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**GOVERNMENT OF INDIA.
HOME DEPARTMENT.**

POLITICAL—A.

Proceedings, April 1916, nos. 465—468.

Extension of Sections 3—11 of the Defence of India Act, 1915, to those districts of Bengal to which they have not already been extended.

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PREVIOUS REFERENCES.

Political A., June 1915, nos. 233—236.
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LATER REFERENCES.

NOTES.

POLITICAL A, APRIL 1916.

Nos. 465—468.

EXTENSION OF SECTIONS 3—11 OF THE DEFENCE OF INDIA ACT, 1915, TO THOSE DISTRICTS OF BENGAL TO WHICH THEY HAVE NOT ALREADY BEEN EXTENDED.

FROM THE GOVERNMENT OF BENGAL, NO. 693-X, DATED THE 16TH MARCH 1915.

Pro. no. 465.

This request of the Government of Bengal that sections 3—11 of the Defence of India Act may be extended to the districts of Bengal to which they have not already been extended is submitted for orders. In this connection attention is invited to His Excellency's note of the

Political A., April 1915, nos. 385—411.

21st March 1915, regarding the extension of the sections to certain districts of the Punjab, which

lays down the policy to be followed in disposing of requests for the extension of these sections of the Act.

A. L.,—23-3-16.

The proposals contained in the present letter will, I presume, be considered in connection with the general question of the political situation in Bengal.

I cannot help thinking that the letter inverts the reasoning of the Bengal Government, which seems to be "we are now prepared, although we were not a year ago, to assume responsibility for recommending the extension of sections 3—11 to Calcutta. We are anxious to avoid undue attention being called to this particular extension, and we therefore recommend that the sections be applied to the whole of Bengal (other than the districts to which the sections have already been extended). The only real argument we can adduce in support of the larger proposal is that we urgently require to find fresh areas in which we can order compulsory residence without running the risk of interference on the part of the ordinary courts of law."

I must confess that this latter argument appears to me extremely far-fetched. Sections

Political A., May 1915, nos. 22—25.

Political A., June 1915, nos. 233—36.

3—11 have already been extended to 18 districts in five Divisions. Up to date 126 orders of compulsory residence only have been passed, and it is

impossible to believe that all suitable places for such residence in the large areas contained in the 18 districts have been exploited, and that it is really necessary to find fresh fields and pastures now. His Excellency's views in regard to the extension of these sections will be found in his

Political A., April 1915, nos. 385—411.

order dated 21st March 1915. Briefly stated they are that the sections should only be extended to

areas where they are required. The question for decision therefore seems to be—Are we to extend the sections to the remainder of Bengal because extension to Calcutta alone is likely to attract attention whereas with the wider extension the attention paid to Calcutta may escape notice? or

Shall we extend only to the areas where the extension is necessary?

The Indian Press and critics of Government in Calcutta and Bengal generally are peculiarly astute and vigilant, and I do not for one moment believe that the extension of the provisions to Calcutta will escape widespread and hostile criticism, whether the extension is to Calcutta alone or as part of a wider extension. If this anticipation is correct the criticism will be strengthened and to some extent justified if the sections are extended to areas in which they are really not required.

S. R. HIGNELL,—26-3-16.

When we extended section 3 *et seq.* of the Defence of India Act to certain districts in Bengal,

Political A. Pro., May 1915, nos. 22—25.

Honourable Member noted on the 17th April 1915 that "the Bengal Government have omitted a great

many areas which they would themselves have liked to include," and particularly commented upon the omission of Calcutta. However, we did not then desire to do more or less than the local Government recommended. They have now hardened their hearts and asked for extension

to the rest of the province. They have based their argument on a ground that is not very strong, namely, that they want to order men compulsorily to reside in areas other than the

Nadia was subsequently included, making 18 17 districts referred to, and are afraid of bringing districts.

H. WHEELER. breaches of such an order before the ordinary courts, but such cases should not usually be complicated, and if an order is broken it is not over clear why the ordinary courts should be reluctant to punish. However, we know that the ever present fear of an appeal or motion before the High Court does cramp action in Bengal, and there is really the stronger reason that seditious crime knows no district boundaries and may just as easily occur outside the 18 districts as within them. If so, there is little reason for a geographical distinction.

2. The net result of the noting in the general case as to the state of affairs in Bengal is that the conditions there require urgently to be grappled with. The Bengal Government have recently shown more activity, and I certainly would not discourage them in any way. If they think this extension to be required we may accept that view, even although we do not altogether accept their arguments, while that about concealing the fact that these sections have been extended to Calcutta is particularly feeble. Bengalis will, of course, immediately grasp that fact, even if (as is possible) we do not have specifically to mention it in the Notification, as to which we may consult the Legislative Department once the policy has been settled.

3. His Excellency should see.

H. WHEELER,—29-3-16.

I have no objection to an extension which shall include Calcutta, but I would boldly specify the areas to which it is extended and attempt no concealment of the extension to Calcutta, which strikes me as being a particularly feeble and ostrich-like device.

R. H. CRADDOCK],—29-3-16.

SUMMARY.

Under His Excellency's order of the 20th April 1915 sections 3 *et seq.* of the Defence of India Act were extended to 17 districts in Bengal, and subsequently to an 18th (Nadia).

The local Government now recommend their extension throughout the province, including Calcutta. Their reasons rather obscure the real issue. They appear to think that unless this is done it will be risky to direct compulsory residence outside the 18 districts for fear of prosecutions for a breach of such orders being challenged in the ordinary courts, while they hope by the form of notification to give less prominence to the fact that the extension includes Calcutta.

The Home Department think that the last point is impracticable and that it is unnecessary to seek after it. The true justification lies in the fact that seditious crime in Bengal does not recognise district boundaries and when the partial extension was previously made its limitations (particularly as regards Calcutta) were criticised. It is thought desirable to support Bengal in any measure to facilitate the control of sedition, and if His Excellency approves the extension asked for may be approved.

H. WHEELER,—29-3-16.

I think we might tell the Government of Bengal that we agree to the extension of the application of the Defence of India Act to the whole of Bengal, since they expressly ask for it, but that we do not approve in principle to the extension of the Act to districts when there has been no special reason for it. We might add that it would in our opinion have been better to mention the districts including Calcutta, and that we assume no responsibility for acting otherwise.

H[ARDINGE],—30-3-16.

As we shall have to issue the Notification I am afraid we must assume responsibility for its correct form, regarding which we may consult the Legislative Department.

H. WHEELER,—30-3-16.

R. H. CRADDOCK],—30-3-16.

Legislative Department.

From our point of view the most convenient and correct form of Notification would be one on the lines of that already issued for 17 districts of Bengal, specifying the remaining districts in a schedule. We cannot have a plain Notification extending the sections to the whole province, since the date of coming into force has to be given. A Notification in general terms, extending

the sections to all those parts of the province in which they are not already, by virtue of former Notification in force, is possible ; but specification would be better.

H. M. SMITH,—31-3-16.

I understand that the Home Department merely wish us to help them with the form of the Notification extending the Act. I do not, therefore, deal with the legal arguments in the Government of Bengal's letter, some of which do not appeal to me in the least, and are indeed, I think, at variance with the opinions we have given in this department on other cases.

2. In this view I place in the file a form of draft notification which, I think, does all that is necessary.

A. P. MUDDIMAN,—4-4-16.

Home Department.

We may accept and issue the draft Notification prepared by the Legislative Department.

2. A draft to the Government of Bengal and also one to the India Office are put up for approval.

A. L.,—7-4-16.

S. R. HIGNELL,—7-4-16.

I had previously discussed this with Hon'ble Member (now on tour), and we had better send copy of the Notification to Bengal without comment. As we have to issue it, we can scarcely admit or infer that we are issuing it in deference to them while not convinced of its necessity. Apparently Lord Hardinge was under the impression that action would be taken by the local Government and the position could have been explained to him had he been here.

I have amended the draft accordingly.

H. WHEELER,—10-4-16.

NOTIFICATION NO. 1211, DATED THE 11TH APRIL 1916.

Pro. no. 466.

LETTER TO THE GOVERNMENT OF BENGAL, NO. 1212, DATED THE 11TH APRIL 1916.

Pro. no. 467.

LETTER TO THE INDIA OFFICE, NO. 1213, DATED THE 11TH APRIL 1916.

Pro. no. 468.

Demi-official letter from the Hon'ble Mr. J. G. Cunningham, C.I.E., I.C.S., Chief Secretary to the Government of Bengal, to the Hon'ble Mr. H. Wheeler, C.S.I., C.I.E., I.C.S., Secretary to the Government of India, Home Department, no. 953-X., dated Calcutta, the 8th April 1916.

Would you kindly refer to Bengal Government letter no. 699-X, dated the 20th March 1916, relating to the extension of the provisions of the Defence of India Act to certain areas in Bengal ? The areas in question are the districts of Burdwan, Bankura, Birbhum, Murshidabad, Jessore, Malda, Bogra, Darjeeling and the Chittagong Hill Tracts, and the town of Calcutta. The extension to the districts named has become rather an urgent necessity owing to the difficulty of finding a sufficient number of suitable places in the districts to which the Act had been previously extended, which at the same time would satisfy the conditions which have been laid down for the compulsory domiciling of persons under the Act. As regards these districts I do not think there is any question of principle involved ; and, if you could see your way to give us as early as possible the relief which we seek, I should be very grateful.

It may be that your reply will be delayed on account of the consideration of the question whether the Calcutta area should be included or not. We want the Calcutta area for the purpose of dealing with offences for breaches of the rules under the Act ; and possibly for the creation of a Commission to try any serious offence which may take place in Calcutta. But we do not primarily want the extension to Calcutta for the purpose of domiciling anybody : for it is unlikely that we should ever think of domiciling anybody in Calcutta. At His Excellency's instance, therefore, I am to request the favour that at any rate as regards the addition of the districts named we should receive orders as early as possible.

On the main file a Notification is being issued extending sections 3 to 11 of the Defence of India Act to be districts of Bengal to which the sections have not already been applied. No

action is, therefore, required on this demi-official but we may telegraph to Bengal and let them know that Notification will be issued in this week's Gazette. A draft is placed below.

A. L.,—11-4-16.

S. R. HIGNELL,—11-4-16.

H. WHEELER,—11-4-16.

Demi-official telegram from the Secretary to the Government of India, Home Department, to the Chief Secretary to the Government of Bengal (Political), no. 1223, dated Simla, the 12th April 1916.

Your demi-official 953-X, dated 8th April. Notification will issue this week's Gazette.

Demi-official letter from the Hon'ble Mr. J. G. Cunningham, C.I.E., I.C.S., Chief Secretary to the Government of Bengal, to the Hon'ble Mr. H. Wheeler, C.S.I., C.I.E., I.C.S., Secretary to the Government of India, Home Department, no. 1120-X., dated Calcutta, the 20th April 1916.

I am desired to express the thanks of the Governor in Council for the ready acceptance by the Government of India of his proposal for the extension of sections 3—11 of the Defence of India (Criminal Law Amendment) Act, 1915, to that part of Bengal in which those sections were not already in force.

For information only.

A. L.,—25-4-16.

S. R. HIGNELL,—26-4-16.

H. WHEELER,—28-4-16.

Exd. by—E.A.
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PROCEEDINGS OF THE
HOME DEPARTMENT, APRIL 1916.

Extension of Sections 3—11 of Defence of India Act, 1915, to those districts of Bengal to which they have not already been extended.

EXTENSION OF SECTIONS 3—11 OF THE DEFENCE OF INDIA ACT, 1915, TO THOSE DISTRICTS OF BENGAL TO WHICH THEY HAVE NOT ALREADY BEEN EXTENDED.

No. 699-X., dated Calcutta, the 16th March 1916.

Pro. no. 465.

From—A. MARR, Esq., I.C.S., Additional Secretary to the Government of Bengal,

To—The Secretary to the Government of India, Home Department, Delhi.

I am directed to refer to Home Department Notifications no. 1379, dated the 23rd April, and no. 1789, dated the 10th June 1915, under which sections 3 to 11 of the Defence of India (Criminal Law Amendment) Act, 1915, were extended to certain districts in the Presidency of Bengal.

2. On a reference to Mr. Kerr's letter no. 5079-P., dated the 12th April 1915, it will be seen that the Governor in Council at that time advisedly did not recommend the application of the entire Act to the whole of the Presidency of Bengal on the ground that there was some political advantage to be gained by limiting these sections of the Act, in the first instance, to those districts in which they were most urgently required, extending them later on to other districts, should necessity arise. The districts in which sections 3 to 11 of the Act are not at present in force are Burdwan, Bankura, Birbhum, Murshidabad, Jessore, Malda, Bogra, Darjeeling, the Chittagong Hill Tracts and the City of Calcutta.

3. It has now been represented to the Governor in Council that it is most desirable to extend sections 3 to 11 of the Defence of India Act to the remaining districts of Bengal, inclusive of the City of Calcutta. The main benefit to be derived from the procedure laid down in these sections is, that breaches of the orders and rules made under the Act and also certain offences, specified in section 3 (1) of the Act, can be tried by Special Commissioners appointed by the Local Government. The extension of the Act to the unproclaimed districts is not so pressingly necessary from the point of view of political agitation and crime in those districts, although it can be shown that in some of them, notably Burdwan, Murshidabad, Jessore and Malda, the anarchical movement does exist. The extension is recommended more on the ground that it is desirable to secure fresh areas, subject to the special procedure provided by the Act, for the domicile of persons directed to reside in those areas. His Excellency in Council is fully aware that persons, against whom orders are issued under rule 3 of the Defence of India Rules, can be domiciled anywhere in Bengal. In the case of those districts which have not been notified, however, transgressions of the orders are triable in the ordinary courts, and it is considered eminently desirable that the advantage provided by the speedy trial under the special procedure in respect of such offences should be secured, if possible.

4. The Government of India are aware that the Government of Bengal have initiated a vigorous campaign against the members of the revolutionary party in Bengal, and that free use is being made of the power of compulsory domicile in selected areas, conferred by rule 3 of the Defence of India Rules. Up to date 126 orders of internment in specified places have been issued. So far, the various detenus have been restricted to areas in the notified districts, but it has now been reported that great difficulty is being experienced in finding suitable places of domicile in these districts, and that the selection of fresh ground is necessary. His Excellency in Council is convinced of the urgent desirability of finding fresh areas for the domicile of persons served with orders of compulsory residence, and at the same time of securing the application of the special procedure to those areas.

5. The case of Calcutta, where the revolutionary movement has its main stronghold, is somewhat different. The extension of the Act is recommended not

PROCEEDINGS OF THE
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Extension of sections 3—11 of Defence of India Act, 1915, to those districts in Bengal to which they have not already been extended.

so much on account of the need for fresh ground for domiciling, as it is only in exceptional cases that persons will be domiciled in Calcutta, but rather on account of the extreme desirability of making breaches of orders under the Defence of India Rules, within the limits of the original jurisdiction of the High Court, triable by Special Commissioners appointed under the Act. Many of the most important of the suspects upon whom orders under these Rules have to be served are found in Calcutta, and should they refuse to obey the orders served upon them it would be necessary to bring them before the ordinary tribunals, if sections 3 to 11 of the Act are not extended to this area.

6. The Governor in Council fully realizes that in the case of the City of Calcutta the Original jurisdiction of the High Court is a special feature and that, in the event of the extension of these sections of the Act to Calcutta, an attempt might be made to test the validity of the power of the Imperial Legislative Council to constitute a Special Tribunal with no appeal from its decision and also to bar the jurisdiction of the High Court by section 11 of the Act. In view of this apprehension he has had the following question examined by the Hon'ble the Advocate General of Bengal and by Sir S. P. Sinha; "In the event of the extension to the town of Calcutta, i.e., to the area included in the Original jurisdiction of the High Court, of sections 3 to 11 of the Defence of India Act, would the powers of the Commissioners appointed under the Act be open to question in the High Court and could they be questioned successfully."

Copies of their opinions are enclosed for the information of the Government of India. It will be seen that both Dr. Kenrick and Sir Satyendra Sinha are agreed that the bar of jurisdiction in the High Courts effected by section 11 is not legally open to question, and that it could not be questioned successfully. In this connection I am to invite the attention of the Government of India to the joint opinion given by Sir R. B. Finlay and Sir Erle Richards on the 15th June 1914, a copy of which was forwarded with your letter no. 2061, dated the 23rd October 1914, from which it will be observed that, in the opinion of these two learned Counsel, it is within the legislative capacity of the Government of India to create a new Court within the jurisdiction of the High Court, with no appeal from its decision. In view of these three concurring opinions, which have been given altogether independently of one another, the Governor in Council is satisfied that the risk of any difference of opinion with the High Court is small compared with the undoubted advantages to be derived from the extension of these sections of the Act to the City of Calcutta.

7. In the circumstances stated above, I am to request that the Governor General in Council will be pleased to direct, by notification in the *Gazette of India*, that sections 3 to 11 of the Defence of India Act, 1915, shall come into operation in the remaining areas of Bengal, in which those sections are not at present in force. If this proposal be approved, I am to suggest, for the consideration of His Excellency in Council, that the notification may be in general terms as above and need not specify the different districts. This would avoid undue attention being called to the fact that the City of Calcutta is included in the notification.

(Copy of opinion of the Hon'ble Mr. C. H. B. Kenrick.)

OPINION.

I am of opinion that in the event of the extension of sections 3 to 11 of the Defence of India Act IV of 1915 to the City of Calcutta, i.e., to the area included in the Original jurisdiction of the High Court, the powers of the Commissioners appointed under the Act could not legally be questioned in the High Court.

Section 11 of that Act excludes the jurisdiction of any Court by enacting that "no order under this Act shall be called in question in any Court."

X

PROCEEDINGS OF THE
HOME DEPARTMENT, APRIL 1916.

Extension of Sections 3—11 of Defence of India Act, 1915, to those districts of Bengal to which they have not already been extended.

Under the Letters Patent of 1865 the jurisdictional powers were conferred on the High Court "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council." Clause 44 of the Letters Patent provides; "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor General in Council * * * and may be in all respects amended and altered thereby."

In my opinion section 11 of the Defence of India Act which excludes the jurisdiction of any Court in respect of a matter to which that Act applies, is valid and binding and within the legislative powers of the Governor-General in Council, and the Charter itself was granted subject to and contemplates the exercise of such legislative power. The Defence of India Act in enabling the appointment of and trial by Commissioners of certain offences has created a special and temporary machinery available in times of emergency, and I am of opinion that the bar of jurisdiction in the High Courts effected by section 11 is not legally open to question nor could it be questioned successfully.

HIGH COURT, CALCUTTA; , }

The 7th March 1916. }

(Sd). G. H. B. KENRICK,

Advocate General, Bengal.

(Copy of Opinion of Sir S. P. Sinha.)

OPINION.

I am of opinion that if sections 3 to 11 of the Defence of India Act (No. IV of 1915) are extended to the area included in the Original jurisdiction of the High Court of Calcutta, the powers of the Commissioners appointed under the Act cannot be *successfully* questioned.

Act No. IV of 1915 is enacted by the Governor-General in Council. It is in my opinion now settled beyond controversy by the decision of the Privy Council, in the case of *Empress versus Burah* (4 Cal. 172 at pages 177-179) that the supreme legislative authority of India can by its legislation effect, alter or modify the jurisdiction of the Chartered High Courts, with regard to all persons, all places and things within British India. See also 26 Cal. 874, and 27 Bombay 424.

In the case of *Empress v. Burah*, it was held by the Privy Council, over-ruling the decision of a majority of the Calcutta Full Bench, that Act XXII of 1869 passed by the Indian Legislature, purporting to remove the Garo Hills from the jurisdiction of the ordinary civil and criminal Courts (including the High Court) and from the laws applicable to those Courts, was not inconsistent with the Indian High Court's Act, 1861 (XXIV and XXV, Vict. c. 104) or with the Charter of the Calcutta High Court, and that it was in its general scope within the legislative powers of the Governor-General in Council. Reference was made to section 9 of 24 and 25 Vict. code 104 (the High Courts' Act) and Clause 44 of the Letters Patent of 1865.

This is the leading case on the general powers of the Indian legislature and the principles laid down therein remain good at the present time. Section S.-63 of Ilbert's Government of India, 3rd Edition, page 226, 230, etc. This has been made still more clear by the recent Government of India Act of 1915 (V and VI George V., Chapter 61, Section 65) which was passed by Parliament on the 29th of July 1915. This Act itself being passed subsequently to the Defence of India Act, 1915, may not be strictly applicable, but it is only declaratory of the law as it stood when Act No. IV of 1915 was passed and may therefore be usefully referred to.

If the Governor General in Council can legislate so as to effect the criminal appellate and revisional jurisdiction of the High Court of Calcutta as regards the

PROCEEDINGS OF THE
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Extension of Sections 3—11 of the Defence of India Act, 1915, to those districts of Bengal to which they have not already been extended.

Garo Hills, I am not aware of any provision of the law which affects the power of the Governor-General in Council to modify, alter, or otherwise affect the original criminal jurisdiction of the High Court, or of the Courts of Magistrates in Calcutta.

If therefore Act No. IV of 1915 is *intra vires* the effect is that the Governor-General in Council may under Section 1, clause 3 direct by notification in the *Gazette of India* that sections 3 to 11 should come into operation in the area under question on such date as may be notified in such notification and thereafter an order may be made under section 3 which would render the procedure laid down in the Act applicable to any case with reference to which the last order may be made.

Dated the 11th March 1916.

(Sd.) S. P. SINHA.

Pro. No. 466.

No. 1211, dated Simla, the 11th April 1916.

Notification by the Government of India, Home Department.

In exercise of the power conferred by section 1, sub-section (3), of the Defence of India (Criminal Law Amendment) Act of 1915, IV of 1915, the Governor-General in Council is pleased to direct that sections 3 to 11 of the said Act shall come into force with effect from the date of this notification in that part of the Presidency of Bengal in which the said sections are not already in force.

Pro. No. 467.

No. 1212, dated Simla, the 11th April 1916.

From—The HON'BLE MR. H. WHEELER, C.S.I., C.I.E., I.C.S., Secretary to the Government of India, Home Department,

To—The Additional Secretary to the Government of Bengal.

In reply to your letter no. 699-X., dated the 16th March 1916, I am directed to enclose copy of a notification applying sections 3 to 11 of the Defence of India (Criminal Law Amendments) Act, 1915, to those districts in the Presidency of Bengal in which they are not already in force.

Pro. No. 468.

No. 1213, dated Delhi, the 11th April 1916.

From—The HON'BLE MR. H. WHEELER, C.S.I., C.I.E., I.C.S., Secretary to the Government of India, Home Department,

To—SIR T. W. HOLDERNESS, K.C.B., K.C.S.I., His Majesty's Under Secretary of State for India, India Office, London.

In continuation of my letter no. 1790, dated the 10th June 1915, I am directed

1. Letter from the Government of Bengal, No. 699-X., dated the 16th March 1916.

2. Notification no. 1211, dated the 11th April 1916.

3. Letter to the Government of Bengal, no. 1212, dated the 11th April 1916.

to forward for the information of the Secretary of State for India a copy of the correspondence noted on the margin regarding the extension of sections 3 to 11 of the Defence of India (Criminal Law Amendment) Act, 1915, to those districts in

the Presidency of Bengal to which they have not already been extended.

Exd. by—E.A.

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