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A CRITICAL NOTE ON JANAK DULARI *V.* SRI GOPAL, I.L.R. 1939 ALL. 912.

The validity of the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) was affirmed by the Allahabad High Court in *Janak Dulari* v. *Sri Gopal*[1]. In that case a widow claimed that she was entitled to certain properties of which her husband had died possessed, either as his heir or by virtue of the provisions of Act XVIII of 1937 if it transpired that he had died undivided. The main defences were that the family was joint and that Act XVIII of 1937 was not validly passed.

A noteworthy fact concerning the Act is that though as a Bill it had been passed by both the Houses of the Indian Legislature while the Government of India Act, 1915, as amended in 1919 was in operation, yet the Governor-General's assent to the measure was given only on the 14th of April 1937, after the coming into force of the Government of India Act, 1935, excepting for Part II thereof.

The Government of India Act, 1935, repealed practically in its entirety the earlier Government of India Act[2]. The effect of the repeal was to bring about a resumption into the hands of the Crown of all rights, authority, and jurisdiction in whomsoever they had been vested at that time and their redistribution in the manner prescribed by the repealing Act[3]. As observed by Lord Tenterden, C.J., in *Surtees* v. *Ellison*[4],

> "it has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed."

Consequently all appointments made, institutions created and laws framed under the earlier Government of India Act would cease

1. I.L.R. 1939 All. 912.
2. S. 321 and Sch. X.
3. *See* S. 2.
4. 9 B. & C. 750 : 109 E.R. 278 ; *see also Attorney General* v. *Lamplough*, 38 L.T. Rep. 87.

to have effect unless saved by express provisions in the repealing Act. S. 321 (2) provides that the repeal shall not affect any appointment made under the repealed Act to any office and any such appointment shall have effect as if it was an appointment to the corresponding office under the repealing Act. It was by virtue of this provision, that the validity of the election to the office of Speaker of the Bengal Legislative Assembly, which was challenged on the ground that the Governor of Bengal who had directed such election and subsequently accorded his assent to the choice made had not been validly re-appointed as Governor of the Province after the commencement of Part III of the Act of 1935 in the manner provided by that Act, was affirmed in *Tulsi Charan Goswami* v. *Azizul Huq*[1]. Similarly S. 223 saves the jurisdiction of the High-Courts as well as the powers of the judges thereof in relation to the administration of justice including their rule making powers, and the section was held to preserve all the powers which the High Courts in fact had prior to the Act of 1935[2]. Likewise. S. 276 provides for the continuance in force of the rules relating to the services under the Crown framed under the repealed Act until other provision is made under the new Act, as if they were rules framed under the latter Act[3]. The scheme of the Act is clear, namely, that wherever existing appointments or institutions or rules are intended to be continued express savings are to be provided prescribing that they all are to be regarded as having been done under the appropriate provisions of the Act of 1935.

It is a general principle that when a parent Act is repealed, all the laws passed under that Act also stand repealed unless there is an express saving provision in the repealing enactment[4]. S. 292 of the Government of India Act, 1935, provides for the continuance of all the laws in force in British India prior to the commencement of Part III of the Act, *i.e.*, before the 1st April 1937[5], though the validity of such laws is not in any way guaranteed[6]. Laws made before the commencement of Part III but intended to take effect only after that date were to have validity for twelve months from that date despite the repeal of the 1919 Act and notwithstanding S. 292 of

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1. I.L.R. (1937) 2 Cal. 509.

2. *Mulji Sicka & Co.*, v. *Municipal Commissioner of Bombay*, A.I.R. 1939 Bom. 471 : 41 Bom.L.R. 984.

3. *See also* S. 15 (2) of the Government of India (Commencement and Transitory Provisions) Order, 1936.

4. *Atiqa Begam* v. *Abdul Maghni*, A.I.R. 1940 All. 272, 280 (F.B.) ; *Watson* v. *Winch*, (1916) 1 K.B. 688 : 114 L.T. 1209. *See also* Halsbury (Hailsham edition) vol. 26, p. 608, para 1291.

5. *See* Art. 3 of the Government of India (Commencement and Transitory Provisions) Order, 1936.

6. *See* S. 176.

the Act of 1935.[1] This provision was in effect superseded by S. 1 of the India and Burma (Existing Laws) Act, 1937, which laid down that for the purposes of S. 292 a law passed or made before the commencement of Part III of the Act of 1935 shall be declared to be a law in force immediately before that date, notwithstanding that it, or parts of it, may not then be in operation, either at all or in particular areas.

The Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) was certainly not a law in force prior to the commencement of Part III of the Government of India Act, 1935. Being an Act of which the commencement was not specifically enacted it became law only from the date when the Governor-General signified his assent, *i.e.*, from 14th April 1937[2]. Further it is the assent of the Governor-General that gives a Bill " the complement and perfection of a law "; and thus the Hindu Women's Rights to Property Act had no place in the Statute Book of the country till after the commencement of Part III of the Government of India Act, 1935. Neither S. 292 of the Act of 1935 nor S. 1 of the India and Burma (Existing Laws) Act, 1937, can therefore apply. Nor can the Hindu Women's Rights to Property Act be regarded as a law passed subsequent to 1st April 1937, for the Bill had emerged from both Houses of the Legislature prior to that date. When the Government of India Act, 1919, was repealed the Indian Legislature functioning under that Act would stand dissolved *ipso facto* there being no express provision in the Act of 1935 continuing its existence in its identical form. With such dissolution of the Legislature all Bills pending the assent of the Governor-General would automatically lapse[3]. Since the assent of the Governor-General to the Hindu Women's Rights to Property Act was not accorded prior to the 1st of April 1937 it looks as if there was in law no Bill to which such assent could be given on a later date. The positive provision in S. 30 (5) of the Act of 1935 that it is only a Bill pending in the Federal Assembly or having been passed by the House is pending in the Council of State that will lapse on a dissolution of the Assembly no doubt constitutes a departure from the English practice but can be of no avail in the present case for it is the old practice that will operate till Part II of the Act of 1935 is brought into force. Rule 36-C of the Indian Legislative Rules made under S. 67 read with S. 129-A of the earlier Act, provides that on the dissolution of either Chamber all Bills which have not been passed by the Indian

1. S. 9 (1) of the Government of India (Commencement and Transitory Provisions) Order, 1936.

2. *See* S. 5 of the General Clauses Act (Act X of 1897).

3. May, Parliamentary Practice (13th edition), p. 56. *Cf.* Halsbury (Hailsham edition), vol. 24, p. 268, para 517.

Legislature shall lapse. The expression "Indian Legislature" is explained in S. 63 as consisting of the Governor-General and the two Chambers. It is also stated that ordinarily a Bill is not to be deemed to have been passed by the Indian Legislature unless it has been agreed to by both the Chambers. This cannot however mean that a Bill so agreed to will be a Bill passed by the Indian Legislature, for, the Governor-General is a part of the Legislature and under S. 67 (4) he can remit the Bill for reconsideration or may altogether refuse to assent. So long as assent has not been given a Bill will not be one passed by the Legislature and as such will not be saved from lapse by Rule 36-C, on dissolution of either House. It is true that by virtue of the provisions of Ss. 316 and 317 of that Act the former Indian Legislature is to exercise the functions of the Federal Legislature during the transitory period. This however cannot imply that the Indian Legislature functioning under Part XIII of the Act of 1935 is the same juristic body as that which functioned under the Act of 1919. On the commencement of Part III of the Act of 1935 the members of the Council of State and the Legislative Assembly who had been elected or nominated to represent Burma or Burma constituencies dropped out.[1] Again, the Indian Legislature after that date can exercise its powers freely only as regards the items constituting the Federal List and in a restricted degree over the subjects specified in the Concurrent List and not at all in the case of the items forming the Provincial List, whereas formerly its powers were far wider in range and operation. Do not these facts suggest that on the coming into operation of the Government of India Act, 1935, there has been a notional dissolution in any event in the first instance of the Indian Legislature that functioned under the Act of 1919 and a subsequent resurrection of it with reduced powers and altered composition by virtue of Part XIII of the Act of 1935? If there was then a dissolution, even if it be only notionally, will not the Bills pending the assent of the Governor-General at that time lapse? Nor is there any provision in Part XIII of the Act of 1935 empowering the Governor-General to assent to Bills of that type. No doubt S. 68 of the repealed Act empowering the Governor-General to assent to a Bill passed by both chambers of the legislature is kept in force during the transitory period; but this can govern only in the case of a Bill passed by the Chambers after 1st April, 1937, *i.e.*, at a time when the Houses functioned with reduced strength and powers. There is nothing in the Act of 1935, to suggest that it ever contemplated or provided for assent being given to a measure of the type of the Hindu Women's Rights to Property Bill. In the present decision the Allahabad High Court has cryptically stated :

1. S. 8 of the Government of India (Commencement and Transitory Provisions) Order, 1936.

"It appears to us that the provisions made in S. 317 and Sch. IX are intended to continue the validity of the functions of the Indian Legislature."

Evidently their Lordships are of the opinion that there is no break in the continuity of the Legislature despite the repeal of the Act of 1919. It is one thing to make provision for the Indian Legislature assuming the functions of the Federal Legislature but it will be an altogether different thing to read those provisions as maintaining intact the Indian Legislature and preserving its juristic identity and continuity despite the repeal of the Act which had given birth to that Legislature. In the circumstances therefore a fuller consideration of the question is certainly to be desired.

MADRAS PAWNBROKERS BILL

The Madras Pawnbrokers Bill has met with considerable opposition from pawnbrokers in the City and in the Mofussil. While it must be admitted that the Bill requires modification in several respects the measure itself is a very desirable piece of legislation. The Bill is largely modelled on the corresponding English Act 35 and 36 Vict., c. 93 and its language is clear and concise. It is significant that the protest against the measure has practically been directed to the points on which the framers of the Bill have departed from the English Act.

LICENCES.—Thus in respect of the grant of licences the power is vested in England with the Magistrates or with the Justices of the Petty Sessional Division, while under the Madras Bill the power is vested with the Police Officers specified in S. 4 (1). The combination of the licensing and prosecuting powers in the Police is open to serious objection. The issue of a licence is no doubt made obligatory except in the two circumstances mentioned in S. 4 (2); but even then, it should not lie within the power of the Police to decide if the applicant has adduced 'satisfactory evidence of good character.' It would be well if the licensing authority were vested in Magistrates, and it is further necessary that there should be a right of appeal to a higher authority when the licence is refused.

ARREST BY POLICE.—The other provision which should be jettisoned from the Bill is S. 18, which provides that "any Police Officer may arrest without a warrant any person committing in his view an offence." Neither grounds of public policy nor the ends of justice would seem to require this extraordinary extension of the power of the Police to arrest without warrant, and our experience of the exercise of such powers even in cases now allowed by the law does not encourage any extension thereof. If the offence disclosed is a major offence such as theft, forgery or breach of trust, the general Penal Law can be availed of; and in respect of the other offences committed under the Act there is no need for undue severity in the

matter of cognisance. The criticism that the section as it stands vests an unduly large power of surveillance in the Police is largely justified.

PAWN TICKET.—The provisions of the Bill as to the issue of a pawn ticket, and the legal incidents of the ticket have been taken word for word from the English Act and are in the main salutary; but it is doubtful if the average pawner in this country can be trusted to appreciate the value of the document in the same manner as in England where conditions of literacy and business are quite different. The provision in S. 8 (2) that the pawnbroker shall not be bound to deliver back a pledge unless the pawn ticket is delivered may work hardship in the majority of cases where the ticket is lost or mislaid, and any amount of conflict might arise between the possible holder of the ticket and the person making a declaration of "pawn ticket lost." And cases again may easily be imagined where the ticket given by the pawnee with his right hand is taken back by his left hand. The better arrangement would seem to be to have the pawn tickets issued in duplicate, and allow the duplicate copy containing the signature of the pawner to remain with the pawnee. And the pawner might be enabled to redeem the pledge after acknowledging the same in the duplicate so left. It is worth remembering that in England in the case of special contracts of pawn the pawn ticket is so made in duplicate.

PUNISHMENTS.—With reference to the punishments prescribed, S. 14 makes certain acts of the pawnbroker punishable, while S. 15 makes certain acts of the pawner punishable. They correspond word for word to Ss. 32 and 34 of the English Act; but while the English Act awards a sentence of fine only in such cases, the Madras Bill renders the offences punishable with *imprisonment or fine*. The proposed legislation being protective in its nature it would be better to adopt the standard of punishment prescribed by the English Act and abolish the sentence of imprisonment. And the provision in S. 15 as to the pawnbroker's right to detain persons suspected of an offence seems to provide a needless rigour in the law. It is well known that while the English Law contemplates arrest and detention by a private person under certain circumstances, the Indian Law does not recognise such a right. It is somewhat extraordinary that the right of seizure and detention of an offender should be conferred by this Bill on the private citizen. A right to detain the stolen article and to complain to the Police should be quite sufficient in most cases. Otherwise, the liberty of the subject is in danger of jeopardy at the hands of an over-zealous or unscrupulous pawnbroker.

INTEREST AND ACCOUNT.—The provision in the Bill for a maximum interest rate of 6¼ *per cent.* per annum has been criticised by pawnbrokers as too low a rate; the rate, however, is not unduly low in view of the facts that the loans in such cases are secured loans, and

the Contract Act provides easy means for realisation of the debt; and further, the interest rate in general would seem to be looking down in India. The provision that the accounts should be kept in English or in the language of the locality as may be prescribed has evoked protest from North Indian pawnbrokers; the account book while undoubtedly a weapon of offence for the pawnbroker is also looked upon under the Bill as a shield in favour of the pawner, and the above provision would seem to be justified.

Subject to the criticisms above referred to, the Bill under review is a beneficent piece of legislation, and the fact that it is sponsored at a time when a popular Government is not at the helm of affairs is no ground for viewing it with any disfavour.

B. V. VISWANATHA AIYAR.

JOTTINGS AND CUTTINGS.

A Jocular Predecessor.—While Mr. Justice Darling was perhaps the most prolific in the way of enlivening the progress of a case by a series of *bons mots*, there were those on the judgment seat before his day, who, if not quite so prodigal in the scattering of witty sayings in the course of a case, could yet enliven them with a humorous remark. Those whose memories go back to the days when Baron Pollock was still on the Bench—he was the last survivor of those bearing the judicial title of Baron—will recall him wearing the coif, the distinctive mark of the old serjeants, and every now and again making a little joke, which was all the more effective by reason of the absence of any jocular features on the Baron's countenance. Not indeed that he ever sought to court the name of a wag. But at least on one occasion he made a very happy remark which tickled those who were within earshot, if it did not altogether please them at whom it was directed. On the occasion in question the Baron was trying a case which turned on what constituted "necessaries" for a minor. On one side there was a somewhat decrepit and elderly Q.C. whose marriage to the mature daughter of a patrician house had occasioned a good deal of ironic banter from his learned friends. The opposing side was captained by a silk who, although younger than his opponent, had decidedly the advantage over him in the matter of olive branches. The question in dispute in the case was whether a piano constituted a "necessary," the childless old Benedict urging that it was, while his opponent, the paterfamilias, strenuously argued that it was not. At last the former began to allude somewhat pompously to his married experience, being, it was said, rather fond of doing so by reason of the augustness of the alliance. "As a married man," he said, "I can speak with some authority on these matters, and I have always understood that a piano was a "necessary" for one in the position with the minor in this case occupies." This

oration was rudely broken in upon by his opponent, who remarked that " my learned friend boasts of his married experiences, but I must remind him that as a matter of fact he only entered upon the connubial state comparatively recently, whereas I have not only been married nearly 20 years, but am the father of a large family, while in that respect, so far as I am aware, the union to which my learned friend refers with so much complacency has not proved equally fortunate." This onslaught naturally provoked the opponent almost to madness, and he jumped up and began to protest as vigorously as his wrath would allow him, for the titter in court was becoming somewhat unpleasant at this stage. Baron Pollock intervened and threw oil upon the troubled waters by quietly remarking : " Gentlemen, I think we had better confine ourselves to the issue in this case." Could anything have been neater and so singularly apropos ?—*L.T., 1940, p. 288.*

Limitation on Right of Appeal.—The suggestion that litigants should be limited in their right of appeal is one which has often been advanced by reformers, and is again learnedly discussed in a recent work published by the Cambridge University Press under the title " The Machinery of Justice," from the pen of Mr. R. M. Jackson. According to the author, one appeal and one only should be accorded even to the most pugnacious of litigants who may desire to test the accuracy of the decision of which he complains. In recent years, it is true, there has been a slight diminution in the number of appeals competent in ordinary civil cases by the elimination, now a good many years ago, of the Divisional Court, but there still remain the Court of Appeal and the House of Lords. To the latter tribunal the would-be appellant must obtain the leave of the Court of Appeal or that of the House itself, but it has been noticeable that when leave has been refused by the Court of Appeal the House has in a number of cases granted the necessary permission to bring on the appeal. Somehow in the old days our forefathers contrived to get on without so many appellate tribunals, and in some of the Courts the difficulties that arose at times were surmounted in singular fashion. Thus, in the old Court of Exchequer which was manned by a Chief Baron and three puisnes an equal division of opinion sometimes occurred and when that happened the Chancellor of the Exchequer was called in to give the casting vote. We read that in one case in 1735—*Naish* v. *East India Company*—the services of Sir Robert Walpole, the then Chancellor of the Exchequer, were requisitioned, and after a re-hearing lasting three days he gave the casting vote in what was regarded as a matter of great doubt and difficulty. Nowadays we see the Chancellor of the Exchequer but once a year in the courts, his functions there being limited to the settling of the list of sheriffs for the ensuing year.—*S.J., 1940, p. 309.*
