

THE
COLLECTED
WORKS
OF
MAHATMA
GANDHI

VOLUME TWELVE



THE PUBLICATIONS DIVISION

375. THE LEGAL POSITION

[Before July 18, 1914]¹

As the removal of the £3 tax has given rise to the fear that it makes the Indians affected by it prohibited immigrants and that, therefore, their position becomes worse than before, it may be worth while examining the true legal position. For, if it is a fact that the removal makes them prohibited immigrants, the first clause of Paragraph 2 of the letter² from the Secretary for the Interior addressed to Mr. Gandhi, providing for the issue of discharge certificates to such Indians, does not, as *The Natal Mercury* says, take them out of the category. That clause was inserted, not for the purpose, as the *Mercury* would have us believe, of securing these poor men's right of domicile. It was inserted simply to enable the men to move about the Province without vexatious inquiries from the Police and to free them from liability of arrest for being without passes. Now the contention that has been made by the *Mercury* is that, if the men do not pay the tax, they have to perform one of the other two conditions of their contract, namely, to re-indenture or to repatriate themselves to India, and, if they do not do either—so it is argued—they can be declared prohibited immigrants in virtue of Section 30 of the Immigrants' Regulation Act of last year, which defines the term "domicile", declaring those who may have entered the Union under terms of conditional residence prohibited immigrants. If the above contention were correct, those Indians who have not paid the tax for years could all have been declared prohibited immigrants and driven out of the Province immediately after the passing of the Immigrants' Regulation Act. But no such thing was done. The contracts containing the conditions as to re-indenture or re-patriation are made with the Immigration Trust Board, a private body. It is a well-known maxim of law, that contracts which are opposed to public morals or are in restraint of personal liberty, are invalid. Therefore, the clause as to repatriation, being against public morals and in restraint of personal liberty, is invalid, and a special statute would be necessary to make them valid and effective in law. This is what the late Natal Government tried and failed to

¹ Evidently, this item was written before July 18 when Gandhiji left for England *en route* to India.

² *Vide* Appendix XXVI.

obtain from the Government of India, and the only thing—though it was a wrong and shameful thing—that the then Government of India consented to do, was to make the men, who did not repatriate themselves, liable to pay the tax. Therefore, the tax being removed, the clause as to repatriation or re-indenture becomes ineffective and valueless. Another maxim of law is that any Statute which does not provide a sanction, that is, a penalty, for a breach of any of the obligations which it may impose upon the subject is powerless to compel the subject to perform that obligation. This was clearly laid down by the Supreme Court of the Transvaal in a case that arose out of Law 3 of 1885, which requires Indians to reside in Locations. If they do not so reside, no penalty is provided in that Law, and the Supreme Court has, therefore, held that Indians cannot be compelled to live in Locations, and that position remains unchanged, and, in spite of the Section referred to, Indians reside where they like in the Transvaal. It is, therefore, absolutely clear, so far as the legal aspect is concerned, that the Indians affected by the repeal of the tax are exactly in the same position as those who came under Law 25 of 1891. Adding to this the fact that the Commission themselves, composed of three distinguished lawyers, recommended the repeal of Section 6 of the Act of 1895 in question, and considered the repeal to be sufficient to put the men who came under it in the same position as those who came under Law 25 of 1891, that the Government of India and the Imperial Government, too, hold the same opinion as the Commission, and understood clearly that the men, after the repeal of the tax, would be free to settle in the Province after completing their present indenture and that the Union Government themselves have declared that such is also their reading of the law, we fail to see the slightest cause for alarm. The *Mercury* further has suggested that, whilst the assurance of the Union Government may be enough, should the legal interpretation placed upon it be found to be true, that assurance will not be of any value if General Hertzog were to become the Premier. We cannot share this fear, no matter what policy General Hertzog may have on the Indian question. In a constitution[al] State such as the Union of South Africa is, General Hertzog would be bound by the promise made by his predecessor to third parties. He can change policy, he can alter laws, but he cannot, he dare not, alter or commit a breach of promise made by predecessors in office to third parties. If he could, it is easy to see that there would be an end to government, and that people could not with any assurance have dealings with governments where there is Responsible

Ministry [*sic*]. Lastly, our countrymen need have no fear as to the future. Many things are possible; they are highly improbable. It is possible that the Supreme Court may interpret the law as the *Mercury* has. It is possible, though highly improbable, that any future Government or even the present Government would commit a breach of the promise deliberately made. Surely, in those circumstances, with the clearest conscience and with the fullest justification before the world, Indians can make use of the same irresistible weapon of Passive Resistance, as they have hitherto done.

Indian Opinion, 22-7-1914

376. FAREWELL LETTER¹

[CAPE TOWN,
July 18, 1914]

I would like, on the eve of my departure for India, to say a few words to my countrymen in South Africa, and also to the European community. The kindness with which both European and Indian friends have overwhelmed me sends me to India a debtor to them. It is a debt I shall endeavour to repay by rendering in India what services I am capable of rendering there; and if, in speaking about the South African Indian question, I am obliged to refer to the injustices which my countrymen have received and may hereafter receive, I promise that I shall never wilfully exaggerate, and shall state the truth and nothing but the truth.

A word about the Settlement, and what it means. In my humble opinion, it is the Magna Charta of our liberty in this land. I give it the historic name, not because it gives us rights which we have never enjoyed and which are in themselves new or striking, but because it has come to us after eight years' strenuous suffering, that has involved the loss of material possessions and of precious lives. I call it our Magna Charta because it marks a change in the policy of the Government towards us and establishes our right not only to be consulted in matters affecting us, but to have our reasonable wishes respected. It moreover confirms the theory of the British Constitution that there should be no legal racial inequality between different subjects of the Crown, no matter how much practice may vary according to local circumstance. Above all, the Settlement may well be called our Magna Charta, because

¹ Gandhiji released this to Reuter's Agent at Cape Town. Addressed to Indians and Europeans in South Africa, it was also published in *Rand Daily Mail*, 20-7-1914, and *The Transvaal Leader*, 24-7-1914.