PLD 1955 FEDERAL COURT 240

(Appellate Jurisdiction)

Present : Muhammad Munir, C. J., A. S. M. Akram, A. R. Cornelius, Muhammad Sharif and S. A. Rahman, JJ

(1) FEDERATION OF PAKISTAN,
(2) MUHAMMAD ALI,
(3) CHAUDHRI MUHAMMAD ALI,
(4) MAJOR GENERAL ISKANDER MIRZA,
(5) M. A. H. ISPAHANI,
(6) DR. A. M. MALIK,
(7) DR. KHAN SAHIB
(8) GENERAL MUHAMMAD AYUB KHAN,
(9) GHYAS-UD-DIN PAIHAN AND
(l0) MIR GHULAM ALI TALPUR
Appellants
versus

Moulvi TAMIZUDDIN KHAN-Respondents Constitutional Civil Appeal No. 1 of 1955, decided in Pakistan v, April 1955.

(On appeal from the judgment and order of the Chief Khan Court of Sind at Karachi, dated the 9th February 1955, in -- Writ Petition No. 43 of 195--- P L D 1955 Sind 96). Indian Independence Act, 1947, Ss. 5. 6 (3), 8 (I), 223-A, C J Assent of Governor-General necessary to all legislations of Constituent Assembly, including those making provision as to the Constitution of the Dominion under S. 8 (I)-Constituent Assembly acting under S. 8 (I) acts as the "Legislature of the Dominion"-S. 223-A, Government of India Act, 1935, invalid for want of .such assent-Rule 62, Rules of Procedure of Constituent Assembly-Dominion Status-Independent Dominion History fsand background-Governor-General part of Legislature-King's Prerogative-Constituent Assembly, whether sovereign-Contemporanea Expositio and argument ab incon venienti-Assent need not be in writing.

The Constituent Assembly of Pakistan was dissolved by the Governor-General by a Proclamation dated the 24th of October, 1954 and a re-constituted Council of Ministers was set up. The President of the Constituent Assembly, Moulvi Tamizuddin Khan (respondent) thereupon put in a Writ Petition (under section 223-A, Government of India Act, 1935) in the Chief Court of Sind against the Federation of Pakistan and the members of the re-constituted Council of Ministers (appellants) praying that a writ in the nature of mandamus be issued against the appellants restraining them from implementing the Proclamation of the 24th October, 1954 and from interfering with the exercise of respondent's functions as President of the Constituent Assembly, and another writ in the nature of quo warranto with a view to determining the validity of appellants' appointment as members of the Council of Minister.

The appellant's reply inter alia was that the dissolution of the Assembly was valid and that the Chief Court has no jurisdiction to issue the writs, because section 223-A was not validly enacted for want of assent of the Governor General to the enactment (Government of India (Amendment) Act, 1954), inserting that section in the Government of India Act, 1935.

The Chief Court issued the writs prayed for, holding that the Acts of the Constituent Assembly, when it did not function as the Federal Legislature did not require the Governor-General's assent.
The Federation of Pakistan and the re-constituted Council of Ministers appealed to the Federal Court.

Held, (Per Muhammad Munir, - C. J., A. S. M. Akram, Muhammad Sharif and S. A. Rahman, JJ. agreeing ; Cornelius, J., contra).-The Constituent Assembly when it functions under subsection (I) of section 8 of the Indian Independence Act, 1947, acts as the Legislature of the Dominion within the meaning of section 6 of that Act, and under subsection (3) of the latter section the assent of the Governor General is necessary to all legislations by the Legislature of the Dominion. Since section 223-A of the Government of India Act under which the Chief Court of Sind assumed jurisdiction to issue the writs did not receive such assent, it was not yet law, and that therefore that Court had no jurisdiction to issue the writs.

In view of this conclusion, the Court did not go into the other issues in the case.

The main conclusions supporting the above opinion were :

The position of the Constituent Assembly is that it is the Legislature of the Dominion when it makes laws for the constitution of the Dominion and the Federal Legislature when it functions under the limitations imposed upon it by the Government of India Act, 1935.

The Crown is a constituent part of Parliament in the United Kingdom and of all Dominion Legislatures either because it is expressly so stated in the constitutional statutes or because the Crown appoints the Governor-General who is empowered to give or withhold assent to the legislation of the Dominion. The same was the position, under the Government of India Act, 1935, i. e. the Governor-General, was a part of the Federal Legislature. It is this common restriction that exists on the Dominion legislation which subsection (3) of section 6, Indian Independence Act, 1947 intended to enact when it provided that the Governor-General of the Dominion shall have full power to assent in His Majesty's name (including the power to withhold assent) to the laws of the Legislature of the Dominion.

The restrictions are illustrative of the constitutional position that assent to the Dominion legislation by the Crown or its representative is indispensable and has in no instance ever been dispensed with by the Crown. [ibid]C

The provisions in Constitutions of other Dominions relating to assent do not create in tile Crown or to its representative a new right, but confirm an existing right and

merely provide the manner in which that right is to be exercised. Thus if the right to withhold assent to Dominion legislation is inherent in the . Crown .and the statute that legislates on that right merely says that a bill after it has been passed by the popularly elected House or Houses shall be presented for - assent to the Governor- General, , who will give assent to that bill or withhold it there from, the statute does not create the right to withhold assent but merely describes the manner in which that right is to be exercised. Similarly the provisions in the Government of India Act which give to the Governor- General the right to withhold assent from legislation do not confer on, or create a new right in, the Crown ; on the contrary, they implicitly recognise such right and regulate the manner in which it is to be exercised. 1t is for this reason that fiction. of making the Crown a constituent of the legislature is resorted to, because neither the King nor his representative, the Governor- General, is a member of the legislature like other members: The King or the Governor- General is a part of the Legislature only in the sense that all bills passed by the Legislature are presented to him, so that he may exercise his right of giving or withholding assent. Thus subsection (3) of section 6 produces the same result by giving to the Governor- General full power to assent in His Majesty's name to any law of the Legislature of the Dominion. It makes the Governor- General a constituent part of the legislature inasmuch as the right, to give assent necessarily includes in it the right to withhold assent. Every bill must therefore be presented to him to provide him an occasion to exercise that right, and unless a bill is so presented a constituent part of the Legislature does not function and the proposed legislation does not become law. There is, therefore, no distinction between those constitutions where the Crown is a constituent part of the Legislature and the Legislature of the Dominion of Pakistan whose functions are being exercised by the Constituent Assembly and to whose legislation assent is enacted by subsection (3) 'of section 6 as a necessary condition.

"The powers of the Legislature of the Dominion" in subsection (1) of section 8 ' refer back to the powers of the Legislature of the Dominion defined in section 6, which the Constituent Assembly was to exercise in its capacity of Legislature of the Dominion.

The provisions of section 6 are applicable to the powers given to the Constituent Assembly by subsection (1) of section 8 and the restriction as to the Governor- General's assent to legislation by the Legislature of the Dominion, whatever may be the character of that legislation, is applicable when the Constituent Assembly exercised the powers of the Legislature of the Dominion under subsection (1) of section 8. That subsection does not say that the constitution of the Dominion shall be made by the Constituent Assembly. It assumes that the powers of the Legislature of the Dominion include the power to make provision as to the constitution of the Dominion, declares that those powers shall be exercisable in the first instance by the Constituent Assembly and directs that references in the Act to the Legislature of the Dominion shall be taken as references to the Constituent Assembly. The plain words of subsection (1) of section 8 that "reference in this Act to ' the Legislature of the Dominion shall be construed accordingly" have the effect of substituting the 'Constituent Assembly for the. words "the Legislature of each of the new Dominion" in subsections (1) and (3) of section 6. That being the position, there can be no escape from the conclusion that the Governor- General's assent to the laws made by the, Constituent Assembly is an necessary as his assent to any future Legislature of the Dominion brought into existence by the Constituent Assembly to replace itself.

Legislation is the exercise of a high prerogative power and even where it is delegated by statute or charter to a legislature, in theory it is always subject to assent whether that assent be given by - the King or by a person nominated by the King. In the British system there is not a single instance to the contrary. That necessity was enjoined in the case of Pakistan so long as it continued to be a Dominion, though it was open to that Dominion, if the Governor- General gave assent to a bill of secession to repudiate its Dominion status. The force of the words `full power to assent' would be realised if a situation arose where a bill of secession came up before :the Governor- General for assent. So far as His Majesty was concerned he had given full powers to his Governor- General to assent to any legislation of the Dominion ; but the Governor- General, though he was a representative of the King, was also the representative of the Dominion in the sense that he was a person in whom the majority party of the Assembly had confidence. He would, therefore, have no hesitation, and would also have the requisite authority to give assent. If, however, he withheld assent, his' immediate recall by His Majesty would have been successfully insisted upon by the Assembly and the assent could then have been obtained from his successor.

The word `law' in subsection (3) of section 6 has been used in a general sense, namely, any proposed legislation which has not as yet received the assent of the Governor General.

The legislation of the, Constituent Assembly under subsection (1) of section, 8 is a part of the government of the Dominion within the meaning of section 5 arid 'the whole scheme of the Government of India Act proceeds on the assumption that the Governor- General represents the . Crown when he assents in Her Majesty's name to the laws, of the Federal Legislature. Therefore it seems to me to be an impossible proposition to assert that the .making of laws is not a part of the government of the Dominion, and that being so no reason whatsoever has been suggested why the making of constitutional laws should not be a part of the Government of the Dominion. If the Governor- General represents the Crown for the purposes of the government of the Dominion when he gives assent to the laws passed by the Federal Legislature, it must a fortiori follow that he represents the Crown for the same purpose when he assents to constitutional laws, because in a State like ours it is impossible to conceive of a Government without there being a constitution.

Rule 62 of the Rules of Procedure of the Constituent Assembly, which provides that when a bill is passed by - the ,Assembly a copy thereof shall be signed by the President and it shall become law on being published in the official Gazette of Pakistan under the authority of the President, is a mere rule of procedure which cannot amend the Constitution Act.

The rule of Contemporanea expositio and argument as inconvenient does not apply to the present case inasmuch as there is no doubt as to the true meaning of sections 6 and 8 as a whole, and there is no estoppel.

As for the question whether the Constituent Assembly is a sovereign body it is a mistake to suppose that sovereignty in its larger sense was conferred upon the Constituent Assembly, or that it could function outside the limits of the Indian

Independence Act. The only power given to that Assembly was the, power to make laws, constitutional or federal. In the former case, it exercised the power to make provision as to the constitution of the Dominion which had been included in the generality of the powers conferred by section 6 on the Legislature of the Dominion, and in the later. it acted as the Federal Legislature with all the limitations to which that Legislature was subject. Apart from these powers, it had no other power and it lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body in the State. It had, of course, legislative sovereignty as the Legislature of the Dominion but then the Governor-General was a constituent part of the Legislature. Every. Act passed by it required the Governor General's assent, consistently with the position that prevails throughout the Dominions,. the Colonies. and the Possessions, settled or ceded or conquered, where the Crown still retains to itself or has delegated to its representative the high prerogative right of assenting to bills.

Any attempt to construe the Governor-General's power to withhold assent, as a veto on legislation proceeds on a misapprehension and cannot be made a ground for the inference that that power is an infringement of the legislative sovereignty of the Legislature of the Dominion and - thus of the Constituent Assembly.

We are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under subsection (3) of section 8 needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country.

The Governor-General is appointed by the King or Queen and represents, him or her for the purposes of the government of the Dominion (section 5 of the Indian Independence Act). The authority of the representative of the King extends to the exercise of the royal prerogative in so far as it is applicable to the internal affairs of the Member, State or Province, even without express delegation, subject to any contrary statutory or constitutional provisions.

History and background of Dominion Status discussed from pp. 258to 267.
Incidents of an Independent Dominion indicated from pp. 306 to 313.
Assent need not be in writing.

M. A: Khuhro v. The Federation of Pakistan P L D 1950 Sind 49, dissented from.

Khan Iftikhar Hussain Khan of Mamdot v. The Crown (1951) F C R 24- P L D 1930 F C 15, not applicable.

Stockdale v. Hansard 1839-9-A ' & E 1, Ndlwana v. Hofmeyer 1937 A D 229 and Campbell v. Hall XX How-St. Tr. 239 ref.

Per A. S. M. Akram, J.- Reading section 6 (3) and the 1st part of section 8 (1) together the conclusion which I am able to draw is that the Governor-General has full power to give assent to any kind of law proposed by the Legislature of the Dominion and that the Constituent Assembly which in the first instance is to make provision

- for the constitution of the Dominion is to exercise the power of the Legislature of the Dominion for that purpose. As a result, the assent of the Governor- General ' becomes necessary for the validity of even constitutional laws. In my opinion the words "full power to assent" in the context carry with them full liberty to refuse - assent as power' conferred does. not mean liability imposed or, obligation. created.

In the interpretation of laws and statutes plain words, should, as a rule, be given their plain meaning and a laboured construction should not be put ; upon them to bring into prominence some kind of a remote signification.

The effect of conferring Dominion Status was that certain rights and liabilities as between the Dominion and the United Kingdom came into existence, for instance, if the Dominion by its legislation negated allegiance to the Crown or severed' connection with it, such a legislation perhaps could not be considered as legally valid or justified. The expression, "Independent Dominion" has, therefore, been purposely used in the Independence Act in order to give to the Dominion a freedom of choice either to remain or to refuse to remain within the British Commonwealth of Nations.

I am of the view that in the absence of any express or implied provision in any enactment to the contrary, the assent of the Governor- General is necessary before any constitutional measure framed under section 8 (1) of the Independence Act, 1947; can pass into law.

Per Cornelius, J. (Contra).- The Indian Independence ,Act, 1947, possessed in several respects the same character as the Statute of Westminster, 1931, but with one major difference . . . . the extent of freedom accorded to the countries which, as Dominions, were to replace the Indian Empire, was in very material degree greater than that which the older Dominions had gained in 1931. That, in my view, is the circumstance which justifies the application of the special description "Independent Dominions" to the two new States which were brought into existence by means of this highly effective instrument.

The Governor- General owes nothing to the British Sovereign except his warrant of appointment, issued upon the recommendation of the Government of Pakistan. No duty of any kind is prescribed which he owes to Her Majesty, except that of being "faithful", appearing in the oath which Her Majesty is pleased to accept. The appointment, by its terms affirms and emphasises that the Governor- General's duty, or as it might be termed "allegiance", is to the Constitution, as in existence from time to time.

The Constituent Assembly was, as a body, not a creation of the British Parliament. It is, in my opinion, to be regarded as a body created by a supra- legal power to discharge the supra- legal function of preparing a Constitution for Pakistan. Its powers in this respect belonged to itself inherently, by virtue of its being a body representative of the will of the people in relation to their future mode of Government. In relation to constitutional provisions, it (Constituent Assembly) exercised the powers of the British Parliament, which were in that respect, untrammelled by any laws.

With respect to the necessity of assent by the Governor. General to laws of a constitutional nature passed by the Constituent Assembly, this doubt arose at a very early stage. The Court is indebted to the learned Advocate- General of Pakistan for the assertion, made on more than one occasion, that the Late Ministry of - the Government of Pakistan (by which was meant the body of permanent officials constituting the staff of the Ministry under the Law Minister) had consistently advised the Minister that - such assent was sine` qua non. On the other hand, the Constituent Assembly had throughout maintained the view that assent was not necessary, and acting on that view had made and promulgated a rule, No. 62 in the Rules of the Constituent Assembly, to give formal expression to that view.

The major limb (Constituent Assembly) of the three great limbs of the autonomous State of Pakistan had clearly expressed in 1948 its view on this question, which has now assumed so high an importance. I place the Constituent Assembly above the Governor- General, the Chief Executive of the State, for two reasons, firstly that the Constituent Assembly, was a sovereign body, and secondly because the Statutes under and in accordance with which the Governor- - General was required to function, were within the competence of the Constituent Assembly to' amend.

The second great limb of the State, namely the Executive 'Government of the Federation, has never, until after the event of the 24th October 1954, shown any sign, of doubt on this point.

The Government of Pakistan, composed of the Governor General and his Ministers, , have, throughout the relevant period, been aware that the Constituent Assembly had formally declared that its constitutional laws became law under its own Rule 62, without the need of the Governor- General's assent.

In illustration of the view of the third great limb of the State, His Lordship referred to the three cases : M. A. Khuhro v. The Federation of Pakistan 1950- 51 F C R 24= P L D 1950 F C 15. Khan Iftikhar Hussain Khan of Mamdot v. The Crown, P L D 1950 Sind 49, ex- Major- General Akbar Khan and Faiz Ahmad Faiz v. The Crown P L D 1954 F C 87 and observed

For the first seven years of Pakistan's existence, the three great limbs of this new "autonomous community" exhibited complete harmony of view in regard to the point this Court is now. called upon to decide.

The Constituent Assembly . . . . . was a supra- legal body, not acting in its constitution- making capacity within the Constitution. It was not to be presumed that,' in this capacity, its proceedings and decision were subject to the qualified negative of the Governor-General, who was a statutory authority, owing existence - to the interim Constitution.

With reference to the argument ab inconvenienti His Lordship observed : -

The present is not a case where a mere "departmental construction", or even a judicial or legislative construction is put forward, as a caution against lightly disturbing .that which has been accepted and acted upon as settled law for a period, leading to development of vested rights. The rule of stare decisis is altogether too small in its

content to fit the case. Here, the greatest organs and agencies of the State have been consciously and unanimously holding a certain belief, and have been acting upon it, in numerous respects affecting the most fundamental rights of the entire people, It is difficult to imagine a law which affects so large a proportion of the public as does a law designed to grant adult suffrage, and to determine the composition of Provincial Legislatures on that basis. The Delimitation of Constituencies (Adult Franchise) _Act, 1951, was procured by the Federal Government, was passed by 'the Constituent Assembly, was put into operation by the combined labours of the Federal and Provincial Governments, and has borne fruit in the shape of new Legislative Assemblies, which have been, busy ever since passim; .new laws and in other ways; regulating the lives of the people. It is beyond conception to tabulate all the vested . rights and interests which have been developed in conseclimice of this law. And there are many other laws which have produced 'extensive effects, which cannot possibly be ascertained with exactness. These circumstances should; in my opinion, furnish an argument of almost insuperable character, in favour of. upholdihg what has been the practice hitherto in regard to assent to constitutional laws,

The effect of section 6 (3) read with section 8 (1) and section 5 of the Indian Independence Act, 1947 was stated thus by His Lordship The Constituent Assembly being designed to be a sovereign body and to exercise sovereign power, including power to alter the Constitution subject to which the Governor- General was intended to act, it would clearly be inconsistent with that design and purpose if the "qualified negative" of assent by the Governor- General were imposed upon its constitutional laws. Secondly, it being within the complete power of thg Constituent Assembly to determine the constitution of the "Legislature of the ~ Dominion", or Union Legislature, and to determine the scope of its legislative competency as well as the mode in which its laws should be enacted, the British Parliament could' not affect to prescribe the requirement of assent, as an essential formality, in respect of the laws made by such a Legislature. This would be to usurp the functions of the Constituent Assembly. To impose such a requirement upon laws of a constitutional nature made by the Constituent Assembly would be a direct affornt to the position and authority of that body. Hence the careful use of expressions in section 8,- Indian Independence Act, to indicate that the necessary powers of legislation should be exercisable by the Constituent Assembly. The words signify the courtesy owed by one sovereign body to another. There was no direct imposition of obligations, but the need being indicated, it was indicated also that the Constituent Assembly, as previously agreed upon by the plenipotentiaries in the negotiations between' the United Kingdom Government and the representatives of the Indian people, might fulfil the need.

Section 5, Indian Independence Act, cannot operate to confer any right to grant assent beyond that conveyed by the relevant words in section 6 (3). Therefore, to draw the right of assent from section 5 seems to me to be impossible.

In the context, (of section 6 (3) "any law" must mean "any law requiring assent for it to become operative", i.e., any Bill passed by the "Legislature of the Dominion", which under any provision of law required to be presented to the Governor- General for his assent, and to receive assent before it could become operative.

The term "Legislature of the Dominion", cannot be, and was not intended to be, regarded as equivalent, at any time, to the Constituent Assembly.

Neither the British Sovereign nor the Governor- General, as such, was a part of the Constituent Assembly.

His Lordship arrived at the conclusion
There is nothing in section 6 (3), Indian Independence Act, or in the status of Pakistan as a Dominion which creates the obligation that all laws made by the Constituent Assembly, of a constitutional nature, require the assent of the Governor- General, for their validity and operation.

Per S. A. Rahman, 'J,. (agreeing with the. leading judgment).- After a comparison of 'sections 6 and 8 the inference seems to be irresistible that during the interregnum prior to the promulgation of a fresh' constitution, . the Constituent Assembly in fact functions as the Legislature of the Dominion. It is only thus that full meaning can be given to the words 'of subsection (1) of section 8 "references in this Act to the Legislature of the Dominion shall be construed accordingly" and to the provision contained in subsection (3) of section 8. The plenary law- making powers of the Legislature of the Dominion mentioned in section 6 had to be divided into two compartments for transitional period, in order to keep the legislative machinery of the Government of India Act, 1935, in working order, with all its limitations, side by side with the enactment of a new Constitution. For the purpose of functioning as the Federal Legislature under the Government of India Act, 1935, the Constituent Assembly as the Legislature of the Dominion, should be deemed to have placed the incident limitations on itself, under the provisions of subsection (6) of section 6 read with subsection (3) of section 8. I confess I am unable to follow the process of reasoning which seeks to give a different meaning to "Legislature of the Dominion" occurring in subsection (3) from that possessed by the expression in other subsections of section 6. The attempt seems to be directed towards investing the Constituent Assembly with all the powers under section 6, without attracting the restriction (if restriction it really be) regarding assent, provided for in the same section. The two submissions made that subsection (3) is confined to the Federal Legislature functioning under the Government of India Act, 1935, and that the sub section would also be applicable to laws passed by the future Legislature of the Dominion, appear to me to be mutually contradictory. The word `law' or `laws' - used in subsection (3) obviously includes laws of a constitutional character as a reading of the whole of section 6 shows and must clearly mean enactments passed by the Legislature and awaiting assent of competent authority.

The words "full power" (in section 6 (3)) amply connote discretion to give or withhold assent, beside indicating freedom from extraneous control, in full measure. The presumption is implicit in the subsection that all such laws shall be submitted to the Governor- General for his assent.

A reading of sections 5 and 6 together, would lead to the inference that henceforth the prerogative of the Crown as respects assent, would, in the case of each new Dominion, be exercised by the Governor- General as representing His Majesty.

Op the doctrine of "Departmental Construction" as applied to the interpretation of statutes His Lordship observed A practice in contravention of a constitutional provision'

contained in a statute, can never ; abrogate or repeal a rule of strict law, with which alone the Courts are concerned.

Faiyaz Ali, Advocate-General of Pakistan and Kenneth Diplock, Q. C. Abdul Haq, Advocate, Federal Court, with them) instructed by Iftikhar-ud Din, Attorney for Appellants.

L I. Chundrigar and Nazir Ahmad Khan (Mahmud Ali, Sharifuddin Pirzada and Manzar-e-Alam with them) instructed by M. Siddiq, Attorney for Respondents.
Dates of hearing: March 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, and 21, 1955.

JUDGMENT

MUHAMMAD MUNIR, C. J.-- This is a constitutional appeal from the judgment of the Chief Court of Sind, dated the 9th February, 1955, directing writs of mandamus and quo warranto to issue against the appellants, the Federation of Pakistan and certain Ministers of the Central Government, on the application of the respondent Mr. Tamizuddin Khan. The application was heard by a Full Bench of five Judges of whom Mr. Justice Hassanally Agha retired during the hearing and, therefore, gave no opinion. The remaining four Judges were unanimous in their findings. The leading judgment was written by Constantine, C. J., with which Muhammad Bachal, J., agreed, while Vellani and Muhammad Bakhsh A. Memon, JJ., delivered separate judgments.

Pakistan came into existence as an independent Dominion and a member of the British Commonwealth of Nations on the 15th August, 1947, with a provisional constitution of the Federal pattern, under the Indian Independence Act, 1947 (10 & 11 Geo. VI, Ch. 30) hereinafter also referred to as the Act of 1947. Under that Act, until a new Constitution was framed., the Government of Pakistan was to be carried on under the Government of India Act, 1935 (26 Geo. V, Ch. 2), hereinafter referred to wherever necessary as the Act of 1935, subject to such adaptations and modifications as were consequential on her attaining the status of an independent Dominion. A Governor-General was to represent His Majesty for the purposes of the government of the Dominion. The functions of the Legislature of the Dominion, including the making of a constitution, were to be performed by a Constituent Assembly which had also to function as the Federal Legislature under the adapted Act of 1935. At the relevant time the respondent wad the President of that Assembly. The Assembly had not made any constitution when on 24th October, 1954, it was dissolved by the following proclamation of His Excellency the Governor-General :-

"The Governor-General having considered the political crisis with which the country is faced, has with deep regret come to the conclusion that the constitutional machinery has broken down. He, therefore, has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer, function.

The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible.

Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted.

The security and stability of the country are of paramount importance. All personal, sectional and provincial interests must be subordinated to the supreme national interests."
The reconstituted Council, of Ministers which was announced in an extraordinary issue of the Gazette of Pakistan, on the 26th October, 1954, consisted of :-

(1) Mr. Muhammad Ali,

(2) Ch. Muhammad Ali,

(3) Major- General Iskander Mirza,

. (4) Mr. A. H. Espahani, ,

(5) Dr. A. M. Malik,

(6) General Muhammad Ayyub Khan,

(7) Mr. Chyasuddin Pathan, and

(8) Mir Ghulam Ali Talpur.

Dr. Khan Sahib was included in the Council a few days later.

On the 7th November, 1954, the respondent put in an application, Writ Petition No. 43 of 1954, on the Extraordinary Special Jurisdiction Side of the Chief Court of Sind. The respondents to this petition were the present appellants, namely, the Federation of Pakistan, the aforesaid members of the Council of Ministers, and the Estate Officer of the Government of Pakistan. After stating the facts leading to the setting up of the Constituent Assembly and the coming into force of the Act of 1947, the application alleged that the 4th appellant, Major- General Iskander Mirza, had informed the respondent on the 26th October, 1954, that the Constituent Assembly had been dissolved ; that the respondent and members of the Constituent .Assembly had been forcibly prevented from entering the premises of the Constituent Assembly Building in Karachi on the 27th October, 1954 ; that on the 30th October, 1954, the Estate Officer of the Government of Pakistan has addressed a letter to the respondent intimating to him that as he had ceased to be the President of the Constituent Assembly the allotment in his name of Bungalow No. 3, Bath Islands, had been cancelled with effect from the 8th November, 1954, and requesting him to vacate the said premises by 8th November, 1954 - ,. that the appellants were contending that in pursuance of the alleged proclamation the Constituent Assembly had been dissolved and were interfering with the duties of the ,respondent as the President of the Assembly and preventing him from exercising his functions ; that for the reasons

stated in the application the alleged proclamation and the appointment of appellants 2 to 16 as members of the Council of Ministers were unconstitutional, illegal, ultra vires, without jurisdiction, inoperative and void ; that in any case the inclusion of appellants 4, 5, 7, 8 and 10 in the Council was contrary to the provisions of the Act of 1935 inasmuch as they were not the members of the Federal Legislature ; and that there resided in the respondent a legal right to the performance of legal duties 13y the appellants which was of a public nature. The application concluded with the prayer that a writ in the nature of mandamus be issued against the appellants, their agents, servants and all persons claiming and acting through or under them restraining them from implementing or otherwise giving effect to the proclamation of the 24th October, 1954, and. from interfering, directly or indirectly, with the exercise of the respondent's functions and duties. as the President of the Constituent Assembly ; and ,that another writ in the nature of quo warranto be issued against appellants 4, 5, 7, 8 and 10 with a view to determining the validity of their appointment as members of the Council of Ministers. A joint reply to this application was filed by the Advocate General of Pakistan on behalf of appellants, raising some preliminary objections and opposing the application on the merits. The reply alleged that the Sind Chief Court had no jurisdiction to issue either of the writs ; that the dissolution of the Assembly was valid ; that the writs prayed for could not, in any case should not, issue'; and that the grounds mentioned in the proclamation for the dissolution of the Assembly were true, and if any proof was needed the appellants were prepared to show that the constitutional machinery had broken down, that the Constituent Assembly had lost the confidence of the people, and that it could no longer function in accordance with the provision of the - Act of 1947. In the arguments before the Chief Court several questions which the application and the reply gave rise to were debated, but the main points which received the attention of that Court and which were argued before us on behalf of the appellants were :-

(1) that since the Government of India (Amendment) Act, 1954, by which on 16th July, 1954, section 223- A, which empowered the High Courts to issue writs to mandamus and of quo warranto, was inserted in the Act of 1935, had not received the assent of the Governor- General, it was not law, and that therefore .the Sind Chief Court had no jurisdiction to issue the writs ;

(2) that the prayer for a writ of quo warranto must also fail on the ground that section 10- A of the Act of 1935, which imposed on members of the Council of Ministers the qualification of being members of 'the Federal Legislature, and which was inserted in that Act by the Government of India (Fifth Amendment) Act, 1954, was not law because that Amendment Act also had not received the assent of the Governor- General ;

(3) that the Governor- General was competent to dissolve the Constituent Assembly and in the circumstances had rightly dissolved it ; and

(4) that the direction to issue either of the writs should not be exercised in favour of the respondent.

The Chief Court held' that the Acts of the Constituent Assembly, when it did not function as the Federal Legislature, did not require the Governor- General's assent and

that the dissolution of the Assembly was illegal. It, therefore, issued the writs prayed for.

In order to appreciate the nature of the issues raised and the implications flowing from their determination one way or the other it is necessary to preface this judgment with some observations of a general character before stating the precise constitutional position that the Act of 1947 brought about and deciding the main issue, the determination of which is in my opinion sufficient to dispose of the appeal. The words democracy, democratic institutions, sovereignty, political sovereignty, legislative sovereignty, independent dominion etc., have been freely used in the arguments before us. I, therefore propose- to give a general idea of these terms but only to the extent that it, is necessary for the purpose of this judgment.

DEMOCRACY AND ENGLISH POLITICAL INSTITUTIONS

The word `Democracy' is now used at least in three different senses. It is the name given to a philosophy of life, to the means requisite to live up to that philosophy and lastly to the principles which determine those means. In the first sense democracy is a subjective attitude. by which the members of the community secure to every one his rights, look upon all fellow citizens without distinction of colour or race .as brethren in a common enterprise and give spontaneous support to projects which enhance the- civic excellence and promote the general welfare. It is thus a way of life; based contrary to the ancient Greek, conception, upon - the fundamental assumption of equality of" all .individuals and of their equal rights of life, liberty of action, thought and expression and pursuit of happiness. It is. essentially an attitude towards life, and a definite conception of man's place in society, and of the ends of life. As a mode of government, democracy involves a study of the basic principles on which political institutions ought to be founded as well as of the actual mechanism to be employed in particular conditions. The basic idea on which such form of government rests is that of self- rule of the people of freely elected representative institutions and of an executive responsible to the people. The fundamental institution in modern democracy is the constitution, whether this be a written or an unwritten one. The constitution performs three functions : it expresses the consent by which the people actually establish the state itself : it sets up a definite form of government ; and it grants and at the same time limits the power which that Government possesses. It is the people who give the constitution and the appointed ruling agency is held in its administration within the rigid limits of its letter, subject to the right of the people at any time by appropriate means to enlarge or constrict the power it had granted. Since democracy is that form of government which represents the common will, political institutions under that form of government, whatever may be the form of the constitution, must be based on principles without which democratic ends cannot be realized. In no modern state can the people now like the City States of ancient Greece, directly assume legislative functions, the number of population ahd size of the country making it impossible for them to meet in an assembly for purposes of legislation. Therefore in a nation of any size it is necessary to find some means by which people could rule without taking part in every immediate step of the process of authority. Thus the principle has now been firmly established of choosing a certain number of agents or representatives, who are numerous enough to speak for the whole people and few enough to meet at one place. The first essential of democratic constitution therefore is that the entire people must be represented in the Legislature by their nominees to be elected periodically by them. The object being that the popular will

should be reflected in the Legislature, the only means known to _modern democracy of achieving this result is election of the people's representatives who on being elected constitute the popular assembly, whether it be called by the name of Parliament, the House of Commons, House of Representatives, the House of People or by any other name.

The second and by far the most important requirement of a democratic constitution is the need for periodic accountability of the representatives to their electors. In modern times within a few years political events of great and unanticipated importance may happen in a country and the mental horizon of the whole people may change by a sudden international or domestic event, the importance and implications of which may not have been present to the minds of the people when elections were hold. It is, therefore, necessary that old representatives should seek re- election either because of their having ceased to reflect in the Legislature the progressive or changing outlook of the people or because of their having ceased to represent the views of the people on a particular issue. The principle, therefore, is fundamental that in every democratic constitution there must . exist a provision for holding elections after. a few years, so that the House may continue to be representative of the varying aspirations and needs of the people. It is unnecessary to discuss here the position of a representative after he has been elected, whether he is an agent or trustee of the people or a mere messenger. . The basic principle is that no - representative body can continue indefinitely and that its composition must admit of change from time to time by means of an appeal to the people. An irremovable Legislature is the very antihesis of democracy and no democratic constitution is known in the world where elections are for, life or for an indefinitely long time.

It may incidentally be mentioned here that in the Act of 194 7 there was no express provision for the dissolution of the Constituent Assembly, and it was alleged before us by Mr. Chundrigar on behalf of the respondent that the only way to get rid of the Assembly if it did not dissolve itself, may force or revolution, thus admitting that extra legal acts like revolution, coup d'etat and other unconstitutional acts become legal concepts where the people, deprived of political sovereignty which in a democracy is their birthright, seek to assert that right against an indissoluble Assembly. .

This is what Sir William Blackstone said in 1765 about a perpetual Legislature

"Lastly, a Parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual ; or might last for the life of the Prince who convened, them, as formerly ; and were so to be supplied, by occasionally filling the vacancies with new representatives ; in these cases, if it were once corrupted, the evil would be past all remedy ; but when different bodies succeed each other, if the people show cause to disapprove of the present, they may rectify its faults in the next." (Commentaries on the Laws of England, Book I, Chapter 2, p. 189.)"

The requirement of periodic accountability of a representative Assembly to the electors is so basic that in the United Kingdom the Crown, which since long has ceased to exercise its discretion in opposition to the advice of the Ministry, will be considered to be justified in exercising its reserve powers of withholding assent

or .directing dissolution if Parliament ever attempted to prolong its own life indefinitely. The reason for it is that in a democratic constitution the ultimate or political sovereignty resides in the people, while the popular assembly, where the constitution does not impose any limitation on its powers, exercises legislatives sovereignty only during its term. Since sovereignty as applied to States imports the supreme, absolute, uncontrollable power by which a State . is governed, and democracy recognises all ultimate power as resting in the people, it is obvious that in the case of a conflict between the ultimate and legal sovereign, the latter must yield. An irremovable Legislature, therefore, is not only a negation of democracy but is the worst calamity that can befall a nation because it tends to perpetuate an oligarchic rule which, while it has none of the advantages, has all the disadvantages of a dictatorial rule. An oligarchy, while it lacks the determination, the singleness of purpose and the clarity of vision of a dictator, is subject to all the temptations to which a dictator may be exposed. - If, therefore, the Constituent Assembly was an irremovable Legislature, it was a form of oligarchy and not a body of representatives subject to periodic accountability. The reason for it may be' that the framers of the Act of 1947 expected that constitution would be framed within a reasonable time and that the Constituent Assembly would thus dissolve itself. They may not have imagined that the Assembly to which they were confiding all legislative powers would not complete the constitution even for seven years and, on the contrary, would assume the role of an irremovable and irresponsible Legislature.

As Government is the responsibility of the executive in a constitution, it- is an indisputable corollary of the democratic principle that the executive must be responsible to the Legislature for its acts. The executive discharges its duty of day to day administration without the popular Assembly enquiring into it but there may come an occasion, and this sometimes does happen, when on some important issue, executive or legislatve, ` there ensues a conflict between the executive and the Assembly. In such a case, if the Assembly does not support the executive, the Government must take it to mean that it has ceased to be the representative of the House, and on the principle of responsible Government must make way ,for those who have the support of the Assembly. The same is the effect of a general vote of no confidence, which is intended to declare to the Government that it no longer enjoys the confidence of the House. In that case, too, the Government, if it wishes to stay on, has one means of asserting its will against the will of the Assembly. , If it is sure that the Assembly itself has ceased to be representative of the people and that in fact the Government has the popular support on that issue, it may ask for a dissolution of the House however recently the House might have been elected, though this course will constitutionally not be adopted where elections were held on the specific issue on which the Government insists to, take a particular stand. To meet such a situation and to enable the popular will to be reflected in the Assembly it is necessary that, apart from the provisions relating to periodic dissolution; there should exist in the constitution some power competent to dissolve the Assembly, if, before the expiry of a normal life, it adopts on a particular issue an attitude which is not the attitude of the electors. Every democratic constitution, therefore, written or unwritten, gives to the Head of the State the power to dissolve the Assembly in the contingency just mentioned.

The next basic fact in a democracy of the British pattern, which has a constitutional monarch at the head; is that of ministerial responsibility. This doctrine proceeds on the assumption that the sovereign himself belongs to no party, that he does nothing on his own individual responsibility, and that every act, of his is backed by ministerial advice. If there be no clash between the Government and the Assembly, and a measure be brought up by Government which the sovereign feels would be resented or disliked by the people, he is entitled to dismiss the Ministry, to form a Ministry from amongst the members of the opposition, and then on the advice of the new Ministry, to order dissolution. This power undoubtedly rests in the British Monarch, though it has not been exercised since the time of William IV, the established convention now being that by dismissing a Ministry, which represents the House of Commons whose life has not yet expired, the Monarch must be deemed to have taken active interest in party politics, and thus foregone his claim to the respect and affection which every one in the realm owes to him because of his aloof and lofty' position. It will have been noticed that the principles mentioned above can operate in full force only where there are organised parties in the country and at least two parties in the Legislature, namely, the Treasury Benches and the Opposition, so that in case the existing Government be dismissed the Opposition may be called upon to form a new Government.

Another means possessed by the British Monarch of appealing to the electorate against the House of Commons and the Government which enjoys the confidence of that House is that of withholding his assent to a bill. This power was last exercised in the time of Queen Anne and is now stated to be as dead as the dodo. But as late as the reign of King George V. there were suggestions, when the House of Commons twice passed the Irish Home Rule Bill, that the Sovereign could withhold his assent from the bill and appeal to the country. The King was himself inclined to accept this view and Sir William Harcourt had to tell him in a personal interview that, if he dissolved the House of Commons, in the ensuing elections Sir William would not mention the issue of Home Rule but that elections would be fought on the issue

"Is the country governed by the King or by the people?" and that every Minister would then attack the King personally.

Thus the necessary mechanism in a normally functioning democratic constitution of the British principle consists of :-

(1) a free and independent electorate, willing to give, when necessary, what is called an
"electoral mandate";

(2) a popularly elected Legislature ;

(3) an executive responsible to the Legislature ;

(4) the Head of the State, with a legal right not only to dissolve the legislature but also to withhold assent to bills The question in what circumstances these powers of the King are to be exercised is an entirely different question and has nothing to do with the legal powers of the King, though clearly defined conventions have come to be recognised which the King can, ignore only if he wishes to take the responsibility of

ceasing to be a constitutional monarch. But these conventions 'cannot be enforced by the Courts, though they will undoubtedly be taken cognizance of in the interpretation of written constitutions. The only issue that the Court is required to determine in such cases is whether the legal power existed or not, and not whether it was properly and rightly exercised, which is a purely political issue.

POSITION OF ME DOMINIONS

As the principal argument which is to be found in the judgment of the learned Judges of the. Chief Court of Sind and which has been reiterated before- us is founded on the conception of an `independent dominion' and the alleged sovereignty of the Constituent Assembly, it becomes necessary to ascertain the meaning of the words `independent dominion' and to have a clear comprehension - of the powers that the Governor- General of a ,Dominion exercised in 1947, when the Indian Independence Act was passed. For that purpose we shall have to go far back in history and to trace the origin and subsequent development of the British Empire itself.

Up to the date. of the passing. of 'the Statute of Westminster in 1931 there was no distinction between a Colony and a Dominion. Section 18 of the Interpretation Act, 1898, had a colony - as "Any part of His Majesty's Dominions exclusive. of the British Islands and of British' India, and where parts of such Dominions are both under a Central and a local Legislature, all parts under the Central Legislature shall, for the purposes, of this definition, be deemed to be one colony."

By section 11 of the Statute of Westminster the definition of a colony was not to include in any Act of the Parliament of the United Kingdom passed after the commencement of the Statute, a dominion or any province or state, forming part of a "dominion" which was defined by section 1 of the Statute as meaning the Dominion of Canada, the Common wealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free state and Newfoundland.

Colonies in America and other parts. of the globe were obtained in three ways :-

(1) by treaty of cession ;
(2) by conquest ; and
(3) by taking possession and peopling them where they were found uninhabited.

On the well- recognised doctrine of. Constitutional Law that all acquisitions of sovereignty by a subject are on' behalf of the Crown, all ceded or conquered colonies were under the Common Law of England held of the Crown. The relationship between such colonies and countries which, the King did not hold in right of his British Crown, as for instance, the German territories, was of a fundamentally different character because those territories during the union of the two Crowns had no connection with England or its laws.

Where a colony was acquired by treaty, the King could not legally disregard or violate the articles on which .the country was ceded and such articles were sacred and inviolable according to their true intent and meaning. Subject to this qualification,

there - was hardly any distinction between a colony acquired by treaty or by conquest. Thus in the case of a territory, whether acquired by conquest or treaty, the King, subject to the terms of the treaty, possessed an exclusive prerogative power over it and could entirely change or newmodel, the whole or part of its laws and political form of government and govern it by Letters Patent or orders- in Council. But because a country acquired by British arms became a dominion of the King in right of his Crown, it was necessarily subject to the Legislature of Great Britain and consequently the King's legislative powers over it, as conqueror, were subordinate to his own authority in Parliament, so that the King could not make any new change contrary to fundamental principles or exempt the inhabitants from the power of Parliament. The King could preclude himself from the exercise of his prerogative legislative authority in the first instance over a conquered or ceded territory by promising to vest it in an , elected Assembly of the inhabitants and the Governor or by any other measure of a similar nature by which the King did 'not claim or - reserve to himself that important prerogative. But the grant of representative institutions, without the reservation of a power of concurrent legislation, precluded the exercise of the prerogative only while the legislative institutions continued to exist.

If an inhabited country was discovered and peopled by English subjects, they were supposed to possess themselves of it for the benefit of their Sovereign and such of the English laws then in force as were applicable and necessary to their situation were immediately enforced on the principle that wherever an Englishman goes he carries. with him as much of English law and liberty as . the nature of the situation will allow. In the case of such colonies the Crown never had the prerogative of legislation. The distinction, between ceded or conquered territories and settled colonies was clearly brought out by the Privy Council in Sammut v. Strickland, (1938 A C 678) where Lord Maugham L. C. delivering the judgment of the Board said

"The line of distinction here has always been based on the circumstance that English settlers wherever they went carried with them the principles of English Law, and that English common law necessarily applied in so far as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it. has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession (if it was a case of that kind), to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown.".

But it was a common characteristic of all colonies, ceded, conquered or settled, ,that they were subject to the legislative sovereignty of Parliament. .

I have already observed that the King cannot vary from any treaty which he has entered into on the Acquisition of a country and may preclude himself from the exercise of his prerogative powers of legislation in the first instance over an acquired or ceded territory by vesting it in an elected Assembly of the inhabitants and a Governor. It is, therefore the most important principle that though the King may keep in his own hands the power of regulating or governing inhabitants, he cannot infringe or depart from the provisions of the Charter by which he has, though voluntarily,

granted them any liberties or privileges. Thus in every question which arises between the King and his colonies respebting the prerogative, the first consideration is the Charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the King's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country. Where the Colonial Charter affords no criterion or rule of construction, the Common Law of England with respect to the rule or prerogative is the, common law of the territory. Rut whether a, colony was ceded or conquered territory to which representative legislative institutions were granted by Letters Patent or Order- in- Council or a settled colony governing itself under a constitution granted to it by Parliament, the King in no instance delivered himself or was divested of the prerogative to withhold assent to colonial legislation. And this prerogative has always been considered to be so material to the existence of the King's real or formal sovereignty, that there can scarcely be imagined a case in which such power could not be exercised. True, the King did not exercise this power himself, but only through his agent or representative, but that the power was exercised by the Governor or the Governor- General on the King's behalf has always remained undoubted: In every sense of the term the Governor- General has remained a constituent part of the, local Legislature.

STATUTE OF, WESTMINSTER DOMINIONS

In exercise of its right to legislate for the colonies settled, ceded or conquered- the British Parliament provided a constitution for the Dominion of Canada in 1867, for the Commonwealth of Australia in 1900, for South Africa in 1909, for New Zealand in 1852; and for Newfoundland in 1809. In the case of Ireland the Constitution framed by Dail Eireann, sitting as a Constituent Assembly, was recognised by 'the Irish Free State Agreement to which statutory effect was given by the Irish Free State Constitution Act, 1922. These constitutions defined the Legislative powers of the Legislatures in these Dominions and worked under a Governor or a Governor- General who represented the King and exercised on behalf of the King the power of giving assent to or withholding assent from bills or of reserving them for the signification of His Majesty's pleasure. The Governor- General or the Governor had also the power to prorogue, adjourn or dissolve the Legislature of which he himself as representative of- the King was a necessary constituent. Though originally these Dominions were subjected to British control through the Governor- General, and the British Parliament had the authority to legislate for them, the development of the system of responsible Government in them was so steady and consistent that they began to claim for themselves complete autonomy and an equal status with Great Britain. Accordingly, an Imperial Conference was held in London on the 25th October, 1926, in order to investigate some of - the questions affecting interimperial relations. This Conference was attended by the representatives of Great Britain, Canada, Australia, New Zealand, Union of South Africa, Newfoundland, the Irish Free State and India. Among the resolutions passed at the Conference was one which defined the mutual position and relation of Great Britain and the Dominions. It stated "They (Dominions) are autonomous communities within the British Empire, equal in status, is no way subordinate one to another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

It was recognised at the Conference that every self- governing member of the Empire was the master of its own destiny and that in fact, if not always in form, it was subject to no compulsion whatever. Regarding the position of the Governor General it was declared :-

"In our opinion it 'is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor- General of a Dominion is the representatives of the Crown holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."

The attention of the Conference was also called to various points in connection with the operation of the Dominion Legislation which, it was- suggested, required clarification, the particular points involved being

(a) the practice under which Acts of the Dominion Parliaments were sent each year to London, and it was intimated, through the Secretary of State for Dominiori Affairs, that "His Majesty will not be advised to exercise his powers of disallowance" with regard to them ;

(b) the reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which was signified on a advice tendered by His Majesty's Government in Great Britain ;

(c) the difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliament in the Acts passed by the latter operated, as a general rule, only within the territorial area of the Dominion concerned and ;

(d) the operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured , by the enactment of reciprocal statutes based upon consultation and agreement.

The Conference gave .to these matters the best consideration possible but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a statement of certain principles which underlay the whole question of the operation of the Dominion Legislation. It felt that for the rest it would be necessary to obtain expert guidance as preliminary to- further consideration by the Governments in Great Britain and the Dominions. With regard to the disallowance and reservation of Dominion Legislation the Conference placed on record that, apart from the provisions embodied in the Constitutions or in specific statutes expressly providing for reservation, it is recognised that- it was the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Secondly, that it would not be in accordance with constitutional practice that any advice should be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of the Dominion against the view of the Government of that Dominion:

On the question raised with regard to the legislative competence of members of the British Common wealth of Nations other than Great Britain and in particular to the disability of those members to legislate with extra-territorial operation; the Conference thought that it should similarly be placed on record that the constitutional practice was that . legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned. The Conference recommended that steps should be taken by Great Britain and the Dominions to set up a committee to enquire into, report upon, and make recommendations concerning :-

(1) the statutory provisions requiring reservation of Dominion Legislation for the assent of His Majesty or authorising the disallowance of such legislation ;

(2) (a) the position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation ;

(b) the practicability and most convenient method of giving effect. to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order and good government of the Dominion ;

(3) the principles embodied in or .underlying the Colonial Laws Validity Act, 1869, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the relations between the various members of the British Commonwealth of Nations, At the Imperial Conference of 1930 the report of the Conference of 1929 on the operation of the Dominion Legislation was considered and it was recommended that a statute be passed by the Parliament at Westminster embodying certain specific provisions. Accordingly in 1931 there was passed by the Parliament of the. United Kingdom a statute called the Statute of Westminster which gave effect to the resolutions of the Imperial Conference of 1930. This statute referred to the declarations and resolutions set forth in the report of the Imperial Conferences held in 1926 and 1930, and attended by the delegates of the .Government in the United Kingdom, the Dominion , of Canada, the, Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, and considered it to be meet and proper to set out by way of Preamble that the. Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and that as they were united by a common allegiance to the Crown it would be in accordance with established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom, and .enacted the resolutions of the Imperial Conferences in 12 sections. Section ,2 of that Act declared that the Colonial Laws. Validity Act, 1865,, was, not to apply to any law made after the commencement' of the Act by the. Parliament of a Dominion, that no law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion shall be void or inoperative on the . ground that it was repugnant to the law of England or to provisions of any existing or future Act of the Parliament of the United Kingdom or to

any order, rule or regulation made under any such Act and that the powers of the Parliament of a Dominion shall include. the power to repeal or amend any such Act, _ order, rule or regulation in so far as the same was a part of the law of the Dominion. The Colonial Laws Validity Act which was declared by the Act not to be applicable to any law made by the Parliament of a Dominion had declared in section 2 .that any Colonial Law which was or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colonies to which such law may relate or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the Colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be. and remain absolutely, void and ineffective. Section 3 of the Statute gave to the Parliament of a Dominion full powers to make laws having extra- territorial operation. Section 4 declared that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend, or be deemed td extend, to a Dominion as part of the law of that Dominion unless it was expressly declared in that Act that that Dominion had requested, and consented to, the enactment thereof. Section 5 dealt with the powers of the Dominion Parliaments in relation to merchant shipping and 'section 6 with their powers in relation to Courts of Admiralty. Sections 7 and 8 enacted that nothing in the Act was to be deemed to apply to the repeal, amendment or alteration of the Constitutions of the Dominion- of Canada, the Commonwealth of Australia and New Zealand or the distribution of legislative powers between the Parliament of Canada and the Legislatures of the Provinces of . that Dominion.

Some important constitutional practices which had been firmly established between the Dominions and the United Kingdom before the passing of the Statute of Westminster have to be fully understood with a view to appreciating the constitutional position existing at the time of the passing of that Statute. The first of these relates to the position of the Governor- General. Originally under the Constitution Acts of the Dominion the Governor- General had substantial powers of interference in the administration of the Dominion. He was not a representative of the Dominion but a person appointed by the British Government who was responsible to that Government. Under the Constitution he exercised his powers of control by withholding his assent from and reservation of bills or by dissolving the Legislature, powers which were expressly vested in him. These powers could be exercised by him even in opposition to the advice of the Ministry, But by 1926, when the Imperial Conference met in London, his position had become that of a constitutional Governor General; he had ceased to be an agent of the British Government and become a representative of the King, exercising in relation to the affairs of the Dominion the same powers as were exercised by the King in the United Kingdom. In other words, the principle of ministerial' responsibility hack been firmly established in the Dominions. This constitutional position was affirmed by the ruling of 3rd December, 1915, in the New South Wales constitutional crisis of 1926 when in reply to a request for instructions regarding some appointments to the Legislative Council, Mr. Amery, the Secretary of State, informed the Governor that , established constitutional principles require that the question should be settled between the Governor and the Ministry. Consequently I do not feel able to give you (i. e. the Governor) any instruction". He re- affirmed this attitude in the House of Commons on March 15th, 1926, and said

"Since there seems to be some misconception as to the position of the Secretary of State in relation to matters of this kind, I should like to take this opportunity of making it clear that; in my view, it would not be proper for the Secretary of State to issue instructions to the Governor with regard to the exercise of his constitutional duties."

Stating his final conclusion on the issue, which was conveyed by his letter, dated the 14th July, 1926, to the Attorney- General, he said that if Ministers at home purported to intervene in the internal affairs of New South Wales, that would be wholly incompatible with the status of New South Wales within the Empire, and that the matter in dispute as to the Legislative Council appointments was essentially one to be settled in New South Wales, and not in London. (pp. 127 and 128 of Evatt's `The King And His Dominion Governors', 1936 Edition).

After the post- Statute- of- Westminster controversy between Sir Philip Game and the Lang Ministry of New South Wales in 1932, Sir Alexender. Hore- Ruthven, Sir Philip Game's successor, announced on his arrival that "The Governor can advise his advisers. He can suggest. He can warn. But as long as Ministers are chosen representatives of the people, he must defer to their advise and assist them to the best of his ability in their deliberations, no matter what may be his private view or personal conviction." (Evatt, The `King And His Dominion Governors', p. 152). These are only two of the several incidents in the history of Dominion Government which confirm the principle that the, position of 'a GovernorGeneral or a Governor qua ' a Dominion Government is precisely the same as that of the British Monarch qua the Government in London.

A much more important constitutional incident of the office of the Governor- General is that his appointment and dismissal actually rest with the Dominion Government and not with the home Government, and that if he ever comes in conflict with the Government of the Dominion, that Government can successfully insist on his recall by the King. Speaking generally, he has ceased to possess the right of exercising the reserve powers of the King against the wishes of the Dominion Government. Stating the position as it exists after the Imperial Conferences of 1926 and 19'30, Evatt at pp. 192 and 193 of his book "The King And His Dominion Governors" says "Other aspects of these decisive declarations are of supreme importance, but, for present purposes, it has to be noted that the decisions of the two Conferences assert the general principle that the King proceeds upon the advice of responsible Ministers. Moreover, the general doctrine of Ministerial responsibility in its application to the affairs of a Dominion does not except from its operation, but definitely includes, the appointment of the King's representative therein. Such matter thus becomes a Dominion affair, and a very important and vital one The declarations of 1926 and 1930, despite their great significance in the other respects, do not contain any final solution of the various problems of the reserve. power, although it is recognised that the general principle of Ministerial responsibility (illustrated by the Harcourt decision in the Tasmanian case of 1914) governs the actions of the King and Governor- General alike ; and also that in the appointment of the latter the relevant Ministers are those of the Dominion concerned".

And Jenks states at p. 21 of the Cambridge Law Journal (1927) Vol. 3, "Who then is to advise the King upon the appointment of the Governor General, say, of Canada, Australia, or New Zealand ? The answer (I may be wrong) seems as a matter of principle to me to be reasonably plain, namely, that, just as the King in matters affecting the United Kingdom takes the advice of his Prime Minister, in London, , so in matters affecting Canada he will take the advice of his Prime Minister in the Dominion, and in the case of Australia that of his Prime Minister in the Commonwealth of Australia, and so forth. And I see .no difficulty in applying the principle in that way". Resuming the discussion at p. 196 of his book Evatt again says : "For paragraph VI of the Report of the 1930 Conference certainly secures to the Dominion Ministers direct access to the King himself for the purpose of the King's. acting on their advice in relation to the appointment of the Governor- General, His Majesty's Government in Great Britain being neither interested nor concerned in such appointments. And the new method of appointing the Governor- General, exclusively upon the advice of Dominion Ministers, has been adopted in appointments since 1930".

The Strickland- Holman controversy of 1916 which resulted in the recall of Sir- Gerald. Strickland, : the Governor of New South Wales, in something like disgrace is a very apt illustration of the power of the Dominion Government to insist on the recall of a Governor who does 'not act according to the advice of the Ministry. The implications of the Imperial Conference Resolutions and Declarations are thus stated by Evatt :-

"Now Jenks logical inference from the 1926 Report, that the appointment of a Governor- General is . exclusively a matter of Dominion concern, seems to justify the further inference- equally logical- that the termination of the appointment of a Governor- General is also a matter exclusively of local or Dominion concern. So far as the position of strict law is concerned, it is well- established that, in the absence of a controlling statute, a person _ holding such a position as that of Governor or Governor- General holds it at the pleasure of the Crown. It would seem, therefore, that Dominion Ministers must possess sufficient constitutional authority to approach His Majesty directly, i.e., without any intervention by Ministers in Britain, for the purpose of advising the King that the appointment of the Governor- General should be terminated. This course was apparently the procedure adopted when the De Valera Government of the Irish Free State secured the termination of Mr. McNeill's appointment as Governor- General in the year 1932".' (The King And His Dominion Governors.

Under the Constitutions of the Dominions the Governor General had the power of withholding his assent from bills or reserving them . for the signification of His Majesty's pleasure. But before the Imperial Conference of 1926 he had ceased to exercise these powers in opposition to the wishes of the Dominion Government, unless under some Act of the British Parliament he was bound to reserve a particular bill for the signification of His Majesty's pleasure. This was is consonance with the principle of ministerial responsibility, according to which his discretionary powers in all matters were to be exercised in accordance with the advice of the Dominion Ministry. His position had, therefore, become precisely that of a constitutional monarch in the United Kingdom, and this was recognized by the representatives of the United Kingdom who took part in the deliberations of the Imperial Conferences in

1926 and 1930. The resolutions of those Conferences relating to the position of the Dominions and the powers of the . Governor-General were therefore a factual statement of the constitutional position. In fact, the position was so clearly understood by all concerned that the Statute of Westminster said nothing about it and took for granted the well-recognized convention that the Governor-General was not in a position effectively to interfere with the administration of a Dominion contrary to the wishes of that Dominion. Thus, at the time the Statute of Westminster was passed there were only a few legal restrictions on the legislative sovereignty of the Dominion Parliaments. They could not pass laws having extra-territorial operations ; any Dominion laws which were repugnant to the law of England were invalid ; and the United Kingdom Parliament could still legislate for, those Dominions. All these restrictions were removed by - the Statute of Westminster.

PRE-INDEPENDENCE INDIA

Nowhere else is the common law principle that the acquisition of political power in a_ foreign land accrues for the benefit , of the Crown better illustrated than by the history of the Government of India. By the Charter of 1600 A. D. granted to it by Queen Elizabeth, the East India Company was authorised to make reasonable laws, constitutions, orders and ordinances, not repugnant to English Law, for the good government of the Company and the management of its affairs. But when consequent on the grant of the `Diwani' to the Company by the helpless Moghal Emperor, Shah Alam, on 12th August 1765, presistent scandals relating to - the conduct of the officers of the Company began to reach England, the British Parliameit stepped in and claiming the right to interfere with the exercise of political powers by the Company passed the Regulating Act of 1773. The subsequent Acts,, namely, the Amending Act of 1781, Pitt's India Act of 1784, the Act of 1793, the Charter Acts of 1830 and 1833 and the Act of 1854, were all based on the claim that the Company held the Indian territories in trust for the Crown. By the Charter Act of 1858, the British Crown formally assumed responsibility for the- Government of India and Lord Canning came to India as the first Viceroy and Governor-General Eighteen. years later . Queen Victoria assumed the title of "Empress of India" by the Royal Titles Act of 1876. This addition to the Royal Titles was indicative of the sovereignty of the Crown in India. The controversy between the Viceroy, Lord Northbrook, and the Secretary of State, Lord Salisbury, during Disraeli's Ministry resulted in an emphatic pronouncement by the latter that it was "not open to question that Her Majesty's Government are as much responsible to the Parliament for the Government of India as, they are for any of the, Crown Colonies of the Empire", and section 33 of the Government of India Act, 1915, imposed upon the Governor-General in Council a constitutional obligation of paying true obedience to all such orders as he received from. the Secretary of State, thus 'securing the supervision of British Parliament over Indian affairs.

The element of responsible government in the Government of India was first introduced by the Act of 1919, which was passed on the recommendations contained in the Montague Chelmsford Report. This Act introduced in the sphere of Provincial Government the system of diarchy , which was based on the principle that Ministers, without being answerable for the Reserved Departments or for the policy on the reserved side, were jointly responsible to the popularly elected Legislature in respect of the Transferred Departments. The system was extended by the Act, - of 1935, so as

to cover, with some important exceptions, the whole field of Government. But though the element of responsibility had been considerably enlarged, the basic constitutional position still was that the ultimate responsibility . for the administration of Indian affairs still vested in the United Kingdom Government. As the Indian Independence Act 1947, brought about a complete change in the government and transferred all responsibility for the government of the Indo-Pakistan sub-continent to the two new Dominions, it is necessary, to have a thorough grasp of the main principle which underlay the Act of 1935 in order to be able to appreciate the fundamental change that wag effected by the Act of 1947.

GOVERNMENT , OF INDIA ACT, 1935

Section 2 of the Act of 1935 asserted that all rights, authority and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertained and were incidental to the government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exerciseable - by him in or in relation to any other territories in India, were exercisable by His Majesty, except , in so far as it was otherwise' provided by or under the Act, or as it was otherwise directed by His Majesty, provided that any powers connected with the exercise of the functions of the, Crown in its relation with the Indian States was, if not exercised by His Majesty, to be exercised only by, or, by persons acting under the authority. of, His' Majesty's representative for - the exercise of those functions of the Crown. The said rights, authority and jurisdiction were to include any rights, authority or jurisdiction heretofore exercisable in, or in relation to, any territories in India by the Secretary of State, the Secretary of State-in Council, the Governor-General, the Governor-General-in Council, any Governor or any local Government, whether by any delegation from His Majesty or otherwise. Sections 5 and 6 of the Act contained provisions for the establishment of a Federation and .the accession of the Indian States to that Federation. Section 8 defined the extent of the executive authority of the Federation and section 9 provided for the administration of the Federal affairs. The Council of Ministers to be set up under subsection (1) of section 9 was to aid and advise the Governor-General in the exercise of his functions, except in so far as he was required by the Act to exercise those functions or any of them in his discretion and the proviso to the subsection stated that nothing in that subsection was to be construed as preventing the Governor=General from exercising his individual judgment in any case whereby or under the Act he was required so to do. Subsection (3) of that section declared that if any question arose whether any matter was or was not a matter as respects which the Governor-General was under the Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor General in his discretion would - be final and that the validity of anything done - by the Governor-General was not to be called in question on the ground that he ought or ought not to have acted in his discretion or exercised his individual judgment. Under section 10 the Ministers were to be chosen or dismissed, by the Governor-General in his discretion. Section 11 enumerated some of the functions of the Governor-General which were. to be exercised by him in his discretion, while section 12 defined his special responsibilities in the discharge of which he was to exercise his individual judgment. Under section 13 the Secretary of State was, with the approval of the Parliament, to issue an instrument of instructions to the Governor-General but the validity of anything done by the Governor-General was not to be called in question on the ground that it was done otherwise than in

accordance with that instrument. Where the Governor- General acted in his discretion or in exercise of his individual judgment, he was placed by section 14 udder the general control of the Secretary of State. Chapter III made provision for a Federal Legislature. The Governor- General had the power to summon, prorogue and dissolve the House of Assembly, one of the three constituents of the Federal Legislature. When a bill was passed by the chambers (the Council of State and the House of Assembly) it had to be presented to the Governor General who . was in his discretion to declare either that he assented in His Majesty's name to the bill or that he withheld assent there from or that he reserved the bill for the signification of His Majesty's pleasure, and a bill was not to become an Act unless and until within 12 months from the date on which it was presented to the Governor General, he made known by public notification that His Majesty had assented thereto. An Act assented to by the Governor- General could be disallowed by His Majesty within 12 months from the date of the Governor- General's assent.

Under sections 42 and 43 the .Governor- General had the power to promulgate ordinances during the recess of the Legislature, and with respect to certain subjects at any time. In any such" case he acted either in his discretion or in exercise of his individual judgment. He could also enact Acts in relation to matters in which he was required to act in his discretion or in exercise of his individual judgment. By section 45 he had the power to assume to himself all or any of the powers vested in or exercisable by. any Federal body or authority if he was satisfied that a situation had arisen in which the government of the Federation could' not be carried on in accordance with the provisions of the Act, and in this matter he was to act in his discretion.

The position in the Provinces was similar to that at the Centre. The Governor was appointed, like the Governor- General, by His Majesty by a Commission under the Royal Sign Manual. He was also to have a Council of Ministers and in certain specified matters was required to act in his discretion or in exercise of his individual judgment, and when so. acting he was subject to the general control of the Governor- General. He had the power to summon, prorogue or dissolve the Assembly. He could withhold assent to bills of the Provincial Legislature or, reserve them for the consideration of the Governor- General, who could either assent to the bill or withhold his assent therefrom or reserve it for the signification of His Majesty's pleasure thereon. Apart from this, His Majesty had the power to disallow Acts passed by the. Provincial Legislature. The Governor could either in his discretion or in exercise of his individual judgment promulgate ordinances during the recess of the Legislature, and with respect to certain subjects at any time. He could also enact Acts concerning matters, which were within his discretion or his individual judgment. If at any time he was satisfied that a situation had arisen in which the government of the Province could not be carried on in accordance with the provisions of the Act, he could by proclamation assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority.

As the scheme underlying the Government of India Act was that of a federal pattern of government the Act had defined in List . I matters with respect to which the Federal Legislature could make laws, in List II matters with respect to which the Provincial Legislature could, make laws and in List III matters in "which the Federation and the Provinces, subject to certain restrictions, were both competent to

make Laws. Residual powers were to be assigned by the Governor-General to the Federal Legislature or to the Provincial Legislature by, public 'notification. In the cases specified in section 99, the Federal Legislature could make laws having extra-territorial operation.

Under section 108, unless the Governor-General in his discretion thought fit to give his previous sanction, no bill or amendment could be introduced into or -moved in either Chamber of the Federal Legislature which inter alia : (a) repealed, amended or was repugnant to any provision of any Act of Parliament extending to British India ; (b) repealed, amended or was repugnant to any Governor General's or Governor's Act or any ordinance promulgated in his discretion by the Governor-General or a Governor ; and (c) affected matters as respects which the Governor- F General was required by the Act to act in his discretion. , °There were similar restrictions on the chambers of the Provincial Legislature.

Section 110 enacted that nothing in the Act was to be taken to affect the power of Parliament to legislate for any part of British India ; or to empower the Federal Legislature or any Provincial Legislature to make any law affecting the Sovereign or the Royal family or the sovereignty, dominion or - suzerainty of the Crown in any part of India or the law of British nationality ; or to make any law amending any provision of the Act.

Under section. 91 His Majesty could at any time by Order-in-.Council direct that a specified area .shall be an excluded area or, partially excluded area and on such direction no Act of the Federal Legislature or the Provincial, Legislature was td apply to it unless the Governor by public notification so directed in his discretion.

To summarize, the position under the Act of 1935 was that though in matters in which the Governor-General .was not empowered to act in his discretion or in exercise of his individual judgment,. the Ministers could take action, which as a matter of. convention was not to be questioned by the Governor-General, there still remained a large sphere of action in which either the Governor-General did not consult the Ministers or he was not bound by their advice. In matters lying within that sphere he was responsible solely to the British, Government through the Secretary of State. Though he was appointed by the King, he was a nominee of the British Government and subject to the control of the Secretary of State who was one of the members of the British Cabinet, which was ultimately responsible to Parliament for the Government of India. The Indian Legislature was not a sovereign Legislature and limitations on its powers were not only imposed by the Act but the Governor-General could withhold assent to its legislation. It was wholly . incompetent to legislate on certain matters, and ` the United Kingdom Parliament had not only full authority specifically to legislate for British India but the laws made by that Parliament could extend to British India.

It was in fact in exercise' of this legislative sovereignty that the Indian Independence Act was passed. These restrictions on legislation and the .external control on government had, therefore, to be removed if India was to become independent.

Now for a country to be independent it is necessary-

(1) that it should have a Legislature with' authority to legislate on all matters without any restriction, including matters relating to the making of a constitution ;

(2) no law made by it should be invalid by reason of its being repugnant to the law of any other country ;

(3) no other country should have any authority to legislate for it and no law made by any other country should extend to it ;

(4) its government should be responsible only to its own people or to itself and not to any outside authority ;

(5) if independence is to be granted by the law of `a dominant country, that law must provide 'for the freed country a provisional constitution including ' a sovereign Legislature and a government so that the withdrawal of control may not be followed by chaos and confusion, and if the constitution with which the freed country starts its independence is .a Federal Constitution, the Legislature of the country must accept limitations on its powers if it has also to function as the Federal Legislature..

Limitations on the sovereignty of a Legislature can be imposed by itself as well as by yin external authority if it is the creation of such authority. Thus the dominant country, which grants the constitution of an independent country to a dominated country, can by that constitution impose limitations on the powers of the Legislature of the independent country, provided it also leaves powers to that Legislature to remove those limitations. Limitations on the powers of a Legislature may also be imposed by itself, as for instance, where it has defined fundamental rights or has converted itself into a Federal Legislature with defined powers. Even in the case of a country with a unitary constitution, its Legislature may impose future limitations on its power if it precludes itself from legislating on defined subjects or from making certain laws.

INDIAN INDEPENDENCE ACT

It is in the light of these principles that the Indian Independence Act has to be examined when it came into force on the midnight of the 14th August ' 1947. The principles mentioned above underline the whole scheme of that Act whose true scope and significance can be understood and appreciated- only if those principles are borne in mind. The scheme of that Act for our present purposes will be apparent from the following sections of the Act :-

The Governor- General of the New Dominions-

5. For each of the, new Dominions, there shall be a Governor- General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the government of the Dominion :-

Legislation for the new Dominions-

6. (1) The Legislature of each of the new Dominions shall have full power to make laws. for that Dominion, including laws having extra- territorial operation.

(2) No law and - no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

(3) The Governor- General of each of the new Dominions shall. have full power to assent to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon of the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions.

(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the. law off' that Dominion unless it is extended thereto by a law' of the Legislature of the Dominion.

(5) No Order- in- Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion.

(6) The power referred to in subsection (1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion.
Consequences of the setting up of the new Dominions-

7. (1) As from the appointed day-

(a) His Majesty's Government in the United Kingdom have no responsibility as respects the
government of any of the territories which, immediately before that day, were included in British India ;

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable, by His Majesty at that date with respect to, Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and, all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty,, grant, usage, sufferance or otherwise; and

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date

by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise

Provided that, notwithstanding anything in paragraph 1(b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred' to which relate to customs, - transit, and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.

(2) The assent of the Parliament of the United Kingdom is hereby . given to the omission from the ' Royal Style and Titles of the words `Indiae Imperator' and the words `Emperor of India, and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm.

Temporary Provision as to government of each . of the new Dominions-

8. (1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall; for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and reference in this Act to the Legislature of the Dominion shall be construed accordingly.

(2) Except in so - far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other , parts Thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders- in- Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor- General, under the next succeeding section, have effect accordingly Provided that-

(a) the said provisions shall apply separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on for after the appointed day any Central Government or Legislature common to both the new Dominions

(b) nothing in this subsection shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new - Dominions or of . any Province or other part thereof ;

(c) so much of the said provisions as requires the Governor- General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure, and no Provincial Act shall be disallowed by His Majesty thereunder ; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of this section.

(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by sub section (2) of this section 'and the orders therein referred 'to, operates to limit the power of the Legislature of the, Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub section (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature. ' „

Orders for bringing this Act into force-

9. (1) The Governor- General shall by order make such provision as appears to him to be necessary or expedient-

(c) for making omissions from, additions to, and adaptations and modifications of the Government of India Act, 1935, and the Orders- in- Council, rules and other instruments made there under in their application to the' separate new Dominions.
Interpretation, etc.-
19. (3) References in this Act to the Constituent Assembly of a Dominion shall be construed as references-

(b) in relation to Pakistan, to the Assembly set up or about to be set up at the date of the passing of this Act under the authority of the Governor- General as the Constituent Assembly for Pakistan.

Provided that nothing in this subsection shall be construed as affecting the extent to which representatives of the Indian States take part in either of the said Assemblies, or as preventing- the filling of casual vacancies in the said Assemblies, or as preventing the participation in either of the said Assemblies in accordance with such arrangements as may be made in that behalf, of representatives of the tribal areas on the borders of the Dominion for which that Assembly sits, and the powers of the said Assemblies shall extend, and be deemed always to have extended, to the making of provision for the matters specified in this proviso.

Thus by section 1 Pakistan became an Independent Dominion. Because it became a Dominion, it had to be connected by a legal link' with the United Kingdom and the other Dominions. Section 5, therefore, provided that there shall be for the Dominion a Governor- General, who shall be appointed by His Majesty and who shall represent His Majesty for the purposes of the government of the Dominion.

And because the status of Pakistan was that of an Independent Dominion, its Legislature' should possess .full power to make laws for that Dominion, including

laws having extraterritorial operation, laws limiting for the future the powers of the Legislature of the Dominion, and laws making provision for its constitution. None of its laws should, be void on the ground that it is repugnant to the past or future laws of another country ; and it should have full power to alter any provision of the provisional constitution with which it started. There must also exist in that Dominion an authority competent to give assent to its laws and no law of the dominant . country relating to disallowance, suspension or reservation of laws should be applicable to, it. Nor should any law of the dominant country passed after the attainment of independence be applicable to it. These propositions were all recognised by section 6 of the Indian Independence Act which followed closely the scheme of the Statute of Westminster; subsection (1) of the former corresponding to section 3 of the latter, subsection (2) to subsection (2) of section 2, subsection (3) to sections 5 and 6, subsection (4) to section 4 and subsection (6) to sections 7 and 8. Thus section 6 ' of the Act of 1947 practically, adopted every important provision of the Statute of Westminster. This section is the most important section in the Act because it gives to the Legislature of the Dominion full power to make any law that it likes, including laws making provision for the constitution, because laws- having extra-territorial operation which this section mentions as being .within the competence of the Legislature of the Dominion are often constitutional laws while laws repugnant to or repealing or amending the Government of India Act, 1935, or the Indian Independence Act itself, which are mentioned in subsection (2) and laws limiting for the future the powers of the Legislature of the Dominion are necessarily constitutional laws. The words of the first subsection `the Legislature of each of the new Dominions shall have full power to make laws for that Dominion are thus wide enough to include .laws of every description. The exact meaning of the words `Legislature of the Dominion' that occur in this section in several places has been the subject matter of some discussion before us, counsel for the respondent contending that these words are used in the Act- in several different senses. Any such possibility would, in " my opinion, entirely take away the artistic ,value and destroy the underlying scheme of the Act, leaving it a jumble of confused ideas and full of inconsistencies and contradictions. Thus Mr. Chundrigar's contention that the words "Legislature of that Dominion" and "Legislature of either pf the new, Dominions" that occur in subsection (3) refer only to Federal Legislature and not to the Legislature of the Dominion which is mentioned in subsection (1) is entirely devoid of substance because, as I have pointed- out, the laws which .the Legislature. of the Dominion may make include in three places expressly and in the whole , of the section by necessary implication what are essentially constitutional laws. There can be no difficulty in understanding this section if it be borne in mind that the words `Legislature of the Dominion' are used in this section to indicate the future Legislature which was to make all laws. for the ,Dominion. When the Act. was passed, the Legislature of the Dominion was an abstract conception which was to be applicable to the future sovereign Legislature of the Dominion, including the Legislature that came into existence on the 15th August, 1947, without any limitations on its power. ' The section is a power-giving section and must be read as such to be intelligible in all its implications. The power to make all laws. was given to the Legislature of the Dominion while the power to give assent to those laws was given to the Governor General, who thus became a constituent part of the Legislature and was to occupy the same position as the Sovereign in the United Kingdom in respect of the prerogative of giving or withholding assent.

The next important provision in the Act is section 8 which make's temporary provision as to the government of each of the new Dominions. The first subsection of that section provides that in the case of each of the new Dominions the powers of the Legislature of the Dominions shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable, in the first instance, by the Constituent Assembly of that Dominion and that references in the Act to the Legislature of the Dominion shall be construed accordingly. The important point to remember about this subsection is that it refers to the powers of the Legislature of the Dominion which had been defined in section 6 and which included the power to make constitutional laws. The subsection, however, provides that so far as the powers for the purpose of making provision as to the Constitution of the Dominion are concerned, they shall be exercisable in the first . instance by the Constituent Assembly which for the purposes of the Act shall be construed to be the first Legislature of the Dominion. The subsection is a machinery provision as the words in the marginal note to the section "temporary provision as to government of each of the new Dominions" show and not a power- giving .provision except in so far as it states that immediately on coming into force of the Act the Constituent Assembly shall, in the first instance, exercise the ~ powers of the Legislature of the Dominion. Another important point not to be overlooked in construing subsection (1) of section 8 is that the Constituent ,Assembly can make a provision as to the constitution of the Dominion only by "law". This is clear from the second subsection which says that the Dominion shall be governed in accordance with the ,,Government of India Act, 1935 "except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of ,the Dominion under subsection (1) of this section."

The second subsection to section 8 also provides a provisional constitution for' the new Dominions and that constitution is the Government of India Act, 1935, as adapted in exercise of the authority given to the Governor- General by section 9 of the Indian Independence Act. The subsection has five provisos, of which proviso (c) declares that Any provision of Government of India Act which requires the Governor- General or any Governor to act in his discretion or exercise his individual judgment shall cease to have effect ; and proviso (d) states that no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure nor any Provincial Act disallowed by His Majesty there under. Both these provisos were necessary deductions from the main provision enacted in section 7, that from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility as respects the government of any of the territories which immediately before that day were included in British India and from proviso (b) to subsection (2) of section 8, that nothing in subsection (2) shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof. The principle that His Majesty's Government in the United Kingdom had no responsibility for and had relinquished all control over the government of the Dominion made necessary the enactment of section 7 which declares that from the appointed day the suzerainty of His Majesty over the Indian States lapses, as well as all treaties and agreements in force between His Majesty and any person having authority in the Tribal areas, and that words `Indiae Imperator' and `Emperor of India' which represented the sovereignty of the King over Indian territories shall be omitted from the Royal Style and Titles.

Under the temporary constitution provided by section 8 a Federal Legislature had to come into existence and some one from the appointed day had to - exercise its functions under that constitution. Proviso (c) to subsection (2) of section 8 therefore declares that the powers of the Federal Legislature or the Indian Legislature under the Government of India Act, 1935; as in force in relation to each of the Dominions, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of that section. Thus the Constituent Assembly became on the 15th August 1947, not only the Legislature of the Dominion for the purposes of section 6, fully competent to make provision as to the constitution of the Dominion but also the first Federal Legislature under the scheme outlined in the Government of India Act, 1935, which with necessary adaptation came into force on the same date. Accordingly the position of the Constitutent Assembly is that it is the Legislature of the Dominion when it makes laws for the constitution of the Dominion and the Federal Legislature when it functions under the limitations imposed upon it by the Government of India Act, 1-,35. This position may be explained in the form of a mathematical proposition and that is this :-

(1) Constituent Assembly minus the fetters to which it is subject as a Federal Legislature is equal to the Legislature o1 the Dominion ; and

(2) Constituent Assembly plus the fetters to which it is subject under the Government of India Act, 1935,- is equal to the Federal Legislature.

This situation is, clearly brought out in subsection (3) of section 8 which says that any provision of the Government of India Act, 1935, which, as applied to either of the new ` Dominions by subsection (2), operates to limit the powers of ; the Legislature of that Dominion shall, unless and until other 5 provisions made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of the section, have the like effect , as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature. Thus subsection (3) recognises the principle I have mentioned earlier that the Legislature of a Dominion may impose limitations on it for the future. The Constituent Assembly had under subsection (1) of section 8 the authority to exercise all the powers given to the Legislature of the Dominion by section 6 but because that Assembly had also to function as the Federal Legislature, the provisions of the Government of India Act which operated to limit the powers of the Legislature of the Dominion were to have the same effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature. In other words, the Constituent Assembly by functioning, as the Federal Legislature had by law imposed future limits on its power, but under section 6 it had full authority to remove those fetters from itself at any time after the midnight of ' 14th August, 1947, and this position was recognised expressly both by subsection (2) and subsection' (3) of section 8, to indicate which the former uses the words "excepting in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion", and the latter the words "unless and until other provision is made by or in accordance with a lave made by the Constituent Assembly of the Dominion in accordance with the provisions or subsection (1) of this section". Thus Pakistan became independent because (I) in law, on the midnight of the 14th August, 1947, if the Constituent Assembly made a law and the Governor-General assented to it, it

could secede from the Commonwealth and become a completely independent State, its citizens owing no allegiance to the Crown and not being British subjects ; and ,

(2) it was not subject, as Canada and Australia were, to any disability to change its constitution. It could have any constitution or form of government she liked, having no connection with the Commonwealth or the Crown or the Governor- General as the representative of the Crown.

But so long as it did not secede from the Commonwealth, it was a Dominion because

(a) it was linked with the Commonwealth by allegiance to a common Crown ;

(b) its citizens were internationally British subjects ;

(c) its laws needed the assent of His Majesty or his representative, the Governor- General ;

(d) the King's prerogative existed here except to the extent that it was utilized by parliament in the Indian Independence Act because the King had placed .his ' prerogatives and interests at the disposal of Parliament only "so far - as concerned the matters dealt with by the bill"; and

(3) it could make any law it liked, constitutional or otherwise, and no law of the dominant ,country was to extend to it.

LACUNA

There is, however, one obvious lacuna in the Indian Independence Act which is otherwise a masterpiece of draftsmanship- it contains no express provision as to what was to happen if the Constituent Assembly did not or was unable to make a constitution,. or resigned en bloc, or converted itself into a perpetual Legislature. It may be that any such contingency was beyond the imagination of the authors of the Act, but the more probable reason seems to be that they thought that any such contingency had .ceased to be their headache. and was purely a concern of the "independent" Dominion. So long, as the responsibility for the government of the country was that of the Government in London, a provision to meet such a situation appeared in the constitution, but that responsibility having been disclaimed by the Indian Independence Act, the necessity for relating any such provision also disappeared from the constitution. If a breakdown came, it seems to have been thought, it was for the Dominion itself to reset the tumbled down machinery. A third explanation has been suggested by the learned , counsel for the appellants and that is that section 5, in view of its wide terms, was supposed to contain a solution of the difficulty .by the exercise by the Governor- General of his prerogative powers as representative of the. King.

ROYAL ASSENT

We are now in a position to approach the , question whether the Sind Chief Court had the jurisdiction to issue the writs in question. The point sought to be made on behalf of the appellants is, that section 223- A of the Government of India Act, 1935, which gives to a High Court the power to issue writs in the nature of habeas corpus,- mandamus, prohibition, quo warranto and certiorari and which was inserted in that .Act by the Government of India (Amendment) Act, 1954, is not a part of the law because the amending Act did not receive the assent of the Governor- General as required by subsection (3) of section 6 of the Indian Independence Act. The answer to the question raised depends upon the true construction of .that subsection but before I come to that it is necessary briefly to refer to the English Constitutional Law and the law in force , in the Dominions on the Subject.

ASSENT IN BRITISH AND DOMINION LEGISLATION .

The necessity of the King's assent to all legislation in England has its origin in a remote period in British history. Not only was Kingship the great central institution around which the English constitution grew, but monarchy has always been the most deeply rooted and enduring part of that constitution and the whole course of English constitutional history is a story of the ever varying concept of King , the Crown, the Sovereign and His or Her Majesty. Though these words often represent- a political abstraction and are not necessarily significant- of any judgment or discretion to be exercised by the person who for the time being happens to occupy the throne, nevertheless they hide in themselves a .political doctrine of profound practical importance which must be thoroughly understood in order to comprehend the essential characteristics , of democractic institution of the British pattern. Kingship was not imported in Britain from the forests of Germany but is an essentially indigenous institution which first came into importance by the domination of the Heptarchy by Wessex. The emergence of a single kingship and his `Council of wise men' called the `Witenagernot' lies at the root of present political institutions and the theory of the Royal prerogative. The King issued his orders with the advice of the `witen'; his acts were limited by the customs of the people ; and though he was the supreme judge, the `witen' sat with him when he held his supreme court of justice.

Though the British people were jealous of the power of the King, and they even beheaded one, except for a few brief periods they never ceased to associate his name with legislation, however strong and independent the Parliament became. He was always an integral part of Parliament and even now the enacting part of every Act begins with the words "Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same." The power to give assent to bills or withhold it therefrom continued to remain for a long time one of the personal prerogatives of the King which he could use to veto bills passed by Parliament, and though the last exercise of this power was in the time of Queen Anne, several eminent constitutional. writers referred to this reserve power of the King to control legislation as recently as 1913 in the controversy that arose over the passing of the Irish Home Rule Bill, Professor Dicey, the celebrated constitutional writer, writing to `The Times' in the course of that controversy declined to enter on the academic enquiry whether during that political crisis the King could rightly or wisely refuse

assent to the Home Rule Bill after it should for a third time have been passed by the House of Commons and rejected by the House of Lords but he agreed with the following words of Burke :-

"The King's negative to bills is one of the most undisputed of the royal prerogatives, and it extends to all cases whatsoever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would had had a very heavy loss, but it is not the propriety of the exercise which is in question. It repose may be the preservation of its existence and its existence might be the means of saving the constitution itself on an occasion worthy of bringing it forth.

Mr. Disraeli in 1852 expressed the view that the Crown's right to refuse assent 'to legislation was still outstanding and was not an empty form. "It is not difficult", he said, "to conceive an occasion when, supported by the sympathies of a loyal people, its exercise might defeat an unconstitutional ministry and a corrupt parliament." Frederic Austin Ogg in his `English Government and Politics' asserts that the royal assent, though given indirectly and perfunctorily, is indispensable to legislation and then reproduces the following graphic account of the ceremony from Sir Courtenay Ilbert's book 'Parliament':-

"The assent is given periodically to batches of bills, as they are passed, the largest batch being usually at the end of the session. The ceremonial observed datos from Plantagenet times, and takes place in the House of Lords. The King is represented by Lord Commissioners who sit in front of the throne on a row of armed chairs arrayed in scarlet robes and little cocked hats . . . . . .At the- .bar of the House stands the Speaker of the House of Commons who has. been summoned from that House. Behind him stand such members of the House of Commons as have followed him through the lobbies. The Clerk of the House of Lords reads out in sonorous voice the commission which authorises the assent to be given. The Clerk of the Crown at one side of the table reads out the title of each bill. The Clerk of the Parliament on the other side making profound obeisance’s, pronounces the Norman French formula by which the King's assent is signified : The Little Peddington Electricity Supply Act. (Le Roy le Veult.)

Between the two voices six centuries lie."

Mr. Chundrigar in all seriousness raised what appeared to me to be a novel contention that royal assent is not indispensable even in the United Kingdom legislation, and in this connection he drew our attention to some episodes in English history when the country had to carry on the business of legislation without a King, and referred to the following passage from Anson's "Law and Custom of the Constitution", Fifth Edition, p. 333

"3. We have still to consider the action of the Crown as a party to legislation, and looking back at the history of this matter, and noting, as we have had to do, the large, share of legislative power which the Crown once possessed, we are apt to forget that laws have been passed to which no royal assent was given ; we are apt to forget the .episode of the Commonwealth ; the restoration of Charles 11 ; . the resolution of the Lords and Commons that the Crown, should be offered, on the abdication of James II, to William and Mary ; the strange conclusion at Which Lord Chancellor Thurlow arrived during the insanity of George III, in 1788, that he could put the great

seal to a Royal Commission, empowering him to give the royal assent to Acts of Parliament."

He, however, omitted to read the very next passage at page 334 of the book which contains the following explanation of this anomalous position :-

"We may leave out of consideration the make- shifts to which constitutional lawyers may be reduced when the throne is vacant or its occupant insane. All that can be done under such circumstances is to supply, as soon as may be, the deficiency in the constitution. Apart from catastrophies which need to be dealt with as may best suit the circumstances of each case, we may safely join with the second Parliament of Charles II in holding that there is no truth in the `opinion that both Houses of Parliament, or either of them, have a legislative power without the King', an opinion the expression of which rendered its holder liable, by the same statute, to the penalties of a praemunire."

As far therefore as English law is concerned, there has never been, and cannot be any doubt that a bill cannot become a law in the absence of the royal assent, and the House of Lords case in Stockdale v. Hansard (11839- 9- A & E 1) expressly rules that no Resolution of the House of Commons is a law unless it is passed by the other House and receives the royal assent. There is a South African case, Ndlwana v. Hofmeyer (1937 A D 229) commenting upon which at page Iii of his Introduction to Dicey's `Law of the Constitution' Wade says :-

"The Court refused to regard the procedure of Section 152 as binding and held that the legislature could pass any measure by joint or separate sessions at their option provided that the bill received the royal assent, it was binding on the Courts who would accept the King's Printer's copy as conclusive evidence."

In that case Stratford A. C. J. had thus stated the point - -

"This is not a case where one of the constituent elements of Parliament has not functioned. The contrary is clearly to be inferred from the royal assent and promulgation. A resolution of one of the Houses of Parliament, in an example of such a case : it is not an Act of Parliament, and a court of law would not enforce it." '

The assent of the King is also necessary to all Dominion legislation, and before their independent status was recognised by the convention of non- interference, the Governors- General of the Dominions utilized their reserve powers to withhold assent if as representatives of the British Government they thought that the legislation in question was contrary to imperial interests. A similar power rested with the Governors of Colonies and Possessions. But before the Imperial Conference of 1926 the Governor- General's power to veto Dominion legislation had practically fallen into disuse and its removal was not therefore insisted upon at that conference. Thus the Statute of Westminster, 1931,, which recognised the independent status of certain Dominions, did not, except in relation to Merchant Shipping and Colonial Admiralty . Courts, contain any provision for the removal of this legal restriction ; but this was not because these restrictions were not in law limitations on their sovereignty but because they had not since long been used and it was mutually understood that they shall not in future be used. Of course under subsection (2) of section 2 of that Statute these

limitations could be removed by the Dominion concerned because under that subsection no law and no provision of any law made after the commencement of the Statute by the Parliament of a Dominion could be void or inoperative on the ground that it was repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the power of the Parliament of a Dominion were to include the power to repeal or amend any such Act, order, rule or regulation in so far as the same was a part of the law of the Dominion ; and the reason that they 'have not yet been so removed is that in practice they had become inoperative and no Governor-General who is appointed and' is liable to dismissal at the instance of the Dominion concerned call now possibly think of bridging them into use, whatever his 'personal view or inclination may be.

Mr. Mahmood Ali was obviously labouring under some misapprehension when he attempted to apply to the present case the principle that the- right to withhold assent exists only where there is a power to legislate and that where the latter does not exist the former cannot. Stated as an abstract proposition, the principle is correct but I do not see how it is applicable here, Mr. Mahmood Ali read long passages from Lord Mansfield's judgment in Campbell v. Hall (XX How-St. Tr. 239) which lays down no more than that where the King has surrendered his prerogative of legislation to a popular Assembly in a conquered country, he himself cannot legislate. That case is considered by constitutional lawyers as an authority for the deduction that freedom once granted cannot be taken back. But how can that principle be applied to the present case ? The Indian Independence Act does not take away anything which had been previously granted.. On the contrary, it confers full freedom on the Dominion and gives to the legislature-of the Dominion powers which under the Act of 1935 it was incompetent to exercise. If Mr. Mahmud Ali assumes that the Crown had parted with the power to withhold its assent to legislation in India, he is clearly mistaken because under the Act of 19:5 the Governor-General and the Governors were entitled not only to give assent to bills in His Majesty's name but also to withhold assent therefrom in their discretion. It is, therefore, wholly incorrect to . suppose that the right to control legislation by withholding assent did not exist before the Indian Independence Act came into force and that that Act, if it-retains the Governor-General's power to withhold assent, has the effect of taking away something which had previously been granted. The Crown is a constituent part of a Parliament in the United Kingdom, and of all. Dominion Legislatures: either - because it is expressly so stated in the constitutional statutes or because the Crown appoints the Governor General who is empowered to give or withhold assent to the legislation of the Dominion. The same was the position under the Act of 1935, where the King's representative, i.e., the Governor-General, was a part of the Federal Legislature. It is this common restriction that exists on the Dominion legislation which subsection (3) of section 6 intended to enact when it provided that the Governor-General of the Dominion shall have full power to assent in His Majesty's name (including the power to withhold assent) to the laws of the Legislature of the Dominion.

On this part of the case Mr. Chundrigar's argument was that the right to withhold assent to bills was retained in the adapted Act of 1935 because it had existed in the original Act and that it was not a necessary deduction from the provisions of subsection (3) of the Act of 1947 ; but in adopting this position he contradicted his other proposition, vehemently urged, that the right to withhold assent to bills is an

arbitrary control on legislation and therefore a restriction on the legislative sovereignty of ' the Constituent Assembly. If the power to withhold assent derogates from the legislative supremacy of the Legislature of the Dominion, i.e., the Constituent Assembly, it is obvious that sections 32, 75 and 76 of the adapted Act of 1935 which still retain for the Governor- General the right to withhold assent are incompatible with the otherwise limited legislative sovereignty of the Federal Legislature whose power also are exercised by that Assembly, and that such restrictions being inconsistent with the conception of full freedom could only be retained or inserted if they were authorises and followed from the provisions of subsection (3). The restrictions are, therefore, illustrative of the constitutional position that assent to the Dominion legislation by the Crown or its representative is indispensable and has in no instance ever been dispensed with by the Crown. Elsewhere in this judgment I have pointed out that Mr. Chundrigar' contention that the right to withhold assent is an effective restriction on the legislative activity, of a Dominion Parliament is wholly unfounded. and that no Governor- General o Governor of a Dominion can continue to occupy his office he does not act on the advice of the Ministry to assent to an important legislation: This is certainly the position under the adapted Government of India Act because the appointment and dismissal of the Governor- General being a matte on which the advice of the Dominion Government would invariably be accepted by the Crown, it is impossible for the Governor- General to withhold assent from a bill to which the Ministry advises him to assent. Mr. Chundrigar urges the in the case of the Constituent Assembly the , position .: different because the Assembly has no Cabinet and no Prim Minister, but he forgets the basic position that the Constituent Assembly as also the Federal Legislature and virtually choose a Cabinet and a Prime Minister and that in case of a difference between the Governor- General and the Constituent Assembly the Assembly as the Federal Legislature can always have the Governor- General recalled.

Equally incorrect is the contention of Mr. Chundrigar that the requirement as to assent in the other constitutions is the creation of the statutes granting those constitutions. The true position is that the provisions of those statute relating to assent do not create in the Crown or in its representative a new right, but confirm an existing right and merely provide the manner in which that right is to be exercised. Thus if the right to withhold assent to Dominion ., legislation is inherent in the Crown and the statute that legislates o that right merely says that a bill after it has been passed by the popularly elected House or Houses shall be presented for assent to .the Governor- General, who will give assent to that bill or withhold it there from, the statute does not create the right to withhold assent but merely describes the manner in which that right is to be exercised. Similarly the provision in the Government of India Act which give to the Governor General the right to withhold assent from legislation do no confer on, or create a new right in, the Crown ; on the contrary, they implicitly recognise such right and regulate the manner in which it is to be exercised. It is for this reason that the fiction of making the Crown a constituent of the Legislature is resorted to, because neither the King nor hi representative, the Governor- General, is a member of the Legislature like other members. The King or the Governor General is a part of the Legislature only in the sense that all bills passed by the Legislature are presented .to him, so that he may exercise his right of giving or withholding assent. Thus subsection (3) of section 6 produces the same result by giving to the Governor- General full power to assent in His Majesty' name to any law of .the Legislature of the Dominion. It makes the Governor- General a constituent part of 'the

legislature inasmuch as the right to. give assent necessarily includes in it the right to withhold assent. Every bill must therefore be presented to him to provide him an occasion to exercise that right, and unless a bill is so presented a constituent par of the legislature does not function and the proposed legislation does not become law. There is, therefore, no distinction between those constitutions where the Crown is a constituent part of the legislature and the Legislature of the Dominion o Pakistan whose 'functions are being exercised by - the Constituent Assembly and to whose legislation assent is enacted by subsection (3) of section 6 as a necessary condition.

Let us now revert to subsection (3) of section 6, the true question on which the decision of the case depends being whether the first part of that subsection which says that the Governor- General of each of ' the new Dominions - shall have full power to assent in His Majesty's name to any, law of the legislature of that Dominion has the effect of enacting the necessity of assent of the Governor- General to all laws made by the Legislature of that Dominion and whether the Constituent Assembly when acting under subsection (1) of section 8 is a Legislature of the Dominion within the meaning of subsection (3) of section 6. It should be noticed that the marginal note to section 6 is . `Legislation for the New Dominions', which means that the provisions relating to the assent of the Governor- General relate to legislation by the Legislature of the Dominion. If the power to assent includes in it the legal right to withhold assent, which it does as held by Muhammad Bakhsh, J., then the subsection must be held to mean that the Governor- General has the right to withhold' assent to any law of the Legislature of the Dominion. The plain meaning of this provision is that, as representative of His or Her Majesty, the Governor- General has full power of himself giving assent to laws which otherwise, on the common law doctrine that a law made by the legislature of a Dominion is not law unless it receives the royal assent, would require the royal assent. If the law gives to a person the power to do a thing, the necessary implication is that; he heed not exercise that power. and that he has the right of refusing to exercise such power A power is not a duty or an obligation and it is only if the words "shall have full power to assent" are read to mean "shall be under an obligation to assent", that the discretion to withhold assent can disappear, though even then the legal necessity of a formal assent would remain. Mr. Chundrigar has referred to section 32 of the Interpretation Act, 1889, but that section in no way supports him because it not only draws the distinction between a power and a duty but also declares that where a power is given to a person to do a certain thing, that power may be exercised . from time to time. In the debates on the Indian Independence Act in the House of Commons, Mr. Molson speaking on clause (d) of the Proviso to subsection (2) of section 8 suggested that under that clause instead of His Majesty disallowing legislation on the advice of the Secretary of State for India, it would under the Act be done by the Governor- General. In replying to this, the Attorney- General said:

"The second point raised by the Honourable Member was in regard to the provision in clause 8 (2) (d) as to reservation. That corresponds in the case of the Provincial Legislature with the provisions under clause 6 (3) with regard to the reservation of laws passed by the Central legislature. That was dealing with reservation until His Majesty's pleasure was known and that was a form of reservation which enabled the Governor- General to withhold assent to a Bill until His Majesty could be advised by the Government of the United Kingdom about the matter. That provision would have been a wholly inappropriate one to retain and obviously would have involved a derogation from the sovereignty we are now giving to the Dominion. No doubt, the

Governor- General will provide immediately, as the eventual Constitution will have to provide that there will be some sort of power of that kind vested in the Governor- General or provided for in the provisions of the new Constitution, but that will be a matter for the new Constituent Assembly." (440 H. C. Deb., 5th Series 194647, column 122).

It is quite clear from these observations of the Attorney- General that in place of the provisions which did away with reservation and disallowance by the insertion of clause (d) some sort, of control on the Provincial Legislature was contemplated to be given to the Governor- General in the provisional constitution. Such. control was actually given by providing in section 75 of the adapted Act of 1935 that the Governor shall declare either that he assents to a bill or that he withholds assent therefrom or that he reserves the bill for the consideration of the Governor- General, as well as by providing in section 76 that - when a bill is reserved by a Governor for :he consideration of the Governor- General, the Governor- General shall declare that he assents in His Majesty's name to the bill or that he withholds his assent therefrom. In the same way section 32 of the . adapted Government of India Act gives to the Governor- General the power to withhold assent from a bill. This power to withhold assent could, however, be given only if it was implied in the provision in subsection (3) of section 6 that the Governor- General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the; Legislature of that Dominion. The position, therefore, is that the words of the provision in question give to the Governor- General the power to withhold assent ; the sponsors of the Indian Independence Bill thought that this power was implied in this provision ; and the experts who adapted the Government of India Act, 1935, took this provision to mean that the power to withhold assent is implied in the power to give assent. If the power to withhold assent had not been included in this provision, its insertion in sections 32, 75 and 76 of the adapted Government of India Act would have been entirely without authority.

I have already pointed out that the words "the powers of the Legislature of the Dominion", in subsection (1) of section 8 refer back to the powers of the Legislature of the Dominion defined in. section 6, which the Constitutent Assembly was to exercise in its capacity of Legislature of the Dominion pertinent reference to section 6 is to be found in the Attorney- General's speech in column 118 of 440 H. C. Deb. 5th Series, 1946- 47 ; where referring to section 8 he said that that section was to provide for a temporary constitution and that subsection (1) of section 8 gave the necessary legislative power to a Constituent Assembly and attracted the provisions of clause 6. This .could only mean that section 6 was the power- giving section while subsection (1) of section 8 made those powers exercisable by the Constituent Assembly. If this relation of the two provisions was correctly stated by the. Attorney- General, as I think it was, it could only mean that the provision of section 6 were applicable to the powers given to the Constituent Assembly by subsection (l) of section 8 and that the restriction as to the; Governor- General's assent to legislation by the Legislature of the Dominion, whatever may be the character of that legislation was applicable when the Constituent Assembly exercised the powers of the Legislature of the Dominion! under subsection (1) of section S. That subsection does not say that the constitution of the Dominion shall be made by then Constituent Assembly. It assumes that the powers of the Legislature of the Dominion include the power to make provision as to the constitution of the Dominion, declares that those powers shall be exercisable in the

first instance by the Constituent Assembly and directs that references in the Act to the Legislature of the Dominion shall be taken as references to the Constituent Assembly. It was contended both byl Mr. Chundrigar and Mr. Mahmud Ali that the Constituent Assembly, though it exercises the powers of the Legislature of the Dominion, is not itself the Legislature of the Dominion. This to my mind is tantamount to a refusal to read subsection (1) of section 8, the only purport of which can be that the Constituent Assembly shall be the first Legislature of the Dominion, competent to exercise all the powers give to that Legislature by section 6 including the power to make laws as to the constitution of the Dominion. Learned counsel for the appellants therefore rightly contended that the plain words of subsection (1) of section 8 that "reference in this Act to the Legislature of the Dominion shall be construed accordingly" have the effect of substituting the Constituent Assembly for the words "the Legislature of each of the new Dominions" in subsections (1) and (3) of section 6. That being the position, there can be no escape from the conclusion that the Governor-General's assent to the laws made by the Constituent Assembly is as necessary as his assent to any future Legislature of the Dominion brought into existence by the Constituent Assembly to replace itself. It was conceded before us that if the Constituent Assembly dissolved itself after creating another Legislature of the Dominion and everything else remained as it is today, the provisions of section 6 would be applicable to such Legislature, including the provision in subsection (3) relating to the assent of the Governor-General, and if that be so, I do not see why the provisions of that subsection should not have been applicable to the Constituent Assembly itself when under the express words of subsection (1) of section, 8 it became the Legislature of the Dominion on the coming into force of the, Indian Independence Act.

The necessity of the Governor-General's assent to legislation-is, as I have already said, based on a well-understood principle which is known to every constitutional lawyer conversant with constitutional practice in the United Kingdom and the Dominions. Legislation is the exercise of a high prerogative power and even where it is delegated by statute or charter to a Legislature, in theory it is always subject tai assent whether that assent be given by the King or by a person nominated by, the King. In the British system there; is not a single instance to the contrary. That necessity was, enjoined in the case of Pakistan so long as it continued to be, a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a bill of secession to repudiate its Dominion status. The force of the words `full power to assent' would be realised if a situation arose where; a bill of secession came up before the Governor-General for assent. So far as His Majesty was concerned he had given full powers to his Governor-General to assent to any legislation of the Dominion ; but the Governor-General; though he was a respresentative of the King, was also the representative of the Dominion in the sense that he was a ,person in whom the majority patty of the Assembly had confidence. He, would, therefore, have no hesitation, and would also have the requisite authority to give assent. If, however, he withheld assent, his immediate recall by His Majesty would have been successfully insisted upon by the Assembly and the assent could then have been obtained from his successor.

Confused and clearly contradictory, though they. are said to be alternative, arguments have been addressed to us as to the construction of this subsection which consists of two distinct parts, the first declaring that the Governor-General of the Dominion shall have full power to assent in His Majesty's name to any law of the Legislature of the

Dominion and the second saying. that so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of .laws until the signification of His Majesty's pleasure thereon shall not apply to the laws of the Legislature of the Dominion. I have already shown that if the power to assent includes, as in my opinion it does, the power to withhold assent, then the true import of the first part ,trust be that the . Governor- General, since he has the power to withhold assent, is a necessary part of the Legislature in precisely the - same sense as under the old Government of India Act he was a constituent part of the Federal Legislature because no bill could become law unless he gave his assent thereto. The argument of Mr. Chundrigar and Mr. Mahmud Ali is that the word `law' as it first occurs in the subsection means a bill to which the assent of .the Governor- General has been given and which has thus become a law. In this connection the language of the subsection is compared with clause (d) of the proviso to subsection (2) which speaks of bills and .not laws. No inference. from this comparison can, however, be drawn because clause' (d) uses the language of the Government of India Act when it refers to the reservation of the Provincial bills for the signification of ' His Majesty's pleasure, or when it refers to an assented bill as a `Provincial Act'. The word `law' in the subsection has been used in a general sense, namely, any proposed legislation which has not as ye t~ received the assent of the Governor- General ; otherwise the subsection would lead to this absurd result that a legislative proposal which has already received the assent of the Governor- General would need a second assent. The assent of the Governor-General in respect of a proposed legislation, which by the Government of India Act is described as a bill, is needed only once and it is ridiculous to say that the Governor- General of the 'new Dominion shall have full power to assent to any bill to which assent has already been given by him..

The second contention of Mr. Chundrigar is that when this subsection says that the Governor- General of the Dominion shall have full Dower to assent in His Majesty's name to any law of the Legislature of the Dominion, it empowers the Governor=General to give assent only in cases, which are mentioned in the second part of the subsection, namely, where a law may be disallowed by His Majesty or reserved for the signification of His Majesty's pleasure or suspended until the signification of such pleasure. This contention has to be rejected for ,several ,reasons. Firstly, on that construction the first part of the subsection becomes wholly superfluous, because it is undoubtedly within the competence of the Legislature of the Dominion to say under subsection (t) of section 6 that to a particular' law the provisions of any Act of the Parliament of the United Kingdom relating to disallowance, reservation or suspension shall not apply ; secondly, the plain terms of the first part of the subsection do not limit its application to the cases specified in the second part ; and thirdly, the words `reservation of laws' cannot possibly relate to laws which have already received the . assent of the Governor- General. When asked to paraphrase the first part of the subsection in order to give to it the meaning contended for, Mr. Chundrigar attempted the following substitution for it : the powers of the Governor General to assent in His Majesty's name to any law of the Federal Legislature, which previously were not full, shall hereafter be full in the. sense that , the, Governor- General shall be competent to give his assent in His Majesty's name in cases where a law could be disallowed by His Majesty or reserved for the signification of His Majesty',s pleasure or suspended until the signification of such pleasure. Comment on this strained paraphrase is superfluous. There is no warrant for

substituting `Federal Legislature' for `Legislature of the Dominion' ; nor for limiting the operation of the first part only to cases contemplated in the 'second part ; and the words used are clearly inapplicable to `reservation' of laws.

Our attention was drawn to some Acts which provide for disallowance, reservation or suspension, but none of these Acts contemplates reservation after the proposed legislation has been assented to by the Governor-General or the Governor of a Dominion or a Colony. I have already pointed out that the second part of the subsection corresponds to sections 5 and 6 of the Statute of Westminster which specifically refer to the Merchant Shipping Act and the Colonial Courts of Admiralty Act. Section 735 of the Merchant Shipping Act, 1894, enacts :-

"The Legislature of any British Possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal wholly or in part, any provision of this Act relating to ships registered in that Possession ; but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the Possession or until such time thereafter as may be fixed by the Act or Ordinance for the purpose."

It is obvious that the intention of this section is that even where an Act or Ordinance of any British Possession has received the assent of the Governor-General or the Governor, it shall not be law until it has been confirmed by . Her Majesty in Council and Her Majesty's approval of that Act or Ordinance has been proclaimed in the Possession. Similarly, section 736 of that Act says :-

"The Legislature of a British Possession may, by any Act or Ordinance, regulate the coasting trade of that British Possession, subject inter alia to the condition that the Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's; pleasure thereon has been publicly signified in the British Possession in which it has been passed."

Though the language used in' this section is different from that of section 735, the principle underlying both of them is the same, inasmuch as section 736 instead of requiring confirmation and its proclamation enjoins on the Legislature concerned that the Act or Ordinance itself shall contain a suspending clause providing that it shall not come into force until Her. Majesty's pleasure thereon has been publicly signified. Thus though subsection (3) of section (6) may apply to section 736, it does not in terms apply to confirmation, or approval mentioned in section, 735.

Section 4 of the Colonial Courts of Admiralty Act, 1890, relates to reservation of Colonial laws for Her Majesty's assent. It provides that certain Colonial laws shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon,- or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British Possession in which it has been passed. Here again the section relates . to approval, reservation and suspension, and though the second part of subsection (3) may be applicable to suspension, it does not . apply to approval and is clearly inapplicable to reservation in the sense which Mr: Chundrigar and Mr. Mahmud Ali attach to it, because the section clearly enjoins the assenting authority not to assent to it but to reserve it for the

signification of Her Majesty's pleasure. Similarly. the reference to section 1 of- the Colonial Evidence Act, 1843, is beside the point because what that section enacts is

"No law or ordinance made or to be made by the Legislature of any British colony for the admission of the evidence of any such persons as . aforesaid in any Court or before any magistrate within any such colony shall be or be deemed to have been null and void or invalid by reason of any repugnancy or supposed repugnancy "of any such enactment to the law of England, but every law or ordinance made or to be made by any such Legislature as aforesaid, for the admission before any such Court or magistrate of the evidence of any such .persons as aforesaid on any conditions thereby imposed, shall have such and the same effect, and shall be subject to the confirmation or disallowance of Her Majesty is such and the same manner, as any other law or ordinance enacted for any other purpose by any such colonial Legislature",

but subsection (3) of section 6 contains no reference to confirmation.

It will be apparent from what I have said above that it is a contradiction in terms to speak of the Governor- General as giving assent to a proposed legislation which has already received his assent, and unless this impossible position be accepted, the construction of this subsection put forward for the respondent, namely, that the word `law' where it first occurs in subsection (3) refers to cases where the assent of the ' Governor- General has already been given, cannot be accepted. Again, the- word `law' has to be distinguished from the word `Act' because while the first part of the subsection says that the Governor- General shall have the power to assent to any law, the second part speaks of an Act relating to disallowance, reservation or suspension. This clearly means that the second part of the subsection applies to Acts relating to disallowance, reservation or suspension and that the word `Act' there is used in a sense different from that in which the word "law' has been used in the first part, namely, in the sense of a bill or legislative proposal which has been passed by the Legislature but which has not received the assent of the Governor- General. Faced with this difficulty Mr. Mahmud Ali shifted his position and asserted that the word `law' in the first 'part of the subsection means an Act or Ordinance. But any such construction would lead to the absurd result that an Ordinance or Act which has been passed by, or received the assent, of the Governor- General would need a second assent by him. Thus none of the various constructions suggested on behalf of the respondent fits in with the plain language of the subsection, which shows that the word "law" in the first part of the subsection is used in a general sense and not in the sense of a bill which has already received the assent of the Governor- General. Evidently the words "so much of any Act" used in the second part of the subsection were intended to refer not. only to those provisions of the Act of 1935 which had required the Governor- General to reserve . bills for the signification of His Majesty's pleasure or enabled His Majesty to disallow Acts, but also to those provisions of the other Acts of Parliament of the United Kingdom which related to reservation, disallowance or suspension of laws in the Dominions, Colonies or Possessions. The power to withhold assent has not been specifically mentioned in subsection (3) and the subsection, as it stands, cannot be taken as enacting that the Governor- General shall not have the power . to withhold assent to legislation. The power to withhold assent appeared in the Act of 1935, and has also been retained in the adapted Act. Unless, therefore, the power to assent necessarily included in it the power to withhold assent, and this result followed from subsection (3), it could not have found place in

the adapted Act either in regard to Federal' legislation or in regard to Provincial legislation. Mr. Chundrigar's argument that it has been retained in the adapted Act because it appeared in the original Act .being based, as already pointed out, on an obvious fallacy.

The argument seriously advanced on behalf of the respondent and which was readily accepted in the Chief Court that the words "Legislature of the Dominion" in subsection (3) refer only to the Federal Legislature must be rejected on the short ground that; as already pointed out, the laws which the Legislature of the Dominion is empowered by section 6 to make may be constitutional laws which are not within the competence of the Federal Legislature as, for .instance, laws repealing or amending the . Indian Independence Act, or the adapted Government of India Act, and laws limiting for the future the powers of the Legislature of the Dominion. If the reference in section 6 had been only to the Federal Legislature, one would have expected for the present phraseology of subsection (3) some provision similar to proviso (d) to sub= section (2) of section 8.

The next point taken by Mr. Chundrigar was that subsection (3) of section 6 must be read with section 5 which says that the Governor- General represents the Crown only for the purposes of the government of the Dominion, the inference sought to be drawn being that because the Governor-General represents the Crown only for the purposes of the government of the Dominion he can have no say in constitutional legislation by the Constituent Assembly. This argument appeared to be unanswerable to one of the learned Judges of the Sind Chief Court who thought that. the words `government of the Dominion' only meant government under the adapted Government of India Act as provided by subsection (2) of section 8. When questioned whether government also includes the administration of constitutional laws Mr. Chundrigar replied in the affirmative, but he asserted that so far as the making of constitutional laws is concerned it is not a part of the government of the Dominion and the Governor General does not come in there. I do not understand how if the administration of constitutional laws is a part of the government of a Dominion, their making is not. The marginal note to section 8 "temporary provision as to the government of each of the new Dominions" shows that the legislation of the Constituent Assembly under subsection (1) of section 8 is a part of the government of the Dominion and the whole scheme of the Government of India Act proceeds on the assumption that the Governor- General represents the Crown when he assents in Her Majesty's name to the laws of the Federal Legislature. Therefore it seems to me to be an impossible proposition to ,assert the making of laws is not a part of the government of the Dominion, and that being so no reason whatsoever has been suggested why the making of constitutional laws should not be a part of the government of the Dominion. If the Governor- General represents the Crown for the purposes of the government of. the Dominion when he! gives assent to - the laws passed by the Federal Legislature, it must a fortiori follow that he represents the Crown for the same purpose when he assents to constitutional laws, because in a State like ours it is impossible to conceive of a government without there being a constitution.

It is next contended on behalf of the respondent that rule 62 of the "Rules of Procedure of the Constituent Assembly,. which provides that when a bill is passed by the Assembly copy thereof shall be signed by the President and it shad, become law on being published . in the official Gazette Pakistan under the authority of the

President, has the effect Q fi validly dispensing with the Governor- General's assent. This rule has a history which should be mentioned. In its original form the Rule, when passed on the 24th February, 1948, in meeting presided over by the Quad- i- Azam who was thin the President of the Constituent Assembly, was as follows :-

"When a bill is passed by the Assembly a copy there shall be signed by the President." In the meeting of the 22nd May 1948, under the presidentship of the respondent, Sardar Abdur Rab. Khan Nishtar moved the following amendment :-

"That for rule 62 of the Constituent Assembly Rules, tie following be substituted, namely :-

"Assent to Bills.- When, a bill has been passed by the Assembly, it shall be presented to the President for his assent'."

Khan Sardar Bahadur Khan, however, moved the following amendment for that moved by Sardar Abdur Rab Khan Nishtar :-

"That for rule 62 of the Constituent . Assembly Rules, the following be substituted When a bill is passed by the Assembly, a copy thereof shall be signed by the President and it shall become law on being published in the official Gazette of Pakistan under the authority of the President."

This amendment was accepted by Sardar Abdur Rab Khan Nishtar and was adopted without discussion. The confusion as to the scope and nature of the rule is apparent from the amendments. Sardar Abdur Rab Khan Nishtar's amendment related to assent to bills while that of Sardar Bahadur .Khan related to their authentication. The former aimed at substituting the assent of the President for that of the Governor General without an amendment of section 6 of the Indian Independence Act while the latter said nothing about assent and sought to provide for authentication. of the bills and as to when they became law. The latter amendment succeeded and is now Rule 62 of the Rules of Procedure.

There is no specific provision in the Act of 1947 empowering the Constituent Assembly to make its own Rules of Procedure but that does not mean that it was incompetent to . flake such Rules. Such power is inherent to a Constituent Assembly and must be presumed to vest in it. The question, however whether Rule 62 is a mere rule of procedure or law in the Sense that it overrides the provision in the constitution that tense bill of the Legislature of the Dominion requires the Governor General's assent. It will be noticed that the Rule says nothing about assent and relates only to authentication. It is, therefore, not inconsistent with the constitutional provision that a bill in order to become law must be assented to- by the Governor General, and is quite capable of the construction that it assumes a bill to have been assented to by the Governor- General before it is signed by the President and published in the Gazette. In the second place, it cannot. be said to be a law governing the decision of the present question. It may be that if a legal right can be founded on a Rule of Procedure, the breach of that rule may provide to the person in whom that right vests a cause of action. to come in Court, but no such rule can become law so long as the constitutional provision which conflicts with it is not repealed. Under the Assembly's own rules, all amendments to the Constitution have to follow the procedure of bills

which is' prescribed by Rules 43 to 62 and it is admitted that the amendment which gives its present form to the Rule did not comply with that procedure. This shows that even the Constituent Assembly did not consider the Rule to be a constitutional provision, much less a provision overriding or repealing a specific constitutional provision. If the Assembly intended to change the law relating to assent, it was necessary for it to amend section 6 of the Indian Independence Act in such a manner as to dispense with the necessity of the Governor- General's assent. A mere Rule of Procedure cannot amend the Constitution Act any more than a Resolution by the Assembly that a person named shall be stoned to death for an act that is not an offence under the substantive law of crimes and without his being tried in accordance with the law relating to criminal procedure. Lastly, even if this Rule be assumed to be a constitutional provision, it itself required the Governor- General's assent and, in the absence of such assent, is wholly invalid.

Contemporanea Expositio and argument ab inconvenient

I may notice here Mr. Chundrigar's argument that because for several years no assent to an Act of the Constituent Assembly, while sitting as a constitution- making body under subsection (1) of section 8, was ever obtained, and that some important Acts passed by the Assembly were treated as law by every one concerned, though they had not received the assent of the Governor- General, subsection (3) bf section 6 must be so interpreted as not to be applicable to the legislation passed by the Constituent Assembly . under subsection (1) of section 8. In this connection, he read to us some passages from pages 399- 401 of Crawford's "Statutory Construction", 1940 Edition, and pages 144, 146, 147, 148 and 150 from Cooley's First Volume of "Constitutional Limitations", Eighth Edition. The rule enunciated in these passages is the principle of Contemporanea Expositio which also applies to the construction of documents. The principle as applied to documents may be stated to be as follows in order to explain, but not to contradict, ancient (documents whose meaning is doubtful, the acts of the parties, even before the execution of the instrument, or the mode in which property has since been held and enjoyed thereunder, as well as constant modern user may be given in evidence. Such. evidence, however, seems now admissible not only in the case of ancient, but also of modern documents, and whether the ambiguity be a curable patent ambiguity or a latent ambiguity. On the other hand, where the meaning of the words is not ambiguous, the subsequent acts of the parties are not admissible to construe it, whether the document be ancient or modern (Sue Phipson's Evidence, 7th Ed., 605 and Taylor, Evidence Sections 1204=1205.).

In its application to constitutional statutes, the rule is thus stated by Cooley at page 144 of his book :-

"Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way: In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always of. necessity be vague and indecisive. But where there has been a practical construction, which has been 'acquiesced in for a considerable period, considerations in favour of adhering to this construction 'sometimes present themselves to the Courts with a plausibility and force which it is not easy to resist.

Indeed, where a particular construction has been, generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

In all the cases where observations of this kind have been made, the true intention of the particular provision in the constitution was ambiguous or doubtful, and I know of no instance where the words of the constitution being clear and consistent with a reasonable interpretation, any Court ever went to the extent of misconstruing its true purpose merely because somebody else had, taken a mistaken view of it. There is no question of estoppel in such cases, the correct description of 'the reasoning employed being argument ab . inconvenienta. This mode of construction of written constitutions is, therefore; - subject to an overriding consideration which has thus been stated by . Cooley himself at pages 149- 150:-

"Contemporary construction . . . . . can never abrogate the text ; it can never fritter away its obvious sense ; it can never narrow down its true limitations ; it can never enlarge its natural boundaries. While we conceive this to be the true. and only safe rule, we shall be obliged to confess that some of the cases. appear, on first reading, not to have observed these limitations . . . . . .

"It is believed, however-, that in each of these cases an examination of the Constitution left in the minds of the Judges sufficient doubt upon the question of its violation to warrant their looking' elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it' is claimed,, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing or without anyone being sufficiently interested in the subject to raise the question ; but these circumstances cannot he allowed to sanction an infraction of the Constitution. We think we allow to contemporary . and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favour the doubts which arise on reading the instrument to be construed."

Therefore to apply the principle of contemporaneous and practical exposition to the present case, we shall first have to say that there is a doubt in our mind as to the true meaning of sections 6 and 8 as a whole, and particularly as to the meaning of subsection (3) of section 6 and subsection (1) of section' 8.

I think we should be mutilating the- Act and misunderstanding in its true purpose and scheme if we were to hold that the words of subsection (1) of section 8 "for the purpose of making provision as to the constitution of the Dominion" do not refer to the power which section 6 gives to the Legislature of the Dominion, including the power to alter, repeal, or amend the two Constitution Acts themselves or that the power to give assent to which the third subsection of section 6 . refers does not include the power to withhold assent. In my opinion, it is a mistake to suppose that sovereignty in its larger sense was conferred upon the Constituent Assembly, or that it

could function outside Vie limits of the Indian Independence Act. The only power given to that Assembly was the power to make laws, constitutional or federal. In the former case, it exercised the power to make provision as to the constitution of the Dominion which had been included in the generality of the powers conferred - by section 6 on the Legislature of the Dominion, and in the latter it acted as the Federal Legislature with all the limitations to which that Legislature was subject. Apart from these powers, it had no other power and it lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body in the State. It had, of course,

Legislative so , as the Legislature of the Dominion but then the Governor-General was a constituent part of legislature. Every Act passed by it required the Governor-or-General's went, consistently with the position that prevails throughout the Dominions, the Colonies and the Possessions, settled or ceded or conquered, where the Crown still retains to itself or has delegated to its representative the high prerogative right of assenting to bills. If this basic position was misunderstood or misconstrued, there is neither any estoppel nor is the argument ab inconvenienti applicable. On its interpretation of the Indian Independence Act, the Constituent Assembly attempted to function outside the Constitution, and it was the right not only of the Governor-General to object to such, unconstitutional activity, but the right of every citizen in the State to demand that the Assembly .must function within its constitutional limits. The members of the Assembly before they undertake the duties of their office take the oath of allegiance to the constitution of Pakistan, and they are subject to all the limitations of that Constitution. Having taken that oath, they cannot subsequently forswear themselves and assert that they are the only sovereign body in, the State and that their will is the law whether the Governor-General endorses or do no endorse that will.

DISASTER

It has bean suggested by the learned Judges of the Sind Chief Court and has also been vehemently urged before us that if the view that I take on the question of assent be correct, the result would be disastrous because the entire legislation passed by the Constituent Assembly, and the acts done and orders passed under it will in that case have to be held to be void. On this part of the case I do not wish to say anything more than that the sole question before us is whether the Governor-General's assent was obtained to the Government of India (Amendment) Act of 1954, which, inserted section 223-A to the Government of India Act, and nothing said here should be deemed to be applicable to any other Act. In England the assent is given by the King to a bill in person or by commission. It is ceremonial act and has to be formally recorded. Mr. Chundrigar is, however, right in the contention that in Pakistan no particular form for assent is prescribed, .and- that it need not be in writing. It may be that where the Governor-General has taken some action as, for example, where he has issued some rules in exercise of the authority given to him by the Act or taken some other step, his assent to the proposed legislation may by inferred. . That question is not before us and I do not decide it. We are concerned in the present case only with the validity of the Government of India (Amendment) Act of 1954, and so far as that Act is concerned, it is common ground that it was not presented to the Governor-General for assent, and that he has not done anything under this Act which might be taken as~ indicatives of his having assented to 'it. I am quite clear in my mind that we are not concerned with the consequences, however beneficial or

disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under subsection (3) of section 3 needed the assent of the Governor- General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent 'Assembly proceeded with its business and by assuming for itself the position of an- irremovable Legislature to what straits it has brought the country. Unless any rule of estoppel require its to pronounce merely, purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constitution or to the country to set right the position in any way it may be open to 'them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule estoppel stands in the way of a clear pronouncement. Consistently with the practice that has grown up since his sad demise, of citing Quaid- i- Azam's alleged oral sayings as authority for a particular proposition, it has been alleged before us that the practice of not obtaining the assent of the Governor- General to acts of the Constituent Assembly had, come into existence during the Quaid's time and had his support. We have no record of any ruling having been given by him on this point, nor any legal opinion obtained by the Assembly from anyone has been produced before us: Reference has been made to two Acts which during the Quaid's Presidentship of the Assembly were published in the Gazette "under the authority of the President of the Constituent Assembly" and it is alleged that they were never placed before the Quaid for purposes of assent: But during those days the Quaid was not only the President of the Assembly but also the Governor- General and it is quite possible that he might have thought that since the bills were passed under his own Presidentship it was unnecessary again to place them for his assent as Governor- General. Be this as it may, the conduct of one Governor- General in a matter like this does not relieve his successor of * the duty of demanding compliance with the Constitution. Wheare, while discussing the efficacy of non- legal rules as - a medium of constitutional change, says at page 18 of the Fifth Edition of his book "The Statute of Westminster and Dominion Status": "In the first place, they (non- legal rules) cannot always nullify or modify a rule of strict law. In the second place, though they may nullify, a rule of strict law, . they do not and cannot, abolish it. They may paralyse a limb of the law but they cannot amputate it." Can practices and conventions override an express statutory provision merely because nobody attempted or cared to understand it and its implication ?

I now proceed to examine the case on which. Mr. Chundrigar relied. The first of these is the Sind . case, M. A. Khuhro v. The Federation of Pakistan (P L D 1950 Sind 49) in which Hassanally Agha J. held that the meaning of subsection (3) of section 6 of the Indian Independence Act is that the assent of the Governor- General is required only where the assent of His Majesty is necessary under the Constitution. These, however, are not the words of the subsection which speaks of the "Legislature of the Dominion" in which expression subsection (1) of section 8 expressly includes the Constituent Assembly, and says that the Governor- General of the Dominion shall have full power to assent in His Majesty's name to the laws of the Legislature of the Dominion, which power necessarily implies the power to withhold assent. In Khan Iftikhar Hussain Khan of Mamdot v. The Crown ((1951).FCR24- PLD195UFC15) the Crown was intervener, but there the sole question to be determined, was whether the Public and Representative Offices (Disqualification) Act, 1949, fell within the powers of the Constituent Assembly as the Federal Legislature or within. the powers of the Legislature of the Dominion competent to make constitutional provisions, it being

assumed by every one concerned that the assent of the Governor-General was necessary only where the Constituent Assembly functioned as the Federal Legislature. The question whether when the Constituent Assembly acts under subsection (1) of section 8 and exercises the powers of making provision as to the constitution of the Dominion, the assent of the Governor-General under subsection (3) of section 6 is necessary for its Legislation, was neither raised,. nor discussed, nor decided. That case therefore is no authority for the proposition that the Governor-General's assent is. not necessary under subsection (3) of section 6 to legislation by the Constituent Assembly when it functions as the Legislature of the Dominion..

In the Irish case Ryon v. Lennon (1935 1 R 170.) extracts from which are reproduced at pages 377 to 383 of Sir Ivor Jennings' book "Constitutional Laws of the Commonwealth"., 2nd Edition, the question involved was entirely different, namely, whether the amendment by the Oireachtas to the constitution set up by the Third Dail, sitting as Constituent Assembly, was ultra vires, though .there are some observations there in the arguments of counsel, Mr. Gavan Duffy, that the constitution was proclaimed in the name of the people' by Dail Eireann (Third Dail) as an act of supreme authority and that it did not require any -assent. The all-important fact which must not be forgotten about the Irish instance is that the Constitution of the Irish Free State , (Saorstat Eireann) Act, 1922, made by the Third Dail (Dail Eireann) was recognised by the Irish Free State (Constitution) Act. 1922, passed by the Parliament of the United Kingdom just as the Constitution of India made by the Constituent Assembly which, if the information supplied to us by Mr. Chundrigar is correct; had not received the assent of the Governor-General, was recognised by the Parliament by the India (Consequential Provision) Act, 1949 (11, 13 and 14 Geo. 5 c. 92)

Sovereignty of Constituent Assembly

Mr. Chundrigar's next contention was that this interpretation of subsection (3) should be rejected on the principle of reductio and absurdem inasmuch as it affects the sovereignty of the Constituent Assembly by recognising outside that Assembly an authority which has the power to veto all legislation by it. He also relies on the omission of the words `in his discretion' in the adapted Government., of India Act by virtue of clause (c) to the Proviso to subsection (2) of section 8 and the disappearance of the practice of , issuing instructions to the Governor-General, as factors, in favour of a contrary construction. Illustrating the point, he argues that on this construction of the subsection the Crown may appoint any one it likes as the Governor-General of the Dominion and the person so appointed may be hostile to Pakistan, as for instance, a retired officer of the old Civil Service with Congress sympathies and anti-Pakistan views who may not only refuse assent to all material legislation but also withhold assent from any legislation removing the office of the Governor-General himself or declaring Pakistan as an independent country. No construction of this subsection, he says, should be accepted which would be completely incompatible with the independence of Pakistan as a Dominion and introduee into the legislation of the Dominion effective control by the Crown or by the . Crown's representative. The argument proceeds on an obvious fallacy and a clearly mistaken assumption. In the first place, the Indian Independence Act nowhere says that .the Constituent Assembly shall be the sovereign of the new Dominion. It gives to it only the power of the Legislature of the Dominion and' nothing more. The expression sovereignty of Constituent Assembly was repeated before us ad nauseam but as has been observed

elsewhere when we pointedly asked Mr. Chundrigar whether apart from legislative functions it had any other powers, under the Indian Independence Act, the hesitating reply was, and rightly, in the negative. Now if it be held as a matter of construction that the Governor- General _ is assigned a necessary part in the legislation of the Dominion, the legal sovereignty of the Constituent Assembly is reduced to a myth, because on that construction the Assembly cannot effectively function alone. But that does not mean that its legislative sovereignty cannot be converted into an actuality in exactly the same way as in the other constitutions, namely, by having a Governor- General who is acceptable to the Assembly, who will not resist legislation by the Assembly, and who can be recalled if he goes against the advice of the Ministry. The rule has worked well for a long time in all self- governing Dominions. 1f, therefore, a similar provision has not in any way affected the independence of the other Dominions where well- established conventions have been responsible for a smooth working of the constitution, there is no reason why. the Pakistan Constitution could not have been and should not have been worked in that manner. To illustrate the point, suppose that the Constituent Assembly. 'decides . to secede from the Commonwealth and to declare Pakistan as an independent republic. On my interpretation of subsection (3), the Governor- General's assent to such legislation would be necessary. But there cannot be the slightest difficulty in obtaining his assent. If the GovernorGeneral refuses assent a request for his recall addressed by the Prime Minister to the Secretary of Her Majesty would be sufficient for the purpose because the matter would not go to Her Majesty's Government in the United Kingdom, that Government having relinquished all responsibility for the government of this country, and Her Majesty xhe Queen in such matters normally acts on the advice of the Ministry of the. Dorhinion provided that the ministry represents the people of the .Dominion as ministries in other Dominions do. She herself takes no more part in the politics of a Dominion as she does in the United Kingdom and it is wholly erroneous to suppose that contrary to her attitude in home politics she would assume the . role of a partisan in the internal politics of any of her Dominion. On having the Governor- General recalled, the Constituent Assembly can recommend for appointment another person who would be willing to give his assent to the bill of secession.

I have already pointed out that the necessity of the assent of the King to legislation by the House of Commons and the House of Lords was at one time one of the most important reserve powers and was actually used in Britain by the Crown in and before the reign of Queen Anne to veto objectionable legislation and in the Dominions by the Governor- General to defeat legislation which appeared to him adversely to affect the Imperial interests .or to be otherwise unpopular. Now the generally accepted position in this respect, however, is that this power can be exercised. in the United Kingdom only on the advice of Ministry and in the Dominions oar the advice of the Ministry of the Dominion. The issue has not actually arisen in recent times because the throwing out of an important Government bill by the House of Commons in England or by the Legislature in a Dominion amounts to a vote of no , confidence in the Ministry and is thus a valid constitutional ground for the Ministry to resign or to ask for a dissolution and not for advising the King or the Governor General to withhold assent. But whatever may be the position, it cannot possibly be said in the case of Dominions including Pakistan' that the Governor- General is in a position to exercise this power in opposition to the wishes of a Ministry which represents the people of the Dominion, Though the Governor- General is supposed to be a representative of the king, in fact

he is a representative of the Dominion concerned, because his appointment and dismissal depend on the advice of the Ministry of the Dominion which on the convention of non-intervention is always accepted by the Crown. If, . therefore, the Governor-General withholds his assent to any legislative measure to which he is required to give his assent by the Ministry of the Dominion, the Ministry is generally in a position to have .him immediately recalled oar removed. He cannot, therefore, exercise the power of with' holding assent contrary, to the wishes of the Ministry or in order to veto legislation against the advice of the Ministry. It follows from this that the provisions empowering him to give his assent are in no sense a fetter on the sovereignty or the independence of the Dominion, and' in Pakistan they certainly do not amount to an encroachment on the legislative sovereignty of the Legislature of the Dominion. Even in the case of Federal legislation the Governor-General has the power to give or withhold assent, but he cannot, if the Constitution is functioning in normal times and in its true spirit, withhold assent contrary t0 the wishes of the Ministry And this is so, not because the words `in his discretion' which occurred is the Act of 1935 have been omitted from the adapted relevant provisions but because the withholding of assent to such legislation, when the Ministry requires him to give his assent, can raise - a constitutional issue which can only end in the recalling or removal of the Governor-General. Any attempt therefore to construe the Governor-General's power to withhold assent as a veto on legislation proceeds on a misapprehension and cannot be made a ground for the inference' that that power is an infringement of the legislative sovereignty of the Legislature of the Dominion and thus of the Constituent Assembly. ,

NODDING AUTOMATON OR AUTOCRAT?

From the fact that the Governor-General is the head of the State, it must not tie inferred that in matters of legislation his position is either that of a nodding automation or that of an autocrat. He is appointed by the King and represents the King for the purposes of the Government of the. Dominion, .but that does not mean that he is an unrestrained autocrat, and purporting to act on behalf of the King, can in normal times take an active part in the actual administration of the country: Since the Imperial Conference of 192.) he has generally been a man of the Dominion and a representative of that Dominion just as the Prime Minister is. As a constitutional functionary, it is his duty to give his assent to all reasonable and necessary legislation by the Legislature. But there may be occasions, however remote their conception may be, where the Governor-General would be entitled to withhold his assent from a particular legislation. In the United Kingdom, if the House of Commons passes a law - which strikes at the very .foundations of the constitution, as for instance, where Parliament indefinitely prolongs its life or trifles with the right of the electors to vote, the Sovereign may, and perhaps would, whether the Ministry advise it or. not, exercise his reserve powers of withholding assent or dissolution. The same is the position of the Governor-General in the Dominions Leslie Stephen, while illustrating the omnipotence of the Legislature, says at page 143 of the 1882 edition of his Science of Ethics: "If a Legislature decided that blue-eyed babies should be murdered, the preservation of blue-eyed., babies would be illegal; but legislators must go mad 'before they pass such a law and subjects be idiotic before they submit to it." If a similar law were passed by the Constituent Assembly, and this of course is an extreme case which is being mentioned merely to explain the point, I have no doubt that it would be the duty of the Governor-General to. withhold his assent from such

legislation not because he has any instructions in the matter from the King, but because he represents the Dominion and in such matters he is supposed to be able rightly to gauge the public feelings and sentiments. Similarly, if the Constituent Assembly decided to make a law - that all adults; shaven or unshaven as it chose to say, shall be deprived of the rights of citizenship in Pakistan, the Governor- General will undoubtedly withhold assent from such legislation. Or take the instances mentioned by Mr. Faiyaz Ali before the learned Judges of the Chief Court to illustrate his theory of checks and balances. "I have given your Lordships," said Mr. Faiyaz Ali,- "one, example of a possible misuse of these powers, namely, that the Constituent Assembly could, if absolutely uncontrolled, legislate that everyone of its members was to get a - salary of one lac of rupees per month, enjoyable for life and heritable from generation to generation. What was there to prevent it 'from doing so ? But let us take a more probable and less extravagant instance. Suppose the Constituent . Assembly. in the exercise of its absolute powers decided to impose a Soviet Constitution on Pakistan. Suppose they said.: ' It is our will that there shall henceforth be no God. in Pakistan and no Religion. Let Religion and God both be ejected from Pakistan and. a Constitution based on the purely economic doctrine of Karl Marx be framed ' and suppose they did all this against the will of the people and in open defiance of. their views and sentiments. What would have happened in such a case ? The - Assembly, if it had absolute and uncontrolled powers, could very w 11 impose such a Constitution on Pakistan. What could the people do ? What could be their remedy ?" And surprisingly enough the reply to it 'by one of the learned Judges was "If the majority of the members are for it that means the people are for it." Comment on this reply is unnecessary beyond saying that it overlooks the doctrine, which is a fundamental doctrine in democracy, that the mere fact that the majority of the members of a Legislature are in favour of a measure does not necessarily mean that the .people are for such measure. The second instance cited by Mr. Faiyaz Ali was precisely the instance where if the question arose in the United Kingdom the King' would exercise his reserve powers of dissolution or of withholding assent. In the circumstances supposed, the Governor- General here will act in precisely the same way,. namely, he will withhold his assent from such legislation, not because he represents the King but because he represents, the people of the Dominion and in such matters acts on their behalf in the belief that his action will have their approval. '

An instance may also be cited from the history of the Constituent Assembly itself. It is alleged before us in an affidavit put in by the attorney of the appellants that at the time the Constituent Assembly decided to repeal the Public and Representative Offices (Disqualification) Act, 1 949, proceedings under that Act were contemplated against ten members of the Constituent Assembly itself. The law repealing the Act which is said to have been passed in undue haste could have been attributed by the Governor- General to a desire on the part of the Constituent Assembly to screen its own members from prosecution, and few people could have objected if he had withheld his assent from the repealing bill. It will, therefore, be seen that in this respect tha Governor- General occupies a very important constitutional position. By withholding assent to an unpopular measure he cari create a constitutional crisis of the first magnitude, and though eventually he himself may have to go, he can in appropriate cases rivet the attention of the country to the caprice, cupidity or folly of the Legislature.

In the course of arguments before us, a question arose, similar to the one mooted before this, Court in Khan Iflikhar Husain Khan of Mandot v. The Crown (1950-51 F C R 24=P L D 1950 F C 15), namely, whether if the Constituent Assembly passed a law, which was within its competence as the Federal Legislature, it could be held to be ultra vires on the ground that it did not receive the assent of the Governor-General. The point was not decided in that case, but Mr. Chundrigar appeared to suggest before us that is such a case because the Constituent Assembly is a sovereign body, the Court could . not inquire into the ultra vires of, any law purporting to have been passed by it under subsection (1) of section 8 of the Act of 1947. If Mr. Chundrigar's claim is valid, does it not follow from it that the Constituent Assembly ,can dispense with the necessity of all assent even in regard to laws which fall within the Federal List merely by purporting to pass such laws in exercise of the powers conferred on it by subsection (1) of section 8? The question whether a law falls within the Federal List or relates to the constitution of the Dominion being one for the Constituent Assembly .to determine and not for the Courts to decide, the Assembly could at its will do away with the. necessity of assent to all Federal legislation merely by not placing a bill before the Governor General for his assent.

For the foregoing reasons I hold that so long as the provision in subsection (3) of section 6, giving full powers to the Governor-General to assent to any law of the Legislature of the Dominion stands, every bill passed by the Legislature of the Dominion which has the effect of amending the existing constitution as contained in the Government of India Act and the Indian Independence Act must be presented for the assent of the Governor-General, and this assent is as necessary to the validity of legislation as the law which requires a document to be under seal 'or registered. It is a formality which cannot be dispensed with except by a proper amendment of the Constitution. In view of this it is wholly unnecessary to go into the other issues, and nothing said in this judgment is to be taken as an expression of opinion on anyone of them.

INDEPENDENT DOMINION

I now proceed to notice some of the incidents of an independent dominion which were referred to in the arguments before us by the parties. These incidents are connected with allegiance, Royal Style and Titles, nationality, assent to legislation and Prerogatives.

INDEPENDENT

The words `independent dominion' first received statutory recognition in the Act of 1947. The speakers in the House of Commons who took part in the debates on the bill had different conceptions of an independent dominion. There were also proposals that these words be substituted by some more expressive words. Thus Mr. Godfrey Nicholson suggested the amendment "two independent States within the British Commonwealth of nations, hereinafter to be known for the purposes of' this Act as the new Dominions", because he thought the word "Dominion" was subject to several misconceptions. Mr. Wilson Harris supported Mr. Nicholson and said

"I think that we need the word `Dominion' here and that it was a stroke of genius on the part of Lord Mountbatten to apply the possibility of Dominion Status to the two halves of India. I cannot help thinking, however, that the term `Independent Dominion' involves a certain contradiction. Dominions as between themselves are interdependent and not independent. I would very much prefer the use of the words `autonomous Dominions'. In the famous language of 1926, the Dominions are not subordinate one to another in any internal or external affairs, but they are not entirely independent. They do not stand completely apart from one another, indeed they have the right to secede from the. Commonwealth in which case they would, achieve complete independence. It seems to me the word `independent' ought to be used for that status. It would be more desirable to speak of autonomy in this case and to use the words `autonomous Dominions' rather than `independent Dominions'.

Replying to this criticism,. the Prime Minister, Mr. Atlee, said :-

"With regard to the term `independent Dominions', I think you need the word Dominions here. We .do understand what Dominion Status means under the Statute of Westminster. .Whatever alteration there may be in the future in the Statute of Westminster, that statute today does define this position. It does mean complete autonomy. With regard to the word `independence', that again one may quarrel over, but one has to consider both history and psychology in this matter and it is a fact that it is not generally realised throughout the world, that although it is quite properly said that there is interdependence there is complete independence in the Dominions from any control, whether from Whitehall .or from Parliament. That is the important point that needs to be stressed. It is not perhaps quite the same as if this were being formed from some' country adjoining, which had never been in the position of being under this Parliament and under Whitehall. I think that is what the- Indians really want to have emphasised. I think they quite accept the position and they know the advantages of being in the Dominions. People, who have long been under the tutelage of Whitehall and under the control of this Parliament, feel that now, at last, they are independent of that control."

The essential characteristics of an independent Dominion were rightly brought out by Mr. Atlee when he said that the independence of a Dominion implied freedom from all control by the Government in London and the British. Parliament. If the Government of the United Kingdom has no right to interfere in the affairs of a Dominion and the Legislature of that Dominion can pass any law that it likes, including the law relating to its own future constitution, and the authority of the Parliament of the United Kingdom to legislate for it comes to an end, we have a true conception of the independence that was intended to be conferred on the Dominions of India and Pakistan. In this sense the Dominions. of Canada, Australia and New Zealand cannot be said to be independent because under the Statute of Westminster, their Legislatures are incompetent to amend their Constitution Acts. India and Pakistan, however, could frame their own constitutions as independent countries and - entirely secede from the Commonwealth.

DOMINION

ALLEGIANCE TO THE CROWN

But though independent in the .sense just explained, Pakistan, is a Dominion and therefore certain incidents attach to it by reason of that status. The first feature that is common to the Dominions which are members of the British Commonwealth 'of Nations is common allegiance to the Crown. This common feature, as pointed out by Wade and Phillips at page 443 of 4th Edition of their Constitutional Law is the one legal link which joins members of the Commonwealth (except India) and Empire, though it is no longer regarded as indispensible for membership of the former. In the Commonwealth Declaration of April 1949 made by the Prime Ministers of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon and the Canadian Secretary of State for External Affairs, it was declared that their countries were united as members of the British Commonwealth of Nations and owed a common allegiance to the Crown which - was also a symbol of their free association. The Declaration was made on the occasion of receiving India as a member of the Commonwealth view of the new Republican Constitution she was about to adopt. In the resolutions of the Imperial Conference of 1926, common allegiance to the Crown was stated to be one of the. bonds that united the participating Dominions: This position received a recognition by the Statute of Westminster, 1930, the preamble of which states that the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and that they are all united by, a common allegiance to the Crown. Halsbury describes common allegiance to, the Crown as a common law doctrine (Laws of England, 3rd Edition, Volume V, paragraph 1024). It is for this reason that the Statute of Westminster requires that any alteration in the law touching the succession to the Throne or the Royal Style and Titles must have the assent of the Parliaments of the Dominions as well as the Parliament of the United Kingdom.

So important is the connection of a common Crown and common allegiance that in the case of Canada, Australia and New Zealand, it cannot be broken by local legislation, and General Smuts consistently maintained that even the King himself could not with due regard to his duty assent to a measure of a Dominion Parliament purporting to destroy the connection with the Crown. Writing .in 1932, Keith in his Constitutional Law of the British Dominions (page 61) thought that to effect a separation there would in law be necessary an Imperial as well as a Dominion measure .and that under the principle enunciated by the Statute of Westminster the concurrence of the other Dominions would also be requisite. This relation is very different from the mere personal union between the United Kingdom and Hanover where the connection could be, and was broken as a result of the different laws of descent of the Crowns of the two territories when Queen Victoria succeeded to the throne in 1837. He says at page 62 of the book :-

"Closely connected with the question of the common Crown is that ' of a common alligiance. The issue might rest, of course, on the old decision in Calvin's case, after the union of the Crowns of England and Scotland in the person of James I, that person born in Scotland after the union were natural born in English subjects, despite the absolutely distinct character of the two kingdoms. The same doctrine was applied during the period of the union of the Crown of England with the Electorate '.of Hanover, Even were each of the Dominions to be regarded as an absolutely distinct kingdom, the subjects of the King therein would on . that doctrine be subjects in the United Kingdom".

These observations were of course not applicable to the two Dominions created by the Indian Independence Act because each of them was declared to be fully competent to

secede. But so long ast either of them remains a Dominion; assent to its legislation is necessary both under the common law doctrine and the statutory provision in subsection (3) of section 6. So strict is this rule that even if a dominion intended to secede from the Commonwealth and repudiate allegiance to the Crown, it could do so only by an extra-legal act. But if it intended -to - proceed constitutionally such secession would itself require the assent of the Queen or her representative, or legislation by the Parliament of the United Kingdom. Such. assent was given when Burma became independent under the Burma .. Independence Act, 1947. And though in the case of India no such assent seems to have been requested or given, the . . connection between India and the United Kingdom had to be . recognised by a statute of the British Parliament, India (Consequential Provision) Act, 1949, to retain India as a member of the Commonwealth.

ROYAL STYLE AND TITLES

Though by subsection (2) of section 7 of the Act of 1947 the words `Indiae Imperator' and the words `Emperor of India' were omitted from the Royal Style and. Titles by a Royal Proclamation under the Great Seal of the Realm, the words "of Great Britian, Ireland and British Dominions beyond the Seas, Queen" continued to be used. In December, 1952, after consultation between the Governments of members of the Commonwealth it was agreed that ' in place of the existing Titles which had ceased to be, fully appropriate each member should adopt for its own purpose a form of Title suitable to its particular circumstances but including a substantial common element. A separate Title has accordingly been adopted for use in the United Kingdom (including the territories for whose foreign relations the United Kingdom Government is responsible). This Title, which was adopted in pursuance of section 1 of the Royal Titles Act, 1953 (1 and 2 Eliz. 2 c. 9), is "Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith". In Canada, Australia and New Zealand, the Title adopted, in each case by a local enactment, is . "Elizabeth the Second, by the Grace of God of the United Kingdom (Canada or Australia of New Zealand) and Held other Realms and Territories, Head of the Commonwealth". In South Africa the Title adopted by the Royal Style and Titles Act, 1953 (local) is "Elizabeth the .Second, Queen of South Africa and Her other Realms and Territories, Head of the Commonwealth". In Ceylon the Title is the same as for South Africa with substitution of `Ceylon' for `South Africa'. A few days before her Coronation, the Queen received the Prime Ministers of the United Kingdom, Canada, Australia, New Zealand and Ceylon who submitted for her signature the proclamations relating to the Royal Style and Titles for their countries. In Pakistan, the Title signed by the Governor-General, and published simultaneously in the Commonwealth capitals on the 29th May, 1953, was "Elizabeth the Second, Queen of the United Kingdom and of Her. other Realms and Territories, Head of the Commonwealth". It should be noted that under subsection (4) of section 6 of the Act of 1947 no Act. of the' United Kingdom passed on or after the appointed day - was, to extend or be deemed to extend to the Dominion of Pakistan as a part of the law of the Dominion unless it was extended thereto by a law of the Legislature of the Dominion. No such law adopting the Royal Title was passed by the Legislature of the Dominion and the Title was published by a proclamation signed by the Governor-General. The words `Her other Realms - and Territories' in the Title were evidently considered to embrace Pakistan because on the occasion of the 'Coronation of Her Majesty on the

2nd June, 1953, the oath that was administered to her by the Archbishop. of Canterbury was

"Will you solemnly promise and swear to govern the peoples of the United Kingdom of Great Britian and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon and of your possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs ?"

The commission that was issued by His Majesty's command appointing the Governor- General of Pakistan described His Majesty'as "George VI, by the Grace of God of Great Britian and the British Dominions beyond the Seas, King, Defender of the Faith", and the oath that the Governor- General takes is :-

"I do solemnly affirm true faith and allegiance to the Constitution of Pakistan as by Law established and I will be faithful to His Majesty (or Her Majesty), his heirs and successors in the Office of the Governor- General of Pakistan. "

The point sought to be made by Mr. Chundrigar is that in this oath the allegiance that is sworn is to the Constitution of Pakistan and not to the Crown ; but if allegiance to the Crown is a necessary incident of the Constitution of Pakistan, the allegiance to that Constitution obviously implies allegiance to the Crown. Further it - does not make the slightest difference whether the Queen is described as the Queen of Pakistan or the Head of the Commonwealth of which Pakistan is a member. ,

NATIONALITY

From the common law doctrine of common allegiance it must follow that those who owe allegiance to the same Crown or common subjects. In United Kingdom law, citizens of the United Kingdom and the Colonies and citizens of other Commonwealth countries, including Pakistan, are British subjects and Commonwealth citizens, and by section 2 of the Pakistan Citizenship Act, 1951, read with section 1 of the British Nationality Act, 1948, a Commonwealth citizen, as for instance a citizen of Pakistan, is a British subject. Thus the second incident of Pakistan being a Dominion is that her citizens are for international purposes British subjects. Under section 262, subsection (4) of the adapted Government of India Act, no person who is not a British subject is eligible to hold any office under the Crown in Pakistan, and under subsection (1) of section 298 of that Act no subject of His Majesty domiciled in Pakistan shall, on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in Pakistan. '

PREROGATIVE

The Governor- General of Pakistan is appointed by the King or Queen and. represents him or her for- the purposes of the Government of the Dominion (section 5 of the Indian Independence Act). The authority of the representative of the King extends to the exercise of the royal prerogative' in so far as it is applicable to the internal affairs of the Member, State or Province, even without express delegation, subject to any contrary statutory or constitutional provisions. In Canada and the Union of South Africa the full external prerogatives are exercisable by the Governor- General, who, is

invariably invested with the duties of Commander-in-Chief of the armed forces, is authorised to appoint Judges, Ministers and other Crown servants, to summon, prorogue and dissolve Parliament, assent to legislation, and grant pardons oil ministerial advice. Mr. Mahmud Ali's contention that in Pakistan the Governor-General does not exercise any of the prerogatives of the King is clearly wrong because here, even under the adapted Act of 1935, the Governor-General appoints -the Governors of . Provinces, the Commanders-in-Chief of the Pakistan Army, Royal Pakistan Navy and the Royal Pakistan Air Force, and Judges of the Federal Court and the High Courts. Ambassadors to foreign countries are accredited and ambassadors from foreign countries are received by, the Governor-General. The defence and civil services in Pakistan are services of the Crown and appointments to them are made by. the Governor-General while in the Provinces the appointments to the services of the - Province are made by the Governors. In defence services 'the Governor General has the power to grant commissions. Every person who is a member of the Civil Service of the Crown in Pakistan or holds any post under the. Crown holds office during His Majesty's pleasure. And assent to - all legislation under the adapted Act of 1935 is given in His Majesty's name, in the case of bills of the Federal. Legislature by the Governor General, and in the case of Provincial bills by the Governor: Criminal prosecutions are initiated and conducted in the name of the Crown. In the face of these constitutional provisions I do ,not see how Mr. Mahmud Ali finds it possible to assert that in Pakistan the Royal Prerogative is not exercised by the Governor-General.

I am conscious that in thus interpreting the Constitution of Pakistan and emphasising the, incidents that attach to it as a Dominion I am going against a layman's idea of an "independent dominion", the implications of which were not fully understood even by the wise and experienced members of the Constituent Assembly, though some of them were prominent members of the legal profession. But- I am quite clear in my conscience what the duty of a Judge in such cases is. That duty is rightly to. expound the law in complete indifference to any popular reaction. The status .of which I have described the main incidents was accepted by our leaders under a gentlemen's agreement which received statutory recognition in the Act of 1947. If they had been so minded, they need not have accepted that status and like Burma could have complete independence. And if the legal incidents of association with the Commonwealth under a common head hurt their pride or were offensive to thier susceptibilities, and the Constituent Assembly, shared that feeling, it could have done away with all these so-called indicia of inferiority within a day. It is not that the Constituent Assembly was unaware of these incidents. I had drawn their attention to them by my judgment in the Full Bench case of Sarfraz Khan v. The Crown (1950 P .L R (Lah.) 658=P L D 1950 Lah. 384) as far back as May 1950. But the only action taken by the Assembly on that judgment was to delete the words "in His Majesty's name" from subsection (3) of section 6 of the Act of 1947 and those provisions of the adapted Act of 1935 where these words occurred in respect of the Governor-General's assent to bills. This tinkering with the provisional constitution merely showed that the Constituent Assembly was unwilling to take big decisions, and they can hardly have any grievance if, on the present occasion, that position is restated to them. In this connection it will be interesting to mention here the history of an incident from a High Court file. In 1951 some one appears to have sent to the Prime Minister of Pakistan a High Court Notice which began with the words "George VI, by the Grace of God of Great Britain and Northern Ireland and of the British Dominions beyond the Seas,

King, Defender of the Faith". The Prime Minister. appears to have been surprised at the heading of this Notice and the Cabinet Secretariat, through the Secretary to the Governor, Punjab, drew the attention of the High Court to this Notice by a letter in which the view was expressed that while the inclusion of the name and Titles of the King in the Notice was constitutionally and legally correct, it did not appear to be legally necessary and was liable to misinterpretation. The letter also communicated the Prime Minister's desire to omit these words from the Court Notices if there was no objection. The matter was discussed in a meeting of the Judges of the Lahore High Court when I was the Chief Justice of that Court. In reply, the High Court pointed out that the Letters Patent Seal of the Court also contained the Royal Arms and suggested that the Seal of the Court be changed. That reply went from the High Court on the 19th March, 1952, but since. an amendment of the Letters Patent, however simple it might appear to be, involves some study and thought, the matter is still under consideration, and the High Court writs, though they no longer run in the name of "Elizabeth the Second, Queen of the United Kingdom and of her other Realms and Territories, Head of the Commonwealth", continue to issue under a seal containing the Royal Coat of Arms.

JUDGMENT OF THE SIND CHIEF COURT

All that remains to notice now is the judgment of the Sind Chief Court. That judgment which was delivered after 19 days of argument and 25 days of deliberation, is a disappointing document. In the lengthy arguments before us, extending over three weeks, hardly any reference was made to it by either party. On the vital point in the case, repeatedly urged by Mr. Faiyaz Ali before the learned Judges, namely that the power of making provision as to the constitution of the Dominion which the Constituent Assembly was to exercise in the first instance under subsection (1) of section 8 was included in the powers conferred by section 6 on the Legislature of the Dominion, there is not one word in the judgment. Nor is there in any of the opinions delivered even a remote reference to the basic question, which .I am not deciding because the respondent was not called upon to reply to it, but. which must undoubtedly have stated the learned Judges in the face, namely, whether it is a wise exercise of discretion for the judiciary to re- install in power a deposed government by issuing enforceable writs against a de facto government. .

On the question on which we are disposing of this appeal Constantine, C. J. merely followed the opinion of Hassanally Agha, J. in a previous case and thought that the provision requiring the Governor- General's assent to legislation by the Legislature of the Dominion was inconsistent with independence. He overlooked- the obvious fact that if the Governor General is a man from the Dominion and is appointed and dismissed on the advice of the Dominion Government, the legislative sovereignty of the)Legislature is not at all affected by the provision relating to assent. Nor, in the absence of a finding that some sort of estoppel operated or that there was an ambiguity in the Act, was he entitled to let his judgment be swayed by the consideration that the Law Officers of the Crown on previous occasions did not considers assent necessary, and that the objection was novel and, if accepted, would upset a consistent course of practice and understanding. I should incidentally mention here that it was stated before us by Mr. Faiyaz Ali, Advocate- General of Pakistan, - that on the point now raised the Law Ministry has consistently been taking the view that assent to constitutional legislation by the' Constituent Assembly is necessary, As

regards the point that assent is needed only with respect to legislation by the Federal. Legislature and that there is no corresponding provision in the Act of 1947 in respect of legislation by the Constituent Assembly as Legislature of the Dominion; it is sufficient to say that the argument begs the whole question because the essential question that has to be determined is whether subsection (3) of section 6 does or does not have the effect of requiring assent to all legislation by the Constituent Assembly when it functions as the Legislature of the Dominion under subsection (I) of section 8 to exercise the powers given to it by section 6. The ground on which Mr. Justice Vellani's judgment proceeds is somewhat more remarkable inasmuch as that learned Judge merely contents himself by asserting that the Constituent Assembly was- a' supreme body, subject to no agency or instrument to give its laws validity, and that the provision requiring the Governor General's assent to its legislation would make the Governor- General truly a Viceroy. He should have seen that other Dominions are independent, though similar provisions relating to assent exist in their constitutions, that the Governor General, though a representative of the King, is a leading public man from the Dominion and certainly not the agent of the Government of the United Kingdom, and that the provision as to assent is not in the nature of a veto, because if the Constitution is properly worked as the Constitutions of the other Dominions are, the Governor- General is not in a position to veto any legislation by the Legislature of the Dominion unless he withholds his assent from some outrageous legislation, in which case, whatever may be the legal position, the final law would be the will of the people and not the will of the 'Constituent Assembly. The finding of Mr. Justice Muhammad Bakhsh Memori that the word `law' occurring in subsection (3) of section 6 of the Act of 1917 refers to laws made by the Federal. Legislature amounts to a plain misreading of that: provision and his view that the action of the Privy Council in transferring certain appeals to the Federal Court under the Privy Council (Abolition of Jurisdiction Act, 1950, and their receipt by the Federal Court amounts to "law declared" within the meaning of section 212 of the Act of 1935, amounts to misunderstanding of how law is declared. He was not concerned with the consequences, if on a true construction of the Act, he had come to the conclusion that assent was necessary. The validity or otherwise of other Acts was not before him, the only question that he was called upon to decide being whether the impugned amendment to the Government of India Act was valid. He also begs the question when he finds that Rule 62 of the Constituent Assembly Rules is law, and whether that Rule did or did not receive the assent of the Governor- General, it can override the express provisions of subsection (3) of section 6.

CONCLUSION

For the reasons given, I hold that the Constituent Assembly when it functions under subsection (1) of section 8 of the Indian Independence Act, 1947, acts as the Legislature of the Dominion within the meaning of section 6 of that Act, that under subsection (3) of the latter section 'the assent of the Governor- General is necessary to all legislations by the Legislature of the Dominion, that since section 223- A of the Government of India Act under which the Chief Court of Sind assumed jurisdiction to issue the writs did not receive such assent, it is not yet law, and that therefore, that Court had no jurisdiction to issue the Writs. In view of this conclusion we cannot go into the other issues in the case whatever their general importance may be.

I would, therefore, accept the appeal, set aside the Judgment of the Chief Court of Sind, and recall both the writs. Parties will bear their own costs throughout.

Before concluding I should like to express our appreciation of the assistance rendered by counsel in the decision of this case, of Mr. Faiyaz Ali's vigorous all round argument, Mr. Diplock's masterly analysis of the Acts of 1935 and 1947 and Mr. Chundrigar's brave fight in defence of the sovereignty of the Coustituent Assembly.

AKRAM J.- I agree in the order allowing the, appeal. I, however, desire to say a few words of my own in support of the order. The facts of; the case are set out in detail in the judgment of my Lord the Chief Justice and need not be repeated. As regards the preliminary question : "Whether the assent of the Governor- General is necessary before any constitutional legislation by the . Constituent Assembly under section 8 (1) of the Independce Act, 1947, can pass into law?", the answer to it seems to me to' depend upon a true construction of the relevant provisions of the Independence Act itself. Section 6 (3) and the Ist part of section 8 (1) of the Act are as follows :-

"6 (3)- The Governor- General of each of the new Dominions shall have full power to assent to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall no apply to laws of - - the Legislature of either of the new Dominions. -
8 (1) (1st part)- In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references u this Act to the Legislature of the Dominion shall be construed accordingly."

Reading section 6 (3) and the 1st part of section 8 (1; together the conclusion which I am able to draw, is that the Governor- General has full power to give assent to any kind of law proposed by the Legislature of the Dominion and that the Constituent Assembly which in the first instance is to make provision for the constitution of the Dominion is to exercise the power of the Legislature of the Dominion for that purpose. As a result, the assent of the Governor- General become necessary for the validity of even constitutional laws. In my opinion the words "full power to assent" in the context carry with them full liberty to refuse assent as power conferred does not mean liability imposed or obligation created. I am unable to construe section 6 (3) in the manner suggested by counsel for the respondent and to hold that the assent of the Governor General is not necessary so far as constitutional laws are concerned. I have carefully considered the arguments which he has advanced- in its support,. namely :-

(a) That in case the assent of the Governor- General is regarded as essential to the validity of constitutional laws, then the result will be that the form of the Constitution will depend on the views of the Governor- General rather than those of the Constituent Assembly in contravention of section 8 (1) of the Independence Act-

(b) That under section 5 of the same Act, the Governor General is to represent His Majesty for the purposes of the government of the Dominion, but this cannot confer on the Governor- General authority to nullify constitutional legislation by withholding assent.

(c) That all along, the Government itself, the - people and the Courts, proceeded on the same view as is now pressed for by the respondent, namely, that the assent of the Governor- General is not necessary for constitutional legislation under section 8 (1) of the Independence Act.

(d) That in section 6 (3) reference to ' the Dominion Legislature is only notional as no Dominion Legislature exists or existed before ; that in reality the reference is to the Federal Legislature functioning under section 8 .(2) - of the Independence Act ; that "law" in the subsection (3) is used in a broad and comprehensive sense in order to cover not only proposed legislative bills but also enactments which require confirmation by His Majesty under section 736 of the Merchant Shipping Act and section 4 of the Colonial Courts of Admiralty Act ; that the expression "full power to assent" has been used because the power of disallowance, reservation or suspension which existed under section 32 of the old Government of India Act, 1935, is done away with ; that the two parts of subsection (3) are to be read in close conjunction with each other in order to bring out the real meaning of the subsection; that "full power to assent" cannot be interpreted as full option to refuse assent.

(e) That section 8 (1) is not to be read with section 6 (3); there is no connection between the two.

(f) That there is no provision anywhere for the presentation of a constitutional legislation by the Constituent Assembly to the Governor- General for his assent.

But these arguments, though ingenious and interesting, do not seem to me to be so cogent and convincing as to prevail over the clear meaning of section 6 (3) read with section 8 (1) of the Independence Act. In the interpretation of laws and statutes plain words should, as a rule, be given their plain meaning and a laboured construction should not be put upon them to bring into prominence some kind of a remote signification. I see no justification for any embroidery upon the plain and simple language of the subsections. Certain decisions in support of the respondent's contention were also cited but they do not appear to me to be precisely in point- and need not be referred to. But apart from the reasons given by me, while interpreting sections .6 (3) and 8 (1) of the Independence Act, if we look to the statement of His Majesty's Government, dated the 3rd June 1947; para. 20 and take into 'consideration the conditions and the circumstances existing at the time of the passing of the Independence Act, the plan and the purpose which the Legislature had' in view will not, perhaps, be far to seek. Paragraph 20 of the statement aforesaid runs as follows:

"Accordingly, as the most expeditious, and indeed the only practicable way of meeting this desire,-'His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year . on a Dominion Status basis to one or two successor authorities according to the decisions taken as a result of this announcement. This will be without prejudice to the right of the Indian Constituent Assemblies to decide in 'due course whether or not the part of India, in respect of which they have authority, will remain within the British Commonwealth."

"Dominion Status", it appears, had already acquired a technical meaning ; it implied, according to the declaration of the Imperial Conference held in London in 1926, "autonomous communities within the British Empire, equal in status; in no way

subordinate one to another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations". Indeed, the Dominions were virtually distinct kingdoms united by a common King and a common allegiance and their inter- Imperial relations were in no sense regarded as international.

Thus the effect of conferring 'a Dominion Status was that certain rights and liabilities as between the. Dominion and the United Kingdom came into existence, for instance, if the Dominion by its legislation negated allegiance to the Crown or severed connection with it, such a legislation perhaps could not be considered as legally valid or justified. The expression, "Independent Dominion" has, therefore, been' purposely used in the Independence Act in order, to give to the Dominion freedom of choice either to remind or to refuse to remain) within the British Commonwealth of Nations as envisaged in para. 20 of the statement of His Majesty's Government quoted above. It is clear that by the Independence Act the intention was to give a constitutional form of Government modelled on the pattern of the British Government pending the setting up of a final constitution by the Dominion itself. According to English Constitutional theories, the Sovereign, who is the Executive Head of the State; is always a constituent part of the supreme legislative power and as such has the legal right not only of giving assent but also of refusing assent in case he considers a' provision to be inexpedient or injurious. The power to give or to refuse assent is one of a great variety of royal prerogatives and cannot be abrogated or curtailed without clear statutory provision to that effect made with the royal concurrence. See (a) Blackstone on the Laws of England, Volume I, Fourth Edition, Chapter VII, page 221 :-

He, (the Sovereign) may reject what bills may make what treaties, may create what peers, may pardon what offences he pleases : unless where the constitution has expressly, or by evident consequence, laid down some exception or boundary: declaring; that thus far the prerogative shall go, and no further."

(b) Keith's' Constitutional Law, Seventh Edition (1946 Reprint), page 201 :-
"The prerogative of the King is the privilege of his subjects; that is the King must exercise his - prerogative not for his own benefit but for the protection of his subject in accordance with the advice of his constitutional legal advisers. The King in Council is the Executive; the King in Parliament is the Legislature ; the King in his Courts administers justice; and thus the Crown binds together every department of the State."

(c) Constitutional law by Wade and Phillips, Third Edition, page 95- .-

"Parliament cannot legislate without the concurrence of all its parts, and therefore the assent of the King is required. The King not only summons Parliament and can dissolve Parliament, but must give his consent before any legislation can take effect."
(d) Stephen's Commentaries on the Laws of England, Eighteenth Edition (By Edward Jenks), Volume I, page 176;-

"In legal theory, the King is .capable of refusing- to give his ,assent to a Bill; and, if he did so refuse, 'the Bill, although it had passed both Commons and Lords, could not become law. But . for over two centuries, no monarch has placed himself in opposition to the wishes of the people as expressed through their representatives. The Spirit of the Constitution is, that the Government is carried do by the Houses of

Parliament (since 1911 one may say by one House only), and that the King's functions in legislation are purely formal. The last occasion when the royal assent was refused was when Queen Anne rejected the Scotch Militia Bill in, 1707; and it is unlikely that the words `le roys' avisera' will ever be spoken in the House of Lords again."

Such being the English constitutional theories, it would be a strange supposition to make that the British Parliament, while framing an interim Constitutional Act for Pakistan, acted in a manner contrary to its own principles and traditions and deprived the Executive Head of the Dominion of power to give or to withhold assent as respects constitutional laws. For the reasons stated, I am of the view that in the absence of any express or implied provision in any enactment to the contrary, the assent of the Governor-General is , necessary before any constitutional measure framed under section 8 (1) of the Independence Act, 1947, can pass into law.

CORNELIUS, J.- It is proper that, realising the grave issues which are involved in this case, I could commence with an expression of - my sincere regret at being unable to agree with the view on one part of the case, which has commended itself to my Lord the Cheif Justice and my learned brothers, in consequence of which the appeal has been allowed. It will be the principle concern in this judgment .to indicate with such clarity and brevity as may be possible to me, the reasons which have compelled me to come to a different conclusion. The resolution of a question affecting the interpretation of important provisions of the interim constitution of Pakistan in relation to the very high matters which are involved, entails a responsibility going directly to the oath of office which the constitution requires of a Judge, namely, to bear true faith and allegiance to the Constitution of Pakistan as by law established and faithfully to perform the duties of the office to the best of the incumbent's ability, knowledge and judgment. The reasons I am about to set out have the effect of determining my humble judgment in one way and one way only, namely, that in the given circumstances, there is nothing in the law which makes the grant of assent bar the Governor-General to Acts of the Constituent Assembly, which make provision as to the Constitution of the country, a sine qua non, so that the absence of assent has the effect of invalidating all laws which have been passed in that mode, i.e., without the Governor-General's assent. Since the questions to be dealt with relate in essence to the period immediately prior to the 24th October 1954 when the Proclamation was made by His Excellency the Governor-General, as a consequence of which the Constituent Assembly was deemed to have been dissolved, the argument will of necessity proceed upon. the assumption that the Constituent Assembly is still in being. The assumption cannot of course affect the factual position.

A brief recital of the facts is necessary, and may appropriately commence with the enactment by the Constituent Assembly of two Acts in the year 1954, amending the Government of India Act, 1935. The first of these Acts is described as the, . Government of India (Amendment) Act, 1954, and purported to insert a new section ' 223-A in the Government of India Act, which reads as follows :-

"223-A. Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them.

The second Act was described as the Government of India (Fifth Amendment) Act, 1954, which inter alia inseited a new section 10 to replace the existing sections 10, 10-A and 10-B. The relevant provision in the new section 10, for the purpose of the present case, is contained in subsection (1) which reads as follows :-

"10. (1)- The Governor-General shall appoint a Member of the Federal Legislature who commands the confidence of the majority of the Members of the Federal Legislature as Prime Minister. The other Ministers shall be appointed by the Governor-General, from amongst the Members of the Federal Legislature in accordance with the advice of the Prime Minister."

The previous provision on this subject was that "the Governor-General's Ministers were chosen and summoned by him, and that a Minister who for any period of ten consecutive months was not a member of the Federal Legislature, should at the expiration of that, period, cease to be a Minister.
Both these Acts were passed by the Constituent Assembly and were signed by the President, by way of authentication and in the belief, based upon rule 62 of the Rules of Procedure of the Constituent Assembly of Pakistan which I reproduce below' that by such authentication and subsequent publication these Acts became law without the necessity of the Governor General's assent. Rule 62 reads as below

"When a Bill is passed by the Assembly, a copy thereof shall be- signed by the President and it shall become law on being published in the official Gazette of Pakistan under authority of the President."
Shortly after the making of the Proclamation, Maulvi Tamiz-ud-Din Khan; who was President of the Constituent Assembly, filed a' writ petition in' the Chief Court of Sind, citing as respondent the Federation .of Pakistan and nine Ministers who had been sworn in as Ministers of the Federal Government. The reliefs claimed were inter alia, .a writ of mandamus against all the respondents, their agents, etc., to prevent them from giving effect to the Proclamation and from interfering with the exercise by Maulvi Tamiz-ud-Din Khan of his functions and duties as President of the Constituent Assembly, and a separate writ of quo warranto against each of the respondents who were Ministers in the newly-constituted Government to determine the validity of their appointments. The respondents contested the petition raising preliminary objections as well as objections on the merits. The first preliminary objection was that section 223-A (which has been reproduced above) had not yet become law in Pakistan by reason of absence of the Governor-General's assent which was sine qua non for the purpose. The other preliminary objections were to the effect that, even if section 223-A was held to be valid, in the existing 'circumstances, no writ as claimed could issue. The objections on the merits related to the dissolution of the Constituent Assembly and set out that in view of the fact that Pakistan is expressly constituted as " one of the dominions of the Crown of the United Kingdom, a power to dissolve the Legislature was furnished by the common law and also lay in the prerogative which the GovernorGeneral could exercise". After lengthy arguments, a Bench of four Judges of the Sind Chief Court held unanimously that the conditions requisite for the issue of the writs claimed were shown to exist, and accordingly they directed that the writs should issue. Three of the learned judges wrote separate judgments, the fourth learned judge expressing agreement with the judgment written by the learned Chief Judge. It is not necessary to state in detail all the findings

recorded by the learned .Judges or the reasons which they have furnished in support of each finding, for the reason that in this Court the decision has been confined to the single question of necessity for the Governor-General's assent iii relation to laws made by the Constituent Assembly containing provisions as to the Constitution of Pakistan. On the latter point, the reasons which guided the learned judges of the Court below may be shortly stated as under :-

(1) The key to the Indian Independence Act, 1947, is the independence of Pakistan, and the purpose of section 6 of that Act is to efface the supremacy of the British Parliament.

(2) Subsection (3) of section 6, which provides that "the Governor-General shall have full power to assent to any law of the Legislature of the Dominion" does not impose the requirement of assent for all laws made by the "Legislature of the Dominion", but merely provides that if assent were necessary, the Governor-General should have full power in that respect. Express provision was retained in the Government of India Act, 1935, for the necessity of assent to Acts of the Federal Legislature only, and therefore section-6 (3) applies only to such Acts.

(3) The Crown is not named in the relevant Constitutional Instruments. viz., the Indian Independence Act and the Government of India Act, 1935, as sharing in the power of legislation and the clear implication was that the Crown was excluded from such power.

(4) On the Constitution-making side the Constituent Assembly had sovereign power, equal to that of the King, and therefore, no assent of the King was necessary.

(5) That the Constituent Assembly could have repealed section 6 (3) and even the whole of the Independence Act; it was impossible to think that such a law would require the assent of the Governor-General.

(6) That all authorities in Pakistan, executive, legislative and judicial, had for many years past interpreted the Constitution in this way, i.e., that constitutional enactments by the Constituent Assembly became law without the assent of the Governor-General.

Accordingly, the learned judges held that section 223-A by which they were empowered to issue writs was good law, and proceeded thereafter to consider the question whether the Governor-General had the power to dissolve the Constituent Assembly, and whether in the given circumstances, the writs claimed could properly issue. They answered the first question in the negative and the second in the affirmative as against the Federation and five of the Ministers. The reasons for these findings have been given at great length, but do not require mention for the purpose of this judgment.

The respondents appealed in this Court against this decision under section 205 of the Government of India Act, on a certificate issued by the Court below as required by that section. In support of the appeal, the Court heard addresses from the Advocate-General of Pakistan who was followed by Mr. Kenneth Diplock Q. C. of the English Bar. On the question of assent, the argument of the learned Advocate General was confined to showing that such a requirement could be construed out of

the provisions of section 6, subsection (3) of the Indian Independence Act, and that rule 62 made by the Constituent Assembly had no validity in law, though not having been made in the proper form viz., by presentation as a Bill and consequential proceedings, and also though its lacking the assent of the Governor- General.

The learned Advocate- General urged that in order to produce the result which rule 62 was designed to achieve, the Constituent Assembly should have amended section 6 (3) of the Indian Independence Act, which they had full power to do, subject to the assent of the Governor- General. The argument presented by Mr. Kenneth Diplock was lengthy and elaborate. The resume which I proceed to attempt may, therefore, be incomplete in some respects. He started with the proposition that although when the King has once transferred legislative powers to representative institutions in one of his realms or territories, he cannot thereafter take back that power, yet, in every such realm ®r territory, at every stage of its development, the King remains an integral part of the law- making machinery. In this connection, he referred to the decision of the Privy Council in the case of The Liquidator of the Maritime Bank of Canada v. The Receiver- General - of new Brunswick (1892 A C 437). The question there raised was that the British Sovereign had no direct connection with a Province of the Dominion of Canada after the passing of the British North America Act, 1867. The Privy Council overruled the contention, having found that the Lieutenant- Governor of a Province was appointed by the Executive Government of the Dominion which was expressly vested in the Queen, that all public properties and revenues in the Province were also vested in the Queen, and that the Queen was part of the Legislature. The relevant observations, which relate to the last- mentioned finding, may be reproduced verbatim :-

"It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share."

Next, Mr. Diplock urged that the key to the Indian Independence Act was not the independence of Pakistan, as had been concluded by the learned Chief Judge of the Sind Chief Court, but the formation of an independent Dominion of Pakistan, and he argued that in all essential respects, Pakistan was on the same footing as any of the other Dominions. Dominion Status was virtually undistinguishable from independence, for it was recognized that the Dominions were Sovereign States in the eye of international law, since they enjoyed independent treaty- making powers. the right of separate representation in the United Nations, and the right to appoint their own ambassadors in foreign. countries. Such was the degree of independence they enjoyed, that even a declaration of war against a foreign country by His Majesty's Government in the United Kingdom did not operate in relation to any Dominion of its own force. The Dominions were free to accept the British Sovereign in relation to themselves, with such royal titles as they might themselves determine. Yet, as is stated in the Preamble to the Statute of Westminster, 1931, "the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and . . . . . they are united by a common allegiance to the Crown." Both as a symbol of such free association and as recognition of the allegiance owed to the British Sovereign, it was the invariable practice in all Dominion countries to seek the assent of the Sovereign from his representative in the Dominion, namely, the Governor

General, in relation to Dominion laws. This was an inherent feature of Dominion Status, and could not be avoided unless by express words or necessary intendment. The right of assent was a prerogative right of the Sovereign and although it could be taken away either by the British Parliament, where it retained the capacity to legislate or by the "Legislature of the Dominion" itself, following the rule applicable to prerogatives of the Crown, it could not be taken away except by express words or necessary intendment.

On this foundation it was argued that subsection (3) of section 6 of the Indian Independence Act, so far from excluding the royal prerogative, was founded upon the assumption that the prerogative of assent was to apply in relation to all laws of the "Legislature of the Dominion". although the. "Legislature of the Dominion. " was not constituted by any provision in the Indian Independence Act, and the intention was that its constitution and powers should be settled by the Constitution to be drawn up by the Constituent Assembly, yet the provisions of the Indian Independence Act when read together could lead to only one conclusion, namely, that, pending the promulgation of a new Constitution, the Constituent Assembly was, to all legal intents and purposes, the "Legislature of the Dominion". Therefore, until such time as the country ceased to be a Dominion, or a new Constitution came into force which avoided the requirement, assent on behalf of the British Sovereign was a necessary requisite to validity of all laws made by the Constituent Assembly including laws of a constitutional nature. The latter conclusion was unavoidable in view of the provision in subsection (6) of section 6, Indian Independence Act, that the "Legislature of the Dominion " should have power to make laws limiting its own powers for the future, and such laws were undeniably constitutional in their nature.

Mr. Diplock also argued at length that a power of dissolution of the Constituent Assembly could be found in favour of the Governor- General from the words of section 5 of the Indian Independence Act which provide that "the Governor- General shall represent His Majesty for the purposes of the government of the Dominion", coupled with the proposition, firstly, that a power of dissolution vests in the Crown in the United Kingdom by virtue of the prerogative, and secondly, that after the grant of legislative institutions to an overseas possession, the Crown acting through its Governor- General, stands in the same relation to the Legislature of that possession as it does to the British Parliament. The force of this argument was materially impeded by two powerful considerations,- viz., that in the case of every other Dominion and possession, the power of dissolution was vested in the Governor or. Governor- General by express provision in the Constitution, and secondly, by the circumstance that a power of dissolution of the Federal Legislature which was contained in section 32, Government of India Act, 1935, had been deliberately taken away in the course of adapting the Government of India Act to the conditions which were to obtain after the creation of the independent Dominions. By section 8 (2), proviso (e) of the Indian Independence Act, it was enacted that the powers of the Federal Legislature or the Indian Legislature, as set out in the Government of India Act, should be exercisable in the first instance by the Constituent Assembly, and it is all too plain that to allow the Governor- General to dissolve the Federal Legislature, would in effect be to allow him to dissolve the Constituent Assembly. The second part of Mr. Diplock's argument on this point was, to my mind, the more attractive, namely, that the Governor- General of Pakistan is the virtual head of the State and under the maxim salus populi est suprema lex, he has not only the power but also the duty to act,

in face of any great national disaster; threatening the country, in such a way- as to avert that disaster. His action, when purporting to be taken in exercise of this power anti duty, would be above the law, and, consequently, not justiciable. I found it impossible, however, to accede to Mr. Diplock's further claim that if, in such a threatening situation, the Governor- General should fail to act, the British Sovereign, by virtue of the relationship of allegiance, would have power to intervene and to take action for the safety and security of the country in accordance with the express wishes of the people of the country. Such a possibility has never so far as I am aware been present to the minds of any persons in Pakistan who have ever had occasion to examine the incidents of Dominion Status, and it is easy to imagine that any such action by the British Sovereign, as distinguished from the Government of the United Kingdom, would be beset by practical difficulties in relation to a country such as Pakistan, some of which would appear at first sight to be insuperable.

The main reply to these arguments on behalf of the petitioner was made by - Mr. Chundrigar. He stressed that the point for consideration was the validity of the practice of a Sovereign Constitution- making body. while engaged in making provision as to the Constitution. Both as to the practice as well as in relation to its validity, the right of decision vested in the Constitution- making body alone. In that view of the matter the expressed will of the Constituent Assembly as declared in rule 62 of the Rules of Procedure must be regarded as final. The rule in its original shape merely provided for authentication of the Bill by the President. It was made at a meeting of the Constituent .Assembly held on the 24th February 1948, which was presided over by the late Quaid- i- Azam, who combined in himself the offices of first Governor- General of Pakistan and first President of the Constituent Assembly of Pakistan. The rule was amended and brought to its present shape at a meeting of the Constituent Assembly held on the 22nd May 1948, under the Chairmanship of Mr. Tamiz- ud- Din Khan, then Deputy President of the Constituent Assembly of Pakistan, deputizing for the Quaid- i- Azam in his absence. It must be assumed that the rule was made in its final shape to the knowledge of the then Governor- General.

On the point of assent, as a requisite derivable 'from the considerations (a) that the country possessed Dominion Status and (b) that it owed allegiance to the King, Mr. Chundrigar argued that Pakistan and India were constituted not as mere Dominions, but as "Independent Dominions" and the difference was very strong and very material. Each of these new Dominions was provided, at its very birth, with an apparatus, namely, the Constituent Assembly composed of elected representatives of the people for equipping itself with a Constitution of its own choice, even one which could take it out of the oversight of the British Sovereign altogether. No other case of the same kind was known in the history of development of the British Commonwealth. It was, he urged, in consequence of this enormous difference that a great change was brought about in the oath which the Governors General of Pakistan are required to take upon assuming office. The previous oath was one to be faithful, and bear true allegiance to His Majesty the King etc.". but from the very inception of Pakistan the oath has been to bear true allegiance to the Constitution of Pakistan, and to be faithful to His Majesty the King, etc. Allegiance to a Constitution which, although effective to create a Dominion, could have been changed by the Constituent Assembly at any time, could not be construed as acceptance by the Governor- General of the King as liege lord, or to constitute the Governor- General as liege- man of the King. Between allegiance and faithfulness, as forms of human relationship, there was a vast difference. The position

is further emphasised by the fact that, upon the accession of the present British Sovereign, Her Majesty Queen Elizabeth II, the title relevant to Pakistan which was accepted by Pakistan was not that of Queen of Pakistan but only that of "Head of the Commonwealth". The materiality of the difference appears from the fact that the other Independent Dominion created in 1947, namely, India, became by virtue of a Constitution passed by the Constituent Assembly of that country, which was set up in precisely the same circumstances, a Republic. That Constitution did not receive the assent of the then Governor-General, and in India also the practice throughout was that constitutional Acts of tile Constituent Assembly were sufficiently passed into law by authentication of the President, and assent of the Governor General was never obtained. India also, after becoming a Republic, has accepted the British Sovereign only in the capacity of "Head of the Commonwealth". Therefore, in the existing conditions, no bond of allegiance could be deemed to exist between the Governor-General of Pakistan as head of this State on the one side and the British Sovereign on the other. (It was emphasised that even the acceptance of the title "Head of the Commonwealth" had been effected not by an expression of the will of the country's Legislature but only by a proclamation made by the Governor-General, whose status under section 5 of the Indian Independence Act is that of representative of the British Sovereign.)

Mr. Chundrigar then pointed out that the Constitutional Instruments relevant to Pakistan are devoid of any expression such as might have the effect of making tile British Sovereign a part of any Legislature in Pakistan. ' This has been achieved by gradual steps. The provision in the Act: that the Federal Legislature of India should consist of the British Sovereign represented by the Governor-General and two Chambers was radically altered in the cause of adaptation to the new conditions which were expected to develop from the date of establishment of the new Dominions. The new section merely set out in different words the provisions of section 5, subsection (2), proviso (e) of the Indian Independence Act, viz., that the powers of the Federal or Indian Legislature should be exercisable by the Constituent Assembly. The Constituent Assembly had thereafter been at pains, by amendment of the Indian Independence Act and the Government of India Act to remove references to the grant of assent to legislation by the Governor. General and by. Governors of Provinces in Ibis Majesty's name,, thereby emphasising the actual, independence of the Governor-General and the Governors in respect of the grant of the assent. Where the interim Constitution provided that the head of the Government should be a part of the legislative machinery, it said so explicitly, e.g., in section 60 of the Government of India Act which declares that "there shall for every Province be a Provincial Legislature, which shall consist of the Governor, and one Chamber". This was in 'accordance with the practice in every other Dominion, and, therefore, since the Government of India Act and the Indian Independence Act are wholly devoid of any words which could make the Governor-General a part of the Constituent Assembly, either in the capacity of Federal Legislature or in its higher Constitution-making capacity, the conclusion must be that the Governor-General as such was not a part of the law-making machinery of the Dominion.

Next, Mr. Chundrigar put forward the argument that assent is a form of control over legislation, and referred to the history of the grant of independence to the subcontinent of India for the purpose of showing that in relation to the preparation of new Constitutions for the two countries, it was impossible to suppose that any control was

intended to be imposed. The constitutional documents relevant to the grant of independence showed a clear intention on the part of His Majesty's Government in the United Kingdom to fulfill the wish of the Indian people to attain freedom, and to assist the Indian people to achieve freedom in a form which they should freely decide for themselves, by helping to establish the necessary machinery. Although the hope was expressed that the new countries would remain within the Commonwealth, and emphasis was laid upon the advantages of such a position, contrasted with the perils of isolation in the modern world, it was nevertheless repeatedly stated that the Constitution would be settled by Indians for Indians. It was said that His Majesty's Government had "no intention of attempting to frame any ultimate Constitution for India; this is a matter for the Indians themselves". The argument for the appellants had been that the power of assent included necessarily the power to withhold assent and the implication was that insistence upon assent by the appellants was tantamount to insistence upon the acceptance of a control. The conditions which His Majesty's Government in the United Kingdom created in India and in Pakistan before they themselves relinquished all responsibility for the Government of these territories, clearly militated against the presence of any such control.

With reference to section 6 (3), Indian Independence Act, the contention was that its terms did not render assent to constitutional laws necessary, but, on the other hand, if the express terms imposing the necessity of assent which are contained in the Constitution of every other Dominion existing in 1947, be compared with this provision, the necessary conclusion must be that no provision requiring assent to constitutional law made by the Constituent Assembly, had been made by the British Parliament. The necessity for assent to Federal legislation arose out of the statutory provision under section 32, Government of India Act, 1935. The Constituent Assembly which in the interim period exercised the powers of the Federal Legislature could have amended section 32 to remove the requirement of assent, which was in the nature of a control, but it chose of its own free will not to do so. The added powers of legislation which were to vest in the Dominions through the relinquishment of such power by the British Parliament were conveyed by the Indian Independence Act, and if it was the intention of Parliament, which was fully aware that such vested powers were being conveyed away, to impose upon the exercise of such powers, the control implicit in assent, they would certainly have done so in explicit terms. That had been done by the same Parliament in the case of every other Dominion, and its omission from the Indian Independence Act could only lead to the conclusion that Parliament intentionally avoided making such a provision, and that it did so in view of the plenary powers which were being allowed in favour of the Constituent Assemblies of the Dominions, to prepare a wholly new Constitution for each Dominion. If there was to be any such control imposed upon the Constituent Assembly's power, that control must be left to the Constituent Assembly itself to impose ; having declared the Constituent Assembly to be fully unfettered in this particular respect. the British Parliament could not thereafter have concerned itself with the imposition of control of any kind, whether exercisable from the United Kingdom or from within the new Dominion of Pakistan.

Consequently, section 6 (3), Indian Independence Act, was to be construed as a provision which broke down with one stroke all pre-existing restraints imposed from the United Kingdom, whether by virtue of His Majesty's prerogative, or by Act of the British Parliament, upon the Governor-General's power to grant assent to laws which

might for the future be made so as to have effect throughout the new Dominion, supposing that it remained a Dominion. It had been made clear that this would depend upon the free choice of the Constituent Assembly, and therefore to suppose that section 6 (3) had the effect of making assent sine qua non was impossible, since that would be to fetter the powers of the Constituent Assembly.

It was next urged that the Indian Independence Act did not purport to set up a Legislature for either of the two independent Dominions that were to be formed. Here also, the Indian Independence Act furnishes a sharp contrast with every other law of the British Parliament, creating Dominions. No body of persons was specified which would constitute the "Legislature of the Dominion". The expression was indeed used in a completely abstract sense, as is clear from the fact that the only aid furnished by the Act to the formation of any idea as to the nature and quality of the "Legislature of the Dominion" was by references to things which the "Legislatures of the Dominions" might do, which were mentioned in a number of sections in the Act, notably subsection (1) of section 8, which refers to "the powers of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion". On the other hand, the Constituent Assembly was 'referred to throughout as a specific body, and indeed on the appointed day, the Constituent Assembly of Pakistan was already in being. In section 8, Indian Independence Act, which has reference to the exercise of legislative powers of the Dominion, the Constituent Assembly is mentioned three times and each time as a distinct body, differentiated from the "Legislature of the Dominion". if the intention of the British Parliament had been that as from the appointed day, viz., 14th August 1947, the Constituent Assembly of Pakistan should be the "Legislature of the Dominion", nothing could have been easier than to have said so expressly, and- if that had been done, a considerable number of provisions, which were made necessary only because the conception of the "Legislature of the Dominion" was to be kept distinct from the actuality of - the Constituent Assembly, would have been rendered unnecessary, and the Act might have been greatly shortened and 'simplified. In fact, the Constituent Assembly could not conceivably be identified with the "Legislature of the Dominion" for the simple reason that the Constituent Assembly was to be the parent and creator of the "Legislature of the Dominion", whose shape and form the British Parliament could not presume to set, having once declared that this function was to be performed by the Constituent Assembly of Pakistan free of all control. It might have been that in the result the Constituent Assembly may have decided upon a Legislature to exercise the legislative powers of the Dominion, in which the Governor General might have been an integral part, and in that case, that provision, in section 6 (3), Indian Independence Act, would immediately come into play. But until that happened, the correct position was that the Constituent Assembly was not the "Legislature of the Dominion", whether it was exercising Constitution- making powers or the powers of the Federal Legislature.

Lastly, Mr. Chundrigar referred to the great number of constitutional laws which had been made. by the Constituent Assembly in the same mode as the laws which were now being impugned, and emphasised that the addition of section 223A to the Government'- of India Act had been made by the Constituent Assembly upon motion of the then Law Minister, Mr. A. K. Brohi. Being a provision relating to a highly important subject of great public interest, namely, the jurisdiction of the High Courts, it must be presumed to have been put forward after due consideration by the Federal

Government. It did not lie in the mouth of that Government now to repudiate this provision, which it itself moved to obtain, presumably with the intention that it should be effective. M. Chundrigar also referred to a number of judgments of superior Courts in Pakistan where either directly or by implication, effect had been given to the view that a law of the Constituent Assembly making provision or containing a provision as to the Constitution of Pakistan did not require the assent of the Governor General. These cases are firstly, M. A. Khuhro v. The Federa tion of Pakistan, (P L D 1950 Sind 49) the Mamdot case (P- L D 1950 F C 15=1950- 51 F C R 24) and ex- Major General Akbar Khan's case (PLD 1954 FC87). In the first case, a single Judge of the 'Sind Chief Court, in the year 1950 expressly accepted a contention advanced on behalf of the Federation of Pakistan, in respect of a law which the opponent was seeking to avoid, that that law, being a law making provision of a Constitutional nature, was validly passed without the assent of the Governor-General. In the other two cases, which were subsequently decided in 1950 and 1954 respectively, in both of which the Federation of Pakistan was represented, the validity of the law in question in each case was challenged on the ground that it . was not a law relating to the Constitution; and therefore, required assent. In each case, this argument was negatived, but the absence of assent was the central and crucial fact in each of these cases and it .was of the utmost significance that the eminent counsel who appeared did not challenge the validity of the legislation, even as constitutional legislation, on this ground. Nor did the learned Judges of the Federal Court themselves take notice of the matter, indicating clearly that the judicial view expressed in the Sind case was accepted as correct in this regard. .

The issue between the parties on the point of necessity of assent may be stated somewhat as follows. For the Federation of Pakistan and the Ministers whose legal status has been held by the Sind Chief Court to be unsound, the contention is that the necessity of assent by the Governor- General, as a condition of the validity of all laws passed by any Legislature which has the capacity to make laws for the whole Dominion, including laws making provision as to the Constitution, is derivable from (a) the fact that Pakistan is a Dominion included in the British Commonwealth of Nations and (b) the following words contained in section ; 6 (3) of the Indian Independence Act, viz., "The Governor- General of each of the new Dominions shall have full power to assent to any lave of the Legislature of that Dominion". On behalf of the petitioner, the contention is that no such condition or obligation can be construed out of Pakistan's membership of the British Commonwealth of nations, even as a Dominion, in view. of the present- day conception of that membership, of the deliberate avoidance by .Pakistan of acceptance of allegiance to the British Crown, and the equally deliberate acceptance of the British Sovereign, not as Queen of Pakistan,- , but only as Head of the Commonwealth. The Construction placed upon section 6 (3) of the Indian Independence Act is characterized as entirely incorrect, and it is contended that the words are only of enabling effect and cannot carry any connotation of a duty. I shall examine first the question whether the necessity of assent by the Governor- General can be founded upon any consideration arising out of Pakistan's membership of the British Commonwealth of Nations.

As far back as 1926,, following the Imperial Conference of that year (the British Empire being then a. living reality), it was declared that the United Kingdom and the Dominions were "autonomous communities within the British Empire, equal in status, in, no way one subordinate to another in any aspect of their domestic or external

affairs, though united by q common allegiance to the ' Crown, and freely associated as members of the British' Commonwealth - of Nations". It was still possible at that time to describe the British Parliament as "the Imperial Legislature", a term employed by the Privy Council in the Maritime Bank of Canada case which I have already cited. In 1931, "the Imperial Legislature" passed what may be described, I hope without disrespect, as a self- denying enactment, viz,, the Statute of Westminster, whose long title however was-

"Act of the Imperial Parliament to give Effect to, certain Resolutions passed by Imperial Conferences held in the years 1926 and 1930."

The lengthy preamble to this Act is in six separate paragraphs of which the second contains an attempt at a definition of the' position of members of the Commonwealth, couched in the following words:- . .

"It is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the = free association of the members of the British Common wealth of Nations; and as they are united by a common allegiance to the Crown."

It may be noted that the freedom was confined to the association of the countries among themselves; as against the Crown however there was not' freedom but allegiance. It is, I think, entirely justifiable to give to the word "allegiance", when used in respect of a high and mighty Prince, its full connotation, namely, that bond of servitued which a liege- man owes to his liege- lord. A liege- man is, in the feudal. concept, from which it is not safe to depart when assessing at its full weight the power and authority. of royalty, a sworn vassal, bound by an oath of fealty to his liege- lord, namely, a feudal superior or sovereign entitled to receive feudal service. It may be that by convention and also as a result of the devolution of power involved in the . grant of representative institutions, the strict obligations, which words such as "feudal sovereign", "feudal service" import become. inapplicable in course of time. In the case of the sub- continent of India, which was known as the Indian Empire in which the British Sovereign as will appear from section 2 of the Government of India - Act, 1935, enjoyed and possessed every kind of royal power and authority, being also sovereign - of all the territories thereof, it would be possible, in my view, to place a meaning upon the word "allegiance" not far removed from that which might be thought to convey the maximum obligations arising out of the relationship. At that time, however, i.e., in the year 1931, India was not a Dominion.

As a - result of the Statute of Westminster, the conception of an "Imperial Parliament" was swept away in relation to the Dominions of Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland. Yet, - allegiance to the British Crown was retained on the one side, and while it was declared that no future Act of the British Parliament would extend to any of these Dominions (subject to acceptance of this provision by Australia, New Zealand and Newfoundland) and that the Parliaments of these Dominions should be free to make any law they pleased, even a law repugnant, to arty United Kingdom law having effect in the Dominion so that the power to repeal any such law of England was included, yet the Parliaments of Canada, Australia and New Zealand were expressly debarred by sections 7 and 8 from amending or repealing their respective constitutional Acts, being Acts of the erstwhile "Imperial Parliament". In the case of Australia, a further limitation upon the fullness

of the legislative power of the Dominion was provided by section 9, namely, that the British Parliament retained power to make laws "with respect to any matter within the authority of the States of Australia, not being a matter within the.-. authority of the Parliament or Government of the Commonwealth of Australia", where the making of such a law without the concurrence of the Parliament of the Dominion was in accordance with the previous constitutional practice. These provisions are still substantially in operation as law, and, in my opinion, they detract very greatly from the nature of the- sovereignty which was received by these Dominions in consequence of the Statute of Westminster. It was argued for the appellants that by convention the stringency of these powerful controls was susceptible of relaxation, but at this point, it is useful, in my opinion, to repeat one of the basic propositions which Mr. Kenneth Diplock advanced as the foundation .. of his argument, viz., that in construing any constitutional enactment the Courts are concerned only with legal powers.. In my opinion, the existence of these restraints clearly, and forcefully, stands in the way of acceptance of Mr. Diplock's assertion that all the Dominions were independent Dominions in exactly the same) sense as India and Pakistan became independent Dominions in August 1947. It is true that Mr. Diplock. did not rely to the greatest extent for this assertion on the case, of India, Australia and New Zealand. His strongest card as the South Africa Act, 1909, which by section -t52, gave power to the Parliament of the Dominion to repeal or alter any of the provisions of that Act. Yet that Act imposed specific jurisdictions of a very real kind which exist to this day, as is evident from section 9 providing that the Governor-General shall be appointed by the King and section 64 which lays down that a Bill passed by the two Houses should be presented to the Governor-General for the King's assent, and the Governor General shall declare "according to his discretion, has subject to the provisions of this Act, and to such instruction as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent". The power of this strong legal provision was sought to be minimised in argument by reference to conventions, but again I repeat that the Court is not concerned with conventions but only with legal provisions.

The conclusions which I reach on the basis of this brief examination regarding the effect of the Statute of Westminster are as follows. In respect of the specified Dominions, for the future, the British Parliament altogether, lost the status of "Imperial Legislature". ' In the case of each Dominion, the duty of allegiance to the British Crown was asserted, and in the case of three of them, the power to alter their own Constitutions, which had been conferred upon them by Act of the "Imperial Legislature" was expressly withheld. The idea of independence is certainly not the first or the strongest, impression conveyed by these stipulations. In only one respect was a word of liberation employed, viz., these countries, enjoying a mitigated form of legislative power,. Approximating to but distinctly different from legal sovereignty, were described as being "freely associated" with each other; as well as with His Majesty's Government- in the United Kingdom.

After the year 1931, a number of rapid developments took place, particularly in relation to the Irish Free State, which are of great importance to a proper understanding of the position occupied by Pakistan and the obligations arising out of that position, when it was admitted to the community of the 'Dominions in 1947. The history of the developments affecting the Irish Free State may be conveniently extracted from a foot-note to paragraph 1022 on page 458 of Volume V. of

Halsbury's Laws of England. Third Edition, which reads as follows, the unnecessary matter being excised :-

"The Irish Free State was one of the Dominions specified in the Statute of Westminster, 1931. In 1933 she abolished the oath of allegiance ; in 1935 she purported to exclude her citizens from the definition of British subjects, in 1936 she abolished the office of Governor-General ; in 1937 she adopted what was in effect a republican Constitution, in which the only reference to the Crown related to the Executive Authority (External Relations) Act, 1936, which provided that so long as the -Free State was associated with the Commonwealth the King could act on her behalf and on the advice of her Government for the appointment of diplomatic and consular representatives. The adoption of the 1936 Constitution was not accepted by the United Kingdom as effecting a fundamental change in Eire's relations with the Commonwealth, and an argument that the adoption of the 1937 Constitution was an act of secession was rejected in Murray v. Parkes 1942 2 K B 123."

The final steps were however not taken until 1949, and these may be conveniently set out in the words of paragraph 1022 mentioned above :-

"In 1949 Eire, which, regarding herself as being externally associated within the Commonwealth, had for long occupied an equivocal and anomalous constitutional position, seceded from the Commonwealth by her own action. By an Act of the Oireachtas her remaining formal links with the Crown were severed and she was declared to - be the Republic of Ireland ; this measure was accompanied by an announcement by. the Government of Eire of intention to terminate the association with the Commonwealth. The United Kingdom Parliament by statute recognized and declared that Eire had ceased as from 18th April 1949 (the date fixed by Eire) to be part of His Majesty's dominions". From foot-note (o) at page 459, however, it appears quite clearly that even these acts are not construed in the United Kingdom as determining finally the traditional relationship between Eire and the United Kingdom.

Accordingly it would appear to .be perfectly clear that in August 1947, when India and Pakistan. entered the community of the Dominions, there was in existence one Dominion accepted As such by- His Majesty, and by His Majesty's Government in the United Kingdom as well as by the other 'Dominions, which did not owe allegiance to the British Crown, which by law had declared that her citizens were not British subjects, and had by law abolished the office of Governor-General hitherto within the power of the British sovereign to fill, replacing him by an elected President. These several acts, which might be thought to be unequivocal acts of dissociation and severance .from the purview of the British Sovereign, were not ' regarded by any of the other parties interested to maintain the position of Eire as a country within the community of: the British Commonwealth of Nations, to have the effect of excluding Eire from that community. The same view was -apparently taken by Eire herself, for she delayed her final act of severance from the Commonwealth for another twelve years. Nothing can indicate more clearly the interest which the United Kingdom displayed in retaining Ireland within the Commonwealth, despite its denial of every kind of obligation which might be thought to stem from a common allegiance to the Crown" than the fact that even after 1949, it continued to be assumed in the United Kingdom that citizens of Eire and Eire herself are not yet wholly free of the character which they had earlier possessed.

It is, therefore, not surprising to find the learned author of the monograph on "Commonwealth and Dependencies" in the latest edition of Halsbury's Laws declaring at page 431 of the volume already cited that :-

"Having regard to the variant conceptions of the Commonwealth association held by different members; no attempt has been made or is likely to be made to prescribe a uniform terminology to designate the association."

By the year 1947, the clear-cut conception of "a common allegiance to the Crown" as a necessary incident of membership of the Commonwealth had, as a result of the studied defection therefrom of a valued and apparently still-cherished member,, become obscured to vanishing point. Consequently, any new entrants into the Commonwealth might reasonably consider that they were under no obligation accept any ties or bounds in excess of the minimum which the- existing members being, of course, freely associated with each other, were content to regard as sufficient in relation to any one of their number. The point .is of crucial importance for determining the obligations of India and Pakistan when they entered the Commonwealth in 1947, that Ireland had completely renounced all allegiance to the British Crown at that time, and was being governed under .a republican constitution, F according to which the head of the State was an elected President, whose powers of ail kinds were derived from the Constitution of the country and not in any way from or through the British Sovereign. When it is borne in mind, as a matter of public general knowledge of which judicial notice may properly be taken, that the Indian Independence Act was passed by the British Parliament as a result of an insistent public demand throughout the sub-continent of India - for independence from what used to be described as the "British yoke" a fair idea may be formed of the sense in which entry into the Commonwealth was regarded by those to whom, on their departure. from the -sub-continent, the British transferred power of every kind. The temper of the people may be gauged with a high degree of accuracy from the last of the popular political slogans which preceded the transfer of power. It was contained in two words, namely, "Quit India". Further proof of that temper, if proof be needed, is provided by the rapidity with which the Indian people proceeded to frame a new Constitution for themselves and proclaimed a Republic under an elected President in January 1950. It, is true that this did not lead to dissociation of India from Commonwealth, any more than a similar declaration some thirteen years earlier by Eire had been thought either by Eire or by the United Kingdom or by any of the .other then existing Dominions to have caused such a . severance. But allegiance to the British Crown of necessity- `disappeared and India accepted the British Sovereign only as Head of the Common wealth.

Again, as a matter of public general knowledge, judicial notice may be taken of the fact that in material respects, the attitude in Pakistan was no different from that - displayed in the other "Independent Dominion" towards the British connection. By way of evidence, one may cite the several occasions upon which the Constituent Assembly has acted to remove from the Instruments which formed the interim Constitution 'of the country, namely, the Indian Independence Act, 1947, and the Government of India Act, 1935 (as adapted to come into effect on the 14th August 1947) various . residual references to the British Sovereign which were taken as imposing restraints upon legislative freedom. - Another indication of the same

intention is to be found in the official declaration by Pakistan that the country is to be under its new Constitution, an Islamic Republic. I am not aware that any later declaration has been made on this subject by any competent authority.

There are, however, two very precise acts of the Pakistan Governor-General which' cannot be interpreted otherwise than as acts of denial of allegiance to the - British Sovereign. The first such act was performed by the first Governor-General of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah. When the time came for him to take the oath upon assuming office as Governor-General of Pakistan, he .refused to accept the earlier form which required the Governor-General to bear "true faith and allegiance to His. Majesty"

and thereupon, by agreement with the British Sovereign, the oath which he took and which, his successors after him have taken requires that he should bear true allegiance ' to the Constitution and be faithful to His Majesty. Nothing can indicate more clearly that appointment at the hands of the British Sovereign to the office of the Governor-General of Pakistan is accepted by .the Governor-General of this country in a form vastly different from that which the Governors General of the other Dominions are required to accept.. In the case of these latter Governor-General, they swear "true faith and allegiance to the British Sovereign." That imports of necessity a disparity of position . and acceptance of servitude. The Governor-General of Pakistan,' when he swears to 'be faithful to the British Sovereign cannot be thought to accept any inferiority of position, much less of servitude in the feudal sense appropriate to the conception of royalty. At the highest it is an undertaking of loyalty on equal terms, and entirely appropriate to acceptance of the British Sovereign not as a Queen, .but as a symbolic Head of the, Commonwealth.

The second such act was performed by the present Governor-General, His Excellency _Mr. Ghulam Muhammad. By the preamble to the Statute of Westminster, it is set out that through the Crown being the symbol of free association within the Commonwealth, and as the members are united by the common allegiance to the Crown, constitutional practice require that the royal styles and titles should, after the Act, require the assent "as well of the Parliaments of the Dominions as of the Parliament of the United Kingdom." Such a question arose upon the accession of the present occupant of the British Throne, Her Majesty Queen Elizabeth 11. Although the Constituent Assembly met on numerous occasions after June 1953, when Her Majesty was crowned, it does not appear that the matter of acceptance or otherwise of the royal styles and titles appropriate to Her Majesty, in relation to Pakistan, was ever brought before the Constituent Assembly. On the other hand, and perhaps by way of substitution; a proclamation was made by the Governor-General accepting Her Majesty Queen Elizabeth II as "Head of the Commonwealth," which expression, so far as I can gather, includes every Dominion and may also include other realms and territories. It seems to me quite clear from this Tingle act that the position which has been accepted by Pakistan, as being- occupied by Her Majesty in relation to this country is in no way different from that which has been accepted by the neighbouring Republic of India. Despite the apparently, constant activity of well-informed persons, in unravelling the legal incidents of the various terms employed in British Constitutional Law with reference to the Commonwealth, no authority has yet chosen to derive from the description "Head of the Commonwealth" anything importing the exercise either directly or by . a delegate of royal prerogatives of powers. A passage

from a notable judgment by my Lord the Chief Justice, delivered as Chief Justice of the Lahore High Court in the case of Sarfraz Khan v. The Crown (P L R 1950 Lah. 658 : P L D 1950 Lah. 348) may assist materially in 'elucidating the position. That judgment was delivered at a time when the declaration of the Governor-General in relation to the status of Her Majesty Queen Elizabeth II qua Pakistan had not yet been made. The passage reads as follows :-

"The assent to the bills, however, is still given by the Governor-General and the Governors in the name of His Majesty but that is because the Crown is the symbol of the free association of the members ;of the British Commonwealth of Nations and not because His Majesty exercises any control over it in the form of revoking the assent or the authority of the Governor-General or disallowing the Act. The Governor-General is the head of the Government of the Dominion, and he is there by reason of the will of that Government and not by the will of the British Government or that of His Majesty, His Majesty in such matters having no will at all.

True he represents His Majesty for the purposes of the Government of the Dominion but that does not mean that he is an agent of His Majesty in the sense that His Majesty has delegated any authority to him- which His Majesty can revoke at will."

Having regard to the change brought about by the Governor-General's proclamation in respect of the present occupant of the British Throne qua Pakistan, the view expressed in this passage gains enormous emphasis from the circumstance that, as Head of the Commonwealth, Her' Majesty is indeed a `mere symbol, although as Queen of Pakistan a more substantial position might perhaps have been claimed.

The next question to which I propose to address myself is what was the nature of the freedom which the Indian Independence Act, 1947, was intended to convey ? I .use the expression "freedom" advisedly, for, it is sufficiently clear from the foregoing that in the description "free association of free peoples", so often applied to the Dominions, the words "free peoples" must necessarily be understood in a qualified sense. I conceive that they are meant in the sense of peoples enjoying- the advantage of representative institutions according to the British pattern, and that fullness of legislative competence does not necessarily follow from the application of these words. In order to confirm this view, I propose at this stage to. reproduce verbatim from the Constitutions of the three principal Dominions, namely, Canada, Australia and South Africa, provisions relating to the powers still reserved in His Majesty to control legislation in these Dominions.

In Canada, by section 17 of the British North America Act, 1867, it is provided that :-

“There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled ‘the Senate', and the House of Commons."

By section 9 of the same Act, it is provided that" The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

Provision under section 11 is made for the Governor General who is to be aided and advised by a Council composed of members to be chosen and summoned by him, this Council being described as "The Queen's Privy Council for Canada". Section 55 of

the Act relating to Royal assent is of the utmost significance. I reproduce it below along with sections 56 and 57, ~as these form a self- contained legal code, which visibly and expressly reserves power in the Queen to veto legislation by the Parliament of Canada :-

"55. Where a bill passed by the Houses of the Parliament is presented to the ' Governor- General for the Queen's assent he shall declare, according to his discretion, but subject' to the provisions of this Act and to Hey Majesty's instructions, either that' he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

56. Where the Governor- General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within 2 years after receipt thereof by the' Secretary of State thinks fit to disallow the Act, such disallowance- (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor General, by speech or message to each of the Houses of the Parliament or, by proclamation, shall annul the Act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within 2 fears from the day on which it was , presented to the. Governor- General for the Queen's assent, the Governor General signifies, by speech or message to each of the Houses of the Parliament or by proclamation, that it. has received the assent of the Queen in Council."

In a judgment of this character it may, I think, be presumed that whore a Governor- General reserves a bill for the signification of the Royal pleasure, he does so in accordance with general. instructions received in that behalf from the British Sovereign. In each of the three sections which are reproduced above the assent of the British Sovereign in person therefore appears with absolute clearness, as a final controlling force applicable to legislation of the Canadian Parliament.

The .corresponding provisions in the Australian Constitution are as follows. In the Commonwealth of Australia Constitution Act, 1900, it it is provided by section 1 of Chapter I as follows :-

"The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, `and which is hereinafter called `the Parliament', or `the Parliament of the Commonwealth."

By section 2 provision- is made for appointment . by the British Sovereign of a Governor- General to be the Sovereign's representative in the Commonwealth. Sections 58, 59 and 60 give effect to the control provided by the requirement of Royal assent and are in the following terms :-

"58. When a proposed law passed by both Houses of the Parliament is presented to the Governor- General for the Queen's assent, he shall declare, according to his'

discretion, but subject to this constitution, that he assents in the Queen's name, or that he withholds assent!. or that he reserves the law for the Queen's pleasure.
The Governor- General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and ,the Houses may deal with the recommendation.
59. The Queen may disallow any law within one year from the Governor- General's assent, and such disallowance on being made known by the Governor: General by speech or .message to each of ' the Houses of the Parliament, or by proclamation,' shall annul the .law from the day when the disallowance is so made known.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within 2 years from the day on which it was presented to the .Governor- General for the Queen's assent the Governor- General makes known, by speech or message to each of . the Houses of the Parliament, or by proclamation, that it has received the Queen's assent."

The same observations as have been made above with reference to the Canadian Constitution are fully applicable to the restraints so specifically imposed upon the legislative power of "the Parliament of the Commonwealth."
In the South Africa Act, 1909, section 19 by which the Parliament of the Union was constituted; reads as under
"The, legislative powers of the Union shall be vested in the Parliament of the Union, hereinafter called `Parliament', which shall consist of the King, a Senate and a House of Assembly".

By section 9 it is provided that the Governor- General shall be appointed by the King. Section 64 to which reference has already been made may here be reproduced in full with advantage :-

"64. When a 'bill is presented to the Governor- General for the King's assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name or that he withholds assent. The Governor- General may return to the House in which it originated any bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation."

In the face of these provisions it is obvious, that these great countries can hardly be called "Independent Dominions",

Their. principal Legislatures work under controls imposed- from without, by force of law.

The Indian Empire, as it was till the grant of independence in 1947, did not enjoy Dominion Status, but it had been provided by the British Parliament with a series of constitutions, progressively liberal in character, under which the Government of the country with its vast population and extremely complex administrative problems, had been successfully carried on for a great many years. The last of these constitutions was that contained in the Government of India Act, 1935, and it falls to be observed that in many essential respects, it provided a degree of freedom not far removed from

that enjoyed by the recognised Dominions. True, by section 2 of the Government of India Act, it was stated, in words of high import that :-

"All rights, authority and, jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by his Majesty."

The words, perhaps by design, convey a vast sense of majesty and authority, which despite the generous distribution effected by the Act could yet be exercised by the Sovereign, free of all control. Nevertheless, in their effect, they are scarcely to be distinguished from the simpler words of section 9 of the British North America Act, 1867, relating to Canada. Indeed, if distinction be sought, in relation to imposition of legal limitations upon the exercise of royal power, that distinction would appear to lie clearly in favour of the then Indian Empire. But Canada as a country within the purview of the Statute of Westminster, 1931, enjoyed one advantage, namely, that the British Parliament could no longer legislate for Canada, except with the consent of the Dominion. The condition in India - was entirely different. Although very wide legislative powers had been expressly conveyed to the Indian people by, numerous provisions in the Government of India Act and intricate provisions were made for exercise of these powers in a harmonious manner by the Centre and the Provinces among whom those. powers had been distributed, yet, by section 110, the following over- riding provision was made, viz :-

"Nothing in this Act shall be taken to affect the power of Parliament to legislate for British India, or any part thereof."

There were other limitations also contained in this section, but these are of minor importance compared with that appearing from the words reproduced above. Restrictions oil the exercise of legislative powers were spread all. over the Government of India Act; in several different forms, but as regards reservation and disallowance, the main provisions relating to the Central Legislature were contained in a single section, viz., section 32, which is reproduced below:-

"32. (1) When a Bill has been passed by the Chambers, it shall' be presented to the Governor- General, and the Governor- General shall in his discretion declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reseves the Bill for the signification of His Majesty's pleasure:

Provided that the Governor- General may in hr's discretion return the Bill to the Chambers with a message requesting that they will reconsider the Bill or any specified provisions thereof arid, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and the Chambers shall reconsider the Bill accordingly.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Federal Legislature unless and until, within twelve months from the day on

which it was presented to the Governor-General, the Governor-General makes known by public notification that His Majesty has assented thereto.

(3) Any Act assented to by the Governor-General may be disallowed by His Majesty within twelve months from the day of the Governor-General's assent; and where any Act 'is so disallowed the Governor-General shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void."

The terms of this section do not vary materially from those which are still in operation in the senior Dominions of Canada and Australia. 1n the case of laws made by the Provincial Legislatures, which had their own independent powers of legislation, it was laid down that the assent of the Governor should be necessary and the Governor should either accord assent, or reserve the bill for the consideration of the Governor-General, who might in his discretion either grant or withhold 'the assent or reserve the bill for the signification of His Majesty's pleasure. A time limit was fixed within which a reserved bill could become law by proclamation of. His Majesty's assent, as in the case of Federal laws. Finally, there was a specific provision enabling His Majesty to disallow Provincial Acts within twelve months of the giving of the assent by the Governor or the Governor-General.

Here again, it seems evident that the position in the Indian Empire was not materially different from that which the great self-governing Dominions were enjoying. The Governor-General and the Governors were required to observe Instruments of Instructions issued to them after approval by the British Parliament in the name of His Majesty, and these contained, inter alia, very precise directions regarding the kind of legislation which must be submitted for signification of His Majesty's pleasure. (These Instruments of Instructions were declared by subsection (4) of section 18, Indian Independence Act to 'lapse as from the appointed day").

A distinction might perhaps appear at this point, in favour of the -older Dominions, viz., that His Majesty, when exercising, the power of granting or' withholding .Royal assent, or disallowing Acts, would not be advised by His Majesty's Government in the United Kingdom, as was the case in relation to the Indian Empire. In this respect the position of the Indian Empire approximated to that of a British Colony or Possession, for the Government of which the British Parliament was directly responsible.

' It will be of advantage, if at this stage, two sections from the Government of India Act, 1935, relating to the constitution of Legislatures under the Act are reproduced, viz., section 18 relating to the Federal Legislature and section 60 relating to Provincial Legislatures:-

"18. (I) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor General; and two Chambers, to be known respectively as the Council of State and the House o#' Assembly (in this Act referred to as "the Federal Assembly").

(2) The Council of State shall consist of one hundred and fifty-six representatives of British India. and not more than one hundred and four representatives of the Indian States, and the Federal Assembly shall consist , of two hundred and fifty

representatives of British India and not more than one hundred and twenty- five representatives of the Indian States.

(3) The said representatives shall be chosen in accordance with the provisions- in that behalf contained in the First Schedule to this Act.

(4) The Council of State shall be a permanent body not subject to dissolution, but as near. as may be one- third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner .. dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly."

"60. (1) There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented
by the Governor, and

(a) - in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, two Chambers;

(b) in other Provinces one Chamber.

(2) Where there are two Chambers of a. Provincial Legislature, they shall be known respectively as the Legislative Council and the Legislative. Assembly, and where there is only one Chamber, the Chamber shall be known as the Legislative Assembly."

It is particularly to be noted that as in . the case of each of the Dominions, the sections expressly , declared His Majesty represented by the Governor- General or the Governor to be a part of the relevant Legislature.
I now proceed to consider the impact of the' Indian Independence Act in relation to the matters appearing from the Government of India Act fo which I have referred above, all of which were materially altered in the course of adaptation by the Governor- General of the Indian Empire in the exercise, of the powers conferred upon him by section 9 of the Indian Independence Act.. It should be fairly clear from the preceding discussion that . the Indian Independence Act, 1947, possessed in several respects the same character as the Statute of Westminster, 1931, but with one major difference. It will, I think, be clear from the analysis I am about to attempt, that the extent of freedom accorded to the countries which, a§ Dominions, were to replace the Indian Empire, was in A very material degree greater than that which the older Dominions had gained in 1931. That, in my view, is the circumstance which justifies the application of the special description "Independent Dominions" to the two new States which were brought into existence by means of this highly effective instrument.

Firstly, I take up the provisions for appointment of the Governor- General and the provincial Governors. The original Government of India Act provision relating to the Governor-General read as follows :-

"3. (1) The Governor- General of India is appointed by His Majesty, by a Commission under the Royal Sign Manual and has- .

(a) all such powers and duties as are conferred or imposed on him by or under this Act ; and-

(b) such other powers of His Majesty, • not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleased to assign :to him."
In the adapted Government of India Act, 1935, which was in force when Pakistan came into existence, section 3 reads simply as follows :-

"The Governor- General of Pakistan is appointed by His Majesty. by a Commission under the Royal Sign Manual."
This, however, is not to be regarded as divesting him of all power, for by section 5 of the Indian Independence Act, 1947, it was provided that-

"For each of the new Dominions, there shall be a Governor- General who shall be appointed by His Majesty and- shall represent His Majesty for the purposes of the government of the Dominion "

The Royal Commission which issues under His Majesty's in signature contains the following significant provisions. Firstly, the appointment is "during our pleasure". Secondly, the in Governor- General is to have "all the powers, rights, privileges and advantages to the said official belonging or appertaining"

and it would appear that neither the British Sovereign nor the British Parliament possess any longer the authority to vary these powers, rights, privileges and advantages. On the date of the creation of Pakistan, and at least until just before the 24th October, 1954, such a power could be regarded as belonging to no person or body, other than this Constituent Assembly of Pakistan. Next, the Governor- General is authorised, empowered find commanded to perform the powers and duties conferred and imposed upon him by and under the Indian Independence Act, 1946. These powers and duties are also no longer subject to regulation by either the British Sovereign or the British Parliament. Only one of the Royal prerogatives is specifically conveyed to the Governor- General, namely, that of pardon, and is conferred in the following terms :

"We- do hereby authorise and empower you in our name and on our behalf to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within our territories in Pakistan a pardon, either free or subject to such lawful conditions as you may deem fit." There are no instructions or authorizations in relation to legislation, e.g., with respect to grant or assent, and even the prerogative of summoning, proroguing and dissolving the Legislature is not conveyed.

The contrast with the case of Governor- General of the older Dominions is almost startling. In South Africa which Mr. Diplock urged was as "independent" as Pakistan, the following authorizations are found in the Letters Patent, viz., (a) to fulfil his duties "according to our instructions"; (b) to keep and use the Great Seal ; (c) to summon, prorogue and dissolve the Union Parliament ; (d) to appoint deputies to himself ; and

(e) to exercise the prerogative of mercy. In Canada and Australia, the Governor-General is authorised to appoint Judges, commissioners, justices of the peace, Ministers, and other officers "in our name and on our behalf", and also to suspend and remove such persons, under instructions given by, or under the authority of, the King. In each case, the Governor-General is forbidden to quit the Dominion on any pretence whatsoever, except under the Sign Manual of the King, on the ground, expressed in the Canada Royal Instructions, 1931, that "great prejudice may happen to our service and to the security of our said Dominion" otherwise.

One cannot fail to observe that the formal order made by the British Sovereign, in relation to the Pakistan Governor General contains no instructions or prohibition at all. He is merely enjoyed to perform his duties under the interim Constitution, which itself provides for the grant of the Royal prerogative of mercy in section 295, Government of India Act, 1935. It could hardly appear more clearly that the Governor-General owes nothing to the British Sovereign except his warrant of appointment, issued upon the recommendation of the Government of Pakistan. No duty of any kind is prescribed which he owes to Her Majesty, except that o g being "faithful ', appearing in the oath. which Her Majesty is pleased to accept. The appointment, by_ its terms affirms and emphasises that the Governor-General's duty or as it might be termed "allegiance", is to the Constitution, as in existence from time to time.

With respect to Governors, the earlier position was that each Governor was appointed by His Majesty by a Commission under the Royal Sign Manual, but under the adapted Government of India Act, 1935, the new provision reads as follows :-

"48. The Governor of a Province holding office as from the date of the establishment of the Federation is, appointed by His Majesty by a Commission under the Royal sign Manual but any person appointed thereafter to be the Governor of a Province shall be appointed by the Governor General and shall hold office at the Governor-General's pleasures." ,

A provision similar to the latter part of the section cited above was also included in the British North America Act, 1867, but as has been seen in the Maritime Bank case cited above, such a provision was not regarded as sufficient for holding that the Lieutenant-Governor of a' province in Canada was not a representative of His Majesty, because the same Act expressly vested the Executive Government of Canada in the Queen. The corresponding provision in section 2 of the Government of India Act, 1935 (cited above, was entirely omitted, in advance of the creation of Pakistan in the course of adaptation and, consequently; it would appear difficult to suppose, under. the existing provisions, that Governors of Provinces other than those who were holding office at the time when Pakistan came into being, are appointees of or owe their position in any respect . to, the British Sovereign.

The impression is thus clearly gained that the effective presence of the British Sovereign in the new State of Pakistan was confined to the connection still retained by virtue of the power of appointment of the Governor-General being by law vested in Her ,Majesty. That furnishes, in my opinion, a precise indication of the measure of freedom which Pakistan possessed, at its creation, by virtue of the legislative and other actions taken by the King and the British Parliament.

In all but name, the Governor-General was free of all connection with the British Sovereign ; and in point of control, he was altogether free.

At this stage it will be convenient for me to state my opinion. regarding an argument raised by Mr. Diplock concerning the use to be made of adaptations of the Government of India Act effected by the then Governor-General, in advance of the creation of the new Dominions, under the powers given by section 9 of the Indian Independence Act. I am unable to agree with Mr. Diplock that these are acts of a subordinate or delegated character and therefore .cannot be called in aid for the purpose of interpreting the meaning of words contained in the Indian Independence Act and the intention underlying those words. This is a proposition which may be appropriate to many types of legislation, but it cannot, in my view, be sustained in relation to an organic document such as the Indian Independence Act. By section 9 of that Act, the Governor-General was given power equivalent to that of the British Parliament to make all changes in the Government of India Act which were necessary for the purpose of carrying out the intentions underlying the specific provisions of that Act. The Governor-General of that time, namely, Lord Mountbatten, was not a mere statutory authority working within the four corners of the Government of India Act, 1935, as a number of his predecessors had been. He acted, for instance, as a plenipotentiary of His Majesty's Government in the United Kingdom, for the purpose of carrying out the design of that Government to provide the peoples of the Indian Empire with machinery appropriate for the purpose of enabling them to draw up a new Constitution for themselves, and to decide at the same time whether or not they would remain within the British Empire. Similarly, under section 9 of the Indian Independence Act, the power which the Governor-General exercised was not exercised by him as merely an instructed agent, for it is a matter of public general knowledge that Lord Mountbatten had been most intimately associated with both the peoples of the Indian Empire as well as- the members of His Majesty's Government in the United Kingdom, in settling details of the great compromise which was eventually. found acceptable to both parties. Any action. taken by a person in that position, which in its nature, is susceptible of only one explanation in point of intention must, in my view, be regarded as furnishing a very powerful indication of the intention underlying the provision in the Indian Independence Act, which was thereby carried into effect. Exactly the same holds good in the case of the first Governor-General, of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah, for he too had been associated in the closest manner with the negotiations of 1946-47 which preceded the elimination of the British power in the subcontinent of India, and having been designated as the first Governor-General of Pakistan well in advance of that event, may be assumed to have been directly concerned in the decisions relevant to the adaptations which were necessary in the case of Pakistan. .

The important changes in the Government of India Act relating to the exercise of the 'legislative power in respect of the future Dominion as a whole may now be considered. The Government of India Act provided, as has already been stated, a very precise distribution of legislative powers between the Centre and the Provinces, and as section 8, subsection (2) of the Indian Independence Act clearly shows, it had been agreed that each of the Dominions should continue, during the interim period, to be governed in all respects according to that Act as adapted, and subject to any alterations therein which might be subsequently effected by the Constituent Assembly.

The wording of this provision is important and it is accordingly reproduced below in full

"8 (2). Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor- General under the next succeeding section, have effect accordingly provided that-

(a) the said provisions shall apply , separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions ;

(b) nothing in this subsection shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof ;

(c) so much of the said provisions as requires the Governor- General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure and no Provincial Act shall be disallowed by His Majesty thereunder.; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under subsection (1) of this section."

At this stage I invite particular reference to provisos (b), (c) and (d) in this subsection. By these provisos, the power of His Majesty's Government in the United Kingdom over the affairs of Pakistan and its Provinces was .completely eliminated. The pre- existing requirement that the Governor-General and the Governors should in certain respects act in their discretion (i.e., independently of the elected Ministers) or in their individual judgments (i.e. according to their own judgment although after consultation with the elected Ministers) were - also- removed and .the removal is- significant powers given by section 9 of the Indian Independence Act. I am unable to agree with Mr. Diplock that these are acts of a subordinate or delegated character and therefore .cannot be called in aid for the purpose of interpreting the meaning of words contained in the Indian Independence Act and the intention underlying those words. This is a proposition which may be appropriate to many types of legislation, but it cannot, in my view, be sustained in relation to an organic document such as the Indian Independence Act. By section 9 of that Act, the Governor- General was given power

equivalent to that of the British Parliament to make all changes in the Government of India Act which were necessary for the purpose of carrying out the intentions underlying the specific provisions of that Act. The Governor-General of that time, namely, Lord Mountbatten, was not a mere statutory authority working within the four corners of the Government of India Act, 1935, as a number of his predecessors had been. He acted, for instance, as a plenipotentiary of His Majesty's Government in the United Kingdom, for the purpose of carrying out the design of that Government to provide the peoples of the Indian Empire with machinery appropriate for the purpose of enabling them to draw up a new Constitution for themselves, and to decide at the same time whether or not they would remain within the British Empire. Similarly, under section 9 of the Indian Independence Act, the power which the Governor-General exercised was not exercised by him as merely an instructed agent, for it is a matter of public general knowledge that Lord Mountbatten had becn most intimately associated with both the peoples of the Indian Empire as well as- the members of His Majesty's Government in the United Kingdom, in settling details of the great compromise which was eventually. found acceptable to both parties. Any action. taken by a person in that position, which in its nature, is susceptible of only one explanation in point of intention must, in my view, be regarded as furnishing a very powerful indication of the intention underlying the provision in the Indian Independence Act, which was thereby carried into effect. Exactly the same holds good in the case of the first Governor-General, of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah, for he too had been associated in the closest manner with the negotiations of 1946-47 which preceded the elimination of the British power in the subcontinent of India, and having been designated as the first Governor-General of Pakistan well in advance of that event, may be assumed to have been directly concerned in the decisions relevant to the adaptations which were necessary in the case of Pakistan. .

The important changes in the Government of India Act relating to the exercise of the 'legislative power in respect of the future Dominion as a whole may now be considered. The Government of India Act provided, as has already been stated, a very precise distribution of legislative powers between the Centre and the Provinces, and as section 8, subsection (2) of the Indian Independence Act clearly shows, it had been agreed that each of the Dominions should continue, during the
interim period, to be governed in all respects according to that Act as adapted, and subject to any alterations therein which might be subsequently effected by the Constituent Assembly. The wording of this provision is important and it is accordingly reproduced below in full
"8 (2). Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly
provided that-
(a) the said provisions shall apply , separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after

the appointed day any Central Government or Legislature common to both the new Dominions ;
(b) nothing in this subsection shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof ;
(c) so much of the said provisions as requires the Governor- General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;
(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure and no Provincial Act shall be disallowed by His Majesty thereunder.; and
(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under subsection (1) of this section."
At this stage I invite particular reference to provisos (b), (c) and (d) in this subsection. By these provisos, the power of His Majesty's Government in the United Kingdom over the affairs of Pakistan and its Provinces was .completely eliminated. The pre- existing requirement that the Governor General and the Governors should in certain respects act in their discretion (i.e., independently of the elected Ministers) or in their individual judgments (i.e. according to their own judgment although after consultation with the elected Ministers) were - also- removed and .the removal is- significant in this respect that by specific provisions in the Government of India Act and the instructions issued to the Govern General and the Governors, these powers were to be exercise in consultation with the Secretary of State for India London, who was in the last resort to be the deciding authority. Thirdly, there was an express prohibition against reservation of Provincial laws for signification of His Majesty's pleasure and equally express withdrawal : of His Majesty's power disallow such laws, both to take effect upon, a. . date in t future, which in the case of Pakistan was fixed as the 14th August, 1947. .

The terms of the last- mentioned provision are, in n opinion, of high significance. In respect of the laws applicable in the whole of the Dominions, the - corresponding provision was in subsection (3) of section 6, and is contained in the following words :-

"so much of any Act as relates to the disallowance law by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall net apply to laws . c the Legislature of either of the new Dominions."
As has been seen, provisions for disallowance and reservation of Central laws were contained in the Government of India Act, 1935, and it appears that such provisions might also be found in other Acts of the British Parliament. As regard suspension, the only example brought to the notice - of the Court was a provision contained in the Colonial Courts o Admiralty Act, 1890, which did apply to the Indian Empire The point which emerges, and which is, to my mind, of the greatest importance, is that whereas the wording in relation to Provincial laws is in absolute and peremptory terms of immediate application on the appointed date the provision relating to the "Legislature of the Dominions" is expressed in terms of simple futurity. This is

relevant, anal in my opinion appreciably so, to the contention raised on behalf of the petitioner in the present case that the British Parliament in the Indian Independence Act having indicated some forms of legislative activity appropriate to a Legislature whose Acts were to have force throughout the Dominion, designedly refrained from constituting such a Legislature. Since it was concerned only to make provision for an interim period to precede the establishment of the new Constitution which was to be drawn up by the Constituent Assembly, the British Parliament was content to provide for exercise of those legislative powers only,- vide section 8, subsection (1) and proviso (e) to subsection (2), Indian Independence Act: Therefore, the "Legislature of the Dominion" being intended to assume concrete from at a date in the future, under and in accordance with the decision of the Constituent Assembly it was deemed sufficient to provide that the laws of such a Legislature, assuming that the country still remained a Dominion, would not be subject to the' restrictions and controls which were part of the heritage of .the other Dominions and had also by statute been imposed upon the pre- existing Indian Empire. As for laws of the Constituent Assembly made in the interim period, that Assembly being a sovereign body, it was unnecessary and might have been thought derogatory to its position, for a Legislature not superior in status, to provide that such laws should be not subject to controls exercisable by the British Sovereign. But as for the Provincial Legislature, they were either in being, or were to be constituted for newly- created Provinces by the Governor- General under section 9 (1) (i), Indian Independence Act, and - they were to act under the terms of the adapted Government of India Act, 1935, as from the appointed day. Their existence and powers being actual on the appointed day, the words used to free those powers from all control by His Majesty needed to - be absolute and peremptory in their effect.

In my opinion, the language in which the relevant controls were sought to be eliminated in relation to laws of "the Legislature of the Dominion" furnishes a strong clue to the time when the words were to take effect, and the nature of that effect. Putting the matter in a single sentence, I would say that these words constituted a promise that, should the count remain a Dominion, and should e, as course could a more confidently expected, a Union Legislature, then unlike the great self- governing Dominions of - Canada, Australia and South Africa, Pakistan would be wholly free of any control of an kind exercisable- over the laws of the Union legislature by His Majesty., But the difference of language also include me to think that section 6 (3) of the, Indian Independence Act was - not drafted on the assumption that on the appointed date, there would be a "Legislature of the Dominion" in existence in Pakistan.

Section 6 of the Indian Independence Act contains provisions of the highest significance, couched in language of subtle and comprehensive nature, whose interpretation is a task, as the lengthy arguments in the present case clearly show, of no mean magnitude. Subsection (2) of section 6 is in almost precisely the same terms as subsection (2) of section 2 of the Statute of Westminster. Taken by itself, this provision would necessarily be understood .a instituting the people of Pakistan a "free people" in a sense no higher than that which, as has already been - seen, must be accepted in relation to the “free peoples” of Canada, Australia and Newzealand subsection (4) of section 6 of Independence Act corresponds to section 4 of the Statute of Westminster. It provides that Acts of the British Parliament passed after the transfer of power should not extend or be deemed to extend to Pakistan, unless

extended to Pakistan "by a law of the Legislature of the Dominion". (In the Statute of Westminster, the condition is differently expressed as follows, viz., "unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof".) Subsection (5) provides similar immunity from the operation of Orders-in-Council, and other orders, rules and instruments made under Acts of the British Parliament, passed after the transfer of power. Subsection (1) of section 6 is/ in the following terms:-
"The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territoral operation."

This may be compared with section 3 of the Statute of Westminster which reads as follows:

"It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra territorial operation."

This provision was interpreted in The British Columbia Electric Co., Ltd. v. The King ((1946) 4 Dominion Law Reports, p. 81,) in the following terms:

"The specific investment of extra-territorial power by section 3 of . the Statute of 1931 was designed no doubt to remove the generally accepted limitation of colonial legislative jurisdiction, a limitation which the Courts of the colony itself were bound to recognise."

It may be pointed out that in the original Government of India Act by section 99 (2), extra-territorial operation had been allowed within specified limits to laws . of the Federal Legislature of India. The effect of the relevant clause in section 6 of the Indian Independence Act, would naturally be to remove these limitations, and accordingly it is found that section 99 was adapted,. before the transfer of power, so as to eliminate the subsection making this provision.

It yet remains to consider why it was thought necessary by the British Parliament to declare, in the clear language of futurity, that "the Legislature of the Dominion" should have "full power to make laws for that Dominion". Having equipped the Dominion at its very birth with a Constituent Assembly whose function would be to make provision for exercise of legislative powers including the legislative power which was to vest in the Union or Federation, it might have been thought sufficient for the British Parliament to remove by express words, all the controls of any kind which had previously operated on such laws, through operation of laws of the British Parliament or through the exercise of the Royal prerogative.

The Government of India Act, 1935, as originally enacted contained a number of scattered. provisions operating in restraint of the power of the Federal Legislature to pass laws within the sphere allotted to it in the distribution of the powers effected by that Act. Thus, under section 116, which has been referred to already, there are words which clearly debar the Federal Legislature or any Provincial Legislature from making laws, inter alia, affecting the British Sovereign or the Royal Family, Succession to the Crown, the sovereignty of the Crown in any part of India, the law of British nationality, the Army Act, the Air Force Act, the Naval Discipline Act, or the law of Prize or Prize Courts; it was forbidden also for these Legislatures to make any

laws amending any provision of the Government of India Act, 1935, or any subordinate legislation thereunder, except to the extent permitted expressly by the Act; and finally subject to the same condition, they were forbidden to legislate so as to take away the prerogative right of His Majesty to grant special leave - - - appeal from any Court .(i.e., to the Privy Council). Another of mode of restraint appears in section 108 which contains a lengthy list of subjects in regard to which the introduction of any bill in the Federal Legislature would require the previous sanction of the Governor- General in his discretion, i.e., acting within that sphere of his executive power which was controlled by His Majesty's Government in the' United Kingdom.

It should be remembered that the Indian independence Act was passed in advance of the adaptations which were made in the stage immediately prior to the transfer of power. Two of these adaptations were the entire elimination of section 108 and section 110 and it may safely, be said that all other provisions of a similarly restraining nature were also removed in the same process. The conclusion would appear to be plain that the complete removal of these powerful restraints was a necessary consequence of the employment by the British Parliament, whose intention was being carried out in course of the adaptations, of the expression "full power to make laws". The word "full" in that aspect would perhaps be completely translated as "unrestrained". .

It was stated from time to time in the course of arguments' that the Constituent Assembly derives power to make laws for the Dominion from section 6 (1), ,but with great respect, it seems to me that the interpretation overlooks the, fact that the Constituent Assembly' was, as a body, not a creation of the British Parliament. It is, in my opinion, to be regarded as a body created by a supra- legal power on Constitution for the supra-legal function of preparing a Pakistan. Its powers in respect belonged to itself inherently, by virtue of its being a body representative of the will of the people in relation to their future mode of Government. The will of the people had, up to that time, been denied expression in this respect, through the presence, by virtue of conquest and cession, of the undisputed and plenary executive power in India of the British Sovereign, which was being withdrawn by unilateral act. That power did not owe its existence to any law, though its exercise ma have time to time progressively been reduced to regulation b laws of the British Parliament and of the Indian Empire.

I draw a sharp distinction between the function of providing for the government of the Indian Empire and the function of governing the Indian Empire. The latter function was to be carried out by the Governor- General, of, India and his subordinates acting in accordance with instructions received from His Majesty's Government in the United Kingdom in certain respects, and in other respects in accordance with the provisions of the statutory instrument then in force, viz., the Government of India Act, 1935. That Act, however, must not itself be included in the complex which may be described as the "Government of India". It was set apart from and above that complex, the whole of which was conducted in accordance with the strict terms of that Act. The making of that Act, and the replacement and amendment of that Act, on the other hand, belong to the sphere of making provision for the government of the Indian Empire, and that was until the 14th August, 1947, a function exclusively to be discharged by the British Parliament of which the British Sovereign is an integral part. For the purpose of making such provision, the British' Sovereign has invariably made the Royal prerogatives available to the British Parliament so that their operation might

be provided for, so far as necessary, in the constitutional instrument to be enacted. It is quite clear that the Latter function which is obviously the higher of the two functions, was entrusted to the Constituent Assembly of Pakistan. .
The nature of the freedom from external control of the Governor- General having already been considered, . and found to be absolute so long as he remained faithful to His Majesty", it is now possible to answer - the question posed at the commencement of this discussion. That answer may be considered under three heads:-

(i) What was the nature of the autonomy, in the legislative sphere, which - the British Parliament intended to convey by means of the Indian Independence Act, 1947, and the adapted Government of India Act, 1935?

(ii) Did the autonomy include power to interpret and apply the provisions in these constitutional instruments as the successor authorities thought best?

(iii) How did these successor authorities interpret and apply the provisions, in respect of the matter now in dispute, and what weight is to be allowed to the interpretations as they appear from the actions of these persons or bodies?
It should be quite clear from the foregoing discussion . that, in a legal sense, the older Dominions to which in 1926 the description "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs", had been applied, were in respect of legislation at least, not so blessed as was Pakistan when it emerged as an "Independent Dominion". In the case of Pakistan, the statute which created the new State, was prepared with meticulous attention to the elimination in detail of every provision of law which had hitherto operated to impose controls upon the executive government and Legislatures in the territory. Existing laws were retained, whether they operated as part of the law of the territory, or as part of the law of the United Kingdom, but there was provided, a Constituent Assembly which being empowered to furnish if it : so chose, a completely new Constituent assembly which being empowered to furnish, if it so chose, a completely new Constituent for the country, was not to be regarded bound by any law in existence, unless it choose to be so bound. In relation to constitutional provisions, it exercised exercises the powers of the British Parliament, which were in that respect, untramelled by any laws. By way of a practical expedient, it was declared in section 8, Indian Independence Act, that
(a) "the powers of the Legislature of the Dominion shall for the purpose of making provision as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly" and (b) "the, powers 'of the Federal Legislature or Indian Legislature under , (the Government of India) ' Act, as in force - in relation to each Dominion, shall in the first instant, be exercisable by the Constituent Assembly."

It will be necessary, .in connection? with an argument to be dealt with later, to decide whether these provisions have
the effect contended for by the appellants of (i) prescribing the powers of the "`Legislature of the Dominion" as being the aggregate of "powers for the purpose of making provision for the Constitution of the Dominion" and "powers of the Federal, or Indian Legislature under the Government of India Act" and (ii) making the Constituent Assembly, since these powers were exercisable by it, identical with the "Legislature of the Dominion" as so composed. It may save discussion at a later stage, if I utilise this occasion to say that proposition (i) involves usurpation by the British

Parliament of a very essential part of the power which had expressly been delivered over to the Constituent Assembly, namely to provide a Constitution for Pakistan, in which there might or might not be a "Legislature of the Dominion," and if there were such a Legislature, to prescribe its powers and functions. To my mind, such an inference is obnoxious to the entire plan which His Majesty's Government in the United Kingdom. implemented through the enactment by the British Parliament of the Indian Independence Act. And it seems to me that to identify an existing body of persons such as the. Constituent Assembly clothed with sovereign power to provide a new Constitution for the country, with an entirely different and as yet notional body, whose constitution and. powers were yet to be shaped by the Constituent Assembly, involves an operation in thought of extreme difficulty. It stands out most prominently, in this context, that the Indian Independence Act uses no words to relate "the vow of the Federal Legislature or the Indian Legislature under the Government of India Act" with any future power of the "Legislature o t e Dominion".

The reason seems obvious, namely, that it was for the Constituent Assembly to say, what should be the powers of the "Union Legislature", and they were in no way bound to follow the pattern provided by the Government of India Act, 1935. In marked contrast with the Constitutions of other Dominions, all of which have been enacted by the same British Parliament, the Indian Independence Act refrains from constituting any "Legislature of the Dominion". The references to it are confined to mentioning, in scattered sections, , certain powers which it could exercise, and certain matters with which it might deal. There are only eleven such provisions, and putting all these together, they cannot,, in the remotest degree, be thought to meet the enormous complexities involved in a distribution of legislative powers between the Centre (or Dominion) and the Provinces. Therefore, to refer to the expression "full power to make laws for the Dominion" as conferring plenitude of power is not helpful, and the deliberate avoidance of any words to suggest that, on the appointed day, the "Federal Legislature or the Indian Legislature" was to be replaced by the "Legislature of the Dominion" makes it clear beyond doubt, that no definition of the "Legislature of the Dominion" by reference to the powers which it was to exercise was attempted in the Indian Independence Act. For that, the- plain reason is that it was for the Constituent Assembly to provide for (a) the Constitution and (b) the powers of tl?e Union Legislature, or the "Legislature of the Dominion".

But to return to the question of the legislative autonomy which can be construed out of the Indian Independence Act, I think I can safely predicate on the basis of what I have already said, that it was intended to be absolute, the existing laws as adapted being retained only for the purpose of continuing the Government of the country on a stable and uniform basis, pending the preparation and promulgation of a new Constitution. The British Parliament was so meticulous in this regard that it was even at pains to include in the Indian Independence Act, two provisions designed to produce the effect that the limitations upon legislative powers which were contained in the Government of India Act, 1935, should be deemed to be of Dominion origin. By subsection (6) of section 6, the following provision was made - .-

"The power referred to in subsection (1) of this section (i.e., full power to make laws for the Dominion) extends to the making of laws limiting for the future the powers of the Legislature of the Dominion."

Learned counsel on the two sides were at a loss to explain the purpose of this provision. It was referred to for the appellants as conveying indubitably a power of making Constitutional laws, to the "Legislature of the Dominion", but that appears in clearer terms from section 8 (1) of the same Act. It might have been thought that an' autonomous Legislature, such as was intended by subsections (1) and (2) of the same section, would possess the capacity to limit its own legislative competence, e.g., in the interest of a harmonious operation of legislative powers distributed between the Centre and the Province. Such a distribution already existed, and might conceivably have been thought to be likely to continue under the future arrangements.

In my opinion, the true explanation of section 6 (6) is to be found in the presence of section 8 (3) of the Indian Independence Act, which reads as follows : .

"(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by subsection (2) of this section and the orders therein referred to, operates to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature."

The operation of "deeming" involves the supposition that a thing is that which is not. All the limitation on the powers of the legislature of the Dominion" with a small `1' indicating as Mr. Diplock thought, that the reference might be to the .Legislature, which had power to legislate for the whole of British India before the transfer of power were limitations imposed upon it by the British Parliament. The delicate design and intention of section 6 (6) and section 8 (3) seems clearly enough to be, to cause it to appear, for the satisfaction of all those who were sensitive to controls from outside the country, that the limitations were of local origin, and- for the time being only, until the Constituent Assembly should see fit to remove or alter them.

As the Governor- General's power of granting assent to laws of the Legislature of the Dominion" was uncontrolled from without, complete autonomy was secured to the new Dominion in the legislative sphere, by virtue of the 'terms employed in the relevant documents, if and when it should be equipped with a Legislature of the Dominion". In the interim period, the position was, if anything superior, in point of freedom, for the Constituent Assembly, 'which was to legislate in the place both of the self- effaced British Parliament, as well as of the dissolved Federal of Indian Legislature, was a body which ex hypothesis was free of all forms of legal or other control.

But, in the operation of a Constitution, there frequently arise occasions where the meaning of one or more of its provisions,' or the intention in a particular respect of the instrument as a whole, gives rise to doubt. With respect to th
necessity of assent by the Governor- General to laws of constitutional nature passed by the Constituent Assembly, this doubt arose at a very early stage. The Court is indebt to the learned Advocate- General of Pakistan for the assertion, made on more than one occasion, that the Law Ministry of the Government of Pakistan (by which was meant the body of permanent officials constituting the staff of the Minister under the Law . Minister) had consistently advised the Minister that such assent was sine

qua non. On the other hand, the Constituent Assembly had throughout maintained the view that assent was not necessary, and acting on that vie, had made and promulgated a rule, No. 62 in the Rules o the Constituent Assembly to give formal expression to that view. This rule, as originally framed on the 24th February I, 1948, at a meeting presided over by the President, the late Quaid-e-Azam Muhammad Ali Jinnah, merely provided that when a Bill had been passed by the Assembly, a copy of it should be signed by the President. As this was not followed by any provision for submission to the Governor-General for his assent, it was understood to provide a sufficient formal act to give validity as law to the Bill as passed, but it appears that doubts were felt on this subject, and the rule was amended at a meeting presided over by the Deputy President, Mr. Tamizuddin Khan, and held on the 22nd May, 1948, to read as follows :-

"When a Bill is passed by the assembly a copy thereof shall be signed by the President, and it shall become law on being published in the official Gazette of Pakistan under authority of the President."

No words could express more clearly the opinion of the Constituent Assembly, passed nearly seven years ago, on the question which is now before the Court. I quote here from Craies on - Statute Law, 5th Edn. at page 11 :-

"Parliament is the supreme authority for interpretation of Statutes parliament has power to declare by statute the common law or the meaning of any prior statute, and may declare wrong and repeal any - judicial legislation effected by interpretation or misinterpretation of statutes, and may make the declaratory - or repealing statute retrospective."

It is argued, however, for the appellants ,that a rule of the Constituent Assembly is not a law. The proposition, on the face of it, seems valid, but it is permissible to observe that there are several other rules made by the Constituent Assembly, which it alone was competent to make, which have been acted upon, and which in their character and essence are not only laws in the most thorough-going sense, but must also be placed in the very highest category of laws, viz., constitutional laws. I cite three instances below. Rule 6 of the Rules makes elaborate provision for filling of "casual vacancies" in the membership of the Assembly. By the first proviso to subsection (3) of section 19 Indian Independence Act, 19.47, it was declared that "nothing in this subsection shall be construed as preventing the filling of casual vacancies in the (Constituent Assembly of Pakistan). . . and the powers of, the said (Assembly) shall extend; an& be deemed always to have extended, to the making of provision for the matters specified in this proviso".

I do not construe this proviso. as conferring any power upon the Constituent Assembly which it did not inherently possess ; it is obviously intended for the avoidance of doubts which might. have been founded on the wording of subsection (3). But it would seem' clear enough that, in the eye of the British Parliament, the matter was one of "powers" and not merely of administrative or incidental or ancillary nature so that the exercise of the power in question would, I apprehend,. lead to the creation of law.

Next, I refer to Rule 6-B which provides for "Disqualification from membership", and lays down a large number of conditions which individually shall be sufficient to cause vacation of his seat by a member. In one case, the President is enjoined to direct, upon - being satisfied of the conditions, that the disqualified member ceases to be a member and to declare his seat vacant ; and it is further provided that the President's decision shall be final and shall not be questioned in any Court of law or before any other authority. A fine of rupees five hundred per day, recoverable as a debt to the Federation, is prescribed for any person who sits or votes as a member of the Constituent Assembly, while under the disqualification or prohibition. that by this rule, the constituent assembly purported to make law.`

Rules 75 to 86 of the Rules relate to "Doubts and Disputes as to Elections" to membership of the Constituent Assembly. No possible doubt can be entertained regarding these rules that they constitute law. It is true that they were not made in the form prescribed for a statute, but there is authority for the view that in the case of a sovereign body, like the Constituent Assembly, it is the substance and not the form which determines whether the expressed will of such a body constitutes law. I reproduce a below the observations of a learned an much respected American authority on Constitutional Law. In Cooley's Constitutional Limitations, Eighth Edition, at page 266, at the commencement of the chapter entitled "On the Enactment of Laws", there occurs the following passage, which. is deserving of careful study

"When the supreme power of a country is wielded by a single man, or by a single body of men, any discussion, in the Courts, of the rules which should be observed, the enactment 'of laws must. generally be without 'practical value, and in fact impertinent; for, whenever the unfettered sovereign power of any country expresses its will in the promulgation of a rule of law, the expression must be conclusive, though proper and suitable forms may have been wholly omitted in declaring it. It is necessary attribute of sovereignty that the expressed will of the sovereign is law; saw an while 'we may question and cross- question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet, when the intent is made out, it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not."

But even if statutory authority be not conceded in favour of rule. 62, on the ground discussed above, it cannot be denied that it embodies a "parliamentary exposition" - of the highest importance. I quote again from Craies on,Statute Law, p. 137:-

"But Acts of Parliament, without having been passed for the. express purpose of explaining previous Acts, are, sometimes spoken of as being "legislative declarations" or "parliamentary expositions" of the meaning of some earlier Act. This in Battersby v. Kirk ((1836) 2 Bing. N C 584, 609), Tindal C. J. said "We cannot but consider these legislative enactments as forming a . glossary for the proper interpretation of the expressions in the Bristol Dock Act which are considered to be left in doubt". . . : . But, as has been pointed out; , it is the Courts of law and not the Legislature, who are the authorised expositors of the statute law of the land, so that anything 'in the nature of a "parliamentary exposition", of an Act of Parliament is only an argument that may be proved in aid of attaching some certain meaning to a statute and cannot be treated as- per se conclusive."

If the matter related to the meaning of a doubtful expression in some Act making a substantive provision, so clear an expression of opinion by the Constituent Assembly would carry very great weight. The question here is of the mode of enactment of constitutional laws. Here, I am concerned to point out that the major limb of the three great limbs .of the autonomous State of Pakistan had clearly expressed in 1948 its view on this question, which has . now assumed so high an importance. I place the Constituent Assembly above the Governor-General, the chief Executive of the State, for two reasons, firstly that the Constituent Assembly was a sovereign body, and secondly because the statutes under and in accordance with which the Governor General was required to function, were within the competence of the Constituent Assembly to amend.

The a second -great limb of the State, namely the Executive Government of the Federation, hays never, until after the event of the 24th October 1954, shown any sign of doubt of this point. This was in the highest, degree natural, for not only the three successive Governors-General of Pakistan, but with a few exceptions, mostly of very recent date, every Minister of the Federal Government has been a member of the Constituent Assembly. The first Governor-General, 'the late Quaid-e-Azam Muhammad Ali Jinnah, and the second Governor-General Khwaja Nazimuddin were original members of the Constituent Assembly, as appears from the notification on the subject in the Gazette of India of the 26th July 1947. The third Governor-General, H. E. Mr. Ghulam Muhammad, was elected as a member of the Constituent 'Assembly from East Bengal in June 1948, and retained his membership until July, 1953. The requirement that Ministers of the Federation should be members of the "Federal Legislature" was contained in the Government of India Act, 1935, and has already been cited. Thus it is possible to declare that the Government of Pakistan, composed of the Governor-General and his Ministers have, throughout the relevant period, been aware that the Constituent Assembly had formally declared that its constitutional laws became law under its own Rule 62, without the need of the Governor-General's assent. The knowledge was not passively ,possessed, for occasions when the' Federal Government was under the necessity of obtaining enactment of laws of a constitutional nature arose from a very early stage in the history of the country, and continued to arise with increasing frequency as it progressed. Not all these laws were of the same importance, and I shall therefore select for mention those which, in my humble opinion, are connected with matters of the highest importance to the State.

From the very inception of Pakistan, matters connected with defence have been germane to its very existence. It might reasonably be assumed that in obtaining a necessary law relating to the Defence Services, the -Federal Government would exercise the .utmost care to ensure that the mode of enactment was fully effective. Chapter I in Part -X of the Government of India Act, 1935, originally contained sections 232 to 239, which empowered His Majesty-in-Council in all necessary respects, and contained numerous references to "His Majesty's Forces". These sections were deleted at the adaptation prior to the transfer of power in. 1947, and were not replaced until 1950, when two new sections, viz., Nos. 232 and 233 were inserted in the Act, empowering the Governor-General to raise and maintain - Forces and Reserves, to grant Commissions in the Forces and Reserves, to appoint Commanders-in-Chief of the three Services, and to fix their emoluments, etc, These powers, , which of necessity are frequently exercised, thus derive from an Act of the

Constituent Assembly, viz., the Government of India (Second Amendment) Act, 1950, which was passed into law without the assent of the Governor- General.

The second instance I propose to cite is the Delimitation of Constituencies (Adult Franchise) Act, 1951, which was passed by the Constituent Assembly - in the same form. This Act was designed to extend adult franchise to the Provinces of Pakistan, and' provided for the necessary increase of - seats and readjustment of constituencies, on the basis of a report to be submitted by a Committee to be appointed to each Province where an election was to be held,' which Committee would be appointed by . the Central Government. That Government was empowered to amend and modify the scheme of delimitation proposed by- the Committee, . and the Governor-General was empowered, by order, to make consequential amendments in the Government of India (Provincial Legislative Assemblies) Order, 1936. So far as I am aware, action has been taken in regard to three Provinces, under powers derived from this Act, and consequential amendments have also been made in the appropriate schedule of the Government of India Act. " As a consequence, these Provinces, namely East Bengal, Sind and the N.- W. F. Province are today equipped with Legislative Assemblies elected on the basis of adult franchise, and so far as I am aware, these Assemblies have during their term already passed numerous laws of far- reaching effect, touching great numbers of citizens and a great many rights, in property and otherwise. All concerned, including the Provincial executive authorities, and the newly elected Legislatures themselves have acted throughout in the firm belief that they were doing so effectively.

I shall mention the third instance very briefly. Under the original Government 'of India Act, the Federation had power under List I, Item 1 of the Legislative Lists, to legislate on "preventive detention for reasons of State connected with defence or external affairs," while the Provinces had power under List II, Item 1, to legislate on "preventive detention for reasons connected with the maintenance of public order.". The division of powers being found inconvenient, the Government of India (Second Amendment) Act, 1952, was passed by the Constituent Assembly whereby in List I, Item 1, the relevant entry was altered so as to read "preventive detention for reasons of state connected with defence, external affairs, or the security of Pakistan or any part thereof", the relevant words in List II, Item 1 were deleted, and in their place a new entry was added in List III as Item 1- A, so as to come within the legislative competence of the Federation as well as the Provinces, which reads as follows : "Preventive detention for reasons connected with the maintenance of public order, or the maintenance of supplies and services essential to the community." The law did not receive the assent of the Governor- General, - but that it was initiated by the Federal Government is evident from the fact that in the same year, a comprehensive measure entitled the Security of Pakistan Act, 1952, was moved by that Government in the Federal Legislature, which took advantage of the access of power derived from the amendment of the Lists, to make necessary provisions "to deal with persons acting in a manner pre-judical to the defence, external affairs and , security of Pakistan, or. the maintenance of supplies and services essential for the community, or for the maintenance of public order". Here again was a matter touching the safety of Pakistan, on which the Federal Government might have been expected to act with the utmost circumspection. There can be no doubt that they did so, and the Court is indebted to the learned Advocate- General of Pakistan for the assurance that, throughout, the

Federal Government was in possession of the advice consistently given by the permanent .staff of the Law Ministry that assent was essential. The possibility of action per incuriam is ruled out conclusively.

The third great limb of the, State is the Judicature, and as was brought out in the course of the argument, the question has been before superior Courts in Pakistan on three occasions. The first was in early 1950, in the Sind Chief Court, in the case M. A. Khuhro v. The Federation of Pakistan (1950-51 FYC R 24=P L D 1950 F C 15) decided on 20th March, 1950. The appellant had been an original member of the Constituent Assembly of Pakistan, but by virtue of an order of disqualification made by the Governor-General under section 3 of the Public and Representative Offices (Disqualification) Act, 1949, he had been disqualified for three years for holding any political office, including membership of the Constituent Assembly. The other features of the case are not relevant for the purposes of the discussion. It will be sufficient to say that Mr. M. A. Khuhro raised squarely the contention that the Act under which he had been disqualified was invalid because it had not been assented to by ,the Governor-General. The Federation of Pakistan met the contention squarely by assenting that no such assent was necessary because the Act was passed by the Constituent Assembly sitting as a Constituent-making body and not as Federal Legislature. The Judge (Hassanally. Agha, J) held that no assent was necessary, and reference to the words in section 6 (3) "the Governor-General shall have full power to assent in His Majesty's name (the last four words were deleted by the Constituent Assembly in 1950 to any lava of the Legislature of the Dominion", he observed

"All that this clause says is that in cases where the assent of His Majesty may be necessary, it shall be given in His Majesty's name."

The attitude taken by the Federation of Pakistan in that case was the exact reverse of that presented before this Court. It was in complete accordance with the view of the Constituent Assembly with which, of course, the plaintiff Mr. M. A. Khuhro, who had been disqualified for membership, could not be expected to agree. The condition of the initiating, party in the next case, viz. Khan Iftikhar Husain Khan of Mamdot v. The Crown (P L D 1950 Sind 49) in this respect, was not productive of the same degree of antagonism: The case was decided on the 19th May, 1950. The Khan of Mamdot was an original member of the Constituent Assembly of Pakistan, and he too had been respondent in a case under the same Act as Mr. M. A. Khuhro. At the stage at which he brought his case before the Federal Court, there had been an equal division among the Judges of the Lahore High Court who had tried the case, as to the question ' of guilt on several charges and a Full Bench of the same Court had decided that the matter should be referred to a third Judge for final decision. .It was against the decision of the Full Bench that the Khan of Mamdot, who was still a member of the Constituent Assembly appealed to the Federal Court, through a very senior and experienced Advocate., Dr. Khalifa Shuja-ud-Din, Barister-at.Law' The Federation of Pakistan was represented at the hearing. The question of assent to the Public and Representative Offices (Disqualification) Act, 1949, was raised in the following form, viz :-

"The Act should have been passed, not by the Constituent Assembly, but by the Federal Legislature of Pakistan, and it should have received the assent of the Governor-Genenral of Pakistan in accordance with the provisions of the Government

of India Act. The Act, having been passed by the Constituent Assembly and not having received the assent of the Governor-General in accordance with the provisions . of the Government of India Act, was void and ultra vires . . . ."

The reply to the argument was that the Act was a "constitutional law" and "therefore, if fell within the purview of the words `for the purpose of making provision as to the Constitution of the Dominion', as they occur in subsection (1) of section 8 of the Independence Act, 1947." This argument was accepted by the Federal Court in full, and the appeal was accordingly dismissed. There are no words in the judgment of Sir Abdul Rashid (then Chief Justice of Pakistan) which amount to formulation of the proposition for which the petitioner contends, but the proposition necessarily follows from the conclusion that the appeal must fail, although there was no assent by - the Governor-General, because the law was a `constitutional law'. The absence of assent being prominently before the Court, the sufficiency of - the finding - that the law was a `constitutional law' to put the appellant out of Court, clearly leads to the inference drawn above.

The third case on the subject arose about four years later, also in the Federal Court. It is reported as ,ex-Major-General Akbar Khan and Faiz Ahmad Faiz v. The Crown (P L D 1955 F C 185) and was decided on the 21st December 1953. The appellants were two of the persons convicted in proceedings held under the Rawalpindi Conspiracy (Special Tribunal) Act, 1951, and were represented by an eminent English barrister with much experience of constitutional law cases, namely, Mr. D. N. Pritt, Q. C. Here also the argument put forward was that the Act under which the appellants had been tried and convicted needed assent because it related to the sphere of Federal legislation and the latter contention being negatived, by reason of the presence of a provision having. the effect of avoiding an appeal in the Federal Court, whose jurisdiction is a matter to be regulated by the Constitution, the appeal was dismissed. In both these cases, the argument that assent was necessary even' to a constitutional law, which arose in the most obvious manner, was not taken, and the Court in dealing with the two pronged argument that the decision of the Court below should be upset (1) because the law under which it was passed, was a law within the Federal sphere of legislation. and (2) because the law had not received the assent of the Governor-General, thought that a reply sufficient to defeat the argument was that the law was a constitutional law. By clear implication, it was held that assent was not ' non for a constitutional law. [I should add here that. since the First March, 1955, it has been laid down by this Court that it is not bound by its previous decisions; Criminal Appeal No. 50 of 1953, Anwar and Nawaz v. The Crown] (P L D 1954 F C 87). Thus, for the first seven years of Pakistan's existence, the three great limbs of this new "autonomous community exhibited complete harmony of view in regard to the point this'! Court is now called upon to decide. They had not reached their conclusions in any superficial way. Throughout there was awareness of the status of the country as a "Dominion" and of the existence of the link with the 'British Crown. In the case of Sarfaraz Khan (P L R 1950 Lab. 658 P L D 1950 Lah. 384) it appeared, among the relevant facts, that the Governor-General's assent had been given to the Punjab Public Safety Act, 1949, .in a form from which the words "in His Majesty's name" had been scored out. Shortly after, the Constitution Act was amended' by - the Constituent Assembly, wherever necessary, to exclude these words from provisions relating to the grant of assent by the Governor General and the Governors, thereby evincing an intention to retain the link at a purely nominal level.

These actions were plainly performed in compliance with a clearly- formed notice regarding the nature of the autonomy enjoyed by the country as an "Independent Dominion". They of indicate a determination to manifest freedom from everything M resembling control from without, and in that respect, they did no more than to confirm and continue that spirit which had inspired the people of the country in their struggle for independence which had achieved success in 1947. The autonomy of the country, its independent power to control its own affairs, both internal and external,. was embodied in the three great agencies of the State, the Constituent Assembly, the Executive, and the Judicature, and all three were agreed that the country was independent in all but name, and that they were entirely free to adopt their own methods, in regard to matters such as legislation, without reference to any practice prevailing elsewhere, and without suffering from any sense of obligation, as the price of their continuing membership of the Commonwealth, to follow any methods, or assume any ideology, except such as was found suitable to their own requirements. True, they had undertaken to perform their tasks in accordance with the Indian Independence Act and the adapted Government of India Act, but that was the initial step only, for the Constituent Assembly had sovereign legislative power; including power to alter these instruments, which in relation to the Government of India Act, was repeatedly mentioned in the Indian Independence Act. The interpretation of the latter Act too was now a purely domestic matter, in which no outside interference, or sense of obligation to any outside person, or State, or organisation of States, could compel the autonomous State of Pakistan in favour of one view rather than of another.

I conceive that the settled and complete unanimity on be the point now in dispute of the three major organs of the State is most properly to be regarded, from this point of view, as a manifestation of their conception of the country's autonomy, in the particular sphere. Such a temper accorded with the still active demand for complete independence. In assuming such a - temper, while accepting the appellation of an "independent Dominion" Pakistan need not have feared to involve itself in any inconsistency, or any behaviour such as might bring about its expulsion from the Commonwealth. For it was a "free association of free peoples", and the merest link with the British Crown was the sole necessary qualification for retention of membership. There was an example of a European nation, namely the people of the Irish Free State, who in 1947 continued to be accepted by the United Kingdom and the other Dominions as one of themselves despite having broken off, by unilateral act, nearly every possible link with the Crown. It could hardly have been expected, in the light of the views held at the time, that the great organs of the State of Pakistan, an Asiatic country, to which a degree of emancipation from every form of control exercisable by the British Sovereign or the British Parliament, had been accorded which far transcended anything previously granted to any of the senior self- governing Dominions, should, in regard to the question of assent to constitutional laws made by its Constituent Assembly, assume an attitude less resistant to controls from the old masters than was evinced by Ireland.

On this point, moreover, they could find direct support in the practice of the great American . Republic of the United States, a practice consistently followed since the year 1798. I refer once again to Cooley's Constitutional Limitations, Eighth Edition, at page 70, where the mode of amendment of the Constitution of the United States is dealt with, and it is said, in the simplest language-

"The submission of an amendment does not require the action of the President."

Two cases are cited- namely (Holingsworth v. , Virginia ((1789) U S S C R Lawyers Ed. 644) and Hawke v. Smith (1919 U S S C R 64 Lawyers Ed. 871). A clear statement of the opinions expressed in both these judgments appears from the following paragraph which I extract from the later judgment :-

"At an early day this Court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the 11th Amendment. 'Hollingsworth v. Virginia (3 Dall. 378 I L'Ed. 644). In that case it was contended that the amendment had not been proposed in the manner provided, in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1; section 7, of the Constitution. The Attorney General answered . that the case of amendment's is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution - investing the President with a qualified negative on the acts and resolutions of Congress. In , a footnote to this argument of the Attorney- General, Justice Chase said

"There can surely be no necessity to answer that .argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendment to the Constitution", The Court by a unanimous judgment held that the amendment was constitutionally adopted."

The Constituent Assembly too was a supra , legal body, not acting in its constitution- making capacity within the; Constitution. It was not to be presumed that, in this, capacity, its proceedings and decisions were subject to the qualified negative of the Governor- General, who was a statutory authority, owing existence to the interim Constitution.

This, then, was the situation on the 24th October, 1954, and it was only thereafter that, for the first time, the Federal Government of Pakistan raised the plea that all Constitutional Acts of the Constituent Assembly needed the Governor- General's assent. It is permissible, perhaps, at this stage, to refer to the argument ab inconvenienti, which arises naturally enough whenever a long course of legislative, administrative and judicial action has been based upon a certain view of law which is sought to be upset. Certain events have followed the pronouncement of the orders in this case, which necessitate - the exercise of great caution in making these comments, lest they may influence and perhaps confuse the decision of matters already pending before other Courts. I will content myself with citing a few extracts from Cooly's Constitutional Limitations, and from Crawford's Statutory Construction (Thomas Law Book Co. St. Louis, 1940).

At page 144 of Cooley's book, I find the following observations :-

"Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those - who had the . opportunity to understand the intention of

the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

Three passages from Crawford's book are relevant. At page 381, he says :-

"Where the meaning of a statute is in doubt, the Court may resort to contemporaneous construction- that is, the construction placed upon the statute by its contemporaries, at the time of its enactment and soon there after for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment, and acquiesced in- by the Courts arid the Legislature for a long period of time."

And, speaking of "departmental construction" which means "construction by the Executive Department", the learned author says at page 395 and page 399-

"And where vested rights have grown up under the departmental construction, the Courts are , justified in being more reluctant than in ordinary cases in adopting a construction which will destroy or disturb such rights."

" where the executive construction has been for a long time, an element of estoppel seems to be involved. Naturally, many rights will grow up in reliance upon the interpretation placed upon a. statute by those whose duty it is to execute it."

The kind of case to which these observations, in their terms apply, is however of importance far below that of the present case. The present is not a case where a mere "departmental construction", or even a judicial or legislative construction is. put forward, as a caution against lightly disturbing that which has been accepted and acted upon as settled law for a period, leading to development of vested rights. The rule . of stare decisis is altogether too small III its content to fit the case. Here, the greatest organs and agencies of the State have been consciously and unanimously holding a certain belief, and have been acting upon

it in numerous respects 'affecting the most fundamental right of the entire people. It is difficult to imagine a law which affects so large a proportion of the public a does a law designed to grant adult suffrage, and to determine the composition of Provincial Legislatures on that basis. The Delimitation of Constituencies (Adult Franchise) Act, 1951, was procured by the Federal Government, was passed by the Constituent Assembly, was put into operation by the combined labours of the Federal and Provincial Governments, and has borne fruit in the shape - of new Legislative Assemblies, which have been busy ever since passing new laws and in other ways, regulating the lives of the people. It is beyond conception to tabulate all the vested rights and interests which have developed in consequence of this law. And there are many other laws which have produced extensive effects, which cannot possibly be ascertained with exactness. These circumstances should, in my opinion, furnish an argument of almost insuperable character, in favour of upholding what has been the practice hitherto in regard to assent to constitutional laws.

I now take up for examination the final argument for the appellants, namely, that assent of the Governor- General is rendered essential by the formula appearing in section 6 (3) of the Indian Independence Act, viz.-

"The Governor- General of each of the new Dominions shall have full power to assent to any law of the Legislature of that Dominion "

The argument was supported by reference to section 5, which lays down that the Governor- General shall represent His Majesty for the purposes. of the government of the Dominions." It was said that by this simple formula His Majesty transferred all his Royal prerogatives to the Governor- General, including the prerogative of assent, which it thereafter became incumbent upon the Governor- General to employ, and upon the Legislature of the Dominion to seek. In my humble opinion, the argument is unsound, and for the following reasons. Assent is a matter which is not dealt with in any document issued to Governor- General of Dominions from His Majesty direct, except in relation to the question of reservation of Bills for His Majesty's own assent, when it finds place in the Instrument of Instructions. But in the Constitution of every Dominion, there are precise provisions relating to the presentation of Bills to the Governor- General for his assent, and for the action which he is to take thereon.

The Indian Independence Act, 1947, expressly deals with a, field of legislation, viz., constitutional legislation, lying outside the scope of the Government of India Act, 1935, in which .there was, as has been seen already, a specific provision relating to assent to Bills passed within the powers of the Federal Legislature. This provision was in the full terms already in use, since 1867, in relation to other Dominions. In 1947, when transferring additional legislative powers to the new Dominions the British Parliament were aware that express provision for assent was necessary in relation to laws made in exercise of these powers, if such assent was to be prescribed. The provision would have been in the nature of conveyance of His Majesty's prerogative, which in this respect had been placed at the disposal of the British Parliament. That Parliament chose to make the provision in the terms reproduced above from section. 6 (3). It is settled that when the British Sovereign parts with any of his prerogatives in the shape of a grant to a country with representative institutions, then unless there is an express reservation (which is not found here), the grant is final and cannot be revoked. (Sammut - v. Mrickland) (1). Therefore, section 5 cannot be referred to for enlarging the power which the words of sections 6 (3), Indian Independence Act, operate to convey.

I propose to examine the effect of those words in three parts, viz., firstly the words "shall have full power", secondly the words "any law" and lastly the words of the Legislature of the Dominion".

It , will not, I think be disputed that the words "shall have full power" convey no more than a power or capacity: I have already stated my opinion that the word . "full" signifies the withdrawal of pre- existing restraints, appearing tfie original the Government of India Act, 1935, and in. the Instrument of Instructions, etc. Indirectly, it may also be thought to indicate a variation from, and an improvement upon, the limited , powers conferred in the same respect by the Constitution Acts of the older Dominions. But I do not read it in any sense such as might impose obligations, besides conferring a capacity. It is one thing to enlarge a ' capacity to the utmost; it is

quite another thing to covert it into a duty. These words purport plainly and unambiguously to convey a power. The circumstances in which such words occurring in an English statute may be construed to impose a duty have been considered and passed upon by the House of Lords in the case of Jilivs v. Bishop of Oxford (5 Appeal Cases Page 214). Lord Cairns L. C. stated the matter in the following terms regarding the meaning of the words `,`It shall be lawful":-

"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty . or power, and they do not themselves confer more than a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for , whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so . . . . . And the words "It shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of. the case something which according to the principles I have mentioned,, creates this obligation.."

A little further on; the learned Lord Chancellor observed as follows:-

" the cases to which I have referred, appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

Similar views . were expressed by the other three noble Lords who heard the case. Lord Penzance said:-

"The conclusion then, at which I arrive is, that the Appellant has not established his case. The words `It shall be lawful' are permissive and enabling only. It devolved upon him 'to show that the Legislature intended the exercise of the power, thus conferred, to be a duty, in the performance of which the Bishop was not intended to have any discretion- ."

And Lord Blackburn observed:

"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

I am not aware that the construction thus placed upon words which are, in themselves, merely potential, or permissive or enabling, i.e., words which create a mere faculty or power, has been varied or departed from in any judgment of equivalent authority. It therefore becomes necessary to examine why the same Parliament, which in relation of the other Dominions, and even to India, had, in this respect always made the, most precise and specific provision, requiring that Bills when passed should be submitted to the Governor-General, who should either assent in His Majesty's name, or withhold

assent, or reserve the Bill for signification of His Majesty's pleasure, should on this occasion have,. elected to employ simpler language, conveying no more than a mere power of assent.

Two reasons stand out at once. The Constituent Assembly being designed to be a sovereign body and to exercise sovereign power, including power to alter the Constitution subject to which the Governor- General was intended to act, it would clearly be , inconsistent with that . design and purpose if the `qualified negative" of assent by the Governor- General were imposed upon its constitutional laws. Secondly, it being within the complete power of the Constituent Assembly to determine the Constitution of the "Legislature of the Dominion", or Union Legislature, and to determine the scope of its legislative competency as well the mode in which its laws should be enacted, the British Parliament could not" affect to prescribe the requirement of assent, as an essential formality, in respect of the laws made by such a Legislature. This would be to usurp the functions of the Constituent Assembly. To impose such a requirement upon laws of a constitutional nature made by the Constituent Assembly would be a direct affront to the position and authority of that body. Hence the careful use of expressions in section 8, Indian Independence Act, to indicate that the necessary powers of legislation should be exercisable by the Constituent Assembly. The words signify' the courtesy owed by one sovereign body to another. There was no direct imposition of obligations, but the need being indicated, it was indicated also that the Constituent Assembly, as previously agreed upon by the plenipotentiaries in the negotiations between the United Kingdom Government and the representatives of the Indian people, might fulfil the need.

I conceive that it was for these and possibly other similar reasons that a form of words was chosen which created no more than the power, without specifying the occasion and manner of its exercise. I do not agree that the words can mean that the British Parliament intended or assumed that assent was an essential requisite. I find it impossible to spell out, of the words used any obligation upon any Legislature, be it the Constituent Assembly acting as such or the "Legislature of the Dominion", to present the laws made by them, for assent ; that, in my opinion, must have been separately provided, to make it essential, and the absence of such provision, in the Indian Independence Act, when contrasted with its presence in the Government of India Act, 1935, and in the Constitutions of nearly all other British Possessions, having representative institutions, be they Dominions or merely Colonies or "realms and territories", strongly inclines me to the view that such prescription was deliberately avoided by the British Parliament, in view of the special conditions created by the Indian Independence Act, and otherwise, at the time when Pakistan came into being.

On this view the conception of an obligation resting on the Legislature in relation to the Governor- General cannot be thought to arise out of the terms of the section in the Indian Independence Act, whatever the condition might have been at a later date under the new Constitution, or under any provisions which the Constituent Assembly might have thought fit to make in respect of its constitutional laws. As has been pointed out above the Constituent Assembly, as early as May, 1948, formally recorded its considered will that its constitutional laws should become operative with no more formality than (a) the President's signature on a copy of the Bill, by way of authentication and (b) publication, in the Federal Government's Gazette under the

authority of the President. What right could then bethought to be effectuated by applying a compulsive effect to the disputed words of mere potentiality ? The argument of the appellants seemed to be that the right inhered in the Governor- General by virtue of his being the representative of His Majesty, and from the fact that. Pakistan was a Dominion.

I have already shown that section 5, Indian Independence Act, cannot operate to confer any right to grant assent beyond that conveyed by , the relevant words in section 6 (3). Therefore, to draw the right of assent from section 5 seems to me to be impossible. Moreover, the position of the Governor General was such that there was no power on earth which could compel him to exercise any power vested in him, unless it was or became coupled with a duty, as indicated in the case of Julius v: Bishop of Oxford (cited above), in which case recourse might perhaps be had to the Courts. For over seven years, the Governor- General had, despite advice being given by the permanent staff of the Law Ministry in the contrary sense, decided and acted on the basis that he did not possess any such right as that which was claimed for the first 'time in the present case. The sovereign body in the State, namely the Constituent Assembly, had declared to this effect, and the view was confirmed on three occasions by the highest Courts in the land.

To derive the right or duty from the. idea of Dominion Status seems to me an even more difficult operation. It may be entirely proper for a new member of a club to conform, as nearly as may be, to the manners and practices of the oldest and most influential members. That is the - part of wisdom, if the new member sets a value upon his membership. But the sanction thus conceived is a social or communal sanction ; it is entirely different from a legal sanction. Indeed, where the club is composed of "autonomous communities" the entire conception of communal sanctions being applied, through legal process, to enforce any kind of obligation in the 'discharge of domestic functions of any one member, is fallacious. The question of assent by the Governor- General to constitutional laws was purley a domestic matter for Pakistan to settle for itself ; and the three great limbs of the State had settled it, and were content with the settlement for seven years. No one in the club of Commonwealth countries had objected, or could object, to this practice. The club tolerated the greatest divergence of practice among its members and even of belief regarding the existence of any obligations whatsoever inter se among the members. When Pakistan, as a country whose people were intent upon securing their absolute independence, entered the club, there was among the members a country, namely Ireland, which had even renounced allegiance to the British Sovereign, and replaced the Governor- General by a President. Three years later, another republic, namely India was allowed to continue its membership, on a slightly altered basis. There was apparently no limit to which the members could not go, in regard to what were habitually thought, not many years ago, to be the basic essentials, for acquiring and retaining Dominion Status, without incurring the least danger of forfeiting that status.

In these circumstances, was it unnatural that the State of Pakistan should evince, from the date of its admission to membership, a clear intention and determination - to accept only the minimum possible obligations ? If that be granted it, seems to me. a very difficult proposition to suppose that the new State accepted, as a condition of membership, that all its laws would be subject to assent by the Governor- General.

Such ' an inference is the precise opposite of the definitive opinion which the State, through its three great organs, displayed in all its relevant actions over the first seven years of its existence. What they have been given to run was an autonomous State. not academy for the advancement of a particular school of political philosophy. it would be a denial o t e autonomy of a State of Pakistan to declare that its opinion in this matter was wrong.

It seems to me that to 'enforce the right of assent in favour of the Federal Government would come clearly in conflict with the principle of "approbation and reprobation". To enforce it in the interest of the community o nations known as the Commonwealth would be absurd, because, firstly, it was not regarded as a necessary qualification for membership of the community when Pakistan was admitted, and, secondly, it conflicts with the clear principle of, non- interference in the domestic affairs of an autonomous State. To enforce it, as an obligation arising out of the mere idea of Dominion Status, is to confer upon that idea a shape and a certitude which, if it ever existed, had quite definitely been blurred into vagueness by the toleration, at least since 1933, of widely variant practices and conditions among Dominion countries, in regard to the most essential features of their organisation.

The other two matters arising in respect of the relevant words in section 6 (3), Indian Independence Act, may be very briefly dealt with. The argument for the petitioner, Mr. , Tamiz- ud- Din Khan, that "any law" meant only such instruments as had already acquired legal effect is plainly unacceptable. In the context, "any law" must mean "any law requiring assent for it to become operative", i.e., any Bill passed by the "Legislature of the Dominion", which under any provision of law required to be presented to the Governor General for his assent, and to receive assent before it could) become operative.

As for the term "Legislature of the Dominion", I have already indicated my view that it cannot be, and was no p intended to be, regarded as equivalent, at any time, to the o Constituent Assembly. The mere provision, specific though it be, that certain powers stated in section 8 (1) of the Indian Independence Act to be powers of the "Legislature of the Dominion" were to be exercisable by the Constituent Assembly cannot operate to produce any such identity even for the limited purpose of these powers. The further provision in this subsection that "reference to the Legislature of the Dominion shall be construed accordingly" must be confined in its meaning and application, by the .earlier provision that the relevant powers were exercisable by another body. If the effect of section 8 (I) were to make the "Legislature of the Dominion" and the Constituent Assembly identical in all respects, in relation to the power of constitution- making, there would be no reason whatsoever for providing in section 8 (3) that limitations on the power of the "legislature of the Dominion" appearing in the Government of India Act should be deemed to .have the same effect as similar limitations imposed by a law of the - "Legislature of the Dominion" unless and until other provision is made by or in accordance with a, law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this section. The underlined words appear as they are in section 8 (3). 1 can only regard them as the clearest possible indication that the Constituent Assembly and the "legislature of the Dominion" were treated in the Act, and were intended by the British Parliament to be entirely distinct bodies. As I have pointed out already, one of the functions of the Constituent Assembly, in preparing the new Constitution, was

expected to be to provide the country with a "Legislature of the Dominion," if it was to remain a Dominion. An instance of a law to the British Parliament making the powers of one Legislature exercisable by another and wholly distinct Legislature, which the former was intended to replace in .due time, may be found in section 316 of the original Government of Indian Act, 1935. The two Legislatures in question were the Federal Legislature, for whose constitution specific provision was made under the Act of 1935, but which could not come into being until certain things were accomplished; and the "Indian Legislature" constituted under the Government of India Act, 1919, by whom the powers of the Federal Legislature, as specified in the Act of 1935 were. declared to be exercisable in the interim period. No one would suggest that by virtue of this provision, the "Indian Legislature" became the Federal Legislature.

As a consequence of my conclusion on this subject, it is unnecessary for me to pronounce upon the further question whether, in the absence- and seemingly studied absence- of expression in the relevant instruments, the British Sovereign, or the Governor- General must be deemed to be a part of the "Legislature of the Dominion". I consider, however, that there can be no possible doubt that neither the British Sovereign nor the Governor- General, as such, was a part of the Constituent Assembly.

The conclusion of this discussion enables me to reach and record my final decision, which is that on the most careful consideration of the matter of which I am capable, I cannot find that there is anything in section 6 (3), Indian Independence Act, or in the status of Pakistan as a Dominion which creates the obligation that all laws made by the Constituent Assembly, Q of a constitutional nature, require the assent of the Governor- Q General, for their validity and operation. On this view; the appeal would appear not to be concluded, but as . my Lord the Chief Justice and my brothers are of the contrary opinion, and as on the basis of that opinion, the appeal is indeed entitled to succeed, the result must be that the appeal be allowed, and the writ petition of Mr. Tamiz- ud- Din Khan being dismissed, the ' writs should be recalled. On the question of costs, I agree that in the circumstances of the case, each party should bear its own costs.

MUHAMMAD SHARIF, J.- I agree with my Lord the Chief Justice.

S. A. RAHMAN, J.: The material facts of this case have been sufficiently set out in the judgment of my Lord the Chief Justice and need not be reiterated. The only question that was argued in full before us is whether it was necessary for legislation passed by the Constituent Assembly to receive the assent of the Governor- General before it could be accorded the status of law. I find myself in respectful agreement with the reasoning of my Lord and the conclusions reached by him on that point. In view of the importance of the legal issues involved in the case, however, I am tempted to make a few observations of my own:

The question turns on the construction of section 6 of the Indian Independence Act, 1947, which created the two new independent Dominions of India and Pakistan. The provisions of that section have to be read, for that purpose, with those of sections 5 and 8 of the Act. Section 5 provides for the appointment of a Governor- General by His Majesty in each Dominion and declares that he shall represent His Majesty for the purposes of the Government of the Dominion. Section 6, inter alia, confers full

legislative sovereignty on the Legislature of each Dominion, inasmuch as it is authorised to pass laws repugnant to any existing or future Act of - the British Parliament (including the Indian Independence Ac itself) or any order, rule or regulation passed thereunder. The power thus conferred is expressly extended to include the power to repeal or amend any such Act, order, etc., and to the making of laws limiting for the future the powers of the Legislature of the Dominion thus .permitting the setting up of a federal type of Constitution. By subsection (3) of this section, full power to assent to any law of the Legislature of the Dominion is vested in the Governor- General and it is added that so much of any Act "as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until such signification, shall not apply to laws of the Legislature of the Dominion". Legislative autonomy of the Dominion is further ensured by providing in subsections (4) and (5) of this section that no Act of the British Parliament, on order or rule; etc., promulgated under such Act and no Order- in- Council made on or after the 15th of August 1947, shall extend or be deemed to extend to either Dominion, as part of its law, unless so extended by a law of the Legislature of the Dominion itself. Section 8 of the Act makes temporary provision for the Government of each of the new Dominion. Subsection (1) of this section lays down that the powers of the Legislature of the Dominion referred to in section 6, shall be exercisable, in the first instance, by the Constituent Assembly of the Dominion, for the purpose of making provision as to the constitution of the Dominion and references in the Act to the Legislature of the Dominion are required to be construed accordingly. Subject to laws thus made by the Constituent Assembly and the provisions of the Indian Independence Act, the government of 'the Dominion is to be carried on by virtue of subsection (2), in accordance with the Government of India Act, 1935, and the Orders- in- Council, rules, etc., made thereunder, so far as applicable, with such adaptations and modifications as may be 'specified by the Governor- General under section 9 of the Act. The provisions requiring the Governor- General or any Governor ' to act in his discretion or in his individual judgment in respect of any matter, were to cease to have any effect, all control by His Majesty's Government was removed and the necessity of reserving Provincial Bills for the signification of His Majesty's pleasure was done away with. The powers of the Federal Legislature or Indian Legislature under the Government - of India Act, 1935, as in force in relation to each Dominion, were, , in the first instance, made exercise able by the Constituent Assembly, in addition to the powers referred to in subsection (1) of section 8. The limitations placed by the adapted Government of India Act, 1935, on the legislative powers of the Dominion Legislature (which must be understood to mean the Federal or Indian Legislature in this context) were to have effect as a restrictive law of the Legislature of the Dominion, within the meaning of subsection (6) of- section 6 of the Indian Independence Act.

It is suggested on behalf of the respondent that subsection (3) of section 6 of the Indian Independence Act should be so interpreted as to equate the expression "Legislature of the Dominion" occurring therein, ,with the Federal Legislature functioning under the adapted- Government of India Act, 1935, and that it should be held that the subsection was merely intended to give the Governor- General plenary powers of assent within the limited legislative field of the latter Act.

The - position seems to me to be untenable on several grounds. If that had been the sole object aimed at, it could have been effectively achieved without using the general words "full power to assent to any law of the Legislature of that Dominion, in the first part of the subsection and by merely enacting the subsequent part of the subsection beginning with the words "so much of an Act. The argument raised - imputes a redundancy to the British Parliament without . any apparent necessity. The interpretation ,contended for would cut down the generality of the words in the beginning of the subsection and impose a limitation on them, to be imported from the latter part of the subsection, a procedure not warranted by the context! Again, it should . have been easy enough to use the words "Federal Legislature" instead of the comprehensive expression "Legislature of the Dominion" and thus to have ensured perfect clarity, if the intention sought to be read into this subsection was the correct one.

It is clear that at the time of the passing of the' Indian Independence Act or even on the Appointed Day, no Legislature of the Dominion, envisaged in section 6 of the Act, actually existed. Mr. Chundrigar conceded at the Bar that the relevant expression occurring in this section would cover the future Legislature of the Dominion which the framers of the Act anticipated, was likely to be set .up under .the new, constitutional provision to be made by the Constituent Assembly under subsection (1) of section 6 read with subsection (I) of section 8 of the Act. It was further admitted as is also apparent from the plain language of section 6, that such a Legislature would be competent to pass laws including constitutional laws and that if subsection (3) was allowed to stand in its present form, the subsection would subject ail such laws to the necessity of assent by the Governor- General. For the interim period, however, while the Provisional Constitution embodied in, the adapted Government of India Act, 1935, and the Indian Independence Act, 1947, is in force, it was contended, the position was different qua the Constituent Assembly. The argument was raised that though subsection (1) of section 8 made the constitution- making powers included in subsection (1) of section 6, exercisable in the first instance (the phrase "in the first instance" needs to be specifically emphasised in this connection) by the Constituent Assembly, the latter body was not identifiable with the "Legislature of the Dominion" within the meaning of subsection (3) of section 6. A similar formula contained, in proviso (e) to subsection (2) of section 8, makes the powers of the Federal Legislature or Indian Legislature, exercisable in the first instance by the same Constituent Assembly. After, a comparison of sections 6 and 8, the inference seems to be irresistible that during the interregnum prior to the promulgation of a fresh constitution the Constituent Assembly in fact functions as the Legislature of the Dominion. It is only thus that full meaning can be given to the words of subsection (1) of section "references in this Act to the Legislature of the Dominion shall be construed accordingly" and to the provision contained in subsection (3) of section 8. The plenary law- making powers of Legislature of the Dominion mentioned in section 6 had to be divided into two compartments for the transitional period, in order to keep the legislative machinery of the Government of India Act, 1935, working order, with all its limitations, side by side with the enactment of a new Constitution. For the purpose of functioning as the Federal Legislature under the Government of India Act, 1935, the Constituent Assembly as the Legislature of the Dominion; should be deemed to have placed the incident limitations on itself, under the provisions of subsection (6) of section 6 read with subsection (3) of section 8. I confess I am unable to follow the process of reasoning which seeks to give a different meaning to

"Legislature of the Dominion" occurring in subsection (3) from that possessed by the expression in other subsections of section 6. The attempt seems to be directed towards investing the Constituent Assembly 'with all the powers under section 6, without attracting the restriction (if restriction it really be) regarding assent, provided for in the same section. The two submissions made that subsection (3) is confined to the Federal Legislature functioning under the Government of India Act, 1935, and that the subsection would also be applicable to laws passed by the future Legislature of the Dominion, appear to me to be mutually contradictory. The word `law' or laws' used in subsection (3) obviously includes - laws of a constitutional character as a reading, of the whole of section 6 shows and must clearly mean enactments passed by the Legislature and awaiting assent of competent authority.

The mere absence of an express provision included in the Indian Independence Act for Bills being presented to the Governor- General for assent, after being passed by the Constituent Assembly when sitting as the Legislature of the Dominion to frame the Constitution and the fact that discretion to withhold assent is not specifically mentioned, though provision to that effect .exists in the Government of India Act, 1935, or in the Constitutions of other Dominions, strike me as of no material significance. The words "full power" amply connote discretion to give or withhold assent, beside indicatings freedom from extraneous control, in full measure. The presumption is implicit in the subsection that all, such laws shall be submitted to the Governor- General for his assent.

It seems to me that the attitude, adopted on behalf of the respondent rests on the fallacious premise that the prescription of the formality of assent for laws passed by the Constituent Assembly, would detract from the legislative ,sovereignty of that body, undoubtedly conferred on it by the Indian Independence Act. In the background of this attitude there appears to lurk the spectre of a full sovereignty, not merely in the legislative field but in all spheres, claimed for the, Constituent Assembly, somewhat feebly, it is true, at one stage of the arguments: That the Constituent Assembly is not sovereign in the full sense of the term, it was later admitted. What was not realised was that the - provision regarding assent should not be regarded as a clog on the legislative sovereignty of that body, in the context of an "Independent Dominion" free from all control by His Majesty's Government in England. The Governor- General of such a Dominion is no doubt formally appointed by His Majesty but in effect the appointment rests with the responsible Ministry whose advice would, as a matter of settled convention, be accepted in all cases by the King or Queen. The Ministry would have the means, for the same reason, of arranging the recall of a Governor- General who intended to flout their wishes in any matter. This aspect of the case has been exhaustively dealt with in the judgment of my Lord the Chief Justice and I need not labour the point further. '

A reference to the history of prerogative of the Crown in England would also lend support to the conclusion that the above interpretation of subsection (3) of section 6 is correct. In my humble judgment, no other construction of 'that subsection would be acceptable and I only wish to draw additional strength for this construction from a consideration of the constitutional history of England. Assent to legislation is one of the most important prerogatives of the Crown in England, There is also ample authority for the proposition that the prerogative of the Crown extends to the Colonies and Dominions of His Majesty beyond the Seas. See Halsbury's Law's of England,

2nd Edition, Volume VI, page 445, paragraph 513 ; New Brunswick case (1892 A C 437 (at page - 441)), and Re Bateman's Trust (IS E C 355). Only express words or necessary intendment of a statute can take away a . prerogative and the presumption would be against such a result. Reference in this connection may be made to British Coal Corporation v. King (1935 A C 500) and Mayor of Weymouth's case (141 R R 392). I can discover nothing in the Indian Independence Act which could support the plea of express or implied abrogation of the prerogative of assent in the case of laws enacted by the Constituent Assembly sitting as the Legislature of the Dominion to frame the Constitution. On the other hand, a reading of section 5 and 6 together would lead to the inference that henceforth the prerogative, of the Crown as respects assent, would, in the case of each new Dominion, be exercised by the Governor- General as T representing His Majesty. Allegiance to the Crown, however tenuous the bond may in practice turn out to be, is an essential incident of Dominion Status. Nothing seems to turn in this connection on the form of the oath taken by the Governor-General or by members of the Provincial Legislatures in Pakistan or on the form of the Royal Style and Titles adopted in this country. This position would continue to hold good in Pakistan as long as it is a Dominion, 'albeit an "Independent Dominion", unless of course it is altered by a proper constitutional provision. From the expression "Independent Dominion", merely constitutional autonomy and not full political' sovereignty in the legal sense, can be spelt out, though the latter status would . be potentially within the Dominion Legislature's grasp.

The doctrine of "Departmental Construction" applied by American Courts to the interpretation of the Statutes, was also sought to be pressed into service on . behalf of the .respondent, to favour a particular construction of subsection (3) of section 6 of the Indian Independence Act. Reliance was placed or rule 62 of the rules of procedure framed by the Constituent Assembly, of Pakistan and the practice that has been followed hitherto, of not submitting laws passed by the Constituent Assembly to the Governor- General for his assent. These - facts were, however, not advanced as raising the bar of estoppel against any party. Even in America the rule is not regarded as conclusive and is obviously available only to resolve doubts in cases where the language used in a statute is equivocal. The present does not appear to me to fall in that category of cases. As long ago as 1889, Lord Esher laid down the rule in Sharpe v. Wakefield (22 Q B D 239 (242)) that an Act ought to construed as it would have been the day after Act was passed, unless some subsequent statute declares that another construction was to be adopted. It must follow as a corollary that the subsequent conduct of any functionaries in purported pursuance of an Act, would not be decisive of the interpretation to be placed on the statute. A practice in contravention of a constitutional provision contained in a statute can never abrogate or repeal a rule of strict law, with which alone the Courts are concerned- See Disallowance and Reservation References (1938 S C R 71), and The Statute of Westminster and Dominion Statute ; 1949 Edition, by K. C. Wheare, pages 18 and 292. It is doubtful if the practice or usage mentioned has hardened into an obligatory constitutional convention. Even if that were the position, it would require to be translated into or supplemented by a statute, if it is to be recognised by Courts (K. C. Wheare s Book, page 18 et seq). As has been pointed out by my Lord the Chief Justice, rule 62 of the Constituent Assembly rules, is not really in conflict with the provisions, of subsection (3) of section 6 of the Indian Independence Act and, in any case, it does not operate to effect the necessary constitutional amendment, eve- n under the rules of that body, which prescribe a specific procedure for constitutional legislation.

Finally I am not impressed by the argument which seems have found favour with some of the learned Judges of the Sind Chief Court that the omission to deal with the question of assent in earlier cases amounts to an indirect decision on that point. Every case is aft authority for the point or points actually decided by it ether expressly or by necessary implication and no more. The point was not expressly raised or decided in those cases and I can find little in them to support the theory of an implied decision. The only precedent which deals directly with the point is Khuhro's case (P L D 1950 Sind 49) in which a learned Single Judge of the Sind Chief Court held that no assent was required under the law, for legislation passed by the Constituent Assembly. The ratio decidendi in that case was the assumption of unfettered legislative power possessed by the Constituent Assembly and the relevant provisions of the Indian Independence Act were not fully examined.

A. H. Appeal accepted.