

March 1940: it was not issued till 7th March. Fourthly, no complaint has been made to a Magistrate of any facts which constitute an offence under S. 190 (1) (a), Criminal P. C. It is not, *prima facie*, an offence to sell a tube of ethyl chloride for the sum of Rs. 2 instead of Re. 1-8-0. It is added that he 'refused to give a voucher', but there is an omission to say when, or to whom. Fifthly, the provisions of R. 130 made under the Act of 1940 appear to have been entirely ignored. And after listening to prolonged argument on both sides I have been quite unable to elicit any facts which are alleged to constitute a contravention of R. 81 of the Defence of Burma Rules.

The proceedings have been very slipshod. This is apparent from the reference to the non-existent R. 81 (b) (4), to the allusion to "a tube" of ethyl chloride without specifying the amount sold, to the failure to state how the supposed maximum price of Re.1-8-0 was arrived at, and to the complete absence of any information showing when or to whom the accused refused to give a voucher. When a person is charged with a criminal offence he must be told with particularity not only the act he is alleged to have committed which is said to constitute it but also what is the law which he is said to have infringed. We appear to have no power to award costs to the applicant. We much regret this, for he might have been less out of pocket if he had submitted to a fine which would probably have been a relatively small one, rather than take up the case in revision on behalf of the public. In saying this I do not omit to notice that in the first information report it is stated that the applicant said he knew he was charging more than the permitted price. But, whatever he may have thought, no maximum price had been fixed by a competent authority for this commodity. We also think that although in such a case the police have authority to effect an arrest without a warrant it was a most unfortunate course to arrest him in a case of this kind. Since writing this judgment I have had sent to me in chambers what purports to be a true copy of a letter from the Secretary of the Department of Commerce and Industry to the Accountant-General, dated 14th November 1939 conveying the sanction of His Excellency the Governor to the temporary appointment of Mr. F. B. Arnold as Controller of Prices with effect from 4th October 1939. But the hearing of this application has been completed. I must pay no attention to this letter. In any event it is

plain that its earlier production could not have affected the result. These proceedings must be quashed.

D.S./R.K.

Proceedings quashed. —

**** A. I. R. 1941 Rangoon 5**

SHARPE J.

U Lun — Plaintiff

v.

U Chit Hlaing and another —

Defendants.

Civil Regular No. 103 of 1940, Decided on 23rd August 1940.

**** (a) Government of Burma Act (1935), S. 27 (3) — Speaker has no power to declare whether seat has become vacant or not.**

One must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration. In order, therefore, to appreciate the position of the speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Government of Burma Act. The speaker in Burma has no powers to declare whether a seat has become vacant or not.

[P 11 C 2; P 12 C 2]

*** (b) Government of Burma Act (1935), Ss. 27 (1) and 32 (2) — Speaker in declaring that certain member's seat was vacant is not protected either by S. 27 (1) or by S. 32 (2).**

Section 27 (1) is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. The speaker's declaration that certain member's seat was vacant, although the declaration was made by words spoken in the chamber does not come within the purview of the sub-section. In making such declaration the speaker is doing more than merely giving a ruling on a point of order. He is therefore not protected either by S. 27 (1) or by S. 32 (2).

[P 13 C 1, 2]

(c) Government of Burma Act (1935), S. 41 — Ordinance under S. 41 providing that ordinance would cease to operate at expiration of six weeks from re-assembly of Legislature — Re-assembly of Legislature at 11 a. m. on 15th February — Ordinance ceases to operate at midnight on 28th/29th March.

An ordinance under S. 41 provided that the ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature if there be no resolution disapproving it passed by the House of Representatives. The Legislature re-assembled at 11 a. m. on 15th February:

Held that the ordinance ceased to operate at midnight on 28th/29th March as the law takes no notice of the fractions of a day: *Case law referred.*

[P 14 C 1]

*** (d) Government of Burma Act (1935), S. 25 (1) (a) — Member appointed second Lieutenant in Army holds office of profit even if he has received no remuneration and his appointment is subject to His Majesty's approval.**

A person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers holds an office of profit under the Crown in Burma even if he has in fact received no remuneration or has not joined any particular unit of the Army in Burma

or his appointment is subject to His Majesty's approval. [P 14 C 2; P 15 C 2]

(e) *Government of Burma Act (1935), S. 5 (3)* — *Correct reading of S. 5 (3), stated.*

The correct reading of S. 5 (3) is that if any question arises whether any matter (a) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (b) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment then the decision of the Governor in his discretion is final. [P 19 C 1]

(f) *Government of Burma Act (1935), S. 5 (3)* — *S. 5 (3) applies only as between Governor and Ministers regarding administrative matters.*

Section 5 (3) only applies as between the Governor and the Ministers in regard to administrative matters. S. 5 (3) has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of Part 4 ("Legislative") of the Government of Burma Act. [P 19 C 2]

** (g) *Government of Burma Act (1935), S. 42* — *High Court has power to enquire whether ordinance promulgated under S. 42 is or is not within powers of Governor — Ordinance providing that members of House of Representatives should not be disqualified for being members of House if they held commission in His Majesty's forces is beyond legislative powers of Governor.*

High Court is not precluded from enquiring whether an ordinance promulgated by the Governor under S. 42 is or is not within his powers. Sub-section (4) of S. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under S. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature would not have been valid. An ordinance providing that members of the House of the Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces is not a matter of defence, but is concerned with something which is a matter entirely for the Ministers. Accordingly the Governor has no power to promulgate such ordinance when the Legislature is then in session. [P 18 C 2; P 19 C 1, 2]

(h) *Government of Burma Act (1935), S. 42* — *Ordinance is promulgated on date when it is published in Gazette.*

Promulgation of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. Promulgation of a new law takes place through the medium of the Official Gazette. It is wrong for the notifications which appear in the Burma Gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; they should say "The Governor hereby promulgates the following ordinance." An ordinance therefore is promulgated on the date on which it is published in the Gazette. [P 20 C 1, 2]

(i) *Government of Burma Act (1935), Ss. 25 (1) (a) and 42* — *Ordinance providing that member whose seat has become vacant under Government of Burma Act shall nevertheless be restored to his former seat is beyond powers of Governor and is void.*

The only meaning which can be assigned to S. 25 (1) (a) is that if an office of profit is not to

disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. An ordinance the effect of which is to provide that a member whose seat has become vacant under the Government of Burma Act shall nevertheless be restored to his former seat, which is then vacant is beyond the powers of the Governor and is void. [P 20 C 2; P 21 C 1]

E Hay, U E Maung and U Maung Maung —
for Plaintiff.

Kyaw Din and P. K. Basu —
for Defendants Nos. 1 and 2, respectively.

Judgment. — In this and the other case which was heard at the same time extremely important questions of law arise and for that reason very full arguments were addressed to me by the learned advocates for the respective parties and I am very much obliged to them for their assistance. Among the matters into which I have had to enquire are the extent of the powers of the Speaker of the House of Representatives in Burma and whether, and to what extent, he is subject to the jurisdiction of this Court, and the extent of the legislative powers both of the Governor (by way of Ordinances) and of the Burma Legislature. With such important questions falling for my decision, it is a matter of regret to me that I have had since the hearing was concluded but a few days for the preparation of this judgment, and even on almost all those days I have been fully occupied disposing of important cases under the Tenancy Act and the Tenancy Ordinance. To-day is Friday, and on Monday not only does the long vacation of this Court commence but the Legislature reassembles. Therefore it was most desirable that I should deliver these two judgments to-day. With a little more time at my disposal I would have been able to condense considerably what I am about to say. No evidence has been called before me by any party, as the facts are not in dispute. They are either admitted or ascertainable from agreed documents. I will set out the facts at once. I shall do so somewhat fully, as there is no oral evidence on the record. On 18th September 1939, at a time when the Legislature was not in session the Governor of Burma promulgated, under S. 41, Government of Burma Act, an Ordinance called the Burma Legislature (Removal of Disqualifications) Ordinance, 1939 (to which I shall hereafter refer as "the first Ordinance"), S. 2 of which provided that a person should not be disqualified nor should be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legis-

lature by reason only that as a member of any of His Majesty's Forces he was holding or had held any office of profit under the Crown. At the time of the promulgation of this, the first Ordinance, the plaintiff, U Lun, was the member of the House of Representatives of the Burma Legislature for the constituency of Insein North, having been chosen, at the General Election in November 1936, in accordance with the provisions in that behalf contained in Schedule 3 to the Government of Burma Act, 1935. Neither then nor subsequently was he subject to any disqualification rendering his seat in the House of Representatives vacant, save that he was, in March last, appointed a Second Lieutenant in the Army in Burma Reserve of Officers, as I shall presently mention, if indeed that was a disqualification. Whether or not the holding of such appointment did disqualify the plaintiff is one of the important questions which fall to be decided in the present case.

By sub-s. (2) (a) of S. 41, Government of Burma Act, the first Ordinance ceased to operate at the expiration of six weeks from the first reassembly of the Legislature after its promulgation, or, if a resolution disapproving it was passed by the House of Representatives and agreed to by the Senate, then upon the resolution being agreed to by the Senate. The first reassembly of the Legislature after the promulgation of the first Ordinance was at 11 a. m. on 15th February 1940, the first Ordinance was duly laid before the Legislature, but no resolution disapproving it was passed by the House of Representatives. In the Burma Gazette for 16th March 1940^a it was notified, under date 13th March, that the plaintiff together with his fellow member of the House of Representatives, U Ba Maung, the plaintiff in the other case, and together with some nineteen other persons, were subject to His Majesty's approval, appointed to be Second Lieutenants in the Army in Burma Reserve of Officers, with effect, in the case of the plaintiff and U Ba Maung from 11th March. Neither the plaintiff, U Lun, nor his fellow Member U Ba Maung, has ever proceeded to join any unit of the Army in Burma, for training or otherwise, nor has either of them drawn any pay or allowances. All the other 19 persons whose appointments as Second Lieutenants were notified in the Burma Gazette of 13th April joined a unit at Maymyo or elsewhere, and it is agreed that the reason for U Lun and

U Ba Maung not doing so was that they might be left free to discharge their duties and responsibilities as members of the House of Representatives, and in fact they continued to do so. At about 12 noon on 29th March, during the course of the sitting of the House of Representatives, defendant 2 who was the Karen member for Thaton West and also the Deputy Speaker of the House, rose in his place in the Chamber and addressed defendant 1, who was and is the Speaker of the House of Representatives, in the following terms :

Mr. Speaker, may I draw your attention that the Burma Legislature (Removal of Disqualifications) Ordinance, 1939, ceased to operate on 28th March 1940, and now we have two officers of the Army in Burma Reserve of Officers sitting in this House. If you refer to S. 25, Government of Burma Act, Sir, a person shall be disqualified for being chosen as, and for being, a member of either Chamber, if he holds any office of profit under the Crown in Burma. I understand that these two officers will be called for training for which they will be remunerated very soon as they have been appointed Second Lieutenants.

The Speaker enquired who the two members were, and defendant 2 gave the names of the plaintiff and of U Ba Maung, the member for Myitkyina, and added :

"Sir, if they are disqualified under S. 25, are they under S. 24 (a) entitled to sit in this House and vote? I am just drawing your attention to this matter."

The Speaker thereupon said that he thought that the question raised was a constitutional one and a very serious one too and suggested that the matter be considered after four o'clock. The Premier agreed, and added that he thought "the Advocate-General also should be present." The Speaker observed that, if a member is disqualified under S. 25, then under S. 26, he is liable to a fine of Rs. 500 in respect of each day he sits or votes, and he (the Speaker) added :

Therefore, I say it is very essential that this question should be decided promptly and we shall take it up after four o'clock to-day..

Both the plaintiff and the other member named were present in the Chamber when defendant 2 so raised this point. When four o'clock came the Speaker addressed the Chamber in this way :

Now we come to the point raised by U Hla Pe this morning whereupon the Premier said :

"Sir, I have already supplied you with a copy of the Ordinance about which you may kindly inform the members."

to which the Speaker rejoined :

I will read the Ordinance by His Excellency the Governor that has just been delivered to me. It reads thus :

^a Burma Gazette, Part I, p. 311: Defence Department Notification No. 185.

and he read out a type-written document headed the Burma Legislature (Removal of Disqualifications) Ordinance (Ordinance No. 5 of 1940). This ordinance (to which I shall hereafter refer as "the second ordinance,") was expressed to be made under S. 42, Government of Burma Act. The terms of s. 2 of the second Ordinance were identical with those of s. 2 of the first ordinance. Having read out the document, the Speaker returned it to the Premier and then asked defendant 2 what he had got to say, whereupon the latter addressed him as follows :

Sir, this Ordinance has just been promulgated, but when I drew your attention this morning there was no Ordinance in existence. The Ordinance first promulgated under S. 41, Government of Burma Act, ceased to operate on 28th March. That is why I raised this point, Sir.

The Speaker then said :

What has the Government got to say?
to which the Premier replied :

The Ordinance is quite clear, Sir. It operates with effect from 28th March. We cannot go beyond the action which has been taken by His Excellency. We are precluded from doing so and it is outside our jurisdiction.

The Speaker then addressed the house at considerable length upon the matter and thereby initiated a discussion in which about a dozen members (including three or four Ministers) participated, several of them at even greater length than the Speaker, until, apparently by chance, there appeared the Advocate-General who suggested that he would like a little time to consider the matter. This was on a Friday afternoon and the Advocate-General asked if he could have time till Monday, the 1st April. In the end this was agreed to.

The only other matters in connexion with this long discussion in the Chamber that afternoon (the 29th March) which it is material to mention here are these : At one stage of the discussion defendant 2 interposed and called attention to a certain passage in Byrne's Law Dictionary under the heading "office of profit under the Crown." His interjection only occupies two or three lines in the official report and except for that one interjection on 29th March defendant 2 took no part whatsoever in the discussion either that day or on 1st April. The other material matter to be mentioned in connexion with 29th March is that almost at the end of that day the plaintiff, U Lun, said this :

As a member charged as having been disqualified, I think, I need give an explanation in this House, to which the Speaker replied :

No, the time has not yet come for your statement. Only when you are leaving this House you can make a statement, because according to the rule a

Minister who resigns will be permitted to make a statement only when he tenders his resignation.

That attempt to intervene in his own defence is the only time upon which the plaintiff took any part in the discussion in the Chamber on this matter, except for a parting shot, as I may call it, which he made at the very close of the sitting on the 29th, when he remarked : "One thousand five hundred rupees to buy a vote." The plaintiff never again attempted to speak in his own defence.

On 30th March the second Ordinance was published in a Burma Gazette, Extraordinary, of that date. When the matter was resumed in the Chamber on 1st April the proceedings were opened by a lengthy and no doubt carefully prepared speech, or, rather, legal address by the Advocate-General. When he had concluded, a number of other members spoke on this question, again about a dozen of them, and one of the Counsellors to the Governor also spoke. Several of the members spoke at great length, and some of those (including at least one Minister) who spoke on 1st April had already spoken on 29th March, while one member who had spoken in English on the first day spoke in Burmese on the second. The discussion in the Chamber was again a prolonged one.

It is to be noted that at no time whatever when the question of the plaintiff's position as a member was under consideration—that is to say, at no time either on 29th March, 1st April, or 2nd April—was any motion or resolution ever before the House. It was not for or against any resolution that all these members were speaking, and it is said by the learned advocate on behalf of the Speaker that all that was happening for these two days of lengthy discussion was the putting by defendant 2 of a point of order ; and that the subsequent ruling given by the Speaker was upon that point of order. It is not unimportant, perhaps, to say this about the various speeches which were made on 29th March and 1st April : there was certainly no agreement amongst the various members as to whether it was the Speaker or the House who was to be urged to accept this or that particular view of the law which was being presented by the respective members. It is, I think, fair to say that although the various members who spoke knew quite well what they were talking about, yet few of them had any clear idea as to whether it was the Speaker or the House who was to do some-

thing about the matter. Even the Speaker himself, if one reads the observations which he interposed from time to time during the two days' discussion, thought that the matter was one for the House to decide (*see*, for example, his remarks at the bottom of page 1536, and especially his remarks at the bottom of p. 1564 of vol. VII of the Official Report of the Proceedings of the House), yet in the end he decided it himself. When the many speeches had come to a close upon 1st April the Speaker said that, as this was an important matter, he would like to consider it very carefully that evening and would give his ruling the following morning.

An interesting thing happened on 1st April, after the Speaker had said that he would postpone his decision. First of all the House considered three or four Bills which have nothing to do with this case, and then there came before the House the Burma Legislature (Removal of Disqualifications) Bill, 1940, as passed by the Senate. The Minister for Judicial Affairs moved that that Bill be taken into consideration. This was the Bill which was destined to receive the Governor's assent four days later and to become thereby the Burma Legislature (Removal of Disqualifications) Act—Burma Act 12 of 1940. Section 2 of that Act is in precisely the same terms as the two sections 2 of the two Ordinances which I have already mentioned. The Burma Legislature (Removal of Disqualifications) Bill, 1940 (as passed by the Senate) was duly passed by the House of Representatives on 1st April, but not until after a lengthy debate in which there took part both the plaintiff, U Lun, himself and also, and, I think, at greater length than any other member, the Speaker, who addressed the Chamber not only in English for some time but also at length in Burmese, until Mr. Robertson, the representative of the Burma Chamber of Commerce, felt constrained to intervene in what he called the "rather embarrassing and difficult position" in which he found himself, with the object, not only of interrupting what had undoubtedly become a speech and a lengthy one — by the Speaker, but also of calling the Speaker's attention to the fact that by addressing the House in Burmese he (the Speaker)—as the Speaker himself was afterwards the first to admit—was not following the rules of the House which it was for him to enforce. Before, however, the House of Representatives passed the Burma Legislature (Removal of Disqualifications) Bill, 1940 (as passed by the Senate) on 1st April, a

division was taken and amongst those who then voted were the plaintiff, U Lun, and also U Ba Maung, the two persons whose position as members was then under consideration by the Speaker. By their own votes they supported the attempt to maintain their own positions as members, and that at a time when the Speaker had their position as members under consideration.

The following morning, namely, 2nd April, the Speaker proceeded to give what he called his "ruling on the matter that was discussed yesterday." He commenced by referring to the matter as a point of order. He dealt at moderate length with the legal points raised, and towards the end of his ruling he said this:

In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions.

Under S. 26, Government of Burma Act, they have become liable to pay a penalty of Rs. 500 per day of their sitting in this House from 28th March and I request the Government to take necessary action for such recovery from the said gentlemen.

It has been contended by the Government that the Speaker should not act as a Court under S. 27 (3) and in my view the chair can give a ruling on a point of order raised in the House under R. 46 (2) without fear or favour.

This is the "ruling" of which the plaintiff now complains. It is agreed by all parties that the plaintiff and also his fellow member U Ba Maung were both present in the Chamber as well in the afternoon as in the morning of 29th March, and again on both 1st and 2nd April, although from a passage in the Speaker's address on 29th March it appears that they were absent for a part of the afternoon on that day. On 5th April the Governor gave his assent to the Burma Legislature (Removal of Disqualifications) Bill, 1940, to which I have already referred. In the Burma Gazette (Extraordinary) of 6th April the fact of the Governor's assent to that bill was published for general information, and it was also therein notified that the Governor had withdrawn the second Ordinance, as he had power to do under s. 42 (3) (b), Government of Burma Act. No proceedings have been taken against the plaintiff under S. 26 of the Act. On 24th of April the present suit was filed. By his plaint the plaintiff asks, first, as against both the defendants' for a declaration that he is (that is to say, that he was, at the time of the institution of the suit) a member of the House of Representatives and that his seat in the said House had not become vacant, and he also seeks, as against the Speaker only, both a declaration that

the latter had no power to determine the matters disposed of by him in his "ruling" of 2nd April 1940 and that the Speaker's declarations and findings are of no force or validity, and also an injunction restraining the Speaker from taking any steps pursuant to his declaration that the seat of the plaintiff had become vacant and from in any way interfering with the exercise by the plaintiff of his rights, duties or privileges as a member of the House of Representatives. The contentions of the plaintiff, on the one hand and of the Speaker, on the other, can be stated quite shortly. I will deal later with the case in regard to defendant 2. The plaintiff says that he is, and at all material times has been, a member of the House of Representatives, that his seat has never become vacant; and, further, that in any event, whether his seat did become vacant or not, the Speaker had no power to decide whether it was vacant or not, and it was not for him (the Speaker) to declare it vacant. To this the Speaker replies, in the first place, that he is not subject to the jurisdiction of this Hon'ble Court or any other Court in respect of acts done by him in exercise of the powers vested in him as the Speaker of the House of Representatives under the law.

That is para. 11 (*sic*) of his written statement. This plea must, I think, be read in connexion both with what he states in para 2 of his written statement, namely, that he, apart from performing his duty as the Speaker of the House of Representatives to regulate the procedure or the conduct of business or maintaining order in the Legislature by enforcing the rule that only a member shall sit and vote in the House, has neither denied nor is interested in denying the plaintiff's status

and also with what he states in para. 10 (*sic*) which is that he by virtue of his office as the Speaker of the House of Representatives properly constituted under the law is the sole authority to give a ruling on the point raised 'by his co-defendant' and his ruling is final and conclusive and cannot in any way be questioned in any Court of law.

Finally he says—in para. 12 (*sic*)—that in any event the plaintiff was not, at the time the ruling was given, a member of the House of Representatives, as no Act of the Legislature or Ordinance could legally make him a member once he had ceased to be one. Incidentally the Speaker admits, by para. 1 of his written statement, that the plaintiff was a member at the date of the plaint. This is obviously an error in drafting, and the case has been fought on the basis that the two defendants had denied and not ad-

mitted such allegation. The words of para. 11 (*sic*) of his written statement are expressly designed to afford the Speaker the immunity given him by s. 32 (2), Government of Burma Act. It is clear that, if all that the Speaker did on 1st April was to exercise the powers vested in him for regulating procedure and the conduct of business and for maintaining order, then he is not subject to the jurisdiction of this Court in respect of the matter now complained of by the plaintiff. The first question really is, on this part of the case whether the Speaker was not doing more than merely giving a ruling on a point of order. In my judgment he was doing more and a great deal more. It must be borne in mind that for two days he had been hearing arguments on the one side and on the other and the Advocate-General had given a carefully prepared address on the legal position. Reported decisions of various Indian High Courts had been cited to him, and, when all this had been done and after taking time to consider his decision, he delivered from the Speaker's chair a speech which was quite the equivalent of a judgment of a Court of law. I do not say that this speech of the Speaker (to borrow the words of Stephen J., in (1884) 12 Q B D 271¹ at p. 285, when referring to the resolution of the House of Commons which gave rise to that case) is the judgment of a Court but it has much in common with such a judgment. The Speaker had concluded his speech in these terms :

In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions.

I think that it would not be wrong to say that the Speaker sought to attract to himself something very little, if at all, removed from the status of a Court; and that is something directly opposed to the clear terms of s. 27 (3), Government of Burma Act. The fact that the Speaker concluded his speech by expressly stating that he was not acting as a Court but was only giving a ruling on a point of order does not to my mind in any way alter the true effect of the facts, which to my mind clearly show that, whether or not the Speaker was acting as a Court in this matter, he was certainly doing something more than merely regulating procedure or maintaining order. After all, in the extract from his written statement which I have just read, the Speaker is now definitely claiming to be the sole authority for

1. (1884) 12 Q B D 271 : 53 L J Q B 209 : 53 L T 620 : 32 W R 552, *Bradlaugh v. Gossett*.

deciding the question raised by defendant 2, which was whether the plaintiff's seat was vacant or not. I think it quite impossible to accept the contention put forward on behalf of the Speaker, that he was merely dealing with a point of order. He was in my judgment claiming to have the right to declare whether any particular seat was vacant or not. I will now consider what the powers of the Speaker of the House of Representatives are and whether the right to declare when a seat in the House has or has not become vacant is one of them or not.

More than once during the course of his address to me Mr. Kyaw Din, on behalf of the Speaker, emphasised the fact that of course he was not contending in this case that the Speaker of the House of Representatives here in Burma has powers which are equal to those of the Speaker of the House of Commons in England. But it appears to me that in this particular matter the Speaker is claiming a great deal more than the Speaker of the House of Commons in England now claims, and something, indeed, to which no claim has been made by Mr. Speaker in England for at any rate some hundreds of years. It is important to distinguish between the Speaker of the House of Commons in England and the House of Commons itself. One of the privileges of the House of Commons in England is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament. It is to be noted however that what I have just mentioned is the privilege of the House of Commons and not that of the Speaker. When a vacancy occurs in the House of Commons from any cause which legally vacates a seat, a warrant is issued by the Speaker, but it is only issued by him in pursuance of an order of the House. In order to get over the difficulty which otherwise would have arisen when a vacancy occurred during a recess, when the immediate authority of the House of Commons would not have been available, it was necessary to pass the Recess Elections Act, 1784. Without the statutory power given to him by that Act even the Speaker of the House of Commons in England had no power to issue a writ for the purpose of filling a vacancy. In the present case there was never any order of the House of Representatives. As I have already stated, no resolution or motion was at any time before the House. The Speaker does not suggest for one moment that he has taken the sense

of the House on the matter at all. He listened to the arguments on the one side and on the other, as a Judge might do. In the end he delivered his decision, or whatever you like to call it. It was his own, personal decision at which he, after due reflection, thought fit to arrive. It is in no sense the decision of the House of Representatives; it is solely the decision of the Speaker. Let me at this point read one short passage from the judgment of the Privy Council (delivered by Sir James Colville) in (1866) 4 Moo P C (N S) 203² at p. 218, which, it seems to me, should be borne in mind in the present connexion:

The privileges of the House of Commons belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot therefore be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the Crown.

In other words, one must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration: see also (1890) 24 Q B D 557³ per Pollock B at p. 559 and (1998) A C 769,⁴ per Lord Hobhouse at bottom of p. 775. In order therefore to appreciate the position of the Speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Government of Burma Act. The Speaker here is entirely the creature of that Statute; he is brought into being by s. 21 of that Act. A reading of that and the next succeeding section of the Act shows to my mind that the Speaker is what in ordinary parlance would be called a "Chairman." S. 29 of the Act provides for the making of rules, both by the House of Representatives and also by the Governor, for regulating, subject to the provisions of the Act, the procedure and the conduct of its business by the House of Representatives, and the Speaker is the particular individual charged with supervising the due conduct of the proceedings of the House of Representatives, for maintaining order therein, and for conducting and seeing that the business of the House is conducted in accordance with those rules. He is also, by chap. 16 of the Rules of Procedure, made the medium of communication from the House to the Governor

2. (1866) L R 1 P C 328 : 4 Moo P C (N S) 203 : 36 L J P C 33 : 15 W R 366, Doyle v. Falconer.

3. (1890) 24 Q B D 557 : 62 L T 768 : 38 W R 507, Attorney-General v. Theobald.

4. (1898) 1898 A C 769 : 67 L J P 144 : 79 L T 42 : 14 T L R 488, Harding v. Commissioners of Stamps for Queensland.

to one of the mediums of communication from the Governor and the House. The Speaker of the House of Commons in England also has functions similar to the foregoing, but he has however in addition, other functions which are not bestowed upon the Speaker here. That there are strict limitations placed upon the powers of the Speaker of the House of Representatives is apparent from s. 27(3), Government of Burma Act, which provides, as I have already indicated, that notwithstanding the right of freedom of speech in the Legislature and the other privileges accorded to members by the earlier provisions of that section, nothing in the Act shall be construed as conferring, or empowering the Legislature to confer, on any officer of either Chamber (which, so far as this case is concerned, means the Speaker) the status of a Court, or any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner. A further instance of a limitation on the Speaker's powers is to be found in R. 42 of the Rules of Procedure for the House of Representatives, which provides that even if a question arises in the House whether a motion, amendment or question is or is not such as to require the prior sanction of the Governor, the Speaker cannot decide it, although he is presiding over the Chamber. I also call attention to the fact that it is not the Speaker, nor even the House, who can take proceedings under s. 26. I will at this point deal with a case upon which much reliance was placed by Mr. Kyaw Din, namely, 51 Cal 279,⁵ a decision of Page J. as he then was, which on appeal was upheld by Sander-son C. J. and Richardson J. The point of that decision can really, I think, be summed up in a single passage to be found in the judgment of Page J. at the very top of p. 287: . . . where a question within the jurisdiction of a public officer entrusted with judicial powers has been bona fide entertained and decided by such officer, the Court will not interfere with his decision merely upon the ground that his decision was erroneous either with respect to facts or in point of law.

With that statement of the law I, with respect, entirely agree. The whole question in the present case is whether the Speaker was entrusted with the powers which he claims. If he seeks to rely upon the above decision of Page J., he must admit that the powers which he exercised were judicial

5. (24) 11 A I R 1924 Cal 761 : 79 I C 1042 : 51 Cal 279 : 39 C L J 58, Manindra Chandra v. Provas Chandra.

powers, but s. 27(3), Government of Burma Act, denies him such powers. If he says, as in view of s. 27(3) of the Act, he must do that he was not exercising judicial powers, then the above decision has no application to the facts of the present case.

In my judgment it is quite clear that the Speaker in Burma has no powers beyond those which are conferred upon him by or under the Government of Burma Act. Can it be found anywhere in that Act that the Speaker is given the power to declare whether a seat has become vacant or not? I cannot find such a power anywhere in that Act. I invited Mr. Kyaw Din to point it out to me, and he had to admit that he could not do so. He argued however that there was a gap in this regard in the constitution of Burma as it now stands. He said that no provision has been made either by the Government of Burma Act or by His Majesty in Council for determining who shall have the right to declare when a seat becomes vacant (the special case provided for by s. 24(3) has no application to the present suit) and that there is neither an Act of the Burma Legislature nor any rules made by the Governor under Cl. 15 of Sch. 3 to the Act dealing with this matter. And so Mr. Kyaw Din argued that, there being, so he says, this gap the Speaker is impliedly made the person or authority who is given the power to declare whether a seat in the House of Representatives is vacant or not. I am not prepared to accept that argument. Such powers as are conferred by the Act upon the Speaker in Burma are so few, and are limited in so many ways, that I cannot hold that he has any such implied power as that for which Mr. Kyaw Din contends. In my judgment he has only such powers as are expressly conferred upon him by or under the Government of Burma Act. The power to declare whether a seat is vacant or not is admittedly not expressly conferred upon the Speaker by or under the Act. It is, in my view, unnecessary for me to decide whether there is or is not this gap in the constitution of which Mr. Kyaw Din speaks. It is enough for me to hold, and I do hold, that at any rate the Speaker has no such power of declaring a vacancy as he undoubtedly claims to have.

It is, I think, worth while looking to see what powers the Imperial Parliament conferred upon the Legislatures in other parts of the Empire, in regard to the declaration of vacancies in their Lower House. In the case of Canada it thought fit to confer upon

the House of Commons in that Dominion such privileges and powers as might from time to time be defined by Act of the Parliament of Canada, provided that they did not exceed those then enjoyed by the House of Commons in England: *see* S.18, British North America Act, 1867. So that it was open to the Canadian Parliament to give the Canadian House of Commons (not, be it noted, its Speaker) the right to declare when a vacancy arose. In Australia (and it is interesting to note that the "disqualification sections" of the Act dealing with Burma are very similar indeed in their wording to those of the Act dealing with Australia) the right of determining any question respecting the qualification of a member of the House of Representatives or respecting a vacancy therein, was (until the Parliament should otherwise provide) expressly given to the House (again not to the Speaker) in which the question might arise: *see* S.47, Commonwealth of Australia Constitution Act, 1900. There is nothing in the Government of Burma Act which comes anywhere near the above-mentioned provisions of the Imperial Statutes which brought into being those two Dominions. It is abundantly clear to me that the Speaker, the defendant in the present suit, is not invested with those powers to which he so plainly lays claim in para. 10 (*sic*) of his written statement.

One final point on this part of the case. The Speaker claims that he is not subject to the jurisdiction of any Court in regard to this matter, for the further reason that he is protected by S.27 (1), Government of Burma Act. Mr. Kyaw Din raised this point in the course of his argument: it is not pleaded by the Speaker, although it is pleaded by his co-defendant. The point can be disposed of very briefly. The sub-section which I have just mentioned renders all members of the Burma Legislature immune from any proceedings in any Court in respect of anything said by them in the Legislature. In my judgment this sub-section is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. I do not think that the Speaker's declaration that the plaintiff's seat was vacant, although the declaration was made by words spoken in the Chamber, comes within the purview of the sub-section. It must also be noted that S.27 (1) opens with the words "subject to the provisions of this Act..." Section 27 (3), I have already pointed

out, expressly declares that the Speaker is not to have "the status of a Court." So that if the Speaker purports within the Chamber, to act as a Court, he will not, in my view, be protected by the provisions of S.27 (1) in regard to what he then says.

In the result, on this part of the case, I have come to the conclusion that the Speaker, on 1st April last, did a great deal more than merely rule upon a point of order arising under the rules of procedure of the House, that he wrongly, and in excess of his legal powers, assumed the right to declare whether a seat was vacant or not, and that in respect of that wrongful assumption of a power which was not vested in him he is amenable to the jurisdiction of this Court, and is not protected either by S.32 (2), Government of Burma Act, or otherwise. I now turn to the second main part of the case, which involves a decision as to whether the plaintiff was, either on 1st April, when the Speaker gave his decision, or on 24th April, when the present suit was instituted, still a member of the House of Representatives.

The first question on this part of the case is whether the plaintiff was holding an office of profit under Crown in Burma at the time when the first Ordinance ceased to operate. There is even a contest between the parties as to when that was. The first Ordinance was promulgated under S.41, Government of Burma Act. By sub-s. (2) (a) of that section the first Ordinance ceased to operate "at the expiration of six weeks from the reassembly of the Legislature," there having been no resolution disapproving it passed by the House of Representatives. The plaintiff contends that, as the Legislature reassembled on 15th February, the Ordinance ceased to operate at midnight on 28th/29th March, which is six weeks from midnight on 15th/16th February, while the Speaker contends that the Ordinance either ceased to operate at midnight on 27th/28th March or, at latest, at 11 A.M. on 28th March, the latter being six weeks from the precise moment at which the Legislature reassembled. Although it would be necessary to decide this matter if I were now dealing with a case under S.26, Government of Burma Act—for in such a case it would be necessary to ascertain the exact number of days on which the plaintiff sat or voted when disqualified, if he ever was disqualified—yet to my mind and on the view which I take of the case it is immaterial for the purpose of the present suit to decide this point, because (1) the matter now in dispute was never raised in the

Chamber until about noon on 29th March, so that there was in any event a gap between the time when the first Ordinance ceased to operate and the raising of the present question; (2) the second Ordinance is expressed to have come into force with effect from 28th March, which means midnight on 27th/28th March, and so, if it is valid, then it covers even the widest gap suggested by the defendants in this case; and (3) if Act 12 of 1940 is valid, that also covers any possible gap, as the Act is expressed to come into force on the date on which the first Ordinance ceased to operate. But, as my conclusion on the point can be stated quite briefly and as the point was fully argued before me I will give my decision upon it. Had it been necessary for me to decide this question, I should have held that the first Ordinance ceased to operate at midnight on 28th/29th March. This appears to me to follow from the judgment of Sir John Romilly M. R., in (1859) 28 Beav 93⁶ at p. 94 and from such a case as in (1904) 1 KB 1.⁷ It also follows if one applies the test, suggested by Lord Tenterden C. J. in (1829) 9 B & C 134⁸ at p. 144, of reducing the time to one day—a test which was more than once adopted by Parke B: *see* (1838) 3 M & W 473⁹ and (1890) 6 M & W 49¹⁰ and which was adopted again in 1891, in fact twice in that year, once by Wills J. in (1892) 1 Q B 61¹¹ at p. 163 and again by Day J. in (1891) 1 Q B 402¹² at p. 405. The well-known maxim that the law takes no notice of the fractions of a day—and, except where there are conflicting rights between subject and subject for the determination of which it is necessary to ascertain the actual priority, such is the universal rule—is to my mind enough to dispose of the Speaker's alternative contention that the period of six weeks must be calculated from the actual hour namely, 11.0 A.M. at which the Legislature reassembled on 15th February: 46 MAD 685¹³ and

6. (1859) 28 Beav 93 : 28 L J Ch 886 : 5 Jur (NS) 696, Williams v. Nash.

7. (1904) 1 KB 1 : 72 L J K B 931 : 89 L T 428 : 52 W R 21 : 68 J P 41 : 20 T L R 7, Goldsmith's Co. v. The West Metropolitan, Ry. Co.

8. (1829) 9 B & C 134 : 4 M & Ry 130 : 7 L J (O S) M C 84, Pellew v. East Woford.

9. (1838) 3 M & W 473 : 6 D P C 549 : 7 L J Ex 140, Webb v. Fairminer.

10. (1840) 6 M & W 49 : 8 D P C 212 : 9 L J M C 29 : 4 Jur 125, Young v. Higgon.

11. (1892) 1 Q B 161 : 61 L J M C 63 : 65 L T 677 : 40 W R 63 : 56 J P 262, Radcliffe v. Bartholomew.

12. (1891) 1 Q B 402 : 60 L J Q B 47 : 63 L T 807 : 55 J P 168, South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association.

13. (24) 11 A I R 1924 Mad 257 : 76 I C 721 : 46 Mad 685 : 45 M L J 557 (S B), In re Court Fees.

(1879) 4 Q B D 230¹⁴ and *see per* Lust J. at p. 232, both also support this view.

It is said against the plaintiff that as he was appointed a Second Lieutenant in the Army in Burma Reserve of Officers with effect from 11th March, he was from and after that date holding an office of profit under the Crown in Burma. Two things are said on his behalf: (1) that his appointment was made "subject to His Majesty's approval" and that His Majesty had not at any material time given his approval; and (2) that he (the plaintiff) has never been called upon to join any unit of the Army in Burma for training and has accordingly never drawn any pay or allowance. The whole position surrounding an "office of profit under the Crown" is as regards those holding commissions in His Majesty's Forces, an extremely difficult one. In England "the incapacity, if any, arises under s. 24, Succession to the Crown Act, 1707," to quote the words of the Attorney-General when bringing in a bill on 2nd September last, on the eve of the present war; while on the following day in the House of the Lords the Lord Chancellor, moving the second reading of that bill referred to the "difficulty often in the minds of quite a number of lawyers" on this question.

The fact that the plaintiff before me has not in fact received any remuneration does not to my mind assist him, for the stewardship of the Chiltern Hundreds in England in fact now brings no profit to the steward, yet for very many years appointments to that office have been made for the express purpose of enabling members who wish to retire from membership of the House of Commons to accept an office of profit from the Crown so that their seats can be legally vacated. Nor in my opinion does the plaintiff obtain assistance from the fact that he has not yet joined any particular unit of the Army in Burma. His position, I think, is analogous to that of a person in England who holds a commission in the territorial force or reserve of officers. But let me first of all take the old Militia, the law relating to which was consolidated in the Militia Act, 1882. That Act provided for the calling up for a short annual training, and also for the embodiment (in case of imminent national danger or of great emergency) and for the disembodiment of the Militia. S. 38 of that Act expressly provided that the acceptance of a commission as a militia officer should

14. (1879) 4 Q B D 230 : 48 L J M C 95 : 40 L T 459 : 27 W R 552, Tomlinson v. Bullock.

not vacate the seat of any member returned to serve in Parliament. If the mere acceptance of a commission in the militia, without being called up for training or without being embodied, did not amount to accepting an office of profit under the Crown, why was it necessary to include in the Militia Act, 1882, a section such as S. 38?

The territorial force in England was brought into being by the Territorial and Reserve Forces Act, 1907. That Act also provided both for an annual training and for the embodiment of the force (if the army reserve was called out on permanent service) and for its subsequent disembodiment. Yet it was thought necessary to insert in that Act a provision — s. 23 (1) — that the acceptance of a commission as an officer of the territorial force should not vacate the seat of any member returned to serve in Parliament. If the contention of the plaintiff in the present suit were a sound one, it is strange that s. 23 (1) of this Act of 1907 should have been inserted to protect a person who merely accepted a commission, apart altogether from attending the annual training or being embodied. But perhaps the nearest thing to the Army in Burma Reserve of Officers is the Reserve of Officers in England. Here again it was thought desirable to provide in s. 36, Territorial and Reserve Forces Act, 1907, that the acceptance of a commission even only as an officer in the reserve of officers should not vacate the seat of any member returned to serve in Parliament. Why was that section incorporated? Both at the beginning of the last War (in November 1914) and again on the outbreak of the present War (in September last) an Act was passed to avoid the possibility of the seat of any member of the House of Commons in England being vacated by reason of his acceptance of a commission as an officer in his Majesty's Forces.

The only statutory provision which I can find which throws a favourable light upon the plaintiff's contention is the concluding sentence of S. 44, Commonwealth of Australia Act, 1900, which provided that a member of the Commonwealth House of Representatives should not be disqualified by the receipt of pay, half pay or a pension as an officer or member of the Queen's navy or army, or by the receipt of pay as an officer or member of the naval or military forces of the Commonwealth, if his services were not wholly employed by the Commonwealth. At that time the Imperial Parliament apparently thought the receipt of pay was the test. It

is to be noted however that this section is not only dealing with persons of commissioned rank but with all members of the forces. In view of all these enactments (other than the one dealing with Australia), and in view also of the fact that acceptance of the Stewardship of the Chiltern Hundreds vacates the seat of a member of the House of Commons notwithstanding the fact that the incumbent derives no actual profit from the office, I think it would be impossible for me to say that a person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers does not hold an office of profit under the Crown in Burma.

There is just one other point which was raised on behalf of the plaintiff in connexion with this matter with which I must deal. It is said that the fact that the plaintiff's appointment was made "subject to His Majesty's approval" is sufficient to preserve the plaintiff's position as a member of the House of Representatives. It has been argued on his behalf that until His Majesty approves of his appointment the plaintiff cannot be said "to hold the office." I cannot accede to that argument. Take the case of all those other persons whose appointments as Second Lieutenants were announced in the Burma Gazette at the same time as the plaintiff's and who then proceeded to join a unit, either at Maymyo or elsewhere, without waiting for His Majesty to approve their appointments. Can it be said that they had no standing as Second Lieutenants, that they had none of the powers which ordinarily vest in Second Lieutenants, and that any man under their command or to whom it was necessary for them to issue orders could disobey them with impunity, on the ground that His Majesty had not approved their appointments? To me that seems an impossible proposition.

In all the circumstances which I have just been mentioning I feel constrained to hold that at the time the first Ordinance ceased to operate, be that at midnight on 27th/28th March, or twenty-four hours later, or at some time between the two, the plaintiff was holding an office of profit under the Crown in Burma. S. 25 (1) (a), Government of Burma Act, disqualifies for being a member of the House of Representatives *inter alia* a person who holds an office of profit under the Crown in Burma, other than an office declared by Act of the Legislature not to disqualify its holder. There was, when the first Ordinance ceased to operate, no Act of the Legislature in opera-

tion whereby a Second Lieutenant in the Army in Burma Reserve of Officers was declared not to be disqualified for being a member of the House of Representatives. S. 24 (2) (a) enacts that, if a member becomes subject, *inter alia*, to any of the disqualifications mentioned in S. 25 (1), his seat shall thereupon become vacant. Therefore it is clear that the plaintiff's seat became vacant the moment the first Ordinance ceased to operate. The next question therefore is whether the second Ordinance restored the plaintiff to membership of the House. This question involves a consideration of four separate legal points: (1) Is this Court entitled to go into the question whether the Governor had power to promulgate the second Ordinance; (2) had the Governor in fact power to promulgate an Ordinance on this matter under S. 42, Government of Burma Act; (3) when was the second Ordinance promulgated and (4) if it was only promulgated on 30th March and if the Governor had such power as I have just mentioned, had he power to make the second Ordinance take effect retrospectively?

The Burma Legislature is created by S. 17, Government of Burma Act, and consists of His Majesty (represented by the Governor), the Senate, and the House of Representatives. The extent of the legislative powers of the Burma Legislature are to be found in ss. 33 and 34 of that Act. But in Burma the power of legislation is not confined to the Legislature which is set up by S. 17. The Governor himself, in addition to being, as His Majesty's representative, a part of the Legislature which is set up by S. 17, has also legislative powers of his own, which are set forth in ss. 40 to 43, Government of Burma Act. In the first place the Governor has certain legislative powers of his own in regard to what I will call "the special areas"—those areas, such as the Shan States, the Chin Hills District and the Somra tract, which are specified in Sch. 2 to the Government of Burma Act—but I need not examine this particular legislative power of the Governor because the question of these special areas does not arise in this case. In regard to the remainder of the territories in Burma which are vested in His Majesty, the Governor is given legislative powers of his own, which are quite distinct from the legislative powers given to the Burma Legislature. The Governor is given, under ss. 41 and 42, Government of Burma Act, the power to promulgate Ordinances, and under s. 43 the power to enact what are called

"Governor's Acts." These two powers are quite distinct. I need not consider the latter of them—an example of which is the Defence of Burma Act, 1940, which was considered by a Bench of this Court earlier this week in *Cri. Revision No. 340B of 1940*¹⁵ as no question about it arises in this case, but the Governor's powers in regard to promulgating Ordinances require a somewhat careful examination.

The Ordinances which the Governor is given power to promulgate fall into two distinct classes, the one under S. 41 and the other under S. 42. In order to appreciate the Governor's legislative powers as conferred by these two sections it is necessary to understand his position in the constitution of Burma, so far as the executive is concerned as the extent of his legislative powers under part 4 of the Act is closely linked with his executive and administrative powers under part 2. The constitution of Burma is to be found in the Government of Burma Act, 1935, as amended two or three months ago by the India and Burma (Emergency Powers) Act, 1940. The recent amendments to the principal Act, which are designed to meet present war time conditions, do not, however, affect this case.

By S. 2 (1), Government of Burma Act, all rights, authority and jurisdiction theretofore belonging to His Majesty which appertain to Burma are exercisable by His Majesty except in so far as may be otherwise provided by or under that Act, or as may be otherwise directed by His Majesty. By S. 3 (1) of the Act the Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under that Act, and such other powers of His Majesty as His Majesty may be pleased to assign to him. The executive functions of the Governor of Burma fall into two main classes: those which he is, by or under the Government of Burma Act, required to exercise in his discretion (which may be conveniently called his "discretionary functions") and his remaining functions under the Act, which I will call his "non-discretionary functions". The discretionary functions of the Governor are, in the main, specified in S. 7 (1), Government of Burma Act. I say "in the main" because other discretionary functions are specified in other sections of the Act, as, for example, in S. 6 (5), which provides that the functions of the

¹⁵ Reported in (41) 28 A I R 1941 Rang 1, *S. K. Roy Chowdhury v. The King*.

Governor with respect to the choosing and summoning and the dismissal of ministers shall be exercised by him in his discretion. The discretionary functions specified in S. 7 (1) are defence, ecclesiastical affairs, the affairs of what I have called above "the special areas", the control of monetary policy, currency and coinage, and with respect to external affairs. Section 7 (2) of the Act provides that, to assist the Governor in the exercise of these discretionary functions, he may appoint not more than three counsellors.

Now as regards the non-discretionary functions of the Governor: s. 5 (1) of the Act provides that there shall be a council of not more than ten ministers to aid and advise the Governor in the exercise of his non-discretionary functions. Section 9 (1) of the Act enables His Majesty, on the recommendations of the Secretary of State and in pursuance of an address presented to His Majesty by both Houses of Parliament, to issue instructions to the Governor. Pursuant to an address so presented to him, His Majesty has in fact issued instructions to the Governor, which are incorporated in what is known as the instrument of instructions, cl. 8 of which specially enjoins the Governor to be guided by the advice of his Ministers in relation to his non-discretionary functions. The result is that, in exercising his discretionary functions, the Governor can, if he so decides, do everything himself—he need not appoint any Counsellors, and, even if he does, he need not follow his or their advice—but in exercising his non-discretionary functions the Governor must not only choose and summon a Council of Ministers but must be guided by their advice. As the Governor's functions with regard to defence, ecclesiastical affairs, monetary policy and the other matters mentioned in S. 7 (1) are his discretionary functions, it follows that these subjects are outside the sphere of the Council of Ministers. I have indicated the two main divisions of the Governor's executive authority, but S. 8, Government of Burma Act, remains to be considered. That section gives the Governor certain special responsibilities, and if, and in so far as, any special responsibility of the Governor is involved S. 8 (2) requires him, in the exercise of his functions, to exercise his individual judgment as to the action to be taken. The principal matters which are thus made the special responsibilities of the Governor—or perhaps I should say "some of the matters", for the Governor's special responsibility is

equal as regards them all—are the prevention of any grave menace to the peace or tranquillity of Burma, the safeguarding of the financial stability and credit of the Government of Burma, the safeguarding of the legitimate interests of minorities, and restrictions on discrimination. In regard to these matters the Governor is given special responsibilities, and in regard to the exercise of his functions, so far as the special responsibilities are involved, he must exercise his individual judgment. There are certain other matters about which the Governor is required to exercise his individual judgment (*see*, for example, Ss. 12 and 13 of the Act), but I need not detail these other matters in this judgment.

The great importance of these special responsibilities not only emerges from S. 8 (1) of the Act but is also specially emphasised by the proviso to S. 5 (1) which says that nothing in that sub-section, namely sub-s. 5 (1) of S. 5 (which is the sub-section which brings into being the Council of Ministers) shall be construed as preventing the Governor from exercising his individual judgment in any case where he is by or under the Act required so to do. The paramount importance of the Governor's special responsibilities is recognized by His Majesty in cl. 8 of the Instrument of Instructions, which expressly lays it down that the Governor shall not be guided by the advice of his Ministers—in other words he must over-ride their advice—if in his opinion so to be guided would be inconsistent with the fulfilment of any of his special responsibilities, in which case, so the Instrument of Instructions directs, the Governor shall, notwithstanding his Ministers' advice, act in such manner as to his individual judgment seems requisite for the due discharge of his special responsibilities. Again, although, in so far as the Governor is by or under the Government of Burma Act required to act in his discretion or exercise his individual judgment, he is under the general control of, and is required to comply with such particular directions, if any, as may from time to time be given to him by the Secretary of State, yet, by S. 10 (2) the Secretary of State is required, before giving any directions to the Governor, to satisfy himself that nothing in such directions requires the Governor to act in any manner inconsistent with any instrument of Instructions; and, as the Instrument of Instructions as I have already pointed out, . . . preserves the Governor's special responsibilities, so equally, the superinten-

dence of the Secretary of State over the Governor cannot encroach upon these special responsibilities which have been imposed upon him by the Imperial Parliament. This consideration of the Governor's executive functions is necessary for an appreciation of the true meaning and effect of Ss. 41 and 42 to which I referred earlier in this judgment and to which I will now return.

Section 41, Government of Burma Act, gives the Governor power to promulgate ordinances only when the Legislature is not in session. At any time when the Legislature is not in session the Governor may, if satisfied that circumstances exist which render it necessary for him to take immediate action, promulgate such ordinances as the circumstances appear to him to require. There is no limitation regarding the subjects or matters about which the Governor may promulgate ordinances under S. 41, that is to say, when the Legislature is not in session. Now I turn to S. 42. That section gives the Governor power to promulgate ordinances at any time, that is to say, at any time whether the Legislature is or is not then in session, but the Governor's power to promulgate ordinances under S. 42, that is to say, when the Legislature is in session, is limited. He only has such power when he is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under the Government of Burma Act required in the exercise thereof to act in his discretion or to exercise his individual judgment. It is then, and then only, that he may promulgate such ordinances as in his opinion the circumstances of the case require. So that his power is limited, when the Legislature is in session, to promulgating ordinances, to put it in another way, either (a) in respect of matters outside the sphere of the Ministers, or (b) in respect of matters within that sphere but as regards which the Governor's special responsibilities require him to override their advice, or (c) in respect of the other matters about which he is required by the Act to exercise his individual judgment. Sub-s. (5) of S. 42 provides that the functions of the Governor under S. 42 are to be exercised by him in his discretion.

Now in this particular case the Governor promulgated the second ordinance under S. 42. As the Legislature was then in session he had no power to promulgate an ordinance under S. 41. The question therefore is whether (a) the subject-matter of the second

ordinance was concerned with one of the discretionary functions of the Governor, or with one of his special responsibilities, or with one of the other matters about which he is required to exercise his individual judgment; or (b) whether, on the other hand, it was concerned with a matter which was one entirely for the Ministers. It is said on behalf of the plaintiff that the second ordinance was concerned with a matter of defence, which is the first of the discretionary functions of the Governor which are mentioned in S. 7 (1), Government of Burma Act. That is the only ground put forward by the plaintiff for saying that the second ordinance was within the legislative powers of the Governor, and it appears to me that that was the only ground which could be advanced in this particular case. If the subject-matter of the second ordinance was a matter of defence, then the Governor had power to promulgate it.

Now what did the second ordinance provide? It provided that members of the House of Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces. Can it be said that that was a matter of defence? I do not think that it can. Even if there had been no second ordinance, Members of the House of Representatives would have been perfectly free to join His Majesty's forces and to be granted commissions therein. It may be that, if a member were granted a commission, he would thereupon lose his seat in the House of Representatives, but there is no legal bar which prevents him from joining His Majesty's force. He would perhaps be penalised for, but would not be prevented from, being granted a commission, if "penalised" is the right word to use; the penalty would merely be the loss of his seat. His Majesty is not prevented from utilizing his services in the defence of Burma, although his constituents lose the benefit of being represented by him in the Legislature. The latter may be an unfortunate matter for the electors, but I do not think that it is a matter of defence. The electors can choose someone else. It is not, and, indeed, could not be, suggested that this matter was one concerning which the Governor had a special responsibility under S. 8, Government of Burma Act. The result, therefore, is that the subject-matter of the second ordinance was in my judgment concerned with something which was a matter entirely for the Ministers. Accordingly, in my opinion, the Governor had no power

to promulgate the second ordinance, as the Legislature was then in session.

But it is said on behalf of the plaintiff that it is not for this Court to say whether the second ordinance is valid or not—that this Court cannot go into that question—on the ground that if the Governor says in an ordinance that he makes it under S. 42—as is in fact stated in the second ordinance—that concludes the matter; if the Governor says he makes it under S. 42, that means that he has decided that its subject-matter properly brings it under S. 42, and this Court cannot enquire whether its subject-matter does or does not come within the purview of S. 42. It is contended on behalf of the plaintiff that the position is governed by S. 5 (3), Government of Burma Act. That sub-section says that the decision of the Governor in his discretion shall be final if any question arises whether any matter is or is not a matter in respect of which the Governor is by or under that Act required to act in his discretion or to exercise his individual judgment. For the Speaker it has been suggested that this sub-s. (3) means that if any question arises whether any matter is (a) one about which the Governor is required to act in his discretion or (b) is one about which he is required to exercise his individual judgment, then the decision of the Governor in his discretion is final.

I do not think that that reading of the sub-section is right. I think that the correct reading is this. If any question arises whether any matter (a) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (b) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment—then the decision of the Governor in his discretion is final. But whether that reading of mine is right or wrong, it appears to me that S. 5 (3) only applies in regard to questions arising as between the Governor and his Ministers. Suppose the Governor says to his Ministers that in his opinion a particular matter about which it is necessary to take executive action (and which is admittedly not one of the Governor's special responsibilities) comes within the purview of his discretionary functions, and suppose the Ministers say that it is a non-discretionary function, and that accordingly the Governor must follow their advice. In such a case the decision of the Governor in his discretion would settle the question. That would be a case within

S. 5 (3) of the Act. My interpretation of the Act is that that sub-section only applies as between the Governor and the Ministers in regard to administrative matters. For observe: In the first place it is a sub-section of the section (S. 5) which creates the Council of Ministers; next, S. 5 is a group of sections with the sub-heading "administration"; thirdly, that sub-heading itself comes under the main heading "the executive," which constitutes Part II of the Act. Section 5 (3) is quite distinct from, and in my opinion has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of Part IV ("Legislative") of the Government of Burma Act. In my judgment this Court is not precluded from enquiring whether an ordinance promulgated by the Governor under S. 42 is or is not within his powers. Sub-section (4) of S. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under S. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature, would not have been valid. So that, in the absence of any restraining provision in Part IV of the Act, I do not feel any difficulty about examining the provisions of an ordinance promulgated under S. 42 with a view to seeing whether or not it comes within the limited terms of S. 42 (1). In this connexion the following words of Lord Selbourne, when delivering the judgment of the Judicial Committee of the Privy Council in *5 I A 178*¹⁶ at pages 193 and 194, afford support for the view which I have taken of this matter:

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers 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 Burma Legislature has, according to my construction of the Government of Burma Act, been given the exclusive right, while the Legislature is in session, to legislate on certain matters, and the subject-matter of the second ordinance is one of them. It is not, in my opinion, possible to say that this Court is exceeding its powers

16. (179) 4 Cal 172 : 5 I A 178 : 3 C L R 197 : 3 Sar 834 (P C), *Emperor v. Burah*.

when it enquired into the question whether the subject-matter of a certain piece of legislation is one which lies within the exclusive legislative power of the Burma Legislature or whether it is one within the legislative powers of the Governor. I hold that this Court has jurisdiction to go into that question, and, having gone into that question, I have come to the conclusion, for the reasons which I have already given, that the second ordinance was beyond the legislative powers of the Governor and so was void and of no effect. But the matter does not rest there, for, a further point is raised in connexion with the second ordinance, namely, that (even if I cannot go into the question whether the Government had power to promulgate it, or if I can go into that question and decide that he did have such power) yet, by reason of S. 42 (4), Government of Burma Act, the second ordinance is void so far as, and because, it contains a provision which would not have been valid (for the reason that it infringed the terms of S. 33 or S. 34 of the Act) if it had been enacted in an Act of the Legislature — because, in other words, it had retrospective effect.

There is however, a preliminary point on this question which I must first decide. If the second ordinance was promulgated on 29th March, then it would be possible to say, on the authority in (1879) 4 Q B D 230,¹⁴ —and see also 46 MAD 685¹³—that the second ordinance was not invalid as having retrospective effect merely because it was promulgated after the first ordinance ceased to operate. But it is only possible to say that if the second ordinance was promulgated on 29th March; if it was promulgated after 29th March it would mean that it purported to have retrospective effect, and on that ground and to that extent its validity might be assailed. In my judgment the second ordinance was not promulgated on 29th March, but on 30th March. "Promulgation" of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. In this country, as in India and elsewhere, promulgation of a new law takes place through the medium of the official gazette. It is in my judgment wrong for the notifications which appear in the Burma gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; to my mind they should say "The Governor hereby promulgates the following ordinance." In the case of the second ordinance it was not published in

the Burma Gazette till 30th March, and I hold that that was the day on which it was promulgated. I am not prepared to accept the suggestion that it was promulgated on 29th March when the Speaker read out to the House of Representatives the terms of a typed copy document handed to him by the Premier. I think that the official print of the second ordinance published by the Government Press (which is the equivalent in this country of a King's Printer's copy of an Act of Parliament in England) is quite right in stating, as it does, that it was promulgated on 30th March. As I hold that that was the date on which the second ordinance was promulgated it must now be considered whether (even if the Governor had power to promulgate an ordinance under S. 42 on this subject), the second ordinance is not invalid so far as it purports to have retrospective effect. This point, with which I am now about to deal, was in my opinion, if I may say so, particularly well argued by Mr. Basu. The material words of the second ordinance are to be found in S. 2, which reads thus:

A person shall not be disqualified nor shall be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legislature by reason only that as a member of any of His Majesty's forces he holds or has held any office of profit under the Crown.

The grounds for this further objection to the second ordinance can, I think, be stated quite shortly. Section 24 (2) (a), Government of Burma Act, says in clear terms that if a member becomes subject to any disqualification mentioned in S. 25 (1) his seat shall thereupon become vacant. Section 25 (1) (a) says that a person shall be disqualified for being a member if he holds any office of profit under the Crown in Burma other than an office declared by Act of the Legislature not to disqualify its holder. The use of the past participle of the verb "declare" is important. Reading the two sub-sections together it is clear to me that the result is that, if the particular office of profit of which a member becomes the holder, has not already been declared not to disqualify its holder, then the seat thereupon becomes vacant. To my mind nothing could be clearer. A vacant seat can only be filled in accordance with the provisions of S. 17 (3) of the Act. Section 34 (b) (ii) of the Act expressly deprives the Legislature of power, except in so far as expressly permitted by the Act, to make any law amending any provisions of the Act. An Act of the Legislature, the effect of which is to provide that

a member whose seat has become vacant under the Government of Burma Act shall nevertheless be restored to his former seat, which is then vacant—such an Act to my mind amends the provision of the Government of Burma Act, and as I cannot find any express provision in that Act permitting the Burma Legislature so to amend the Government of Burma Act, it is beyond the powers of the Burma Legislature to enact such an Act. Having regard to the terms of S. 24 (2) the only meaning which I can assign to S. 25 (1) (a) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. Now S. 42 (4) limits the legislative powers of the Governor under S. 42 to the same extent as S. 34 (b) limits the legislative powers of the Burma Legislature. If the Burma Legislature could not have made a law in the terms of the second ordinance containing such terms, then the Governor could not promulgate an ordinance, and in this respect it matters not whether the ordinance is promulgated under S. 41 or under S. 42, for S. 41 (3) is in the same terms as S. 42 (4).

I must therefore hold that on any view of the matter, at any rate the provision of the second ordinance which purported to restore the plaintiff to the seat which he occupied, up till the time when the first ordinance ceased to operate, is void. I now come to the Burma Legislature (Removal of Disqualifications) Act—Act 12 of 1940. It is said on behalf of the speaker that I need not consider that Act, because it only received the Governor's assent after the speaker had given his decision. But the plaintiff is claiming, *inter alia*, a declaration that he was at the time he instituted this suit, which is after Act 12 of 1940 came into force, a member of the House of Representatives. If Act 12 of 1940 restored him to his original position as a member, then I shall have to consider whether or not to grant him the declaration for which he asks. Therefore in my view I must necessarily deal with Act 12 of 1940. The terms of S. 2 of that Act are identical with the terms of S. 2 of the second ordinance. For reasons similar to those which I have just given for holding that the second ordinance was invalid, under S. 42 (4), Government of Burma Act—for similar reasons which I need not restate, I hold that, in so far as Act 12 of 1940 purported to restore the plaintiff to the

seat which had already become vacant, it infringed the provisions of S. 34 (b) and at any rate to that extent was invalid. It is unnecessary for me to decide, and I do not decide, whether it is possible to say that the words "nor shall be deemed ever to have been disqualified" in S. 2 of Act 12 of 1940 can be passed over so that the Act is valid as regards all its other provisions. On this point argument can, I think, be adduced on both sides. •

The result is that in my judgment neither the second ordinance or Act 12 of 1940 restored the plaintiff to his membership of the House of Representatives. I hold that his seat became vacant when the first ordinance ceased to operate and has been vacant ever since. He cannot, therefore, possibly have a declaration that he was a member when he instituted this suit, namely on 25th April last. As that is the only relief which he seeks as against defendant 2, I need say nothing about those points which were raised by Mr. Basu on behalf of defendant 2 which were additional to those raised on behalf of the speaker and which were peculiar to the case of defendant 2. The suit against defendant 2 fails and as against him it is dismissed with costs. Bearing in mind the fact that the two cases were heard together, but also bearing in mind the importance of this case and the amount of work which has obviously had to be done by the advocates, I fix an advocate's fee, for defendant 2, of twenty gold mohurs for the first day, twelve gold mohurs each for the second, third, fourth, fifth and seventh days, eight gold mohurs for the sixth day (which was not a full one) and three gold mohurs for to-day. I have not quite finished with the case against the Speaker, for the plaintiff also seeks as against him (a) a declaration that he (the Speaker) had no power to determine the matters disposed of by him in his "ruling," as it is called, of 2nd April, and that his findings are of no force or validity, and (b) an injunction to restrain the speaker from *inter alia*, interfering with the exercise by the plaintiff of his rights, duties or privileges as a member of the House of Representatives. This last-mentioned relief, the injunction, cannot possibly be granted as I hold that the plaintiff is no longer a member of the House of Representatives. With regard to the claim for the declaration which I have just mentioned it is true that I have held that the Speaker had not power to determine this matter and that his "ruling" is of no effect,

but apart altogether from the question whether S.42, Specific Relief Act, entitles me to grant the plaintiff this declaration in such terms as he seeks, about which I am not at all sure, I would not be prepared in the present case to exercise my discretion and grant the plaintiff such a declaration—for it is undoubtedly a matter of discretion under S. 42—even if I had the power to do so, for the simple reason that, as I have held that the plaintiff's seat did become vacant, it follows that I think that the speaker's decision was a correct one as regards the plaintiff although he had no power to give that decision which is accordingly of no force or validity.

In these circumstances it would to my mind be of no use to the plaintiff for me to grant him such a declaration, and I would not be prepared to exercise my discretion and do so. As, for the reasons given, I am not prepared to grant the plaintiff any of the reliefs which he seeks from defendant 1, the suit must also be dismissed as against that defendant as well as against defendant 2. Mr. Kyaw Din has informed me, at the Bar, that the Government has been, and is, responsible for conducting the case on behalf of the Speaker and that he (Mr. Kyaw Din) is retained by the Government to act on behalf of the Speaker—and, incidentally, that the Advocate-General would himself have appeared before me to argue the case, had it not been that he felt that he might find himself in an embarrassing position having regard to the fact that he, the Advocate-General, had spoken fully on the subject in the House of Representatives—and Mr. Kyaw Din also informed me that he was instructed not to ask on behalf of the speaker for cost against the plaintiff in the event of the suit being dismissed. There will accordingly be no order for costs in favour of defendant 1.

I have every sympathy with the plaintiff. The whole trouble has been brought about by the Government's omission, for a reason not disclosed to me—and indeed it was not necessary that it should be—to see that the Burma Legislature (Removal of Disqualifications) Ordinance, 1940, as passed by the Senate, was not passed through its remaining stages before the first ordinance ceased to operate. I cannot, however, allow my sympathy for the plaintiff to affect in any way my judgment on the legal issues which have fallen for my decision. The suit is dismissed.

D.S./R.K.

Suit dismissed.

* A. I. R. 1941 Rangoon 22

BAGULEY J.

U Po Hlaing and another—Applicants
v.*Daw Ngwe*—Respondent.

Civil Revn. No. 378 of 1938, Decided on 28th February 1939, from order of Dist. Court, Yamethin at Pynmana, D/- 25th October 1938.

(a) *Civil P. C. (1908), S. 115—Ignoring or failing to grasp essentials of reported ruling of High Court is material irregularity.*

The ignoring of a reported ruling of the High Court, or complete failure to grasp its essentials, must be taken as material irregularities. [P 23 C 2]

(b) *Arbitration—Dispute about inheritance referred to arbitration by some heirs only—Award cannot be set aside so far as they are concerned.*

The mere fact that all the heirs did not join in the reference to arbitration of a dispute about inheritance is no ground for upsetting the award so far as those people who made the reference are concerned: A I R 1925 P C 216, *Rel. on.*

[P 24 C 1]

* (c) *Arbitration—Reference to number of arbitrators—Evidence recorded by some—Award sent to absentee arbitrator and he getting acquainted with evidence—Award is not invalidated.*

It is true that when arbitrators are appointed they are supposed to act together, but it is not absolutely essential that all the arbitrators should be present when all the evidence is recorded provided all the arbitrators are made acquainted with the evidence that has been recorded before they come to their decision. There is nothing illegal or contrary to the principles of natural justice in this.

[P 24 C 1]

Hence where reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence the award is not invalidated.

[P 24 C 2]

Basu—for Applicants.*Guha*—for Respondent.

Order.—This application arises out of an application to file an award under para. 20 of sch. 2, Civil P. C. The facts of the case are that one Daw Thaung died leaving a son, three daughters and three grand-children by another son Po Saing who predeceased her. It would appear that there were certain admitted immovable properties left by Ma Thaung and these were partitioned among the heirs. After this had been done U Po Hlaing, the surviving son, and Maung Phye (a) Maung Thu Daw, one of the grand-children who seems to have been representing his brother and sister throughout, claimed that Ma Thaung had left some jewellery and cash in addition to the landed property which had been divided up. Daw Ngwe said that Ma Thaung had left nothing more. Her two sisters agreed with her, and executed a deed in