

Sushil Kumar Bose Vs. Emperor

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Court : Kolkata

Decided On : Jul-12-1943

Reported in : AIR1943Cal489

Appellant : Sushil Kumar Bose

Respondent : Emperor

Judgement :

Derbyshire, C.J.

1. This is an application by Sushil Kumar Bose under Section 491, Criminal P.C., alleging that he has been illegally and improperly detained in jail custody and should be set at liberty or brought up before the Court to be dealt with according to law. The petitioner was on 26th January 1948, convicted by a Special Magistrate at Narail (in the district of Jessore) sitting under the provisions of the Special Criminal Courts Ordinance (ordinance 2 of 1942). The conviction was under Sections 120B and 411, Penal Code. Under the former charge, which was conspiracy to steal guns and cartridges, he was sentenced to rigorous imprisonment for four years, and under the latter charge, namely under Section 411, Penal Code, receiving stolen property i.e., a shot gun, he was sentenced to one year's rigorous imprisonment. The offences were alleged to have taken place on September 4/5, 1942, and were regarded as being in the nature of subversive activities. Other persons were originally tried along with the accused, some of them also being found guilty of conspiracy but sentenced to lesser terms of

imprisonment or else bound over.

2. The applicant appealed to the Special Judge - a Sessions Judge - under the Ordinance at Jessore who, on 26th February 1943 dismissed his appeal and at the same time allowed the appeal of some of the others concerned with him in the matters complained of. The applicant had no further right of appeal under the Ordinance. On 21st April 1943, a Special Bench of this Court in criminal Revn. case No. 81 of Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 decided that Sections 5, 10 and 16 of Ordinance No. 2 of 1942 which directed the trial of persons in the Special Courts by District Magistrates or by the Provincial Government or a servant of the Crown empowered in that behalf by the Provincial Government were invalid. Apart from these provisions, the Special Magistrate had no powers to try any person under the Ordinance. On 3rd May 1943, the petitioner applied for the present rule under Section 491, Criminal P.C. The Court directed the rule to issue and made it returnable on 17th May 1943. In the meantime the Government of Bengal announced their intention to appeal to the Federal Court against the decision of the High Court in Benoari Lall Sarma's case Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 and as a result no further steps were taken to deal with the rule pending the decision of the Federal Court. On 4th June 1943, the Federal Court by a majority affirmed the judgment of the Calcutta High Court in Benoari Lall Sarma's case Reported in and dismissed the appeal. On 5th June 1943, the Governor-General made and promulgated Ordinance No. 19 of 1943 which repealed the Special Criminal Courts Ordinance 1942, that is Ordinance No. 2 of 1942 under which the applicant had been convicted and made provision 'for certain matters in connexion with such repeal.' Ordinance No. 19 of 1943 came into operation the same day, namely, 5th June 1943.

3. As there were a number of cases in which persons had been convicted in this Province by the Special Courts under Ordinance 2 of 1942 and as the repealing Ordinance (NO. 19 of 1943) needed careful consideration I directed that applications arising out of the two Ordinances should be considered together by this Special Bench. Consequently, learned Counsel for the applicant and learned Counsel for the Crown, namely, the Advocate-General of Bengal, have been heard in this matter upon the general effect of the repealing Ordinance 19 of 1943. At the

same hearing learned Counsel appearing in the other cases arising under Ordinance 2 of 1942 and Ordinance 19 of 1943 have been heard. The repealing Ordinance (NO. 19 of 1943) is set out in full:

Whereas an emergency has arisen which makes it necessary to repeal the Special Criminal Courts Ordinance 1942 (2 of 1942), and to provide for certain matters in connexion with such repeal;

Now, therefore, in exercise of the powers conferred by Section 72, Government of India Act, as set out in Schedule 9, Government of India Act, 1935 (26 Geo. V, c. 2), the Governor-General is pleased to make and promulgate the following Ordinance:

1. Short title and commencement. - (1) This Ordinance may be called the Special Criminal Courts (Repeal) Ordinance, 1943. (2) It shall come into force at once.

2. Repeal of Ordinance 2 of 1942. - The Special Criminal Courts Ordinance, 1942 (hereinafter referred to as the said Ordinance) is hereby repealed.

3. Confirmation and continuance, subject to appeal, of sentences : (1) Any sentence passed by a Special Judge, a Special Magistrate or a summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (5 of 1898), by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code; (2) Notwithstanding anything contained in any other law, any such sentence as is referred to in Sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under Section 8, and whether or not the sentence was the subject of an appeal under Section 13 or Section 19 of the said Ordinance, be subject to such rights of appeal as would have accrued and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance; (3) Where any such sentence as aforesaid has been altered in

the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence.

4. Disposal of pending cases. - Where the trial of any case pending before a Court constituted under the said Ordinance has not concluded before the date of the commencement of this Ordinance, the proceedings of such Court in the case shall be void; and the case shall be deemed to be transferred, in a Presidency town to the Chief Presidency Magistrate, or elsewhere to the Sub-divisional Magistrate, who may either, (i) inquire into or try the case himself or (ii) transfer the case of inquiry or trial to any Magistrate subordinate to him-

in accordance with the Code of Criminal Procedure, 1898 (5 of 1898).5. Indemnity.
- No suit, prosecution or other legal proceedings shall lie in any Court against any servant of the Crown for or on account of or in respect of any sentence passed or any act ordered or done by him whether in exercise of any jurisdiction or power conferred or purporting to have been conferred on him by or under the said Ordinance, or in carrying out any sentence passed by any Court in exercise of any such jurisdiction as aforesaid.

4. The question for decision is : what is the position in law of the applicant, having regard to the decision of this Court Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 and of the Federal Court in the case of Emperor v. Benoari Lall Sarma Reported in and the subsequent Ordinance 19 of 1943? It is convenient here to state the order of this Court made in Benoari Lall Sarma's case Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 . It was ordered: That the convictions be set aside and that the applicants be released but that they be rearrested and dealt with in the ordinary Courts according to the ordinary process of law. It will be for those in charge of this case to see that these persons are rearrested and brought before the Magistrate and dealt with; and we direct the attention of the Magistrate to the provisions relating to bail in Section 130A of the Defence of India Rules but not in the sense that we suggest that they should have bail.

5. In Benoari Lall Sarma's case Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 there was a charge and conviction under Rule 34(6)(b)(c) of the Defence of India Rules, namely, committing a prejudicial act, hence the direction as to the Magistrate considering the question of bail. There has been a great deal of legal argument in the hearing of this application turning upon the meaning of Section 3 of the repealing Ordinance. Learned Counsel for the applicant has contended that the applicant is entitled to be released as the Court which tried him was without jurisdiction and therefore, the proceedings under it including the conviction and sentence were void. He has not contended, that it is not open to the Crown to put his client on trial in the ordinary Courts in the ordinary way for such offence as they think proper. That argument has been reinforced in different ways by counsel who appeared for the applicants in the other cases. The learned Advocate-General, on the other hand, contends that the effect of Section 3 of the Ordinance is to legalize and validate what has been done by the special Courts both as to conviction and sentence subject to a right given to the applicant to come to this Court by way of appeal or revision under the Criminal Procedure Code.

6. The reply by the applicant to that argument is that if such is the case, the repealing Ordinance is simply giving effect and legality to something which the Courts have declared that the Governor-General in Ordinance No. 2 of 1942 could not do under the Constitution. Before considering the meaning of Section 3 of the repealing Ordinance, it is necessary to consider the circumstances in which the Ordinance was made. As from 21st April 1943, the proper Courts in Bengal would, on application by a convicted person declare that a conviction by a special Court was void. There was, of course, the possibility of the Federal Court reversing the decision of the Calcutta High Court which accounted for such applications not being dealt with by this Court. As from 4th June 1943, the whole of the High Courts in British India would be bound to follow the decision of the Federal Court and declare that the proceedings of the Special Courts were void.

7. It may be mentioned here that the Federal Court gave leave to the Government of Bengal to appeal to the Privy Council but it does not as yet appear whether that appeal will be made nor would the fact that the appeal was made affect the position of the law to be applied by the Courts in British India. It was therefore

apparent on the evening of 4th June 1943, that a large number of persons who had been convicted and sentenced by the Special Courts were in a position to apply at once to the appropriate Court for the appropriate relief, and, in most cases, to be set at liberty either under the provisions of Section 491, Criminal P.C., or, as in Benoari Lall Sarma's case *Benori Lall Sarma v. Emperor* Reported in : AIR1943 Cal285 , under the provisions of the High Court's revisionary powers. Some of the persons convicted might be innocent whilst some of them might be guilty of serious offences, against the law. The persons who were in prison under sentences passed by the Special Courts were held in custody by the jailors under warrants presumably in Form No. 29 of Schedule 5, Criminal P.C., signed by the Special Magistrate or Special Judge who had convicted them. This warrant is given pursuant to Section 388, Criminal P.C., which provides that:

Where the accused is sentenced...to imprisonment the Court passing the sentence shall forthwith forward a warrant to the jail in which the accused is or is to be detained.

8. On the pronouncement of the judgment of the Federal Court, that warrant, being issued by a Court without jurisdiction would be no authority in law for the jailor retaining the accused in custody. The result might easily be that a number of persons who had committed offences against the law would be entitled in law to have their release. It is unthinkable that the jailor would of his own accord release the persons convicted by the Special Courts in the absence of an order either from a Court of competent jurisdiction or a duly authorised officer of the Government of the province. In the meantime their custody would be illegal, and steps would have to be taken to indemnify the jailor and also the Court which sent the accused to prison and possibly others. Something obviously had to be done and done quickly to give the jailor authority to retain the prisoners in custody until they could be dealt with according to law; that is either liberated or brought up before a proper Court or both. Such situations as the present one are rare and I know of no precedent for dealing with them. Obviously some measure had to be devised at once and the result was Ordinance 19 of 1943. In view of the circumstances under which, and the speed with which, the amending Ordinance was passed, it would be unfair to criticise it in the way that a statute might be criticised. The proper

course, in my opinion, is to take the Ordinance as a whole and in the light of the surrounding circumstances construe it so as to give effect to what appears to be its proper meaning.

9. Sections 2, 4 and 5 of the Ordinance are quite clear. Section 2 repeals ordinance 2 of 1942. Section 4 declares the pending proceedings under ordinance 2 of 1942 to be void and provides for the cases pending before Special Courts to be dealt with in accordance with the Criminal Procedure Code. Section 5 gives the right of indemnity to those servants of the Crown who have passed a sentence or ordered any act to be done in pursuance of the repealed Ordinance. Section 3 is the difficulty. Its language apart from Sub-section (8) is involved. The Advocate-General has argued that the words in Section 3(1) 'any sentence passed by a Special Magistrate...in exercise of jurisdiction conferred by or under the Ordinance shall have the effect and continue to have effect' subject to the succeeding provisions mean that the sentences stand good as if the trial had been held completely in accordance with the Criminal Procedure Code. That is a possible construction but certain obvious criticisms arise when that construction is contended for. In the first place, it would seem illogical to hold past convictions good and at the same time to provide that pending proceedings shall be void as Section 4 does. In the second place, it would seem unnecessary to provide the indemnity clause in Section 5 in the full manner therein set out though of course that might be due, as the Advocate-General suggested, to abundant caution.

10. Where it is desired to legalise something illegally done in the past the words of the legalising statute are generally very clear : see the case in *Phillips v. Eyre* (1870) 6 Q.B. 1. In that case Willes J. delivered the decision of the Court which dealt with the effect of the indemnity measure passed by the Jamaica Legislature in respect of certain acts done in a rebellion. Martial law had been declared to put an end to the rebellion and the enactment declared that all such acts done under it 'are hereby made and declared lawful and are confirmed.' At page 17, 'Willes J. said:

Under these and like circumstances it seems to be plainly within the competence of the Legislature, which could have authorised by antecedent legislation the acts

done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done, or, in the language of the law under consideration, to enact that they shall be 'made and declared lawful and confirmed.' Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the mother country and in other dominions and colonies of the Crown.

11. There is nothing in this Ordinance which approaches the words 'made and declared lawful and confirmed.' The words 'made and declared lawful and confirmed' are not used. The word 'confirmance' is used but does not occur in the operative part of the section but in what might be called the side-note. In Halsbury's Laws of England, Edn. 2, vol. 31, under the heading 'statutes' at p. 164 the following appears:

The modern view is that these (side notes) are not part of the Statute and the Court will not regard them.

12. I think that view is correct. The British Parliament in 1926 had occasion to regularise the position with regard to certain decrees in divorces granted by the High Courts in India where the parties were domiciled in England and Scotland. The English Courts declared that such decrees were of no effect. The statute of 1926 made the decrees in question valid and in Section 3 provided that any order made by the Court in relation to such decree shall, if the proceedings were commenced before the passing of this Act, be as valid, and be deemed always to have been as valid in all respects, as if the parties to the marriage had been domiciled in India.

13. The word 'valid' is not used in Ordinance No. 19 of 1948. Another example is the Decrees and Orders Validating Act (Act 5 of 1936), which is as follows:

Whereas doubts have arisen as to the validity of certain proceedings in the High Courts of Judicature in British India under the Letters Patent erecting and establishing those Courts;

And whereas it is expedient to terminate those doubts and to establish the validity of those proceedings;

It is hereby enacted as follows:

(1) This Act may be called the Decrees and Orders Validating Act, 1936;

(2) No decree passed or order made by the High Courts of Judicature...in Bengal, Madras or Bombay in the exercise of its ordinary original civil jurisdiction under Clause 12, Letters Patent, or by the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction under Clause 10 of its Letters Patent shall be called in question in any proceedings before any other Court on the ground that the High Court passing the decree or making the order had no jurisdiction to pass and make the decree or order.

(3) Where in any proceedings concluded on or after the 26th August 1935, any such decree or order has been found to be invalid on such grounds by any Court such finding shall be void and of no effect and the Court shall, notwithstanding anything to the contrary in the Indian Limitation Act, 1908, or in any other law for the time being in force, on application made within six months from the commencement of this Act by any person prejudicially affected by such finding, restore the proceedings at, and continue the proceedings from, the stage reached immediately before the order embodying or based on such finding was made.

14. It may be noted that in this validating Act it was provided that no decree passed by the High Court should be called in question and that any finding that any such decree (that is of the High Court) was invalid on the ground that the High Court had no jurisdiction should be void and of no effect. If the Ordinance had wished to validate the proceedings of the special Courts, it might have used language such as is found in the Act of 1936 and have declared that the proceedings of the special Courts should not be called in question in any other Courts and that any finding that they were invalid should be void and of no effect. The Ordinance does nothing of the sort; it puts an end to the Courts and gives an indemnity for acts done therein and thereunder. The Public Suits Validating Act, 1932, may also be looked at in this connection.

15. It is interesting to note that nowhere in the amending Ordinance does the word conviction occur. Conviction means, in ordinary Criminal trials, the judicial determination of the guilt of the accused. Sentence is the punishment awarded consequent upon the conviction. Conviction and sentence are two different things. What follows from a sentence 'having effect and continuing to have effect'? It certainly means that the person sentenced shall do as he was ordered by the Court sentencing him, or that the jailor to whose custody he was committed shall hold him in custody or otherwise deal with him as the Court has directed. Does it mean also (as the Crown has contended) that the antecedent conviction on which the sentence was based is also valid? The Ordinance does not say so in terms, so that whether the conviction is valid is a matter of implication or inference from the words of Section 3(1). The Federal Court and this Court have held that the convictions are void so that in British India outside Bengal and parts of Assam as from 4th June 1943, persons convicted under the Special Courts Ordinance were entitled to have their convictions quashed, whilst in Bengal the same position prevailed as from 21st April 1943. To take away retrospectively these rights from those convicted persons would require legislation in the clearest possible terms as was done in the Validating Statutes set out above - implication or inference is not enough.

16. If the contention of the Crown is correct as to Section 3(1), the effect is to append each sentence of the special Courts to a notional trial, not a real trial, held in accordance with the provisions of the Code of Criminal Procedure. In such an event the sentences passed by a special Judge would be deemed to be passed by a Sessions Judge, and the sentences passed by a special Magistrate by an Assistant Sessions Judge, exercising competent jurisdiction under the Code. Now Section 268 provides that 'all trials before a Court of Session shall be either by jury or with the aid of assessors.' If the Crown's contention is right, then the notional trial, to which the sentence is appended, must be one in which there is either a jury or with the aid of assessors, so that there must be a notional jury and a notional body of assessors.

17. We have therefore to imagine a jury of assessors in the notional tribunal, and we should have to regard the finding of the Special Judge or the Special

Magistrate as the verdict of the jury or in some cases perhaps as the opinion of the assessors. In Bengal apart from the Jalpaiguri District, sessions trials are held by a jury except in a comparatively few cases. Trials with assessors are not numerous. Under Section 418, Criminal P.C., where the trial is by a jury an appeal only lies on a matter of law. The result is that on questions of fact, except where the 'question of admissibility of evidence is concerned, the Court could not in appeal question the correctness of the conviction; thus the new Ordinance would appear to be giving an illusory right of appeal to many of the persons convicted under the old Ordinance. It must be remembered that a grave defect in Ordinance 2 of 1942, under which the trials in question had taken place, was that the persons tried were arbitrarily selected and some of them deprived of their rights to be tried by a jury. If the Crown's contention is correct, the amending Ordinance would be simply covering up that defect and deeming that such selected persons, who ought to have been tried by a jury, had been tried by a jury. In other words, it would be validating what has been declared to be invalid, and that would be taking place not by the specific wording of the new Ordinance, but by implication. I turn now to Section 3(2) which says:

Notwithstanding anything contained in any other law any such sentence...shall...be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at the trial so held been passed on the date of the commencement of this Ordinance....

18. Clearly, whatever the meaning of Section 3(2) is, it means that the convicted persons have the right to go to the appropriate Court and have their sentences dealt with in appeal or revision. The powers of an appellate Court under the Code of Criminal Procedure are dealt with in Section 423 which provides that 'the appellate Court shall then send for the record of the case, if such record is not already in the Court. After perusing such record...the Court may...' deal with the conviction as it thinks fit in accordance with the Code. The powers of revision vested in the revising Court are dealt with in Section 435 which says:

the High Court or any Sessions Judge...may call for and examine the record of any proceeding before any inferior criminal Court situate within the local limits of it or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court....

and then exercise the revisional powers given to it. Clearly, both the appellate and revisional powers can only be exercised and based upon a perusal or examination of the record of the case or proceeding. There is no power in the Code for the appellate or revisional Court to exercise its powers otherwise than after perusing or examining the record of the case or proceedings. That means the actual case or actual proceedings. There is no power in the Code of Criminal Procedure to deal with a notional case or a notional proceeding. The actual record in each case or proceeding of the special Courts is what is set out in the papers which form the record and those papers, in each case, disclose that the case was tried by a special Court, and the Federal Court has declared that such proceedings are void. If on the other hand, the words of Sub-section (1), viz., 'the sentence...shall have the effect and continue to have the effect' simply mean that until appeal or revision the person sentenced shall do what he was ordered by the Court sentencing him, and the jailor, to whose custody he was sent, shall hold him in custody or otherwise deal with him as directed, then the appellate or revisional Court can, acting upon the actual record of the case or proceeding, deal with the case justly according to law.

19. We have thus two constructions - the one contended for by the Crown which involves in some cases illusory rights of appeal and revision, and the other which involves the real rights of appeal and revision so as to enable the case to be dealt with according to law. I cannot bring myself to think that after the Federal Court had declared the invalidity of the proceedings under the special Courts an Ordinance would immediately be passed which meant that people illegally convicted by the special Courts got illusory rights when there is another construction of the Ordinance which gives them real rights. I cannot think that the amending Ordinance intended that many persons convicted by the special Courts before 5th June 1943, should have illusory rights of appeal and revision, whereas

those being tried on 5th June 1943, should be given their full and real rights under the Code of Criminal Procedure.

20. Looking at the Ordinance as a whole, as I think it ought to be looked at, and having regard to what it provides and what it omits to provide, and having regard also to the circumstances in which it was passed, I am of the opinion that the meaning and purpose of Section 3 were that sentences already passed should continue to have effect as if they had been passed by a valid Court, until under rights therein given to those convicted by the special Courts, those sentences could be reviewed or dealt with in appeal under the provisions of the Code of Criminal Procedure when they should be dealt with according to law. One important feature of that law, declared by the Federal Court on 5th June 1943 and as far as Bengal and Assam were concerned by this Court on 21st April 1943, was that such sentences were invalid as being based upon convictions in Courts which had no legal authority. In my opinion, it is the duty of the proper Court which has appellate or revisional jurisdiction in the areas in which these sentences were passed to have those convictions brought up before it and quashed and, further, to direct that the persons concerned should be dealt with according to law in the ordinary Courts according to the ordinary process of law, with this exception that where the sentence passed by the special Courts has been substantially served the Court should direct that no further proceedings be taken. Where subsequent trials under the Code are held and result in convictions it would be the duty of the Judges passing sentences to have regard to the sentences passed and already served or suffered under the special Courts convictions and pass such new sentences as in effect give to the convicted persons credit for the sentences served or suffered under the special Courts convictions.

Khundkar, J.

21. I agree. The substantial question which we are called upon to decide is whether Section 3 of Ordinance 19 of 1943 is ultra vires, on the ground that it seeks to validate something done in the exercise of a jurisdiction which the Federal Court held, in the case of Benoari Lal Sarma Reported in , to be beyond the powers of the Legislature to confer. The learned Advocate-General conceded

that the words of Section 3(1) had the literal effect of validating convictions and sentences pronounced by special Courts under Ordinance 2 of 1942. At the outset of the discussion at the bar, he however stated, in answer to a question put by me, that the ultimate object of Section 3 was to bring about a simple two-fold result; firstly, to continue as valid the penalty or punishment incurred or received by persons who have been sentenced in trials held under Ordinance 2 of 1942; secondly, to enable the High Court to set aside the penalty or punishment in those cases in which the evidence which has been led against these persons would be either insufficient in fact or inadmissible in law to support their convictions, had these persons been tried by the ordinary Courts under the Code of Criminal Procedure. A reading of the Ordinance as a whole makes it clear that these are essentially the results aimed at in Section 3, but the question is whether they can now be accomplished after the Federal Court has declared that the special Courts under Ordinance 2 of 1942 had no jurisdiction. If the punishments cannot be given effect to because the convictions and sentences fail for want of jurisdiction, the Court cannot ever be called upon to consider the evidence whether in appeal or revision.

22. This is not a case within that category, where, the Court having declared the meaning of an enactment, other than a Constitution Act, the Legislature seeks by an amendment of the enactment merely to alter that meaning. In *Benoari Lal's* case Reported in the Federal Court was dealing with the Governor-General's legislative power and the limits of that power under the Constitution Act, and it declared that under Section 72 in Sen. 9 of that Act, the Governor-General had not the power to vest the special Courts constituted under Ordinance 2 of 1942 with jurisdiction in the manner in which that was sought to be done by Sections 5, 10 and 16 of that Ordinance. The argument is that there is a fundamental affinity between the jurisdiction of a Court and the sentences passed by it, so that the re-creation of the sentence must involve the re-creation of the jurisdiction. To give legal existence to the sentences, passed by the special Courts is to rehabilitate the jurisdiction of those Courts, and so what is being done here is to make, in a circuitous manner, the declaration that the judgment of the Federal Court notwithstanding, the Governor-General has yet the power under the Constitution Act to vest jurisdiction in special Courts in the manner which Sections 5, 10 and 16

of the Ordinance provided for. This declaration, oblique though it is, is beyond the legislative powers of the Governor-General. It is said that the Legislature cannot bring about by indirect methods what it is beyond its power to enact directly, and the case in *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters* (1940) 1940 A.C. 513 is relied upon in this connexion.

23. Ordinance 19 of 1943 makes it apparent that it seeks to give effect to any sentence passed in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance (ordinance 2 of 1942) as if the trial at which it was passed had been held, etc. Attention is focussed on the words above set out. The 'sentences' it is contended, are an integral part of the proceedings in the trials and are as much an outcome of the jurisdiction of the Courts holding the trials as the convictions or the trials themselves. You cannot make valid a sentence passed in a trial held under ordinance 2 of 1942 without validating, at the same time, the jurisdiction conferred on special Courts by that Ordinance. This the Governor-General is now precluded from doing, and therefore Section 3 of the present Ordinance is invalid. By this argument we are presented at once with the question whether, in considering the Ordinance, the Court is confined to the meaning and implications of the words

sentence passed by a Special Judge, a Special Magistrate or a summary Court in exercise of jurisdiction conferred Or purporting to have been conferred by or under the said Ordinance,

or whether it is the duty of the Court to look beyond those words in order to see if any, and if so what effect can be given to the intention of the Legislature as expressed in the statute. The Advocate-General has strenuously contended that SHCQ effect must be given to it as is possible and he has submitted, as already stated, that it is possible to hold that punishments have been continued, and that a right of appeal and revision on evidence has been given to persons who are now suffering those punishments. In my judgment the interpretation of Section 3 of this Ordinance calls for the application of two well known rules of construction. The first is that a statute must be construed so that the intentions of the Legislature may not be treated as entirely vain. In *Courtis v. Stovin* (1889) 22 Q.B.D. 513 at p. 517

Bowen L.J. said:

The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz., that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *'ut res magis valeat quam pereat'*.

24. In *Smith's case In re London Marine Insurance Association* (1869) 4 Ch. A. 611 at p. 614, Selwyn L.J. observed that it was not the duty of the Court 'to be astute to find out ways in which the object of an Act of the Legislature may be defeated.' The rule that Courts will presume that legislation was intended to be *intra vires*, and will not hold it to be *ultra vires* unless the invalidity is clear beyond doubt, finds frequent expression in the decisions which relate to the powers of the Dominion Legislatures. *Attorney-General for Ontario v. Attorney-General for Canada* (1912) 1912 A.C. 571 was a case which arose out of an Act of the Ontario Legislature authorising any person to exchange, through an attorney, with persons resident in Ontario or elsewhere, reciprocal contracts of insurance. The provision was impugned as *ultra vires* on the ground that it sought to affect acts and persons not within the territorial jurisdiction of the Province. Duff J. said:

The terms of the statute as a whole are in their Lordships' judgment capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, apply only to persons and acts within the territorial jurisdiction of the province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts.

25. In *Valin v. Langlois* (1880) 5 A.C. 115 the competency and validity of an Act of the Dominion Legislature of Canada was raised, and it was stated by Lord Selborne, as appears from page 118 of that report:

It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character.

26. In *Citizen Assurance Co. v. Parsons* (1882) 7 A.C. 96 the question whether a statute passed by the Legislature of Ontario was ultra vires of its powers under the British North America Act, 1867, had to be considered. Reference was made to a provision contained in an Act of the Dominion Parliament which consolidated certain Acts respecting insurance. That provision had declared that each of the provinces had exclusive legislative control over the insurance companies incorporated by it. The Privy Council said:

The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.

27. This case affords valuable guidance in the solution of the question with which we are here concerned. The express repeal by Section 2, of Ordinance 2 of 1942, coupled with the provisions of Section 4 indicate that the Governor-General, in his legislative capacity under S. 72 in Schedule 9, Government of India Act, unquestionably accepted the decision of the Federal Court regarding his inability under that section to enact jurisdiction of the special Courts under Ordinance 2 of 1942 in the manner in which Sections 5, 10 and 16 of that Ordinance sought to create it. I cannot read the repeal, and Section 4, following as they did upon the Federal Court's decision Reported in , as anything but an implied declaration that the Governor-General had no such power under the Constitution Act. One aspect of the rule of interpretation which is illustrated in the cases just noted is closely related to the other rule of construction to which I shall presently refer, and it is expressed in Halsbury's Laws of England (Hailsham Edn., Vol. 31, p. 477) in the following words:

The Court will lean against a construction which is opposed to the intention of the Legislature as it appears from the statute, and if the words are sufficiently flexible, will adopt some other construction by which the intention will be better effectuated.

28. In *R. v. Halliday* (1917) 1917 A.C. 260 at p. 808 of the report there appears in the speech of Lord Shaw a quotation from the judgment of Lord Selborne in

Caledonian Railway Co. v. North British Railway Co. (1881) 6 A.C. 114 at p. 122:

The more literal construction ought not to prevail if...it is opposed to the intention of the Legislature as apparent by the statute and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

29. Now what is the position here? The Legislature has said that sentences pronounced in the exercise of an invalid jurisdiction will nevertheless have effect. If this is a declaration that the jurisdiction conferred on special Courts by Ordinance 2 of 1942 is valid and legally capable of supporting those sentences, then no effect of any kind, however limited, could be given to Section 3. But the rule of the presumption of validity prevents the Court from inferring that the Legislature intended to make such a declaration, unless the words of the present Ordinance lead unmistakably to that conclusion and to no other. The second rule of interpretation which applies to the present case is one that is spoken of as construction *ex visceribus actus* - within the four corners of the Act. Coke said in 1 Inst. 881 b:

It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers...and this exposition is *ex visceribus actus*.

30. This rule has been acted upon by the Courts from Coke's time down to the present day. In *Brett v. Brett* (1826) 3 Adams. 210, Sir John Nicholl expressed it in the following way:

The key to the opening of every law is the reason and spirit of the law; it is the *animus imponentis*, the intention of the law-maker expressed in the law itself taken as a whole. Hence to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connexion with its whole context, meaning by this as well the title and preamble as the purview or enacting of the statute.

31. In *Brett v. Brett* (1826) 3 Adams. 210 at p. 660, Lord Tenterden stated:

In construing Acts of Parliament we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act. And if we find in the preamble or in any particular clause, one expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause.

32. In *In re Viscountess Rhodda's Claim* (1922) 2 A.C. 339 at page 399, Lord Chancellor, Birkenhead said:

The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied and the defects to be amended, may legitimately be looked at together with the general scheme of the Act.

33. Now the argument here is that the words of Sub-section (1) of Section 3, quoted above, render the provision contained in that sub-section ultra vires. Bearing in mind what has been laid down in the decisions above noted, we have to scrutinise the language of this Ordinance and to see whether those words in Sub-section (1) of Section 3 are unyielding, or if they afford a different result when viewed in their whole context; whether there are other provisions larger and more extensive in import, and finally what the existing state of the law and the mischief to be remedied were. Let us examine the provisions of the Ordinance from these points of view. Sentences which are now being served or suffered by persons, tried by special Courts under Ordinance 2 of 1942 rest for their validity, and so depend for their continuance, on pronouncements of conviction already made by those Courts. We have seen what the opening words of Section 3 are. But Section 3, Sub-section (1) goes on further to say that any such sentence

shall have effect and shall continue to have effect as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure.

34. These words are bringing about a substitution of the old foundation upon which the sentence rested by a new foundation, viz., a trial held in accordance with the Code of Criminal Procedure. The manner in which this is accomplished is to take the sentences out of the trials in which they were actually passed, and to rest them in a notional or fictional trial under the Code of Criminal Procedure. Whether the Legislature has power to do this will be considered later, but what is now to be noted is that the Legislature is here contriving a fictional support for the sentences, - a proceeding which would be quite profitless if the Legislature had meant to declare that the sentences still stood firmly rooted in a jurisdiction which it insisted was good. Here I may say that the employment of the word 'sentences' in Section 3 is ill-judged and out of place. What the Legislature apparently intended to give life, to and to continue was really the penalty or punishment, be it fine or imprisonment, which is now in process of being endured by persons who have been visited with such penalty or punishment under Ordinance 2 of 1942. No more than this was intended. Section 2 of the present Ordinance repeals Ordinance 2 of 1942, and the importance of this nowhere wanes. Sub-section (1) of Section 3 cannot resurrect jurisdiction when the enactment which created that jurisdiction is repealed. Repeal is the overriding intention. It is fundamental, and it has consequences to which legislative recognition is given in Section 4, which expressly renders void every trial pending at the date of the new Ordinance, and in Section 5 which indemnifies servants of the Crown for anything done under the repealed Ordinance. These provisions help to explain the import of Sub-section (1) of Section 3. The words of that sub-section must be viewed in their proper collocation and actual context. In that collocation and context, the meaning which the argument for the petitioners would read into them is thus seen to be singularly at variance with the intention which the Ordinance elsewhere expresses in provisions of larger import.

35. Sub-section (2) of Section 8 seeks to confer a right of appeal from, and of revision of, the sentences passed by special Courts. Under the old Ordinance, the High Court could entertain neither appeal nor revision from the Courts under that Ordinance. There then came the decision of the Federal Court which declared that those Courts had no jurisdiction. That was the state of the law when the repeal was enacted. The whole of the Ordinance was repealed but it was not considered

desirable that punishments received in trials under the old Ordinance should stand defeated forthwith. They should be regarded not as void, but voidable. Yet since the rest of the Ordinance was repealed, the provisions of that Ordinance which barred appeal, or revision were also thenceforward necessarily discontinued. And so, it was thought, there arose the need to state and define present rights of appeal and revision in respect of punishments occasioned by sentences already pronounced. One plain and obvious purpose of this Ordinance is to remedy the hardship and the anomaly which would ensue if punishments which have already been dealt out are to be continued but are to be exempt from judicial examination. This, I think, is how Sub-section (2) came to be enacted, and it is not inconsistent with the view that the Legislature had bowed to the authority of the Federal Court in the matter of the jurisdiction of the Special Courts.

36. The conclusion which I have so far reached is that Section 3(1) does not amount to a declaration that the jurisdiction conferred by Sections 5, 10 and 16 of Ordinance No. 2 of 1942 was a valid jurisdiction, nor can it be said that this sub-section is resurrecting or re-enacting that jurisdiction. Ordinance No. 2 of 1942 is repealed. Pending proceedings under that Ordinance are declared void. Servants of the Crown who have taken action under that Ordinance are protected by an indemnity. These provisions are good. The punishments are continued. Is this provision valid? The answer will, I think, depend on the extent to which they may be continued. In my judgment Section 3(1) has, as stated by my Lord the Chief Justice, very clearly and undoubtedly this operation : it extends the indemnity contained in Section 6 to jailors if they continue to hold persons imprisoned under Ordinance 2 until a Court orders those persons to be released, and to officers of Courts into which fines have been paid if they retain the money until a Court orders the fines to be refunded. Can Section 3(1) go any further? Can it prevent Courts of appeal and revision from quashing these punishments at sight without looking at the evidence at all? This is now the question. As already observed Section 3(1) has sought to do it by enacting the fiction that the trials in which the punishments were meted out were not trials under ordinance 2 of 1942 but trials under the Criminal Procedure Code. In doing so it recognises that these punishments cannot for a moment stand if they are founded in trials under Ordinance 2 of 1942.

37. The learned Advocate-General, in his defence of the validity of Section 3, relied strongly on the case in *Trustees of the Ottawa Roman Catholic Separate Schools v. The Quebec Bank* ('19) 6 A.I.R. 1919 P.C. 96 for the proposition that the Legislature could validate the sentences even though they arose out of its own ultra vires statute. In this case the appellants to the Privy Council were the trustees of the Ottawa Roman Catholic Separate Schools. They, at one time, having refused to conduct their schools according to rules made by the Education Department, the Legislature of Ontario passed an Act, under which commissioners were appointed to take over the management of the schools. The Commissioners carried on the management, and for this purpose drew and expended money standing to the credit of the appellants, with the Quebec and other banks. Then the Privy Council declared the Act to be ultra vires. The appellants thereupon instituted proceedings for the recovery from the Commissioners of the money disbursed by them, and from the Quebec Bank of the amount which had stood at the credit of the appellants prior to their supersession. While this litigation was pending, the Legislature of Ontario passed another Act declaring that all payments made by the Commissioners were deemed to have been made at the appellant's request, and that the liabilities were to be the liabilities of the appellants. The Privy Council held that the second Act of the Ontario Legislature was perfectly good. Lord Dunedin, delivering the judgment of the Board said:

It was frankly admitted by the learned Counsel for the appellants that the money spent and the liability incurred was spent and incurred in the carrying on of schools in a proper manner : that is to say was not in any way expended on purposes other than the carrying on of the schools. The appellants cannot say that the money if they had had it would not have been spent on the same purposes, all that they can say is that they would have had the control and spending of it. The right which has got to be prejudicially affected is the right to maintain separate schools under the Education Acts. Now it was pointed out by the Lord Chancellor in deciding the *Ottawa Corporation Case, Ottawa Separate Schools Trustees v. Ottawa Corporation* ('16) 3 A.I.R. 1916 P.C. 267 (the decision which had declared the earlier Act to be ultra vires), that there might be cases where a right might be affected without being prejudicially affected. It will at once be apparent what a contrast there is between the legislation which was the subject of that decision and

that in the present case. There the right of the appellants to conduct their schools was taken away for an indefinite period. Their restoration did not depend on themselves but could only be given them by others. They are now restored - that legislation having been held to be ultra vires - but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools. If the contention of the appellants were given effect...to the result would be that the schools would have been carried on by funds provided gratuitously by the banks or by the individual Commissioners, the appellants would be in the possession of funds which had been detained for the carrying on of the schools in the past and which, as they would not now be so applied, would form a gratuitous bonus in their hands.

38. Mr. Chatterjee, on behalf of the petitioners, has distinguished this case by pointing out that the Validating Ontario Act could not, as stated by Lord Dunedin, obliterate the extrusion of the trustees from management, because that was a matter of past history. All that the Validating Act sought to accomplish was to indemnify the Commissioners and the banks in respect of the disbursement of moneys already expended on objects that were proper. Here Section 3 does not indemnify anybody, (the indemnity section is Section 5) but it strives to give the complexion of validity to the trial held by the special Courts set up under Ordinance 2 of 1942 by enacting that that they are to be considered to be trials which were held in accordance with the Code of Criminal Procedure. It has been declared that those trials were void. The void trials are as much a matter of past history as was the extrusion from management of the trustees in the Canadian case, and they cannot now be obliterated or converted into imaginary trials under the Code of Criminal Procedure. This is a strong argument. Monetary liabilities may be wiped out if justice and equity so require. But penal retribution can never be permitted to issue except out of lawful trial, and criminal justice cannot be founded in fictional proceedings. In the Canadian case, it was held that the trustees' rights had been prejudicially affected by their extrusion from the control

and management of the schools, but that their rights had not been prejudicially affected by the disbursements made for the benefit of the schools out of the schools funds. In the present case it is the sentences themselves which affect the rights of individuals, and the passing of a sentence is not something which is separable in law from the holding of a trial. The punishment is merely the carrying out of the sentence; it is the necessary consequence of it. If the trial is without jurisdiction the sentence cannot stand and the punishment may not be carried out. To engraft the sentence on a fictional trial would be to support it by a sham.

39. The learned Advocate-General contended, that what the Federal Court has held is, not that the Governor-General had no power, under Section 72, Schedule 9, Constitution Act, to vest special Courts with jurisdiction, but that jurisdiction could not be given to Courts in the manner in which Sections 5, 10 and 16 of ordinance 2 of 1942 sought to confer it. He argued that in as much as the power to legislate in Section 72 includes, as it undoubtedly does, the power to constitute special Courts and to give them, in a proper manner, jurisdiction to try offenders, that implies that the Governor. General has power to give validity to sentences pronounced by special Courts which he had set up in the past. The power of the Governor. General to constitute those Courts was never doubted. To give effect to the learned Advocate-General's argument would be to say that people can be punished for criminal offences without trial, for no trial that can be rightly called a trial have these persons had. Legal fiction in a potent contrivance. Much can be accomplished by Legislatures through its instrumentality, but I have yet to learn that where British jurisprudence prevails, a man can be punished for an offence in a trial before a tribunal that had no jurisdiction, and that thereafter the punishment can be validated by the supremely arbitrary postulation that the trial was held by some other tribunal which had jurisdiction. To me it is clear that these, sentences cannot be sustained.

40. We have heard a great deal of argument about the practical unworkability of Sub-section (2) of Section 3, at least that part of it which purports to provide a right of appeal. The discussion at the bar revealed that this provision has not been anxiously handled by the draftsman. As pointed out by my Lord the Chief Justice, the right of appeal is almost entirely illusory. But apart from that, the very idea of

appeal is misconceived. The rights of appeal here contemplated are those conferred and regulated by the Code of a Criminal Procedure, and even if we accept the contention of the Crown that a right of appeal on facts was intended, yet such right or rights can have no application to orders passed in trials that were *ab initio* void because the Courts conducting those trials never had any jurisdiction. A Court of appeal cannot be called upon to go into evidence when the trial itself was void. To press the acceptance of such rights upon persons tried by the special Courts under Ordinance 2 of 1942, cannot but imply that those Courts had jurisdiction under that Ordinance. This, as already seen, is beyond the intention of the present Ordinance. In my judgment this Court, acting by virtue of its powers under Section 491, Criminal P.C., can at any time order the records of any case tried under Ordinance 2 of 1942 to be brought up, and can, subject to the provisions of that section, quash the sentence. This Court requires no power from the present Ordinance to do so. As regards the rights of revision which Section 3(2) purports to confer, I can see no objection to reading this provision as meaning that the Courts referred to in Section 435, Criminal P.C., can also, at any time, call up the records of cases tried by the Special Courts for the purpose of quashing the sentences passed in those cases. There is the line of argument, already noted, which insists that Section 3 is *ultra vires*, and for this purpose it seeks to represent Sub-section (2) of Section 3 as importing the declaration that the Courts under Ordinance 2 had jurisdiction, the decision of the Federal Court notwithstanding. The dialectics of this position are that you [must accept the literal meaning of Section 3(2), but that if you do so, then the Legislature is saying that the jurisdiction given by Ordinance 2 of 1942 was a good jurisdiction. The answer, I think, is that we must not enter into Section 3(2), except in so far as it contains a power to call, under Section 435, Criminal P.C., for records of trials held by the Special Courts. So much of it as is meaningless and unworkable may be disregarded. In *Maxwell on Statutes* (Edn. 3, page 319) the rule is thus put:

When the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.

41. In this connexion the following eases may be seen. In *Salmon v. Duncombe* (1886) 11 A.C. 627, Lord Hob-house in delivering the judgment of the Privy Council said:

It is however a very serious matter to hold that when the main object of a statute is dear it shall be reduced to a nullity, by the draftman's unskilfulness or ignorance of law.

42. This was followed in *R. v. Vasey* (1905) 2 K.B. 748. In *R. v. Ettridge* (1909) 2 K.B. 24 Darling J. said:

Where no meaning can be given to certain words of a statute without rejecting some of those used in it, or where the statute would become a nullity were all the words retained, the Court has power to read a section as though the words which make it meaningless or nullify it were not there....

43. The result, in my judgment, is that all sentences pronounced by Special Courts under Ordinance 2 of 1942 must be quashed when they come before this Court under Section 491, Criminal P.C., or before any Court in revision. Till then the jailor may hold the persons who are in prison, and the authorities to which fines have been paid may retain the money in their hands. This, in my opinion, is the only effect which can be given to Section 3(1), but it is an effect Which I think we are bound to concede to it by reason of the rules of interpretation which I have discussed above.

Sen, J.

44. This is an application by Sushil Kumar Bose convicted and sentenced by a Special Court established by the Special Courts Ordinance, 2 of 1942, invoking the powers given to us by Section 491, Criminal P.C. The application is based on the ground that Ordinance 2 is ultra vires of the Governor-General's ordinance-making powers. The Crown meets the application by placing reliance on ordinance 19 of 1943 which has repealed ordinance 2, and made certain provisions with respect to the rights of persons sentenced under Ordinance 2. The contention is that this new Ordinance will govern these proceedings. On behalf of the petitioner

it is argued that this Ordinance is ultra vires the powers of the Governor-General. It will now be necessary to relate certain facts regarding Ordinance 2 of 1942. This Ordinance provided for the constitution of 3 classes of Courts of criminal jurisdiction viz., Special Judges, Special Magistrates and Summary Courts. The jurisdiction of each Court was not defined but it was provided that each Court would try only such cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in that behalf may by general or special order in writing direct.

45. The validity of this Ordinance was questioned before us in the case of Benori Lall Sarma v. Emperor Reported in : AIR1943 Cal285 . The Chief Justice and Khundkar J., held that Sections 5, 10 and 16 of the Ordinance were ultra vires the powers of the Governor-General and that consequently the special Courts were not legally vested with jurisdiction to try cases. I held the view that not only were those sections invalid on the grounds stated by the Chief Justice and Khundkar J., but that the entire Ordinance was ultra vires the powers of the Governor-General inasmuch as the Ordinance showed, on the face of it, that, in the opinion of the Governor-General, an emergency necessitating the ordinance had not arisen at the time the Ordinance was promulgated and also on the ground that the Governor-General had delegated to the Provincial Government the function of deciding whether or not an emergency requiring the application of the Ordinance had arisen. The unanimous opinion of the Court was that the special Courts had no jurisdiction to try the petitioners and we set aside the convictions and sentences and directed the release and retrial of the petitioners according to law.

46. An appeal from our decision was taken to the Federal Court by the Crown. The majority of the Federal Court, Rowland J. dissenting, dismissed the appeal. They held the view that unless Sections 28 and 29, Criminal P.C., were repealed, the special Courts of the Ordinance would have no jurisdiction to try cases. They held further that, notwithstanding drafting devices, the Ordinance by itself had not repealed the actions, but that it was the executive order to be passed under Sections 5, 10 and 16 of the Ordinance in respect of each case or group of cases that would, in fact, operate to repeal these provisions of the Code, to divest the regular Courts of their jurisdiction and to invest the special Courts with jurisdiction

to try any case or group of cases. They added 'We are of opinion that such executive orders cannot in law have any such effect.' They also held the view that the powers of the High Court though in form taken away by Section 26 of the Ordinance were, in fact, taken away only when an executive order was passed under Sections 5, 10 or 16. Their Lordships' view was that the powers of the High Court could be taken away only by a Legislature. Lastly, they took the view that the Governor-General had, by the provisions of Sections 5, 10 and 16 of the Ordinance delegated his legislative powers to the executive in a manner which amounted to an abdication of his legislative powers and that the Constitution Act did not empower him to do such a thing. In the result, they found that the special Courts had no jurisdiction to try the respondents. Rowland J., rejected the unanimous opinion of this Court and also the view that I alone held, viz., that the whole of Ordinance 2 was ultra vires as the Ordinance, on the face of it, showed that the Governor-General was of opinion that an emergency requiring the Ordinance had not arisen at the time the Ordinance was promulgated. He has expressed disagreement with my view in language which I cannot hope to emulate. He describes His Excellency the Viceroy sitting in his special train and hearing the wheels humming 'Emergency, Emergency,' and then 'no Emergency yet, no Emergency yet.' Then he goes on to say:

I am not speaking in a spirit of levity. I am very much in earnest but so strong is my dissent from the line of argument I am examining that without some safety valve I could hardly restrain myself from commenting on it with undue warmth.

47. A little later his Lordship observes:

Do I dream? Am I in wonder-land? Have we met in the person of the learned Judge, what Lord Atkin might call a new Humpty-Dumpty? How much over time are the words to earn by meaning what the learned Judge says? For it seems to me that the boot is on the other foot.

48. I believe there is a sound rule that metaphors like strong drinks should never be mixed, Such mixtures lead only to confused thinking. I must confess that the mixture of Viceregal trains, dreams and boots is too potent for my assimilation. Is it my judgment that is solely responsible for making his Lordship feel once like an

over-heated locomotive with an inadequate safety valve drawing the Viceregal special train and then like innocent Alice, wondering at things she cannot understand? I may have thought it was, were it not for the fact that the other two learned Judges, who were trained in the profession of law reacted differently from Rowland J., who, in the words used by Turner L.J. of the Judicial Committee from the Sivagunga case, is 'an unprofessional Judge' *Kattama Nachiar v. Rajah of Shivagunga* (1861-63) 9 M.L.A. 539 at p. 601. Their Lordships, the Chief Justice of India and Zafrulla Khan J. after setting out in great detail the arguments on the points concluded:

The contentions put forward on behalf of the respondents in this part of the case found favour with Sen J. in the Court below and they undoubtedly raise substantial questions. In view, however, of the conclusions at which we have arrived on the main ground of attack against the validity of the Ordinance we do not consider it necessary to pronounce an opinion on these questions.

49. Having introduced the technique of likening Judges whose opinion differ from his to characters in fiction, Rowland J., will, I am sure, not take it amiss if I say that his manner of criticism of points of law which he does not appreciate makes me wonder whether in him we have not a re-incarnation of that well-known character in fiction - Bumble the beadle - who, disliking an interpretation of the law exclaimed : 'The law is - a 'ass - a' idiot' (*Oliver Twist*, Chapter 41).

50. Rowland J.'s judgment cannot, of course, have any authoritative value; it may have a persuasive value. I am however not persuaded. I shall therefore deal with the new Ordinance from the same standpoint as that which I took when examining the repealed Ordinance 2 of 1942 and even at the risk of again disturbing his Lordship's composure I shall try and avoid that attitude which Lord Atkin deprecates in the very case from which Rowland J., sought to draw inspiration. I refer to the observations of Lord Atkin, which probably escaped the notice of Rowland J. They are as follows:

I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive : *Liversidge v. Sir Johan*

Anderson (1942) 1942 A.C. 206 at p. 244.

51. The new Ordinance avoids some of the defects of the one it repeals. There is nothing, on the face of it, to show that the Governor. General was of opinion that an emergency necessitating the measure had not arisen at the time of its promulgation. It comes into force at once, there is no delegation of the function to decide whether an emergency exists; there is no delegation of legislative powers to the executive nor is there any abdication of legislative powers, nevertheless, in my opinion, one of its sections, viz., Section 3, is tainted with, what I may term, the original sin of the old ordinance and is therefore ultra vires. What does the new Ordinance purport to do? Section 2 repeals ordinance 2 of 1942. Section 3(1) gives effect to and continues in effect every sentence passed by a special Judge, special Magistrate or summary Court constituted by the repealed Ordinance and seeks to transform it into a sentence passed at a trial held in accordance with the provisions of the Criminal Procedure Code by either a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively. Sub-section (2) subjects the sentences so confirmed to such rights of appeal or revision as they would have been subjected to if they have been passed at trials held in accordance with the provisions of the Criminal Procedure Code by the above mentioned Courts from the date of new Ordinance. Sub-section (3) is immaterial for the purposes of this case.

52. Section 4 deals with trials held under the old Ordinance which are still pending. It renders all proceedings taken thereto before as void and directs the transfer of such cases to a Presidency Magistrate or a Sub-divisional Magistrate as the case may be. Section 5 indemnifies servants of the Crown against legal proceedings in connexion with certain acts done by them in the exercise of powers conferred or purported to have been conferred upon them by the repealed Ordinance. It is obvious that in the present application Section 3(1) is the section which is of vital importance. If it is ultra vires then the application must succeed, the conviction and sentence must be set aside and the petitioner must be released from the custody in which he is at present. If it is not we must consider what rights he has under it. Section 3(1) is as follows:

Any sentence passed by a special Judge, a special Magistrate or a summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (5 of 1898) by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively exercising competent jurisdiction under the said Code.

53. The argument of the learned Advocate-General is this : Section 3 is intra vires because it deals with a subject which is within one or other of the lists of subjects with which the Governor-General may deal by Ordinance. The contention on behalf of the petitioner is that although the Ordinance purports to deal with such a subject it is really validating that portion of ordinance 2 which has been declared to be ultra vires by the Federal Court. Mr. Sadhan Gupta put the point with great succinctness and clarity thus : Every sentence passed under the old Ordinance has been validated by Ordinance 19. There cannot be a valid sentence without a valid conviction, there cannot be a valid conviction without a valid trial, there cannot be a valid trial unless there was a proper Court and there cannot be a proper Court unless it has jurisdiction validly conferred upon it. By validating the sentences passed by the Courts constituted under Ordinance 2, the new Ordinance validates the jurisdiction given, to those Courts by Sections 5, 10 and 16 of Ordinance 2. The Federal Court having held that the Governor. General as a Legislature had no power to confer jurisdiction on the special Courts in the manner in which he had tried to confer it by the above mentioned sections, it is not open to the Governor. General as a subordinate Legislature to enact either directly or indirectly that that jurisdiction was good.

54. The learned Advocate-General admits that Section 3 of Ordinance 19 validates every sentence passed under Ordinance 2. He further admits that by validating every sentence Section 3 also validates every conviction, but he does not admit that by validating these convictions the Governor-General is validating Sections 5, 10 and 16 of Ordinance 2. Nor does he admit that the Governor-General is either directly or indirectly validating anything which the Federal Court has declared to be ultra vires of the Governor-General as a legislator. His argument is this : It is true

that the Governor-General in Ordinance 2 vested jurisdiction in the special Courts by a method he was not empowered to employ, but he did have the power to vest the special Courts with jurisdiction properly. By declaring that the convictions and sentences passed by these Courts are valid the Governor-General is neither asserting that he has power to vest Courts with jurisdiction by the illegal method employed by him under Ordinance 2, nor is he seeking to vest any Courts with jurisdiction by such method. He is merely doing something which he is clearly entitled to do namely, legislating with respect to a subject which is within one of the three lists of subjects with respect to which the Governor-General may make an Ordinance.

55. In examining these arguments there is one thing which we must always remember and it is this : There is a fundamental difference between a Sovereign and a subordinate Legislature. No Court can question the validity of a law made by a Sovereign Legislature like Parliament inasmuch as it has unfettered legislative powers. Bodies or persons given legislative powers by Parliament are in a different position - they are subordinate or non-sovereign Legislatures and as such their Acts may be adjudicated upon by Courts which, in a proper case, may declare them to be ultra vires. The Governor-General as ordinance-maker is such a subordinate Legislature. He derives his legislative powers from the Government of India Act of 1936. Now a subordinate or non-sovereign Legislature has definite limits upon its law-making powers. It can legislate only within the ambit of the powers which are conferred upon it by the enactment which creates it. Any law which it passes outside this ambit is ultra vires. It follows from this that a non-sovereign Legislature which has made a law which is ultra vires of itself cannot by a subsequent act declare such law or any part thereof to be intra vires. To permit this would be to permit a Legislature with powers limited by some other authority to enlarge its powers by its own act without reference to the authority creating it. Now if this cannot be done directly, obviously, it cannot be done indirectly by means of drafting or other devices. If authority is needed for this proposition I would refer to the case in *Madden v. Nelson and Fort Sheppard Railway* (1899) 1899 A.C. 626 at p. 627 and to the case in *Board of Trustees of Lethbridge Irrigation District v. Independent Order of Foresters* (1940) 1940 A.C. 513 at pp. 533 and 534. These principles are obvious and simple but their application in particular cases has not

always be easy, owing to the difficulty of determining whether a piece of legislation, which purports or appears to do something within the powers of the Legislature, is really doing something which is outside such powers.

56. Now let us test the validity of the present Ordinance by the application of this principle. On the face of it, the Ordinance appears to be legislating with respect to a subject regarding which the Governor-General has the power to make an Ordinance. What this Court has to see is whether in the guise of legislating with respect to this subject the Governor-General is, in fact, extending his legislative powers beyond the prescribed limits. I shall examine the question first from the standpoint that Sections 5, 10 and 16 only of Ordinance No. 2 of 1942 are ultra vires of the powers of the Governor-General. The Federal Court's decision put shortly is that the Governor-General had not the power by Ordinance to subject persons to trial by Courts which were given jurisdiction solely by executive order. Now let us see what Section 3(1) of the new Ordinance does. Let us suppose that the section stopped after the words 'shall have effect.' It would then read thus:

Any sentence passed by a special Judge, a special Magistrate or a summary Court in exercise of jurisdiction conferred or purported to have been conferred by the said Ordinance shall have effect.

57. Would such a provision be valid? The Governor-General had no power to make a law subjecting persons to be tried by Courts upon which jurisdiction was conferred by executive order only. The Governor-General however made such a law and the petitioner was subjected to trial by a Court upon whom jurisdiction was conferred in this manner. The Federal Court has declared that such a law was ultra vires and that trials and convictions held under such a law were illegal. The Governor-General thereupon makes another law repealing, it is true, the old law, but validating sentences passed by the special Courts which had been given jurisdiction by the invalid law. Is not the Governor-General by this device really validating those very sections of ordinance 2 of 1942 which were declared to be ultra vires by the Federal Court? Is he not trying to do indirectly what he could not do directly and thereby enlarging his powers beyond the limits prescribed by the Constitution Act? In my opinion he is doing so and my reasons are those stated by

Mr. Sadhan Gupta which I reproduced in the earlier part of the judgment. By validating the sentences the Governor-General is really validating the sections by which he conferred jurisdiction upon the special Courts - sections which have been declared to be 'ultra vires' by the Federal Court. To permit the Governor-General to do this would be to permit a ratification of an ultra vires act by a person guilty of it. This cannot be done. (Street on Ultra Vires, p. 441). To my mind it is quite clear that if Section 3(1) stopped after the words 'shall have effect' it would be ultra vires.

58. Let us see whether the addition of the other words makes any difference. These words only mean this : although the sentences were passed by the special Courts of Ordinance 2 in accordance with the procedure laid down by that Ordinance, they shall be deemed to be sentences passed in accordance with the provisions of the Code of Criminal Procedure by Courts constituted under that Code. What is being done? To use a homely metaphor, a new label is being put on the bottle containing the same old medicine. Nothing is being really changed, only a fiction is being introduced. The position therefore is not altered and Section 3(1) remains ultra vires.

59. We must next examine whether Sub-section (2) of Section 3 makes any difference to the validity of the section. By this sub-section the sentences are made subject to certain rights of appeal and revision. The learned Advocate-General very frankly stated that the provision of this sub-section would have no effect on the validity of the section. If it was ultra vires without Sub-section (2) it would remain ultra vires even after the addition of Sub-section (2). This must be so. The sentences passed under the old Ordinance were not invalid because they were not subject to the rights of appeal and revision granted by Sub-section (2). They were invalid because sections 5, 10 and 16 of the old Ordinance were ultra vires and these sections were ultra vires because the Governor-General had in enacting them delegated his legislative powers to the point of abdication in favour of the executive and left it entirely to the executive to vest jurisdiction in special Courts by order. This defect is not removed by Sub-section (2). Section 3, therefore, remains ultra vires.

60. I shall now deal with some of the other arguments of the learned Advocate-General. His contention is that in considering the question whether a Legislature has the power to make a particular enactment all that the Court should do is to see whether the legislation is with respect to a matter included in the list of subjects regarding which the Legislature is empowered to legislate. If it is in respect of such a matter, the Act cannot be ultra vires. He invited us to forget that there was any other Ordinance except the present one and to focus our attention only on the point whether Ordinance 19 legislated in respect of a subject which was to be found in the lists of subjects regarding which an Ordinance could be made. If the Ordinance dealt with such a subject, says the learned Advocate-General, that was the end of the matter; it must be taken to be valid; we must not direct our attention to anything else. In this connection he drew our attention to the case in *Trustees of the Ottawa Roman Catholic Separate Schools v. The Quebec Bank* ('19) 6 A.I.R. 1919 P.C. 96. Before dealing with this case I shall endeavour to show that the learned Advocate-General is wrong in inviting us to inflict upon ourselves an opthalmic disease known as 'tubular vision' i.e. the restricted vision of a person looking through a tube. In deciding upon the validity of an Act, the Court should look all round the Act and not shut out from its view anything which may help it in determining what the Act really plans to do. The Court must look to the substance and not merely to the form of the Act. It must consider whether the purpose of the Act is to do something illegal in the guise of doing something legal. I can do no better than quote the words used by Lord Maugham in the case in *Attorney General for Alberta v. Attorney General for Canada* ('39) 26 A.I.R. 1939 P.C. 53 at p. 130 where the question arose whether an Act, in form intra vires, was in fact ultra vires because it was part of a 'legislative plan' to do something which the Legislature had no power to do. This is what his Lordship says at page 130:

The next step in a case of difficulty will be to examine the effect of the legislation : *Union Colliery Co. of British Columbia Ltd. v. Bryden* (1899) 1899 A.C. 580. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into

account any other Act operating, or intended to operate, or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of Section 92(2), 'direct taxation within the province in order to the raising of a revenue for Provincial purposes' is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other.

61. In order therefore to appreciate correctly whether the present Ordinance is valid it is obligatory upon us to ascertain its purpose and plan and this we can best do by reference to the repealed Ordinance 2 and to what happened after its promulgation. The case relied upon by the learned Advocate-General really does not help him. In fact it impliedly recognises the principle that the petitioners are relying upon viz., that a Legislature cannot do indirectly what it could not do directly. The facts briefly were these.

62. The trustees for the Roman Catholic Schools in Ottawa neglected to perform their duties. The Legislature of Ontario passed an Act 5, Geo. V, C. 45, by which it appointed commissioners to take over the management of the schools. The commissioners took over and managed the schools for about nine months. In the course of their management they drew money from the school funds and spent it and incurred liabilities. In *Ottawa Separate Schools Trustees v. Ottawa Corporation* ('16) 3 A.I.R. 1916 P.C. 267 this Act was declared ultra vires by the Privy Council because of the provisions of, Section 93(1) of the British North America Act. Section 93 provided that the Provincial Legislature may make laws in relation to education. Sub-section (1) laid it down that nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons has by law in the province of the Union. It was held that the Act prejudicially affected the right or privilege conferred upon the supporters of the Roman Catholic Separate Schools of Ottawa by the British North

America Act, 1867.

63. After this the trustees were restored to the management of the schools and they instituted a suit against the commissioners and the bank in which the school funds had been deposited for a refund of the moneys spent by the commissioners on the ground that the Act vesting management in the commissioners was ultra vires. The Legislature passed another Act, viz., 7 Geo. V, C. 60. By this Act, it was declared that the payments made by the commissioners were such as were necessary for the schools and as should have been made by the Board of Trustees in the proper management of the school. It declared further that the payments so made by the commissioners should be deemed to have been made by them at the request of and on behalf of the Board of Trustees and indemnified the commissioners against all action for the recovery of these sums.

64. This Act was pleaded by the Commissioners in their defence. It was contended that this Act was also ultra vires. The Privy Council held that it was not ultra vires. The learned Advocate-General argued that the Judicial Committee merely looked to see whether the Provincial Legislature by the new Act had legislated on a subject which was within the Provincial field and being satisfied that it had so legislated, the Judicial Committee declared the Act to be intra vires. He submitted on the strength of this case that we should declare the present Ordinance intra vires as it has legislated with respect to a subject in the appropriate list. In my opinion, the learned Advocate-General has misappreciated the decision of the Judicial Committee. Their Lordships recognised that the Act was a measure dealing with civil rights and as such 'within the domain of the Provincial Legislature.' But this did not satisfy their Lordships. They certainly did not declare that the Act must be intra vires because of this fact. They examined the Act further to see whether in the guise of legislating with respect to a 'Provincial subject' it was offending against some other restriction imposed upon the Provincial Legislature. They examined it to see whether it was hit by Sub-section (1) of Section 93, i.e., whether it prejudicially affected the rights or privileges of the appellants. They discussed this aspect of the matter at length and this discussion occupies 1 1/2 pages of the report. Their findings may be summarised thus : (a) The Commissioners actually spent the money for the carrying on of the school in a

proper manner, (b) The appellant Board' could not say that if they had the money they would not have spent it in the same manner, (c) The spending of the money may have in a sense affected the rights of the Board but it had not prejudicially affected any right of the Board, (d) The new Act did not seek to obliterate the unlawful extrusion of the Board from management which was effected by the Act which was declared ultra vires. It merely declared that payments duly made were good payments.

65. After arriving at these findings their Lordships say:

Their Lordships therefore agree with the unanimous judgment of the Supreme Court that the statute is not ultra vires and that the actions fall to be dismissed. They fail to see that the right of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice to affirm that the money was rightly spent for the purposes for which it was destined. The same ratio applies to a liability incurred by others for an equally proper purpose.

66. It is quite clear from this decision that their Lordships did not hold that the new Act was intra vires merely because it legislated with respect to a 'provincial subject.' They upheld the Act because the gist of the statute was not to validate an ultra vires law but to validate something which was done in a way which the Legislature could have validly sanctioned at the time when that thing was done. In this connexion it is interesting to find what Street in his book on 'Ultra vires' says with respect to this case. This is what appears at p. 441:

This statute looks very much like the ratification of an ultra vires act by the party guilty of it, but it is not really so. In delivering judgment, Lord Dunedin pointed out that it did not seek to obliterate past history, but only declared that the payments made for the carrying on of the schools were good payments. In effect it goes no further than the Cork and Youghal Railway decision (1865) 16 Ir. Ch. R. 268 in the case of corporations.

67. After this Street reproduces the passage in the judgment of the Judicial Committee which I have quoted above. True, the present Ordinance legislates, in form, with respect to a subject which lies within the ambit of the ordinance-making power of the Governor-General, but in fact the ordinance is in the words of Street 'the ratification of an ultra vires Act by the party guilty of it.' By maintaining the sentences passed by authorities illegally vested with jurisdiction to try cases by Ordinance 2 it seeks to obliterate or cover the illegality of Ordinance 2. The illegality of Ordinance 2 cannot be obliterated by clothing acts done thereunder with a fictional garb of legality nor can it be obliterated by giving the convicted persons a right of appeal or revision.

68. In my opinion the present Ordinance is nothing but an attempt to keep in force by legislative devices something which the Governor-General could not legally bring about. The case in *Board of Trustee of Lethbridge Irrigation District v. Independent Order of Foresters* (1940) 1940 A.C. 513 supports my view. The facts were these : Two Acts which may briefly be described as Act 12 and Act 13 were passed by the Legislature of the province of Alberta whereby interest on Guaranteed Securities were reduced. Both these Acts were declared to be ultra vires of the Provincial Legislature as they legislated with respect to 'interest' which was a subject-matter within the exclusive legislative competence of the Dominion Legislature and in respect of which the Dominion Legislature had already legislated. There was another Act which I may describe as Act 11 which purported to prohibit any proceedings in Alberta for the recovery directly or indirectly of money due in respect of any guaranteed security without the consent of the Lieutenant Governor, in Council. This Act in form purported to legislate-with respect to head 14 of Section 92, British North America Act, viz., 'Administration of Justice' which was a provincial subject, nevertheless it was declared to be ultra vires because it was carrying into effect the same illegal purpose or plan of the other two ultra vires Acts. This is what their Lordships said with respect to the Act:

By this method, reductions in the rate of interest on the guaranteed securities would be enforceable, regardless of the fate of the Act, c. 12. In other words, the Act, c. 11, is an attempt to do by indirect means something which their Lordships are satisfied the Provincial Parliament cannot do. This Board has never allowed

such colourable devices to defeat the provisions of Sections 91 and 92. Reference may be made to Lord Halsbury's statement in delivering the decision of the Judicial Committee in *Madden v. Nelson and Fort Sheppard Railway* (1899) 1899 A.C. 626. It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly. The substance and not the form of the enactment in question must be regarded. Their Lordships cannot come to any other conclusion than that under colour of an Act relating to the class of subject described in head 14 of Section 92, the Provincial Parliament has passed legislation which is beyond their powers.

69. Section 3 of the present Ordinance, in my opinion, falls within the mischief of the general principle laid down above. The learned Advocate-General next drew our attention to certain passages in *Craies on Statutes* (Edn. 4) at p. 61 et seq. He pointed out that a Legislature has power to make declaratory Acts with retrospective effect and thereby to validate illegal actions or to set aside decisions of the Courts which do not appear to be correct to the Legislature. He contends that this is what the present Ordinance is doing. Here again the learned Advocate-General seems to be in error. *Graies* was dealing with legislation by a Sovereign Legislature - the British Parliament - regarding whose legislation no question of ultra vires can arise. Further he was not discussing the validity of statutes at all but was merely classifying them. There can be no doubt that a Legislature be it sovereign or subordinate has power to pass statutes of this description. But every Act of a subordinate Legislature, be it of this description or not, is liable to be declared ultra vires, if, either directly or indirectly, it goes beyond the bounds of the legislative capacity of that Legislature. Whether or not the present Ordinance resembles a declaratory Act having retrospective effect is therefore immaterial; what we must see is whether the Legislature in the guise of doing something which it may do is really doing something which it may not do. The learned Advocate-General also referred to the case in *Phillips v. Eyre* (1870) 6 Q.B. 1. He drew our attention to a passage at p. 23 and another at p. 25. All that was said there was that it was open to the colonial Legislature to pass an Act of indemnity validating certain actions of the Governor of the colony and that such law could have retrospective effect. The case has little to do with the question whether a subordinate Legislature can validate by a subsequent statute a former statute

passed by itself which has been declared by the Court to be ultra vires of that Legislature. It is one thing for a Legislature to validate an illegal action done by somebody else, but quite another thing to validate an illegal law made by itself. In the last mentioned case the facts were these : The Governor of Jamaica in the course of putting down a rebellion did certain things. Thereafter an Act of indemnity was passed by the colonial Legislature. It was held that such an Act was valid and would have retrospective effect. There is a significant passage at p. 17 which is as follows:

Under these and like circumstances it seems to be plainly within the competence of the Legislature, which could have authorised by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done or in the language of the law under consideration to enact that they shall be 'made and declared lawful and confirmed.' Such is the Act of indemnity in question, which follows the example of similar legislation in the mother country and in the dominions and colonies of the Crown.

70. I would draw attention to the fact that Willes J. was careful to say that the acts in respect of which the Indemnity Act was passed were such as could have been authorised by the Legislature by antecedent legislation. After the decision of the Federal Court regarding Ordinance 2, we must hold that the Governor-General as Ordinance-maker had no power to make a law which could subject the petitioners to the trials in which they have been sentenced. As such trials could not have been authorised by antecedent legislation they cannot be validated by a subsequent Ordinance. It follows that the sentences also cannot be validated. In these proceedings we are not concerned with Sections 4 and 5 of the Ordinance and I express no opinion regarding them. In my view Section 3(1) is ultra vires the Governor-General's ordinance-making powers and the other sub-sections of Section 3 being consequential to Sub-section (1) must fall with it. I shall now deal with the matter on the footing that the entire Ordinance 2 was ultra vires inasmuch as the Governor-General was not of opinion that an emergency requiring the Ordinance had arisen and also because he delegated his function of deciding whether an emergency existed to the Provincial Government. There is nothing in

the decision of the majority of the Federal Court which discourages me from adhering to that view. In this aspect; of the case also, Section 3 of ordinance 19 would be ultra vires.

71. The position may be stated thus : There being in law no emergency the Governor-General had no power to make any Ordinance. Therefore he had no power to make any law subjecting the petitioner to be tried and convicted by the special Court of ordinances. Nevertheless he made ordinances and the petitioner was subjected to trial, convicted and sentenced. Then he declares that an emergency has arisen and makes an Ordinance repealing the old Ordinance but validating the sentences passed under it. What is the Governor-General doing in effect? He is really validating ordinance 2 which he had no power to promulgate by antedating the present emergency. By the employment of drafting devices he is taking powers which the law has not given him viz., the power to make an Ordinance where in law no emergency exists.

72. My Lord the Chief Justice and my learned brother Khundkar have expressed the opinion that Section 3 is not ultra vires : as I differ from them I feel that I should give my reasons for so doing. The Chief Justice's view is this : Section 3 does not validate anything at all. The sentence is not validated nor the conviction. All that Section 3 has done is to make it legal for the jailor to hold in custody persons convicted under Ordinance 2. Such persons may now come to Court in appeal or revision and the Court must instantly quash the sentences as they are not based on a valid conviction, the Court passing the order of conviction not having any valid authority to pass any such order. In my opinion the words 'shall have effect' and 'shall continue to have effect' mean that the sentences are being validated. 'Shall have effect' must mean 'shall have legal effect.' A sentence which is void cannot have legal effect. It is only a valid sentence which can have legal effect. If therefore a sentence is given legal effect it is necessarily given validity. Again the fact that the sentences are made subject to appeal and revision presupposes that they are being validated subject to appeal and revision. If they were intended to be kept void then there was no necessity to make them subject to appeal and revision.

73. My learned brother Khundkar says that the whole Ordinance indicates an intention on the part of the Governor-General to bow to the decision of the Federal Court and that we must therefore hold that Section 3 was also framed with this intention. According to him the word 'sentence' in Section 3 really does not mean 'sentence' in the strict legal sense. What the Legislature meant to give life to and continue, according to him, was not the sentence but the penalty or punishment. Neither the sentence, the conviction nor anything else, he says, is validated. I must say with respect that I cannot appreciate this view. If the punishment is validated the sentence is validated. What is a 'sentence' but a punishment inflicted by a Court? Even if the word punishment is substituted for the word 'sentence' in Section 3(1) what would be its effect? The punishment is given effect to as if it were the punishment inflicted by a validly constituted Court. This means that the punishment is being converted into a valid sentence of a valid Court. I agree that parts of Ordinance No. 19 indicate that the decision of the Federal Court is being accepted but Section 3 is not such a part. Because an Act is valid in parts it does not follow that we must construe every section to be valid. We must, I agree, strain in favour of validity--that is a well-known principle of interpretation of statutes--but straining the meaning of a word is one thing and legislating or giving it a meaning that it can not reasonably bear is another. The words used are 'every sentence shall have effect.' Now can we say that the word 'sentence' does not mean sentence? The word has a well-known and accepted meaning in criminal law. I do not think that we are permitted to give it a different meaning. My brother Khunkar after interpreting the word 'sentence' in this manner concludes that every sentence passed by the special Courts must be quashed in as much as the trial and conviction remain illegal.

74. If the intention of the Governor-General in enacting Ordinance 19 was to have all the convictions and sentences automatically quashed by the Courts he could very easily have said so; there was no need to declare that the sentences should be deemed to have been passed in accordance with the Code of Criminal Procedure nor was there any need to make elaborate provisions for appeal and revision. I may contrast the point of view held by me with that held by the majority of this Court as follows : I have held that Section 3 is clothed in the garb of legality in order to effect something which is illegal, and therefore it is ultra vires. The view

taken by My Lord the Chief Justice and my learned brother Khundkar is that Section 3 may appear to be clothed in the garb of illegality but as it intends to effect something legal it is intra vires. For the reasons stated above I respectfully differ from the view taken by My Lord the Chief Justice and my learned brother Khundkar.

75. I shall now examine Section 3 on the basis that it is intra vires. Sub-section (1) of Section 3 lays it down that every sentence passed by a special Judge, Special Magistrate or summary Court shall have effect as if it were a sentence passed in accordance with the Code of Criminal Procedure by a Sessions Judge, Assistant Sessions Judge or Magistrate of the first class respectively. Sub-section (2) put shortly says that every sentence shall be subject to such rights of appeal and revision as it would have been subject to if it had been passed at a trial held in accordance with the provision of the Code of Criminal Procedure by one or other of the last-mentioned Courts on the date on which the new Ordinance came into operation. The learned Advocate-General when asked to interpret the words 'in accordance with the Code' said that the words meant that the Court will have to presume that all the provisions of the Criminal Procedure Code have been complied with, i.e., the trials have been held in strict compliance with the Code. If that is the correct interpretation, let us see what the rights of appeal and revision granted by Sub-section (2) amount to. In the case of every sentence passed by a special Judge or special Magistrate the right of appeal or revision is almost illusory. Every sentence must be deemed to have been passed by a Sessions Judge or Assistant Sessions Judge at a trial held in strict compliance with the provisions of the Code of Criminal Procedure. We must presume that the trial was by jury or with the assistance of Assessors. In most cases in this Province we must presume that the trial was held with a jury. This means that in most cases the appellants will not be allowed any appeal on questions of fact.

76. Let us next examine to what extent there is an appeal on points of law. There being no charge to the jury, the appellant will not be able to challenge the conviction on any ground of misdirection. Next the Court will have to presume that no section of the Code of Criminal Procedure has been disobeyed. The appeal on points of law will be narrowed down to an investigation of whether any provision of

the Penal Code or Evidence Act has been infringed. What has been said above will indicate that the position of persons sentenced by special Judges and special Magistrates has been considerably worsened by the new Ordinance. The position with regard to persons tried by summary Court has also deteriorated though not to such an extent. Their right to appeal on questions of fact remain but objections regarding questions of law have been considerably narrowed down. If the interpretation of the learned Advocate General be accepted it becomes still more evident that the new Ordinance is a mere device for keeping persons sentenced under the old Ordinance from obtaining any redress and for perpetuating the illegalities committed under that illegal Ordinance.

77. If we do not accept this interpretation the only other interpretation possible is that persons sentenced by the special Courts will be permitted to urge that the provisions of the Code of Criminal Procedure which apply to trials by Sessions Judges, Assistant Sessions Judges and Magistrates of the First Class have not been followed by the special Courts. If this is permitted, sentences passed by special Judges and special Magistrates must all be set aside inasmuch as the trials were not held with the aid of Jurors or Assessors. Most sentences passed by the summary Courts will also have to be set aside as it will be found that many of the mandatory sections of the Code of Criminal Procedure have not been followed, as they were not required to be followed under the old Ordinance. In the view that I have taken it is not necessary for me to decide which interpretation should be adopted. Having held that Section 3 is ultra vires I would direct that this rule be made absolute and the conviction and sentence be set aside. The petitioner should be set at liberty forthwith.

78. We direct that the conviction in this case be set aside and that the applicant be released but that he be re-arrested and dealt with in the ordinary Courts according to the ordinary process of law. It will be for those in charge of this case to see that this person is re-arrested, brought before the Magistrate and dealt with. This direction is without prejudice to the powers of the prosecution under Section 494, Criminal P.C. Certificate under Section 205, Government of India Act, is granted in this case.

