1959

January 15.

DEEP CHAND

v.

THE STATE OF UTTAR PRADESH AND OTHERS

(and connected appeal)

(S. R. DAS, C. J., N. H. BHAGWATI, B. P. SINHA, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Transport Service—Scheme of nationalisation formulated under State enactment of Amendment of Central Act—Effect—Repugnancy —Constitutional validity of State enactment—Uttar Pradesh Transport Service (Development) Act (IX of 1955), s. 11(5)—Motor Vehicles (Amendment) Act, 1956 (100 of 1956), Ch. IVA—General Clauses Act, 1897 (10 of 1897), s. 6—Constitution of India—Articles 13, 31, 245, 246, 254.

These appeals impugned the constitutionality of the Uttar Pradesh Transport Service (Development) Act, 1955 (U. P. IX of 1955), passed by the State Legislature after obtaining the assent of the President, and the validity of the scheme of nationalisation framed and the notifications issued by the State Government under it. The appellants as permit-holders under the Motor Vehicles Act, 1939, were plying buses on different routes in Uttar Pradesh along with buses owned by the State Government. The State Government issued a notification under s. 3 of the impugned Act directing that the said routes along with others should be exclusively served by the State buses, and followed up that notification by others under ss. 4 and 8 of the Act. The appellants moved the High Court under Art. 226 of the Constitution challenging the validity of the said Act and the notifications thereunder. The High Court rejected their petitions and thereafter came into force the Motor Vehicles (Amendment) Act (100 of 1956), inserting Ch. IVA into the Act, which provided for nationalisation of transport services. The contentions raised on behalf of the appellants were,—(1) that the passing of the Amending Act made the impugned Act wholly void under Art. 254(1) of the Constitution, (2) that the scheme framed under the impugned Act fell within the purview of s. 68B of the Amending Act and ceased to be operative and (3) that even assuming that the impugned Act was valid in so far as the scheme was concerned, it violated Art. 31 as it stood before the Constitution (Fourth Amendment) Act, 1955. A further contention on the basis of the proviso to Art. 254(2) was that the impugned Act stood wholly repealed by the Amending Act, s. 68B of the latter excluding the operation of the General Clauses Act. It was contended, inter alia, on behalf of the State that the amendment of Art. 31 by the Constitution (Fourth Amendment) Act, 1955, having removed, before the scheme under the impugned Act had

yet been framed, the constitutional limitation which that Article had imposed on the Legislature when it passed the impugned Act, had the effect of validating that Act passed by it at a time when it was subject to the limitation.

Held, (per curiam), that the Uttar Pradesh Transport Service (Development) Act, 1955, did not, on the passing of the Motor Vehicles (Amendment) Act, 1956 (100 of 1956), become wholly void under Art. 254(1) of the Constitution but continued to be a valid and subsisting law supporting the scheme already framed under the U.P. Act. Even assuming that the Amending Act had the effect, under Art. 254(2), of repealing the State Act, such repeal could not nullify the scheme already framed under that Act, for the provisions of s. 6 of the General Clauses Act would operate to save it.

Nor could it be said, having regard to the provisions of the impugned Act and particularly s. 11(5) thereof, that it offended Art. 31 of the Constitution as it stood before the Constitution (Fourth Amendment) Act, 1955, by failing to provide for the payment of adequate compensation.

Per Das, C.J., and Sinha, J.—There was no reason why the doctrine of eclipse as explained in *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh*, [1955] 2 S.C.R. 589, could not also apply to a post-Constitution law that infringed a fundamental right conferred on citizens alone. Such a law, though shadowed and rendered ineffective by the fundamental right so far as the citizens were concerned, would remain effective so far as non-citizens were concerned. The moment the shadow was removed by a constitutional amendment, the law would apply to citizens without re-enactment.

John M. Wilkerson v. *Charles A. Rahrer*, (1891) 140 U.S. 545; 35 L. Ed. 572 and *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh*, [1955] 2 S.C.R. 589, referred to.

The question whether a post-Constitution law that infringed a fundamental right guaranteed to all persons, citizens or non-citizens, would be subject to that doctrine should, however, be left open.

Held, (per Bhagwati, Subba Rao and Wanchoo, JJ.), that it was apparent from the provisions of Arts. 254, 246 and 13 of the Constitution, read together, that the power of Parliament and the State Legislature to make laws with regard to any of the matters enumerated in the relevant list in the Seventh Schedule was subject to the provisions of the Constitution including Art. 13. There was a clear distinction between the two clauses of Art. 13. Under cl. (1), pre-Constitution law subsisted except to the extent of its inconsistency with the provisions of Part III whereas under cl. (2) any post-Constitution law contravening those provisions was a nullity from its inception to the extent of such contravention. The words "any law" in the second line of

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cl. (2) meant an Act factually passed in spite of the prohibition contained therein, and did not pre-suppose that the law made was not a nullity. That prohibition went to the root and limited the State's power of legislation and law made in spite of it was a still-born one.

In construing the constitutional provisions relating to the powers of the legislature embodied in Arts. 245 and 13(2) of the Constitution, no distinction should be made as between an affirmative and a negative provision, for both are limitations on that power.

K. C. Gajapati Narayan Deo v. *The State of Orissa*, [1954] S.C.R. 1, referred to.

A distinction, well-recognised in judicial decisions, had, however, to be made in judging the effect of law made in transgression of the limits fixed by Arts. 245 and 13(2), between an Act that was void from its inception and one that, though valid when made, was rendered unconstitutional later on. On that distinction was based the principle that an after-acquired power could not validate a statute and a law validly made could take effect when the obstruction was removed.

A review of the relevant authorities and judicial decisions clearly established, (1) that affirmative conferment of power to make laws subject-wise and the negative prohibition from infringing any fundamental rights were but two aspects of want of legislative power, (2) that by expressly making the power to legislate on the entries in the Seventh Schedule subject to other provisions of the Constitution, that power was subjected to the limitations laid down in Part III of the Constitution, (3) that, therefore, a law in derogation or in excess of such power would be void *ab initio* either wholly or to the extent of the contravention and that (4) the doctrine of eclipse could be invoked only in the case of a law that was valid when made but was rendered invalid by a supervening constitutional inconsistency.

Newberry v. *United State*, (1912) 265 U.S. 232; 65 L. Ed. 913; *John M. Wilkerson* v. *Charles A. Rahrer*, (1891) 140 U. S. 545; 35 L. Ed. 572; *Carter* v. *Egg and Egg Pulp Marketing Board*, (1942) 66 C.L.R. 557; *Keshavan Madhava Menon* v. *The State of Bombay*, [1951] S.C.R. 228; *Behram Khurshed Pesikaka* v. *The State of Bombay*, [1955] 1 S.C.R. 589; *Saghir Ahmed* v. *The State of U. P.* [1955] 1 S.C.R. 707; *Ram Chandra Balai* v. *State of Orissa*, [1956] S.C.R. 28 and *Pannalal Binjraj* v. *Union of India*, [1957] S.C.R. 233, referred to and discussed.

The tests of repugnancy between two statutes, one passed by the Parliament and the other by the State Legislature, were, (1) whether there was a direct conflict between them, (2) whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature, and (3) whether both the laws occupied the same field.

A comparison of the provisions of the two Acts indicated

that both were intended to operate in respect of the same subject matter and the same field but only in respect of the schemes initiated after the Amending Act had come into force, the latter Act having no retrospective effect. The State Act must, therefore, yield place to the Central Act to that extent and become void only in respect of schemes framed under the Central Act.

Keshavan Madhava Menon v. *The State of Bombay*, [1951] S.C.R. 228, applied.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 380 to 389, 391 to 399, 401, 429 and 431 to 434 of 1958.

Appeals from the judgment and decree dated December 19, 1956, of the Allahabad High Court in Civil Misc. Writs Nos. 1574, 1575, 1576, 1577, 1578, 1579, 1444, 1584, 1586, 1589, 1631, 1632, 1634, 1635, 1636, 1694, 1695, 1697, 1704, 1707, 3726, 1647, 1948 and 1949 and 1956.

M. K. Nambiyar, Shyam Nath Kacker, J. B. Dadachanji, S. N. Andley and *Rameshwar Nath*, for the appellants (in C. As. Nos. 380-385, 387-389, 391-399 and 401 of 1958).

S. N. Kacker and *J. B. Dadachanji*, for the appellant (in C. A. No. 386/58).

Naunit Lal, for the appellants (in C. As. Nos. 429 & 431-434/58).

K. B. Asthana & G. N. Dikshit, for the respondents.

1959. January 15. The judgment of Das, C. J., and Sinha, J., was delivered by Das, C. J. The judgment of Bhagwati, Subba Rao and Wanchoo, JJ., was delivered by Subba Rao, J.

Das C. J.

DAS, C. J.—We have had the advantage of perusing the judgment prepared by our learned Brother Subba Rao and we agree with the order proposed by him, namely, that all the above appeals should be dismissed with costs, although we do not subscribe to all the reasons advanced by him.

The relevant facts and the several points raised by learned counsel for the appellants and the petitioners in support of the appeals have been fully set out in the judgment which our learned Brother will presently deliver and it is not necessary for us to set out the

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same here. Without committing ourselves to all the reasons adopted by our learned Brother, we agree with his following conclusions, namely, (1) that the Uttar Pradesh Transport Service (Development) Act, 1955 (Act IX of 1955), hereinafter referred to as the U. P. Act, did not, on the passing of the Motor Vehicles (Amendment) Act, 1956 (100 of 1956), hereinafter referred to as the Central Act, become wholly void under Art. 254(1) of the Constitution but continued to be a valid and subsisting law supporting the scheme already framed under the U. P. Act; (2) that, even if the Central Act be construed as amounting, under Art. 254(2), to a repeal of the U. P. Act, such repeal did not destroy or efface the scheme already framed under the U. P. Act, for the provisions of s. 6 of the General Clauses Act saved the same; (3) that the U. P. Act did not offend the provisions of Art. 31 of the Constitution, as it stood before the Constitution (4th Amendment) Act, 1955, for the U. P. Act and in particular s. 11(5) thereof provided for the payment of adequate compensation. These findings are quite sufficient to dispose of the points urged by Mr. Nambiyar and Mr. Naunit Lal in support of the claims and contentions of their respective clients.

In view of the aforesaid finding that the U. P. Act did not infringe the fundamental rights guaranteed by Art. 31, it is wholly unnecessary to discuss the following questions, namely, (a) whether the provisions of Part III of the Constitution enshrining the fundamental rights are mere checks or limitations on the legislative competency conferred on Parliament and the State Legislatures by Arts. 245 and 246 read with the relevant entries in the Lists in the Seventh Schedule to the Constitution or are an integral part of the provisions defining, prescribing and conferring the legislative competency itself and (b) whether the doctrine of eclipse is applicable only to pre-Constitution laws or can apply also to any post-Constitution law which falls under Art. 13(2) of the Constitution. As, however, our learned Brother has thought fit to embark upon a discussion of these questions, we desire to guard ourselves against being understood as

accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitution law. A post-Constitution law may infringe either a fundamental right conferred on citizens only or a fundamental right conferred on any person, citizen or non-citizen. In the first case the law will not stand in the way of the exercise by the citizens of that fundamental right and, therefore, will not have any operation on the rights of the citizens, but it will be quite effective as regards non-citizens. In such a case the fundamental right will, qua the citizens, throw a shadow on the law which will nevertheless be on the Statute Book as a valid law binding on non-citizens and if the shadow is removed by a constitutional amendment, the law will immediately be applicable even to the citizens without being re-enacted. The decision in *John M. Wilkerson* v. *Charles A. Rahrer* (1) cited by our learned Brother is squarely in point. In other words the doctrine of eclipse as explained by this Court in *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh* (2) also applies to a post-Constitution law of this kind. Whether a post-Constitution law of the other kind, namely, which infringes a fundamental right guaranteed to all persons, irrespective of whether they are citizens or not, and which, therefore, can have no operation at all when it is enacted, is to be regarded as a still born law as if it had not been enacted at all and, therefore, not subject to the doctrine of eclipse is a matter which may be open to discussion. On the findings arrived at in this case, however, a discussion of these aspects of the matter do not call for a considered opinion and we reserve our right to deal with the same if and when it becomes actually necessary to do so.

Subba Rao J.

SUBBA RAO, J.—These twenty-five appeals are by certificate under Arts. 132 and 133 of the Constitution granted by the High Court of Judicature at Allahabad and raise the question of the validity of the scheme of nationalization of State Transport Service formulated by the State Government and the consequential orders made by it.

(1) (1891) 140 U.S. 545; 35 L. Ed. 572. (2) [1955] 2 S.C.R. 589.

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The said appeals arise out Writ Petitions filed by the appellants in the Allahabad High Court challenging the validity of the U. P. Transport Services (Development) Act of 1955, being U. P. Act No. IX of 1955 (hereinafter referred to as the U. P. Act), and the notifications issued thereunder. All the appeals were consolidated by order of the High Court.

The appellants have been carrying on business as stage carriage operators for a considerable number of years on different routes in Uttar Pradesh under valid permits issued under the Motor Vehicles Act, 1939, along with buses owned by Government. The U. P. Legislature, after obtaining the assent of the President on April 23, 1955, passed the U. P. Act and duly published it on April 24, 1955. Under s. 3 of the U. P. Act, the Government issued a notification dated May 17, 1955, whereunder it was directed that the aforesaid routes along with others should be exclusively served by the stage carriages of the Government and the private stage carriages should be excluded from those routes. On November 12, 1955, the State Government published the notification under s. 4 of the U. P. Act formulating the scheme for the aforesaid routes among others. The appellants received notices under s. 5 of the U. P. Act requiring them to file objections, if any, to the said scheme; and after the objections were received, they were informed that they would be heard by a Board on January 2, 1956. On that date, the objections filed by the operators other than those of the Agra region were heard and the inquiry in regard to the Agra region was adjourned to January 7, 1956. It appears that the operators of the Agra region did not appear on the 7th. The notification issued under s. 8 of the U. P. Act was published in the U. P. Gazette on June 23, 1956, and on June 25, 1956, the Secretary to the Regional Transport Authority, Agra, sent an order purported to have been issued by the Transport Commissioner to the operators of the Agra region prohibiting them from plying their stage carriages on the routes and also informing them that their permits would be transferred to other routes. On July 7, 1956, a notice was sent to

the other operators in similar terms. The appellants filed Writ Petitions in the Allahabad High Court challenging the validity of the U. P. Act and the notifications issued thereunder.

The facts in Civil Appeal No. 429 of 1958 are slightly different from those in other appeals and they may be stated: The appellant's application for renewal of his permanent permit was rejected in 1953; but, on appeal, the State Transport Authority Tribunal allowed his appeal on September 6, 1956, and directed his permit to be renewed for three years beginning from November 1, 1953. Pursuant to the order of the Tribunal, the appellant's permit was renewed with effect from November 1, 1953, and it was made valid up to October 31, 1956. The scheme of nationalisation was initiated and finally approved between the date of the rejection of the appellant's application for renewal and the date when his appeal was allowed. The appellant applied on October 11, 1956, for the renewal of his permit and he was informed by the Road Transport Authority, Allahabad, that no action on his application, under reference was possible. The appellant's contention, among others, was that the entire proceedings were taken behind his back and therefore the scheme was not binding on him.

The appellants in thirteen appeals, namely, Civil Appeals Nos. 387 to 389, 391 to 394, 396 to 399 and 401 and 429 were offered alternative routes. Though they tentatively accepted the offer, presumably on the ground that it was the lesser of the two evils, in fact they obtained stay as an interim arrangement and continued to operate on the old routes.

The appellants filed applications for permission to urge new grounds in the appeals, which were not taken before the High Court. The said grounds read :—

(i) That by reason of the coming into operation of the Motor Vehicles (Amendment) Act, No. 100 of 1956, passed by Parliament and published in the Gazette of India Extraordinary dated 31st December, 1956, the impugned U. P. Act No. IX of 1955 has become void.

(ii) That by reason of Article 254 of the Constitution of India, the said impugned Act No. IX of 1955,

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being repugnant and inconsistent with the Central Act No. 100 of 1956, has become void since the coming into operation of the aforesaid Act No. 100 of 1956". The judgment of the Allahabad High Court, which is the subject-matter of these appeals, was delivered on December 19, 1956. The Amending Act of 1956 was published on December 31, 1956. It is therefore manifest that the appellants could not have raised the aforesaid grounds before the High Court. Further, the grounds raise only a pure question of law not dependent upon the elucidation of any further facts. In the circumstances, we thought it to be a fit case for allowing the appellants to raise the new grounds and we accordingly gave them the permission.

Mr. M. K. Nambiar, appearing for some of the appellants, raised before us the following points: (i) The Motor Vehicles (Amendment) Act (100 of 1956) passed by the Parliament is wholly repugnant to the provisions of the U. P. Act and therefore the latter became void under the provisions of Article 254(1) of the Constitution; with the result that, at the present time, there is no valid law whereunder the Government can prohibit the appellants from exercising their fundamental right under the Constitution, namely, to carry on their business of motor transport; (ii) the scheme framed under the Act, being one made to operate in future and from day to day, is an instrument within the meaning of s. 68B of the Amending Act, and therefore the provisions of the Amending Act would prevail over those of the scheme, and after the Amending Act came into force, it would have no operative force; and (iii) even if the U. P. Act was valid and continued to be in force in regard to the scheme framed thereunder, it would offend the provisions of Art. 31 of the Constitution, as it was before the Constitution (Fourth Amendment) Act, 1955, as, though the State had acquired the appellant's interest in a commercial undertaking, no compensation for the said interest was given, as it should be under the said Article. The other learned Counsel, who followed Mr. Nambiar, except Mr. Naunit Lal, adopted his argument. Mr. Naunit Lal, in addition to the argument

advanced by Mr. Nambiar in regard to the first point, based his contention on the proviso to Art. 254(2) of the Constitution rather than on Art. 254(1). He contended that by reason of the Amending Act, the U. P. Act was repealed in *toto* and, because of s. 68B of the Amending Act, the operation of the provisions of the General Clauses Act was excluded. In addition, he contended that in Appeal No. 429 of 1958, the scheme, in so far as it affected the appellant's route was bad inasmuch as no notice was given to him before the scheme was approved.

We shall proceed to consider the argument advanced by Mr. Nambiar in the order adopted by him; but before doing so, it would be convenient to dispose of the point raised by the learned Advocate General, for it goes to the root of the matter, and if it is decided in his favour, other questions do not fall for consideration. The question raised by the learned Advocate General may be posed thus: whether the amendment of the Constitution removing a constitutional limitation on a legislature to make a particular law has the effect of validating the Act made by it when its power was subject to that limitation. The present case illustrates the problem presented by the said question. The U. P. Legislature passed the U. P. Act on April 24, 1955, whereunder the State Government was authorized to frame a scheme of nationalization of motor transport. After following the procedure prescribed therein, the State Government finally published the scheme on June 23, 1956. The Constitution (Fourth Amendment) Act, 1955, received the assent of the President on April 27, 1955. The State Government framed the scheme under the U. P. Act after the passing of the Constitution (Fourth Amendment) Act, 1955. Under the said Amendment Act, cl. (2) of Art. 31 has been amended and cl. (2A) has been inserted. The effect of the amendment is that unless the law provides for the transfer of ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or

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requisition of property within the meaning of cl. (2) of that Article and therefore where there is no such transfer, the condition imposed by cl. (2), viz., that the law should fix the amout of compensation or specify the principles on which and the manner in which the compensation is to be determined and given, is not attracted. If the amendment applies to the U. P. Act, as there is no transfer of property to the State, no question of compensation arises. On the other hand, if the unamended Article governs the U. P. Act, the question of compensation will be an important factor in deciding its validity. The answer to the problem so presented depends upon the legal effect of a constitutional limitation of the legislative power on the law made in derogation of that limitation. A distinction is sought to be made by the learned Advocate General between the law made in excess of the power conferred on a legislature under the relevant List in the Seventh Schedule and that made in violation of the provisions of Part III of the Constitution. The former, it is suggested, goes to the root of the legislative power, whereas the latter, it is said, operates as a check on that power, with the result that the law so made is unenforceable, and as soon as the check is removed, the law is resuscitated and becomes operative from the date the check is removed by the constitutional amendment.

Mr. Nambiar puts before us the following two propositions in support of his contention that the law so made in either contingency is void *ab initio*: (i) the paramountcy of fundamental rights over all legislative powers in respect of all the Lists in the Seventh Schedule to the Constitution is secured by the double process of the prohibition laid by Art. 13(2) and the restrictions imposed by Art. 245, unlike the mere implied prohibition implicit in the division of power under Art. 246; and (ii) where the provisions of an enactment passed by a legislature after January 26, 1950, in whole or in part—subject to the doctrine of severability—are in conflict with the provisions of Part III, the statute, in whole or in part, is void *ab initio*. This question was subjected to judicial scrutiny by this

Court, but before we consider the relevant authorities, it would be convenient to test its validity on first principles.

The relevant Articles of the Constitution read as follows:

Article 245: "(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State."

Article 246: "(1) Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Article 13: "(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

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Article 31 (Before the Constitution (Fourth Amendment) Act, 1955):

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given".

The combined effect of the said provisions may be stated thus: Parliament and the Legislatures of States have power to make laws in respect of any of the matters enumerated in the relevant lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution including Art. 13, i.e., the power is made subject to the limitations imposed by Part III of the Constitution. The general power to that extent is limited. A Legislature, therefore, has no power to make any law in derogation of the injunction contained in Art. 13. Article 13(1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency be void. The clause, therefore, recognizes the validity of the pre-Constitution laws and only declares that the said laws would be void thereafter to the extent of their inconsistency with Part III; whereas cl. (2) of that article imposes a prohibition on the State making laws taking away or abridging the rights conferred by Part III and declares that laws made in contravention of this clause shall, to the extent of the contravention, be void. There is a clear distinction between the two clauses. Under cl. (1), a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas, no post-Constitution law

can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. When cl. (2) of Art. 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition. A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions; nor can we appreciate the argument that the words "any law" in the second line of Art. 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and therefore any law made in contravention of that clause presupposes that the law made is not a nullity. This argument may be subtle but is not sound. The words "any law" in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law.

Cooley in his book "Constitutional Limitations" (Eighth Edition, Volume I), states at page 379:

"From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions."

The Judicial Committee in *The Queen* v. *Burah* [1] observed at page 193 as under:

(1) (1878) L.R. 5 I. A. 178.

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"The established courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted."

The Judicial Committee again in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1) crisply stated the legal position at page 583 as follows:—

".....if the text is explicit the text is conclusive, alike in what it directs and what it forbids."

The same idea is lucidly expressed by Mukherjea, J., as he then was, in *K. C. Gajapati Narayan Deo* v. *The State of Orissa* (2). It is stated at page 11 as follows:—

"If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers."

The learned Judge in the aforesaid passage clearly accepts the doctrine that both the transgression of the ambit of the entry or of the limitation provided by the fundamental rights are equally transgressions of the limits of the State's constitutional powers.

It is, therefore, manifest that in the construction of the constitutional provisions dealing with the powers of the legislature, a distinction cannot be made between an affirmative provision and a negative provision; for, both are limitations on the power. The Constitution affirmatively confers a power on the legislature to make laws within the ambit of the relevant entries in the lists and negatively prohibits it from making laws infringing the fundamental rights. It

(1) (1912) A.C. 571. (2) [1954] S.C.R. 1.

goes further and makes the legislative power subject to the prohibition under Art. 13(2). Apparent wide power is, therefore, reduced to the extent of the prohibition.

If Arts. 245 and 13(2) define the ambit of the power to legislate, what is the effect of a law made in excess of that power ? The American Law gives a direct and definite answer to this question. Cooley in his " Constitutional Limitations " (Eighth Edition, Volume I) at page 382 under the heading " Consequences if a statute is void " says :—

" When a statute is adjudged to be unconstitutional, it is as if it had never been. .....And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

In Rottschaefer on Constitutional Law, much to the same effect is stated at page 34 :

" The legal status of a legislative provision in so far as its application involves violation of constitutional provisions, must however be determined in the light of the theory on which *Courts ignore it as law* in the decision of cases in which its application produces unconstitutional results. That theory implies that the legislative provisions *never had legal force* as applied to cases within that clause."

In " Willis on Constitutional Law ", at page 89 :

" A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned. The Courts generally say that the effect of an unconstitutional statute is nothing. It is as though it had never been passed. ....."

" Willoughby on Constitution of the United States ", Second Edition, Volume I, page 10 :

" The Court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of

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the parties just as if such statute had no application.

.....

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted. 'An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted'.

"However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed."

For the former proposition, the decision in *Newberry* v. *United States* (1) and for the latter proposition the decision in *John M. Wilkerson* v. *Charles A. Rahrer* (2) are cited. In *Newberry's Case* the validity of the Federal Corrupt Practices Act of 1910, as amended by the Act of 1911, fixing the maximum sum which a candidate might spend to procure his nomination at a primary election or convention was challenged. At the time of the enactment, the Congress had no power to make that law, but subsequently, by adoption of the 17th Amendment, it acquired the said power. The question was whether an after-acquired power could validate a statute which was void when enacted. Mr. Justice McReynolds delivering the opinion of the court states the principle at page 920 :

"Moreover, the criminal statute now relied upon ante-dates the 17th Amendment, and must be tested by powers possessed at time of its enactment. An

(1) (1921) 256 U.S. 232 ; 65 L. Ed. 913.
(2) (1891) 140 U.S. 545 ; 35 L. Ed. 572.

after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted."

In *Wilkerson's Case* (1) the facts were that in June 1890, the petitioner, a citizen of the United States and an agent of Maynard, Hopkins & Co., received from his principal intoxicating liquor in packages. The packages were shipped from the State of Missouri to various points in the State of Kansas and other States. On August 9, 1890, the petitioner offered for sale and sold two packages in the State of Kansas. The packages sold were a portion of the liquor shipped by Maynard, Hopkins & Co. It was sold in the same packages in which it was received. The petitioner was prosecuted for violating the Prohibitory Liquor Law of the State of Kansas; for, under the said law, "any person or persons who shall manufacture, sell or barter any intoxicating liquors, shall be guilty of a misdemeanor". On August 8, 1890, an Act of Congress was passed to the effect that intoxicating liquors transported into any State should upon arrival in such State be subject to the operation and effect of the laws of such State. It will be seen from the aforesaid facts that at the time the State Laws were made, they were valid, but they did not operate upon packages of liquors imported into the Kansas State in the course of inter-State commerce, for the regulation of inter-State commerce was within the powers of the Congress; and that before the two sales in the Kansas State, the Congress made an Act making intoxicating liquors transported into a State subject to the laws of that State, with the result that from that date the State Laws operated on the liquors so transported. Under those circumstances, the Supreme Court of the United States held:

"It was not necessary, after the passage of the Act of Congress of August 8, 1890, to re-enact the Law of Kansas of 1899, forbidding the sale of intoxicating liquors in that State, in order to make such State Law operative on the sale of imported liquors."

The reason for the decision is found at page 578:

(1) (1891) 140 U.S. 545; 35 L. Ed. 572.

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"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State Law was required before it could have the effect upon imported which it had always had upon domestic property."

A reference to these decisions brings out in bold relief the distinction between the two classes of cases referred to therein. It will be seen from the two decisions that in the former the Act was void from its inception and in the latter it was valid when made but it could not operate on certain articles imported in the course of inter-State trade. On that distinction is based the principle that an after-acquired power cannot, *ex proprio vigore*, validate a statute in one case, and in the other, a law validly made would take effect when the obstruction is removed.

The same principle is enunciated in *Carter* v. *Egg and Egg Pulp Marketing Board* (1). Under s. 109 of the Australian Constitution "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." Commenting on that section, Latham, C. J., observed at page 573:

"This section applies only in cases where, apart from the operation of the section, both the Commonwealth and the State Laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word "invalid" in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed the State law would again become operative."

We shall now proceed to consider the decisions of this Court to ascertain whether the said principles are

(1) (1942) 66 C.L.R. 557.

accepted or departed from. The earliest case is *Keshavan Madhava Menon* v. *The State of Bombay* (1). There the question was whether a prosecution launched under the Indian Press (Emergency Powers) Act, 1931, before the Constitution could be continued after the Constitution was passed. The objection taken was that the said law was inconsistent with fundamental rights and therefore was void. In the context of the question raised, it became necessary for the Court to consider the impact of Art. 13(1) on the laws made before the Constitution. The Court, by a majority, held that Art. 13(1) of the Indian Constitution did not make existing laws which were inconsistent with fundamental rights void *ab initio*, but only rendered such laws ineffectual and void with respect to the exercise of the fundamental rights on and after the date of the commencement of the Constitution and that it had no retrospective effect. Das, J., as he then was, observed at page 233:

"It will be noticed that all that this clause declares is that all existing laws, *in so far as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation."

At page 234, the learned Judge proceeded to state:

"They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights.....Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution."

At page 235, the same idea is put in different words thus:—

".....Article 13(1) only has the effect of

(1) [1951] S.C.R. 228.

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nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution."

At page 236, the learned Judge concludes:

"So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights."

Mahajan, J., as he then was, who delivered a separate judgment, put the same view in different phraseology at page 251:

"The effect of Article 13(1) is only prospective and it operates in respect to the freedoms which are infringed by the State subsequent to the coming into force of the Constitution but the past acts of a person which came within the mischief of the law then in force are not affected by Part III of the Constitution."

The learned Judge, when American law was pressed on him in support of the contention that even the pre-Constitution law was void, observed thus, at page 256:

"It is obvious that if a statute has been enacted and is repugnant to the Constitution, the statute is void since its very birth and anything done under it is also void and illegal. The courts in America have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs. If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law. This rule, however, is not applicable in regard to laws which were existing and were constitutional according to the Government of India Act, 1935. Of course, if any law is made after the 25th January, 1950, which is repugnant to the Constitution, then the same rule will have to be followed by courts in India as is followed in America and even convictions made under such an unconstitutional law

will have to be set aside by resort to exercise of powers given to this court by the Constitution."

Mukherjea, J., as he then was, in *Behram Khurshed Pesikaka* v. *The State of Bombay* (1) says at page 652 much to the same effect:

"We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State Legislatures as conferred by articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of Constitution. A mere reference to the provisions of article 13(2) and articles 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution."

The effect of the decision may be stated thus: The learned judges did not finally decide the effect of Art. 13(2) of the Constitution on post-Constitution laws for the simple reason that the impugned law was a pre-Constitution one. Art. 13(1) was held to be prospective in operation and therefore did not affect the pre-existing laws in respect of things done prior to the Constitution. As regards the post-Constitution period, Art. 13(1) nullified or rendered all inconsistent existing laws ineffectual, nugatory or devoid of any legal force or binding effect with respect to the exercise of the fundamental rights. So far as the past acts were concerned, the law existed, notwithstanding that it did not exist with respect to the future exercise of the said rights. As regards the pre-Constitution laws,

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this decision contains the seed of the doctrine of eclipse developed by my Lord the Chief Justice in *Bhikaji Narain Dhakras* v. *The State of Madhya Pradesh* (1) where it was held that as the pre-Constitution law was validly made, it existed for certain purposes even during the post-Constitution period. This principle has no application to post-Constitution laws infringing the fundamental rights as they would be *ab initio* void in *toto* or to the extent of their contravention of the fundamental rights.

The observations of the learned judges made in the decision cited above bring out the distinction between pre and post-Constitution laws which are repugnant to the Constitution and the impact of Art. 13 on the said laws.

In *Behram Khurshed Pesikaka's Case* (2), this Court considered the legal effect of the declaration made in the case of *The State of Bombay* v. *F. N. Balsara* (3) that clause (b) of s. 13 of the Bombay Prohibition Act (Bom. XXV of 1949) is void under Art. 13(1) of the Constitution in so far as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol and held that it was to render part of s. 13(b) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. Bhagwati, J., at page 620, cited all the relevant passages from textbooks on Constitutional Law and, presumably, accepted the view laid down therein to the effect that an unconstitutional Act in legal contemplation is as though it had never been passed. Jagannadhadas, J., at page 629, noticed the distinction between the scope of cls. (1) and (2) of Art. 13 of the Constitution. After citing a passage from "Willoughby on Constitution of the United States", the learned Judge observed:

"This and other similar passages from other treatises relate, however, to cases where the entire legislation is unconstitutional from the very commencement of the Act, a situation which falls within the scope of article 13(2) of our Constitution. They do not directly cover a situation which falls within

(1) [1955] 2 S.C.R. 589. (2) [1955] 1 S.C.R. 613.
(3) [1951] S.C.R. 682.

article 13(1). .....The question is what is the effect of article 13(1) on a pre-existing valid statute, which in respect of a severable part thereof violates fundamental rights. Under article 13(1) such part is "void" from the date of the commencement of the Constitution, while the other part continues to be valid. Two views of the result brought about by this voidness are possible, *viz.*, (1) the said severable part becomes *unenforceable*, while it remains part of the Act, or (2) the said part goes out of the Act and the Act stands *appropriately amended pro tanto*. The first is the view which appears to have been adopted by my learned brother, Justice Venkatarama Aiyar, on the basis of certain American decisions. I feel inclined to agree with it. This aspect, however, was not fully presented by either side and was only suggested from the Bench in the course of arguments. We have not had the benefit of all the relevant material being placed before us by the learned advocates on either side. The second view was the basis of the arguments before us. It is, therefore, necessary and desirable to deal with this case on that assumption."

This passage shows that his opinion—though a tentative one—was that the severable part became unenforceable while it remained part of the Act. But the learned Judge made an incidental observation that the American view applied to cases that fall within the scope of Art. 13(2) of the Constitution, i.e., the entire legislation would be unconstitutional from the very commencement of the Act. Venkatarama Aiyar, J., founded his decision on a broader basis. At page 639, the learned Judge observed :

"Another point of distinction noticed by American jurists between unconstitutionality arising by reason of lack of legislative competence and that arising by reason of a check imposed on a competent Legislature may also be mentioned. While a statute passed by a Legislature which had no competence cannot acquire validity when the Legislature subsequently acquires competence, a statute which was within the competence of the Legislature at the time of its enactment but which infringes a constitutional

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prohibition could be enforced *proprio vigore* when once the prohibition is removed."

On the basis of this distinction, the learned Judge held that Art. 13(1) of the Constitution only placed a check on a competent legislature and therefore the word "void" in that article meant "relatively void", i.e., the law only condemned the Act as wrong to individuals and refused to enforce it against them. In support of the said conclusion the learned Judge cited a passage from "Willoughby on the Constitution of the United States". A comparison of the passage cited with that in the text book discloses that one important sentence which makes all the difference to the legal position is omitted by mistake and that sentence is "An after-acquired power cannot *ex proprio vigore* validate a statute void when enacted". The second paragraph in the extract on which the learned Judge placed reliance and also the decision relied upon by him did not support his conclusion. As already stated, the decision and the passage dealt not with a case where the State had no power to make the law, but with a case where the law lay dormant till a law of the Federal Congress removed the conflict between the State Law and the Federal Law. That case may by analogy be applied to Art. 13(1) in respect of laws validly made before the Constitution but cannot be invoked in the case of a statute which was void when enacted. By a subsequent order, this Court granted the review and reopened the case to enable the Bench to obtain the opinion of a larger Bench on the Constitutional points raised in the judgment delivered by the learned Judges. That matter came up before a Constitutional Bench, and Mahajan, C. J., who was a party to the decision in *Keshavan Madhava Menon's Case* (1) explained the majority view therein on the meaning of the word "void" in Art. 13(1) thus, at page 651 :—

"The majority however held that the word "void" in article 13(1), so far as existing laws were concerned, could not be held to obliterate them from the statute book, and could not make such laws void altogether, because in its opinion,article 13 had not been given any

(1) [1951] S.C.R. 228.

retrospective effect. The majority however held that after the coming into force of the Constitution the effect of article 13(1) on such repugnant laws was that it *nullified* them, and made them ineffectual and nugatory and devoid of any legal force or binding effect. It was further pointed out in one of the judgments representing the majority view, that the American rule that if a statute is repugnant to the Constitution the statute is void from its birth, has no application to cases concerning obligations incurred or rights accrued in accordance with an existing law that was constitutional in its inception, but that if any law was made after the 26th January, 1950, which was repugnant to the Constitution, then the same rule shall have to be followed in India as followed in America. The result therefore of this pronouncement is that the part of the section of an existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January, 1950, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution. Thus, in this situation, there is no scope for introducing terms like "relatively void" coined by American Judges in construing a Constitution which is not drawn up in similar language and the implications of which are not quite familiar in this country."

The learned Judge, as we have already pointed out, rejected the distinction made by Venkatarama Aiyar, J., between lack of legislative power and the abridgment of the fundamental rights. Though that question did not directly arise, the learned Judge expressed his view on the scope of Art. 13(2) at page 653 thus:

"The authority thus conferred by Articles 245 and 246 to make laws subjectwise in the different Legislatures is qualified by the declaration made in

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article 13(2). That power can only be exercised subject to the prohibition contained in article 13(2). On the construction of article 13(2) there was no divergence of opinion between the majority and the minority in *Keshava Madhava Menon* v. *The State of Bombay* (supra). It was only on the construction of article 13(1) that the difference arose because it was felt that that article could not retrospectively invalidate laws which when made were constitutional according to the Constitution then in force."

Das, J., as he then was, in his dissenting judgment differed from the majority on other points but does not appear to have differed from the aforesaid views expressed by Mahajan, C. J., as regards the scope of *Keshava Madhava Menon's Case* on the meaning of the word " void " in Art. 13(1). This judgment is therefore an authority on two points and contains a weighty observation on the third : (i) when the law-making power of a State is restricted by written fundamental law, then any law opposed to the fundamental law is in excess of the legislative authority and is thus a nullity ; (ii) even in the case of a statute to which Art. 13(1) applies, though the law is on the statute book and be a good law, when a question arises for determination of rights and obligations incurred prior to January 26, 1950, the part declared void should be notionally taken to be obliterated from the section for all intents and purposes ; and (iii) on the construction of Art. 13(2), the law made in contravention of that clause is a nullity from its inception.

The next case is a direct one on the point and that is *Saghir Ahmad* v. *The State of U. P.* (1). There, the U. P. Road Transport Act (II of 1951) was passed enabling the State to run stage carriage service on a route or routes to the exclusion of others. Under that Act, the State Government made a declaration extending the Act to a particular area and issued a notification setting out what purported to be a scheme for the operation of the stage carriage service on certain routes. At the time the said Act was passed, the State had no such power to deprive a citizen of his

(1) [1955] 1 S.C.R. 707.

right to carry on his transport service. But after the Act, Art. 19(1) was amended by the Constitution (First Amendment) Act, 1951, enabling the State to carry on any trade or business either by itself or through corporations owned or controlled by the State to the exclusion of private citizens wholly or in part. One of the questions raised was whether the amendment of the Constitution could be invoked to validate the earlier legislation. The Court held that the Act when passed was unconstitutional and therefore it was still-born and could not be vitalised by the subsequent amendment of the Constitution removing the constitutional objections but must be re-enacted. At page 728, Mukherjea, J., as he then was, who delivered the judgment of the Court, has given the reasons for the said view :—

"As Professor Cooley has stated in his work on Constitutional Limitations (Vol. I, page 304 note.) "a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted". We think that this is sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under article 19(1) (g) of the Constitution and is not shown to be protected by clause (6) of the article, as it stood at the time of the enactment, must be held to be void under article 13(2) of the Constitution."

This is a direct authority on the point, without a dissenting voice, and we are bound by it.

The decision given in *Bhikaji Narain's Case* (1) is strongly relied upon by the learned Advocate General in support of his contention. Shortly stated, the facts in that case were : Before the Constitution, the C. P. & Berar Motor Vehicles (Amendment) Act, 1947 (C. P. III of 1948) amended the Motor Vehicles Act, 1939 (Central Act IV of 1939) and conferred extensive powers on the Provincial Government including the power to create a monopoly of the motor transport business in its favour to the exclusion of all motor transport operators. It was contended by the affected parties that by reason of Art. 13(1) of the Constitution,

(1) [1955] 2 S.C.R. 589.

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the Act became void. On behalf of the State, it was argued that the Constitution (First Amendment) Act, 1951, and the Constitution (Fourth Amendment) Act, 1955, had the effect of removing the inconsistency and the Amendment Act III of 1948 became operative again. This Court unanimously accepted the contention of the State. This decision is one given on a construction of Art. 13(1) of the Constitution and it is no authority on the construction and scope of Art. 13(2) of the Constitution. The reason for the decision is found in the following passages in the judgment, at page 598:

"..... on and after the commencement of the Constitution the existing law, as a result of its becoming inconsistent with the provisions of article 19(1)(g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book .....In short, article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with article 19(1) (g) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26th January, 1950, and 18th June, 1951, the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under Article 19(1)(g). The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. .....
The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still-born as it were. .....
Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as

against the citizens that they remained in a dormant or moribund condition."

The aforesaid passages are only the restatement of the law as enunciated in *Keshavan Madhava Menon's Case* (1) reaffirmed in *Pesikaka's Case* (2) and an extension of the same to meet a different situation. A pre-Constitution law, stating in the words of Das, J., as he then was, exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights. That principle has been extended in this decision, by invoking the doctrine of eclipse. As the law existed on the statute book to support pre-Constitution acts, the Court held that the said law was eclipsed for the time being by one or other of the fundamental rights and when the shadow was removed by the amendment of the Constitution, the impugned Act became free from all blemish or infirmity. The Legislature was competent to make the law with which *Pesikaka's Case* (2) was concerned at the time it was made. It was not a case of want of legislative power at the time the Act was passed, but one where in the case of a valid law supervening circumstances cast a cloud. To the other class of cases to which Art. 13 (2) will apply, the views expressed by the American authorities, by Mahajan, J., as he then was, in *Pesikaka's Case*, and by Mukherjea, J., as he then was, in *Saghir Ahmad's Case* (3) directly apply. To the facts in *Bhikaji Narain's Case*, (4) the principle laid down in *Keshavan Madhava Menon's Case* is attracted. But it is said that the observations of the learned Judges are wide enough to cover the case falling under Art. 13 (2) of the Constitution and further that a logical extension of the principle laid down would take in also a case falling under Art. 13(2). The first contention is based upon the following passage :—

But apart from this distinction between pre-Constitution and post-Constitution laws, on which however we need not rest our decision, it must be held that these American authorities could have no application to our Constitution. All laws existing or future

(1) [1951] S.C.R. 228.
(2) [1955] 1 S.C.R. 613.
(3) [1955] 1 S.C.R. 707.
(4) [1955] 2 S.C.R. 589.

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which are inconsistent with the provisions of Part III of our Constitution, are by express provisions of article 13 rendered void to the extent of such inconsistency. Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition."

The first part of the said observation states nothing more than the plain import of the provisions of Art. 13(1) and (2), namely, that they render laws void only 'to the extent' of such inconsistency. The second part of the observation directly applies only to a case covered by Art. 13(1), for the learned Judges say that the laws exist for the purposes of pre-Constitution rights and liabilities and they remain operative even after the Constitution as against non-citizens. The said observation could not obviously apply to post-Constitution laws. Even so, it is said that by a parity of reasoning the post-Constitution laws are also void to the extent of their repugnancy and therefore the law in respect of non-citizens will be on the statute book and by the application of the doctrine of eclipse, the same result should flow in its case also. There is some plausibility in this argument, but it ignores one vital principle, viz., the existence or the non-existence of legislative power or competency at the time the law is made governs the situation. There is no scope for applying the doctrine of eclipse to a case where the law is void *ab initio* in whole or in part. That apart, in the present case—we do not base our decision on that—Art. 31(1) infringed by the Act, applies to all persons irrespective of whether they are citizens or non-citizens, and therefore the entire law was void *ab initio*. That judgment, therefore, does not support the respondent as it has bearing only on the construction of Art. 13(1) of the Constitution.

In *Ram Chandra Palai* v. *State of Orissa* (1), this Court followed the decision in *Bhikaji Narain's Case* (2) in the case of a pre-Constitution Act. In *Pannalal*

(1) [1956] S.C.R. 28. (2) [1955] 2 S.C.R. 589.

Binjraj v. *Union of India* (1), Bhagwati, J., quoted with approval the extract from *Keshavan Madhava Menon's Case* (2), wherein it was held that Art. 13(1) has only the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory or devoid of any legal force or binding effect only with respect to the fundamental rights on or after the commencement of the Constitution.

The learned Advocate General relied upon certain decisions in support of his contention that the word "void" in Arts. 13(1) and 13 (2) means only "unenforceable" against persons claiming fundamental rights, and the law continues to be in the statute book irrespective of the fact that it was made in infringement of the fundamental rights. The observations of Mukherjea, J., as he then was, in *Chiranjit Lal Chowdhuri* v. *The Union of India* (3) are relied on and they are:

"Article 32, as its provisions show, is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for such enforcement arises out of an action of the executive or of the legislature. ..... The rights that could be enforced under article 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights and approaches the court for relief."

He also relies upon the decision of Das, J., as he then was, in *The State of Madras* v. *Srimathi Champakam Dorairajan* (4), wherein the learned Judge states thus, at page 531:

"The directive principles of the State Policy, which by article 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under article 32."

Basing his argument on the aforesaid two observations,

(1) [1957] S.C.R. 233.
(2) [1951] S C.R. 228.
(3) [1950] S.C.R. 869, 899.
(4) [1951] S.C.R. 525.

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it is contended that in the case of both the directive principles and the fundamental rights, it must be held that the infringement of either does not invalidate the law, but only makes the law unenforceable. This argument, if we may say so, mixes up the Constitutional invalidity of a statute with the procedure to be followed to enforce the fundamental rights of an individual. The Constitutional validity of a statute depends upon the existence of legislative power in the State and the right of a person to approach the Supreme Court depends upon his possessing the fundamental right, i.e., he cannot apply for the enforcement of his right unless it is infringed by any law. The cases already considered supra clearly establish that a law, whether pre-Constitution or post-Constitution, would be void and nugatory in so far as it infringed the fundamental rights. We do not see any relevancy in the reference to the directive principles; for, the legislative power of a State is only guided by the directive principles of State Policy. The directions, even if disobeyed by the State, cannot affect the legislative power of the State, as they are only directory in scope and operation. The result of the aforesaid discussion may be summarized in the following propositions: (i) whether the Constitution affirmatively confers power on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power; (ii) the Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumcribes or reduces the said power by the limitations laid down in Part III of the Constitution; (iii) it follows from the premises that a law made in derogation or in excess of that power would be *ab initio* void wholly or to the extent of the contravention as the case may be; and (iv) the doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening existing statutory

inconsistency; when the shadow is removed, the impugned Act is freed from all blemish or infirmity. Applying the aforesaid principles to the present case, we hold that the validity of the Act could not be tested on the basis of the Constitution (Fourth Amendment) Act, 1955, but only on the terms of the relevant Articles as they existed prior to the Amendment.

We shall now proceed to consider the first contention of Mr. Nambiar. He contends that the Motor Vehicles (Amendment) Act (100 of 1956) passed by Parliament was wholly repugnant to the provisions of the U. P. Act and therefore the law became void under the provisions of Art. 254(1) of the Constitution, with the result that at the present time there is no valid law whereunder the State can prohibit the appellants exercising their fundamental right under the Constitution, namely, carrying on the business of motor transport.

Mr. Naunit Lal bases his case on the proviso to Art. 254(2) of the Constitution rather than on cl. (1) thereof. He contends that by reason of the Amending Act, the U. P. Act was repealed in *toto*; and because of Section 68B, the operation of the provisions of the General Clauses Act saving things done under the repealed Act was excluded. The learned Advocate General attempted to meet the double attack by pressing on us to hold that there was no repugnancy at all between the provisions of the Central Act and the U. P. Act and therefore the U. P. Act had neither become void nor was repealed by necessary implication by the Central Act. We shall now examine the provisions of Art. 254(1) and 254(2).

Article 254:

"(1) If any provisions of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of

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such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

Article 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualifies the exception. If there is repugnancy between the law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and the law made by the State shall, to the extent of such repugnancy, be void. Under cl. (2), if the Legislature of a State makes a provision repugnant to the provisions of the law made by Parliament, it would prevail if the legislation of the State received the assent of the President. Even in such a case, Parliament may subsequently either amend, vary or repeal the law made by the Legislature of a State. In the present case, the Uttar Pradesh Legislative Assembly, after obtaining the assent of the President on April 23, 1955, passed the U. P. Act. Parliament subsequently passed the Motor Vehicles (Amendment) Act (100 of 1956). Therefore, both the clauses of Art. 254 would apply to the situation. The first question is whether the provisions of the Union law, i.e., the Motor Vehicles (Amendment) Act (100 of 1956), are repugnant to the provisions of the U. P. Act and if so to

what extent. Before we proceed to examine the provisions of the two Acts, it may be convenient to notice the law pertaining to the rule of repugnancy.

Nicholas in his Australian Constitution, 2nd Edition, page 303, refers to three tests of inconsistency or repugnancy :—

"(1) There may be inconsistency in the actual terms of the competing statutes;

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

This Court in *Ch. Tika Ramji* v. *The State of Uttar Pradesh* (1) accepted the said three rules, among others, as useful guides to test the question of repugnancy. In *Zaverbhai Amaidas* v. *The State of Bombay* (2), this Court laid down a similar test. At page 807, it is stated:

"The principle embodied in section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State."

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

We shall now examine the provisions of both the Acts in some detail in order to ascertain the extent of the repugnancy between them. The Scheme of

(1) [1956] S.C.R. 393. (2) [1955] 1 S.C.R. 799.

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the U. P. Act may be summarized thus: Under the U. P. Act "State Road Transport Service" is defined to mean transport service by a public service vehicle owned by the State Government. Under s. 3:

"Where the State Government is of the opinion that it is necessary in the interests of the general public and for subserving the common good, or for maintaining and developing efficient road transport system so to direct, it may, by notification in the official Gazette declare that the road transport services in general, or any particular class of such service on any route or portion thereof as may be specified, shall be run and operated exclusively by the State Government, or by the State Government in conjunction with railways or be run and operated partly by the State Government and partly by others under and in accordance with the provisions of the Act".

After the publication of the notification under s. 3, the State Government or, if the State Government so directs, the Transport Commissioner publishes in such manner as may be specified a scheme as to the State Road Transport Service providing for all or any of the matters enumerated in cl. (2) of s. 4. Clause (2) of s. 4 directs that, among others, the scheme should provide the particulars of the routes or portions thereof over which and the date on which the State Transport Service will commence to operate, the roads in regard to which private persons may be allowed to operate upon, the routes that will be served by the State Government in conjunction with railways, the curtailment of the routes covered by the existing permits or transfer of the permits to other route or routes. Section 5 enjoins the Transport Commissioner to give notice to the permit-holder requiring him to lodge a statement in writing whether he agrees to the transfer of the permit and in cl. (2) thereof, it is prescribed that in case he accepts the transfer, he is not entitled to any compensation, but if he does not agree to the transfer, his permit will be cancelled subject to his right to get compensation under the Act. Under s. 6 any person whose interests are affected may within 30 days from the publication of the scheme, file objections

on it before the Transport Commissioner who shall forward them to the Board constituted under s. 7, consisting of the Commissioner of a Division, Secretary to Government in the Transport Department and the Transport Commissioner. The Board shall consider the objections, if any, forwarded under s. 6 and may either confirm, modify or alter the scheme. The Scheme so confirmed or modified or altered under s. 7 shall be published in the Official Gazette. Any scheme published under s. 8 may at any time be cancelled or modified or altered by the State Government. Section 10 gives the consequences of the publication under s. 8. Section 11 provides compensation for premature cancellation of permits or curtailment of route or routes, as may be determined in accordance with the principles specified in Schedule I. In Schedule I, compensation is payable as follows:

"(1) For every complete month or part of a month exceeding fifteen days of the unexpired period of the permit.	Rupees one hundred.
(2) For part of a month not exceeding fifteen days of the unexpired period of a permit.	Rupees fifty.

Provided always that the amount of compensation shall in no case be less than rupees two hundred."

Section 12 authorises the State Government, in a case where the permit has been cancelled, to purchase the motor vehicle covered by it if the holder of the permit offers to sell, upon terms and conditions laid down in Schedule II provided the vehicle is of the type of manufacture and model notified by the State Government and provided secondly that the vehicle is mechanically in a sound condition or otherwise declared fit by the Transport Commissioner or his nominee. Sections 13 to 18 provide for a State Machinery for the development of motor transport industry. Sections 19 to 22 are provisions which are consequential in nature. Shortly stated, under the U. P. Act the State Government initiate a scheme providing for the nationalization of the road transport in whole or in part; the objections filed by the persons affected by the scheme are heard by a

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Board of three officers appointed by the State Government; the Board after hearing the objections may confirm, modify or alter the scheme; the scheme so confirmed may be cancelled, modified or altered by the State Government by following the same procedure adopted for framing the original scheme; and the holders of permits cancelled may be given new permits if they choose to accept and if not they will be paid such compensation as prescribed under the Act. Under the Amendment Act 100 of 1956, whereby a new chapter was inserted in the Motor Vehicles Act of 1939, the procedure prescribed is different. Under s. 68-A of that Act, 'State Transport Undertaking' is defined to mean any undertaking providing road transport service, where such undertaking is carried on by,—(i) the Central Government or a State Government; (ii) any Road Transport Corporation established under s. 3 of the Road Transport Corporation Act, 1950; (iii) the Delhi Transport Authority established under s. 3 of the Delhi Road Transport Authority Act, 1950; and (iv) any municipality or any corporation or company owned or controlled by the State Government. Under s. 68C, the State Transport Undertaking initiates a scheme if it is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport service in general, or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking, whether to the exclusion complete or partial, of other persons or otherwise. Section 68D says that any person affected by the Scheme may file objections to the said Scheme before the State Government; the State Government may, after considering the objections and after giving an opportunity to the objectors or their representatives and the representatives of the State Transport Undertaking to be heard in the matter, approve or modify the Scheme. Any Scheme published may at any time be cancelled or modified by the State Transport Undertaking following the same procedure; for the purpose of giving effect

to the Scheme, the Regional Transport Authority, *inter alia*, may cancel the existing permits or modify the terms of the existing permits. Section 68G lays down the principles and method of determination of compensation. Under that section compensation is payable for every completed month or part of a month exceeding fifteen days of the unexpired period of the permits at Rs. 200 and for part of a month not exceeding fifteen days of the unexpired period of the permit at Rs. 100. Under the Amending Act, the gist of the provisions is that the Scheme is initiated by the State Transport Undertaking carried on by any of the four institutions mentioned in s. 68A, including the State Government; objections are filed by the affected parties to the Scheme, the affected parties and the Undertaking are heard by the State Government, which, after hearing the objections, approves or modifies the Scheme. There is no provision for transfer of permits to some other routes, or for the purchase of the buses by the State Government. Compensation payable is twice that fixed under the U. P. Act. One important thing to be noticed is that the U. P. Act is prospective, i. e., comes into force only from the date of the passing of the Amending Act and the procedure prescribed applies only to schemes that are initiated under the provisions of the U. P. Act.

A comparison of the aforesaid provisions of the U. P. Act and the Amending Act indicates that both the Acts are intended to operate in respect of the same subject matter in the same field. The unamended Motor Vehicles Act of 1939 did not make any provision for the nationalization of transport services, but the States introduced amendments to implement the scheme of nationalization of road transport. Presumably, Parliament with a view to introduce a uniform law throughout the country avoiding defects found in practice passed the Amending Act inserting Chapter IV-A in the Motor Vehicles Act, 1939. This object would be frustrated if the argument that both the U. P. Act and the Amending Act should co-exist in respect of schemes to be framed after the Amending Act, is accepted. Further the authority to initiate

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the scheme, the manner of doing it, the authority to hear the objections, the principles regarding payment of compensation under the two Acts differ in important details from one another. While in the U. P. Act the scheme is initiated by the State Government, in the Amendment Act, it is proposed by the State Transport Undertaking. The fact that a particular undertaking may be carried on by the State Government also cannot be a reason to equate the undertaking with the State Government; for under s. 68A the undertaking may be carried on not only by the State Government but by five other different institutions. The undertaking is made a statutory authority under the Amending Act with a right to initiate the scheme and to be heard by the State Government in regard to objections filed by the persons affected by the scheme. While in the U. P. Act a Board hears the objections, under the Amending Act the State Government decides the disputes. The provisions of the scheme, the principles of compensation and the manner of its payment also differ in the two Acts. It is therefore manifest that the Amending Act occupies the same field in respect of the schemes initiated after the Amending Act and therefore to that extent the State Act must yield its place to the Central Act. But the same cannot be said of the schemes framed under the U. P. Act before the Amending Act came into force. Under Art. 254(1) "the law made by Parliament, whether passed before or after the law made by the Legislature of such State.....shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void."

Mr. Nambiar contends that, as the U. P. Act and the Amending Act operate in the same field in respect of the same subject-matter, i. e., the nationalization of bus transport, the U. P. Act becomes void under Art. 254(1) of the Constitution. This argument ignores the crucial words "to the extent of the repugnancy" in the said clause. What is void is not the entire Act but only to the extent of its repugnancy with the law made by Parliament. The identity of the field may relate to the pith and substance of the subject-matter

and also the period of its operation. When both coincide, the repugnancy is complete and the whole of the State Act becomes void. The operation of the Union Law may be entirely prospective leaving the State Law to be effective in regard to thing already done. Sections 68C, 68D and 68E, inserted by the Amending Act, clearly show that those sections are concerned only with a scheme initiated after the Amending Act came into force. None of the sections, either expressly or by necessary implication, indicates that the schemes already finalised should be reopened and fresh schemes be framed pursuant to the procedure prescribed thereunder. Therefore, under Art. 254(1), the law under the U. P. Act subsists to support the schemes framed thereunder and it becomes void only in respect of schemes framed under the Central Act. A similar question arose in the context of the application of Art. 13(1) to a pre-Constitution law which infringed the fundamental rights given under the Constitution.

In *Keshavan Madhava Menon's Case* (1), which we have referred to in a different context the question was whether Indian Press (Emergency Powers) Act, 1931, was void as infringing the provisions of Art. 13(1) of the Constitution; and the Court held that the said Act was valid and would continue to be in force to sustain a prosecution launched for an act done before the Constitution. In the words of Das, J., as he then was:

"Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution." (p. 234).

"So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights." (pp. 235-236).

Article 13(1), so far as it is relevant to the present inquiry, is *pari materia* with the provisions of Art. 254(1) of the Constitution. While under Art. 13(1) all the pre-Constitution laws, to the extent of their inconsistency with the provisions of Part III, are void, under

(1) [1951] S.C.R. 228.

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Art. 254(1) the State Law to the extent of its repugnancy to the law made by Parliament is void. If the pre-Constitution law exists for the post-Constitution period for all the past transactions, by the same parity of reasoning, the State law subsists after the making of the law by Parliament, for past transactions. In this view, both the laws can co-exist to operate during different periods.

The same decision also affords a solution to the question mooted, namely, whether if the law was void all the completed transactions fall with it. Mahajan, J., as he then was, draws a distinction between a void Act and a repealed Act vis-a-vis their impact on past transactions. At page 251, the learned Judge says:

"The expression "void" has no larger effect on the statute so declared than the word "repeal". The expression "repeal" according to common law rule obliterates a statute completely as if it had never been passed and thus operates retrospectively on past transactions in the absence of a saving clause or in the absence of provisions such as are contained in the Interpretation Act, 1889, or in the General Clauses Act, 1897, while a provision in a statute that with effect from a particular date an existing law would be void to the extent of the repugnancy has no such retrospective operation and cannot affect pending prosecutions or actions taken under such laws. There is in such a situation no necessity of introducing a saving clause and it does not need the aid of a legislative provision of the nature contained in the Interpretation Act or the General Clauses Act. To hold that a prospective declaration that a statute is void affects pending cases is to give it indirectly retrospective operation and that result, is repugnant to the clear phraseology employed in the various articles in Part III of the Constitution."

The said observation directly applies to a situation created by Art. 254(1). As the U. P. Act was void from the date of the Amending Act, actions taken before that date cannot be affected. In whichever way it is looked at, we are satisfied that in the present case, the scheme already framed subsists and the

State law exists to sustain it even after the Parliament made the law. In this view we reject the contention of Mr. Nambiar based on Art. 254(1) of the Constitution.

The alternative argument advanced by Mr. Naunit Lal may now be considered. It is not disputed that under the proviso to Art. 254(2), the Parliament can repeal the law made by the Legislature of a State and that Parliament can repeal the repugnant State law whether directly or by necessary implication. Assuming that Parliament in the present case by enacting the Amending Act repugnant to the State law with respect to the same subject-matter i. e., nationalization of road transport, impliedly repealed the State law, would it have the effect of effacing the scheme already made? If there was a repeal, the provisions of s. 6 of the General Clauses Act of 1897 are directly attracted. The relevant part of s. 6 of the General Clauses Act reads:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder."

The express words used in clause (b) certainly take in the scheme framed under the repealed Act. It was a thing duly done under the repealed Act. But it is said that a comparison of the provisions of s. 6 with those of s. 24 would indicate that anything duly done excludes the scheme. Section 24 deals with the continuation of orders, schemes, rules, forms or bye-laws, made or issued under the repealed Act. But that section applies only to the repeal of a Central Act but not a State Act. But the exclusion of the scheme is sought to be supported on the basis of the argument that in the case of a repeal of a Central Act, both the sections apply and, in that context, a reasonable

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interpretation would be to exclude what is specifically provided for from the general words used in s. 6. Whatever justification there may be in that context, there is none when we are concerned with the repeal of a State Act to which s. 24 does not apply. In that situation, we have to look to the plain words of s. 6 and ascertain whether those words are comprehensive enough to take in a scheme already framed. We have no doubt that a scheme framed is a thing done under the repealed Act.

A further contention is raised on the basis of the provisions of s. 68B to achieve the same result, namely, that the said section indicates a different intention within the meaning of s. 6 of the General Clauses Act. Section 68B reads:

"The provisions of this Chapter and rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of this Act or in any other law for the time being in force or in any instrument having effect by virtue of any such law."

This section embodies nothing more than the bare statement that the provisions of this Act should prevail notwithstanding the fact that they are inconsistent with any other law. We have expressed our view that the provisions of this Act are prospective in operation and, therefore, nothing in those sections, which we have already analysed, is inconsistent with the provisions of the State law in regard to its operation with respect to transactions completed thereunder. Assuming without deciding that the word 'instrument' in s. 68B includes a scheme, we do not see any provisions in the Act which are inconsistent with the scheme framed under the State Act. The provisions starting from s. 68C only contemplate a scheme initiated after the Amending Act came into force and therefore they cannot obviously be inconsistent with a scheme already framed under the State Act before the Amending Act came into force. We, therefore, hold that s. 6 of the General Clauses Act saves the scheme framed under the U. P. Act.

The next contention of the learned Counsel Mr.

Nambiar, namely, that the scheme being a prescription for the future, it has a continuous operation even after the Amending Act became law, with the result that after the Amending Act, there was no valid law to sustain it, need not detain us; for, we have held that the State law subsists even after the Amending Act to sustain the things done under the former Act.

This leads us to the contention of the learned Advocate General that even if the Constitution (Fourth Amendment) Act, 1955, could not be relied on to sustain the validity of the U. P. Act, there was no deprivation of property of the appellants within the meaning of the decisions of this Court in *The State of West Bengal* v. *Subodh Gopal Bose* (1); *Dwarkadas Shrinivas of Bombay* v. *The Sholapur Spinning & Weaving Co. Ltd.* (2) and *Saghir Ahmad's Case* (3). Those cases have held that cls. (1) and (2) of Art. 31 relate to the same subject matter and that, though there is no actual transfer of property to the State, if by the Act of the State, an individual has been substantially dispossessed or where his right to use and enjoy his property has been seriously impaired or the value of the property has been materially reduced, it would be acquisition or taking possession within the meaning of cl. (2) of the said Article. After a faint attempt to raise this question, the learned Advocate General conceded that in view of the decision in *Saghir Ahmad's Case* he could not support his argument to the effect that the State did not deprive the petitioners of their interest in a commercial undertaking. In the said case, this Court held in express terms that U. P. Transport Act, 1951, which in effect prohibited the petitioners therein from doing their motor transport business deprived them of their property or interest in a commercial undertaking within the meaning of Art. 31(2) of the Constitution. Mukherjea J., as he then was, observed at page 728:

"It is not seriously disputed on behalf of the respondents that the appellants' right to ply motor vehicles for gain is, in any event, an interest in a

(1) [1954] S.C.R. 587. (2) [1954] S.C.R. 674.
(3) [1955] 1 S.C.R. 707.

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commercial undertaking. There is no doubt also that the appellants have been deprived of this interest."

The learned Judge proceeded to state at page 729 :

"In view of that majority decision it must be taken to be settled now that clauses (1) and (2) of article 31 are not mutually exclusive in scope but should be read together as dealing with the same subject, namely, the protection of the right to property by means of limitations on the State's powers, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of the property referred to in clause (2). The learned Advocate General conceded this to be the true legal position after the pronouncements of this Court referred to above. The fact that the buses belonging to the appellants have not been acquired by the Government is also not material. The property of a business may be both tangible and intangible. Under the statute the Government may not deprive the appellants of their buses or any other tangible property but they are depriving them of the business of running buses on hire on public roads. We think therefore that in these circumstances the legislation does conflict with the provisions of article 31(2) of the Constitution and as the requirements of that clause have not been complied with, it should be held to be invalid on that ground."

The above observations are clear and unambiguous and they do not give scope for further argument on the subject. It follows that if the Act does not provide for compensation, the Act would be invalid being in conflict with the provisions of Art. 31(2) of the Constitution.

The next question is whether in fact the provisions of Art. 31(2) of the Constitution, before the Constitution (Fourth Amendment) Act, 1955, were complied with. Under Art. 31(2) no property shall be taken possession of or acquired save for a public purpose and save by authority of law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and

given. In *The State of West Bengal* v. *Mrs. Bela Banerjee* (1), Patanjali Sastri, C. J., has defined the meaning of the word 'compensation' at page 563, as under :

"While it is true that the legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated, such principles must ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner, the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed."

On the basis of the aforesaid principle, Mr. Nambiar contends that the U. P. Act does not provide for compensation in the sense of giving the operator deprived of his interest a just equivalent of what he has been deprived of, or fix any principles to guide the determination of the amount payable. The U.P. Act, the argument proceeds, does not provide at all for compensation payable in respect of the interest of the operator in a commercial undertaking, but only gives compensation for the unexpired period of the permit. On the other hand, the learned Advocate General contends that the appellants would be entitled only to just equivalent of the interest that they are deprived of, namely, the interest in a commercial undertaking and that the cumulative effect of the provisions of the U. P. Act is that just equivalent of the said interest is given. As it is common case that what the Act should give is just compensation for the interest of the operator in a commercial undertaking, we shall now examine the provisions of the U. P. Act to ascertain whether it

(1) [1954] S.C.R. 558.

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provides a *quid pro quo* for the interest the operator is deprived of.

The provisions of the U. P. Act relating to compensation may usefully be read at this stage:

Section 5: "(1) Where the scheme published under section 4 provides for cancellation of any existing permit granted under Chapter IV of the Motor Vehicles Act, 1939, or for the transfer of such permit to any other route or routes the Transport Commissioner shall cause notice thereof to be served on the permit-holder concerned and on any other persons to whom in his opinion special notice should be given. The notice shall also require the permit-holder to lodge a statement in writing within the period to be specified therein whether he agrees to the transfer of the permit.

(2) If the permit-holder agrees to the transfer of his permit, he shall, provided the permit is actually so transferred ultimately, be not entitled to claim compensation under section 11 but the transference of the permit shall be deemed to be in lieu of compensation and complete discharge therefor of the State Government. Where, however, the permit-holder does not agree to the transfer, the permit shall, without prejudice to the right of the permit-holder to get compensation under the said section be liable to be cancelled."

Section 11: "(1) Where in pursuance of the Scheme published under section 8 any existing permit granted under Chapter IV of the Motor Vehicles Act, 1939, is or is deemed to have been cancelled or the route or routes covered by it are curtailed or are deemed to have been curtailed, the permit-holder shall, except in cases where transfer of the permit has been agreed to under sub-section (2) of section 5, be entitled to receive and be paid such compensation by the State Government for and in respect of the premature cancellation of the permit or, as the case may be, for curtailment of the route or routes covered by the permit as may be determined in accordance with the principles specified in Schedule I.

(2) The compensation payable under this section shall be due as from the date of order of cancellation

of the permit or curtailment of the route covered by the permit.

(3) There shall be paid by the State Government on the amount of compensation determined under sub-section (1) interest at the rate of two and one-half per cent. from the date of order of cancellation or curtailment of route to the date of determination of compensation as aforesaid.

(4) The compensation payable under this section shall be given in cash.

(5) The amount of compensation to be given in accordance with the provisions of sub-section (1) shall be determined by the Transport Commissioner and shall be offered to the permit-holder in full satisfaction of the compensation payable under this Act and if the amount so offered is not acceptable to the permit-holder, the Transport Commissioner may within such time and in such manner as may be prescribed refer the matter to the District Judge whose decision in the matter shall be final and shall not be called in question in any Court."

Section 12: "Where a permit granted under Chapter IV of the Motor Vehicles Act, 1939, has been cancelled or the route to which the permit relates has been curtailed in pursuance of the scheme published under section 8, the State Government may if the holder of the permit offers to sell, choose to purchase the motor vehicles covered by the permit upon terms and conditions laid down in Schedule II:

Provided, firstly, that the vehicle is of a type, manufacture and model notified by the State Government; and

Provided, secondly, that the vehicle is in a mechanically sound condition and is otherwise declared fit by the Transport Commissioner or his nominee."

SCHEDULE I.

"*Paragraph 1*: The compensation payable under section 11 of the Act for cancellation of a contract carriage or stage carriage or public carrier's permit under clause (e) of sub-section (1) of section 10 of the

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Act shall be computed for every vehicle covered by the permit as follows, namely:

(1) For every complete month or part of a month exceeding fifteen days of the unexpired period of the permit.	Rupees one hundred
(2) For part of a month not exceeding fifteen days of the unexpired period of a permit.	Rupees fifty

Provided always that the amount of compensation shall in no case be less than rupees two hundred.

Paragraph 2: The compensation payable under section 11 for curtailment of the route or routes covered by a stage carriage or public carrier permit under clause (d) of sub-section (1) of section 10 of the Act shall be an amount computed in accordance with the following formula:

$$\frac{Y \times A}{R}$$

In this formula—

Y means the length in mile by which the route is curtailed.

A means the amount computed in accordance with paragraph 1 above.

R means the total length in miles of the route covered by the permit."

The aforesaid provisions constitute an integrated scheme for paying compensation to the person whose permit is cancelled. The gist of the provisions may be stated thus: The scheme made by the State Government may provide for the cancellation of a permit, for curtailment of the route or routes or for transfer of the permit to other routes. Where a transfer of the permit is accepted by the operator, he will not be entitled to any compensation; if he does not accept, compensation will be paid to him with interest in respect of the premature cancellation of the permit, or as the case may be for the curtailment of the route or routes covered by the permit. The amount of compensation to be given shall be determined by the Transport Commissioner in accordance with the provisions of the Act, and if the amount so

offered is not acceptable to the permit-holder, the Transport Commissioner may, within such time and in such manner as may be prescribed, refer the matter to the District Judge whose decision in the matter shall he final. There is also a provision enabling the Government to purchase the motor vehicles covered by the permit, if the holder of the permit offers to sell and if the vehicles satisfy the specifications laid down in the Act. The question is whether these provisions offer a *quid pro quo* for the interest of the petitioners in the commercial undertaking i.e., business in motor transport. Let us examine the question from the standpoint of a business deal. If the transport business is sold, the seller gets his value for the assets *minus* the liabilities and for his good-will. In the case of a scheme framed under the Act, the assets are left with the holder of the permit and under certain conditions the State purchases them. As the scheme is a phased one, it cannot be said, though there will be difficulties, that the assets cannot be sold to other operators. If a permit is not cancelled but only transferred to another route, it may be assumed that if the transfer is voluntarily accepted by the permit-holder, he is satisfied that the route given to him is as good as that on which he was doing his business. On the other hand, if he chooses to reject the transfer of his permit to another route and takes compensation, the question is whether the compensation provided by s. 11 is anything like an equivalent or *quid pro quo* for the interest in the commercial undertaking acquired by the State. If cl. (5) of s. 11 had not been there, we would have had no hesitation to hold that a flat rate of Rs. 100 or less irrespective of the real loss to the holder would not be compensation within the meaning of Art. 31(2). But, in our view, s. 11(5) gives a different complexion to the entire question of compensation. Under that clause, a permit-holder aggrieved by the amount of compensation given by the Transport Commissioner may ask for referring the matter to the District Judge for his decision in regard to the adequacy of the compensation. This clause is susceptible of both a strict as well as a

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liberal interpretation. If it is strictly construed, it may be held that what the District Judge can give as compensation is only that which the Transport Commissioner can, under the provisions of s. 11(1) i. e., at the rates mentioned in the Schedule. But a liberal interpretation, as contended by the learned Advocate General, can be given to that clause without doing violence to the language used therein and that interpretation will carry out the intention of the legislature. If the jurisdiction of the District Judge relates only to the calculation of figures, the said clause becomes meaningless in the present context. Section 11 read with the Schedule gives the rate of compensation, the rate of interest, the dates from which and up to which the said compensation is to be paid with interest. The duty of calculating the said amount is entrusted to the Transport Commissioner who will be a fairly senior officer of the Government. If he made any mistake in mere calculations, he would certainly correct it if the permit-holder pointed out the mistake to him. In the circumstances, is it reasonable to assume that the legislature gave a remedy for the permit-holder to approach the District Judge for the mere correction of the calculated figures ? It is more reasonable to assume that the intention of the legislature was to provide *prima facie* for compensation at flat rate and realising the inadequacy of the rule of thumb to meet varying situations, it entrusted the duty of the final determination of compensation to a judicial officer of the rank of a District Judge. The provisions of s. 11(5), in our view, are certainly susceptible of such an interpretation as to carry out the intention of the legislature indicated by the general scheme of the provisions. The crucial words are " if the amount so offered is not acceptable to the permit-holder ". The amount offered is no doubt the amount calculated in accordance with s. 11(1). But a duty is cast on the Transport Commissioner to refer the matter to the District Judge if the amount offered is not *acceptable* to the permit-holder. The word " acceptable " is of very wide connotation and it does not limit the objection only to the wrong calculation under s. 11(1). The permit-holder may

not accept the amount on the ground that compensation offered is inadequate and is not a *quid pro quo* for the interest of which he is deprived. It is therefore for the District Judge, on the evidence adduced by both the parties, to decide the proper compensation to be paid to him in respect of the right of which he is deprived by the cancellation of the permit. The language of s. 11(5) not only bears the aforesaid construction but also carries out the intention of the legislature, for it cannot be imputed to the legislature that it intended to deprive a valuable interest by giving a nominal amount to the permit-holder.

Section 11(5) speaks of the time limit within which such reference may be made to the District Judge, but no such rule has been brought to our notice. We hope and trust that, without standing on any such technicality, the Transport Commissioner, if so required, will refer the matter of compensation to the District Judge. Having regard to the entire scheme of compensation provided by the Act, we hold that the Act provided for adequate compensation for the interest acquired within the meaning of Art. 31(1) of the Constitution.

It is said that out of the twenty five appeals appellants in thirteen appeals had accepted to take a transfer of the permits to different routes; but on behalf of the appellants it is denied that the acceptance was unequivocal and final. They say that it was conditional and that, as a matter of fact, they have not been plying the buses on the transferred routes and indeed have been operating them only on the old routes. In these circumstances, we cannot hold that the said appellants accepted the alternative routes. If they or some of them choose to accept any alternative routes, they are at liberty to do so, in which event they will not be entitled to any compensation.

Lastly, the learned Counsel for the appellants contends that cl. (2) of s. 3 of the U. P. Act infringes their fundamental rights under Art. 31(2) inasmuch as it prevents them from questioning the validity of the scheme on the ground that it is not for public purpose. Section 3 reads :

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"(1) Where the State Government is of the opinion that it is necessary in the interest of the general public and for subserving the common good, or for maintaining and developing efficient road transport system so to direct, it may, by notification in the official Gazette declare that the road transport services in general, or any particular class of such service on any route or portion thereof as may be specified, shall be run and operated exclusively by the State Government, or by the State Government in conjunction with railways or be run and operated partly by the State Government and partly by others under and in accordance with the provisions of this Act.

(2) The notification under sub-section (1) shall be conclusive evidence of the facts stated therein."

The argument of the learned Counsel on the interpretation of this section appears to be an after-thought; for the records do not disclose that the appellants attempted to question the said fact before the Government and they were precluded from doing so on the basis of cl. (2) of s. (3). We are not, therefore, prepared to allow the appellants to raise the contention for the first time before us.

The last contention, which is special to Civil Appeal No. 429 of 1958, is that during the crucial period when the scheme of nationalization was put through, the appellant had no permit, it having been cancelled by the order of the appropriate tribunal; but subsequently, after the scheme was finalised, the said order was set aside by the Appellate Tribunal retrospectively and therefore the order of the State Government made behind the back of the appellant does not bind him. The appellant's permit was not renewed by the Regional Transport Authority. Against the said order, he preferred an appeal to the State Transport Tribunal, which by an order dated September 6, 1956, allowed the appeal and directed that the appellant's permit be renewed for three years beginning from November 1, 1953. In disposing of the appeal the State Transport Tribunal observed:

"We are told that in the meantime this route has been notified and the Government buses are plying

on it. The effect of this order will be that the appellant shall be deemed to be in possession of a valid permit and he shall have to be displaced after following the usual procedure prescribed by the U. P. Road Transport Services (Development) Act." Pursuant to their order, it appears that the Regional Transport Authority renewed his permit on October 11, 1956 with effect from November 1, 1953 to October 31, 1956. In the circumstances, as the petitioner was not a permit-holder when the Government made the order, no relief can be given to him in this appeal. This order will not preclude the appellant in Civil Appeal No. 429 of 1958, if he has any right, to take appropriate proceedings against the State Government.

In the result, all the appeals are dismissed with one set of costs to the State of Uttar Pradesh.

Appeals dismissed.

THE WESTERN INDIA THEATRES LTD.

v.

THE CANTONMENT BOARD, POONA, CANTONMENT

(S. R. DAS, C. J., S. K. DAS, P. B. GAJENDRAGADKAR, K. N. WANCHOO and M. HIDAYATULLAH, JJ.)

Entertainment Tax—Imposition on cinema show—Validity—Cantonments Act, 1924 (Act II of 1924), s. 60—Bombay Municipal Boroughs Act, 1925 (Bom. XVIII of 1925), s. 73—Government of India Act, 1935, s. 100, Sch. VII, Entry 50.

The appellant, a public limited company, was the lessee of wo cinema houses, " West End " and " Capitol " situated within the Poona cantonment area. By a notification dated June 17, 1948, the Bombay Government with the sanction of the Governor-General-in-Council imposed certain taxes in the cantonment of Poona including an entertainment tax of Rs. 10 per show on the appellant's cinema houses and Rs. 5 per show on others. The appellant, who paid the tax under protest, brought the suit, out of which the present appeal arose, for a declaration that the