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RECENT CASES

Inquest Proceedings — Reviewability by Supreme Court

The applications before Tennekoon J. in *Seneviratne* v. *Attorney-General* (1968) 71 N.L.R. 439 raised important questions as to the nature of inquest proceedings and the correct procedure in an inquest of death. An inquest was held by the Magistrate into the death of a person who was brought into the C.I.D. office for questioning. After recording the evidence of witnesses called by the police the Magistrate held that the deceased had jumped from the fourth floor window on his own and committed suicide. Some months later the Magistrate re-opened the inquest on the application of the deceased's brother who alleged the existence of other evidence relating to the death. At this inquest witnesses called by counsel appearing for the brother spoke of the deceased being assaulted by the police and thrown out of the window. The Magistrate then altered his previous finding and brought in a 'verdict' of 'culpable homicide'. Thereafter proceedings took an unusual turn with Crown Counsel inviting the Magistrate in view of his verdict to commence non-summary proceedings against those police officers accused at the second inquest of being responsible for the death, and the Magistrate indicating that it was for the Attorney-General to initiate criminal proceedings if he thought fit. In this impasse one of the police officers implicated by the witnesses applied to the same Magistrate to lead further evidence. The Magistrate refused this application to re-open the inquest again. The applications for a writ of *certiorari* and in revision resulted from this refusal and were directed towards quashing the findings of the Magistrate at the second inquest.

The Attorney-General who was a party respondent contended that powers of revision could not be exercised over inquest proceedings, but conceded that *certiorari* lay ; the deceased's brother who was named a respondent in both applications contended that neither revision nor *certiorari* was available to the petitioner.

At the root of the problem lies the nature of an inquest of death for the remedies sought will generally not lie unless the functions exercised by the Magistrate were judicial in character. Dealing with *certiorari* first, Tennekoon J. said, " the true test to my mind of whether the writ lies is what kind of function the law has imposed upon the authority when acting within its statutory powers and not what it has actually done acting outside of its powers. If the answer to that question is that the function imposed by law is judicial in character the writ will lie to quash determinations or orders made outside or in excess of its statutory authority, or in breach of the rules of natural justice or where there is error of law on the face of the record. Where the function is not judicial in character, whatever other remedies may be available, the prerogative writs of *certiorari* or prohibition will not be available to question acts of such authority which are *ultra vires* of its legal powers. " (p. 446). Holding that " the more reliable test is to inquire to what end or purpose (legal) powers are given, " the learned Judge was satisfied that inquest proceedings are of a non-judicial character. Tennekoon J. was also unimpressed by the argument that the Magistrate being a judicial officer must be presumed to act judicially. " It is a mistake, " he said, " to lay too much stress on the office held by the person against whom *certiorari* is sought. It is more important to have regard to the nature of the functions with which the law has invested him. "

Pronouncements on the scope of the writ of *certiorari* by a Judge whose special familiarity with the writs is well-known is entitled to very great respect. But what were the reasons for excluding the power of review by the Supreme Court over inquest proceedings ? The nature of an inquest of death is to be inferred from the provisions in the Criminal Procedure Code, especially sections 362 and 363. Where an inquirer holds an inquest it is expressly stated that he shall record marks of injury found on the body and this may also be considered an important function where an inquest is held by a Magistrate. More than this however an inquest is an inquiry into the cause of death and whoever is holding the inquest whether inquirer or Magistrate must record a finding as to the cause of death based on the evidence. " The function of an inquirer or Magistrate under Chapter 32 is to hold an inquiry into the cause of death and to state as a finding what in his opinion was the cause of death", per Tennekoon J.

The learned Judge inferred from these provisions that the Magistrate's functions are investigative only and concluded that " there is no power in an inquirer or Magistrate to pronounce any ' verdict ',

his duty is only to record a finding of the cause of death." (p. 447). In drawing this distinction between a 'verdict' and a 'finding', Tennekoon J. was, it is submitted, ignoring that a finding is colloquially called a verdict and that nothing in substance turns on the term used. But what is more important is that he has also implied that the Magistrate erred in coming to a finding (verdict) of 'culpable homicide.' This would indicate that Tennekoon J. was of opinion that a finding should be non-committal, but it is submitted, the purpose of an inquest is not merely to ascertain the cause of death in the medical sense, but cause in the sense of the agency responsible for the death, that is, whether it was a case of suicide, accident, misadventure, homicide or due to natural causes.

Much of the uncertainty surrounding inquests would disappear if there are rules prescribing the requirements relating to a finding, and the form of an inquirer's report, as in English Law (see *Halsbury*, Vol. 8, pp. 515 - 519). It is because Tennekoon J. did not think that a finding of homicide was the kind of finding contemplated by Chapter 32 that he held that "the Magistrate or inquirer holding an inquest is not called upon to determine any question affecting the rights of the subject" (p. 445), and that *certiorari* did not lie to quash a finding.

An argument that English Law should be made applicable under section 6 of the Criminal Procedure Code appears not to have been seriously considered on the ground of substantial differences in the law relating to inquests. In England a coroner's verdict (which is nothing more than his conclusion) can take the form that death was due to murder or manslaughter in which case the inquisition (*i.e.* report containing the verdict) would name the persons, if any, who have been found guilty of the offence. When Tennekoon J. said that the inquisition of a Coroner's Court in England "automatically" initiates legal proceedings he had in mind an inquisition which *charged* a person with murder or manslaughter and is immediately followed by other steps. But as *Halsbury* states "A coroner's inquest being but a preliminary inquiry *which may or may not end in a criminal charge against a particular individual*, the inquisition is in no case conclusive, and *anyone affected by it* may deny its authority and traverse the finding." (Vol. 8, p. 528. Italics supplied). It is clear that essentially the English inquest, like an inquest under the Code, is in the nature of an investigation, particularly where it does not end in a criminal charge. Nevertheless, any person aggrieved by a finding though not charged has at common law a remedy by way of an application to the High Court for an order of *certiorari* quashing the inquisition.

A finding of homicide at an inquest is not usual in our law because non-summary proceedings would normally commence immediately upon the Magisterial inquiry being held under section 153 of the Criminal Procedure Code, displacing the need for a separate inquest. If however, an inquest is held and the Magistrate is of the opinion that it is a case of homicide he should soon after recording the verdict " assume powers of a Magistrate's Court under Section 148 (1) (*a*) and initiate criminal proceedings himself " per Tennekoon J. This would bring our procedure very much in line with the English procedure after an inquisition has charged a person with an offence. In *Seneviratne's* case the Magistrate did not arrive at a finding that any one or more persons had caused the death of the deceased, but in the course of pronouncing his ' verdict ' he placed certain named police officers under a cloud of suspicion. In the second place, he brought in a verdict of ' culpable homicide ' but did not take the further steps required to initiate criminal proceedings. In the third place, Tennekoon J. was highly critical of the procedure adopted by the Magistrate at both inquests and described the findings as " utterly unreliable and unconvincing. " In these circumstances and in the absence of express provisions in the Code, it is submitted that the law applicable should be the law in force in England and any person affected by the finding, like the petitioner, was entitled to invoke the jurisdiction of the Supreme Court by writ of *certiorari* to quash the finding.

The application in revision also failed because in spite of the wide words used in section 19 of the Courts Ordinance when conferring revisionary jurisdiction on the Supreme Court a Magistrate holding an inquest is not acting judicially. With the conclusion that the Supreme Court had no power to interfere with inquest proceedings the unfortunate result was that an admittedly unsatisfactory finding as to the cause of death was allowed to stand.

In the course of his judgment Tennekoon J. had occasion to comment on the procedure in an inquest of death :

(*a*) In inquests held by the Magistrate under section 363 (1) he should make an independent attempt to trace witnesses and not leave this entirely to the police.

(*b*) Lawyers may appear at inquest proceedings but they must declare their interest. They are not entitled to cross-examine witnesses but they can " suggest any questions or line of inquiry for the inquirer to adopt in his discretion. "

(*c*) It is not proper for Crown Counsel to make an appearance as *amicus curiae* if he is there in reality to watch the interests of the Police. " The term *amicus curiae* can sometimes

be only a Latin guise for a Greek friend " per Tennekoon J. A police officer who wishes to have his interests watched should retain private counsel.

One important question arising from the facts of the case however remains unanswered. This is whether an inquirer or Magistrate has jurisdiction to re-open an inquiry once he has reached his finding. In England a coroner is considered to be *functus officio* after he has entered his verdict and may not *mero motu* hold a second inquest. An application to re-open the inquest must be made to the High Court which alone can direct the same coroner or another to commence fresh proceedings. Tennekoon J. does not seem to have seen anything objectionable in the Magistrate re-opening the inquest and substituting a new verdict for the earlier one ; nor in his refusal to record further evidence at the request of the police officer. Yet, if a Magistrate is right in re-opening an inquest once there is nothing to prevent him from doing so any number of times. Again it is submitted that a more desirable result is gained by following the English procedure. This reasoning would also apply to a related question, *viz.*, can a Magistrate hold an inquest under section 362 if an inquirer has already held one and forwarded his report to the Magistrate ? Section 362 (3) empowers the Magistrate to initiate criminal proceedings if the report discloses a reasonable suspicion that an offence has been committed ; subsection (4) although following this cannot be interpreted to mean that a Magistrate, if he is dissatisfied with the proceedings before the inquirer, can proceed to hold a second inquest. No authority is given in the Code for the Magistrate to substitute his findings for that of an inquirer who has held an inquest *super visum corporis*. The purpose of sub-section (4) is merely to indicate that the powers given to an inquirer by Chapter 32 to hold inquests are not to exclude a Magistrate's powers under section 9 so that an inquest can be held either by an inquirer or a Magistrate.

The provisions of the Code do not justify the holding of parallel inquests in respect of the same death or establish a hierarchy of inquests.

Maintenance for Child Over Sixteen Years

" If as a result of changing social conditions, it has again become necessary to amend the law, the remedy lies with the legislature. The function of the Court is to interpret the law and if the Judges consider it desirable to extend the law it must only be done in exceptional circumstances and in accordance with fundamental principles."

per Alles J. in *Nadaraja* v. *Nadaraja* (1965) 71 N.L.R. 16. If one disagrees with these sentiments as to the role of the judiciary in legal development it is partly because of the context in which they were uttered. The validity of a maintenance order in respect of a child was canvassed on the ground that the child was over 16 years at the time of the application and therefore disqualified by section 7 of the Maintenance Ordinance from seeking maintenance. The problem has been created by the way in which the statutory provision is worded in spite of an amendment in 1925. The section does not expressly state that an application for maintenance cannot be made after a child has attained the age of 16 years, but renders a maintenance order invalid after the child has attained that age unless the Magistrate extends its validity until the child reaches the age of 18 years. The authorities are agreed that the Maintenance Ordinance effected a departure from the Roman-Dutch law by fixing an upper limit of 18 years for the father's liability to support his children. Did it also lay down that an order for maintenance cannot be made for the first time in respect of a child between the ages of 16 and 18 ? Alles J. thought so after an examination of the language of the section and rejecting the test of reasonableness urged by counsel for the child. This interpretation gains support from decisions denying to a Magistrate jurisdiction to extend a maintenance order if the application for such purpose is made after the child has reached 16 years of age. *Dona Rosalina* v. *Gunasekera* (1926) 13 C.L.W. 17; *Hinniappuhamy* v. *Wilisindahamy* (1952) 54 N.L.R. 373. Alles J. preferred to take a view which was consistent with those decisions rather than follow a decision of Soertsz J. on the identical question before him.

If the decisions approved by Alles J. are examined it will be seen that they were influenced by considerations other than the end for which the law was enacted. It was Withers J. who in a short judgment in *Este* v. *Silva* (1895) 1 N.L.R. 22 attached undue importance to the fact that a maintenance order appears to be fixed with a date of expiry at the time it is first entered and held that a liability to pay maintenance which expires on reaching that date cannot be renewed by an extension of the order. This very literal interpretation of the Maintenance Ordinance ignores that it is a basic civil liability which is being enforced by the Magistrate. It was expressed at a time before the law settled down to the view that the father's duty to maintain his children is enforceable only under the Maintenance Ordinance and not also under the common law. On the other hand Soertsz J. in *Thangayagam* v. *Chelliah* (1941) 42 N.L.R. 379 showed more concern for the rights intended to be protected by the Ordinance when he held that an order for maintenance can be made at any time before the child attained 18 years. Although the learned

Judge was able to distinguish the judgment of Garvin A.C.J. in *Dona Rosalina* v. *Gunasekera* on the facts, perhaps one is justified in querying whether Swan J. in *Hinniappuhamy* v. *Wilisindahamy* was correct when he said that Soertsz J. " did not in any manner express disagreement with or doubt the correctness of the view taken by Garvin A.C.J. "

There remains the question whether Alles J. was right in not following *Thangayagam* v. *Chelliah* on the ground that it was wrongly decided. Since this is not an isolated instance of disagreement in single Bench decisions it is well to refer to a suggestion made some years ago by another distinguished Judge, that a Judge sitting alone is bound to follow any earlier decision of a single Judge, unless he regards the decision as made *per incuriam*, in which case " it would generally be more expedient if instead of refusing to follow the decision made *per incuriam* he reserved either the entire appeal or the particular question for a larger Bench constituted under section 38 or section 48A of the Courts Ordinance." (Justice Gratiaen, "The Tangle of Precedent," (1952) 10 *University of Ceylon Review*, 265, 274). In *Nadarajah* v. *Nadarajah* the Judge was invited to refer the question to a fuller Bench but did not think it necessary to do so. As against the suggestion of Justice Gratiaen is the observation of the present Chief Justice in *Bandahamy* v. *Senanayake* (1960) 62 N.L.R. 313, " Our Law Reports reveal that the limited right to disagree with a former decision of a Bench of equal strength has quite often provided a mode of correction of errors. " But it is questionable whether even this view concedes to a Judge the right to disagree merely on the ground that he is of a different opinion. The unsettling effect of a conflicting decisions on lower courts makes it desirable that a Judge should have no qualms about making use of the provisions of the Courts Ordinance for obtaining an authoritative decision on a controversial point.

An Accused's Right to be Defended

Recent decisions of the Supreme Court have emphasised the importance of the right of representation given by section 287 of the Criminal Procedure Code : " Every person accused before any criminal court may of right be defended by a pleader. " In *Premaratne* v. *Gunaratne* (1965) 71 N.L.R. 113 T. S. Fernando J. observed that this right is ingrained in the Rule of Law. In this case the accused had, from the date of being charged by the Magistrate to the date of trial (a period of 5 days), been on remand in connection with another charge. He was unrepresented at the trial and had not cross-

examined any of the prosecution witnesses. It was held that in the circumstances the accused had not been in a position to exercise the right to representation. From the fact that the case was sent back for fresh trial it is clear that section 287 enacts no mere permissive right but a right which if expressly or even by implication is denied to an accused will vitiate the trial. A reasonable request for time to engage a lawyer for the defence should not be refused (*Jayasinghe* v. *Munasinghe* (1959) 62 N.L.R. 527); a lawyer who is retained must be given sufficient time for preparation (*The Queen* v. *Peter* (1961) 64 N.L.R. 120). A Magistrate should also inform an unrepresented accused of his right at the earliest opportunity and wherever necessary refer him to legal aid facilities.

In *Subramaniam* v. *I. P. Kankesanturai* (1968) 71 N.L.R. 204, Weeramantry J. in a carefully reasoned judgment reflecting the impact of " Warren Court " decisions held that if a lawyer retained by an accused is not permitted to cross-examine a witness who had given evidence when the accused was unrepresented, this would amount to denial of a fair trial. An important fact emerging from this case is that even if the police have acted with commendable promptness and filed plaint on the day after the offence the Magistrate should not immediately proceed with the case. This is particularly so when the accused is produced straight from police custody, but even if he has been released on bail, the Magistrate should satisfy himself that he has had a reasonable time to retain a lawyer.

In view of these decisions it is time to ask whether the right exists in theory only or whether there also exist effective opportunities for the exercise of the right. The poverty of most accused persons and the voluntary character of Free Legal Aid services may render this right incapable of exercise unless it is strengthened by a machinery solely directed towards protecting the substance of the right. The Public Defender Departments established in many American States perform this function in a satisfactory manner. Their usefulness is not only at the trial stage but in that important pre-trial stage when the accused is in police custody and is helpless to take necessary steps to estabish his innocence before being charged or to obtain release on bail. There may be other schemes which are deserving of study.

Revocability of Kandyan Deed of Gift

The Privy Council in *Dullewa* v. *Dullewa* (1968) 71 N.L.R. 289 had to decide whether a Kandyan deed of gift executed after the Kandyan Law Declaration and Amendment Ordinance of 1939 can

be revoked if the donor had merely described the gift " as a gift irrevocable. " The Ordinance of 1939 deprived a donor of the right to cancel or revoke a gift provided he had expressly renounced the right " by a declaration containing the words ' I renounce the right to revoke ' or words of substantially the same meaning. " (section 5 (1) (*d*)). In interpreting this provision it is only natural to seek assistance from the Kandyan Law Commission Report (Sessional Paper 24 of 1935) to which the Ordinance could be traced. But the extent to which Judges could rely on the Report has been differently understood. The Supreme Court in *Punchi Banda* v. *Nagamma* (1963) 64 N.L.R. 548 did not think the Report was of help in interpreting the words of section 5 (1) (*d*). It was true that the Report contained a recommendation that the renunciation should be made in explicit terms and according to a prescribed form, but Sansoni J. said, " Parliament has not accepted the recommendation so far as it relates to a clause or to a prescribed form, and we thus come back to the actual words of the Ordinance. " It was held in this case that the word " irrevocable " was an abbreviated form used by the Notary expressly to renounce the donor's right to revoke. (It is clear, however, from *Ukku Amma* v. *Dingiri Menika* (1965) 69 N.L.R. 212, *Tammita* v. *Palipane* (1965) 70 N.L.R. 520 and other cases that Notaries also use an express clause of renunciation). On the other hand, in the Privy Council Lord Hodson delivering the majority judgment relied on the Report to ascertain the evil or defect which the Ordinance was intended to remedy and from this arrived at the conclusion that the Ordinance required a special clause of renunciation. " The renunciation is to be expressed and not to be implied and a description of a gift as being irrevocable does no more than imply the renouncing of an existing right to renounce. " (p. 28). This was also the view of H. N. G. Fernando S.P.J. (as he then was) in *Ukku Amma* v. *Dingiri Menika* where he said, " The ordinary meaning of the words ' expressly renounced ' is *exactly or definitely renounced* as opposed to *impliedly renounced.* " Lord Hodson drew attention to the possibility of a conflict between the intention of the donor and the expression of that intention. " In construing the Ordinance it is necessary to consider whether its requirements have been complied with irrespective of the intention which can be found on a reading of the original document. The intention may have been to give up the right to revoke but this is not the same as express revocation of an existing right. " (p. 296). The result was that the deed of gift was held to be revocable and *Punchi Banda* v. *Nagamma* was over-ruled.

Lord Donovan in a dissenting judgment did not agree that the statute requires that there should be a formal declaration to take

away the right of revocation. According to his Lordship the purpose of section 5 (1) (*d*) was to insist on the use of the word " irrevocable " as the minimum to convey the donor's renunciation of his right. There was no difference between the use of the word ' irrevocable ' and the formula prescribed by the Ordinance. Another reason for Lord Donovan preferring this construction was that it was in keeping with previous decisions of the Supreme Court and therefore ensured stability of title to land transferred after the Ordinance.

On this last point the majority judgment did not disagree in principle. Lord Hodson conceded that there was a long line of decisions *before* the Ordinance taking the view that if a gift is stated to be irrevocable *simpliciter* then it cannot be revoked and did not doubt that in the case of pre-1939 deeds this construction would still be proper. *Dullewa* v. *Dullewa* therefore does not take away the authority of *Tikiri Bandara* v. *Gunawardane* (1967) 70 N.L.R. 203. (For a recent decision holding that the words ' the donee shall possess for ever ' in a pre-1939 deed, was not an effective renunciation of the right, see *Kekulandara* v. *Molagoda* (1968) 71 N.L.R. 433). But his Lordship held that as a matter of fact, there was no consistent current of authority in relation to deeds *after* the passing of the Ordinance, so that in their case a different construction based on the language of the Ordinance was permissible. A renunciation can now be effected only by a declaration containing a transitive verb ' renounce ' or an equivalent as opposed to " an adjectival description of the gift as irrevocable. " In the absence of a declaration by the donor to this effect, the gift is revocable.

Profiteering and Punishment

The attempt to check profiteering by means of deterrent punishment meted out by a fortified criminal law has raised a number of interesting questions. One of the first things to note is that it was necessary to get over the difficulty created by the Divisional Bench decision in *Perera* v. *Munaweera* (1955) 56 N.L.R. 433 which rightly held that a mistake of fact (section 72 of the Penal Code) could be pleaded by an accused who was charged under the Control of Prices Act. As long as this decision stood it meant that there was not strict liability for contravention of a Price Control Order and this virtually made it impossible to secure a conviction for a sale by a retail trader who could always say he was mistaken as to number or weight. The amending Act No. 44 of 1957 therefore very deliberately enacted

that section 72 of the Penal Code should not apply in the case of offences under the Control of Prices Act. Even so the law could be considered to lack teeth as long as a conviction entailed a small fine only. Although a fine upto Rs. 7,500 or imprisonment not exceeding six months or both fine and imprisonment were possible convicting Magistrates did not always impose severe penalties for profiteering. The amending Act No. 44 of 1957 therefore made a prison sentence and a fine mandatory on conviction, and in 1966 a further amendment made a minimum of 4 weeks ' imprisonment inescapable.

The social purpose of the change in the law was never in doubt but in refusing to treat a first offender with leniency and in regarding all acts of profiteering, great and small, alike, the amended Act posed problems to Magistrates. In *Attorney-General* v. *Gunawardena* (1967) 70 N.L.R. 68 the Magistrate without imposing a sentence of imprisonment ordered the accused, a petty trader, to be detained in Court under section 15 B of the Criminal Procedure Code. In an appeal by the Attorney-General it was held that the Magistrate was bound to impose a term of imprisonment. An argument urged in appeal that the accused should be dealt with under section 325 of the Code was considered by Alles J. to be excluded by the imperative provisions of the amending Act of 1966.

Soon after this decision a Regulation made under section 5 of the Public Security Ordinance (which had been invoked for the purpose of proclaiming a state of emergency in the country) expressly stated that section 325 of the Code shall not apply to persons charged with profiteering.

In two cases decided in appeal after this Regulation but in respect of offences committed before the Regulation became law the Supreme Court set aside the conviction and sentence, and warned and discharged the accused. *Don Edirisinghe* v. *de Alwis* (1967) 71 N.L.R. 88, *Podiappuhamy* v. *Food & Price Control Inspector, Kandy* (1968) 71 N.L.R. 93. In the latter case H. N. G. Fernando C.J. clearly expressed his disapproval of attempts to fetter a court's discretion in regard to punishment. As the learned Chief Justice said, " section 325 of the Criminal Procedure Code gives expression to the fundamental principle of justice that contraventions of the law, which are purely technical and not substantial, do not call for the exercise of punitive powers of the Courts. The principle *de minimis non curat lex* received practical application through the discretion vested in the courts by section 325. " (p. 94). In the third case, *Gunapala* v. *Wilson de Silva* (1968) 71 N.L.R. 233 Weeramantry J. agreed with the observations of the Chief Justice but made it

clear that in his opinion section 325 can only be applied where mitigatory circumstances are present. A mitigatory circumstance could be the absence of an intention to contravene the law (or mistake of fact) as in *Podiappuhamy's* case, or the age and good character of the accused, as in *Don Edirisinghe* v. *de Alwis* and *Devendram* v. *de Silva*, (1969) 72 N.L.R. 186. In this last case Alles J. preferred to follow the later decisions than his own decision in *Attorney-General* v. *Gunawardena* so that with the lifting of the emergency and the consequent repeal of the Regulation, there is no impediment to a Magistrate proceeding to warn and discharge an accused in a profiteering case. The alternatives now available to a Magistrate to impose a term of imprisonment or to warn and discharge the accused may not be in keeping with the original intention of the legislature, but the Chief Justice has observed, " I have rarely come across any case in which the discretion of leniency conferred on the courts by section 325 has been unreasonably exercised. If the courts have that discretion even in cases of homicide, why not also in cases of profiteering ." (p. 94.)

Negotiorum Gestio. Paulian Action

Schulz, *Classical Roman Law*, has this interesting comment on the institution of *negotiorum gestio :* " It is a quite original genuinely Roman creation without parallels in the laws of other people not dependent on Roman Law. It emanated from Roman *humanitas*. The underlying idea was that a man should help his fellow men in case of emergency. The Romans carried through this idea with their usual common sense without confusing morality and law. Nobody is legally bound to care for the affairs of another ; but the law should favour and facilitate such altruistic action by granting the *gestor* the right to claim reimbursement of his expenses, which of course entails a liability of the *gestor*. The institution of *negotiorum gestorum* was a happy invention, quite in the bold and original style of the republican jurisprudence, although in this present age of quick postal service, telegraph and telephone it has lost some of its importance. "

Undoubtedly there is something peculiar about recognizing an unauthorised management of another's affairs when the opportunities for obtaining his prior mandate are present. Yet in *Atukorale* v. *Attorney-General* (1968) 71 N.L.R. 369 the Supreme Court had no doubts in finding a *negotiorum gestio* situation in a modern context. The question was whether a person who paid off a mortgage debt binding two properties, one of which belonged to him,

was entitled to a claim against the other owner. Samerawickrame J. held that he had the *actio negotoriorum gestorum contraria* to recover an appropriate amount for discharging the mortgage on the other's land. Even the fact that the *gestor* acted in his own interest in paying off the debt was not considered a ground for refusing remedy. In Roman Law the *actio contraria* for reimbursement did not lie unless the act was done in the interests of the principal, although as Buckland says, " an interpolated text gives the *actio contraria* even in this case, to the extent of the principal's enrichment " (*Textbook*, p. 538). The equitable extension has the undoubted authority of Voet 3.5.9 for Roman-Dutch law, and the judgment has affirmed that the *actio contraria* is available either for reimbursement of expenses incurred by the *gestor* or for compensation to the value of the enrichment of the principal. Some jurists have indeed gone further and asserted that an action based on enrichment would lie even if the principal has forbidden the *gestor* to act for him. (See the authorities cited in Lee, *Commentary to Grotius*, p. 324).

The scope of *negotiorum gestio* is only one of the interesting questions that arose for decision in *Atukorale* v. *Attorney-General*; the other concerned another well-known Roman remedy, the Paulian action. This action which was available to a creditor who was prejudiced by an alienation by the debtor in fraud of creditors has a long history in Ceylon. Although the requisites for maintaining such an action can now be considered to be settled there is still some doubt as to who is a creditor for the purposes of the action. In this case the person who had settled the mortgage debt had notified the mortgagor of his claim for having discharged the mortgage on his land, and subsequently brought action to enforce it. Between the date of notification by the *gestor* of his claim and the obtaining of judgment in his favour, the mortgagor (principal) had alienated the land. The question was whether the *gestor* who had only an unliquidated claim at the time of the transfer was a creditor who could succeed in a Paulian action to set aside the transfer. Samerawickrame J. on the authority of the judgment of Keuneman J. in *Fernando* v. *Fernando* (1940) 42 N.L.R. 12 gave answer in the affirmative. Both Judges refused to draw a distinction between an alienation in fraud of a creditor *in esse* and an alienation with the deliberate object of rendering nugatory a decree which the alienor anticipates would eventually be entered against him. What was important was that the decree against the alienor should have been obtained before the Paulian action is brought and not before the alienation. *Punchi Appuhamy* v. *Sedara* (1947) 48 N.L.R. 130.

In spite of the authorities in favour of the view taken by Samerawickrame J. a difficulty is posed by the Divisional Bench decision in *Mukthar* v. *Ismail* (1962) 64 N.L.R. 293. In a judgment which strangely makes no reference to earlier decisions Basnayake C.J. very definitely took the view that the creditor-debtor relationship should exist at the date of alienation, and by debt he understood something more than a claim for unliquidated damages. But Basnayake C.J. also decided that the Paulian remedy would not lie in respect of property obtained by the debtor after the institution of the action for damages against him and subsequently alienated (*sed quaere*?). The existence of this second ground for refusing to set aside the alienation enabled Samarawickrame J. to distinguish *Mukthar* v. *Ismail* on the facts. It is submitted with resepct that one cannot restrict the Divisional Bench decision to a secondary proposition of law stated therein, and therefore Samerawickrame J.'s decision is in conflict with it on the question as to who is a creditor in a Paulian action.

One last point of interest. A foreigner who wishes to gain an insight into our legal system and judicial process would be rewarded by reading Samerawickrame J.'s judgment. He would probably be astonished by the richness of the source material as revealed in the authorities cited in the judgment. The authorities in the order in which they appear are : Roman Law (— the reference to the text in the Digest is mutilated by an unfortunate printer's devil —); Roman-Dutch law, old (Voet) and modern (South African writer); English Judicial Dictionary ; French Treatise on the Civil Law ; two 19th century English decisions ; and a local statute, the Prescription Ordinance.

R.K.W.G.

Cheques — Notice of Dishonour

The decision in *Senanayaka* v. *Abdul Cader* (1969) 77 C.L.W. 79 is a timely reminder to Counsel who advise and conduct actions on cheques of the need to plead and prove the essential requirements (1) that the cheque was duly presented for payment (section 45, Bills of Exchange Ordinance) and (2) that in the event of dishonour by non-payment due notice of dishonour was given to the defendant (section 48). Alternatively, if these essential requirements were

dispensed with in terms of section 46 (2) and section 50 (2) Counsel must plead and prove the facts on which they rely for dispensation of both these requirements.

In this case the plaintiff sued the defendant for the recovery of a sum of Rs. 12,000 borrowed by the defendant on a cheque drawn by him in favour of the plaintiff. The plaint contained no averment that the cheque was duly presented for payment, or that it had been dishonoured by non-payment or that notice of dishonour had been given to the defendant. Further, no facts were pleaded showing that these essential requirements had been dispensed with, nor was any issue raised at the trial on any of these matters. The Supreme Court dismissed the plaintiff's appeal from the judgment of the District Judge which had dismissed his action for his failure to comply with these essential and imperative requirements of law.

The plaintiff said in evidence that he did not present the cheque for payment because the defendant had asked him not to present it as he was pressed for money. This was not evidence that the defendant had waived the requirement that the cheque should have been presented for payment (section 46 (2) (*e*)) and did not justify the plaintiff's omission to present it for payment. The plaintiff acted imprudently because section 46 (3) does not dispense with the necessity to present a cheque for payment merely because the holder has reason to believe that the cheque will be dishonoured on presentment. Counsel for the plaintiff ought to have taken heed of the clear warning on the back of the cheque that it had not been presented by the plaintiff for payment. He should have considered how far section 46 (2) (*c*) would have come to his client's assistance. That section dispenses with the need for presentment as regards the drawer (the defendant in this case) where the bank as between itself and the drawer was not bound to pay the cheque and the drawer had no reason to believe that the cheque would be paid if it had been presented. This might well have been the case if in fact the drawer had no funds at the bank either at the time he drew the cheque or at any time thereafter when it could have been presented. If such was the fact the need both for presentment as well as for notice of dishonour was dispensed with. Chalmers, *Bills of Exchange*, p 144 (12th ed.) gives an appropriate illustration. A cheque is drawn on X Bank, the drawer not having sufficient funds there to meet it, and having no reason to expect that it will be honoured. Presentment is not necessary to charge the drawer. *Wirth* v. *Austin* (1875) L. R. 10 C. P. 689. Counsel could have ascertained, before he drafted the plaint, whether facts existed which dispensed with the need for presentment as well as with the need for notice of dishonour (section 46 (2) (*c*) and

section 50 (2) (*c*) (iv). If they did exist, he ought to have averred them in the plaint and led them in evidence. If the case had been entrusted to him after the plaint had been filed, the absence of any endorsement by the bank on the back of the cheque was clear warning that he should have sought for leave from Court on terms to amend the plaint to include the necessary averment that presentment for payment and notice of dishonour were dispensed with *Burgh* v. *Legge* (1839) 5 M and W 418. This was not done. *Hanc illae lacrimae.*

If on the other hand the facts were that the drawer had funds at the material time, Counsel should have sued for money lent and advanced instead of suing on the cheque. In view of the fact that Counsel for the plaintiff in appeal conceded that this was an action on the cheque, it may be that the cause of action for money lent and advanced was already prescribed at the time the action was instituted, (section 7, Prescription Ordinance) and there was no alternative but to proceed with the action on the cheque. If so, it is all the more lamentable that the plaint in this case was manifestly inadequate in that it did not disclose a cause of action on the cheque.

The Supreme Court deplored the fact that, in spite of the clear and well settled law on this point, and the repeated stress by our Courts on the importance of pleading the essential requirements of due presentment and notice of dishonour, there are still plaints which ignore these requirements as though they did not exist.

V. RATNASABAPATHY*

TAXATION WITHOUT CONSENT OF PARLIAMENT

Section 2 (7) of the Heavy Oil Motor Vehicles Taxation Ordinance enacts,

> "(*a*) The rates prescribed in the First Schedule to this Ordinance may, from time to time be varied by the Minister of Finance by Order published in the Gazette.
>
> (*b*) Every Order made under paragraph (*a*) of this sub-section shall come into force on the date of its publication in the Gazette or on such later date as may be specified in the Order, and shall be brought before the House of Representatives within a period of one month from the

*B.A. (Cey.), LL.B. (Lond.), Advocate ; Reader, Ceylon Law College.

date of the publication of such Order in the Gazette, or if no meeting of the House of Representatives is held within such period, at the first meeting of that House held after expiry of such period, by a motion that such Order shall be approved. There shall be set out in a Schedule to any such motion the text of the order to which the motion refers.

(*c*) Any Order made under paragraph (*a*) of this sub-section which the House of Representatives refuses to approve shall, with effect from the date of such refusal, be deemed to be revoked but without prejudice to the validity of anything done thereunder. Notification of the date on which any such Order is deemed to be revoked shall be published in the Gazette."

In two recent cases it was argued that an exercise of the above delegated legislative power, varying the rates in the First Schedule was invalid because the regulations had not been laid before the House of Representatives within the period specified in the Schedule.

Alles J. in *Podi Appuhamy* v. *Government Agent, Kegalle* (1967) 70 N.L.R. 544 held that provisions regarding Parliamentary approval were not mandatory and the delegated legislation took effect immediately and was therefore valid. In *Illeperuma Sons Ltd.* v. *Government Agent, Galle* (1968) 70 N.L.R. 549 H. N. G. Fernando C.J. did not follow the view of Alles J. and held that the second part of paragraph (*b*) was mandatory.

He referred (p. 551) to paragraph (*c*) which provides that even if the House refuses to approve a taxation order and the Order thereby becomes revoked, the levy of the taxes prior to the time of such revocation will be valid which he admitted seemed to support the view of Alles J. But H. N. G. Fernando C.J. did not discuss the effect of the statement in paragraph (*b*) which is more relevant to the conclusion of Alles J. Paragraph (*b*) provides that the order will come into force on the date of its publication in the Gazette or on a specified later date. The Chief Justice held that the validity conferred by paragraph (*c*) flows from the fact that the law is observed and that Parliament is duly invited to consider whether or not to approve the order. But in a case where the order is not brought before Parliament at all or where as in this case the order is brought before Parliament long after the prescribed time, the Chief Justice held that paragraph (*c*) is of no avail. In coming to this conclusion the Chief Justice referred to the fundamental principle of British

Constitutional law that the subject cannot be taxed except directly by statute enacted by Parliament or by a resolution of the House of Commons.

The principle that the subject cannot be taxed except under the authority of Parliament is nowhere specifically mentioned in the Ceylon Constitution. Its origin in British Constitutional law could be traced to the conflict in the seventeenth century between Crown and Parliament. Its application rendered invalid the imposition of taxes by the Crown acting under prerogative powers. (See Case of Impositions (*Bates'* case) (1606) 2 St. Tr. 371 ; Case of Ship Money (*Hampden's* case), (1637) 3 St. Tr. 825. See Wade and Phillips, *Constitutional Law* (7th ed.) at 36 - 39.). In Britain this principle has not been applied in respect of legislative powers delegated by Parliament because in such a situation the tax is levied under the authority of Parliament. In this case apart from the fact that the delegated power merely enables the Minister of Finance to *vary* rates specified in the First Schedule and not to *impose* rates, the power conferred by the Minister is one granted by Parliament and therefore exercised under the authority of Parliament. It is submitted that the principle is not relevant in the context in which it was invoked by H. N. G. Fernando C.J. The principle would be relevant in Ceylon only if the Governor-General purporting to act under prerogative powers, or an executive authority or a local authority attempted to levy rates or taxation, and was not able to point to an Act of Parliament conferring power on it to do so.

The divergence in approach between Alles J. and H. N. G. Fernando C.J. as to whether the words in section 2 (7) were mandatory perhaps arose from the unusual procedure prescribed in section 2 (7) for the laying of the delegated legislation before Parliament. Section 2 (7) does not appear to fall within one of the four standard procedures of laying before Parliament adopted in the drafting of statutes (See Wade and Philips, *op cit.* at 617). (i) An Act may require delegated legislation made under power conferred by it to be laid before Parliament without prescribing what action may be taken by Parliament if this is not done. In such a case the delegated legislation is valid as soon as it is made. (ii) An Act may provide that regulations made under it are subject to annulment by resolution of either House within a specified period. The Act provides that the regulations are valid immediately they are made but if either House within a certain period after the regulations are laid before it resolves that a regulation be annulled, the regulation thereupon ceases to have effect, but without prejudice to the validity of anything done thereunder. (iii) A particular Act might provide that regulations

made thereunder might have to be laid before Parliament and would be of no effect unless approved by resolution. (iv) An Act might provide that regulations take immediate effect but require approval by an affirmative resolution within a stated period as a condition of continuance.

The regulation which gave rise to the litigation in the two cases referred to above, were gazetted on 29th April, 1963. Therefore as the Chief Justice pointed out the motion for approval should have been moved in the House before 29th May, 1963 if a meeting took place before that date or else at the first meeting which took place thereafter. The motion for approval was not moved in the House until 20th August, 1964.

The procedure adopted in section 2 (7) is confusing in that the draftsman of the Act seems to have had in mind (iv) above, but while stating that the regulations should be approved by Parliament within a particular period *does not state the consequences of failure to do so* and therefore the procedure prescribed by the section does not fall exactly within (iv). The requirement of parliamentary approval seems to point to (iii). On the other hand the requirement that the order comes into effect from the date of publication in the Gazette or a prescribed late date and the requirement in paragraph (*c*) that if Parliament refuses to approve a regulation it would be revoked without prejudice to the validity of anything done thereunder seems to point to (ii).

The view of H. N. G. Fernando C.J. was that the regulations published in the Gazette had no validity, apparently on the assumption that section 2 (7) fell within (iii) above. Alles J. held that the regulations were valid and did not require Parliamentary approval, apparently on the assumption that section 2 (7) fell within (ii) above. But it may also be argued that section 2 (7) fell within (iv) and took immediate effect on publication in the Gazette and lapsed on 29th May, 1963 or after the first meeting of the House of Representatives after that date.

It appears that in the ultimate analysis, the fault lies with the draftsman who has been guilty of contradictions and the section is amenable to *three* interpretations, none of which could be unequivocally supported by reference to the language of the section. It appears that the third interpretation, *i.e.* that section 2 (7) falls within (iv) was in the mind of the draftsman, though it has not been clearly expressed in the enacting words.

It is however respectfully submitted that the principle that taxation cannot be imposed without the consent of Parliament is not relevant in this context.

L. J. M. COORAY*

LABOUR TRIBUNALS AND STANDARD OF PROOF

The decision of the Supreme Court in *Ceylon University Clerical and Technical Association, Peradeniya* v. *The University of Ceylon Peradeniya* (1968) 72 N.L.R. 84 raises an interesting question about the degree of proof required to justify the termination of services of a workman on the ground that he has committed a criminal act involving moral turpitude such as the making of a fraudulent entry with a view to misappropriation of his employer's money. In this case Wijayatilake J. held that where a Labour Tribunal is called upon to decide whether the employee is guilty of such misconduct, the standard of proof should be as in a criminal case. Accordingly, if there is a reasonable doubt the benefit of such doubt should be given to the employee. This requirement, he held, is not in conflict either with section 31 (C) (1) of the Industrial Disputes Act which empowers the Labour Tribunal to make a " just and equitable order " or with section 36 (4) according to which the Tribunal is not bound by any of the provisions of the Evidence Ordinance.

The issue of law involved in this decision is closely connected with the larger issue of degree of proof required to establish a crime which is alleged in a civil case. The rules as to burden of proof contained in our Evidence Ordinance have no bearing on the question of the " standard of proof " required to establish a particular matter in issue. Cross, *Evidence*, p 87 (3rd ed.) refers to it as " degrees of proof ".

The only provision of the Evidence Ordinance relevant here is section 3 which defines the term " proved " as follows : " A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that the prudent man ought, *under the circumstances of the particular case*, to act upon the supposition that it exists. "

*LL.B. (Cey.), Ph.D. (Cantab.); Lecturer in Law, University of Ceylon, Colombo.

Where in terms of this definition of proof the Court believes a fact to exist, the degree of proof beyond any reasonable doubt that is required in a criminal case is reached. Where the Court considers the existence of the fact so probable that the prudent man ought to act upon the supposition that it exists, the degree of proof on a preponderance of probability that is required in a civil case is reached.

Even in civil cases this definition envisages that the quantum of evidence required to reach the civil standard of proof may vary according to the circumstances of a particular case. That is why the definition qualifies the standard of probability with the words " under the circumstances of the particular case. " Thus where A sues B on an oral debt, the evidence of A and B will be tested on the basis of simple balance of probability. But where B is dead and is not there to deny or repudiate A's oral claim, and A makes a similar claim against the estate of B in circumstances where the heirs have no knowledge of the facts of the alleged transaction, the quantum of the evidence demanded by the Court would be higher than where B is living to meet the claim. In *Muththal Achy* v. *Murugappa Chettiar* (1954) 57 N.L.R. 27 it was held that in such circumstances it is the duty of the Court to scrutinise the plaintiff's case with " great jealousy. "

With regard to crime alleged in a civil case, in *People of the State of New York* v. *Heirs of Phillips* (1939) 3 All E. R. 952 where the plaintiff claimed damages for conspiracy to defraud, the Privy Council held that the standard appropriate to criminal proceedings was the right one. Lord Atkin said that this proposition had been laid down time and again by the Courts in England and appeared to be just (at p. 955).

Although in *Hornal* v. *Neuberger Products Ltd.* (1956) 3 All E.R. 970 the Court of Appeal in England stated in general terms that proof by a preponderance of evidence is sufficient when the commission of a crime is alleged in a civil action, yet the specific decision of the Privy Council referred to earlier has greater weight and authority behind it, and the principle enunciated there has been followed in a number of cases in Ceylon where there has been an allegation of fraud. It will be interesting to note in this connection that in the *Thenuwera Will* case where the grant of probate to a widow who was appointed executrix and heir by the will of the deceased husband was sought to be revoked on the ground that she had participated in the murder of the deceased husband or had been party to the conspiracy to kill him, the District Court required proof beyond any reasonable doubt as in a criminal case and held on the evidence that the criminal act

of the widow had been established beyond reasonable doubt and the probate granted to her revoked.

This rule as to standard of proof of a crime alleged in a civil action has greater relevance to labour disputes where termination of services is sought to be justified on the ground of a criminal act done by the employee. Although the normal standard of proof required to justify termination of services is a balance of probability, proof beyond reasonable doubt should be strictly and consistently followed. Where the termination of services is sought to be justified on the ground of a crime committed by the dismissed workman, the finding of a Labour Court that the workman was guilty of the crime alleged against him by his employer will be a permanent stigma on the workman and jeopardise his chances of obtaining any subsequent employment. The only difficulty that will arise in such a case is whether an employer can be compelled to retain in employment a workman against whom the employer has *bona fide* reasonable and strong grounds for suspicion of a criminal act. But this consideration will not affect the issue of justification of termination, but will affect the question of the relief the workman will be entitled to, that is, whether he is to be awarded reinstatement or compensation or gratuity for past services. Thus where the termination of services is sought to be justified on the ground of a criminal act committed by the employee, the Labour Tribunal, if it is not satisfied that the criminal act of the employee has been proved beyond reasonable doubt, will hold that the determination of services is not justified, and on the question of relief, if the Tribunal is satisfied that there is sufficient evidence to support a *bona fide* and reasonably strong suspicion of the criminal act, it will not order reinstatement of the dismissed workman but only grant him compensation for past services depending on the circumstances of the case.

K. SHANMUGALINGAM*

THEDIATHEDDAM — A CHANGING LEGAL CONCEPT.

The concept of Thediatheddam in Thesawalamai has been the subject of much judicial explanation and statutory definition. The cumulative effect of all these undoubtedly honest endeavours

*B.A. (Cey.), Advocate.

has been to give rise to a totally new concept altogether unrelated to the one formulated and followed by that simple unsophisticated individual called the Malabar inhabitant of the Province of Jaffna.

The judgment of Siva Supramaniam J. in *Arunasalam* v. *Ayadurai* (1967) 70 N.L.R. 165 is one of the recent decisions touching on this matter. The facts in the case are simple. The plaintiff was a Tamil to whom the Thesavalamai applied. He married one Sivakolunthu in 1949. During the subsistence of this marriage he purchased a property in his own name. The consideration for the purchase was obtained by a loan raised jointly by husband and wife from certain third parties. Sivakolunthu died in 1959 intestate, issueless, leaving behind as her heirs, her father, two brothers, and one sister.

In the judgment of the Supreme Court his Lordship held

(*a*) that the property is Thediatheddam property and

(*b*) that both spouses will be equally entitled thereto.

In determining the rights of Sivakolunthu to the property in question the law applicable is the Jaffna Matrimonial Rights and Inheritance Ordinance No. 1 of 1911 as amended by Ordinance No. 58 of 1947 in as much as the parties were married and the property was acquired after the 4th of July 1947 being the date on which the Amending Ordinance No. 58 of 1947 came into operation. Accordingly, the property acquired by the plaintiff is clearly the Thediatheddam property of the plaintiff in terms of the provisions of section 5 of the Ordinance No. 58 of 1947 which is the new section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58.)

His Lordship having correctly classified the property in question as Thediatheddam property proceeds to hold that ' both spouses will be equally entitled thereto. ' It is submitted with respect that there is nothing either in sections 5 or 6 of the Amending Ordinance No. 58 of 1947 which warrants such a finding. Neither is the conclusion, it may be noted in passing, justified on the basis of a constructive trust in terms of the provisions of section 84 of the Trusts Ordinance.

True it is that if the property had been acquired prior to the 4th of July 1947 a half share of the property acquired by the plaintiff in his own name would have vested in Sivakolunthu by reason of the provisions of section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance as it stood prior to the amendment by section 5 of the Amending Ordinance No. 58 of 1947. It is submitted that this provision of the law has no application to the present case, and the

nature and devolution of the Thediatheddam of the plaintiff will be governed by section 6 of the Ordinance No. 58 of 1947 *i.e.* section 20 of Cap. 58.

It may be noted that section 6 of the amending Ordinance repealed section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance and substituted in its place a new section which Gratiaen J. in *Kumaraswamy* v. *Subramaniam* (1954) 56 N.L.R. 44 at 47 thought had the following effect :

(*a*) if either spouse acquires Thediatheddam property after the 4th of July 1947 no share in it vests by operation of law on the non-acquiring spouse during the subsistence of the marriage ;

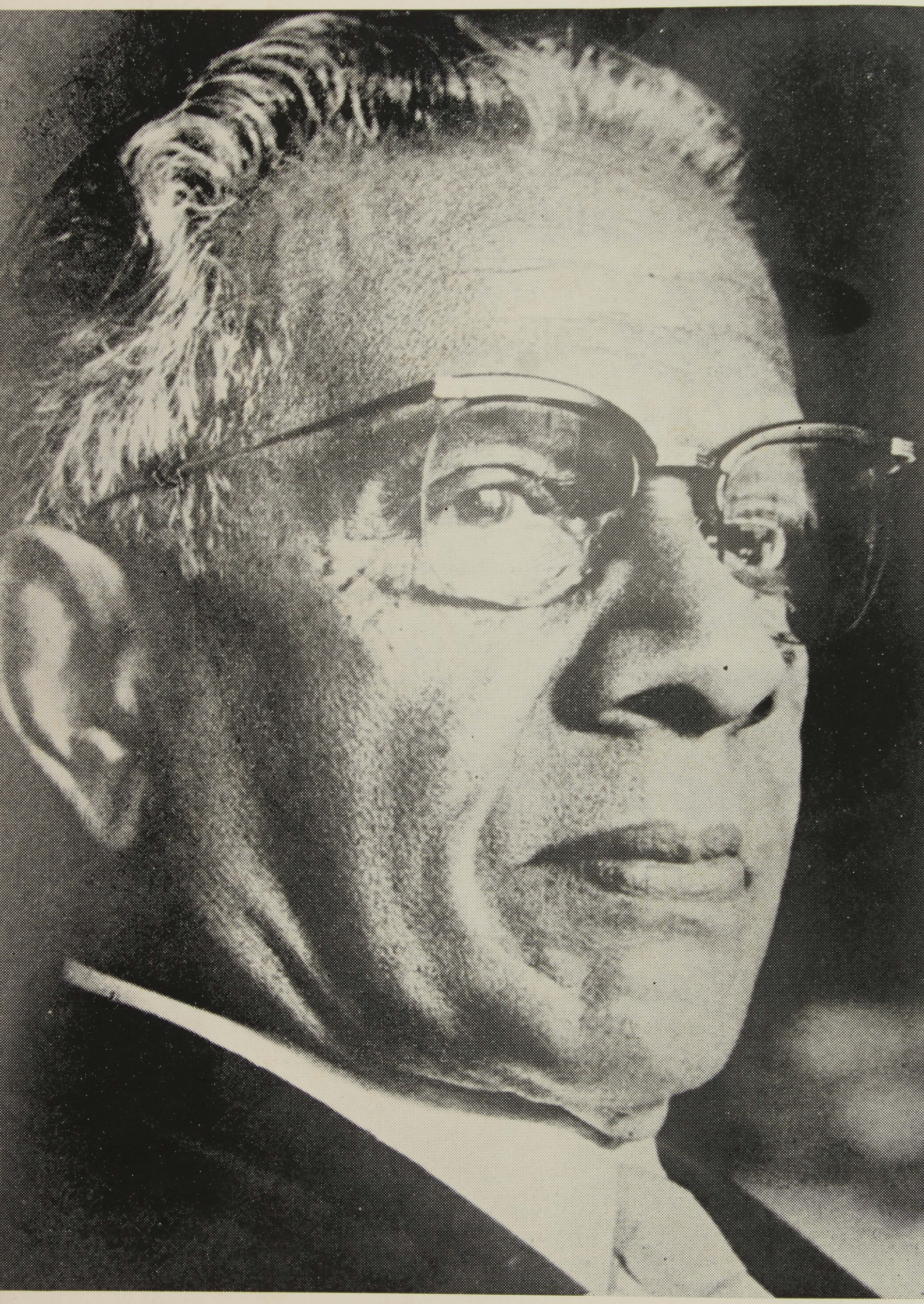
(*b*) if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of the Thediatheddam property section 6 of the amending Ordinance No. 58 of 1947 *i.e.* the new section 20 of the principal Ordinance applies ; half the property devolves on the survivor and the other half on the deceased's heirs ;

(*c*) if the non-acquiring spouse predeceases the acquiring spouse the Thediatheddam property of the acquiring spouse continues to vest exclusively in the acquiring spouse and the new section 20 of the principal Ordinance has no application because the Thediatheddam property of the acquiring spouse never belonged to the non-acquiring spouse. It may be noted that the above observation of Gratiaen J. does not appear to have been cited to Siva Supramaniam J. in the present case.

It is submitted that on the facts in the present case no share in the property acquired by the 1st plaintiff in his own name ever vested in Sivakolunthu during her life-time, and she having predeceased her husband the Thediatheddam property of the 1st plaintiff continued to remain exclusively in him and the heirs of the deceased Sivakolunthu did not become entitled to any share therein.

P. THURAIAPPAH*

*Advocate.



H. V. Perera, Q.C.

IN MEMORIAM

H. V. Perera, Q.C. (1890 — 1969).

Herbert Victor Perera was born on 31st October, 1890. He died on 16th April, 1969 after a short illness, while still practising the profession which he had entered fifty three years earlier. It is not necessary to compare him with the leaders of the Bar who had gone before. It is enough to say that the most discerning judges of his ability — his fellow lawyers — unhesitatingly acknowledged him as their leader for a great many years until his death. It is of such a man that I write, and to do so is a great honour.

Let me begin by referring to some details of his early life. He was educated first at Prince of Wales College, Moratuwa, and later at Royal College, Colombo. At Royal he won a Lorenz Scholarship in 1906, the Governor's Gold Medal, the Turnour Prize for the most distinguished student of the year in 1908, and the Senior Mathematics Prize in 1909. He crowned his School career by winning the University Scholarship, which was awarded annually by the Government to enable a student to be educated at an English University, in 1908.

He chose to enter London University, and he left it with a First Class in the B.Sc. (Honours) Examination, in which he was placed first. He won a Prize for that achievement; another — the Mayer de Rothschild Prize — for Pure Mathematics, and a third — the Ellen Watson Prize — for Applied Mathematics.

Before returning to Ceylon he was called to the English Bar at the Middle Temple on 26th January, 1916. He was admitted to the Bar of Ceylon on 14th June, 1916. He did not come of legal stock. There were no relatives in the law to send him briefs as soon as he had been enrolled. He had to establish himself in the profession the hard way, by his own unaided efforts and by preparing himself for the day when he would be given an opportunity to prove his worth as a lawyer. Opportunity was all he needed, and when it came he was ready.

He joined the Editorial Board of the Ceylon Weekly Reporter from its third Volume which contains reports of cases from July, 1916, and he continued to be an Editor until the eighth — and last — Volume was published in 1920. He would naturally have devoted

the early years of his practice to studying the laws of Ceylon, which differed in so many respects from those he had studied in England for his Bar examinations. It is most unlikely that he would have learnt anything of Mahomedan Law there, and he would certainly not have been taught the Thesawalamai, Buddhist Ecclesiastical Law, or Kandyan Law.

Some research in the law reports has disclosed that the first reported case in which he appeared was decided on 13th December, 1917. Three of his cases decided in 1918 have been reported. From 1919 the reports contain a steadily increasing number of his cases. Every lawyer knows that only a fraction of the cases decided in appeal are reported, so it is fairly clear that his practice in the Appeal Court grew rapidly. By February, 1920 he had successfully argued " a fundamental point in the Kandyan Law of Inheritance, " as Bertram C.J. described it in his judgment : (1920) 21 N.L.R. 294. His opponent in that appeal was B. W. Bawa K.C., an expert in that branch of the law.

It would have sounded romantic, but it would not be quite accurate, to write of H. V. Perera as an Advocate waiting briefless for some years. Nor would it be correct to say that he was on the point of leaving the Bar for good, at the time the briefs began to come in. He did receive an invitation to join the Staff of Ananda College, Colombo, but he turned it down. Whoever makes the law his first love remains, with few exceptions, faithful to it. And it is not difficult to understand how H. V. Perera, who could not have reached the heights he did if he had not thrown all his energy, his industry and his love into the study of it, became not only its slave but also its master. There was no branch of the law, Civil or Criminal, that he was not fully competent to handle within a short time after his call.

He took silk on 10th May, 1937. Abrahams C.J. in his address to the new King's Counsel, referred to the impression he had already formed of H. V. Perera. " I knew, " he said, " that I had one before me who would not only give the utmost of his great talents to his clients, but who would also act in all things connected with his profession according to the best ideals of that profession. " On that very day, this able advocate of freedom and the Rule of Law successfully challenged an illegal assumption of power by the Governor of Ceylon, who had attempted to deport a British citizen : *In re Bracegirdle* (1937) 39 N.L.R. 193.

He was not the ordinary layman's ideal of a brilliant lawyer. He made no emotional addresses before juries ; he indulged in no

devastating cross-examinations of witnesses ; he probably never set foot in a trial court. He might be best described as a lawyers ' lawyer. His practice — apart from Chamber work — was confined entirely to the Appeal Court, where the only arguments heard are those addressed to the intellect. He had all the qualities needed by a successful Appeal Court lawyer — a complete, profound and accurate knowledge of the law in all its departments ; the ability to pick out and apply the principles of law pertaining to the particular case ; a mind that was quick to grasp and analyse the relevant details ; an effective presentation of the law and the facts in the way that appeared most favourable to his client's case.

He had another asset. He was blessed with a most attractive speaking voice — the voice of one who seeks to convince by persuading — and he knew how to use the magic of that precious gift. Perhaps this delight in listening to good music, and his early experience of singing in the Choir of the Church of St. Michael and All Angels, Polwatte, taught him how to make the most of that gift. It was never harsh or loud or monotonous, and Judges who have to listen to speeches throughout every working day appreciated arguments presented in so pleasing a manner. What Homer said of Nestor, " He from whose tongue flowed discourse sweeter than honey, " may well have been said about H. V. Perera.

He was a great talker, as great lawyers are so often the best talkers. Whether seated near the Bench while his opponent was arguing, or at the rear of the Court while some other appeal was being heard, he was rarely silent. He would talk on any subject except the cases he had to argue that day. One can see why he never wanted to be a Judge. Talking, not listening, was the business that pleased him most.

Those who have seen him in action will always remember the erect figure, the unfaltering gaze constantly fixed on the Bench, and the ceaseless flow of the choicest language. At the commencement of his address he would appear to feel his way cautiously, watching the Judges to discern what effect his arguments had on them. At that stage he would welcome interruptions, for they gave him an indication of how the Judges were reacting to his arguments. If he could not win them over the first time, he would approach the subject by a different route. He would constantly try to ascertain what difficulties the Judges had in accepting his submissions and what kind of assistance he could render in order to win them over to his side. When he felt confident that he had cleared away the obstacles that first stood in his way, it was then that he would talk, in his

inspired, unique manner. Many a Judge will remember the joy he experienced while sitting back and listening to advocacy at its best.

H. V. Perera was scrupulously accurate in his statements, and his presentation of the issues to be decided was clear cut. He made his points according to a pre-arranged plan ; and he did not shrink from retracing a path he had trod in the course of an argument, if he felt that a particular point needed emphasising. He was also not averse to reaching his goal by a circuitous route, making an occasional detour in order to illustrate and elaborate. There was in him something of the artist who wishes to make his finished work both complete and attractive. With advancing years this habit grew more pronounced, but nobody minded that.

He had a strong dislike to precedents being used as substitutes for argument. He began and ended his submissions by basing them on well-established legal principles. A reported case was referred to only on the rarest occasions, and always at the end of his argument. A Judge would far rather listen to him expounding principles, than try to follow a counsel who read copious extracts from judgments which dealt with entirely different facts. There must have been a time when he applied himself to the study of case-law. Once his brain had absorbed the learning contained in reported judgments he seems to have spent little time on them, and his library reflected that attitude. He never relied on such judgments to save himself " the intolerable labour of thought, " and he once expressed the opinion that reported cases should never be permitted to paralyse thought.

Great advocacy consists not only of investing spoken words with magic. Lucidity of thought and expression, and a sound grasp of the law, are also indispensable. But all these things are not enough. It is also required of an Advocate that he should be a man of honour and sincerity, who can be relied on by his fellow Advocates and the Judges to conduct his case fairly and honestly. He must, in the classic phrase of Celsus, be " a priest in the service of Justice. " This role has been best described by Natesan J., when he said : " Just before we commence work for the day we bow, but we are not bowing to each other but at the Altar of Justice, that we may do the task, assigned to us in all humility. We are ministers at the Altar. " Thus the Bar is no ordinary profession. Its members occupy a special relationship to each other and to the Judges, all of whom need to work together to serve Justice, the Law and the Community.

In the discharge of his office, H. V. Perera did his duty to his client by presenting his case to the best advantage. But he never

forgot the duty he owed to his opponent, to the Court, and to himself. That is why, on the fiftieth anniversary of his call to the Bar of Ceylon, both the Bench and the Bar joined to honour him as the greatest Advocate his country had known for many years.

He played no public part in politics. His disposition was far removed from that of the politician who enjoys addressing a crowd in the market-place. He would have recoiled from the very thought of using inducements, threats or promises to win votes. He was built to make his arguments in the quiet and dignified atmosphere of a court room or a council chamber. As a member of the Bar Council, the Council of Legal Education, and the Council of the University of Ceylon for many years, as a Director of the Bank of Ceylon from its inception, and ultimately as its Chairman ; and by his services in the administration of justice, he helped to keep the foundation and framework of the State steady. In doing so, he ably served his country.

M. C. SANSONI*

*Retired Chief Justice, Supreme Court. Chairman, Law Commission.

THE COURT OF CRIMINAL APPEAL*

To give its full title, the Court of Criminal Appeal Ordinance was born, in the sense that it became law, only on the 27th April, 1940. It was conceived about three years before its actual birth, and there is no doubt as to its paternity. In 1936 when we received our Chief Justices and Attorney-General from the Colonial Legal Service there arrived in our midst two remarkable men, one Sir Sidney Abrahams and the other Mr. John Howard who received shortly thereafter the honour of knighthood. The first named came here as Chief Justice from a similar post in an African colony and took his oath of office on the 3rd July, 1936. In response to the welcome from the Bar he stated that he could " say without any modesty that it was the greatest day of his life — it was a dream come true. " He went on to say what few in his position would have liked to admit that " every entrant to the Colonial Legal Service dreams that one day he may have the joy of occupying this seat. " The other, Sir John Howard, although he came here as Attorney-General, became two months later Ceylon's first Legal Secretary with the assigned duty of preparing the way for a Ministry of Justice. Eventually he became Chief Justice himself and to him fell the distinction of the first President of our Court of Criminal Appeal. He held that distinction for over nine years, one of the longest terms of office ever. Sir Sidney Abrahams who had to leave us prematurely for reasons of health is now dead, but Sir John Howard in his retirement in England still recalls his many pleasant years in our midst.

Before Sir Sidney Abrahams had spent many months in this Island he discovered that this Garden of Eden was overgrown with weeds, and great credit must be given for his energy and drive which compelled the legal authorities here to give instant attention to the more pressing reforms he advocated. It did not take him long to discover that the most competent advocate of the time, who commanded the largest practice besides, had not been awarded the dignity of silk, and his forceful minutes soon brought about the necessary change of heart in the authorities which led to Mr. H. V. Perera taking his place within the Inner Bar. He also found that what he had thought — before coming here — was " the finest system of

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justice in the whole of the British Empire " did not have the usual machinery to test the correctness of decisions of trial courts where the jury was for all practical purposes the arbiters of a man's life. All that was then available was the inadequate power contained in Section 355 of the Procedure Code of a Judge of the Supreme Court to refer or reserve a question of law arising on a trial before him to two or more judges. Sir Sidney Abrahams found that the charges to the jury and rulings on evidence needed further examination, and he began to press for radical changes. It was fortunate that occupying the seat of legal power at the time was his colleague, Sir John Howard, who had stated in a message shortly after his assumption of office that his " short acquaintance with the statute book of Ceylon had indicated that much of our law is archaic and unsuited to the needs of a vigorous and enlightened commercial community." He was certainly in a position to speed the wishes and the reforming zeal of his friend and senior colleague, the Chief Justice.

There was not far to go for a model. The Criminal Appeal Act, 1907 had substituted for England and Wales a procedure by appeal on questions of law or fact or of mixed law and fact, or as to the legality or propriety of the sentence imposed. It abolished writs of error and the jurisdiction and practice of the King's Bench Division as to the granting of new trials in criminal cases. Ceylon modelled its Court of Criminal Appeal almost completely on that enactment. The notable departure was the entrusting of a power to the new Court here of ordering a new trial, a power which had ceased to exist in England in 1907. The English common law never looked with favour on a procedure which seemed to encroach on the principle that no man shall be twice vexed for the same offence, and so steadfast did the British Parliament stand true to the common law that it acquiesced in a man going unpunished where his trial had been vitiated by misdirection or other error than ordering him to submit to a second trial. The fact that we did not copy the English model in its entirety is a tribute to the wisdom of our legislature of 1938, and our law reports of the last thirty years bear evidence to that wisdom.

It was a matter of profound personal regret for the real father of the Court of Criminal Appeal Ordinance and indeed for all of us who knew of the history of the measure that he could not stay long enough in this country to preside even on a single occasion over the Court he took so strong a hand in creating. Unforeseen illness compelled Sir Sidney to leave tropic climes towards the end of 1939, and when the Court did sit for he first time in May, 1940 it was the mother who brought forth the baby who occupied the seat of President.

Sir John Howard had succeeded to the post of Chief Justice and he took a strong hand in interpreting the Island's criminal law and procedure till his retirement in 1949.

Meanwhile, let me turn to what was happening in other places. In the chambers of the Attorney-General, who was to be called upon to make arrangements for representation on behalf of the Crown in practically every appeal or application before the new Court, Mr. Ilangakoon who planned his cases and arguments military-wise, was keeping his assistants busy as to the manner in which indictments were to be drawn up in the future. I recall that indicting Crown Counsel were circularised that they should in the future, observe the practice indicated in the cases of *Davies*[1] and *Large*[2] that an accused person should not have more than one charge of murder laid against him in an indictment. There is nothing in the English Indictments Act and no rule of law in England that forbids the joinder of more than one charge of murder or, for that matter, the joinder of a charge of murder with a charge or charges on a lesser offence or offences. But on the basis that it is a sufficient burden to impose on an accused person that he should concentrate on defending himself on one charge of murder without more or without having to worry himself over smaller charges at the same time, indicting counsel observe the rule cited in the two cases I have just mentioned, and there is the discretion of the judge to ensure separate trials if the rule is disregarded.

The following of the English practice in this regard locally met with some unexpected results. I need refer only to *Emanis*[3] and *De Silva*.[4] Moreover, the rule could work to the distinct disadvantage of an accused person. At a trial in respect of murder, the accused may find himself acquitted altogether, but there was no legal impediment to his being put on trial on the second or even a third indictment in respect of another murder committed at the same time and he may on the subsequent occasion find himself convicted. There was also difficulty in the way of the Crown presenting its cases adequately where the evidence had to be confined to part of the events of the incident that led to a crime or crimes. This led to the whole question of joinder of more than one charge of murder being raised in 1946 in *Pedrick Singho*,[5] and the Court ruled that joinder of more than one charge of murder in respect of offences so interwoven as to constitute offences committed in the course of

1 (1937) 26 Cr. App. Rep. 95.
2 (1939) 27 Cr. App. Rep. 65.
3 (1940) 41 N.L.R. 529.
4 (1940) 41 N.L.R. 483.
5 (1946) 47 N.L.R. 256.

one transaction did not prejudice an accused person. Sir John Howard could not, however, refrain from adding the observation that " the practice of including more than one charge of murder in the same indictment is not a desirable one. " Today the practice of joining more charges to an indictment containing a charge of murder is by no means uncommon in our Courts. This practice was referred to by the Privy Council in *Ebert Silva*[6] in the following way " It appears that, contrary to the practice that prevails in this country, there is no objection to the joinder of more than one count of murder in the same indictment in cases where the charges arise out of the same set of facts, subject always to the power of the trial judge to order separate trials on each count if he considers that the accused may be prejudiced by the simultaneous trial of two or more charges. "

I make this early mention of the departure between the law that came to be accepted in this country on this point and that of the law or practice of England because our Court of Criminal Appeal professed from the very commencement that it was going to model itself on the decisions and practice of the English Court of Criminal Appeal. While this profession of faith was understandable when it was made in 1940 (in *Seeder de Silva*)[7] during a truly Colonial period I think it is disadvantageous to have Imperial limits set for us in this manner. No doubt, so long as the jurisdiction of the Privy Council to entertain appeals from Ceylon lasts, we must take note of ways of thought of the Judges of the final Court of Appeal ; but our judges must not be unduly inhibited from undertaking original thinking by which I refer to something much more modest that the original thinking that led to an abolition of the criminal jurisdiction of the Privy Council by judicial decision alone—an infringement of the theory of the separation of powers !

To return to Sir John Howard and our Court of Criminal Appeal of 1940, in the first appeal before the Court, that of *Seeder Silva*, argued by Mr. H. V. Perera for the appellant and Mr. Ilangakoon, Attorney-General, for the Crown, Sir John appeared to me to go out of his way when, referring to the important but humdrum question of the demarcation between questions of law and those of fact, he observed that " it is *advisable* (mark the word) that the principles on which their Court is to be guided, in matters such as this, should be clearly stated at the earliest opportunity after its establishment." Said he, " Ordinance No. 23 of 1938 follows almost word for word the *Imperial* (again mark the word) Criminal Appeal Act, 1907, and hence it is *expedient* (note the word) that our procedure in Ceylon should

6 (1951) 52 N.L.R. 505.
7 (1940) 41 N.L.R. 337.

model itself on the decisions and practice of the English Court of Criminal Appeal". Moseley J. in *Andris Silva*[8] continuing the mistake of referring to the 1907 Act as the Imperial Criminal Appeal Act, went on to say that from its inception in 1908 the English Court has shown in a series of decisions its disinclination to question a verdict given by a jury on questions of fact. Again, in the same year, in the case of *Don Robert*,[9] dealing with a question arising from an amendment to procedure effected by the 1938 amendments to the Procedure Code, the Court took a somewhat surprising and resigned attitude when it observed that " it seems to us, however that the amendment was made with the intention, and with the effect, of bringing the local procedure into line with the English practice. We propose, therefore, to consider this appeal in the light of such decisions of the Court of Criminal Appeal in England as have been made available to us. " I can, therefore, hardly refrain from adverting to the English soldier *Buckley's*[10] case where the Court — acting under section 5 (1) — set aside a verdict of guilty of rape on the ground of unreasonableness of verdict by assuming that " in arriving at a verdict of guilty the majority of the jury must have viewed the evidence in sections and accepted and convicted the appellant on those parts of the evidence that were satisfactory and disregarded those facts that pointed to the improbability of the story put forward by the Crown. The jury should have viewed the evidence, as a whole ". How any Court of Appeal could have concluded that the jury did not view the evidence as a whole, especially as the jury could not have been questioned as to the process or processes of thought followed by them in arriving at their verdict defies explanation. And *Buckley's* case was one devoid of misdirection by the judge ! Had the court but remembered to follow the precedents of the English Court of Criminal Appeal, I venture to say that the appeal would have had to be dismissed.

The first question that was naturally expected to arise before the Court was the demarcation between questions of law and of fact. The personnel of the Court was identical with that of the Supreme Court, the members of which had long been accustomed to the exercise of their appellate jurisdiction. In the course of that exercise they had gained practical experience of the nature of the interference possible with decisions of fact reached by judges. Their own experience must have shown that they had not been niggardly in the manner in which they set aside findings of fact. They could properly be said to have come to their duties on the new court with

8 (1940) 41 N.L.R. 433.
9 (1940) 42 N.L.R. 73,
10 (1942) 43 N.L.R. 474.

a predisposition to interfere even more liberally with decisions reached by jurors. I think it was here, more than anywhere else, that the caution of the experience of the English Court was welcome.

As the entire work of the Court of Criminal Appeal turns on verdicts of guilty returned at trials by jury in Assize Courts — and there are generally seven such Courts sitting in some part or other in the Island all the time — one must be excused for tarrying a while to look at the system of jury trial itself. Ceylon, it must never be forgotten, was the first British colonial possession inhabited by people not of European origin in which the system of trial by jury was given a trial. Had it not been for the undoubted success the system proved itself here, we would probably not have had the present Court of Criminal Appeal at all.

Our Criminal Procedure Code lays down that it is the duty of the jury, *inter alia*, to determine all questions which according to law are to be deemed questions of fact. Generally speaking, jurors have never before had any experience of weighing evidence and perhaps not of applying their minds judicially to any problem. As the Law Commissioners of England of 1853 somewhat untactfully put it, they are " often unaccustomed to severe intellectual exercise or to protracted thought. " It was no other than that great judge, Lord Devlin, who said of the jurors ' task that " the case may be an intricate one, lasting some weeks and counsel may have put before them piles of documents, of which they are given a few to look at. They may listen to days of oral evidence without taking notes — at least, no one expects them to take notes, and no real facility is provided for that purpose. Yet they are to be sole judges of all the facts."

Trial by jury has been described as a compounding of the legal mind with the lay. The prescription of this compound has been one of the greatest achievements of the English common law. Trial by jury is a unique institution, devised deliberately or arisen accidentally : it would perhaps be more correct to say that its origin was accidental, but its retention deliberate. The essentials of the system are that the tribunal " consists of a comparatively large body of men who have to do justice in only a few cases once or twice in their lives, to whom the law means something but not everything, who are anonymous and who give their decision in a word and without a reason. " A just verdict comes from a coalition of the lay mind with the legal ; but if there is a conflict, it is the lay mind that predominates. That is the essence of the jury system.

We talk nowadays of the province of law and the province of fact as if they are separate jurisdictions, and sometimes of a judge

encroaching on the jury's province. But the judge has a great deal to do with the facts.

On the day the Court of Criminal Appeal Ordinance became law, if I may be pardoned for introducing a personal note here, I was Crown Counsel prosecuting at the Southern Sessions that opened at Galle on 25th April, 1940. The presiding Judge was Sir Francis Soertsz (Mr. Justice Soertsz he was then). I always looked forward to appearing before him and did learn a great deal which was very useful to me in later years. I recall him calling me into Chambers at the end of the first week of that Sessions and reminding me that "from next week we shall have to be very careful." And, to the credit, shall I say, of both of us, we were very careful indeed, as careful as that Dickensian character Samuel Weller said he was of the first suit of clothes given to him by his employer, Mr. Pickwick. I must have been more careful than the Judge as my lapses would have come in for greater criticism in the Attorney-General's Department than the Judge's in the Court of Criminal Appeal.

The issue as to who was master of the decision as to facts came up in May, 1940 itself in *Andris Silva*.[11] That was the first real test for the Court, but Mr. R. L. Pereira for the appellants could not shake the determination of the Court to let the jury's verdict stand. Moseley J. recalled that, from the inception of the English Court of Criminal Appeal in 1908, that Court had shown in a series of decisions its disinclination to question a verdict given by a jury on questions of fact. He adopted the words of Channell J. in *Martin*[12] "The case has been argued as if this Court was to retry the case, but that is not its function," and those of Pickford J. in *Hancox*[13] that "this case turned on the manner in which the witnesses gave their evidence; there was a proper direction to the jury, and the Court does not see that it can interfere with the verdict without substituting itself for the jury, which was the proper tribunal to decide on the matter. It is unnecessary to say whether we would have given the same verdict." These words have been echoed practically every fortnight in the Court during the last thirty years.

A few years after *Andris Silva's* case, the Court in *Ranasinghe*[14] declared that "where there has been a proper direction to the jury regarding the value to be attached to the evidence of a witness and two views are possible in regard to that evidence, it is not the usual practice of the Court to interfere." Again,

11 (1940) 41 N.L.R. 433.
12 (1908) 1 Cr. App. Rep. 52.
13 8 Cr. App. Rep. 193, 197.
14 (1944) 45 N.L.R. 118.

" where two views are possible in regard to the appellant's complicity, we prefer the view that did commend itself to the jury. That would not be in derogation of the meaning and purpose of trial by jury." The correct functions of the Court were explained in the case of *Endoris*[15] as being " to satisfy ourselves with the assistance of counsel that there is evidence upon which the jury could have reached the verdict to which they came, and also, similarly, to examine the charge of the trial Judge to satisfy ourselves that there has not been any substantial misdirection or non-direction."

In *Arnolis Appuhamy*[16] the Court pointed out that section 248 (2) of the Procedure Code emphasises the principle that the object of trial by jury is to secure a verdict which the jury holds to be proper and not a verdict which a Judge will find acceptable. Said the Court in *Gardiris Appu*,[17] " The powers of this Court to quash the verdict of a jury in a proper case being undoubted, the difficulty is to know when such powers should be invoked, and in what cases the verdict of the jury in an apparent case of hardship should be allowed to stand." The general principles are summarised thus :— " Questions of fact are for the jury. The Court does not sit to retry cases thereby usurping the functions of the jury. As the Court sits as a court of appeal, if there has been no misdirection, no mistake in law and no misreception of evidence, the verdict will not be upset even though the Court feels that, had the members of the Court been on the jury, they would have come to a different conclusion." No rules, it should be borne in mind, are so inflexible as to be applied rigorously and indiscriminately to every case. Each case must be decided on its own peculiar facts and circumstances, phraseology reminiscent of that described and used by Lord Hodson in the 1964 case of *Ridge* v. *Baldwin*[17a] and which he himself characterised as being " the last refuge of the judge " in a difficult situation. Dias J. suggested that as the Ordinance which set up the Court has enacted that there may be cases in which the Court will interfere on questions of fact, the Court should interfere " where the verdict of the jury is unreasonable, that is to say, not sound or sensible, or not governed by good sense."

It should be mentioned that the Judge's certificate plays but little part in influencing the Court of Criminal Appeal. The Court in *N. K. A. Appuhamy*[18] applied a dictum of Lord Goddard L.C.J.

15 (1945) 46 N.L.R. 498.
16 (1967) 70 N.L.R. 256.
17 (1951) 52 N.L.R. 344.
17*a* (1964) A.C. 40.
18 (1960) 62 N.L.R. 484.

of England, where he had said, " From a very early period in the history of this Court it has been laid down, and has been laid down frequently since, that the fact that the trial Judge was dissatisfied with the verdict, although it is a matter to be taken into account, must not be taken as a good ground by itself for quashing the conviction. If it were, it would seem that we should be substituting the opinion of the Judge for the opinions of the jury, and that is one of the things which this Court will never do. In just the same way it has been laid down from an equally early period in the history of this Court that the fact that some members or all members of the Court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. "

I think it may be of some interest if I were to dwell a little on the manner in which the Court set about to deal with the grounds of appeal on which argument would be allowed by it. In the first case the Court had to hear, the Court laid down that it " will as a general rule refuse to entertain grounds not stated in the notice of appeal but would relax the rule where the appellant was without legal aid and had drawn his own notice of appeal. " This statement was adopted in the case of *Marthino*[19] and again in *Sivapathasundaram.*[20] Today the question of absence of legal aid can arise in practice only when an applicant refuses such aid. To go on with the development of the law on this point, the Court took the view in *Kaviratne*[21] that application for extension of time within which to appeal may be granted where the ground upon which it was sought to appeal raised a point which had not been considered before by a superior court. Later on, the Court did not naturally extend the same tolerance. For example, in *James Singho*[22] the Court said that it had repeatedly laid down that it will not entertain additional grounds of appeal, except in very exceptional circumstances, *e.g.* when a substantial question of law is seen to arise. It approved what the English Court had stated in the case of *Wyman*[23] that the judges of that Court were there to deal only with substantial points of misdirection, not with some possible oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence. Fairly early in its life the Court came down heavily against inadequate grounds of appeal. In 1947, the Court in *Bello Singho*[24] insisted on a strict compliance

19 (1941) 43 N.L.R. 521.
20 (1942) 44 N.L.R. 13.
21 (1942) 43 N.L.R. 505.
22 (1942) 44 N.L.R. 53.
23 13 Cr. App. Rep. 184.
24 (1947) 48 N.L.R. 542.

with the provisions of the Ordinance regulating grounds of appeal. It refused to hear a ground of appeal which had not been stated in the notice and was formulated only after the argument was taken up. This point emphasised eight years later, in 1955, in *Pintheris*.[25] Pulle J. for the majority of the Court, was explicit. He chose to follow English precedent, and said " The English authorities and our own are entirely inconsistent with the construction sought by counsel for the appellant. A practice had grown up in England which we have followed — (We seem to have followed English practice irrespective of whether it was good or bad) — of showing indulgence under exceptional circumstances. There is nothing in any of the cases to indicate that this indulgence was shown in the exercise of a judicial discretion to give relief to an appellant who has failed to give a notice of appeal conforming to the requirements of the Statute. Unfortunately, it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit. This Court will in future show no indulgence and strictly limit argument to matters of law raised within the prescribed limit of time. " Even so strong an expression of the determination of the Court did not fetter it for all time. The greatest stickler for procedure relents when a man struggling for his liberty, and sometimes for his life, can urge a good point in favour of that liberty or life if only the rules of procedure can be rendered elastic. It was therefore, not surprising that in *Gunawardena*[26] the Court freed itself from the rigour of the dictum expressed by Pulle J. when it stated that " although no appellant or applicant for leave to appeal may claim as of right to make submissions except on grounds particularised in compliance with the Ordinance, this does not mean that the Court itself is powerless, when disposing of an appeal or application, to set aside a conviction on *any other ground* which is sufficiently substantial to justify the decision that the verdict under appeal should not be allowed to stand." As if to emphasise the co-operative nature of the work, Gratiaen J. (on behalf of the Court) went on to say, " let it be said in conclusion that it is quite proper (and indeed it is his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of the Court any substantial matter which though not formally raised within the prescribed limit of time, nevertheless merits consideration. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility."

25 (1955) 57 N.L.R. 49.
26 (1955) 57 N.L.R. 126.

If I may say something here myself, it would be helpful if counsel who intend to raise additional points give notice of their intention to the Crown immediately the point occurs to them. Too often do we have the spectacle of the additional point being raised only on the date of the argument, and it has not always been the practice to give to counsel for the Crown the time he must obviously have to prepare himself to reply to a ground sprung upon him only at the hearing.

The liberal attitude of the Court exemplified in *Gunawardena* was cold shouldered two years later in *Sirisena.*[27] Said the Court, " we have reconsidered the observation in *Gunawardena* which assumes that this Court has powers similar to the power of revision vested in the Supreme Court, and we have reached the conclusion that we have no such power.....A right of appeal from the decisions of a court being a right that does not lie unless expressly conferred by statute, its exercise is entirely regulated by the statute that confers it, and the appellant must comply with its requirements before he can claim a hearing in the appellate tribunal. We therefore think that this Court was construing its powers too widely when it stated that it had power to act on grounds not taken in the notice. We have searched in vain for a precedent or a principle on which the proposition can be founded, and none was cited to us. We have therefore come to the conclusion that the dictum in *Gunawardena's* case should not hereafter be acted on." This view so emphatically expressed in *Sirisena's* case was, I venture to submit, out of keeping with modern trends in the administration of criminal justice, quite apart from the possible criticism that it appears to slur over the boundary between the *right of appeal* on the one hand and the *grounds* that may be urged in support of the exercise of that right on the other. Certainly it is difficult to justify the further expression of opinion in *Sirisena* that the provisions of sections 20 and 21 of the Court of Criminal Appeal Ordinance and of section 355 of the Criminal Procedure Code afford adequate remedy when there is a good ground of appeal which merits decision and which the Court is precluded from considering owing to the failure of the appellant to specify it in his notice of appeal. If the ground of appeal is good enough to bring into operation those provisions, well may one ask why that ground should not be permitted to be argued at the hearing of the appeal itself instead of postponing it for another occasion before a Court similarly constituted.

The current practice of the Court is, I believe, in keeping with what I have described is the liberal attitude, but there is validity in the criticism that the grounds of appeal are today stated in too general

27 (1957) 59 N.L.R. 198.

a form and too often afford little notice to the Crown of the specific question which may ultimately be sought to be argued under cover of the ground inadequately specified in the notice. I am therefore in sympathy with the opinion in *Nimalasena de Zoysa*[28] that the grounds of appeal should not be vague and general but specific, and if misdirection is alleged the misdirection must be specified, and that if a wrong decision of any question of law is alleged, that wrong decision should be specially stated. As Du Parcq J. stated in the case of *Jack Fielding*,[29] " It is not only placing an unnecessary burden on the Court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution who are entitled to know what case they have to meet. " Having said as much, stressing the aspect of rigorous compliance with the rules relating to grounds of appeal is capable of defeating the spirit behind the very conception of the creation of a Court of Criminal Appeal. Born out of a desire to guard persons accused and convicted of crimes from unreasonableness on the part of a jury and faults of misdirection and non-direction on the part of the judge, that desire is not furthered but actually frustrated by insisting on technicality rather than on substance. The Court may, of course, be complying with the law as it interprets it, but if the law is defeating justice, then surely it is time for the legislature to step in to ensure that we do not lose sight of the original objective. In this, as in so many other matters, the law is in need of reform, and the proper and efficient administration of justice requires that all organs of Government perform their constitutional duties. It is necessary to remind ourselves in this context that it was 25 years ago, in 1944 to be precise, that the Court in *Harmanisa* [30] stated in reference to that troublesome section 122 (3) of the Procedure Code that " it bristles with difficulties and is so difficult to interpret that in our view, it is the duty of the Legislature to redraft the section to make its meaning clear." The Ministry concerned has not taken the hint, with the result that the Court has had, from time to time, to grope in a jungle of conflicting authorities, with occasional light thereon by the Privy Council.

The Court has never sat in its full strength, the largest number of Judges who ever assembled being seven. In *K. D. J. Perera*[31] it was stated that where the Court is constituted of a number of Judges which is more than the minimum quorum that is necessary to constitute the Court, a full Court would be constituted, provided

28 (1958) 60 N.L.R. 97.
29 26 Cr. App. Rep. 211.
30 (1944) 45 N.L.R. 532.
31 (1951) 53 N.L.R. 193.

the Judges assemble for the purpose of reviewing or reconsidering a previous decision of the Court. On this line of reasoning it was concluded that a Court of five Judges can over-rule another court of five judges. This definition of a full Court may require reconsideration on a future occasion. When seven Judges assembled to decide that most important question of evidence in *Chandrasekera*,[32] in 1942 which had Judges of the Supreme Court sharply divided sitting in Assize, English habits of thought were well entrenched. The 1935 case of *Woolmington* v. *D.P.P.*[33] with its " golden thread that runs through the web of the English criminal law " had made more impact in this country than the decision warranted. The question of the burden of proof on the defence had to be decided sooner or later, and a suitable occasion presented itself at the Galle Assizes before Moseley J. where in *Chandrasekera's* case it was apparent within half-an-hour of the commencement of the trial that the defence was relying on the general exception of private defence. The injuries were such that a verdict of murder was out of the question. I had the privilege of representing the prosecution at the trial, and I recall vividly Moseley J. mentioning to me in Chambers that "here is a heaven-sent opportunity " to bring the matter up before the Court of Criminal Appeal. He mentioned the matter over the telephone to the Chief Justice during the interval. His summing-up on the actual point of evidence is reproduced in the law report, and in its own way was a little gem so far as making the law clear to the jury was concerned. The decision at the trial was never in doubt. There was a unanimous verdict of guilty of causing grievous hurt. The Department of the Attorney-General was quite divided in its opinion over the question of law, but representation for the Crown before the Court of Criminal Appeal took the unfortunate shape of counsel who shared the view for the appellant. This was the subject of some caustic comment from the Bench itself as the Judges wished to hear a view contrary to that advanced for the appellant. De Kretser J. who was the minority in a 6 to 1 decision characterised the role of the Bench as one " reduced to the position of an opposition " as all counsel submitted the same proposition which the majority of the Bench found unacceptable.

The problem of the limits within which a verdict could be set aside on facts, naturally enough, had to be faced by the Court from its very commencement. In *Gardiris Appu*,[34] the Court stated that " it is necessary to remind ourselves of our statutory powers, because if these are not borne in mind there is always the risk of our

32 (1942) 44 N.L.R. 97.
33 (1935) A.C. 462.
34 (1951) 52 N.L.R. 344, 348.

unwittingly substituting trial by the Court of Criminal Appeal for trial by jury. In *Abeywickrema*,[35] our Court employed the language used by Lord Hewart on a similar occasion and contented itself with saying that " the conclusion at which we have arrived is that the case against the 7th applicant which we have carefully and anxiously considered and discussed was not proved with *that certainty* which is necessary in order to justify a verdict of guilty." In *Mustapha Lebbe*,[36] the Court used the language of the English decision in *R.* v. *Bradley*[37] and said " on the whole we think it *safer* that the conviction should not be allowed to stand." With all respect to the Court, there was in my submission a clear assumption by the Court of the functions of a jury when it set aside the verdict of guilty of rape in *Themis Singho*,[38] by saying that "it is only when the evidence of the complainant is of such a character as to *convince the jury* that she is speaking the truth that the accused should be convicted." (There had been a unanimous verdict of guilty raising the presumption at least that the jury were convinced.) In a similar strain was the decision of the Court in *Tikiriya*,[39] when it interfered with a verdict of murder by saying that " a careful examination of the evidence has led us to the conclusion that there are no facts from which it can be inferred that when the accused fired he did so with a murderous intention." In *Peeris Singho*,[40] it preferred the phraseology, " if upon a consideration of the case as a whole *it is felt that the verdict is not satisfactory.*" And here is a non-democratic vote in the judgment :—" It is not necessary for the Court to single out any particular item upon which it bases its view;" reminiscent of Humpty Dumpty — it is not satisfactory because the Court says it is not satisfactory.

No new formulae were, however, seriously attempted by the Court which has generally contented itself with adopting language in which the judges of the English Court of Criminal Appeal have thought fit to explain their disquiet over a verdict of the jury.

The admission of the evidence of confessions has always caused a stir in criminal trials. Confessions are often welcomed by prosecutors who appreciate their effect on juries. When a confession is a truly voluntary one, nothing can be more compelling to induce the jury to return a verdict of guilty. Our sections 25 and 26 of the Evidence Ordinance notwithstanding, confessions do loom large at

35 (1943) 44 N.L.R. 255.
36 (1943) 44 N.L.R. 505.
37 4 Cr. App. Rep. 228.
38 (1944) 45 N.L.R. 378.
39 (1944) 45 N.L.R. 474.
40 (1953) 55 N.L.R. 173.

Assize trials here. Prior to the establishment of the Court of Criminal Appeal we had only three cases of any significance to contend with in relation to confessions, *viz.*, *Kalu Banda*,[41] *Ukku Banda*[42] which sought to explain *Kalu Banda*, and *Cooray*.[43] Quite early, the decision in the case of *Kalu Banda* came in for adverse criticism in *Gunawardena*[44] and laid the door open to the eventual over-ruling of the *Kalu Banda* decision. The question was next taken up in the case of *Anandagoda*,[45] where exclusion was limited to cases of admissions of the commission of *the* offence or of admissions suggesting the inference that the accused committed *the* offence. This view was upheld in the Privy Council where their Lordships stated that " the test whether a statement is a confession is an objective one, whether to the mind of a reasonable man reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed *the* offence or which suggested the inference that he committed *the* offence. The statement must be considered as a whole, and it must be considered on its own terms without reference to extrinsic facts. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession." But *Anandagoda* notwithstanding, the Court, almost unrepentant, had this to say in *Abadda* [46] — " We are in respectful accord with what was said by the Privy Council in *Anandagoda's* case, but where the accused's statement contains a confession, the prohibition contained in section 25 bars the proof against the accused of not only those portions of the statement which admit the guilt or suggest the inference that he committed the offence, but also those portions of the statement which when taken out of the context by themselves are innocuous. In other words, no portion of a statement in the course of which an accused makes a confession to a police officer can be proved against an accused person." This decision is, of course, contrary to that of the Court given in *Vasu* [46a] which did not come to be referred to in the judgment at all.

Naturally enough, a point that will often give room for argument is the meaning of the proviso to section 5 (1). Quite early, in

41 (1912) 15 N.L.R. 422.
42 (1923) 24 N.L.R. 327.
43 (1926) 28 N.L.R. 74.
44 (1955) 57 N.L.R. 126.
45 (1960) 62 N.L.R. 241.
46 (1963) 66 N.L.R. 397.
46*a* (1941) 27 C.L.W. 16.

Karthigesu,[47] the Court applied the rule in *Stirland* v. *D.P.P.*[48] whereby the House of Lords had ruled that the proviso assumes a situation where a reasonable jury, after being properly directed would, on the evidence properly admissible *without doubt*, convict. This was an improvement on the *R.* v. *Haddy*[49] formula, " would inevitably convict. " The Privy Council itself, on appeal from a Ceylon case, *Dharmasena*,[50] stated that the test in *Stirland* is the correct one. While this of course must now be considered a settled point, we must not discount possibilities in the personality and attitude of certain Judges to trim the test to slightly altered situations. In no other way can one account for the dictum in *Gunawardena*,[51] where the majority of the Court held that the proviso cannot properly be applied in the case of a divided verdict, unless the evidence is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse. While the *Stirland* test is still regarded by our Courts as the correct one to be applied in a case of *misdirection of the jury*, I venture to think that the recent test indicated by Lord Morris in *Harz*,[52] is that correctly applicable to a case of *misreception of evidence*. Said he, " It is to be observed that the test to be followed is that of seeking to assess what the particular jury that heard the case would or must have done if it had only heard a revised version of the evidence. For the purpose of the test, the appellate Court must assume a reasonable jury, and must then ask whether such a jury, hearing only the admissible evidence, could, if properly directed, have failed to convict. "

Our own Court, in *Nimalasena de Zoysa*[53] appears to have assumed that section 167 of the Evidence Ordinance (applicable to trials by jury as well as to trial by judge alone) furnished a different test to that applicable when considering the application of the proviso. With respect, I do not see that the application of the proviso leads to a result substantially different to that which would follow from applying the rule contained in section 167. In the recent case of *Pauline de Croos*,[53a] in reference to misreception of evidence, I ventured to describe the test in the following words :—" I wish to guard myself against an impression that any kind of admissible evidence would suffice. A *mechanical reading* of the transcript of the evidence will not do. There must be *an examination* of the transcript, and that examination involves a consideration of the *weight*

47 (1946) 47 N.L.R. 234.
48 (1944) A.C. 315.
49 (1944) K. B. 442.
50 (1950) 51 N.L.R. 481.
51 (1950) 52 N.L.R. 142.
52 (1967) A.C. 824.
53 (1958) 60 N.L.R. 97.
53*a* (1968) 71 N.L.R. 169.

to be attached to the evidence. It is not merely a matter of paper and ink or of mere bulk. It is not merely a case of finding a skeleton or a frame-work, the bare bones, so to say. The Court must be satisfied that within the frame-work there is also flesh and blood of quality and extent which would suffice to pass the test." Where the test to be applied in considering the application of the proviso to section 5 (1) is satisfied, I ventured also to suggest in the same case that the question of ordering a retrial cannot ordinarily arise. Tambiah J. said more in his judgment on the same case, that " section 5 (2) has only to be considered where the appeal is not dismissed on the ground that no substantial miscarriage of justice has actually occurred, and yet the Court is of opinion that there is evidence on which the jury may reasonably convict. Prisoners who will be acquitted in England if substantial miscarriage has actually occurred as a result of inadmissible evidence being led, will not be acquitted in Ceylon if this Court is of opinion that there is evidence before the jury or the judge, as the case may be, upon which the accused would have been reasonably convicted but for the irregularity upon which the appeal was allowed. Our Legislature, while considering some of the defects in the English statute and considering local conditions, has thought it fit to introduce this provision for re-trial. By the introduction of this provision the words which occur in the proviso to section 5 (1) are in no way affected."

In seeking to apply the proviso in the case of divided verdicts, a liberal-minded bench of the Court — if I may use that expression without offence — had laid down in *Gunawardena*[54] that " it cannot properly be applied in a case of a divided verdict unless the evidence is of such a character as to justify the reproach that the judgment of the dissenting juror was manifestly perverse." Certain words used by Lord Morris in the recent case referred to earlier appear to militate against the soundness of this ruling of our Court. Said Lord Morris, " I cannot think that the mere circumstance that there has been a fresh trial in which the jury disagreed should automatically preclude the application of the proviso, if there is an appeal following on a conviction at a second trial. The reason why a jury fail to agree either to convict or to acquit are in normal circumstances not known. No firm conclusion can be drawn from the fact of a disagreement. There could be cases where nearly everyone on a jury considered that guilt was proved, and where the contrary view was held irrationally or perversely or possibly for discreditable reasons. Why, it may be asked, should an application of the proviso be ruled out automatically, or almost automatically, in such a case."

54 (1950) 52 N.L.R. 142.

That troublesome section of the Procedure Code — section 122(3) — has occupied no little time of the Court, and has even led to a wrong decision of five Judges of the Court, a decision which has only recently been over-ruled. Quite early in its life, the Court pronounced, correctly it is submitted, in *Harmanisa*[55] that (a) a statement under section 122 (3) is available only to contradict a witness and not to corroborate him, and (b) under section 91 of the Evidence Ordinance the written statement had to be produced and that alone was admissible. Six years later, in *Jinadasa*,[56] five Judges of the Court by a majority decision held that the prohibition contained in section 122 (3) does not apply to the *oral statement* of a person made in the course of a police investigation, but only to the production of the *written record* of the oral statement. It expressly dissented from the decision in *Harmanisa's* case. Eleven years had to elapse and much confusion had to be tolerated in the meantime before the Court could again reconsider the decision in *Jinadasa*. That was in *Buddharakkita*,[57] where the Court attempted to explain or confine the decision in *Jinadasa*, but it did rule that section 122 (3) applies both to the spoken and to the written word. In the still later case of *Ramasamy*[58] the Court purported expressly to disagree with *Jinadasa*; but as that too was only a decision of five Judges, the actual over-ruling must be attributed to the Privy Council which heard the appeal from the Court of Criminal Appeal in *Ramasamy*. Disagreeing with the Court of Criminal Appeal, Lord Radcliffe's opinion went on to state that they " must accept the conclusion that evidence falling within section 27 of the Evidence Ordinance can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122."

I might add, while I am still on section 122 (3), that quite recently, in *Kularatne*,[59] the Court ruled that a statement made in the course of an inquiry under Chapter XII cannot be used to form the basis for an inference that the conduct of the person who made it was suspicious. No question had arisen there for contradiction of that person.

The range of topics with which the Court has had to deal during the last thirty years has been so wide that it is quite impossible in the course of the hour to which I shall limit myself to refer to more than a few.

55 (1944) 45 N.L.R. 532.
56 (1950) 51 N.L.R. 529.
57 (1962) 63 N.L.R. 433.
58 (1964) 66 N.L.R. 265.
59 (1968) 71 N.L.R. 529.

The late L. M. D. de Silva J. who occupied a seat on the Court for a brief period in preparation for his work on the Judicial Committee has left us this oft-quoted passage dealing with the manner in which a summing-up to the jury should be effected :— " In a summing-up, a general statement of the law followed by a statement of the facts is undesirable. A summing-up should avoid not only the pattern just mentioned, but any pattern that approximates to it. From a practical point of view it should be realised that a jury is not likely to absorb a long disquisition on the law and the significance to be attached to such a disquisition is problematical. What is of importance is that, with or without a preliminary general disquisition the trial judge should apply the relevant law to the relevant facts in as simple a manner as possible and in the course of the analysis of those facts. The closer he keeps to this narrow path the more likely is it that the jury will arrive at a correct conclusion and more clearly will it appear to this Court that justice has been done. "

A fair presentation of the facts is essential to a fair trial by jury. As Lord Devlin pointed out in the Privy Council case of *Broadhurst*,[60] a jury is likely to pay great attention to the opinion of a presiding judge, and that is why those opinions should not be much stronger than the facts warrant. Our own Court in *Jayasinghe*[61] had to point out that " the powers given to a trial Judge to express opinions on questions of fact must be used cautiously. " Quite recently, in reference to inferences suggested by the trial Judge in a case dependent on circumstantial evidence, the Court (in *Kularatne's* case) quoted a South African judge with approval when he said : " All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional use of potential error because the Court may be mistaken in its reasoning. The inference which it draws may be a *non sequitur*, or it may overlook the possibilities of other inferences which are equally probable or at least reasonably possible. It sometimes happens that the trier of facts is so pleased at having thought of a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred. " As our Court observed, " in a case of circumstantial evidence, the jury should be only too willing to follow the Judge as to the inferences which they are told could reasonably be drawn from the evidence."

From the earliest days of the Court, the question of the failure of the trial Judge to direct the jury to consider the availability of

60 (1964) A.C. 441.
61 (1965) 69 N.L.R. 327.

defences other than those expressly pleaded did arise, and this question repeats itself from time to time. The law is now, of course, fairly well settled in a long line of decisions, and is adequately expressed in the following terse terms :— " The fact that the accused or his counsel does not advert to a possible plea of private defence that may reasonably be said to arise upon the facts does not relieve the judge from the duty imposed upon him of placing it before the jury in his summing-up." The Court has gone the extent of holding that " where, in a trial for murder, the accused expressly pleads the general exception of accident, but there are circumstances which make it necessary for the jury to consider the general exception of the right of private defence, the trial Judge must not withdraw from the jury the consideration of the exception of private defence. "[62] Moreover, in the recent case of *Sinnethamby*[63] (the Kataragama murder), the Court declared that " it is not the law that the question of unsoundness of mind should be put to the jury only if the accused's counsel raises that defence. " It quoted with approval Lord Denning's words in *Bratty* v. *A - G. for Northern Ireland*[64] that the old notion that only the defence can raise the defence of insanity is now gone. The prosecution is entitled to raise it, and it is its duty to do so rather than allow a dangerous person to be at large.

There is now, since 1947, an authoritative decision of the Court in the case of *Velaiden*[65] dealing with the question of the plea of drunkenness as mitigating an offence, according to which the burden of proof in a case of murder in which the defence of drunkenness is put forward rests on the accused who must prove on a balance of evidence that by reason of intoxication there was an incapacity to form the intent necessary to commit the crime. Evidence of drunkenness falling short of this and merely establishing that the mind of the accused was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts. "

There was a certain period in the past history of the Court, fortunately a short period because of the intervention of the Privy Council, when the Judges were almost evenly divided as to the law to be applied on a plea of grave and sudden provocation raised in a murder trial. What a jury may regard as provocation in Ceylon need not be the same conduct as that in England. Here we have regarded mere abuse unaccompanied by some physical act as afford-

62 *Sunderam* (1961) 63 N.L.R. 363.
63 (1965) 68 N.L.R. 193.
64 (1963) A.C. 386.
65 (1947) 48 N.L.R. 409.

ing sufficient provocation, see *Kirigoris.*[66] This was not so in England until comparatively recent years, but the English Courts and English juries have had to take note of the characteristics of immigrant communities whose emotional disturbances do not follow English patterns. The intervention of the Privy Council I referred to above, in *K. D. J. Perera,*[67] stabilised in Ceylon the applications of the principle that a jury could take into account the violently disproportionate mode of resentment in determining whether the provocation pleaded was grave.

While the dispute over the availability of the test of the disportionate mode of resentment was awaiting decision in the Privy Council, a five Judge Bench of the Court by a majority held that "as in Ceylon the offences of murder and culpable homicide not amounting to murder have been defined by statute, the Courts cannot with propriety approach the function of interpreting the Penal Code with the same latitude which may be permissible in case of judges administering the English criminal law." The question whether another case, that of *Punchirala,*[68] which had prescribed a reduced test of gravity where an accused person was provoked while intoxicated should be over-ruled was left to five Judges in *Muthu Banda,*[69] and the Court did over-rule it by laying down that the true position would seem to be that the intoxication of the accused in such a case as contemplated in *Punchirala* only becomes relevant for the consideration of the jury when they are considering the question whether the accused was in fact provoked by provocation which would, in the opinion of the jury, have provoked a normal or average reasonable man.

Other matters that have received the attention of the Court include the question of the legitimacy of comments by the Judge on the silence of an accused person. The view of the Court is best indicated in *John Silva*[70] in three principles :—

(1) It is within the discretion of a Judge to comment on the failure of an accused to give evidence, and the Court will not generally interfere with the exercise of that discretion :

(2) The comments should be confined to those cases in which there are special circumstances which only the accused can explain and which therefore call for explanation by him ;

66 (1947) 48 N.L.R. 407.
67 (1951) 53 N.L.R. 193.
68 (1924) 25 N.L.R. 458.
69 (1954) 56 N.L.R. 217.
70 (1945) 46 N.L.R. 73.

(3) The failure of the accused to give evidence though not amounting in law to corroboration of the story of the prosecution may enable a jury to act where perhaps they would not otherwise have done so.

The Court also held in *Handy*[71] that a Judge (incidentally that was myself) is not entitled to discharge a jury because he does not agree with the verdict they have returned. As the Court observed on that occasion, " the provisions of the Procedure Code which prescribe the respective duties of the Judge and the jury are designed to serve the interests of justice. They are served when the judge does not encroach on the functions of the jury. Any departure from those provisions would defeat and not serve the interests of justice."

There is a present conflict of opinion as to what the trial Judge can do when a jury is not agreed. In *Juan Appuhamy*,[72] the Court held that if the jury or the required majority of them cannot agree in regard to the verdict, it is a matter for the trial Judge to decide, in the exercise of his discretion, whether he should discharge the jury or advise them to continue their deliberations for a further period and see if they can arrive at a verdict." This undoubtedly seems the correct view; nevertheless, without even referring to this decision, the Court seven years later, in *Piyadasa*,[73] by a majority, held that if the jury are divided 4 to 3 they have no power under the Code to return a verdict, and the Judge must discharge them, (and this is the difficult part) and cannot require them under section 247 (2) or 248 (2) to retire for further consideration. This last view was repeated in *Punchi Banda*[74] two years later, again without reference to the decision in *Juan Appuhamy*. The fallacy underlying these two later decisions is revealed by an examination, particularly of the later of the two judgments, where the Court has said " But if, despite the decision that the verdict must be by a majority of not less than 5 to 2, *the jury do what in law they should not do* and return without arriving at a verdict and say they are unable to arrive at a verdict, then what is the presiding Judge to do? The only course open to him is to discharge the jury under section 250." Surely, it is wrong to contemplate that the jury can return only when they are ready to give verdict. If they are divided 4 to 3, must they for ever remain rooted to their seats in the jury room?

The Court has also, in several cases culminating in the cases of *Mendis Appu*[75] and *Alwis*[76] laid down practical rules to be observed

71 (1959) 61 N.L.R. 265.
72 (1952) 54 N.L.R. 370.
73 (1959) 63 N.L.R. 399.
74 (1963) 65 N.L.R. 342.
75 (1960) 60 C.L.W. 11.
76 (1967) 70 N.L.R. 558.

when a Judge wishes to call evidence after the close of the defence, and has defined the true scope of section 429 of the Procedure Code.

It has also commented on the Judge's power to put questions, section 165 of the Evidence Ordinance notwithstanding. In *Nimalasena de Zoysa*[77] the Court observed wisely that although the power contained in section 165 is extensive it has limits which, however, are not capable of precise definition. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise the Judge should be careful not to usurp the functions of the prosecution or the defence. He should also regulate his interpositions as not to hamper the conduct of the case by counsel for the prosecution and the defence. The fact that neither the parties nor their agents are entitled to make any objection to any question by the judge or to cross-examine any witness upon any answer given in reply to his questions is a matter which calls for caution in the exercise of this power. As the trial Judge in a later case, *David Perera*,[78] it was pointed out to me in a judgment of the Court that I had put more questions than both Crown Counsel and defence counsel together had done !

The Court has in a long line of decisions, not all of them consistent, indicated the procedure to be followed when evidence of bad character of an accused person has transpired in evidence. Nagalingam J. in *Fernando*[79] made certain observations in regard to a possible difference of approach in cases where evidence of bad character had been elicited that may be of doubtful validity. Said he :— " It should be borne in mind in this connection that, under the law prevailing in England, the Court of Criminal Appeal there has not the right to order a retrial, so that if the Court did interfere on the ground of irregularity of reception of evidence, the prisoner would then in effect have secured an acquittal, for a retrial could not have been ordered. That is a factor which, no doubt, would strongly weigh with the English Court of Criminal Appeal in holding that the right to complain is lost where application for a retrial is not made in the course of trial, and it cannot be said that we need give the same amount of weight to such a circumstance here. " I venture to submit that his viewpoint is not valid. Certainly the following observations of Viscount Simon L.C., could not have been before Nagalingam J. on that occasion, because they are opposed to the view-point expressed :— " The object of the British Law, whether civil or criminal, is to secure, if it is possible, that justice is done

77 (1958) 60 N.L.R. 97.
78 (1963) 66 N.L.R. 553.
79 (1951) 54 N.L.R. 151.

according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive."

Some interesting comments have been made by the Court in regard to the separation of falsehood from the truth, obviously a difficult undertaking at most times. Dias J. observed in *Gardiris Appu*[80] that it is the experience of every Judge of Assize that not infrequently a certain amount of false evidence has been introduced into the case by the witnesses. In such cases the jury can do one of two things. It is open to them to say that the falsehoods are of such a magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth. With such a practical rule to guide Judges, it was a surprise to find the Court about ten years later in *Vellasamy*[81] saying that "a witness's credibility cannot be treated as divisible and accepted against one and rejected against the other." I believe this statement of our Court was influenced by a misunderstanding of certain remarks of the Privy Council in *Baksh*[82] and, in a recent case, *Francis Appuhamy*[83] I myself took leave to say that the remarks in *Baksh's* case cannot be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. The Judge or jurors will have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true.

The question of corroboration of an accomplice and of a prosecutrix in a case of a sexual offence has come up on numerous occasions. It will take an hour at least even if I were to attempt a survey of the cases. I think *Ana Sheriff*[84] struck the right note when five Judges ruled that "although the question of the presence or absence of corroboration is one of law to be decided by the Judge, in reality it becomes one of fact as to whether certain evidence, if believed, shows or tends to show that the story of the complainant that the appellant raped her is true." We have also followed here the view that there is no duty upon the Judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration : it would be sufficient if the Judge has told the jury what is meant in law by corroboration.

80 (1951) 52 N.L.R. 344.
81 (1960) 63 N.L.R. 265.
82 (1958) A.C. 172.
83 (1966) 68 N.L.R. 437.
84 (1941) 42 N.L.R. 169.

The attitude the jury should adopt towards dying depositions and dying statements was specified by the Court in *Arsirwadan Nadar*,[85] the Court stating that it was imperative that the jury should have been adequately cautioned that, when considering the weight to be attached to the statements contained in the dying deposition, they should appreciate that the statements of the deponent had not been tested by cross-examination : and that the attention of the jury should be specifically drawn to the question how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the statement. The Court in *Lewis Fernando*[86] qualified these cautions only to the extent that it is not imperative that the jury be advised that they ought not to act on the deceased's statement unless there is some corroboration. Few were, however, prepared for the majority decision in *Vincent Fernando*[87] that — mark the words — " it would be a misdirection to tell the jury that the statement of a deceased person as to the cause of his death which is admissible under section 32 of the Evidence Ordinance as a relevant fact is diminished in weight by the absence of cross-examination or that it is an inferior kind of evidence which must not be acted upon unless corroborated. " This last-mentioned view was disapproved in *Justinapala*[88] when the Court stated that it was the duty of the Judge to warn the jury adequately that, when considering the weight to be attached to the evidence, they should appreciate that the statement has not been tested by cross-examination.

The law relating to criminal conspiracy needs greater clarification than has been possible hitherto, and should receive attention when suitable occasions present themselves in the future. Certainly, a statement contained in the judgment of Gratiaen J. in *Rodrigo*[89] which, however, is not a decision of the Court of Criminal Appeal, that where the evidence on which the Crown relied in support of the charge of conspiracy was none other than the evidence intended to be submitted as proof of the commission of the actual offences (in that case of cheating and abetment thereof), it has been considered undesirable and improper by the English Courts to charge the accused persons only with conspiracy or to include a charge of conspiracy in an indictment alleging the commission of the offences themselves, has not generally been acted upon. The expression of opinion in that judgment notwithstanding, there have been cases in our courts,

85 (1950) 51 N.L.R. 322.
86 (1952) 54 N.L.R. 274.
87 (1963) 65 N.L.R. 265.
88 (1964) 66 N.L.R. 409.
89 (1952) 55 N.L.R. 49.

one or two of which have reached the Privy Council itself, where the inclusion of a charge of conspiracy along with charges of the offences themselves have met with no adverse comment.

You have listened patiently enough to my survey of some of the work of our new Court. By and large it can be proud of its achievements. At least a quarter of the full time of at least three Judges is devoted to their duties on this particular Court. I reminded you at the beginning of this survey that the Court set out to model itself on the English prototype. Even in the matter of sentences passed at Assize trials, the model was the same one. In *Rankira* [90] it said that " like the Court of Criminal Appeal in England this Court is very reluctant to interfere with the judicial discretion of a Judge passing sentence. That judicial discretion is one vested in him by law, and this Court will only do so when it is apparent that that discretion has been exercised on a wrong principle. " As analysis of the figures shows that in the last three years the number of cases in which the sentence was reduced on appeal is large in comparison with the previous years. I believe the present practice is to grant legal aid to every applicant, even to one who seeks to appeal solely against the sentence, a practice which may require reconsideration in the future.

In an independent country the judges must themselves play their part in their proper sphere of influence, *viz.*, the courts, in letting men's minds blossom without being forever confined to colonial moulds. There is a lesson to be learned from the case of *John Perera*[91] where it was left to the Privy Council to point out that the decision there " depended entirely upon the true construction of the Ceylon Penal Code which does not provide for any doctrines of English law to be imported into the criminal law of Ceylon unlike in the case of the law relating to criminal procedure. And, we must take heart from Sir John Howard's words in *Chandrasekera*,[92] " It has been seriously maintained that the decision at which I have arrived will have the effect of limiting one of the fundamental principles that lies at the whole basis of British criminal jurisprudence, *viz.*, the presumption of innocence. If this is so, it is not a reason for importing into the law of Ceylon a principle of English law contrary to the clear, definite

90 (1941) 42 N.L.R. 145.
91 (1952) 54 N.L.R. 265.
92 (1942) 44 N.L.R. 97.

and unequivocal language employed in a Ceylon enactment." I think Soertsz J., who had had rich practical experience hit the nail on the head when he observed on a point arising in regard to the law of evidence that the difficulty that attends the question before us seems to be due almost entirely to the fact that, by the time our Evidence Ordinance came to be enacted, we had followed the English law of evidence for nearly a century, and modes of thought and speech acquired during the long association have persisted in our Courts even after we have received a code with a different orientation. Is there truth in the saying that even in the Courts we are acting after Independence, as if we are inhabitants of a colonial era? If there be any truth, then I venture to submit that the remedy lies with the legislature. I am provoked to remind you of a story about F. E. Smith, afterwards Lord Birkenhead. He was a very bright scholar, and when, contrary to everybody's expectation, he failed to secure a first class in the degree of Bachelor of Civil Laws at Oxford, an analysis of the answer papers showed that he had messed up an answer to a question as to the nature of the Rule in *Shelley's* case. When young F. E. Smith heard the reason, he exclaimed, "By gad, that Rule should be abolished." When thirty years later in 1925 as Lord Chancellor Birkenhead he piloted massive reforms of law, he abolished also the Rule in *Shelley's* case. I do not know whether our present Minister of Justice had difficulties in satisfying the examiners about any Rules during his student days. I would commend to him the Birkenhead example.

A particularly appropriate topic with a view to a possibly advantageous reform, I venture to suggest, would be the composition of the Court itself. Throughout its thirty years' existence the Court has consisted of Judges of the Supreme Court. It is not a satisfactory feature that the duty of sitting in appeal on that part of the work which is the original criminal jurisdiction of the Supreme Court is imposed on that very body of Judges. I submit that this is a mistake in the structure of the Courts which we have, without real examination, copied from England where for about sixty years prior to 1966, the original criminal jurisdiction was subject to the appellate jurisdiction of the Court of Criminal Appeal composed of Judges of the Queen's Bench Division itself. In the spate of Law Reforms which the present Labour Government of England was induced by its Lord Chancellor, Lord Gardiner, to introduce there, the appellate jurisdiction is now conferred on the Court of Appeal, so that appeals from both civil *and* criminal cases tried in the Queen's Bench Division

are heard by Lords Justices of the Court of Appeal who themselves have ordinarily had several years' experience in the Queen's Bench Division before they reached the Court of Appeal.

Judges being human, it is a human weakness not to examine too closely points and arguments about the law which they have long been accustomed to believe are beyond dispute. It was partly this weakness that was responsible for the change introduced in England about three years ago. Changes in the constitution and the composition of the hierarchy of the judicature in this country, are of course, overdue. We still follow here patterns that were meant for a colonial era. All the newly independent countries have streamlined this aspect of the judicatures, but we have been preoccupied with other matters to give these any real thought. If changes are seriously to be considered in the near future, I submit the composition of this Court must also be seriously examined.

I must thank the Principal quite sincerely for his kind invitation to me to speak on today's subject. The Court of Criminal Appeal is one in which I always liked to work whether as Counsel or as Judge. Although, if I may borrow language familiar to us from the time of *Liyanage*[93], I myself received the "full judicial power" to sit as a Judge of the Court in May, 1956, I remained more often than not— in the terminology of the cricket field — on the boundary lines, so to say, a reserve in the team till about August, 1964, a period of over eight years. And eventually when I was sent in to bat late in the order of batting — too late as all batsmen think — I was inhibited in following the example of all late batsmen to have " a go at the bowling " by what I saw of the state of the wicket. It may be that my role for the four years I really sat on the Court was therefore more in the nature of rehabilitation and restoration of the pitch.

The Court can certainly look back on its work since its establishment with some pride. It has elucidated the law on many points. It deals with appeals against every conviction in our Courts on a capital charge. There were 40 of them last year in addition to 110 in non-capital cases. There were therefore 150 cases disposed of last year with no case delayed in appeal — a creditable achievement by any standard you judge. It has served the dual purpose of keeping counsel to the straight roads of relevancy and admissibility of evidence and discouraged the introduction of hearsay at trials and of making

93 (1965) 68 N.L.R. 265.

the judge wary in his instructions to the jury. There are two people on trial in Assize cases, the accused in the dock and the Judge on the Bench. For the former the trial ends with the verdict ; for the latter it ends only in the Court of Criminal Appeal. For the success of the Court a true synthesis of the assistance of counsel in the determination by the Bench is the vital need. We have today, as we have had in the past, both counsel and Judges who combine in them the learning, experience and capacity necessary to ensure that the Court performs its important role in the administration of criminal justice which yet consumes the greater part of the time of the Judges of our Courts.

T. S. FERNANDO*

* Q.C., retired Senior Puisne Justice ; former Attorney-General of Ceylon.

JUDICIAL REVIEW THROUGH CERTIORARI IN CEYLON

I

Of the various methods by which the Courts in Ceylon review the legality of the exercise of the powers of public authorities, the writ of certiorari is one of the most popular. Under section 42 of the Courts Ordinance the Supreme Court has power to issue this and other writs " according to law. " This phrase has been held to mean that the relevant rules of English common law must be resorted to in order to ascertain in what circumstances and under what conditions the Court should be moved for the issue of a writ.[1] These rules must themselves guide the practice of the Supreme Court.[2]

In many leading cases the Courts of Ceylon have adopted the well-known dictum of Atkin L. J. in *R. v. Electricity Commissioners*[3], namely that the Court has jurisdiction to issue the writ of certiorari (and prohibition) " wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority. "

In order that these writs may issue the body must, in the first place, exercise a jurisdiction that is legal though not necessarily statutory. The writs will not issue to a body which derives its jurisdiction from mere agreement or contract. " The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. "[4] The circumstance that a University or other authority, is established and regulated by statute does not necessarily involve that contracts of employment made with teachers are other than ordinary contracts of master and servant.[5] Thus, where a statutory body is merely given a power to dismiss a member of its staff without any specification of the grounds of dismissal or of the procedure to be followed before dismissal,

1 *Nakkuda Ali* v. *Jayaratne* (1950) 51 N.L.R. 457 at 461 : *Abdul Thassim* v. *Edmund Rodrigo* (1947) 48 N.L.R. 121 ; See also Grenier's Reports, 122 at 125 ; *Gooneratnanayake* v. *Clayton* (1929) 31 N.L.R. 132, 133 ; *Wijesekera* v. *Assistant Government Agent, Matara* (1943) 44 N.L.R. 533 ; *Goonesinghe* v. *de Kretser* (1944) 46 N.L.R. 107.

2 See note 1 (*supra*).

3 (1924) 1 K. B. 171 at 204.

4 *Vidyodaya University Council* v. *Silva* (1964) 66 N.L.R. 505 at 507 ; *Ridge* v. *Baldwin* (1964) A. C. 40.

5 *Vidyodaya Case* (*supra*) ; *Francis* v. *Municipal Councillors of Kuala Lumpur* (1962) 3 All E. R. 633.

that body may not be bound to act judicially in reaching its decision and certiorari will not lie.[6] It would be otherwise where there is "an entirely different situation from the ordinary master and servant case,"[7] for example, where there is a statutory scheme which gives a number of rights and imposes a number of obligations going far beyond any ordinary contract of service.[8]

The writs will not lie where a person or body exercises a jurisdiction without legal authority to determine questions affecting the rights of subjects. Thus the writs do not generally issue to a voluntary domestic tribunal or a private arbitral body which derives its jurisdiction from the consent of its members.[9] The position is otherwise in the case of arbitrators invested with jurisdiction by statute, the reason for the difference being that when Parliament has conferred statutory powers on such bodies which, when exercised, may lead to the detriment of subjects who have to submit to their jurisdiction, it is essential that the Courts should be able to control the exercise of such jurisdiction strictly within the limits which Parliament has conferred upon them.[10]

The writs will be refused where the body exercises a merely advisory, deliberative or non-binding recommendatory power distinct from a legal authority or jurisdiction.[11] Certiorari does not lie as a means of interfering with the proceedings of a legislative or deliberative assembly.[12] In *Dias* v. *Abeywardena*[13] it was held that a writ of prohibition did not lie even against a Commissioner appointed by the Governor-General under the Commissions of

6 *Kulatunge* v. *Co-operative Wholesale Establishment* (1963) 66 N.L.R. 169 ; *Thenabadu* v. *Samarasekera* (1967) 70 N.L.R. 472.

7 *Vine* v. *National Dock Labour Board* (1957) A. C. 488 at 500.

8 *Vidyodaya University Council* v. *Silva* (1964) 66 N.L.R. 505 at 516.

9 *Colombo Commercial Co., Ltd* v. *Shanmugalingam* (1964) 66 N.L.R. 26 at 32. *R.* v. *National Joint Council for the Craft of Dental Technicians, ex parte Neate* (1953) 1 Q.B. 704 at 708 ; *Lee* v. *Showman's Guild of Great Britain* (1952) 2 Q. B. 329 at 346.

10 *Colombo Commercial Co., Ltd.'s Case* (*supra*) ; *Neate's* Case (*supra*) ; *R.* v. *Powell, ex parte Comden* (1925) I K.B. 641.

11 *Dias* v. *Abeywardena* (1966) 68 N.L.R. 409 ; *R.* v. *Macfarlane, ex parte O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518 ; *R. v. Clipsham* (1965) 49 D.L.R. (2d) 747 ; *R.* v. *Legislative Committee of the Church Assembly* (1928) 1 K.B. 411. *Re Clifford and O' Sullivan* (1921) 2 A. C. 570.

12 *R.* v. *Legislative Committee of the Church Assembly, ex parte Haynes-Smith* (*supra*) ; *R.* v. *Wright, ex parte Waterside Workers' Federation* (1955) 93 C.L.R. 528 at 541 - 542.

13 (*Supra*) ; See also *Seneviratne* v. *The Attorney-General* (1968) 71 N.L.R. 439 (where Tennekoon J. held that the writ does not issue even to proceedings of an Inquirer or Magistrate holding an inquest of death); *R.* v. *St. Lawrence's Hospital, Caterham, ex parte Pritchard* (1953) 1 W.L.R. 1158. Contrast *R.* v. *Boycott* (1939) 2 K.B. 651 and *R.* v. *Botting* (1966) 56 D.L.R. (2d) 25. See S.A. de Smith, *Judicial Review of Administrative Action*, (2nd ed.), pp. 217 - 221, on exposure to legal hazards as a ground for importing a duty to act judicially although the proceeding does not itself involve any final determination.

Inquiry Act to inquire into alleged unlawful interception of telephone messages and to make a report *inter alia* as to the persons responsible for such unlawful interception or by or to whom the contents of messages so intercepted were divulged. On the other hand, if an adverse finding against a person by a Commissioner would under legislation have the effect of depriving that person of his civic rights, the writs would lie.[14] The writs may also be available where a public body is required by law to determine at any stage of the process matters affecting the rights of subjects even though the final decision is left to confirmation or approval by some other public authority.[15]

The " rights " affected are not restricted to any particular category. These are not to be confined to rights in the jurisprudential sense to which correlative legal duties are annexed.[16] These legally recognised interests have included immunity from being found guilty of incompetence in the performance of duties,[17] a workman's right to the receipt of compensation on account of illness[18] or of a benefit from instructions in a special school on the basis of a certificate.[19]

The writs, it is often said, are issued in respect of judicial acts as distinguished from ministerial and administrative acts. But this distinction is not always easy to draw in practice. The term " judicial act " as used in this connection is sometimes broadly described as one which involves the exercise of some right or duty to decide, after investigation of facts and circumstances, a question affecting the rights of individuals .[20] The term " extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties."[21]

In *Nakkuda Ali* v. *Jayaratne*[22] the Controller of Textiles had cancelled a textile dealer's licence acting under a Regulation conferring such power to do so where he had " reasonable grounds to believe"

14 *de Mel* v. *de Silva* (1949) 51 N.L.R. 105.
15 *Estate and Trust Agencies* (1927) *Ltd.*, v. *Singapore Improvement Trust* (1937) A. C. 898 at 917 (P.C.) ; *de Mel* v. *de Silva* (*supra*).
16 de Smith, *op. cit.*, at pp. 70, 163, 395 - 396.
17 *Durayappah* v. *Fernando* (1966) 69 N.L.R. 265; (1967) 2 A.C. 337.
18 *R.* v. *Postmaster-General, ex parte Carmichael* (1928) 1 K.B. 291.
19 *R.* v. *Boycott, ex parte Keasley* (1939) 2 K.B. 651.
20 See *R.* v. *Dublin Corporation* (1878) L.R. Ir. 371 at 376 ; *R.* v. *Woodhouse* (1906) 2 K.B. 501 at 535; *R.* v. *Electricity Commissioners* (1924) 1 K.B. 171 at 205 ; *Subramaniam* v. *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254 at 259 - 260 ; *Vadamaradchy Hindu Educational Society Ltd.* v. *Minister of Education* (1961) 63 N.L.R. 322 at 327.
21 *Local Government Board* v. *Arlidge* (1915) A. C. 120 at 140.
22 (1950) 51 N.L.R. 457 (P.C.) ; (1951) A.C. 66. Followed in *Kadawata Meda Korale Multi-Purpose Co-operative Societies Union* v. *Ratnavale* (1964) 66 N.L.R. 220 and *Hassan* v. *The Controller of Imports and Exports* (1967) 70 N.L.R. 149.

that any dealer was unfit to be allowed to continue as a dealer. The Privy Council held that, although there should in fact have existed reasonable grounds known to him before he could have validly exercised the power of cancellation, he was not under a duty to act judicially. Their Lordships of the Privy Council adopted the following statement of Lord Hewart C. J. in *R.* v. *Legislative Committee of the Church Assembly*:[23] " In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects ; there must be superseded to that characteristic the further characteristic that the body has the duty to act judicially. " In *Nakkuda Ali's* case the Privy Council went on to point out : " It is that characteristic that the Controller lacks in acting under the Regulation. "

In *Ridge* v. *Baldwin*[24] Lord Reid disapproved this part of the judgment in *Nakkuda Ali's* case which gave a narrow interpretation to the duty to act judicially, as having been given " under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative. " According to Lord Reid both Bankes L. J. and Atkin L. J. in *R.* v. *Electricity Commissioners*[25] inferred the judicial character of the duty from the nature of the duty itself (to affect the rights of subjects).

It is submitted that this wide interpretation given by Lord Reid if it is valid, is equally applicable to certiorari as to a declaratory action to invalidate a decision for breach of the rules of natural justice. [26]

In the course of the Privy Council judgment in *Nakkuda Ali's* case their Lordships also said:[27]

> " It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something, he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation.....No procedure is laid down by the Regulations for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. "

23 (1928) 1 K.B. 411 at 415.
24 (1964) A. C. 40 ; (1963) 2 All E. R. 66.
25 (1924) 1 K.B. 171 at 198 et seq.
26 See, however, the contrary view expressed by T. S. Fernando J. in *Kadawata Meda Korale Multi-Purpose Co-operative Societies Union Ltd.* v. *Ratnavale* (1964) 66 N.L.R. 220.
27 At 462 - 463.

There are cases where in the absence of any express statutory duty to provide a hearing to the parties or to follow a procedure analogous to the judicial, an implied duty to act judicially has been held to arise from the nature of the statutory power to affect the rights of individuals.[28] In other words, it is submitted, certiorari may issue as long as a judicial element may be inferred from the nature of the power to affect the rights of citizens. " The duty to act judicially may arise in widely different circumstances which it would be impossible and, indeed, inadvisable to attempt to define exhaustively"; but it will not arise if the administrative body in arriving at its decisions has " throughout to consider the question from the point of view of policy and expediency. "[29] The answer in each case will depend " on the wording of the statute, the subject-matter dealt with, and the circumstances under which the power to act is conferred ."[30] The same administrative agency may even be required to act judicially at one stage in the exercise of a power though not at another stage.[31] In *Subramaniam* v. *Minister of Local Government and Cultural Affairs*[32] the relevant section of the Statute provided that " if at any time the Minister is satisfied that there is sufficient proof " of any of the facts enumerated therein, the Minister may by order remove any member of a Town Council from office. It was held that when making such Order, the Minister not only exercised a power which involved legal authority to determine questions affecting the rights of subjects but was also under a duty to act judicially. Gunasekera J. said:[33]

> " It was stated in the judgment of the Divisional Bench (in *de Mel* v. *de Silva*)[34] that the Commissioner had to inquire into various allegations of bribery and for that purpose he had to examine witnesses on oath or affirmation ' and reach a decision on such evidence with regard to the allegations made against the petitioner. ' While it so happened that in that case

28 *University of Ceylon* v. *Fernando* (1960) 61 N.L.R. 505 (P.C.) (1960) 1 All E.R. 631 ; *Maradana Mosque* (*Board of Trustees*) v. *Minister of Education* (1966) 68 N.L.R. 217; (1966) 1 All E.R. 545; *Durayappah* v. *Fernando* (1966) 69 N.L.R. 265; *Ridge* v. *Baldwin* (1964) A.C. 40 ; *R.* v. *Manchester Legal Aid Committee, ex parte Brand & Co., Ltd.*, (1952) 2 Q.B. 413 ; *New Zealand Licensed Victuallers' Association of Employees* v. *Price Tribunal* (1957) N.Z.L.R. 165 at 203, 209 - 210.

29 *R.* v. *Manchester Legal Aid Committee, ex parte Brand & Co., Ltd.* (*supra*);

30 *Kandiah* v. *Ministry of Local Government* (1966) 69 N.L.R. 25 at 28. See also *Munasinghe* v. *Jayasinghe* (1958) 61 N.L.R. 425 at 428.

31 *Munasinghe* v. *Jayasinghe* (*supra*) at 428. *Leo* v. *The Land Commissioner* (1955) 57 N.L.R. 178; *R.* v. *Manchester Legal Aid Committee, ex parte Brand & Co., Ltd,*. (*supra*). *Robinson* v. *Minister of Town and Country Planning* (1947) K.B. 702.

32 (1960) 59 N.L.R. 254.

33 At 259 (citing in support, *R.* v. *Manchester Legal Aid Committee, ex parte Brand & Co., Ltd.* (*supra*)

34 (1949) 51 N.L.R. 105.

the person who 'had legal authority to determine questions affecting the rights of subjects' also had the power to examine witnesses on oath or affirmation it is not necessary that such a person should have that power in order that he may be under a duty to act judicially..... The Commissioner in *de Mel's* case was under a duty to act judicially because his decision, upon questions affecting the rights of subjects, was one that had to depend upon the proof of certain allegations of fact, and not because he had the power to examine witnesses on oath or affirmation or had some of the other attributes of a court."

Their Lordships of the Privy Council also stated (in *Nakkuda Ali's* case) that when the Controller cancelled a licence he was not determining a question affecting the rights of subjects but was merely "taking executive action to withdraw a privilege."[35] This distinction which was drawn by the Privy Council between the grant or withdrawal of a licence and the taking away of some right or proprietary interest has also been subject to much criticism. The withdrawal of a licence in public law may well mean the deprivation of a person's means of earning a livelihood; a conceptualist approach equating public and private law licences and the procedures to be followed by various licensing authorities may often prove unrealistic[36]. Licensing procedures often differ from each other. There are many reported cases reviewing certain licensing functions of administrative authorities by certiorari and prohibition, particularly where licences have been revoked,[37] although certain other licensing functions have been held by the Courts to be unreviewable by these writs as they were not regarded as judicial.[38]

II

The grounds upon which certiorari (and prohibition) may be awarded are (i) Want or excess of jurisdiction (ii) Denial of the rules of natural justice (iii) Error of law on the face of the record (iv) Fraud or collusion.

35 51 N.L.R. 457 at 463; See also *R.* v. *Metropolitan Police Commissioner, ex parte Parker* (1953) 2 All E. R. 717; cf. *Merricks* v. *Nott-Bower* (1965) 1 Q. B. 57 at 61; see also D. M. Gordon, "The Cab Driver's Licence Case" (1954) 70 L. Q. R. 203.

36 *Ridge* v. *Baldwin* (1963) 2 All E. R. 66 at 90, *per* Lord Evershed. (His Lordship, however stated, that on the language of the enactment in *Nakkuda Ali's* case there was in truth conferred on the Controller an unfettered discretion); Friedmann and Benjafield, *Principles of Australian Administrative Law* (2nd ed.) 47, de Smith, *op. cit.* at 208 - 211. See also *Noordeen* v. *Chairman, Village Committee, Godapitiya* (1943) 44 N.L.R. 294 at 295.

37 E.g. *R.* v. *Woodhouse* (1906) 2 K.B. 501; *R.* v. *London County Council, ex parte Entertainments Protection Association Ltd.* (1931) 2 K.B. 215. *Klymchuk* v. *Cowan* (1964) 45 D.L.R. (2d) 587; see the cases in Commonwealth jurisdictions referred to in de Smith, at 211 note 43.

38 *Nakkuda Ali's* case (*supra*); *Parker's* case (*supra*).

(i) *Want of jurisdiction.*

This may arise by reason of the illegal or improper constitution of the tribunal. It may also arise because the necessary statutory requirements which constitute a condition precedent to the exercise of jurisdiction have not been satisfied, or because the tribunal, although it had jurisdiction in the first place, has proceeded to consider matters beyond its competence.[39] The tribunal may also exceed its jurisdiction by acting in bad faith and for an improper purpose or by taking into account extraneous or irrelevant considerations or ignoring relevant matters.

As long as a tribunal has jurisdiction to enter upon the enquiry, it does not exceed its jurisdiction by making an incorrect decision on the merits. [40] If under a statute the jurisdiction which is conferred on a body depends on the existence of a certain state of facts, the absence of an essential fact will deprive that body of its jurisdiction and any decisions made by it will be *ultra vires.* The facts which constitute a condition precedent to the exercise of the administrative power or jurisdiction are referred to as " jurisdictional facts. " Unless the legislature has entrusted the body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, that body although it can inquire into the facts in order to decide whether or not it has jurisdiction, cannot however give itself jurisdiction by wrongly deciding those facts to exist.[41] Thus, in *Leo* v. *The Land Commissioner*,[42] where the Land Commissioner was empowered under the Land Redemption Ordinance to acquire " agricultural land " as defined in the Ordinance and no other property, a purported exercise of the power was quashed and held invalid on the ground that, in the opinion of the Court, the property in question was not " agricultural land " within the meaning given in the statute. Gratiaen J. said[43] : " .....the mere fact that he (the Land Commissioner) was ' satisfied ' (which is conceded) did not vest him with jurisdiction if in fact the land was not ' agricultural ' in character. "

39 de Smith, *op. cit.* pp. 407 - 408; Griffith and Street, *Principles of Administrative Law*, (4th ed.), 217

40 *Colonial Bank of Australia* v. *Willan* (1874) L.R. 5 P.C. 417 at 444.

41 *Leo* v. *The Land Commissioner* (1955) 57 N.L.R. 178 ; *White and Collins* v. *Ministry of Health* (1939)2 K. B. 838. *R.* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q. B. D,313 at 319, *per* Lord Esther M. R.; *R.* v. *Fulham Rent Tribunal, ex parte Lerek* (1951) 2 K.B. 1 at 6 ; *Eshugbayi Eleko* v. *Government of Nigeria* (1931) A. C. 662 at 670. See also the American cases of *Crowell* v. *Benson* (1932) 285 U. S. 22 and *Social Security Board* v. *Nierotko* (1946) 327 U.S. 358, 369.

42 *Supra.*

43 At 182.

(ii) *Denial of natural justice.*

The rules of natural justice, like the "due process of law" clause that exists in the United States, ensure that the fundamentals of fair administrative procedure are adhered to by administrative tribunals. There is of course this basic difference, namely, that in the United States these rules of fair procedure are embedded in the Constitution itself and cannot be done away with by the legislature in the course of ordinary legislation.[44] In the *University of Ceylon* v. *Fernando*[45] Lord Jenkins said that subject to the reservation that the requirements of natural justice must depend to a great extent on the facts and circumstances of each case, Lord Loreburn's much quoted statement in *Board of Education* v. *Rice*[46] still affords as good as general definition as any of the nature of and limits upon the requirements of natural justice in that kind of case:

> " .....they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything .....They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudical to their view. "

In *Local Government Board* v. *Arlidge*[47] Lord Haldane in developing Lord Loreburn's statement said : " .....they must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. " It is however important to note that the content of these principles varies according to such circumstances as the constitution of the tribunal, the nature of the inquiry, the subject-matter that is being dealt with and the exact words of the statute.[48]

It has been pointed out by the Privy Council in *Maradana Mosque* (*Board of Trustees*) v. *Minister of Education*[49] that " when an applicant is applying to quash an order on the ground that there was an infringement of the rules of natural justice, he is not confined to the face of the record. He may establish his case from other reliable evidence. " In that case the Privy Council held that it was

44 See Bernard Schwartz, *An Introduction to American Administrative Law*, pp. 105 - 106.
45 (1960) 61 N.L.R. 505 at 512.
46 (1911) A. C. 179 at 182.
47 (1915) A.C. 120 at 132.
48 *The University of Ceylon* v. *Fernando* (1960) 61 N.L.R. 505; *Russel* v. *Duke of Norfolk* (1949) 1 All E.R. 109 at 118, *per* Tucker L.J.; *R.* v. *Registrar of Building Societies* (1960) 2 All E.R. 549 at 554, *per* Lord Parker C.J.; see also *Arlidge* case (*supra*) at 130, *per* Lord Haldane and at 140 *per* Lord Parmoor.
49 (1966) 68 N.L.R. 217 at 224 ; (1966) 1 All E. R. 545 at 550.

sufficiently established by the official paper published by the Government which contained a broadcast statement of the Minister that he in making the order complained of was largely influenced by an alleged contravention of a statutory provision of which the applicants had no notice.

The rule against bias. A tribunal should be impartial and free from bias. The tribunal should have no pecuniary or other personal interest in the subject-matter or other similar form of bias.[50] There must not even be the appearance of bias. The *dictum* of Lord Hewart C. J. that " justice should not only be done, but should manifestly and undoubtedly be seen to be done "[51] has been adopted in a number of cases in England and in Ceylon.

The test is whether there is a real likelihood of bias.[52] This matter will be considered by the court " as a reasonable man would judge of any matter in the conduct of his own business ."[53] There may be real likelihood of bias where there is, for example, personal friendship or hostility, family or other close relationship with a party.[54]

In the case of judicial functions vested in Ministers, they may sometimes have to be exercised in favour of government policy ("departmental bias"). In this sphere the rule against bias is more restricted than in other spheres although even here the order could be set aside if there is evidence of some gross bias.[55]

Bias renders the proceedings voidable only, not void,[56] and objection on the ground of bias may therefore be waived by an aggrieved party by his acquiescence in the proceedings.[57]

It has been suggested that in a case of necessity where no other judge has jurisdiction, a judge may act although he has an interest which would otherwise disqualify him.[58] The modern tendency is

50 *Dimes* v. *Grand Junction Canal* (1852) 3 H. L. C. 759 (decree of Lord Chancellor Cottenham set aside by the House of Lords on the ground that he was a shareholder in the company although it was not suggested that he was influenced by this interest) ; *R.* v. *Sunderland Justices* (1901) 2 K.B. 357.

51 *R.* v. *Sussex Justices, ex parte McCarthy* (1924) 1 K.B. 256 at 259. See also *Cooper* v. *Wilson* (1939) 2 K.B. 309; *Franklin* v. *Minister of Town and Country Planning* (1948) A.C. 87.

52 *Frome United Breweries* v. *Bath Justices* (1926) A.C. 586, *R.* v. *Camborne Justices, ex parte Pearce* (1955) 1 Q.B. 41

53 *R.* v. *Sunderland Justices*, (*supra*) at 373, *per* Vaughan Williams, L.J.

54 See de Smith, *Judicial Review of Administrative Action* (2nd ed.), 246 - 252.

55 *Franklin* v. *Minister of Town and Country Planning*, *supra* note 51 (an order could be challenged if the Minister did not consider the report of the official and the objections or " if his mind was so foreclosed that he gave no genuine consideration " to the question before him — *per* Lord Thankerton at 106).

56 *Dimes* v. *Grand Junction Canal* (*supra*)

57 *R.* v. *Cheltenham Commissioners* (1841) 1 Q. B. 467. *R.* v. *Richmond JJ.* (1860) 24 J.P. 422.

58 H. H. Marshall, *Natural Justice* (1959) 38 ; de Smith, *op. cit.* at p. 262; Griffith and Street, *op. cit.* at 158; *Serjeant* v. *Dale* (1877) 2 Q. B. D. 558, 566. *The Judges* v. *Att-Gen. for Saskatchewan* (1937) 53 T.L.R. 464 (P.C.)

to apply the rule of necessity only in rare instances. In the United States it has been held that just as in the case of a judge in a court of law so also an administrative agency is not disqualified by mere prejudgment of the issues by the agency in the first hearing.[59] Statutes may authorise persons or bodies to adjudicate in cases where they have an interest.[60]

The right to a hearing: *audi alteram partem*. Each party must be given adequate notice of the case against him and thereby afforded a fair opportunity of stating his own case and of correcting or contradicting any relevant statement prejudicial to him.[61] This rule governs even domestic tribunals such as committees of clubs which under their rules have power to expel members for misconduct.[62]

Although there may be no positive words in a statute which confer a judicial function, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.[63] In *Durayappah* v. *Fernando*[64] the Privy Council held that the rule, *audi alteram partem*, was applicable to a decision of the Minister to make an order under section 277 (1) of the Municipal Councils Ordinance (Cap. 252) dissolving and superceding the council if it appeared to him that the council was incompetent. Their Lordships of the Privy Council stated that outside well-known classes of cases such as dismissal from office, deprivation of property and expulsion from clubs there was a vast area where the principle could only be applied upon most general considerations. Although outside these cases no general rule could be laid down as to the application of the general principle in addition to the language of the provision, there were according to their Lordships ' view three matters which must always be borne in mind when considering whether the principle should be applied or not. " These three matters are: first, what

59 *National Labor Relations Board* v. *Donnelly Garment Co.*, 33 U.S. 219 (1947) at 236 - 7, *per* Justice Frankfurter (cited in Schwartz, *op. cit.* at 143).
60 Marshall, *op. cit.* 41.
61 *The University of Ceylon* v. *Fernando* (1960) 61 N.L.R. 505 (P.C.) ; *Board of Education* v. *Rice* (1911) A.C. 179 at 182, *per* Lord Loreburn L.C.
62 *Fernando* v. *The University of Ceylon* (1956) 58 N.L.R. 265 at 279 - 280. *Wood* v. *Wood* (1874) L.R. 9 Ex. 190, 196. *Fisher* v. *Keane* (1878) 11 Ch. D. 353. *Lapointe* v. *L' Association de Bienfaisance et de Retraite de la Police de Montreal* (1906) A.C. 535 ; *General Medical Council* v. *Spackman* (1943) A.C. 627. See also Sir John Morris, " The Courts and Domestic Tribunals " (1953) 69 L.Q.R. 318.
63 *Durayappah* v. *Fernando* (1966) 69 N.L.R. 265 at 269, citing with approval Byles J. in *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180 at 194. See also *Subramaniam* v. *Minister of Local Government and Cultural Affairs* (1959) 59 N.L.R. 254. *Errington* v. *Minister of Health* (1935) 1. K.B. 249 at 280, *per* Roche L.J.
64 *Supra.*

is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to intervene. Thirdly, when a right to intervene is proved, what sanction in fact is the latter entitled to impose on the other. "[65]

Similarly a Minister who was empowered to take over an unaided school for State management, if satisfied that the school was being administered in contravention of any provision of the Assisted School Act, No. 5 of 1960, was bound by the rules of natural justice to give the proprietors notice of what was charged against them and to allow them to make answer.[66]

In the application of the rules of natural justice to dismissal of employees three classes of cases have been distinguished by Lord Reid[67]: (1) dismissal of a servant by his master when the question does not arise whether the master has heard the servant in his own defence although such dismissal may constitute a breach of contract (ii) dismissal from an office held during pleasure where too the officer has no right to be heard before he is dismissed[68] (iii) dismissal from an office where there must be something against a man to warrant his dismissal. In this class of case the employee has a right to a hearing before he can lawfully be dismissed. In *Ridge* v. *Baldwin*[69] the Brighton watch committee dismissed the Chief Constable from his office acting under a statutory provision which empowered them to dismiss " any constable whom they think negligent in the exercise of his duty or otherwise unfit for the same. " The House of Lords, reversing the decision of the Court of Appeal, held that the rules of natural justice applied and he should have been given an opportunity to be heard before the power of dismissal was exercised.

In *Vidyodaya University* v. *Silva*[70] it was held that although the University was regulated by statute and contracts of employment of teachers were subject to statutory power of dismissal, the

65 At 269, 270.

66 *Maradana Mosque* (*Board of Trustees*) v. *Minister of Education* (1966) 68 N.L.R. 217 ; (1966) 1 All E.R. 545. See also *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 N.L.R. 433 ; (1966) A.C. 47.

67 *Ridge* v. *Baldwin* (1964) A.C. 40 at 65 - 68.

68 It is of interest to note that the Constitution of India, art. 311 (2) expressly provides that, subject to certain specified exceptions, no public servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

69 *Supra.*

70 (1964) 66 N.L.R. 505 ; (1964) 3 All E.R. 865. Prof. S. A. de Smith includes this case among his " less commendable " decisions and has stated that it contains " unsatisfactory reasoning " the most plausible explanation of which was the reluctance of the Privy Council to give a decision leading to reinstatement. (*Judicial Review of Administrative Action*, 161, 217.)

relationship between the University and teachers was that between master and servant and there was no need to have given the respondent an opportunity of being heard before his dismissal.

In *University of Ceylon* v. *Fernando*[71] a General Act of the University provided that, where the Vice-Chancellor was satisfied that any candidate for examination had acquired knowledge of any question, the Vice-Chancellor might suspend the candidate from the examination. The Privy Council decided the appeal on the assumption that the Vice-Chancellor was required in accordance with the principles of natural justice to give the student a fair opportunity to correct or contradict any relevant statement made to his prejudice. It was held, however, on the facts of the case that the finding had been reached with due regard to the principles of natural justice.

Notice which is given of one charge is not sufficient for proceeding under another charge even though both charges arise out of the same circumstances.[72] In *Board of Trustees of Maradana Mosque* v. *Minister of Education*[73] although the applicants had an opportunity of answering the complaint under Section 6 (i) of the Act, which required them to pay teachers their monthly salary not later than the tenth of the following month, they had had no notification of any complaint under section 6 (k) under which they were bound to satisfy the Director of Education that necessary funds to conduct the schools were available. Since the alleged contravention of Section 6 (k) played an important part in the Minister's decision to make the order under s. 11 declaring that the school should cease to be an unaided school, the Privy Council held that the order should be quashed. Although a tribunal is not bound to treat the matter for decision as if it were a trial and may obtain information in any way it thinks best, it ought not to base its decision on evidence for one party without allowing the other an adequate opportunity of meeting it.[74] This rule applies also to real evidence.[75] All relevant reports must be disclosed to the parties.[76]

71 (1960) 61 N.L.R. 505 ; (1960) 1 All E.R. 631.

72 *Maradana Mosque* (*Board of Trustees*) v. *Minister of Education* (1966) 68 N.L.R. 217; *Annamunthodo* v. *Oilfield Workers' Trade Union* (1961)A.C. 945 (expulsion of the applicant under a rule of the union which was invoked without giving him notice of it was void notwithstanding the fact that he had attended a hearing earlier in respect of a charge of breaking four other rules.)

73 *Supra.*

74 *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 N.L.R. 433 ; *The University of Ceylon* v. *Fernando* (*supra*) at 515 ; *Board of Education* v. *Rice* (*supra*); *Ridge* v. *Baldwin* (1964) A. C. 40.

75 *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex parte Bell London & Provincial Properties Ltd.* (1949) 1 K.B. 666.

76 *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* (*supra*).

Even when a party makes objections in accordance with statutory requirements, in considering the objections evidence cannot be received from the other party without the former being given an opportunity of meeting it.[77] Whenever a punishment, forfeiture or disability may be imposed by a tribunal and a duty to hold an inquiry exists, the party concerned has a right to call evidence if he so desires.[78] The further question, whether it could be a valid answer to say that the party had in truth no defence even if he had been given an opportunity of preventing it, has been left undecided by the Privy Council and by the House of Lords in England.[79]

Where evidence is given by or on behalf of one party, the other party should not normally be refused the opportunity of testing the evidence by cross-examination.[80] In *University of Ceylon* v. *Fernando*[81] the Privy Council held that the omission of the tribunal to tender an essential witness unasked for cross-examination by a student who was charged with cheating at an examination did not constitute a breach of the right to a fair hearing. The Privy Council went on to state :

> " In their Lordships ' view, this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused .....There is no ground for supposing that, if the plaintiff had made such a request, it would not have been granted. "

In a case where a party is entitled to appear in person, he has, unless there is statutory provision to the contrary, also a right to appear by counsel or other agent,[82] except before a domestic tribunal. It has been stated by eminent jurists that the right to legal representation before statutory tribunals should be curtailed only in the most exceptional circumstances and for sufficient reasons.[83]

Where a decision is not a nullity and is only voidable, it will be declared void only at the instance of the person against whom the

77 *Munasinghe* v. *The Auditor-General* (1961) 64 N.L.R. 474 at 478 ; *Stafford* v. *Minister of Health* (1946) K.B. 621 at 625. *Errington* v. *Minister of Health* (1935) 1 K.B. 249.

78 *Vadamaradchy Hindu Educational Society Ltd.* v. *Minister of Education* (1961) 63 N.L.R. 322 ; *General Medical Council* v. *Spackman* (1943) A.C. 627.

79 *Maradana Mosque (Board of Trustees)* v. *Minister of Education* (1966) 68 N. L. R. 217 at 224 ; *Ridge* v. *Baldwin* (1964) A. C. 40.

80 *The University of Ceylon* v. *Fernando* (1960) 61 N. L. R. 505 at 518 - 519 ; *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636 at 646, 660. *Marriot* v. *Minister of Health* (1936) 154 L.T. 47 at 50.

81 *Supra.*

82 *R.* v. *St. Mary Abbotts Assessment Committee* (1891) 1 Q.B. 378 ; *R.* v. *Board of Appeal, ex parte Kay* (1916) 22 C.L.R. 183. See *Report of Committee on Administrative Tribunals and Enquiries* (1957) Cmd. 218, para 78. (Franks Report).

83 Franks Report para 87 ; *Report of the International Congress of Jurists, New Delhi* (1959), p. 8.

decision is made.[84] In *Durayappah* v. *Fernando*[85] the Privy Council held that the Minister's order, made under section 277 (i) of the Municipal Councils Ordinance (Cap. 252,) superseding the Municipal Council for incompetence without giving an opportunity to the Council to be heard in defence, was not a nullity but was voidable, not at the instance of the Mayor in his personal capacity but only of the Council when the order could have been held void *ab initio.*[86] Their Lordships deprecated the use of the word " void " in distinction to the word " voidable " in the field of law with which their Lordships were concerned on the ground that the words " void " and " voidable " were imprecise and apt to mislead.[87]

(iii) *Error of law on the face of the record.*

The courts will review the decision of an inferior tribunal if an error of law is apparent on the face of the record. This rule extends to a tribunal although it is not a court of record and whether or not the error goes to jurisdiction.[88]

In Ceylon a tribunal generally is under no obligation to make a " speaking order," that is, one setting out the reasons on which it is based. Cases have sometimes come before the courts where no written reasons had been given by tribunals for their decisions. In view of the importance of sufficient reasons being given for the purpose of effective judicial review of administrative decisions, the Supreme Court has stated from time to time that it is desirable that this should be done by tribunals.[89] Where, however, a particular statute requires a body to give reasons, it is an error of law not to give reasons or to give reasons which are substantially inadequate.[90]

84 *Durayappah* v. *Fernando* at 274. See also *Ridge* v. *Baldwin* at 86, *per* Lord Evershed, at 141 - 142, *per* Lord Devlin. See de Smith, *op. cit.* at 224 (note 9) and 227 (note 26).

85 (1966) 69 N. L. R. 265.

86 See de Smith, *op. cit.* 224 and 227 for some illuminating comments on this part of the decision.

87 *Durayappah's* case (*supra*), at 273.

88 *Mudanayake* v. *Sivagnanasunderam* (1951) 53 N.L.R. 25 ; *Dissanayake* v. *Kulatilleke* (1956) 59 N.L.R. 310 ; *Hayleys Ltd.* v. *Crossette-Thambiah* (1961) 63 N.L.R. 248 ; *Stratheden Tea Co., Ltd.* v. *Selvadurai* (1963) 66 N.L.R. 6; *New Dimbulla Co., Ltd.* v. *Brohier* (1962) 64 N.L.R. 380; *Colombo Commercial Co. Ltd.* v. *Shanmugalingam* (1964) 66 N.L.R. 26; *Walsall Overseers* v. *London & North Western Railway* (1878) 4 App. Cas. 30 at 40, 43, 44. *R.* v. *Nat Bell Liquors Ltd.* (1922) 2. A.C. 128. *R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1952) 1 K.B. 338.

89 *Kandy Town Bus Co., Ltd.* v. *Commissioner of Motor Transport* (1949) 51 N.L.R. 153 ; *Fernando* v. *Paul E. Pieris and others* (1948) 37 C.L.W. 32. In England the Tribunals and Inquiries Act, 1958, requires tribunals subject to the Act to state the reasons for their decisions. See also *Report of Committee on Ministers' Powers*, Cmd. 4060, 116, and *Report of Committee on Administrative Tribunals and Enquiries* (1957) Cmd. 218, para 98.

90 See Motor Traffic Act (Cap. 203) ss. 63 (2), 97 (2). See *Re Poyser and Mill's Arbitration* (1964) 2 Q.B. 467.

A decision which according to statutory provision "shall be final" may be quashed for error of law on the face of the record.[91] Even if there has been delay in making the application, where notice on the respondent has already issued and at the subsequent hearing the petitioner, as a party aggrieved, is able to establish an error of law on the face of the record, and there is no other remedy, certiorari is granted *ex debito justitiae*.[92]

(iv) *Fraud*

Decisions made by inferior tribunals may be quashed through certiorari if they have been obtained by clear and manifest fraud or collusion.[93] Even express statutory exclusion of certiorari is ineffective to exclude the power to quash an order of a tribunal when a case of manifest fraud or collusion is shown.[94]

Locus standi.

Any person who is aggrieved by the decision of a tribunal is entitled to make an application for certiorari. The term "a person aggrieved" is generally given a broad construction by the courts.[95] Where injustice has been done to an applicant for relief it is natural for the courts to adopt a lenient attitude in deciding the sufficiency of his interest in the subject-matter. Surprisingly, however, the Privy Council, in the *Durayappah* case, adopted a very strict test in determining that the applicant was not an aggrieved person. In *Durayappah* v. *Fernando*[96] where a Minister had in the exercise of his statutory power dissolved a Municipal Council for incompetence, it was held that the order of the Minister being only voidable the Mayor had no right independently of the Council to apply for writs of certiorari and injunction because he held no office that was independent of the Council.

Refusal of relief.

The circumstances in which the writ will be refused are in many respects similar to those relating to mandamus.[97] For example, the writ will be refused on the ground of unreasonable

91 *Reg.* v. *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 574.
92 *Virakesari Ltd.* v. *Fernando* (1963) 66 N.L.R. 145.
93 *R.* v. *Gillyard* (1848) 12 Q.B. 527 ; *R.* v. *Leicester Recorder* (1947) K.B. 726; *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5. P.C. 417 ; R. v. *Ashford, Kent Justices, ex parte Richley* (No. 2) (1956) 1 Q.B. 167.
94 *Colonial Bank of Australasia* v. *Willan* (*supra*).
95 *Kandy Omnibus Co., Ltd.* v. *Roberts* (1954) 56 N.L.R. 293 ; R. v. *Manchester Legal Aid Committee, ex parte Brand & Co.* (1952) 2 Q.B. 413. See D.C.M. Yardley, "Certiorari and the Problem of Locus Standi" (1955) 71 L.Q.R. 388.
96 (1966) 69 N.L.R. 256.
97 See de Smith, *op. cit.* 578 - 586.

delay[98] or acquiescence or waiver or because their issue would be vexatious or futile or because of the probable consequences of their issue.[99] In *P. S. Bus Co., Ltd.* v. *Ceylon Transport Board*[100] the court refused the writ on the ground that the consequences of granting the writ would be disastrous, and stated : " It would result in all the legislation passed by Parliament since it came into existence and all its actions liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid ; it would disturb the peace and quiet of the country ; and above all, it will bring the government of the country to a standstill."

Although as a general rule the Supreme Court will not grant these writs where there is an alternative and equally convenient remedy, the rule is not a rigid one. If the applicant satisfies the court that the decision has been made without jurisdiction or in complete disregard of the rules of natural justice, the writs will lie even though an alternative remedy is also available.[101] In *Sirisena* v. *Kotawera-Udagama Co-operative Stores Ltd.*[102] certiorari was granted to quash the award of an arbitrator made in flagrant excess of his statutory jurisdiction under the Co-operative Societies Ordinance even though an alternative remedy was available under the Ordinance. " Where an aggrieved party applies for certiorari in respect of an order made by a quasi-judicial body which had acted in the particular matter where it totally lacked jurisdiction, that party is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary ."[103]

Practice and procedure.

No Rules have been made by the Supreme Court with regard to the procedure to be adopted in applications for writs. It is, however, desirable that the procedure should be governed by such Rules. The present practice is by way of application to the Supreme Court by way of petition together with an affidavit

98 See *e.g. R.* v. *Stafford Justices, ex parte Stafford Corporation* (1940) 2 K.B. 33.
99 *P. S. Bus Co., Ltd.* v. *Ceylon Transport Board* (1958) 61 N.L.R. 491. See also *R.* v. *Paddington Valuation Officer, ex parte Peachy Property Corporation Ltd.* (1965) 2 All E. R. 836.
100 *Supra* at 496 - 497.
101 *Sirisena* v. *Kotawera-Udagama Co-operative Stores Ltd.*, (1949) 51 N.L.R. 262 *R.* v. *Wandsworth Justices, ex parte Reid* (1942) 1 All E.R. 56; *R.* v. *Postmaster-Geneal, ex parte Carmichael* (1928) 1 K.B. 291 ; *R.* v. *Paddington Valuation Officer, ex parte Peachy Property Corporation Ltd.* (1966) 1 Q.B. 380 ; see also de Smith *op. cit.* 436 - 438.
102 *Supra.*
103 *Kandy Omnibus Co., Ltd.* v. *Roberts* (1954) 56 N.L.R. 293.

verifying the statement of facts relied upon in the petition. Fresh evidence to supplement that in the record is not receivable except where there is an objection to the jurisdiction on the ground of disqualification of the members of the tribunal or on the ground of the bias or interest in the subject-matter.[104] Cross-examination of deponents on their affidavits is permitted in exceptional circumstances.[105] Persons other than those who are parties to the application are not entitled to take part in the proceedings as intervenients.[106]

III

Statutory restriction of judicial review through certiorari.

Statutes in Ceylon sometimes purport to exclude judicial review of administrative decisions and of subordinate legislation.[107] The statement made in this connection by Professor S. A. de Smith with reference to Britain is also true of Ceylon. He states : " The Executive has shown an understandable reluctance to offer the citizen a sporting chance of disturbing the course of administration, and has secured the passage of legislation designed to protect the exercise of its administrative and subordinate legislative powers against effective challenge in the courts. In addition, attempts have been made to limit or take away the inherent supervisory jurisdiction of the High Court over the determination of some classes of claims and controversies by Ministers and special tribunals."[108]

There is a strong presumption against the statutory exclusion of the jurisdiction of the ordinary courts of law. It is indeed a principle of the law of Ceylon that every person has a right of access to the courts for the determination of his legal rights and such access cannot be denied except by clear words of legislation.[109]

104 *Mudanayake* v. *Sivagnanasunderam* (1951) 53 N.L.R. 25 ; *R.* v. *Nat Bell Liquors Ltd.* (1922) 2 A.C. 128 at 160.

105 *Mansoor* v. *Minister of Defence and External Affairs* (1963) 64 N.L.R. 498. *R.* v. *Stokesley (Yorks.) Justices, ex parte Bartram* (1956) 1 All E.R. 563. de Smith, *op. cit.* at 441.

106 *Chandrasena* v. *de Silva* (1961) 64 N.L.R. 143.

107 See, for example, Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961, s. 9 ; (" A Vesting Order (made by the Minister) shall be final and conclusive and shall not be called in question in any court whether by way of writ, order, mandate or otherwise ") ; see also similar provisions in the Criminal Law (Special Provisions) Act, No. 1 of 1962, s. 8, and the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, s. 25.

108 *Judicial Review of Administrative Action* (2nd ed.) 340.

109 *Modera Patuwata Co-operative Fishing Society Ltd.* v. *Gunawardena* (1959) 62 N.L.R. 188 at 192 ; *Aziz* v. *Thondaman* (1959) 61 N.L.R. 217 at 222 - 223; *Andrews* v. *Mitchell* (1905) A. C. 78 ; *Chester* v. *Bateson* (1920) 1 K.B. 829 ; *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1960) A.C. 260 at 286.

It is relevant in this connection to point out that in Ceylon the judicial power was wielded by the Judicature under the Charter of Justice in 1833 and later under the Courts Ordinance in 1889. Under the Charter as well as under the Courts Ordinance the Supreme Court was empowered in the exercise of its judicial power to grant remedies or writs of certiorari, prohibition, mandamus, procedendo and habeas corpus.[110] Under the Constitution of Ceylon which was enacted in 1946 the judicial power has remained where it had lain for more than a century and it cannot be eroded or infringed by the legislature.[111] It appears therefore to be doubtful whether judicial review of powers and the methods by way of writs through which review is exercised by the Court can be taken away in the course of ordinary legislation.[112]

In England, it is now provided by section ii of the Tribunals and Inquiries Act, 1958, that any provision in an Act passed before the abovementioned Act stating that any order or determination shall not be called in question in any court shall not, subject to certain exceptions, prevent the grant of the remedies of certiorari and mandamus.[113] In Italy the Constitution itself provides in Articles 113 that judicial review cannot be " excluded from nor confined to particular methods of challenge or particular categories of acts."[114]

Under the common law, a general finality clause in a statute that a determination or decision of a public authority " shall be final and conclusive " does not restrict or prevent the courts from exercising their powers of review to correct patent errors of law[115] or jurisdictional defects.[116] Nor does such a clause affect the power of the court to grant a declaratory judgement that the determination or order is invalid.[117]

Where a finality clause forbids the correction of errors of law by providing, for example, that the determination " shall not be

110 Charter of Justice, ss. 36 and 49 ; Courts Ordinance, ss. 42 and 45.

111 *Liyanage and others* v. *The Queen* (1965) 68 N.L.R. 265 at 281 - 283 ; *Kariapper* v. *Wijesinghe* (1967) 70 N.L.R. 49 at 53 ; see also *Bribery Commissioner* v. *Ranasinghe* (1964) 66 N.L.R. 73.

112 See the doubts expressed by H. N. G. Fernando S.P.J. (later C.J.) in *Anthony Naide* v. *The Ceylon Tea Plantations Co. Ltd.*(1966) 68 N.L.R. 558 at 570.

113 See also Franks Report, para 117, and the *Report of the Committee on Minister's Powers*, Cmd. 4060 (1932) para 65.

114 See S. Galeotti, " *The Judicial Control of Public Authorities in England and in Italy* (1954), 89.

115 *R.* v. *Minister of Transport, ex parte H.C. Motor Works Ltd.*(1927)2 K.B. 401.

116 *R.* v. *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 574; *R.* v. *Nat Bell Liquors Ltd.* (1922) A.C. 128 at 159 - 160 ; see also *United States ex rel. Trinler* v. *Caruse*, 166 F. 2d. 457, 460 - 461 ; *Estep* v. *Unites States* 327 U.S. 114, 120 (1946).

117 *The Land Commissioner* v. *Ladamuttu Pillai* (1960) 62 N.L.R. 196 ; *Pyx Granite Co.* v. *Minister of Housing and Local Government* (1960) A.C. 260 ; *Ridge* v. *Baldwin* (1964) A.C. 40.

called in question in any court of law, " the court may still consider whether the decision was within " the area of inferior jurisdiction, " although it may be prevented from considering errors of law not going to jurisdiction. Even where the right to certiorari has been expressly taken away by statute, the court may nevertheless issue the writ if the inferior tribunal has exceeded its jurisdiction and acted *ultra vires*, on the ground that Parliament could not have intended the tribunal to exceed its powers without the possibility of checks and scrutinies of the courts.[118]

There is a distinction between, on the one hand, an error made in the exercise of jurisdiction (such as a mere construction of an Act of Parliament) and, on the other, an error in deciding whether jurisdiction can be assumed (such as disregarding the provisions of a statute and considering matters which ought not to be considered.)[119] The determination, in order that it may be final in such cases, must be a real determination, not one which purports to be a determination but which in fact is no determination at all, and is a nullity.[120] But where a statute provided that a compulsory purchase order of a public authority could not be questioned " in any legal proceedings whatsoever " after the expiry of the prescribed period of time, it has been held by the House of Lords in England, by a majority of three to two, that the validity of such an order cannot be challenged in the courts after the prescribed period, even on the ground that it had been made in bad faith.[121] It has since been stated by the House of Lords that this case needs reconsideration, if a case arose where bad faith was alleged.[122]

Another example of an exclusive clause is that an order or regulation made by a public authority " shall on publication in the Gazette, have the force of law " or " shall have effect as if enacted in this Act. " These will not have the effect of excluding judicial review if the order or regulation is in conflict or is inconsistent with the provisions of the Act.[123] The Donoughmore Committee on Ministers ' Powers in England has pointed out in its Report[124] that the House of Lords in *Minister of Health* v. *The King* (*on the prosecu-*

118 *Ram Banda* v. *River Valleys Development Board* (1968) 71 N.L.R. 25 at 38, *per* Weeramantry J ; *Anisminic Limited* v. *Foreign Compensation Commission* (1969) 1 All E.R. 208 at 213, 221 - 2, 224 - 5, 238 ; *Ridge* v. *Baldwin* (1964) A.C. 40 at 120 - 21; S. A. de Smith, *op. cit.* at 346.

119 *Anisminic* case, at 225 (citing Kennedy J. in *R.* v. *Cotham* (1898) 1 Q. B. 802 at 896).

120 *Anisminic* case, at 213, *per* Lord Reid.

121 *Smith* v. *East Elloe Rural District Council* (1956) A.C. 736.

122 *Anisminic* case, at 213, 221, 238, 246.

123 *Subramaniam* v. *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254 at 261; *Minister of Health* v. *The King, ex parte Yaffe* (1931) A.C. 494 ; cf. *Institute of Patent Agents* v. *Lockwood* (1894) A.C. 347.

124 Cmd. 4060, p. 40.

cution of Yaffē) [125] " laid it down that while the provision makes the order speak as if it were contained in the Act, the Act in which it is contained is the Act which empowers the making of the order, and that therefore, if the order as made conflicts with the Act, it will have to give way to the Act. In other words, if in the opinion of the Court the order is inconsistent with the provisions of the Act which authorises it, the order will be bad. "

Nor does a statutory provision that every regulation made by the Minister should be placed before Parliament for approval and that, on such approval and publication in the Gazette, it shall be " as valid and effectual as though it were herein enacted ", confer validity on a regulation which is outside the scope of the enabling powers.[126] The mere 'passage of such a regulation through Parliament does not give it the *imprimatur* of the legislature in such a way as to remove it from the purview of the courts on the ground of *ultra vires.*[127] Nor does section 17 (i) (e) of the Interpretation Ordinance that " all rules shall be published in the Gazette and shall have the force of law as if they had been enacted in the Ordinance or Act of Parliament " by itself clothe such rules with validity.[128]

Future of certiorari.

It has been seen already that there are many deficiencies associated with certiorari and other writs such as the difficulty of distinguishing " judicial " from " administrative " acts and of defining the phrase " excess of jurisdiction. " Moreover, in a writ proceeding no discovery of documents can be obtained nor can such a proceeding be combined with ordinary civil remedies such as injunction and damages.

The technicalities, procedural defects and other deficiencies of these writs as compared with the superior flexibility of the declaratory judgment have persuaded a distinguished American jurist to suggest that " either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinkers to prevent them from rising again.[129] Lord Denning too

125 (1931) A.C. 494.

126 *Ram Banda* v. *River Valleys Development Board* (1968) 71 N.L.R. 25.

127 *Ram Banda's* case (*supra*) ; see also *The Pinikahana Kahaduwa Co-operative Society Ltd.* v. *Herat* (1957) 59 N.L.R. 145 at 152 - 156; *Lockwood's* case *op. cit.* at 366 ; *Bowles* v. *Bank of England* (1913) 1 Ch. 57; *Stockdale* v. *Hansard* (1839)9 A & E I. Cf. *Sparkes* v. *Edward Ash Ltd.* (1943) K.B. 223 at 230, *Lockwood's* case (*supra*) at 357 and *Yaffe's* case *op. cit.* at 502 - 03, *per* Viscount Dunedin.

128 *Ram Banda's* case (*supra*) at 33 ; cf. *Abdul Cader* v. *Sittinisa* (1951) 52 N.L.R. 536.

129 Kenneth Culp Davis, "The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence, " 61 *Columbia Law Review* 201, 204 (1961). See also the same author's article on "English Administrative Law—An American View" in (1962) *Public Law* 139; cf. Louis L. Jaffe, " English Administrative Law—A Reply to Professor Davis" (1962) *Public Law* 407; Walter Gellhorn and Clark Byse, *Administrative Law* (4th ed.), 405 n. 9.

has suggested that the procedure of mandamus and certiorari are not suitable for the winning of freedom in the new age. He has stated: " They must be replaced by new and up-to-date machinery by declarations, injunctions and actions for negligence; and, in judicial matters, by compulsory powers to order a case stated. This is not a task for Parliament.....The Courts must do this. Of all the great tasks that lie ahead, this is the greatest. " [130]

These views are indeed controversial but there cannot be much doubt that the usefulness of these writs would be greatly enhanced in our changing society by the adoption of more flexible rules with regard to the scope of the writs and by a reform of their procedure. Professor H. W. R. Wade of England has said : " We need to build up something like the concept of ' due process of law' "[131] and " the courts should return to their fine tradition of enforcing the rules of natural justice as general principles ; certiorari could then continue to play its historic part,subject tothe necessary procedural reform."[132] Writing in 1962 Professor Wade complained that English administrative law was suffering from weakness and uncertainty and that it needed " the unifying, strengthening and improving spirit that Holt and Mansfield breathed into our commercial law..... ."[133]

But, as Professor S. A. de Smith has stated,[134] " in a series of cases decided in the 1960's, the English courts and the Privy Council gradually began to evacuate the untenable positions that were being adopted in the early 1950's and to address themselves to essentials. " The most notable of these cases is of course *Ridge* v. *Baldwin*.[135] In his celebrated speech Lord Reid outlined a broad conception of the " judicial " function requiring the application of the rules of natural justice and arising by implication from the nature of the function itself and the circumstances in which it is exercised.[136] So far as Ceylon is concerned, this modern trend towards the avoidance of technicalities and the formulation of a judicial policy of fair administrative procedure relating to administrative action is also visible in certain recent cases decided both in the Supreme Court[137] and on

130 *Freedom under the Law* (1949) 126. See also *Pyx Granite Co., Ltd.* v. *Ministry of Housing and Local Government* (1958)1 Q.B. 554 at 570 and Lord MacDermott, *Protection from Power under English Law* (1957) 88.
131 " Law, Opinion and Administration " (1962) 78 L.Q.R. 188 at 192.
132 " The Future of Certiorari " (1958) *Cambridge Law Journal*, 218 at 228.
133 " Law, Opinion and Administration " (1962) 78 L.Q.R. 188 at 200.
134 *Judicial Review of Administrative Action* (2nd ed.) 158 - 159.
135 (1964) A. C. 40.
136 At 73 - 79.
137 *Subramaniam* v. *Minister of Local Government and Cultural Affairs* (1957) 59 N.L.R. 254 ; *Samuel* v. *de Silva* (1959) 60 N.L.R. 547 ; *Munasinghe* v. *Auditor-General* (1963) 64 N.L.R. 474.

appeal in the Privy Council.[138] As long as this trend continues, there would not be the same urgent need to replace certiorari and other writs by new machinery, as had been suggested in England[139] during what may be called the " dark age " of natural justice.

JOSEPH A. L. COORAY*

138 *University of Ceylon* v. *Fernando* (1960) 61 N.L.R. 505 ; *Maradana Mosque (Board of Trustees)* v. *Ministry of Education* (1966) 68 N.L.R. 217 ; *Durayappah* v. *Fernando* (1966) 69 N.L.R. 265.

139 See notes 129 and 130 (*ante*).

*LL.B. (Lond.), Advocate ; Lecturer in Constitutional and Administrative Law, Ceylon Law College ; Member, Ceylon Law Commission.

THE SOURCES OF SINHALESE CUSTOMARY LAWS

The Sinhalese laws, (the survivals of which are called today Kandyan Law) have their origins in customs introduced, in an elementary state, by the Aryan immigrants that came to Ceylon from the North West and North East of India a few centuries before the Christian era and by other Aryan groups who arrived in Ceylon with the introduction of Buddhism. These mainly ranged in the beginning round the King, the Caste system and the system of land holding in a small agricultural community.

These customs began to be developed in their island home thereafter into a system which suited a feudal agricultural society of which the King (*Rājā*) was always the head. In the course of its growth for almost twenty-three centuries the Sinhalese legal system gathered material from various quarters. It appears to us that the following sources furnished material in the beginning and subsequently, to the development of the Sinhalese customary laws up to the end of the Sinhalese Kingdom :—

(1) Hindu laws and customs
(2) Canonical writings, practices and rites of Buddhism
(3) Sakyan and Mauryan customs
(4) *Pera Sirit* (former or immemorial customs)
(5) *Kula Sirit* (customs of clans and castes)
(6) *Gam Sirit* (customs mainly connected with land holding in villages)
(7) South Indian customs.

We shall now discuss them individually.

(1) Hindu Laws and Customs

Foremost amongst the sources stand Hindu laws and customs which constituted the base upon which the Sinhalese system stood and developed. As the Sinhalese people had been mainly Hindus in the first two and half centuries of their existence in Ceylon it is quite possible that with their religious beliefs and practices they brought with them some form of Hindu customary laws and institutions as well. This position is supported by the fact that the Hindus who migrated to South East Asia took with them their customary laws as we shall show later on. As to the religious beliefs of the Sinhalese at the time of their settlement in Ceylon Dr. Paranavitane says that

these beliefs could not have been different in their essentials from those which prevailed in their original home at that time. He says further " The religion of the higher classes of society in North India in those days was that reflected in the earlier strata of the two great Indian Epics the *Rāmāyana* and the *Maha Bhārata.*"[1] Professor Geiger describes the original religion of the Sinhalese as " a popular form of Hinduism."[2] As to the laws and customs which the first ruler and the people brought to Ceylon Sir Alexander Johnstone states in a letter to the Secretary of the Royal Asiatic Society of Great Britain, while forwarding D'Oyly's *Sketch of the Constitution of the Kandyan Kingdom,* that the first ruler introduced into Ceylon " the same form of government, the same laws and the same forms of institutions as prevailed at that time in his native country."[3] Sir Alexander goes on to state that he had got some ancient History Books translated into English and comments " It further appears by the same ancient authorities and by many modern histories in my possession that this form of government and that these laws and institutions had never been altered or modified by any foreign conqueror but had continued to prevail in the original state from the time they were first introduced into the interior of Ceylon till the year 1815 when the Kingdom of Kandy was conquered by the British Arms and when the account of its ancient government was drawn up by Sir John D'Oyly the chief civil officer of the British Government in Kandy from the information of principal officers of the former Kandyan government."[4] Without considering these statements of Sir Alexander carefully, and finding out whether any existing customs or institutions in the Kandyan Kingdom could be co-related to these statements, Dr. Ralph Pieris criticises them in very picturesque language as " a wandering into the nebulous realm of conjectural history."[5] While admitting that there were some changes and introductions of new and unknown customs among the Sinhalese during the time of the Tamil invasions, certain fundamental customs endured generally from the beginning up to the end of the Kandyan Kingdom. We could thus see that Sir Alexander's first statement that the original settlers introduced into Ceylon the same forms of government, same laws and institutions as prevailed in their home country is not devoid of some degree of truth.[6] The

1 *University History of Ceylon*, Vol. I Part I, p. 135 (1959).
2 *Culture of Ceylon in Mediaeval Times*, p. 164.
3 Public Record Office London, Colonial Office Series 54/124. Also *Royal Asiatic Society Transactions* (1832).
4 *Ibid.*
5 Dr. Ralph Pieris, *Sinhalese Social Organisation*, p. 5 footnote 9 (1956).
6 The Kandyan Priests whom Governor Falk interviewed, seem to suggest that Vijaya the first King gave laws. Bertolacci, *View of Ceylon*, pp. 451, 452 and 453 (1817).

position of Sir Alexander is supported by both external and internal evidence. External evidence comes in the form of the practices of the Hindus who emigrated before and after the Christian era to other parts of Asia,*viz.*, South East Asian countries like Burma,Siam, Malaya and Java, and founded settlements there. Internal evidence is supplied by some institutions existing in the last days of the Kandyan Kingdom which existed among the Sinhalese in the 5th or 6th century B.C. when they first came to Ceylon. Taking external evidence first we see that writers on Hindu expansion overseas mention the institutions, laws and customs which Hindus took away with them and established in their new homes. R. C. Majumdar describes the Hindu colonies in countries like Burma, Siam, Malay Peninsula and Java and shows how the Hindu colonists introduced into these countries Hindu culture, civilization and religion. Discussing Hindu civilization in Suvarnadvipa, Majumdar says "The Sanskrit inscriptions discovered at Borneo, Java and Malay Peninsula lead to the conclusion that the language, literature, religion and political and social institutions of India made a thorough conquest of these far off lands and to a great extent eliminated or absorbed the native elements in these respects."[7] Speaking of the colonies in the Far East he says "The Indian colonists in the Far East transplanted to their land of adoption the cultural ideas with which they were imbued at home."[8] The earliest law book in Burma, the Dhammathat, owed its origin to the Code of Manu which was taken by the Hindu colonists who went to Burma about the 3rd century A.D.[9] Therefore it seems quite natural that the Sinhalese being Hindus at that time brought with them such laws and customs they were used to at home in the same way that English settlers of the 17th and 18th centuries took with them their Common Law to America and Australia. Professor Geiger's views on laws and customs brought over by the Sinhalese also support Sir Alexander. Professor Geiger states in his last work "The Colonists no doubt brought along with them as an inheritance from their ancestors the remembrances of Indian Customs and institutions, the Indian ideology, concerning social organisation and the superior or inferior position of the various classes. But we have also seen that the new colonists first came under Dravidian influence and the infusion of Dravidian ingredients into the Aryan civilisation was therefore inevitable. But fortunately very soon a lively intercourse set in with the Aryan N. E. India, with Kalinga, Magadha, Bengal, and this intercourse was never interrupted so that the Sinhalese retaining

7 R. C. Majumdar, *Hindu Colonies in the Far East*, p. 23.
8 *Ibid.* p. 26.
9 See J. D. Mayne, *Hindu Law and Usage*, p. 25.

on the whole its Aryan character could develop on parallel lines with the Indo-Aryan culture. The fundamental basis of this culture was the caste system which in the course of time gradually had become very complicated with innumerable sub-divisions, and with a vast number of prescriptions and regulations."[10]

As regards internal evidence, we see the existence of the following Hindu institutions and customs which the Sinhalese seemed to have brought with them.

(*a*) Kingship. We learn from the Mahavamsa and the inscriptions that kingship was considered essential in Sinhalese society. We even see King Sahasamalla making an addition to his step brother's political theorities by stating in an inscription "*rajahu näti rajaya nam niya muva näti nävak se no pavatne-ya, hiru nati davasa se no-h' obaneya.*" "A Kingdom without a King like a ship without a steersman would not endure ; like a day without the sun it would be lustreless.".[11]

(*b*) The Caste System. The Sinhalese brought with them the Aryan caste system of four Varnas (*Catubbannam* in Pali). Sir Emerson Tennent says "The followers and successors of Wijaye preserved intact the institutions of caste which they had brought with them from the Valley of the Ganges and although caste was not abolished by the teachers of Buddhism, who retained and respected it as a social institution, it was practically annulled and absorbed in the religious character — all who embraced the ascetic life simultaneously absolved from all conventional disabilities and received as members of the Sacred Community with all its exalted prerogatives."[12] Speaking of caste and slavery Dr. Hayley says "At any rate the caste system which came over with the invaders seems if the Chronicles are a safe guide to have progressed from the earliest period on lines similar to those which it has followed in recent times and existed side by side with slavery ."[13] Slavery too which was of a very mild kind existed from ancient times.

(*c*) Patriliny in the descent and inheritence of kingship and also property, existed from the very beginning. The patriarchal family was the rule with the father as the head of the family. The marriage, *digha*, akin to or derived from the Brahma form of marriage was also the rule.

10 *Op. cit. supra* note 2 at p. 23.
11 *Epigraphia Zeylancia*, Vol. 2 p. 225.
12 Tennent, *Ceylon: An Account of the Island, Physical, Historical and Topographical.* Vol. I p. 350.
13 Hayley, *Sinhalese Laws and Customs*, p. 135 (1923).

(*d*) Concept of *gama*, the Aryan village as described by Sir John Budd Phear and other writers, was brought over by the early settlers. The original *gama* round the *wewa* (*vāpi*) tank is one of the earliest Sinhalese institutions which has survived up to date in the North Central Province.

The Hindu laws and customs thus brought would have developed with further additions into the traditional law in course of time in Ceylon and would have been handed down as a part of *pera sirit*.

Hindu law also came in later stages. We see in the time of Samudra Gupta not only intercourse between India and Ceylon but also a spread of Sanskrit learning and culture of the time. This further spread of Sanskrit learning was not without effect in Ceylon. Dr. Ariyapala says " Under Samudra Gupta and Chandra Gupta II North India attained a higher standard of prosperity and culture than it had experienced since the days of the Mauryas. Both Buddhism and Hinduism supported by the Kings revived and flourished. Sanskrit became the language of the Court. Fine Arts were developed and learning spread under the imperial Guptas. Indian influence on Ceylon during the Gupta period was quite extensive, but it appears to have weakened considerably after the time of Skanda Gupta (A.D. 470.) Sanskrit was not only the language of the Mahayanist Scriptures but was also the language of Hinduism and therefore it had a double significance. Thus with this powerful influence Sanskrit learning spread in Ceylon bringing scholars into touch with more secular subjects such as medicine and prosody. "[14]

This close connection between Ceylon and North India is attested by E. B. Havell. He says " The Buddhist chronicles of Ceylon throw interesting light upon the history of the Gupta era. They both explain why Samudra Gupta refrained from any attempt to repeat Rama's final exploit by the conquest of Ceylon and prove that there was no narrow sectarian feeling in the Aryan revival which the Gupta era inaugurated. Ceylon at that time was practically a part of Aryan India. Its dynasty was of Indo-Aryan not Dravidian descent and Hinayana Buddhism which flourished there was representative of the older Aryan culture of Asoka's time. There was therefore no feeling of racial or religious antagonism between Ceylon and the Aryans of Northern India ."[15] Another fact which would have facilitated spread of Sanskrit culture in Ceylon was the establishment of a Sinhalese *Arama* in North India. Havell continues " At the beginning of Samudra Gupta's reign, the reigning King of

14 M. B. Ariyapāla, *Society in Mediaeval Ceylon*, p. 5.
15 E. B. Havell, *History of Aryan Rule in India*, p. 153.

Ceylon had despatched a mission with costly presents which had established cordial relations between the two rulers and had led to the fulfilment of Meghavarna's desire to found a monastery near the Bodhi tree at Gaya for the benefit of Sinhalese students and pilgrims[16]. We see that during this period even Sanskrit literary works were composed in Ceylon as for example King Buddhadasa's Book of Medicine. A claim is also made that a Sinhalese King Kumaradāsa composed the Sanskrit work *Jānakiharana.* Under the above circumstances it is conceivable that some at least of the Hindu laws current at the time reached Ceylon.

The next stage when the Hindu *Nīti* literature came to Ceylon was in the Polonnaruva period. We see institutions from Kautilya and Manu referred to in the chronicles and inscriptions. The punishments inflicted on the guilty show the influence of *Dandanīti.* The *Wewāl Katiya* and Badulla Pillar inscriptions of the period also reflect the influence of Hindu Laws. The restitution of property in theft and the practice of putting people in *valakma* (derived from Hindu custom *dharna*) to compel payment of dues are sanctioned by Hindu Laws. The *panca maha pātaka* (five great crimes) of Hindu Law have been recognised in the Sinhalese system. Manu became the leading authority on Hindu Law. As there was a mixture of the four castes General Ayasmanta had a law book written after separating the castes.

In the Kotte and Kandyan times too these laws would have continued to operate. The position is not quite clear as to how far the Shastras were applied in Ceylon. The last King, however, tried to justify his actions on this score as Henry Marshall observes. Marshall describing a conversation with the King says, " In the course of conversation he entered upon a discussion in regard to the cause of thunder and lightning. Some allusion having been made to the severity of the King's punishments he rather testily observed 'I governed my Kingdom according to the Shastras'."[16a]

Apart from the cruel punishments inflicted by other Kings and some references to some kind of crimes, there seems to be hardly any other evidence to justify the conclusion that the whole of the Hindu criminal law obtained in Ceylon. It is quite possible that for serious crimes like *rājaparāda kamma* (treason) and other serious offences the Hindu Law could have been applied as at least from, if not earlier than, Polonnaruva times. In the sphere of Buddhist Ecclesiastical law however certain Hindu customs have come in as we shall show later on.

16 *Ibid.* p. 154.
16*a* Marshall, *A General Description of the Island and its Inhabitants.*

(2) Canonical Writings, Practices and Rites of Buddhism.

With the advent of Mahinda and the conversion of King Tissa to Buddhism there arose not only the *Mahavihāre* as the centre of Buddhist learning but also a great ecclesiastical body, the order of Monks, the *Sangha*. To control the conduct of this body the Buddha had established rules and regulations which had the effect of positive law in the Austinian sense. It would appear that the Buddha did not at first lay down any rules of law. But when he found persons joining the Sangha to escape from their political, economic and social obligations and when members of his Sangha acted in a way unbecoming of a Bhikku he laid down a rule on each occasion and gradually a set of rules arose which took the form of a code called the *Vinaya* or *Vinaya Pitaka*. The infringements of these rules entailed punishments of varying degrees depending on the gravity of the offences. The *Vinaya Pitaka* was brought to Ceylon with the establishment of the *Sāsana* (Buddhist Church) by Mahinda along with the other two *Pitakas* called collectively the *Trīpitaka* (Three Baskets) which contain the doctrines and teachings of Buddhism. This *Vinaya Pitaka* became *par excellence* positive law which the members of the *Sangha* had to observe depending as they did on the bounty of the King and the people. When Kings granted lands for the maintenance of Viharas we see them inscribing on stone some rules of the *Vinaya* to be observed scrupulously by the grantees. The King as the chief lay patron or the protector of the church would see that the priesthood observed the ecclesiastical law applicable to them. Occasionally when the *Sangha* became corrupt the Kings would cleanse the Church, by act of *dhamma kamma* by causing the head of the church to publish a *katikāva* and root out the corrupt clergy. It is also a common feature that when lands were granted the Kings gave certain immunities and privileges as the inscriptions show. As a result of the pious acts of Kings in granting large tracts of land to the Buddhist monasteries to enable them to carry on their work, we see that in course of time a large extent of land became *Viharagam* (temple villages) with tenants enjoying allotments in them and performing services according to customary law to the monasteries, in lieu of rent.

In course of time perhaps due to Hindu influence rules of succession to temples and temple lands called *sisyānu sisya paramparāwa* and *siwuru param parāwa* began to be developed.

As regards the laity there does not seem to exist any rules of law springing from Buddhist tenets governing their personal or proprietary relationships, as Buddhism was mainly concerned with realisation of the sorrows of existence and the twin doctrines of

Kamma and Rebirth and the methods of ultimate attainment of the highest bliss, *Nibbāna.* There is an absence of belief in, and reliance on, God or commands from Him for man to observe. Buddhism thus conferred the highest liberty on individuals leaving them to accept and follow central doctrines if they were convinced on their own of their truth and not otherwise. Men and women had to work out their own salvation by their own efforts. There are no dogmas, injunctions, rituals or a code of laws in Buddhism binding on the laity as the Buddha did not claim to be God (or a God), son of God or a prophet of God. He was a Teacher who had attained Buddhahood and discovered the Truths of life which earlier Buddhas had discovered, *i.e.*, the Four Noble Truths, and taught a way of life, the middle path as lying between extreme asceticism and a life of luxury and prescribed the means, the eightfold path, to escape from a series of rebirths and to ultimately attain *Nibbāna* (Pali form of Sanskrit Nirvāna). The rules nearest to law which a lay Buddhist had to follow apart from the Five Precepts (*Panca Sīla*)[17] of daily life would be those contained in the *Sigālovāda Suttanta* which is popularly referred to as the *Gihivinaya* (*Vinaya* for the laymen) in Dialogues of the Buddha Part III Book IV XXX. In this discourse the Buddha discusses the duties of a householder towards various persons he has relations with. When Buddha saw a householder's son young Sigāla rising in the morning and with wet hair and garments worshipping the several quarters of the earth and sky the East, South, West, North, and Nadir and the Zenith, he asked him why he was doing so. Sigāla replied that he was thus worshipping at the request of his dead father. Then the Buddha said that he should not worship in that way and stated that the following should be looked upon as the six quarters, *viz.*, parents as the East, teachers as the South, wife and children as the West, friends and companions as the North, servants and workpeople as the Nadir, Religious teachers and Brahmins as the Zenith. The Buddha then proceeded to give the relative duties of the householder towards people represented by each of the quarters and their duties towards the householder.

17 The first and most important of the five is the respect for all forms of life (*Ahimsā*). This is a sequel to Buddha being one of the kindest of world Teachers. Hence he was called *Maha Kāruniko Nātho* (Great Compassionate Lord).

As Buddhism did not provide rules on mundane matters like marriage[17a], inheritance, etc. the Sinhalese Buddhists had to fall back on Hindu law in respect of them.[18]

As a result of Buddhism there sprang up the practice of Kings ordering in inscriptions *Māghāta i.e.*, non-slaying of wild animals in forests and non-killing of fish in tanks. We thus see the beginnings of game and fauna protection laws in the Sinhalese Kingdom. This practice is continued on a restricted basis today by the establishment of game reserves by the Fauna and Flora Protection Ordinance.

The rights of Sanctuary (*Abhaya*), too were conferred on holy places and monasteries. Criminals escaping thereto were immune from arrest. Various privileges and immunities were given to temple lands.

Along with Buddhism came certain Buddhist rites and practices, some of which had Hindu origins. The method by which property given to the Buddhist church is rendered Sanghika by the ceremony of pouring water onto the hands of the donee, with certain words being spoken, became part of Ceylon's Buddhist Ecclesiastical law. The erection of *sīma* or boundaries on lands granted to the Church became an important and necessary feature in grants to the Church. The property given in the prescribed manner could not be taken back. Various other rites and practices having legal consequences began to be evolved in Ceylon in the course of centuries. We see the derivation of the theory of Kingship and *Abhiseka* from Buddhist canonical writings. Commentaries on the Pali cannon written in Ceylon like Buddha Ghosa's *Sumangala Vilāsini* and *Samantha Pāsādika* are sources of some legal institutions and customs of the Sinhalese. Slavery and its origins are discussed in *Sumangala Vilāsini* while the *Samantha Pāsādika* gives very interesting insight into the property rights of the Sangha in relation to the law of theft for example.

(3) Sakyan and Mauryan Customs

The Sakyans who came to Ceylon before the arrival of Mahinda have brought with them some of their customs which have got engrafted into the Sinhalese legal system. Though there is no

17*a* The memorial of Kandyan Chiefs sent to Governor Sir Henry Ward in 1859 said *inter alia* " That the religion of Buddha which is the national faith of the memorialists prescribes no rules regarding marriage".

18 Both Jardine and Dr. Forchhammer have pointed out the dependence of the Burmese Buddhists on Dhammathat based on Manu for their personal law. See *Notes on Buddhist Law* by John Jardine, and *Introductory Remarks* by Dr. E. Forchchammer (1882).

precise information as to what extent their customs applied, we see in the Sinhalese legal system certain practices and institutions characteristic of Sakyan life in the time of the Buddha. In the personal law of the Sinhalese we can say that the independence the married women enjoyed in respect of their personal and proprietary relationships is derived from Sakyan sources. The present and past Sinhalese custom of a man marrying his *ewēssa* cousin which has been recognized in a Kandyan Law Ordinance of recent times[19] is also derived, in our opinion, from Sakyan customs.

With the advent of Mahinda and the Mauryan clans came also Mauryan customs. We see that the *Abhisēka* of Kings came from this quarter. The Lambakanna and other Kshattriya clans brought their *kulasirit* and the *khattiya dhamma.* R. W. Ievers has gone into the history of Mauryan descendants of the North Central Provinces. He says, "The Suriyawanse Nuwarawewa family claim descent from ancestors who accompanied the Bo-Tree to Ceylon 289 B.C. There are several villages dedicated to the *Uda Maluwa* (Bo-Tree Vihare) inhabited by low caste (sic) people. These "*Durai*" were originally *Pannayo* or *Panna Durai.* These *Pannayas* claim also descent from persons who accompanied the Bo-Tree (for it may be remarked that the Bo-Tree takes the same place here that William the Conqueror takes in English pedigree)."[20] The *Pannayas* had to protect the Bo-Tree from monkeys.

Certain incidents of land tenure and some *gam sirit* seem to have been derived also from Mauryan sources. Some of these seem to have been preserved in villages in the remote North Central Province as Sir John F. Dickson had shown. Ievers quotes from Dickson "The point in which the political condition of this Province especially differs from that of the rest of Ceylon is that here the original Oriental village still remains of a pure and simple type while in the rest of Ceylon it has generally disappeared under the influence of Foreign Government and the jurisdiction of English Courts. If these districts have been neglected and the villages have been left buried in their virgin forests and so have failed to share in the general progress which has been going forward around them they have at least this compensation that they have retained almost in its pristine purity the ancient village system of the Aryan races."[21]

In a brief introduction to the study of land tenure in Ceylon in ancient times Julius de Lanerolle has shown some aspects of land

19 Ordinance No. 39 of 1938.
20 R. W. Ievers, *Manual of the North Central Province, Ceylon*, p. 42 (1880).
21 *Ibid.* at p. 74.

tenure and customs brought to Ceylon by the Sakyans and the Mauryans. De Lanerolle says " It would appear however that the first settlers brought with them the system of tenure that prevailed in their homeland at the time of their departure. The earliest Indian colonies in Ceylon seem to have been populated mainly by Sakyan clans and governed by Sakyan princes who had come here from the country that eventually came to be absorbed by the well known Mauryan Empire. According to *Arthasāstra* of Kautilya (confirmed by authorities like Manu and Sukra) the land system in the Mauryan Empire was a highly developed one."[22] He points out the bringing over of some of these customs into Ceylon in the early period of Sinhalese settlement. He continues " There can be little doubt nevertheless that they practised here whatever land customs they were used to in India with such modifications as were found necessary to suit a newly opened land which was vastly different in climatic conditions, rainfall etc. etc. "[23] A systematisation of the land system was found necessary and the fixation of the village boundaries by King Pandukābhaya was an important aspect of it. We also see the arrival of Mauryan clans with the Bo-tree. They were given land and settled in Ceylon by King Tissa and it is quite likely that they observed the customs in land holding they were used to in India in respect of their lands in Ceylon. We also see that they and their descendants had to perform certain functions in relation to the Bo-tree at Anuradhapura. It would appear that some of the descendants of the Mauryan clans were performing the same services at the time Sir John Dickson became the Agent of the Government in the North Central Province (1873) and gave the earlier quoted description of the village in that province. R. W. Ievers too confirms Sir John Dickson's description.

Coming to specific customs of Mauryan origin de Lanerolle states, " When we examine the Mauryan system of land and revenue we cannot help finding quite a number of them still surviving in Ceylon. In most of them only the names differ, the customs and practices remain the same. It may not be out of place if one or two examples are cited here.

What were known as *Sītā* under the Mauryan system for instance exactly correspond to the *muttettu* fields of a *gabada-gama* so well known during the Kandy period. It is as we know the King's demesne. Only we do not know what *sītā* or *muttettu* fields were called in Ceylon during the early periods though we are quite certain

22 *Sir Paul Pieris Felicitation Volume*, p. 27.
23 *Ibid.*

that King's demesne as such did exist in Ceylon throughout the Sinhalese period."[24]

De Lanerolle continues to give some more examples of Sinhalese land customs obviously derived from Mauryan sources. He says further " Under the Mauryan system there were *bali* and *karā* while during the Kandyan and earlier times Ceylon had *otu karavvara* and *badu* of various kinds corresponding to them."[25] De Lanerolle also gives the origin of the well known *ande* system of cultivating paddy land, whereby the owner of the land gets a half share of the crops and the cultivator the other half share. " What is known as *ande* in Ceylon today " says de Lanerolle " was under the Mauryan System called *vāpūtirikta* the system under which an amount equal to the seed sown is deducted from the gross produce of the field and handed over to the tenant the balance being then divided between the King and the tenant. Similar conditions of tenure prevail also in Behar today. In Vishnupurana a tenant of this description is referred to as *ardhika*."[26]

Sir John Budd Phear who studied the Aryan village from the standpoint of both Bengal and the North Central Province of Ceylon found many common features in them. These common features are obviously due to the fact that both systems are derived from the same source, probably the Mauryan system of land holding. He shows the similarity of incidents of land tenure and customary laws in both systems of villages and says " The sketch which has been attempted in the foregoing pages seems to be sufficient to disclose a very close parallelism between the agricultural village of Ceylon and the agricultural village of Bengal or Upper India. The village head proprietor or Seignior of Ceylon is the Zamindar of Bengal. The *muttettuva* of the former is the *Ziraat* of the latter. The Sinhalese *nilakāraya* with his *panguwa* or share of the village paddy field is the Bengali *ryot* with his *jot* — with this difference that the *nilakūraya's* right in his land is almost universally hereditary and absolute subject only to the rendering of the special service to the lord while the *ryot's* tenure does not generally nowadays rise above a right of occupation with liability to variation of rent. The cultivation of *ande* of the one people is also the precise counterpart of the *batai* cultivation of the other. And the deputing of the right to cultivate the soil as distinguished from the letting out land as a commodity for a price seems to characterise both agricultural systems. The usu-

24 *Ibid.* at p. 27. See also E. H. Johnston, " Two Studies in the Arthasastra of Kautilya." *Journal of the Royal Asiatic Society of Great Britain* (1929) pp. 90, 92.
25 *Sir Paul Pieris Felicitation Volume*, p. 27.
26 *Ibid.* at p. 28.

fructuary mortgage it may be added which flows from this conception is the prevailing form of dealing with both the *panguwa* and the *jot* respectively as commodities.

Lastly we see in Ceylon as in Bengal the double set of village officers to which the relation between the members of the village republic on the one hand with their lord on the other gives rise to, *viz.*, the *gamarāla*, *lēkhama*, *kankānama*, answering to the *naib*, the *petwari*, the *gomashta* and the *velvidāne* equivalent to the *mandal* ."[27] Sir John goes on to conclude " The ways of life, customs and laws of the two populations are almost identical ".[28]

(4) Pera Sirit (Former or Immemorial Customs)

We see in the chronicles and inscriptions references to the observance of and sometimes disregard of *pera sirit* by Sinhalese Kings. The chronicles when referring to *pera sirit* (*pubba Caritta* in Pali) do not seem to define or state what they were. Generally they were customs observed by former Kings which the later Kings followed as a matter of conservative policy. Professor Geiger comments " In order to be able to fulfil his duty in the most perfect manner the King must never disregard old custom and tradition. "[29] Therefore it would appear that they would include the traditional laws brought over by the Aryans with some additions locally with the passage of time. Walpola Rāhula asks the question " What was this custom or *carittam* ? " and endeavours to answer it. He says " In ancient days the customs of virtuous men (*sadacāra*) handed down in regular succession (*paramparya krāmāgata*) formed part of the established law of the country, ranking in the same category as religious injunctions and legal enactments. In Ceylon too the law of the land was nothing but the established customs of the country. "[30] He gives instances of Kings observing religious customs. Old established customs have been sanctioned as law by Manu in several instances. Manu says " Usage is highest *dharma*, (it is) mentioned in the Vedas and approved by tradition ; therefore a prudent twice born (man) should ever be intent on this. "[31] Manu continues with further comments on custom " The Veda tradition good custom and (what is) pleasing to one's self, that (the wise) have plainly declared to be the four-fold definition of *dharma*. "[32] Manu elaborates on the idea of good custom when he

27 Sir John Budd Phear, *The Aryan Village*, p. 206 (1880).
28 *Ibid.*
29 *Op. cit. supra* note 2 at p. 132.
30 Walpola Rāhula, *History of Buddhism in Ceylon*, p. 64.
31 The Ordinance of Manu (*Trubner's* Oriental Series, *Burnell's* translation) 1 - 108.
32 *Ibid.* I - 12.

says "What customs of the (four) castes (and) the mixed castes have been handed down by course of succession in that country that is called good custom."[33] It is quite possible that the Sinhalese ideas of custom were based on and influenced by these Hindu views. In the Sinhalese system *sirit* (singular *sirita*) customs or better still ***pera sirit*** (former or immemorial customs) held the same position as the common law in England.

In order to have an idea of what exactly were these *sirit* we have to look into references to *pera sirit* in the Chronicles, and the inscriptions. We see in the Mahavamsa references to various Kings observing former customs and traditions and these Kings being considered good ones, by the chroniclers. Kassapa III and Aggabodhi III are good examples. King Udaya III's reign after he had obtained pardon from the monks of the Tapovana for disturbing the right of sanctuary, when the people rose against him, has been described

Tato Patthūya cārittam pāletva Pubba rajunam
rājā so tatyae Vasse yathā Kammam upāgami

("From that time onwards the King observed the conduct of former Kings and passed away in the third year (of his reign) in accordance with his deeds.")[34]

From this reference and from similar references to Kings' reigns in the Chronicles we can infer that a good portion of *pera sirit* would constitute constitutional law. The *pera sirit* in this instance would include therefore

(*a*) Observance by the King of the customs and traditions brought over from India by the early immigrants, the caste laws for example, and

(*b*) Observance by the King of precepts and practices that arose as a result of Buddhism, *viz.*, protection of the *loka* and *sasana*, practice of the four heart winning qualities, the *dasa raja dhamma*, avoidance of *satara agati*, respect or right of sanctuary and general rule in justice and peace (*dhammena* and *sāmena*).

From the inscriptions we can infer that secular legal customs formed part of *pera sirit* too. *Sirita* was the general word for a law, and the law was *sirit* or *pera sirit*. If we cite an example the position becomes clear. In the Badulla Pillar inscription[35] it is recorded for example

33 *Ibid.* II - 18.
34 *Culavamsa*, Chap. 53 v. 27
35 *Epigraphia Zeylancia*, Vols. 3 and 5.

Vat-himiyan Vahanse Vädiyä äpū raddaruvan Vädiya pere sirit padura dena isū.

(" On the occasion of a visit of His Majesty or of the royal princes presents according to former usage should be given ").

In the same inscription it is said :

Pohode Sal Kalūkugen Väpudayat tel paddak ganna isū Miyugun Maha Veherä Väpuda pavatvanu isū Vapudayat no läbunū kugen Pere Sirit dada-väpudayat ganna isū. (" From whomsoever trades on Sabbath (Pōya) day a padda of oil should be levied for the offering of lamps and this offering of lamps should be done at the great monastery of Miyagun. From any (such) persons from whom (this quantity of oil) is not received for the offering of lamps fines according to former custom should be taken for the offering of lamps. ")

Then we see the idea of illegality being expressed by the negative expression " *Nosirit* " in the following passage *Satalosa piriniviyan vahanse davasa kala väuasthe ikmä annäyen dada gath no sirit padura gatha gamin piye yisi väda tänä dänvu tanin Satalosa* (*Vahanse*) *davasa Kala Siritak misa*.....(" Transgressed the regulations enacted during the time of the Lord who expired in the seventh year exacted fines illegally and received presents contrary to custom..... prohibiting the unlawful acts committed in violation of the institutions of the Lord who expired in the seventh year. ") So we see that by the term *pera sirit* are included constitutional and religious customs derived from Buddhist precepts and practices and secular laws and customs derived from Hindu sources.

(5) Kula Sirit (Customs of Clans and Castes)

Kula sirit or *kulācāra* are customs of clans or families handed down for generations. Manu mentions in his treatise the eternal *dharma* of countries, castes, families also the *dharma* of heretics and of guilds.[36] We have seen various *kulas* in existence in Ceylon and they would have brought with them their *kula sirit* or *kulā cāra* from India. S. Roy defines family custom or *kulachār* to be the " Usages of a family transmitted successively (from father to son) according to law. " (*Katyayana* cited in *Viramitrodaya*.) Roy says further " It generally relates to matters affecting the members of a family in their relationship to each other and to the family as a unit. Amongst the members of a family it has an obligatory force and distinguishes the family by its rules from other families. These rules chiefly concern adoption, marriage, descent and devolution

36 The Ordinance of Manu (*Trubner's* Oriental Series, *Burnell's* translation) I - 118.

of property. "[37] It would appear that the above principles applied to Sinhalese *kula sirit*, or *kulācāra*. We see some of the family and clan customs becoming part of Sinhalese laws. To give an example, we see from Sigiriya times at least, the Sinhalese *kulas* beginning to have the marked characteristic feature of the race even today, *viz.*, the bearing of *ge* names. Each member of a family had the common *ge* (house or family) name together with his own personal name. Dr. Paranavitane mentions the presence of *ge* names in the Sigiri graffiti, perhaps the earliest observance of such a custom. He cites instances and comments " In a number of names the relationship of the individual to another person is indicated by the word *ge*, *e.g.*, *Neliyë Väsi Kasäba-himiyan ge swāmi*. The element *ge* in this and a number of other names may be taken as the word meaning "house" derived from Sanskrit *geha* or the genitive post position which itself most probably has a similar derivation. In any case there is little doubt that in names such as the one cited above we have the prototype of the modern Sinhalese *ge* names. "[38]

As to the *kula sirit* which the members of the *kulas* observed references are made in the Chronicles and inscriptions. The Sinhalese Kings allowed clans and families to observe their *kula sirit*. A good example of a *kula sirita* which became part of Sinhalese laws would be the cross-cousin marriage introduced to Ceylon by the Sakyan clans and continued down the centuries. We see from Kapuru Hamy's account of the Rata Sabhawa that families and clans in the North Central Province observed the customs of the *varige* (endogamous kin-group) and that violations of them met with social ostracism at least up to the end of the last century.

Allied to *kula sirit* were the caste laws which each caste had to observe. Due to the influence of Buddhism and absence of a religious sanction for caste and the absence of a powerful Brahmin group to regulate caste, the caste system among the Sinhalese was not so rigid. It was essentially feudal in character, and the caste system developed in the present form only from after the mediaeval period. In the late Anuradhapura times we see the continuation in a mild way of the earlier Aryan caste system of the four *Vannas*. In mediaeval times this developed into the *kulina* and the *hīne* "the haves " and " have nots " probably. Thereafter the caste system seemed to have developed on a quasi-Dravidian pattern due perhaps to Cola and Hindu influence after the mediaeval times. That these castes had their own laws can be seen from references in the Chroni-

37 S. Roy, *Customs and Customary Law in British India* (Tagore Law Lectures 1908) p. 43.
38 S. Paranavitane, *Sigiri Graffiti* Vol. I p. CCXIII.

cles occasionally. Parakkama Bahu's knowledge of customs of the chief caste Kshattryas is referred to

Tato sobhananikkhatte Khatta dhamma Vicakkhana
Mahūdipāda padavīpatta bandha mahussave

("Then versed in the laws valid for the nobility at a favourable constellation during the festival of the binding on of the frontlet denoting the rank of Mahadipada he held a solemn procession.")[39] Geiger comments "The Khattiya had their own laws the *Khatta dhamma*. We do not hear much in the Chronicles about the details of those laws. The marriage rules may have been included in them. There existed no strict endogamy within the single clans. Examples of intermarriage between them are often reported."[40] Professor Geiger cites examples to illustrate the working of these laws in the sphere of what would be the law of persons in modern parlance. The existence in Sinhalese society of the Aryan clans like the Sakyas, Moriyas, Lambakannas had been mentioned. There were intermarriages among them who were of Khattiya caste. Professor Geiger says "A younger sister of Mooriya Meghavanna was the consort of the Lamba Kanna Silakala. Mahinda IV is said to have fetched the princes from Kālinga and made her his queen though there was a race..... It is implied in this notice that he could woo as an equal consort a daughter of each of the Khattiya clans in Ceylon. Equality of birth was the first requisite in a nobleman's marriage and all the Khattiya clans were equal to each other."[41] The other castes would have had their laws on personal matters like marriage, inheritance, etc.

(6) Gam Sirit (Customs Mainly Connected With Village Land)

The word "*gama*" derived from Sanskrit "*grāma*" denoted among the Sinhalese not only village but also land. Hence customs affecting land tenure came to be known as *gam sirit*. We see references to these in the inscriptions. In the Anuradhapura period the main occupation of the Sinhalese being the growing of paddy on flat land drained with water from the large man-made irrigation works, *gam sirit* covers not only the working of land holdings but also the rights to water from the reservoir. Some of these customs have survived to the present day and have even been put into legislative enactments. The *ande* and *betma* system of cultivation and the *sirit* on irrigation which Bailey had collected to serve as the basis for the Irrigation Ordinance, are good examples of ancient

39 *Culavamsa*, Chap. 67 vv. 91, 92.
40 *Op. cit. supra* note 2 at p. 29.
41 *Ibid.*

gam sirit surviving in modern times. The full effect of *ande*, the origin of which we have stated earlier, is described by Ievers " When lands are cultivated on *anda* (*andēta*) the custom is that the landowners supply the *anda* cultivators with cattle, implements and seed padi and perform all the work in the tank which may be necessary for securing water. The *ande* cultivators do the rest of the work and the produce, less tithe, and Velvidane's commission, is equally divided, *viz.*, half to the landowners and half to the cultivators. If the landowner does not supply anything he is only entitled to one fourth of the produce as his land share. "[42]

Ievers describes the *betma* system " When the storage of water in the tank is not sufficient to irrigate all the paddy fields or at least one *vela* under it, a part of the field[43] proportionate to the supply of water available is selected and divided among all the *pangukūrayo* (shareholders)of the village in proportion to the extent each owns. Each takes the produce of the bit he cultivates. This is called *betma* meaning division."[44] It may be noted that each such *betma* arrangement is binding only for one crop. When it has been removed matters revert to their original position. This ancient custom of *betma* has continued down the centuries and today it has received legislative sanction. We see in the Irrigation Ordinance No. 32 of 1946 [45] under section 11 proprietors of lands within an irrigable area have power to make rules *inter alia* for the enforcement of established customs affecting such cultivation, and under sub-section 2 it is enacted that " rules made under this section may if the majority of the proprietors so require include rules making provision for the form of cultivation known as *Betma* cultivation."

There were a large number of customs or *gam sirit* of water rights and paddy cultivation during the time of the Sinhalese Kings. We see in inscriptions references to disputes arising from violation of these customs. Dr. Paranavitane discusses some regulations concerning village irrigation works in Ceylon in ancient times.[46] He goes on to state that even Buddhaghosa discussed in his work *Samantapūsūdikū* the manner in which theft could be committed in the course of the utilization of water from a reservoir, *e.g.*, the taking of water from the reservoir at the turn of another. We also see that during the middle of the last century due to the interest

42 R. W. Ievers, *op. cit. supra* note 20 at p. 181.
43 Paddy field.
44 R. W. Ievers, *op. cit. supra* note 20 at p. 183.
45 Legislative Enactments of Ceylon Vol. XII Cap. 453.
46 S. Paranavitane, " Some Regulations concerning Village Irrigation Works in Ceylon " *Journal of Historical and Social Studies* (1958) pp. 1 - 7.

taken in irrigation and paddy cultivation by a British Governor, Sir Henry Ward, information was collected on the subject in question. This information published in a government publication[47] served as a basis for an Ordinance to promote paddy cultivation. An Assistant Government Agent of Badulla, J. Bailey, went about the district under his charge and collected the agricultural customs which have come down from ancient times. He arranged these *gam sirit* in order and they were published in Governor Ward's papers. Bailey states in the course of his paper " I will not give the result of a very careful examination of the local customs in this district. I have not confined myself to any one part of it but have made myself thoroughly acquainted with the practice in all. From data thus obtained I have drawn up the following rules which will give a correct idea of the legislation of irrigation so to speak among the Kandyans. I need not say that the agricultural customs were never reduced to writing under the native government, the common law of the land — the *lex non scripta* of the Kandyans — was founded like our own on customs which have been used so long that the memory of man runneth not to the contrary."[48] J. Bailey then goes on to state these ancient agricultural rules which he called " General Customs or Sirita in respect of Irrigation " as follows :—

" 1. It was incumbent on all the proprietors of any tract of paddy land irrigated by any common canal or water course to keep that canal or water course at all times in proper repair.

2. The dam was erected and kept in repair by the joint labour of all the proprietors who were bound to assemble at the proper season or seasons for that purpose.

3. The whole length of the channel from the dam to the *moolata* fields (nearest the source of the canal) was apportioned out among the proprietors in proportions varying according to the extent of land possessed by each.

4. In the event of any damage occurring to the dam or channel in consequence of a sudden flood or any unforeseen accident it was incumbent on all to assemble and at once repair it.

5. No person was allowed the use of water if he had failed to take this share in the annual and necessary repair of the dam and channel.

6. No one could asweddumize new land with the water of the common channel to the detriment of existing fields. It was necessary

47 Papers upon the subject of Irrigation with a Sketch of the Native Agricultural Customs and suggestions with a view to legislation for the protection of the Cultivators (*The Speeches and Minutes of Sir H. G. Ward, 1855-60*).
48 *Ibid.* at p. 101.

that those interested in the supply of water should be consulted before new land could be cultivated.

7. It was the duty of one or more persons interested in the supply of water to inspect the channel daily or once in two or three days to remove obstructions to provide for the prompt repair of any sudden accident to detect theft of water or injury to the banks. (During the Kandyan government almost all the large channels irrigated some Royal lands and in such case there was an officer appointed for this purpose. With regard to the smaller channels, it is customary because it is the interest of some one always to look the *ella*. The duty generally falls on the *gammahe*.)

8. It was sufficient evidence of theft against any proprietor of water if his field was found to be irrigated out of its proper rotation.

9. The *agata* fields (at end of channel farthest from dam) were ploughed first in order to ensure their supply of water while there was abundance of it in the supplying stream and the rest upwards in regular order ; so that the *moolata* fields whose supply of water was the most certain were ploughed last, but the *agata* fields must be ploughed at the proper season otherwise they lose their right to priority of water.

10. During the dry season when the supply of water began to fail the fields were irrigated by rotation commencing the *moolata* fields. The rotatory period was regulated by the volume of water in the supplying stream. This is called *diya moore* or *waturu moore* (water turn).

11. When the volume of any supplying stream was insufficient for the irrigation during the same season of all lands depending on it, it was customary to divide the tracts of fields into portions of such extent as would admit of each being properly irrigated and these portions received the whole volume of the water during succeeding seasons in rotation. This rotation would come round to each portion biennially, triennially etc., according to the number of portions into which the whole tract was divided. (This is called *diya ware*, water season.)

12. Anyone offending against any of these customs was promptly punished by whipping or fine and if any royal prison was at hand by imprisonment also.

These are general customs for any tolerably large irrigation channel and for smaller ones customs are in the same spirit and for tanks the same.

Under native government they are strictly enforced though still to a certain extent in force and invariably recognized they are disregarded whenever it suits the purpose of cultivators. "[49]

Bailey suggested a legislative enactment based on the above customs. His final comments on them are extremely interesting. He concludes " The successful cultivation of every tract of fields depends upon the combined exertions of all concerned. Almost every act of every cultivator is associated with the interests of the rest and on a close examination of the ancient customs in all their bearings it is impossible not to be struck with their perfect sufficiency for the purpose required,*viz.*, to ensure that all should act in concert and and it is difficult to conceive a more just code of laws. They are laws which have been sanctioned by the experience of centuries and are therefore surely worthy of our attention and it is only by studying the effects of the breach of them that we shall be able to form a just estimation of the consequences of permitting them to be infringed."[50] We find that as a result of this report an Ordinance 9 of 1856 [51] was passed " to facilitate the renewal and enforcement of the ancient customs regarding the irrigation and cultivation of paddy lands. " The preamble, which explains the purpose of the Ordinance, states " Whereas the non-observance of many ancient and highly beneficial customs connected with the irrigation and cultivation of paddy lands as well as the difficulties, delays and expense attending the settlement of differences, and disputes among the cultivators relating to water rights and in obtaining redress for the violation of such rights in the ordinary course of law, are found to be productive of great injury to the general body of proprietors of such lands and it is expedient to provide a remedy for these ends it is enacted by the Governor of Ceylon etc. " The Ordinance was in operation from 1st January 1857 to 31st December, 1861. Thereafter we see a number of Ordinances being passed affecting paddy cultivation and irrigation which give effect to the ancient customs of the Sinhalese.

(7) South Indian Customs

With the frequent invasions by the Colas and Pandyans of South India the Sinhalese became susceptible to their influence. We see that due to this influence some Dravidian customs have been introduced into Sinhalese society and these became parts of the Sinhalese legal system. In the sphere of the personal law of the Sinhalese we find that the institution of polyandry, which existed among the

49 *Ibid.*
50 *Ibid.*
51 Legislative Acts of Ceylon Government Vol. III (1852-60) pp. 20 - 23.

Sinhalese till it was abolished by an enactment in the middle of the last century came through South India. In the Sinhalese literary sources there is no mention of the institution before the 14th or 15th centuries. There were, however, attempts at polyandrous unions of the adelphic kind, which were resented by the husbands. It is quite possible that this custom was brought to Ceylon and to Sinhalese society by the South Indian mercenary troops of the invading South Indian foes of the Sinhalese, such as the Colas and Māgha of Kālinga. Its prevalence among the highest caste in Malabar, the Nairs has been attested by a number of writers. The Culavamsa mentions the presence of Malayali or Kerala soldiers in the army of Māgha as well as in the Valaikkara regiments. It is evident that polyandry having been introduced by about the 13th or 14th century took root in the Sinhalese legal system when the Sinhalese Kingdom moved into the hilly country. The feudal system of land holding and the rigours of *rāja kariya* can be considered as contributory causes for its wide prevalence as mentioned by Portuguese, Dutch and British writers.

We also notice that the Sinhalese caste system of the four *vannas* underwent a change after the 12th and 13th centuries. In mediaeval times the *vannas* got mixed up to form the *kulina* the landholding gentry, the upper class, and *hina* probably the " have nots " in society. Thereafter the caste system evolved on a quasi-South Indian pattern among the Sinhalese and it has continued to be so till the present day with some changes.

In the sphere of land tenure and in court circles the existence of Tamil terms show the Dravidian influence. The inscriptions give some of these terms as we see that Sinhalese Kings had given allotments of land to their Tamil mercenaries. The *Demel Käbali* as these allotments were called would have had attached to them customs brought over by the mercenary soldiers from South India and it is quite probable that some of them got attached to the Sinhalese legal system in course of time.

The introduction of Hindu cults too had a pronounced effect on Sinhalese land tenure. In the early period of the Christian era King Gājabahu is said to have brought from South India the Pattini cult into Ceylon. Round this cult grew temples dedicated to the goddess Pattini and lands seemed to have been dedicated to them. Hence we have the origin of the tenure so well known in Kandyan times called the Dewalagam tenure. With the influx of Tamil princes and South Indian Brahmins during the Kotte and Kandyan

times more Hindu cults and practices came into Ceylon. As the people sought temporal favours from these deities there grew up eventually from devotion to them a kind of popular religion imbued with pomp, pageantry and periodical celebrations. The temples of these deities too had their lands which were tenanted by people on the Dewalagam tenure.

M. L. S. JAYASEKERA*

*B.A., LL.M., Ph.D. (Lond.), Advocate.

THE ROLE AND NATURE OF COLLECTIVE AGREEMENTS AND THEIR IMPACT ON THE CONCEPT OF CONTRACT

The importance of collective bargaining agreements, though particularly relevant to the industrial relations system of a country, is, as we shall see, by no means confined to it. Its relevance outside the field of industrial relations lies in the fact that it is one of the several modern phenomena which has undermined certain notions underlying the law of contract and has consequently compelled re-thinking on classical theories of contract. The purpose of this article is to analyse the role and nature of collective agreements in an industrial relations system, with particular reference to Ceylon, as well as the attitudes taken by law towards such agreements, and to assess the impact of collective agreements outside the industrial relations system. The first object is justified in the context of the fact that generally industrial law has a greater social and economic impact than any one branch of the civil law proper and collective agreements in particular affect the daily lives of a larger class of persons than an ordinary contract. Since the social and economic implications of these agreements are often overlooked, it is necessary to place collective agreements in their proper social and economic context.

The Role and Nature of Collective Agreements

" Collective bargaining may be defined as negotiations about working conditions and terms of employment between an employer, a group of employers or one or more employers ' organisations, on the one hand, and one or more representative workers ' organisations on the other, with a view to reaching agreement. "[1] Many conditions have generally been accepted as necessary for successful collective bargaining, and the more important of these may be summarised as follows :

(1) Active encouragement of collective bargaining by the State, which may take the form of laws to ensure compliance with collective agreements and prohibitions against ' contracting

1 *Collective Bargaining* (I.L.O., Geneva, 1960) p. 3. This will be accepted as a working definition for the moment, but, as we shall see, it does not reflect the essential nature of collective agreements.

out.' In the absence of such laws, there should at least be an attitude of non-intervention by the State. However, as far as England is concerned, collective bargaining has developed, as we shall see, largely without the aid of the law.

(2) Freedom of association granted to organisations of workers and employers. The concept of freedom of association is expressed in Article 2 of the famous International Labour Organisation Convention of 1948 (No. 87) regarding the Freedom of Association And Protection Of The Right To Organise :

> " Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. "[2]

(3) It is axiomatic that a strong and stable trade union movement is a pre-requisite to successful collective bargaining. A strong and independent[3] trade union, with the ultimate sanction of the strike weapon, is the most effective guarantee that employers would not only bargain but would also do so in good faith. It also provides some guarantee that there will be equality in the bargaining position of the parties.

(4) A sufficiently representative trade union of workers and recognition of such unions by employers, since the existence of freedom of association does not necessarily imply that employers will recognise representative organisations of workers. " The reciprocal recognition of organisations is a necessary preliminary to the regulation of collective labour relations, and the fact of an agreement being concluded implies such recognition. "[4]

2 Article 9 recognises that the extent to which this Convention applies to the armed forces and the police must be determined by national laws. The whole issue of freedom of association and its limits is too complex and large to be dealt with here. But two points may be noted. Firstly, many countries do impose certain limits on the freedom of association. Secondly, Ceylon has not formally accepted this Convention.

3 That is, independent from employer control.

4 *Collective Agreements* (I.L.O. Studies and Reports, Series A, Industrial Relations No. 39, 1936) p. 61. It is not proposed to deal with questions of recognition here. It would suffice to say that while some countries make it legally obligatory for employers to recognise trade unions which are sufficiently representative, others like Ceylon and England have not prescribed legal compulsion. In the latter systems, therefore, recognition does not entail legal consequences as such. Further, the criteria adopted in affording recognition vary, though usually it is dependent on the union having in its membership a required percentage of the work-force.

(5) Both parties should bargain in good faith. Otherwise no agreement is likely to flow from bargaining and negotiation.

It is generally accepted that the credit for the pioneering investigations in the field of collective bargaining belongs to Sidney and Beatrice Webb. They regarded collective bargaining as one of the several methods used by trade unions to further their basic purpose " of maintaining or improving the conditions of their working lives "[5] (*i.e.*, of their members). The primary role of collective bargaining, then, is to improve the working conditions of the generally large number of employees affected by it. As pointed out by Allan Flanders :[6]

> " In short, for the Webbs, collective bargaining was exactly what the words imply ; a collective equivalent and alternative to individual bargaining. Where workmen were willing and able to combine, they preferred it to bargaining as individuals with their employer because it enabled them to secure better terms of employment by controlling competition among themselves. And the greater the scale of the bargaining unit — so it appeared — the greater their advantage. Such a view.....ignored any positive interest on the part of the employers. "

If the Webbs overlooked any positive advantage on the employers ' side, it is easily understandable since it was much later in the history of collective bargaining that tangible benefits to employers emerged. From the employers ' point of view, collective agreements often guarantee periods free from industrial strife in the form of ' no-strike ' clauses. This is a fairly modern addition to the content of collective agreements and was largely unknown in the time of the Webbs. Further, the normative effect of present day collective agreements, particularly those which cover an industry as a whole, enables trade competition between employers on a more equal footing. This is because the normative effect of collective agreements often ensures stability of one of the most important items of cost to an employer — the cost of labour. From an economic point of view, collective agreements are an important factor in determining the price of labour, particularly in a society where there is full employment and collective bargaining is common.

5 Sidney and Beatrice Webb, *The History of Trade Unionism 1666 — 1920*, p. 1 (1st ed. 1920).

6 Allan Flanders, " Bargaining Theory : The Classical Model Reconsidered " in *Industrial Relations : Contemporary Issues*, (ed. by B. C. Roberts, 1968).

Collective agreements have often been regarded as the best method of settling industrial disputes because they have distinct advantages over other forms of settlement of disputes. They obviate the necessity for loss of production, wages and perhaps violence and ill-feeling engendered by the use of the strike weapon and other forms of trade union action. It is assumed that parties to a contract are satisfied with its terms. Similarly, collective agreements, inasmuch as they are concluded after negotiation, represent the compromises to which both parties have agreed. This is not necessarily so where terms are imposed by a third party such as a court or wage fixing body which does not have the advantage of representing the choice of the parties themselves. Thus collective agreements play an important role in promoting harmonious industrial relations. Both parties would generally be content with what has been agreed upon since neither party is likely to concede what it cannot give. That is why it is true to say that collective bargaining finds its own level. Parties and negotiators are ever conscious of the necessity for leaving the door open for bargaining in the future.

Collective bargaining agreements have also been used as a tool in the sharing of rule-making power by employers with unions and have thereby eroded into a province which was hitherto jealously guarded by employers as being " management functions. " The traditional theory that matters relating to transfers, discipline, redundancy, promotions, production standards, etc. are the exclusive function of management has given way to a new concept that these matters may be the subject of joint regulation by employers and unions. That is why it is common today to find these matters forming part of the subject matter or contents of collective agreements. Hence it has been said that a collective agreement constitutes " a set of administrative standards in the operation of a business. "[7] Collective bargaining therefore represents a transition from the old system of unilateral determination of terms and conditions of employment to the modern pattern of their joint determination by employers and unions. By allowing parties to regulate their terms and conditions of employment, an important law-making

7 Neil W. Chamberlain, *Collective Bargaining* p. 153 (1951 ed.). In the 1965 edition the words used are " a guide for administrative action within the firm " (p. 131). W. Friedmann, *Law In A Changing Society*, pp. 124-5 (1959 ed.) points out that " collective bargaining narrows the gap between the mobility of contract and the stability of status. The paramount purpose of collective bargaining on an industry-wide or nation-wide scale is the stablization of industrial conditions. The more successful the collective bargaining the greater the approximation of the status of the employee to that of an official. They.....(give) employees an assured status in exchange for a limited surrender of mobility. "

function of the State has been given over to employers and trade unions.

The normative, or sometimes quasi-legislative, effect of collective agreements plays an important role of standard-setting in industrial relations behaviour. Agreements often prescribe not only the terms and conditions on which workers may be employed but also the procedure to be followed in the event of a dispute. The aspect of standard-setting often has a very wide impact. Thus, a collective agreement may be treated as a source of equity by labour courts even in cases where the parties are not bound by one. In *United Engineering Workers' Union* v. *Devanayagam*[8] Lord Devlin, in enumerating the guides which a Labour Tribunal may resort to, said :

> " A good guide to what is fair and equitable in a particular case must be furnished by settlements which bodies of employers and workmen have made or are making in similar cases. The terms of collective bargains must be a source to which the Tribunal can properly resort. "

The standard-setting role played by collective agreements is recognised today as being a key factor which affects all future bargaining either between the same or even different parties. In a sense, standardisation is not the direct result of collective agreements but rather collective agreements are a method by which standardisation is achieved. A characteristic feature of social evolution has been standardisation of working conditions, resulting from modern methods of communication and transportation

> " which have had the effect, through increased mobility of labour and goods, of diminishing the variation in methods of production and utilisation of labour in different localities. Formerly economic life was largely localised, and wide differences in standards of productive efficiency and, therefore, in standards of living existed even between regions not widely separated. There are still wide differences, especially internationally, but with a marked tendency towards reduction of inequalities. Information about new inventions and improved methods is quickly disseminated and competition compels firms to introduce these methods if they are to survive. Thus, the technical organisation of industry is becoming more standardised and this reacts upon working conditions. "[9]

8 (1967) 69 N.L.R. 289 at 312.
9 *Collective Agreements, supra* note 4 at 206.

Therefore, standardisation is a tendency which exists quite apart from collective agreements, which in a sense is an instrument which helps this tendency on its way, and the transformation of collective bargaining from the local to the national level has been of particular significance in promoting this tendency. Standardisation guarantees workers against deterioration of working conditions, provides a starting point for further improvement when an agreement comes to be re-negotiated and protects employers against exploitation of labour by competitors.[10]

Two questions which have often been raised in considering the role of collective agreements are whether unions have secured for their members better terms of employment, particularly in regard to wages, and also a larger share of the national income, than otherwise would have been the case.[11] The first question admits of no definite answer since any conclusions must necessarily be speculative. Comparison between unionised and non-unionised industries may not often yield satisfactory results due to the operation of numerous factors such as market conditions and improved technology which affect wage differentials. However, in the case of developing countries such as Ceylon where the problem is not one of labour shortage but of unemployment, there is a greater likelihood that in unionised industries employees enjoy better terms and conditions of employment than in non-unionised ones and unions play a more definite role in pushing up wage rates. In developed countries where there is full employment and consequent labour shortages, the role of unions in pushing up wage rates may be less, but it is difficult to believe that collective bargaining would continue to be popular if unions were unable to secure tangible benefits for their members. The answer to the second question appears, on a balance of opinion, to be in the negative. One reason, *inter alia*, is stated by N. Robertson and J. L. Thomas :[12]

10 See also the view expressed by O. Kahn-Freund, " Inter Group Conflicts And Their Settlement " in *Collective Bargaining* pp. 59 - 60 (ed. by Allan Flanders, 1969) that the collective standards set up by collective agreements are both contractual and normative. By contractual he means those standards " which govern the behaviour of the groups themselves, for example, the obligation.....not to strike or to lock out with the intention of changing the terms agreed upon..... " By normative he means those standards " designed to regulate the conduct of individuals: wages clauses are a common example. All collective bargaining aims at the formulation of norms for the guidance of individual employers and individual workers. In this sense it is, as it were, not a contract - making but a legislative process. It is, or tends to be, autonomous bilateral legislation. "

11 See E. H. Phelps Brown, *The Economics of Labour*, Chapter 6 (1962). For a brief but clear summary see N. Robertson and J. L. Thomas, *Trade Unions and Industrial Relations* pp. 94 *et seq.* (1968).

12 *Op. cit.* p. 95.

> " Pay increases tend to be absorbed by productivity and/or price increases ; the total revenues of the firms concerned therefore tend to increase in the same proportion as the wage increase, with consequently no change in the shares of pay and profits. "

The last point raises the question of the disadvantages of collective agreements when looked at from a national point of view. Two such alleged disadvantages merit consideration. Firstly, it has been said that collective agreements result in inflationary tendencies. The argument advanced is that higher wages — an invariable consequence of collective agreements — result in higher prices, particularly where higher wages are not matched by increased productivity. It would suffice to say, in the context of the present discussion, that such a generalisation is difficult without an examination of the effects of collective agreements in each country. There is some justification for saying that in developing countries price increases are less likely than in developed countries since the economies of developing countries are often incapable of withstanding price increases.

Secondly, collective agreements, particularly national and comprehensive ones, are obstacles to a wage or incomes policy.[13] Wage rates fixed by collective agreements are not consciously fixed on any principles or criteria designed to promote some definite social and economic objectives, but generally reflect the supply and demand conditions of labour in the industry and the bargaining strength of the employer and unions. Many countries, including developed countries, have at one time or another been compelled to introduce wage policies to meet economic emergencies created by adverse balance of payments or war, or to enable economic development by exercising some control over excessive wage increases. The problem has been aggravated in some countries in recent years by the tendency for price increases to follow upon wage increases.[14] One method, therefore, which has often been suggested as a measure designed to arrest these tendencies is a wage or incomes policy.[15]

13 A wage or incomes policy has been defined as " legislation or Government action calculated to affect the level or structure of wages, or both, for the purpose of attaining specific objectives of social and economic policy. " *Problems of Wage Policy In Asian Countries* (I.L.O., Geneva, 1956) p. 39, adopted by the National Wage Policy Commission (Sessional Paper VIII, 1961, Ceylon) Chapter 4.

14 It must be understood, however, that any explanation of price increases exclusively in terms of wage increases is inadequate because prices are affected by numerous other factors such as excessive demand, indirect taxation, and competition among employers for labour.

15 " In Asian countries the most obvious general economic objective of wage policy would be to establish a level and structure of wages conducive to accelerated economic development." *Problems Of Wage Policy In Asian Countries*, p. 39.

In Ceylon the problem was examined by the National Wage Policy Commission[16] which recommended a wage policy for Ceylon with a view to attaining certain specific economic and social objectives. Though its Report was published in 1961, no attempts were made to implement its recommendations, until the Government introduced in September 1968 a Bill in Parliament to provide for the establishment of a National Wage Council to, *inter alia*, determine a standard wage and overtime rate in respect of any industry. The Council was also required to examine and report to the Minister of Labour on collective agreements. The Industrial Disputes Act[17] (1950) requires collective agreements to be published by the Commissioner of Labour if one of the parties transmits a copy of the agreement to him, provided the terms contained therein are not less favourable than those obtaining in the industry to which the agreement relates. The proposed Bill sought to alter this procedure by empowering the Minister of Labour to publish or withold publication, at his discretion, having regard to the report of the Council. The justification for including collective agreements within the ambit of the Council's powers and functions is that if the objective of a National Wage Council as a body with overall control over all methods of wage increases and adjustments is to be achieved, it necessarily follows that collective agreements should come within its purview since it is a method of wage fixation and adjustment. A national wage policy may become meaningless if parties are free to negotiate their own terms contrary to the specific aims sought to be achieved by such a policy.

This Bill, however, met with strong resistance from trade union circles. The Bill has been opposed, *inter alia*, on the ground that collective agreements should be left to the free negotiation of parties and should therefore be outside the purview of the Council and the Minister of Labour. It has also been asserted that the proposed legislation would discourage collective bargaining since employers would invariably refuse to bargain and place the entire burden of wage fixing on the Council. Consequently, the Bill was withdrawn from Parliament and it is not certain whether it will be re-introduced with amendments or whether the whole idea of establishing a National Wage Council has been abandoned.

The fact which emerges is that trade unions are generally opposed to any attempts to impose limits on collective bargaining even where it is with a view to setting up an incomes policy. To

16 *Op. cit. supra* note 13.
17 Cap. 131 Legislative Enactments of Ceylon (1956).

this extent collective bargaining, or rather trade union notions of collective bargaining, can prove an obstacle to the formulation of a national wage policy. The experience in England in the field of incomes policy also tends to confirm this view.[18] However, it would not be true to say that trade unions are always opposed to wage policies. In fact, when the National Incomes Commission was set up in England in 1961 the Trades Union Congress accepted that one important aim of a national wage policy is the need to keep increases in income in line with increased productivity and efficiency.

Something remains to be said regarding the nature of collective bargaining and agreements. Bargaining has been defined as " the process by which the antithetical interests of supply and demand, of buyer and seller, are finally adjusted " so as to end " in the act of exchange. "[19] The British Ministry of Labour says :[20]

> " The term collective bargaining is applied to those arrangements under which wages and conditions of employment are settled by a bargain in the form of an agreement made between employers or associations of employers and workers' organisations. "

While this is a generally accurate description, it does not help us to understand the essential characteristics of collective bargaining agreements.

Allan Flanders[21] points out that collective bargaining cannot correctly be contrasted with the individual contract because in collective bargaining the employer does not buy labour at a price in the labour market as in the case of an individual contract of employment. His excellent analysis of this idea is expressed thus :

> " The individual bargain concluded between employers and employees in labour markets, which is given a legal form in employment contracts, accords with this definition.[22] It provides for an exchange of work for wages and, in stipulating the conditions of the exchange, adjusts for the time being the conflict of interests between a buyer and seller of labour. A collective agreement, on the other hand, though it is frequently called a collective bargain, and in some countries

18 For a history of attempts in England to formulate an incomes policy see B. C. Roberts, *National Wage Policy In War And Peace* (1958) and Robertson and Thomas, *op. cit. supra* note 11, Chapter 7.
19 R. H. Maciver and C. H. Page, *Society*, p. 474, (1953).
20 *Industrial Relations Handbook*, (1961) p. 18. See also the text at footnote 1.
21 *Op. cit. supra* note 6.
22 *I.e.*, that of Maciver and Page, *op. cit. supra* note 19.

> where it has legal force, a collective contract does not commit anyone to buy or to sell labour. It does something quite different. It is meant to ensure that when labour is bought and sold.....its price and the other terms of the transaction will accord with the provisions of the agreement. These provisions are in fact a body of rules intended to regulate among other things the terms of employment contracts. Thus collective bargaining is itself essentially a rule-making process, and this is a feature which has no proper counterpart in individual bargaining."

Collective bargains, then, do not replace individual contracts as such but rather impose certain limitations on them to the extent that individual contracts must conform to the standards laid down in such agreements. Therefore, as Flanders says :[23]

> "It is more correct then to refer to collective bargaining as regulating, rather than replacing, individual bargaining."

Collective bargaining has to a great extent freed the individual from the labour market by determining the price that is paid for his labour. This rule-making process is an essential feature of collective agreements.

A second feature of collective bargains is that they are a compromise between the conflicting power groups of capital and labour. This compromise brings us to a third feature of such agreements, namely, that the rules laid down are derived from the joint decisions of the parties to the agreement. Therefore, though such agreements are characterised by a quasi-legislative process, they differ from the rule making process of state laws in that the latter originates from the State and not from the parties themselves.

The Legal Status of Collective Agreements in England

In considering the legal status of collective agreements, three questions arise :

(*a*) Who are the parties to a collective agreement, that is, is it the trade union or the employees ?

(*b*) Is a party to a collective agreement entitled in law to enforce it ?

(*c*) What is the legal effect of a collective agreement on the individual contract of employment ?

23 *Op. cit.*

> " The remarkable British development of collective bargaining has happened.....largely without the aid of the law. Normally there is no duty on employers (as there is in the U.S.A.) to bargain at all. Only the nationalised industries are placed under a legal duty to do so..... "[24]

English law looks upon collective bargains as agreements which are not legally binding upon or enforceable by an individual employee or employer inasmuch as the parties to such agreements are not individual employees and employers but organisations of workers and employers, which are legally not agents of individual employees or employers.[25] In common law the terms of collective agreements do not become incorporated in the individual contracts of employment, so that a person who is not a party to the contract cannot derive benefits under it. The weight of opinion favours the view that a trade union bargains as principal and not as agent.[26] Even certain statutes militate against the agency theory.[27] In *Holland* v. *London Society of Compositors*[28] it was held that an agreement between two trade unions of employees was not enforceable at the instance of a member of one of the unions. Though not a case of a collective agreement between trade unions of workers and employers, it suggests that unions do not enter into such agreements as agents of their members. In *Rookes* v. *Barnard*[29] Sachs J. referred to union representatives on bargaining bodies as agents authorised " to bind the trade union as a whole and the members individually. " Though this question did not arise for decision in appeal because counsel conceded that a collective agreement containing a ' no-strike ' clause bound individual members, Donovan L. J.[30] doubted the theory of agency. It will be seen later that there are exceptions to

24 K. W. Wedderburn, *The Worker And The Law*, p. 103 (1968). A fair description of British collective bargaining is given by Noel Branton in *Economic Organisation Of Modern Britain*, (1966) : " It is.....more akin to a marriage contract whereby two parties who are dependent on one another can accommodate each other's interests. When they negotiate they know that some kind of agreement must eventually result. The union and the employers ' association cannot deal with anyone else — they cannot ' shop around ' to get a better bargain. "

25 See G. H. L. Fridman, *The Modern Law Of Employment*, pp. 12 - 13, 419 - 22 (1963). K. W. Wedderburn, *op. cit. supra* note 24 at 105 *et seq.*

26 See K. W. Wedderburn, *ibid.*, p. 113 for some of the arguments advanced against the agency theory. The Royal Commission On Trade Unions And Employers ' Associations (1965-68) in England, (hereinafter referred to as " The Royal Commission "), also favoured the view that a union acts as principal when concluding collective agreements (paragraph 477).

27 Section 8 (1) (*a*) of the Terms And Conditions Of Employment Act (1959), refers to the organisations as " parties to the agreement. "

28 (1924) 40 T.L.R. 440.

29 (1961) 2 All E.R. 825 at 827.

30 (1964) 1 All E.R. 367.

the rule that the terms of collective agreements are not incorporated in the individual contract of employment.

The second question is whether the parties to the agreement, (*viz.*, union and employer or association of employers) can legally enforce it. The orthodox view is that in English law a collective agreement is not enforceable even between the parties. The reasons for this attitude are many. Firstly, section 4 (4) of the Trade Union Act (1871) makes it impossible to directly enforce an agreement between two trade unions, which would include an employers ' association. Thus while an action for damages for breach of such agreement would not lie, it may be otherwise where the action is for a declaration as to the proper interpretation of the agreement since it would not amount to direct enforcement. Further, since a single employer is not a trade union, an agreement between a single employer and a union is not affected by this section. Secondly, bargaining takes place at different levels at the same time and is often informal. Therefore, on the one hand difficulties arise in determining the parties to the agreement and on the other its informality makes it difficult to determine the content of the agreement to satisfy legal requirements, so that such agreements may be void for uncertainty. Thirdly — and this is the most important reason — English law witholds legal status to collective agreements because parties to them do not intend to enter into legal relations. As Kahn-Freund says :[31]

> " collective agreements are not contracts for the reason that the parties do not intend them to be contracts. What is known as ' the intention to create legal relations ' is in this country, as elsewhere, indispensable for raising an agreement between given parties to the level of a legally enforceable contract. The general view appears to be that collective agreements are to be binding only by industrial custom, ' in honour ' and to be enforced only by the social sanctions of industrial pressure and not by the legal sanctions of injunctions, orders for damages etc. ..... "

This reason was also favoured by The English Royal Commission :[32]

> " This lack of intention to make legally binding collective agreements, or, better perhaps, this intention and policy

31 O. Kahn-Freund, " Report On The Legal Status Of Collective Bargaining And Collective Agreements In Great Britain " in *Labour Relations And The Law* (ed. by O. Kahn-Freund, 1965).

32 Paragraphs 470 - 71.

> that collective bargaining and collective agreements should remain outside the law, is one of the characteristic features of our system of industrial relations which distinguishes it from other comparable systems. It is deeply rooted in its structure.....Collective bargaining is not in this country a series of easily distinguishable transactions comparable to the making of a number of contracts by two commercial firms. It is in fact a continuous process in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect. Moreover, even at industry level, a great deal of collective bargaining takes place through standing bodies, such as joint industrial councils and national or regional negotiating boards, and the agreement appears as a ' resolution ' or ' decision ' of that body, variable at its will, and variable in particular in the light of such difficulties of interpretation as may arise. Such ' bargaining ' does not fit into the categories of the law of contract. "

A collective agreement, then, is an important illustration in English law of the requirement of the law of contract that parties must intend to enter into a legally binding obligation. It seems, therefore, that this is a separate requirement of the law. It is not automatically inferred merely from the presence of consideration. On the other hand, the cases which are often cited as obvious examples where there is no intention to enter into legal relations are domestic arrangements between husband and wife. It may plausibly be argued that collective agreements are more in the nature of business arrangements and, as such, do not stand on the same footing; apart from considerations of vagueness in content and difficulties in identifying ' the parties ' to the agreement, they fit into the general notion of contract. If a contract can be spelt out between passengers and public transport authorities when in fact they hardly give their minds to the possibility of creating legal relations, there appears to be less justification for witholding legal recognition from collective agreements exclusively on this ground. It is therefore interesting to consider the case of *Edwards* v. *Skyways Ltd.*[33] which, at first sight appears to be a departure from the general attitude of withholding legal status from collective agreements. In this case a discussion took place between representatives of a pilots ' association and representatives of the Company in regard to impending redundancies. It was agreed that redundant pilots who opted to claim back their contributions to the pension fund instead of a paid-

33 (1964) 1 All E.R. 494.

up pension later " would be given an *ex gratia* payment equivalent to the Company's contribution to the pension fund." The Company later sought to go back on this decision. A pilot who was declared redundant and had exercised the option in favour of the *ex gratia* payment was successful in an action to recover it. The basis of the decision was that the pilot had accepted the standing offer and not that the union was his agent (though the latter was conceded). It was urged on behalf of the Company that though it intended to carry out its promise it had no legal effect because there was no intention to enter into legal relations. The Court said :

> " It is clear from such cases as *Rose and Frank Co.* v. *J. R. Crompton & Bros. Ltd.* and *Balfour* v. *Balfour* that there are cases in which English law recognises that an agreement, in other respects duly made, does not give rise to legal rights, because the parties have not intended that their legal relations should be affected. Where the subject-matter of the agreement is some domestic or social relationship or transaction, as in *Balfour* v. *Balfour*, the law will often deny legal consequences to the agreement, because of the very nature of the subject-matter. Where the subject-matter of the agreement is not domestic or social, but is related to business affairs, the parties may, by using clear words, show that their intention is to make the transaction binding in honour only, and not in law ; and the courts will give effect to the expressed intention.....[34]
>
> In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds — an intention to agree. There was, admittedly, consideration for the company's promise... In a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."[35]

This case, however, is no authority in English law for any general theory that collective agreements are legally enforceable. In fact, though the discussion was between the association and the Company, the factor which created the contract was the particular pilot's exercise of the option ; in other words, the contract was between the pilot and the Company. The contract, therefore, was not a collective agreement at all.

34 This suggests that in non-domestic and social arrangements there is generally an intention to enter into legal relations unless a contrary intention is clear from the words used. This is supported by the next paragraph of the judgment which is quoted in the text.

35 The Court also held that the words " *ex gratia* " do not negative the inference that legal relations were intended.

Though as a general rule collective agreements are not legally binding and do not form part of the individual contract of employment, there are three exceptions to this rule :

(1) Where a contract of employment expressly or impliedly incorporates the terms of a collective agreement. Thus in *National Coal Board* v. *Galley* [36] where the contract of employment stipulated that the employees would be governed by whatever national agreements were in force between employers and trade unions, the individual contract was held to incorporate such agreements. No implication can be made where it would be contrary to an express term in the contract of employment.[37]

(2) Where a statute provides that contracts of employment in particular trades are to be governed by collective agreements, in which event the incorporation is a consequence of the statute.

(3) Where terms of collective agreements are enforced by special bodies created by statute, in which case the terms of collective agreements are incorporated into the individual contracts for the future.[38]

The problem of the law and collective bargaining was examined by the Royal Commission. It pointed out[39] that the legal requirement in the U.S.A. that employers should bargain in good faith with representative trade unions was intended to encourage collective bargaining where it did not exist and to strengthen the power of workers to influence the running of industry. A similar legal provision is not required in England where collective bargaining is already widespread. " What is needed is a change in the nature of British collective bargaining and a more orderly method for workers and their representatives to exercise their influence in the factory ; and for this to be accomplished, if possible, without destroying the British

36 (1958) 1 All E.R. 91. See *Rookes* v. *Barnard* (1962) 2 All E.R. 579, where, quite apart from the concession made by counsel that a ' no-strike ' clause in an agreement bound the employees, the agreement itself stipulated: " The *Employers*.....and the *Employees*.....undertake that no lock-out or strike shall take place. " The position in such a case cannot be equated to a situation where the *union* agrees (*as distinct from the employees*) not to call a strike.

37 " Whenever there is the slightest conflict, therefore, English law still says that the individual contract of employment prevails over the collective agreement." K. W. Wedderburn, *op. cit. supra* note 24 at p. 115.

38 See G. H. L. Fridman, *op cit. supra* note 25 at pp. 420 - 21 and O. Kahn-Freund, *op. cit. supra* note 31, for the ways in which this may occur.

39 Paragraph 190.

tradition of keeping industrial relations out of the courts."[40] The opinion in England in favour of conferring legal status on collective bargaining agreements is based partly on the view that such a step would minimise unofficial strikes (*i.e.*, strikes not sanctioned or ratified by the union), which constitute about 95 per cent of all strikes in England. The argument is that such a step would provide some sanction against such strikes which are often in breach of collective agreements. Legal intervention in collective bargaining, however, is unlikely to ease the strike situation for two reasons. Firstly, strikes in breach of collective agreements are invariably unofficial, so that the agreements are breached not by trade unions but by their members. As stated by the Royal Commission :[41]

> " Official strikes in breach of a collective agreement are very rare.....Unofficial strikes in breach of a procedure agreement are common in a small number of important industries... But they are not, or they are hardly ever, broken by trade unions. They are broken by trade union members. This is a fact of fundamental importance, and a feature of our industrial relations peculiar to this country.....Our problem is the short spontaneous outburst not the planned protracted industrial action of long duration which is the main problem, for example, in the United States and in Canada. "

Secondly, employees participating in unofficial strikes are liable for breach of contract because notice of strike is hardly ever given as required by contract, custom or the Contracts of Employment Act (1963). To this extent no legislation is necessary to render such strikes illegal. But in practice employers do not take their striking employees to court, either because it is impractical or there is nothing to be gained in the long run by generating bad feeling among employees who would, at the time of the court proceedings, invariably be re-employed. Further, to give legal effect to an agreement which was never intended to create legal obligations would be contrary to the policy of the law. The law would in effect be imposing " on the parties a relationship which they do not desire. This measure would be tantamount to a new departure in the law of contract and also to a breach with a long tradition of our industrial relations."[42]

40 *Ibid.*
41 Paragraph 462.
42 Paragraph 474. For the Commission's reasons for not recommending sanctions for breach of agreements see paragraphs 477 - 499. The view has been expressed that British trade unionism has been over pre-occupied with questions of wages to the exclusion of other aspects and that many unofficial strikes could be avoided if procedures to avert them are worked out in collective agreements. See Noel Branton, *op. cit. supra* note 24.

The Commission concluded[43] that collective agreements should not at the present time be made legally enforceable.

The fact that there have been no recent changes in the attitude of English law on the question of the legal enforceability of collective agreements is evident from the recent case of *Ford Motor Company Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers*[44] which appears to have settled any doubts regarding collective agreements and the law. In this case the relations between the Ford Company and several unions to which the employees belonged were governed by a procedural agreement of 1955 and an agreement of 1967 relating to terms and conditions such as wages. Under the former agreement a National Joint Negotiating Committee (NJNC) was set up with representatives from each side. The second agreement provided for any variation of terms and conditions to be through the NJNC. In 1969 Fords proposed a variation of the 1967 agreement, which was accepted by the majority of the unions but was rejected by the minority of the unions who went out on strike. In an action for injunctions against the striking unions, the Company contended that all the agreements with the unions were legally enforceable since they were commercial agreements inasmuch as they were intended to regulate terms and conditions of employment. The unions replied that none of the agreements was legally enforceable since they were negotiated against a background of industrial opinion known to the parties which was against legal enforceability of collective agreements, and further the vague aspirational wording of many clauses in the agreements showed that the parties did not intend them to be legally binding. The Court upheld the contentions of the unions and concluded :[45]

> " If one applies the subjective test and asks what the intentions of the various parties were, the answer is that, so far as they had any express intentions, they were certainly not to make the agreement enforceable at law. If one applies an objective test and asks what intention must be imputed from all the circumstances of the case, the answer is the same. The fact that the agreements *prima facie* deal with commercial agree-

43 Paragraph 506. For reasons see Chapter 3. For collective bargaining in the U.S.A., Belgium, France, Germany, Italy, The Netherlands and Switzerland see O. Kahn-Freund, *Labour Relations And The Law*, Chapters 3 - 9.

44 (1969) 2 All E.R. 481. For a discussion of this case see Norman Selwyn, " Collective Agreements And The Law " (1969) 32 *Modern Law Review* p. 377 where he challenges the idea that the climate of opinion is against legal enforceability of collective agreements and regards as erroneous the assumption that when parties conclude such agreements they do not intend to create legal relations.

45 *Supra at* p. 496. *Quaere*, whether the concluding part of the judgment at p. 497 suggests, *obiter*, that a union is regarded as an agent in the bargaining process.

ments is outweighed by the other considerations, by the wording of the agreements, by the nature of the agreements, and by the climate of opinion voiced and evidenced by the extra-judicial authorities. Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in the legal sense and are not enforceable at law. Without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour. None of the authorities cited by counsel for Fords dissuades me from this view. In my judgment, the parties, neither of them, had the intention to make these agreements binding at law."

The following principles in regard to English law emerge from this decision:

(1) Collective agreements are not legally enforceable contracts unless there is a clear intention to the contrary on the part of both parties.

(2) In ascertaining the intention of the parties, the agreement itself and the climate of opinion on the question of legal enforceability in which the agreement was concluded are relevant.

(3) Collective agreements are binding in honour only, notwithstanding that they may be commercial arrangements.

(To be continued)

S. R. De Silva*

*LL.B.(Hons). Advocate; Assistant Secretary, Employers' Federation of Ceylon.

STATUTES

Registration of Persons Act No. 32 of 1968

This Act which received Assent on 28th June, 1968, has not come into operation. It provides for the registration of certain persons in a book to be called the " Register of Persons " as a preliminary to the issue of identity cards. All persons in Ceylon who are 18 years of age are liable to registration except (*a*) those unlawfully in the country as illicit immigrants and persons whose visas have expired (overstays), (*b*) those lawfully in the country but as temporary residents — holders of valid visas and diplomatic and other foreign personnel who are exempted from the restrictions as to entry imposed by the Immigrants and Emigrants Act.

A scheme for registration and issue of identity cards is the best protective measure against illicit immigration and a check on non-nationals residing in the country. As such it is adopted by many countries. It will also enable the Government to make practical legislative proposals to control employment and trade of non-nationals. Registration of adult non-voters was mooted at the time of the Indo-Ceylon Agreement in 1954 as a measure which would expedite the deportation of illicit immigrants, but no steps were taken to compile a register. By an amendment to the Ceylon (Parliamentary Elections) Order in Council in 1959 provision was made for the issue of identity cards to voters whose names appeared in any register of voters. This however was not implemented for the reason that the issue of identity cards which would serve a variety of purposes was contemplated.

Before the present Act there were two Bills presented in Parliament — The National Registration Bill in 1962, and the Registration of Persons Bill in 1966, but both lapsed. The main criticism against these Bills was that they contained provisions which left the determination of questions of citizenship to administrative officers. This was condemned as going beyond registration and an exercise of judicial power. The present Act has dropped these provisions so that the object of registration is not even remotely to determine citizenship or to identify citizens but to separate those who are lawfully in the country from those who are unlawfully here.

This is not the only respect in which the Act differs from the previous Bills. The provision that any person who does not hold

an identity card shall be presumed to have entered and to be remaining in Ceylon in contravention of the provisions of the Immigrants and Emigrants Act unless he proves the contrary, has also been dropped. The Government conceded that a provision of this nature could have the effect of subjecting citizens of this country who have neglected to apply for registration to the hardships of a detention camp for illicit immigrants. Conversely, registration and possession of an identity card are not intended to be conclusive that he is not an illicit immigrant or that he is a Ceylon citizen (section 46).

All persons who are liable to registration are obliged to apply for registration and to furnish information relevant to their application (section 8). A decision of the Commissioner for Registration of Persons is final and conclusive subject only to an appeal to a Registration of Persons Tribunal (section 13). There will be a Tribunal in each district and it will consist of one person (section 25). In disposing of an application the Commissioner will act not only on documentary evidence before him but, if necessary, he will hold an inquiry for the purpose of which he is given the power of a District Court to summon witnesses and compel production of documents (section 39). The burden of proof is cast on the applicant for registration (section 45). A Tribunal is similarly empowered (section 28), and it is further enacted that proceedings before a Tribunal " shall as far as possible be free from the formalities and technicalities of the rules of procedure and evidence ordinarily or normally applicable to a court of law, and may be conducted by the Tribunal in any manner not inconsistent with the principles of natural justice, which to the Tribunal may seem best adopted to elicit proof concerning the matters that are being investigated " (section 32). Decisions of the Tribunal are final and conclusive (section 33).

The issue of identity cards follows on registration (section 14). The production of the identity card for inspection is made obligatory on the holder whenever a request is made by the Commissioner " or any other prescribed officer " (section 15). A " prescribed officer" in this context is not defined and will probably not be confined to officers appointed for the purposes of the Act.

Nindagama Lands Act no. 30 of 1968

The Nindagama Lands Act is a measure of limited land reform — limited in scope and as to the extent of the land affected. It is the last in the series of legislative acts having a bearing on an ancient tenurial system ; the first was the Order in Council of 12th April,

1832, by which service tenures in the Maritime Provinces were abolished. The present Act seeks to achieve the same for the Kandyan Provinces.

The registration of service lands under the Service Tenure Ordinance of 1870 revealed that there was a total of 511 lands coming under the description of *nindagam* situated in 8 districts (Kandy, Matale, Nuwara Eliya, Badulla, Ratnapura, Kegalle, Kurunegala, Anuradhapura). Although both *paraveni pangu* and *maruvena pangu* were registered under this Ordinance commutation was made possible only in respect of services due by proprietors of *paraveni pangu*. The extent of land registered as *paraveni pangu* was 12,337 *amunas* consisting of high land and paddy land but the lack of uniformity as to the extent of land which can be sown by an *amuna* makes the acreage of *paraveni pangu* uncertain. Inspite of the provisions enabling commutation in lieu of service few *paraveni nilakarayas* took advantage of them ; in fact commutation proved to be unnecessary for the *nilakarayas* simply ceased to perform the services due on their *pangu* and the *nindagam* owners acquiesced in this state of affairs.

The Viharagam, Dewalagam and Nindagam Commission (Sessional Paper I of 1956) pointed to this fact as a peaceful evolutionary process without force or opposition. Legally however the *nilakaraya* was bound to perform the services (unless prescribed) and his rights over the *panguwa* were less than ownership. The Commission were of opinion that the law should be brought in line with the changed factual situation and recommended the total abolition of services without compensation to the *nindagam* owner. The Nindagama Act gives effect to this recommendation. It is concerned only with releasing the *paraveni* and *maruvena pangus* from the services attached to them *stricto lege* thereby conferring on the *nilakarayas* absolute ownership. The Act does not make changes in respect of the *bandara* land in a *nindagama* which from early times was considered to be the absolute property of the *nindagama* owner.(*Bandara* lands never came within the scope of the Service Tenure Ordinance and there is no register of such land).

The Act which refers to the *paraveni nilakaraya* as ' holder ' and the *maruvena nilakaraya* as ' tenant ' abolishes the services or the liability to pay the commuted sum, due from the holder or tenant, and declares the holder or tenant to be owner of the ' *nindagama.* ' (The Act departs from established usage by referring to the *panguwa* of the nilakaraya as ' *nindagama* land'.)

Parts II, III and IV of the Act make provision for the registration of title of the new owner. It is clear that section 3 which declares a holder or tenant to be owner should not be taken literally to mean that he need do nothing more to preserve his rights of ownership. The provisions of section 22 are important in this connection for an award of title in respect of *nindagama* land is declared to be conclusive proof as to ownership in its fullest sense. The procedure for obtaining an award as to title is by application to the Nindagama Lands Board set up under the Act. The Act does not appear to envisage that there will be parties to the application, and section 17 states that proceedings before the Board "shall as far as possible, be free from the formalities and the technicalities of the rules and procedure and evidence applicable in a court of law, and may be conducted by the Board in any manner, not inconsistent with the principles of natural justice, which to the Board may seem best adopted to elicit proof concerning the matters that are investigated." Decisions of the Board are final and conclusive and subject only to an appeal to the District Court. There is no right of appeal from the determination of a District Court (section 20). But an award of title is always impeachable in grounds of fraud or wilful suppression of facts (section 22). An award is registrable under the Registration of Documents Ordinance without payment of fee.

R. K. W. G.

Crown (Liability in Delict) Act. No. 22 of 1969.

Ever since the decision in *Colombo Electric Tramway Co.* v. *The Attorney-General* (1913) 16 N.L.R. 169 it was authoritatively settled in Ceylon that by virtue of the Royal Prerogative an action in tort is not maintainable against the Crown for a wrong committed by one of its servants in the course of his employment under the Crown.

This rule of immunity disappeared into the limbo of forgotten law in England when the Crown Proceedings Act of 1947 made the Crown in England liable for tort.

In Ceylon however the rule of immunity went unchallenged for some considerable time. In *Attorney-General* v. *Russell* (1955) 57 N.L.R. 364 Gratiaen J. referred to "The Crown's much deplored continued immunity in this Country for the torts of its public officers," and tempered the rigour of the rule by deciding that Section 463 of the

Civil Procedure Code provided the machinery by which the Attorney-General, on behalf of the Crown, can intervene in an action in tort against a public officer, and thereby not merely provide legal representation for the public officer concerned but also accept responsibility for the satisfaction of the decree awarded to the plaintiff. The limitation inherent in section 463 is that it does not impose a duty on the Attorney-General to intervene, but only gives him a discretion to do so in cases which he thinks to be appropriate or in which he is directed to intervene by the Government of the day.

In *Nadarajah* v. *Attorney-General* (1956) 59 N.L.R. 136 the rule survived the shock of a frontal attack made on it by a crusading plaintiff who made an enthusiastic but unsuccessful attempt to establish that the Crown Proceedings Act of England was part of the law of Ceylon.

The Parliament of Ceylon has now abolished the rule of immunity by the Crown (Liability in Delict) Act No. 22 of 1969 which came into operation on the 2nd of December, 1969 (Ceylon Gazette No. 14, 879/13 of 27-11-69).

Section 2 (1) subjects the Crown to all those liabilities in delict to which, if it were a private person, it would be subject in respect of delicts committed by its officers or agents. Section 13 makes it clear that the independent contractor employed by the Crown is not included in the term ' agent. '

The proviso to this sub-section states that no proceedings shall lie against the Crown by virtue of the sub-section in respect of any act of an officer of the Crown unless the act in question would have given rise to a cause of action against that officer or his estate. This proviso preserves to the Crown the benefit of any defence available in law to the officer of the Crown or his estate. For example a Crown servant who is sued for a delict may take the defence of Act of State if the act complained of was committed by him against a non-resident alien elsewhere than in Ceylon and the Crown either ratified it or authorised it. *Buron* v. *Denman* (1848) 2 Ex. 167. Again a personal action such as an action for defamation may not be brought against a servant of the Crown after his death. *Hoffa* v. *S. A. Insurance* 1965 (2) S. A. L. R. 944 at 950 ; *Myers Executors* v. *Gericke* (1880) Foord 14 and 18. The benefit of both these defences is preserved to the Crown by this proviso. The proviso also makes it abundantly clear that section 2 (1) does not remove the individual liability of a Crown servant for a delict committed by him in the execution of his duty.

Section 4 (2) provides that the Law Reform (Contributory Negligence and Joint Wrongdoers) Act shall bind the Crown. Section 4 (1) enacts that where the Crown is subject to liability in delict the law relating to indemnity and contribution shall be enforceable by or against the Crown. The combined effect of sections 2 and 4 makes the Crown and officers of the Crown jointly and severally liable, and, in the event of the Crown satisfying a claim, gives it the right to claim recovery of contribution or indemnity from an officer who is a fellow wrongdoer.

Section 2 (2) imposes delictual liability on the Crown for breach of a statutory duty when such duty binds both the Crown as well as persons other than the Crown. The statute which creates the duty may state expressly that it binds the Crown. Thus section 125 of the Factories Ordinance (Cap. 128 Legislative Enactments) makes the Factories Ordinance applicable to factories belonging to the Crown unless the Minister, in terms of the proviso to section 125 (1), by order exempts any factory from that Ordinance. If however the statute is silent the common law principle of construction is that the Crown is not bound by a statute in the absence of express words or necessary implication. The Legislature appears to have, *ex abundanti cautela*, preserved this principle in section 11 (2) by enacting that nothing in this Act shall affect rules of evidence or any presumptions relating to the extent to which the Crown is bound by any written law.

Section 2 (5) exempts the Crown from liability for anything done by any person while discharging (*a*) any responsibilities of a judicial or quasi-judicial nature or (*b*) any responsibilities he has in connection with the execution of judicial process or (*c*) any responsibilities vested in him in his capacity as a member of the Public Service Commission or the Judicial Service Commission. There is a significant difference between this sub-section and the corresponding section of the English Act. The English Act confines the exemption to responsibilities of a judicial nature but the Ceylon Act extends it to responsibilities of a quasi-judicial nature. Considering the potentiality for vagueness implicit in the term quasi-judicial, the inclusion of quasi-judicial responsibilities might lead to uncertainty as to the exact scope of the exemption given to the Crown in this regard.

Section 5 recognizes the special status of the Post Office and exempts both the Crown as well as the particular officer of the Crown from liabilitiy in delict for anything done in relation to a postal article by such officer. This section is made subject to the Post Office Ordinance (Cap. 190 Legislative Enactments). Section 6 of that Ordinance exempts the Government of Ceylon from loss or damage

to a postal article. Section 33 of that Ordinance gives a discretion to the Minister to permit the payment of compensation for loss to an uninsured registered postal article and gives him the right to place a limit on the amount of compensation. The combined effect of section 5 of this Act and the Post Office Ordinance presents a sad picture of a niggardly disregard of the rights of the subjects of the Crown to compensation. In contrast the Crown Proceedings Act of England not only makes the Crown liable for the loss of a registered postal article due to a wrongful act of a servant of the Crown, but also creates a presumption in favour of the owner of such article that the loss was caused by a wrongful act of a servant of the Crown. The omission by the Parliament of Ceylon of this salutary provision in the English Act is mute but eloquent testimony of the extent of Parliament's want of confidence in the Postal Department of the Government of Ceylon.

Section 7 preserves the prerogative and statutory powers of the Crown, in particular those relating to the defence of Ceylon, the exercise of emergency powers, and the maintenance of the efficiency of the armed forces, and enacts that these prerogative powers are not abridged or extinguished.

Section 8 preserves the common law immunity of Her Majesty's ships or aircraft from proceedings *in rem* and enables proceedings *in rem* which have been instituted against any such ship or aircraft in the reasonable belief that it did not belong to the Crown to be treated as valid proceedings *in personam* against the Crown.

Section 9 introduces a welcome change in the law relating to actions against the Crown or any of its officers. A court cannot refuse to entertain any action brought under this Act only on the ground that the provisions of section 461 of the Civil Procedure Code as to notice of an action against the Crown have not been complied with. The Court may now give the plaintiff an opportunity to make good any omission in regard to notice.

Section 11 saves the common law rule that a proceeding in delict cannot be brought against Her Majesty in her private capacity.

V. RATNASABAPATHY

Law Reform (Contributory Negligence and Joint Wrongdoers) Act No. 12 of 1968

Date of Assent : 17th April, 1968.

The Law Reform (Contributory Negligence and Joint Wrongdoers) Act No. 12 of 1968 constitutes the first statutory intervention in the common law relating to contributory negligence and joint wrongdoers, which has long been considered unsatisfactory. The amending Act contains no substantial innovations. The draftsman has restricted his labours to reproducing in Ceylon the statutory provisions which were made in England and then adopted in South Africa.

This process of statutory provision begins with the 1935 English Act entitled the Law Reform (Married Women and Tortfeasors) Act. The reform regarding the law relating to contributory negligence was made by the Law Reform (Contributory Negligence) Act of 1945.

The law of South Africa dealt with the problem of joint wrongdoers and contributory negligence in one statute and by the Apportionment of Damages Act of 1956 the law of South Africa on this matter was brought into line with England.

We in Ceylon have now taken the step taken in South Africa in 1956.

Contributory negligence

The common law rule was that a plaintiff in an action for damages would be deprived of relief if he was also guilty of negligent conduct, however trifling that may have been. This was in effect the application of a penal theory of contributory negligence. Its injustice was manifest in a legal system which upheld compensatory theories. In order to diminish its harsh effect the English courts acting within the limits which they set themselves, formulated rules such as the ' last opportunity ' rule (*Davies* v. *Mann* (1842) 10 M. & W. 546), the ' last clear chance ', the ' proximate cause ' rule etc. These rules in effect stated that the contributory negligence of the plaintiff is no defence if the defendant who knew of the danger caused by the plaintiff's negligence had a later opportunity than the plaintiff of avoiding the accident by reasonable care.

Application of this law involved the court in a direct examination of the causing of the accident. The new rule, which makes contributory negligence no longer a *defence* to an action, will require the court

to *assess* the quantum and the degree of responsibility of each party. This is no doubt a more complex task than that which has been done previously by the courts.

A simple example will illustrate this. Prior to the 17th April, 1968, (when the Act came into force) A, while driving his car at a fast speed knocks down B, a pedestrian who rushed across the road. In this instance, if it is decided that B's act was negligent, B's action is dismissed and he gets nothing. But if this incident took place after 17th April 1968, the court will have to assess the total damage caused, say Rs. 10,000 and then decide what percentage of responsibility is attributable to B's negligence. If it is 10 per cent he will be entitled to 90 per cent, *i.e.*, Rs. 9,000. In assessing this responsibility various items of evidence will be relevant, *e.g.*, was the horn tooted, where were the brake marks, where on the road did the accident take place, the speed of the car. These no doubt are questions which are relevant under the present law, but under the new law the answers to these questions have a new significance.

The question may well be asked as to what happens to the old rules such as the ' last opportunity ' rule and the doctrine of ' alternative danger. ' Glanville Williams (*Joint Torts and Contributory Negligence*) and Salmond (*Law of Torts*) appear to be of the view that these have lost their place in the law. They submit that the question now is whether the party acted reasonably in all the circumstances of the case. However, it may be stated that the courts in taking into account the circumstances of the case will in assessing the responsibility for damage have need in some instances to refer and make use of these well-known rules.

The application of the new rule in England since 1945 (*vide* Salmond, *op.cit.*) has created an amount of new law. This cannot however be dealt with in a note such as this. But some of the more salient practices of the courts may be set out here.

(i) It is inappropriate to apply the Act when the responsibility of the parties is properly to be assessed at 100 per cent.

(ii) The court cannot deal with minor percentages. The Act operates only when it has been determined that one of the parties is at least 10 per cent responsible.

(iii) An appellate court, in a case in which the findings of fact are not disputed, will interfere with the apportionment made at the trial, only when it is clearly wrong ; it will not interfere merely because its members might themselves have made a different apportionment.

(iv) There is no rule that costs must be apportioned between the parties on the same basis as the loss.

A more detailed examination of the sections is now necessary.

Section 3 (1) (*a*) is the same as the South African provision in section 1 (1) (*a*) of the Apportionment of Damages Act. The only difference is that our Act adds the word ' only ' in stating that an action shall not be defeated by reason (only) of the fault of the claimant. This addition adds an element of clarity but is a distinction without a difference. Section 3 (1) (*b*) is the same as the South African provision in 1 (1) (*b*) of their Act. Section 3 (1) (*a*) and (*b*) and the corresponding South African provision describe the role played by the claimant as his ' fault '. The corresponding English section 1 (1) on the other hand describes it as the claimant's share in the ' responsibility for the damage. '

' Fault ' is described in all three statutes but it is only defined in the English section. In Ceylon and South Africa a formulation is used, but the meanings given are only inclusive of others unspecified.

The formulations are as follows :—

CEYLON

Section 8 : ' fault ' includes any wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages, or would apart from this Act give rise to the defence of contributory negligence.

SOUTH AFRICA

Section 1 (3) : For the purposes of this section ' fault ' includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

ENGLAND

Section 4 : ' fault ' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

SCOTLAND

The word ' fault ' is *defined* as in the Ceylon statute. The word ' includes ' is therefore excluded.

It will be seen therefore that our definition has been taken from Scotland. This is perhaps the first time that such an event has occurred. It is welcome that even though belatedly we should recognise the affinity our system bears to another Roman influenced 'mixed ' system of law.

It is submitted that the formulation in our statute is the most satisfactory. In the first place, as it is not a definition, it leaves the courts free to make formulations as and when necessary. Secondly, the content of the formulation is more comprehensive than the English and South African versions. Our formulation permits the court to look into acts or omissions to which the defence of contributory negligence will not be available. For instance, without our wide definition wilful wrongdoing would not amount to a 'fault'. This inadequacy in the English law has been pointed out by Glanville Williams (*op. cit.*) in his comments on the English Act. The same observation has been made as regards the South African Act by McKerron (*Law of Delict*, 6th ed. p. 270) and by Macintosh and Scoble, (*Negligence in Delict*, 4th ed. p. 52). It is therefore a matter for congratulation that our statute has coped with the problem satisfactorily. Similarly, our statute has provided for cases where there is a breach of an absolute or strict duty.

But the acts of negligence that are assessed are the acts of the parties to the action. There is no provision to take into account the acts of a party who is not a party to the action. Thus, it may well become a matter of strategy for the plaintiff to include two joint wrongdoers in an action. In most cases it would be desirable to ensure that all the wrongdoers should be made defendants.

Joint wrongdoers

Joint wrongdoers are usually described as persons jointly liable for the same wrong. Such joint liability arises in three classes of cases, (*a*) where two or more persons have acted in concert towards a common end, (*b*) where a duty imposed on such persons jointly has not been performed, (*c*) where one person is vicariously responsible for the acts or omissions of the other or others. However at common law, concurrent wrongdoers were not joint wrongdoers as they had acted independently although they produced the same damage. This distinction the Act has abolished for now joint liability accrues upon the production of the same damage irrespective of whether the acts were independent or concerted. The Act further clarified the law by stating that for the purposes of section 5 a person is a joint wrongdoer although another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so. The effect of this provision is to abolish the ' last opportunity ' rule as a test for determining liability in the case of joint wrongdoers.

At common law, the weight of authority was that there was no right to contribution between joint wrongdoers, although strangely enough this was available as between concurrent wrongdoers (*Hughes* v. *Transvaal Associated Hide and Skin Merchants (Pty). Ltd.* (1955)

2 S.A.L.R. 176. Writers on the Roman-Dutch law sometimes argued (*vide* Mc Kerron, *op. cit.* pp. 102 *et. seq.*) that the right to contribution was on general principles available in the Roman influenced legal system. However, under the English Law no right to contribution existed and this rule was practised in the courts.

The Act, however, gives statutory authority to the right to contribution. Now, one wrongdoer against whom a judgment has been given may claim a contribution from any other joint wrongdoer. In such a case the sum recoverable will be " such an amount as the Court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault. " The same principle of apportionment will apply where one joint wrongdoer without awaiting a judgment agrees to pay the claimant a sum of money in full settlement of his claim. In such a case the right to contribution arises only upon the payment of an agreed sum. These matters may now be dealt with in detail.

Proceedings against joint wrongdoers

Prior to the Act,a plaintiff might have sued one joint wrongdoer for the whole damage or sued all jointly in the same action. In the latter instance he was entitled, usually, to an undivided judgment for the full amount of the loss.

If he chose the course of suing one wrongdoer and succeeded he would not have the opportunity of proceeding against the others even if judgment against the defendant-wrongdoer remained unsatisfied. The theoretical basis for this rule was that judgment against one joint wrongdoer released all the others because the delict was merged in the judgment (*Brinsmead* v. *Harrison* (1871) L.R. 7 C.P. 547).

This rule has been abolished by the Act. The present position is that where a plaintiff sues one of many joint wrongdoers, notice of such action may *at any time* be given to the joint wrongdoer who is not sued. This notice may be given by the plaintiff or by the joint wrongdoer sued. Upon receipt of such notice the party noticed may intervene as a defendant in that action (section 5 (2) (*a*) and (*b*)).

The fact that this application may be made at any time can work to the disadvantage of the intervening defendant, particularly if the application is belated. For this and other reasons, the court is vested with discretionary power to order separate trials or make such other order it may consider just and equitable (section 5 (3)).

Failure to notice all joint wrongdoers, unlike at common law, does not necessarily defeat a claim against them. However, where

the plaintiff or a sued wrongdoer has failed to give such notice no action may be instituted without leave of the court on good cause shown as to why notice was not given as provided in the Act (section 5 (4) (*a*) and (*b*)). These are salutary provisions against a needless multiplicity of actions.

The right to contribution is prescribed within a period of 12 months. This period is to be reckoned from the date of judgment or where there is an appeal from the date of the final judgment, in appeal. This general rule is modified in the case of any joint wrongdoer who is governed by a law which prescribes a period of prescription or a period of notice which is less than one year (*e.g.*, the Customs Ordinance). In such a case the lesser period will apply but it will be reckoned from the date of judgment and not from the date of the original cause of action (section 5 (6) (*b*)).

In any action for contribution, the defendant wrongdoer may raise any defence which a plaintiff wrongdoer could have raised against the plaintiff in the original action. It must be noted that this provision does not permit the defendant wrongdoer to raise a defence which he himself might have raised against the plaintiff in the original action (section 5 (6) (*c*)).

Section 5 (6) (*a*) provides that a joint wrongdoer who has paid the judgment debt in full, may recover from any joint wrongdoer a contribution in respect of his responsibility for such damage. Section 5 (7) makes a similar provision where one joint wrongdoer, *in pursuance of a judgment*, pays to the other *an amount* in respect of his responsibility for such damage (not necessarily the judgment debt in full) and the amount so paid is in excess of the amount apportioned by court as his responsibility. By virtue of section 5 (12) similar principles are applied where one joint wrongdoer pays the plaintiff a sum of money in full settlement of the plaintiff's claim. This is a payment made by virtue of an agreement not the result of a judgment. In such a case contribution will be permitted if the court is satisfied that the sum paid to the plaintiff is *less* than the full amount of the damage actually suffered by him.

A simple example will illustrate the application of this principle. P sues JW1 in respect of damages suffered by him. He obtains judgment in Rs. 10,000 and it is held that JW1 is only 30 per cent responsible for the damage. JW1 pays P Rs. 5,000. This is Rs. 2,000 in excess of his own responsibility. JW1 can sue JW2 for contribution. JW1 will in this instance recover Rs. 2,000 being the excess.

By virtue of section 5 (12) similar principles are applied where one joint wrongdoer pays the plaintiff a sum of money in full settlement of the plaintiff's claim. This is a payment made by virtue of an agreement not the result of a judgment. In such a case contribution will be permitted if the court is satisfied that the sum paid to the plaintiff is *less* than the full amount of the damage actually suffered by him. Section 5 (8) of the Act is concerned with the orders that may be made by a court when judgment is given in favour of the plaintiff in an action against two or more joint wrongdoers. These provisions are concerned with the proportion and manner in which each defendant will bear the amount of damages awarded. Thus the court may order the payment of damages by such wrongdoers jointly and severally, the one paying and the other being absolved. But where the court is satisfied that all the joint wrongdoers have joined in the action, it may apportion the damages awarded " in such proportions as the Court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff ". In such a situation the court may even give judgment separately against each joint wrongdoer for the apportioned sum. If however the plaintiff is unable to recover the amount so separately awarded from one wrongdoer, *e.g.*, because of his insolvency, the plaintiff may recover the same from the other joint wrongdoer or if there are more than one from both provided it is apportioned in accordance with the aforesaid principle (section 5 (8) (*a*) (ii)).

In order to facilitate actions for contribution between joint wrongdoers, the court when delivering judgment may fix the proportion of the damages payable by the joint wrongdoers *inter se* (section 5 (8) (*a*) (iii)). A similar order may be made as to costs. (section 5 (8) (*a*) (iv)). Section 5 (9) gives the court power to make an order it considers just as to costs where judgment is given in favour of any joint wrongdoers. This includes the power to apportion, the power to permit recovery of an excess paid by one and even to order the plaintiff to pay such joint wrongdoers' costs.

There are certain classes of cases where a joint wrongdoer is a privileged defendant, *e.g.*, because of an agreement by which he is entitled to an indemnity and therefore exempt from liability or because he is a person whose liability is limited. In such a case, for all purposes of this Act, such an amount, or excess as the case may be, cannot be recovered from the other joint wrongdoer. It is regrettable that this section did not go on to cover cases where the immunity arises other than by agreement,*e.g.*, by statute, diplomatic privilege etc. (section 5 (10)).

Provision is also made for cases where a sum in contribution cannot be recovered from one joint wrongdoer. In such a case the court may, if it deems it just and equitable, re-apportion that contribution among the other joint wrongdoers.

When a judgment in any action is given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or any joint wrongdoer has agreed to pay the full sum to the plaintiff, then upon the satisfaction of the judgment or the payment of the sum so agreed, every other joint wrongdoer is discharged from any future liability towards the plaintiff.

Section 5 of the Act applies to persons jointly or severally liable in delict. Since this section does not expressly refer to liability created by statute, section 6 enacts that the provisions of section 5 will also apply in relation to any liability imposed under Part VI (*i.e.*, sections 99 to 121) of the Motor Traffic Act. This Part of the Motor Traffic Act applies to insurance against third party risks. As a result of this Act the liabilities imposed by Part VI of the Motor Traffic Act becomes liable to contribution.

L. W. Athulathmudali*

*M.A., B.C.L. (Oxon.), LL.M. (Harv.) Advocate; Lecturer, Ceylon Law College.

NOTES AND COMMENTS

Editorial Comment

At the meeting of the Council of Legal Education on 25th February, 1968, Mr. Justice Weeramantry referred to the absence of a law journal in Ceylon and urged that in the interests of legal education the Council should actively assist in the publication of a journal. A Committee appointed by the Council reported in favour of the proposal and in April, 1968, the Council agreed to give financial support for a law journal to be published half-yearly. This decision of the Council means that it is now possible to give the legal profession and law students a regular journal devoted to the law of Ceylon and matters of legal interest.

Lawyers who are also students of law whether in practice, in teaching or holding legal positions under the Government or in the private sector, will welcome this encouragement to write on the various aspects of Ceylon law which have held their attention. Those of us who are familiar with the many strands which combine to make a strong and virile legal system are aware that there are many areas of the law of Ceylon that call for exposition and clarification. Since the number of those who are capable of making scholarly contributions is no longer small, it is confidently predicted that this journal will not be starved of articles of value to lawyers and students. The rich substratum of our law, the Roman-Dutch law, is always there — a temptation to the scholar to delve into hidden depths from which he will surface with fragments of a forgotten law. While these studies will no doubt continue to be an important contribution to our legal literature, it is well to remember the words of a South African Judge : " The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards. Lot's wife looked back. Our national jurisprudence moves forward where necessary, laying aside its swaddling clothes " per Holmes J. in *Ex parte De Winnaar* 1959 (1) S.A.L.R. 837, 839.

There is even greater reason for us in Ceylon to bear these words in mind for differences in language, culture and above all social conditions should make us chary of accepting uncritically the opinions and sentiments even from an historically valid source. It is heartening to find that the Privy Council has in no uncertain terms placed

limits on the usefulness of legal searching into a remotely relevant past. In *Kodeeswaran v. Attorney-General* (1969) 73 N.L.R. 337 Lord Diplock observed that where there is a long established judicial authority for a proposition of law in the decisions of the Ceylon courts " there is no need to go back to see whether any precedents can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. " He further clarified the correct attitude to older authorities when he said " Even a clear conflicting precedent in the eighteenth century jurisprudence or doctrine of the United Provinces would not necessarily be a conclusive indication that a later decision of a Ceylon court is erroneous. "

In emphasising that there is a body of Ceylon law which has a right to independent recognition Lord Diplock has stated an undeniable fact. Law must be seen as more than an extension of an accidental past—as an instrument of change ; and the legal order not simply as a system of rules and norms but as playing a vital role in the development process. The journal will accordingly not be confined to writings on purely academic topics but will take in a much wider sweep which will show the full scope of the Ceylon law. We shall focus attention on current legal developments and the role of the legal system in the context of the economic, social and political development of the country. There is a need for studies on the functional aspects of the legal system in order that where it is found that established laws and institutions are disfunctional or incompatible with society's needs then attention can be drawn to meaningful reforms.

It is not only the law and the legal system which is involved in the process of change. The legal profession has also a role to play in a developing society and must display a vitality if it is to fulfil this role. The legal profession, its strength and weakness, the direction of reform, are equally matters for serious discussion.

The Journal of Ceylon Law invites contributions from lawyers and non-lawyers on all aspects pertinent to the legal system of the country and the judicial process.

THE EDITOR

THE ATTORNEY-GENERAL *v.* LADY ROWE

It is sometimes stated that Judges make law in the sense that they create legal principles in the process of declaring the law. The

limits to this method of legal development have been set by no less a person than the late Justice Cardozo. There are rarer instances of Judges contributing to the growth of law in their own personal cases. This is a method of making law that is not familiar to the legal mind and when the particular Judge in question happens to be a former Chief Justice of this country, it becomes of extra interest to members of the profession. It is for that reason that the case of *Attorney-General v. Lady Rowe* (1862) 1 H. & C. 12, becomes of topical interest to us.

Sir William Carpenter Rowe was born in England of English parents and practised as a member of the English Bar until the beginning of 1856, having been previously appointed as one of Her Majesty's Counsel. In the month of February, 1856, he was appointed by Her Majesty to be Chief Justice of Ceylon as successor to Sir William Ogle Carr. Shortly after his appointment he left England and proceeded to Ceylon with his wife and family and continued to reside in Ceylon holding during the whole period the office of Chief Justice until his death in Colombo in November, 1859. On 15th October, 1859, he made his last will and testament in writing in the presence of five witnesses present at the same time who attested and subscribed the will in his presence. In his will, he described himself as 'Sir William Carpenter Rowe, Knight, Chief Justice of Ceylon' and he thereby constituted his wife, Lady Rowe, sole executrix of his will. The testator, while he resided in Ceylon, invested a large sum of money—over £ 20,000—on the mortgage of real property and in respect of this sum of money and other personal property, his widow obtained probate of the testator's will from the District Court of Colombo. Subsequently Lady Rowe proved the said will in the Principal Registry of Her Majesty's Court of Probate on 6th March, 1860, and thereby became the sole legal representative of the testator. But she refused to pay legacy duty in respect of the testator's personal estate on the ground that at the time of the testator's death he was not domiciled in England, but was domiciled in Ceylon and consequently no such duty was payable.

The information in equity by the Attorney-General came up for argument before the Court of Exchequer on May 12th, 1862. Counsel, including the Attorney-General and the Solicitor-General, appeared for the plaintiff while Lady Rowe was represented by counsel of her choice. The Court was presided over by Chief Baron Sir Frederick Pollock with whom were associated Baron Bramwell and Baron Wilde. The question for decision before the Court of Exchequer was whether Sir William had abandoned his domicil of origin and acquired a new domicil of choice in Ceylon by obtaining what the Court picturesquely called a 'Cingalese domicil.'

From the outset Counsel for the defendant faced an uphill task. Apart from the fact that the onus of proving that the testator had abandoned his domicil of origin was a difficult one, the evidence necessary to prove the abandonment of the domicil of origin was extremely meagre. Counsel found it difficult to prove to the satisfaction of the Court that Sir William left England *sine animo revertendi* notwithstanding that he took with him his family (and his horse carriage). An analogy was sought to be proved from a consideration of the case of officers of the East India Company, who went to India in the civil or military service of the Company. In their case, at that time, even an intention to return ultimately, however strongly expressed, was not conclusive on the question of domicil because such service entailed the obligation of permanent residence in the Company. But as Baron Bramwell said there was a difference between a young officer going East to acquire competency and the case of a Judge who has already attained a position and who goes out at a time of life when the chances are that only a few years would be spent abroad.

Sir William was appointed Chief Justice of Ceylon at the pleasure of the Crown and had the right to resign his appointment any time he chose to. There was not a single fact which indicated an intention to reside in Ceylon. On the contrary he had left behind his law books in England and had bequeathed them to relatives in England ; he had also instructed his wife to realize his investments in Ceylon and invest in English securities. According to Pollock C.B. the domicil of origin was clear and there was nothing to indicate a change of that domicil and therefore the Crown was entitled to judgment. Bramwell B. and Wilde B. delivered separate judgments concurring with the views of Sir Frederick Pollock.

This case helped materially in the formulation of the principles governing the acquisition of a domicil of choice. It was decided before that other well-known Ceylon case concerning an Englishman in the Ceylon Civil Service, *Le Mesurier v. Le Mesurier*, which established the importance of domicil in actions for matrimonial relief. *Attorney-General v. Rowe* is still an authority for two propositions of law :

(1) A person who has the intention of residing in a country for a fixed period lacks the *animus manendi* necessary for the acquisition of a domicil of choice.

(2) There is a presumption that a person who goes to a country in order to perform a contract of service does not acquire a domicil of choice in that country.

A third proposition found in the judgment of Bramwell B. that a person may be domiciled in different countries for different purposes is still controversial.

A. C. ALLES*

SOCIAL DISABILITIES ACT–CONFLICTING JUDICIAL ATTITUDES

At the time the Social Disabilities Act was enacted it was apparent that the need for legislation was greatest in the North. (See the writer's analysis of the Act in the *Law Students Magazine*, 1968.) In this article it was also pointed out that the success of the Act cannot be measured in terms of convictions and that the value of the legislation lay in helping to bring about a change of behaviour by the morality of the law. Other reasons were given for thinking that the implementation of the Act would not be easy. In fact there have been few prosecutions and these have all been for caste discrimination among Tamil people. What was unexpected however was that the Supreme Court should be in two minds as to the type of behaviour the Act was directed against.

The first inkling of this was in *Sevvanthinathan v. Nagalingam* (1960) 69 N.L.R. 419. Here there was an inverted application of the Act in a private prosecution under section 290 of the Penal Code for defilement of a Hindu temple. The alleged defilement consisted of entry by the accused into the inner courtyard of the temple for worship because by virtue of his caste he was excluded from the category of persons who had a right to be there. The accused was acquitted by the Magistrate on the ground, *inter alia*, that a conviction would be tantamount to denying the accused's right of worship. There being no right of appeal it was urged in revision that there was no denial of the right of worship because the accused only had the right to worship in the outer courtyard. Why was the accused so discriminated? Obviously because he did not belong to the right caste. Yet T. S. Fernando J. expressed the opinion that the Social Disabilities Act did not " have the effect of conferring on the followers of any religion a right of entering, being present in or worshipping at any place of worship which they did not have before the Act came into force. " According to his reasoning the Act only protected the accused's right to enter the outer courtyard — a proposition which has only to be stated in this form to see that it is untenable.

*Puisne Justice, Supreme Court, Ceylon.

In *Muthulingam* v. *I. P. Chunnakam* (1969) 71 N.L.R. 571, two Tamils, a clerk and a bus conductor, entered the accused's barber saloon when there were no other customers and wanted a hair cut. The accused refused on account of the caste of the complainants, and was prosecuted under the Act. The charge was defective in that it did not specify that the accused was running a *public* hair dressing saloon (this is required in the definition of imposing a social disability in section 3). The substance of the defence was that the accused was prejudiced because he was not able to take the defence that the saloon was meant for persons of a certain caste only and, therefore, was not a *public* hair dressing saloon. De Kretser J. in upholding this contention and setting aside the conviction appears to have assented to the proposition that a service which is public in character can by the mere *ipse dixit* of the proprietor be taken out of the category of a public service, thereby it is respectfully submitted, nullifying the whole object of the legislation. The fundamental question is whether it is any longer permissible to deny to a person a service which is open to all others, by reason of his caste.

These decisions are to be contrasted with *Suntheralingam* v. *Herath* (1969) 72 N.L.R. 54, which was a Police prosecution under the Act for preventing a Hindu worshipper entering the inner court-yard owing to his 'low' caste. Three arguments were advanced against the conviction of the accused :

(1) The legality of the Act was challenged on the ground that it permits entry of persons whose presence would according to the custom or ancient usage observed in the temple constitute a defilement. Since this was an alteration of the constitution of a religious body, the Act offended the provisions of section 29 (2) (*d*) of the Constitution in that it had not been passed by a two-thirds majority. The possibility of legislation to end discrimination over temple-entry being challenged as *ultra vires* the Constitution was considered by the Special Committee on Hindu Temporalities. Their Report (Sessional Paper V of 1951) concluded that the prohibition of certain classes from entering temples does not form part of the fundamental doctrines of the religion of any sects of the Hindu in Ceylon and that they are mere customs and usages which have grown round religion. As such there would be no infringement of the 'entrenched' clauses. The Chief Justice came more directly to the same conclusion. "Section 29 (2) (*d*) of the Constitution of Ceylon would in my opinion apply only to a law which purports to alter the mode by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship *inter se* of members of the body."

(2) The Social Disabilities Act does not contain a clause to the effect that its provisions are to prevail over any other law and therefore cannot displace the right to discriminate which was implied by the Tesawalamai Code, section 4. This argument was rejected on the ground that the Act being a later special law with provisions directly giving a right of entry to hitherto prohibited areas must prevail over the Tesawalamai Code.

(3) Finally H. N. G. Fernando C.J. considered the *obiter dictum* of T. S. Fernando J. in *Sevvanthinathan* v. *Nagalingam*. It was obvious that on the reasoning of T. S. Fernando J. the accused had not committed an offence under the Act. But as the learned Chief Justice pointed out this was a narrow construction which renders the Act ineffective to eradicate an existing social evil. " I much prefer," said the Chief Justice, " the construction, plainly appearing from the Act, that Parliament did intend to prevent forms of discrimination which prevailed in the past." The judgment and the conviction in the case are to be welcomed as indicating a complete absence of judicial sympathy for, to borrow the words of the Chief Justice, " undemocratic and anti-social forms of discrimination."

Conciliation Boards

The Conciliation Boards Act (No. 10 of 1958) was passed in 1958 with the object of putting an end to wasteful litigation by promoting amicable settlement of disputes, civil and criminal. It was essentially meant for village areas and the arbitrators were therefore men of the village as in the ancient days of the Gansabhavas. The provisions of the Act were extended to urban areas after 1963 when the Minister of Justice was given wider powers to constitute the Panel of Conciliators.

The first Board was constituted in February, 1959, but at the end of 1965 only 75 Boards had been established. After 1965 the number of Boards increased steadily and today there are over 300 functioning in different parts of the country. In 1963 the Act was amended in important respects. A time limit of 30 days was fixed for the repudiation of a settlement by one party, and provision was made for the enforceability of a settlement as a decree of a court of law. The offences which were amenable to settlement were also reduced. No regulations however have been made under the Act and this has meant that no assistance has been given for the clarification of doubtful points. Statistics kept by the Ministry of Justice reveal that up to 1969, 29,441 disputes were referred to

Conciliation Boards, and of these 13,710 (or nearly 50 per cent) were settled. These figures are taken as an indication of the good results flowing from the implementation of the Act, particularly in the last few years. It is also true that some of the difficulties inherent in the statutory provisions are now being seen and have become the subject of a number of appeals to the Supreme Court.

Judicial approbation of the object of the legislation is not wanting. See, *e.g.*, T. S. Fernando J. : " What it seeks to do is to place a bar against the entertainment by Court in certain stated circumstances of civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute over which the parties appear set on embarking on litigation which is often expensive to the parties as well as to the State and which almost always finishes up in bitterness. " (*Samarasinghe v. Samarasinghe* (1967) 70 N.L.R. 276). Alles J. in *Wickramaratchi v. I. P., Nittamburwa* (1968) 71 N.L.R. 121 was more specific when he said, " the Act was intended to provide an expeditious and inexpensive means of settling disputes between parties without the necessity of having recourse to the complicated process of a law suit. It was no doubt a salutary piece of legislation which enabled subjects to relieve their disputes in a simple and effective manner. " At the same time however one detects judicial uneasiness over the possibility of erosion of a fundamental right by western legal standards, *viz.*, the citizen's right of access to the established courts of law. Now that this dichotomy has received judicial notice lawyers, legislators, and litigants will be anxious to know what the final outcome will be.

In *Wickramaratchi v I. P., Nittamburwa* Alles J. was dealing with an appeal against a conviction in the Magistrate's court. The offence was causing simple hurt (which is an offence specified in the Schedule as falling under the conciliatory process created by the Act) and the objection was taken on behalf of the accused that the Magistrate could not have entertained the plaint in the absence of the certificate from the Chairman of the Conciliation Board. In earlier cases Judges had implied that a party to a dispute was obliged to have the dispute referred to a Conciliation Board in the first instance and had considered the absence of a certificate as fatal to the court's exercise of jurisdiction. See *Brohier v. Saheed* (1968) 71 N.L.R. 151, *Samarasinghe v. Samarasinghe.* The wording of section 14 strongly supports this interpretation, but Alles J. showed that section 14 was necessarily linked with section 6 : " The bar to the institution of certain civil actions or prosecutions for certain offences mentioned in section 14 is in connection with civil disputes and offences that may be referred to Conciliation Boards under

section 6 ". And section 6 enacts that disputes and offences are referred for inquiry either by the Chairman *mero motu* or upon application made to him by at least one of the parties. On this reasoning the learned Judge came to the conclusion that " disputes and offences of the kind enumerated in section 6 (*a*) to (*d*) which are not referred to a Board by either one or other of the two methods mentioned above would ordinarily be justiciable by the established courts, even without the required certificate " (p. 124). As a matter of interpretation this conclusion was coloured by the Judge's prepossessions as to the presumption against the ouster of the jurisdiction of courts of law. For example, he observed " The right of the subject to seek redress for any grievance from the established courts of law is a right that is fundamental and should not in any way be fettered " (p. 123).

We can distinguish the following situations arising in respect of a dispute or offence which is *prima facie* referable to a Conciliation Board :

(*a*) The dispute or offence is referred for inquiry to the Conciliation Board, and the parties accept the settlement.

(*b*) The dispute or offence is referred to the Conciliation Board but no settlement has been possible.

(*c*) The parties accept the settlement of the Conciliation Board but within 30 days one party repudiates the settlement.

(*d*) One party repudiates the settlement after 30 days.

(*e*) Plaintiff comes to court without a certificate from the Chairman of the Conciliation Board.

(*a*), (*b*), and (*c*) are dealt with in the Act and create no problems It is obvious that the success of the Act must depend on the willingness of parties to settle, whatever be the dispute. The possibility of (*b*) and (*c*) also indicates that the Act did not introduce radical changes but took the realistic view that parties should be free to take their disputes to court. On the other hand (*d*) can create problems, *e.g.*, cannot the authority of the Conciliation Board over the particular dispute or offence be canvassed at any time ? Presumably a settlement outside the contemplation of section 6 would be devoid of binding force. There are real difficulties when it comes to defining the scope of a Conciliation Board's powers of inquiry. The word " dispute " itself can be the source of much confusion and the location of a dispute can even raise questions of a metaphysical kind (see *de Silva v. Ambawatte* (1968) 71 N.L.R. 348).

In the case of (*e*) if an issue as to jurisdiction in the absence of a certificate is not raised by the defendant (this could happen where

both parties prefer to have their dispute before a court without waste of time) the court may not independently raise it. Even if an issue is raised the absence of the certificate may not be a bar to maintaining the action unless it is shown that proceedings were pending in the Conciliation Board at the time the action was instituted. The last proposition is derived from *Wickramaratchi v. I. P., Nittamburwa* and *Samarasinghe v. Samarasinghe* if we accept the limited *ratio* assigned by Alles J. to the latter case, *viz.*, that if the dispute had been referred for inquiry to a Conciliation Board the Court is precluded from entertaining the action, and it is not sufficient for the plaintiff to obtain the certificate after having instituted the action. (Actually the issue argued in *Samarasinghe v. Samarasinghe* was whether a dispute over a tenancy falls within the ambit of section 6 of the Act (see *Brohier v. Saheed*). This analysis, if correct, will make it important to ascertain the earliest that an action can be said to be pending in a Conciliation Board. Is the critical time when the application is made to the Chairman or when the latter refers the dispute to a Conciliation Board? Although a delay is not contemplated and would be regarded as unusual, *de Silva v. Ambawatte* is proof that it can happen. Samerawickrame J. held in this case that *certiorari* and *mandamus* lie against the refusal by the Chairman to refer the dispute to the Conciliation Board. (*Quaere*, does the Chairman exercise a quasi-judicial function?)

These difficulties make it all the more necessary to consider another argument advanced in *Wickramaratchi v. I. P., Nittamburwa.* This was that even assuming that a certificate was required to give a court jurisdiction the absence of the certificate was only a procedural irregularity that was curable under section 425 of the Criminal Procedure Code. The section gives the Supreme Court in appeal or revision authority to ignore an irregularity in the proceedings before or during trial. Alles J. was of the opinion that the absence of the certificate " only relates to the exercise of jurisdiction as distinct from the conferment of jurisdiction, " and held that the curative provisions would apply to the facts of the case. It will be seen that the second ground for dismissing the appeal is of limited applicability and will not authorise a lower court, when objection is taken, to ignore the defect unless the objection is taken too late (*Atapattu v. Punchi Banda* (1938) 40 N.L.R. 169). Nevertheless it seems likely that the second ground will be regarded as what was decided in *Wickramaratchi v. I. P., Nittambuwa* since the plaintiff's failure to produce the certificate was not raised as an objection at the trial.

R.K.W.G.

Custody of Minor Children

Madulawathie v. *Wilpus* (1967) 70 N.L.R. 90 is a welcome decision on the topic of the award of custody of minor children where there is only a *de facto* separation of husband and wife. It reasserts the validity of *Ivaldy* v. *Ivaldy* (1956) 57 N.L.R. 568 which was obscured by recent decisions of the Supreme Court that seemed to question a fundamental premise of the modern Roman-Dutch law of custody, *viz.*, the preferential right of the father (*Calitz v. Calitz* (1939) A.D. 56).

In *Madulawathie v. Wilpus* Siva Supramaniam J. considered an application by a married woman (who already had the custody of a 3 year old son) for custody of a girl of 5 years and 9 months living with the father. The woman claimed that the father could not give proper care and attention to the child who was subsequently, " in a state of anxiety, " that there was no proper person to look after the child, and that the father threatened her with bodily harm whenever she visited the child. Siva Supramaniam J. dismissed her application holding that, subject to the interests of the child, the father as natural guardian had a preferential right to custody and the petitioner had not discharged the burden on her to prove that it was in the interests of the child to deprive the father of custody. In coming to this conclusion the learned Judge observed that the third ground of the petitioner was irrelevant and that the other grounds were unsupported by the evidence. He said that where the parents and a sister of the husband were in a position to care for the child when the father was away at work, and he had the means to support her, she could be well looked after, and that " while it is undoubtedly very desirable that the children of a family should have the companionship of each other particularly when they are young " this could not be the deciding factor.

The judgment is therefore strongly reminiscent of the approach in the leading South African case of *Calitz v. Calitz* cited before Siva Supramaniam J. In this case in awarding custody of a $2\frac{1}{4}$ year old girl to the father the Appellate Division reviewing the approach of the text writers on the Roman-Dutch law said " the court has no jurisdiction where no divorce or separation authorising the separate home has been granted to deprive the father of his custody, except under the court's power as upper guardian of all minors to interfere with the father's custody on special grounds such for example as danger to the child's life, health or morals. "

In emphasising the preferential right of the father the judgment did not rely on the concept of *patria potestas*, for the Roman-

Dutch law did not recognise the *patria potestas* of the Roman law (Voet 1.6.3). Tindall J. A. however drew attention to the fact that while the parental power over minor children of a marriage was with both the father and mother, the law showed a preference for the rights of the father, either because a man was considered to have superior judgment or because a marriage partnership could not work if one spouse did not have an over-riding interest in the upbringing of children. Even though the court was familiar with liberal thinking on the parent-child relationship which even as far back as 1938 emphasised the status of married women and the psychological welfare of children, it concluded that the modern Roman-Dutch law on custody should develop in the context of the superior rights of the father. The English common law and even recent South African statute law emphasises the welfare of the child as the sole criterion in determining the issue of custody. The phrase " danger to life, health or morals " as expressed in *Calitz v. Calitz* introduces that same general concept (see *Ivaldy v. Ivaldy* ; *Weragoda v. Weragoda* (1961) 66 N.L.R. 83) but it is a device by which the court can interfere with the exercise of the father's rights. It is obvious therefore that even though there may not be a conceptual difference, the fact that in the modern Roman-Dutch law the concept functions in a system that recognises a special right in the father can affect significantly the burden of proof. The father will be deprived of custody only upon proof that he is unfit to care for the child.

The correctness of *Calitz v. Calitz* appears to have been recognised by our Supreme Court in important decisions of the past. Thus in *Fernando v. Fernando* (1956) 68 N.L.R. 262 H. N. G. Fernando J. (as he then was) reiterated the position he had taken in *Ivaldy v. Ivaldy* and said that he was called upon to decide whether " a father's fundamental right to the custody of his children during the subsistance of the marriage is to be over-ridden on the ground that if the child is permitted to continue in the custody of the father there will be detriment to the life, health or morals of the child. " Where the facts showed that the father wished to entrust the child to a sister who was over 50 years of age to " compensate her apparently for her own childlessness " the learned Judge was of the opinion that " it would be detrimental to the life, health and even morals of such a young child if that child is forcefully separated from her mother and compelled to live not even in her father's custody but under the care of an elderly relative" Fernando J.'s comment that no evidence was led to show that the mother was incompetent and that " so long as the mother is shown to be fit to care for the child it is a natural

right of a child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously " must be understood in the context of the case. They cannot be taken to suggest that the custody of a young child must be awarded to the mother unless she is shown to be unfit to care for the child. Such a proposition would conflict with the learned Judge's earlier exposition of the law which was in keeping with *Calitz v. Calitz.*

In *Weragoda v. Weragoda* Sansoni J. does not appear to have departed from the view taken in *Ivaldy v. Ivaldy* because though he said that " danger to life, health or morals is only an example of the special grounds which would justify the interference of the court" he did recognise the preferential right of the father when he said " the rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case. "

Madulawathie v. Wilpus is in line with these decisions but in conflict with *Kamalawathie v. de Silva* (1961) 64 N.L.R. 252 and the more recent case of *Fernando v. Fernando* (1968) 70 N.L.R. 534. These latter decisions make the sole criterion the welfare of the child and make no mention of the father's preferential right to custody.

In *Kamalawathie v. de Silva* Tambiah J. decided that as long as the mother is a fit person the father can be deprived of his right to custody. This conclusion suggests that the mother can claim custody even without leading evidence to indicate that the father was not fit to have the custody of the child. It is respectfully submitted that while the learned Judge cited the dictum in *Fernando v. Fernando* in support of this view, he failed to distinguish the context in which it was made. His Lordship said that our courts have developed a principle that a court can order a father to hand over the custody of a minor child if it is necessary in the interest of the minor child's life, health or morals relying on English decisions and sometimes on the Roman-Dutch law to formulate this principle. One can hardly disagree with the learned Judge's comment that "law like race is not a pure-blooded creature " but it is respectfully submitted that his Lordship saw a fusion where there was none. Consequently he misread the Roman-Dutch law doctrine which quite clearly and independently of English influences recognises that a court can deprive the father of custody, in the interest of the child, but places the burden of proving the need to do that fairly and squarely on the party who seeks to deny the father's preferential right. (For a criticism of this case see 1 *Ceylon Law Recorder* (New Series) CXLI). In the process of emphasizing the criterion of the welfare

of the child (which is not absent in the Roman-Dutch law) Tambiah J. obscured the fundamental premise that the father had a preferential right to custody.

The danger of over-emphasising the dictum in *Fernando's* case is also revealed in *Fernando v. Fernando* (1968) 70 N.L.R. 534. Weeramantry J. goes so far as to suggest that in Ceylon there " is a rule commended by law and ordinary human experience that the custody of very young children ought ordinarily be given to the mother. " It is submitted that his further comment that " over-riding considerations taking their force from the mother's past character or conduct or from her inability to give the children a suitable home may no doubt prevail over this principle ", indicates the distortion resulting from a reading of the dictum of H. N. G. Fernando J. out of its special context. For in the judgment of Weeramantry J. that dictum is cited in support of the proposition that the law of Ceylon gives a preferential right of custody to the mother.

It is submitted that the correct view of the law of custody as it applies in Ceylon is that set out in the recent decision in *Madulawathie v. Wilpus.* There is a sufficient line of authority that has accepted the development in the modern Roman-Dutch law, recognising a preferential right to custody in the father which however can be displaced by proof in court that he is not fit to have the custody of a minor child. That principle has been accepted in decisions of the Supreme Court as part of the Roman-Dutch law applying in Ceylon and is not a product of the dual operation of the English law and the Roman-Dutch law. A court in Ceylon can interfere with a father's rights if there is danger to life, health or morals because our law accepts the wider criterion of the welfare of the child, but there is no room for the further proposition suggested in *Kamalawathie* v. *Silva* and *Fernando* v. *Fernando* that the court will regard that it is always in the interests of a young child to be with the mother. Acceptance of that viewpoint will erode the concept of the father's preferential right and create in its place a preferential right in the mother. While liberal thinking on the parent-child relationship must necessarily influence courts and guide them in determining matters of custody outside the context of parental authority, it is submitted that the Roman-Dutch law effects a delicate balance between parental power and the welfare of the child which is in keeping with the social traditions of Ceylon and this must not be jettisoned in a mistaken attempt to introduce liberal thinking into the law.

SAVITRI GOONESEKERE*

*LL.B. (Cey.), LL.M. (Harvard), Advocate ; Lecturer in Law, University of Ceylon, Colombo.

Student Legal Aid Program

In a year marked by significant innovations at the Law College, none is probably more promising than the inauguration of a Student Legal Aid Program. During the academic year nearly ninety third and fourth year students and Advocate apprentices will participate through the Program in the administration of the national Legal Aid Scheme, operated with Government support by the Law Society.

Students will interview legal aid applicants at the Scheme's Colombo Centre and, in the case of remanded prisoners, at the four prisons in the Colombo area. The students will determine whether applicants are financially eligible for assistance from the Scheme, conduct interviews into the applicants ' substantive legal problems, and prepare detailed reports setting out and analysing the problems presented. After review by members of the Law College and Legal Aid staffs, these reports will be forwarded to Proctors and Advocates participating in the Scheme, for their use in handling cases. These lawyers are also being encouraged to involve the students who have conducted the initial interviews in further developments in these legal aid cases, such as in the interviewing of witnesses, the preparation of pleadings, further legal research, and the observation of court hearings.

The Student Legal Aid Program is viewed as potentially making a contribution both to the students participating and to the administration of the Scheme. The benefits to the students are the most evident. There is exposure to the aspects of law practice not taught in the classroom and only imperfectly conveyed by the present apprenticeship system. With proper supervision the student can learn how to deal with clients, how to conduct a proper interview and how to analyse everyday legal problems. Involvement in the drafting of pleadings and in other pre-trial preparations can familiarise the student with court procedure — one of the most incomprehensible aspects of legal practice to the young practitioners now passing out of our law schools. To the Legal Aid Scheme the benefits of the student program can be no less substantial. The time of Law Society staff now engaged in conducting the initial interview of applicants will be freed for other pressing Legal Aid and Law Society business. The reports prepared by students should be sufficiently detailed to significantly expedite the handling of the cases by the Proctors and Advocates participating in the Scheme. This, hopefully, will increase the number of cases which can be handled by the Scheme within presently available funds. Possibly the greatest benefits of the student program will be in the long run,

however. In familiarising students with the work being done by the Scheme and by generating enthusiasm for this type of professional activity, the prospect arises of a generation of young practitioners dedicated to and willing to devote freely of their time and professional energies to legal aid efforts.

To assist the Law College in the establishment and operation of this Program, the International Legal Center of New York has made available the services of an American lawyer, Mr. Barry Metzger. For the past two years Mr. Metzger has served on the staff at the Harvard Law School of the Harvard Legal Aid Bureau — at fifty-seven years old the longest functioning student legal aid program in the United States.

The Student Legal Aid Program was formally inaugurated at a meeting held at the Law College on 17th January, 1970. The gathering of over 120 students was addressed by the Principal of the Law College, the Hon'ble the Chief Justice Mr. H. N. G. Fernando, Mr. Metzger, and, on behalf of the Law Society, Mr. N. J. V. Cooray. Following the meeting nearly ninety students stepped forward to register for participation in the Program. Operation of the student program begain in mid-February.

BARRY METZGER*

*A.B. (Princeton) J.D. (Harvard) Attorney, District of Columbia, Supervisor Student Legal Aid Program and Moot Court, Ceylon Law College.

REVIEWS

The Colombo Law Review (1969). (Published by the Faculty of Law, University of Ceylon, Colombo).

The first number of the *Colombo Law Review*, which has been published by the Law Faculty of the University of Ceylon, Colombo, contains many learned and interesting Articles, Comments and Notes. It is not possible for a reviewer to discuss all of them, much as he would like to. The *Review* begins with a paper entitled "The Roman-Dutch law in South Africa: the influence of English law," which the late Professor R. W. Lee read to the students of law in the University of Amsterdam. One is struck by the many points of resemblance between this account of the introduction of English law into South Africa and the story of its introduction into Ceylon. Legislation, the influence of judges who came from England, the difficulty of ascertaining what the Roman–Dutch law on any particular point was owing to the scarcity of translations, and the ready availability of a vast collection of legal literature containing the English law dealing with such subjects as insurance, banking, commerce, agency, bills of exchange, promissory notes and cheques — all these factors contributed to the steady introduction of English law principles. Further encroachments, though with less justification, continued in other departments of the law, such as negligence and defamation, because text-books and law reports were so easily obtained. But at the same time the Bench and the Bar showed that they were perfectly capable of keeping the Roman-Dutch law alive and active in many other branches, particularly our land law. Some names of judges and other lawyers, who made the Roman-Dutch law their special study, come to mind, and they will be remembered for the contributions they made.

Dr. C. F. Amerasinghe has written a very learned article on "The Concept of Animus Injuriandi." He has probed deep into the texts and the cases dealing with the mental element in the action for injuries, and he has arrived at nine conclusions which he offers at the end of the article. The subject has been exhaustively considered, with the thoroughness that we have come to expect of the author.

The article on leases executed in breach of the Prevention of Frauds Ordinance demonstrates how Judges have tried to mitigate

the hardships which would have resulted from a strict application of the uncompromising terms of section two of the Ordinance. Naturally, different Judges had different ideas of how best to grant relief. The influence of English law on the early decisions is very marked, even though there was little or no justification for its introduction into transactions relating to land. The author, Mr. S. S. Basnayake, points out the uncertain state of the law which has arisen owing to conflicting decisions. His hope that a Full Bench will examine the matter may not be realized, but it is not unlikely that a Divisional Bench will sit in judgment before long.

Dr. L. J. M. Cooray points out in his article on Secret Trusts that this is an unexplored corner of the law, so far as Ceylon is concerned. It does seem surprising that no cases bearing on this subject have been reported since the Trusts Ordinance came into operation in 1918. It may be partly due to the difficulty of establishing such a trust in a court of law. One prefers, however, to think that it is mainly due to the honesty of secret trustees, which compelled them to keep faith with those who could not appeal to the jurisdiction of an earthly tribunal. The subject of trusts in our law has proved a fertile field for lawyers, as the law reports amply prove ; but it has not been dealt with adequately in a textbook. It is to be hoped that Dr. Cooray will soon show that an academic lawyer has much to teach the practising branch of the profession.

The transformation in the relationship existing between a workman and his employer since the enactment of the Industrial Disputes Act of 1950, as amended by Act No. 62 of 1957, has been closely and well examined by Mr. S. R. de Silva. These legislative changes were necessary because Ceylon was faced with new situations arising out of industrialisation. The classical theory of contract, built upon such ideas as free enterprise, equality of bargaining power, and freedom to make terms agreeable to both parties, was completely unsuited to the conditions prevailing in most countries of the world. Freedom of contract therefore had to be restrained, or as Pollock and Maitland put it, " If there is to be any law at all, contract must be taught to know its place. " And so the modern democratic state stepped in to exercise its function as a protector of the weaker party in the tussle between the employer and the worker. There was opposition to the new order of things, due partly to doubts about the constitutional position of the new tribunals created by the Act, for they were appointed by the Minister or the Public Service Commission. There was also uncertainty as to their powers and as to the law they should apply. It might be useful to point out that the only question which was considered by the Supreme Court in

Walker Sons and Co. Ltd v. Fry (1965) 68 N.L.R. 73 was whether any of the new tribunals exercised judicial power ; and if so, whether they had been properly appointed according to the Constitution. None of the Judges thought that it was an undesirable thing for properly constituted tribunals to give relief to a workman against his employer, provided that the power to do so was lawfully conferred. It is a good thing that the Supreme Court has, by a liberal interpretation of the words " a question of law, " exercised a restraining influence on Labour Tribunals when they forgot that discretion " must be governed by rule, not by humour ; it must not be arbitrary, vague and fanciful, but legal and regular " — as Lord Mansfield said two hundred years ago.

The article on " *Res Ipsa Loquitur* " by Mrs. Savitri Goonesekera shows how the rule of common sense enunciated by Pollock C. B. in *Byrne v. Boadle* (1863) 2 H. & C. 722, has become encrusted with doubts and difficulties with the passage of time. According to that rule, where a man is passing in front of premises occupied by a dealer in flour, and there falls down upon him a barrel of flour, the fact of its falling is *prima facie* evidence of negligence. The Chief Baron explained why that should be : " A barrel could not roll out of a warehouse without some negligence : and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. " The complaint made by Mrs. Goonesekere is that the rule has been extended far beyond its true scope. Two propositions seem to emerge from a statement of the rule : (1) The plaintiff must first prove the circumstances upon which he relies to make out that there is *prima facie* evidence of negligence, and (2) it is only after such evidence has been led, that the defendant is called upon to rebut it by explaining that the accident occurred without any negligence on his part. If these two propositions are accepted, it is difficult to see how the burden of proof is affected by the rule. The *legal* burden that rests on every plaintiff in an action founded on negligence is imposed by the law. It never passes to the defendant. But there is another burden — the *provisional* burden — which arises on the evidence led during a trial, and which shifts from one side to the other according to the state of the evidence. The High Court of Australia has held that the legal burden is always on the plaintiff, and if the House of Lords has held otherwise one would certainly prefer to follow the High Court. But it is most probably the provisional burden that the House of Lords referred to when it said that there was an onus on the defendant : in other words, it referred to the burden that passes to the defendant after the plaintiff has made out a *prima facie* case.

As to the cases to which the rule of *res ipsa loquitur* applies, it is perhaps correct to say that the categories cannot be closed. As the House of Lords has said, the rule " is based on common sense, and its purpose is to enable justice to be done where the facts bearing on causation and on the care exercised by the defendant are, at the outset, unknown to the plaintiff and are or ought to be within the defendant's knowledge. "

These observations have been confined, for reasons of space alone, to the six Articles which occupy 90 out of the 170 pages of the *Review*. But there are in addition Comments and Notes which fill the remaining pages. Dr. C. F. Amerasinghe's Comment is on " The Sovereignty of the Ceylon Parliament revisited, " Dr. L J. M. Cooray's on 'The Relevance of English Law in the Event of a Casus Omissus in a Ceylon Code.' Mr. A. I. Pulle has written on '*Thiagarajah v. Karthigesu* and the Declaratory Action.' The writers of these Comments have dealt with judgments both of the Privy Council and of the Supreme Court in a frank, if not always complimentary, manner. The same may be said of the Notes on Cases, which range in character from the severely critical to the mildly analytical.

The *Review*, as a book, has been very attractively produced. The paper and the printing are both good, with a few errors which could have been eliminated by more thorough proof-reading. Those responsible for this very welcome publication are to be heartily congratulated.

The appearance of a law journal such as this is most welcome. Argument and discussion should not be confined to the courts. It is essential that they should find a place in legal periodicals if the law is to be set on a correct course. We are all liable to make mistakes, and judges are included in that observation. They too will surely welcome the expression of views, whether favourable or not, regarding their judgments.

M. C. SANSONI.

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