STATE OF BOMBAY

v.

NAROTHAMDAS JETHABAI AND ANOTHER

[SAIYID FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN, MUKHERJEA and DAS JJ.]

Bombay City Civil Court Act (XL of 1948)—Provincial Act constituting City Civil Court to try suits of civil nature of value up to Rs. 10,000—Provision empowering Provincial Government to invest court with jurisdiction up to Rs. 25,000—Validity of Act—Power of Provincial Legislature to make laws relating to jurisdiction of courts—Delegation of legislative powers—Conditional legislation—Government of India Act, 1935, Seventh Schedule, List I, items 28 & 53; List II, items 1 & 2; List III, items 15—Power to make laws as to 'Administration of Justice" and "Constitution and organisation of courts", whether includes power to define "Jurisdiction and powers" of courts—Interpretation of Lists—Reference to legislative practice—Doctrine of pith and substance.

The Bombay City Civil Court Act of 1948, an Act passed by the Provincial Legislature of Bombay, provided by s. 3 that the Provincial Government may, by notification in the official Gazette, establish for the Greater Bombay a court to be called the Bombay City Civil Court, and that this court shall, notwithstanding anything contained in any law, have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value arising within Greater Bombay except certain kinds of suits which were specified in the section. Section 4 of the Act provided that subject to the exceptions specified in s. 3 the Provincial Government may, by notifica-

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tion in the official Gazette, invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding Rs. 25,000 as may be specified in the notification. Section 12 barred the jurisdiction of the Bombay High Court to try suits and proceedings cognizable by the City Civil Court. In exercise of the powers conferred by s. 4 the Provincial Government invested the City Civil Court with jurisdiction to receive, try and dispose of all suits and proceedings of a civil nature not exceeding Rs. 25,000 in value. The first respondent instituted a suit in the High Court of Bombay for recovery of Rs. 11,704 on the basis of a promissory note, contending that the Provincial Legislature had no power to make laws with respect to jurisdiction of courts in regard to suits on promissory notes which was a matter covered by item 53 of List I, and the Bombay City Civil Court Act of 1948 was therefore *ultra vires*. It was further contended on his behalf that in any event s. 4 of the Act was invalid as it involved a delegation of legislative powers to the Provincial Government and that the suit was therefore cognisable by the High Court.

Held by the Full Court.—(i) that the impunged Act was a law with respect to a matter enumerated in List II and was not *ultra vires;* (ii) that as the legislature had exercised its judgment and determined that the City Civil Courts should be invested with pecuniary jurisdiction up to Rs. 25,000 and all that was left to the discretion of the Provincial Government was the determination of the conditions under which the court should be invested with the enhanced jurisdiction, s. 4 did not involve any delegation of legislative powers but was only an instance of conditional legislation and was not *ultra vires* or invalid on this ground; (iii) inasmuch as the impunged Act was in pith and substance a law with respect to a matter covered by List II, the fact that it incidentally affected suits relating to promissory notes (a subject falling within items 28 and 53 of List I) would not affect its validity and the suit was accordingly not cognisable by the High Court.

Per FAZL ALI, MEHR CHAND MAHAJAN AND MUKHERJEA JJ.—The power of the Provincial Legislature to make laws with respect to "administration of justice" and "constitution and organisation of all courts" under item 1 of List II is wide enough to include the power to make laws with regard to the jurisdiction of courts established by the Provincial Legislature; the object of item 53 of List I, item 2 of List II and item 15 of List III is to confer special powers on the Central and the Provincial Legislatures to make laws relating to the jurisdiction of courts with respect to the particular matters that are referred to in Lists I and II respectively and the Concurrent List, and these provisions do not in any way curtail the power of Provincial Legislature under Item 1 of List II to make laws with regard to jurisdiction of courts and to confer jurisdiction on courts established by it to try all causes of a civil nature subject to the power of the Central and

Provincial Legislatures to make special provisions relating to particular subjects referred to in the Lists.

Per PATANJALI SASTRI and DAS JJ.—The words "administration of justice" and "constitution and organisation of all courts" in item 1 of List II must be understood in a restricted sense excluding from their scope "jurisdiction and powers of courts" as the latter subject is specially dealt with in item 2 of List II. Item 1 of List II does not therefore by itself authorise legislation with respect to jurisdiction and powers of courts, but the legislative power under item 2 in regard to 'jurisdiction and powers of courts", which can legitimately be exercised with respect to any of the matters in List II, can be exercised with respect to administration of justice as this is one of the matters enumerated in that List, with the result that the subject of general jurisdiction of courts is brought within the authorised area of provincial legislation; and as the Provincial Legislature is thus competent to make a law with respect to the general jurisdiction of the court, the apparent conflict with the central legislative power under item 53 of List I can be resolved by invoking the doctrine of pith and substance and incidental encroachment.

[The legislative practice which prevailed in India before 1935 was relied on in this case in support of the view that the Provincial Legislatures had power under the constitution of 1935 to invest courts constituted by them with general pecuniary jurisdiction.]

Quaere: Whether it was not open to the Legislatures of India under the Government of India Act of 1935 to delegate their legislative powers to other agencies.

Queen v. Burah (52A 178) applied. *Jatindra Nath Gupta* v. *Province of Bihar* (1949 F.C.R. 596) distinguished. *Mulchand Kundanmal Jagtiani* v. Raman (51 Bom. L. R. 86), *United Provinces* v. *Atiqa Begum* (1940 F.C.R. 110) and *Prafulla Kumar Mukherjea and Others* v. *Bank of Commerce, Khulna* (1947 F.C.R. 28) referred to.

APPELLATE JURISDICTION: Civil Appeal No. 10 of 1950.

Appeal from a Judgment of the High Court of Judicature at Bombay (Chagla C.J. and Tendolkar J.) dated 29th March, 1950, in Suit No. 24 of 1950.

1950. December 20. The Court delivered Judgment as follows :

FAZL ALI J.—I have read the judgment prepared by my brother, Mahajan J., and generally agree with his conclusions and reasonings, but, having regard to

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the importance of the points raised, I wish to add a short judgment of my own.

There are really three questions to be decided in this appeal, and they are as follows:

(1) Whether the Bombay City Civil Court Act, 1948 (Act XL of 1948), is *ultra vires* the Legislature of the State of Bombay ;

(2) Whether in any event section 4 of the above Act is *ultra vires* the State Legislature ; and

(3) Whether the Bombay High Court has jurisdiction to try the suit.

The first and the third questions have been answered by the High Court in favour of the appellant, and the second question has been answered in favour of the respondents. In this Court, the appellant attacked the judgment of the High Court in so far as it concerns the second question, whereas the first respondent attacked it in so far as it concerns the first and the third questions.

The Bombay City Civil Court Act purports to create an additional civil court for Greater Bombay having jurisdiction to try, receive and dispose of all suits and other proceedings of a civil nature not exceeding a certain value, subject to certain exceptions which need not be referred to here. It was contended on behalf of the respondents that the Act is *ultra vires* the Legislature of the State of Bombay, because it confers jurisdiction on the new court not only in respect of matters which the Provincial Legislature is competent to legislate upon under List II of the 7th Schedule to the Government of India Act, 1935, but also in regard to matters in respect of which only the Central or Federal Legislature can legislate under List I (such as for instance, promissory notes, which is one of the subjects mentioned in entry 28 of List I). To understand this argument, it is necesssary to refer to entry 53 of List I, entries 1 and 2 of List II and also entry 15 of List III. These entries run as follows:—

Entry 53, List I :—

"Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List....."

Entries 1 *and* 2, *List II*—

"1.....the administration of justice; constitution and organisation of all courts except the Federal Court....."

"2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List....."

Entry 15, *List III*—

"Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List."

The respondents' contention may appear at the first sight to be a plausible one, but, in my opinion, it is not well founded in law. For the purpose of correctly deciding the question raised, we must first try to understand the meaning of the following items in entry 1 of List II, "administration of justice, constitution and organization of all courts except the Federal Court." A reference to the three Legislative Lists shows that "administration of justice" is entirely a provincial subject on which only the Provincial Legislature can legislate. The same remark applies to "constitution and organization of all courts except the Federal Court." The expression "administration of justice" has a wide meaning, and includes administration of civil as well as criminal justice, and in my opinion entry 1 in List II, which I have quoted, is a complete and self contained entry. In this entry, no reference is made to the jurisdiction and powers of courts, because the expressions "administration of justice" and "constitution and organization of courts", which have been used therein without any qualification or limitation, are wide enough to include the power and jurisdiction of courts, for how can justice be administered if courts have no power and jurisdiction to administer it, and how can courts function without any power or jurisdiction. Once this fact is clearly

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grasped, it follows that, by virtue of the words used in entry 1 of List II, the Provincial Legislature can invest the courts constituted by it with power and jurisdiction to try every cause or matter that can be dealt with by a court of civil or criminal jurisdiction, and that the expression "administration of justice" must necessarily include the power to try suits and proceedings of a civil as well as criminal nature, irrespective of who the parties to the suit or proceedings or what its subject-matter may be. This power must necessarily include the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the courts and defining their jurisdiction territorially and pecuniarily.

The question then arises as to the exact meaning of entry 2 of List II and entry 53 of List I, which are said to militate against the above construction. These entries, in my opinion, confer special powers on Provincial and Central Legislatures, as opposed to the general power conferred on the Provincial Legislature by entry 1 of List II, the special powers being the logical consequence or concomitant of the power of the two Legislatures to legislate with regard to the matters included in their respective Legislative Lists. The effect of these entries is that while legislating with regard to the matters in their respective Legislative Lists. the two Legislatures are competent also to make provisions in the several Acts enacted by them, concerning the jurisdiction and powers of courts in regard to the subject-matter of the Acts, because otherwise the legislation may not be quite complete or effective. The words used in entry 2 of List II and entry 53 of List I are wide enough to empower the two Legislatures to legislate negatively as well as affirmatively with regard to the jurisdiction of the courts in respect of the matters within their respective legislative ambits. In other words, they can exclude or bar the jurisdiction of the courts in regard to those matters, and they can also confer special jurisdiction on certain courts. They can also, apart from the general power which the courts usually exercise, confer power on the courts to

pass certain special orders, instances of which I shall give later. In this connection, reference may be made to section 9 of the Code of Civil Procedure, which provides that—

"the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

This section obviously postulates among other things the barring of the jurisdiction of the civil courts by Legislatures with respect to particular classes of suits of a civil nature, and the statute-book abounds in instances in which the jurisdiction of the civil courts is barred under Acts passed by the Central and Provincial Legislatures. There are also many Acts providing that any suit or proceeding concerning the subjects matters of those Acts shall be triable by the court or courts specified therein. Such provisions are to be found in a number of Acts enacted both prior to and after the enactment of the Government of India Act, 1935, and there can be no doubt that the British Parliament while enacting that Act was fully aware of the existing legislative practice obtaining in this country as well as of the fact that the provisions in question were sometimes necessary and therefore it empowered the Central and Provincial Legislatures to make them under entry 53 of List I and entry 2 of List II, respectively. This, in my opinion, is the true meaning of these entries, and it also explains why a separate entry was necessary enabling the two Legislatures to legislate with regard to the power and jurisdiction of the courts in respect of the subject-matters mentioned in the three Legislative Lists. But for an express provision like that made in the entries referred to above, the two Legislatures might not have been able to confer special jurisdiction on the courts in regard to the matters set out in the Legislative Lists, nor could they have been able to bar the jurisdiction of the ordinary courts in regard to them, however necessary or desirable such a course might have appeared to them.

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It should be noted that the words used in these entries are : "jurisdiction and power". "Power" is a comprehensive word, which includes all the procedural and substantive powers which may be exercised by a court, but the full significance of the use of the word in the context can be grasped only by reading a large number of local and special Acts in which power has been given to Courts to pass certain special and unusual orders. For example, section 13 of the Indian Aircraft Act, 1934, provides that—

"where any person is convicted of an offence punishable under any rule made under clauses.....the Court by which he is convicted may direct that the aircraft or article or substance, as the case may be in respect of which the offence has been committed, shall be forfeited to His Majesty."

Reference may also be made to section 24 of the Indian Arms Act, 1878, which provides that—

"when any person is convicted of an offence punishable under this Act, committed by him in respect of any arms, ammunition or military stores, it shall be in the discretion of the convicting Court or Magistrate further to direct that the whole or any portion of such arms, ammunition or military stores, and any vessel .....shall be confiscated."

(See also section 10 of the Central Excises and Salt Act, 1944 [Act I of 1944], and section 13 of the Food Adulteration Act, 1919 [Bengal Act VI of 1919], which are in similar terms, and the various Acts relating to money-lenders and money-lending which confer special power on the courts of reopening several kinds of transactions for the relief of debtors.)

It seems to me that the word "power" was added to the word "jurisdiction", in entry 53 of List I, entry 2 of List II, and entry 15 of List III, in order to enable the two Lagislatures to grant special powers like those I have mentioned to the courts which are to deal with the subject-matter of any special legislation.

A reference to the Acts passed after the enactment of the Government of India Act, 1935, will show that

special provisions with regard to the jurisdiction of courts have been made even after the passing of that Act, in a large number of Central and local Acts. Confining ourselves to the Acts passed by the Bombay Legislature, since we are concerned here with one of such Acts, we find that in The Bombay Probation of Offenders Act, 1938 (Bombay Act No. XIX of 1938), section 3 empowers the following courts "to exercise powers under the Act,—(a) the High Court, (b) a Court of Session, (c) a District Magistrate, (d) a Sub-Divisional Magistrate, (e) a salaried Magistrate....." Similarly, in The Bombay Agricultural Produce Markets Act, 1939, section 23 provides that "no offence under this Act.....shall be tried by a court other than that of a Presidency Magistrate, or a Magistrate of the First Class or a Magistrate of the Second Class specially empowered in this behalf." Section 11 of the Bombay Cotton Control Act, 1942, provides that "no criminal court inferior to that of a Presidency Magistrate or a Magistrate of the Second Class shall try any offence under this Act". Section 19 of the Bombay Sales of Motor Spirit Taxation Act, 1946, and section 5 of the Bombay Harijan Temple Entry Act, 1947, are provision which exclude the jurisdiction of courts under certain circumstances. Similar instances may be multiplied from the Acts of the Central Legislature and other Provincial Legislatures, but, in my opinion, the instances I have quoted are sufficient to show (1) that the practice which prevailed before the Government of India Act has continued even after its enactment, and (2) that the words "jurisdiction and powers" have been consistently construed to bear the meaning which I have attributed to them.

The interpretation which is sought to be put on the entries by the respondent is in my opinion open to the following objections :—

(1) It involves the curtailment of the meaning of the expression "administration of justice" in such a way as to rob it of its primary content—the jurisdiction and powers of the court, without which justice cannot be administered.

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(2) It makes it necessary to read entry 2 of List II as part of entry 1 of the same List, though it has been separately numbered as an independent entry. This is opposed to the scheme followed in the three Legislative Lists, which seems to be that each particular entry should relate to a separate subject or group of cognate subjects, each subject or group of subjects being independent of the others (subject only to incidental overlapping). The construction suggested by the respondents makes it necessary to assume that though according to their line of reasoning the words "jurisdiction and powers of courts, etc." occurring in entry 2 of List II should have been put in entry 1 of the same List, being intimately connected with the subject of "administration of justice and the constitution and organization of courts", it was without any apparent reason numbered separately and made an independent entry.

(3) The suggested construction would exclude from the jurisdiction of the Provincial Courts a large number of matters which normally come before courts exercising civil or criminal jurisdiction and, if it is accepted, the courts will not be able to function in the fullest sense unless both the Provincial and Central Legislatures have by piecemeal legislation or otherwise exhausted their power of legislating on all the subjects comprised in Lists II and I respectively. Even after they have exhausted such power, the courts will not be able to deal with important matters, such as contracts, transfer of property, arbitration, wills and succession, criminal law, etc., which are subjects mentioned in List III, until one of the two Legislatures has legislated in regard to those subjects, which raises two important questions :—

(1) Which of the two Legislatures has to do it first; and (2) How is the conflict to be avoided?

That the construction put by the respondents will lead to anomalous results which could not have been within the contemplation of the British Parliament while enacting the Government of India Act, 1935, may be illustrated by one or two examples. Reference

might here be made to entry 26 of List I, which deals with "carriage of passengers and goods by sea or by air." It should be supposed that if any of the goods carried by air are lost and a suit is instituted in regard to them, the suit will be triable by the Court having jurisdiction over the matter under the Civil Procedure Code, subject to any special legislation on the subject by the Central Legislature, in spite of the fact that the carriage of goods and passengers by sea or by air is a subject mentioned in List I. But, on the view propounded before us by the respondent, the Provincial civil courts will not be competent to try such a suit, unless they are empowered to do so by the Central Legislature. In order to show to what absurd result this doctrine may be pushed, and in order to avoid the criticism of taking for granted what is in controversy, we may take a very extreme example, because the soundness of the respondents' contention can be tested only by trying to find out what would happen if we were to stretch it to the utmost limit to which it can be stretched. Entry 13 in List I is: "the Banaras Hindu University and the Aligarh Muslim University." Under entry 53 of List I, the Central Legislature has power to legislate in regard to the jurisdiction and powers of courts in respect of the subject-matter of entry 13. It may therefore be supposed, having regard to the wide language used in entry 13, that it is open to the Central Legislature to enact that suits in which these Universities are concerned as plaintiff or as defendant, will be triable only by the particular court mentioned in the enactment concerned and that no other court shall have jurisdiction in regard to such suits. It is difficult to think that until such a legislation is made, a court which would otherwise be the proper court, has no jurisdiction to try any suit in which one of these Universities is a party, no matter what the subject-matter of the suit may be. I am certain that the framers of the Government of India Act did not contemplate such a result.

We all know that at the date when the Government of India Act, 1935, was passed, there were in existence

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in the different Provinces a large number of courts of law and the administration of justice throughout the Provinces was in the hands of these provincial courts. The civil courts in the Province used to try all suits and proceedings of a civil nature which are triable under section 9 of the Civil Procedure Code, and the criminal courts used to try all criminal cases which are triable under the Code of Criminal Procedure. The jurisdiction and power of the courts were not confined to cases in regard to the subjects stated in List II, nor were they debarred from dealing with cases relating to matters which have been assigned to List I. The jurisdisction of the courts depended in civil cases on a "cause of action" giving rise to a civil liability, and in criminal cases on the commission of an offence, and on the provisions made in the two Codes of Procedure as to the venue of the trial and other relevant matters. It seems to me that the Government of India Act, 1935, did not contemplate any drastic change in the existing system of administration of justice, but what it contemplated was that that system should continue subject to future legislation by the proper Legislature. Central or Provincial, barrying the jurisdiction of courts or conferring jurisdiction or power on special courts with regard to the matters included in the appropriate Legislative Lists, should there be any occasion for such special legislation. Under the Government of India Act, 1935, every Province became more or less an autonomous unit with a complete machinery for administering justice to the fullest extent. In my opinion, there is nothing in the Act of 1935 to show that there was any intention on the part of its framers to affect the machinery so drastically as to confine it to the administration of a mere partial or truncated kind of justice relating only to matters specified in List II.

Mr. Setalvad, the learned Attorney-General, who appeared on behalf of the appellant, in supporting the impunged Act, argued before us that for the purpose of deciding this appeal, we might also refer to entry 4 of List III. His contention was that the impunged

Act having had the assent of the Governor-General, it would be permissible to see what powers the Provincial Legislature could exercise under Lists II and III taken together. If the course which he suggests is adopted, then the subjects on which the Provincial Legislature can legislate would be: (1) administration of justice; (2) constitution and organization of courts; and (3) civil procedure, including all matters included in the Code of Civil Procedure at the date of the passing of the Government of India Act, 1935. One of the matters included in the Civil Procedure Code is the jurisdiction of courts. Section 9 of the Code provides, as I have already stated, that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. There are also provisions in the Code dealing with the territorial and pecuniary jurisdiction of the courts. The three entries will thus cover exactly the field which is covered by item 14 of section 92 of the Canadian Constitution which comprises the following matters: "administration of justice in the Provinces, including constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction including procedure in civil matters in those courts." It has been held in Canada that the words referred to above include the power and jurisdiction of courts, and, under that item, the Provincial Legislature can confer the widest power on the courts. It seems to me that the approach suggested by the learned Attorney-General is useful for testing whether entry 2 of List II was intended to be treated as the sole and only basis of the power of the Provincial Legislature to confer jurisdiction on the provincial courts and whether it was really the intention of the British Parliament to empower the Provincial Legislature to confer jurisdiction of only such a limited character as can be conferred on the provincial courts under entry 2 of List II, if that entry is treated as a self-sufficient entry. In my opinion, the correct view is to hold that it is not necessary to call into aid either entry 4 of List III or any of the

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provisions of the Canadian Constitution in this case, and that the words "administration of justice; constitution and organization of courts" are by themselves sufficient to empower the Provincial Legislature to invest a new court with all the power which has been conferred upon it by the impugned Act. It is of course open to the Central Legislature to bar the jurisdiction of the new court by a special enactment with regard to any of the matters in List I, but so long as such jurisdiction is not barred, the court will have jurisdiction to try all suits and proceedings of a civil nature as enacted in the Act in question. I think that if the Provincial Legislature had merely enhanced the pecuniary jurisdiction of any of the existing civil courts there could have been no objection to that course. Why then should there be any objection when, instead of investing one of the existing courts with power to try suits and proceedings of a civil nature not exceeding a certain amount, the Legislature has created a new court and invested it with the same power.

Perhaps, it will be simpler to deal at this stage with the third question, namely, whether the Bombay City Civil Court has jurisdiction to try a suit based on a promissory note. So far as this point is concerned, the respondent bases his contention on entries 28 and 33 of List I, Entry 28 relates to "cheques, bills of exchange, promissory notes and other like instruments". Entry 53, as already stated, relates to "jurisdiction and powers of courts with respect to any of the matters in List I." It is contended on behalf of the respondent that the effect of these two entries, when they are read together, is that no court can try a suit relating to a promissory note, unless it is invested with the jurisdiction to try such a suit by the Central Legislature by virtue of the power given by entry 53 of List I. The question so raised is covered by the answer to the first question, and I shall only add that the answer already given to that question finds some support in the case of *Prafulla Kumar Mukherjee and Others* v. *Bank of Commerce Limited, Khulna*(1), in which the argu-

(1) [1947] F.C.R. 28.

ments of the respondents before the Privy Council proceeded on the same lines as the arguments of the respondents before us. The question raised in that case was as to the validity of the Bengal Money-lenders' Act, 1940, which limited the amount recoverable by a money-lender on his loans and interests on them, and prohibited the payments of sums larger than those permitted by the Act. The validity of the Act was questioned by the respondent Bank in certain suits brought by them to recover loans and interests alleged to be due on promissory notes executed by the appellants-borrowers as well as in suits brought by the debtors claiming relief under the Act. The argument put forward on behalf of the Bank was that the Bengal Legislature by the impugned Act had attempted to legislate on subjects expressly forbidden to it and expressly and exclusively reserved for the Federal Legislature, that is to say, in relation to promissory notes and banking, which are reserved for the Federal Legislature exclusively, under entries 28 and 38 respectively of List I. On the other hand, the arguments put forward on behalf of the appellants was that the impugned Act was in pith and substance legislation dealing with money-lending and that in so far as it dealt with promissory notes or banking that was only incidental or ancillary to the effective use of the admitted legislative powers of the Provincial Legislature to deal with money-lending. This argument of the appellants was substantially accepted by the Privy Council.

The second point raised on behalf of the respondent relates to the validity of section 4 of the Act, which runs as follows :—

"Subject to the exceptions specified in section 3, the Provincial Government, may by notification in the Official Gazette, invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature, arising within the Greater Bombay and of such value not exceeding Rs. 25,000 as may be specified in the notification."

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It is contended that this section is invalid, because the Provincial Legislature has thereby delegated its legislative powers to the Provincial Government which it cannot do. This contention does not appear to me to be sound. The section itself shows that the Provincial Legislature having exercised its judgment and determined that the New Court should be invested with jurisdiction to try suits and proceedings of a civil nature of a value not exceeding Rs. 25,000, left it to the Provincial Government to determine when the Court should be invested with this larger jurisdiction, for which the limit had been fixed. It is clear that if and when the New Court has to be invested with the larger jurisdiction, that jurisdiction would be due to no other authority than the Provincial Legislature itself and the court would exercise that jurisdiction by virtue of the Act itself. As several of my learned colleagues have pointed out, the case of *Queen* v. *Burah*(1), the authority of which was not questioned before us, fully covers the contention raised, and the impugned provision is an instance of what the Privy Council has designated as conditional legislation, and does not really delegate any legislative power but merely prescribes as to how effect is to be given to what the Legislature has already decided. As the Privy Council has pointed out, legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and in many instances it may be highly convenient and desirable. Examples of such legislation abound in England, America and other countries. As some of the American Judges have remarked, "there are many things upon which wise and useful legislation must depend which cannot be known to the law-making power and must therefore be the subject of enquiry and determination outside the halls of legislation (*Field* v. *Clark*)(2). Mr. Setalvad, the learned Attorney-General who appeared on behalf of the appellant, contended that in this country even delegated legislation is

(1) 3 A.C. 889.

(2) 143 U.S.649.

permissible, but I do not consider it necessary to go into that question, because the principle enunciated in *Queen* v. *Burah*(1) is sufficient to dispose of the contention raised here. I think that the present case stands well outside what was laid down by the Federal Court in *Jitendranath Gupta* v. *The Province of Bihar*(2), as two of my colleagues who were parties to the majority decision in that case have pointed out.

In the result, this appeal is allowed.

Patanjali Sastri J.

PATANJALI SASTRI J.—This appeal raises the important question of the constitutional validity of the Bombay City Civil Court Act, 1948 (hereinafter referred to as the Act) and though I concur in the conclusion reached by the majority of my learned brothers I wish to state precisely the reasons which lead me to that conclusion.

The first respondent brought the suit in the High Court at Bombay on its original side for recovery of Rs. 11,704 from the second respondent on promissory notes. Notwithstanding that the jurisdiction of the High Court to try suits cognisable by the City Civil Court was barred under section 12 of the Act and the pecuniary limit of the jurisdiction of the latter court had been enhanced from Rs. 10,000 to Rs. 25,000 by a notification issued by the Provincial Government under section 4 of the Act, it was stated in the plaint that the High Court had jurisdiction to try the suit because the Act as well as the said notification was *ultra vires* and void. In view of the constitutional issues thus raised, the State of Bombay, the appellant herein was on its own motion, made a party defendant.

The High Court (Chagla C. J. and Tendolkar J.) held (1) the Act was *intra vires,* but (2) that section 4 which authorised the Provincial Government to enhance the jurisdiction of the City Court up to the limit of Rs. 25,000 amounted to a delegation of legislative power, and as such, was void and inoperative, with the result that the suit, which exceeded Rs. 10,000 in

(1) 5 I. A. 178. (2) [1949] F.C.R. 595.

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value and was not cognisable by the City Court apart from the impeached notification, was held to have been properly laid in the High Court. Both these findings have been challenged before us as erroneous, the first by the first respondent and the second by the appellant.

On the first point, learned counsel for the first respondent urged that section 100 of the Government of India Act, 1935, read with entries 53 of List I, 2 of List II and 15 of List III, the relevant parts of which are in identical terms, namely, "jurisdiction and powers of all courts except the Federal Court with respect to any of the matters in this List", conferred power on Legislatures in British India to make laws with respect to jurisdiction of courts only in relation to matters falling within their respective legislative fields, and that, therefore, the expressions "administration of justice" and "constitution and organisation of courts" in entry 1 of List II, although they might be wide enough, if that entry stood alone, to include the topic of "jurisdiction and powers of courts", should not be construed in that comprehensive sense as such construction would give no effect to the limiting words in entry 2 which would then become meaningless. Indeed if those expressions in entry 1 included the power to legislate with respect to jurisdiction also, there would be no need for entry 2, while, on the other hand, without including such power, they would still have ample content, as various other matters relating to administration of justice and constitution of courts would have to be provided for. The scheme disclosed by the three separate entries in identical terms in the three lists was said to be this: The Provincial Legislatures were to have the power of constituting courts and providing for administration of justice, but the power to invest the courts with jurisdiction was to rest with the Federal Legislature in respect of the matters mentioned in List I and with the Provincial Legislature in respect of the matters mentioned in List II, while both the Federal and the Provincial Legislatures were to have such power with respect to

the matters mentioned in List III subject to the provisions of section 107. It was, therefore, submitted that the Act, in so far as it purported to provide by section 3 that the City Civil Court established thereunder "shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising within Greater Bombay" (with certain exceptions not material here) was *ultra vires* the Provincial Legislature, constituting as it did a direct invasion of the Federal field marked out by entry 53 of List I. As all the three entries dealt with the same topic of jurisdiction and powers of courts, there was no room, it was said, for the application of the doctrine of incidental encroachment.

The argument is not without force. The Bombay High Court in *Mulchand* v. *Raman*(1), which was followed by the learned Judges in the present case, and the Attorney-General who adopted the same line before us, invoked the doctrine of pith and substance in answer to the argument on behalf of the respondent. But that doctrine, while it often furnishes the key to the solution of problems arising out of the distribution of overlapping legislative powers in a Federal system, is not of much assistance in meeting the difficulty in finding any usefulness in entry 2 if under entry 1 the Provincial Legislature were intended to have the power to legislate generally with respect to the jurisdiction and powers of courts. The greater power must include the less. A similar difficulty in construing entry 4 of List III and entry 2 of List II arose in *Stewart* v. *Brojendra Kishore*(2) and led a Division Bench of the Calcutta High Court to construe the expression, "civil procedure" occurring in the former entry in a "limited sense" as excluding jurisdiction and powers of courts. After referring to the decision of the Judicial Committee in *In re Marriage Reference*(3) where "marriage and divorce" in the Dominion List was construed as excluding matters relating to the "solemnisation of

(1) 51 B.L.R. 86.

(2) A.I.R. 1939 Cal. 628.

(3) [1912] A.C. 880.

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marriage in the province" because the latter topic was specifically included in the Provincial List, the learned Judges observed: "The position is similar here. 'Civil procedure' in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of courts since special provision is made for those matters elsewhere in the lists." "To hold otherwise", they pointed out, "would be completely to wipe out the second entry in the Provincial Legislative List." Learned counsel for the first respondent strongly relied on that decision and suggested that, if it had been brought to the notice of the learned Judges in *Mulchand* v. *Raman*(1), their decision might well have been the other way.

On the other hand, the Attorney-General submitted that there could be no question of conflict between two entries in the same list and that the natural meaning of one should not be restricted simply because of the presence of the other. He placed reliance on the following observations of Gwyer C. J. in *Atiqua Begum's case*(4). "It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every item in that List and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by words of broad and general import. .....I think, however, that none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it." These observations were, however, made to support the conclusion that the power to legislate with respect to "collection of rents" under entry 21 of List II includes the power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well, and that, therefore, the United Provinces Regularisation of Remissions Act, 1938, was *intra vires*. General observations made in such

(4) [1940] F.C.R. 110, 134.

context do not answer the objection that the wider construction of entry 1 would deprive entry 2 of all its content and reduce it to useless lumber. I am therefore, of openion that the words "administration of justice" and "constitution and organisation of courts" occurring in entry 1 must be understood in a restricted sense excluding from their scope "jurisdiction and powers of courts" dealt with specifically in entry 2.

This does not, however, compel the conclusion that it is beyond the competence of the Provincial Legislature to confer general jurisdiction on courts constituted by it, for, if entry 1 does not by itself enable the legislature to do so, entry 2 certainly does when read with entry 1. It should be remembered—and this is what the argument for restricting the legislative power of provinces in regard to jurisdiction overlooks—that "administration of justice" is one of the matters mentioned in List II itself. The Provincial Legislature, therefore, is competent under entry 2 to legislate conferring jurisdiction on courts with respect to administration of justice, that is to say, general jurisdiction to administer justice by adjudicating on all matters brought before them, except, of course, matters excluded expressly or by implication either by an existing law continued in force or by a statute passed by the appropriate legislature under the entries in the three Lists relating to jurisdiction and powers of courts. In other words, though "administration of justice" in entry 1 does not authorise legislation with respect to jurisdiction and powers of courts, the legislative power under entry 2 in regard to the latter topic, which can be legitimately exercised "with respect to any of the matters in this List," can be exercised with respect to administration of justice, one of the matters comprised in that List, with the result that the subject of general jurisdiction is brought within the authorised area of provincial legislation. This view thus leaves a field in which entry 2 could apply.

When once the Provincial Legislature is found competent to make a law with respect to the general jurisdiction of courts, the apparent conflict with the Cen-

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tral Legislative power under entry 53 of List I can be resolved in a given case by invoking the doctrine of pith and substance and incidental encroachment. For, that rule, though not of much assistance in construing entries 1 and 2 which occur in the same List II, has its legitimate application in ascertaining the true character of an enactment and attributing it to the appropriate list where the Federal and the Provincial Lists happen to overlap. Accordingly, if the Legislature of Bombay was, in conferring jurisdiction on the City Civil Court to hear and determine all suits of a civil nature, really legislating on a subject which was within the ambit of its legislative power, and if in doing so, it encroached on the forbidden field marked off by entry 53 of List I, the encroachment should be taken to be only incidental. It may be that such encroachment extends to the whole of that field, but that is immaterial, as pointed out by the Judicial Committee in the *Khulna Bank case*(1). One of the questions their Lordships put to themselves in that case was "Once it is determined that the pith and substance is money-lending, is the extent to which the federal field is invaded a material matter?" Answering the question in the negative their Lordships observed: "No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into the federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has its trespassed, more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory-notes or banking? Once that question is determined, the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content". In answering the objection that that view does not give sufficient effect to the words of precedence used in section 100 of the Govern-

(1) [1947] F.C.R. 28.

ment of India Act as between the three Lists, their Lordships went on to say "No doubt where they come in conflict List I has priority over Lists III and II, and List III has priority over List II; but the question still remains priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

The test for determining whether in pith and substance a particular enactment falls within one list or another is further elucidated in a passage quoted with approval from Lefroy's Treatise on Canadian Constitutional Law in the judgment of the Federal Court in the *Bank of Commerce case*(1). "It seems quite possible" says the learned writer, summarising the effect of the Privy Council decisions on the point "that a particular Act regarded from one aspect might be *intra vires* of a Provincial Legislature and yet regarded from another aspect might also be *intra vires* of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act. The cases which illustrated this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating—the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon." Applying that test there can be little doubt that the impugned Act must, in its pith and substance, be attributed to List II, as the legislators of Bombay were certainly not conferring on the new court, which they were constituting under the Act, jurisdiction with respect to any of the matters in List I. They were, as section 3 clearly indicates constituting a new court, the Bombay City Civil Court, and investing it with the

(1) [1944] F.C.R. 126, 139.

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general jurisdiction to try all suits of a civil nature within certain pecuniary and territorial limits, and if they were acting, as I have endeavoured to show, within the scope of the legislative power conferred on them under entry 2 read with entry 1 of List II, it seems immaterial that the enactment, so far as one aspect of jurisdiction, namely, its conferment, is concerned, encroaches practically on the whole of the federal field marked out by entry 53 of List I. The encroachment, however, would still leave ample room for the exercise by the Centre of its legislative power under entry 53 in regard to other aspects of jurisdiction and powers of courts.

This view is strongly reinforced by a consideration of the legislative practice prevailing in this country prior to the passing of the Government of India Act, 1935. That it is legitimate to have regard to legislative practice in determining the scope of legislative powers has been recognised in decisions of high authority (*e.g., Croft* v. *Dunphy*)(1). It had long been the practice in this country to constitute and organise courts with general jurisdiction over all persons and matters subject only to certain pecuniary and territorial limitations, and to confer special jurisdiction limited to certain specified cases or matters either on the ordinary courts in addition to their general jurisdiction or on tribunals set up to deal with such matters exclusively. The various Provincial Civil Court Acts as well as the provisions of the Civil and Criminal Procedure Codes invest the courts, both civil and criminal, with general jurisdiction, that is to say, power to adjudicate in respect of all persons and all matters except those that are specifically excluded or brought within the cognisance of tribunals with special or limited jurisdiction extending only to those matters. The grading of the court too in their heirarchy has reference to the pecuniary and territorial limits rather than to the nature and kind of the subject-matter which they are empowered to deal with. It is reasonable to presume that this system of organisation of courts in British

(1) [1933] A. C. 156, 165.

India was known to the framers of the Government of India Act, 1935, and it cannot be readily supposed that they wanted to introduce a radical change by which the power of constituting courts and providing for administration of justice is to be vested in the Provincial Legislatures, while jurisdiction has to be conferred by piecemeal legislation by the Federal and Provincial Legislatures with respect to specific matters falling within their respective legislative fields which are by no means capable of clear demarcation. The constitutional puzzles which such a system is likely to pose to the legislatures no less than to the courts and the litigant public in the country whenever a new court is constituted in finding out by searching through the legislative lists, whether jurisdiction to deal with a particular matter or power to make a particular order is validly conferred by the appropriate legislature, must make one pause and examine the relevant provisions of the Government of India Act to see if there is anything in them to compel the acceptance of so novel a system. After giving the matter my careful consideration, I am convinced that both the language of the provisions and the antecedent legislative practice support the conclusion that the Provincial Legislatures, which have the exclusive power of constituting and organising courts and of providing for the administration of justice in their respective provinces, have also the power of investing the courts with general jurisdiction.

On the question whether section 4 of the Act operates as a delegation of legislative power, I entirely agree with the reasoning and conclusion of my learned brother Das, who has said all I wish to say in his judgment which I have had the advantage of reading, and, like him, I reserve the larger question raised by the Attorney-General as to how far it is open to the legislatures in this country, while acting within their authorised areas, to delegate their legislative powers to other agencies. I find it no more necessary in the present case to decide that point than in *Jatindranath*

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Gupta's case(1) where I preferred to rest my decision on a narrower ground.

It follows that the High Court has no jurisdiction to hear and determine the first respondent's suit and I agree that the appeal should be allowed.

MAHAJAN J.—This is an appeal from the judgment of the High Court of Judicature at Bombay dated the 29th March, 1950, in Suit No. 240 of 1950, holding that section 4 of the Bombay City Civil Court Act (Bombay Act XL of 1948) is *ultra vires* the Provincial Legislature.

The facts are that on the 6th February, 1950, the first respondent presented a plaint to the Prothonotary and Senior Master of the High Court for filing a summary suit against the second respondent to recover a sum of Rs. 11,704-2-4 alleged to be due under promissory notes. This suit was instituted in the High Court in contravention of a notification dated the 20th January, 1950, issued under section 4 of the City Civil Court Act, under which suits up to the pecuniary limit of Rs. 25,000 could be heard only by the City Civil Court, and not by the High Court. As the question of jurisdiction was of importance, the matter was referred to the sitting Judge in Chambers. On 23rd February, 1950, the learned Judge admitted the plaint holding that section 4 of the Act was *ultra vires* the Provincial Legislature and the notification issued under it was consequently inoperative and that the High Court had jurisdiction to hear the suit. The first respondent thereupon took out summons for judgment against the second respondent. On the application of the Advocate-General, the State of Bombay was impleaded as defendant at this stage and the proceedings were transferred to a Division Bench of the High Court. The Division Bench upheld the view of the Judge in Chambers and returned the cause to him for disposal on the merits. The State of Bombay, dissatisfied with this decision, has preferred the present appeal.

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

Two questions have been canvassed in this appeal: (1) whether the City Civil Court Act is *ultra vires* the legislature of the Province of Bombay in so far as it deals with the jurisdiction and powers of the High Court and City Civil Court with respect to matters in List I of the Seventh Schedule of the Government of India Act, 1935; and (2) whether section 4 of the Act is void as it purports to delegate to the Provincial Government legislative authority in the matter of investing the City Civil Court with extended jurisdiction.

Bombay Act of 1948 came into force on 10th May, 1948. It was considered expedient to establish an additional civil court for Greater Bombay presumably with the object of relieving congestion of work on the original side of the Bombay High Court. Sections 3, 4 and 12 of the Act are in these terms :—

"3. The State Government may, by notification in the Official Gazette, establish for the Greater Bombay a court, to be called the Bombay City Civil Court. Notwithstanding anything contained in any law, such court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ten thousand rupees in value, and arising within the Greater Bombay, except suits or proceedings which are cognisable—

(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a Colonial Court of Admiralty, or as a Court having testamentary, intestate or matrimonial jurisdiction, or

(b) by the High Court for the relief of insolvent debtors, or

(c) by the High Court under any special law other than the Letters Patent, or

(d) by the Small Cause Court:

Provided that the State Government may, from time to time, after consultation with the High Court, by a like notification extend the jurisdiction of the City Court to any suits or proceedings which are cognisable by the High Court as a court having testamentary or

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intestate jurisdiction or for the relief of insolvent debtors.

4. Subject to the exceptions specified in section 3 the State Government may by notification in the Official Gazette, invest the City Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding twenty-five thousand rupees as may be specified in the notification.

12. Notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognisable by the City Court:

Provided that the High Court may, for any special reason, and at any stage remove for trial by itself an suit or proceeding from the City Court."

On the second question the High Court held that section 4 of the Act was inoperative as it purported to delegate the law-making powers of the legislature to an outside authority and hence the notification issued in pursuance of it had no effect whatsoever and did not take away the jurisdiction of the High Court to try the present suit. On the first question the High Court placed reliance on its own earlier decision in *Mulchand Kundanmal Jagtiani* v. *Raman Hiralal Shah*(1), and held that the Act was *intra vires* the Bombay Legislature. The appellant assails the correctness of the decision of the High Court on the second point and supports the decision on the first point. The first respondent, on the other hand, while supporting the decision of the High Court on the second question, challenges its correctness in regard to the first question. The learned Attorney-General contends that the High Court placed an erroneous construction on sections 3 and 4 of the Act; that reading the two sections together the effect is that the legislature has set up the City Civil Court with an initial jurisdiction of Rs. 10,000 and has placed an outside limit of Rs. 25,000 on its pecuniary jurisdiction and that it

(1) 51 Bom. L.R. 86.

has left to the discretion of the Provincial Government the determination of the circumstances under which this extension of the pecuniary jurisdiction between Rs. 10,000 and Rs. 25,000 is to take place. It was said that section 4 is in the nature of a conditional legislation and that under it no legislative function has been delegated to the Provincial Government. The learned Chief Justice in the court below disposed of this contention with the following observations :—

"I am also conscious of the fact that an Act must be construed in a manner which would reconcile its different sections but with the best of intention in the world I do not see how it is possible to read sections 3 and 4 together so as to come to the conclusion for which the Advocate-General contends. To my mind it is patent that the Legislature never applied its mind to the question as to whether the new court which it was setting up should have a jurisdiction higher than that of Rs. 10,000. It never passed any judgment on that question. It never laid down any policy with regard to that question and section 4 is not a section which merely directs the Provincial Government to carry out the policy laid down by the legislature.....but it is a section which confers upon the Provincial Government the power to confer jurisdiction upon the Court, or in other words, it is a section which entitled the Provincial Government to lay down its policy as to whether the new Court should have the increased jurisdiction up to twenty-five thousand rupees."

I find it difficult to accept this view. Without applying its mind to the question as to whether the new Court which it was setting up should have a jurisdiction higher than Rs. 10,000, how could the legislature possibly enact in section 4 that the pecuniary jurisdiction of the new court would not exceed Rs. 25,000. The fixation of the maximum limit of the court's pecuniary jurisdiction is the result of exercise of legislative will, as without arriving at this judgment it would not have been able to determine the outside limit of the pecuniary jurisdiction of the new

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court. The policy of the legislature in regard to the pecuniary jurisdiction of the court that was being set up was settled by sections 3 and 4 of the Act and it was to the effect that initially its pecuniary jurisdiction will be limited to Rs. 10,000 and that in future if circumstances make it desirable—and this was left to the determination of the Provincial Government—it could be given jurisdiction to hear cases up to the value of Rs. 25,000. It was also determined that the extension of the pecuniary jurisdiction of the new court will be subject to the provisions contained in the exceptions to section 3. I am therefore of the opinion that the learned Chief Justice was not right in saying that the legislative mind was never applied as to the conditions subject to which and as to the amount up to which the new court could have pecuniary jurisdiction. All that was left to the discretion of the Provincial Government was the determination of the circumstances under which the new court would be clothed with enhanced pecuniary jurisdiction. The vital matters of policy having been determined, the actual execution of that policy was left to the Provincial Government and to such conditional legislation no exception could be taken. The section does not empower the Provincial Government to enact a law as regards the pecuniary jurisdiction of the new court and it can in no sense be held to be legislation conferring legislative power on the Provincial Government.

In *Queen* v. *Burah*(1), section 9 of Act XXII of 1869, which was a piece of legislation analogous to section 4 of the City Civil Court Act, was held *intra vires* by their Lordships of the Privy Council. By the 9th section power was conferred on the Lieutenant Governor of Bengal to determine whether the Act or any part of it should be applied to certain districts. In other words, authority to extend the territorial limits of the operation of the statute was conferred on the Lieutenant Governor and such extension had the result of depriving the High Court of its jurisdiction in those areas and of conferring jurisdiction in respect to them

(1) 5 I.A. 178.

on the commissioner. Objection was taken as to the validity of section 9 on the ground that it was legislation delegating legislative power and was therefore void. Their Lordships negatived this contention and held that section 9 was *intra vires* the Governor-General's power to make laws and was a piece of conditional legislation. That was a case of an extension of territorial limits within which an Act of the Legislature was to be in force, whereas the present is a case of extension of pecuniary limits of a court's jurisdiction. In principle, there seems no difference between the two cases and the present case is therefore within the rule of the decision in *Queen* v. *Burah*(1). Their Lordships in holding section 9 *intra vires* made the following observations :—

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

(1) 51 I.A. 178.

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Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it."

These observations appositely apply to the legislative provision contained in section 4 of the impugned Act. The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. Objection may be taken to the former but not to the latter. Reference in this connection may also be made to the decision of the Supreme Court of America in *Field* v. *Clark*(1) wherein referring to *Locke's case*(2) the following observations were made :—

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

The High Court in support of its view placed considerable reliance on the decision of the Federal Court in *Jatindra Nath Gupta* v. *The Province of Bihar*(3) and it was considered that the present case fell within the ambit of the rule therein laid down. It seems to me that the decision in the Bihar case has no application to the case in hand. The Federal Court there was

(1) 143 U.S. 649.
(2) 72 Pa. 491.
(3) [1949] F.C.R. 595.

dealing with an Act which contained the following provisions in section 1, sub-section (3) :—

"The Act shall remain in force for a period of one year from the date of its commencement :

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

In connection with this proviso I said in my judgment in that case that the power conferred therein was much larger than was conferred on the Lieutenant-Governor in *Queen* v. *Burah*(1) inasmuch as it authorised the Provincial Government to modify the Act and also to re-enact it. It was pointed out that "distinction between delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised." The following observations made by me there pointedly bring out the distinction between the two cases :—

"The proviso which has been assailed in this case, judged on the above test, comes within the ambit of delegated legislation, and is thus an improper piece of legislation and is void. To my mind, it not only amounts to abdication of legislative authority by the Provincial Legislature, it goes further and amounts to setting up a parallel Legislature for enacting a modified Bihar Maintenance of Public Order Act and for enacting a provision in it that that Act has to be enacted for a further period of one year. A careful analysis of the proviso bears out the above conclusion. It may be asked what does the proviso purport to do in terms and in substance? The answer is that it empowers the Provincial Government to issue a notification say-

(1) 5 I.A. 178.

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ing that the Provincial Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification.....Modification of statute amounts to re-enacting it partially. It involves the power to say that certain parts of it are no longer parts of the statute and that a statute with X sections is now enacted with Y sections. In the act of modification is involved a legislative power as a discretion has to be exercised whether certain parts of the statute are to remain law in future or not or have to be deleted from it. The power to modify may even involve a power to repeal parts of it. A modified statute is not the same original statute. It is a new Act and logically speaking, it amounts to enacting a new law."

I have not been able to follow how these observations concerning the Bihar statute could be relied upon by the High Court in support of its decision in respect to the invalidity of section 4 of the Bombay City Civil Court Act. The two provisions are not analogous in any manner whatsoever and that being so, no support can be derived by the respondent from this decision.

In the concluding portion of his judgment under appeal the learned Chief Justice observed as follows :—

"Now applying once more these tests to the City Civil Court Act, we find that the Legislature in the exercise of its legislative power has set up a Civil Court with a limited jurisdiction under section 5 of the Act. It has not set up a court with jurisdiction higher than ten thousand rupees. Having set up a court of limited jurisdiction it has given to the Provincial Government under section 4 the power to confer upon that court a higher jurisdiction up to twenty-five thousand rupees. Now this power which is conferred upon the Provincial Government is a power which could only have been exercised by the Legislature itself."

It seems to me that the above observations are based on a construction of sections 3 and 4 of the Act which these sections cannot legitimately bear. As already observed, the Legislature set up a Civil Court for Greater

Bombay and decided that to start with, it will have pecuniary jurisdiction up to Rs. 10,000. It also decided at the same time that it would also have jurisdiction up to Rs. 25,000 as soon as circumstances necessitate it. The Provincial Government was constituted the judge of those circumstances. What the limit of that jurisdiction was to be was in unmistakeable terms enacted in section 4 of the Act. It was not left to the will of the Provincial Government to confer on that court any pecuniary jurisdiction that it liked to confer upon it. It would be by force of the legislative power of section 4 that the City Civil Court will be vested with enhanced jurisdiction but that vesting cannot take place till a notification is issued by the Provincial Government. It is conditional on that event only.

For the reasons given above, in my judgment, the High Court was in error in holding that section 4 of the City Civil Court Act was void and *ultra vires* the Provincial Legislature. In this view the notification issued under section 4 must be held to be effective. That being so, it is unnecessary to go into the question raised by the learned Attorney-General that assuming that section 4 of the Act was delegation of legislative power, it was still valid.

The next question to decide is whether the Act is *ultra vires* the Bombay Legislature. In order to appreciate Mr. Seervai's contention on this point it is necessary to set out some of the provisions of the Government of India Act, 1935, relevant to the enquiry. These are contained in section 100, and in the Seventh Schedule in entries 28 and 53 of List I, entries 1 and 2 of List II, and entries 4 and 15 of List III. They are in these terms :—

Sec. 100 (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature, has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").

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(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

List I. 23. Cheques, bills of exchange, promissory notes and other like instruments.

55. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers.

List II. 1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organization of all courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subject to such detention.

2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

List III. 4. Civil Procedure, including the Law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act: the recovery in a Governor's Province or a Chief

Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

15. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list.

Mr. Seervai contends that section 3 of the impugned Act is void because it directly trenches on the exclusive legislative powers of the Centre conferred on it by List I of the Seventh Schedule inasmuch as it confers jurisdiction on the new court in respect to all cases of a civil nature. The expression "all cases of a civil nature" presumably brings within the ambit of the Act suits in respect to subjects contained in List I. He urged that the three similar entries in the three lists namely, entry 53 in List I, entry 2 in List II and entry 15 in List III indicated that in respect to the subjects covered by the three fields of legislation demarcated for the two Legislatures the Parliament empowered each of them respectively to make laws in respect to jurisdiction and power of courts and that in view of the provisions of section 100 of the Constitution Act the Provincial Legislature had no power to make any law conferring jurisdiction on courts in respect to subjects covered by List I. In other words, the Federal Legislature alone could legislate on the jurisdiction and powers of a court in regard to the subjects in List I. Similarly in respect of subjects contained in the Provincial List, jurisdiction and power of courts could only be determined by a law enacted by the Provincial Legislature and that in respect of items contained in List III, both Legislatures could make laws on the subject of jurisdiction and powers of courts. It was said that the exceptions and the proviso to section 3 of the City Civil Court Act in clear terms disclosed that jurisdiction in respect to the subjects on which the Provincial Legislature had no competence to legislate, was also conferred on the new court. Section 12 of the Act by which the High Court was deprived of all jurisdiction on matters that fell

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within the jurisdiction of the City Civil Court was assailed on similar grounds. In regard to the legislative power conferred under entry I of List II on the Provincial Legislature it was contended that this wide power stood limited by the three entries above mentioned and that under it legislation could only be made to the extent of establishing and organizing courts but no legislation under it was permissible in respect to the powers of those courts.

The learned Attorney-General, on the other hand, contends that the Act is *intra vires* the Bombay Legislature under entry 1 of List II and under entries 4 and 15 of List III, it having received the assent of the Governor-General. It was urged that the Provincial Legislature had exclusive legislative power on the subject of administration of justice and constitution and organization of all courts and that this power necessarily included the power to make a law in respect to the jurisdiction of courts established and constituted by it and that the impugned legislation in pith and substance being on the subject of administration of justice, it could not be held *ultra vires* even if it trenched on the field of legislation of the Federal Legislature. In regard to entry 53 of List I, entry 2 of List II and entry 15 of List III of the Schedule, it was said that these conferred legislative power on the respective Legislatures to confer special jurisdiction on established courts in respect of particular subjects only if it was considered necessary to do so. In other words, the argument was that the Provincial Government could create a court of general jurisdiction legislating under entry 1 of List II and that it was then open to both the Central and the Provincial Legislatures to confer special jurisdiction on courts in respect to particular matters that were covered by the respective lists. In my opinion, the contention of the learned Attorney-General that the Act is *intra vires* the Bombay Legislature under entry 1 of List II is sound and I am in respectful agreement with the view expressed by the Chief Justice of Bombay on this point in *Mulchand Kundanmal Jagtiani* v. *Raman Hiralal*

Shah (1). The learned Chief Justice when dealing with this point said as follows :—

"If, therefore, the Act deals with administration of justice and constitutes a court for that purpose and confers ordinary civil jurisdiction upon it, in my opinion, the legislation clearly falls within the legislative competence of the Provincial Legislature and is covered by item 1 of List II of Schedule 7. That item expressly confers upon the Provincial Legislature the power to legislate with regard to the administration of justice and the constitution and organization of all courts except the Federal Court. It is difficult to imagine how a court can be constituted without any jurisdiction, and if Parliament has made the administration of justice exclusively upon the Provincial Legislature the power to constitute and organize all courts, it must follow, that the power is given to the Provincial Legislature to confer the ordinary civil jurisdiction upon the courts to carry on with their work. Item 2 of List II deals with jurisdiction and power of all courts except the Federal Court with respect to *any of the matters in this list* and Mr. Mistree's argument is that item 1 is limited and conditioned by item 2 and what he contends is that the only power that the Provincial Legislature has is undoubtedly to create courts, but to confer upon them only such jurisdiction as relates to items comprised in List II. I am unable to accept that contention or that interpretation of List II in Schedule 7. Each item in List II is an independent item, supplementary of each other, and not limited by each other in any way. Item 1 having given the general power to the Provincial Legislature with regard to all matters of administration of justice and with regard to the constitution and organization of all courts, further gives the power to the Legislature to confer special jurisdiction, if needs be, and special power, if needs be, to these courts with regard to any of the items mentioned in List II. It is impossible to read item 2 as curtailing

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and restricting the very wide power with regard to administration of justice given to the Provincial Legislature under item 1. Similarly in List I the Federal Legislature has been given the power under item 53 to confer jurisdiction and power upon any court with regard to matters falling under any of the items in that list, and, therefore, it would be competent to the Federal Legislature to confer any special jurisdiction or power which it thought proper upon any court with regard to suits on promissory notes or matters arising under the Negotiable Instruments Act.....". It seems to me that the legislative power conferred on the Provincial legislature by item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organization of all courts). It was not denied that the phrase employed would include within its ambit legislative power in respect to jurisdiction and power of courts established for the purpose of administration of justice. Moreover, the words appear to be sufficient to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice in the Province. Legislation on the subject of administration of justice and constitution of courts of justice would be ineffective and incomplete unless and until the courts established under it were clothed with the jurisdiction and power to hear and decide causes. It is difficult to visualise a statute dealing with administration of justice and the subject of constitution and organization of courts without a definition of the jurisdiction and powers of those courts, as without such definition such a statute would be like a body without a soul. To enact it would be an idle formality. By its own force it would not have power to clothe a court with any power or jurisdiction whatsoever. It would have to look to an outside authority and to another statute to become effective. Such an enactment is, so far as I know, unknown to legislative practice and history. The Parliament by making administration of justice a provincial subject could

not be considered to have conferred power of legislation on the Provincial Legislature of an ineffective and useless nature. Following the line of argument taken by Mr. Mistree before the High Court of Bombay, Mr. Seervai strenuously contended that the only legislative power conferred on the Provincial Legislature by entry 1 of List II was in respect to the establishment of a court and its constitution and that no legislative power was given to it to make a law in respect to jurisdiction and power of the court established by it.

The argument, logically analysed, comes to this: that such a statute will contain the name of the court, the number of its judges, the method of their appointment, the salaries to be drawn by them and it will then stop short at that stage and will not include any provision defining the powers of the tribunal or its other jurisdiction and that the court so constituted could acquire jurisdiction only when a law was made relating to its jurisdiction and powers by the Federal Legislature under entry 53 of List I, by the Provincial Legislature under entry 2 of List II and by either Legislature under entry 15 of List III. The learned counsel contended that this peculiar result was the natural consequence of a federal constitution with divided powers, and that entries 53. 2 and 15 of the three respective lists limit and curtail the wide power conferred on the Provincial Legislature by item 1 of List II. It is difficult to accede to this contention because it would amount to holding that though the Provincial Legislature under item 2 of List II has been given the widest power of legislation in the matter of administration of justice and constitution and organization of courts and though that field has been demarcated for it as its exclusive field of legislation, yet all that it can do, acting within that field, is merely to establish a court without any competency to function and that it can only become an effective instrument for administering justice by laws enacted elsewhere or under powers conferred under other items of the different lists. I am unable to read items 53, 2 and 15 of the three

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respective lists as imposing limitations on legislative power conferred on the Province by item 1 of List II. Such a construction of the Act would not only do violence to the plain language of item 1 of List II but would be contray to its scheme under which administration of justice was made a provincial subject. It is significant that no other Legislaure has been given the power to bring into existence a court. A court without powers and jurisdiction would be an anomaly as it would not be able to discharge the function of administration of justice and the statute establishing such a court could not be said to be a law on the subject of administration of justice. It is a fundamental principle of the construction of a constitution that everything necessary for the exercise of powers is included in the grant of power. Everything necessary for the effective execution of power of legislation must therefore be taken to be conferred by the constitution with that power. It may be observed that in exercise of legislative power under item 1 of List II a Provincial Legislature can alter the constitution of the existing courts, can abolish them, reorganize them and can establish new courts. If the construction contended for by Mr. Seervai is accepted, then the existing courts re-established or re-organised by the Provincial Legislature would not be able to function till legislation under item 53 of List I, under item 2 of List II or item 15 of List III also simultaneously was made. I do not think that such a result was in the contemplation of Parliament.

Mr. Seervai with some force argued that if full effect is given to the comprehensive phraseology employed in item 1 of List II, then it would result in making the provisions of item 2 of List II, of item 53 of List I and item 15 of List III nugatory, in other words, if the Provincial Legislature could bring into existence a court of general jurisdiction which could hear all causes on subjects concerning which legislative power was divided in the three lists, then the conferment of legislative power on the Federal Legislature under item 53 of List I, on the Provincial Legislature under item 2 of List II and on both the Legislatures under

item 15 of List III was purposeless. In my opinion, this argument is not a valid one and the premises on which it is based are not sound. The three lists of subjects contained in Schedule 7 have not been drawn up with any scientific precision and the various items in them overlap. The point kept in view in drawing up the lists was to see that all possible power of legislation was included within their ambit. By making administration of justice a provincial subject and by conferring on the Provincial Legislature power to legislate on this subject and also on the subject of constitution and organization of courts, Parliament conferred on that Legislature an effective power which included within its ambit the law-making power on the subject of jurisdiction of courts. The Provincial Legislature could therefore bring into existence a court with general jurisdiction to administer justice on all matters coming before it within certain territorial and pecuniary limits, subject of course to the condition that such general jurisdiction may be expressly or impliedly taken away by the provisions of other laws. The Parliament having divided the field of legislation between the two Legislatures, naturally thought that as a corollary or a necessary consequence of this division of legislative power it was necessary to provide by way of a complementary provision a legislative power specifically on the two Legislatures in respect to the jurisdiction and powers of courts on subjects which were within their exclusive legislative field. If a Legislature could exclusively legislate in respect to particular subjects, as a necessary consequence it should also have the power to legislate in respect to jurisdiction and power of the court dealing with that subject. It is this power that has been conferred by entries 53, 2 and 15 above mentioned on the two Legislatures. Entries 42 and 99 of List I, entries 37 and 42 of List II and entries 25 and 36 of List III are of a similar consequential character. The respective Legislatures are therefore competent to confer special powers on courts and can create special jurisdictions acting under those powers in respect to

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their divided fields of legislation. Instances of conferment of powers and jurisdiction on courts to hear cases on particular subjects were well known to Parliament. Such powers had been conferred on different courts in respect of testamentary and intestate jurisdiction, admiralty jurisdiction, under the Indian Companies Act, under the Succession Act, Guardians and Wards Act and under the various Rent Acts and Acts dealing with relief of indebtedness. In view of the division of powers in respect to different subjects, power was given under item 53 of List I, item 2 of List II and item 15 of List III to the different Legislatures when dealing with those subjects also to legislate on the question of jurisdiction and powers of the courts. This conferment of legislative power to create special jurisdiction in respect to particular subjects does not in any way curtail the legislative power conferred on the Provincial Legislature under item 1 of List II. As soon as special legislative power under item 53 of List I, under item 2 of List II and item 15 of List III is exercised, the causes that arise in respect to those subjects would then only be heard in jurisdictions created by those statutes and not in the courts of general jurisdiction entrusted with the normal administration of justice. In the language of section 9 of the Code of Civil Procedure, jurisdiction of the general courts will then become barred by those statutes.

I am therefore of the opinion that under item 1 of List II the Provincial Legislature has complete competence not only to establish courts for the administration of justice but to confer on them jurisdiction to hear all causes of a civil nature, and that this power is not curtailed or limited by power of legislation conferred on the two Legislatures under items 53, 2 and 15 of the three lists. On the other hand, these three items confer on the respective Legislatures power to legislate when dealing with particular subjects within their exclusive legislative field to make laws in respect of jurisdiction and powers of courts that will be competent to hear causes relating to those subjects; in other words, this is a power of creating special

jurisdictions only. This interpretation of the entries in the lists is not only in accordance with the scheme of the statute but it harmonizes the different entries in the lists and does not make any of them nugatory and ineffective. The interpretation contended for by Mr. Seervai would reduce the power of the Provincial Legislature under item 1 to almost nothingness.

The crux of the case is whether item 1 of List II should be given a limited construction which makes it nugatory or whether a limited construction is to be placed on items 53, 2 and 15 of the three lists. I have no hesitation in holding that both in the light of principles of construction of statutes and principles of legislation, the course to adopt is the one that I have indicated above.

Finally, it was contended that section 12 of the Act in any case was a void piece of legislation as it deprived the High Court of its jurisdiction even in respect to subjects contained in List I of the Seventh Schedule. In view of the construction that I have placed on item 1 of List II this argument has no force. If the Legislature has power to bring into existence a court and confer jurisdiction and power on it, *a fortiori* it has power to take away the jurisdiction and power that already exist in other courts. Moreover, the Bombay City Civil Court Act in section 3 has excepted from the jurisdiction of the new court all cases which the High Court can hear under any special law. Special law has been defined as a law applicable to a particular subject. If under List 1 of the Seventh Schedule the Federal Legislature by any law determines that a case has to be heard by the High Court, section 5 will not affect the jurisdiction of that court in any manner whatsoever.

The result, therefore, is that the Bombay City Civil Court Act is a statute which is wholly within the legislative field of the Province under item 1 of List II and its validity cannot be affected even if it incidentally trenches on other fields of legislation. It is not a statute dealing with any of the subjects mentioned in List I and therefore it cannot be said that the

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Provincial Legislature has in any way usurped the power demarcated for the Centre. In view of this conclusion I think it unnecessary to pronounce any opinion on the other points raised by the learned Attorney-General.

For the reasons given above I allow the appeal preferred by the Government of Bombay and set aside the decision of the High Court holding that section 4 of the City Civil Court Act (XL of 1948) is void. In the circumstances of the case I leave the parties to bear their own costs of the appeal.

Mukherjea J.

MUKHERJEA J.—In my opinion this appeal should be allowed and I concur substantially in the line of reasoning adopted by my learned brother Mahajan J. in his judgment. Having regard to the constitutional importance of the questions raised in this case, I would desire to add some observations of mine own.

There are really two questions which require consideration in this appeal. The first is whether section 4 of the Bombay City Civil Court Act, 1948, is void and inoperative by reason of its amounting to a delegation of legislative powers by the Provincial Legislature to the Provincial Government of Bombay. The Bombay High Court has answered this question in the affirmative and it is entirely upon this ground that the judgment appealed against is based. The propriety of this decision has been challenged by the learned Attorney-General who appeared on behalf of the State of Bombay in support of this appeal. On the other hand, Mr. Seervai, appearing on behalf of the respondents, has not only attempted to repel the contention advanced by the learned Attorney-General, but has sought to support the judgment appealed against on another and a more comprehensive ground which, if accepted, would make the entire Bombay City Civil Court Act a void piece of legislation, as being an encroachment by the Provincial Legislature upon the field of legislation reserved for the Centre under List I of Schedule 7 to the Government of India Act, 1935.

As regards the first point, I agree that the contention of the appellant is sound and must prevail. I have no hesitation in holding that the Legislature in empowering the Provincial Government to invest the City Court, by notification, with jurisdiction of such value not exceeding Rs. 25,000 as may be specified in the Notification, has not delegated its legislative authority to the Provincial Government. The provision relates only to the enforcement of the policy which the Legislature itself has laid down. The law was full and complete when it left the legislative chamber permitting the Provincial Government to increase the pecuniary jurisdiction of the City Court up to a certain amount which was specified in the Statute itself. What the Provincial Government is to do is not to make any law; it has to execute the will of the Legislature by determining the time at which and the extent to which, within the limits fixed by the Legislature, the jurisdiction of the court, should be extended. This is a species of conditional legislation which comes directly within the principle enunciated by the Judicial Committee in *The Queen* v. *Burah*(1), where the taking effect of a particular provision of law is made to depend upon determination of certain facts and conditions by an outside authority.

The learned Judges of the Bombay High Court in coming to their decision on the point seem to have been influenced to some extent by the pronouncement of the Federal Court in *Jatindranath Gupta* v. *Province of Bihar* (2), and the learned Counsel for the respondents naturally placed reliance upon it. I was myself a party to the majority decision in that case and expressed my views in a separate judgment. I do not think that there is anything in my judgment which lends support to the contention which the respondents have put forward. I stated expressly in course of my judgment on the authority of the well known American decision in *Locke's appeal*(3) that a legislature may not

(1) 5 I. A. 178.

(2) [1949] F.C.R. 596.

(3) 13 American Reports, 716.

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delegate its powers to make law but "it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend"; and that the inhibition against delegation does not extend to legislation which is complete in itself, though its operation is made to depend upon contingencies the ascertainment of which is left to an external body.

The subject matter of dispute in the Bihar case was the validity of a proviso engrafted upon section 1, sub-section (3) of the Bihar Maintenance of Public Order Act. The sub-section laid down that the Act would remain in force for a period of one year from the date of its commencement. The proviso then added "that the Provincial Government may, by notification on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification." Mr. Seervai would have been probably right in invoking the decision in that case as an authority in his favour if the proviso simply empowered the Provincial Government, upon compliance with the conditions prescribed therein, to extend the duration of the Act for a further period of one year, the maximum period being fixed by the Legislature itself. The proviso, however, went further and authorised the Provincial Government to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself was to be modified in any way or not. It was conceded by the learned Counsel appearing for the Province of Bihar that to authorise another body to modify a statute amounts to investing that body with legislative powers. What the learned Counsel contended for, was that the power of modification was severable from the power of extending the duration of the statute and the invalidity of one part of the proviso should not affect its other part. To this contention my answer was that the two provisions were inter-related in such a manner in the statute that one could not be severed from the

other. Obviously, the facts of this case are quite different, and all that I need say with regard to my pronouncement in *Jatindranath Gupta's case* is that the principle upon which that case was decided is not applicable and cannot be attracted, to the present case.

I may state here that a question in the broad form as to whether a Provincial Legislature exercising its legislative powers within the limits prescribed by the Imperial Parliament in the Government of India Act, 1935, could delegate its legislative functions in any manner to an outside authority as it thought proper, was neither raised nor decided in *Jatindranath Gupta's case*. The learned Attorney-General has not very properly invited any final decision on that point in the present case and I would refrain from expressing any opinion upon it.

The second point appears to be of some complexity and it was decided by the Bombay High Court adversely to the respondents on the basis of an earlier pronouncement of the same Court in *Mulchand* v. *Raman*(1). The arguments of Mr. Seervai are really directed as assailing the correctness of this earlier decision which the learned Judges held to be binding on them in the present case. The contention of Mr. Seervai, in substance, is, that the Bombay City Civil Court Act, which is a piece of provincial legislation, is *ultra vires* the legislature inasmuch as it purports to endow the City Court, which it brings into existence, with jurisdiction to receive, try and dispose of "all suits and other proceedings of a civil nature" with certain exceptions that are specified in the different sub-sections of section 3. What is said is that the expression "all suits of a civil nature" is wide enough to include suits in respect to matters specified in List I of the Seventh Schedule of the Constitution Act with regard to which the Central Legislature alone is competent to confer jurisdiction on courts under entry 53 of the said List. It is argued that so far as the Provincial Legislature is concerned, it may empower all courts (except the Federal Court) with jurisdiction in respect to any of the matters in the Pro-

(1) 51 Bom. L.R. 86.

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vincial List. And it may also be capable of exercising like powers in regard to subjects enumerated in the Concurrent List as provided for in article 15 of List III, subject to the conditions laid down in section 107 of the Act. But as the scope of section 3 of the Bombay City Civil Court Act is not limited to matters in Lists II and III only and its language can embrace subjects coming under List I as well, and furthermore as the different subjects both within and outside the provincial and concurrent fields dealt with by section 3 are inextricably intertwined and not capable of severance or demarcation, the whole Act must be held to be *ultra vires*.

In answer to this, it has been urged by the learned Attorney-General that amongst the subjects included in Item 1 of the Provincial List are "the administration of justice and constitution and organization of all courts except the Federal Court", and these expressions obviously include within their ambit the conferring of general jurisdiction to hear and decide cases upon courts which are set up by the Provincial Legislature, and without which they cannot function as courts at all. It is said that Item 2 of the Provincial List which mentions "jurisdiction and powers of all courts except the Federal Court with respect to any of the matters in this List" does not in any way limit or curtail the ordinary connotation of the expressions "administration of justice and constitution of courts" as used in Item I of the said List referred to above.

It cannot be disputed that the words "administration of justice" occurring in Item 1 of the Provincial List, unless they are limited in any way, are of sufficient amplitude to confer upon the Provincial Legislature the right to regulate and provide for the whole machinery connected with the administration of justice. Section 92 of the North America Act deals with the exclusive powers of the Provincial Legislatures and clause (14) of the section speaks of "the administration of justice in the Provinces" as including "the constitution, maintenance and organization of Provincial Courts." In interpreting this provision of the constitution it has been held in North America that the words

"constitution, maintenance and organization of courts" plainly include the power to define the jurisdiction of such courts territorially as well as in other respects(1). Mr. Seervai argues that this might be the normal meaning of the words if they stood alone. But if Items 1 and 2 of the Provincial List are read together, the conclusion cannot be avoided that the expressions "administration of justice and constitution of courts" do not include "jurisdiction and powers of courts" which are separately dealt with under Item 2. To find out, therefore, the extent of powers of the Provincial Legislature in respect of conferring jurisdiction upon courts, the relevant item to be looked to is not Item 1 but Item 2 of the Provincial List.

The contention in this form seems to me to be plainly unacceptable. I agree with Mr. Setalvad that the different topics in the same Legislative List should not be read as exclusive of one another. As was observed by Sir Maurice Gwyer in *The United Provinces* v. *Atiqua Begum*(2), "the subjects dealt with in the three Legislative Lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that List, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import....I think that none of the items in the List is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it." As there can be no question of conflict between two items in the same List, there is no warrant for restricting the natural meaning of one for the simple reason that the same subject might in some aspect come within the purview of the other.

The difficulty, however, arises when we come to entry 53 of List I. Under this entry, it is the Central

(1) *Re County Courts of British Columbia*—21 S.C.R. 446.

(2) [1940] F.C.R. 110 at p.134.

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Legislature that has been given the power of legislating in regard to jurisdiction and powers of all courts except the Federal Court in respect to any of the matters in List I. The difficulty that one is confronted with, is that if Item 1 of the Provincial List is taken to empower the Provincial Legislature to invest a court with jurisdiction with respect to all subjects no matter in whichever List it might occur, a clear conflict is bound to arise between Item 1 of the Provincial List and Item 53 of the Central List; and a Provincial legislation trespassing upon the exclusive field of the Centre would be void and inoperative under section 100 of the Constitution Act. This being the position, a way would have to be found out to avoid the conflict. As the Privy Council observed in the case of the *Citizens Insurance Company of Canada* v. *Parsons*(1) "it could not have been the intention that a conflict should exist and in order to prevent such a result the two sections must be read together and the language of the one interpreted and where necessary modified by the other."

Mr. Seervai suggests that the proper way of reconciling this apparent conflict would be to read the words "administration of justice and constitution of courts" occurring in entry 1 of the Provincial List as exclusive of any matter relating to jurisdiction of courts. The Provincial Legislature can only set up or constitute courts but their jurisdiction or power of deciding cases must be derived from the Central or the Provincial Legislature or from either of them in accordance with the subjects to which such jurisdiction relates. The Provincial Legislature can endow the court with jurisdiction in respect to any matter in List II and the Central Legislature can do the same with regard to subjects specified in List I. So far as matters in the Concurrent List are concerned, either of the Legislatures can make provisions in respect of them subject to the conditions laid down in section 107 of the Constitution Act.

(1) 7 A.C. 96 at p. 109.

This argument, though apparently plausible, cannot, in my opinion, be accepted as sound. It is to be noted that the right to set up courts and to provide for the whole machinery of administration of justice has been given exclusively to the Provincial Legislature. Under section 101 of the North America Act, the Parliament of Canada has a reserve of power to create additional courts for better administration of the laws of Canada but the Indian Constitution Act of 1935 does not give any such power to the Central Legislature. Courts are to be established by the Provincial Legislature alone. The word 'court' certainly means a place where justice is judicially administered. The appointment of Judges and officers or the mere setting apart of a place where the Judges are to meet, are not sufficient to constitute a court. A court cannot administer justice unless it is vested with jurisdiction to decide cases and "the constitution of a court necessarily includes its jurisdiction."(1) If Mr. Seervai's contention is accepted, the result will be that when a Provincial Legislature establishes a civil court, it can only be invested with jurisdiction to decide cases in respect to matters coming within the Provincial List. Such court can have no power to decide cases relating to any matter which is enumerated in List I so long as the appropriate Legislature does not confer upon it the requisite authority. Thus an ordinary Provincial Court established to decide civil suits would be entitled to entertain all money claims but not a claim on a promissory note; nor could it entertain a suit for recovery of corporation tax, for Negotiable Instruments and corporation tax are subjects of the Central List. This certainly was not the scheme of the Constitution Act. In my opinion, the proper way to avoid a conflict would be to read entry 1 of the Provincial List, which contains the only provision relating to constitution of courts and administration of justice, along with the group of three entries, *viz.*, entry 53 of List I, entry 2 of List II and entry 15 of List III with which it is supposed to be in conflict,

(1) Vide Clemen's Canadian Constitution, 3rd Edn., p. 527.

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and to interpret the language of one by that of the other. Entry 1 of List II uses the expressions "administration of justice and constitution of all courts" in a perfectly general manner. No particular subject is specified to which the administration of justice might relate or for which a court might be constituted. It can, therefore, be legitimately interpreted to refer to a general jurisdiction to decide cases not limited to any particular subject. The other three items on the other hand relate to particular matters appearing in the three Lists and what they contemplate is the vesting of jurisdiction in courts with regard to such specific items only. In one case the jurisdiction is 'general' as is implied in the expression "administration of justice", while in the other three the jurisdiction is 'particular' as limited to particular matters and hence exclusive. I agree with my learned brother Patanjali Sastri J. that one approved way of determining the scope of a legislative topic is to have regard to what has been ordinarily treated as embraced within that topic in the legislative practice of the country(1); and if that test is applied, the interpretation suggested above would appear to be perfectly legitimate. The distinction between general and particular jurisdiction has always been recognised in the legislative practice of this country prior to the passing of the Constitution Act of 1935 and also after that. There have been always in this country civil courts of certain classes and categories graded in a certain manner according to their pecuniary jurisdiction and empowered to entertain and decide all suits of a civil nature within particular localities. Particular jurisdiction again have been conferred on some one or the other of these courts to try cases relating to certain specified matters. Thus there have been special jurisdictions created for insolvency, probate or guardianship proceedings, for deciding disputes relating to compulsory acquisition of land and for dealing with cases arising under the Rent Acts or the different legislations passed in recent years

(1) Vide *Croft* v. *Dunphy*, [1933] A.C. 156.

for scaling down exorbitant rates of interest or giving relief to rural debtors. Similar instances may be cited with regard to conferring of special jurisdiction in criminal cases.

There will be no difficulty in interpreting in a proper manner the different entries in the Legislative Lists referred to above if this distinction between general and special jurisdiction is kept in view. The entire scheme of the Constitution Act of 1935 is to vest the power of establishing courts upon the Provincial Legislature. The Provincial Legislature can endow the courts which it sets up with general jurisdiction to decide all cases which, according to the law of the land, are triable in a court of law, and all these powers can be exercised under entry 1 of List II. If the Central Legislature or the Provincial Legislature chooses to confer special jurisdiction on certain courts in respect to matters enumerated in their appropriate legislative lists, they can exercise such powers under the three entries specified above. But the exercise of any such powers by the Central Government would not in any way conflict with the powers exercisable by the Provincial Legislature under entry 1 of List II. The expression 'general' must always be understood as being opposed to what is 'special' or exclusive. If the Central Legislature vests any particular jurisdiction upon a court in respect to a Central matter, that matter would cease to be a general matter and consequently the court having general jurisdiction would no longer deal with that, but the general jurisdiction of such courts would not be affected thereby. The contents of general jurisdiction are always indeterminate and are not susceptible of any specific enumeration. In this view, I do not think that it would be at all necessary to invoke 'the pith and substance' doctrine in avoiding the possibility of incidental encroachment by the Provincial Legislature upon Central subjects in regard to conferring jurisdiction upon courts. If the expression 'jurisdiction' in entry 53 of List I means and refers to special jurisdiction only, there cannot be even an incidental encroachment upon such special jurisdiction

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by reason of the conferring of general jurisdiction upon courts by the Provincial Legislature under entry 1 of List II. As I have said already what is 'special' or made so, will automatically cease to be in the category of what is 'general' and no question of a conflict would at all arise.

It may be pointed out in this connection that in the Canadian Constitution also, the general scheme is to carry on administration of justice throughout Canada through the medium of provincial courts. Subject to the residuary power reserved to the Dominion Parliament under section 101 of the North America Act, the Constitution has assigned to the provinces the exclusive power in relation to administration of justice including the maintenance, constitution and organization of courts. There is no limitation in any provincial court along the line of division that exists between matters within the legislative competence of the Dominion Parliament and of the Provincial Legislative Assemblies(1). There is indeed no such thing as entry 53 in List I of the Indian Act in the Canadian Constitution, but there are judicial pronouncements to the effect that the Dominion Parliament can impose jurisdiction on provincial courts over Dominion subjects(2). It may be that the British Parliament in framing the legislative topics in the Government of India Act of 1935 in regard to administration of justice and jurisdiction of courts wanted to adopt the Canadian model with such modifications as they considered necessary. It is, however, immaterial to speculate on these matters. For the reasons given above, I am of the opinion that the decision of the Bombay High Court in *Mulchand* v. *Raman*(3) is correct, and the contention of Mr. Seervai should fail.

In the result, the appeal is allowed and the judgment of the High Court is set aside.

DAS J.—I agree that this appeal should be allowed. In view of the importance of the questions raised in

(1) Vide Clements Canadian Constitution p. 526.

(2) Vide Lefroy's Canada's Federal System p. 541.

(3) 51 Bom. L.R. 86.

this appeal, I consider it right to state my reasons for coming to that conclusion.

The salient facts, as to which there is no dispute, are as follows: On May 10, 1948, the Provincial Legislature of Bombay passed Act No. XL of 1948, called the Bombay City Civil Court Act, 1948. It was passed with a view "to establish an additional Civil Court for Greater Bombay." The provisions of that Act which will be relevant for the purposes of the present appeal may now be set out:

"1. (2) It shall come into force on such date as the Provincial Government may, by notification in the Official Gazette, appoint in this behalf.

3. The Provincial Government may, by notification in the Official Gazette, establish for the Greater Bombay a Court, to be called the Bombay City Civil Court. Notwithstanding anything contained in any law, such Court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ten thousand rupees in value, and arising within the Greater Bombay, except suits or proceedings which are cognizable—

(a) by the High Court as a Court of Admiralty or Vice-Admiralty or as a Colonial Court of Admiralty, or as a Court having testamentary, intestate or matrimonial jurisdiction, or

(b) by the High Court for the relief of insolvent debtors, or

(c) by the High Court under any special law other than the Letters Patent, or

(d) by the Small Cause Court:

Provided that the Provincial Government may, from time to time, after consultation with the High Court, by a like notification extend the jurisdiction of the City Court to any suits or proceedings of the nature specified in Clauses (a) and (b).

4. Subject to the exceptions specified in section 3, the Provincial Government may, by notification in the Official Gazette, invest the City Court with jurisdiction to receive, try and dispose of all suits and

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other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding twenty-five thousand rupees as may be specified in the notification.

12. Notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court:

Provided that the High Court may, for any special reason, and at any stage, remove for trial by itself any suit or proceeding from the City Court."

The Act received the assent of the Governor-General about the same time. It came into force on August 16, 1948, by a notification issued by the Provincial Government and published in the Official Gazette. Simultaneously with the passing of the above Act the Bombay Legislature also enacted Act (XLI of 1948) called the Bombay High Court Letters Patent Amendment Act, 1948. By section 3 of that Act Clause 12 of the Letters Patent was amended by adding the following words :—

"Except that the said High Court shall not have such Original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay or the Bombay City Civil Court."

Shortly after the passing of the above Acts, the validity of the Bombay City Civil Court Act (XL of 1948) as challenged in *Mulchand Kundanmal Jagtiani* v. *Raman Hiralal Shah*(1), a suit on promissory notes filed in the Original side of the High Court. A Division Bench of the Bombay High Court (Chagla C.J. and Bhagwati J.), on September 2, 1948, held that the Act was well within the legislative competence of the Provincial Legislature and was not *ultra vires*. Leave was given to the plaintiff in that suit under section 205 of the Government of India Act, 1935, to appeal to the Federal Court but no such appeal appears to have been filed.

On January 20, 1950, the Provincial Government of Bombay issued the following notification No. 2346/5 in the Official Gazette :

(1) A.I.R. 1949 Bom. 197; 51 Bom. L.R. 86.

"In exercise of the powers conferred by section 4 of the Bombay City Civil Court Act, 1948 (Bombay Act LX of 1948), the Government of Bombay is pleased to invest, with effect from and on the date of this notification, the City Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding twenty-five thousand rupees in value, and arising within the Greater Bombay subject, however, to the exceptions specified in section 3 of the said Act."

On February 6, 1950, the first respondent Narothamdas Jethabhai presented a plaint before the Prothonotary of the Bombay High Court for recovery of Rs. 11,704-5-4 with further interest due by the second respondent Aloysious Pinto Phillips upon three several promissory notes. In paragraph 4 of this plaint it was expressly pleaded that the High Court had jurisdiction to receive, try and dispose of that suit because (1) of the Bombay City Civil Court Act, 1948, was *ultra vires* and (2) at least section 4 of that Act and the notification issued thereunder were *ultra vires*. Having some doubts as to whether in view of the notification issued by the Provincial Government under section 4 of the Act the plaint could be admitted in the High Court, the Prothonotary placed the matter under the rules of the Court before Bhagwati J. who was then the Judge in Chambers. By his judgment delivered on February 23, 1950. Bhagwati J. held that section 4 of the Act and the notification issued thereunder were *ultra vires* and void and that the High Court, therefore, had jurisdiction to entertain the suit. The plaint as accordingly received and admitted.

The first respondent thereupon took out a summons under the rules of the Court for leave to sign judgment against the second respondent. The State of Bombay was, on its own application, added as a party to the suit. The matter was put up before a Division Bench (Chagla C. J. and Tendolkar J.) for trial of the following issues :

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"(1) Whether Act XL of 1948 is *ultra vires* of the Legislature of the State of Bombay.

(2) Whether Section 4 of Act XL of 1948 is in any event *ultra vires* of the Legislature of the State of Bombay.

(3) Whether the Government of Bombay Notification No. 2346/5 dated 20th January, 1950, is *ultra vires*, void and inoperative in law.

(4) Whether this Court has jurisdiction to try the suit."

The larger point involved in issue No. 1 having been concluded by the earlier decision of the Division Bench in *Mulchand Kundanmal Jagtiani* v. *Raman Hiralal Shah*(1) that issue was answered in the negative without any argument but leave was reserved to the first respondent to contest the correctness of that earlier decision in this Court. The Division Bench in agreement with Bhagwati J. held that by section 4 of the Act the Provincial Legislature did not itself legislate but delegated the power of legislation to the Provincial Government which it had no power to do and, therefore, section 4 and along with it the notification No. 2346/5 issued thereunder were *ultra vires*, void and inoperative. Accordingly they answered issues Nos. (2). (3) and (4) in the affirmative and sent the summons for judgment back to the learned Judge taking miscellaneous matters to dispose it of on merits. The State of Bombay has now come up before us in appeal from this decision of the High Court.

The Advocate-General of Madras has intervened in support of this appeal and for maintaining the validity of the Madras City Civil Court Act (VII of 1892) section 3A of which inserted in 1953 by way of amendment is in identical terms with section 4 of the Bombay Act except that the amount of the value was fixed at Rs. 10,000 in section 3A of the Madras Act instead of Rs. 25,000 fixed in section 4 of the Bombay Act.

The distinction between conditional legislation and delegation of legislative power has been well-known

(1) 51 Bom. L.R. 86.

ever since the decision of the Privy Council in *R.* v. *Burah*(1) and the other Privy Council cases cited in the judgments of the High Court. It is firmly established that conditional legislation is not only permissible but is indeed in many cases convenient and necessary. The difficulty which confronts the Courts is in ascertaining whether a particular provision of a Statute constitutes a conditional legislation as explained in the decisions of the Privy Council. In the present case the High Court, on a construction of section 4 of the Bombay City Civil Court Act, came to the conclusion that it was not an instance of conditional legislation at all. The use of the word "invest" in section 4 was considered by the High Court to be very significant and the difference between the language in section 3 and that in section 4 appeared to them to be very marked and striking. According to the High Court while by section 3 the Legislature itself set up a Court with a particular pecuniary jurisdiction, under section 4 the Legislature itself did not invest the Court with any higher jurisdiction but left it to the Provincial Government to exercise the function which the Government of India Act laid down should be exercised by the Provincial Legislature. The learned Chief Justice expressed the view that the Legislature never applied its mind to the question as to whether the new Court which it was setting up should have a jurisdiction higher than that of Rs. 10,000, and that section 4 was not a section which merely directed the Provincial Government to carry out the policy laid down by the Legislature, but that it was a section which conferred upon the Provincial Government the power to confer jurisdiction upon the Court. Then, after referring to *R.* v. *Burah*(1) and several other cases and purporting to apply the tests laid down in the decisions to the Act the learned Chief Justice concluded that the Legislature in the exercise of its legislative power had set up a Civil Court with a limited jurisdiction under section 3 of the Act, that it had not set up a Court with a jurisdiction higher than ten thousand rupees and

(1) L.R. 5 I.A. 178.

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that, having set up a Court of limited jurisdiction, it had given to the Provincial Government under section 4 the power to confer upon that Court a higher jurisdiction up to twenty-five thousand rupees. This power, which was conferred upon the Provincial Government was according to the Chief Justice, a power which could only have been exercised by the Legislature itself. I am unable to accept the afore-mentioned construction of sections 3 and 4 of the Act.

As I have already said, the High Court founded their conclusions principally on the observations of their Lordships of the Privy Council in *R.* v. *Burah*(1) and certain other Privy Council cases. It will be useful, therefore, to analyse the Privy Council decision in *R.* v. *Burah*(1). In 1869 the Indian Legislature passed an Act (No. XXII of 1869) purporting, first, to remove a district called Garo Hills from the jurisdiction of the Courts of civil and criminal jurisdiction and from the law prescribed for such Courts by Regulations and Acts and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. The Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the Calcutta Gazette, direct. The 8th section authorised the Lieutenant-Governor of Bengal by notification in the Calcutta Gazette to extend to the said territory, any law or any portion of any law then in force in other territories subject to his government or which may thereafter be enacted by the Council of the Governor-General or of himself. The 9th section of that Act provided:

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

(1) L.R. 5 I.A. 178.

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

On October 14, 1871, the Lieutenant-Governor of Bengal issued a notification in exercise of the powers conferred on him by section 9 extending the provisions of that Act to the territory known as the Khasi and Jaintia Hills and excluded therefrom the jurisdiction of the Courts of civil and criminal justice. The respondent Burah and another person having been convicted by the Deputy Commissioner of the Khasi and Jaintia Hills of murder and sentenced to death, which was later on commuted to transportation for life, they from jail sent a petition of appeal against their conviction. The provisions of Act XXII of 1869 having been extended, by notification under section 9, to the Khasi and Jaintia Hills, the High Court would have no jurisdiction to entertain the appeal, unless section 9 and the notification were *ultra vires* and void. The majority of the Judges of the Full Bench constituted for considering the question took the view that section 9 was really not legislation but was an instance of delegation of legislative power. The Crown obtained special leave to appeal to the Privy Council. In summarising the effect of the provisions of sections 1 to 8 of that Act on Garo Hills Lord Selborne who delivered the judgment of the Privy Council observed at page 194 that the Governor-General in Council had determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal leaving it to the Lieutenant-Governor to say at what time that change should take place, that the Legislature had determined that, so far, a certain change should take place, but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this

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district also, but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. His Lordship then proceeded to state the true meaning and effect of the provisions of section 9:

"This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The Legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted for these purposes also, a discretionary power to the Lieutenant-Governor."

Finally, his Lordship concluded at p. 195:

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council Their whole operation is, directly and immediately, under and by virtue of this Act XXII of 1869 itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in any imperial or in a Provincial Legislature they may, in their Lordships' judgment, be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence,

is no uncommon thing; and in many circumstances, it may be highly convenient."

If the reasonings underlying the observations of the Bombay High Court were correct then on those very reasonings it could be held in *Burah's case*(1) that while in enacting sections 1 to 8 the Legislature had applied its mind and laid down its policy as to the exclusion of the Garo Hills from the jurisdiction of the Courts the Legislature did not apply its mind and did not lay down any policy as to the exclusion of the Khasi and Jaintia Hills from the jurisdiction of the Courts but had left it to the Lieutenant-Governor to do what it alone could do. This construction quite clearly did not find favour with the Privy Council. The Privy Council by construction spelt out of the very language of section 9 that the Legislature itself had decided that it was fit and proper that the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts and brought under the same provisions as applied to the Garo Hills, not necessarily and at all events but if and when the Lieutenant-Governor should think it desirable to do so and accordingly entrusted a discretionary power to the Lieutenant-Governor. Adopting the same method of construction and adopting the language of Lord Selborne it may well be said that in enacting section 3 the Legislature itself has determined, in the due and ordinary course of legislation, to establish an additional Court of civil jurisdiction with jurisdiction to entertain suits and other proceedings arising within the Greater Bombay of the value up to Rs. 10,000 leaving it, by section 1 (2), to the Provincial Government to say at what time that change should take place. Likewise, it may be said that in enacting section 4 the Legislature itself has decided that it is fit and proper to extend the pecuniary jurisdiction of the new Court, not necessarily and at all events or all at once but, if and when the Provincial Government should think it desirable to do so and accordingly entrusted a discretionary power to the Provincial Government. It is entirely wrong to say that the

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Legislature has not applied its mind or laid down any policy. Indeed, the very fact that the extension of pecuniary jurisdiction should not exceed twenty-five thousand rupees, that the extension should be subject to the exceptions specified in section 3 clearly indicate that the Legislature itself has decided that the extension of the pecuniary jurisdiction of the new Court should be made, not necessarily or at all events or all at any one time but when the Provincial Government may consider it desirable to do so and while entrusting a discretionary power with the Provincial Government to determine the time for investing such extended jurisdiction on the new Court, the Legislature itself has also prescribed the limits of such extension. The efficacy of the Act of extension of jurisdiction is, therefore, not due to any other legislative authority than that of the Legislature itself. The expression "invest" does not appear to me to have any special significance. It only implies or indicates the result of the fulfilment of the condition which the Legislature itself laid down. To use the language of Lord Selborne the extension of jurisdiction is directly and immediately under and by virtue of this very Act itself. Here there is no effacement of the Legislature, no abdication of the legislative power. On the contrary, the proper Legislature has exercised its judgment as to the possible necessity for the extension of the pecuniary jurisdiction of the new Court and the result of that judgment has been to legislate conditionally as to such extension and that the condition having been fulfilled by the issue of the notification by the Provincial Government the legislation has now become absolute. In my judgment the construction put upon sections 3 and 4 by the High Court was erroneous and cannot be supported either on principle or on authority. When properly construed in the light of the observation and decision of the Privy Council in *R.* v. *Burah*(1) as indicated above section 4 does not amount to a delegation of legislative power at all but constitutes what is known as conditional legislation.

(1) L.R. 5 I.A. 178.

Reliance was placed by the High Court on the decision of the Federal Court of India in *Jatindra Nath Gupta* v. *Province of Bihar*(1) in support of their conclusions. That case was concerned with the question of the validity of the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act (V of 1947). Section 1 (3) provided the Act should remain in force for a period of one year from the date of its commencement. The relevant part of the proviso was in the following terms :

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

Three of the learned Judges held that the proviso and the notification thereunder were *ultra vires* and void. They laid particular emphasis on the power given to the Provincial Government to make any modification in the Act when extending its life as indicating that it was a delegation of legislative power. Another learned Judge did not decide this point but agreed to set aside the order of detention on another ground not material for our present purpose and the remaining learned Judge took a different view of the effect of the proviso and held that it was a conditional legislation within the meaning of the decision in *R.* v. *Burah*(2). I do not find it necessary, for the purposes of the present appeal, to express any view as to the correctness of the decision of the Federal Court in that case. Assuming, but without deciding, that the entrustment with the Provincial Government of the power to extend the life of an Act with such modifications as the Provincial Government in its unfettered discretion thought fit to make was nothing but a delegation of legislative powers, there is no such power of modification given to the Provincial Government by section 4 of the Bombay City Civil Court

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Act, 1948, and, therefore, that decision of the Federal Court can have no application to the case before us.

The learned Attorney-General wants to go further and contend that under the Government of India Act, 1935, it was permissible for the Legislatures, Central or Provincial, while acting within their respective legislative fields, to delegate their legislative powers. In the view I have expressed above, namely, that section 4 of the Bombay City Civil Court Act, 1948, does not involve any delegation of legislative power, I do not consider it necessary, on this occasion, to go into that question and I reserve my right to consider and decide that question including the question of the correctness of the decision of the Federal Court in *Jatindra Nath Gupta's case*(1) on that point as and when occasion may arise in future.

Learned Counsel for the first respondent then raises before us the larger question as to whether the Bombay City Civil Court Act, 1948, as a whole was or was not within the legislative competence of the Provincial Legislature of Bombay. Legislative powers were by section 100 of the Government of India Act, 1935, distributed amongst the Federal and the Provincial Legislatures. Under that section the Federal Legislature had, and the Provincial Legislature had not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to that Act. Likewise, the Provincial Legislature had, and the Federal Legislature had not, power to make laws for the Province with respect to any of the matters enumerated in List II in that Schedule. It will be noticed that the section, while affirmative giving legislative power with respect to certain matters to one Legislature, expressly excluded the legislative power of the other Legislature with respect to those matters. Lastly, section 100 gave concurrent power of legislation to the Federal as well as to the Provincial Legislature with respect to matters enumerated in List III in that Schedule. Section 107 of that Act made provision for resolving the inconsistency, if any, between a Provincial law and a Federal law or the existing Indian

(1) AIR 1949 FC 175

law with respect to any of the matters in the Concurrent List (*i.e.*, List III). Turning now to the three lists we find several entries relating to Courts, the relevant portions of which are as follows :—

List I.

Entry 53 : Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list.....

List II.

Entry 1 : .....the administration of justice, constitution and organisation of all Courts, except the Federal Court, and fees taken therein ;.....

Entry 2 : Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list ; procedure in Rent and Revenue Courts.

List III.

PART 1.

Entry 2 : Criminal Procedure, including all matters included in the Code of the Criminal Procedure at the date of the passing of this Act.

Entry 4 : Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act ;.....

Entry 15 : Jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list.

Learned Attorney-General urges that entry 1 in List II clearly indicates that administration of justice had been expressly made a provincial subject and that it was only the Provincial Legislature which could make laws with respect to administration of justice. The next steps in the argument are that there could be no administration of justice unless Courts were constituted and organised; that the constitution and organisation of Courts would be meaningless enterprises for the Provincial Legislatures to indulge in, unless the Courts so constituted and organised were

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vitalised by being invested with jurisdiction and powers to receive, try and determine suits and other proceedings. The argument, therefore, is that entry 1 in List II by itself gave power to the Provincial Legislature not only to constitute and organise Courts but also to confer jurisdiction and powers on them. The learned Attorney-General relies on *Jagtiani's case*(1) and points out that under entry 1 administration of justice was entirely a provincial responsibility and the Provincial Legislature was authorised to make laws with respect to administration of justice. Administration of justice, so the argument proceeds, is inseparable from Courts and Courts without jurisdiction is an incomprehensible notion. The conclusion sought to be established, therefore, is that under entry 1 alone of List II the Provincial Legislature had power to make a law, not merely constituting a new Court but, investing such new Court with general jurisdiction and powers to receive, try and determine all suits and other proceedings. If entry 1 in List II stood alone and entry 53 in List I, entry 2 in List II and entry 15 in List III were not in the Seventh Schedule, the argument would have been unanswerable. In Section 92 of the British North America Act, 1867, there was no separate provision authorising the making of laws with respect to jurisdiction and powers of Courts and, therefore, the authority to make laws with respect to the jurisdiction and powers of Courts had of necessity to be found in and spelt out of the words "administration of justice" occurring in section 92 (14) of that Act. There is, however, no such pressing or compelling necessity for giving such wide and all embracing meaning to the words "administration of justice" in entry 1 of List II. The expression "administration of justice" may be an expression of wide import and may ordinarily, and in the absence of anything indicating any contrary intention, cover and include within its ambit several things as component parts of it, namely, the constitution and organisation of Courts, jurisdiction and powers of the Courts and the laws to be administered by the Courts. But the legislative

(1) 51 Bom. LR 86.

practice in England as well as in India has been to deal with these topics separately in legislative enactments: see for example Indian High Courts Act 1861 (24 and 25 Vic., c. 104) sections 2 and 19; Government of India Act, 1935, sections 220 and 223, the Letters Patent of the Bombay High Court, 1865, and also the different Civil Courts Acts. Of these, one topic, namely, "constitution and organisation of Courts" had been expressly included in entry 1 of List II in addition to "administration of justice", a fact of some significance which must be noted although I do not say that the inclusion of the words "constitution and organisation of all Courts" in entry 1 of List II by itself and in the absence of anything else cut down the generality of the meaning of the expression "administration of justice" which preceded those words, for such a construction may militate against the principle laid down by the Privy Council in *Meghraj* v. *Allah Rakhia*(1). Further, entry 2 in List II would have been wholly unnecessary if the expression "administration of justice" in entry 1 in List II were to be given the wide meaning contended for by the learned Attorney-General, for if under entry 1 in List II the Provincial Legislature had plenary powers to make laws conferring on, or taking away from, Courts, existing or newly constituted, jurisdiction and powers of the widest description, such power would also include the lesser power of conferring jurisdiction and powers with respect to any of the matters enumerated in List II, such as is contemplated by entry 2 in List II. The greater power would certainly have included the lesser. I do not say that the presence of entry 2 in List II by itself cut down the ambit of the expression "administration of justice" in entry 1, for if there were only entries 1 and 2 in List II and there were no entries like entry 53 in List I and entry 15 in List III, it might have been argued with some plausibility that in framing the two entries in the same list not much care was bestowed by the draftsman to prevent overlapping and that as

(1) LR 74 IA 12, at p. 20.

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both the entries in one and the same list gave legislative power to the same Legislature the overlapping caused no confusion or inconvenience and that it was not necessary, therefore, to construe entry 1 of List II as cut down by entry 2 in the same List. The important thing to notice is that the topic of "jurisdiction and powers of Courts" had not been included in entry 1 in List II along with the topic of "constitution and organization of Courts", but the legislative powers with respect to the topic of "jurisdiction and powers of the Courts" had been distributed between the Federal and the Provincial Legislatures in the manner set forth in entry 53 in List I, entry 2 in List II and entry 15 in List III. The inclusion of "constitution and organisation of Courts" as a separate item in entry 1 in List II, the omission of the topic of "jurisdiction and powers of Courts" from entry 1 and the deliberate distribution of powers to make laws with respect to jurisdiction and powers of Courts with respect to the several matters specified in the three lists clearly indicate to my mind that the intention of Parliament was not, by entry 1 in List II by itself, to authorise the Provincial Legislature to make any law with respect to the jurisdiction and powers of Courts. In my judgment, entry 1 in List II cannot be read as at all giving any power to the Provincial Legislature to confer any jurisdiction or power on any Court it might constitute or organise under that entry and that the expressions "administration of justice" and "constitution and organisation of Courts" occurring in entry 1 in List II should be read as exclusive of "the jurisdiction and powers of Courts" the powers of legislation with respect to which were distributed under entry 53 in List I, entry 2 in List II and entry 15 in List III. Such a construction will be consonant with the principle of construction laid down by the Privy Council in the case of *In re Marriage Legislation in Canada*(1).

It is next said that entry 1 in List II gave general powers to the Provincial Legislature to make laws

(1) [1912] AC 880.

conferring general jurisdiction and powers on Courts constituted by it under that entry while entry 53 in List I, entry 2 in List II and entry 15 in List III conferred special powers on the Federal and Provincial Legislatures to make laws conferring special jurisdiction and powers with respect to matters specified in their respective Lists. As I have already pointed out, if entry 1 in List II conferred plenary powers on the Provincial Legislature to make laws with respect to jurisdiction and powers of Courts in widest terms, entry 2 in List II would be wholly redundant, for the wider power itself would include the lesser power. Further, the very concession that entry 53 in List 1, entry 2 in List II and entry 15 in List III gave special powers to the Legislature to confer special jurisdiction and powers necessarily amounts to an admission that the powers conferred on the Provincial Legislature by entry 1 in List II were exclusive of the powers conferred under entry 53 in List I, entry 2 in List II and entry 15 in List III, for if entry 1 in List II gave power to the Provincial Legislature to make laws conferring general jurisdiction of the widest kind which included jurisdiction and powers with respect to all matters specified in all the Lists, then the utility of entry 53 in List I, entry 2 in List II and entry 15 in List III as giving special powers to make laws conferring special jurisdiction would vanish altogether. Special power to confer special jurisdiction would be meaningless if it were included in the general power also. This circumstance by itself should be sufficient to induce the Court to assign a limited scope and ambit to the power conferred on the Provincial Legislature under entry 1 in List II. We, therefore, come back to the same conclusion that entry 1 in List II should be construed and read as conferring on the Provincial Legislature all powers with respect to administration of justice and constitution and organisation of Courts minus the power to make laws with respect to the jurisdiction and powers of Courts.

It is pointed out that under entry 1 in List II it was only the Provincial Legislature which alone could

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constitute and organise a new Court and if that entry did not empower the Provincial Legislature to vest in such new Court the general jurisdiction and power to receive, try and dispose of all kinds of suits and other proceedings, then no new Court of general jurisdiction could be established at all. As will be seen hereafter, the Provincial Legislature has, under entry 2 in List II, power to make laws conferring wide general jurisdiction and powers on a newly constituted Court and consequently a forced construction need not be placed on entry 1 in List II. It is said that if the Provincial Legislature could not, under entry 1 in List II, confer jurisdiction on a new Court set up by it under that entry, the result would have been that the Provincial Legislature would have had to set up a new Court by one law made under entry 1 of List II without conferring on it any jurisdiction whatever and would have had to make another law with respect to the jurisdiction and powers of such Court. I see no force in this, for the Provincial Legislature could by one and the same law have set up a Court under entry 1 in List II and vested in the Court jurisdiction and powers with respect to any of the matters specified in List II and, subject to section 107 of the Act with respect to any of the matters enumerated in List III. It is wrong to assume that the Provincial Legislature could not make one law under both entry 1 and entry 2 in List II and entry 15 in List III at one and the same time.

A good deal of argument was advanced before us as to the applicability of the doctrine of pith and substance and, indeed, the decision of the Bombay High Court in *Jagtiani's* case was practically founded on that doctrine. Shortly put, the argument, as advanced, is that under entry 1 in List II the Provincial Legislature had power to make laws with respect to administration of justice; that, therefore, the Provincial Legislature had power, under entry 1 itself, to make laws conferring general jurisdiction and powers on Courts constituted and organised by it under that entry; that if in making such law

the Provincial Legislature incidentally encroached upon the legislative field assigned to the Federal Legislature under entry 53 in List I with respect to the jurisdiction and powers of Court with respect to any of the matters specified in List I, such incidental encroachment did not invalidate the law, as in pith and substance it was a law within the legislative powers. In my judgment, this argument really begs the question. The doctrine of pith and substance postulates, for its application, that the impugned law is substantially within the legislative competence of the particular Legislature that made it, but only incidentally encroached upon the legislative field of another Legislature. The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular Legislature which made it. Therefore, if the Provincial Legislature under entry 1 had power to vest general jurisdiction on a newly constituted Court, then if the law made by it incidentally gave jurisdiction to the Court with respect to matters specified in List I the question of the applicability of the doctrine of pith and substance might have arisen. I have already pointed out that on a proper construction, entry 1 of List II did not empower the Provincial Legislature to confer any jurisdiction or power on the Court and the expression "administration of justice" had to be read as covering matters relating to administration of justice other than jurisdiction and powers of Court and, if that were so, the discussion of the doctrine of pith and substance does not arise at all. I find it difficult to support the reasonings adopted by the Bombay High Court in *Jagtiani's case.*

The argument as to the applicability of the doctrine of pith and substance to the impugned Act can, however, be well maintained in the following modified form. Under entry 2 in List II the Provincial Legislature had power to make laws with respect to the jurisdiction and powers of Courts with respect to any of the matters enumerated in List II; that "administration of justice" in entry 1 is one of the matters in

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List II; that, therefore, the Provincial Legislature had power to confer the widest general jurisdiction on any new Court or take away the entire jurisdiction from any existing Court and there being this power, the doctrine of pith and substance applies. It is suggested that this argument cannot be formulated in view of the language used in entry 2 in List II. It is pointed out that entry 2 treats "any of the matters in this List" as subject-matter "with respect to" which, *i.e.*, "over" which the Court may be authorised to exercise jurisdiction and power. This construction of entry 2 is obviously fallacious, because jurisdiction and powers of the Court "over" administration of justice as a subject-matter is meaningless and entry 2 can never be read with entry 1. This circumstance alone shows that the words "with respect to" occurring in entry 2 in List II when applied to entry 1 did not mean "over" but really meant "relating to" or "touching" or "concerning" or "for" administration of justice, and so read and understood, entry 2, read with entry 1 in List II, clearly authorised the Provincial Legislature to make law conferring on or taking away from a Court general jurisdiction and powers relating to or touching or concerning or for administration of justice. This line of reasoning has been so very fully and lucidly dealt with by my brother Sastri J. that I have nothing to add thereto and I respectfully adopt his reasonings and conclusion on the point. This argument, in my opinion, resolves all difficulties by vesting power in the Provincial Legislature to confer general jurisdiction on Courts constituted and organised by it for effective administration of justice which was made its special responsibility. Any argument as to deliberate encroachment that might have been founded on the Proviso to section 3 of the Act which enabled the Provincial Government to give to the City Court even Admiralty jurisdiction which was a matter in List I has been set at rest by the amendment of the Proviso by Bombay Act XXVI of 1950. The impugned Bombay Act may, in my judgment, be well supported as a law made by the Provincial Legislature under

entry 2 read with entry 1 in List II and I hold accordingly. I, therefore, concur in the order that this appeal be allowed.

In the view I have taken, it is not necessary to discuss the contention of the learned Attorney-General that the Bombay City Civil Court Act may be supported as a piece of legislation made by the Provincial Legislature of Bombay under entry 4 read with entry 15 in Part I of List III and I express no opinion on that point.

Appeal allowed.

Agent for the appellant: *P. A. Mehta.*

Agent for the respondents: *Rajinder Narain.*