A126

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.10866-10867 OF 2010

IN THE MATTER OF :

M. Siddiq (D) Thr. Lrs. ....Appellant

VERSUS

Mahant Suresh Das & Ors. Etc.etc. ...Respondents

COMPILATION OF JUDGMENTS
BY SHRI K. PARASARAN SR. ADV

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BHAKTI VARDHAN SINGH
ADVOCATE ON RECORD

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APPELLATE CIVIL.

Before Guha and Bartley JJ.

HARACHANDRA DAS

v.

BHOLANATH DAS.*

1935
Jan. 16, 17, 22.

Appeal—Statutory right—Persons who may appeal—Test of appealability—Finding, adverse, if appealable—Code of Civil Procedure (Act V of 1908), ss. 2 (2), 100.

The Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment.

On grounds of justice and recognising that on that ground the implication of suitable exceptions or qualification may, however, be justifiable and even necessary, it is proper to follow the rule engrafted on the statute by a current of decisions by High Courts in British India that an aggrieved party may have a right of appeal, though the decree is in his favour ; and that the test to be applied in such a case is whether the *finding* sought to be appealed against is one, to which the rule of *res judicata* may be held to be applicable, so as to disentitle the aggrieved party to agitate the questions covered by the *finding* in any other proceeding.

The rule now practically adopted in British India has to be given effect to, on the assumption that it was not the intention of the legislature to prejudice the rights of parties ; and it has to be determined in each particular case, in which it is sought to be applied, whether the finding in a judgment against a party decided adversely to him was on a point directly and substantially in issue, and whether the rule of *res judicata* would be a bar in the matter of parties being allowed to re-agitate the question, involved in the finding, in other proceedings.

Case-law reviewed.

SECOND APPEAL by the defendants Nos. 1 to 3.

The facts of the case and the arguments in the appeal appear fully in the judgment.

Amarendranath Basu and *Jitendrakumar Sen Gupta* (for *Manmathanath Das Gupta*) for the appellants.

*Appeal from Appellate Decree, No. 475 of 1932, with cross-objection, against the decree of N. G. A. Edgley, District Judge of Sylhet, dated July 29, 1931, affirming the decree of Sureshchandra Sen, Third Subordinate Judge of Sylhet, dated March 31, 1931.

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Saratchandra Basak, Senior Government Pleader, and *Chandrashekhar Sen* for the respondents.

Cur. adv. vult.

GUHA J. The plaintiffs in the suit, out of which this appeal has arisen, sought to exercise their right of pre-emption, in respect of the property described in the plaint, against the defendants Nos. 1, 2 and 3 in the suit, as purchasers of the property in question from the defendants Nos. 4 and 5 by a *kabâlâ*, Ex. B in the case, dated the 25th *Bhâdra*, 1335. The plaintiffs and the defendants Nos. 4 and 5 were admittedly co-sharers in regard to the property in dispute, and the right of pre-emption sought to be exercised in the suit was the right to a certain share in joint property, owned by the plaintiffs and the defendants Nos. 4 and 5, the vendors of the defendants Nos. 1, 2 and 3 in the suit. The claim to the exercise of the right of pre-emption as made by the plaintiffs was resisted by the defendants Nos. 1, 2 and 3; the defendants Nos. 4 and 5 supported the case of these defendants by the written statement filed by them, but they did not appear at the hearing of the suit.

The plaintiffs' claim for pre-emption, as made in the suit, was dismissed by the court of first instance on the ground that the suit was barred by limitation. On appeal by the plaintiffs, the learned District Judge of Sylhet, reversed the decision of the trial court on the question of limitation; according to the judge the suit was not barred by limitation. The court of appeal below, however, came to the decision that the *kabâlâ*, Ex. B in the case, had never been legally registered owing to the fact that the Sub-Registrar registering the same had not been vested with requisite powers. There was no sale in respect of the property covered by the *kabâlâ*, Ex. B, and it followed from that that the plaintiffs had no cause of action. Although the reasons were different from those recorded by the Subordinate Judge in the court

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of first instance, the conclusion of the District Judge in the court of appeal below was the same as that at which the trial court had arrived, namely, that the plaintiffs' suit should be dismissed. The defendants Nos. 1 to 3 appealed to this Court; and the appeal is directed, as stated in the memorandum of appeal, "against a finding of the lower appellate court, "although the appeal before that court was dismissed, "and the appellants were respondents in that appeal". There were cross-objections preferred by the plaintiffs respondents in the appeal to this Court.

The cross-objections filed in this Court were not pressed.

At the hearing of the appeal objection was raised on behalf of the plaintiffs, respondents, as to the maintainability of the appeal to this Court, by the defendants Nos. 1, 2 and 3 in the suit, in view of the dismissal of the plaintiffs' suit, by the court of appeal below, in concurrence with the trial court. It was urged, in support of the objections to the maintainability of this appeal, that section 100 of the Code of Civil Procedure was a complete bar in the matter of preferring an appeal by the defendants Nos. 1, 2 and 3: there was a decree of dismissal of the plaintiffs' suit passed by the court of appeal below, and the defendants in the suit were not entitled to maintain this appeal. The decree of the lower appellate court was in their favour, and they could not appeal to this Court, with a view to attack the propriety of the grounds assigned in the judgment of the lower appellate court in support of the judgment. The position taken up, as indicated above, by way of a preliminary objection to the hearing of the appeal is, it may be noticed, in consonance with an observation contained in the decision of this Court in the case of *Byomkes Seth* v. *Bhut Nath Pal* (1), and is founded upon the wording of the provisions of the Code of Civil Procedure giving the right of appeal to a litigant before the civil court.

(1) (1921) 34 C. L. J. 489.

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The question raised before us in support of the position that an appeal to this Court is maintainable on the facts and in the circumstances mentioned above is of general importance, and we proceed to discuss the same under two different heads, in view of the line of argument followed before us.

I. The appeal before us is an appeal from an appellate decree, and the right to appeal is conferred by section 100 of the Code of Civil Procedure, which provides for an appeal to this Court from every decree in appeal on any of the grounds specified in clauses (*a*), (*b*) and (*c*) of that section. It may be conceded that the grounds of this appeal are such as come within the purview of any or all of those clauses. The question, however, is whether the appellants are persons, against whom there is a decree, which may be the subject of an appeal. The statute as it stands provides for an appeal from a decree and not from a finding on a question of law or fact, on which that decree is based. "Decree" has been defined in the Code of Civil Procedure [section 2 (*2*)]; it means the formal expression of an adjudication, which, so far as the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. This definition purports to be exhaustive in its nature; and a decree under this definition does not include a judgment or any finding on which the decree is based; and on the definition of the decree, the right of appeal given to a party cannot necessarily be extended to a finding contained in a judgment, as it was the trend of argument on behalf of the appellants before us. The observation of Sir Asutosh Mookerjee J. in *Byomkes Seth's* case (1) referred to above that a party cannot appeal against a decree in his favour solely with a view to attack the propriety of the grounds assigned in the judgment in support of that decree is based upon an interpretation of the wording of the statute, and have special significance so far as the question

(1) (1921) 34 C. L. J. 489.

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of a general right of appeal, as conferred by the Code of Civil Procedure, is concerned. In our judgment, on the provisions of the Code, as they now stand, there cannot be an appeal "against a finding of the lower "appellate court, although the appeal was dismissed, "and the present appellants were respondents in the "said appeal" as mentioned in the memorandum of appeal presented to this Court. An appeal is a creature of the statute, and as it has been said it cannot be assumed that there is a right of appeal in all matters coming for consideration of the court; unless a right of appeal is expressly given, it does not exist, and the litigant may have independently of any statute a right to institute a suit for nullifying the effect of any decision of a court. As it was noticed by the Judicial Committee of the Privy Council, it was incumbent upon an appellant to show that there was a statutory right of appeal; an appeal does not exist in the nature of things; a right of appeal from any decision must be given by express enactment, and it cannot be implied [See *Rangoon Botatoung Company, Ld.* v. *The Collector, Rangoon* (1) and *Sandback Charity Trustees* v. *North Staffordshire Railway Co.* (2), cited there]. It may be noticed in this connection that, so far as the statute goes, it gives a right of appeal only against decrees and certain orders against which an appeal is expressly given, and there is nothing contained in the Code of Civil Procedure, with reference to which it could be said that appeals could lie against a finding contained in a judgment.

II. The next branch of the arguments in support of the maintainability of the appeal as preferred, relates to the position that the Code of Civil Procedure, in the provisions relating to appeals, does not mention persons who may appeal; and it was, therefore, urged that any party to the suit adversely affected by the decree as passed by a court may appeal.

(1) (1912) I. L. R. 40 Calc. 21; L. R. 39 I. A. 197.

(2) (1877) 3 Q. B. D. 1.

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There is no doubt that High Courts in this country have held, apart from the provisions of the Code of Civil Procedure, that a party adversely affected by a decree may prefer an appeal from the decree; and that the question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its peculiar circumstances.

In *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (1), it was held by Sir John Woodroffe J., on review of authorities, that a defendant had a right of appeal notwithstanding that the suit had been dismissed as against him, if he was aggrieved by the decree. The decree sought to be assailed in the case was undisputedly one adjudicating the right of the defendant seeking to appeal, although it was a decree of dismissal of the suit. It was observed in the judgment that the question, who may appeal, was determinable by the commonsense consideration that there could be no appeal, when there was nothing to appeal about, and that it was not because the suit was formally dismissed as against the defendant that no appeal lay, but because such dismissal was ordinarily not merely no grievance, but an actual benefit to the defendant. There was in such cases nothing to complain of; if there was, then, notwithstanding that the suit was dismissed against him, he might appeal.

In *Jumna Singh* v. *Kamar-un-nisa* (2), according to the opinion of the Full Bench of the Allahabad High Court, there was no appeal maintainable in the case before the Full Bench for the reason that the finding, against which it was directed, would not bar the adjudication of the question in a subsequent suit, and also on the ground that under the law it was inferable that the parties, who are allowed to appeal, are those who may desire that a decree should be varied or reversed, Stuart C. J. confining himself to the latter of the two aspects of the case before the court. The majority of the learned Judges expressed the opinion that the finding sought to be challenged

(1) (1905) 9 C. W. N. 584. (2) (1880) I. L. R. 3 All. 152.

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in appeal would not bar a suit by one against another for the establishment of the validity of the sale deed in question, the finding between the plaintiff and the defendants in the suit, and not between the defendant vendor and the defendants vendees, who were not then litigating, would not bar an adjudication of the matter in issue between them, in a suit brought by the latter for the establishment of the validity of the sale deed.

In *Jamna Das* v. *Udey Ram* (1), it was held that an appeal could lie against a decree, even though it was not a decree against an appellant, if it implied a finding, but for which the decree could not have been given in favour of the plaintiffs in the case.

In *Nimmagadda Venkateswarlu* v. *Bodapati Lingayya* (2), it was laid down that where a suit was dismissed the true test for determination, whether the defendant could appeal, was to see, not merely the form, but the substance of the decree and the judgment; and where the point decided adversely to the defendant was directly and substantially in issue, and, where in other proceedings, the matter would be *res judicata*, it would be contrary to all principles of justice and equity to hold that the defendant was precluded from agitating the matter on appeal, merely because the suit was dismissed.

The case of *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (3), referred to above, was cited in the judgment of this Court in *Nirode Chandra Banerjee* v. *Profulla Chandra Banerjee* (4), and it was said by Sir Asutosh Mookerjee J. that *Krishna Chandra Goldar's* case (3) showed that even a defendant may appeal against a decree, which dismisses the suit against him, but prejudices his position.

As indicated by the decisions in the cases referred to above, it may be taken to be the view of courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on

(1) (1898) I. L. R. 21 All. 117.
(2) (1924) I. L. R. 47 Mad. 633.
(3) (1905) 9 C. W. N. 584.
(4) (1923) 40 C. L. J. 535.

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which a decree is based, may appeal; and the test applied in some of the cases for the purpose of determining whether a party has been aggrieved or not was whether the finding would be *res judicata* in other proceedings. This rule permitting an appeal from a finding in a judgment in a case, in which the decree is in favour of the party seeking to appeal, is engrafted on the provisions in the Code of Civil Procedure bearing on the question of the right of appeal, on principles of justice and equity, and on the ground of common sense. The rule now practically adopted in this country has to be given effect to, on the assumption that it was not the intention of the legislature to prejudice the rights of parties; and it has to be determined in each particular case, in which it is sought to be applied, whether the finding in a judgment against a party decided adversely to him was on a point directly and substantially in issue, and whether the rule of *res judicata* would be a bar in the matter of parties being allowed to re-agitate the question involved in the finding in other proceedings. It may be taken to be well settled that to constitute a matter directly and substantially in issue it is not necessary that a distinct issue should have been raised upon it; it is considered sufficient if the matter was in issue in substance. Further, an issue is *res judicata* when the judgment of an appellate court shows that the issue was treated as material and was decided, although the decree passed merely affirms the decree of the trial court, which did not deal with the issue [See the judgment of this Court quoted *in extenso* and adopted by the Judicial Committee in *Midnapore Zamindary Company, Ltd.* v. *Naresh Narayan Roy* (1)]. The question also has to be considered, whether in view of the position that it is not enough to constitute a matter *res judicata* that it was in issue in the former suit; it is necessary that it must have been in issue directly and substantially; and a matter cannot be directly and substantially in issue in a suit

(1) (1924) I. L. R. 51 Calc. 631 ; L. R. 51 I. A. 293.

unless it was alleged by one party and denied or admitted either expressly or by necessary implication, by the other.

In the case before us, the finding sought to be challenged in appeal to this Court is on a question, not directly put in issue; it was on a matter not alleged by any party and denied or admitted by the other. No issue, directly or in substance, was suggested on the point, in regard to which a finding adverse to some of the defendants in the suit was arrived at by the lower appellate court. In our judgment, the finding so arrived at might, and it does, sustain a decree of dismissal of the suit, but it cannot be held to be one, which does or could disentitle the defendants Nos. 1, 2 and 3 in the suit from re-agitating the question of registration of the *kabâlâ*, Ex. B, in any other proceeding; the finding could not further be held to operate as *res judicata* on the question, whether there has been a valid sale in respect of the property covered by the *kabâlâ*, Ex. B.

To summarise our conclusions, the Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment; the appellants in this Court have, therefore, no right of appeal under the law. On grounds of justice, and recognising that, on that ground, the implication of suitable exception or qualification may be justifiable and even necessary, we are prepared to follow the rule engrafted on the statute by a current of decisions by High Courts in this country, that an aggrieved party may have a right of appeal, and that the test to be applied in such a case is whether the finding, sought to be appealed against, is one, to which the rule of *res judicata* may be held to be applicable, so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. In the case before us, the defendants Nos. 1, 2 and 3 are not parties, against whom the finding could operate as *res judicata* for the reasons stated above.

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In the result the preliminary objection raised by the plaintiffs, respondents in the appeal—that the appeal was not maintainable—is allowed to prevail.

The appeal is dismissed; there is no order as to costs in the appeal.

The cross-objections preferred by the plaintiffs respondents are also dismissed without costs.

BARTLEY J. I agree.

G. S. *Appeal dismissed.*

and gave the accused the benefit of the doubt. The Crown has appealed against this acquittal.

The Court is not bound to accept the evidence of an expert, even though there are no special reasons for not accepting it; and it was certainly proper on the part of the Magistrate to satisfy himself by personal examination that the impressions of the accused and of those on the broken glass were identical. Even though he did not feel himself to be expert, yet he was bound, unless he was himself satisfied that the expert's evidence was correct, to acquit the accused. As the learned Magistrate did compare the impressions, I do not think this Court should set aside the acquittal merely because the learned Magistrate might have adopted a sounder procedure.

One of the impressions found on the glass was a fairly good one but the other was somewhat blurred; and it was probably difficult for the learned Magistrate to compare all the points made by the expert merely with the aid of the notes. What he should have done was to have asked the expert in Court to elucidate his notes and to point out in the two impressions the points of identity which he had found. The expert filed his notes with his evidence and he has pointed out no less than 11 points of identity with regard to one impression and 10 points with regard to the other. If these points of identity really do exist, then there can be no doubt that the expert satisfactorily proved that the impressions on the glass were those of the accused. Unfortunately the expert had no opportunity of explaining to the Magistrate. The Magistrate let him leave the box without questioning him with regard to any single point of his evidence. Although I am not interfering with the order of acquittal, I would like to express a hope that the learned Magistrate, if he has to deal with the evidence of an expert witness in future, will take the pains to have the expert explain in Court the reasons for his opinion. It is only after hearing those reasons in detail that the Magistrate would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory..

N. R. R. *Appeal dismissed.*

FEDERAL COURT.

[From Allahabad.].

UNITED PROVINCES *v.* Mt. ATIQA BEGUM and others.

Gwyer, C.J., Sulaiman and Varadachariar, JJ.

6th December, 1940. Case No. 5 of 1940.

Federal Court—Practice—Dispute between private parties—Attack on the validity of provincial legislation—Provincial Government whether a proper party—High Court holding Act ultra vires*—Appeal only by the Provincial Government—Maintainability*

—*Interference with the decree of the High Court on the ground that the impugned Act is* intra vires—*Whether permissible.*

In a suit instituted on 5th December, 1934 by two landholders for their share of the arrears of rent against the defendants who were lessees of proprietary rights in agricultural lands, the defendants claimed a deduction on account of remissions of rent ordered by Government. Both the Assistant Collector and the District Judge on appeal rejected the plaintiffs' contention against deduction claimed and the landlords appealed to the High Court. While the appeal was pending in the High Court, the U. P. Regularisation of Remissions Act (XIV of 1938) came into force but the High Court held the Act to be *ultra vires* and allowed the appeal after impleading the Provincial Government as a party to the case and hearing arguments on its behalf. The Government alone appealed to the Federal Court after obtaining the certificate under S. 205 of the Government of India Act.

Held (i) that the Act was not *ultra vires* of the Provincial Legislature as it fell within item 21 of the Provincial Legislative List ;

(ii) that where the validity or the constitutionality of a provincial legislation is in issue as in the present case, it is more convenient and correct that the Advocate-General should represent the executive Government for the time being of the province : and

(iii) that the appeal of the Government should, however, be dismissed.

Per Chief Justice :—The province not being interested in any way in the original disputes between the plaintiffs and the defendants, save to uphold the validity of a particular law which had been challenged in the course of the proceedings, the Federal Court should not order the High Court to vary the decree which it had given as between plaintiffs and defendants.

Per Sulaiman, J.—The impugned Act was not applicable to the appeal pending before the High Court and hence the decree of the High Court must stand.

Per Varadachariar, J.—Notwithstanding the acceptance by the Federal Court of the appellant's contention as to the validity of the impugned Act, there was no justification for the Federal Court interfering with the decree of the High Court in the circumstances of this case, and in view especially of the fact that that the defendants had acquiesced in the decree of the High Court and had not even appeared before the Federal Court to explain the circumstances in which they did not choose to appeal nor to ask for its modification.

Dr. Narain Prasad Asthana, Advocate General of the United Provinces (*with him* Mr. *Sri Narain Sahai, Advocate, Federal Court*), instructed by Mr. *G. Sahay, Agent*—for the Appellant.

Mr. *P. L. Banerji, Senior Advocate, Federal Court* (*with him* Mr. *Prem Mohanlal Verma, Advocate, Federal Court*) instructed by Mr. *T. K. Prasad, Agent*—for the Respondents.

JUDGMENT.

Gwyer, C. J. —In this case the principal question to be decided is whether the Regularization of Remissions Act, 1938, (XIV of 1938), an Act of the Legislature of the United Provinces, was within the competence of the Legislature which enacted it. The litigation in which the question has arisen can be briefly described. The defendants to the original suit were thekadars, a thekadar being, by statutory definition, "a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits,"

with the terms of his lease or theka embodied in a written instrument executed by the landlord. They were sued by their lessors for arrears of rent for the year ending June 1931, and the two following years at the rate reserved by the lease, and among other defences pleaded that remissions of rent had been ordered by the Local Government which ought to be taken into account in calculating the amount due. The plaintiffs contended that these remissions were beyond the power of the Government to order and that the defendants were not therefore entitled to rely upon them. On this issue both the trial Judge and the District Judge on appeal decided in the defendants' favour. The plaintiffs then appealed to the High Court and during the pendency of the appeal a Division Bench of the High Court held in another case, *Muhammad Abdul Qaiyum* v. *Secretary of State* (1), that remissions made in pursuance of the Government order above referred to had no legal effect. In order to appreciate the legal questions involved, it is necessary to refer to certain statutory provisions contained in the Agra Tenancy Act, 1926, which at all material times regulated the relations between the parties, though it has since been repealed and only re-enacted with substantial alterations.

The purpose of the Act is indicated by its title, "an Act to consolidate and amend the law relating to agricultural tenancies and certain other matters in Agra," and it may be described as a Code of landlord and tenant law for the province of Agra. At the end of that part of the Act which dealt with the subject of rent and of the machinery whereby in certain circumstances rent might be enhanced or abated, there was a fasciculus of sections entitled "exceptional provisions," including three sections which require to be noticed. S. 72 empowered a Court making a decree in a suit for arrears of rent to allow, with the sanction of the Collector, such remissions from the rent payable as might appear to the Court to be just, if the produce of the land had been so diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrears were claimed that the full amount of rent payable by the tenant for that period could not be equitably decreed. The section then provided that where rent was thus remitted, the revenue authorities should, on the report of the Court, grant a remission of land revenue in proportion to the rent remitted for the corresponding area belonging to the same landlord. S. 73 dealt with the converse case, and provided that when for any cause the Local Government, or any authority empowered by it remitted or suspended for any period the whole or any part of the revenue payable in respect of any land, a Collector might order that the rents of the tenants should be remitted or suspended

"to an amount which shall bear the same proportion to the whole of the amount payable in respect of the land as the revenue of which the payment has been so

(1) I.L.R. 1938 All. 114.

remitted or suspended bears to the whole of the revenue payable in respect of such land."

By S. 74, an order passed under S. 73 was not to be questioned in any civil or revenue Court, and no suit was to lie for the recovery of any rent of which the payment had been thus remitted or suspended. It will be seen therefore that, in the first case, the remission or suspension of land revenue followed the remission or suspension of rent allowed by the Court and sanctioned by the Collector; and that, in the second, remission of rent might be ordered by the Collector only after the Local Government had remitted or suspended the land revenue. S. 73 was expressly extended to thekadars by S. 219 of the Act, but not S. 72. The reason no doubt was that where the parties had embodied their contract in a formal written instrument, they must in agreeing upon the amount of rent be assumed to have had in mind the possibility of such occurrences as were dealt with in S. 72; but a remission or suspension of land revenue under S. 73 would,destroy the basis upon which they must necessarily have contracted and it would be inequitable if a consequential adjustment were not permitted.

In 1931, the United Provinces were faced with a catastrophic fall in agricultural prices followed by threats to withhold rent on a large scale. Faced with what was clearly a most difficult situation, the Government appears to have acted with courage and promptitude. It took the view that the most urgent problem was that of rent, and devised a scheme for the systematic reduction of rents, varying with the circumstances of the different Districts, followed later by consequential adjustments in land revenue. The plans adopted were described in a series of communiques issued from time to time, the first being dated 29th April 1931 and the last 28th October, 1932. The Government appears to have been well aware of the legal position, for, in its last communique, a statement on the report of the rent and revenue committee of the Legislative Council, it observed that

"the Governor in Council..... ... recognizes that the action which Government were compelled to take last year was not covered by any provision in the existing law, and he is as anxious as any party that the position should be regularized as soon as possible. But owing to the magnitude of the problem the process will inevitably take time. The law was not framed to meet such a position as has arisen from the recent severe fall in prices."

The Government, in other words, were faced with a problem with which executive governments have often to deal; a grave emergency, threatening public order, and inadequate powers for meeting it. In circumstances such as these, a government has to do the best it can, relying, if it exceeds the limit of its powers, upon the willingness of the Legislature to indemnify it subsequently; and Legislatures are usually prepared to grant a government absolution, if they are satisfied of the gravity of the emergency, of the *bona fides*

of the action taken, and of the reasonableness of the measures adopted. A government however always runs the risk of the measures which it has taken becoming the subject of legal proceedings before it has obtained its indemnity, and this is what happened in the present case. It is clear that S. 73 of the Act, only enabled remissions of rent to be ordered, if there had been a prior remission of land revenue ; and therefore the orders of the Government on this occasion had no legal force or effect and could not be relied upon by any tenant in a suit by his landlord for the recovery of arrears of rent. The Allahabad High Court so decided, as I have already stated; and it was because of this decision that the Government found themselves compelled to invite the Legislature to pass the Act which is the subject of the present appeal; the question is whether that Act is effective for the purpose for which it was designed. I think it right to observe, in justice to the Government, though the matter does not of course affect the legal position, that while no doubt its action exposed it to much criticism, a substantial number of landlords were willing to co-operate with it in meeting the emergency. This appears from the communique of 11th May 1931 in which the Government recorded its appreciation of the spirit shown by a deputation of the taluqdars of Oudh who had waived their legal claims and agreed without condition to remit whatever Government considered fair to their tenants; and also of the generosity with which the Agra landlords had shown their willingness to grant remission to a large number of cultivators. It is desirable that this should be said for Courts of justice, while giving no countenance to the theory that governments are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of government, when suddenly faced with a serious and perhaps dangerous situation.

The Regularization of Remissions Act, 1938, had been passed before the present appeal came before the High Court, and when the appellants sought to take advantage of it, on the ground that the respondents could no longer challenge the validity of the remission orders, the latter replied by challenging the new Act itself. This point was referred to a Full Bench, which held the Act to be beyond the competency of the Legislature to enact. The three learned Judges who composed the Bench (Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.) all took the view that the Act was contrary to the provisions of S. 292, Constitution Act, because it attempted to legislate retrospectively ; but Iqbal Ahmad, J, was also of opinion that none of its provisions was with respect to any of the matters set out in List 2 of Sch. 7 to the Constitution Act, nor indeed with respect to any of the matters in List 3, the Concurrent List.

Before the case was heard by the Full Bench, the High Court had caused notice to be given to the Advocate-General of the Province, in order that, if the United Provinces Government so directed, he might appear and support the validity of the Act. The Advocate-General was accordingly heard; and when, after the Full Bench had given judgment, the case came again before the High Court to be finally dealt with, the Government applied to be made a party to the appeal, in order that (as the applications stated) it might have a right of appeal to the Federal Court. The application not being opposed, the Government was duly made a party; and its name appeared thereafter as respondents on the record, under the style of the United Provinces Government, in addition to those of the plaintiffs-appellants and the defendants. In the final order of the High Court, however, admitting the appeal to this Court, the parties on the record are described as "the United Provinces, Applicant (*sic*) the Federal Court," with all the original plaintiffs and defendants as respondents. It is in that form that the appeal has now come before us. It should be added that the defendants did not enter an appearance in this Court and only the United Provinces and the plaintiffs were represented at the hearing.

In these circumstances Counsel for the lessors took a preliminary objection and contended in a very able argument that the Advocate-General ought not to be heard, because the High Court had no power to make the Province a party to the suit and the Province had therefore no right to appeal. He put it as a matter of jurisdiction and not merely as a wrongful exercise of discretion by the High Court. The application of the United Provinces was made under O. 1, R. 10 (2) Civil Procedure Code, the material words of which are as follows:

> "The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order.....that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, to be added."

Counsel for the lessors argued that the desire of the Province to secure the right of appeal did not make O. 1, R. 10 (2) applicable to the case; but, he also based his argument on broader grounds and contended that the mere fact that the validity of provincial legislation was being challenged was no sufficient reason for making the Province a party to a suit between private persons.

I desire to say at the outset that, assuming for the moment that there was jurisdiction to add a party to represent the executive Government of the Province, that party ought not in my opinion to have been the Province itself. It is true that by section 176 (1), Constitution Act, a Provincial Government may sue or be sued by

the name of the Province, and may, subject to any provisions which may be made by Act of the Federal or the Provincial Legislature, sue or be sued in relation to its affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Act had not been passed. But it seems to me that where the validity or constitutionality of provincial legislation is in issue, and not any matter relating to the proprietary rights or interests of the Province, it is more convenient and more correct that the Advocate-General should represent the executive Government for the time being of the Province. This is the Dominion practice, and in my opinion it ought to be followed in India. The Secretary of State was first made liable to be sued by S. 65, Government of India Act, 1858, and the same suits and remedies were made available against him as had been available against the East India Company. He was no doubt substituted for the East India Company after the transfer of all the rights of the Company to the Crown, because under the constitutional arrangements made by the Act of 1858 he had complete control of all the revenues of India. But the question of the constitutionality of an Indian statute could rarely have arisen before the present Constitution Act, and even more rarely still in the case of a provincial statute; and it seems to me, as I have said, that the more convenient course is to confine the operation of S. 176 (1) to cases in which the proprietary rights or interests of the Provinces are affected, and, if the Government of a Province desires to uphold the validity of a Provincial Act or to challenge that of a Federal Act, it should direct the Advocate-General of the province to intervene on its behalf.

A number of cases were cited on the true construction of O. 1, R. 10. Counsel for the lessors relied principally upon *Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1) in which Srinivasa Ayyangar, J. refused an application by the Secretary of State to be added as a party in a case said to involve the question whether an Act of the Provincial Legislature was *ultra vires*. The learned Judge, treating the case as one of first impression, held that the words "all the questions involved in the suit" must refer to questions as between the parties to the litigation, that neither on principle nor authority could the Secretary of State be regarded as a necessary or a proper party, and that he ought not to be joined as an additional defendant. He concluded his judgment with these words :

"Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of *ultra vires* are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them."

(1) 50 Mad. 34=24 L. W. 738.

This judgment was criticised and dissented from in *Secretary of State* v. *Murugesa Mudaliar* (1) by Venkatasubba Rao, J., a case in which the plaintiff had brought a suit against a district board for a declaration that he had been duly elected a member of the board by a resolution passed at the meeting of a certain taluq board. The Government applied to be joined as a defendant, but both plaintiff and defendant opposed the application. It was held that since by a local Act Government had the power of control over all local boards in the province and could suspend the execution of any resolution (as they had apparently done in the case of the taluq board), it was a proper party to the suit and ought to be added. The learned Judge was of the opinion (which I cannot myself share) that Srinivasa Ayyangar, J. had in the earlier judgment ignored the distinction made in O. 1, R. 10 between (1) persons who ought to have been joined, and (2) persons whose presence is necessary to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the suit, i. e., between necessary parties and proper parties. Basing his opinion on earlier English and Indian authorities, he held that the Court was not bound to decide a dispute in the absence of persons whom it most vitally concerned, and that in the case before him it was the Government who had interfered with the alleged right of the plaintiff by suspending the execution of the resolution of the taluq board. Hence he concluded that the Government was a proper party to the suit.

It is not clear to me that Srinivasa Ayyangar, J., would have come to a conclusion contrary to that of his brother Judge, if the later case had come before him; for different principles appear to be involved in the two cases. The question of the validity of the Act could certainly have been decided in the absence of the Secretary of State in the first case, though it might have been convenient to have him represented before the Court. In the second case, it was in effect the action of the Government itself of which the plaintiff complained. But it is obvious that in the later case a wider view was taken of the powers conferred by O. 1, R. 10, and stress was laid rather upon the words "effectually and completely to adjudicate upon and settle all the questions involved in the suit" than upon the words "necessary to enable the Court" which preceded them. The Allahabad High Court appear to have gone further in *Mt. Jaimala Kunwar* v. *Collector of Saharanpur* (2) and to have held that the Court has inherent powers of its own in the matter which are not restricted by O. 1, R. 10; but I should always hesitate to rely on unspecified and undefined inherent powers as a justification for any action taken, if it is possible to avoid doing so. In any case, the first of the Madras decisions is directly in point in the present case, though the report

(1) A.I.R. 1929 Mad. 443=29 L. W. 753. (2) 55 All. 825.

does not indicate how the question of *ultra vires* in fact arose in connection with the provincial statute which was under discussion, nor is it easy to see how under the Government of India Act, 1919, and the Devolution Rules, questions of *ultra vires* in the case of provincial statutes could have come before the Court. The decision in the later case may have been justified on the facts, but those facts were very different from those which are now under consideration.

Since the new Constitution Act, however, the position with regard to the competence of Indian Legislatures, whether the Central Legislature or the Legislatures of the Provinces, is completely changed; and the cases which have already come before this Court during its brief history show the difficulty and complexity of the disputes in which questions of legislative competence are involved. I think that it would be a matter of great regret to this Court if in any such case it had not the assistance of the Advocate-General of the Province concerned, and this point was not overlooked when the rules of the Court were drafted: *see* Federal Court Rules, O. 36. But, in the absence of such an express rule in the Code, it is necessary to decide first, whether the Advocate-General was rightly empowered to intervene as a party on the record, and, secondly whether in the particular circumstances of the present case he has an independent right of appeal.

It can but rarely happen in cases between private persons involving the constitutional validity of a statute, that an Advocate-General is a "necessary" party; and I am not prepared to say without further consideration that he is even a "proper" party in each and every case. But in a number of cases, of which the present is an example, the question whether a statute is or is not valid involves the question of the scope of the executive authority of the province. The executive authority of a province vests in the Governor on behalf of the Crown, and extends to all matters with respect to which the Legislature of the province has power to make laws (S. 49, Constitution Act). If then a provincial Act purporting to confer powers upon the executive is held to be beyond the competence of the Provincial Legislature, the scope of the executive authority of the province is thereby declared to be more restricted than Legislature and Government had supposed or intended. If the Act impugned in the present case is held to be invalid, orders issued by or under the authority of the Provincial Government in the past can be questioned in a Court of law, and the Government would have no power to issue any orders of the kind in the future. It is therefore impossible for a Court so to decide in litigation between private parties without imposing a hitherto unsuspected restriction upon the powers of the Government; and it does not seem right that this should be done without the Government being a party to the proceedings before the Court. In my opinion, the Advocate-General of the province is a

proper party, in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions involved in the suit. I am not prepared to extend the operation of O. 1, R. 10, beyond what is necessary, but it seems to me that to allow the Advocate-General to intervene as a party in cases of this kind is for the reasons which I have given within the spirit and I think also the letter of the rule.

The Judicial Committee held in *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (1) that when an action, if successful, will affect the rights claimed by the Crown, but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is nevertheless a necessary and proper party and may be joined as a defendant by the plaintiff. In that case the validity of a Crown grant, and not of a statute, was challenged, but I draw attention to the following observations of Lord Buckmaster, who delivered the judgment of the Committee:

> "It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as a defendant and that is the best means of testing the necessity of the attendance of the Crown (at page 363)."

Adapting these words, I might say that in the event of the lessors succeeding in the present case, certain rights of the Crown, that is, of the executive of the province will cease to exist, in the sense that they will no longer have that extended effect which it was believed that the impugned Act had given them. In a recent case in a Canadian Province *Beauharnois L. H. & P. Co.* v. *Hydro Electric Power Commission* (2), a local Judicature Act had provided that no Act of the Provincial Legislature should be adjudged invalid in any proceedings until after notice had been given to the Attorney-General of Canada and to the Attorney-General of the province and that the two Attorneys-General were entitled as of right to be heard, notwithstanding that the Crown was not a party to the proceedings. This enactment was held not to preclude the making of the Crown, represented by the Attorney-General a party to an action, and the Court stating that in cases admitting of doubt it was desirable that the Crown should be made a party, declared the Attorney-General to be a proper, if not a necessary, party to the litigation before it. It is not necessary for me to say whether I agree with this more general proposition; I am content to limit my observations to cases where to challenge the validity of a statute would, if successful, affect the executive authority of the province. It would no doubt be often, perhaps usually, convenient if the Court had the Advocate-General of the province

(1) (1920) A.C. 358.

(2) (1937) 3 D.L.R. (Ont) at p. 458.

before it, when the validity of a provincial statute is in issue; and High Courts may desire to consider whether they should not frame a rule of their own upon the subject which will set all doubts at rest.

It seems to me however by no means to follow that, because the Advocate-General of the Province has been permitted to be put on the record as an intervener in the suit, he is also entitled to prefer an independent appeal to this Court, in the absence of any appeal by the parties. He has an interest in the litigation, it is true, but the suit is after all between private parties; and if they are content with the decision of the Court, whether it be in favour of the plaintiff or the defendant, it is difficult to see on what principle the Advocate-General can be held to have a *locus standi* sufficient to justify an independent appeal of his own. If one of the parties appeals, then of course the Advocate-General has a right to appear before this Court, since he is an intervener in the suit; but he is a party only in a very special and limited sense. The doubts which I have felt on this point are not diminished by a very recent decision of the Canadian Supreme Court: *Attorney Gen. of Alberta* (*Intervenant*) v. *Kazakewich* (1). In that case the Supreme Court of Alberta had held that a statute under which a husband had been ordered to pay a certain sum towards the maintenance of his wife was beyond the competence of the Provincial Legislature to enact. The Attorney-General of the Province had intervened to uphold the validity of the Act, and special leave to appeal to the Supreme Court of Canada had been granted both to the Attorney-General and to the wife, but the wife failed to perfect her appeal. The Supreme Court were of opinion that though, on an appeal to the Court by the wife, the Attorney-General would, in the ordinary course, have the right to appear in order to support the validity of the Act, he had no status to appeal to the Court, so long as the wife had not perfected her appeal, and that until she had done so the Court had no jurisdiction. This decision seems to me, if I may respectfully say so, to be based upon sound principle, and in my opinion this Court ought to follow it. There is a significant observation by Lord Haldane in *John Deere Plow Co.* v. *Wharton* (2) that Attorneys-General intervening in private litigation were only entitled to present their views to the Judicial Committee and had no right of reply. If an Attorney-General had in such circumstances an independent right of appeal of his own, it is difficult to see why he should not be allowed a right of reply like any other appellant.

I should be disposed to hold therefore in favour of the lessors on the preliminary point; but as both my brethren are of a different opinion, I will not formally dissent from them. I am very conscious of the difficulty which might be caused if the doubts which I have thought it right to express were justified, for, private persons could

(1) (1937) Can. S.C. R. 427. (2) (1915) A. C. 330 at p. 334.

by a private settlement of their dispute, or even by collusion, prevent a Provincial Government from obtaining a decision of the Federal Court on issues of the highest importance. This is a matter which might well engage the attention of the Central Legislature who have power under S. 215, Constitution Act, to make provision for conferring on the Federal Court such supplementary powers not inconsistent with any of the provisions of the Act as may appear necessary or desirable to enable the Court more effectively to exercise the jurisdiction conferred upon it by or under the Act. I now come to the impugned Act itself. The Preamble to the Act runs as follows :

"Whereas it is necessary to regularize the remissions of rent made before the passing of this Act on account of the fall in prices,"

and S. 2 then provides that

"notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court."

All three Judges in the High Court have held that these provisions were beyond the competence of the United Provinces Legislature by reason of S. 292, Constitution Act. That section provides that

"Notwithstanding the repeal by this Act of the Government of India Act, (that is to say, the Government of India Act, 1919), but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

It is said that since these words keep existing British Indian laws in force until they are altered or repealed or amended by competent authority, it is beyond the powers of any authority, no matter how competent otherwise, to legislate with retrospective effect ; because, if they do so, they are contravening the provisions of the section which makes those laws continue in force up to the moment of alteration, repeal or amendment. The purpose of S. 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorized its enactment ; and it is a safeguard usually inserted by draftsmen in similar circumstances. An analogous provision was included in S. 130, Government of India Act, 1919, though in that case it took the form of a proviso that the repeal of earlier Government of India Acts should not affect the validity of any existing law. The Union of South Africa Act, 1909, S. 135, is almost identical with S. 292, but a slightly different formula was adopted in the British North America Act, 1867, and in the Commonwealth

of Australia Constitution Act, 1900. Section 129 of the former is as follows :

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union.....shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made; subject nevertheless.....to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

Section 108, Australian Act is as follows :

"Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth shall, subject to this Constitution, continue in force in the State; and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration or repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State."

I pause here to inquire what reason there can have been for Parliament to place such a fetter as is suggested upon the powers of the new Indian Legislatures. No such fetter was imposed by S. 130, Government of India Act, 1919, for there is nothing in the words of that section which could by any stretch of language be construed as a prohibition of retrospective legislation. But the suggestion now is that the new Legislatures set up by the Act of 1935, which have certainly been given powers no less wide than those of their predecessors, have nevertheless had a restriction imposed upon them which Parliament admittedly saw no reason to impose at an earlier date. I agree that it is not for this Court to speculate upon the reasons which may have induced Parliament to leglislate in one way rather than another; but when I am told that these novel and unexpected provisions have been enacted and that no apparent reason can be assigned for them, I am entitled to ask whether it is not possible to place a different and more reasonable construction upon the language which Parliament has used. It then appears that Parliament has used almost identical language when it enacted the constitution of the Union of South Africa ; and the industry of counsel was unable to suggest, nor have I myself been able to discover, that the interpretation which commended itself to the High Court of Allahabad has ever been even hinted at in any South African Court. The same may be said of the Canadian and Australian sections; for though it is true that the wording of those sections is a little different, I confess that I can detect no difference in the meaning of the language used.

I find myself unable to agree with the decision of the High Court on this point, and it is only out of respect for the three learned Judges who have taken a contrary view that I have dealt with the question at any length; for, but for their unanimous opinion, I should have thought it scarcely open to argument. It must always

be remembered that within their own sphere the powers of the Indian Legislature are as large and ample as those of Parliament itself [*Reg.* v. *Burah* (1)], and the burden of proving that they are subject to a strange and unusual prohibition against restrospective legislation must certainly lie upon those who assert it. I can see nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor, so far as that may be relevant, any explanation why Parliament should have desired to do so. The sections in the Dominion Acts to which our attention was called do not seem to have been cited to the learned Judges in the High Court; and I cannot but think that their decision might have been different if they had had those sections before them.

Apart however from the above considerations, I doubt whether the Regularization of Remissions Act does in fact alter, repeal or amend any existing Indian law. There is nothing in it inconsistent with, or repugnant to, the Agra Tenancy Act, 1926. No doubt it adds another case in which a tenant may claim the benefit of remissions of rent as against his landlord to those already specified in the latter Act; but it appears to me to have succeeded in doing so without touching any of the provisions of that Act itself. The view that the Regularization of Remissions Act was invalid because it was not enacted 'with respect to' any of the matters enumerated in List II or List III of Sch. 7 to the Constitution Act, though it was strenuously argued in this Court, only found favour in the High Court with Iqbal Ahmad, J., the two other Judges holding that the Act was within item No. 2 or 21 of List II, or partly within one and partly within the other. These two items are as follows :

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

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

I am of opinion that in enacting the Act the Legislature has legislated with respect to matters covered by item 21. The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as "Local Government," "Education," "Water" "Agriculture"

(1) (1878) 3 A. C. 889.

and "Land," the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus " Courts of Wards " and " treasure-trove " might not ordinarily have been regarded as included under " Land," if they had not been specifically mentioned in item 21. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court. I am moved to make this observation because of a passage in the judgment of Iqbal Ahmad, J., in which he says :

"By the authority given to it to make laws about the "collection of rents" the Provincial Legislature is in my judgment authorized to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected, to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which rent is to be collected and to legislate about kindred matters. The impugned Act, however, is not with respect to any such matter. It is therefore outside the scope of entry 21 of the Provincial List."

I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive. I agree that, if it were, his conclusion might follow logically from his premises; but such *a priori* assumptions are a dangerous guide for the construing of a statute. The general descriptive words in item 21 include "the collection of rents"; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Item 22 of the Provincial List is "forests"; could it reasonably be argued that the power to legislate with respect to forests did not include a power to legislate with respect not only to afforestation but also to disafforestation; Item 24 is "fisheries"; could it reasonably be argued that this only included the regulation of fishing itself and did not include the prohibition of fishing altogether in particular places or at particular times? I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in item 21.

It is then necessary to inquire whether the impugned Act is an Act with respect to "remission of rents," "for, if it is, it follows from what I have just said that it was within the competence of the Provincial Legislature to enact it. In my opinion, it is such an Act,

although it may also be an Act with respect to something else, that is to say, the validation of doubtful executive orders. It does not seem to me necessary to consider what the pith and substance of the Act is, to use a now familiar phrase; for that question does not arise, unless the Court is inquiring whether a particular Act falls within one Legislative List or another. In the present case, there is no suggestion of any competition between List I and List II, and if the Act does not fall within List II, (since no one has suggested that it falls within List III), it can only be an Act with respect to a subject-matter which has been overlooked or forgotten, and no Legislature in India could deal with it until the Governor-General had exercised his powers under S. 104, Constitution Act. The validation of doubtful executive acts is not so unusual or extraordinary a thing that little surprise would be felt if Parliament had overlooked it, and it would take a great deal to persuade me that legislative power for the purpose has been denied to every Legislature, including the Central or Federal Legislature, in India. It is true that "validation of executive orders" or any entry even remotely analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

I arrive at the conclusion therefore that the remission of rent is a matter covered by item 21, that the impugned Act is an Act with respect to the remission of rent, and that it was within the competence of the United Provinces Legislature to enact it. On this view of the matter, it is not necessary to decide whether the Act is also with respect to matters covered by item 2, that is to say, "Jurisdiction and Powers of the Provincial Courts" but, if it had been otherwise, I should have been disposed to say that the jurisdiction and powers of the Courts are not affected merely because certain executive orders are not allowed to be questioned in any Court. If the Act had provided, as it well might, either that these particular orders, if produced from the proper custody, should prove themselves, or (if the Act is to be given a rather wider interpretation) that they should be conclusively presumed to have been lawfully made, then it does not seem to me that any doubt could have arisen, unless indeed any Act relating to evidence must also be held to relate to the jurisdiction and powers of the Courts; but this can scarcely be so, in view of item No. 5 in the Concurrent List. If, on the other hand, it were to be contended that the impugned Act was an Evidence Act and therefore in competition with List III, then I should have no hesitation in holding that its pith and substance is rent or remission of rent and

not an amendment of the law of evidence, and that therefore it still fell within List II.

Two other points were raised in the course of the argument, but they need only be mentioned to be dismissed. There is nothing in the contention that the Act is void under S. 299 (3), Constitution Act, because the prior sanction of the Governor had not been obtained to the introduction of the Bill, since it is completely disposed of by the provisions of S. 109 (2). The contention that the Act bars a civil remedy and therefore conflicts with Ss. 4 and 9, Civil Procedure Code, a matter falling under List III, so that by reason of S. 107 (2), Constitution Act, the assent of the Governor-General would be required to make an Act passed by a Provincial Legislature with respect to it valid, is equally barren of substance. S. 4 of the Code only applies "in the absence of any specific provision to the contrary" and S. 9 excepts suits which expressly or impliedly are not cognizable by the Courts.

But if, as I hold, the Regularization of Remissions Act was not beyond the competence of the Legislature to enact, the question still remains what is to be the effect of such a decision. The thekadars, the original defendants, entered no appearance in this Court and the province was the only appellant. The province was not interested in any way in the original dispute between the plaintiffs and the defendants, save to uphold the validity of a particular law which had been challenged in the course of the proceedings. It is, in my opinion, impossible for this Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it has given as between plaintiffs and defendants and the difficulties which would arise if any other view were taken lend additional force to the doubts which I have already expressed on the right of the province to appeal at all. I think therefore that the appeal should be dismissed, and my brothers concur, though for different reasons. In these circumstances it is not necessary for me to express an opinion on two other points which were strongly argued before us by Counsel for the lessors, that is to say, whether the Act ought to be construed as having no application in the case of suits pending at the time when it is passed, and whether the provision in it which forbids the remissions from being questioned in a Court of law has the effect of validating them for all purposes, and of preventing any suit for recovery of the rent alleged to have been remitted. Many interesting questions of law arise in connection with both these points, which might be profitably discussed on a more appropriate occasion, but I express no opinion on them now. The appeal will be dismissed. There will be no order as to costs.

Sulaiman, J.—This is an appeal by the United Provinces which intervened and were impleaded in the second appeal before the High Court. The present suit was instituted on 5th December 1934, by two landholders for their share of the arrears of rent for the period, 1339-1341 Fasli (1931-1934 A.D.), against the defendants who were thekadars (lessees of proprietary rights in agricultural lands) under a registered document, dated 20th April 1928, fixing an annual rent of Rs. 948 and entitling the thekadars to make collection of rents from tenants. The defendants claimed a deduction on account of remissions of rent which had been ordered. The Assistant Collector rejected the plaintiffs' contention that remissions could not be set off under the terms of the thekanama, made a deduction of Rs. 908-8-3 on that account in the rent for the years in suit, and allowing for Rs. 105 as remission in revenue, decreed the suit in part. On appeal, the District Judge rejected the contention that the scale of remission of rent was excessive and upheld the first Court's decree.

On 26th September, 1935, the landholders appealed to the High Court and in their grounds Nos. 2, 3 and 6 urged that it had not been shown that remissions in revenue and rents were made under S. 73, Agra Tenancy Act (Act III of 1926), and that the decision of the Assistant Collector was not final under S. 74 of that Act, which had been misconstrued. Another suit, which had been filed by Muhammad Abdul Qaiyum, a landholder, in 1935, against the Secretary of State, for a declaration that orders for remission of rents previously made were not legally authorized and for injunctions and damages, came up in appeal before the High Court and was disposed of on 13th May, 1937 : *Muhammad Abdul Qaiyum* v. *Secretary of State* (1). The High Court held that the remissions, not being in accordance with S. 73, Agra Tenancy Act, were *ultra vires* and illegal, and S. 74 of that Act was not a bar to that suit ; but the suit was dismissed on the ground that the then plaintiff should have sued his tenants ignoring the remissions. While the appeal in the present case was pending in the High Court, the impugned Act, viz., the U. P. Regularization of Remissions Act (Act XIV of 1938) came into force on 24th September, 1938. The appeal came up before a Bench of two Judges who allowed time to the U. P. Advocate-General to consult his Government whether they would like to be heard on the question of the *ultra vires* nature of the impugned Act. Later the question of law whether Act XIV of 1938, was or was not *intra vires* the Legislature, was referred to a Full Bench of three Judges for an authoritative pronouncement. Before the Full Bench the Advocate-General was allowed to be heard on behalf of the Government. Although there were differences of opinion on some of the points raised in the case, all the three learned Judges

(1) I. L. R. 1938 All. 114.

ultimately came to the conclusion that the Act was *ultra vires* the Legislature. The case then went back to the Division Bench. On 8th April 1940, an application was presented on behalf of the United Provinces Government praying that the Government be formally impleaded as a party to the case. The application came up for disposal on 9th April 1940. The Court ordered, "This application is not opposed. Let the United Provinces Government be made a party to the appeal." On 12th April 1940, the Division Bench, accepting the opinion of the Full Bench, allowed the appeal and decreed the claim to the extent of the remissions. On the same date the High Court granted the required certficate under S. 205 (1), Government of India Act. The appeal was finally admitted on 18th June 1940.

Preliminary objection—Mr. Pearey Lal Banerji has raised a preliminary objection to the hearing of the appeal filed by the United Provinces. The statement in the order of the High Court that the application was not opposed and the fixing of a date with consent, implied that some Advocate for the plaintiffs-appellants was present and did not think it fit to oppose the application. There is no affidavit before us to show that both of the appellants' Advocates were absent, or to show that the Advocate who was present had no authority to accept notice. They admittedly appeared at the next hearing. It is however urged that their acquiescence would at best amount to an admission on a point of law that an application for impleading the United Provinces Government was not improper, and so there should be no estoppel against the objection being considered on its merits here.

Section 107 (2), Civil P. C., confers on an appellate Court the same power and directs it to perform, as nearly as may be, the same duties as are conferred on Courts of original jurisdiction. Courts of original jurisdiction have under O. 1, R. 10 (2), Civil Procedure Code, power to order that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved, be added. A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication. In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all, as a proper decree can certainly be passed in their absence. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public and the Provincial Government would be indirectly interested in such an adjudication. In the present case, the Government were

interested to this further extent that the effect of the High Court's ruling would be to nullify certain orders, previously issued by the Government, the enforceability of which was indirectly attempted by the impugned Act. Apparently, the defendants were too poor to think of preferring an appeal to the Federal Court; and the High Court thought that it would not only be convenient but quite fair to make the U. P. Government a respondent to enable it to secure a more authoritative pronouncement. As the Act was passed during the pendency of the High Court appeal, there was no earlier occasion on which the Government could have been impleaded. It is contended before us that the powers of an appellate Court are restricted within the limits imposed by O. 41, R. 20, and that the same restriction is imposed on a Court hearing a second appeal under O. 42, Civil Procedure Code. That rule no doubt permits of making a person respondent, who was a party to the suit in the original Court, and who has not been made a party to the appeal, but is interested in the result of the appeal. Obviously, this rule would not apply to the present case. But the language of the rule does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by S. 151, Civil Procedure Code.

The Allahabad High Court in *Mt. Jaimala Kunwar* v. *Collector of Saharanpur* (1) referred to some cases where it had been held that there is also an inherent jurisdiction to add a new party even outside O. 41, R. 20. There is nothing in *Shiam Lal* v. *Dhanpat Rai* (2) which in any way conflicts with this. Unfortunately, the headnote of that case is incomplete. It was obviously not intended to lay down that the appelate Court has no power to implead a person who was no party to the original suit at all. All that was said was that there was no such power under O. 41, R. 20, Civil Procedure Code. It was pointed out that S. 107, Civil Procedure Code, gives an appellate Court powers, generally speaking, of the trial Court. In that case the District Judge had impleaded a new person in the appeal and then set aside the decree of the first Court and "remanded the case for retrial." It was pointed out by the High Court that the proper procedure was to remand the case to the first Court with the direction to implead that person and then to proceed to dispose of the case. It would then have been possible for this new party to file his written statement upon which the Court would be in a position to consider whether there should be a trial *de novo* on all the issues or whether only some of the issues should be retried. The order of the District Judge for the trial *de novo*, before knowing what pleas the new party would take, was considered wrong. It was therefore suggested that

(1) 55 All. 825 at p. 832. (2) A.I.R. 1925 All. 768.

the more appropriate course should be to direct the Court below to implead him and give him an opportunity to file a written statement. In the present case the impleading of the U. P. Government necessitated no retrial. *Pachkauri* v. *Ram Khilawan* (1) was a peculiar case where a *pro forma* defendant, who had benefited under the first Court's decree, was not impleaded in the first appeal by the principal defendants and was sought to be impleaded in the second appeal by the same defendants long after limitation had expired. The High Court naturally declined to implead him. The earlier cases referred to therein were under the previous Code. I, therefore, find it difficult to hold that the High Court had no jurisdiction at all to implead the United Provinces Government as a party to the appeal, particularly when no objection was taken on behalf of the plaintiffs on that occasion. If there were no such jurisdiction at all, then the Provincial Government cannot appeal.

Really, the question before us is not whether the United Provinces Government were rightly impleaded. As regards that point, I myself may prefer a different course. The only question that now remains is whether the appeal itself is incompetent on the ground that the High Court erred (assuming that it did) in impleading the United Provinces Government. If the discretion was wrongly exercised, that would be no ground for holding that the appeal itself does not lie. S. 205 (2), Government of India Act, lays down that where the certificate under Sub-S. (1) has been given (as it has been done in the present case) "any party in the case" may appeal to the Federal Court, on the ground that any such (constitutional) question, as aforesaid, has been wrongly decided. This was not like a case where an Advocate General may be allowed to intervene merely to present before the Court the point of view of his Government, if such a duty is assigned to him by the Governor under S. 55 (2) of the Act. In such a case, he would have no independent right of appeal. In India we have a specific provision in S. 176 (1) under which a Provincial Government can be sued and therefore made a party by the name of the province. Here the High Court by an express order brought the United Provinces Government on the record and then made them a party to the appeal, and indeed it did so with the idea that that would give to the United Provinces Government a right to appeal to the Federal Court. It cannot now be said that the United Provinces Government were not "any party" in the appeal. S. 205 does not say any party "directly aggrieved by the judgment, decree or the final order," much less "directly aggrieved by the decree actually passed." In the absence of any such restriction in S. 205 and in view of the fact that an appeal lies even on a constitutional question alone without raising any

(1) 37 All. 57.

other ground, I am unable to hold that the United Provinces Government who were a party to the appeal in the High Court have no right of appeal at all. Whether, if we allow the appeal we should direct the High Court to exercise powers similar to that given by O. 41, R. 33, Civil Procedure Code, so as to vary the decree, would be another matter. Several objections were taken to the validity of the impugned Act, XIV of 1938. These may be classified under three heads ;

(1) The objection, which has been accepted by all the three learned Judges, is that the Act is void as it offends against S. 292, Government of India Act. (2) The objection, which has been accepted by one of the learned Judges and not the other two, is that the Act is invalid because it is not with respect to any of the matters enumerated in List II, entries 2 and 21, or List III, entry 4, relied upon by the United Provinces. (3) The objections, which have been rejected by all the three learned Judges, are that ; (a) the Act is void as it offends against S. 299, Government of India Act; and (b) it is void because it is repugnant to the existing S. 9, Civil Procedure Code.

The respondents have pressed all these before us. The last two can be disposed of summarily.

Section 299 of the Act.—The objection taken under S. 299 (3) of the Act that previous sanction of the Governor had not been obtained is completely met by S. 109 (2), as assent was later given to it.

Section 9, Civil Procedure Code.—Similarly, the objection that the Act bars a civil remedy and therefore conflicts with S. 9, Civil Procedure Code, has no force. In the first place, even if there were repugnancy, the Act would under S. 107 (1) be void only to the extent of the repugnancy. S. 9, therefore, cannot stand in the way of its applicability to a revenue case. In the second place, S. 9 itself contains an exception in favour of suits of which cognizance is either expressly or impliedly barred. S. 4, Civil Procedure Code, also contains a saving clause. Not being repugnant to any of the provisions of the Code, the impugned Act does not fall under entries 4 and 15 of List III.

Section 292 of the Act.—S. 292, Government of India Act, contains a saving clause for the continuance of the existing laws.

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

The High Court has laid a great emphasis on the use of the expressions "……shall continue in force…… until altered or repealed or amended." Iqbal Ahmad J. has thought that this section

is more than a mere saving or preserving section. Its effect is not merely to declare that the repeal will not affect the validity of the existing laws, but it proceeds further and enjoins that all the laws shall continue in force until altered, repealed or amended. This is thought to imply that the alteration, repeal or amendment of any previously existing law cannot be made with a retrospective effect at all. It is suggested that the word "until" puts a time limit on the power of the Legislatures. As regards the plea that the provisions of S. 2 of the impugned Act should be upheld so far as they relate to the orders passed after the passing of the Act, it has been held that the two portions cannot be separated. Bajpai J. also concurred in holding that S. 292 is mandatory and that the law would continue in force until altered,etc., and that as the impugned Act had attempted to do something indirectly which it could not do directly, this cannot be countenanced. The learned Judge further held that what S. 292 says has to be preserved in terms of the section only, and not in the manner adopted by the U. P. Legislature. Ismail J. held that as the Agra Tenancy Act (III of 1926), had been neither repealed nor altered at the time the Act was passed, the Legislature was not competent to nullify the provisions of the subsisting Act. The Legislature could not take away the rights conferred by the old Act without repealing or altering the Act.

Although there can be no doubt that the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the language of S. 292 is certainly more emphatic than would have been ordinarily necessary. S. 130, Government of India Act, 1919, was a similar section couched in a simple language : "This repeal shall not affect the validity of any law, etc., etc.," There is a saving provision in S. 129, British North America Act, 1867, but the words there are :

"All laws in force in Canada, Nova Scotia or New Brunswick at the Union .....shall continue in Ontario, Quebec, Nova Scotia or New Brunswick, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered....."

Similarly, S. 108, Commonwealth of Australia Constitution Act, 1900, though embodying a somewhat similar provision, has a different phraseology.

"Every law.....shall, subject to this Constitution, continue in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have.....powers of alteration and of repeal, etc., etc."

No doubt in Canada and Australia retrospective legislation has been upheld. But in the constitutions of these Dominions the language, as already quoted, is not indentical with that used in S. 292 of the Indian Act. The corresponding S. 135, Union of South Africa

Act, 1909, is, however, similar in phraseology to S. 292, Government of India Act. It says:

"Subject to the provisions of this Act, all laws in force.....shall continue in force.....until repealed or amended, etc., etc."

In spite of the departure from the phraseology adopted in the constitutions of Canada and Australia, there appear to be no adequate historical grounds for singling out the Union of South Africa for a different treatment. There have certainly been several Acts passed by the Union Parliament which have a retrospective operation, particularly in the case of Marriage Laws, Act XX of 1913, amending the law in force in the several Provinces relating to marriage by banns, contained S. 2 which applied to marriages solemnized "before or after the commencement of this Act." Similarly S. 2 of Act XVII of 1921 provided that any marriage contracted before the commencement of that Act, which would have been void or voidable by reason of any law repealed by that Act, shall (subject to two conditions) be deemed to be as valid as if duly solemnized after the commencement of that Act. Again, there have been Acts passed in the Union which came into effect by the assent of the Governor-General later than the date from which their operation began. Act XXIX of 1922, relating to the payment of duty upon the estates of deceased persons and in respect of successions to inheritances, is an instance in point. Our attention has not been drawn to any case where the validity of any South African Act, with a retrospective effect, has been challenged. The passing of such Acts merely shows the interpretation put on S. 129 of the Union Act by the South African Legislature and does not take us very far, so long as there is no judicial pronouncement on their validity.

The difference in the language employed in S. 130 of the old Act and S. 292 of the new Act is certainly marked. The former is in a negative form: "Provided that this repeal shall not affect the validity of any law, etc., etc." The latter is in a positive form: "Notwithstanding the repeal...all the law... shall continue in force...until repealed, altered or amended, etc., etc." The former is a mere saving clause, pure and simple, its effect being to make it clear that the mere repeal of the previous Government of India Act shall not *ipso facto* put an end to the other laws previously in force. The latter is a little more than that, inasmuch as it affirmatively continues the other laws until such laws are hereafter altered, repealed or amended. In the former section the word "repeal" related to the Constitutional Acts specified in the Schedule attached. In the latter section "repealed etc.," refer to the other laws which are not repealed etc., by the Government of India Act, 1935, but may thereafter be repealed, etc. The effect certainly is that until altered, repealed or amended, such other laws do continue in force. The High Court was apparently impressed by the obvious departure from the phraseology of the old

S. 130, as such a deliberate change is not ordinarily made without a special significance.

There is no doubt that the word "until" does ordinarily connote a point of time. 'Until altered, repealed or amended' is equivalent to saying 'until the alteration, repealment or amendment.' This can have two possible meanings—first, until the date from which the alteration, repealment or amendment takes place, and second, the date on which the Act altering or repealing or amending the previous law is actually passed, or rather when it comes into force. If the Act is retrospective, it would obviously operate from a date earlier than that on which it comes into force. If the view taken in the High Court were to prevail, then no legislation altering, repealing or amending the law which was in force when the Government of India Act was passed, no matter how long afterwards it comes to be passed, can have any retrospective provision so as to affect any transactions prior in time to the date when such Act is actually passed. It would follow that not only the Provincial Legislature but also the Central Legislature would be debarred from giving any retrospective effect whatsoever to any Act by which not only a previous Act but any other law is altered, repealed or amended. This is a drastic consequence which, it is difficult to believe, could have been contemplated. As long ago as 1878, their Lordships of the Privy Council in *Reg* v. *Burah* (1) when speaking of the powers of the Indian Legislature remarked :

"When acting within these 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."

Even though we are not concerned with the wisdom of the Legislature, one cannot help saying that there appears to be no adequate reason why the power to give retrospective effect to a new legislation should be curtailed, limited or minimized, particularly when S. 292 applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. The suggestion made on behalf of the repondents that the idea was not to permit retrospective legislation having effect from a date earlier than the coming into force of the Government of India Act when legislative powers of the Centre and the Provinces were separately allocated cannot be accepted, because the effect would be not only to stop at the year 1937, but to prohibit retrospective legislation right up to the date of the passing of any new Act, no matter how long after 1937 that may happen. If there are two possible interpretations, it is the duty of a Court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results. It must, therefore,

(1) (1878) 3 A.C. 889.

be held that there is nothing in S. 292, Government of India Act, which debars the Central or a Provincial Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

One must not, however, overlook the important provision that the previously existing law must in any case continue in force, until altered, repealed or amended. Unless, therefore, there is an Act which actually alters, repeals, or amends it, that law must, in view of the provisions of S. 292, continue in force and cannot be considered as non-existent. Those provisions not merely preserve such laws but keep them in force until actually altered, repealed or amended.

But it is not absolutely necessary that a statute must be repealed by express language, e. g., shown as repealed in an attached schedule. Repeal, and certainly alteration or amendment, can be effected by necessary implication also. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to have been impliedly repealed or amended, as the last expression of the will of the Legislature must always prevail. But they must really be irreconcilable with each other. Two negative enactments need not, however, be contradictory. An earlier statute expressed in negative language may be included in or absorbed by a later statute expressed in a similar negative language, but with a wider scope. The former in such a case would not be repealed, nor even necessarily altered by the latter, as they both can stand together, but it can be said to have been amended.

The impugned Act did not in reality repeal, alter or amend the provisions of the law contained in S. 73, Agra Tenancy Act. Indeed, that was repealed subsequently by Act XVII of 1939. It therefore stood intact in December 1939, by virtue of the provisions of S. 292, Government of India Act. What the impugned Act attempted to do was to widen the scope of S. 74 (1) without embodying anything like the provisions of S. 74 (2), which would have destroyed the right to sue. S. 74 (1) of the old U.P. Act prevented any order, passed under S. 73 from being questioned. The impugned Act attempts to prohibit any order for remission from being questioned, without saying any order, "under" or "in accordance with ' S. 73. It follows that without altering the substantive law so as to give a Collector power to order remission of rent exceeding the remission of revenue in proportion, it has merely created a further bar which completely restricts a civil right to challenge it under S. 9, Civil Procedure Code. Whether valid or invalid on any other ground, it cannot be said to offend against the provisions of S. 292, Government of India Act.

List II, Nos. 2 and 21.—While Iqbal Ahmad, J., has held that the subject-matter of the impugned Act does not fall within any of the

entries in List II or List III of Sch. 7 of the Act, both Bajpai and Ismail, JJ. have held that it falls under these two entries.

It is true that the three lists even if taken together may not prove to be absolutely exhaustive. As legislation can cover a very wide range, it is quite possible to conceive of cases which are not comprised in any of the lists. It was with the consciousness of this possibility that provision as to residual power of legislation was made in S. 104 which assumes that there may be a matter with respect to which a law may be enacted, which is not enumerated in the lists of Sch. 7. But the lists are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them at all.

Entry No. 21 of List II includes 'land, with rights therein, land tenures, including the relation of landlord and tenant, and the collection of rents,' besides other categories. This itself has a wide scope. If the impugned Act were in pith and substance one for remission of rent, it would be impossible to exclude it from this entry. Entry No. 2 of List II includes jurisdiction and powers of all Courts, with respect to any of the matters in that list. Accordingly, entries Nos. 2 and 21 read together would cover any restriction that may be imposed on the jurisdiction and powers of Courts, with respect to land, land tenures, relation of landlord and tenant, and collection of rents. As there is no category in List I or List III which is similar to entry No. 21 of List II, the latter must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision. I am not prepared to hold that entry No. 21 must necessarily be confined to substantive provisions and not to procedural law. Methods of collection of rent may be a matter of procedure and yet fall under this head. Provisions as to registration of leases, functions of special officers in fixing rents and giving of certain notices, may well be procedural and yet fall within this entry. These are but a few instances. On the other hand, legislation, which affects the jurisdiction and powers of civil or revenue Courts, would come under entry No. 2. Legislation affecting procedure in rent and revenue Courts would also fall under the same entry. But mere procedure in civil Courts will be outside those entries, and can only come under entry No. 4 of List III. The result is that if the subject-matter is within entry No. 21, then restriction on jurisdiction and powers of civil and revenue Courts with respect to it would also be within the authority of Provincial Legislatures. If, however, the matter itself is not within List II, then it cannot be brought under entry No. 2 of that List, which in express terms refers only to matters in that List.

Tenancy Law.—The defendants were thekadars, holding under a registered lease of proprietary rights, (including a right to

receive rents and profits), from the landholders for a term of years on a fixed annual rent. The word tenant in the Agra Tenancy Act excludes a thekadar, though certain specified provisions relating to tenants, including Ss. 73 and 74, also apply to them. (See chap. 13, Agra Tenancy Act, 1926). Outside that Act the United Provinces Government had no special power to interfere with the agreement between a landholder and his thekadar. The landholder would be entitled to enforce the liability of the thekadar to pay the rent. There are provisions for enhancement and abatement of rent, subject to certain limitations but with them the Government were not concerned. There was no power given to the Government themselves to order remission of rent in individual cases. Under S. 72, if remission of rent were granted by a Court on account of draught, hail, deposit of sand or other like calamity, then proportionate remission of revenue was to be ordered by the revenue authorities subsequently. S. 73 (1) was intended to cover the converse case. When for any cause the Local Government, or any authority empowered by it, had in the first instance "remitted or suspended" whole or part of revenue, a Collector, or if so empowered by Government, a first class Assistant Collector, might order the remission or suspension of rents to an amount "which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which the payment has been so remitted or suspended." Under Sub-S. (2), where revenue has been wholly or partly "released, compounded for or redeemed," remission or suspension of rent could be ordered by such authority and in accordance with such scale as the Local Government may by rule direct. This sub-section did not apply to the case where revenue had been "remitted or suspended." Sub-S. (3) made this provision applicable to a thekadar. S. 74 (1) provided that an order "under Sub-S. (1) or Sub-S. (2) of S. 73" shall not be questioned in any civil or revenue Court. Sub-S. (2) provided that a suit shall not lie for the recovery of any rent of which the payment has been remitted or suspended "in accordance with the provisions of S. 73." As already mentioned, the High Court in *Mahammad Abdul Qaiyum* v. *Secretary of State* (1) interpreted these two sections as meaning that a civil suit would be barred only if the order were in accordance with S. 73, that is to say, if the remission ordered by the Collector were in proportion to the remission of the revenue. It further held that the aggrieved landholder could sue for arrears of rent ignoring the order of remission, or pay revenue under protest and sue the Government for refund under S. 183, U. P. Land Revenue Act (III of 1901).

The impugned Act—If the Provincial Legislature felt that the sections had been wrongly interpreted by the High Court, it was open to it to pass a declaratory or explanatory Act, to make its

(1) I.L.R. (1938) All. 114.

intention clear. Such a legislation would, of course, have been retrospective in nature, and would have nullified the effect of the High Court's ruling. No such course was followed and instead the impugned Act (U. P. Act XIV of 1938) was passed. The Preamble stated its object to be to " regularize " the remissions of rent made " before " the passing of that Act, which meant that certain orders already passed, which might have been irregular, were to be made regular by this Act. But in fact the provisions of S. 2 on the one hand fall short of the object by not attempting to validate any invalid orders that might have been passed before, and on the other hand they go beyond the Preamble by making orders passed even after the Act equally unquestionable. They are in the following terms:

"Notwithstanding anything in the Agra Tenancy Act, 1926.....where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court."

There are two provisos, the first limiting the amount to what may be ordered in the agricultural year in which the Act comes into force, and the other to the period of the settlement. The Act was to come into force when notified.

Interpretation.—The intention of the Legislature has to be gathered from the language actually employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of Courts of law, express and unambiguous words are necessary. No loopholes should be left for escape. The order of remission dealt with by the U. P. Act is not one necessarily within the four corners of S. 73, nor is there any specific reference to that section. The language actually used can suggest that the section was intended to prevent the order of the Provincial Government, or any authority empowered by it in that behalf, from being questioned. In the main section, the word order is used only when referring to "the order of the Provincial Government or any authority empowered by it in that behalf. " This is followed immediately by the words " such order etc." The word "such" ordinarily means 'aforementioned'. The normal construction of the section would then imply that such order of the Provincial Government, or any authority empowered by it in that behalf, shall not be called in question.

A reference to S. 73, Sub-S. (2) shows that where revenue has been "released, compounded for or redeemed" [and not 'remitted' or 'suspended' as under Sub-S. (1)] the Local Government can nominate an authority and make a rule fixing a scale according to which remission or suspension of rent may be ordered. The Government had no power whatsoever to fix any scale for remission or suspension of rent where revenue had been "remitted or suspended"

under Sub-S. (1). Nor can it itself make any order of remissions; it is the Collector who does so in each case under the statutory authority conferred on him by Sub-S. (1). The Government can empower an Assistant Collector of the first class to act instead of the Collector, but the order of remission made by him also will not be "under the order of the Provincial Government" but under S. 73 (1). It is probable that in issuing the notification containing a scale of remissions the distinction between the two sub-sections was overlooked. At any rate for over seven years no attempt was made to approach the Legislature to validate such action. Similarly, when the bill was introduced, it was assumed that the Provincial Government itself could order remissions, and it was on that assumption that the Legislature proceeded to enact that such an order should not be questioned. The words "under the order of the Provincial Government" have no meaning so far as S. 73 (1) is concerned. On this interpretation, the section would be wholly ineffectual, because in a suit for arrears of rent the landholder is not challenging the scale which the local Government was pleased to lay down, amounting at best to instructions to Collectors, but is challenging the order of the Collector or the Assistant Collector, passed under statutory authority, on the ground that it was not in accordance with S. 73, his suit not being barred under S. 74.

A majority of the learned Judges of the High Court have expressed the opinion that the real object of the U. P. Act was not what it purports to suggest. Iqbal Ahmad, J., has remarked:

"Here again the substance of the section, apart from its form, is to regularize and validate irregular and invalid orders as to remissions of rent passed by the provincial executive. There is, therefore, no escape from the conclusion that by the impugned Act, validity is given to wholly arbitrary and invalid orders already passed or to be passed in future by the executive authorities."

He has again remarked:

"Now a scrutiny of the impugned Act as a whole leads to the irresistible conclusion that it was designed to, and does in substance, though not in form, validate the invalid orders as to remissions passed by the provincial executive .....In short the impugned Act, though disguised as an enactment regulating procedure, is, in fact and substance, an enactment regularizing illegal executive orders. It is a disguised and colourable legislation intended to serve the purpose indicated above, and this is not permissible."

Bajpai J. has said:

"The Act pretends to deal with procedure only for it attempts to regularize the remissions of rent and says that certain orders of the Provincial Government shall not be called in question in any civil or revenue Court, but this is only a masquerade and the real purport of the Act is to take away the rights of the landlords which were contained in Ss. 73 and 74, Agra Tenancy Act, as interpreted by this Court in *Muhammad Abdul Qaiyum* v. *Secretary of State* (1). I therefore feel inclined to hold that the Act does not deal merely with matters of procedure but deals with substantive rights as well."

(1) I. L. R. 1938 All. 114.

Ismail, J. has not expressed any such opinion.

Past orders—As regards past orders, S. 2 does not contain any substantive provision which would even imply that the orders were in fact valid or were being made valid. Nor is there any mention that the liability of the tenant to pay the rent remitted has ceased, and the right of the landholder to realize it has been extinguished. It merely attempts to create a bar against the question being agitated in a civil or revenue Court. This is quite a different thing from a substantive provision validating any order that might have been passed in contravention of the provisions of S. 73, Agra Tenancy Act. The opening words "Notwithstanding anything in the Agra Tenancy Act, 1926" do not amount to an alteration, repeal or modification of S. 73 of that Act. Indeed, not only was S. 73 not mentioned in this Act as having been repealed by it, but was actually repealed later by Act XVII of 1938, which came into force in December of that year. It is possible to conceive of cases, for example, where the whole rent has been paid with mutual consent, where the landholder would not stand in need of suing for it, so as to be compelled to call in question the order of remission. His right has not been extinguished, only his remedy in a Court of law is barred. The essence of the landholders' grievance is that the Government made them give up their rents in part without in their own turn making compensation to them by giving up a proportionate amount of the revenue. The alleged illegality of the order of remission arises from the circumstances that the Provincial Legislature prevents them from challenging the illegal action of the Government.

Future orders.—The limit to which the past orders of remission had gone was perfectly known. But as regards future orders, the scope of S. 2 is very wide. The Government could up to June 1939 (and later if the notification were delayed), issue any order of remissions that it chose. Such an order would be operative irrespective of the extent of the remission, even up to the remission of the entire rent, irrespective of the period of remission, as it can be continued even up to the expiry of the settlement, and also irrespective of the amount of remission of revenue, even to the extent of there being no remission of revenue at all. If it is a valid Act, it enabled the Provincial Government to issue an order directing Collectors to remit to all the tenants the whole of the rents for the entire province for the remainder of the period of the settlement, while not remitting any revenue at all. This would mean that landholders would be compelled to pay revenue to Government, although they would be prevented from realizing any rents at all from their tenants. For all practical purposes, this would amount to an extinction of the relation of landlord and tenant for the time being. Such a measure is

highly inconceivable, and yet it is not beyond all possibility that a Government, bent on abolishing zamindari rights, may resort to it under the authority of this section. In spite of the confiscatory powers exercised by the Government, no remedy, whatsoever would be open to the aggrieved landholders in any civil or revenue Court to which alone they can have recourse. This section would therefore invest the Provincial Government with full powers to do what they like, no matter to what extent the contract between a landholder and his lessee is disturbed. Such a drastic interference may well infringe the proprietary rights possessed by landholders, and may also in an extreme case amount to a flagrant breach of the agreement entered into by the Government at the time of the settlement for its duration. Of course, no Act can be invalidated on the mere ground that it may possibly be abused; but in order to see in which list it falls, its provisions have to be examined in their full scope.

"*With respect to*"—The crucial point in this appeal is whether this section can be held to be "with respect to" any of the matters mentioned in entry No. 21 of List II, in particular, land, relation of landlord and tenant, and collection of rents. The words "with respect to" are not necessarily the exact equivalent of 'relating to' or 'connected with.' These words may not include a case where the subject of legislation is only remotely related or very indirectly connected with the matters mentioned in the categories. An Act may principally be with respect to some other subject and yet it may incidently relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connexion, would not be sufficient to answer in the affirmative the question whether it is with respect to such subject. It is not enough that it should in its working somehow overreach that subject. It has to be seen whether it appertains to such matters substantially and directly, and not only whether it would in actual operation affect any such matters in an indirect way. Again, a provision of law may be partly in one category and partly outside it. The mere fact that it is partly in that category would not suffice for making it valid if it is *ultra vires* with regard to the other portion. When the question is whether any impugned Act is within any of the three lists, or in none at all, it is the duty of Courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation.

Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in *Russel* v. *Reg* (1),

(1) (1882) 7 A. C. 829.

"the true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subjects to which it really belongs."

In *Attorney-General for Canada* v. *Attorney-General for Ontario* (1) Lord Atkin laid down :

" In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade rights within the province, or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid."

As it was found that the impugned Act was in pith and substance an Insurance Act, affecting the civil rights of employers and employed, it was held to be *ultra vires*. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) Lord Atkin, after pointing out the limitation on the plenary power of the Dominion that Parliament " shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in S. 92," though there would be no objection if there were a genuine attempt to amend the criminal law, remarked :

" In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the Legislature is in pith and substance only interfering with civil rights in the province."

In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3), Lord Atkin after agreeing with the view that the sections said to be severable were in fact incidental and ancillary to the main legislation, remarked :

" As the main legislation is invalid as being in pith and substance an encroachment upon the provincial rights the section referred to must fall with it as being in part merely ancillary to it."

In *Shannon* v. *Lower Mainland Dairy Products Board* (4) Lord Atkin's remark was quoted : " It is well established that you are to look at the ' true nature and character of the legislation,' *Russel* v. *Reg* (5) the pith and substance of the legislation'." See also *In the matter of C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938* (6).

Section 2.—The question raised in *Muhammad Abul Qaiyum* v. *Secretary of State* (7) was not a constitutional one, but merely turned on an interpretation of Ss. 73 and 74 of the old Agra Tenancy Act. Its soundness has not been questioned before us, and I can

(1) (1937) A.C. 355 at p. 367.
(2) (1937) A.C. 368.
(3) (1937) A.C. 377 at p. 389.
(4) (1938) A.C. 708.
(5) (1882) 7 A.C. 829.
(6) (1939) F.C.R. 18 at p. 95 = (1938) 2 F.L.J. 6 at p. 65.
(7) I.L.R. (1938) All. 114.

only assume that the previous order of remission of rent as held therein was *ultra vires* and illegal. Had the previous order of remission of rent been merely irregular, as not being in strict conformity with the existing law, but without any absence of jurisdiction in the authority issuing it, for instance, when some mistake in the calculation of the ratio is made or there has been any other defect of procedure, then S. 2 of the impugned Act would certainly be with respect to "the collection of rents," so far as such orders are concerned, and it would be *intra vires*.

If the order of remission, which the impugned Act attempts to make unquestionable, was in fact wholly *ultra vires* and totally void issued by an authority not at all competent to do so, with a view not only to benefit the tenants but also to protect Government officers against any suit for damages that may be brought on account of their illegal orders, or protect the Government in a suit brought against it under S. 183, U. P. Land Revenue Act, (III of 1926), [assuming that the suggestion made in *Muhammad Abdul Qaiyum* v. *Secretary of State* (1), was correct], then the U. P. Act which merely prevents such an order from being questioned in a civil or revenue Court, would not be so much with respect to "collection of rents," as with respect to "validating void orders." There is a clear distinction between challenging the legality of an order in the sense that for non-compliance with certain provisions of law it is invalid or ineffective, and challenging the authority, power or jurisdiction of the person or body, who issued that order. In the latter case the challenge is much more than merely calling in question the order itself. It is an assertion that the act of that authority or body was itself a nullity and no more binding than the act of a man in the street. If the U. P. Act, which obviously falls short of validating previous illegal and void orders, is principally for preventing illegal orders from being called in question, then it is more substantially with respect to validating such illegal orders than with respect to the matter to which those orders had originally related. In such a case it would not fall solely within the categories "relation of landlord and tenant" or "collection of rent."

Further more, the impugned Act is not confined to the orders of remission previously passed, but goes further and provides that even all future orders of remission, regardless of the fact whether they are or not authorized by any law or are contrary to any existing laws, shall be unquestionable. This is inextricably interwoven into the whole scheme so as not to be separable. The whole purport of the Act is indirectly to invest the Provincial Government with very extensive powers to pass any order of remission which it chooses to do even to the extent of stopping all payments of rents. It thus con-

(1) I.L.R. 1938 All. 114.

fers in an indirect way a wide power on the Government or authority empowered by it to pass in the future even arbitrary orders for remission, with or without authority, in utter disregard of the existing legislation. If a Legislature cannot itself enact a wholesale deprivation of legal rights, then, it cannot by enactment adopt the device of appointing an authority invested with such powers. What the Legislature cannot do directly, it cannot do indirectly: *Great West Saddlery Co.* v. *Reg* (1). But if it can so enact then the possibility of the power being abused in future cannot invalidate the Act: *See In the matter of C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938* (2). It seems to me that S. 2 goes beyond the subject of remission of rents. In pith and substance, it is an Act not only with respect to "the relation of landlord and tenant" or the "collection of rents," but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands. But the category of "land" in entry No. 21 of List II includes rights in and over land, and is also within the exclusive authority of the Provincial Legislature. Even if by any chance the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39, and be still in List II. We are not concerned with any unfairness or injustice of the legislation, nor with any injury that may be caused to private rights so long as there is authority to pass it. The only protection available, even though of a limited character, is that contained in S. 299 (3), Government of India Act, requiring a previous sanction of the Governor, and if that is gone then a representation that assent should be withheld. It would be too late to object afterwards. The want of a previous sanction of the Governor in the present case is cured by the assent given to the Act subsequently. In view of the fresh tenancy legislation that came into effect in the United Provinces later, the present case is probably the last pending case in which this difficult point has to be decided.

Pending action.—The learned Advocate for the plaintiffs has in the last resort sought to support the decree of the High Court on the ground that the impugned Act did not apply to the pending action at all. Unfortunately, this point was not raised or argued before the High Court, nor is this a constitutional question. But, if we overrule the High Court, we cannot direct it to modify its decree in the light of that Act without disposing of this plea. In that case we must either ask the High Court to do so, or decide the point ourselves.

Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very

(1) (1921) 2 A.C. 91. (2) (1939) F. C. R. 18.

strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognized rule that statutes should, as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly and not given a liberal interpretation.

In *Moon* v. *Durden* (1) a new Act (Gaming Act, 1845), which was passed while an action was pending, was held not to be retrospective in its effect so as to defeat that action, even though S. 18 had said, "no suit shall be brought or maintained for recovering money etc." The alternative "or maintained" would ordinarily have been held to be applicable to a pending suit. Nevertheless, Parke, B. remarked :

"It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation."

Similarly, in *Smithies* v. *National Union of Operative Plasterers* (2) S. 4 Trade Disputes Act, 1906, was interpreted as not preventing a Court from disposing of an action begun before the passing of that Act, although S. 4 had enacted : "an action for tort against a trade union shall not be entertained by any Court." Again in *Beadling* v. *Goll* (3), the Gaming Act, 1922, which had repealed a section of an earlier Gaming Act, was held by the Court of Appeal not to operate to put an end to the pending action, even though it had enacted that "no action for the recovery of money under the said section shall be entertained by any Court." In *Henshall* v. *Porter* (4) the Court went further and held that the Gaming Act of 1922 did not prevent the bringing of an action under the repealed section of the older Act, even after the date when the Repealing Act came into force in respect of a cause of action which had arisen before that date. In *Thistleton* v. *Frewer* (5) followed in subsequent cases, it was held that S. 32, Medical Act, 1858, (C. 90), did not apply to an action for medical services begun before that date, but tried after it, although the section had enacted that no person should after 1st January 1859, recover any charge for medical treatment unless he shall prove at the trial that he was on the Medical Register. The case in *Colonial Sugar Refining Co.* v. *Irving*. (6) was pending when the Commonwealth of Australia Constitution Act,

(1) (1848) 2 Ex. 22.
(2) (1909) 1 K. B. 310.
(3) (1922) 39 T. L. R. 128.
(4) (1923) 2 K. B. 193.
(5) (1862) 31 L. J. Ex. 230.
(6) (190)5 A. C. 369.

1900, came into force, under S. 73 of which a decision of a Court of any State, from which an appeal would have previously lain to the Queen in Council, became appealable only to the High Court. At p. 372, Lord Macnaghten, while considering whether an appeal lay to the Privy Council, laid down the general principles applicable to the retrospective character of a legislation and remarked :

"On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment."

It was further remarked :

"In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

This view was of course followed by a Full Bench of the Allahabad High Court in *Ram Singha* v. *Shankar Dayal* (1). In *Suleman Quadir* v. *Salimullah Bahadur* (2), their Lordships had to consider the effect of the Mussalman Wakf Validating Act, (VI of 1913) of which the Preamble had expressly stated :

"Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith.....; and whereas it is expedient to remove such doubts."

Section 3 said : "It shall be lawful.....to create a wakf, etc." ; and S. 4 said : "No such wakf shall be deemed to be invalid etc." Their Lordships held that the Act could not be construed as validating deeds executed before its date. In this case the Act had been passed even before the suit had commenced. No doubt in *Shyamakant Lal* v. *Rambhajan Singh* (3), this Court applied a new Bihar Money-lenders Act (VII of 1939) which came into force after the filing of the appeal. But S. 13 expressly said: "When an application is made before or after the commencement of this Act, etc." Since then S. 7 of the new Act has been consistently applied in all the Bihar cases, even in suits pending in appeal. But here again S. 7 contains the words,

"in any suit brought by a money-lender.....before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit."

which in express terms refer to a pending suit. In *Mukherjee* v. *Mst. Ram Ratan Kuer* (4), the new Bihar Act had express words to the effect that all transactions from 1910 shall be deemed to be valid, which if applicable to the appeal would take away the appellant's

(1) 50 All. 965 (F.B.).
(2) 49 Cal. 820.
(3) 1939 F.C.R. 193.
(4) 63 I. A. 47=43 L.W. 336 (P.C.)

right altogether. Their Lordships held that in view of that enactment the appeal should not be allowed. In *Quilter* v. *Mapleson* (1), a new Act had come into force, S. 14 of which made the section applicable to old leases as well, and which clearly deprived the landlord of a right to claim forfeiture. In that case the landlord had not till then re-entered. The Court of appeal applied the new Act on the ground that appeals had the character of re-hearing and the appellate Court could make such order as ought to be made according to the state of things at that time.

As already mentioned, the landholders in the present case ignoring the order of remission had claimed the full amount of the arrears of rent from the very beginning. Even in the second appeal before the High Court, they had challenged the order of remissions of rent in grounds Nos. 2, 3 and 6 of their memorandum of appeal, several years before the imgugned Act came into force. They had already called the previous order in question, and that plea was already before the High Court for consideration. The Legislature was presumably aware of the previous decision in *Muhammad Abdul Qaiyum* v. *Secretary of State* (2) and must also have been aware that numerous other suits for arrears of rent must be pending. And yet no express words were put in the impugned Act to show that it should apply to all actions pending in appeal. Further the provisions that no such order shall be called in question has a certain amount of ambiguity in it and leaves it doubtful whether only the parties are prevented from questioning the order or even the Court is debarred from ignoring it as having been issued by an unauthorized body, and enforcing the law that has not been repealed or amended by the U. P. Act. Of course, no such bar would exist against the Federal Court ; but in declaring what decree should be passed by the High Court it cannot ignore such a bar if it exists. In view of the trend of judicial decisions already referred to, I am of the opinion that the impugned Act was not applicable to the appeal pending before the High Court. The decree of the High Court must therefore stand and this appeal should be dismissed.

Varadachariar J.—The constitutional question arising for decision in this appeal relates to the validity of the Regularisation of Remissions Act(XIV of 1938) passed by the Legislature of the United Provinces. A Full Bench of the Allahabad High Court held the Act to be *ultra vires* that Legislature. All the three learned Judges who constituted the Full Bench were of the opinion that as the Act attempted to legislate with respect to a period anterior to the date of its enactment, a period during which another valid Act was in force, it contravened the provisions of S. 292, Constitution Act. One of the learned Judges (Iqbal Ahmad, J.) based his conclusion on

(1) (1882) 9 Q. B. D. 672. (2) I. L. R. 1938 All. 114.

an additional ground *viz.*, that the impugned legislation was not one made "with respect to any of the matters enumerated in List II" of Sch. 7 to the Constitution Act nor even one with respect to one of those enumerated in the List III. The circumstances that led up to the impugned legislation and to the attack on its legality have been stated in the judgments just delivered. Reference has also there been made to the stage at which the Government of the United Provinces came to be impleaded as a party to this litigation and to the fact that this appeal has been preferred not by the original defendant but by the Government of the United Provinces.

At the hearing of this appeal, the learned Counsel for the plaintiffs-respondents took a preliminary objection to the maintainability of the appeal by the Government of the United Provinces. He contended that there was no decree in this case against that Government, that the Government was not aggrieved or affected by the decree of the High Court and that it accordingly had no *locus standi* to prefer the appeal. Though S. 205, Constitution Act, provides in general terms that "any party" in the case may appeal to the Federal Court the learned Counsel maintained that these general words must be limited in the manner in which S. 96, Civil Procedure Code, has been limited, and he argued that the mere fact that the United Provinces Government had been formally impleaded as a party in the second appeal would not give it a right to appeal to this Court. He further said that where a person who ought not to have been impleaded had been improperly added as a party by the Court, such person should not be regarded as a party competent to prefer an appeal and he insisted that on the admitted facts of the case the order of the High Court impleading the United Provinces Government as a party to the second appeal should be held to be unwarranted and without jurisdiction. In support of his contention that the United Provinces Government should not have been added as a party, he relied on the observations of a learned Judge of the Madras High Court in *Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1), and of the Court of appeal in England in *Moser* v. *Morsden* (2). He invited attention to the fact that even the allegations made in support of the petition filed in the High Court to join the United Provinces Government as a party did not attempt to bring the case within O. 1, R. 10, Civil Procedure Code., or suggest that the Government was at least a "proper" (if not "necessary") party to the proceeding and he contended that the alleged desire or intention of the Government to take the case on appeal to the Federal Court which was all that was set out in the petition was no ground for impleading it as a party. The learned Advocate-

(1) 50 Mad. 34=24 L. W. 738. (2) (1892) 1 Ch 487.

General of the United Provinces relied on the circumstance that his petition was not opposed before the High Court ; to this, the learned Counsel for the plaintiffs replied that even if the absence of opposition should be held to amount to consent, such consent could not cure a defect of jurisdiction and that such consent would not in any event give the United Provinces Government a right of appeal which it did not otherwise possess.

I am free to admit the force of some of these contentions. The circumstances that some of the observations in *Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (1) have been doubted by another learned Judge of the same Court in *Secretary of State* v. *Murugesa Mudaliar*(2), does not seem to me to carry Dr. Asthana very far. Again it is true that in *Mt. Jaimala Kunwar* v. *Saharanpur* (3) the Court observed that the power to add parties had not always been limited to cases falling within the language of O. 1, R. 10, Civil Procedure Code, but an examination of the facts of that case and of the decisions referred to in that judgment will show that in these cases, the person added was not really a third party but one who on some recognized principle would be bound by the result of the litigation. In *Moser* v. *Morsden* (4), the Court of appeal (in reversal of the trial Court's order) dismissed the application of the third party, even while recognizing that that party might be "indirectly" affected by the result of the case. The allegation made in support of the petition in that case was that the defendant on record "will not contest the case properly" and yet Kay, L. J. was content to answer "we cannot help that." It however appears to me that in a case like the present it will not be right to regard the State as standing for all purposes on the same footing as a private third party. Its character as the guardian of the public interests cannot be ignored and it will not be right to limit its interest in a litigation strictly to cases in which its pecuniary or proprietary interests or the interests of the public revenue are involved.

In most of the Indian decisions bearing on the question of joinder of parties, the discussion has had to proceed within the limits imposed by the language of the relevant statutory provisions which were in the main intended to deal with private parties. The position of the King as *parens patriae* has long been recognized in this country ; but the extent to which the King's law officer is entitled to initiate or intervene in proceedings in Courts "to see that justice is done to every part of the King's subjects" (as it is expressed in the old English authorities) has never been clearly or sufficiently defined. As early as in 53 Geo. III, Chap. 155, provision

(1) 50 Mad. 34=24 L.W. 738.
(2) A.I.R. 1929 Mad. 443=29 L.W. 753.
(3) 55 All. 825.
(4) (1892) 1 Ch. 487.

was made authorizing the Advocate-General in this country to take such proceedings as His Majesty's Attorney-General may take in the Courts of Equity in England (S. 111). This section was at one time interpreted by the Supreme Court in Madras as authorizing the Advocate-General to represent the Crown only in cases involving the pecuniary interests of the Crown. But this narrow interpretation was not endorsed by the Judicial Committee : *see Attorney-General* v. *Brodie* (1) a case relating to a charity. The section was reproduced in successive Government of India Acts up to 1919 (see S. 114, Government of India Act of 1919) ; but in the Act of 1935 neither S. 16 nor S. 55 follows the same lines. Barring Ss. 91 and 92, Civil Procedure Code of 1908, relating to public nuisances and charities and special provisions like S. 26, Patents and Designs Act, 1911, and S. 39, Lunacy Act, 1912, there are at present no specific provisions in the Indian statute book empowering the Advocate-General to institute or intervene in any proceedings in the Civil Courts. And it cannot even be said that a well-defined course of practice has grown up as to the cases or circumstances in which the Advocate-General is entitled to intervene or to be impleaded as a party, apart from his representing the Crown or the Secretary of State in suits in which either the Crown or the Secretary of State happens to be a party. Even in England, the distinction between cases in which the Attorney-General figures as a party and cases in which he only intervenes or is merely heard does not appear to be very clearly marked.

The Indian Procedure Code does not contemplate the Advocate-General " intervening " without himself or the Secretary of State being a party to the suit. The result is that even in proceedings similar to those in which the Attorney-General will merely intervene, according to the English or the Dominion practice, the same result has to be attained in this country by impleading the Government as a party. The new Constitution Act (taken with the adaptation of S. 79, Civil Procedure Code) has introduced a further complication as a result of the provision that in suits by or against the Crown, the Governor-General should be named as the plaintiff or the defendant in certain cases, that in certain other cases the Provinces should be so named, and that in a third group of cases the Secretary of State's name should be stated. But in whatever form the cause title may run, the theory is that the Crown is the party. It may be added that even when the Attorney-General figures as the party in England the theory is that the Crown is a party to the litigation through him : *See Attorney-General* v. *Logan* (2) and *Attorney-General v. Cockermouth Local Board* (3). Such being the state

(1) 4 M. I. A. 190. (2) (1891) 2 Q. B. 100 at p. 106.
(3) (1874) 18 Eq. 172 at p. 176.

of the law and of precedents as to the position of the Government in this country or the Advocate-General in relation to proceedings in Courts, it seems to me that when a question like the present one is raised, it must be decided on broad grounds of justice and convenience and not merely as turning on the interpretation of a particular rule in the Civil Procedure Code.

If the practice in England is to be treated as affording any guidance here, it may be useful to refer to two instances. In *Ellis* v. *Duke of Bedford* (1), the Court of Appeal directed the Attorney-General to be added as a party defendant to an action in which certain plaintiffs sued on behalf of themselves and of other growers of fruit, flowers, vegetables, etc., to enforce certain preferential rights to stand in the Covent Garden market. The Lord of the market was the sole original defendant. The action did not relate to a charity nor did it arise out of a public nuisance. The Court of Appeal nevertheless held that the Attorney-General must be before the Court "to represent the public as against the alleged preferential rights of the growers." This direction was referred to with approval by the Judicial Committee in *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (2). In *In re Chamberlain's Settlement* (3). P. O. Lawrence, J. directed the addition of the Attorney-General as a party to a proceeding in which the point for decision was whether a tenant for life had forfeited his interests under a particular settlement by reason of his having become a "German National" within the meaning of the Peace Treaty Order of 1919. The tenant for life objected to the addition of the Attorney-General, but the learned Judge overruled the objection, not merely on the ground that the interpretation of the treaty was a matter which concerned the Crown but also on the ground that the question raised was one "which may affect a large section of the British public."

I find it difficult to say whether and if so how the same course could have been adopted by a Court governed by the Civil Procedure Code in this country and whether according to the processual law obtaining in this country the Government or the Advocate-General will be the proper party to be impleaded, if the principle of the above decision is to be followed here. A decision of a learned Judge of the Calcutta High Court seems apposite here. In *In the goods of Bholanath Pal* (4), the Advocate-General sought to intervene on behalf of the Secretary of State in a Succession Certificate Proceeding with a view to contend that the High Court on its original side could only grant letters of administration but not a succession certificate. It is possible to suggest that the interests of Government revenue were concerned here, because on the issue

(1) (1899) 1 Ch. 494.
(2) (1920) A. C. 358.
(3) (1921) 2 Ch. 533.
(4) 58 Cal. 801.

of letters of administration succession duty might be payable on the whole estate, whereas a succession certificate could be limited to particular debts and the duty payable to Government correspondingly reduced. But the learned Judge (Remfry J.) did not merely hear the Advocate-General on the question of jurisdiction or Court-fee, but added the Secretary of State as a party. The very circumstance that in the present case the High Court thought it proper to issue notice to the Provincial : Government involves a recognition of the fact that the Government was interested in the question raised—presumably as representing the large class of subjects for whose benefit the Act was intended—though its interest may be limited to the general question, viz., the validity of the enactment. There was also the fact that the remission whose legality was in question had been granted under the orders of the Provincial Government.

It is not however necessary for me to consider at this stage what this Court should do if it had in the first instance to deal with the application made by the United Provinces Government to the High Court in this case; nor does it seem to me useful to speculate what the High Court itself would have done if the application of the United Provinces Government to be joined as a party had been opposed by the plaintiffs. I am not prepared to go so far as to ignore the fact that the High Court has impleaded the United Provinces Government and that this course has been adopted with the consent (express or implied) of the plaintiffs. In my opinion, there is no case here of a defect of jurisdiction in the sense in which it is said that consent cannot cure a defect of jurisdiction. It is true that in *Moser* v. *Morsden* (1) Lindley, L. J. observed that the question was not one of "discretion but of jurisdiction". But as the antithesis shows, the learned L. J. apparently had in mind the difference between the decision of the question of joinder on the interpretation of a rule of law and a direction given by the lower Court in the exercise of its discretion, bacause in the latter case the Court of Appeal would generally be reluctant to interfere. It may even be regarded as a case of excess of jurisdiction within the meaning of S. 115, Civil Procedure Code, but that will not make the order void in the sense that it may be ignored or treated as if it had never been passed. In *Prayaga Doss Jee Varu* v. *Board of Commissioners for Hindu Religious Endowments, Madras* (2), the learned Judge intimated that but for the opposition of the plaintiff he might have directed the addition of the Secretary of State as a party. To the suggestion that the expression "any party" in S. 205 (2), Constitution Act, must be limited on the lines on which the generality of the language of S. 96, Civil Procedure Code., has been limited by decisions, the answer is furnished by the difference in language between the two provisions. S. 96, Civil Procedure Code, does not in terms say who is entitled

(1) (1892) 1 Ch 487. (2) 50 Mad. 34=24 L. W. 738.

to prefer an appeal. But according to the Code it is the " decree" that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party adversely affected by the decree is the only person entitled to appeal. It was however realised that a rule so limited might cause hardship in some cases. An extension was therefore made by conceding a right of appeal to a party who might be bound by a finding in the judgment, though there was no decree against him : *see* the cases reviewed in *Harachandra Das* v. *Bholanath Das.* (1). S. 205, Constitution Act, provides for an appeal "from any judgment, decree or final order" —an expression which has received varying interpretations—and Sub-S. (2) of the section enacts that "any party in the case may appeal". Why should this express provision be qualified by adding the words *if adversely affected by the decree* ? It may be taken as a matter of "common-sense that there can and will be no appeal when there is nothing to appeal about" : *See Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (2). But why limit the grievance to a grievance about the decree ? Even on the footing that the general language of S. 205 (2) may or must be limited in some manner, it seems to me that its scope ought not to be unduly narrowed so far as the Government (whether Central or Provincial) in this country is concerned. The section is principally concerned with the determination of constitutional questions though arising in a litigation between private parties. The Government stands in a peculiar situation : it has no doubt pecuniary or proprietary interests in one sense, but in another aspect it is also the custodian and the protector of the interests of the public; and the question of the legality of a statute is one in which it has a special interest.

It is in view of this consideration that this Court has in O. 36 of its Rules provided for notice of any proceedings being given to the Advocate-General of India or to the Advocates-General of the Province and for applications being made by them to be heard in any proceedings before this Court. Both on principle and as a matter of expediency, it seems to me very undesirable to place the Government in this embarrassing position, that while it must deem itself bound by an opinion expressed by the High Court as to the invalidity of a stat ute, it must find ways of persuading private parties formally to file an appeal, if it desires to have the constitutional question brought up before this Court. The procedure under S. 213, Constitution Act, may not be found appropriate when the question of the legality of a statute has actually been put in issue before a Court of law in a litigation between private parties.

I have already stated that the Indian Civil Procedure Code does not contemplate an "intervention" by the Advocate-General as distinguished from an addition of the Advocate-General or the Govern-

(1) 62 Cal 701. (2) 9 C.W.N. 584 at p. 588.

ment as a party. When either of them has been impleaded as a party with a view to give them a hearing, it seems to me that the Court would fail to give full effect to the language of S. 205 (2), Constitution Act, if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal. In proceedings relating to charities, it has been held that where the Advocate-General is a party, he is the proper person to appeal against an adverse judgment : *Jan Mahomed* v. *Syed Nurudin* (1) following *Att.-Gen* v. *Wright* (2); (*see also In re. Rai Rukhiabai* (3) where the learned Judges took the additional ground that the beneficiary, though he was heard by Counsel, was not to be treated as a *party*). I see no reason why the principle should be different in a case like the present. Neither in the one case nor in the other has the Advocate-General or the Crown or the State any pecuniary or proprietary interest if that is to be the sole test. The right of appeal being a creature of the statue, the right of one who is within the terms of the statute cannot, it seems to me, reasonably be denied when even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim to be heard. In *John Deere Plow Co.*, v. *Wharton* (4) the parties concerned had themselves preferred an appeal to the judicial Committee and the Attorneys-General of Canada and British Columbia seem to have intervened before the judicial Committee. The case therefore throws no light on the question of the right of the Attorney-General of the Dominion to prefer an appeal in a case where he had intervened even in the lower Court. The report of the decision in *Att.-Gen. for Alberta* (*Intervenant*) v. *Kazakawich* (5) referred to in my Lord's judgment is very brief and it does not appear whether the decision was based on the language of any statute and if so what that language was. For the reasons set forth above, I would overrule the preliminary objection.

There is another aspect of the case which also deserves consideration in this connection. The application filed by the United Provinces Government in the High Court put the plaintiffs on notice that the Government sought to come in as a party for the very purpose of placing itself in a position to prefer an appeal to this Court. If the plaintiffs had opposed the petition, the Government might have taken steps to ensure that an appeal was formally lodged by the original contesting defendant. This opportunity has now been lost to that Government and this is in a large measure attributable to the attitude taken by the plaintiffs towards the application in the High Court. This may not create an estoppel nor suffice to confer on the Government a right of appeal which it

(1) 32 Bom. 155.
(2) (1841) 3 Beav 447.
(3) I. L. R. 1937 Bom. 425.
(4) (1915) A. C. 330 at p. 334.
(5) (1937) Can S. C. R. 427.

would not otherwise possess. But if the Government can bring itself within the letter of the law, one need not hesitate to uphold its right to prefer an appeal in such circumstances.

Proceeding now to the question of the invalidity of the impugned Act, it will be convenient to take up first the ground on which all the learned Judges of the Full Bench of the High Court agreed, namely, the objection based on S. 292, Constitution Act. As I understand the argument, this objection interprets S. 292 not merely as enacting that the law in force in British India immediately before the commencement of Part III, Constitution Act, shall continue in force notwithstanding the repeal of the earlier Government of India Act, but as also fixing a time-limit up to which the operation of such law should not be disturbed by anything contained in any enactment that may come to be passed by any of the Legislatures in British India. It was conceded before us and it was recognized before the High Court that a provision like S. 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. (Compare S. 108, Commonwealth of Australia Constitution Act, S. 129, British North America Act and S. 135, Union of South Africa Act). But laying special stress on the words "until altered or repealed or amended" the learned Counsel for the plaintiffs desired to read S. 292 as containing a direction by Parliament that the law then in force must in any event continue up to a specified date, namely, the date of its alteration, repeal or amendment by a later Act of the Legislatures in India; and, it was sought to be inferred therefrom that no later Act of such Legislatures can by words of retrospective operation antedate its effect so as to affect rights acquired under previous law down to the date of the new legislation. At one stage, the learned Counsel for the plaintiffs even went so far as to suggest that the Legislatures in India had been deprived by this provision of the power of enacting *at any time* laws with retrospective effect, or they were at least incompetent to extend the retrospective operation of their enactments to a period anterior to 1st April, 1937, when the Constitution Act came into operation in the provinces. These arguments were, however, not persisted in, when it was pointed out that the Indian Legislatures were, within the statutory limits assigned to them, bodies possessing plenary powers : (*see Reg* v. *Burah* (1), *Archibald G. Hodge* v. *Reg* (2) and *Croft* v. *Dunphy* (3)) and that whatever might be the objection on grounds of reasonableness or expediency to retrospective legislation, there was nothing in S. 292 to deprive the Indian Legislatures of this particular incident of plenary legislative power.

(1) (1878) 3 A. C. 889. (2) (1883) 9 A.C. 117 at p. 132.
(3) (1933) A.C. 156.

[Compare *Phillips* v. *Eyre* (1) relating to an Act of Jamaica Legislature ; and *The King* v. *Kidman* (2) relating to an Act of the Commonwealth Parliament in Australia.]. The objection was then limited to the power of the Legislature to give retrospective operation to an enactment when, by so doing, it would prevent a law in existence at the date of the commencement of Part III, Constitution Act, from having its full effect up to the date of the repealing or amending Act. It was pointed out that the language employed in S. 292, Constitution Act, was not identical with that to be found in the corresponding provisions in the British North America Act or in the Commonwealth of Australia Act. But it would appear that this language is so similar to that found in S. 135, Union of South Africa Act, as to suggest that it might have been taken from it. The reason for a provision like that contained in S. 292 being the one already stated, it does not seem to me necessary or proper to lay undue stress on the word "until" used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in the other Constitution Acts above referred to. I see no justification for drawing a distinction between the statement that the previous law shall continue in force *subject* to repeal or amendment by later legislation and the statement that it shall continue in force *until* repealed or amended by later legislation. That Parliament might have had some reason or motive for denying to the Indian Legislatures the power of retrospective legislation with reference to pre-existing laws seems to me to rest on mere speculation and is not a fair inference from the language used in the section.

In the judgments delivered by the learned Judges of the Full Bench of the Allahabad High Court, I find it stated in some places that S. 2 of the impugned Act in effect repealed S. 73 of the Act of 1926 with retrospective effect or that the provisions of the two Acts were diametrically opposed to each other. With all respect, I find some difficulty in following this view. It is true that the remission which the impugned Act sought to regularise was not one made in conformity with the provisions of S. 73 of the Act of 1926. But such regularization would only mean the *addition* of a *new* head of remission; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of S. 73 of that Act. The co-existence of two kinds of remission given for different reasons is not inconceivable or impossible. It can of course be said that the impugned Act retrospectively deprived landlords of a share of the rent to which they had already acquired a right. But if on general principles a Legislature has ordinarily power—for reasons which it is not open to the Court to investigate—to enact measures which by retrospective operation may deprive some subjects of vested rights,

(1) (1870) 6 Q. B. 1 at pp. 23, 27. (2) (1915) 20 Com L.R. 425.

I see no sufficient reason for treating the present case as standing on any special footing. In this view, it will follow that there is no reason for saying (as Bajpai, J. has said) that "the impugned Act has attempted to do something indirectly which it could not do directly".

Reference has been made in the judgments of the learned Judges of the High Court and reference was also made in the course of the arguments before us to the fact that a later Act of the U. P. Legislature, namely, Act XVII of 1938, took care to repeal Ss. 73 to 75, Agra Tenancy Act of 1926, and to add in Cl. (2) of S. 5 a provision corresponding to Cl. (2) of S. 74 of the Act of 1926, while the impugned Act contains no provision corresponding to this clause. It does not appear to me that this is any legitimate ground to be considered in the present connexion. The policy of Act XVII of 1938 is apparently not the same as that of the Act of 1926, because the conditions and procedure stated in S. 4 of the new Act are not identical with those contemplated in S. 73 of the older Act and that affords a sufficient explanation for the repeal of Ss. 73 to 75 of the old Act.

The additional ground of invalidation relied on by Iqbal Ahmad, J. was also pressed before us at some length by the learned Counsel for the repondent. With all respect, it seems to me there is even less force in this objection than in the one based on S. 292. The only question to be considered in this connexion is whether the impugned Act can reasonably be described as one made "with respect to" any of the matters enumerated in item 21 of List II of Sch. 7, Constitution Act. Item 2 of that list is only of secondary importance in this case, because the first part of item 2 is governed by the words "with respect to any of the matters in this list"—which takes us to item 21, and the second part, namely "procedure in rent and revenue Courts" can scarcely be held to authorize legislation which in effect dealt with substantive rights, by precluding the landlord from objecting to a remission which had been improperly made under executive authority.

Both in the High Court and in the arguments before us, great stress has been laid upon the way in which S. 2 of the impugned Act had been worded and it has been said that all that the Act did was to validate arbitrary executive orders. This view does not seem to me to take the whole of S. 2 into account and give due effect to the substance of the enactment. The Preamble recites the necessity for regularising certain remissions of rent, and even if we are to exclude the Preamble from our consideration, S. 2 in terms refers to the fact of remission of rent having been made under orders of the Provincial Government by reason of the fall in the prices of agricultural produce which took place before the commencement of the Act. The succeeding words can, as a matter of grammar only, mean that the order of remission thus passed shall not be called in question. There can

thus be little doubt that the Act intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Government. It can make no difference for the present purpose whether it laid down general provisions for remission of rent for all time or dealt with the remission made or to be made in particular years. The subject-matter in every one of these cases must be held to be remission of rent.

A point was raised in the course of the discussion before us, whether the words "such order" in S. 2 of Act XIV of 1938 referred to the order of the Provincial Government authorising the remission in general terms or to the consequent orders passed by revenue officers fixing the remission in the case of each individual or holding. I am inclined to think that the reference must be to the order passed by the revenue officers with reference to individual holdings and the reference to the order of the Provincial Government is only to indicate the authority under which the remission was granted. This is to some extent supported by the reference in the proviso to remissions "in excess of the remission ordered for the same holding," etc. But this again is immaterial, so far as the question of the subject-matter of the Act is concerned. Whether it is the order of the Provincial Government or the consequent order of the revenue officer, the order was one which related to remission of rent and that is the subject-matter of the Act. It was pointed out that the section did not in terms purport to validate the remission, and it was argued that an Act which merely protected from attack an order which granted the remission could not be said to be an Act dealing with remission. This seems to me an unsubstantial distinction. Whatever consequences might flow from the absence of a direct provision validating the remission or precluding the landlord from recovering the remitted rent, the avowed purpose of the Act was to ensure that the tenants had the benefit of the remissions which had been made.

A point was made by the learned Counsel for the respondents that S. 100, Constitution Act, used the expression "with respect to any of the matters enumerated in the list" and not words like "relating to the matters enumerated in the list." It seems to me that the words "with respect to" are not by any means less comprehensive than the words "relating to." [*Cf.* observations in *The King* v. *Kidman* (1); Wynes : Legislative and Executive Powers in Australia, at pages 28, 29]. The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as "passed in respect of a forbidden subject" or can be considered as only incidentally affecting such a subject while forming part of an

(1) (1915) 20 Com. L.R. 425 at p. 449.

Act which in the main deals with an authorised subject: *see* the antithesis indicated by Lord Atkin in *Gallagher* v. *Lynn* (1) with reference to the use of the expression "in respect of" in S. 4, Government of Ireland Act. In the present case, the Act in question deals with only one matter and the distinction between what is "substantial" and what is only "incidental" does not arise for consideration.

In coming to the conclusion that the impugned Act did not fall within any of the heads enumerated in item 21 of List II, Iqbal Ahmad, J. gave it as one of his reasons that that item could only cover provisions of "substantive law" and that the impugned Act did not embody any provision of substantive law either in respect of rights over land or land tenures or the relation of landlord and tenant or the collection of rent. The fact that the provision is couched in the form of an immunity of the remission order from attack in a civil or revenue Court will not, I think, take away from its character as one depriving the landlord of his right to the full rent. It is well settled that the substance of the legislation has to be examined to see what the Legislature was doing, and the form which the statute may have assumed under the hand of the draftsman is not decisive. As explained by Dr. Asthana, it might have been thought sufficient to frame the new Act on the lines of Cl. (1) of S. 74, Tenancy Act of 1926. The learned Judge enumerated certain provisions which he would regard as provisions relating to the "collection of rents." But I do not see why the list given by the learned Judge should be regarded as exhausting all conceivable provisions relating to that head. S. 2 of the impugned Act had a two-fold operation; on the one hand, it prevented the landlord from questioning the order of remission with a view to recovering the full rent, on the other, it might also be held to prevent the Court *suo motu* from questioning the order of remission. In the latter sense, it might be said to be an interference with the power of the Court and it is in answer to such a possible contention that reliance seems to have been placed on behalf of the Government on item 2 of List II. One or two other objections were mentioned in the course of the argument, but I did not gather that they were seriously meant to be urged. In the result, I am of opinion that the impugned Act was within the sphere allotted to the Provincial Legislature by the Constitution Act, that it was not opposed to S. 292 of that Act and that it was *intra vires* the United Provinces Legislature.

The question still remains what is the decree to be passed in the case, in the view that the impugned Act was valid. The conclusion of the High Court against the validity of the Act will no longer hold good, but will that constitute sufficient reason for

(1) (1937) A.C. 863.

modifying the decree of the High Court so far as it relates to the rights of the original parties? According to my reasoning in the earlier portion of this judgment, the United Provinces Government was interested only in the general question and had no other interest in the particular litigation. In *In the Goods of Bholanath Pal* (1) the learned Judge limited the Advocate-General's argument to the question of jurisdiction which alone, he considered, was one of public importance. The contesting defendant in the present case does not seem to me to be entitled to ask for a modification of the decree on the principle of O. 41, R. 4, Civil Procedure Code, because there is no "decree" in this case against the Government and hence there can be no question of a decree proceeding "on a ground common to all the defendants." The anomalous situation of a decree passed against several defendants on the same ground being reversed as against some and being allowed to stand as against the rest will not arise in this case. Further the power recognized by this rule as also the one referred to in O. 41, R. 33, Civil Procedure Code, is only discretionary and the present case is not in my opinion one in which any discretionary power ought to be exercised in favour of the contesting defendant. He has not merely acquiesced in the decree of the High Court, he has not even appeared before this Court to explain the circumstances in which he did not choose to appeal nor to ask for its modification. This is significant in view of the suggestion thrown out by Dr. Asthana that the original parties to the litigation have in all probability come to a settlement. I am accordingly of opinion that notwithstanding this Court's acceptance of the appellant's contention as to the validity of the impugned Act, there is no justification for disturbing the decree passed by the High Court in the case.

Two more contentions of the learned Councel for the respondents remain to be noticed. It was argued that Act XIV of 1938 even if valid, would not preclude the plaintiffs in this case from recovering the full rent due to them, because the Act had not been made applicable to pending actions. There can be little doubt that there is a well-recognized presumption against construing an enactment as governing the rights of the parties to a pending action. *Moon* v. *Durden* (2) is an instance of the extreme limits to which this rule has been carried; for notwithstanding the doubt felt by Baron Parke in that case that the denial of the application of the Act to pending actions would render inoperative the words "or maintained" used in the Act, the Court thought it safer not to apply the statute to pending actions. The Act now under consideration was clearly intended to be retrospective, in so far as it took away certain vested rights which had accrued before the date of its enactment. But the presumption against retrospective operation is said to be so strong that it has been recognized that even in construing an Act or a section which is

(1) 58 Cal. 801. (2) (1848) 2 Ex. 23.

to a certain extent retrospective, it ought not to be given a larger retrospective operation than the words clearly involve : see *Reid* v. *Reid* (1). There are two recognized principles, (1) that vested rights should not be presumed to be affected and (2) that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. The language used in an enactment may be sufficient to rebut the first presumption, but not the second. Where it is intended to make a new law applicable even to pending actions, it is common to find the Legislature using language expressly referring to pending actions. But it will be seen from the decision of the Privy Council in *Mukherjee* v. *Mst. Ram Ratan Kuer* (2), that it is not necessary that the intention of the Legislature should always be expressed in that particular form. In that case, the enactment validated all transactions subsequent to a *specified* date and their Lordships held that the new law would apply to a transaction of that kind even if it had become the subject of an action prior to the date of the passing of the Act; and in those circumstances, they reversed the usual presumption and looked to see whether there was any reservation in the Act in respect of pending actions.

The question of the applicability of the impugned Act to pending actions is likely to arise only in a few cases and whatever may be its importance to the parties to those cases, it does not seem to me to be a matter in which the United Provinces Government can be said to be interested. As I have already indicated that as between the original parties to this suit there is no justification for this Court's interference with the decree of the High Court, I do not find it necessary to express any definite opinion on the question of the extent to which the impugned Act operates retrospectively. For the same reason, I refrain from expressing any opinion on the argument urged by the learned Counsel for the respondents, as to the effect of the absence from the impugned Act of a clause corresponding to S. 74 (2), Agra Tenancy Act, 1926, and S. 5 (2) of Act XVII of 1938. He argued that it might be that the impugned Act prevented the order of remission being questioned in a Court, but this would not of itself take away the contractual right of the landlord to the full rent or absolve the tenant from liability for the full amount of the stipulated rent. This again is a question relating to the construction of the Act and does not bear upon the question of its validity ; and as it has not been raised or discussed before the High Court, I prefer to leave it alone, as I have held that this appeal should be dismissed for another reason. I agree that there should be no order as to the costs of this appeal.

N. R. R. *Appeal dismissed.*

(1) (1886) 31 Ch. D. 402. (2) 15 Pat. 268=43 L.W. 336 (P. C.)

Srimathi K. PONNALAGU AMMANI v. THE STATE OF MADRAS, represented by the Secretary to the Revenue Department, Madras and others.

Rajamannar, C. J., and Venkatarama Ayyar J,

L. P. A. No. 134 of 1952 and W. P. No. 317 of 1952.

Appeal (disposed of on 7—11—1952) under Cl. 15 of the Letters Patent, against the order of the Honourable Mr. Justice Subba Rao, dated 15th April 1952 and made in C. M. P. No. 13519 of 1950 being a petition for issue of a writ of Mandamus.

Letters Patent, Cl. 15 and C. P. C., S. 96—Person not party to proceedings appealed against, if can appeal—Leave to appeal, whether can be granted—Test.

According to the practice in the English Courts, a person who is not a party to a suit or proceeding can appeal against the decision therein if he is aggrieved by the order or prejudicially affected by it, with the leave of the Court. This practice consistently followed by the English Courts is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute. There is no reason why this practice should not be followed by Courts in India.

While it may not be proper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment, ordinarily leave to appeal should be granted to persons who, though not parties to the proceedings, would be bound by the decree or judgment and who would be precluded from attacking its correctness in other proceedings. Leave will not be given where the appellant could not have been a party and the application for leave must be made within the time limited for the appeal.

Held: on facts, that it is not a fit and proper case in which leave to appeal should be granted as the appellant would not be bound by the judgment appealed against and had other steps open to her.

Messrs. *K. V. Venkatasubramanya Ayyar, K. S. Desikan* and *V. C. Sri Kumar* for Appt,

Messrs. *R. Kesava Aiyangar, K. S. Ramamurthi, K. Parasaran* and *The Government Pleader* for Respts.

JUDGMENT.

(Delivered by The Chief Justice.)

L. P. A. No. 134 of 1952. This is an appeal under the Letters Patent against the judgment of Subba Rao, J. in C. M. P. No. 13519 of 1950. That petition was filed in the following circumstances. Krishna Vijaya Pocchayya Naicker, Zamindar of Marungapuri, an impartible estate situated in Tiruchirapalli District died on 17th September 1926 leaving behind him three widows, Lakshmi Ammani, Ponnalagu Ammani and Muthualagu Ammani. As one of the incidents of impartible estates in Southern India is that the estate is descendible to a single heir, the seniormost of the three widows would be first entitled to succeed. The Government on the assumption that Lakshmi Ammani was the senior most of the widows, proceeded to exercise powers conferred on them by the Madras Court of Wards Act. On 11th July 1927 the following notification was published in the Fort St. George Gazette and in the Tiruchirapalli District Gazette:

"Under S. 15 of the Madras Court of Wards Act 1902, His Excellency the Governor in Council declares Lakshmi Ammani Ammal, the proprietrix of the Marungapuri estate in the Kulitalai taluk of the Tiruchirapalli District to be incapable of managing her property and directs the Court of Wards to assume the Superintendence of that property.

2. The Collector of Tiruchirapalli will discharge in respect of the property the duties imposed on a Collector by the said Act."

It is common ground that in pursuance of this notification the Court of Wards assumed the superintendence not only of the impartible estate of Marungapari but also other partible properties left by the deceased Zamindar.

The late Zamindar left behind him a will dated 30th July 1915 and a codicil dated 10th August 1926. Ponnalagu Ammani alleged that she took the son of her daughter in adoption to her husband on 1st December 1949 under the authority given to her by her husband in the will and the codicil. She appears to have sent a petition to the Government on 6th January 1950 on behalf of the minor adopted son. Lakshmi Ammani filed another petition on 1st May 1950 evidently attacking the validity of the alleged adoption. The Government passed an order, G. O. No. 2709 on the 9th October 1950 dealing with both the petitions and communicated portions of their order to the two widows respectively. The following is the portion of the order communicated to Ponnalagu Ammani:

"(5) With reference to her petition dated 6th January 1950, read above, Srimathi Ponnalagu Ammani is informed that the Government have directed the Court of Wards to release from its superintendence the properties pertaining to Marungapuri estate which are now under its superintendence. As however there is dispute as to title to the properties between the Senior Zamindarini and the adopted boy the Government have decided to retain custody to enable either of the claimants to obtain suitable orders from the civil Court in regard to the custody of the properties."

To Lakshmi Ammani the Government communicated paragraph 4 of their order, which runs as follows :

"4. Witb reference to her petition dated 1st May I950, read above Srimathi Lakshmi Ammani is informed that the Government have been advised that the adoption made by Sri Ponnalagu Ammani is valid in law and that she (Srimathi Lakshmi Ammani) has no longer, any subsisting legal right or title to the impartible and partible properties of the late Zamindar which are in the custody of the Court of Wards and that it is therefore not possible to hand over possession of such properties without an order of a civil Court. The Government have directed the Court of Wards to release the properties from its superintendence. She is informed that in case she does not obtain suitable orders from a civil Court, within a period of three months from the date of receipt of this order regarding the custody of the properties, the Government will, on the expriry of that period, take such steps in regard to them as they may consider suitable and necessary in the light of the legal advice they have received."

On 17th October 1950, the following notification was published in the Fort St. George Gazette :

"In exercise of the powers conferred by S. 15 of the Madras Court of Wards Act, 1902 (Madras Act 1 of 1902) and of all other powers enabling them in this behalf, His Excellency the Governor of Madras hereby rescinds Revenue Department Notification No. 210 dated the 11th July 1927, published at p. 1079 of Part 1 of the Fort St. George Gazette dated the 19th July 1927, declaring Srimathi Lakshmi Ammani Ammal, then the proprietrix of the Marungapari estate, in the Kulitalai taluk of the Tiruchirapalli District, to be incapable of managing her property and directing the Court of Wards to assume the superintendence of that property."

The Government followed it up by another notification a few days later which was published in the Fort. St. George Gazette dated 21st November 1950. It was in the following terms :

"It is hereby notified under S. 62 of the Madras Court of Wards Act I of 1902 that, under orders of Government, the Court of Wards has released from its superintendence the Marungapuri estate in the Kulitalai taluk on the Tiruchirapalli district including the separate and partible properties left by the late zamindar."

Immediately after this notification Lakshmi Ammani filed in this Court an application under Art. 226 of the Constitution for the issue of a Writ of Madamus or any appropriate Writ or Order directing the State of Madras and the Court of Wards to deliver possession of the Marungapuri zamin properties which were in the superintendence of the Court of Wards to her with accounts, records, documents, etc. She also prayed for an *ad interim* injunction restraining the respondents from parting with the custody of the properties in favour of any person other than her pending disposal of the main application. In the affidavit filed by her karyasthar, after setting out the facts above narrated, he alleged that the Court of Wards was bound to hand over possession of all the properties including the accumulated income only to her and stated that the Court of Wards having assumed management on her behalf and in her right, it would be unjust and incompetent for them to set up the rights of anyone else in derogation of and inconsistent with her rights without surrendering and restoring possession of the properties to her.

The Collector of Tiruchirapalli filed a counter affidavit on behalf of the respondents. He stated *inter alia* that the Government were advised that the adoption was validly made and had the effect of divesting Lakshmi Ammani of the estate and the adopted son became entitled not only to the impartible zamindari but also to the separate and partible properties left by the late zamindar. The attitude taken up by the Government and the Court of Wards is summed up in paragraph 5 of the counter affidavit in which the objection was taken that the question as to who is the proprietor of the estate could not be decided in proceedings by way of a writ and the matter could only be decided properly in a civil Court at the instance of either of the two claimants.

Lakshmi Ammani's karyasthar filed a reply affidavit alleging that it was not competent to the respondents to raise any objection to the redelivery of the zamin to her as it was from her

they took the zamindari and it was on her behalf that they had been in management of the estate. A legal plea was put forward in the following terms:

"The respondents having accepted the position of guardianship and taken the zamin in that capacity it is not competent for them to assert any hostile title or set up *jus tertii* until they had surrendered possession and discharged themselves from the guardianship with which the statute had clothed them."

Lakshmi Ammani's karyasthar subsequently filed a further affidavit evidently because of the notification of the Marungapuri estate under Madras Act XXVI of 1948. He alleged that even if that Act was valid the notification under it would not vest in the Government the properties other than the zamindari like the separate properties, jewels, etc., left by the late Zamindar, and these had in any event to be re-delivered to her. A schedule was attached to the affidavit setting out in detail the items of properties which would not vest in the Government under Madras Act XXVI of 1948.

The petition was disposed of by Subba Rao J. He held after a consideration of the facts and the relevant provisions of the Court of Wards Act that the Court of Wards had no power to refuse to give possession to the person who was their ward and who had subsequently ceased to be such. If a third party had paramount rights it was for that party to institute a suit in a civil Court to establish his or her rights. The learned Judge recognised the effect of Madras Act XXVI of 1948, namely, that even on his finding Lakshmi Ammani could only claim to recover possession of properties that did not vest in the Government under the provisions of that Act. He therefore directed the respondents to hand over to her the properties belonging to Lakshmi Ammani in their possession excluding the properties that vested in the Government under Madras Act XXVI of 1948. This order was passed on 15th April 1952.

Neither the State of Madras nor the Court of Wards filed any appeal. But on 22nd April 1952 Ponnalagu Ammani filed an application before us asking for leave to prefer a Letters Patent Appeal against the order on the ground that neither she nor the adopted son had been impleaded in Lakshmi Ammani's petition, that she was a person whose rights were affected by the said decision and as an aggrieved person she should be granted leave to file an appeal though she was not a party to the petition. In the affidavit filed in support of the application she submitted that even if the adoption were to be disregarded she would be entitled to an equal share in the partible properties left by the late Zamindar and if the adoption were to be upheld neither she nor Lakshmi Ammani would be entitled to any share. We granted leave to appeal as we thought that Ponnalagu Ammani was vitally interested in the subject-matter and felt aggrieved by the order passed by Subba Rao J. and we admitted the Letters Patent Appeal. The order granting leave was however passed *ex parte*.

A preliminary objection was taken by Mr. Kesava Iyengar on behalf of Lakshmi Ammani that the appeal was incompetent because Ponnalagu Ammani who was not a party to the petition disposed of by Subba Rao J. could not file an appeal against the order in that petition and there was no provision of law under which this Court had the power or jurisdiction to grant leave to a person not party to a proceeding to prefer an appeal against an order in that proceeding. His contention briefly was that the right of appeal is the creation of a statute and a Court could not enlarge its appellate jurisdiction by its own rules of practice. His contention was obviously based on the assumption that there was something in the Letters Patent which impliedly restricted the right of appeal against judgment or order in any proceeding to the parties to the proceeding. The material provision of the Letters Patent is Cl. 15. It runs thus:

"*Appeal from the Courts of Original Jurisdiction to the High Court in its appellate Jurisdiction*:—And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in

respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 10 of the Government of India Act or in the exercise of Criminal Jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act and that notwithstanding anything herein before provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any division Court, pursuant to S. 108 of the Government of India Act made (on or after the 1st day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in Our or Their Privy Council, as hereinafter provided."

The arguement was that the word "Judgment" in this clause has the same meaning as the word "decree" in the Code of Civil Procedure and S. 96 of the Code which provides for an appeal from "every decree passed by any Court exercising Original Jurisdiction to the Court authorised to hear appeals from the decisions of such Court" has been construed as conferring that right of appeal, only on the parties to the suit who might be aggrieved by the decree.

Mr. Kesava Iyengar relied on the following observation which occurs in the opinion of Sir John Edge in *S. J. Bhogilal* v. *Temple Committee* (1):

"The term "Judgment" in the Letters Patent of the High Court means in Civil Cases a decree and not a judgment in the ordinary sense."

In the Code of Civil Procedure we find three expressions used relating to the decisions of Courts, namely, decree, order and judgment. Decree is defined as follows :

" 'Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

"Order" means "the formal expression of any decision of a Civil Court which is not a decree." "Judgment" is defined as "the statement given by the Judge of the Grounds of a decree or order." Their Lordships of the Judicial Committee evidently had in mind this definition of judgment when they refer to "a judgment in the ordinary sense." The scheme of appeals under the Code of Civil Procedure is this. Under S. 96

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdication to the Court authorised to hear appeals from the decisions of such Court."

Under S. 104 an appeal lies from certain orders mentioned in that Section and in Order 43. But no appeal ordinarilly lies from any other Order. In certain cases a second appeal is provided from appellate decrees (S. 100). No appeal lies against a judgment as such, as distinct from a decree or order. Under Cl. 15 of the Letters Patent an appeal lies from "the Judgment" of one Judge of the High Court. This difference in language has led to the view taken by this Court in the leading case, *Tuljaram Row* v. *Alagappa Chettiar* (2), and subsequent decisions following it that certain decisions of a Judge on the Original Side of the High Court are subject to appeal under Cl. 15 of the Letters Patent though similar decisions would not be appealable under the Code of Civil Procedure. We are not now concerned with the correctness of this view. Sulaiman J. in *Horiram Singh* v. *Emperor* (3), was inclined to hold that in view of the observation made by the Privy Council in *Bhogilal* v. *Temple Committee* (1) the word "Judgment" cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in the

(1) A. I. R. 1925 P.C. 155=22 L.W. 246.

(2) I. L. R. 35 Mad. 1.

(3) 1939 F. C. R. 159=50 L.W. 95.

High Court so far as the Court is concerned. It was not disputed before us that an appeal would lie from the judgment of a Judge of this Court disposing of an application for a writ under Art. 226 of the Constitution to a Division Bench though it may not be strictly a decree within the meaning of the Code of Civil Procedure. Mr. Kesava Iyengar's anxiety to equate judgment in Cl. 15 of the Letters Patent with "decree" in the Code of Civil Procedure was to have the benefit of rulings in which it was held that only parties to a suit could appeal against the decree in the suit. Support for this view is apparently sought from the denifition of "decree" as "the formal expression of an adjudication which conclusively determines the rights of the parties to the suit." Varadachariar J. in *United Provinces* v. *Atiqa Begam* (1) observes at page 150:

"S. 96 of the Code of Civil Procedure does not in terms say who is entitled to prefer an appeal, but according to the Code it is the decree that has to be appealed against. The decisions have therefore laid it down as a matter of inference.....that a party adversely affected by the decree is the only person entitled to appeal."

Observations in decisions of the Federal Court in Appeals sought to be preferred in criminal cases which were relied on by Mr. Kesava Iyengar appear to us to be entirely irrelevant. Their Lordships in those cases were concerned with the question whether an interlocutory order made in a criminal proceeding could be carried in appeal to the Federal Court, and it was held that it could not be [*See Kuppusami Rao* v. *The King* (2)].

It is equally not necessary to deal with the rulings of English and Indian Courts to which Mr. Kesava Iyengar referred us for the proposition that there is no inherent right of appeal and the creation of a right of appeal is an Act which requires legislative authority and that neither the inferior Court nor the superior Court nor both combined can create such a right. [*Attorney General* v. *Sillam*(3), *National Telephone Company Limited* v. *Postmaster General* (4), *Pashupati Bharti* v. *Secretary of State* (5), and *Lakhpatram* v. *Beharilal* (6)]. In the case before us there is not controversy about the right of appeal as such. The only controversy is as to who is entitled to appeal. On that question the cases referred to above have no bearing whatever.

Mr. Kesava Iyengar concedes that every party to suit is not entitled as of right to file an appeal against the decree in the suit. The party must be aggrieved. While it has been held that a party who is not aggrieved is not entitled to appeal, it has also been held that even a successful party in a suit can file an appeal against a finding of the Court on one of the issues which is adverse to him though the final decision is in his favour [*Vide Nimmagadda Venkateswaran* v. *Bondapati Lingayya* (7) and *Harachandra Das* v. *Bholanath Das* (8)]. It was laid down in these cases that the test to be applied in each case is whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggreieved party to agitate the question covered by the finding in any other proceeding. This rule is certainly an extension of the principle that it is only a party adversely affected by the decree that is entitled to appeal. [Vide Varadachariar J. at page 151 in *United Provinces* v. *Atiqa Begam* (9)]. This extension is evidently based on grounds of justice. Guha J. In *Harachandra Das* v. *Bholanath Das* (8) says:

".....The Code of Civil Procedure, by the Provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment; the appellants in this Court have, therefore, no right of appeal, under the law. On grounds of justice, and recognising that, on that ground, the implication of suitable exception or qualification may be justifiable and even necessary, we are prepared to follow the rule engrafted on this statute by a current of decisions by High Courts in this

(1) 3 F. L. J. 97=58 L.W. 397.
(2) 1947 F. C. R. 180.
(3) 10 H.L.C. 704=11 E. R. 1200.
(4) (1913) 2 K. B. 614 at 621.
(5) I.L.R. 1939 Kar. 1 F.C.=1939 F. L. J. 1.
(6) 1939 F. C. R. 121=49 L.W. 570.
(7) I. L. R. 47 Mad. 633=20 L.W. 63.
(8) I. L. R. 62 Cal. 701.
(9) 3 F.L.J. 97=58 L.W. 397.

country, that an aggrieved party may have a right of appeal, and that the test to be applied in such a case is whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding."

On the immediate question, namely, whether a person who is not a party to a suit or other proceeding is under no circumstance entitled to prefer an appeal against the decision in that suit or porceeding, there is very little authority in India. In *Indian Bank* v. *Bansiram Jashmal* (1), Madhavan Nair and Jackson, JJ. held that neither under the general principles of law nor under the Code of Civil Procedure can a person who was not a party to a suit prefer an appeal against the decree therein. In that case the Official Receiver representing the general body of creditors was a defendant in a suit brought by two plaintiffs to declare their title to two items of property. The suit went against the Official Receiver. But he did not file an appeal. One of the creditors thereupon filed an appeal against the decree in the suit and along with it filed an application praying that in the circumstances this Court may be pleased to permit the applicant to appeal against the decree. The learned Judges held that under the Code of Civil Procedure no person who is not a party to the suit can prefer an appeal under S. 96 because "the right of appeal is a special creature of statute and it can be exercised only by those in whom the power is vested expressly or implied by the Statute." Two decisions of the Chancery Court in England were relied on by the appellant in which leave to a person interested in, but not a party to an action, was given to appeal from an order by which the person was aggrieved. But the learned Judges did not act on those decisions as in their opinion they related to powers of the appellate Court to grant leave to appeal and such power was vested on the practice prevailing in the English Courts. No provision of law or rule of practice, they said, had been shown to them entitling the appellant to claim such leave. But they added that even if such permission could be asked they were not satisfied that it was a proper case in which the permission should be given. This ruling was followed by a single Judge (Abdur Rahman, J.) in *Kasi Chettiar* v. *Secretary of State* (2).

Mr. Kesava Iyengar further contended that an appellate Court cannot give leave to appeal unless under a statutory power. In support of this contention he relied on the decisions in *Pashupati Bharti* v. *Secretary of State* (3), *Lakhpatram* v. *Beharilal* (4), *Kishori Lal* v. *Governor in Council, Punjab* (5), and *Ramanayya* v. *Kotayya* (6)

These decisions are only authority for the position that when under a statute a right of appeal is conferred on an aggrieved party only with the leave of or on a certificate from the Court from which the appeal is sought to be preferred and if such leave or certificate be refused by that Court, an appellate Court will not have the power to grant the leave or certificate. In the decisions of the Federal Court their Lordships had to consider the effect of S. 203 of the Government of India Act 1935 under which an appeal to the Federal Court was available only with a certificate from the High Court. In the earliest of these cases their Lordships say :

"In the first place though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes (of which it is unnecessary and perhaps would be unwise to attempt an exhaustive definition) we know of no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts."

In the later case in *Kishori Lal* v. *Governor in Council, Punjab* (5). Their Lordships point out that a certificate under S. 205 is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for them to enquire into the reasons for the refusal against which no appeal lay to that Court. We have nothing

(1) I.L.R. 57 Mad. 670=39 L.W. 624.

(2) 53 L. W. 479.
(3) I.L.R. 1939 Kar. 1 F.C.= 1939 F. L. J. 1.
(4) 1939 F. C. R. 121=49 L.W. 570.
(5) (1940) 3 F. L. J. 12.
(6) I. L. R. 52 Mad. 952=30 L. W. 386.

like that here. There is no provision making such a leave a condition precedent to an appeal like the one under consideration.

Mr. Venkatasubramania Ayyar for the appellant relied on the decision in *Bombay Province* v. *W. I. Automobile Association* (1) and the English practice on which that decision is based. In the Bombay case Chagla, C. J., and Bhagwati, J. held that a person not a party to a suit may prefer an appeal if he is affected by the order of the trial Court provided he obtained leave from the Court of appeal. The learned Chief Justice observed as follows :

" The Civil Procedure Code does not in terms lay down as to who can be a party to an appeal. But it is clear and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. Even in England the position is the same. But it is recognised that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of appeal therefore whereas in the case of a party to a suit he has a right of appeal, in the case of a person not a party to the suit who is affected by the order he has no right but the Court of appeal may in its discretion allow him to prefer an appeal."

Bhagwati, J. referred to the decision of this Court in *Indian Bank* v. *Bansiram Jashmal* (2), and accepted it as authority for the position that no person who is not a party to a suit or proceeding has a right of appeal. But if he was aggrieved by a decision of the Court the remedy open to him was to approach the appellate Court and ask for leave to appeal which the appellate Court would grant in proper cases. The learned Judge cites a passage from the decision in *In re Securities Insurance Company* (3) where Lindley, L. J. said that the practice of the Courts of Chancery both before and after 1862 was well settled that while a person who was a party could appeal without any leave a person who without being a party was either bound by the order or was agrieved by it or was prejudicially affected by it could not appeal without leave.

There is abundant authority recognising the existence of such a practice and innumerable instances of such a practice to some of which learned Counsel referred us, namely, *In re Markham Markham* v. *Markham* (4), *In re Padstow total Loss and Colliston Assurance Association* (5), *Attorney-General* v. *Marquis of Ailesbury* (6), and *In re Ferdinand, Ex Tsar of Bulgaria* (7). The position is thus stated in the Annual Practice for 1951 at page 1244:

" Persons not parties on the record may, by leave obtained on an *ex parte* application to the Court of Appeal, appeal from a judgment or order affecting their interests, as under the old practice."

Halsbury's Laws of England, Volume XXVI page 115 gives the same rule in a different form :

" A person who is not a party and who has not been served with such notice (notice of the judgment or order) cannot appeal without leave, but a person who might properly have been a party may obtain leave to appeal."

Several instances are referred to in the footnote and the limits of the rule can be gathered from these instances. Leave will not be given where the applicant could not have been a party and application for leave must be made within the time limited for the appeal. The reason for the practice apparently is the principle that a person who could have been made a party and who might have appealed could not afterwards bring an action to declare that the judgment or order was not binding on him [vide *In re Hambrough's Estate, Hambrough* v. *Hambrough* (8)].

In more or less similar terms the rule and its limits are stated in Seton on Judgments and Orders, Seventh Edition Volume I at page 824 :

" Where the appellant is not a party to the record he can only appeal by leave to be obtained on motion *ex parte* from the Court of Appeal.....Leave to appeal will not be given to a person not a party unless his interest is such that he might have been made a party."

Mr. Kesava Iyengar of course could not deny that such a practice was well established in England. But he contended that such a practice could not be followed by our Courts, govern-

(1) A. I. R. 1949 Bom. 141.
(2) I.L.R. 57 Mad. 670=39 L.W. 624.
(3) (1894) 2 Ch. D. 410.
(4) 16 Ch. D. 1.
(5) 20 Ch. D. 137 at p. 142.
(6) 16 Q. B. D. 408 at 412.
(7) 1921 (1) Ch. D. 107 at 110.
(8) 1909 (2) Ch. D. 620.

ed as we are by the Code of Civil Procedure and the Letters Patent. We do not see why. The very doctrine on which Mr. Kesava Iyengar rests his whole case, namely, that a right of appeal is a creature of statute and an appellate Court cannot create a right of appeal is founded on English authorities like *Attorney General* v. *Sillam* (1). The provisions as regards appeal in England are not materially different from those contained in the Code of Civil Procedure or Letters Patent. In neither of them is there any express mention of persons who could appeal. In our opinion the practice consistently followed by the English Courts is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute. With respect of the learned Judges of the Bombay High Court we agree with them that there is no reason why the practice should not be followed by Courts in India.

Now, what is the test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment in such proceedings? We think it would be improper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment. We think that ordinarily leave to appeal should be granted to persons who, though not parties to the proceeding, would be bound by the decree or judgment in that proceeding and who would be precluded from attacking its correctness in other proceedings. We can give as an instance the case where an Official Receiver impugns an alienation by the insolvent and sues to set it aside and fails. If he does not appeal the decision of the trial Court would be final and binding not only on him but also on all the creditors. In such a case, if the Official Receiver does not choose to file an appeal an aggrieved creditor should ordinarily be given leave to appeal if he shows a *prima facie* case against the order sought to be appealed. A more or less similar test has been applied to cases where a successful party has been allowed to file an appeal against an adverse finding [vide. *Nimmagadda Venkatesawarlu* v. *Bodapati Linyayya* (2), and *Harachandra Das* v. *Bholanath Das* (3)].

Applying that test, can we say that Ponnalagu Ammani will be bound by the judgment of Subba Rao, J. in the application filed by Lakshmi Ammani to which she was not a party? We think not. The Court of Wards cannot be said to have represented her. The judgment of Subba Rao, J. was in no sense a judgment *in rem*. It is binding only as between Lakshmi Ammani and the Government and the Court of Wards. Mr. Venkatasubramania Iyer when he says that the judgment of Subba Rao J. affects his client adversely, means not that the decision affects her legal rights but that the carrying of it into effect would adversely affect her, that is, if and when the Government and the Court of Wards deliver possession of the properties to Lakshmi Ammani as directed by that judgment. But it will be open to Ponnalagu Ammani to prevent the happening of such a thing by taking other steps. In these circumstances we do not think that this is a fit and proper case in which leave to appeal should be granted. We therefore hold that the appeal is incompetent and dismiss it.

V. C. S.

(1) 10 H. L. C. 704=11 E.R. 1200.

(2) 47 Mad 633=20 L.W. 63.
(3) 62 Cal. 701.

AVARAN KUTTI (minor) by next friend, Kalathingal Ithalukki *v.* CHERIYAKKAN and others.

Subba Rao, J.

S. A. Nos. 503, 504 and 505 of 1949.

Appeals (disposed of on 11—12—1952) against the decrees of the District Court of the South Malabar in A. S. No. 501 etc., of 1947 respectively preferred against the decrees of the Court of the District Munsif, Parappanangadi in O. S. 640 etc. of 1945 respectively.

Limitation Act, Art 36—Suit for damages for wrongfully cutting trees and removing same—Applicability of the Article.

Art. 36 of the Limitation Act applies to actions *ex delicto* whereas Art. 116 applies to actions *ex contractu*. If an action is founded on tort of one or other of the three kinds mentioned in Art. 36, the suit for damages in

Now coming to the deeds, all that the learned counsel for the revenue was able to show us is that in one of the trust deeds, the trustees were referred to as beneficiaries but on a reading of the entire deed, it is clear that reference to them as beneficiaries is a misnomer and that they are not entitled to any benefit under any of those deeds. Therefore the finding of the tribunal that the sole beneficiary under those deeds is the deity is not open to challenge. If that is so, the case clearly falls within the main Section 41(1) and that the 1st proviso to that section is inapplicable to the facts of the case. On the facts found by the Tribunal, it cannot be said that the income or profits in question are "not specifically receivable by the trustees on behalf of anyone person".

9. The fact that for certain purposes, a trusteeship is considered as "property" and that the trustees have an interest in the trust is irrelevant for our present purpose. In considering the scope of Section 41(1), the only thing that we have to see is whether the income in question was received by the trustees on behalf of any person. If the deity is considered as a "person" then quite clearly the case does not come within the 1st proviso to Section 41(1) and that it has to be dealt with under Section 41(1).

10. For the reasons mentioned above, these appeals fail and they are dismissed. The respondents are ex parte in this Court. Hence there will be no order as to costs in these appeals.

1970(2) Supreme Court Cases 13

(From Andhra Pradesh)

[BEFORE J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.]

NOOKALA SETHARAMAIAH .. Appellant ;

Versus

KOTAIAH NAIDU AND OTHERS† .. Respondents.

Civil Appeal Nos. 2121 and 2122 of 1969, decided on 31st March, 1970

Mineral Concession Rules, 1949—Rules 28(1-A), 57(1)—Scope of—Failure of the State Government to dispose of applications for grant of mining lease within the time prescribed by the rules—Whether the State Government is deemed to have refused the applications.

Mineral Concession Rules, 1949—Rule 57(1)—Applications for grant of mining lease before the State Governments not disposed of within time—Rejection of review under Rule 57(1) by Central Government—Writ petition in the High Court for directing State Government to dispose of applications for lease—Central Government or appellant not parties to the petition—Decision of High Court allowing writ petition—Whether binding on the appellant or Central Government—State Government disposing of applications in pursuance of High Court's decision—Power of Central Government to dispose of revision against State Government's order.

†Appeals from the Judgment and Order, dated 18-7-1969 of the Andhra Pradesh High Court in Writ Petitions Nos. 464 and 602 of 1965.

On September 15, 1953, the first respondent applied for grant of a mining lease in respect of 915 acres and 18 cents of land and got a lease of lands comprising 57 acres 25 cents on January 9, 1954. On November 21, 1955, the appellant applied for a grant of a mining lease of a portion of the area for which the respondent had applied for. The State Government granted some of the areas of mining lease to various persons. The respondent moved the Central Government under Rule 57 of the Mineral Concession Rules, 1949, for directing the State Government to grant him the lease asked for. On December 27, 1955, the State Government granted on mining lease 1 acre, 20 cents of land to the appellant from out of the area included in the first respondent's application. On July 18, 1956, the Central Government rejected the first respondent's review petition. On April 16, 1957, the first respondent filed a writ petition (W. P. 888 of 1957) in the High Court for a writ to the State Government to dispose of his application for lease expeditiously. Neiher the Central Government nor the appellant were made parties to that petition. The High Court allowed the petition in pursuance of which the State Government by its order, dated May 27, 1961, granted on mining lease to the respondent all the areas for which he had made the application less those which had been given to others. The appellant filed a review petition under Rule 57, before the Central Government which by its order, dated February 15, 1965, set aside the grant in favour of the first respondent, dated May 27, 1961, on the ground that the applications of the appellant, first respondent as well as the others which were pending before the State Government should be deemed to have been rejected on March 1, 1958 in view of Rule 57(2). The appellant and the first respondent filed writ petitions in the High Court for grant of lease to them. The High Court allowed the writ petition filed by the first respondent thus setting aside the order of the Central Government and upholding the grant of lease by the State Government in favour of first respondent. The High Court dismissed the writ petition of the appellant. On appeal to the Supreme Court,

Held :

Per Hegde and Grover, JJ., that,

(*i*) According to Rule 57(2), where a State Government has failed to dispose of an application for the grant of a mining lease within the period prescribed therefor in the rules, such failure shall, for the purpose of the rules be deemed to be refusal to grant the lease. The rules referred therein include Rule 28 as well. This deemed refusal, if read with the mandate given to the State Government under Rule 28(1-A) requiring it to dispose of the applications within 9 months of the receipt of those applications, there can be hardly any doubt that if the State Government does not dispose of the applications within the time prescribed, it is deemed to have refused those applications for the purpose of Rule 28 as well as Rule 57. The High Court was wrong in thinking that in the absence of a provision providing for deemed rejection in Rule 28(1-A), the contravention of that rule does not take away the jurisdiction of the State Government, that conclusion ignores the words in Rule 57(2) that deemed rejection is 'for the purpose of these rules'. In view of these words in Rule 57(2), it was unnecessary for the rule-making authority to prescribe in Rule 28(1-A) the consequences of the failure on the part of the State Government to implement the mandate of Rule 28(1-A). Hence, in our opinion, the Central Government's decision that the applications made by the appellant, the 1st respondent and others for mining lease should be deemed to have been refused on March 1, 1958, is correct. Therefore the High Court was wrong in quashing the order of

the Central Government on that ground. (Para 16)

(*ii*) Rule 28(1-A) and Rule 57(2) are statutory rules. They bind the Government as much as they bind others. The requirement of those rules cannot be waived by the State Governments. Therefore the fact that the learned Government Pleader represented to the Court that the petition filed by the 1st respondent on September 15, 1953 was still pending disposal cannot change the legal position nor could it confer on the State Government any power to act in contravention of those rules. (Para 17)

(*iii*) It is true that as far as the State Government is concerned the writ issued was binding whether the decision rendered by the Court was correct in law or not; but then that decision will not bind either the appellant herein or the Central Government who were not parties to that writ petition. It is not a judgment *in rem*. In obedience to the writ issued by the Court, the State Government did consider the application of the 1st respondent. It granted him the lease asked for by him. Therefore the State Government has complied with the direction issued to it by the High Court. The Central Government had been constituted as the revisional authority under Rule 57. That authority is a quasi-judicial body created by statutory rules. It is bound by law to discharge the duties imposed on it by Rule 57. Therefore it had to obey the mandate of Rule 57. In so doing, it cannot be said that it had infringed the mandamus issued by the High Court in Writ Petition No. 888 of 1957 to which, as pointed out before, the appellant was not a party and the order made in which could not be binding either on the Central Government or the appellant. (Para 18)

Dey Gupta & Co. v. *State of Bihar and Another*, AIR 1961 Pat 487, *referred to.*

Held Per Shah, J : that :

(*i*) If the State Government fails to dispose of the application for grant of a mining lease within the time prescribed by the rules, the failure results in refusal to grant the lease. The High Court was in error in holding that in the absence of a provision enacting that even if the application stands rejected for failure to pass an order within the time prescribed, the State Government has power to issue a licence. The High Court was again in error in holding that because of the representations made by the State before Bhimasankaran, J., in Writ Petition No. 1237 of 1957 the State Government were estopped from contending that the application was by the first respondent must be deemed to have been refused. (Para 20)

(*ii*) It was not open to the Central Government in effect to exercise appellate authority over the judgment of the High Court. If the order was erroneous, it could be set aside by an appropriate proceeding before a Division Bench of the High Court or before this Court. But the Central Government had no power to set aside the order on the view that the High Court had reached an erroneous conclusion. To accede to the contention that the executive has the power, when exercising quasi-judicial functions, to sit in appeal over the decision of the High Court is to destroy the scheme of division of powers under our Constitution. I see no reason for making a distinction between the effect of an order made by the High Court and carried out by the State and an order made by the High Court and confirmed in appeal by this Court and carried out by the State. In my view Article 141 of the Constitution has no bearing on that question. If this Court decided a question of law or of fact or a mixed question of law and fact arising in an appeal against an order passed by the High Court in a writ petition against the action of the State Government granting or refusing to grant a licence, it would not, in my judgment, be open to the Central Government,

hearing a review petition against the order of the State Government in compliance with the order of this Court, to set aside the order so as to upset the order of this Court. That is so, not because of Article 141, but because neither the Legislature nor the executive is invested with powers to supersede judgments of Courts. The Legislature may if competent in that behalf change the law but cannot supersede a judgment of the Court. The executive has no power to change the law, and no power to supersede the judgment of the Court. (Para 23)

(*iii*) The appellant could undoubtedly have been made a party to a petition before the High Court. He could, therefore, challenge the correctness of the order made by Basi Reddy, J. No objection could be raised against the grant of leave to him to appeal on the ground that he was not a party to the Writ Petition No. 888 of 1957. (Para 25)

Cases referred to :

Re. "B" and Infant, 1958(1) QB 12 CA ; *In re. Securities Insurance Company*, 1894(2) Ch. 410 ; *The Province of Bombay* v. *Western India Automobile Association*, ILR 1949 Bom 591 ; *Ponnalagu* v. *State of Madras*, ILR 1953 Mad 808 ; *Pullayya* v. *Nagabhushanam*, ILR 1962 AP 127 (FB).

Civil Appeal No. 2121 of 1969 *allowed*.

Civil Appeal No. 2122 of 1969 *dismissed*.

Advocates who appeared in this case :

D. Narasaraju, Senior Advocate (*A. Subba Rao* and *K. R. Sharma*, Advocates with him), for Appellant (in both Appeals).

M. C. Setalvad, Senior Advocate (*P. Parameshwara Rao*, *V. Rajagopal Reddy*, *S. L. Setia* and *K. C. Dua*, Advocates with him), for Respondent No. 1 (in both Appeals).

Dr. Seyid Muhammed, Senior Advocate (*S. P. Nayar*, Advocate with him), for Respondent No. 2 (in both Appeals).

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate with him), for Respondent Nos. 3 and 4 (in C. A. 2121/69) and Respondent No. 3 (in C. A. No. 2122/69).

The Majority Judgments of the Court were delivered by

HEGDE, J.—These appeals by certificate arise from the common judgment of the High Court of Judicature at Andhra Pradesh in Writ Petitions Nos. 464 and 602 of 1965. The appellant herein was the petitioner in Writ Petition No. 602 of 1965 and the 5th respondent in Writ Petition No. 464 of 1965. In this case, it will be convenient to formulate the issues arising for decision after setting out the relevant facts.

2. Amrutham Kotaiah Naidu, the 1st respondent in these appeals applied for the grant of a mining lease in respect of 915 acres and 18 cents of land in Appalanarasimhapuram hamlet of Cheruvumadhavaram in Khammameth Taluqa of Warangal District of the then Hyderabad State, on September 15, 1953. After production of agreement with the Pattedars lease in respect of lands comprising 57 acres 25 Gunthas was granted to him as per the order of the Director of Mines and Geology, dated January 9, 1954. That order is silent as regards the other areas included in his application. Thereafter the respondent was pressing the State Government to grant him on lease the remaining areas included in his application. Meanwhile on November 21, 1955, the appellant applied for the grant of a mining lease of a portion of the area for which the respondent had earlier submitted his application. The State Government granted on mining lease to various persons some of the areas in respect of which the respondent had asked for a mining lease. Obviously aggrieved by those grants the respondent moved the Central Government under Rule 57 of the Mineral Concession Rules, 1949 (to be hereinafter referred to as 'rules') on December 8, 1955, seeking a direction to the State Govern-

ment to grant to him the lease asked for by him by his application of September 15, 1953. He further requested the Central Government to direct the State Government to stop granting further areas to other applicants in Appalanarasimhapuram village pending investigation of the matter and pending decision of the Central Government. Meanwhile on December 27, 1955, the State Government granted on mining lease 1 acre and 20 cents of land to the appellant from out of the area included in the lst respondent's application. On July 18, 1956, the Central Government dismissed the review petition made by the lst respondent on December 8, 1955, with these observations :

"Sir,

I am directed to refer to your application, dated the 8th December, 1955, on the subject and to say that after careful consideration of the facts stated therein, the Central Government have come to the conclusion that there is no valid ground for interfering with the decision of the Government of Hyderabad, rejecting your application for grant of mining lease for iron ore in Appanarasimhapuram and Raigudam villages, Khammameth district. Your application for revision is, therefore, rejected.

Yours faithfully,
Sd./- G. C. Jerath,
Under Secretary to the Government of India."

3. Evidently the Central Government proceeded on the basis that the order of the State Government, dated January 9, 1954 granting 57 acres and 20 cents of land to the lst respondent, by implication amounted to a rejection of his claim in respect of the other areas.

4. Meanwhile on September 15, 1956, some of the rules were amended. After Rule 28(1) a new sub-rule 28(1-A) was inserted. That sub-rule reads :

"Every application under Rule 27 shall be disposed of by the State Government within 9 months from the date of receipt of the application."

At the same time Rule 57 was also amended. Amended Rule 57 reads thus :

Application for review.—(1) Where a State Government passes as under.—

(*i*) refusing to grant a certificate of approval, prospecting licence or mining lease ;

(*ii*) refusing to renew a certificate of approval, prospecting licence or mining lease ;

(*iii*) cancelling a prospecting licence or mining lease ;

(*iv*) refusing to permit transfer of a prospecting licence or any right, title or interest therein under clause (*iv*) of sub-rule (1) of Rule 23 or a mining lease or any right, title or interest therein under Rule 37,

it shall communicate in writing the reasons for such order to the person against whom the order is passed and any person aggrieved by such order may, within two months of the date of receipt of such order, apply to the Central Government for reviewing the same.

(2) Where a State Goverment has failed to dispose of an application for the grant or renewal of a certificate of approval or prospecting licence or a mining lease within the period prescribed therefor in these rules, such failure shall, for the purpose of these rules, be deemed to be a refusal to grant or renew such certificate, licence or lease, as the case may be.

and any person aggrieved by such failure may, within two months of the expiry of the period aforesaid apply to the Central Government for reviewing the case.

(3) An application for review under this rule may be admitted after the period of limitation prescribed under this rule, if the applicant satisfies the Central Government that he had sufficient cause for not making the application within the said period."

5. A further amendment to that Rule 57(2) was made on August 31, 1957. The concerned notification No. S. R. O. 2753 reads :

"In exercise of the powers conferred by Section 5 of the Mines and Minerals (Regulation and Development) Act, 1948, the Central Government hereby makes the following further amendment in the Mineral Concession Rules, 1949, namely :

Provided that any such application pending with the State Government on the 14th September, 1956, and remaining undisposed of on the 24th August, 1957, shall be disposed of by the State Government within six months from the latter date."

6. On April 16, 1957, the 1st respondent filed another review petition before the Central Government. On September 26, 1957, that petition was dismissed by the Central Government as being premature. The relevant portion of that order reads :

"With reference to your application, dated 16th April, 1957, on the above subject, I am directed to invite your attention to this Ministry's Notification No. M-II-152(26)/57 dated the 21-8-57 (copy enclosed) amending the Mineral Concession Rules, 1949. It will be noticed therefrom that the application for concessions received by the State Government prior to the 4th September, 1956 and remaining undisposed of on the 31st August, 1957 shall be disposed of by them within six months from the latter date. Your application for review is therefore premature at this stage and in case your application for mining lease is not disposed of by the State Government within the prescribed period you may apply to the Central Government at the appropriate time."

7. While making this order, evidently the Central Government had overlooked its earlier order, dated July 18, 1956.

8. After the aforementioned order of the Central Government, the 1st respondent moved the High Court of Andhra Pradesh under Article 226 of the Constitution in Writ Petition No. 888 of 1957 seeking a writ of mandamus to the State Government of Andhra Pradesh to dispose of his application for lease made on September 15, 1953, expeditiously. To that petition he made only the State of Andhra Pradesh as the respondent. Neither the Central Government nor the appellant herein were parties to that petition. That petition came up for hearing before Basi Reddy, J., on November 4, 1958. At the hearing the learned Government Pleader who appeared for the State Government conceded that the application of the petitioner for mining lease on September 15, 1953 had not been disposed of by the State Government in the manner prescribed by Rule 17 of the 'Rules' but he contended that that application must be deemed to have been rejected in view of Rule 57(2). The learned Judge rejected that contention with the following observations :

"In my opinion this deeming provision is intended for the benefit of the applicant and does not relieve the State Government from perform-

ing the statutory functions imposed on it by Rules 17(1) and 17(2) viz., of granting or refusing the licence, and in case of refusal of recording in writing the reasons for the refusal and of refunding the application fee."

9. He accepted the petition and issued the mandamus prayed for.

10. During the pendency of the Writ Petition No. 888 of 1957, the lst respondent filed another writ petition on December 16, 1957 seeking the very relief that he had sought in his earlier writ petition. That petition was disposed of by Bhimasankaram, J., on August 20, 1959, with these observations :

> "It is stated by the learned 3rd Government Pleader that the Government is prepared to dispose of the application of the petitioner on the merits without relying upon Rule 57(2) of the Mineral Concession Rules, 1949. In the circumstances the petitioner does not want to press his petition. The writ petition is accordingly dismissed. There will be no order as to costs."

11. The State Government by its order, dated May 27, 1961, granted on mining lease to the respondent all the areas for which he had applied on September 15, 1953 less those areas which had been earlier leased out to others.

12. Aggrieved by the above order, the appellant moved the Central Government under Rule 57 on July 7, 1961 for reviewing the said order. Even before that he had moved the Andhra Pradesh High Court under Article 226 of the Constitution on June 13, 1961 to issue a writ of mandamus to the State Government to consider his application for mining lease in preference to that of the lst respondent as according to him the lst respondent's application should be deemed to have been rejected under Rule 57(2). The High Court rejected that application observing that the appropriate course for him was to move the Central Government under Rule 57 against the order of the State Government. Thereafter on 15-2-1965, the Central Government allowed the review petition filed by the appellant and set aside the grant made in favour of the lst respondent on May 27, 1961. It came to the conclusion that the applications made by the appellant, the lst respondent as well as others which were pending before the Andhra Pradesh Government should be deemed to have been rejected on the lst March, 1958, in view of Rule 57(2). Aggrieved by that order the lst respondent filed Writ Petition No. 464 of 1965 praying that the High Court may be pleased to call for the relevant records from the Central Government by issuing a writ of certiorari and quash the order of the Central Government and issue a further writ to the Central Government and to the State Government to grant the lease asked for by him. During the pendency of that petition the appellant filed Writ Petition No. 602 of 1965 seeking a writ of mandamus against the Central Government and the State Government to grant him the mining lease for which he had applied. The High Court has allowed the writ petition filed by the lst respondent and dismissed that of the appellant. Hence these appeals.

13. So far as Civil Appeal No. 2122 of 1969 is concerned there is no merit in the same. No ground in support of that appeal was urged before us. Hence it fails and it is dismissed.

14. In Writ Petition No. 464 of 1965 from which Civil Appeal No. 2121 of 1969 arises, the High Court set aside the order of the Central Government on various grounds and upheld the grant made by the State Government in favour of the lst respondent. We shall now proceed to consider the correctness of the reasons given by the High Court in support of its order.

15. The High Court was of the opinion that Rule 57(2) was enacted only for the benefit of the applicants for lease, licence *etc.* so that they may have an early opportunity to move the Central Government for appropriate orders. In the view of the High Court that rule does not take away the power of the State Government to dispose of the applications made for mining lease *etc.* even after the period prescribed expires. In support of this conclusion, it relied on the decision of the Patna High Court in *Dey Gupta and Co.* v. *State of Bihar and Another*[1] as well as on the decision of Basi Reddy, J., in Writ Petition No. 888 of 1957 to which reference has already been made. Neither the Patna decision nor the judgment of Basi Reddy, J., nor the decision under appeal gives any cogent reason in support of the conclusion that the deemed dismissal under Rule 57(2) does not take away the right of the State Government to grant the lease asked for. The Patna High Court in support of its conclusion observed :

> "No doubt, reading Rule 28(1-A) with Rule 57(2) of the Rules, it is clear that, if the State Government fails to dispose of an application for the grant of a mining lease within nine months, it must be deemed to have been refused by it.
>
> But this provision is made, in my opinion, only for the purpose of filing a review application before the Central Government, so that an applicant desirous to have a mining lease may not have to wait unnecessarily for a long period without any order being passed on his application. That however, does not mean that after the lapse of nine months from the date of receipt of the application, the State Government ceases to have jurisdiction over the matter so as not to pass any order on any application after the lapse of nine months from the date of its receipt.
>
> The expression "deemed to be a refusal" in Rule 57(2) is only for the purpose of a review application to be filed before the Central Government, and it is not a part of Rule 28(1-A). In this view of the matter the legality of the order passed by the State Government granting a mining lease to respondent No. 2 cannot be challenged on the above ground."

16. We think that these observations are not correct. If it is otherwise, even when a review petition is pending before the Central Government under Rule 57, the State Government can make an order on the application made and thus compel the parties to file another review petition. Further, if the Central Government gives one direction in the review petition and the State Government passes an inconsistent order in the original petition, there is bound to be confusion. If we read Rule 28(1-A) and Rule 57(2) together, there is hardly any doubt that after the period prescribed, the State Government ~~is incompetent~~ to deal with the applications pending before it. According to Rule 57(2), where a State Government has failed to dispose of an application for the grant of a mining lease within the period prescribed therefor in the rules, such failure shall, for the purpose of the rules be deemed to be refusal to grant the lease. The rules referred therein include Rule 28 as well. This deemed refusal, if read with the mandate given to the State Government under Rule 28(1-A) requiring it to dispose of the applications within 9 months of the receipt of those applications, there can be hardly any doubt that if the State Government does not dispose of the applications within the time prescribed, it is deemed to have refused those applications for the purpose

1. AIR 1961 Pat 487.

of Rule 28 as well as Rule 57. The High Court was wrong in thinking that in the absence of a provision providing for deemed rejection in Rule 28(1-A), the contravention of that rule does not take away the jurisdiction of the State Government. That conclusion ignores the words in Rule 57(2) that deemed rejection is 'for the purpose of these rules'. In view of those words in Rule 57(2), it was unnecessary for the rule making authority to prescribe in Rule 28(1-A) the consequences of the failure on the part of the State Government to implement the mandate of Rule 28(1-A). Hence, in our opinion, the Central Government's decision that the applications made by the appellant, the 1st respondent and others for mining lease should be deemed to have been refused on March 1, 1958 is correct. Therefore the High Court was wrong in quashing the order of the the Central Government on that ground.

17. The High Court was also wrong in opining that in view of the representations made by the learned Government Pleader before Bhimasankaran, J., on August 25, 1959, in Writ Petition No. 1237 of 1957, the State Government is estopped from contending that the application made by the 1st respondent on September 15, 1953 must be deemed to have been refused. There can be no estoppel against a statute. Rule 28(1-A) and Rule 57(2) are statutory rules. They bind the Government as much as they bind others. The requirement of those rules cannot be waived by the State Governments. Therefore the fact that the learned Government Pleader represented to the Court that the petition filed by the 1st respondent on September 15, 1953 was still pending disposal cannot change the legal position nor could it confer on the State Government any power to act in contravention of those rules.

18. Yet another ground relied on by the High Court is that in view of the writ issued by Basi Reddy, J., in Writ Petition No. 888 of 1957, the State Government was bound to consider the application of the 1st respondent and therefore the decision of the State Government taken in obedience to the order of the High Court could not have been set aside by the Central Government. It is true that as far as the State Government is concerned the writ issued was binding whether the decision rendered by the Court was correct in law or not ; but then that decision will not bind either the appellant herein or the Central Government who were not parties to that writ petition. It is not a judgment in rem. In obedience to the writ issued by the Court, the State Government did consider the application of the 1st respondent. It granted him the lease asked for by him. Therefore the State Government has complied with the direction issued to it by the High Court. The Central Government had been constituted as the revisional authority under Rule 57. That authority is a quasi-judicial body created by statutory rules. It is bound by law to discharge the duties imposed on it by Rule 57. Therefore it had to obey the mandate of Rule 57. In so doing, it cannot be said that it had infringed the mandamus issued by the High Court in Writ Petition No. 888 of 1957 to which, as pointed out before, the appellant was not a party and the order made in which could not be binding either on the Central Government or the appellant.

19. For the reasons mentioned above, we allow Civil Appeal No. 2121 of 1969 and set aside the order of the High Court and dismiss the writ petition No. 464 of 1965 but in the circumstances of the case, we make no order as to costs in these appeals.

The dissenting Judgment delivered by

SHAH, J.—I agree that Appeal No. 2122 of 1969 must be dismissed. I also agree that if the State Government fails to dispose of the application for

grant of a mining lease within the time prescribed by the rules, the failure results in refusal to grant the lease. The High Court was in error in holding that in the absence of a provision enacting that even if the application stands rejected for failure to pass an order within the time prescribed, the State Government has power to issue a licence. The High Court was again in error in holding that because of the representations made by the State before Bhimasankaran, J., in Writ Petition No. 1237 of 1957 the State Government were estopped from contending that the application was by the first respondent must be deemed to have been refused.

21. But I am unable to agree that the Central Government was competent in exercise of its power of review, against the order of the State Government made in compliance with the order of Basi Reddy, J. in Writ Petition No. 888 of 1957, to set aside the order so as in effect to overrule the judgment of the High Court.

22. The relevant facts may be recalled. The Central Government made an order on September 25, 1957, in the review application filed by the first respondent holding that his application was premature and that it was for the State Government to dispose of the application within six months of August 31, 1957. The first respondent then moved Petition No. 888 of 1957 for a mandamus directing the State Government to dispose of his application. By order, dated November 4, 1958, Basi Reddy, J., observed that Rule 57(2) as amended by S. R. O. No. 2753 "is intended for the benefit of the applicant and does not relieve the State from performing the statutory functions imposed on it under Rule 17(1) and 17(2) *viz.* of granting or refusing the licence". The State Government then heard the application and granted the mining lease for which the first respondent had applied on September 15, 1953. Against that order the appellant moved a review petition. The Central Government by order, dated February 15, 1965, allowed the review petition and set aside the grant in favour of the first respondent.

23. Granting that the High Court erroneously issued a writ of mandamus directing the State Government to perform its functions it was, in my judgment, not open to the Central Government in effect to exercise appellate authority over the judgment of the High Court. If the order was erroneous it could be set aside by an appropriate proceeding before a Division Bench of the High Court or before this Court. But the Central Government had no power to set aside the order on the view that the High Court had reached an erroneous conclusion. To accede to the contention that the executive has the power, when exercising quasi-judicial functions, to sit in appeal over the decision of the High Court is to destroy the scheme of division of powers under our Constitution. I see no reason for making a distinction between the effect of an order made by the High Court and carried out by the State, and an order made by the High Court and confirmed in appeal by this Court and carried out by the State. In my view Article 141 of the Constitution has no bearing on that question. If this Court decided a question of law or of fact or a mixed question of law and fact arising in an appeal against an order passed by the High Court in a Writ Petition against the action of the State Government granting or refusing to grant a licence, it would not, in my judgment, be open to the Central Government, hearing a review petition against the order of the State Government in compliance with the order of this Court, to set aside the order so as to upset the order of this Court. That is so, not because of Article 141, but because neither the Legislature nor the executive is invested with powers to supersede judgments of Courts. The Legislature may if competent in that behalf change the law but cannot supersede a

judgment of the Court. The executive has no power to change the law, and no power to supersede the judgment of the Court.

24. It was, however, said that the appellant was not impleaded as a party to Writ Petition No. 888 of 1957, and he could not seek redress in a superior Court against the order of Basi Reddy, J. But it is settled by a long course of authorities that a person who has not been made a party to a proceeding may still appeal with leave of the Appellate Court, provided he might have properly been made a party to the proceedings see *Re. "B" an Infant.*[1] In *In re. Securities Insurance Company*[2], Lindley, L. J., observed at p. 413 :

> "I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a prima facie case why he should have leave he will get it ; but without leave he is not entitled to appeal."

The rule has been accepted by the High Courts in India : See *The Province of Bombay* v. *Western India Automobile Association*[3] ; *Ponnalagu* v. *State of Madras*[4] and *Pullayya* v. *Nagbhushanam.*[5]

25. The appellant could undoubtedly have been made a party to a petition before the High Court. He could, therefore, challenge the correctness of the order made by Basi Reddy, J. No objection could be raised against the grant of leave to him to appeal on the ground that he was not a party to the Writ Petition No. 888 of 1957. In my judgment, therefore, Appeal No. 2121 of 1967 must also fail.

26. Order.—In accordance with the opinion of the majority Civil Appeal No. 2121 of 1969 is allowed and Civil Appeal No. 2122 of 1969 is dismissed. No order as to costs in these appeals.

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(*From Madhya Pradesh*)

[BEFORE J. C. SHAH, K. S. HEGDE, AND A. N. GROVER, JJ.]

CHANDROJI RAO .. Appellant ;

Versus

COMMISSIONER OF INCOME-TAX, M. P., NAGPUR† .. Respondent.

Civil Appeals Nos. 505 to 508 of 1967, decided on 28th April, 1970

Madhya Bharat Abolition of Jagir Act, 1951—Section 8(1) and (2)—Abolition of Jagir—Compensation under Section 8(1)—Interest on amount of compensation—Whether a capital receipt.

Interpretation of statutes—Marginal heading—Function of.

1. 1958(1) QB 12 CA.
2. 1894(2) Ch. 410.
3. ILR 1949 Bom 591.
4. ILR 1953 Mad 808.
5. ILR 1967 AP 127 (FB).

†Appeals by special leave from the Judgment and Order, dated 20-4-1965 of the Madhya Pradesh High Court in Misc. Civil Case No. 891 of 1914.

of the High Court on March 7, 1918, from which this appeal is brought.

Their Lordships are therefore of opinion that the order of the Subordinate Judge of March 31, 1917, and of the High Court of March 7, 1918, should be set aside, and that the prayer of the appellant for the recovery of the decree amount by attachment and sale of the defendants' immovable properties referred to in the application should be granted, and that the appellant should receive from the respondents his costs in the Court below and of this appeal, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

J. C.* 1920 Dec. 7.

MIDNAPUR ZAMINDARI COMPANY, LIMITED . . . . . { APPELLANTS;

AND

NARESH NARAYAN ROY . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Bengal Tenancy—Occupancy Right—Construction of Patta—Jote—Res judicata Issue determined adversely to successful Party—Code of Civil Procedure (V. of 1908), s. 11—Bengal Rent Act (X. of 1859), s. 6.

In 1864 a zamindar granted to the appellants' predecessors in title an ijara settlement for eight years at an annual rent; the patta and kabuliyat provided as to part of the land namely chur land for the possession of which the zamindar was then suing them, as follows: that the zamindar creating a jote of it and fixing Rs.1300 as the yearly rent should include it in the ijara rent; that after the expiry of eight years a fair rent should be settled in the zamindar's nij share; that until a fair rent was settled the yearly rent of Rs.1300 should continue. In 1912, occupation of the chur land having continued without a fresh rent being settled, the zamindar after notice to the appellants sued them for possession:—

Held, that upon the true construction of the ijara the appellants had not a permanent right of occupation of the chur land, and that the zamindar was entitled to possession.

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*Present: LORD DUNEDIN, LORD MOULTON, and MR. AMEER ALI.

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Jardine, Skinner & Co. v. *Surut Soondari Debi* (1871) L.R. 5 I.A. 164 followed.

A "jote" is a general term and is not necessarily equivalent to a raiyati jote; it is little suited to the recognition of a pre-existing right.

In 1877 the zamindar had sued for possession of the chur land and the tenants had pleaded (1.) an occupancy right, and (2.) that the suit was premature, no attempt having been made to settle a fresh rent. The trial judge made a decree dismissing the suit; he held that there was no occupancy right, but that the suit was premature. Upon an appeal by the zamindar to the High Court, the tenants filed a cross-objection to the finding that there was no occupancy right. The High Court affirmed the decree, on the ground that the suit was premature, and upon the cross-objection affirmed the finding that there was no occupancy right:

Held, that the absence of an occupancy right was not a res judicata against the appellants since the tenants had succeeded upon the other plea, but that it created a paramount duty on the appellants to displace the finding, and that they had failed to perform that duty.

APPEAL from a judgment and decree of the High Court (June 13, 1917) affirming a decree of the Subordinate Judge of Murshidabad.

The respondent sued the appellants for possession with mesne profits of an undivided fractional share of certain chur land of which the appellants were in possession under the terms of a patta and kabuliyat of 1864. The respondent had given notice terminating the tenancy. The appellants pleaded that under the terms of the patta and kabuliyat they were entitled to remain in possession, paying Rs.1300 a year rent so long as a new rent had not been settled. Other pleas were raised which are not material to this report.

The facts, including the terms of the kabuliyat, appear from the judgment of their Lordships.

The Subordinate Judge made a decree for khas possession and for mesne profits; that decree was affirmed upon an appeal to the High Court.

1920. Nov. 15, 16, 18. *De Gruyther K.C.* and *Kenworthy Brown* for the appellants. The appellants had a permanent right of occupation. Their predecessors had possession for the purpose of cultivating the land; they were raiyats and under s. 6 of the Bengal Rent Act (X. of 1859) an occupancy right was obtained by twelve years' continuous possession. [Reference was made to *Durga Prosunno Ghose* v. *Kalidas*

Dut. (1)] They had a permanent right in the chur lands under the terms of the patta and kabuliyat of 1864. *Jardine, Skinner & Co.* v. *Surut Soondari Debi* (2) is distinguishable. First, because in 1864 the appellants' predecessors were in possession as jotidars; the ijara was ancillary to the compromise, it recognized the right to occupy and merely defined the rent payable. Secondly, because the terms of the ijara are not the same; in this case it was expressly provided that the tenancy was to continue at Rs.1300 a year until a fresh rent was settled. The use of the term "jote" shows that a raiyati tenure was created, though it is not conclusive. The finding of the appellate Court in the suit of 1877 that there was no occupancy right did not constitute a res judicata under s. 11 of the Code of Civil Procedure, 1908, since the tenant succeeded upon the other plea. The finding was given upon a cross-objection by them under s. 561 of the Code of Civil Procedure, 1859; they could not appeal against the finding without appealing against the decree of the trial judge. In any case the finding did not affect the question of the rights under the ijara. [Reference was made, on the res judicata point, to *Run Bahadur Singh* v. *Lachoo Koer* (3), *Magundeo* v. *Mahadeo Singh* (4), *Jamaitunnissa* v. *Lutfunnissa* (5), and *Ghela Ichharam* v. *Sankalchand Jetha.* (6)]

Dunne K.C. and *Dube* for the respondent. The former decision of the Board relied on by the High Court is not distinguishable. The provision that the rent of Rs.1300 was to continue until a fair rent was settled merely expressed that which the law would have implied. The appellants, by their written statement, and throughout, have relied upon the ijara of 1864 as creating a jote; no antecedent right was alleged. Earlier litigation precluded the appellants from setting up an occupancy right independently of the ijara. [With regard to the decision at 9 Cal. L. R. 449 reference was made to *Rajani Kanta Ghose* v *Secretary of State for India.*(7)]

(1) (1881) 9 Cal. L. R. 450.
(2) L. R. 5 I. A. 164.
(3) (1884) L. R. 12 I. A. 23.
(4) (1891) I. L. R. 18 C. 647.
(5) (1885) I. L. R. 7 A. 606.
(6) (1890) I. L. R. 18 B. 597.
(7) (1918) L. R. 45 I. A. 190, 194.

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The question of occupancy right was a res judicata in the suit of 1877. There was an issue raised with regard to it, and that issue was finally decided within the meaning of s. 11 of the Code of Civil Procedure, 1908. [Reference was made to *Krishna Bahari Roy* v. *Brojeswari Chowdranee* (1); *Ashgar Ali Khan* v. *Ganesh Dass* (2) being distinguished.]

De Gruyther K. C. replied.

Dec. 7. The judgment of their Lordships was delivered by LORD DUNEDIN. This is an appeal from the judgment of the High Court at Calcutta affirming a judgment of the Subordinate Judge by which he decreed khas possession of certain reformed and accreted chur lands in favour of the plaintiff. The plaintiff is a zamindar and the lands in question are admittedly within his zamindari. The existent lease of the lands having, as he contended, expired, he gave the necessary notice to terminate the tenancy. The appellants plead that they are occupancy tenants and as such entitled to maintain possession under the terms of Act X. of 1859 (the Bengal Rent Act).

The appellants are the successors by transfer to the firm of Jardine, Skinner & Co., who were prior to 1864 in occupancy of the lands, the zamindar at that time being the respondent's father, to whom he has succeeded. In that year the respondent's father raised an action against Jardine, Skinner & Co., claiming the lands in question. That suit was compromised. At the same time Jardine, Skinner & Co. took a lease of the whole taluk within which the lands were situated. Patta and kabuliyat were executed.

The kabuliyat executed by the manager of Jardine, Skinner & Co. bears as follows: "I having applied for a temporary ijara settlement of all the mahals, etc., appertaining to your zamindari and putni taluk. . . . . you grant me an ijara settlement and ijara pottah for a term of eight years from 1271 to 1278 B.S., fixing Rs.7500 as the annual rent, exclusive of collection charges." The kabuliyat then proceeds to incorporate the settlement as follows: "You

(1) (1875) L. R. 2 I. A. 283. (2) (1917) L. R. 44 I. A. 213.

have instituted against me a suit, No. 19 of 1864, in the Sudder Amin Adalat of the district of Murshidabad, claiming a 4 annas 13 gundahs 1 kara 1 krant share of the reformed and accreted chur lands of Bajupur, Krishnapur, Dinurpara alias Manick Chuck, appertaining to taraf Bangsibadanpur, and a 7 annas share of the reformed and accreted chur land of Ashariadaha appertaining to pergunnah Kazirhatta. Creating a jote of the same and fixing Rs.1300 as its yearly rent, you include the same also in the aforesaid ijara rent. In respect of the same, the stipulation is that after the expiry of the term of this ijara, pottah and kabuliyat will be given and taken, settling the rent of the aforesaid chur land in your nij share, at a fair rate, according to the proper rate prevailing in the villages, either amicably and (or) by suit; that until you settle the rent in the aforesaid method, according to the proper rate prevailing in the villages, I will pay up to that time the aforesaid yearly rent of Rs.1300 in twelve monthly instalments as per kistbandi, and in default of any kist, I will pay interest at Re. 1 per cent. per month, and that if after the fair rent is settled according to the proper rate prevailing in the villages I refuse to pay that rent, then you will bring the lands under your khas possession by evicting me therefrom; and I shall not be able to make any objection to the same."

The case accordingly depends upon the proper interpretation of this clause in the ijara. The learned judges of the appellate Court have held that the clause is practically indistinguishable from the clause which was the subject of decision by this Board in the case of *Jardine, Skinner & Co.* v. *Surut Soondari Debi.* (1) There, as here, there was a lease of other lands besides the lands in question, and the words of the kabuliyat are as follows: "Having fixed a yearly rent of Rs.609 4a. for your nij share of 20,950 bighas, describing them as per boundaries given in the schedule below, you have included it in the aforesaid ijara rent of Rs.4417 9a. 5r. I shall be in possession of the said chur as a jote. Upon the expiration of the term of the ijara of the said

(1) L. R. 5 I. A. 160.

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mahals, a pottah and kabuliyat will be respectively given and taken in respect of the jote, regard being had to the quantity of land and amount of rent that shall be determined to belong to your nij share in accordance with the productive power of the land within the area determined by a measurement of the said chur. If I do not take a pottah and give a kabuliyat within two months after the fixing of the rate of that land, you will make a settlement with others."

In that case, as here, Messrs. Jardine, Skinner & Co. claimed to be occupancy tenants, but the High Court and this Board negatived that contention, and held that the agreement merely amounted to a right of renewal, and did not create either an occupancy right or vest in the defendants a new term of years.

Now if the clause in that case be compared with the clause in this it will be seen that it is for all practical purposes identical. The clause employs the term "jote," and speaks of a "nij" share. "Jote" is a general term, and it is not necessarily equivalent to "raiyati jote." In the present case it is shown in another place that the term "raiyati jote" is used when an undoubted right of occupancy is being dealt with. The only distinction that can be drawn between the clause in that case and in this is that a special covenant is inserted in this case fixing the old rent of Rs.1300 as the rent to be paid on holding over till such time as a new rent is fixed, while in the other case there is silence as to this. But this covenant is nothing more than an expression of what the law would hold without it and cannot, in their Lordships' opinion, alter the general construction of the document.

The appellants' counsel further urged that the present case was not ruled by the other because he said that in this case there was an antecedent occupancy right, whereas there was no such right in the other case, and that in the light of that fact the agreement must receive a different interpretation. To make good such an argument the onus is obviously on the appellants to prove such an antecedent right. In their Lordships' view they fail to do so, for several reasons. In

the first place, they bring no clear proof on the subject. But, further, there is a very significant proceeding in a litigation which arose between the parties in 1877. That was after the expiry of eight years from 1864, and the respondent's father sued for khas possession. The defendants, Jardine, Skinner & Co., pleaded (1.) an occupancy right, and (2.) that the suit was premature, no attempt having been made to settle the terms of a new lease under the right to get a renewal for one more term. The Subordinate Judge held that there was no occupancy right, but that the suit was premature. Appeal was taken to the High Court, and they, in affirming the judgment, said as follows, after expressing the view that the action was premature: "If the respondents (defendants) had been satisfied with this judgment, we should have been inclined to dismiss the appeal with costs, but notwithstanding the suggestion of the Court, the Government pleader who appears for the tenants thought it advisable to lay before us a cross-appeal. That cross-appeal is against the finding of the Lower Court that the defendants had not a right of occupancy in this land. It was contended that they had such right of occupancy, because the land leased to them is called a jote, and because from the date of the lease granting them that jote down to the present time they have occupied it for twelve years and upwards, and consequently must be regarded as having a right of occupancy. It seems to us that if there is anything clear in regard to a right of occupancy as defined by Act X. of 1859, it is a right accruing to a raiyat and not to persons who are middlemen. It would be, we think, a monstrous straining of the law to apply the term 'right of occupancy' to such an estate as this."

Their Lordships do not consider that this will found an actual plea of res judicata, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform.

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Lastly, there is the internal evidence from the ijara itself, where the jote is said to be created—an expression little suited to the recognition of a pre-existing right.

On the whole matter their Lordships agree in all points with the judgment of the learned judges of the Appellate Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Burton, Yeates, & Hart.*

Solicitors for respondent: *W. W. Box & Co.*

J. C.* 1920 *Dec.* 16.

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } APPELLANT:

AND

SRINIVASA CHARIAR AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Inam--Shrotriyam--Construction of--Grant--Conveyance of Minerals--Enfranchisement, effect of--Royalties on Quarried Stone--Mad. Act VIII. of 1869.

A village was granted as a shrotriyam inam in A.D. 1750 by the Nawab of Carnatic. The grant, the terms of which appeared from a translation produced from a Government register, provided that its purpose was that the grantee having appropriated to his own use the produce of the seasons each year. might pray for the prosperity of the Empire, and that he should pay a fixed yearly sum to the sirkar. The inam was enfranchised in 1865, there being given to the inamdars title-deeds which purported to convert the tennre into a permanent freehold npon payment of a quit-rent. After the enfranchisement the Madras Government requiring stones acquired part of the village from the shrotriyadars under the Land Acquisition Act. In or about 1905 the Madras Government imposed and levied upon the shrotriyadars royalties in respect of stone which they had quarried in the village:—

Held, (1.) that upon the true construction of the grant the full right to the quarries and minerals did not pass to the grantee; (2.) that the terms of the grant being in evidence neither the inam title-deeds nor the land acquisition proceedings were evidence as to its effect; (3.) that having regard to Mad. Act VIII. of 1869 the inam title-deed could not

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**Present*: LORD MOULTON, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI, and SIR LAWRENCE JENKINS.