

THE

# NEW LAW REPORTS OF CEYLON.

VOLUME XXXII.

1930

Present : Fisher C.J. and Garvin S.P.J.

AREYESEKERE v. JAYATILEKE.

132—D. C. Colombo, 27,232.

*Legislative Council (Order in Council)—Member interested in contract—Penalty incurred—the King's power to remit—Action to recover penalty—Order in Council (1924), clauses XVI. and XVII.*

His Majesty the King, has power by Order in Council to remit a penalty incurred by a member of the Legislative Council under article XVII. of the Ceylon (Legislative Council) Order in Council, 1923, and to deprive any person of the right to maintain an action to recover the penalty.

APPEAL from an order of the District Judge of Colombo. The plaintiff brought this action to recover a sum of Rs. 23,000, being the amount of the penalty to which the defendant, an elected member of the Legislative Council, became liable in terms of clause XVI. of the Ceylon (Legislative Council) Order in Council, 1923. It was alleged that the defendant became in April, 1927, the editor-in-chief of an etymological dictionary at a remuneration of Rs. 1,250 per mensem and that thereby he became directly or indirectly interested pecuniarily in a contract with the Government for or on account of the public service, within the meaning of clause XVII. of the Order in Council; that by sitting and voting on the dates specified in the plaint the defendant became liable to the penalty.

After the case was fixed for trial and an interlocutory appeal was pending, a further Order in Council was published relieving the editor of the etymological dictionary from the penal consequences incurred by sitting or voting in Council as an elected member and prohibiting the institution or maintenance of any action for the recovery of any penalty under clause XVI. On the motion of the defendant, the learned District Judge dismissed the plaintiff's action.

*F. J. Soertsz*, for defendant, appellant.—Under clause XVII. (1) of the Order in Council, 1923, a seat becomes vacant if the holder thereof has a direct or indirect pecuniary interest in a contract with Government.

The defendant by becoming editor of the Sinhalese dictionary on the terms stated has such an interest and his seat has been rendered vacant.

The defendant has, however, continued to sit and has become liable to the penalty in terms of clause XVI. A common informer is entitled to sue for the recovery of such penalty. The plaintiff brings this action as common informer.

The Ceylon Legislative Council Amendment Order in Council, 1928, is relied on by the defendant, who moves that in view of this amending order the action against him may be dismissed, but that order cannot avail the defendant for that purpose because—

(1) The right to the penalty had already vested in the plaintiff who had instituted the action to recover it.

The King cannot take that right away from the subject. *Chitty on the Prerogatives of the Crown*, p. 90, says "the King's right to pardon or remit a penalty is confined to cases in which the prosecution is carried on in His Majesty's name for the commission of some offence affecting the public". The King's prerogative does not extend to the taking away of a penalty to which a subject has become entitled. See *Chitty*, p. 88. *Chalmers and Asquith*, p. 125, of their outlines of Constitutional Law, lay down "when once a common informer had commenced a penal action the King could not remit the penalty, as this would be calculated to prejudice the common informer. If it is contended that this remission is the result not of the exercise of the King's prerogative but as a result of legislation by the King, the appellant argued that even assuming the King continues to have power to legislate for the colony, he cannot legislate in excess of his prerogative, and as submitted already, his prerogative gave him power only in case of public prosecutions in his name and in cases falling under the Remission of Penalties Act in England.

- (2) The King when he legislates, legislates by virtue of a prerogative he possesses, but in so doing he must act within the fundamental principles of the British constitution. See *Campbell v. Hall*.<sup>1</sup> This is an interference with the course of justice and is violation of the *Magna Charta*, for the King has ordered his Judge to dismiss the plaintiff's action.—It is a denial of Justice. (*Halsbury*, vol. VI., p. 423, also p. 378; *Chitty on Prerogative*, p. 32.)

Further authorities cited: *Hall's case*,<sup>2</sup> *Rex v. Meary*<sup>3</sup>; *In re Bateman's Trust*.<sup>4</sup>

*Hayley, K.C.* (with *de Zoysa, K.C.*, and *Ameresekera*), for the defendant, respondent.—The authorities cited by the appellant regarding the limitation of the prerogative

<sup>1</sup> (1774) 1 *Cowper* 204.

<sup>2</sup> 2 *Times Rep.* 569.

<sup>3</sup> 5 *Coke* 51.

<sup>4</sup> *L. R.* 15 *Eq.* 73, p. 55.

of pardon have no application to this case. The prerogative of pardon is quite distinct from the Crown's right to legislate for a colony. The supreme legislative authority can interfere with any right of action. In England, the King in Parliament is the supreme legislative authority. In a colony, the King in Council has similar powers, unless they have been so delegated to the colonial legislature as to preclude further exercise of them by His Majesty. It is not contended that the power of legislation has been so delegated to the Legislative Council of Ceylon, and it accordingly remains in the King. We are not concerned with an act of pardon but with a legislative enactment, the Order in Council, which is, in effect, an act of indemnity, a species of legislation the validity of which is well recognized. (*Phillips v. Eyre*.<sup>1</sup>)

March 20, 1930. FISHER C.J.—

In this case the appellant sued the respondent under article XVI. of "The Ceylon (Legislative Council) Order in Council, 1923," alleging that he, having pecuniary interests in a contract with the Government within the meaning of article XVII. of the Order, had sat and voted in the Legislative Council on numerous occasions and had thereby rendered himself liable to penalties amounting in the aggregate to Rs. 23,000. Certain interlocutory matters were decided in the action, but before the action came on for trial an Order in Council—"The Ceylon (Legislative Council) Amendment Order in Council, 1928"—was passed and came into force on December 14, 1928. This Order, after reciting that His Majesty had reserved to himself power to revoke, alter, or amend the Order of 1923, enacted as follows:—

"II. No action, prosecution, or legal proceeding whatsoever under the provisions of article XVI. of the principal Order or otherwise, shall be brought, instituted, or maintained—

- (a) for the recovery of any penalty incurred, or alleged to have been

<sup>1</sup> (1870) *L. R.* 6 *Q. B.* 1 at 4 and 23.

incurred, under the said Article, whether for the amount prescribed therein, or not ; or

(b) for the recovery of any damages, the enforcement of any forfeiture or penal consequences or the declaration of any vacancy or incapacity—

against the editor of the Sinhalese etymological dictionary for or on account of or in respect of his having sat or voted in the Council as an elected member thereof at any time between the 24th day of January, 1924, and the date of the coming into operation of this Order in Council after his seat became, or is alleged to have become, vacant by reason of his having any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the public service, or of his having accepted a public office under the Crown in the Island, within the meaning of article XVII. of the principal order ; and if any such action, prosecution or legal proceeding has been, or shall hereafter be, brought or instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make.”

On January 28, 1929, the defendant filed a motion that the action be dismissed, and on March 11, 1929, the learned Judge of the District Court made an order dismissing the action, leaving each party to bear his own cost. Against that order the present appeal is brought.

While it was not contended for the appellant that the King in Council has no power to legislate for this Colony it was urged that the power is subject to limitations, one of them being that such legislation cannot divest a plaintiff in an action of any right which became vested in him when he began the action. A good deal of argument was addressed to us based on the assumption that the exercise of the legislative power of the King is entirely analogous to the exercise of the royal prerogative. I do not think that assumption is well founded. The exercise of the royal prerogative in circumstances

which can be said to bear any resemblance to those obtaining in the present case is the exercise by the King of his power as Supreme Executive Officer, a matter entirely distinct from the exercise of the power to legislate.

With regard to the point that the plaintiff has been divested of a right, it is to be noted that the Order in Council creating the right in question contains express provision for its extinction. The plaintiff, therefore, had no vested right which could be said to survive and be independent of any alteration of the law.

No question of construction is involved. The language used is clear and unambiguous. The only question for our decision, therefore, is whether the Order of 1928 is *ultra vires*, and it can only be held to be *ultra vires* if it is repugnant to the Law of England within the meaning of section 3 of the Colonial Laws Validity Act, 1865. That has not been shown to be the case, and the question therefore must be answered in the negative.

When, therefore, the last mentioned Order came into force the basis of the action brought by the plaintiff ceased to exist and the action was rightly dismissed.

The appeal is dismissed with costs.

GARVIN S.P.J.—

The appellant brought this action to recover a sum of Rs. 23,000, being the amount of the penalty to which he alleged the respondent became liable in terms of clause XVI. of the Ceylon (Legislative Council) Order in Council, 1923. The respondent who was duly elected a member of the Legislative Council of Ceylon became in April, 1927, the editor-in-chief of an etymological dictionary (now in course of preparation) at a remuneration of Rs. 1,250 per mensem. It was the appellant's case that the respondent by becoming and undertaking the duties of editor-in-chief became directly or indirectly interested pecuniarily in a contract with the Government for and on account of the public service and thereby contravened the provisions of clause XVII. and that

his seat in Council thereupon became vacant ; and that by sitting and voting thereafter on the dates specified in a schedule filed with the plaint the respondent became liable to the penalty for the recovery of which this action was brought.

The material parts of the two clauses referred to are as follows :

Clause XVI.—“ Every person who . . . shall sit or vote in the Council after his seat has become vacant shall for every day on which he sits or votes after his seat has become vacant, be liable to a penalty of Rs. 500 to be recovered by action in the District Court . . . by any person who shall sue for the same.”

Clause XVII.—“ If any Elected Member of the Council shall . . . have any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the public service . . . or shall accept any public office under the Crown in the Island his seat in the Council shall thereupon become vacant.”

This action was brought on March 13, 1928; answer was filed on May 9, 1928; and the case duly fixed for trial. In the meanwhile an application for the production of certain documents was resisted upon a claim of privilege and the present appellant appealed from the order made thereon. While that appeal was pending, a further Order in Council entitled *The Ceylon (Legislative Council) Amendment Order in Council, 1928*, was made and published. The respondent in pursuance of the said order moved that the appellant's action be dismissed. The scope and object of the Order in Council is set out in the preamble as follows :—

Whereas . . . it is necessary to indemnify and relieve the editor of the Sinhalese etymological dictionary from such penal consequences as he may have incurred or suffered by sitting or voting in the

Council as an elected member thereof between the 24th day of January, 1924, and the coming into operation of this Order in Council after his seat became vacant on the ground herein-after appearing or as he might hereafter incur or suffer for a like reason.

The order then proceeds to prohibit the institution or maintenance of any action, prosecution, or legal proceeding for the recovery of any penalty incurred or alleged to have been incurred under article XVI. or for the recovery or enforcement of any forfeiture or penal consequences of the declaration of any vacancy or incapacity against the editor of the Sinhalese etymological dictionary for or on account of or in respect of his having sat or voted in the Council as an elected member thereof at any time between January 24, 1924, and the date when the order came into operation, and continues as follows :—

And if any such action, prosecution or legal proceeding has been, or shall hereafter be brought or instituted it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make.

The learned District Judge dismissed the appellant's action, ordering that each party should bear his own costs.

The dismissal of his action was opposed by the appellant on the following grounds :—

- (1) that the Order in Council dated November 1, 1928, did not apply to the defendant,
- (2) that the Order in Council was illegal, as the King had granted a legislature to the Colony by the Order in Council, 1923, and had not reserved the power to legislate,
- (3) that even if the King had the power to legislate, the Order in Council was in excess of the powers vested in the King.

Counsel for the appellant intimated to us when opening his appeal that he did not intend to press the first two objections ; the first he admitted was met by the

admission that the respondent was the editor of the Sinhalese etymological dictionary ; as regards the second he was unable to support the contention that His Majesty's powers to legislate by Order in Council had ceased in regard to this Island.

The only point submitted for consideration and argued by counsel was the contention that the Ceylon (Legislative Council) Amendment Order in Council, 1928, was in excess of the powers vested in His Majesty.

The Order in Council, 1928, is expressed to be an amendment of the Order of 1923 but it is as clearly expressed to be and is both in form and in substance a piece of legislation designed and intended to indemnify and relieve the respondent from any penal consequence which he may have incurred by becoming, while still an elected member of the Legislative Council, the editor of the Sinhalese etymological dictionary and sitting and voting in Council thereafter.

If it be assumed—for the matter has not proceeded to the stage of trial and proof—that the defendant has contravened article XVII. of the Ceylon (Legislative Council) Order in Council, 1923, and had at the date of action become in terms of article XVI. thereof liable to the penalty claimed, the effect of the Order in Council, 1928, is to deprive and divest the appellant of a legal right given to him by article XVI. to recover the penalty. It has certainly deprived him of the right to maintain an action to establish the right to recover the penalty which he alleges the respondent became liable to pay.

It was argued that to His Majesty's prerogative right to remit the consequences of a violation of a law there were definite limits and that under no circumstances could His Majesty remit a penalty payable to parties other than the Crown or to remit such a penalty for the recovery of which a common informer had commenced a penal action.

The limits to His Majesty's prerogative right to remit penalties are limits set to a prerogative right vested in His Majesty as the supreme executive Magistrate and exercisable by him as such. There is no need to consider what those limits may be, for this is not the case of a pardon or remission of penalties granted or made by virtue or in exercise of any prerogative right vested in His Majesty as supreme executive authority.

This is a legislative, not an executive, act. The supreme legislative authority in England is vested in the King, Lords and Commons.

"In a constitutional point of view, however, the legislative power is lodged in the King, subject to the assent of the Houses of Parliament. Laws are said to be enacted 'by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in parliament assembled.'"—*Chitty on Prerogatives. p. 3.*

"In settled, conquered, and ceded colonies, before representative legislatures have been granted, and where unrestricted by articles of capitulation or treaty, the Crown enjoys the prerogative right of establishing laws . . ."—*Halsbury, vol. VI., 650.*

It was contended that His Majesty's legislative authority was in some way circumscribed and restricted by the limits assigned to the prerogatives exercisable by him as supreme executive authority. This, however, is a proposition for which no authority was cited and to which I cannot assent. His Majesty has an undoubted right to create in a colony a legislature supreme within the colony though subordinate to Parliament. The power of His Majesty to legislate by Order in Council for a colony where that power has not ceased must be at least as extensive as that of a legislature which he has the power to bring into existence in that colony.

The test therefore of the validity of a law enacted by His Majesty in Council where that power has not ceased must, it

seems to me, be the same as the test by which the validity of a law enacted by the legislature of a colony to which His Majesty has granted a representative legislature without reservation to himself of the power to legislate.

By section 2 of the Colonial Laws Validity Act, 1865, Colonial laws—a term which is defined to include laws made by His Majesty in Council—are declared to be void if and to the extent to which they are repugnant to “the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act . . . .”; and section 3 of that Act states that “no Colonial law shall be deemed to have been void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, Order, or Regulation as aforesaid”.

We have not been referred to any Act of Parliament extending to this Colony or any order or regulation made under any such Act to which the Order in Council under consideration is or may be said to be repugnant.

Learned counsel invited our attention to the following passage in the judgment of Lord Mansfield in *Campbell v. Hall*<sup>1</sup>: “The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; . . . .”

<sup>1</sup> (1774) 1 *Cowper* 204.

The actual decision in *Campbell v. Hall* (*supra*) was that after the Crown has created a legislature in a conquered country, its power to levy taxes of its own authority or to legislate for the colony ceases unless its power of legislation is reserved. What was clearly affirmed was His Majesty's right to legislate until by his own act he divested himself of that power.

The passage relied on by counsel is one of a series of paragraphs in which certain propositions relating to the position of His Majesty in conquered countries are stated at large.

Counsel however sought to found upon the words “he may not make any new change contrary to fundamental principles” the argument that the Order in Council, 1928, in that it deprives a subject of a vested right and by being given retrospective operation interrupts and arrests the due course of an action instituted by him to establish this right is contrary to “fundamental principles” and is therefore in excess of His Majesty's power. In short the argument, as I understood it, is that it is not in His Majesty's power to pass an Order in Council in the nature of an Act of indemnity because such legislation is contrary to natural justice.

Colonial legislatures which derive their powers from His Majesty have passed acts of indemnity. Such Acts or Ordinances have been passed in several colonies, and as far back as 1848 the Governor and Legislative Council of Ceylon passed Ordinance No. 11 of 1848 “to indemnify the Governor and all persons acting under his authority for certain acts done during the existence of Martial Law in certain parts of this Island”.

I shall not pause to inquire how far it is competent for us to consider whether an act of the local legislature or an Order of His Majesty in Council applicable to the colony is void on the ground that it is contrary to natural justice. It is I think sufficient for the purposes of this

appeal to say that the assumption that retrospective legislation is necessarily contrary to natural justice is not well founded. 1930

An Act of Indemnity passed by the Legislative Assembly of Jamaica was pleaded in defence in an action for assault and false imprisonment and was considered in the case of *Phillips v. Eyre*<sup>1</sup> and was held to be an act which it was within the power of that legislature to pass.

An argument similar to the one above referred to was addressed to the Court in that case, and the answer in the words of Willes J., by whom the judgment of the Court was delivered, was this—

“In fine, allowing the general inexpediency of retrospective legislation it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances, involving the safety of the state, or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, *summum jus summa injuria*. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each case involve matter of policy and discretion fit for debate and decision in the Parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a court of ordinary municipal law is not commissioned to inquire or adjudicate.”

The appeal fails, and is dismissed with costs.

*Appeal dismissed.*

<sup>1</sup> (1870) *L. R. Q. B.* p. 1.