EX PARTE S. KAHN.

OPINION.

1. The questions submitted for our advice all relate to the construction of the Suppression of Communism Act,1950.Such questions may appropriately be grouped under the various subjects to which they relate as follows:-

(a) The position of the former Communist Party of South Africa and its former members and property:-

(i) Whether it is competent for the Minister to designate a liquidator of the assets of the already dissolved Communist Party.

(ii) If so, whether such liquidator can set aside any disposition of the assets of the former Communist Party made prior to its dissolution.

(iii) Would such liquidator be empowered to compile a list of former members of the former Communist Party in terms of the Act, Section 4 (10).

(iv) Whether such liquidator would have the right to exercise the powers set out in the Act, Section 7 (3), such powers comprising those of investigation interrogation and seizure.

(v) In such event, what are the privileges conferred on persons interrogated by the liquidator by Section 7 (5) of the Act.

(b) The position of a Member of Parliament, the Provincial Council or of the City Council, who was a member of the former Communist Party :-

(i) Whether the Minister has power under the Act, Section 5 (1)(d), to direct the resignation of such an M.P., M.P.C. or City Councillor merely by virtue of his former membership of the Communist Party, or whether such MP., M.P.C. or Councillor must have professed "Communism" as defined in Section 1 (ii).

(ii)/.....

(ii) Assuming that the Minister by notice directs the resignation from the House of Assembly of Consultant himself, whether Consultant could attack the validity of such notice on the ground that the Minister had not considered a report of a Select Committee of the House. What would the procedure be to which Consultant should have resort in order to vindicate his right (if any) to a hearing before a Select Committee, and on whom would the onus lie to prove that Consultant professed to be a Communist on or after 5th May, 1950.

(iii) If the Minister directed Consultant not again to become a Member of the House of Assembly or of the City Council, would Consultant commit an offence by standing for election and being declared elected, if he refrained from taking his seat in the Assembly and from attending a meeting of the Council, but immediately resigned his seat.

(c) Powers of officers, the Governor-General and the Minister:

(i) To whom a person whose name appears on a list referred to in Section 8(2) must prove that his name should not appear on such list.

(ii) Whether, before exercising his powers to declare an organisation unlawful (Section 2 (2), to prohibit a publication (Section 6) or to deem an alien to be an undesirable inhabitant of the Union (Section 14), the Governor-General must afford the individual or organisation concerned an opportunity to be heard.

(iii) Whether, before exercising his powers, in relation to persons whose names appear on lists, or Communists, (Section 5), to prohibit gatherings or the attendance of individuals at

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gatherings (Section 9) or to banish individuals from defined areas (Section 10), the Minister must afford the persons concerned an opportunity to be heard.

We deal below with these questions in the above order.

2. As to questions (a)(i), Section 3(1) of the Act, so far as relevant hereto, reads:-

> " As from the date upon which an organization becomes an unlawful organization in terms of sub-section (1) of section two....(b) all property....held by the unlawful organization shall vest in a person to be designated by the Minister as the liquidator of the assets of the unlawful organization."

Section 4 (1) - (9) contains elaborate provisions for the liquidation and distribution of the assets of an unlawful organization based on the principles of the Companies' Act. Indeed the Minister is empowered to apply such provisions of the Companies' Act and the Insolvency Act as may be necessary for the proper distribution of the organization's assets and the payment of its debts. "Organization" is defined in Section 1(x) as:-

> "Any association of persons, incorporated or unincorporated, and whether or not it has been established or registered in accordance with any statute."

Whether legal personality(as to which see Morrison v.Standard Building Society(1932 A.D. at p.238) is required or not to constitute an organization (and it seems that it is not so required) is immaterial. The sole question is whether it exists. For the Minister's powers to designate a liquidator depend on the existence of an organization. If there is no organization there is no subject-matter available for the operation of such powers. In terms of Section 2(1):-

> " The Communist Party of South Africa.....is hereby declared to be an unlawful organization."

Section 1(xv) defines "The Communist Party of South Africa" as

"the.....

"the organization known by that name on the fifth day of May, 1950, notwithstanding any change in the name of that organization after the said date". Obviously Section 2 (1), read with Section 1(xv), does not purport to be retrospective. Section 1 (xv) merely identifies "the Communist Party", as existing on 5th May, 1950, with such organization operating under an altered name. But the continued existence of the organization itself is assumed. If the organization was dissolved before the coming into operation of the Act, Section 2 (1) could have no operation. The only grounds upon which the Minister could appoint a liquidator to the former Communist Party, therefore, would be either if the definition of "organization" could be read so as to cover the actual individuals who were members of the Party on 5th May, 1950, or if the Party was not in fact and in law dissolved prior to the date of the coming into operation of the Act.

3. We entertain no doubt that the term, "The Communist Party of South Africa", as used in Section 2 (1) of the Act, does not refer to the individual members of that Party on 5th May, 1950. In Section 1 (xv) such Party is defined as an "organization". The definition of the latter term has been quoted above. As previously indicated, an "organization" may or may not be a legal persona. After perusal of the Constitution of the former Communist Party we have arrived at the conclusion that it was a legal persona. Its characteristics included perpetual succession, the right to hold property through its various organ,s apart from its members, and the right to sue and be sued in its own name through its officials. Such characteristics, prior to the passing of Act of 1939, conferred on the association possessing them the juristic quality of personality. See Morrison v. Standard Building Society (supra). The Communist Party, of course, existed before the 1939 Act and was therefore unaffected by its terms.

Prima facie , in our view, an "organization" that possessed the characteristics of legal personality would cease to exist if its personality were destroyed. Theoretically it might be possible for such "organization" to continue its existence as a voluntary association. But even a voluntary association owes its existence to a contractual bond between its members. (See Maasdorp's Institutes of South African Law (7th.ed. on 1,). If it is dissolved through dissolution of such bond p.341 its existence ceases. In the absence, therefore, of retrospective operation of the Act, we are of opinion that the dissolution of the Communist Party prior to the coming into operation of the Act renders Sections 2, 3 and 4 inapplicable to it.

4. The question whether the Communist Party was in fact and in law dissolved prior to the coming into operation of the Act is, in our view, not so simple a one as our Instructions seem to assume. Indeed we are instructed that "on the 20th June 1950 the Communist Party of South Africa was dissolved by resolution of its Central Committee".

In the case of a body such as a church, which is founded in order to further certain aims, based on faith and doctrine, no organ of such body can, unless authorised by its constitution, alter its basic principles, dissolve the body itself, or bring about an amalgamation with some other body with differing aims and objects. Even the majority of the total membership cannot do so, so as to bind the minority. If they purport to do so the minority will continue to represent the body concerned and will be entitled to its property. See Free Church of Scotland v. Overtoun (1904 A.C. 515); the Nederduitsch Hervormde Congregation of Rustenburg case (12 C.L. J.140). In such a case the unanimous consent of the members would be required in order validly to dissolve the body

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concerned. A political party, however, stands on a different footing. For, as it was put by Wessels, C.J. in Wilken v. Brebner (1934 A.D. 175 at p. 184),

> "in founding a political party there is an implication that its principles may be altered with the altered circumstances ....No political party exists until the intending members all meet or send delegates to represent them for the purpose of forming the party and to determine how the party is to be governed and how its will is to be declared. This can only be done by constituting the party and by determining how the party is to manifest its will. That occurs when the constitution of the party is drawn up and the relation of members to the machine is formulated. The rights of the members then depend on the constitution adopted by the party."

Unlike a church, therefore, there is an implication that a political party may alter its principles, provided that it does so in the manner which the constitution provides for the alteration of the constitution itself. That such a right of alteration extends to a dissolution of the party itself is made clear by Wessels, C.J., in Wilken's case (at p.186):-

> "If the Congress determines to dissolve the party it is difficult to see how an individual member can effectively oppose such a resolution. By modifying or adding to the constitution, as it is entitled to do, the Congress can lawfully curtail the powers of the individual".

The right of the Central Committee of the Communist Party to dissolve the Party itself depends, therefore, on the Party Constitution. That Constitution was adopted by the National Conference in January, 1944. According to Clause 6 (a) thereof, the National Conference is the "highest authority of the Party". It is true that the Clause 7 declares the Central Committee to be "the highest authority of the Party between Conferences", but that it is subordinate to the National Conference is clear from Clause 7(b), which enjoins that it shall "carry out the policy of the National Conference". Prima facie, since the Constitution was adopted by the National Conference, and since the latter is the sovereign authority of the Party, it would seem that the National Conference is the only organ capable of dissolving the Party. Moreover, as appears from Wilken's case (supra), the right of an organ of a political party to dissolve the same

depends/ .....

ddpends on its right to alter the constitution. In the case of the Communist Party, Clause 15 expressly reserves this right to the National Conference. Indeed the terms of Clause 15 seem to negative any such right of amendment in the Central Committee.

In our opinion, therefore, if the Communist Part y was dissolved prior to 17th July 1950 (the date of promulgation of the Act) such dissolution could not, in law, have been effected merely by virtue of the resolution of the Central Committee of 20th June 1950. Indeed our view is that, failing a National Conference resolution, the Party could only have been dissolved with the consent of every member thereof. Whether such consent was, in fact, forthcoming is a question of fact. If the resolution of the Central Committee was in fact brought to the notice (e.g. by way of circular) to each Party member and was acquiesced in by the same, we are of opinion that the dissolution of the Party would be proved. Even if the resolution was publicly advertised through the press and otherwise, under circumstances that would satisfy a Court that every member must have known of the same, and no member protested or otherwise indicated his dissent from the Committee's action, we think that the consent of each member would be held to have been established as a matter of inference. Thus in Cape Indian Congress v. Transvaal Indian Congress (1948, 2 S.A.L.R. (A.D.) at pp. 609 - 610) it was held that certain members of the Committee of the Transvaal Indian Congress must be taken to have resigned merely because circumstances were proved which indicated that they must have known of the election of a new Committee and that they had failed to protest against such new elections. This case seems to us to establish the equivalence of acquiescence in notorius facts to concrete and subject consent. But, however this may be, we would emphasise that the cissolution of the Communist Party is a question of fact, that the

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mere resolution of the Central Committee, though relevant to such question, is not decisive thereof and that, either directly or by inference, the consent of the Party membership as a whole to such dissolution would have to be proved. If practicable a composite affidavit signed by all Party members might be filed.

5. Our conclusion on question (a) (i) is that, provided that the dissolution of the Communist Party prior to the promulgation of the Act can be established, the Minister has no power to designate a liquidator in respect of the Party.

6. As to question (a) (i) avove, it follows from the views just expressed that our opinion is that, since the Minister cannot appoint a liquidator in respect of the ci-devant Communist Party, no question arises as to the powers of a liquidator in respect of dispositions of its assets effected whilst the Party was still in existence.

7. As to question (a)(iii) (above), it further follows that we are of opinion that no liquidator has power to compile a list of former members of the former Communist Party. The powers of a liquidator, conferrec by the Act, Section 4(10), to compile lists assumes the regular designation of a liquidator. This police function is "tacked on", as it were, to the liquidator's administrative functions in connection with the winding up of an unlawful organization. The police function is, in our view, incidental to the administrative function. A liquidator has no independent police functions. His whole locus standi depends on the existence of an organisation, the assets of which he is appointed to liquidate.

8. As to question (a) (iv) (above), it is clear from the terms of Section 4 (12) that a liquidator has the powers referred to in this question. We repeat, however, that provided that the Communist Party was dissolved prior to the promulgation of the Act, no liquidator can be appointed in respect of such Party.

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9. As to question (a) (v)(above), we are of opinion that the privileges referred to in Section 7 (5) are the privileges that the law accords to a witness to refuse to answer questions put to him. Such privileges are listed in Scoble on Evidence (2nd ed., p. 268) and are elaborated upon on pages 269-280. Those relevant to the type of interrogation envisaged by the Act are, in our view, the following :-

A. Professional communications.

No lawyer, whether advocate or attorney, could be compelled to answer questions relating to communications made by his client for the purpose of seeking his advice. The Client himself is, of course, equally protected against disclosure of such communications made by him to his legal adviser.

B. Matrimonial communications.

A spouse is protected from all obligation to disclose any communication between himself or herself and his or her spouse during the subsistence of the marriage.

C. Incriminating questions.

No witness need answer questions that might expose him to a criminal charge. In view of the wide scope and vague definition of some of the offences created by Section 11, this seems to be the most important, from the practical point of view, of the relevant privileges.

As to how these privileges should be asserted is not specified in the Act. In Supreme Court proceedings the witness claims the privilege and the matter is decided by the Court there and then. Here the person interrogated could refuse to answer and thereafter apply to Court for a declaration that he is not obliged to answer the question. Alternatively, he could simply refuse to answer, and, if charged with such refusal under Section 11 (j) he could set up the privilege by way of defence. In our opinion the failure or refusal to answer questions only constitutes an offence under Section 11 (j) if

such questions are of a nature that the accused was legally bound to answer them. If this were not so, Section 7(5) would be meaningless and nugatory.

10. As to question (b)(i), Section 5(1)(b) of the Act empowers the Minister to direct the resignation of an M.P., M.P.C. or City Councillor who is a "communist". A "communist" is defined in Section 1(iii), inter alia , as "a person who professes to be a communist". There is nothing in the language of the Section that, in our view, can be construed as conferring on the Minister the power to decide who is or is not a Communist. His power to issue a notice directing resignation from the public body concerned is limited to its application to persons who are in fact communists. The issue, therefore, as to whether a particular individual is or is not a communist, within the meaning of the Section, falls for determination by the Court as an ordinary question of fact. See Kellerman vs. Minister of the Interior (1945 T.P.D. 179 at pp. 183-3); de Bruin v. Director of Education (1934 A.D. 252 at pp. 256, 258); Rex vs. Padsha (1923 A.D. 281 at p. 304). It is therefore for the Court to determine whether the person concerned "professes" to be a communist. According to the Concise Oxford Dictionary (2nd Ed., p. 919) the word "profess" means (so far as relevant) to "lay claim to ..... pretend ... openly declare...affirm one's faith in or allegiance to". According to Chambers' Twentieth Centuary Dictionary it means "to own freely, to make open declaration of, to declare in strong terms". It is evident that these meanings involve some overt expression of - as opposed to a private mental or emotional adherence to - a doctrine or point of view. To establish that a person "professes" communism, therefore, we are of opinion that some overt conduct on the part of such person must be proved. The necessity for such proof has been recognised by the Courts. (See Ex parte Estate Hack 1945 T.P.D. 414 at pp. 419-420 and authorities there cited). No doubt proof of express statements by the person concerned would not be indispensable to prove his profession of adherence to a particular doctrine.....

doctrine. His adherence to a political party which aims at the furtherance of such doctrine would probably be sufficient to prove profession of such doctrine, provided that he was sufficiently active in party work. But we can conceive of no form of proof that a person "professes" any doctrine other than statements emanating from him or his personal activity as a member of an organization formed to propogate that doctrine. Now in order to prove that a person is a communist for the purposes of Section 5 (1)(d) it would be necessary to prove that he "professes" to be a communist in terms of Section 1 (iii). The word used is "professes", not "professed". In other words, the presnt tense is clearly indicated. In any event, we are of opinion that the "professing" proved would require to have occurred since the Act came into force. This view is fortified by the fact that the legislature clearly intended to distinguish between professing in the present tense and having professed in the past. For, in the proviso to Section 5 (1)(d) the words are "who professes or has on or after 5th May, 1950.....professed". Even if the word "professes" were ambiguous as to the tense (and, in our view, it is not), two principles impress it with the present tense. These are:- (i) the principle of "expressio est exclusio alterius", which requires, in Section 1 (iii), the exclusion of the past tense, and (ii) the principle that, where a word is used in a statute in any particular sense, it is presumed that it bears the same meaning throughout this statute. Since in Section 5 the word "professes" is clearly used in the present tense, so in Section 1 (iii) it is likewise so used. The Courts, moreover, lean heavily against the construction of a statute that would give to such statute retrospective effect. This is more particularly so where existing rights are impaired and offences are created. This Act, Section 11 (a) and (b), makes the propagation of communist doctrines a serious criminal offence. In Section 5 it empowers the Minister to render a communist a political pariah, and, even if he is an M.P., to

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render his continued membership of Parliament a criminal offence. More drastic inroads into existing rights than these it is impossible to conceive. It can no doubt, without fear of contradiction be placed on affidavit that in no country possessing a parliamentary system of government has the power been conferred upon the Executive to remove a regularly elected deputy from the Legislature solely on the ground of his expressed political opinions. The following statement of the presumption against retrospectivity seems to us to be particularly appropriate to this statute:-

> " Perhaps no rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right .....unless that effect cannot be avoided without doing violence to the language of the enactment."

(See Re Athlumney (1898, 2 A.B.At pp. 551 - 2) quoted in Maxwell. "Interpretation of Statutes" ((9th Ed., p. 222). See also Petersen v. Cuthbert (1943) A.D. 420 at p. 432). Consultant was a member of the Communist Party of South Africa prior to its dissolution. Whether or not that Party was technically dissolved prior to the promulgation of the Act, Consultant, as a party to the resolution of the Central Committee of 20th June, 1950, clearly dissaciated himself from the Party as from that date. Hence it could not be claimed that since the promulgation of the Act he has been "professing" communism by participation in Communist Party activities. As to whether he has "professed" Communism since such promulgation in some other manner is, of course, a question of fact. There is nothing in our Instructions indicating that he has. No doubt, if this issue is canvassed in Court, it will be contended that an inference as to his present profession of communism is to be drawn from his past activities. The answer to such a contention is, in our view, his part in bringing about - or attempting to bring about - the dissolution of the Communist Party.

11. We have thus far assumed that, apart from the question of the retrospectivity of the Act, the mere fact that Consultant called himself a "communist" and sat in Parliament as such would be a sufficient profession to communism. Even, however, if, contrary to the view we have expressed above, it were to be held that professions of communism prior to the promulgation of the Act were sufficient to establish present professions of communism, the question would still remain as to whether it could be proved that Consultant has ever professed to be a "communist" within the meaning of the Act. It seems to us that the word "communist"cannot be divorced from the term "communism" as defined in Section 1 (ii). "Communism" as there defined bears no relation whatever to the aims of the Communist Party as set out in its Constitution, Clause 2.

12. This brings us to the question of the onus of proving that a person served with a notice under Section 5 (1) as a communist. In our opinion, in a prosecution for disobedience to such notice under Section 11 (f), or in any other judicial proceedings, the onus would lie upon the Minister to prove that the person concerned is a communist. Where an enabling statute confers on a Minister absolute discretionary power to make an order affecting an individual, such order can only be challenged by proving that the Minister transgressed the limits of his statutory authority. But where the Minister's power to make an order depends upon the objective existence of some fact or circumstance, the Minister must prove such existence if the validity of the exercise of his power is challenged. (See Kellermann's case (supra at pp.191 - 2); Liversege v. Anderson 1941, 3 A.E.R. at pp.363, 385); Beier v. Minister of the Interior (1948), 3.S.A.L.R. (A.D.) at p.443). In our opinion Section 5(1) is incapable of being read so as to confer upon the Minister the power or discretion to decide whether an individual is a communist or not. The plain meaning of the words of the Section is to confer on the Minister a "conditional authority" applicable to

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communists. (See Liversedge's case (supra at p.349 per Lord Atkin), that is, an authority conditioned by the facts. As already pointed out, a "communist" is specially defined. We have quoted a portion of the definition. That portion makes the question whether a person is or is not a communist dependent on the objective fact of his own professions. Another portion of the definition empowers the Governor-General (not the Minister) to "deem" a person a communist. We deal with that portion of the definition below. But, for present purposes, our view is that the Minister may make a direction under Section 5 (1) only in respect of a person whose name appears ona list there mentioned, or who has been deemed by the Governor-General to be a communist or who the Minister is able to prove is a communist in that he professes to be such.

13. Although the question is not specifically raised in our Instructions, the view just expressed makes it necessary to deal with the circumstances under which Consultant could be "deemed" a communist by the Governor-General. For, once he was so deemed, the Minister could direct his resignation from Parliament under Section 5 (1)(d). The definition of "communist" in Section 1(iii) includes a person "who, after having been given a reasonable opportunity of making such representations as he may consider necessary, is deemed by the Governor-General .....to be a communist on the ground that he is advocating, advising, defending or encouraging, or has at any time after the date of commencement of this Act advocated, advised, defended or encouraged the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of any such object". The Shorter Oxford Dictionary (Vol. 1, p.468) defines "deem" (so far as relevant) as meaning "to pronounce judgment...to judge...to decree; to decide.... to judge of, estimate...to form the opinion, to be of opinion; to conclude, consider, hold...to judge or think." It is clear

from the wording/.....

from the wording of Section 1(iii) that the Governor-General may not deem anyone to be a communist. He can only do so on certain grounds. The existence of such grounds depends on certain questions of fact. Provided that the relevant facts exist, the Governor General possesses, on the "ground" of such existence, a discretionary power to "deem" a person a communist. But there is nothing in the Section expressly conferring on the Governor-General the power to decide whether the facts which constitute the necessary legal foundation for his discretion, do or do not exist. If, therefore, such power of decision does indeed rest with the Governor-General, it must have been conferred by necessary implication from the language used. (See S.A. Medical Council v. Natham (1931 T.P.D. 45 at p.47). If such implication is excluded the question of fact would, in such case, be one for the Court to decide in accordance with the cases of Kellermann, de Bruin and Padsha (supra). The question of whether the power of decision is to be implied is one of construction. Prima facie the Courts will lean against the implication of an administrative power that would exclude them from the exercise of their ordinary function of deciding questions of law or fact. (See Padsha's case (supra at p. 304); Kellermann's case (supra at p. 184).

14. It might perhaps be contended that the power to decide whether facts exist entitling the Governor-General to exercise his discretion to deem an individual a communist rests solely with the Governor-General himself on the ground that Section 1(iii) expressly entitles the individual concerned to make representations before any deeming order is made. But this right would appear merely to be an express affirmation of the principle of "audi alteram partem" which the Courts readily imply into the provisions of any statute that empowers an executive authority to act to the prejudice of an individual citizen. (See Sachs v. Minister of Justice (1934 A.D. at pp. 22, 38); Sullivan v. Wheat Industry Control Board (1946 T.P.D. at p.

207); Beier v. Minister of the Interior (1948, 3 S.A.L.R. at pp. 451 - 2). Nor do we think that the circumstance that the Governor-General is obliged to consider a factual report from an official committee in terms of Section 17, affects this matter. No right of audience is given to the individual concerned before such Committee. Even if it had, this would not have affected our view. Thus, in Liversedge v. Anderson (supra at p. 360), Lord Atkin said: "It was further said that the provision of safeguards in the regulation itself, the resort to the advisory committee, the providing of "reasons and particulars" and the right to make representations to the Secretary of State indicate that the original power to detain was unconditional. How unconvincing this appears. These safeguards are nothing compared with those given to a man arrested by a constable, who must at once be brought before a judicial tribunal, which investigates the case in public. Yet the constable, or anyone else empowered to arrest on reasonable cause, is liable to an action if he has exceeded his authority." In our view, therefore it was not the intention of the legislature that either the Governor-General or the committee should sit as a court of enquiry and usurp the functions of the ordinary courts. The factors in favour of our view, as just expressed, are, in our opinion, far more cogent than the possible contention mentioned above. In Padsha's case (supra) the Court was concerned with a Ministerial power to deem a class of persons undesirable inhabitants of the Union "on economic grounds". Although the judges were divided on the actual decision, all seemed to assume that it was for the Court, not for the Minister, to decide what grounds were "economic". Innes, C.J. who dissented from the majority of the Court, but not on this point, expressly so held. Thus at p. 300 he said:

> " I cannot agree with the view expressed in Seedat's case..... that the question as to what are economic grounds is left entirely to the discretion of the Minister....Grounds which in truth are not economic do not become so by virtue of an administrative pronouncement."

Again/.....

Again, in Liversedge v. Anderson (supra) the House of Lords was concerned with the question whether the words of Defence Regulation 18B, "if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations" etc., conferred on the Secretary a right to decide the question of such origin, associations etc., or whether he was bound to establish before a Court the existence of reasonable cause for his belief. The majority of the House, despite the emphatic dissent of Lord Atkin, held that the power of decision resided in the Secretary. But the reasons of the majority are instructive. Throughout the judgments of the majority appear expressions of opinion that indicate that the type of question that fell for decision under the Regulation was not one that the Legislature could have intended the Courts to decide, due to the fact that it involved matters of a confidential nature which affected the safety of the realm in wartime. See Liversedge's case (at pp. 346 per Lord Maugham, 375, 378 per Lord Wright, 386 per Lord Romer). The same type of reasoning underlay the decision of our own Appellate Division in Beier v. Minister of the Interior (Supra at p. 442). Here no such considerations arise. Clearly the type of facts upon which the Governor-General's powers under Section 1(iii) depend are facts which the Legislature contemplated should be made the subject of judicial enquiry. For such facts amount to criminal offences as defined by Section 11(a) and (b). The language of the definition of such offences corresponds exactly with the language of Section 1(iii). Not only, therefore, did the Legislature contemplate judicial adjudication upon such facts, the question of whether or not such facts exist - but it empowered the Court to visit a perpetration of an offence founded upon them with imprisonment with hard labour for 10 years. Furthermore, when the Act intends to vest a discretion or fact-finding power in the Governor-General or Minister it uses language appropriate to such purpose. Thus Section 6 includes the phrase: "If the Governor-General is satisfied." Section 9 includes the phrase: "whenever in the opinion of the Minister there is reason to believe/..

there is reason to believe". Section 10 includes the phrase; "whenever the Minister is satisfied." Nothing could have been simpler than to have used similar language in Section 1(iii) if the intention had been to empower the Governor-General to decide whether the individual concerned was guilty of the conduct rendering him liable to be deemed a communist. We are of opinion therefore, that if the Governor-General issues a deeming order against Consultant, he will, if challenged, have to justify his action in a Court and prove the facts upon which he relied in making the order.

15. As to question (b)(ii) (above), in the light of the views just expressed this really falls away. For if the Minister is able to establish that Consultant is a "communist" the proviso to Section 5(1)(d) clearly excludes him from claiming a hearing before a Select Committee. Even if the Minister were unable to establish that Consultant is a communist, in the sense that he professes to be such, but the Governor-General succeeded in "deeming" him to be one, we think that the fact that Consultant was an active member of the former Communist Party on 5th May, 1950, would disentitle him to a Select Committee hearing

16. But we have regarded it as necessary to examine the proviso from another point of view, namely, as to whether it can be construed so as to modify the governing words of Section 5(1) so as to entitle the Minister to direct the resignation of an M.P. or M.P.C., who did not profess to be a communist after the promulgation of the Act, nor had been deemed such by the Governor-General, but had so professed on and/or after 5th May, 1950. We do not think that such construction is admissible. The governing words of Section 5(1) apply to all four paragraphs of the sub-section - (a), (b), (c) and (d). Obviously the proviso to (d) could have no effect on such governing words so far as (a), (b) and (c) are concerned. Nor could it have any effect in relation to a member of any public body referred to in (d) other than a member of either House of Parliament, a provincial council or the South-West African Legislative Assembly. The proviso is obviously/...

bly. The proviso is obviously, therefore, very restricted in scope and, in our opinion, applies only where the Minister is entitled to issue a notice in terms of the governing words. It might be argued that if a person who was a communist on 5th May, 1950, but was no longer a communist after the promulgation of the Act, could not be served with a notice, the proviso could have no operation. But this is not the case. A person whose name appears on a list referred to in Section 5(1), or who had been "deemed" to be a communist after the promulgation of the Act, may have professed to be a communist on 5th May, 1950, but have ceased to do so at the time of such promulgation. Such a person would obviously fall within the governing words of Section 5(1), and, at the same time, if he were an M.P., M.P.C., etc., be deprived of a right to a Select Committee hearing. The proviso to Section 5(1)(d), therefore, is one possessing an ample field of operation without being construed so as to modify the unambiguous wording of the governing words of Section 5(1) read with Section 1(iii). We are of opinion, therefore, that if the Minister could not prove, or the Governor-General failed to succeed in deeming, Consultant to be a communist after the promulgation of the Act, nothing in the proviso to Section 5(1), (d) could adversely affect his position.

17. As to question (b)(iii)(above), we are of opinion that once a candidate for Parliament is elected he becomes a member. Thus the South Africa Act, Section 32, lays down that "the House of Assembly shall be composed of members directly chosen by the voters." Again Section 51 of that Act requires a "member" to take an oath "before taking his seat." Furthermore, the Electoral Act 46 of 1946 Section 87, requires the publication in the Gazette of "members returned" in an election. The same position applies, in our view, to M.P.C's. See South Africa Act, Section 71; Act 46 of 1946 Section 87. A municipal Councillor also becomes such before attending a meeting of the Council. See Ordinance 10 of 1912, as amended, Sections 71, 72.

In our opinion, therefore, if a valid notice were served on Consultant directing him not only to resign from Parliament and the City Council but to refrain from again becoming a member of either, he would contravene such notice by permitting himself to be elected to either body, even if he resigned immediately thereafter.

18. As to question (c) (i) (above), Section 4(10) and Section 7(2) authorise a liquidator and an authorised officer, respectively, to include in lists "persons who are or have been office bearers, officers, members or active supporters" of unlawful organizations. The proviso to each of these sub-sections embodies the principle of "audi alteram partem", which must be observed by the liquidator or officer before including a person in the list. But, as in the case of the Minister's powers under Section 5(1) and those of the Governor-General under Section 1(iii), no power is conferred on the liquidator or officer to decide the issue of fact as to whether a person is or has been an officer, member etc. of such an organization. For the same reasons as we have adumbrated above as to the powers of the Minister and the Governor-General, we are of opinion that a liquidator or officer, if his action is challenged in a Court, must be prepared to justify the same by proving, as a fact, that the person in question is or has been an officer member etc. of the organization concerned. In the case of Section 8(2) we are likewise of opinion that the Court is the proper tribunal for a person to resort to who wishes to challenge his inclusion in a list in the custody of the officer referred to in Section 8(1). Such officer merely has custody of the lists and has no other administrative functions, of a discretionary character or otherwise, in relation thereto.

Our view that the proper tribunal in which to raise the questions of fact involved is the Court is strengthened by the consideration that Section 12, which introduces certain artificial presumptions

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