JUDGMENT

Constantine, C. J. – On 24th October 1954. His Excellency the Governor-General issued a proclamation which my learned brothers Vellani and Muhammad Bakhsh have set out in full.

In pursuance of the proclamation the cabinet was reconstituted respondents 4, 5, 7, 8 and 10 not being members of the Constituent Assembly. The petitioner was informed by respondent 4 that the Constituent Assembly had been dissolved, and the Constituent Assembly was prevented from meeting. The petitioner as President of the Constituent Assembly prays for writ of *mandamus* and *quo warranto.*

(i) to restrain the respondents from giving effect to the proclamation and from obstructing the petitioner in the exercise of his functions and duties as President.

(ii) to determine the validity of the appointment as ministers of respondents 2 to 10.

The facts are not in dispute.

The respondents rely on objections both preliminary and as to the merits.

The first preliminary objection is that any constitutional provision requires not only passing by the constituent Assembly, but also assents by the Governor-General as conditions of the valid enactment: this assent being absent, section 223-A of the Government of India Act fails and with it fails the writ jurisdiction which it purports to limits the discretion of the India Act, which purports to limits the discretion of the Governor-General in his choice of ministers, and the objection thus also pertains to the merits of the prayer for a writ of *quo warranto.*

The validity of laws enacted by the constituent Assembly has been tested in the Courts of Pakistan, including the Federal Court. Only once has this objection been argued upon section 6 (3) of the Indian Independence Act. Many Acts spread over the period since partition have been passed noticed that what I may call the Privy Council Jurisdiction of the federal court rests upon law enacted by the constituent Assembly. It seems obviously presumable that until the present petition, the law officers of the crown considered assent not necessary. The objection is novel, and if accepted would upset a consistent course of practice and understanding.

The learned Advocate-General relied both upon prerogative and section 6 (3) of the Indian Independence Act, 1947 and I will deal with the latter first.

The preamble of the Independence Act is as follows:

To make provision for the setting in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those dominions, and to provide for other matters consequently on or connected with the setting up of those Dominions.

Section 1 provides for the setting up of the two independent Dominions of India and Pakistan. Sections 2, 3 and 4 provide for the divisions of British India between the two new Dominions. Section 5 provides for appointment by Her majesty of a Governor-General who shall represent Her majesty for the purposes of the Government Majesty's Government in the United Kingdom abdicated power and responsibility over the new Dominions. By section 6 the legislatures of the new dominions shall have full power to make laws repugnant to the law of England and any Act for parliament, while parliament it self abandons its power to assent (in His Majesty's name) to any law of the legislature of the Dominions and provisions as to disallowance or reservation in any Act shall cease to apply to the new dominions, pausing here, it should be noted that the words "in His Majesty's name" were deleted by Act of the constituent Assembly from this subsection and also from section 18 of the Government of India Act in 1950 with retrospective effect , but for the purposes of the learned Advocate-General's argument (which would invalidate the amending Act) the deletion is to be ignored.

After these abdicatory sections we reach in section 8 the temporary provisions as to government 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 and references in this Act to the Legislature of the Dominion shall be except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly, subject to certain express provisos and the power under section 9 of the Governor General limited to a time which has now expired to amend the Government of India Act. The important relevant provisos were the elimination of any control of His Majesty's Government in the United Kingdom, of discretion and individual judgment of the Governor-General and Governors, and of reservation and disallowance of provincial legislation and lastly that the powers of the federal legislature should in the first instance be exercisable by constituent Assembly in addition to the powers exercisable by it in subsection (1) sections 10,

11, 12, 13 and section 14 contain particular provisions regarding the various services. Section 15 deals with litigation by or against the secretary of state, section 16 with Aden and section 17 with divorce jurisdiction. Section 18 provides *inter alia* for the continuance of the existing law of British India except in so far as altered by competent authority, and for lapse of the Instruments of instructions. Section 19 is an interpretation section and in particular subsection (3) provides that in relation to Pakistan references to the Constituent Assembly shall be construed as references to the assembly set up or about to be set up at the date of the passing of this Act under the assembly to make provisions for representation in the Assembly of Indian States and tribal areas and filling of casual vacancies: an amendment by the Assembly gives power to it to increase, reduce or redistribute seats therein.

The key to interpretation of the Act is provided by the preamble-the independence of Pakistan. The purpose of section 6 is to efface the supremacy of parliament in the United Kingdom and to confer power, unfettered by any control from the United Kingdom, upon the legislature of the dominion. The legislature of the dominion has not been defined but the wording in subsections (1) of section 8 shows that it is not restricted to the Constituent Assembly, but refers to future legislative bodies, and further that the legislature of a dominion is not restricted to make provision as to the constitution. The federal legislature until other provision is made by the Assembly is also part of the legislature of a dominion. This is consistent with subsection (3) of section 8 which provides that any provision of the government of India Act which limits the power of the legislature of the dominion shall have the like effect as a law of the legislature of the dominion limiting for the future the powers of that legislature. I think that the use of a small or a capital letter in the word "Legislature" is irrelevant.

Legislature of the dominion appears thus to be comprehensive term, embracing every legislature which has power to legislate for the dominion as a whole whether its power is derived from the Independence Act or from the future legislation of the Constituent Assembly, and whether its power is restricted to or does not extend to the making of constitutional laws.

When we turn to subsection (3) of section 6 we find that the Governor General's full power to assent is accompanied by deletion of disallowance, reservation and suspension and in my opinion the purport of the section is to provide that the Governor General's power of assent is not to be controlled by Her Majesty: this is in keeping with the key to interpretation provided by the preamble-

the declaration of independence and with the purport of sections 5, 6, and 7 the abdication of all control by the crown, parliament and Government of the United Kingdom. Agha J., held subsection (3) does not provide that assent is necessary but that if assent is necessary the Governor General shall have the full power. The necessity of assent was retained in the Government of India Act in respect of the federal legislation: no corresponding provision necessitating consent in respect of the Constituent Assembly was inserted in the Independence Act.

The crown in exercise of the prerogative may legislate for conquered or ceded territories of the crown, but the prerogative is subject to legislation by parliament binding the crown by express words or necessary implication. The legislature of the dominion is given full powers to make laws for the Dominion is given full powers for the purpose of making provision as to the constitution of the Dominion are exercisable by the constituent Assembly. The Crown is not named as sharing in those powers and the clear implication is that the Crown is excluded.

Section 10 of the Government of India Act substituted by the Government of India (5^{th} Amendment) Act 1954 is thus valid and it follows that *prima facie* those respondents who were not members of the federal legislature have been illegally appointed as Ministers. After a faint attempt at argument by Mr. Pitt who had not time to study the various notifications were saved by the new section 10-A. for the opponents it was argued that the legislature being dissolved it was impossible to appoint Ministers from the Legislature: that may be so but no attempt has been made to show that Government could not continue without appointment of fresh Ministers.

That sections 223-A if valid confers upon this Court, the power to issue writs in the nature of quo warranto is disputed. The learned Advocate General argued that the writ can issue only at the instance of the Crown: and not against persons appointed to office by the Crown; this argument was advanced by the Attorney General and rejected by the King's Bench Division, Lord Reading presiding in Speyer's case.

The Advocate-General argued from the *Palikamedi case* that where the subject matter falls beyond the local limits of the High Court's jurisdiction, this court has no power to issue a writ. Now that Privy Council case was considered with the jurisdiction of the Supreme Court to issue a writ of *certiorari*. The Supreme Court's local jurisdiction was confined to Madras city: the Sadar Diwani Adalat exercised jurisdiction over the *mofussil* and had not the power to issue such writs. The power to issue such writs was confined to the High Courts of the

Presidency Towns. Therefore the Privy Council held that the mere location of the Board of Revenue inside the city. Now, however section 223-A has covered the whole area of the dominion (excluding acceding states) with writ jurisdiction divided between the High Courts: the only condition is that the person of authority to whom the writ is issued shall be within the local jurisdiction of the High Court then now issue writs where the authority is within such a point English Law provides no guidance: for its is clear that Central Ministers even if their jurisdiction within Sind and Karachi.

I would therefore issue a writ in the nature of *quo warranto* against respondents 4, 5, 7, 8 and 10.

The proclamation has been accepted by the parties as purporting to dissolve the Constituent Assembly. Has the Governor General the power to dissolve the Assembly? This question is res integra. The opponents based the power on prerogative and upon the statutory power which they argue is conferred by section 19 (3) (b) of the Independence Act. The Governor General by order under section 9 amended the Government of India Act so as to deprive the Governor General of the power to dissolve the Federal Legislature while retaining the power to summon and prorogue. The independence Act is silent regarding summoning, proroguing or dissolving the Constituent Assembly. By rule 9 of the rules of procedure, the President is given the power to summon and prorogue: dissolution according to rule 15 is possible only by resolution assented to by at least two-thirds of the assembly. It is argued by the petitioner that the power to dissolve the federal legislature therefore the Federal Legislature's dissolution would automatically accompany the dissolution of the Assembly and therefore it was inappropriate to retain any provision for the dissolution of the Federal Legislature and therefore the omission of the Governor General's power to dissolve the Federal legislature does not support any inference that the Governor General has no power to dissolve the Assembly. I consider that the opponents arguments is correct to this extent that from the taking away of the power to dissolve the Federal Legislature no inference is deducible as to the presence or absence of the power to dissolve the Constituent Assembly: for suppose that the independence Act had expressly stated that the Governor General has no power to dissolve the Constituent Assembly and alternatively suppose such power had been expressly given, yet in either case it would have been appropriate to given yet in either case it would have been appropriate to take away the power to dissolve the Federal Legislature. The Indian Independence Act contains no express provision for dissolution of the Assembly.

Judging by rule 15 and by the proclamation it appears common ground that both the Assembly and the Governor General considered that the Assembly was subject to dissolution. Did Parliament intend that it should be subject to dissolution? Through out the commonwealth the membership of every representative Legislature is renewable in order that it may more faithfully represent the opinion of those whom it represents: on the other hand, as the very name shows, a constituent assembly is created for particular and temporary purpose of framing a constitution, and it is arguable with equal plausibility that to effect this purpose was not expected by Parliament to take a long time and that the effecting of the purpose that is the framing of a constitution would ipso facto achieve the suppression of the temporary legislature which had framed the new constitution by the permanent Legislature for which the new constitution would provide. Now in England the dissolution of the Parliament is a matter of prerogative (Hal 2nd Ed, Vol. VI is a creature of the common law. Where Legislatures have been created by statue, dissolution has been provided for by statue. (Hence the contrasting omission is independence Act appears deliberate). There is no case throughout the Commonwealth outside England where dissolution of a Legislature takes place except by express or rider in council. The prerogative of dissolution in my opinion extends only to the parliament of the United Kingdom: elsewhere dissolution is dependent upon statue or order in council.

The learned Advocate General relied upon section 19 (3) (b) which reads "References in the 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". This provision he argues, it is to be construed according to the section 32 (1) and 92) of the Interpretation Act, 1889 (52 and 53 Vict. c. 63); (1) where an Act … confers a power ….. Then unless the contrary intention appears the power may be exercised … from time to time as occasion occurs.

(2) When an Act … confers a power…. On the holder of an office, as such than unless the contrary intention appears, the power may be exercised …. by the holder for the time being of the office." Here however a contrary intention appears limiting the power of the Governor General to the period namely about the date of the passing of the Act.

It follows, therefore, that the Constituent Assembly's purported dissolution is a nullity in law, and that both it and the office of its President are still existent. It

is common ground that as a result of the proclamation the petitioner has been prevented from performing the functions of his (un-doubted public) office. We have the power to issue writs against any Government, and that Government for this purpose includes the Federation of Pakistan appears undeniable. Section 306 of the government of India Act confers a personal immunity upon the Governor General: it does not limit the scope of proceeding against "Government" which expression in the case of the Federation of Pakistan corresponds to the executive authority of the Federation of Pakistan corresponds to the executive authority of the Federation exercised by the Governor General either generally directly or through officers subordinate to him. That where an incumbent of a public office has been wrongfully dispossessing him is clear from Rex, v. Blooer (1).

I would therefore issue a writ of mandamus restraining the respondents from preventing the petitioner from performing the functions of his office of President of the Constituent Assembly.

I would order the opponents to bear the costs of the petitioner.

VELLANI, J-19th February, 1955).-This is a petition by Maulvi Tamizuddin Khan, President of the Constituent Assembly of Pakistan, for a writ of mandamus against the ten respondents (the 11th having been dropped) restraining them from giving effect to the proclamation of the Governor General dated 24th October 1954 and from interfering with General dated 24th October 1954 and from interfering with or obstructing the petitioner in the exercise of his functions and duties as the President of the Constituent Assembly and for a writ of quo warranto against respondents 2-10 whose appointments as Members of the council of the Government of India (Fifth Amendment) Act, 1954 which was passed by the Constituent Assembly on 21st September 1954.

The Governor General's proclamation dated 24th October 1954 reads as follows:-

"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 the 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 a fresh. 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."

On 25th October, 1954, the Governor General appointed respondents 4, 5, 8, 9 and 10 to be Members of his Council of Ministers. The same day, the Governor General was "pleased to reconstitute with effect on and from the afternoon of the 24th October 1954, his Council of Ministers, as a result of the declaration of emergency in the country". Including the respondents 2 and 3 making in all 8 Ministers and distributed the portfolios amongst them. On the 28th October 1954, the Governor General appointed respondents 7 to be Minster.

Various pleas have been raised by way of preliminary objections, but not all of them go to the root of the case. On the other hand, the contentions on the merits are so vital that it is convenient to deal with them first, leaving the preliminary objections to be considered thereafter.

The questions involved in the merits of the petition are questions mainly of interpretation of statutory provisions of a written constitution that is to say of the Government of India Act 1935 and the Indian Independence Act 1947.

Part 2 of the Government of India Act, 1935 relating to the establishment of the federation of India never came into effect for it envisaged accession of Indian states which never materialized. On the appointed day, therefore, a Federation of the provinces had to be created in each of the new dominions. There was no Federal Legislature in existence.

There was in existence however, a Constituent Assembly for the whole of India elected by members of Provincial legislatures and this was converted by means unnecessary to trace here into two Constituent Assemblies one for India and other for Pakistan. The special task of the Constituent Assembly was to frame the constitution of the Dominion and till it had done so, it was to exercise the powers of the Federal Legislature as well.

The function of the Federal Legislature was to make laws as to matters enumerated in the Federal and Concurrent Legislative Lists and in emergency or by consent of provinces in the Provincial Legislative list. It was a subordinate and not a Sovereign Legislature for its powers was limited and it was subject to the

legislation of the Westminster Parliament. The power and duty of framing a constitution and bringing it into force which are unmistakable attributes of sovereignty, were placed in the Constituent Assembly and it was given the ancillary power which only the King and the Westminster Parliament had of amending or repealing the Government India Act and even the Indian Independence Act. In addition to these sovereign powers the limited powers of the Federal Legislature were made exercisable by the Constituent Assembly of the Dominion. These two categories of power, however, remained distinct, the powers of the Federal Legislature being governed by the Government of India Act, 1935 and powers of the Constituent Assembly being governed by the Indian Independence Act.

Under section 8 of the Government of India Act the executive authority of the federation extends to the matter with respect to which the Federal Legislature has power to make laws, while section 7 of that Act requires the executive laws, while section 7 of that act requires the Executive Authority of the Federation to be constructed as references to his powers and duties in the exercise of the executive authority of the federation and to any other powers and duties conferred imposed upon him as Governor General by or under the Act. Under section 9 of the Act there is to be a council of ministers to aid advice the Governor General but till the amendment of that section by the Constituent Assembly on 21st September, 1954 there was no specific provision making ministerial advice binding on the Governor General, therefore exercises the executive authority of the Federation in regard to matters which are authority of the Federation legislative field and as matter of law could not be compelled to act on the ministerial advice though he might consider himself bound in propriety to do or impelled to do so by the consideration of his possible removal by the Queen. This was then the position of the Governor General under the Constituent Assembly amended section 9 of the act to make the advice binding upon him.

Section 5 of the Indian independence Act says 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 new Dominions is to be governed as nearly as may be in accordance with the government of India Act, 1935 subject, however, to the express provisions of the Act and the adaptations made by order of the Governor General under section 9 of the Act. The word “government” in section 5 and the word “governed” in section 8, subsection (2) of the Act are but grammatical variations of the word “govern”

and the one ought not to be construed in a wider or different sense or connotation from the other except fro good reason. No such reason appears and none has been suggested. It follows therefore that the Governor General represents His Majesty for the purposes of the government of the Dominion in accordance with the Government of India Act and not generally that is to say for all purposes. The precise specification of the purpose in express enactment shuts the door to further implication and reference may usefully be made to the observations of the Lord Dunedin in Whitman v. Sadler (1).

Prior to the Indian Independence Act, 1947, the Governor General did not represent His Majesty generally. Under section 2, subsection (1) of the Government of India Act, 1935, all rights authority and jurisdiction relating to the government of territories in India were exercisable by His Majesty by a commission under the Royal Sign Manual and was to have such powers and duties as are conferred or imposed on him by or under the Act and such other powers as his Majesty may be pleased to assign to him. The extent to which the Governor General represented His Majesty was ascertainable from the provisions of the Government of India Act and the terms of the commission.

Without considering the position of the Governor General under the prior Indian constituent Acts it is sufficient held in England not to be a Viceroy or Quasi-Viceroy but to represent His majesty only in so far as the commission of his appointment authorities him and for this principle reference may be made to Musgrave v. Pulido (2), where the Privy Council has reviewed prior cases. In Bonanza Creek Gold mining company limited v. Pulido as lying down, "that in the case of a Crown colony, the commission of the Governor must in each case be the measure of his executive authority", and said that this principle "in such a case that of a self governing dominion like Canada might find his analogy in terms not only of the commission but of the statue creating the constitution". To the same effect is the decision of Privy Council Commercial Cable Company v. the Government of Newfoundland (4).

It has been argued that apart from the section 5 of the Indian Independence Act the Governor General has and can exercise His Majesty's prerogative to dissolve the Constituent Assembly because the Constituent Assembly is a legislature and the Indian Independence Act leaves that prerogative of his Majesty unaffected by its provisions. The argument, however, cannot has apart form session 5, because if the Governor General has that prerogative, he has it by virtue only of being His Majesty's representative. That representation has been limited by

express words for the purpose of the government of the Dominion" and the limitation shuts the door to further implication.

1) (1910) A C 514, 527:79 L J K B 1050, 1057
2) (1879) 5 A 102: 41 L T R 629
3) (1916) 1 C 566: 114 L T R 765, 771 (P C)
4) (1916) 2 A C 610, 616:115 L T R 574

In Bonanza Creek Gold Mining Company Limited v. The King Lord Sumner in dealing with the argument that in Canada, "The Governor General and the Lieutenant – Governors of the provinces expecting so far as the Royal prerogative has been reserved expressly or by a necessary implication have the right to exercise them as though by implication completely handled over and distributed in such a fashion as to cover the whole of the fields to which the Self-Government of Canada extends", observed: -

"For a Constitution granted to a Dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative and the British North America act from beginning to end deals with matters of prerogative for the most part without expressly naming the Sovereign".

In Attorney General v. De Keyser's Hotel (1) H. L. Lord Atkinson says, "That after the statute has been passed and while it is in force the thing it empowers the Crown to do can thenceforth only be done by and under the statue and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may therefore have been." In Moors v. Attorney General for the Irish Free State (2) Viscount Sankey L. C. while dealing with the effect of the removal of an amending Act of the Parliament of the Southern Ireland of the proviso of Article 66 of the Constitution of that Dominion which after the decisions of the Supreme Court had been declared final and conclusive by Article 66, declared that nothing in the constitution shall impair the right of His Majesty to grant such leave, observed as follows: -

"Mr. Green has finally contended that the amendment is invalid because it affects the prerogative of the King in a matter outside the Dominion and out side the competence of the Oireachtas. It might be possible to state many objections to this contention but it is enough here to say that whatever might be the position of the King's Prerogative if it were left as a matter of common law, it is here in this particular respect and in this particular enactment made matter of merged in the

statute and the statute gives powers of amendment and altering the statutory prerogative."

Therefore when there is legislation covering a field of prerogative and it is denied to make the prerogative still available, it becomes necessary to reserve in the Legislation, the power to use the prerogative concurrently with the legislation, as otherwise the legislation, so long as it is in force, precludes the exercise of the prerogative. In Sammut v. Strickland (3) the Privy Council dealt with such a reservation in the Malta Letters Patent.

1) (1920) A C 509, 540
2) (1935) A C 484, 499 = A L R 1935 P C 149, 153
3) (1938) A C 678 = A L R (1939) P C 39

Section 295 subsection (2) of the Government of India Act, 1935 and section 401, subsection (5) of the Cr. P. C: are instances of similar reservation of the Royal prerogative of granting pardons, reprieves, respites or remissions of punishment.

In 1947, the need for legislation on the Prerogatives of His Majesty in relation to the new Dominions and particularly the Constituent Assemblies clearly arose in the Indian Independence Act, for it was found necessary to specify and define the purpose for which the Governor-General was to represent His Majesty. That purpose having been clearly defined, the inference is one of prohibition against traveling beyond the boundaries of that definition. Reference may usefully be made to the remarks of Lindly L. J, in *LondonAssociation of Ship-owners* v. *London and India Dock Joint Committee* (1). It is therefore not correct to say that the prerogative to dissolve the Constituent Assembly remains unaffected by the provisions of the Indian Independence Act.

Confirmation of this view is available, though it is not necessary to the interpretation of the clear words of the Indian Independence Act, in the removal of clause *(c)* of the subsection (2) of section 19 of the Government of India Act from 15th August 1947 by the Schedule to the Indian (Pro-visional Constitution) Order, 1947 made by the Governor-General pursuant to his powers under *(c)* of subsection (1) of section 9 of the Indian Independence Act, whereby the power of the Governor-General to dissolve the Federal legislature was taken away, though his powers to summon and prorogue it were allowed to remain. At the same time the Schedule to the Order removed also the whole of Schedule to the Government

of India Act, Part I of which contained provisions for representatives of British India in the Federal Legislature. It has been said that the removal of clause (c) was necessitated by the removal of section 18, but as under that section life of the Federal Assembly was fixed at five years and could have been sooner dissolved, the removal of section 18 was a reason for retention and not removal of clause *(c).*

The position of the Governor-General under section 9 of the Indian Independence Act is, with in its limits, that of a Concurrent Legislature, under subsection (3) with the Westminster Parliament from 3rd June 1947, till the Appointed Day, and thereafter under: subsection (5) with the Constituent Assembly till 31st March, 1949. Since the powers of the Federal Legislature were to be exercised by the Constituent Assembly, the removal of the Governor-General's power to dissolve the Federal Legislature was in consonance with has been said above as to the true meaning of section 5 of the Indian Independence Act and its effect upon prerogative.

The true question is not as to the reasons why clause (c) of subsection (2) of section 19 of the Government of India Act was removed, but as to the effect of the removal. The

(1) (1892) 3 Chancery Division 242, 251

removal itself is quite an ambiguous act, in Moore v. the Attorney – General for the Irish Free State (1) Viscount Sankey L.C considered that the removal of the proviso to Article 66 of the Irish Constitution had the effect of prohibiting appeal to the King in Council from the Supreme Court of that Dominion. Similarly here, the effect of the removal of the clause (c) is to prohibit dissolution of the Federal Legislature and since the same body of men exercises the powers of the Federal Legislature and the Constituent Assembly, the prohibition refers to the Constituent Assembly.

The argument by way of explanation has been advanced that clause *(c)* was removed because it was not necessary to retain it, as the Governor-General had the power under section 5 of the Indian Independence Act or otherwise under the prerogative to dissolve the Constituent Assembly, which is the same body of men as the Federal Legislature. If that were correct, then the Governor-General's powers to summon and prorogue the Federal Legislature under clauses *(a)* and *(b)* of subsection (2) of section 19, and to assent or dissent to its bills under section 32 of the Government of the India Act, should, on parity of reasoning, have been taken away, but they were on contrary retained and have been fully exercised since. The

argument, however, is fruitless, as it leads back to the true meaning of section 5 of the Indian Independence Act and the availability of the prerogative. The result is that the prerogative to dissolve is governed by the express provisions of section 5 of the Indian Independence Act, and that section does not enable the Governor-General to dissolve the Constituent Assembly.

The argument that the Governor General has the power to set up another body of men as the Constituent Assembly for Pakistan under clause *(b)* of subsection (3) of section 19 of the Indian Independence Act is based on the ground that when a power is once conferred, it may be exercised again as occasion may arise. It is open to question whether this subsection, appearing as it does not in a substantive but in an interpretation section, can be held to be one conferring a power on the Governor-General for the time being, to set up a Constituent Assembly for Pakistan as occasion may arise. In terms, it refers "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". That authority is clearly the executive authority of the Governor-General, not under the Government of India Act, 1935, or his Commission, but one under the directions, and as the Agent of His Majesty's Government in Great Britain to implement its scheme to transfer power to the two new Dominions, and it was exercised in anticipation of Parliamentary Legislation giving to the body so set up statutory recognition or existence as the constituent Assembly, and the powers to frame the Constitution of the Dominion. These the Indian Independence Act gave. The words used are "set up or about to be set up", and they refer to the

(1) (1935) A C 484, 498=A I R 1935 PC 149, 154

Assembly which was to the knowledge of Parliament in the process of being set up but as to which Parliament was uncertain whether it had already been set up. The words, "or about to be set up, cover the contingency of the Assembly not having been in fact set up, "at the date of the passing, the Act". It is not unusual for His Majesty's Government in Great Britain to take executive action in anticipation of Parliamentary legislation giving it statutory effect, and if an example were needed outside the various agreements on diverse matters between His Majesty's Government in Great Britain and the two major political parties in India, one may be found in the Articles of an Agreement for a Treaty between Great Britain and Ireland, dated 6th December 1921, which was made law by the Irish Free State

(Agreement) Act 1922, to which the treaty was scheduled. There is further the consideration that" section 19, subsection (1) is meant to be use to interpret the term "Governor-General" used in the Act only "in relation to any other to be made or every act done on *or* after the appointed day", *i*.e., 15th August, 1947. The Indian Independence Act was passed on 18th July 1947, and the Constituent Assembly for Pakistan was set up on 26 July 1947. The reference to the Governor-General in clause *(b)* of subsection (3) of section 19 is to the person of Lord Mountbatten, and he has been referred to therein, not by name but by his designation. Correctly, clause *(h)* is meant to be used to construe references made in the Indian Independence Act to the Constituent Assembly of a Dominion when the reference relates to Pakistan. It does not, as is contended, confer power upon the Governor-General for the time being to set up another body of men as the Constituent Assembly of Pakistan.

The prerogative of preferential payment of Crown debts, to which reference has been made in argument, has long since traveled into the Indian Legislative field and has been legislated upon. as, for instance, in section 49 of the Presidency Towns Insolvency Act 1909, which in Pakistan is called the Insolvency (Capital of the Federation and Dacca) Act, in section 61 of the Provincial Insolvency Act, and in section 230 of the Companies Act in the Central field, and in the Land Revenue Codes in the Provincial field Section 174 and section 175 of the Government of India Act still treat Crown property as vested in His Majesty for the purposes of the Federation or Province, and the prerogative is incidental to the property so vesting. Since the prerogative can be legislated upon by the Federal Assembly it is within the executive authority of the Federation which the Governor-General exercises, and in so far as it is not regulated by statute, can be exercised by the Governor-General. Precisely the same is the position with regard to the prerogative to declare Martial Law, and the cases cited in argument themselves refer to section 72 of the Government of India Act 1919, and section 102 of the Government of India Act, 1935.

The only prerogative assigned to the Governor-General by his Commission is to grant to convicts a pardon either free or subject to lawful conditions.

It is said that subsection (3) of section 6 of the Indian Independence Act renders tile Governor-General's assent necessary *to* Acts of the Constituent Assembly, in that it says, "the Governor-General of each of the new Dominions shall *have* full power *to* assent to any law of the Legislature of the Dominion". The

sentence however, does not stop there and proceeds to mention the matter with reference to which or the context of which these words are used, and *to* deal with the matter and context by enjoining removal of the existing statutory requirements which derogate from the fullness of power, mentioning the respects in which the power was *not full. Their removal is, therefore what subsection (3) effects and is intended to effect, and It is their removal which results in the fullness of the power. The whole subsection (3) is expressed in but one sentence, and parts of it must be interpreted in relation to* each other and in the context on the subject matter with which the sentence deals. The intent is not to create the necessity of assent when none has been prescribed. What subsection (3) does is to shed the existing statutory limitations to the Governor-General's power to assent.

It is said that in subsection (3) of section 6 the words, "the Legislature of the Dominion" mean the Constituent Assembly for Pakistan. The term "the Legislature of the Dominion" is but notional and has reference to the law-making function *or* machinery or scheme of the Dominion for there was no Federal Legislature at the partition, and a body of men called the Constituent Assembly was improvised primarily to frame the Constitution. The function *of* legislation was twofold, to exercise the powers of the Federal Legislature and those for the purpose of making provision as of the Constitution of the Dominion. This is borne out in .subsection (I) of section 8 of the Indian Independence Act, which says:

"....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...."

The words, "the powers of the Legislature of the Dominion "mean quite simply, the powers of legislation of the Dominion in the use *of* the word. “Legislature" the function is concretized or personified as it often is.

It is not necessary to refer to other subsections of section 6, India Independence Act, in order, to, interpret the clear words of subsection (3) for no ambiguity as to their meaning appears, but if it were necessary to do so, the following considerations arise. The words "full power" has been used in subsection (2) *to* remove the only deficiency in subordinate legislative function, namely that making within its own sphere laws having extra-territorial operation. The object of section 6, Indian Independence Act, is to render the legislative function of each of the new Dominions not subordinate to that of the British Parliament. Subsection (1) of which subsection (6) is an explanation of a kind often found in an

interpretation clause, concedes the extra-territorial operation of laws, subsection (2) concedes the power to make laws repugnant to the Law of England or to any Act including the Indian Independence Act of the British Parliament or regulation there under which is in force in the Dominion, subsection (3) removes the means whereby the legislative function was rendered abortive by the British Parliament. These now removed, are indicia of legislative function who subordinate to that of the British Parliament, and it was these among other things that the statute of Westminster dealt in relation to then existing Dominions. Subsections (4) and (5) ensure that no Act of the British Parliament and no Order-in-Council or Rule made in Great Britain shall apply either of the Dominions. It is in this context and as affecting this object that the provisions of subsection (3) of section 6, Indian Independence Act, must be interpreted.

In has been said that the principle to be applied is that expressed by the Privy Council in *Theberge* v. *Laudry* (1). In the following words, approved in *Cushing* v. *Dupuy*(2) and reiterated in *re, The will of Wi Malua* (3):-

"Their Lordship wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle that the Prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the Prerogative of the Crown has existed, precise words must be shown to take away that Prerogative".

That principle has no application here, because the question for determination is whether the prerogative claimed, subsists in the Governor-General. It is unnecessary to repeal here the conclusions which have been herein arrived at on an examination of the provisions of section 5 of the Indian Independence Act and sections 7, 8 and 9 of the Government of India Act.

In law, sovereignty, *i.e.*, sovereign power and function resides in His Majesty and His Majesty exercises it to make constitutional and other laws for conquered and ceded territories. That is the supreme Royal Prerogative, and by the "exercise of it His Majesty distributes, assigns or delegates and so prescribes the mode of the exercise of the powers which in His Majesty, in all fields. In 1935, this sovereign "Lawyer and function" was declared to be and preserved in His Majesty by section 2 of the Government of India Act, "except *far as May other be provided by or under" that Act,* as may otherwise be directed by His Majesty". The Government of India Act truly effects distribution and regulation of the sovereign power and function of His Majesty: it,

(1) (1880) 2 A C 102

(2) (1880) 5 A C 409

(3) (1906) A C 448

effects distribution of the sovereign power and function in the legislative, executive and other fields, specifies the instrument for and prescribes the mode of its exercise. Under section 3 of the Act the Governor-General is said to have such powers and duties as are conferred or imposed on him by under the Act, and to have such other powers as His*Majesty may be pleased to assign to him. The term, "other powers" clearly has reference to the sovereign powers and functions not regulated, distributed or assigned by the terms of the Act. Two fields of the supreme sovereign function* are therefore clearly distinguishable, that regulated or covered, by the Government of India Act, and that beyond the Act which His Majesty retained.

India was a dependent or subject territory by reason (1) the powers reserved under the Government of India **Act** to His Majesty and His Majesty's Government in Great Britain and (ii) the sovereign power and function of His Majesty not affected by the Government of India Act. To effectuate the grant of independence, therefore was to remove one and grant the other. There is no doubt that the reservations were removed, and the question is how the Indian Independence Act dealt with the sovereign power and function beyond the Government of India Act.

There is the sovereign power to grant, amend, withdraw, re-grant and bring into force a constitution, which is indeed the Supreme Prerogative, because by the exercise of it all prerogatives can be distributed, regulated and even taken away, and this power the Indian Independence Act has placed in the Constituent Assembly, fully and finally without limiting its life or making it dependent upon any outside agency or formality to give validity to its measures, except such as the Constituent Assembly itself may choose to prescribe, as will presently appear.

After the appointed day, no Act of the Westminster Parliament can extend to either of the new Dominions unless it is extended to it by the legislature of the Dominion. The effect is that the law of the Constitution to be framed by the Constituent Assembly cannot be Westminster Parliament's legislation and must be the legislation of the Constituent Assembly itself. This supreme Prerogative is, therefore, granted solely to the Constituent Assembly, and since the grant is without any words of limitation, the Constituent Assembly can exercise it as fully as His Majesty, could, that is to say the exercise of it by the Constituent Assembly

is as supreme and unfettered as could be the exercise of it by His Majesty. When Parliament frames the Constitution it uses His Majesty's Prerogative by His Majesty's consent and the grant and the bringing into force of the Constitution is the act of the King. The true question is II; whether tile exercise of the supreme Prerogative by the Constituent Assembly has been made subject to any limitation by the instrument making the grant. If it has, then to that extent the grant is not full. The grant has been made specifically to the Constituent Assembly in subsection (I) of section 8 of the Indian Independence Act, and if any derogation from, limitation of, or condition to the fullness of the grant were intended, it would appear in the Indian Independence Act by specific reference to the Constituent Assembly's powers and functions. None, however, appears.

In the field outside the Government of India Act, the Governor-General could exercise no power of His Majesty, unless it was assigned to him, so that if any such power is now claimed for him, there must appear an express grant or that power to him by the Indian Independence Act in clear and unmistakable terms. Far from expressly granting the power, section 5, Indian Independence Act, declares that the position of the Governor-General in relation to the Dominion is to be only that which it has previously been, the reserved powers now taken away by Statute not being taken into account. The Governor-General was, even prior to 1947, appointed by His Majesty and represented His Majesty for the purposes of the Government of India. Section *5* is definitive of the field in which the Governor-General is to represent His Majesty. The representation does not extend to the field of supreme power or prerogative, which has been granted to the Constituent Assembly to make provisions as to the Constitution of the Dominion, and both the powers or, assent and dissolution are provisions relating to the Constitution. It follows, therefore, that there now resides in the Constituent Assembly the sovereign power and supreme prerogative amend and repeal the existing and frame and bring into force a new Constitution, which was of the essence or His Majesty's sovereignty, and therefore, the Constituent Assembly being in the place of His Majesty is a sovereign body of no prescribed life or duration and subject to no agency or instrument outside itself to effect its dissolution or to give it laws validity, except such as it may itself choose to create.

There now falls to be noticed the significant difference between the Constituent Assembly of Southern Ireland and the Constituent Assemblies of the new Dominions. To give force and effect to the Constitution framed by the former, an Act or the Westminster Parliament was necessary, while, the Indian

Independence Act has rendered it unnecessary in the case of the new Dominions, and this illustrates the fullness of the transfer of power. It was not a case of His Majesty promising to do what the Constituent Assembly might desire, but a case of enabling the Constituent Assembly to do what His Majesty could do. In this situation when His Majesty's own intervention to give validity or force to the measures of the Constituent Assembly was not to be required it is anomalous to say that the intervention of His Majesty's representative was required.

It has been said that the Governor-General as His Majesty's representative was meant to act on the advice of the Ministers responsible to the Federal Legislature, but there was nothing then in the Government of India Act to compel him to act on the advice, and as a result or the provisions of sections 7, 8 and 9 of the Government of India Act the advice the Ministers was confined to the fields of legislative and *executive power covered by the Government of India Act. Therefore, to clothe the Governor-General with powers to assent* or dissent to the Bills of the Constituent Assembly was *to* make him truly a Viceroy, able to foil at will, any constitutional measure framed by the Constituent Assembly and to that extent, the measure of independence would have fallen short full, instant and immediate independence. The argument that His Majesty could remove the Governor-General only accentuates the dependence on the will of His Majesty.

It has been said that what was meant to be achieved by Indian Independence Act was independence from the control His Majesty's Government in Great Britain. It is, however, of importance to remember that the sovereign power and function was in His Majesty and that it was this power and action which enabled the Westminster Parliament with the consent of His Majesty to legislate. The powers of His Majesty's Government in Great Britain were reserved by parliamentary legislation, but if any action wore taken yond them, it involved the executive use of the sovereign power. The independence to be achieved was freedom from existence of this sovereign power and function in His Majesty, and not merely a promise that it would not be exercised; what was required and was affected was a transfer it from His Majesty in whom it resided to hand in laws entirely free His Majesty.

There has be on pressed the consideration of departmental interpretation in that never before this instance in the entire existence of Pakistan, has any action of Government ever en taken on the basis that a Bill of this Constituent Assembly requires the assent of the Governor-General, and consideration of the facts that, among the numerous Acts of Constituent Assembly which have been acted upon

without the assent of the. Governor-General is the Privy Council (Abolition of Jurisdiction) Act 1950, under which Federal Court of Pakistan has derived and exercised the derogative of the King-in-Council to grant special leave to appeal as indeed before it, the Federal Court of India had done under a similar Act not assented to by the Governor-General of India, and that the Constitution of India framed by the Constituent Assembly of India under precisely the same provisions as govern the Constituent Assembly of Pakistan, was not assented to by the Governor-General of India, and the Indian Supreme Court has been treating the Constitution valid and enforcing its provisions. Having regard to the conclusions arrived at on the plain meaning of words used in the statutes in their ordinary and natural sense and in the context in which they appear, it seems unnecessary reach findings upon the effect of these considerations, weighty though they may well be.

Section *223-A* of the Government of India Act was enacted on 6th July 1954 by the Government of India (Amendment) Act, 1954. It reads as follows:-

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

It has been said that this Court has no jurisdiction to issue the writs sought, because the Governor-General's Proclamation and appointment of Ministers have effect and operate not only in the Federal Capital and Sind but also beyond them and that the jurisdiction conferred by section 223-A is limited to matters which take effect only within these territories, and not beyond. This section confers power upon this Court to issue writs throughout the territories in relation to which it exercises jurisdiction to any person or authority or Government within those territories, and the true question is whether the issue of the writs involves the doing of anything not covered by the words of the section.

This Court has sole High Court jurisdiction in the Federal Capital which was established by the Pakistan (Establishment of the Federal Capital), Order 1948, pursuant to power specially reserved under section 290-A, Government of India Act, and that jurisdiction continues, though Karachi is now a Chief Commissioner's Province. The fact remains that Karachi is the Federal Capital where the petitioner and the respondents reside and carryon their legal functions. Under subsection (5)

of section 290-A, Government of India Act the executive authority of the Federation extends to the Capital of the Federation, and any order made under the subsection may be controlled or superseded by an Act of Federal Legislature. The Constituent Assembly which exercises the powers of the Federal Legislature hps its seat at Karachi where also resides and functions the Governor-General. The Proclamation was made and issued and the Ministers were appointed and assumed office and function at Karachi.

Reference has been made to *Ryots of Garabandho* v. *Zamindar of Parlakimedli* (I), but that case is clearly distinguishable. It dealt with the narrow territorial jurisdiction of the Madras High Court extending only to its original civil jurisdiction and the attempt to widen that jurisdiction to subject matter and parties wholly outside it, by reason only of the fact that an order of the Revenue Officer of Ganjam might be corrected by the Board of Revenue, which then happened to have its office at Madras. There was a contrast made between this case and *Nundolal Bose* v. *Calcutta Corporation* (2), where an assessment was made by the Commissioners of the Town of Calcutta upon a dwelling house at Calcutta. The contrast brought out *two* c significant considerations, namely, that it was possible to avoid the jurisdiction of the Madras High Court by shifting the office of the Board of Revenue to a place outside it,

(1) A I R (1943) P C 164, 168

(2) I L R (1885) 11 Cal 275

that before jurisdiction could attach, there would have to be an appeal or revision from the Revenue Officer operating *in G*anjam to the Board of Revenue at Madras, and the Privy Council found that in substance jurisdiction was claimed mainly on the fact that the office of the Board of *Revenue* happened to be situate at Madras. The true objection to holding that the situation of the office gave *jurisdiction to the Madras High Court was that it involved extending the jurisdiction of the Court to subject-matter well as parties outside its original civil jurisdiction. That ratio decidendi* does not support the argument raised here. This case in its relation to Article 226 of the Indian Constitution, upon which section 223-A, Government of India Act, is largely modeled, has been considered in *Election Commission India* v. *Saka Venkataraa* (I) and in K. S *Rashid* & *San* v. *Income-tax Investigation Commissioner* and distinguished, in that the matter now rests upon an interpretation of Article 226 and the jurisdiction to issue writs is that defined in it. *Shree Meenakshi Mills Ltd. V. Provincial Textile Commissioner Madras* (3), is

also distinguishable in that the case turned upon the words of section 45, Specific Relief Act, and all the reliefs asked related to acts done or to be done outside the limits of the ordinary original civil jurisdiction of the Madras High Court.

It has been said that section 306, Government of India Act, a bar to the petition. This petition, however, is a proceeding "against the Governor-General", and the Governor-General is no party to it. The section grant the Governor-General personal immunity, for his exercises executive authority of the Federation, and under section 176, Government of India Act, the Federation may be used. His personal capacity is not involved in this section. The argument that the petition involves consideration of the validity of the Governor-General's Proclamation has no application here, because there is *in the section to show that a Court cannot consider validity of the acts of the Governor-General. On contrary, proceedings allowed by section 176 and* section 223-A, Government of India Act, may well raise the question of their validity, for all executive action the Federal Government is taken in the name of the Governor-General.

It has been said that *mandamus* does not lie, there being no specific statutory right in the petitioner and specific statutory duty upon the respondents to maintain the petitioner in his office. In 1760, a writ of *mandamus* issued to restore a Curate to a chapel in *R.* v. *Blooer* (4) and the decision was affirmed in *King* v. *Barker* (2), a

(I) A I R 1953 S C 210,212-3

(2) A I R 1954 S C 207, 209

(3) A I R 1949 P C 307,310

(4) 97 English Rep. 697 (5) 96 English Rep, 169.

full report of which appears in 97 English Reports *823, 824-5,* where Lord Mansfield has adverted to the nature of the writ and the wide circumstances (restoration of an alderman to precedency was one), to which it has been extended, The Writ "was introduced to prevent disorder from a failure of justice and defect of police" and "it ought to be used upon all occasions when the law has established no specific remedy, and where in justice and good Government therefore ought to be one", and "it has been liberally interposed for the benefit of the subject and advancement of justice." It appears from Halsbury's Laws of England (Hailsham Edition 1935) Vol. IX, page 746, Para 1271, that *mandamus* lies to compel the restoration of a person to an office or franchise, whether spiritual or temporal, of which he has been wrongfully dispossess

provided the office or franchise of a public nature. Since the power exists to restore by *mandamus* a person ousted from his public office, no reason appears why it should not be used to restore the petitioner to his high office; it is certainly an office of a public nature and involves emoluments and advantages.

It has been said that a writ of *mandamus* ought not to issue, because a suit for declaration and/or injunction could and should have been filed. It is a matter of doubt and by no means of certainty, having regard to the provisions of section 24 and section 56, Specific Relief Act, that the remedies suggested would be granted, and it cannot be predicted that in such a suit for discretionary remedies, it would not have been found that they ought not to be granted because a writ of *mandamus* could issue.

There is discretion in the court to withhold a writ of *mandamus,* if there is an alternative legal remedy equally convenient, beneficial and effectual but it is a bold assertion that a Suit on the original civil side of this Court would be that. Besides, it is difficult to conceive of a matter requiring more prompt consideration and speedy final decision than this writ petition. It raises questions of such basic and vital constitutional importance that a writ petition is the only remedy which ought to be regarded as convenient, beneficial, effectual or satisfactory.

It has been said that a writ of *mandamus* ought not to issue because no demand was made by the petitioner and no refusal given by the respondents in respect of the prayer for *mandamus.* In a case of this nature where the action complained of was so deliberate, it seems idle to suggestions that a demand by the petitioner would have led to any compliance on the part of the respondents.

It has been said that a Writ of *quo warranto* issues only at the instance of the King, and that it cannot issue against a Minister appointed" by the King's representative In *Rex*v. *Speyer- and Cassel (1)* where Sir George Makgil purely out of a sense of public duty, questioned the, competence of Sir Edgar Sparer and Sir Earnest Cassel to be

(1) (1916) 1 K B 595: 114 Law Times Reports 463

appointed Members of the Privy Council, it was found that writ of *quo warranto* did issue at the instance of a private *person,* for "every subject has an interest in securing, that public duties shall be executed only by those competent to

exercise them," and the argument that the writ did not issue against the King was found ineffective, in that the writ if it issued at all, would issue against a private person on the ground of his in competency.

Respondents 2, 3, 6 and 9 are Members of the Federal legislature. Respondents 2, 3, 6 and 9 were Ministers prior to 24th October 1954, while respondent 9 was appointed Minister on that day. There is no reason why a writ of *quo warranto* should issue against respondents 2, 3, 6 and 9.

I would therefore issue a writ of *mandamus* restoring the petitioner to his office as President of the Constituent Assembly and restraining all the respondents from obstructing or interfering with the exercise by the petitioner of the functions and duties of his high office. I would also issue a writ of *quo warranto* against respondents 4, 5, 7, 8 and 10 declaring that by reason of section 10 of the Government of India Act as amended on 21st September 1954 they are not qualified for appointment as Ministers, not being Members of the Federal Legislature. There will be a certificate in terms of section 205, Government of India Act.

MUHAMMAD BACHAL, J. -- I agree in tile order proposed by my lord, the Chief Judge.

MUHAMMAD BAKHSH, J. -- 9th February, 1955. This is a petition under section 223-A of the Constitution Act for writs in the nature of *mandamus quo warranto* or any other appropriate writ. The petition has been filed by Maulvi Tamizuddin Khan the President of the Constituent Assembly of Pakistan against the Federation of Pakistan, the Prime Minister of Pakistan and eight Members of the Central Council of Ministers. The facts giving rise to this petition are stated to be as follows:-

On 16th May 1946 an announcement was made about the Cabinet Mission Plan, by the then British Prime Minister Mr. Atlee, making certain recommendations regarding the Indian Constitutional problems and among others, for setting up a Constituent Assembly for united India. The election to that Constituent Assembly took place in or about July 1946. The first session of that Assembly was held on 6th December 1946. Under the directions of the Quaid-e-Azam, the Muslim League Members boycotted the said Constituent Assembly. Eventually on 3rd June 1947 the British Government announced their final decision to transfer power to one or two successor authorities in accordance with the plan envisaged in that statement. Specific provisions for taking steps for setting

up a separate Constituent Assembly for Pakistan were contained in that statement. Thereafter the Indian Independence Act was passed which received His Majesty's assent on 18th July 1947. In accordance with the statement of His Majesty's Government dated 3rd June 1947, His Excellency Lord Mountbatten, the then Governor-General of India, directed the formation of a new Constituent Assembly for Pakistan, consisting of various members mentioned in that order. On 10th August 1947 the first meeting of the said Constituent Assembly of Pakistan held at Karachi. On 11th August, 1947, Quaid-e-Azam Mohammad Ali Jinnah was elected the first President of the said Constituent Assembly. After the death of the Quaid-e-Azam the petitioner Maulvi Tamizuddin Khan was elected as the President of the Constituent Assembly on 14th December 1948 and since then the said office is being held by him.

The Constituent Assembly held various sessions from time to time. On the Constitution side the work of drafting, and enacting the Constitution for Pakistan was being finalized and final session in this behalf was to be held and as publicly declared and announced by the Prime Minister of Pakistan, respondent No.2 himself, the Constitution for this country was to be ready before 25th December *1954*, coinciding with the birthday of the Quaid-e-Azam.

On 24th October 1954, His Excellency the Governor General of Pakistan was pleased to issue a Proclamation which reads as follows: -

"The Governor General having considered the Political crisis with which the country is faced, has with 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. Election 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 give 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 Interest.

On 26th October 1954, various notifications were published in the Extraordinary Issue of the Gazette of Pakistan regarding the reconstitution, appointment and distribution of the portfolios among respondents 2 to 10 as Members of the Governor-General's Council of Ministers. On 25th October 1954, the final meeting of the Drafting Committee appointed by the Constituent Assembly was held wherein the Draft Constitution was approved and the Report of the Committee was finalized and signed. On 26th October 1954, between 8-30 and 9 am, respondent No.4 approached the petitioner and represented to him that in view of the alleged Proclamation of 24th October 1954, the Constituent Assembly was dissolved. He tried to persuade the petitioner to accept that position but the petitioner declined to do so. On 27th October 1954, the Constituent Assembly Building was guarded by a strong Police Force and members of the Constituent Assembly including the Deputy President were prevented from entering the said premises. A meeting of the Constituent Assembly (Legislature side) was scheduled to be held on 28th October 1954 at 11 a.m. The petitioner cancelled the said meeting for want of business and adjourned the Constituent Assembly (Legislature) *sine die.* The meeting of the Constituent Assembly (Constitution side) was also scheduled to be held on 28th October 1954, at 4-30 p.m. The petitioner cancelled the said meeting and announced that it would be held instead on 3rd January 1955, at 11 a.m.

The petitioner has challenged the alleged Proclamation issued by the Governor-General on 24th October 1954, as unconstitutional, illegal, *ultra vires*, without jurisdiction, inoperative and void on various grounds mentioned in Para 11 of the petition. He has further submitted that the appointment and reconstitution of respondents 2 to 10 as Ministers are illegal, ult*ra vires*, without jurisdiction, inoperative and void on the grounds stated in Para 12 of the petition. The petitioner further alleges that he has challenged the legality etc. of the alleged Proclamation, and the respondents are persisting in implementing the same and are thereby interfering with the office and public duties of the petitioner. The petitioner has applied for justice who has been denied to him and he therefore submits that there resides in him a legal right to the performance of legal duties by the respondents. The petitioner has also submitted that there is no other specific, effective or convenient alternative remedy open to him. The petitioner has therefore asked for a writ of *mandamus* or any other appropriate writ to restrain the respondents from implementing or giving effect to the said proclamation and

thereby interfering with the public duties of the petitioner. The petitioner has also lodged information in the nature of *quo warranto* in respect of the respondents 2 to 10 as they have usurped the office of the Council of Ministers. The petitioner has requested that this Court should inquire by what authority the said respondents claim to be Members of the Council of Ministers.

It appears that the Estate Officer of the Government of Pakistan had given a notice to the petitioner on 30th October 1954, to vacate his official residence since the Constituent Assembly had been dissolved. The petitioner had therefore joined the Estate Officer also as respondent No. 11. At the time this application came up for summary hearing the petitioner dropped the Estate Officer from this petition and he was permitted to file a separate petition against him if necessary.

On behalf of the respondents, the following objections have been raised against the petition:

(I) Section 223-A of the Constitution Act under which this petition has been filed has not yet become law, valid and enforceable in Pakistan though passed by the Constitution Assembly, because under section 6 (3) of the Indian Independence Act it required the assent of the Governor-General and has not yet received that assent. Rule 62 of the Constituent Assembly Rules provides that any Bill passed by the said Assembly will become law as soon as it is signed by the President of the Assembly and published in the official Gazette under his signature, but this rule is illegal. *ultra vires* and void on the grounds stated in Para 4 of the objections especially when it did not receive the assent of the Governor-General.

(2) Even if section 223-A was a valid provision of Constitutional law, it limits the writ jurisdiction of a High Court to only such person, authority or Government whose public duties, powers, functions and official sphere activities were confined, strictly within the limits of territorial jurisdiction of the High Court and did not extend beyond it. This Court cannot therefore issue any writ against the Federation of Pakistan which is not and cannot be said to be within the territorial limits of this Court, *viz.* within Karachi and the Province of Sind. Respondents 2 to 10 as Ministers of the Central Government also exercise authority beyond the territorial jurisdiction of this Court. Alternatively, it would not be "appropriate" in this case to include respondent 1 or respondents 2 to 10 in the term 4 "Person or Authority" used in section 223-A.

(3) According to the English Law of writs which must be held to apply in this case in the absence of any definition of the scope and nature of writs in section

223-A, no writs of *mandamus* or *quo warranto* have ever been issued or can legally or equitably be issued against either the King or, his Ministers. On the same principle the petitioner is not entitled to any writ against the respondents.

(4) The petition does not lie in view of the provisions of section 306 of the Constitution Act that lays down that no proceedings can lie against the Governor-General in any capacity. What the law does not permit to be done directly, it will not allow to be done indirectly.

(5) The petition for a writ does not lie if normal remedies under the law are available to the petitioner. Since the petitioner admitted that he had summoned the Constituent Assembly to meet in January 1955, there was ample time for him to give notice to the respondents under section 80 C. P. C. and then to file a suit for declaration and injunction if he had any confidence in the justice or strength of his claim.

(6) A writ of *mandamus* can be issued for the benefit *of* a petitioner only when he has a clear and specific legal right to demand the performance of any specific legal duty from the respondent. Nothing of that kind appears in this case. A writ of *mandamus* does not issue when a wrong has actually been done; what the petitioner wants is to undo it. The writ issues only when the respondent is about to commit a wrong or has omitted doing something which it is his duty to do. The petitioner has lost office by dissolution of the Constituent Assembly and no one is at present illegally occupying that office. Hence the writ does not lie.

(7) In any case respondents 2, 3, 6 and 9 being Ministers of the ald Cabinet have admittedly usurped no office. They continue and remain as Ministers as they were before 24th October 1954. A writ of *quo warranto* can therefore not be issued against them.

(8) In case of usurpation of any office under the Crown, it is the exclusive right of the King to seek a writ of *quo' warranto,* declaring the person to be a usurper and compelling him to vacate the office usurped on the application not, of any private person but on the application of the Attorney General, or in Pakistan the Advocate-General. In case of a person appointed to an office by the King himself, there can be no question of a writ of *quo warranto* by the King's Court against the King's own act of appointment. Therefore respondents 4, 5, 7, 8 and 10 who have been appointed Ministers by the Governor-General representing the Queen, no writ of *quo warranto* can legally issue against them.

(9) To sustain this petition the petitioner must establish some definite injury to himself so far his personal and present rights are concerned. The appointment of respondents 2 to 10 as Ministers has not caused any personal injury to the petitioner or adversely or directly affected his interest. The petition for *quo warranto* is therefore not maintainable.

(10) Until other provision is made under the Indian Independence Act, Pakistan is one of the Dominions of the Crown of the United Kingdom. In each of those Dominions in which Legislature exists the Crown has in common law a power to dissolve that Legislature save in so far as that power has been superseded or regulated by legislation. The power of dissolution is a prerogative of the Crown which vests in the Governor General under section 5 of the Indian Independence Act. The dissolution of the Constituent Assembly was therefore perfectly valid in view of the seven grounds stated in Part 11 of the objections filed by the respondents whi.ch relate to the merits of the petition.

Mr. I. I. Chundrigar, Advocate, and Mr. D. N Pritt, Bar-at-law, argued the matter on behalf of the petitioner. Mr. Faiyaz Ali the Advocate-General of Pakistan argued the case on behalf of respondents I, 2, 3, 6 and 9. Mr. Manzur Qadir argued on behalf of the remaining respondents.

Before dealing with the various questions raised in this important matter it is necessary for us to understand the scheme of the Indian Independence Act, 1947 and its background.

Before the passing of the Indian Independence Act 1947, India was being governed by the provisions of the Government of India Act, 1935. Sections 2 and 3 of that Act must be reproduced here: -

"2. *Government of India by the Crown. -(1)* 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 1 provided by or under this Act, or as may be otherwise directed by His Majesty: Provided that any powers connected with the "exercise of the functions of the Crown in its relation with Indian States shall in India, if not exercised by. His Majesty, he exercised only by, persons acting under the authority of His Majesty. Representative for the exercise of those functions of the Crown.

(2) The raid rights, authority and jurisdiction shall include any fights, authority and 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 declaration from His Majesty or otherwise.

3. *The Governor-General of India and His Majesty's: Representative as regards relations with Indian States.* 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 ful1, of the Crown in its relations with Indian State, as His Majesty may be pleased to assign to him.

(2) His Majesty's Representative for the exercise of 4 the functions of the Crown in its relations with Indian States is appointed by His Majesty in like manner and has such powers and duties in connection with the exercise of those functions (not being power or duties conferred or imposed by or under this Act on the Governor-General as His Majesty may be pleased to assign to him.

(3) It shall be lawful for His Majesty to appoint one person to fill both the said offices.

Under this Act various powers were conferred upon the Governor-General of India. Important amongst that were the Special Responsibilities (section 12), the Individual Judgment and the Discretion (section 14). There were three fields in which the Governor-General could operate.

The first one was the field of “discretion” where Governor General could take any action he liked without consulting his ministers; the second was the field of Individual Judgment was the Governor-General was bound to consult his Ministers but was not bound to act on their advice. In these two fields the Governor-General was directly under the control of the Secretary of State *(vide* section 14 of the Act). The third field was that of “Advice” where the Governor-General was bound to act on the advice of his Ministers. Apart from these powers there were several others which I need not mention at this stage, but which 1 will mention at their proper places where necessary. On the Legislative

side there was a Federal Legislature which consisted of His Majesty represented by the Governor-General and two Chambers (section 18). When a Bill was to be passed by the Chambers, it was to be presented to the Governor-General and the Governor-General; was authorized in his discretion to declare either that he assented in His Majesty's name: to the Bill or that he withheld his assent there from of that he reserved the Bill for the signification of His Majesty's pleasure. A Bill reserved for the signification of His Majesty pleasure was 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 made known by public notification that His Majesty had assented thereto. His Majesty had also the power to disallow the Act assented to by the Governor-General *(vide*section 32). Thus it would be seen that His Majesty represented by the Governor-General was a part of the Legislature and until any Bill was assented to by Him or on His behalf, the Bill could not become Law. In this connection it is important to note, that, in England His Majesty is a part of the Parliament which consists of His Majesty and the two Houses of Lords and Commons. Every Act of Parliament proceeds 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, as."

At this stage I would also invite reference to the Letters Patent where by the office of the, Governor-General of India was created, the Commission issued under the Royal Sign Manual appointing the particular dignitary, to be the Governor-General of India and the Instrument of Instructions issued to the Governor-General of India, Para 2 of the Letters Patent reads as follows: -

"And We do hereby authorize and empower Our Governor General 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 India a pardon, either free or, subject to such lawful conditions as to him may seem fit."

This is the delegation of the Royal Prerogative of pardon and reprieve by His Majesty to the Governor-General. In this connection *see* section 295(2).

Para. 16 of the Instrument of Instructions issued to the Governor-General of India on 8th March 1937 reads as follows: -

"And finally it is our will and pleasure that Our Governor-General should so exercise the trust reposed in him that the partnership between India and the United

Kingdom within Our Empire may be furthered to the end that India may attain its due place among our Dominions."

The people of India were not satisfied with this kind of Constitution for their country and hence a lot of agitation was started against the Government of the day. The people wanted fun and unfettered freedom for their country and things like the "Quit India" movement was launched. The result was that the British Government ultimately decided to confer independence on India. In 1946 the Cabinet Delegation came to India to study the political situation in the country at first hand. On 15th March 1946, before the Delegation left for this country, Mr. Attlee, the British Prime Minister, stated as *follows*: -

"My colleagues are going to India with the intention of using their utmost endeavors to help her to attain her freedom as speedily and fully as possible. What form *of*Government is to replace the present regime is for India to decide but our desire is to help her to set up forthwith the, machinery for making that decision … I hope that India and her people may elect to remain with in the British Commonwealth. I am certain that they will find great advantages in doing so. But if she does so *eject it must be of her own free will. The British* Commonwealth and Empire is not bound together by chains of external compulsion. It is a free association of free peoples, if on the other hand she elects for Independence, in our view she has a right to do so. It will be for us to help to make the transition as soon and easy as possible."

The Cabinet Mission Plan was unfolded in their statement; dated 16th May 1946, in which the following passage appears: -

"We hope that the new independent India may choose to be a member of the British Commonwealth. We hope in any event that you will remain in close and friendly association with our people, but these are matters (for your own free choice. Whatever that choice may be we look forward to you to meet with ever increasing prosperity among the great nations of the world and to a future even more glorious than your past."

In accordance with the Cabinet Mission Plan a Constituent Assembly was set up for United India and the first session thereof was held on 6th December 1946. At that time, there were two main political parties in the country viz, the Congress and the Muslim League. The Muslim League headed by the Quaid-e-Azam did not accept this plan and consequently they boycotted the Constituent Assembly of India. Talks thereafter went on and ultimately on 3rd June 1947, tf1e

British Government announced their final decision to transfer power to one or two successor authorities. Specific provision was also made for setting up a separate Constituent Assembly for Pakistan. I find it necessary and relevant here to reproduce Paras. 3, 19 and 20 from the statement of His Majesty's Government dated 3rd June 1947;-

" 3... His Majesty's Government wish to make it clear that they have no intention of attempting to frame any ultimate Constitution for India; this is a matter for the Indians themselves, nor is there anything in this plan to preclude negotiations between communities for a United India.

19 … The existing Constituent Assembly and the new Constituent Assembly (if formed) will proceed to frame Constitutions for their respective territories; they will of course be free to frame their own rules.

20 … 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 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.

In accordance with this statement of 3rd June 1947 the Indian Independence Act was passed by the British Parliament and it received His Majesty's assent on 18th July 1947. A new Constituent Assembly for Pakistan was brought into being on 26th July 1947 under the directions of the Governor-General of India, Lord Mountbatten, and the first meeting of this Constituent Assembly of Pakistan was held at Karachi on 10th August 1947. On 11th August: 1947, the Quaid-e-Azam was elected as the first President of the Constituent Assembly. Under the Independence Act two separate Independent Dominions to be called India and Pakistan were to be set up with effect from 15th August 1947. On 14th August Lord Mountbatten, till then the Governor-General of united India, came over to Karachi and formally transferred power to the Constituent Assembly. On this account, Pakistan celebrates her Independence Day on 14th August every year. The significance of this should not be forgotten.

On 15th August 1947 the Quaid-e-Azam was also sworn in as the first Governor-General of Pakistan.

This is the background of the Indian Independence Act; I will now deal with the scheme of the Indian Independence Act (hereinafter for the sake of brevity called the "Independence Act") in order to see what changes it brought about the Government of India Act, 1935 (hereafter for the sake brevity called the "1935 Act").

Under the preamble and section 1 of Independence Act two "Independent Dominions" as distinguished from mere "Dominions" were set up in this country. The word “Independent" was not redundant, meaningless or superfluous. The expression Independent Dominions only means that *for themselves* being the status of this country was to be on the Dominion basis as stated by His Majesty's Government on, 3rd June 1947, but the Dominions were at liberty to frame any Constitution for them. This Independence becomes manifest from the provisions on section 6 (2) of the Independence Act. It was apparently 10 consequence of this provision that Section 2 of 1935 Act as reproduced above, was:, done away with. In fact, the Constitution of India whereby the Independence Act and the 1935 Act were repealed makes this position very clear. In this connection it is necessary to refer to Articles 52, 53 and 54 of the Constitution of India. They read as follows:-

"52. There shall be a President of India.

53. (1) the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinates to him in accordance with this Constitution.

(2) Without prejudice to the generality of the forgoing provision, the supreme command of the Defense Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(3) Nothing in this article shall-

(a) be deemed to transfer to the President any functions, conferred by any existing law on the Government of any State or other authority; or

(b) Prevent Parliament from conferring by law functions on authorities other than the President.

"54. The President shall be elected by the members of an electoral college consisting of-

(a) the elected members of both Houses of Parliament; and

(b) the elected members of the legislative Assemblies of the States.

All this could be done and the authority of His Majesty in the affairs of the Indian Republic was altogether omitted because the dominion was an Independent one from the very start and was free to make its own Constitution in any manner it liked. In this respect the Independence Act differs from the Constitutions of other Dominions, for instance; America Australia or South Africa. For those and other Dominions the Constitution is made by the British Parliament of which His Majesty is an integral part. Those Dominions are governed in accordance with the provisions of those Constitutions passed by the British Parliament while this country was to be governed by a constitution made by itself.

Sections 2, 3 and 4 of the Independence Act deal with the territories which are to be comprised in Pakistan.

Section 5 says that for each of the Dominions there was to be a Governor-General who was to be appointed by His Majesty and who was to represent His Majesty for the purposes of the Government of the Dominion. According to the learned Advocate-General of Pakistan this section is the sheet-anchor of his whole case. He relies on this section as vesting in the Governor-General of Pakistan all the prerogatives of the Crown.. The Governor-General, according to this section, is the repository of all the discretionary and arbitrary power of the British Crown. Some of the prerogatives are summoning, proroguing and dissolving of the Federal Legislature and also assenting to the Bills passed by the Legislature. This section, according to the learned Advocate-General, is an omnibus section which contains all the prerogatives of the Crown. I will discuss that aspect of the case later on. For the present I am only outlining the scheme of the Independence Act. At this stage I would only like to reproduce again section 3 of the 1935 Act and the same section 3 as adapted after the Independence Act:-

"3. *Section* 3 *of the* 1935 *Act.-(l)* 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.

(2) His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States is appointed by His Majesty in like manner and has such powers and duties in connection with the exercise of those

functions (not being powers or duties conferred or imposed by or under this Act on the Governor-General) as His Majesty may be pleased to assign to him.

(3) It shall be lawful for His Majesty to appoint one person to fill both the said offices."

Section 3 *of the Adapted Act:*

"3, The Governor-General___ The Governor-General of Pakistan is appointed by His Majesty by a Commission under the Royal Sign Manual.

Now begin the most important provisions of the Independence Act, under section 6 each of the new Dominions was to have a Legislature with full power to make laws for the Dominion, including laws having extra territorial operation, under subsection (2) the Dominion Legislature was authorized to pass any law even though it may be repugnant to the law of England or the Independence Act or the, 1935, Act or any future Act of the British Parliament. The Legislature of the Dominion had also the power to repeal or amend any such Act, order, rule or regulation made the under subsection (3) His Majesty's interference in the sphere of legislation was done away with. The Governor General of Pakistan had full power to assent to any law passed by the Legislature of the Dominion, and no Bills were to be reserved for the signification of His Majesty's pleasure thereon or for disallowance of the same or suspension until the signification. Under subsection (4) Acts of the British Parliament passed after l5th August 1947, were not to apply to Pakistan. Under subsection (5) no order in Council made on or after 35th August 1947 under any Act passed before that date, could apply to Pakistan.

Under section 7 His Majesty's Government was no longer responsible for the Government of any of the territories comprised in British India. The suzerainty of His Majesty over the Indian States lapsed and with it all the treaties and agreements went off. The treaties or agreements between His Majesty and any persons having authority in the tribal areas etc., also went off. The titles of the British Sovereign; namely "Indian Imperator" and "Emperor of India" were done away with, and so also provision for the issue of Royal Proclamations by His Majesty under the Great Seal of the Realm was omitted.

Under section 8 the powers of the British Parliament to frame constitution for this country were removed. Instead this power was given to the Constituent Assembly which alone could make provision as to the Constitution of Pakistan. Subsection (2) gives us a complete legislative assignment. Till other provision was made by the Constituent Assembly, the 1935 Act was to remain in force with all

adaptations, etc., ordered by the Governor-General under section 9. Under section 8 (2) *(b)* His Majesty's Government in the United Kingdom had no kind of control whatsoever over the affairs of the new Dominions or any province or part thereof. Under section 8 (2) *(c)* the individual judgment and the discretion of the Governor-General or any Governor were also done away with. Under section 8 (2) (d) no Provincial Bill was to be reserved for the signification of His Majesty's pleasure, and no Provincial Act was to be disallowed by His Majesty Under section 8 (2) *(e)* the Constituent Assembly was also to exercise the power of the Federal Legislature under the 1935 Act in regard to making laws other than the Constitution.

Under section 9 the Governor-General was empowered to make omissions from, additions to, and adaptations and modifications of the 1935 Act, and the Orders in Council and rules. There under for a fixed period only, *viz.*, from 3rd June 1947 to 31st March 1948. This period was further ex- tended by the Constituent Assembly to 31st March 1949.

Sections 10, 11, 12, and 13 refer to the provisions regarding the Secretary of States services, the Indian Armed Forces, the British Forces in India and the Naval Forces. Sections 14 and 15 make further provisions regarding the Auditor of home Accounts and legal proceedings by and against the Secretary of State. Section 16 refers to Aden, section 17 refers to divorce jurisdiction and section 18 makes a provision as to existing laws. Under section 18 (4) the Instruments of Instructions issued by His Majesty to the Governor-General and the Governors of Provinces before the passing of the Independence Act were to lapse completely with effect from 15th August 1947. Section 19 is the interpretation clause and section 20 is the short title.

This is the entire scheme of the Independence Act, and in accordance with that scheme the Governor-General of India His Excellency Lord Mountbatten, in the exercise of powers conferred upon him by section 9 (I) *(c)*, Independence Act, promulgated on 14th August 1947, *i.e.*, one day previous to the setting up of two Independence Dominions, the Provisional Constitution Order, No. 22 of 1947, whereby the 1935 Act was adapted for each of the two Dominions which were to be governed by the same until other provision was made by the Constituent Assembly. We are at present being governed by the 1935 Act (as adapted by the Provisional Constitution Order 1947 and the various amendments made therein).

I will now deal with various objections raised by the respondents. I will first deal with the most important or vital questions as the learned Advocate-General pointed out in his arguments *viz.,* of Assent and Dissolution.

I shall now take up the question whether the Acts passed by the Constituent Assembly under section 8 (I) of the Independence Act required the assent of Governor-General. The learned Advocate-General has laid great stress on the words of section 6 (3), Independence Act, and has tried to show that every Act passed by the Constituent Assembly whether on the Constitution or the Legislature said necessarily requires the assent of Governor-General and without that assent no Act whatsoever passed by the Constituent Assembly can have the force of law in Pakistan. Section 223-A which was passed by the Constituent Assembly on 6th July 1954, did not receive the assent and hence it is not enforceable. He also argued that section 6 (3) gave statutory recognition to a similar constitutional provision and parallel practice prevailing in other Dominions of the British Commonwealth. The learned Advocate-General also referred to Rule 62 of the Constituent Assembly Rules which provides that a Bill passed by the Constituent Assembly will become law as soon as it is signed by the President of the Constituent Assembly and published in the official Gazette under his signature, and argued that this Rule was *ultra vires,*illegal and void for various reasons, specially for the reason that It did not receive the assent of Governor-General.

In his written objections the learned Advocate-General, did not rely on section 5, Independence Act in this connection and be did not claim that the right of assent to the Bills of the Legislature was also a prerogative of the Crown which now vested in the Governor-General by virtue of section 5. In his arguments, however, he relied for the point of assent on section 5 as well. I will deal with the question of prerogative fully later on. For the present I will confine myself to the other points raised by the learned Advocate-General in this connection.

In my opinion reference to the Constitution of other Dominions in this behalf will not be helpful in the proper; interpretation of section 6 (3) Independence Act. The language of section 6 (3) is materially different from the parallel provisions in other Constitutions. The words generally used the same which are found in section 32 of 1935 Act, original or adapted. They are to the following effect:-

"When a Bill has been passed by the Federal Legislature, it shall be presented to the Governor-General and the Governor-General shall declare either that he assents to the Bill or that he withholds assent there from."

This is not the language of section 6 (3), Independence Act which reads as follows:-

"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 …."

The reason for this difference, in my opinion, is quite simple. The Independence Act is not the Constitution Act of this country in the same sense as 1935 Act or the North America Act, South Africa Act and the Commonwealth of Australia Act, etc. The Independence Act has simply conferred Independence on India, and the permanent Constitution for this country is yet to be framed by a special Chamber, *viz.*, the Constituent Assembly set up under the Independence Act. When a full-fledged Constitution is made for this country, if the Constituent Assembly makes any provision for assent being given to the Acts of the Pakistan Parliament by the Governor-General, the wording will naturally be that "the Bill will be presented to the Governor-General and he shall declare either that he assents to the Bill or withholds his assent". Of course I agree with the learned Advocate- General that "full power to assent to any law" includes the power to withhold assent in proper cases. But this kind of language is never employed in the drafting of a full-fledged and permanent Constitution of a country which is the supreme law of the land. The language employed is always clear and unambiguous. It never reduces people to the necessity of referring to the Interpretation Acts or the General Clauses Acts, especially when a provision is as simple as this one and for which precedent is found in almost every Constitution Act. There is also another reason why reference to the Constitutions of other Dominions will not be of any assistance to us in this behalf. The Constituent Assembly of Pakistan has yet to decide whether Pakistan will remain a dominion within the British Commonwealth of the Nations. In fact India is a no longer a dominion though it was also created like Pakistan on "Dominion basis" by the Independence Act. It is probably on this account that we find the following note at the bottom of page 194, Halsbury's Statutes, Volume 6, Second Edition, which reads as follows:-

"The Dominions of India and Pakistan which were created by the Indian Independence Act, 1947, have not been expressly added to this list of Dominions ….”

In this behalf it will be instructive to read Article 111 of the Indian Constitution which deals with the question of assent to Bills. Article 111 reads as follows:-

"When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent there from:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will re-consider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so- returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent there from.”

In view of these reasons, therefore, we have to interpret section 6 (3) in its proper context, and we have to read the words of the statute itself in order to arrive at the correct interpretation.

Now section 6 (3) reads as follows :- "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 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 not apply to laws of the Legislature of either of the new Dominions.”

This subsection must be read as a whole. It cannot be if divided into two parts and each part read independently of the other. We cannot take up the first part namely, 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 start interpreting it independently of what follows in the second part. When we read it as a whole we have no, difficulty in understanding its true meaning and Import. In view of the scheme of the Independence Act as outlined by me in the previous pages, section 6 (3) clearly refers to the 1935 Act and lays down that with effect

from 15th August 1947 all provisions of that Act with regard to the reservation of any Bills for the signification of Majesty or the disallowance of any law shall disappear. Instead, the Governor-General who is to represent His Majesty under section 5, Independence Act, shall have full power to assent to the bills. This fully explains the different language of this subsection shall have full power to assent". It was an account of this subsection that section 32 of 1935 Act was adapted in the manner as it appears now. A bare look at the original and adapted section 32 will clarify the whole point. In the original section there was also the word "discretion". That too has been removed in view of section 8 (2) *(c),* Independence Act. If the argument of the learned Advocate-General were accepted, section 32 would have been adapted to read as follows and not as it actually appears:-

"When a Bill has been passed by the Federal Legislature, it shall be presented to the Governor-General arid the Governor-General shall have full power to assent to that Bill."

This proves that the expression "law" appearing in this subsection has reference only to the ordinary law which the Federal Legislature has to pass under the 1935 Act, and no the law of Constitution as provided by section 8 (I), Independence Act. Under the Independence Act the Constituent Assembly has two functions to perform. Under section 8 (1) it has the power to frame the Constitution the country, and under section 8 (2) *(e)* it has also the powers which the Federal Legislature had under 1935 Act. Section 6 (3) read along with section 8 (1.) *(e)* Makes it quite clear that the Assent of Governor-General related only to the laws passed by the Constituent Assembly as Federal: Legislature under 1935 Act. In the Full Bench ruling in the case of *Shankari Prasad Singh Deo and others* v. *The Union of* India *and others* (1), their Lordships have clearly recognized the distinction between the ordinary law and the law of constitution. They observed:-

"Therefore, in the context of Article 13 'law' must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."

The provisions of Independence Act leave no room for any manner of doubt that the Constituent Assembly was a sovereign body and was not subject to any checks and balances, restraints and restrictions as the learned Advocate- General pointed out in his arguments. Under section 6 (2) it could make any kind of law it

liked, even though it was against the law of England, against the 1935. Act, against any future Act of British Parliament or even against the Independence Act itself. It had the power to repeal or amend

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and such Act, order, rule or regulation made there under. It had the power to repeal not only section 6 (3) of the Independence Act but the whole of the Independence Act itself. In fact, in the exercise of this power by Article 395 of the Indian Constitution, the whole of the Independence and *of* the 1935 Acts were repealed. If that is the position, which certainly it is, it is impossible to think that an Act of the Constituent Assembly repealing or removing the provision regarding assent by Governor-General would require the assent of Governor-General. To a question by the Court, the learned Advocate Mr. Manzur Qadir conceded that the Constituent Assembly had the power to repeal section 5 and 6 altogether. His argument then was that if these sections were repealed all power would vest in the King because the King has not divested himself of the power. This view is apparently erroneous. "Having by the Indian Independence Act conferred upon the Constituent Assembly a power of legislation, the King could not derogate from his grant; and the Constituent Assembly having set up a Constitution under at power, the King still cannot derogate from his grant notwithstanding the repeal of the Indian Independence Act"*(Vide* page 148, Constitution Law of the Commonwealth, Second Edition, by Sir Ivor Jennings and the late C. M. Young).

In Halsbury's Laws of England, Third Edition, Volume 5, page 488, para. 1082, we have the following passage:

"1082. Pakistan, The Federal Legislature, in its capacity as the Constituent Assembly, is invested with full constituent powers in Pakistan."

The footnote reads "Indian Independence Act, section 8 (1)".

Full constituent powers apparently mean unrestricted powers, powers not restricted by Assent.

I will now go to section 8 (2) which lays down in unambiguous terms that the New Dominions shall be governed in accordance with the provisions of 1935 Act, Orders-in-Council, etc., made there under subject to the express provisions of the Independence Act, and with such omissions, additions, adaptations and modifications as may be specified in the orders of the Governor-General under section 9, 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 section 8 (I). Thus

section 8 (2) clearly lays down that the orders of the Governor-General under section 9, Independence Act were subject to amendment, variation or repeal by the Constituent Assembly: That clearly establishes the sovereignty and the over-riding power of the Constituent Assembly with regard to the making of the Con5titution of the country. Apart from this, the power of Governor-General under section 9 was only temporary. It lasted from 3rd June 1947 to 31st March 1948. This period was then extended by the Constituent Assembly to 31st March, 1949. All this proves fully that the Constituent Assembly was a sovereign body on the Constitution making side and no assent was therefore necessary for its Acts which made a provision as to the Constitution of Pakistan. Under the statute it had the power and it actually exercised the power of extending for year the authority of Governor-General to issue orders under section 9. In this state of law it can never be said that Act passed by the Constituent Assembly is subject to restraint of assent by the Governor-General.

Now I will go to Rule 62 of the Constituent Assembly Rules which reads as follows:-

"Authentication of Bills - When a Bill is passed by Assembly, a copy thereafter shall be signed by the President and it shall become law on being published to the office Gazette of Pakistan under authority of the President."

By the statement of His Majesty's Government dated June 1947, the Constituent Assembly was given the power frame its own rules under the Independence Act it given the power even to increase, reduce or redistribute seats in the Constituent Assembly. It was thus a sovereign body and its rules are therefore the expression of that sovereign body. On the Legislature side, there section 38 of 1935 Act which as adapted reads as follows:

"38. *Rule of procedure.--(l)* The Federal Legislature makes rules for regulating, subject to the provisions of Act, their procedure and the conduct of their business.

* * * * *

(3) Until rules are made under this section, the rules procedure and standing orders in force immediately be the establishment of the Federation with respect to Legislative Assembly of the Indian Legislature shall effect in relation to the Federal Legislature subject to modifications and adaptations as may be made therein by President of that Legislature."

It is important to notice in this connection that in s section (3} for the original words "Governor-Genera!" words "President of that Legislature" were substituted by Provisional Constitution Order, 1947. This would clearly prove that under the Independence Act with which 1935 was brought in line after the Partition, the Constituent Assembly was clearly intended to be a sovereign body to make its own rules on the ordinary Legislative side as the Constitution side. In this connection it is also important to read section 18 of 1935 Act as adapted. It reads follows:

"Constitution of the Federal Legislature----The powers of the Federal Legislature under this Act shall, until other provision is made by or ill accordance with a law mad the Constituent Assembly under subsection (I) of section 8 of the Indian Independence Act, 1947, be exercisable that Assembly, and accordingly references in this Act the Federal Legislature shall be construed as reference the Constituent Assembly."

This clearly shows that the Constituent Assembly had full and unfettered authority to make rules on the make rules on the Legislative as well as the Constitution side.

Rule 62 was passed by the Constituent Assembly of Pakistan on 25th May 1948 under the President ship of the Quaid-e-Azam himself. The Indian Constituent Assembly *of Pakistan* adopted this rule on 4th November 1948 and that is Rule No. 38 (V), Indian Constituent Assembly Rules.

The learned Advocate-General has attacked this rule on two main grounds *viz*:-

(a) That it is a mere rule of procedure and the Constituent Assembly did not pass it as law.

(b) Rule 42 of the Constituent Assembly and section 6

(3), Independence Act, were not followed as the assent of Governor-General was not obtained.

I am unable to agree with these contentions. Section 38 (I) of 1935 Act will show that the Federal Legislature was statutorily authorized to make rules for their *procedure.*The word used therein is "procedure". Section 38 read with section 18 of 1935 Act confers full authority on the Constituent Assembly to make rules of procedure and those rules certainly have the force of law. On the Constitution side it has been given full and unrestricted authority to make rules for their procedure. I

have already referred to the statement of His Majesty's Government dated 3rd June 1947. These rules of procedure have therefore the full force of law.

As regards section 6 (3), I have already stated above that the Constituent Assembly is a sovereign body and as such its Acts and rules did not require the assent of the Governor-General. There remains Rule 42 which reads as follows:-

"42. *Legislation-The* procedure for making provision as to the constitution of the Dominion or for amending the Indian Independence Act and the Government of India Act 1935 shall be the same as that of a Bill."

Now this rule, in my opinion, does not in any way come in conflict with Rule 62. It only means that the procedure, namely of publication, introduction, discussion, etc., regarding a Bill will apply to the making of a provision as to the constitution of the country. Rule 62 deals with the authentication of the Acts of the Constituent Assembly. For that the Constituent Assembly was the sole and sovereign authority to determine the manner of authentication. The Governor-General had to step in only when the Acts of the Federal *K Legislature under 1935 Act had to be dealt with. I have, therefore, no manner of doubt that Rule 62 was perfectly consistent with the letter and spirit of the Independence Act and was fully enforceable as law.*

Having discussed the question of assent from the legal point of view, I will know show that everyone in and outside this country (including the Federation of Pakistan themselves) has been fully accepting and acting on the view up to now that the Acts of the Constituent Assembly did not require the assent of Governor-General.

The learned Advocates for the petitioner have produced: before us a list of as many as forty-six Acts which the- Constituent Assembly has passed so far and none of which ever received the assent of the Governor-General. Some of these Acts are most important, *e.g.* The Privy Council (Abolition of Jurisdiction) Act, 1950, passed on 12th April;' 1950 and published on 20th April 1950, the Rawalpindi Conspiracy (Special Tribunal) Act, 195J, passed on 16 April 1951 and published on 28th April 1951, and the Indian Independence (Amendment) Act, 1948, passed on 2nd March 1948 and published on 17th March 1948. Under the last Act the authority of the Governor-General under section 9, Independence Act, was extended for one year from 31st March 1948. Every one of these Acts is an important and even the Governor-General has himself; been acting udder those Acts and has been passing several; orders there under. Not only this, several people have been convicted and acquitted under these Acts. If every one of these Acts

were held invalid for want of assent, the consequences are bound to be disastrous. Let us take the case or one Act, *viz.*, the Privy Council (Abolition of Jurisdiction) Act, 1950. The Act did not receive the assent of Governor- General and yet the Privy Council sent back all the appeals and other matters of Pakistan pending before it to the Federal Court of Pakistan and the latter Court has been deciding those cases as successors of the Privy Council. I consider this action of the Privy Council in sending all the records here and of the Federal Court of Pakistan dealing with those very cases as successors of the Privy Council, to be a *law declared* under section 212 of 1935 Act, on the point that the Acts passed by the Constituent Assembly did not require the assent of the Governor-General. Although very technically - it may be argued that the point of assent was not particularly raised before both these Courts, still in my opinion it is impossible that the point would have succeeded in escaping the scrutiny of the highest judicial authorities like the Privy Council and the Federal Court.

Then we find that even the British Parliament accepted this position when they passed the India (Consequential Provisions) Act, 1949, whereby the self-same Parliament which had enacted the Independence Act gave parliamentary recognition to the fact that the Acts passed by the Constituent Assembly did not require the assent of Governor-General.

The Governor-General of Pakistan has himself passed so many orders under various Acts passed by the Constituent Assembly, and never was any question raised on his behalf that any of the Acts was invalid for want of assent. For example, he has passed so many orders under the Public and Representative Offices (Disqualification) Act, 1949, which was passed on 6th November 1949, and published on 11th November 1949, disqualifying various persons for various terms. For brevity I will refer to this Act hereafter as "Proda", not only this, the Governor-General was pleased to pass an order on 20th October 1954. i.e. only four days before he issued the Proclamation dissolving the Constituent Assembly, under the same Proda and Proda Repealing Act which was passed on 21st September 1954, and published on the same date, amending; is previous order of disqualification In the cases of certain reasons. In that order which is sufficiently long and well discussed, the plea of assent was never raised. On the contrary *of* the position was accepted that the Acts were quite valid and good law even though they had not received the assent of Governor-General.

I will not go over to the reported cases. The following, cases, chronologically arranged, are relevant to the point at issue:-

(1) The case of *M. A. Khuhro plaintiff* v. *Federation of Pakistan* (1), decided on 20th March 1950.

(2) The case of *Khan Iftikhar Hussain Khan of Mamdot* .v. *The Province of the Punjab* (2), decided on 18th May, 1950.

(3) The case, of *Sarfraz Khan and another* v. *Crown* (3), decided on 31st May 1950 by the Division Bench and thereafter on reference by the Full Bench of the Lahore High Court.

(4) The case of *Ex-Major-General Akbar Khan and another* v. *The Crown* (5), decided on 5th January 1953.

(5) The recent case of *La/ Khan and others* (5) under section 491 Criminal Procedure Code read with section 223-A of the 1935 Act which has not yet been reported but which appeared in "Dawn", dated 22nd December 1954. The learned Advocate Mr. Pritt, continuing his arguments on that day, started with a reference to this case.

I will discuss these cases one by one in their chronological order. In the first case (1950 Sind 49) Mr. Manzur Qadir the learned Advocate who appears for some of the respondents now in this case, was representing the Federation of Pakistan and he took the plea that no assent was necessary of the Acts of the Constituent Assembly. Mr. Siraj who was appearing for Mr. Khuro, relied on section 6 (3) of the Indian Independence Act, 1947, in support of his theory that the assent of Governor-General was necessary. I consider it necessary to reproduce the pertinent passage from the judgment here:-

"From this Mr. Siraj has argued that all laws passed by the Legislature of the Dominion require the assent of the Governor-General. Mr. Manzoor Qadir, who appears for the Federation of Pakistan, has on the other hand relied on section 6, clauses (1) and (2) and section 8, clause (1) and proviso clause (6) in support of his contention that the Act did not require the assent of the Governor-General, as it was passed by the Constituent Assembly sitting as a constitution making body and not as the Federal Legislature."

(1) P L D 1950 Sind 49 (2) P L D 1950 F C 15
(3) P L D I950 Lah.384 (4) P L D I954 FC 87
(5) P L D 1955 Lah. 215.

The Court, after discussing the relevant provisions ca to the following conclusion:

"I have no doubt in my mind that there is no limit imposed upon the Legislative powers of the Constituent Assembly sitting as a constitution making body. No assent of the Governor-General was, therefore, necessary."

The learned Advocate Mr. Abdul Haq, who was assisting the Advocate-General in this case, referred, to some decision., in support of the theory that the rule of "stare-decision cannot apply to the facts of our present case because we will be mostly depending on inferences. But in P L D 1950
Sind 49, a point was actually taken by the Advocate of Mr. Khuhro that the assent of Governor-General Necessary and Mr. Manzur Qadir appearing for the Federation of Pakistan raised the plea that no such assent was necessary. It was, however, decided very definitely and clearly by the Court that the assent was not necessary. It was of course amusing to hear Mr. Manzur Qadir saying now this owns view in 1950 was not mature. I now go to *Mamdot case* reported in P L D (195 F C 15. This case was decided after *Khuhro's case*and those pleas of assent were never raised before the Federal Court. In this case the appeal had been filed by special leave under the Privy Council (Abolition of Jurisdiction) Act, 1950, which was passed by the Constituent Assembly and for which no. assent had been taken. If there had been any force in the plea of assent which has been raised by the learned Advocate-General on behalf of the Federation of Pakistan, surely it could never have escaped the noticed of the learned Advocates and the Honourable Judges of the'" Federal Court.

Then I go to the third case of *Sarfraz Khan*, reported; in P L D (1950) Lah. 384. This was decided by the Full Bench of the Lahore High Court and the leading judgment was delivered by Muhammad Munir, C. J. (at present the Chief Justice of Pakistan). It is a very important judgment which considers the entire constitutional position of the country before and after the passing of the Indian Independence Act. No question came up in this case from any side whether the assent of the Governor-General to the Acts of the Constituent Assembly was necessary.

I now go to the fourth case reported in (1954) F C 872 This dealt with the case of the petitioners under the Rawalpindi Conspiracy (Special Tribunal) Act, 1951, passed on 16th April 1950 by the Constituent Assembly. No question whatsoever of assent to the Acts of the Constituent", Assembly was raised in this case. The Federal Court knew very well that no assent of the Governor-General

had been obtained to this. Act of the Constituent Assembly, and therefore it must be taken for granted that the Federal Court did not think that assent to be necessary. The following observation in the leading judgment of Akram, J. is important: -

It is sufficiently clear from the above provisions that the Constituent Assembly, therefore of Pakistan as the supreme legislature of the dominion is vested not merely with the functions of making provisions as to the Constitution of the dominion" but is further empowered to act as the Federal Legislature for the purpose of the Government of India Act, 1935. The Constituent, therefore much like the British Parliament, can make or unmake any kind of law and no question of vires with reference to any legislation passed by it under its plenary powers can be raised."

Now I will refer to the fifth case which was reported in "Dawn" of 22nd December 1954. There it was held by the Full Bench of the Lahore High Court that section 223-A of the Constitution Act over-rides and abrogates the provisions of section 10 of the Restriction and Detention Ordinance in so far as they are repugnant to it must therefore yield supremacy to the new constitution provisions."

The full Bench of the Lahore High court knew very well that no assent of the Governor General has been well that no assent of the Governor General has been obtained to section 223-A and therefore this judgment judicially recognizes the validity of section 223-A of the 1935 Act.

All the facts clearly establish the theory that the acts of the Constituent Assembly don't need the assent of the Governor General. The question of assent of the Governor General arises under the 1935 Act only. The constituent assembly has no place in the 1935 Act. It was a special chamber created by the independence Act and possessed the sovereign power of framing the Constitution by which this country of which power it could even repeal the whole of 1935 Act. Therefore the question of the Governor General's assent to its Acts does not arise at all. I therefore hold that the petition does lie under section 223-A of the Constitution Act.

I will now take up the question whether the Governor General had the power to dissolve the Constituent Assembly. According to the learned Advocate-General; this is the most important point in the whole case. The petitioner's case is stated in para 11 which are reproduced below: -

"The petitioner is advised that the alleged proclamation is the unconstitutional illegal, ultra vires without jurisdictions inoperative and void on the following among other grounds: -

(a) That His Excellency the Governor-General has authority either under the Indian Independence Act of 1947 or under the Government of India Act, 1935 (as adapted by Pakistan or under any law for the time being in force in Pakistan) for issuing the alleged Proclamation.

(b) It is denied that the Constitutional Machinery had broken down. It is submitted that the said allegation was made in the alleged proclamation merely with a view: justify the promulgation thereof. In any case the insertion or assertion of such allegation therein does not empower His Excellency the Governor-General to issue the alleged proclamation.

(c) Under the provisions contained in the Indian Independence Act, 1947 the Constituent Assembly performs dual functions. It is invested with the higher over-riding functions of acting as a supreme, sovereign, unfettered Legislature and is also empowered to act as the Federal Legislature for the purposes of the Government of India Act 1935 (as adapted by Pakistan).

(d) The said proclamation recites that the Constituent Assembly could no longer function. If thereby it is purported or otherwise intended to dissolve the Constituent Assembly the said petitioner submits that the Proclamation is void as His Excellency the Governor-General has no power to dissolve the Constituent Assembly.

(e) It is denied that the Constituent Assembly has ceased to function. The Constituent Assembly cannot be dissolved by the Governor-General or any other authority except by the Assembly itself.

(f) The Constituent Assembly even in its capacity as the Federal Legislature cannot be dissolved by the Governor-General. The power to dissolve the Federal Legislature was contained in section 19 (2) *(c)* of the Government of India Act 1935 prior to August 15, 1947. Thereafter the said subsection was omitted by and under the Pakistan (Provisional Constitution) Order of 1947. The Governor-General, therefore, does not possess any power to dissolve the Federal Legislature.

(g) As regards the Constituent Assembly exercising the powers of the Legislature of the Dominion, His Excellency, and the Governor-Genera1 has jurisdiction, authority or power to dissolve it. The provisions regarding the summoning, adjourning a meeting, proroguing or dissolving or Constituent Assembly are contained in the rules framed by the Constituent Assembly. The

President alone has the power to summon, adjourn a meeting of and to prorogue the Constituent Assembly. So far as dissolution is concerned it is provided that the Assembly could not be dissolved except by a Resolution assented to by at least two-thirds of the total number of Members of the Assembly.

(h) It is therefore submitted that by virtue of alleged proclamation the Constituent Assembly could not be dissolved.

(i) His Excellency the Governor-General had no control over the Constituent Assembly (Constitution). In fact the acts passed by the Constituent Assembly in that capacity do not require his assent. It is provided that when a bill is passed, 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."

The case of the respondents is that the dissolution of the Constituent Assembly was perfectly valid in view of the following seven grounds stated in Part II of the written objections:-

(1) Until other provision is made under the Indian Independence Act, 1947, Pakistan is one of the dominions of the Crown of the United Kingdom. In each of those dominions in which a Legislature exists the Crown has at common law a power to dissolve that Legislature save in far as that power had been superseded or regulated by legislation.

(2) Pakistan is by the express language of the Indian Independence Act, 1947, one of the said Dominions. The power to dissolve the Legislature of the Dominion, which in accordance with section 8 of the Indian Independence Act, is in the first instance the Constituent Assembly, is a prerogative of the Crown, which cannot be taken away except by express words in an Act of the parliament of the United Kingdom or a law passed under section 8 of the Indian Independence Act. The petitioner does not claim that any such Act or law has been passed, and the Respondents accordingly claim that the power remains in full force and effect.

(3) The Respondents claim that, in order to give independence to the Dominion of Pakistan and to deprive Her Majesty. Government in the United Kingd om of all responsibility as respects the Government of Pakistan, section 5 of the Indian Independence Act provided that the Governor-General should represent Her Majesty for the purposes of the Government of the Dominion and thereby vested in the Governor-General all the powers of the Crown at common law.

(4) By Rule 15 of the Rules of Procedure of the Constituent Assembly of Pakistan, the said Assembly purported to regulate the power of dissolution by

providing that the Assembly should not be dissolved except by a resolution assented to by at least two-thirds of the total number of members of the Assembly. The Respondents claim that this Rule of Procedure is not a law within the meaning of sections 6 and 8 of the Indian Independence Act and accordingly that it has no legal force and effect. Even if it could be regarded as a law it would be void and inoperative because -

(I) It is not a law made for the purpose of making provision as to the Constituent Assembly to keep that Assembly in being and is therefore not within the power conferred on the Constituent Assembly.

(ii) It has not received the assent of the Governor-General under section 6 (3) and is therefore not valid and enforceable law.

(5) *It* is admitted that the Constituent Assembly of Pakistan was established under the authority of the Governor-General of India in accordance with paragraph 21 of the statement of His Majesty's Government dated "3rd June, 1947, It Is however claimed by the Respondents " that its composition was changed under Acts and rules which had not the force of law. The Respondents also claim that by reason of section 19 (3) of the Indian Independence Act and section 12 (I) and (2) of the Interpretation Act, 1889, the Governor-General of Pakistan had power to revoke or vary the order of the Governor-General; of India and to make further orders.

(6) The Respondents deny that the removal of the power to dissolve the Federal Legislature conferred on the Governor-General of India by section 19 (2) *(c)* of the Government of India Act, 1935, deprived the Governor-General of Pakistan of his power to dissolve the Constituent Assembly of Pakistan under section 5 of the Indian Independence Act, 1947.

(7) In the exercise of his said power, His Excellency the Governor-General issued the Proclamation of the 24th October, 1954, whereby the Constituent Assembly wasdissolved. The Respondents submit that it is not within the jurisdiction of the Honorable Court to decide whether His Excellency had or had not good reasons for exercising the power on the 24th October, 1954. If however the Court requires the Respondents to submit proof of fact asserted in the Proclamation, the Respondents are prepared to show that-

(a) The constitutional machinery bad broken down;

(b) The Constituent Assembly had lost the confidence of the people; and

(c) The Constituent Assembly could no longer function in accordance with the provisions of the Indian Independence Act, 1947.

At the time of arguments both the parties developed their case further and supported it by extensive reference to the authorities will deal with all the important points one by one.

The learned Advocate-General at the time of summoning up his arguments, made a categorical statement that the Proclamation of 24th October 1954, dissolving the Constituent Assembly was issued by the Governor-General under section 5, Independence Act. I will deal with the aspect later on. For the present I will deal with section 19 of 1935 Act which according to me, is the most important provision of law bearing on the question of dissolution and which thoroughly solves this question. After considering the aspect of the case under section 19, I really consider any reference to Section 5. Section 19 as it stood originally reads as follows:-

"19. *Sessions of the legislature, prorogation and dissolution.* -- *(1)* The Chambers of the Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

(2) Subject to the provisions of this section, the Governor-General may in his discretion from time to time.

(a) Summon the Chambers or either Chamber to meet such time and place as he thinks fit;

(b) Prorogue the Chambers;

(c) Dissolve the Federal Assembly.

(3) The Chambers shall be summoned to meet for their first session on a day not later such day as may be specified in that behalf in His Majesty's Proclamation establishing the Federation.

Section 19 as adapted reads as follows:-

"19. *Sessions of the Legislature, prorogation and dissolution-(1)* The Federal Legislature shall be summoned to meet once at least in every year, and twelve months shall not intervene between their last sitting in one session and tile date appointed for their first sitting in the next session.

(2) Subject to the provisions of the section, the Governor-General may from time to time ---

(a) Summon the Federal Legislature to meet at such time and place he think fit;

(b) Prorogue the Federal Legislature;

(c) Omitted…..

(3) Omitted……

This adaptation was apparently made in order to bring the 1935 Act in line with the Independence Act. It will be seen from above that while the Governor-General's power to summon and prorogue the Federal Legislature (i.e., the; Legislature under the 1935 Act operating for the enactment of ordinary laws and not the Constituent Assembly under section 8 (I) of the Independence Act were retained after adaptation, his power to dissolve the Federal Legislature was withdrawn by the omission of section 19 (2) *(c)*. It is an admitted position that the summoning, proroguing and dissolving the legislative body are prerogative powers. The argument of the Learned Advocate-General was that even if section 19 (2) *(c)* was omitted, the prerogative to dissolve under section 5, Independence Act, remained. A question was therefore naturally put to the Learned Advocate-General as to why the two prerogative powers of summoning and proroguing were retained in the statute when the third one of dissolution was withdrawn. Up to the last the learned Advocate-General was not able to state any reasons whatsoever for the retention of section 19 (2) *(a)* and *(b)*. At this stage I consider it necessary to reproduce section 18 of 1935 Act, original as well as adapted:-

Government of India Act, 1935

18. *Constitution of the Federal Legislature.-(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 of 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 may be one-third of the members therefore shall retire in every third year in accordance with the provisions in that behalf col1tained in the said First Schedule.

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

Adapted Act

18. *Constitution of the Federal Legislature.-The* powers of the Federal Legislature under this Act shall, until; other provision is made by or in accordance with a law made by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947, be exercisable by that Assembly, and accordingly references in this Act to the Federal Legislature shall be construed as references to the Constituent Assembly.

It will be seen from above that under 1935 Act the life of the Federal Legislature was fixed by the statute to be five years unless sooner dissolved by Governor-General under section 19 (2) *(c).* Under the adaptations its life was not limited to any period for the simple reason that tile Constituent Assembly set up under section 8 of the Independence Act was also to act 8, thc Federal Legislature under 1935 Act and the life of the Constituent Assembly was to last till the Constitution was made for Pakistan. Therefore, it could not be dissolved till it had completed the Constitution. The learned Advocate-General admits that the dissolution of the Constituent Assembly will mean the dissolution of the Federal Legislature and *vice versa.* Because the life or the Constituent of Assembly was unlimited and because it could not be dissolved till it had completed the functions for which it was created under the Indian Independence Act, it was impossible to retain the Governor-General's power of dissolving the Federal Legislature under section 19 (2) *(c).* Hence this power of dissolution was deliberately withdrawn with the set purpose. The learned Advocate-General argued that under 1935 Act the life was fixed for five years and therefore a power of dissolution had to be provided for now that the life was unlimited there was no necessity to retain that power! Frankly, I am not able to understand this argument. If you need the statutory

authority to dissolve a body whose life is only five years, your need of that power is a number of time greater when the life is unlimited. According to me, omission of section 19 (2) *(c)* is a deliberate withdrawal of the prerogative power of dissolution which was merged in the statute. When the statute was repealed it was clearly intended and meant that the Governor-General's power of dissolution had to cease. It is impossible for me to accept the contention that the prerogative was revived by repealing the statute. In this connection it is worthwhile referring to sections 61 (2) and 62 (2) of the 1935 Act as adapted:-

"61 (2) Every Legislative Assembly of every Province. 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 dissolution of the Assembly.

"62 (2) Subject to the provisions of this section, the Governor may from time to time-

(a) Summon the Legislative Assembly to meet at such time and place as be thinks fit;

(I) prorogue the Legislative Assembly;

(c) dissolve the Legislative Assembly.

This will show that while the Provincial Governors prerogative power of dissolution was retained, that of the Governor-General was deliberately withdrawn. If section 19 (2) *(c)*was omitted because section 5 Independence Act was there, as the learned Advocate, General has sought to make out, there was no purpose in retaining section 19 (2) *(a)* and *(b).*Section 5, Independence Act was there even for the purpose of summoning and proroguing the Federal Legislature. This only proves that the learned Advocates for the respondents are reading into section 5, Independence Act what does not really appear there. The real position is so simple. The Constituent Assembly being a sovereign body is summoned and prorogued by the President of the Constituent Assembly in accordance with the rules framed by the constituent Assembly while the constituent Assembly sitting as the federal legislature under the 1935 Act is summoned and prorogued by the Governor-general in accordance with the provisions of section 19 (2) (a) and (b). The Governor General's power of dissolution withdrawn because the dissolution of Federal Legislature is withdrawn because the dissolution of the Constituent Assembly, which is not permissible under the provisions of the Independence Act.

The Constituent assembly have framed rule 15 in regard to dissolution with which I will deal in due course.

I will now take up section 5, independence Act which is the sheet anchor of the respondents' case. It has been argued that this section vests in the Governor General all the prerogative of His Majesty and the Governor General in exercise of his powers under this section. The language employed in the proclamation however is somewhat extraordinary. Relevant extract from it reads as follows: -

"The Governor – General having considered the political crises with which the country is faced has with 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."

It will be noticed that neither section 5, independence Act nor any other provision of law has been cited in the proclamation. It does not even say in clear and specific terms that the Constituent Assembly is "dissolved". Normally, whenever any order is passed, it indicates the provision of law under which the power is exercised. The language of the proclamation would not think of any provision of law. But that doesn't mean that the case setup now by the learned Advocate General under section 5, Independence Act, should not be considered by the Court.

The pertinent portion of section 5 reads as follows: -

"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."

It will be necessary to see what is meant by the words "for the purposes of the Government of the Dominion". The leaned Advocate General has argued and he has relied in this connection on Halsbury's laws of England to show that "government" means government on the Executive, Judicial and Legislative side. The context in which this term appears in section 5 does not however support the connection of the Advocate General. These words in section 5 apparently mean "for the purposes of the government of the Dominion as required by the government of India Act 1935". These words have no reference whatsoever to the Constitution-making function of the Constituent Assembly which is a sovereign body under the Independence Act. This point will be clear if we refer to the other provisions of the independence Act itself. In this connection, section 8 (2) is most important, it reads as under: -

"(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 there under, shall, so far as applicable, and subject to any express provisions or 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:

It will be noticed that the words used here are "shall be governed". The words "for the purposes of the government of the Dominion" section 5 have therefore the same meaning as ill section 8 (2). Section 7 (1) *(a)* reads as follows:-

"(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 ;"

Section 8 (2) *(a)* reads as follows:

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

In this provision of Independence Act, Government and Legislature have been mentioned separately.

In section 10, relating to Secretary of State's services, the word “Government" is used to indicate only the Executive Government. Similar is the case with section 14 which makes provision regarding the Secretary of State and the Auditor or Indian Home Accounts.

The preamble to the India and Burma (Emergency Provisions) Act 1940, reads:

"An Act to make emergency provision with respect to the government or India and Burma.

A perusal of the Act would show that by the expression "government" the Executive Government was intended and meant.

The very title of "The India (Central Government and Legislature) Act 1946" clearly shows that Executive Government) and Legislature are treated as two separate things.

In view of all these reasons, *it* becomes clear that the expression "for the purposes of the government of the *all* Dominion" appearing in section 5 has reference only to executive duties of governing the Country under the Constitution Act of 1935 and has nothing to do with Constitution making under section 8 (1) of the Independence Act.

It therefore becomes necessary now to see the power of the Governor-General under the 1935 Act to issue *the* Proclamation in question. I have already stated very clearly": that the Constituent Assembly has no place in the 1935 Act and therefore the Governor-General cannot exercise any: power or jurisdiction over the same. 1 have also shown that by the omission of section 19 (2) *(c)* the Governor-General's power to dissolve the Federal Legislature was withdrawn on that very account. I will now go over to the relevant provisions of 1935 Act ---

(a) Under section 12 of 1935 Act, as it stood originally, the Governor General has special responsibilities for the due discharge of which he could exercise special powers in his individual judgment. This section has since been omitted by the Provisional Constitution Order, 1947.

(b) The original section 43 empowered the Governor-General to promulgate Ordinances *at* any time with respect to certain Subjects. This section too has been omitted now.

(c) Under section 44 the Governor-General had the power to enact Acts in certain circumstances even when the Legislature was in existence and was not dissolved. Thus he had the overriding power over the Legislature. This section has also been done away with.

(d) Chapter V Part II of 1935 Act contained one section 45 only; the heading of this Chapter is "Provisions in Case of Failure of Constitutional Machinery". This section gave the statutory authority to the Governor-General to govern the Country by means of Proclamation. It was a great power and is relevant to this case. This section too has been omitted now. *(e)* Section 42 which empower the Governor-General to issue Ordinances in case of emergency, does not apply to this case.

(f) Similarly section 126-A also is irrelevant to the present case.

All this clearly shows that there is no provision in the whole *1935* Act under which the Governor-General could issue the Proclamation in question. It was apparently on account of this reason that no provision of law was cited in the Proclamation.

This brings us immediately now to the question of prerogative. We have first to understand what is meant by the words shall represent. His Majesty appearing in section 5, Independence Act. There can possibly be no two opinions on the point that the powers which the Governor-General had under the 1935 Act were far greater than those he has after the passing of the Independence Act. His special power in the discharge of special responsibilities, his individual judgment, his discretion, his powers to supersede Legislature enacting Acts even when the Legislature was in existence and his power to govern the country by proclamation have *gone under the Independence Act. Section 2 has been emitted while section 3 is greatly curtailed In spite of all his position under the 1935 Act itself before the passing of the Independence Act, is described as follows in the commentary under section 3 at page 11 by Rajagopala Aiyangar:-*

"The Governor-General of India, as the Governor-General of the Dominions, is not a general agent of the Crown, with power to exercise all the prerogatives of the Crown but is only a special agent armed with such power as is conferred on him by the constitution and such other prerogative powers as the Crown may lawfully assign to him. Per Higains. *J.* in *Commonwealth.* v. *Colonial Combing, Etc., Ltd.* (1). *Musgrave* v. *Pulido* (2) and: - *Commercial Cable Co.* v. *Newfoundland* (3). "For the measure of his powers the words of his Commission and the statute itself must be looked at *Bonanzo Creek* v. *Rex* (4). For an instance where delegation of a prerogative is expressly contemplated, *see*section 295 (2), *infra."*

His position after the passing of the Independence Act can't be better than this. In the case of *Sarfaraz Khan* v. *Crown* (5), we have the following important observation:

"The Governor-General is the representative, not the agent of His Majesty for the purposes of the government of the Dominion and that being so his act in giving assent to Bills is always symbolic or representative, whether while giving the assent he says or not that he acts in a representative capacity."

The learned Advocate-General referred to the dictionary meaning of the word "Represent" to be "To take the place of, for certain purposes". He therefore argued that under section 5 "the Governor-General shall take the place of His Majesty for the purposes of the government of the Dominion". Let us therefore examine the Constitution Act and find out what powers of His Majesty are actually there still: Under the Independence Act, the King has clearly given away all His

powers in this country. He has even renounced his style and title as "Indian Imperator" and "Emperor of India". In the case of *Gajambal Ramalingam and others* v. *Rukn-ul-Mulk Syed Abdul Wajid and others* (6) their Lordships were pleased to remark as follows: -

(1) 31 C L R 421 (2) 5 A C 102

(3) (1916) 2 A C 610 at p. 6l6

(4) (1916) l A C 566 at p. 587

(5) P L D (1950) Lah. 384

(6) A I R (l950) P C 64

"It appears to their Lordships that, in view of the provisions in the Indian Independence Act, 1947, and of notification to which they had last referred, the jurisdiction formerly exercised by His Majesty in or in relation to the part of the territory of the state of Mysore which known as the Civil and Military Station, Bangalore, to an end. The Courts of the District Judge and of Resident ceased to exist. His Majesty with neither fountain of does not just nor had any executive authority in Civil and Military Station of Bangalore. In lb area, as in the rest of the State of Mysore, the Maharajah alone had sovereign powers and it was for him to make such laws as he thought fit for the administration of justice in his territory. Reference will be made to the laws that he in fact made, but they cannot be regarded as conferring upon His Majesty in Council any jurisdiction.

The precise meaning and effect of those enactment in particular of section 8 of Act XXIV (24) of 1947 which the appellants relied are not in all respects determine nor would it be proper for their Lordships attempt to do so, It is sufficient for them to say however they may be interpreted by the Courts of they cannot be effective to create and vest in His Counci1 a jurisdiction which he bas expressly sure and renounced."

The only provisions of 1935 Act in which His name still appears are the following:-

(a) Sections 3. 48 and 304-relating to the appointment of Governor or Governor-General.

(b) Sections 154 and 174-relating to property rights.

(c) Sections 240, 241, 254, 260,266, 277, 298 and 306 relating to persons in the service of His Majesty.

(d) Section 295-refers to the prerogative of mercy or pardon.

In this connection it is also worthwhile to see the new section 3 of 1935 Act. A consideration of all provisions of the Constitution Act would clearly show even if the dictionary meaning of the word "Represent" adopted the Governor-General cannot be said to have powers than the Queen, who has in fact renounced all in Pakistan: In Halsbury's Laws of England, Third Edition Volume 5, page 463, para. l025, the following passage appears: -

"In Pakistan, where the position may be regarded as transitional, the Queen is not designated as Queen of Pakistan."

A question then naturally arises, what after all meaning of the expression "Represent" in the context in which it is used in section 5. In my opinion the representation is only a formal and symbolic representation of the Queen, who is August and Beloved Head of the Common Wealth, who reigns but does not rule. This formal connection is kept up during the transition period in view of a long contact between this contrary and her Majesty, in the hope expressed in the Cabinet Mission Plan and H.M.G's statement, dated 3rd June l947 that this country will choose to remain in the Commonwealth.

The Governor-General is a creature of the statute and therefore for his powers and prerogatives we have to look to *the statute and Commission of his appointment. Beyond the Commission of appointment and the 1935 Act was brought in line with the Independence Act, he has no other powers. Let us now see the Commission of his appointment. Para. 3 is important for our purposes here. It reads as follows:-*

"And we do hereby authorize, 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 to you may seem fit."

This has reference to section 295 of the 1935 Act, of which only subsection (2) has been retained after the passing of the Independence Act. As adapted, it reads as follows;-

"295 (2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any E such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

This is a specific statutory delegation of the King's prerogative of pardon and mercy. The question naturally arises that if section 5, Independence Act, is a reservation of His Majesty's prerogatives, why was section 295 (2) deliberately retained on the Statute Book? Why was section 19 (2) *(a)* and *(b)* retained? As

stated by me in the preceding pages, the learned Advocate-General at the time of his arguments relied for the question of assent on section 5 also apart from section 6 (3), Independence Act. Why was then section 6 (3) enacted at all, if section 5 was the omnibus section containing all the Royal Prerogatives? This establishes fully that beyond the statute and the Commission of appointment, the Governor-General has no further powers. The Constituent Assembly was a sovereign body specially created for the purpose of framing the future Constitution of the country. The Governor-General had no power under the statute or the Commission of appointment to dissolve it. If the British Parliament wanted to give the power of dissolution to the Governor-General under section 5, they should have said t so in very clear terms. The Governor-General powers in connection with the Constitution of the country are no more than what is laid down in section 9, Independence Act. Those powers were also for a temporary period. In fact the order of the Governor-General himself issued on 20th October 1954, only four days before the Proclamation dissolving the Constituent Assembly, makes this position very clear. Relevant portion of it reads as follows:-

"5. Subsection (2) of section 295 of the Government India Act, 1935, lays it down as follows;-

Nothing in this Act shall derogate from the right of Majesty, or of the Governor-General, if any such right delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment."

It will be seen that under the authority of this subsection, the Governor-General is empowered to exercise the royal prerogative of pardon, reprieve, respite or remission only to the extent to which such right has been especially delegated to him.

Article III of the Royal Warrant of Appointment of the Governor-General which has reference to this prerogative, despites this right to the Governor-General In these terms:

"And we do hereby authorize and empower you in Our name and on Our behalf to grant to any offender committed, in the existence 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 to you may seem fit."

It is clear from this Article that while to the Governor-General has been delegated the power to grant a pardon to offenders committed by Courts of criminal jurisdiction, the right to grant pardons, reprieves, respites or remissions in cases which are not covered by the terms of Article III has not been delegated to

him. It follows, therefore that the submission made by the petitioner that the order of disqualification passed against him under section 3 of the Public and Representative Offices (Disqualification) Act should be rescinded under section 295 of the Government of India Act, 1935, cannot be accepted."

All this discussion clarifies the legal and constitutional position very thoroughly that when tile prerogative is merged in the statute, there can be no reserved prerogative. When the prerogative which has once been put on the statute is deliberately removed there from, it no longer exists. In this connection we have a very important ruling of the House of Lords in the case of *Attorney-General* v. *De Keyser's Rayal Hotel, Limited* (1).

The following observations in this case are very important;-

"In the latter case the Crown is not entitled in virtue of its ancient prerogative apart from statute to take the land of a subject compulsorily. This ancient prerogative is a far narrower thing than has been suggested in argument, and is a right exercised to deal with a concrete emergency; Hampden's Case." (Page 519).

"None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules.

(1) Law Rep. 1920, App, Ca. p. 508

The prerogative is defined by a learned constitutional writer as The residue of discretionary or arbitrary authority which, at any given time is legally left in the hands of the Crown'. (Page 526).

"The late Master of the Rolls in the following pregnant passage of his judgment put a rather unanswerable question. He said; -

“Those powers which the executive exercises without parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised ill a particular manner and subject to' the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative? (Page 538)."

“'The appellant further contended that all that was done could be done, and was done, independently of any statute, by virtue of the Royal Prerogative alone….. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at lest to very its exercise, or to provide an additional mode of attaining the same object. Even the restrictions (such as they were) imposed by the Defense Acts on any powers of requisitioning buildings in time war were in no way consistent with an intention to abate the prerogative in this respect, if not absolutely, at least for so long as the statute operates According to the argument under the prerogative the subject could claim no compensation for losing the use of his property; under the statute he could. It is to be supposed that the Legislature intended merely to give the Legislative, as advisers of the Crown, the power of discriminating between subject and subject, enriching one by electing to precede under the statute and impoverishing another when it requisitions under the alleged prerogative? To presume such an intention seems to me contrary to the whole trend of our constitutional history for over two hundred years.' (Pages 561-562).

"The growth of constitution liberties has largely consisted in the reduction of the discretionary power of the executive and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the Royal Prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within him comparatively narrow limits, The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law as taken the place of an uncertain and arbitrary administrative discretion. A similar tendency may by trace in the growth of our legal system. Portions of the Common Law have been systematically incorporated in or modified by Acts of Parliament, and in this way the obligation which that law imposes has become more definite, and more certain in their application." (Page 568).

“I am further of opinion that the plea of the appellant that the prerogative right of the Crown whatever it may have been, has not been abated abridged or curtailed by any of the Defense Acts, 1842-1873, or by any other statute, cannot be maintained” (Page 575).

In the case of *Rober Lyon Moore and others* v. *Attorney-General for Irish Free Slate and others* (I), it was held by their Lordships "that whatever might be the position of the King's Prerogative, if it were left as matter of the common law,

it was here in this particular respect and in this particular enactment made matter of the Parliamentary legislation, so that the prerogative was *pro tanto* merged In the Statute, and gave powers of amending and altering statutory prerogative."

Both the parties have made extensive references to so many authorities. I do not think it necessary to encumber my judgment with all those principles enunciated by those rulings are the same which I have quoted above from the Privy Council and the House of Lords' case.

It is important also to remember that the right to dissolve the Parliament in England has ceased to be a prerogative since nearly two-and-a-half centuries. It is now a statutory duty In Halsbury's Statute, Second Edition Volume 17 at page 471 we find “The Meeting of Parliament Act, 1694," an Act passed for the frequent meeting and calling *of* Parliaments. Section 2 of this Act clearly refers to the dissolution of tile Parliament. This section reads as follow:-

"2. Writs to be issued once in three years - and that with in three years at tile farthest from and after the dissolution of this Parliament and so from lime to time for ever hereafter with in three years at the farthest from and after the determination of every other Parliament legal writ under the Great Seal shall be issued by directions of your Majesties your heirs and successors of calling assembling and holding another new Parliament."

At page 476 of the same volume we find "The Septennial Act, 1715". Under this Act the duration of the Parliament was fixed for seven years unless sooner dissolved. It reads as follows:-

"The present Parliament, and all Parliaments that shall at any time hereafter be called, assembled, or held, shall and may respectively have continuance for seven years, and no longer, to be accounted from the day on which by the writ of summons this present Parliament hath been, or any future Parliament .shall be, appointed to meet, unless this present or any such Parliament thereafter to be summoned shall be sooner dissolved by his Majesty, his heirs or successors."

At page 555 of the same volume we have got "The Parliament Act, 1911". Under section.7, the Septennial Act 1715

(1) A I R (1935) P C 149

quoted above was amended in so far that the duration of the Parliament was to be five years instead of seven.

It will thus be clear that the right to dissolve has ceased to be prerogative right in England since such a very long time. It is therefore difficult *to* bold that the

prerogative which has ceased in England since two-and-a-half centuries has revived in Pakistan after *1947*.

In the Constitutions of the British Dominions the right of dissolution is a statutory right and has been embodied in the statute. Let us now see Halsbury's Statutes of England, Second Edition and Volume 6. At page 268 we have the Commonwealth of Australia Constitution Act, 1900. Section 28 of this Act at page 273 reads as follows:-

"28. Duration of House of Representatives,-Every use of 'Representatives shall continue for three years from the First Meeting of the House, and no longer, but may be sooner dissolved by the Governor-General."

At page 303 we have got "The British North America Act, 1867."

At page 313, section 50 of this Act reads as follows:-

“50. Duration of House of Commons.-Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House (subject to be sooner dissolved by the Governor-General), and *no* longer."

At page 458 we have got "The South Africa Act, 1909." At page 470, section 45 of this Act reads as follows:-

"45. Duration of House of Assembly.-Every House of Assembly shall continue for five years from the first meeting thereof, and. no longer, but may be sooner dissolved by the Governor-General."

So it becomes clear that in all the Dominion Constitutions the right of dissolution is merged in the statute and no longer exercised as a prerogative right.

In the book "Responsible Government in the Dominions" by Keith, Second Edition, Volume I, at pages 83 and 84, we have the following observations:-

"2. The Governor and the Prerogative

How far does a Governor invested with the royal prerogative by the letters patent and Act constitutes his office, where such exist, in matters on which the statute law *of his territory contains no precise enactment? The answer to this query, long and confusedly debated, must be gathered from consideration of the evidence afforded by decisions of the Privy Council in cases where claims were put for*ward which in the view of a recent writer on colonial law establishes the principle that Governors are exempt from suit in civil actions for actions of state both in the local and English Courts. It seems, however, Impossible to establish

this theorem. The leading case is that of M*usgrave* v. *Pulido* in which the Governor of Jamaica sought to escape responsibility in an action based on his seizure and detention of the 'Florence' by the plea that he had acted as Governor in reasonable exercise of his discretion and that the action taken was an act of state. The Judicial Committee repelled, as did the Court below, the contention that this was any answer; it emphatically asserted that the Governor of a colony in ordinary cases cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that for acts of power done by a Governor under and with in the limits of his commission, he is protected because in doing them he is the servant of the Crown and is exercising its sovereign authority, the like protection cannot be extended to Acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must; necessarily be within the province of municipal Courts to determine the true character of the acts one by Governor, through it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defense is complete and the Courts can take no further cognizance of it. There can be no doubt of the doctrine of the Privy Council, a Governor has no special privilege like that of the Crown; he must show in any Court that he has, authority by law to do an act, and what is more important for our purpose, he must show not merely that the Crown might do the act, but that he personally had authority to do the act. In the case in question it might have been pleaded that the action taken could be defended on the basis that it was an act of state against a foreigner; had this been done, the Privy Council would have had to decide, in the absence of express ratification of the act by the Crown, whether the Governor had sufficient delegation of the royal authority to enable him to commit such an action.

As a last resort, the learned Advocate-General argued that the common law of England which confers on the Queen the right of dissolving the parliament also applies to Pakistan by Virtue of section 18 (3), Independence Act. The Constituent Assembly, he argued, was a Legislative body empowered to pass ordinary laws as well as the law of Constitution, and therefore it was subject to common law prerogative. I see no force in this contention. The common law of England does

not apply here. The common law is based on principles of justice, equity and good conscience. It is unthinkable that the only Legislature of the country, which is also a sovereign" body under the Independence Act, could be dissolved on; principles of justice, equity and good conscience. Here, on the question of dissolution, we have got a full statutory provision and therefore the common law cannot apply. In connection reference may be made to the case of *Muhammad Raza and others* v. *Mst. Abbas Bandi Bibi* (1). In a case of the Calcutta High Court reported in A I R (1927) Cal 496, Rankin, C. J., observed as follows:-

"English common law and statute law as in 1726 was not imported into Calcutta by virtue of any right of sovereignty in the British Crown nor by virtue of the fact that Englishmen at international law or otherwise carried with them their own statutes, but because by the sanction and permission of the sovereign of the place the community was allowed to practice its own law and to introduce in part the laws to which they has been accustomed. These laws were applied even to Englishmen only in part and only with adaptation to the local circumstances."

Now I go to Rule 15 of the Constituent Assembly Rules which reads as follows:-

"Dissolution- The Assembly shall not be dissolved except by a resolution assented to by at least two-thirds of the total number of members of the Assembly."

I have already discussed the weight and value that has to be attached to these rules and I have nothing more to add on that point. There is no provision in the Independence Act for the dissolution of the Constituent Assembly. There is also no provision for setting up a fresh Constituent Assembly by the British Parliament *(vide* section 6 (4), Independence Act). The people of India were given the *freedom and the independence to frame any Constitution for their country as they liked and to do what they liked with their own Constituent Assembly. The British Government bad no more responsibilities for the affairs of this country. In these circumstances Rule 15 was very proper rule which*our Constituent Assembly framed in regard to dissolution. Even the Indian Constituent Assembly had a similar rule 18. At one time the learned Advocate-General argued that the Head of the State could not sit quiet if he saw that the Constituent Assembly was going against the wishes of the people. The answer to this is quite simple. The Constituent Assembly was the representative of the people and by a majority of two-thirds they could certainly dissolves the Constituent Assembly under Rule 15.

The Head of the State could act only in accordance with the statute and the Commission of appointment.

Now I come to section 19 (3) *(b),* Independence Act. It reads as follows;-

"(3). References in this Act to the Constituent Assembly of 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."

(1) A I R (1932) P C 158

From this provision the learned Advocate-General wove out an argument by referring to section 32, Interpretation Act, 1889, that the power to set under the authority the Governor-General includes the power to dissolve the authority. The authority to set up, he argued, was no exhausted with the first exercise and was not withdrawn or revoked. For setting it up again dissolution was necessary in order to create an opening for fresh elections. He also relied on para. 21 of His Majesty's Government's statement, dated 3rd June 1947.

The learned Advocate for the petitioner, Mr. Pritt, gave a complete answer to this point. He referred to section 19 (2). Independence Act which reads as follows;-

“19. (2) References in this Act to the Governor-General; shall, in relation to any order to be made or other act done before the appointed day, be construed as references of the Governor-General of India within the meaning of the Government of India Act, 1935 and so much *or* any other Act as requires references to the Governor-General to be construed as references to the Governor General in Council shall not apply to references to the Governor-General in this Act."

The appointed day is 15th August. The Constituent Assembly of Pakistan was created on 26th July. Therefore the expression Governor-General used in section 19(3) *(b)*apparently means the Governor-General of India who no longer exists either here or across the border. This argument therefore completely falls to the ground.

In view of all these reasons, therefore, I am unshaken in my belief that the Governor-General had no power of any kind to dissolve the Constituent Assembly. Under section 8 (1) read with section 6 (2), Independence Act, the Constituent Assembly was a sovereign body created for a special purpose and it was to function till that purpose was completed, unless it was dissolved by a majority of two-thirds of its own members The true test is always the actual language used and

the intention of the framers of the statute must be ascertained only from the language used in the statute. Nothing is to be read into it on the grounds of policy or the necessity supposed to arise in certain circumstance. (Privy Council case of *Webb* v; *Outrim* (1). nor is the possibility of abuse of power to be considered as affecting the plain words of the statute *Vacher* & *Sons* v. *London Society of Compositors* (2).

Having disposed of the main and the most important objections, I will now deal with the other objections raised against the petition. I will first take up the objection regarding the territorial jurisdiction of this Court.

It is argued that this Court has jurisdiction only in Karachi and the Province of Sind, whereas the Federation

(I) L R 1907 App. Cas. p. 81

(2) 1913 App. Cas. 107 p. 118

of Pakistan as well as the Central Ministers pass orders which affect persons and properties in far-flung Provinces like E. Bengal, N. W. F. P., etc. over which this Court has no jurisdiction. Hence this Court cannot issue any kind of writ against the respondents. Section 223-A reads as follows:-

"223-A, Every High Court shall have power throughout the territories in relation to which it exercise 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."

I see no substance in the objection. If this contention were accepted no High Court in Pakistan can exercise the power of writs against the Federation of Pakistan or the Central Ministers, and the Federal Court of Pakistan have not yet been given the power to issue writs similar to Article 32 (2) of the Indian Constitution. The result will be absurd one. Section 223-A will be a dead letter so far the respondents are concerned. The words in section 223-A are “any government" and there are only two kinds of government in this country. One is the Provincial Government and the other is the Central Government, or in the words of section 79 C. P. C., the "Province" and the "Federation of .Pakistan". If we exclude the "Federation of Pakistan" from the ambit of "any government" appearing in section 223-A, there will only remain "the Province". In that case the Constituent Assembly should have used the word "Province" for the words "any government".

Mr. Chundrigar, the learned Advocate for the petitioner, argued that for the consideration of this question cases could be divided into four classes, namely:-

(1) Where the cause of action arises outside the jurisdiction of the Court where the writ petition; is pending, i.*e.*, when the order of the Court will have to be exclusively outside the jurisdiction of the Court. No writ can be issued in this case.

(2) Writ petition against the authorities or persons whose offices are within the jurisdiction of the Court but the cause of action has arisen outside. In that case also no writ can be issued.

(3) Where mere location of offices within the jurisd1ction of the Court gives the power to the Court to issue writs. In this case the writ is issued.

(4) Writs against the Central Government, Union Government or the Federation whatever you call it.

In this case the Constituent Assembly is situated at Karachi within the jurisdiction of this Court; the Proclamation of 24th October was issued at Karachi, the notifications appointing respective Ministers and allocating portfolios to them were issued and published in Karachi, the Ministers took their oaths of office at Karachi their offices and residences are situated at Karachi, the Central Secretariat of the Federation of Pakistan is situated in Karachi, the seat of the Central, Government is at Karachi *vide* section 290-A of the, Constitution Act read with the Federal Capital Order, 1948, the Budget is to be passed at Karachi the Ministers draw their salaries and allowances in Karachi and the orders of this Court, if any, will have also to be executed in Karachi. The Court, therefore, in my opinion, has full jurisdiction over this matter.

The learned Advocate-General relied on the ruling in the case of *Riots of Garabandho and other villages* v. *Zamindar of Parlakimedi and another* (1). But the facts of that case are entirely different from the facts of this case. In that case the parties were not subject to the jurisdiction of the Court. The following head note of this ruling is important;-

"Held, that the lands in dispute being situated in the *mofussil* and the riots and the Special Revenue Officer being residents in the *mofussil*, the *High* Court had no jurisdiction to issue a writ of *certiorari*. The fact that the Board of Revenue as a body was ordinarily resident or located within the town of Madras did not give the High Court jurisdiction to issue the writ of *certiorari"*.

Similar are the facts of the case of *Sree Meenakshi Mills, Ltd.*, v. *Provincial Textile Commissioner, Madras (2)* where it was held as follows:-

"The jurisdiction of the High Court under section 45 is confined to acts done or to be done within the limits of its ordinary original civil jurisdiction. The High Court of Madras therefore, has no jurisdiction to direct the Textile Commissioner acting under the Cotton Cloth and Yarn (Control) Order, 1945, to desist from seizing the yarn supplied to weavers at places which are outside the local limits of the ordinary original civil jurisdiction of the Madras High Court, though the Textile Commissioner may have his office in Madras within those limits, for the act with reference to which the relief is asked for is to take place outside those limits : A I R (21) 1934 Mad. 140, Approved". (1943) P C 164 was distinguished in A I R (1953) S C 210.

The learned Advocate-General also relied on the case reported in (1951) E. Punjab 174 and another case reported in (1952) Punjab 392, but these were over-ruled in the case of Civil Appeals Nos. 118-121 of 1952, reported in A I R (1954) S C 207, where *it* was held as follows:

"While Article 225 of the Constitution preserves to the existing High Courts the powers and jurisdictions which they bad previously, Article 226 confers, on all the High Courts new and very wide powers in the matter of issuing writs which they never possessed before. There are only two limitations placed upon the exercise of these powers by High Court under Article 226 of the Constitution; one is

(1) A I R (1943) P C 164

(2) A I R (1949) P C 307 = P L D 1949 PC 129

that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction that is to say, the writs issued by the Court cannot run beyond the territories subject to its Jurisdiction. The other limitation is that the person or authority to whom the High Court is em*p*owered to issue writs must be within those territories" and this implies that they must be amenable to its jurisdiction either by residence or location within those territories." It is with reference to these two conditions thus: mentioned that the jurisdiction of the High court & to issue writs under Article 226 of the Constitution is to be determined.

The Punjab High Court has jurisdiction to issue writ to the Investigation Commission in Delhi investigating under section 5 of the Act 30 of 1947, the case of the petitioners, who were the assesses within the U. P. State and whose original assessments were made by the Income-tax. Authorities of that State, even though subsequent proceedings, which would have to be taken in pursuance of the report

of the Investigation Commission would have to be take by the Income-tax authorities in the U. P, and if a case would have to be stated, it would have to be stated to the High Court at Allahabad. A I R 1953 S.C 210, A I R 1943 P C 164, Expl. and Distinguished, A I R 1951 Pb. 74, Reversed".

The principles underlying the question of jurisdiction have been set out by their Lordships of the Privy Council in the case of *Hamid Hasan Nomani* Y. *Banwarilal Roy and others* (1), where it was held as follows:-

"The Original Civil Jurisdiction which the Supreme Court of Calcutta possessed over certain classes of periods outside the territorial limits of that jurisdiction has not been inherited by the High Court.

The power to grant information in the nature of *quo warranto* arises in the exercise of the Ordinary Original Civil Jurisdiction of the High Court. Such jurisdiction is confined to the town of Calcutta. Therefore the High Court has no jurisdiction to grant such information where the person who is called upon to show cause why the information should not be exhibited against him, does not reside and the office which he is alleged to have usurped is not situate, within those limits."

The learned Advocate-General has also relied on the case reported in A I R (1952) Cal. 16. But in that case the Union of India was not located within the jurisdiction of Calcutta High Court. Here the Federation of Pakistan is located within the jurisdiction, of this Court. Similar was the basis of the ruling reported in A I R (1952) Cal. 757 at page 758. The learned Advocate-General argued that it was open to a Central Minister to go out of Karachi, say to Dacca or Peshawar, and there pass the orders, in which case this Court will have no jurisdiction. I think this very argument proves –

(1) A I R (1947) P C 90 = P L D 1947 P C 75

the weakness of the respondents' case. If any person wishes to disobey or circumvent the orders of the Court or may do the same, it is not a contingency in which the order should refuse. In any case it is admitted that this Court has jurisdiction so far Karachi (the Federal Capital) and Province of Sind are concerned. If the writ issued by Court could run in this area as it must, it will be sufficient for the purposes of this case. No further comment appears called for on this point.

Now 1 will take up the objection regarding section 306:- of 1935 Act as adapted, operating as a bar to this petition. It reads as follows:-

"Protection of Governor-General, Governor or secretary of State (1) No proceedings whatsoever shall issue from any Court in Pakistan against the Governor-General, or against the Governor of a Province, whether in a personal capacity or otherwise, and, except with the sanction of the Governor General, no proceedings whatsoever shall lie in any Court in Pakistan against any person who has been the Governor General, His Majesty's representative for the exercise of the functions of the Crown in its relations with Indian States, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done: by any of them during his term of office in performance or purported performance of the duties thereof."

It is argued by the learned Advocate-General that in view of this section the petitioner is not entitled to institute proceedings against respondent No. I, the Federation of Pakistan, whose Executive Head the Governor-General is, or against, Central Ministers who have been appointed by the Governor General in his capacity as the representative of Her Majesty on the principle that what you cannot do directly, you are prohibited from doing indirectly. Reliance is placed on the ruling in the case of *The Attorney-General of Saskatchewan* v. *The Attorney-General of Canada and others* (1) which reads as follows:

"(14) The first of these questions must be answered in the light of an established rule of construction in such cases, *viz.;* that regard must be had to the substance and not to the mere form of the enactment, so that you cannot do that indirectly which you are prohibited from doing directly, (per Lord Halsbury in *Madden* v. *Nelson and Fort Sheppard Ry. Co.,* 1899 A C 626 at p. 627; (68 L J P C 148).

I regret I cannot accept the contention that this dictum of the Privy Council applies here in this case. Section 306 only gives personal immunity to the Governor or the Governor-General against any action. It cannot be construed to mean that no action of the Governor or the Governor-General can ever be scrutinized by the Court of law. I am fortified in my

(I) A I R (1949) P C 190 at p. 193

view by an important ruling of the Bombay High Court in the case of *P. V. Rao and others* v. *Khushaldas* S. *Advani* (1). The pertinent passage runs as follows: -

"The next contention put forward by the Advocate-General is that there is a complete immunity given to the Governor against being brought before a Court of law, and in asking for a writ against the Provincial Government the petitioner is in

effect violating that immunity. It is submitted in the first instance that this Court being the King's Court the Crown cannot be made subject to its writ. This submission is wholly erroneous because the Governor is not the Crown; he is merely the agent of the Crown in the Province of Bombay; and the English Courts have never recognized the principle that a Governor of a Colony or a dependency cannot be sued in English Courts. Numerous cases are to be found in the books where Governors of Colonies have been successfully sued in Courts in England. Therefore if the Governor has immunity at all, that immunity must be found expressly in some statute or legislation. For that purpose reliance is placed on. Sections 306, Government of India Act, under this section no proceedings whatever shall lie and no process whatsoever be issued from any Court in India against the Governor of a Province, whether in a personal capacity or otherwise. It is argued that the Provincial Government is really the Governor because under section 49 the executive authority of a Province is exercised on behalf of His Majesty by the Governor, and according to the Advocate-General the Provincial Government and the Governor are interchangeable terms. Therefore, according to him, if immunity is given to the Governor, the same immunity is given to the Provincial Government. In my opinion, the Provincial Government means, under the constitution, the Governor and Ministers. Before the Independence Act, the Governor had his individual judgment and his discretion and in certain matters he was entitled to act contrary to the advice given by the Ministers or even without King their advice. Under the Independence Act the Governor has become a constitutional Governor and all his acts must now be taken with the aid and advice of his Ministers. But even so; I agree that the Governor does constitute an important part of the machinery which administers the Province and which is described by the expression "Provincial Government". But, in my opinion, it is mistake to read section 306 as giving immunity not only to the Governor but to the Provincial Government also. These are two different concepts, and the immunity to the Governor is not an absolute immunity but it is a personal immunity although it extends both to his private and public acts."

On the same point we have another important ruling of the Nagpur High Court in the case of G. *D. Karkare* v. *T. L Shevde and others* (2). Paras 9 and 10 of this judgment read

(1) A I R (1949) Born. 277 at pp. 288 and 289

(2) A I R (1952) Nag. 330 at p. 333

as follows;-

"(9) We can now proceed to deal with the second and the fourth grounds of the objection. We cannot accede to the contention that because His Excellency the Governor is not amenable to the process of the Court, this Court cannot examine his action in appointing the non-applicant and pronounce upon its legality. The immunity affected Article 361 is personal to the Governor. That Article does not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of Courts. What the Constitution establishes is supreme of law and not of men, however high-placed they might be. Unless there be a provision excluding a particular matter from the purview of the Courts, it is for the Courts examine how far any act done in pursuance of the Constitution is in conformity with it…..

(10) If a question about the validity of an enactment assented to by the Governor can be considered and decided in the absence of the Governor, we see no force in objection that an appointment made by the Governor cannot be questioned in his absence. It is not the rule that relic cannot be granted in proceedings for a writ of *quo warranto in the absence of the authority making the appointment Rex* v. *Speyer* (1) leaves no room for doubt on that point. In *Ashgar Ally* v. *Birendra Nath* (2), in a proceeding for a writ of *quo warranto* Gentle, *J.*, held the appointment of the Chief Engineer of the Calcutta Corporation made by the Corporation and approved by the Provincial Government under the Calcutta Municipal Act (see pp. 250 and 259), invalid in the absence of both, the Government and the Corporation."

In this connection we have also a ruling of the Supreme Court of India in the case of *Province of Bombay* v. *Khushaldas v. Advani* (3) where it was held as follows:-

"(106) On this point, the contentions raised by the learned Attorney-General fall under two heads. The first branch of the argument is that the expression "Provincial Government" occurring in section 3 of the Ordinance means the same thing as the Governor of the Province. This being; the position there is complete immunity enjoyed by the Provincial Government in respect of all judicial process, under section 306 (1) of the Constitution Act, and the; powers of the High, Court itself are restricted and limited in this respect by certain enactments.

(108) As regards the branch of the argument, it may be pointed out at the outset that no definition of the terms 'Provincial Government' has been given in the

Constitution Act, 1935. Part III of the Act deals with Governors' Provinces. Section 49 (1), which occurs in this part, provides that

(1) (1916) K B 595

(2) A I R 1945 Cal. 249

(3) A I R (1950) S C 222 at p. 246

The executive authority of a Province shall be exercised on the behalf of His Majesty by the Governor either directly or through officers subordinates to him.

(109) The Governor is thus the executive head of a province and all executive acts are done in his name. This does mean that Government of a province is vested solely in the Governor, or that the expressions 'Governor' and "Provincial Government" have the same meaning and connotation in the Constitution Act."

In view of all these reasons, this contention raised on of the respondents must fall.

I will now take up the objection that the petition for writ not lays because normal remedies under the ordinary law available to the petitioner. Since the meeting of the Constituent Assembly was fixed for January 1955 there was ample time for the petitioner to give notice under Section 80 C.P.C and then file a suit for declaration and injunction not see any force in this objection. It is settled law the alternative remedy should be convenient, beneficial effectual, i.e., adequate and appropriate. The filing of a regular suit is not at all that kind of remedy. In the first notice under section 80 itself will take two months to expire. Then the processes have to be issued and served, as the learned Advocate Mr. Chundrigar pointed out, Federation of Pakistan usually take a very long time, about eight or nine months, to file their defense; in the while one does not know what may happen to the Constitution of the country. I think this objection is ether baseless. Scores of English and Indian cases were cited on the point by Mr. Chundrigar, and I think the point clear that any reference to those cases will mean loss of precious time. I will merely cite a few of those cases: -

(1) Case of *Rashid Ahmad* v. *The Municipal Board; Kairana* (1).

(2) Case of *Ahmad Hossain* v. *Th. State of Madhya Pradesh and others* (2).

(3) - (1922) I K B. 72 at page 84, in which it was held "that the suggested remedy is so ludicrously inadequate that is misuse of language to call it a remedy at all". The same is the case here. This objection must also therefore fail.

I will now take up the question regarding the Constitutional position of Central Ministers, old and new, in the light of my findings. Respondents 2-3-6 and 9 are the Ministers of old Cabinet, i.e., before the alleged dissolution of the Constituent Assembly on 24-10-1954. They were members of Constituent Assembly. Respondents 4-5-7-8 and 10 on the other hand, are the Ministers who were sworn in after the dissolution. They were not members of the Constituent Assembly.

(1) A I R (1950) S. C. 163.

(2) A I R (1951) Nagpur 138.

In this connection, sections 9 and 10 (1) and (2) of 1935 Act as adapted, are relevant. They read follows:-

"9. *Council of M*inisters.-There shall be a Council of Ministers to aid and advise the Governor-General in the exercise of his functions.

10. *Other provisions as to Ministers-(I)* The Governor General's Ministers shall be chosen and summoned by hi shall be sworn as members of the council and shall hold office during his pleasure.

(2) A Minister who for any period of ten consecutive months is not a member of the Federal Legislature shall at the expiration of the period cease to be a Minister."

The Learned Advocates for the respondents have argued and I would say unfortunately that section 9 is altogether independent of section 10. They have argued that under section 9 the Governor-General shall have a Council of Ministers. If the Federal Legislature is in existence, the Ministers shall be chosen from amongst its members; but if that is not in existence, it was open to the Governor General to choose any Ministers he liked. I think section 10 (2) is a complete answer to that kind of extraordinary constitutional theory. Section 10(2) clearly lies down that if a person who is not a member of the Federal Legislature is chosen as Minister in some contingency, it is necessary that he should get himself elected as a member of the Federal Legislature within a period of ten months, otherwise after that period he will no longer remain as a Minister. This Clear statutory provision of law thus lies down in most unambiguous terms that the Ministers have to be members of the Federal Legislature. In this connection we should remember that the period under section 10(2) was six months under the

1935 Act. It was increased to ten months in the days of the Quaid-e-Azam in view of certain conditions then obtaining in East Bengal. In any case section 10(2) proves that sections 9 and 10 have to be read together. Section 9 can never be independent of section 10. The scheme of 1935 Act itself shows that if there was to be no Legislature there was to be no Council of Ministers. I am not aware of any instance after 1947; when a Legislature should have been dissolved and the Ministers continued in office. As soon as a Legislature is dissolved, the Ministers, who are the members of the Legislature, automatically go out. The learned Advocates have argued the reverse of what the real position is. Actually in East Bengal at the present moment even though the Provincial Assembly is not dissolved the Ministers have been dismissed. After the dissolution of a Legislature the Governor sometimes appoints advisers. But the Advisers do not enjoy the same constitutional position which the Ministers do. They do not take the oath of office; they exercise no power; and the Governor is not bound to follow their advice as he is bound to do in the case of Ministers under the 1935 Act as adapted after partition. In fact there is no statutory provision for the appointment of Advisers under the Constitution Act.

I have referred above to sections 9 and 10 of the 1935 Act as adapted. I have not yet referred to sections 10 as amended by the Constituent Assembly on 21-9-1954. I have already held that no assent of the Governor-General was necessary for the Acts of the Constituent Assembly and therefore this new section 10 is a perfectly valid and enforceable law. It 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.

(2) The Governor-General shall appoint from amongst the Members of the Federal Legislature such persons as Minister of State and Deputy Ministers as are recommended the Prime Minister.

(3) The Council of Ministers shall be collectively responsible to the Federal Legislature and the Ministers including the Prime Minister shall cease to hold office on the expression of want of confidence in anyone of them by the Federal Legislature.

(4) The Prime Minister may, at any time, call upon any Minister, Minister of State or Deputy Minister to resign on or before a date fixed by the Prime Minister. In case the person called upon to resign fails to do so he shall cease to hold his office from that date."

It will be noticed from this that subsection (2) of section 10 as it stood after partition has also been deleted, so that it was longer possible for a non-member to become a Minister not think any further argument is necessary to prove the Ministers before taking the oath of their office have members of the Federal Legislature.

This question being settled, we must now study the Constitutional position of respondents 2 to 10. I would argue point in this manner. The dissolution of the Constituent Assembly was either legal or valid or it was illegal and void. There can possibly be no third alternative. If the dissolution legal, it means that after 24th October the Federal Legislature is not in existence. If the Federal Legislature is not in existence it means that not of respondents 2 to 10 can remain a member of the Council of Ministers to aid and advise Governor-General in the exercise of his functions. But if the dissolution is illegal and void, it means that the Federal Legislature continues to exist and the position will be the same it was before 24th October, 1954, as if the dissolution had not taken place. In that case, only respondents 2, 3, 6 and 9 remain as Ministers because they are the members of the Constituent Assembly while others are not.

Since 1 have held that the dissolution was illegal and void proper constitutional position will be that respondents 2, 3, 6 & 9 only can legally remain as Ministers.

There remains only one more point to be dealt with The learned Advocate-General has argued that a writ *mandamus* or *quo warranto* cannot issue against the respondent in view of the following considerations;-

(1) According to the English law of writs no writ of *mandamus* or *quo warranto* has ever been issued or can issued against the King or His Ministers.

(2) It is not appropriate in this case to include respondent No. I or respondents 2 to 10 in the term "Person Authority" used in section 223-A.

(3) A writ of *mandamus* can't be issued unless the petitioner has a clear and specific legal right to demand the performance of any specific legal duty from the

respondents. This is not the case here. The respondents are not enjoined by any law to maintain the President of a dissolve Assembly in his chair.

(4) Before a petitioner can apply for a writ of *mandamus he must prove that he demanded performance of a specific* legal duty and that he was refused.

(5) A writ of *mandamus* does not issue when a wrong has been actually done. Here the Constituent Assembly has been dissolved. The petitioner has therefore lost the office of the President and none is at present illegally occupying that office.

(6) To sustain a petition for writ the petitioner must establish some definite injury to himself.

(7) In case of usurpation of any office under the Crown it is the exclusive right of the King to seek a writ of *quo warranto.* As respondents 4, 5, 7, 8 and 10 have been appointed Ministers by the Governor-General representing the Queen, no writ of *quo warranto* can legally issue against them.

I will now deal with these points. The law of writs as enunciated by section 223-A is much wider than the English law of writs. Under the English law of writs could be issued against the Crown. Writ of *mandamus* for instance could only be issued to a person, officer, corporation or inferior Court. The writ of *mandamus* was abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938. The *mandamus* now issued in an action in England is no longer a writ of *mandamus* but a judgment or order having effect equivalent to the writ originally issued. Under section 223-A writs could be issued against any government. In these circumstances, we cannot tie ourselves to the English law of writs. We can have considerable help from Article 226 (1) of the Indian Constitution which reads as follows:-

"226 (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person authority, including in appropriate cases any Government, within those territories, direction, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*,prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

The powers under this Article and section 223-A of our Constitution, are equally wide. The words "any other purpose" appearing in Article 226 of the Indian Constitution, extends the application of the Article to every case in which any injustice is being done. Section 223-A, on the other hand, does not even

mention these words. So It becomes clear that any case where a wrong is to be redressed section 223-A will apply provided other conditions are fulfilled. I would now like to refer to certain important rulings of the High Courts of India bearing on the point or the issue of writs.

In the case of *Bhailal Jagadish* v. *Additional Deputy Commissioner, Akola and another* (1), reported at pages 107 and 108 we have the following passage:-

(105) English precedents cannot be regarded as sure guides even though Article 226 makes a reference to the ancient prerogative writs. The mere specification of these writs in Act 226 cannot control the interpretation of that article or compel us to so interpret it as to limit the extent of our powers to that exercisable by the Courts in England in respect of these writs.

(106) These writs, namely, *habeas corpus, certiorari,* prohibition, *mandamus* and *quo warranto,* were known as, high prerogative writs. Each of them had its own purpose, its own history and its own procedure. The origin of the writ of *habeas corpus* is lost in antiquity. It is regarded as the highest remedy in law for any man that is imprisoned.

The writ of *mandamus* was a command issuing in the King's name and from the Court of King's Bench, and directed to any person, corporation, or inferior Court of jurisdiction, within the King's dominions, requiring them to do some particular thing specified therein which appertained to their office and duty. This writ has thus used to compel the admission or restoration of any person to a public office, or to compel the holding of a Court, or to the performance of any other public duty by a person, corporation or an inferior Court concerned.

The writ of *qua warranto* was a writ of right for the King against persons who claimed usurped any office, franchise, liberty or privilege belonging to the Crown to enquire by what authority they maintained their claim, in order to have the right determined. When a writ of this kind was issued, a person concerned had to appear before a Court and justify his claim."

In the case of *G. D. Karkare* v. *T. L Shevde and a/hers* (2), it was held as follows:-

"The power under Article 226 is given not only for the enforcement of the fundamental rights conferred by Part III of the Constitution but also for any other purpose. The enforcement of legal right and the performance of legal duty

(1) A I R 1953 Nag. 89 (2) 1952 Nag. 330

cannot be exhaustive of the purposes for which the Court may issue any order, direction or writ under Article 226. The words "for any other purpose" must receive their plain and natural meaning, namely, for any other object which the Court considers appropriate and calls for the exercise of the powers conferred upon it. Though the power of the Court under Article 226 is ordinarily exercisable for enforcement of right or performance of duty, it cannot necessarily be limited to only such cases. Such a limitation cannot be reconciled with the power to issue a writ in the nature of *quo warranto* which power has been expressly conferred on the court. In proceedings for a writ of *quo warranto* the applicant does not seek to enforce any right of his as such, nor does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office. There is no reason to refuse, a citizen under a democratic republican Constitution; to move for a writ of *quo warranto*, for testing the validity, of a High appointment under the Constitution. The office of the Advocate-General is of a public, nature. From every point of view it is a matter of grave public concern that the legality of the appointment to a High office under the Constitution is not left in doubt. A I R 1950 Pat. 387, *Dissent;*(1916) I K B 595 *relied on.*

In this case their Lordships *relied on* (1916) 1 K B 595.

In the case of *Gopal Jairam* v. *State of Madhya Pradesh* (1), it was held as follows:-

Where the petitioner complaints that because of the inaction of the State Government he has not been able to exercise his rights as a member and vice-president of the superseded municipal committee, which he would be able to exercise if the committee were reconstituted, this is a kind of case in which a writ of *mandamus* can issue, though whether to issue it or not would be in the discretion of the Court."

In the same volume at page 58 it was held in the case of *Sheoshankar* v. *State Government of Madhya Pradesh and others* as follows:-

"Ordinarily before a person petitions for a *mandamus* to enforce the performance of a public duty, or makes some other demand, he must show that he had made such a "demand from the appropriate authority and that the demand was refused or not met. This is, however, not an inflexible rule. So when in the

particular circumstances, such a demand could not have been met, the absence of a demand has been held to be immaterial.

Thus where a petitioner applies under Article 226 for a writ of *mandamus* directing the State Government not to enforce against him the C. P. and Berar Prohibition Act, 1938, or some sections thereof and to withdraw and cancel certain rules and notifications there under and it was found that he had not done any act under the Act nor was any

(1) A I R 1951 Nag. 181

section taken under the Act to his detriment and that there was no demand and refusal of a permit under the Act to him:

Held that what the petitioner sought was something which the State Government or its agencies could not as things stood, be expected to comply with and hence in the circumstances of the case, it being idle for him to make a demand upon them, the absence of demand did not affect the tenability of the petition."

In the case of *Indian Sugar Mills Association through it's President Shri Har; Raj Swarup* v. *Secy. to Government, Uttar Pradesh Labour Department and others* (1), it was held that the power under Article 226 should be used in those clear cases where the rights of a person have been seriously infringed and he has no other adequate and specific remedy available to him.

In the case of *Fram Nusserwanji Balsara.* v. *State of Bombay and another* (2), we have the following Important observations at page 225:

"The Advocate-General has argued that the petitioner is not entitled to any relief because he never made a specific demand of these rights against the Government and he never gave an opportunity to Government to comply with any of his demands and therefore, strictly there was no denial of his rights by Government at the date the petition was filed. To maintain an application under section 45, Specific Relief Act, a demand of justice and its denial is essential before an order can be made under that section. It is true that the orders that the petitioner is now seeking are not confined to section 45 but fall under Article 226 of the Constitution. But even so we have to consider whether it is open to a petitioner under Article 226, without making a specific demand of his right and without giving an opportunity to the Government to comply with that right to file a petition. Therefore, while in a case of urgency where an immediate order may be necessary the Court may not insist upon compliance with conditions similar to

those laid down in section 46, Specific Relief Act, in ordinary cases, in our opinion, the Court must insist upon compliance with those conditions." In the case of *Rabindra Nath Chakravarti v. State of West Bengal and others* (3), it was held as follows:

"As to whether there was a demand of justice before filing the application under Article 226 the Court has to look to the substance of the matter, Where although there was no formal demand of justice on the part of the petitioner, in point of fact there was a resistance on behalf of the petitioner when the opposite-party wanted to take possession under the order for requisition made under section 3 (1) of the West Bengal Act 2 of 1948, it cannot be held that there was no demand of justice on the part of the petitioner and denial on part of the opposite-party.

(1) A I R 1951 All. (2) A I R 1951 Bom. 210

(3) A I R 1954 Cal. 394

I have referred to only a few rulings on the point. Applying this law to the present case, we should now see if there is any force in the objections raised on behalf of the respondents. The respondents surely come with the word "any government, person or authority" appearing in section 223-A. The petitioner has clear and specific rights of a public nature. As the President of the Constituent Assembly he is entitled to a salary, to a free residential house; and what is most important, he has a right to perform his public duties as the President of the Constituent Assembly. He has to call the meeting of the Constituent Assembly and carryon its business. As President of the Federal Legislature he has certainly a right to question the Validity of the appointment of persons who are not members of the Federal Legislature as Ministers. Even as an ordinary citizen he has right to question the validity of their appointments. It is the duty of the respondents to see that the petitioner is not in any way interfered with in the exercise of his powers and duties; It has been alleged in the petition and not denied by the respondents, that even the Deputy President of the Constituent Assembly was not allowed to enter the Assembly Building as a police guard was stationed there to resist the entry of the members. The President has his own chamber in the Assembly Building and it is his right to be there. The petitioner has certainly proved definite injury to himself. It has been alleged that a writ of *mandamus* cannot issue when a wrong is actually done, but here the wrong is continuing to be done. I fail to see how the action of the respondents can possibly be defended on any ground whatsoever. A writ of *mandamus* can issue to restore the petitioner to his office as

the President of the Constituent Assembly by restraining the respondents from interfering with his duties and obstructing him in the exercise of his functions. In view of all these reasons I allow the petition. A writ of *mandamus* as prayed for will be issued against all the respondents. The appointment of respondents 4-5-7-8 and 10 being illegal, a writ of *quo warranto* will issue against them. I further direct that the respondents do bear the petitioner's costs.

ORDER

Per *Curiam.-A* writ of quo *warranto* will issue against respondents 4, 5, 7, 8, and 10 prohibiting them from exercising the office of Minister and a writ of *mandamus* will issue *and* restoring the petitioner to his office as President of the Constituent Assembly by restraining respondents from interfering with his duties and obstructing him in the exercise of his functions.

The opponents will bear the cost of the petitioner of this petition.

A certificate under section 205, Government of India Act, 1935, is hereby given.

A. H.