should be abandoned in all but most exceptional cases and should not be

permitted by Parliament except upon special grounds stated in a ministerial memorandum to the bill. Henry VIII clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year."

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

The Dominion of Canada has a written constitution, The British North Amercia Act (30 & 31 Vict., c. 31). It is not modelled on the doctrine of exclusive division of power between the departments of State, legislative, executive and judicial. It does not place them in three water-tight compartments and it is somewhat similar in shape in this respect to the British constitution where the King is still a part of the legislature, the House of Lords still a part of the judicial as well as legislative and where all parts of government form a mutual check upon each other. This similarity, however, does not mean that the legislature in Canada is of the same kind as the British Parliament. It falls in the class of non-sovereign legislatures, like all colonial parliaments. The decisions of Canadian courts are by no means uniform on the power of the Canadian Parliament to delegate legislative power. Those cited to us of recent date seem to have been given under the pressure of the two world wars and under the provisions of the War Measures Act. With great respect and in all humility, I am constrained to observe that in these decisions, to establish the vires of the powers delegated, arguments have been pressed into service which are by no means convincing or which can be said to be based on sound juristic principles. They can only be justified on the ground that during a period of emergency and danger to the State the dominion parliament can make laws which in peace time it has no competency to enact. There are a number of Privy Council decisions which have concerned themselves with the vires of legislative enactments in Canada which purported to transfer legislative power to outside authorities and it seems to me that these decisions furnish a better guide to the solution of the problem before us than the later decisions of the Supreme Court of Canada which seemingly derive support from these Privy Council decisions for the rules stated therein.

The first of these decisions is in the case of Russell v. The Queen(1) decided in 1882. Two questions were raised in the appeal. The first was as to the validity of the Canada Temperance Act, 1878. It was urged that having regard to the provisions of the British North America Act, 1867, relating to the distribution of legislative powers it was not competent for the Parliament of Canada to pass the Act in question. The second question was that even if

the Dominion Parliament possessed the powers which it assumed to exercise by the Act, it had no power to delegate them (1) 7 App. Cas. 829, and to give local authorities the right to say whether the provisions of the Act should be operative or not. It is the second question which is relevant to the present enquiry the mode of bringing the second part of the Act into force, stating it succinctly, was as follows:

"On a petition to the Governor in Council, signed by not less than one fourth in number of the electors of any 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 GovernorGeneral, after certain prescribed notices and evi- dence, 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 Gover- nor-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."

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

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of Queen v. Burah(1), lately before this Board."

It seems to me that their Lordships acquiesced and assented in the proposition urged by the learned counsel that delegation of legislative power was not permissible when they combated his arguments with the remark that the Act does not delegate any legislative

power whatever. Otherwise, the short answer to the objection was that dele- gation of legislative power was implicit within the power of legislation possessed by the legislature. It was not neces- sary to base the decision on the ground of conditional legislation.

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

"Sec. 4. Save as hereinafter provided, the territory known as the Garo Hills..... is hereby removed from the jurisdiction of the Courts of Civil and (1) 5 I.A, 178.

Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code and the Acts passed by any legislature now or heretofore established in British India, as well from the law pre- scribed for the said courts and offices by the Regulations and Acts aforesaid. And no Act hereafter passed by the Council of the Governor General for making Laws and Regula- tions shall be deemed to extend to any part of the said territory, unless the same be specially named therein. Sec. 5. The administration of civil and criminal jus- tice, and the superintendence of the settlement and realiza- tion of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may, for the pur- pose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall, in the matter of the administration and superin- tendence aforesaid, be subject to the direction and con- trol of the said Lieutenant-Governor and be guided by such instructions as he may from time to time issue. Sec. 8. The said Lieutenant-Governor may from time to time by notification in the Calcutta Gazette, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Gover- nor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provi- sions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sec. 9. The said Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette extend mutatis mutandis all or any of the provisions contained in the other sections

of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India."

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

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

"Their Lordships cannot but observe that, if the princi- ple thus suggested were correct, and justified the conclu- sion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be

applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its com- mencement.

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

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

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

legislation, to remove a particular district from the jurisdiction of the ordinary courts and offices, and to place it under new courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal; leav- ing it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what law he pleases for that or any other district, but to apply by public notification to that district any law, or part of law, which either already was, or from time to time might be, in force, by proper legislative authority, in the other territories subject to his government. The legisla- ture determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Gover- nor.....

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII of 1869) itself. The proper legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been ful- filled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limit- ed discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when consti- tuting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legisla- tive powers which it from time to time conferred. It cer- tainly used no words to exclude it."

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

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

place, persons, laws and powers. It seems to me that though their Lordships were not prepared to assent to the proposi- tion that the matter should be dealt with on principles deducible from the doctrine of the law of agency, they were also not prepared to depart from the rule that apart from the doctrine of the law of agency a person to whom an office or duty is assigned or entrusted by reason of a special qualification cannot lawfully devolve that duty upon another unless expressly authorised so to do. Public func- tionaries charged with the performance of public duties have to execute them according to their own judgment and discre- tion except to the extent that it is necessary to employ ministerial officers to effectively discharge those duties. For the reasons given above presumably the Privy Council was not prepared to lay down that delegation of legislative power was a content of the power itself. It contented itself by holding the law valid under the name and style of condi- tional legislation. It is difficult to conceive that the Privy Council would have hesitated in saying so if it felt that delegation of legislative power was a content of the power itself. Reference in this connection may be made to a passage in the judgment of Markby J. which reads thus :---

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

authority. Every Act of the legislature abounds with exam- ples of discretion entrusted to judicial and executive officers of government, the legality of which no one would think of questioning. 'the broad question, however, is' Can the legislature confer on the Lieutenant-Governor legisla- tive power?' Answer: 'It is a general principle of law in India that any substantial delegation of legislative author- ity by the legislature of this country is void'."

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

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

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

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

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

No doubt was cast on this construction of the language of section 39 either in the minority judgment of the High Court or in the judgment of their Lordships of the Privy Council. In view of this clear expression of opinion of Ainslie J. as to the meaning of the language used in section 39and not disapproved by their Lordships of the Privy Council it cannot with any force be contended that their Lordships in Burahs case(1) gave approval to the proposition that the power of conditional legislation included the power of amendment or modification of the Act of the legis- lature itself. In my opinion, the result of the decision in Burah's case(1) is that it was decided that the Indian Legislature had power to conditionally legislate. This case is no authority for the proposition that it could delegate the exercise of its judgment on the question as to what the law should be to an external agency. This case does not support the (1) 5 I.A. 178.

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

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

1) 9 App. Cas. 117.

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

"It appears to their Lordships, however, that the objec- tion 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 Domin- ion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt for varying details and machinery to carry them out might become oppressive, or absolutely fail, The very full and very elaborate judgment of the Court of Appeal con- tains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at 'the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legis to decide. "lature, and not for courts of law This case, in my opinion, decided the following points :--(1) Power to make by-laws or regulations as to subjects specified in the enactment and with the object of carrying that enactment into operation and effect can be transferred to municipal 'institutions or local bodies. (2) Such an authority is ancillary to legislation. (3) Giving such power of making regulations to agents and delegates does not amount to an effacement of the legislature itself. The case does not sanction the proposition

that power to amend or to modify a statute passed by the legislature itself can be delegated. Power of amending a statute or altering it cannot be described as ancillary to legislation, nor is such a power within the armit of the doctrine of subsidiary legis- lation. It is significant, that their Lordships of the Privy Council never gave their approval to the wide propo- sition that what the legislature itself can do, it can employ an agent with coextensive powers for doing the Same. They have been careful in saying to what extent and in what measure delegation was permissible. All that they sactioned was delegation of authority ancillary to legislation or delegation to municipal institutions to make regulations and by-laws and no more. It was not held by their Lordships that power to declare what the law shall be could ever be delegated or that such delegation will be intra vires the Parliament of Canada or of the Indian Legislature. It was contended that by implication their Lordships held in this case that short of effacing itself the legislature could delegate. In my opinion, there is no justification for placing such a construction on the language used by their Lordships while they were combat- ing an argument that was placed before them by the learned counsel.

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

"Having said so much, their Lordships, following their usual practice of not deciding more than is strictly neces- sary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the court below, to advert to it. Section 92 of the Act of 1867 entrusts the legislative power in a province to its legisla- ture and to that legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a provincial legislature in Canada, could, while preserving its own capacity intact, seek (1) [1919] A.C. 935.

the assistance of subordinate agencies as had been done when in Hodge v. The Queen (1) the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with

its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than draw attention to the gravity of the constitutional questions which thus arise."

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

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

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

Il) 9 App. Cas. 117 (21 [1922] 2 A.C. 128.

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

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

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

Reference was also made to Powell v. Apollo Candle Co. (5) decided in the year 1885. There the question arose as to the validity of section 133 of the Customs Regulating Act of 1879 which authorizes the levy of certain duties under an Order in Council. The section was held intra vires the constitution. It was argued that the power given to the colonial legislature to impose duties was to be executed by themselves (1) [1933] A.C. 156. (4) [1938] A.C. 708.

(2) 5 I.A. 178. (5) 10 App. Cas. 282.

(3) 9 App. Cas. 117.

only and could not be entrusted wholly or in part to the Governor or anybody else. This objection was answered in the following way "The duties levied under the Order in Council are really levied by authority of the Act under which the order was issued. The legislature has not parted with its perfect control of the Governor and has the power of withdrawing or altering the power entrusted."

On this construction of the power delegated, that what the delegate was doing was done under the authority of the Act no question of delegation of lawmaking power arises. Fort Frances Pulp & Power Co. v. Manitoba Free Press (1), Co-operative Committee on Japanese Canadians v. Attorney-General for Canada (2), and Cooperative Committee v. Attorney-General of Canada (3) cited at the Bar are not helpful in giving an opinion on the present matter. Four recent Canadian cases were cited for the extreme view that short of effacing itself Parliament or a legisla- ture has the widest power of delegation and that it acts intra vires the constitution in doing so. The first of these cases is In re George Edwin Gray(4). The case was under section 6 of the War Measures Act, 1914, which con- ferred very wide powers on the Governor-General in Council for the efficient prosecution of the war. The decision was given by a majority of four to two and in the majority judgment the following observations occur :--

"The practice of authorizing administrative bodies to make regulations to carry out the objectives of an act instead of setting out all details in the Act itself is well-known and its legality is unquestioned but it is said that the power to make such regulations could not

constitu- tionally be granted to such an extent as to enable the express provisions of the statute to be amended or repealed; that under the constitution (1) [1923] A.C. 695. (3) [1947] A.C. 87.

(2) [1947] 1 D.L.R. 577. (4) 57 S.C.R. (Canada) 150.

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

To the proposition stated in the opening part of the quotation there can be no possible objection. But when the learned Judges proceed to lay down the rule that in the absence of any limitations in the constitution Parliament can delegate the power to amend and repeal laws made by itself to an external authority unless it amounts to an abdication of its functions does not in my humble opinion seem to be sound. In the first instance, these observations seem inconsistent with the fundamental proposition that a duty entrusted to a particular body of persons and which is to be performed according to certain procedure by that body can be entrusted to an external agency which is not con- trolled by any rules of procedure in the performance of that duty and which would never have been entrusted to perform it. Moreover, abdication by a legislative body need not necessarily amount to a (1) [1917] A.C. 260.

complete effacement of it. Abdication may be partial or complete. It would certainly amount to abdication when in respect of a subject of legislative list that body says it shall not legislate on that subject but would leave it to somebody else to legislate on it. That would be delegation of the law-making power which is not authorized. There is no justification for the assumption that the expression "abdi- cation" is only applicable when there is a total effacement or a legal extinction of such a body. In my opinion, it is the abdication of the power to legislate when a legislature refuses to perform its duty of legislating on a particular

subject and entrusts somebody else to perform that function for it. "Abdication" according to the Oxford Dictionary means abandonment, either formal or virtual, of sovereignty or other high trust. It is virtual abandonment of the high trust when the person charged with the trust says to some- body else that the functions entrusted to him in part or whole be performed by that other person. Be that as it may, the point of view contained in the above quotation cannot be supported on the decisions of their Lordships of the Privy Council discussed in the earlier part of this judgment. Duff J. stated his view in the following way :--

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

These observations, in my opinion,--and I speak with great respect--cannot again be justified on any juristic principle. In the matter of making law there cannot be an anticipatory sanction of a law not yet born or even con- ceived. Moreover, an organ of the legislature for making laws can only be created by the constitution and not by the legislature which is itself confided with that power by the constitution. The learned dissenting Judge in this case observed that a wholesale surrender of the will of the people to any autocratic power would not be justified either in cons- titutional law or by the past history of their ancestors. These observations were made in respect to the power of amendment or repeal conferred on the delegate. As I have pointed out earlier in this judgment, such a power has not even been exercised by the British Parliament and the Do- noughmore Committee recommended that its exercise as far as possible should be abandoned. The decision in this case, in my opinion, is not an apposite authority for arriving at a correct conclusion on the questions involved in the refer- ence.

The next case to which our attention was drawn is Ref. re Regulations (Chemicals)(1). This case arose in connection with the regulations respecting chemicals made pursuant to powers conferred by the Department of Munitions and Supply Act and by the War Measures Act. The question was whether these regulations were ultra vires the constitution. It was held that except in one part the regulations were intra rites, and it was observed that the War Measures Act does not attempt to transform the executive government into a legislature in the sense in which the Parliament of Canada and the legislatures of provinces are legislatures and that the regulations derive legal force solely from the War Measures Act. Reliance was placed on Queen v. Burah(2) and Hodge v. The Queen(3). One of the learned Judges observed that the maxim delegatus non potest delegare is a rule of the law of agency and has no applica- tion to Acts of a legislature, that the power of delegation being absolutely essential in the circumstances for which the War Measures Act has been enacted so as to

prove a workable Act, power must be deemed to form part of the powers conferred by Parliament in that Act. Another learned Judge observed that the maxim was not confined to the law of agency alone but that it had no application to legislation. A third learned Judge, however, said that the maxim quoted above also had application to grants of legislative power but that the Parliament has not (1) [1943] S.C.R. (Canada) 1 (3) 9 App. Cas. 117, (2) 5 I.A. 178.

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

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

Lastly reference may also be made to the case of Oimuit v. Bazi (8). The learned Attorney-General placed reliance on certain obiter dicta of Davies J. to the effect that the Parliament of Canada could delegate its legislative power and such delegation was within its power. The learned Chief Justice did not express (1) 5 I.A. 178. (5) (1943) 1 D.L.R. 248.

(2) 9 App. Cas. 117. (6) [1919] A.C. 935.

(3) (1950)4 D.L.R 369.' (7) 9 App. Cas. 117.
57 S.C.R. 150- (8) 46 S.C.R.L. (Canada)502.

any opinion on the point, while Idington J. was not prepared to subscribe to this view. The other Judges did not consid- er the point at all. In my opinion, these remarks, the soundness of which was doubted by other Judges, are not of much assistance to us in this case. Having examined the Canadian cases on this subject it seems pertinent at this stage to refer to a passage from Street on the Doctrine of Ultra Vires, which states the true position of colonial legislatures and appositely brings out the meaning of the language used by the Privy Council in the cases that the legislatures are not the agents of the Imperial Parliament :--

"However true it may be that colonial legislatures are not mere agents of the Imperial Government, it is also true that they are not unfettered principals. Within the terms of their constitution they are limited at least as to subjects and area, and, to the extent suggested, perhaps also as to power of delegation. If an ultra vires colonial' statute may be ratified by the Imperial Parliament, there is an implica- tion of agency. To do anything outside the scope of their constitution as when the Dominion of Canada established the Province of Manitoba(1), an imperial statute is required. It would appear that a legislature cannot, as an ordinary principal, ratify acts purporting to be done under its authority (2). Taking a broad view, non-sovereign legisla- tures are, and so long as they do not repudiate their con- stitutions must remain, delegates of the Imperial Parlia- ment. They have been so regarded by the Privy Council(3). But just as in the case of the prerogative it would be impolitic to apply a formula too strictly, so also the law of agency must be accommodated to meet the solid fact that the colonies, or the most important of them, enjoy real independence." The decisions of American courts on the constitutionality of delegation of legislative power are, as in (1) 34 Vict. c. 28.

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

221. (3) [1906] A.C. 542; [1914] A.C. 237, 254.

the case of other countries, by no means uniform. Judicial opinion has sometimes taken a strict view against the valid- ity of such delegation and on other occasions it has liber- ally upheld it as constitutional on grounds which again by no means are based on logical deductions from any juristic principle, but generally on grounds of convenience or under the doctrine of "determining conditions" and sometimes on historical considerations. The Supreme Court of America has, however, never departed from the doctrine that legislative power cannot be delegated to other branches of government or to independent bodies or even back to the people. The rule against delegation of legislative power is not based merely on the doctrine of separation of powers between the three state departments, legislative, executive and judicial, evolved by the constitution. This doctrine puts a restraint on delegation to other branches of government. Prohibition against delegation to independent

bodies and commissions rests on Coke's maxim, delegatus non potest delegare. The maxim, though usually held applicable to the law of agency embodies a sound juristic principle applicable to the case of persons entrusted with the performance of public duties and the discharge of high trusts. The restraint on delega- tion back to the people is tied up with some notion of representative democracy.

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

The first American case that needs mention is Waman v. Southard (1), a decision of Marshall C.J. given in the year 1825. The question concerned the validity of certain rules framed by the courts. The learned Chief Justice observed that it could not be contended that Congress could delegate to courts or to any other tribunal powers which are strictly or exclusively legislative.

(1) 6 Law. Edn. 262.

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

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

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

"It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or, if by 103 U.S. 168. (4) 287 U.S. 77.

(2) 143 U.S. 649. (5) 289 U.S. 516.

(3) 277 U.S. 186. (8) 276 U.S. 394.

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

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

The Congress is not permitted to abdicate, or to trans- fer to others, the essential legislative functions with which it is vested. Undoubtedly, legislation must often be adapted to complex conditions involving (1) 293 U.S. a88. (2) [1943] F.C.R. 96.

a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibil- ity and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate

rules within prescribed limits and the determi- nation of facts to which the policy as declared by the legislature is to apply."

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

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

These decisions seem to indicate that judicial opinion in America is against delegation of essential powers of legislation by the Congress to administrative bodies or even to independent commissions. It is unnecessary to refer to all the passages that were quoted from the different text- books which apart from the opinions of the text-book writers merely sum up (1) 312 U.S. 126. (3) 334 U.S. 742.

(2) 321 U.S. 414.

the result of the decisions given by the various courts on this point. This result has been, in my opinion, very accurately summarized by Crawford in his book on Construc- tion of Statutes at pages 215, 26 in the following words and represents the present state of constitutional law in that country on this subject :-

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

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

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

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

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

In a number of decisions mentioned in this book the courts have held that delegation of power to alter or modify a statute is unconstitutional delegation of power. As observed by Prof. Salmond (Jurisprudence 10th Edn. p. 159), a legislative Act passed by the supreme legislature cannot be amended by any other body than the supreme legislature itself. In Rowland Burrow's Words and Phrases, the word "modify" has been defined as meaning "vary, extend or en- large, limit or restrict." In Oxford Dictionary, one of the (1) 46 C.L.R. 73.

(2) 239 App. Div. 703, meanings of this word is "the making of partial changes or altering without radical transformation." The same diction- ary gives the following meaning to the word "modification": ' 'the result of such alteration, a modified form or varie- ty." In Stevens v. General Steam Navigation Co. Ltd.(1) it was stated that modification implies an alteration. It may narrow or enlarge the provisions of a former Act. In my opinion, the view taken in American decisions that delega- tion of authority to modify an Act of the Congress is unconstitutional is fully borne out by the meaning of the expres- sion "modify", though this view is not liked by Walter Gellhorn. Before concluding, it is apposite to quote a passage from Baker's Fundamental Law which states the prin- ciple on which the American decisions are based and which coincides with my own opinion in respect of those decisions. The passage runs thus:

"The division of our American government into three co-ordinate branches necessarily prevents either of the three departments from delegating its authority to the other two or to either of them, but there are other reasons why the legislative power cannot be delegated. Representative government' vests in the persons chosen to exercise the power of voting taxes and enacting laws, the most important and sacred trust known to civil government. The representa- tives of the people are required to exercise wise discretion and sound judgment, having due regard for the purposes and needs of the executive and judicial departments, the ability of the tax-payers to respond and the general public welfare. It follows as a self-evident proposition that a representa- tive legislative assembly must exercise its own judgment; that in giving its consent to a tax levied it must distinct- ly and affirmatively determine the amount of the tax by fixing a definite and certain rate or by fixing an aggregate amount on the tax-payers and that in enacting a law it must so far express itself that the Act when it leaves the legis- lative department is a complete law. It is therefore a maxim of constitutional law that a legislative body (1) [1903] 1 K.B 890.

cannot delegate its power. If it was competent for a repre- sentative legislative body to delegate its power it would be open to make the delegation to the executive which would be destructive of representative government and a return to despotism. Not only the nature of the legislative power but the very existence of representative government depends upon the doctrine that this power cannot be transferred." The Australian Constitution follows the American model (63 & 64, Vic., c. 12, passed in July 1900). The legislative power of the Commonwealth is vested in a Federal Parliament. The executive power is vested in the Queen, while the judicial power is vested exclusively in the courts. The extent of the legislative power is stated in sections 51 and 52 of the Constitution Act. The residuary powers vest in the States. The first Australian case cited to us is Baxter v. Ah Way(1). This was decided in the year 1909. It was held that section 52, sub-section (g), of the Customs Act of 1901, which provides that all goods the importation of which shall be prohibited by

proclamation shall be prohibited imports, is not a delegation of legislative power but conditional legislation and is within the power conferred on Parliament by section 51 of the Constitution. It was further held that prohibition of importation is a legislative act of the Parliament itself, the effect of sub-section (g) being to confer upon the Governor-General in Council the discretion to declare to what class of goods the prohibition will apply. In the course of his judgment the learned Chief Justice observed as follows :--

"The foundation of the argument that this power cannot be delegated by the legislature is to be found in the case of..... It is of course obvious that every legislature does in one sense delegate some of its functions..... Nor is it to the purpose to say that the legislature could have done the thing itself. Of course, it could. In one sense this is delegation of authority because it authorizes another body to do (1) 8 C.L.R. 626.

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 m any sense..... The objection cannot be supported on the maxim delegatus non potest dele- gate or on any other ground..... There being no objec- tion to conditional legislation being passed, this is a case of that sort."

O'Connor J. said as follows :--

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

Higgins J. said :-

"According to my view, there is not here in fact any delegation of the law-making power." This case rests on the principle that legislative power cannot be delegated and it was for that reason that the impugned statute was justi- fied on the ground of conditional legislation. If delega- tion of legislative power was permissible, it was wholly unnecessary to justify the enactment as a form of condition- al legislation.

Roche v. Kronheimer(1), decided in the year 1921, was argued by Dixon (as he then was). The question in that case concerned the validity of the Treaty of Peace Act, 1919, which by section 2authorized the making of regulations conferring the delegation of powers on certain persons. The legislation was held constitutional. In the argument by Mr. Dixon, its

validity was attacked on the following grounds: "It is not conditional legislation as in the case of. Baxter v. Ah Way(2), but it bestows on the executive full 29 C.L.R. 329. (2) 8 C.L.R. 676.

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

It was said that if Parliament had authority to legis- late, it had no power to confer that authority on the Gover- nor-General. On this topic we were referred to Hodge v. The Queen (1) and Rex v. Halliday(2) and In re The Initiative and Referendum Act(3), and much interesting argument was devoted to the real meaning and effect of the first of those cases. It is enough to say that the validity of legislation in this form has been upheld in Farey v. Burvett(4); Pank- hurst v. Kierman(5); Ferrando v. Pearce(6); and Sickerdick v. Ashton(D, and we do not propose to enter into any inquiry as to the correctness of those decisions."

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

In the year 1931 two cases came before the Supreme Court, one of which was decided in February, 1931, and the other in November, 1931. The first of these is the case of Huddart Parker Ltd. v. The Commonwealth(3), in which Dixon J. was one of the presiding Judges. The question in that ease concerned the validity of section 33 of the Transport Workers Act which empowered the Governor-General to make regulations in respect of transport workers. The learned Judge observed that Roche v. Kronheimer(9) had decided that a statute conferring on the executive power to legislate upon some matters, is law with respect to that subject. On this construction of the decision in Roche v. Kronheimer(9) the case was decided.

(1) 9 App. Cas. 117. (6) 25 C.L.R. 241.

12} [1917] A.C. 260. (7) 25 C.L.R. 506.

(3) iI919] A.C. 935. t8) 44 C.L,R. 492.

(4) 21 C.L,R. 433. (9) 29 C.LR. 329.

(5) 24 C.L.R. 120.

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

Victorian etc. Co. & Meakes v. Dignan(2) was decided in November, 1931. The question in that case was whether section 3 of the Transport Workers Act was intra rites the constitution inasmuch as it delegated power of making regu- lations notwithstanding anything else contained in other Acts. The delegation was under the name and style of confer- ring "regulative power." The appellants in that case were informed that they were guilty of an offence against the Waterside Employment rights, picking up for work as a water- side worker at Melbournea person not a member of the Water- side Workers' Federation, while transport workers who were members of the Federation were available for being picked up for the work at the said port. The attack on the Act itself was based on the American constitutional doctrine that no legislative body can delegate to another department of government or to any other authority the power, either generally or specially, to enact laws. The reason, it was said, was to be found in the very existence of its own powers'. This high prerogative having been entrusted to its own wisdom, judgment and patriotism and not to those of other persons, it will act ultra rites if it undertakes to delegate the trust instead of executing it. It was, however, said that this principle did not preclude conferring local powers of government upon local authorities. The defence was that the Act did not impinge upon the doctrine because in it the Parliament confined the regulating power on certain specific matters within the ambit of the trade and commerce power and accordingly merely exercised its own legislative power within that ambit, and did not delegate any part of it. Reference was made to the decision of Higgins J. in Baxter v. Ah Way(3), in which it was observed that the Federal Parliament had within its ambit full power to frame its own laws in any fashion using any agent, any agency, any machinery that in its wisdom it thinks (1) 29 C.L.R. 329.

(2) 46 C.L.R. 73. (3) 8 C.L.R, 640.

fit for the peace, order and good government of the Common- wealth. Rich 3. held that the authority of subordinate law making may be invested in the executive. Reference was made to Roche v. Kronheimer(1) The learned Attorney-General placed considerable reliance on the judgment of Dixon J. The learned Judge expressed his opinion on the American decisions in these words :--

"But in what does the distinction lie between the law of Congress requiring compliance with direction upon some specified subject which the administration thinks proper to give and a law investing the administration with authority to legislate upon the same subject? The answer which the decisions of the Supreme Court supply to this question is formulated in

the opinion of that Court delivered by Taft C.J. in Hampton & Co: v.U.S.(2).. .... The courts in America had never had any criterion as to the validity of statutes except that of reasonableness,--the common refuge of thought and expression in the face of undeveloped or unascertainable standards."

The learned Judge then reached the conclusion that no judicial power could be given or delegated, but from that it did not follow that Parliament was restrained from transfer- ring any power essentially legislative to another organ or body. In an earlier decision the learned Judge had ex- pressed the opinion that time had passed for assigning to the constitutional distribution of powers among.the separate organs of government, an operation which confined the legis- lative power to the Parliament so as to restrain it from reposing in the executive an authority essentially legisla- tive in character and he remarked that he was not prepared to change that opinion or his expression to the effect that Roche v. Kronheirner(1) did decide that a statute conferring upon the executive a power to legislate on some matters contained within one of the subjects of the legislative power of Parliament is a law with respect to that subject and the distribution of powers (1) 29 C.L.R. 329 (2) 276 U.S. 394, 406.

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

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

It seems to me that in its ultimate analysis the judgment of the learned Judge proceeded, as pointed out by him, upon the history and the usages of British legislation and theories of English law and not on the strict construction of the Australian Constitution with respect to which the learned Judge frankly conceded that logically or theoretically the power of delegation of the quality held valid in that case could not be justified on the framework of the constitution. I have also not been able precisely to follow the distinction drawn by the

learned Judge that delegation held justified by him did not include delegation in the fullest extent of any matter falling within the boundaries of federal power. After a careful consideration of the observations of this very learned and eminent Judge I venture to think that these are not a safe guide for deci- sion of the present reference. Not only were the constitu- tional limitations of the written constitution over-reached, but the decision was based on the theories of British legis- lation and English law which could hardly be applied to a written constitution with a complete separation of power.

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

"It is true that the extent of the power granted will often be a material circumstance in the examination of the validity of the legislation conferring the grant..... The nature of the legislative power of the (1) [1945] F.C.R. 161.....

Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject-matters mentioned in sections 51 and 52 of the constitution."

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

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

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

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

In my opinion, the decision in Baxter v. Ah Way(2) is based on a correct construction of the provisions of the Australian Constitution and the later decisions cannot be considered as any guide. in this country for a decision of the point involved m the reference. The argument pressed by Mr. Dixon, as he then was, in (1) 64 C.L.R. 470- (2) 8 C.L.R. 626.

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

The decisions of their Lordships of the Privy Council from India are not many. The first and the earliest of these is in Queen v. Burah(2), which has already been dis- cussed at considerable length in the earlier part of this judgment and as stated already, it is no authority for the proposition that the Indian Legislature constituted under the Indian Councils Act, 1861, had power to delegate author- ity to the executive authorising them to modify or amend the provisions of an Act passed by the legislature itself. King Emperor v. Benoari Lal Sarma(3) is the last Indian decision of the Privy Council on this subject. Conviction of fifteen individuals made by a special magistrate purporting to act under Ordinance II of 1942, promulgated by the Gover- nor-General on the 2nd January, 1942, was set aside by a special Bench of the High Court at Calcutta and this deci- sion was affirmed by the majority of the Federal Court of India. The ground on which the conviction was set aside was that the Ordinance was ultra vires. In appeal before their Lordships of the Privy Council it was contended that the Ordinance was valid. The Ordinance did not itself set up any of the special courts but provided by sub-section (3) of section 1 that the Ordinance--

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

In view of this last provision it was contended that the Ordinance was invalid either because the language showed that the Governor-General notwithstanding the preamble did not consider that an emergency existed but was making provi- sion in case one should arise in 29 C.L.R. 329. (2) 5 I.A. 178, (3) [1945] F.C.R. 161.

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

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

This case brings out the extent to which conditional legislation can go, but it is no authority justifying dele- gation of legislative power authorising an external authori- ty to modify the provisions of a legislative enactment. It may be pointed out that the opening part of the passage quoted above seems to approve the view (1) 7 App. Cas. 829.

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

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

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

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

Acting under the proviso the Provincial Government on the 11th March, 1948, extended by notification the life of the Act by one year. The validity of the proviso to sub- section (3) of section 1 of the Act was attacked on the ground that it amounted to delegation of legislative power by the Provincial Legislature and this it was not competent to do. On the authority of the decision of the Privy Council in Benoari Lal Sarma's case (2) I held the proviso void. The question was posed by me in the following way :--

"It may be asked what does the proviso purport to do in terms and in substance ? The answer is that it empowers the Provincial Government to issue a notification saying that the Provincial Actshall remain (1) [1949] F.C.R. 595. (2) [1945] F.C.R. 161.

in force for a further period of one year with such modifi- cations, if any, as may be specified in the notification. As stated in the earlier part of this judgment, unless the power of the Provincial Government is co-extensive with the power of the Provincial Legislature, it is difficult to see how it can have the power to modify a statute passed by that legislature, Modification of statute amounts to re-enacting it partially. It involves the power to say that certain parts of it are no longer parts of the statute and that a statute with X sections is now enacted with Y sections. In the act of modification is involved a legislative power as a discretion has to be exercised whether certain parts of the statute are to remain law in future or not or have to be deleted from it. The power to modify may even involve a power to repeal parts of it. A modified statute is not the same original statute. It is a new Act and logically speak- ing, it amounts to enacting a new law. The dictionary mean- ing of the word 'modify'

is to make something existing much less severe or to tone it down or to make partial changes in it. What modifications are to be made in a statute or whether any are necessary is an exercise of law-making power and cannot amount merely to an act of execution of a power already conferred by the statute. The extent of changes is left to external authority, i.e., the Provincial Government. Nothing is here being done in pursuance of any law. What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so, what that law will be, whether what was originally enacted or something different. The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legisla- ture than that entrusted with the duty under the Government of India Act, 1935."

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

Reference may also be made to the case of The State of Bombay v. Narottamdas(2), decided recently and to (1) 5 IA. 178. (2) [1951] S.C.R. 51.

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

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

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

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

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

(1) [1949] F.C.R. 595. (3) 1 Ohio St, 88.

5 I,A. 178. (4) 72 Pa. St. 491, "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public wel- fare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossi- ble to fully know." The proper distinction the court said was this: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. 'To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

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

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

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

The question can be posed thus: Why is delegation pecul- iarly a content of legislative power and not of judicial power ? In my judgment, it is a content of none of the three State powers, legislative, judicial or executive. It is, on the other hand, incidental to the (1) [1943] F.C.R, 96. (2) 293 U.S. 388. (3) 5 I.A. 178.

exercise of all power inasmuch as it is necessary to dele- gate for the proper discharge of all these three public duties. No public functionary can himself perform all the duties he is privileged to perform unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and dis- cretion to others. One may well ask, why is a legislature formed with such meticulous care by all constitution makers ? Why do they take pains to lay down the procedure to be followed by an elected legislature in its function of law- making ? Why do they define its different functions and lay down the methods by which it shall act ? The only answer that reasonably can be given to these queries is: "Because the constitution trusts to the judgment of the body consti- tuted in the manner indicated in the constitution and to the exercise of its discretion by following the procedure pre- scribed therein." On the same principle the judges are not allowed to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate ancillary powers to others, for instance, in a suit for accounts and in a Suit for dissolu- tion of partnership, commissioners can be entrusted with powers authorising them to give decisions on points of difference between parties as to items in the account. Again it may be enquired why cannot other public functionaries entrusted in the matter of appointment of public servants delegate this particular duty to others. The answer again is found in the same principle. I put this query to the learned Attorney-General but I could not elicit any very satisfactory answer. He contented himself by saying that possibly there was something in the nature of the power

itself which requires the personal attention of the authori- ties concerned and that therefore delegation was there impliedly forbidden. To my mind, the same principle forbids delegation of essential legislative power. It is inherent in the nature of the power that has to be exercised by the legislature elected for the purpose subject to the qualifi- cations already stated, It would be a breach of the constitutional duty to bestow this power on someone else. In the words of Sir John Salmond, "In general, in- deed, the power of legislation is far too important to be committed to any person or body of persons save the incor- porate community itself. The great bulk of enacted law is promulgated by the state in its own person. But in excep- tional cases it has been found possible and expedient to entrust this power to private hands." In the words of Mr. Dixon (as he then was), the making of a law that another body may make laws upon a particular subject matter is not making a law on that subject. The quotation cited in the earlier part of this judgment from Baker's book appositely states the rule when it says: "It is an axiom of constitu- tional law that representative legislative bodies cannot delegate legislative power because representative government vests in the persons chosen to exercise the power of voting taxes and enacting laws, :the most important and sacred trust known to civil government." In the words of another jurist, "Legislation is the formal utterance by the legisla- tive organ of the society and by no others. Its words constitute the law and not the words of the delegate."

In private law the rule is well settled that an arbitra- tor cannot lawfully devolve his duty on another unless so expressly authorized. The nature of the duty itself is such that it demands exercise of his own judgment and discretion. It is again well settled that fiduciary duties cannot be made the subject of delegation, though trustees in order to discharge certain functions can use machinery or subordinate agencies for effectively carrying on the duties which attach to their constitution. Delegation is permissible in cases where there is a legal or physical necessity to do so be- cause without trusting some person or persons it would be impossible efficiently to discharge the duties. It cannot be denied that municipal and other corporations cannot delegate the by-law making power to the executive officers. It is so because power is entrusted to them in their corporate capac- ity and has to be exercised in that capacity. I am not able to apprehend why this principle which is well settled in. private law cannot appositely be applied to the discharge of duties by public functionaries and by a legislature. It seems to me that the nature of the duty is such that it is implicit within it that it should be discharged by the person en- trusted with it and by no others. In other words, the nature of the public duty itself demands it and the principles of legislation require it.

For the reasons given above I cannot accept the proposi- tion contended for by the learned Attorney-General that in the absence of an express or implied provision in the con- stitution legislative authority can be bestowed on other persons. In my opinion, the correct proposition, on the other hand, is that unless expressly or impliedly author- ized, such

delegation is not permissible. The exceptions to this rule fall in two classes which have been stated in the quotation from Crawford's book earlier cited in this judg- ment.

It is now convenient to examine the provisions of our Constitution in order to appreciate the contention of the learned Attorney-General that it has been modelled on the British system and that the Parliament of India is as omnip- otent as in England and that in the matter of delegation of legislative power it is in an analogous situation. In my opinion, our Constitution is a judicious combination of the American model with the British Parliamentary system. In its main scheme it follows the Government of India Act, 1935, which provides for a federation of States and provides for an executive responsible to the legislature. As a matter of fact, the framers of the constitution, though they have borrowed ideas from other constitutions, have not rigidly adhered to any particular model. Certain provisions in our constitution are such for which there is no precedent in the constitution of any other country. It seems to ,me that they were as much alive to the doctrine of administrative convenience as to the dangers of a system which permits delegation of unfettered legislative power to the execu- tive. The country had recently emerged from the bonds of a bureaucratic system which had killed its very soul and they. apparently did not wish it to get engulfed again m the rigours of that system. Bureaucratic rule is a necessary corollary to the existence of unfettered delegation of legislative power. To avoid this, the consti- tution makers made detailed provision in the Constitution on all matters. It has to be emphasized that no country in the world has such an elaborate and comprehensive constitution as we have in this country and it would not be proper to construe such a constitution with the help of decisions given elsewhere on the construction of constitutions shaped differently. It is only after a consideration of all the provisions of the Constitution and its whole scheme that it has to be decided whether delegation of power--legislative, executive or judicial--is implict in the grant of any of these powers or has been expressly provided for, to the extent it was considered necessary on grounds of administra- tive convenience in peace or war time and therefore confer- ment of this power by implication cannot be upheld on its true construction. It has also to be borne in mind that our Constitution is fundamentally different from the British system inasmuch as the doctrine of supremacy of Parliament has its limitations here. The courts are empowered to declare Acts of Parliament unconstitutional if they are inconsistent with Part III of the Constitu- tion or when they trespass on fields demarcated for State legislatures. Obviously, it is implict in the demarcation of legislative fields that one legislature cannot by delega- tion of subjects that are exclusively within its field clothe the other with legislative capacity to make laws on that subject as it will amount to an infringement of the Constitution itself. It seems clear, therefore, that dele- gation of legislative power to that extent is prohibited by the Constitution. Illustratively, defence is a Union sub- ject, while law and order is a State

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

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

154). In article 77 provision has been made as to how the business of the Government of India has to be conducted. The President has been conferred the power of making rules for the more convenient transaction of the business of the Government of India and for the allocation among Ministers of the said business. Such a detailed provision regarding the exercise of executive power does not exist in the other constitutions to which our attention was drawn. Article 79 provides that there shall be a Parliament for the Union. Provision has then been made in the various articles how the Parliament has to be constituted and how it has to conduct its business, what officers and secretariat it can employ and with what powers. Articles 107 to 119 relate to legislative procedure. It is implicit in these elaborate provisions that the Constitution bestowed the lawmaking powers on the body thus constituted by it, and it was this body in its corporate capacity that had to exercise its judgment and discretion in enacting laws and voting taxes and that judgment had to be arrived at by following the rules of procedure expressly laid down therein. Article

123 confers legislative power on the President when Parlia- ment is not in session and this power is co-extensive with the legislative power of the Parliament itself. Article 124 deals with the Union judiciary. It prescribes the number of Judges and the method of their appointment and it lays down the procedure that the President has the power in making the appointments. In article 140 provision has been made under which Parliament can confer on the Supreme Court such sup- plemental powers as may appear to be necessary for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Consti- tution. An express provision of this kind, in my opinion, very clearly negatives the proposition which the learned Attorney-General has been contending for. If the power of delegation of legislative powers is implict in the power of legislation itself, the constitution-makers would not have made an express provision in article 140 bestowing authority on Parliament for conferment of ancillary powers on the Supreme Court. Parliament obviously had authority to legis- late on "Supreme Court" as it is one of the subjects in the Union List. Article 145 (1) (a)again very strongly negatives the proposition of the learned Attorney General. The constitution has authorized the Supreme Court to make rules as to the persons practising before the court. This is one of the subjects in the Union List and this conferment of power by the Constitution on the Supreme Court is subject to the provision of any law made by the Parliament. In other words, Parliament has been given express power to take away this power or supplement it by making a law. In my judgment, such a provision is quite foreign to a constitution in which delegation of law-making powers is implicit. Detailed provi- sion has been made for the appointment of High Court Judges in article 217, and rule making powers have been given to the High Courts under article 227. In article 243 the Presi- dent has been given the power to make regulations for the peace and good government of territories enumerated in Part D of the First Schedule and in exercise of that power he can repeal or amend any law made by Parliament or an existing law. The Constitution itself has delegated the powers of the Parliament to the President wherever it thought that such delegation was necessary. Articles 245 and 246 demarcate the field of legislation between the Parliament and the State legislature and in article 248 provision has been made that residuary powers of legislation remain in the Parliament. Article 250 makes provision for cases of emergency. Parlia- ment in that event has power to make laws for the whole or any part of the territory of India with respect to any matters enumerated in the State lists.Article 252 is a somewhat peculiar provision. Under it Parliament can legis- late for two or more States with their consent. This is a form of exercise of legislative power by Parliament as a delegate of the State as by its consent alone Parliament gets the power of legislation. By article 258 the President has been authorized with the consent of the Government of a State to entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union ex- tends. In that article provision has also been

made. for delegation of powers by a law made by Parliament. By article 349 the power of the Parliament to enact laws in respect of language has been restricted. Article 353 states the effect of a proclamation of emergency and provides that the execu- tive power of the Union in such a case shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised. Clause (2) of this article requires emphasis. It provides that the power of Parliament to make laws with respect to any matters shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and he imposition of duties, upon the Union, or officers and authorities of the Union, as respects that matter, notwith- standing that it is one which is not enumerated in the Union List. Parliament in an emergency under article 250 has full power to make laws on subjects within the State List and is certainly entitled to delegate that power if that power is a content of legislative power but the constitution makers thought otherwise and made an express provision for delega- tion of power in such a situation. Article 357 provides that where by proclamation issued under clause (1) ofarticle 356, it has been declared that the powers of the legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent for Parliament to confer on the President the power of the legislature of the State to make laws, and to authorize the President to dele- gate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf. This is the only article by which the Constitution has authorized the delegation of essential legislative power. Possibly it was thought that in that contingency it was necessary that Parliament should have power to confer legislative power on the executive and to clothe it with its own legislative capacity in the State field and further to authorize the President to delegate that legislative power to any other authority specified by him. A reference to the entries in the three Lists of the Seventh Schedule furtherillustrates this point. Entry 93 of List I is Offences against laws with respect to any of the matters in this List." Entry 94 is "Inquiries, surveys and statistics for the purpose of any of the matters in this List." Entry 96 is "Fees in respect of any of the matters in this List, but not including fees taken in any court." Entry 95 is "Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List." All these entries are instances of subjects incidental and ancillary to the main subjects of legislation contained in the List. Similar entries are to be found in Lists II and III as well. The Constitution seems to have taken care to confer legislative power in express terms even regarding incidental matters and it is therefore unnecessary to read by implication and introduce by this process within such a constitution any matter not expressly provided therein. I am satisfied that the constitution-makers considered all aspects of the question of delegation of power, whether executive, legislative or judicial, and expressly provided for it whenever it was thought necessary to do so in great detail. In this situation there is no scope for the applica- tion of the doctrine contended for by the learned Attorney- General and it must be held that in the

absence of express powers of delegation allowed by the Constitution, the Par- liament has no power to delegate its essential legislative functions to others, whether State legislatures or executive authorities, except, of course, functions which really in their true nature are ministerial, The scheme of the Consti- tution and of the Government of India Act, 1935, is that it expressly entrusted with legislative capacity certain bodies and persons and it also authorised the creation of law- making bodies wherever it thought necessary but gave no authority to create a new law-making body not created by itself. It even created the executive as a legislature in certain contingencies. In these circumstances it is not possible to add to the list of legislative authorities by a process of delegation. As pointed out by Crawford on Statu- tory Construction, at page 333. "If a statute enumerates the things upon which it is to operate, everything else must necessarily and by implication be excluded from its opera- tion and effect. So if a statute directs certain acts to be done in a specified manner by certain persons, their per- formance in any other manner than{ that specified, or by any other person than is there named, is impliedly prohibited." The ordinary rule is that if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the act authorised under other circumstances than those as defined. Under the Government of India Act, 1935, the executive enjoyed a larger power of legislation than is contained in the new constitution. It seems to have been cut down to a certain extent. The new constitution confers authority on Parliament to make laws for the State of Delhi. It also authorizes it to create a legislature for that State. The Constitution therefore has made ample provision indicating bodies who would be competent to make laws for the State of Delhi. In my opinion, therefore, delegation of legislative power to the executive in matters essential is unconstitutional. Any legislative practice adopted during the pre-constitution period for undeveloped and excluded areas can have no rele- vancy in the determination of this point.

Having examined the provisions of the new constitution, the constitutional position of the Indian legislature under the Indian Councils Act of 1861 and of the Government of India Act, 1935, as subsequently adapted by the Indian Independence Act, 1947, may now be examined. As already stated, the Government of India Act, 1935, envisaged a federal constitution for India with a demarca- tion of the legislative field between the Federation and the States and it is the scheme of this Act which has been adopted in the new constitution. I have already expressed my respectful agreement with the view expressed by Varadachari- ar J. in Benoari Lal Sarrna's case(1) that the constitution- al (1) [1943] F.C.R. 96.

position in India under this Act approximates more closely to the American model than to the English model and it seems to me that delegation of legislative power in its essenti- ality is not allowed by its provisions. During a period of emergency the Governor General could

himself under his own proclamation become the executive as well as the legislature and the necessities of administrative convenience were not a compelling circumstance for introducing into the scheme of the Act by implication, authority in Parliament for the delegation of legislative power. This Actalso contains detailed provisions authorizing delegation of power both in the executive and legislative field wherever it was consid- ered necessary to confer such power. The Indian Independence Act by section 6 conferred the power of legislation on the Dominion Parliament within the ambit of the Act of 1935. By other provisions of the Indian Independence Act it made the Dominion Parliament a Constituent Assembly for the purpose of making the new constitution for India and it also gave it authority to repeal Acts of Parliament. For the purpose of ordinary law-making it had the same powers as the legisla- tures in India enjoyed under the Government of India Act, 1935, and the question referred to us in regard to the Ajmer-Merwara Act, 1947, has to be answered on the provi- sions of the constitution contained in the Constitution Act of 1935.

The constitutional position in India prior to the Act of 1935 may now be briefly stated. Before the Charter Act of 1833 there was a division of legislative power between the Governor-General and the Presidencies. By that Act the power of the Presidencies as legislatures was terminated and the whole law-making power was vested in the Governor-General in Council. Mr. Macaulay was added as a legislative member to the executive council without a right to vote. In sub- stance the executive and the legislative functions were performed by the same body, of course, with the help and advice of Mr. Macaulay. With slight modifications the situation remained the same till theIndian Councils Act, 1861. Under this Act the Governor-General in Council in legislative meetings could legislate for the whole of India and local legislatures could also legislate for the provinces. By section 10 of the Act the legislative power was vested in the Governor- General in Council. Insection 15 it was laid down how that power was to be exercised. For conduct of the legislative business power was given to the Governor-General to make rules in section 18. Section 22 laid down the ambit of the legislative power. Section 23 bestowed power on the Gover- nor-General in emergencies to make ordinances. Section 44 empowered the Governor-General to create local legislatures and confer on them legislative power. It appears that the scheme of the Councils Actwas that whenever Parliament wanted the Governor-General in Council to have power to create legislatures or to make rules or regulations, that power was conferred in express terms. By another statute in the year 1870 summary power to make law was conferred on the Governor-General in his executive capacity in respect to less advanced areas, i.e., non-regulation provinces. Another charter would not have been necessary if the Governor-Gener- al could arm himself with legislative power by a process of delegation from his own Council. In my opinion, the consti- tution as envisaged by the Indian Councils Act, 1861, does not authorize the delegation of essential legislative power by any of the legislative

authorities brought into existence by that Act to the executive and it was for this reason that their Lordships of the Privy Council in Burgh's case(1) did not base their decision on this ground but merely upheld the enactment as intra vires on the ground of conditional legis- lation. I am in respectful agreement with the opinion of Markby J. expressed in the year 1877 in these terms:" that any substantial delegation of legislative authority by the legislature of this country is void." The Privy Council on appeal did not dissent from this view.

It was argued that legislative practice in India since a long time has been such as would validate statutes (1) 5 I.A. 178.

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

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

In my opinion, there is no evidence in this case of any uniform, long continued and undisputed legislative practice for validating statutes which have been drafted on lines similar to the statutes in question. The material on which this argument was based is of a most meagre character and does not warrant the conclusion contended for. Annexure (A) annexed to the case stated on behalf of the President mentions two instances only before the year 1912 of this alleged long continued legislative practice, but even these instances are not analogous to the statutes which have been given in the reference, The scheme of those enact- ments in vital matters is different from the enactments in question. The first instance of this legislative practice is said to be furnished by section 5(a) which was added to the Scheduled Districts Act, 1874, by Act XII of 1891. It pro- vided that with the previous sanction of the Governor-Gener- al in Council in declaring an enactment in force in the scheduled districts or in extending an enactment to a sched- uled district the Local Government may declare the applica- tion of the Act subject to such restriction and modification as the Government may think fit. It is noticeable that,section 7 of the Delhi Laws Act has not been drafted in the same terms as section 5(a) of the Scheduled Districts Act.-Though constitutionally speaking, the Governor-General discharged the executive and legislative functions in meet- ings held separately for the two purposes and with the help of some additional members, for all practical purposes the Governor-General was truly 299 U.S. 304.

speaking in both executive and legislative matters the real authority in this country, and if previous sanction of this authority was necessary before declaring the law even with

modifications, this instance cannot be such as would constitute legislative practice for what has been enacted in section 7 of the Delhi Laws Act.

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

After the year 1912 three other illustrations were men- tioned. The first of these is in sections 68 and 73 of the Inland Steam Vessels Act, 1917. Section authorised modifica- tion of an enactment for the purpose of adaptation. This certainly is no instance of the kind of legislation. con- tained in the Delhi Laws Act, 1912, section 7, or in the Ajmer-Merwara Act, 1947. Section 68 authorized the extension of certain chapters to certain areas with modifications. The next instance mentioned was the Cantonments Act, 1924. By section 9 of this Act it was provided that the Central Government may by notification exclude from the operation of any part of this Act thewhole or any part of a cantonment or direct that any provi- sions of this Act shall in the case of any cantonment apply with such modifications as may be so specified. The third instance mentioned was in section 30 of the Petroleum Act, 1934. Here it was provided that the Central Government may by notification apply all or any of the provisions of this Act with such modifications as it may think fit to any other dangerous inflammable substance. This is an instance of adding certain items to the schedule annexed to an Act.

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

The learned counsel appearing for the Government of Uttar Pradesh submitted a note in which an instance is mentioned of the Uttar Pradesh Land Revenue Act, III of 1901, which

in section 1 of subsection (2) provided that the State Government may by notification extend the whole or any part of this Act to all or any of the areas so excepted subject to such exceptions or modifications as it thinks fit. This instance does not materially affect the situation.

After the research of a fortnight the learned Attorney-General gave us a supplementary list of instances in support of his contention. Two instances contained in this list are from sections 8 and 9 of Act XXII of 1869 discussed in Burah's case(1). The third instance is from section 39 of Act XXIII of 1861, again considered in that case, and these have already been discussed in an earlier part of this judgment. The only new instance cited is from the Aircraft Act of 1934, which authorized modification in the specification of an aircraft. It confers no authority to modify any law. Two instances in' this list are from the Airforce Act 1950, which was enacted subsequent to (1) 5 I.A. 178.

the enactment under reference to us and cannot be considered relevant on this subject. The last instance cited is from the Madras Local Boards Act, 1920, which authorizes the Governor to extend the Act with certain modifications to areas to which it originally had not been made applica- ble. This instance of 1920 bears no relevancy for deter- mining the validity of section 7 of the Act of 1912, enacted eight years before this instance came into existence. A seemingly similar instance to the enactment contained in section 7 of the Delhi Laws Act is in section 8 of Act XXII of 1869, considered by the Privy Council in Burah's case(1). That instance, however, when closely examined, has no real resemblance to section 7 of the Delhi Laws Act. Act XXII of 1869 was enacted to remove the Garo Hills from the jurisdiction of tribunals established under the General Regulations. That was its limited purpose. By section 5 the administration of this part was vested in the officers appointed by the Lieutenant-Governor of Bengal and those officers had to be under his control and were to work under his instructions. The executive administration of this territory was, therefore, vested in the Lieutenant-Governor of Bengal. By section 8 of the Act, already cited, the Lieutenant-Governor was authorized by notification in the Calcutta Gazette to extend to the excluded territories laws in force in the other territories subject to his government or laws which might thereafter be enacted by the Council of the Governor-General or the Lieutenant-Governor in respect of those territories. Both these authorities were competent to make laws for the province of Bengal. The validity of section 8 was not questioned in Burah's case(1) and no argument was addressed about it. Regarding this section, however, the following observations occur in the judgment of their Lordships which were emphasized before us:--

"The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove (1) 5 t.A. 178 a particular district from the jurisdiction of the ordinary

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

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

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

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

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

The section gives a carte blanche to the GovernorGeneral to extend to the newly formed province any enactment in force in any part of British India at the date of the noti- fication and not necessarily any enactment in force in British India at the date of the passing of the Delhi Laws Act. No schedule was annexed to the Act of the enactments that were in force in any part in British India at the date of the passing of the Act. As regards the enactments

that may be in force in any part of British India at the date of any notification, there was no knowing what those laws would be. Laws that were to be made after 1912, their principle and policy could not be known to the legislature that enact- ed section 7 of the Delhi Laws Act. It seems obvious that the legislature could not have exercised its judgment, nor its discretion in respect of those laws. It also conferred on the Governor-General power of modifying existing and future enactments passed by different legislatures in the country. The power of modification implies within it the power of amending those statutes. To use the words of a learned Judge, the section conferred a kind of a vague, wide, vagrant and uncanalised authority on the Governor- General. There is no provision within the section by virtue of which the mind of the legislature could ever be applied to the amendments maple by the Governor-General in the different statutes passed by different legislatures in India and extended to Delhi.

Illustratively, it may be pointed out that numerous rent control Acts have been passed by different legislatures in India, laying down basically different policies and princi- ples. The Provincial Government under the Delhi Laws Act is authorised to apply the policy of any one of these Acts to Delhi or the policy which it might evolve by combining different such statutes passed by different State legisla- tures. Legislative policy in the matter of rent control had not been evolved by the year 1912. Another illustration may be taken from the law of prohibition. Different State gov- ernments have adopted a policy of either complete prohibi- tion or of local option. What policy is to be applied to Delhi and who is to decide that policy ? Obviously, under section 7 the Provincial Government can without going to the legislature adopt any policy it likes whether of partial or of complete prohibition and may apply to Delhi any law it thinks fit. It is obvious therefore that within the wide charter of delegated power given to the executive bysection 7 of the Delhi Laws Act it could exercise essential legisla- tive functions and in effect it became the legislature for Delhi. It seems to me that by enacting section 7 the legis- lature virtually abdicated its legislative power in favour of the executive. That, in my judgment, was not warranted by the Indian Councils Act, 1861, or by any decision of the Privy Council or on the basis of any legislative practice. The section therefore, in my opinion, is ultra vires the Indian Councils Act, 1861, in the following particulars:

(i)inasmuch as it permits the executive to apply to Delhi laws enacted by legislatures not competent to make laws for Delhi and which these legislatures may make within their own legislative field, and (ii) inasmuch as it clothes the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India. If any list of the existing laws passed by the Governor-General in Council in his legislative capacity and of laws adopted by it though passed by other legislatures was annexed to the Act, to that extent the delegation of power, but without any power of modifications in favour of the

execu- tive, might have been valid, but that is not what was enact- ed in section 7 of the Delhi Laws Act. Power to extend laws made in the future by the GovernorGeneral in Council for the whole of India or adopted by it though passed later by other legislatures would also be intra vires, but farther than that the legislature could not go. If one may say so, sec- tion 7 declares that the legislature has no policy of its own and that the Governor-General in Council can declare it and can determine what laws would be in force in Delhi. The second question concerns section 2 of the Ajmer-Mer- wara(Extension of Laws) Act, 1947, which provides for extension of enactments to Ajmer-Merwara. It says:

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

For the reasons given for holding that section 7 of the Delhi Laws Act is ultra vires the constitution in two par- ticulars, this section also is ultra vires the Government of India Act, 193s, in those particulars. The section does not declare any law but gives the Central Government power to declare what the law shall be. The choice to select any enactment in force in any province at the date of such notification clearly shows that the legislature declared no principles or policies as regards the law to be made on any subject. It may be pointed out that under the Act of 1935 different provinces had the exclusive power of laying down their policies in respect to subjects within their own legiSlative field. What policy was to be adopted for Delhi, whether that adopted in the province of Punjab or of Bombay, was left to the Central Government. Illustratively, the mischief of such law-making may be pointed out with refer- ence to what happened in pursuance of this section in Ajmer-Merwara. The Bombay Agricultural Debtors' Relief Acco, 1947, has been extended under cover of this section to Ajmer-Merwara and under the power of modification by amending the definition of the word 'debtor' the whole policy of the Bombay Act has been altered. Under the Bombay Act a person is a debtor who is indebted and whose annual income from sources other than agricultural and manly labour does not exceed 33 per cent of his total annual income or does not exceed Rs. 500, whichev- er is greater. In the modified statute "debtor" means an agriculturist who owes a debt, and "agriculturist" means a person who earns his livelihood by agriculture and whose income from such source exceeds 66 per cent of his total income. The outside limit of Rs. 500 is removed. The exer- cise of this power amounts to making a new law by a body which was not in the contemplation of the Constitution and was not authorized to enact any laws. Shortly stated, the question is, could the Indian legislature under the Act of 1935 enact that the executive could extend to Delhi laws that may be made hereinafter by a legislature in Timbuctoo or Soviet Russia with modifications. The answer would be in the negative because the policy of those laws could never be determined by the law making body entrusted with making laws for Delhi. The

Provincial legislatures in India under theConstitution Act of 1935 qua Delhi constitutionally stood on no better footing than the legislatures of Timbuctoo and Soviet Russia though geographically and politically they were in a different situation.

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

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

For reasons given for answering questions 1 and 2 that the enactments mentioned therein are ultra rites the consti- tution in the particulars stated, this question is also answered similarly. It might, however, be observed that in this case express power to repeal or amend laws already applicable in Part C States has been conferred on the Cen- tral Government. Power to repeal or amend laws is a power which can only be exercised by an authority that has the power to enact laws. It is a power co-ordinate and co-exten- sive with the power of the legislature itself. In bestowing on the Central Government and clothing it with the same capacity as is possessed by the legislature itself the Parliament has acted unconstitutionally. In offering my opinion on the questions mentioned in the reference I have approached this matter with great caution and patient attention and having in mind the rule that the benefit of reasonable doubt on questions on the constitu- tional validity of a statute has to be resolved in favour of legislative action. The legislative action, however, in the enactments which are the subject-matter of the reference has been of such a drastic and wide and indefinite nature con- sidered in its full amplitude that it is not possible to hold that in every particular these enactments are constitu- tional.

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

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

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

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

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

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

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

The Ajmer-Merwara (Extension of Laws) Act was enacted on the 31st December, 1947, by the Dominion (1) [1949-50] F.C.R. 595.

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

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

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

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

It will be noticed that in all the three items of legis- lation, mentioned above, there has been, what may be de- scribed, as conferment by the legislatures, which passed the respective enactments, to an outside authority, of some of the powers which the legislative bodies themselves could exercise; and the authority in whose favour the delegation has been made has not only been empowered to extend to particular areas the laws which are in force in other parts of India but has also been given a right to introduce into such laws, any restrictions or modifications as it thinks fit. The controversy centres round the point as to whether such delegation was or is within the competency of the particular legislature which passed these enactments, The contention of the learned Attorney-General, who represents the President of, India, in substance is that a legislature which is competent to legislate on a particular subject has the competence also to delegate its legislative powers in respect of that subject to any agent or external authority as it thinks proper. The extent to which such delegation should be made is entirely a matter for consider- ation by the legislature itself and a court of law has no say in the matter. There could be according to the learned Attorney-General, only two possible limitations upon the exercise of such right of delegation by a competent legis- lative body. One is that the legislature cannot abdicate or surrender its powers altogether or bring into existence a new legislative power not authorised by the constitutional instrument. The second is that if the constitutional docu- ment has provided for distribution of powers amongst differ- ent legislative bodies, one legislature cannot delegate to another, powers, which are vested in it, exclusively under the Constitution. It is argued that, save and except these two limitations, the doctrine of inhibition of delegation by legislative authority has no place in a Constitution mo- delled on the English system which does not recognise the principle of separation of powers as obtains in the American system. These questions are of great constitutional impor- tance and require careful consideration.

In America the rule of inhibition against delegation of legislative powers is based primarily upon the traditional American doctrine of "separation of powers". Another principle is also

called in to aid in support of the rule, which is expressed in the wellknown maxim of Private Law, "delegatus non potest delegare", the authority for the same, being based on one of the dieta of Sir Edward Coke. The modern doctrine of ,'separation of powers" was a leading tenet in the political philosophy of the 18th century. It was elaborated by Montesquieu in his "Lesprit des lois" in explanation of the English political doctrine and was adopt- ed, in theory at least, in all its fulness and rigidity by the constitution-makers of America. The consti- tution of America provides for the separation of the govern- mental powers into three basic divisions-the executive, the legislative, and the judicial--and the powers appertaining to each department have been vested in a separate body of public servants. It is considered to be an essential princi- ple(1) underlying the constitution that powers entrusted to one department should be exercised exclusively by that department without encroaching upon the powers confided to others. As is said by Cooley,(2) "The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others."

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

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

"But when we speak of a separation of the three great departments of Government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or depend- ence, the one upon (1) See Kilbourn v. Thomson, 103 U.S. 168 at p. 190. i2) See Cooley's "Constitutional Limitations", 7th Edition, page 126.

(3) Story's Constitution, s. 525, the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments: and that such exercise of the whole would subvert the principles of free constitu- tion."

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

As said above, a considerable amount of flexibility was allowed in the practical application of these theories even from early times. The vast complexities of social and eco- nomic conditions of the modern age, and the ever growing amount of complicated legislation that is called for by the progressive social necessities, have made it practically impossible for the legislature to provide rules of law which are complete in all their details. Delegation of some sort, therefore, has become indispensable for making the law more effective and adaptable to the varying needs of society. Thus in America, despite the theory which prohibits delegation of legislative power, one comes across numerous rules and regulations passed by non legislative bodies in exercise of authority bestowed on them by the legislature in some shape or other. The legislature has always been deemed competent to create a municipal authority and empower it to make by-laws. In fact, such legislation is based upon the immemorial (1) Willis on Constitutional Law, p.

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

It does not admit of any serious dispute that the doc- trine of separation of powers has, strictly speaking, no place in the system of government that India has at the present day

under her own Constitution or which she had during the British rule. Unlike the American and Australian Constitutions, the Indian Constitution does not expressly vest the different sets of powers in the different organs of the State. Under article 53(1), the executive power is indeed vested in the President, but there is no similar vesting provision regarding the legislative and the judicial powers. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system, the essen- tial feature of which is the responsibility of the executive to the legislature. The President, as the head of the executive, is to act on the advice of the Council of (1) 293 U.S. 388 at 440.

(2) See Willis on Constitutional Law, p. 137, Ministers, and this Council of Ministers, like the British Cabinet, is a "hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part."

There could undoubtedly be no question of 'the executive being responsible to the legislature in the year 1912, when the Delhi Act X111 of 1912 was passed, but at that time it was the executive which really dominated the legislature, and the idea of a responsible government was altogether absent. It was the Executive Council of the GovernorGeneral which together with sixty additional members, of whom 33 were nominated, constituted the GovernorGeneral's Legisla- tive Council and had powers to legislate for the whole of British India. The local legislatures in the provinces were constituted in a similar manner. The first advance in the direction of responsible government was made by the Govern- ment of India Act, 1919, which introduced dyarchy in the provinces. The Government of India Act, 1935, brought in Provincial autonomy, and ministerial responsibility was established in the provinces subject to certain reserved powers of the Governor. In the Centre the responsibility was still limited and apart from the discretionary powers of the Governor-General the Defence and External Affairs were kept outside the purview of ministerial and legislative control. Thus whatever might have been the relation between the legislature and the executive in the different constitu- tional set ups that existed at different periods of Indian history since the advent of British rule in this country, there has never been a rigid or institutional separation of powers in the form that exists in America.

The maxim delegatus non potest delegare is sometimes spoken of as laying down a rule of the law of agency; its ambit is certainly wider than that and it is made use of in various fields of law as a doctrine which prohibits a person upon whom a duty or office has devolved or a trust has been imposed from delegating his duties or powers to other per- sons. The introduction of this maxim into the constitutional field cannot be said to be altogether unwarranted, though its basis rests upon a doubtful political doctrine. To attract the application of this maxim, it is essential that the authority attempting to delegate its powers must itself be a delegate of some other authority. The legislature, as it exists in India at the

present day, undoubtedly is the creature of the Indian Constitution, which defines its powers and lays down its duties; and the Constitution itself is a gift of the people of India to themselves. But it is not a sound political theory, that the legislature acts merely as a delegate of the people. This theory once popula- rised by Locke and eulogized by early American writers is not much in favour in modern times. With regard to the Indian Legislature as it existed in British days constitut- ed under the Indian Councils Act, it was definitely held by the Judicial Committee in the well-known case of Queen v. Burah (1) that it was in no sense a delegate of the British Parliament. In that case the question arose as to the validity of section 9 of Act XXII of 1869 passed by the Governor-General's Legislative Council. The Actprovided that certain special laws, which had the effect of excluding the jurisdiction of the High Court, should apply to a cer- tain district. known as Garo Hills, and section 9 empowered the Lieutenant-Governor of Bengal to extend the operation of these laws to certain other areas if and when the Lieuten- ant-Governor, by notification in the Calcutta Gazette, would declare that they should be so applied. The majority of the Judges of the Calcutta High Court upheld the contention of the respondent, Burah, that the authority conferred on the Lieutenant-Governor to extend the Act in this way was in excess of the powers of the Governor-General in Council, and in support of this view, one of the learned Judges relied inter alia upon the principles of the law of agency. This view was negatived by the Judicial Committee, and Lord Selborne, in delivering the judgment, observed as follows:

(1) 5 I.A. 178.

"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 cir- cumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of parliament itself."

Practically the same observations were reiterated by the Judicial Committee in the case of Hodge v. The Queen(1) while describing the position of the Provincial Legislature under the Canadian Constitution and stress was laid upon the plenitude of power which such Legislature could exercise when acting within the limits prescribed for it by the Imperial Parliament.

I am quite willing to concede that the doctrine of separation of powers cannot be of any assistance to us in the solution of the problems that require consideration in the present case. In my opinion, too much importance need not also be attached to the maxim delegatus non potest delegare, although as an epigrammatic saying it embodies a general principle that

it is not irrelevant for our present purpose. But even then I am unable to agree with the broad proposition enunciated by the learned Attorney-General that a legislative power per se includes within its ambit a right for the legislative body to delegate the exercise of that power in any manner it likes to another person or authority. I am unable also to accept his contention that in this respect the authority of the Indian Legislature is as ple- nary as that of the British Parliament, and, provided the subject-matter of legislation is not one outside the field of its legislative competence, the legislature in India is able to do through an agent anything which it could do itself.

It is to be noted that so far as the British Parliament is concerned, there is no constitutional limitation upon its authority or power. In the words of Sir 9 App. Cas. 117.

Edward Coke (1), "the power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds..... It hath sovereign and uncon- trollable authority in the making, confirming, enlarging, abrogating, repealing, reviving and expounding of laws..... this being the place where that absolute despotic power which must in all governments reside somewhere is entrusted by the constitution of these king- doms." The British Parliament can not only legislate on any subject it likes and alter or repeal any law it likes, but being both "a legislative and a constituent assembly", it can change and modify the so-called constitutional laws and they can be changed by the same body and in the same manner as ordinary laws; and no act of the Parliament can be held to be unconstitutional in a British Court of Law. (2) This sovereign character was not, and could not be, predicated of the Legislative Council of British India as it was constituted under the Indian Councils Act, even though it had very wide powers of legislation and within the scope of its authority could pass laws as important as those passed by the British Parliament (3). It is not present also in the Indian Parliament of the present day which is a creature of the Indian Constitution and has got to exercise its legislative powers within the limits laid down by the Constitution itself. Acting in its ordinary capacity as a legislative body, the Indian Parliament cannot go beyond the Constitution or touch any of the Constitutional or fundamen- tal laws, and its acts can always be questioned in a court of law. Consequences of great constitutional importance flow from this difference and they have a material bearing on the question before us. The contention of the learned Attorney- General in substance is that the power of delegation of legislative authority without any limitation as to its extent is (1) See Coke's Fourth Institute, p. 36.

(2) See Dicey's Law of the Constitution, p. 88 (9th Edi- tion.) (3) See Dicey's Law of the Constitution, p. 99 (9th Edition).

implicit in the exercise of the power itself, and in support of his contention he refers to the unrestricted rights of delegation which are exercised by the British Parliament. But the validity or invalidity of a delegation of legisla- tive power by the British Parliament is not and cannot be a constitutional question at all in the United Kingdom, for the Parliament being the omnipotent sovereign is legally competent to do anything it likes arid no objection to the constitutionality of its acts can be raised in a court of law. Therefore, from the mere fact that the British Parlia- ment exercises unfettered rights of delegation in respect of its legislative powers, the conclusion does not follow that such right of delegation is an inseparable adjunct of the legislative power itself. The position simply is this that in England, no matter, to whichever department of the powers exercisable by the British Parliament the right of delega- tion of legislative authority may be attributed--and there is no dispute that all the sovereign powers are vested in the Parliament-no objection can be taken to the legality of the exercise of such right. But in India the position even at the present day is different. There being a written constitution which defines and limits the rights of the legislature, the question whether the right of delegation, either limited or unlimited, is included within, and forms an integral part of, the right of legislation is a question which must be answered on a proper interpretation of the terms of the Constitution itself. We need not for this purpose pay any attention to the American doctrine of sepa- ration of powers; we must look to the express language of our own Constitution and our approach should be to the essential principles underlying the process of law-making which our Constitution envisages. According to the Indian Constitution, the power of law-making can be exercised by the Union Parliament or a State Legislature which is to be constituted in a particular manner and the process of legis- lation has been described in detail in various articles(1). Powers have been given to the President (1) Vide Articles 107 and 111; 196 to 200, in article 123 and to the Governor of a State under article 213 to promulgate Ordinances during recess of the respective legislatures. Specific provisions have also been made for exercise of the legislative powers by the President on proclamation of emergency and in respect of Part D territo- ries. Law-making undoubtedly is a task of the highest impor- tance and responsibility, and, as our Constitution has entrusted this task to particular bodies of persons chosen in particular ways, and not only does it set up a machinery for law-making but regulates the methods by which it is to be exercised and makes specific provisions for cases where departure from the normal procedure has been sanctioned, the prima facie presumption must be that the intention of the Constitution is that the duty of law-making is to be per- formed primarily by the legislative body itself. The power of the Parliament to confer on the President legislative authority to make laws and also to authorise the President to delegate the power so conferred to any other authority has been recognised only as an emergency provision in arti- cle 357 of' the Constitution. Save and except this, there is no other provision in the Constitution under which the legislature

has been expressly authorised to delegate its legislative powers. "It is a well-known rule of construction that if a statute directs that certain acts shall be done in a specified manner or by certain persons, then performance in any other manner than that specified or by any other persons than those named is impliedly prohibited(1)." It has been observed by Baker in his treatise on "Fundamental Laws" that quite apart from the doctrine of separation of powers, there are other cogent reasons why legislative power cannot be delegated. "Representative government," thus observes the]earned author,(2) "vests in the persons chosen to exercise the power of voting taxes and enacting laws, the most important and sacred trust known to civil government. The representatives of the people are (1) Vide Crawford's Statutory Construction, p. 334. (2) Baker's Fundamental Laws, Vol. I, p. 287.

required to exercise wise discretion and a sound judgment, having due regard for the purposes and the needs of the executive and judicial department, the ability of the tax- payer to respond and the general public welfare. It follows as a self-evident proposition that a responsible legis- lative assembly must exercise its own judgment." In the same strain are the observations made by Cooley in his "Constitutional Law ,,(1) that the reason against delegation of power by the legislature is found in the very existence of its own powers. "This high prerogative has been entrusted to its own wisdom, judgment and patriotism, and not to those of other persons, and it will act ultra vires if it under- takes to delegate the trust instead of executing it."

The same considerations are applicable with regard to the legislative bodies which exercised the powers of law- making at the relevant periods when the Delhi Laws Act of 1912 and the Ajmer Merwara Act of 1947 were enacted. Under the Indian Councils Act, 1861, the power of making laws and regulations was expressly vested in a distinct body consist- ing of the members of the Governor-General's Council and certain additional members who were nominated by the Governor-General for a period of two years. The number of such additional members which was originally from 6 to 12 was increased by the subsequent amending Acts and under the Indian Councils Act 'of 1909, it was fixed at 60, of which 27 were elected and the rest nominated by the Governor- General. It was this legislative body that was empowered by the Indian Councils Act to legislate for the whole of Brit- ish India and there were certain local legislatures in addition to this in some of the provinces.

Section 18 of the Indian Councils Act of 1861 empowered the Governor-General to make rules for the conduct of busi- ness at meetings of the Council for the purpose of making laws; section 15prescribed the quorum necessary for such. meetings and further provided that the seniormost ordinary member could preside in the absence of the Governor-General. This was (1) Vide Fourth Edition, p. 138, the normal process of law-making as laid down by the Indian Councils Act. Special provisions were made for exceptional cases when the

normal procedure could be departed from. Thus section 23 of the Act of 1861 empowered the Governor- General to make ordinances having the force of law in case of urgent necessity; and later on under section 1 of the Indian Councils Act of 1870 the executive government was given the power to make regulations for certain parts of India to which the provisions of the section were declared to be applicable by the Secretary of State. Besides these exceptions for which specific provisions were made, there is nothing in the parliamentary Acts passed during this period to suggest that legislative powers could be exercised by any other person or authority except the Legislative Councils mentioned above.

The Ajmer-Merwara Act was passed by the Dominion Legis- lature constituted under the Government of India Act, 1935, as adapted under the Indian Independence Act of 1937. The provisions of the Constitution Act of 1945 in regard to the powers and functions of the legislative bodies were similar to those that exist under the present Constitution and no detailed reference to them is necessary.

The point for consideration now is that if this is the correct position with regard to exercise of powers by the legislature, then no delegation of legislative function, however small it might be, would be permissible at all. The answer is that delegation of legislative authority could be permissible but only as ancillary to, or in aid of, the exercise of law-making powers by the proper legislature, and not as a means to be used by the latter to relieve itself of its own responsibility or essential duties by devolving the same on some other agent or machinery. A constitutional power may be held to imply a power of delegation of authori- ty which is necessary to effect its purpose; and to this extent delegation of a power may be taken to be implicit in the exercise of that power. This is on the principle "that everything necessary to the exercise of a power is implied in the grant of the power. Everything necessary to the effective exercise of legislation must, therefore be taken to be conferred by the Constitution within that power."(1). But it is not open to the legislature to strip itself of its essential legislative function and vest the same on an extraneous authority. The primary or essential duty of law-making has got to be discharged by the legisla- ture itself; delegation may be resorted to only as a second- ary or ancillary measure. Quite apart from the decisions of American courts, to some of which I will refer presently, the soundness of the doctrine rests, as I have said already, upon the essential principles involved in our written Constitution. The work of law-making should be done primarily by the authority to which that duty is entrusted, although such authority can employ an outside agency or machinery for the purpose of enabling it to discharge its duties properly and effectively; but it can on no account throw the responsibility which the Constitution imposes upon it on the shoulders of an agent or delegate and thereby practically abdicate its own powers.

The learned Attorney-General in support of the position he took up placed considerable reliance on the observations of the Judicial Committee in the case of Queen v. Burah(2), which I have referred to already and which have been repeat- ed almost in identical language in more than one subse- quent pronouncement of the Judicial Committee. The Privy Council made those observations for the purpose of clearing up a misconception which prevailed for a time in certain quarters that the Indian or the Colonial Legislatures were mere agents or delegates of the Imperial Parliament, and being in a sense holders of mandates from the latter, were bound to execute these mandates personally. This concep- tion, the Privy Council pointed out, was wrong. The Indian Legislature, or for the matter of that the Colonial Parlia- ment could, of course, do nothing beyond the limits (1) Per O'Connor J. in Baxter v. Ah Way, 8 C.L.R. 626 at

637. (2) 5 IA. 178.

prescribed for them by the British Parliament. But acting within these limits they were in no sense agents of another body and had plenary powers of legislation as large and of the same nature as those of the Parliament itself. It should be noted that the majority of the Judges of the Calcutta High Court in Queen v. Burgh(1) proceeded on the view that the impugned provision of Act XXII of 1869 was not a legislation but amounted to delegation of legislative power and Mr. Justice Markby in his judgment relied express- ly upon the doctrine of agency. This view of Mr. Justice Markby was held to be wrong by the Privy Council in the observations mentioned above and as regards the first and the main point the Judicial Committee pointed out that the majority of the Judges of the High Court laboured under a mistaken view of the nature and principles of legislation, for as a matter of fact nothing like delegation of legisla- tion was attempted in the case at all. It seems to me that the observations relied on by the Attorney-General do not show that in the opinion of the Privy Council the Indian, Legislative Council had the same unrestricted rights of delegation of legislative powers as are possessed by the British Parliament. If that were so there was no necessity of proceeding any further and the case could have been disposed of on the simple point that even if there was any delegation of legislative powers made by the Indian Legisla- tive Council it was quite within the ambit of its authority. In my opinion, the object of making the observations was to elucidate the character in which the Indian Legislative Council exercised its legislative powers. It exercised the powers in its own right and not as an agent or delegate of the British Parliament. If the doctrine of agency is to be imported, the act of the agent would be regarded as the act of the principal, but the legislation passed by the Indian Legislature was the act of the Legislature itself acting within the ambit of its authority and not of the British Parliament, although it derived its authority from the latter. This view has been clearly 5 I.A.78.

expressed by Rand J. of the Supreme Court of Canada while the learned Judge was speaking about the essential character of the legislation passed by the legislative bodies in Canada (1). The observations of the learned Judge are as follows :-

"The essential quality of legislation enacted by these bodies is that it is deemed to be the law of legislatures of Canada as a self-governing political organization and not law of Imperial Parliament. It was law within the Empire and law within the Commonwealth, but it is not law as if enacted at Westminster, though its source or authority is derived from that Parliament." It should be noted further that in their judgment in Burah's case(2) the Privy Council while dealing with the matter of delegated authority was fully alive to the implications of a written constitution entrusting the exercise of legislative powers to a legisla- ture constituted and defined in a particular manner and imposing a disability on such legislature to go beyond the specific constitutional provisions. Just after stating that the Indian Legislature was in no sense a delegate of the Imperial Parliament the Privy Council observed: "The Gover- nor-General in Council could not by any form of an enactment create in India and arm with legislative authority a new legislative power not created and authorised by the Coun- cils Act."

Almost in the same strain were the observations of the Judicial Committee in In re The Initiative and Referendum Act, 1919 (3); and while speaking about the powers of the Provincial Legislature under the Canadian Act of 1867 Lord Haldane said :---

"Section 92 of the Act of 1867 entrusts the legislative power in a province to its legislature and to that legisla- ture only. No doubt a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by the provincial legislature in Canada could, while preserving its own capacity intact, seek (1) See Attorney-General of Nova Scotia v. Attorney-General of Canada, (1950) 4 D.L.R, 369 at p. 383. (2) 5 I.A. 178.

(3) [1919] A.C. 935 at p. 945.

the assistance of subordinate agencies as had been done when in Hodge v. Queen(1) the legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

It is not correct to say that what these observations contemplate is a total effacement of the legislative body on surrender of all its powers in favour of another authority not recognised by the constitution. Such a thing is almost outside the- range of practical consideration. The observa- tions of Lord Haldane quoted above make it quite clear that his Lordship had in

mind the distinction between "seeking the assistance of a subordinate agency in the framing of rules and regulations which are to become a part of the law," and "conferring on another body the essential legisla- tive function which under the constitution should be exer- cised by the legislature itself." The word "abdication" is somewhat misleading, but if the word is to be used at all, it is not necessary in my opinion to constitute legal abdi- cation that the legislature should extinguish itself com- pletely and efface itself out of the pages of the constitu- tion bequeathing all its rights to another authority which is to step into its shoes and succeed to its rights. The abdication contemplated here is the surrender of essential legislative authority even in respect of a particular sub- ject-matter of legislation in favour of another person or authority which is not empowered by the constitution to exercise this function.

I will now attempt to set out in some detail the limits of permissible delegation, in the matter of making laws, with reference to decided authorities. For this purpose it will be necessary to advert to some of the more important cases on the, subject decided by the highest courts of America, Canada and Australia. We have also a number of pronouncements of the Judicial Committee in appeals from India and the Colonies. I confess that no uniform view can be gathered from (1) 9 App. Cas. 117.

these decisions and none could possibly be expected in view of the fact that the pronouncements emanate from Judges in different countries acting under the influence of their respective traditional theories and the weight of opinion of their own courts on the subject. None of these authorities, however, are binding on this court and it is not necessary for us to make any attempt at reconciliation. We are free to accept the view which appears to us to be well-founded on principle and based on sound juridical reasoning. Broadly speaking, the question of delegated legislation has come up for consideration before courts of law in two distinct classes of cases. One of these classes comprises what is known as cases of "conditional legislation," where according to the generally accepted view, the element of delegation that is present relates not to any legislative function at all, but to the determination of a contingency or event, upon the happening of which the legislative provi- sions are made to operate. The other class comprises cases of delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body upon what is described as a subordinate agent or authority. I will take up for consideration these two types of cases one after the other.

In a conditional legislation, the law is full and com- plete when it leaves the legislative chamber, but the opera- tion of the law is made dependent upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. "The aim of all

legislation", said O'Connor J. in Baxter v. Ah Way (1) "is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases and therefore legislation from the very earnest times, and particularly in more (1) 8 C.L.R. 626 at 637, modern times, has taken the form of conditional legis- lation, leaving it to some specified authority to deter mine the circumstances in which the law shall be applied or to what its operation shall be extended, or the particular class of persons or goods or things to which it shall be applied." In spite of the doctrine of separation of powers, this form of legislation is well recognised in the legisla- tive practice of America, and is not considered as an en- croachment upon the anti-delegation rule at all. As stated in a leading Pennsylvania case (1), "the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Govern- ment. There are many things upon which wise and useful legislation must depend, which cannot be known to the law- making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation."

One of the earliest pronouncements of the Judicial Committee on the subject of conditional legislation is to be found in Queen v. Burah(2). In that case, as said already, the Lieutenant-Governor of Bengal was given the authority to extend all or any of the provisions contained in a statute to certain districts at such time he considered proper by notification in the official gazette. There was no legisla- tive act to be performed by the Lieutenant-Governor himself. The Judicial Committee observed in their judgment :-

"The proper legislature has exercised its judgment as to place, persons, laws, powers, and the result of that judg- ment has been to legislate conditionally as to those things. The conditions being fulfilled, the legislation is now absolute."

Just four years after this decision was given, the case of Russell v. The Queen(3) came up before the (1) Locke's Appeal, 72 Pa. 491. (8) 7 App. Cas. 829 (2) 5 I.A. 178.

Judicial Committee. The subject-matter of dispute in that case was the Canadian Temperance Act of 1878, the prohibito- ry and penal provisions of which were to be operative in any county or city, only if upon a vote of the majority of the electors of that county or city favouring such a course the Governor-General by Order in Council declared the relative part of the Act to be in force. One of the contentions raised before the Judicial Committee was that the provision was void as amounting to a delegation of legislative author- ity to a majority of voters in the city or county. This contention was negatived by the Privy Council, and the decision in Queen v. Burah(1) was expressly relied upon. ', The short

answer to this question," thus observed the Judi- cial Committee, "is that the Act does not delegate any legislative powers whatsoever. It contains within itself the whole legislation on the matter with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer authority or power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency."

The same principle was applied by the Judicial Commit- tee in King v. Benoari Lal Sarma(2). In that case, the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that "this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local appli- cation of the provisions of a statute is determined (1) 5 I.A. 178. (2) 72 I.A. 57.

by the judgment of a local administrative body as to its necessity."

Thus, conditional legislation has all along been treated in judicial pronouncements not to be a species of delegated legislation at all. It comes under a separate category, and, if in a particular case all the elements of a conditional legislation exist, the question does not arise as to whether in leaving the task of determining the condition to an outside authority, the legislature acted beyond the scope of its powers.

I now come to the other and more important group of cases where admittedly a. portion of the law-making power of the legislature is conferred or bestowed upon a subordinate authority and the rules and regulations which are to be framed by the latter constitute an integral portion of the statute itself. As said already, it is within powers of Parliament or any competent legislative body when legislat- ing within its legislative field, to confer subordinate administrative and legislative powers upon some other au- thority. The question is what are the limits within which such conferment or bestowing of powers could be properly made? It is conceded by the learned Attorney-General that the legislature cannot totally abdicate its functions and invest another authority with all the powers of legislation which it possesses. Subordinate legislation, it is not disputed, must operate under the control of the legislature from which it derives its authority, and on the continuing operation of which, its capacity to function rests. As was said by Dixon J. (1) "a subordinate legislation cannot have the independent and unqualified authority which is an attribute of true

legislative power." It is pointed out by this learned Judge that several legal consequences flow from this doctrine of subordinate legislation. An offence against subordinate legislation is regarded as an offence against the statute and on the repeal of the statute the regulations automatically collapse. So far, the propositions cannot, and need not, be disputed. But, (1) Vide Victoria Stevedoring and General Contracting Company v. Dignan, 46 C.L.R. 73 at 102.

according to the learned Attorney-General all that is neces- sary in subordinate legislation is that the legislature should not totally abdicate its powers and that it should retain its control over the subordinate agency which it can destroy later at any time it likes. If this is proved to exist in a particular case, then the character or extent of the powers delegated to or conferred upon such subordinate agent is quite immaterial and into that question the courts have no jurisdiction to enter. This argument seems plausible at first sight, but on closer examination, I find myself unable to accept it as sound. In my opinion, it is not enough that the legislature retains control over the subor- dinate agent and could recall him at any time it likes, to justify its arming the delegate with all the legislative powers in regard to a particular subject. Subordinate legis- lation not only connotes the subordinate or dependent char- acter of the agency which is entrusted with the power to legislate, but also implies the subordinate or ancillary character of the legislation itself, the making of which such agent is entrusted with. If the legislature hands over its essential legislative powers to an outside authority, that would, in my opinion, amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.

The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legis- lative work to a subordinate authority who will work out the details within the framework of that policy. "So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determi- nation of facts to which the legislation is to apply"(1). (1) Vide Schechter Poultry Corp. v. United States, 295 U.S.

The Supreme Court of America has held in more cases than one that the policy of the law-making body and the standards to guide the administrative agency may be laid down in very broad and general terms. It is enough if the legislature lays down an intelligible principle which can be implemented by the subordinate authorities for specific cases or classes of cases(1). The Court has been exceedingly loath to find violation of this principle and in fact there are, only two cases, viz., Panama Refining Co. v. Ryan(2) and Schechter Poultry Corp. v.U.S.(3) where the federal legislation was held invalid on the ground that the standard laid

down by the Congress for guiding administrative discretion was not sufficiently definite. In Panama Refining Co. v. Ryan(2) Chief Justice Hughes very clearly stated "that the Congress manifestly is not permitted to abdicate or transfer to others the essential legislative functions with which it is invested." "In every case" the learned Chief Justice contin- ued," in which the question has been raised the court has recognised that there are limits of delegation which there is no constitutional authority to transcend..... We think that section 9(c) goes beyond those limits; as to transpor- tation of oil production in excess of state permission the Congress has declared no policy, has established no stand- ard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." Mr. Justice Cardozo differed from the majority view m this case and held that a reference express or implied to the policy of Con- gress as declared in section 1 was a sufficient definition of a standard to make the statute valid. "Discretion is not unconfined and vagrant" thus observed the learned Judge. "It is confined within banks that keep it from overflowing."

It is interesting to note that in the later case of Schechter Poultry Corporation(3), where the legislative power was held to be unconstitutionally delegated by the provision of section 3 of the National Industrial (1) Vdie J. IV. Hampton v.U.S., 276 U.S. 394. (2) 293 U.S. 388. (3) 295 U.S. 495.

Recovery Act of 1933 as no definite standard was set up or indicated by the legislature, Cardozo J. agreed with the opinion of the Court and held that the delegated power of legislation which had found expression in that Code was not canalised within banks but was unconfined and vagrant. "Here in the case before us" thus observed the learned Judge, "is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. This is delegation running riot. No such plenitude of powers is capable of transfer." As said above, these are the only two cases up till now in which the statutes of Congress have been de- clared invalid because of delegation of essential legis- lative powers. In the later cases the court has invari- bly found the standard established by the Congress suffi- ciently definite to satisfy the prohibition against delega- tion of legislative powers, and in all such cases a most liberal construction has been put upon the enactment of the legislature(1).

We are not concerned with the actual decisions in these cases. The decisions are to be valued in so far as they lay down any principles. The manner of applying the principles to the facts of a particular case is not at all material. The decisions referred to above clearly lay down that the legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of' conduct. A surrender of this essen- tial function would amount to abdication of legislative powers in the eye of law. 'the policy may

be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. The Court can interfere if no policy is discernible at all or the delegation is of such an indef- inite character as to amount to abdication, but as the discretion vests with the legislature in determining wheth- er there is necessity (1) See Opp Cotton Mills v. Administrator of Wages, 312 U.S. 126; Yakus v. United States, 321 U.S. 414; American Pt. & Lt. Co. v. Securities and Exchange Commission, 329 U.S. 90.

for delegation or not, the exercise of such discretion is not to be disturbed by the court except in clear cases of abuse. These I consider to be the fundamental principles and in respect to the powers of the legislature the constitu- tional position in India approximates more to the American than to the English pattern. There is a basic difference between the Indian and the British Parliament in this re- spect. There is no constitutional limitation to restrain the British Parliament from assigning its powers where it will, but the Indian Parliament qua legislative body is lettered by a written constitution and it does not possess the sover- eign powers of the British Parliament. The limits of the powers of delegation in India would therefore have to be ascertained as a matter of construction from the provisions of the Constitution itself and as I have said the right of delegation may be implied in the exercise of legislative power only to the extent that it is necessary to make the exercise of the power effective and complete. It is said by Schwartz in his work on American Administrative Law "that these doctrines enable the American courts to ensure that the growth of executive power necessitated by the rise of the administrative process will not be an uncontrollable one. Delegation of powers must be limited ones--limited either by legislative prescription of ends and means, or even of details or by limitations upon the area of the power delegated. The enabling legislation must, in other words, contain a framework within which the executive action must operate"(1).

It would be worth while mentioning in this connection that the report of the Committee on Ministers' Power recom- mended something very much similar to this American doctrine as a proper check on delegated legislation. The report says that "the precise limits of a law-making power which Parlia- ment intends to confer on a Minister should always be ex-pressly defined in clear language by the statute which confers it, when discretion is conferred its limits should be defined with (1) Schwartz's American Administrative Law, p. 22.

equal clearness"(1). It is true that what in America is a question of vires and is subject to scrutiny by courts, in the United Kingdom it is a question of policy having a purely political significance. But the recommendation of the Committee would clearly indicate that the rules

laid down and acted upon by the American Judges particularly in later years can be supported on perfectly clear and sound democratic principles.

I will now advert to the leading Canadian and Australi- an cases on the subject and see how far these decisions lend support to the principles set out above. Many of these Canadian cases, it may be noted, went up on appeal to the Judicial Committee.

I will start with the case of Hodge v. The Queen(2) which came up before the Judicial Committee on appeal from the decision of the Court of Appeal for Ontario in the year 1883. The facts of the case are quite simple. The appellant was convicted for permitting and suffering a billiard table to be used and a game of billiard to be played thereon in violation of a resolution of the License Commissioners who were authorised by the Liquor License Act of 1877 to enact regulations regulating the use of taverns, with power to create offences and annex penalties there to. One of the questions raised was whether the Ontario Legisla- ture could delegate powers to the License Commissioners to frame regulations by which new offences could be created. The Privy Council agreed with the High Court in holding that the legislature for Ontario was not in any sense exercising delegated authority from the Imperial Parliament and it had full authority to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. It was observed :--

"Such an authority is ancillary to legislation;..... the very full and very elaborate judgment of the (1) Vide Report, page 65. (2) 9 App, Cas, 117.

Court of Appeal contains abundance of precedents for the legislature entrusting a limited discretionary authority to others and as many illustrations of its necessity and con- venience."

It will be seen that what was delegated by the Ontario Legislature to the License Commissioners was-simply the power to regulate tavern licenses. There was no question of parting with substantial legislative powers in this case. But although the Privy Council stated clearly that the Ontario legislature was quite supreme within its own sphere and enjoyed the same authority as the Imperial or the Dominion Parliament, they described the power delegated as authority ancillary to legislation and expressly referred to the "abundance of precedents for the legislature entrusting a limited discretionary authority to others." There was no necessity for the Privy Council to use the guarded language it used if in fact the Ontario legislature had the same right of delegating its powers as the British Parliament. It would be pertinent to note that Davey, Q.C., who appeared for the Crown in support of the judgment appealed against. did not contend before the Privy Council that the Ontario

legislature had full rights of delegation like the British Parliament and consequently its acts could not be challenged as unconstitutional. His argument was that in this ease there was no delegation of legislative authority and what was delegated was only the power to make by-laws. By legis- lative authority the learned Counsel apparently meant the essential legislative function as distinguished from the power to make rules and regulations and the argument implied that the essential legislative powers could not be delegated at all.

The case of Powell v. Appollo Candle Co. (1) is the next case in point of time which has a bearing on the question before us. That case came up on appeal from a decision of the Supreme Court of New South Wales, and the question arose whether section 133 of (1) 10 App. Cas. 232.

the Customs Regulation Act of 1879of the Colony, was or was not ultra vires the Colonial legislature. The attack on the validity of the legislation was inter alia on the ground that it conferred upon the Government power to levy duty on certain articles which in the opinion of the Collector were substituted for other dutiable articles. The question was whether such power could be validly conferred. The Privy Council had no difficulty in holding that the provision was perfectly valid and it was quite within the competence of the Colonial legislature which was in no sense a delegate of the Imperial Parliament, to confer a discretion of this character on the executive for the purpose of making the statute properly effective. The policy of the law as well as the main principles were laid down in the Act itself. What was left to the executive was a power to enforce the provisions of the Act more properly and effectively by levying duties on articles which could be used for similar purposes as the dutiable articles mentioned in the statute. The legislature itself laid down the standard and it was sufficiently definite to guide the executive officers. I now come to the decision of the Supreme Court of Canada in In re Gray (1), which was decided during the first world war. The Dominion War Measures Act, 1914, passed by the Dominion Parliament of Canada empowered the Governor- General to make "such regulations as he may, by reason of the existence of real or apprehended war..... deem necessary or advisable for the security, defence, peace, order and welfare of Canada"; and the question arose whether such transfer of power was permitted by the British North America Act. The Supreme Court decided by a majority of four to two that the Act was valid, though the Judges who adopted the majority view were not unanimous regarding the reasons upon which they purported to base their decision. The Chief Justice was of the opinion that there was nothing in the Constitutional Act which so far as material to the question (1) 57 S.C.R. 150.

under consideration would impose any limitation on the authority of the Parliament of Canada to which the Imperial Parliament was not subject. Anglin J. referred to the deci- sion in Hodge v. The Queen(1) (supra) in the course of his judgment. He seemed to think that the

British North America Act did not contemplate complete abdication of its legisla- tive powers by the Dominion Parliament, but considered such abdication to be something so inconceivable that the consti- tutionality of an attempt to do anything of that kind was outside the range of practical consideration. Apparently the learned Judge gave the expression "abdication" a very narrow meaning. The opinion of Duff J. was much the same, and he considered that there was no abandonment of legislative powers in this case, as the powers granted could at any time be revoked and anything done thereunder nullified by the Parliament. Idington and Brodeur JJ. dissented from this majority view. This decision was followed in the "Reference in the Matter of the Validity of the Regulations in Relation to Chemicals Enacted by the Governor-General of Canada under the War Measures Act ", which is to be found reported in 1943 S.C.C. 1.

In this case the question raised related to the validi- ty of certain regulations made by an Order in Council in terms of the powers conferred upon the Governor in Council by the War Measures Act and the Department of Munitions and Supply Act. It was held that with the, exception of para- graph 4 of the Order in Council the rest of the Order was not ultra vires. It appears from the report that in this case it was not disputed before the court that powers could be delegated by the legislature to the Governor in Council under the War Measures Act. The question raised was whether the Governor in Council could further delegate his powers to subordinate agencies. The question was answered in the affirmative, the reason given being that the power of dele- gation being absolutely essential in the circumstances for which the War Measures Act has been designed so as to have a workable Act, the power (1) 9 App. Cas. 117.

delegated must be deemed to form part of the powers con- ferred by Parliament in the Act.

These are war time decisions and it is apparent that the doctrine of delegation has been pushed too far in the Chemical Reference case. In In re Gray (1) the learned Chief Justice at the conclusion of his judgment expressly stated that the security of the country was the supreme law against which no other law could prevail. I agree with the Attorney-General that the competency of the Parliament to legislate could not be made dependent upon the fact as to whether the law was a war time or a peace time measure. But on the other hand, it is possible to argue that in a legis- lation passed by a Parliament in times of war when the liberty and security of the country are in jeopardy, the only policy which the legislature can possibly formulate is the policy of effectively carrying on the war and this necessarily implies vesting of all war operations in the hands of the executive. There appears to be considerable substance in the observations made by Dixon J.(2) that "it may be considered that the exigencies which must be dealt with under the defence powers are so many, so great and so urgent and so much the proper concern of the executive that from its very nature the power

appears by necessary intend- ment to authorise delegation otherwise generally forbidden by the legislature." It may be mentioned here that the decision in In re Gray(1) was sought t6 be distinguished in a subsequent Canadian case on the ground that in case of emergency it was possible to pass legislation of this sort by taking recourse to the residuary powers conferred on the Dominion Parliament by section 91 of the North America Act (3).

In point of time, the case of In re The Initiative and Referendum Act(4) comes immediately after that of In re Gray(1). The dispute in this case related to an Act (1) 57 S.C.R. 150.

(2) Vide Victoria Stevedoring and General Contracting Co. v. Dignan, 46 C.L.R. 73 at p. 99.

(3) Vide-Credit Froncier v. Ross, (1987) 3 D.L.R. 365. (4) [1919] A.C. 935.