VISUVALINGAM AND OTHERS

v.

LIYANAGE AND OTHERS

No. (1)

SUPREME COURT,
SAMARAKOON, Q.C., C.J.,
SHARVANANDA, J., WANASUNDERA, J.,
WIMALARATNE, J., RATWATTE, J.,
SOZA, J., RANASINGHE, J.,
ABDUL CADER J., AND RODRIGO, J.
S.C. APPLICATION NO.47/83,
September 8,9,19,22,23,
26 to 30,1983.
October 3 to 5, 1983.

Sixth Amendment to the Constitution - Is the one month time limit for taking oaths mandatory or directory? - Computation of one month - Interpretation of mutatis mutandis clause - Non compliance by the judges - Did they cease to hold office? - Article 157A (7) read with Article 165 and 169 (12) - Time limit for the decision - Whether mandatory or directory? Article 126 (5) - Article 35 - Proceedings - Oaths and Affirmations Ordinance. - Section 12 and Section 5 of the Judicature Act.

In purported compliance with Article 157 A (7) read with Article 165 and 169 (12) of the Constitution as amended by the Sixth Amendment which came into force on 8th August 1983, the Judges of the Supreme Court and Court of Appeal took the oath set out in the Seventh Schedule to the Bill before another judge of the Supreme Court the Judges of which are

also ex officio J.Ps in terms of section 45 of the Judicature Act, well within the time limit of one month stipulated in the Bill and the Act.

In the course of hearing application No. 47 of 1983 on September 8, 1983 the question arose whether the judges had made sufficient compliance with the requirement of Section 157(A) of the Constitution that the judges of the Supreme Court and the Court of Appeal should take their oaths in terms of the Seventh Schedule before the President. The sittings were thereupon adjourned.

On the 15th September 1983 all the judges received fresh letters of appointment and took their oaths under the 4th and 7th Schedules afresh. On re-sumption of the sittings the question arose whether the hearing should be de novo or merely continued. The State argued that proceedings should be started de novo because the judges had ceased to hold office on 9th September, 1983 and had been re-appointed afresh on 15th September, 1983. The present bench of nine judges was constituted to hear this question.

The questions for determination were whether;

(1) the Judges of the Supreme Court and the Court of Appeal ceased to hold office in terms of the Sixth Amendment to the Constitution;

(2) the requirement in Article 126 of the Constitution that a decision be made within two months of the filing of the petition is mandatory or directory;

(3) the President's act of making a fresh appointment of the Judges was an executive act not questionable in a Court of Law;

(4) the Court is precluded from investigating

matters that happened prior to the fresh appointments made on the 15th September.

Held(Ranasinghe, J.and Rodrigo,J/dissenting):

(1) The principles of interpretation that govern ordinary law are equally applicable to the provisions of the Constitution. For the purpose of deciding whether a provision in a Constitution is mandatory one must have regard also to the aims, scope and object of the provision. The mere use of the word "shall" does not necessarily make the provision mandatory. The provisions of Article 157(A) sub-article 7(a) of the Sixth Amendment which requires the oath prescribed therein to be taken and subscribed before such person or body if any as is referred to in the article namely before His Excellency the President, is directory and default does not attract the sanction prescribed by Article 165 of the Constitution.

(2) Article 126 (5) of the Constitution which states that the Supreme Court shall hear and finally dispose of the application made under that Article within two months of the filing of such petition is directory only and not mandatory and failure by the Supreme Court to dispose of the application within the prescribed period will not nullify the petition or the order.

(3) Actions of the executive are not above the law and certainly can be questioned in a Court of Law. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his actions. But that is a far cry from saying that the

President's acts cannot be examined by a Court of Law. Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.

(4) (Per Samarakoon, C.J.)
A month in terms of section 3 of the interpretation Ordinance means "calendar month". A calendar month is reckoned not by counting the days but by looking at the calendar. The space of time from a day in one month to the day numerically corresponding to that day in the following month is a calendar month.

(5) The phrase mutatis mutandis means with necessary alterations in point of detail.

(6) On application of the principles governing the interpretation of the phrase of mutatis mutandis, the requirement to take the oath before the President is not mandatory but directory.

(7) The requirement to take the oath in terms of the Seventh Schedule within one month of the date of the coming into force of the Sixth Amendment was mandatory but this was complied with and therefore the judges did not cease to hold office.

Cases referred to:

(1) *Ramhari vs. Nilmoni Das A.I.R. 1952 Calcutta 184, 186.*
(2) *State of U.P.V Babu Ram A.I.R. 1961 (SC) 765.*
(3) *Touriel vs. Internal Affairs Southern Rhodesia (1946) S.A.L.R. (A.D.) 535, 544.*

(4) Motilal V. Commissioner of Income Tax A.I.R. 1951 Nagpur 224.
(5) K.M. Works V. I. T. Commissioner A.I.R .1953 A.I.R.1953 Punjab 300.
(6) Burne V. Munisamy 21 N.L.R. 193, 195
(7) The Highland Tea Company of Ceylon Ltd.,V. Jinadasa 35 C.L.W. 47.
(8) Dodds V. Walker[1981] 2 All. E.R. 609 H.L.
(9) Lissenden V. Bosch Ltd. [1940] A.C. 412, [1940] 1 All ER 405, 412.
(10)Evans V. Bartlam [1937] 2 All ER 646, 652.
(11)Nippon Monkwa Kabushiki Kaisha V Dawson's Bank Ltd. [1935] 1 LL L R, 147, 150.
(12)Bank of England V. Cutler [1908] 2 KB 208,234.
(13)Maritime Electric Co.Ltd., V.General Diaries Ltd.,[1937] A.C. 610.
(14)Southend-on-Sea Corporation V. Hodgson Ltd , [1961] 1All ER page 46; [1962] 1 Q.B 416.
(15)Johnson V. Moraton [1978] 3 All ER 37, 47, 49.
(16)Hunt V. Hunt (1862) 31 L.J. Ch. 161, 178.
(17)National Westminister Bank Ltd. V Halesowen Press Works Ltd. [1972] 1 All ER 641,652
(18)Burton V. United States 195 US 205
(19)Customs & Excise Commissioner V. Hebson Ltd. [1953] 2 Lloyds Law Rep. 382.
(20)Society of Medical Officers of Health v.Hope [1960] 1 All ER 317.
(21)N.W. Gas Corporation v. Manchester Corporation [1963] 3 All ER 442.
(22)Welch V. Nagy [1950] 1KB 455.
(23)Basheshar Nath V. Commissioner of Income Tax AIR 1959 SC 149.

(24)Ram Gopal V. National Housing Corporation AIR 1969 Allahabad 278.
(25)Bhaskar Moharana V. Arjun Moharana AIR 1962 Orissa 167.
(26)Kushi Ram Raghunath Sahai V. Commissioner of Income Tax A.I.R. 1953 (Punjab) 300.
(27)Touriel V. Minister of Internal Affairs Southern Rhodesia SALR(1946)AD 535
(28)The Liverpool Borough Bank V. Turner (1860) 30 LJ Ch. 379.
(29)In re C.P. Motor Spirit Act 1939 A.I.R. 4 Fed. ct.p. 1, 5
(30)Kunasingham V. Ponnambalam 54 NLR 36
(31)Imperial Tea Company Ltd., V. Aramady 25 N.L.R. 327.
(32)Scadding V. Lorant (1851) 3 H.L.C. 418; 10 ER 164
(33)R.v. Bedford Level Corporation (1805) 6 East 356, 368.
(34)Bhaskara Pillai V. The State of Travancore Cochin 5 D.L.R. (Trav - Cochin) 382 (1950)
(35)De Bussche V. Alt (1878) 8 Ch. D. 286 (CA)

S. Nadesan Q.C. with S. Mahenthiran And S.H.M. Reeza for petitioners.
S. Aziz, Deputy Solicitor General with P. Karunaratne, S.C. for 1st, 2nd and 3rd respondents.

Cur. adv. vult.

October 20, 1983.
SAMARAKOON, C. J.

Here is a classic example of the uncertainties of litigation and the vicissitudes of human affairs. The annals of the Supreme Court do not record such a unique event and I venture to

hope, there never will be such an event in the years to come. It behoves me therefore to set out in detail the events that occurred in their chronological order.

On the 29th July 1983 the President of the Republic forwarded to the Chief Justice eight copies of a Bill entitled "Sixth Amendment to the Constitution" which the Cabinet of Ministers considered urgent in the national interest in terms of Article 122(1) of the Constitution. The Supreme Court considered this Bill on the 3rd August and tendered its advice on it to the President and the Speaker. This Bill was passed by Parliament with some amendments and was certified by the Speaker on the 8th August. Each of the Judges of the Supreme Court took the oath set out in the Seventh Schedule to the Bill before another Judge of the Supreme Court. Similarly each of the Judges of the Court of Appeal took the said oath before another Judge of the same Court. At this juncture I might mention that the Judges of the Supreme Court and Court of Appeal are ex officio J.Ps. in terms of section 45 of the Judicature Act. The oaths of the Judges of the Court of Appeal were taken on dates prior to the 4th September, 1983, and the oaths of the Judges of the Supreme Court were taken before 31st August, 1983. They were all well within the time limit of one month stipulated in the Bill and the Act.

I must now go back a few days in point of time. On the 22nd July, 1983, the Petitioners in this case (Application No. 47 of 1983) instituted this application against the Respondents complaining of an infringement of their fundamental rights guaranteed by Article 14(1)(a) and (b) of the Constitution. This application was taken up for hearing by a Bench of five Judges of this Court on 8th September, 1983. The argument was not concluded on that day and was resumed on the next day.

Counsel for the Petitioners was making his submissions when one of my brother Judges who was reading a copy of the Act which had reached us two days earlier brought it to my notice that the provisions of section 157A of the Act contained a requirement that the Judges of the Supreme Court and the Court of Appeal should take their oaths in terms of the Seventh Schedule before the President which in fact had not been done by any of the Judges. The Judges of both Courts therefore considered this matter and wrote to the President, inter alia that in their opinion the period of one month expired at midnight on the same day (i.e. the 9th September) and that they were thus prepared to take their oaths. There was no reply from the President. However, I was informed by the Minister of Justice that he had contacted the President on this matter and he had been told that the President had been advised by the Attorney-General that the period of one month had expired on the 7th. In the result no oath could be administered. On Monday the 12th I was informed that the Courts of the Supreme Court and Court of Appeal and the Chambers of all Judges had been locked and barred and armed police guards had been placed on the premises to prevent access to them. The Judges had been effectively locked out. I therefore cautioned some of my brother Judges who had made ready to attend Chambers that day not to do so. I referred to this fact in my conversation with the Minister of Justice on the morning of Monday the 12th and he while deprecating it, assured me that he had not given instructions to the police to take such action. I was made aware on Tuesday that the guards had been withdrawn. This matter was referred to in the course of the argument and the Deputy Solicitor-General informed the Court that it was the act of a "blundering enthusiastic bureaucrat." He apologised on behalf of the official and unofficial Bar. On the last day of hearing the Deputy Solicitor-General withdrew the apology and

substituted instead an expression of regret. The identity of the blundering bureaucrat was not disclosed to us. However his object was clear - that was to prevent the Judges from asserting their rights. I must now revert to the chronology of events. On the 15th September all Judges of the Court of Appeal and Supreme Court received fresh letters of appointment commencing 15th September. Two oaths were also administered to each. One was the oath of office in terms of the Fourth Schedule to the Constitution and the other was the oath in terms of the Seventh Schedule to the Sixth Amendment.

The Bench of five Judges then sat on the 19th September to hear this application. Counsel for the Petitioners vehemently objected to proceedings *de novo* and contended that proceedings must continue from where it stopped on the 9th September as the Judges had not ceased to hold office. I considered this a matter of the greatest importance and therefore referred all points in dispute to this Full Bench of nine Judges. The following issues were raised for decision:-

1. Did the Judges of the Supreme Court and the Court of Appeal cease to hold office in terms of the Sixth Amendment to the Constitution?

2. Is the requirement in Article 126 of the Constitution that a decision be made within two months of the filing of the petition mandatory or directory?

3. Is the President's act of making a fresh appointment of the Judges an executive act not questionable in a Court of law?

4. Is this Court precluded from investigating matters that happened prior to the fresh appointments made on the 15th September?

Issues 3 and 4 were raised, as preliminary objections by the Deputy Solicitor General, but we decided to hear all issues and make one final order. The hearing on these issues commenced on the 22nd September which is the final date for decision if the provisions of Article 126(5) are mandatory. I shall now proceed to deal with the above mentioned issues.

The first question to be decided is whether the Judges of the Court of Appeal and the Supreme Court ceased to hold office as a direct result of the failure to observe the provisions of Article 157A of the Sixth Amendment read with Article 165 of the Constitution. The relevant provisions of Article 157A read as follows:-

"(1) No person shall, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.

(2) No political party or other association or organisation shall have as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka.

.....

.....

(7) Every officer or person who was or is required by, Article 32 or Article 53, Article 61 or Article 107 or Article 165 or Article 169(12), to take and subscribe or to make and subscribe an oath or affirmation, every member of, or person in the service of, a local authority, Development Council, Pradeshiya Mandalaya, Gramodaya Mandalaya or public corporation and every attorney-at-law shall -

(a) if such officer or person is holding office on the date of coming into force of this Article, make and subscribe, or take and subscribe, an oath or affirmation in the form set out in the Seventh Schedule, before such person or body if any, as is referred to in that Article, within one month of the date on which this Article comes into force;

(b) if such person or officer is appointed to such office after the coming into force of this Article, make and subscribe or take and subscribe, an oath or affirmation, in the form set out in the Seventh Schedule, before such person or body, if any, as is referred to in that Article, within one month of his appointment to such office.

The provisions of Article 165 and Article 169(12) shall, *mutatis mutandis* apply to, and in relation to, any person or officer who fails to take and subscribe, or make and subscribe, an oath or affirmation as required by this paragraph".

Article 107(4) referred to in sub-article (7) stipulates that a Judge of the Supreme Court or Court of Appeal shall not enter upon his duties of office until he takes and subscribes an oath in terms of the Fourth Schedule, before the President.

Article 165(1)of the Constitution reads thus-

"Every public officer, judicial officer and every other person as is required by the Constitution to take an oath or make an affirmation on entering upon the duties of his office, every holder of an office required under the existing law to take an official oath and every person in the service of every local authority and of every public

corporation shall take and subscribe the oath or make and subscribe the affirmation set out in the Fourth Schedule. Any such public officer, judicial officer, person or holder of an office failing to take and subscribe such oath or make and subscribe such affirmation after the commencement of the Constitution on or before such date as may be prescribed by the Prime Minister by order published in the *Gazette* shall cease to be in service or hold office."

It is contended that the failure of the Judges to take and subscribe their oaths before the President attracts the sanction set out in Article 165 and thereby they ceased to hold office. It was submitted by the Deputy Solicitor-General that this was a mandatory provision while Counsel for the Petitioners contended that this was merely directory.

It is said that as a general rule "constitutional provisions are mandatory unless by express provision or by necessary implication, a different intention is manifest. Some cases even go so far as to hold that all constitutional provisions are mandatory".(Bindra - Interpretation of Statutes Edn 5 p. 860). But this proposition is too widely stated. No doubt a Constitution is paramount law, to the authority of which all subordinate laws are, and indeed must be, referable. As such there is a bias towards command. But over the years this rigid interpretation has given way to a broad and liberal approach. A Constitution is a "living and organic thing" (per Gwyer, C.J. *In re Motor Spirit Act* (29).It embodies "the working principles for practical Government" and its "provisions cannot be interpreted and crippled by narrow technicalities" per Mukharji, J. in *Ramhari vs.Nilmoni Das* (1). The principles of interpretation that govern ordinary law are equally applicable to the provisions of a Constitution. For

the purpose of deciding whether a provision in a Constitution is mandatory one must have regard also to the aims, scope and object of the provision. The mere use of the word "shall" does not necessarily make the provision mandatory. Subba Rao, J. in the case of *State of U.P. vs. Babu Ram* (2) stated the position thus-

> "When a statute used the word 'shall', prima facie , it is mandatory , but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

The sole object of the Sixth Amendment is to prohibit the violation of the territorial integrity of Sri Lanka and thereby to preserve a Unitary State. With that end in view it imposed penalties which are set out in Article 157A (3)(5) and (6) of the amendment. There was a category of officers and persons who were required by the Constitution to take an oath in terms of the Fourth Schedule. Their allegiance to a Unitary State was compellable. Therefore 157A(7) required them to take an oath in terms of the Seventh Schedule within a month of the Article coming into force on pain of losing the

office they hold. These are no doubt mandatory provisions. If they are not obeyed the whole purpose of the Sixth Amendment will be brought to nought. But it is argued that the provision which requires the oath to be taken before a particular person is also mandatory, and that the Judges must take their oaths before the President. A clue to this problem is to be found in Article 165(1) which must be read *mutatis mutandis* with Article 157A(7). The Deputy Solicitor General stated that the only pertinent portion of Article 165(1) is that an officer shall cease to hold office. He submitted that the mutation must be done in this manner - delete all the words in Article 165(1) except the words "failing to take and subscribe such oath or make and subscribe such affirmation" and the words "shall cease to be in service or hold office" and for those words that have been deleted substitute the words "Any such person or officer". So that the mutation results in the following article -

> "Any such person or officer failing to take and subscribe such oath or make and subscribe such affirmation shall cease to be in service or hold office."

I cannot agree. This is not a mutation but a mutilation of Article 165. The major part of Article 165(1) is thereby abandoned. *Mutatis mutandis* means "with necessary alterations in point of detail" (Wharton's Law Lexicon). The precise significance and the limits of the effect that should be given to the words was set out in the case of *Touriel vs. Internal Affairs Southern Rhodesia* (3) as follows:-

> "Though the phrase *mutatis mutandis* is not infrequently used in statutes and in other legal documents, there seems to be a dearth of authority as to its precise significance, and the limits of the effect which should be given

to it. *'mutandum'*, being the gerundive form of the Latin verb *muto*, is, according to the meaning given to the grammatical term 'gerundive' in the Oxford 'New English Dictionary','a verbal adjective, of the nature of a passive participle, expressing the idea of necessity or fitness'. The question, therefore, arises whether, in deciding as to the effect of the expression *'mutatis mutandis'* the test to be applied for the purpose of ascertaining in any particular case what are *'mutanda'* is 'necessity' or 'fitness'. I think the answer to this question must be that necessity is the test, and that considerations of fitness are not sufficient to justify a change, as a change which the expression *mutatis mutandis* requires to be made, unless they are so cogent as to establish necessity. If fitness in a less strict sense, i.e., fitness not sufficient in degree to show necessity, were the test to be applied for the purpose of ascertaining what changes are required in order to give due effect to *'mutatis mutandis'*, a wide field would be opened up for speculation in many cases where this expression is used, and there would be room for great differences of opinion as to whether particular changes were, or were not, fitting; with the result that in the case of any provision taken from the context of one Act and applied for the purpose of another *'mutatis mutandis'*, there would be serious risk of uncertainty as to how it was to be construed in the context of the Act into which it had been, so to speak, transplanted."

In the case of *Motilal vs. Commissioner of Income Tax* (4) the Court was called on to apply certain Rules of the Income Tax Appellate Tribunal of Bombay *mutatis mutandis* to the provisions of

section 66 of the Income Tax Act of 1922. Section 66(1) reads as follows:-

> "Within sixty days of the date upon which he is served with notice of an order under sub-s.(4) of S.33 the assessee....may, by application in the prescribed form, ... require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court."

Rule 36 provided that Rules 7 and 8 shall apply *mutatis mutandis* to an application under sub-section 1 of section 66. Rules 7 and 8 read thus -

> "7(1) A memorandum of appeal to the Tribunal shall be presented by the appellant in person or by an agent to the Registrar at the head-quarters of the Tribunal at Bombay, or to an officer authorised in this behalf by the Registrar, or sent by registered post addressed to the Registrar or to such officer.
>
> (2) A memorandum of appeal sent by post under sub-r. (1) shall be deemed to have been presented to the Registrar.....on the day on which it is received in the office of the Tribunal at Bombay.....
>
> 8. The Registrar shall endorse on every memorandum of appeal the date on which it is presented, or deemed to have been presented under R.7."

The application requiring the Tribunal to refer the matter to the High Court was received on the 63rd day and a plea in bar was taken. The Court upheld this plea and construed the rules thus -

"(8) In reading Rr.7 and 8 *mutatis mutandis* every effort should be made to adapt every part of these rules for the purposes of the application. It is not permissible to leave out any portion arbitrarily. The Rules do not say that sub-r.(2) of R.7 should be left out, and hence every effort must be made to see that that sub-rule also can be adapted suitably. Reading Rr.7 and 8 in the light of R.36 we get the following result:

7(1) An application under S.66(1) of the Act shall be presented by the applicant in person or by an agent to the Registrar.....or sent by registered post addressed to the Registrar.....

(2) An application under S.66(1) of the Act sent by post under sub-r.(1) shall be deemed to have been presented to the Registrar on the day on which it is received in the office of the Tribunal in Bombay.....

8. The Registrar shall endorse on every application under S.66(1) the date on which it is presented.....It is true that the word 'presentation' is not used in S.66(1). But when the legislature fixed a period of 60 days in which the assessee (or the Commissioner) may 'require' the Tribunal to refer to a question of law, the legislature certainly had in mind a *terminus ad quem* of the period. It is an elementary rule of construction of statutes that the judicature in their interpretation have to discover and act upon the *mens* or *sententia legis* Normally, Courts do not look beyond the *litera legis* and in this case it is not necessary to do any more."

The Court expressly refused to leave out part arbitrarily and made only one alteration. This

method was approved and repeated by Kapur J. in *K.M.Works vs. I.T.Commissioner* (5). He stated that the phrase *mutatis mutandis* permitted "only such verbal changes to be made in the rules mentioned in Rule 36 as would make the principles embodied in these rules applicable to applications under sub-section (1) of section 66." This fact appears to have escaped the notice of the draftsman of the Sixth Amendment.

If necessity, and not fitness, be the test and if the principles of Article 165 are to be maintained then the only changes in Article 165(1) that can be made are -

> *1. To substitute "Seventh Schedule" for the words "Fourth Schedule".*
> *and*
> *2. To substitute the words "within one month of the date on which this Article comes into force" for the words "after the commencement of the Constitution on or before such date as may be prescribed by the Prime Minister by Order published in the Gazette."*

The Deputy Solicitor General contended that " as much as the form is important the manner too is important". If importance is a guide then form, manner and *time* are all important. But what the law requires to be done is to apply the provisions of Article 165 to Article 157A and not vice versa. There are three legal principles in Article 165(1) which have to be applied to the provisions of Article 157A. They are -

(1) the oath,
(2) the time limit, and
(3) the sanction, i.e. the loss of office,

There is nothing else that could be considered. The person before whom the oath is to be taken

finds no place in the provisions of Article 165(1). It is found only in Article 157A. There is therefore no justification for the addition of the words "before the President". Such an amendment can be made by the Legislature only. In the result the words "shall cease to hold office" apply only to the failure to take the oath within one month and has no application to the person before whom the oath has to be taken. To my mind this is a clear indication that this last provision is directory and not mandatory. There is another factor which confirms me in this view. Article 165(1) is one of the Transitional Provisions and in this case applies to persons who are holders of office and have already taken an oath before entering upon their duties and the oath in terms of the Seventh Schedule was merely meant to permit continuance in office. The object of the Sixth Amendment was to bind the persons to allegiance to a Unitary State and to abjure separatism. This has been achieved by the form of the oath and to a certain extent by the time limit of one month.

The Deputy Solicitor General contended that the oaths taken by the Judges before their fellow Judges are not legally binding or valid even though Judges of the Court of Appeal and Supreme Court are ex-officio J.Ps. in terms of section 45 of the Judicature Act (Vide the Fifth Schedule). He added that the requirement to take the oath before the President is mandatory. His reason for stating this needs to be quoted verbatim:

> "The reason for this is not far to seek. The Head of State as repository of certain aspects of the people's Sovereignty has a constitutional obligation to obtain from the Judges their allegiance. The personal allegiance which the Judges owed to the Sovereign in the days of the Monarchy is continued to the present day where the allegiance is owed to the Head of the State as

representing the State. The Head of the State is entitled to ensure that the allegiance is manifested openly and in his presence."

This is a startling proposition. Sovereignty of the People under the 1978 Constitution is one and indivisible. It remains with the People. It is only the exercise of certain powers of the Sovereign that are delegated under Article 4 as follows:-

(a) Legislative power to Parliament
(b) Executive power to the President
(c) Judicial power through Parliament to the Courts.

Fundamental Rights (Article 4(d)) and Franchise (Article 4(e)) remain with the People and the Supreme Court has been constituted the guardian of such rights.(Vide Chapter XVI of the Constitution). I do not agree with the Deputy Solicitor General that the President has inherited the mantle of a Monarch and that allegiance is owed to him. The oath in terms of the Fourth Schedule which the Judges were required to take or affirm in terms of Article 107(4) swore allegiance to the Second Republican Constitution and the Democratic Socialist Republic of Sri Lanka. I cannot therefore accept this reasoning of the Deputy Solicitor General.

The next reason he gives is that a J.P. has never been known to administer a Constitutional Oath, and Judges of the Superior Courts have always taken their oaths before the President. Let me deal first with the first part of this argument. Chapter VIII of the Constitution deals with a Cabinet of Ministers and the President is a member of the Cabinet. It also provides for the appointment of Deputy Ministers, a Secretary to the Cabinet, and a Secretary for each of the Ministries. All of them must take an oath in terms

of the Fourth Schedule before they enter upon their duties. (Vide Article 53). No person is designated to administer the oath. But such an oath to be binding must be taken before a person recognised by law as one empowered to administer a binding oath. It has been customary for the Ministers and Deputy Ministers to take the oath before the President who is an ex-officio J.P. (Vide Fifth Schedule to the Judicature Act). I presume the other officials also are sworn into office by a J.P. The various Public Officers appointed under Chapter IX are required to take a similar oath (Vide Article 61). No person is designated to administer such oath. For this oath to be binding it is sufficient if it is administered by a J.P. Members of Parliament take an oath before Parliament (Vide Article 63). Parliament duly assembled is presided over by the Speaker and in his absence by the Deputy Speaker or the Chairman of Committees. Whoever is in the chair administers the oath. He is an ex-officio J.P. (Vide Fifth Schedule to Judicature Act). The Judges take their oath before the President who is an ex-officio J.P. and similarly the President takes his oath before the Chief Justice or a Judge of the Supreme Court who are ex-officio J.Ps. It is not a coincidence that they are J.Ps. They are so appointed for the reason that they have a constitutional duty to administer an oath. It is customary in this country to take oaths before a J.P. or Commissioner of Oaths unless it is mandatory to take it before a particular J.P. of standing. Oaths required by Article 53 and Article 61 can be administered by any J.P. It is therefore not correct to state that Constitutional oaths are never administered by J.Ps. Judges of the Superior Courts have taken their oaths of office before the President. Section 133 of the First Republican Constitution of 1972 did not require it. Article 107(4) of the Second Republican Constitution of 1978 required it. But this, as I have already

stated, is not mandatory in respect of the oath in the form set out in the Seventh Schedule. In the circumstances such an oath taken before a J.P. empowered by law to administer an oath is a perfectly valid oath.

The Deputy Solicitor General also referred us to the provisions of section 12 of the Oaths and Affirmations Ordinance (Cap.17) which is a reference to Commissioners of Oaths. Section 12 authorises a Commissioner of Oaths to administer an oath "in all cases in which an oath, affirmation or affidavit is commonly administered or taken before a J.P." He seeks to interpret this provision by reference to the provisions of section 84 of the Courts Ordinance. But this we are not permitted to do for the simple reason that the Courts Ordinance was repealed. Section 12 of Cap.17 therefore stands alone. What are the Oaths and Affirmations that are commonly administered by a J.P.? We cannot look to particular instances in a Statute. The words "commonly administered" I understand to mean "ordinarily administered" in day to day affairs of the community. Many types of oaths are required by law as well as by private business. It is common knowledge that when any citizen desires to make an oath or affirmation he must necessarily go to a J.P. or a Commissioner of Oaths, unless the law expressly prescribes some other manner of making such oath or affirmation. In the absence of such compulsion an oath is taken before a J.P. or Commissioner of Oaths. It was not mandatory for a Judge to take the oath in terms of the Sixth Amendment before the President. He was entitled to swear or affirm in any other manner recognised by the law, viz. before a J.P. In the result I hold that the Judges of the Court of Appeal and Supreme Court did not cease to hold office in terms of Article 165(1) of the Constitution.

The next question to consider is the question of the time limit of one month. Counsel for the

Petitioner has stated that the opinion expressed by the Judges in the letter to the President dated 9th September stating that the 9th September was the last date for taking the oath in terms of the Seventh Schedule was a considered opinion of the Supreme Court on a constitutional matter, and the Supreme Court being the final authority on the interpretation of the Constitution, that opinion was binding on all persons in the country including the President. I am unable to accept this proposition as correct. We did not sit as the Supreme Court to consider and decide a disputed constitutional issue or the interpretation of a particular provision of the Constitution. We sat with the majority of the members of the Court of Appeal to discuss a matter arising out of our own contract of service and expressed an opinion which was personal to each of us. We had before us information which showed that the Attorney-General's opinion, as expressed to the Government, considered the 7th September as the final date. We were of the opinion that the last day was the 9th September. I now find that neither side was correct. The final date appears to be the 8th September. "Month" in terms of section 3(p) of the Interpretation Ordinance (Cap.2) means "Calendar month". A Calendar month is reckoned not by counting the days but by looking at the Calendar. "The space of time from a day in one month to the day numerically corresponding to that day in the following month is a Calendar month." *Burne vs. Munisamy* (6), *The Highland Tea Company of Ceylon Ltd. Vs. Jinadasa* (6) and *Dodds vs. Walker* (8).

Before I deal with the preliminary issues I desire to deal with the issue raised on the time limit of two months set out in Article 126(5) which states that the Supreme Court "shall hear and finally dispose of any petition or reference within two months of the filing of such petition or the making of such reference". The Deputy Solicitor-

General submitted that this provision was mandatory so that even a fault of the Court is no excuse. An examination of the relevant provisions of the Constitution indicates that this provision is merely directory. Fundamental Rights are an attribute of the Sovereignty of the People. The Constitution commands that they "shall be respected, secured and advanced by all the organs of Government and shall not be abridged, restricted or denied save in the manner and to the extent (thereinafter) provided" (Article 4(d)). It is one of the inalienable rights of Sovereignty (Article 3). By Article 17 every person is given the right to apply to the Supreme Court to enforce such right against the executive provided he complains to Court within one month of the infringement or threatened infringement (Article 126). These provisions confer a right on the citizen and a duty on the Court. If that right was intended to be lost because the Court fails in its duty the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of punishment if disobeyed. I am of opinion that the provisions of Article 126(5) are directory and not mandatory. Any other construction would deprive a citizen of his fundamental right for no fault of his. While I can read into the Constitution a duty on the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control.

I shall now deal with the two preliminary objections. The Deputy Solicitor-General contends that the Judges are estopped from denying that they now function on a fresh appointment issued by the President on the 15th September. It is correct that such letters of appointment were issued to each Judge on the 15th after two oaths were taken by

each. They are the oath in terms of the Fourth Schedule and the oath in terms of the Seventh Schedule. Counsel for the petitioner contends that an estoppel cannot operate because the Judges had no choice as they had been locked out. There is no doubt that Judges had been denied access to the Courts and Chambers by a show of force. There is also no gainsaying that this act has polluted the hallowed portals of these Courts and that stain can never be erased. But it is unthinkable that Judges should pend an excuse against estoppel on the act of a blundering bureaucrat. *Prima facie* Judges would be estopped. They cannot both approbate and reprobate or to use a "descriptive phrase" they cannot blow hot and cold. Vide Lord Atkin in *Lissenden Vs. Bosch Ltd.* (9) If it was as simple as that then I would have had no hesitation in holding with the contention of the State. But this goes much deeper. It is a constitutional matter and it is contended that the Judges cannot decide whether or not they were *de jure* Judges on the 9th September and that they cannot decide any matter concerning their appointment as Judges. In short they cannot look into facts that existed or occurred before the 15th September. I have already stated that the Judges did not cease to hold office and therefore on the 15th September at the time fresh letters of appointment were issued they were *de jure* Judges. Apart from the fact that there is no estoppel against a Statute there is the larger and more important issue *vis a vis* the Supreme Court. To deny it the right to rule on constitutional issues is to deny the exclusive jurisdiction conferred on the Supreme Court in constitutional matters. What is pleaded as an estoppel against the Judges is in reality an estoppel against the Supreme Court. I have no hesitation in dismissing the two preliminary objections.

In view of the foregoing reasons I am of opinion

that the Judges of the Supreme Court and Court of Appeal did not cease to hold office by reason of the provisions of Article 157A of the Sixth Amendment. Further, that the limit of two months prescribed in Article 126(5) is directory and not mandatory.

S. SHARVANANDA, J.,

The matters referred to the Full Bench involve important questions which concern the jurisdiction, dignity and the independence of the Supreme Court and of the Court of Appeal of the Republic of Sri Lanka. In dealing with the questions we must keep in mind that the objectivity of our approach itself may incidentally be in issue. It is therefore in a spirit of detached objective inquiry which is a distinguishing feature of judicial process, that we need to find an answer to the questions that are raised. It is essential to deal with the problem objectively and impersonally. If ultimately we come to the conclusion that the contention advanced before us by Mr. Nadesan is erroneous, we will not hesitate to pronounce our determination against that submission. On the other hand if we ultimately reach the conclusion that the proposition urged by Mr. Azeez, for the Attorney-General cannot be sustained, we will not falter to pronounce a verdict accordingly.In dealing with problems of constitutional importance and significance it is essential that we should proceed to discharge our duty "without fear or favour, affection or ill-will," and with the full consciousness that it is our solemn duty and obligation to uphold the Constitution of the Democratic Socialist Republic of Sri Lanka (1978).

I agree with the Chief Justice, for the reasons stated by him, that the provision of Article 157(A) Sub-Article 7(a) of the Sixth Amendment which requires the oath prescribed therein to be taken

and subscribed before "such person or body, if any", as is referred to in that Article (Article 107), namely before His Excellency the President, is directory and not mandatory and a default thereof does not attract the sanction prescribed by Article 165 of the Constitution, and that since the Judges of the Supreme Court and of the Court of Appeal had duly taken the oath in the form set out in the Seventh Schedule in terms of the Oaths Ordinance (Ch.17), before another Judge of the respective Court, prior to the expiry of one month from the date on which the Sixth Amendment came into force, their failure to take their said oath before the President did not result in their ceasing to hold office on the termination of the said one month. In my view, the submission of the Deputy Solicitor General that the Judges of the Supreme Court and of the Court of Appeal ceased to hold office in terms of Article 165(1) of the Constitution on midnight of 7th or of 8th day of September 1983, is not well founded and is erroneous; there was no change in the legal status of the Judges; the Judges continued to function with all legitimacy as Judges de jure of the respective courts, without any break, conceptually or otherwise, from the 8th day of September 1983 onwards.

It was urged by the Deputy Solicitor General that the Judges by accepting the fresh appointment issued by the President on 15th September acquired a new lease of life and are now functioning in pursuance of the said letters of appointment and are estopped from denying that they derive their authority from the fresh appointment and from canvassing the propriety of the said appointment.

The Deputy Solicitor General founded his argument on the fact that on 15th September 1983 the Judges accepted without protest fresh letters of appointment dated 15th September 1983 from the

President. He submitted that this conduct is explicable only on the basis that the Judges had resigned themselves to the position that they had ceased to hold office and had elected to accept from the President fresh letters of appointment. He invoked the principle that a person cannot approbate and reprobate at the same time in support of his proposition of estoppel.

The law of estoppel is satisfactorily stated in Halsbury's Laws of England, 2nd Ed.Vol.13, para 452 at page 400 in the following words :

> "Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or so conducts himself that another would as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and alters his position to his prejudice, an estoppel arises against the party who has made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

The principle that a person may not approbate and reprobate is a species of estoppel, intermediate between estoppel by record and estoppel by conduct.

> "The phrases "approbating and reprobating" or "blowing hot and cold" must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and secondly, that he will not be regarded.....as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent" - Per Evershed M.R., (1950) 2 A.E.R. 549 at 552.

"The doctrine of approbation and reprobation requires for, its foundation, inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which confers the benefit" - Lord Russel in *Evans Vs. Bartlam* (10).

"In cases where the doctrine of approbation and reprobation does apply, the person concerned has a choice of two rights either of which he is at liberty to accept, but not both. Where the doctrine does apply if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other," Per Lord Atkin in *Lissenden Vs. Bosch Ltd.*,(9).

A person cannot adopt two inconsistent positions,he cannot affirm and disaffirm; he is presumed to waive one right and elect to adopt the other. This doctrine of waiver looks chiefly to the conduct and position of the person who is said to have waived in order to see whether he has "approbated", so as to prevent him from reprobating - whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny him a later election to the contrary.

"This doctrine of estoppel by representation forms part of the law of evidence and such estoppel, except as a bar to testimony has no operation or efficacy whatsoever. Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail" Spencer Bower - The Law relating to Estoppel by Representation - 2nd Edition pages 6-7.

No cause of action arises upon an estoppel.

It only precludes a person from denying the truth of some representation previously made by him.

> "It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact, the existence of which would destroy a cause of action." Per Lord Russel in *Nippon Monkwa Kabushiki Kaisha vs. Dawson's Bank Ltd.*(11).

The representation relied upon as an estoppel is, in itself no direct or affirmative evidence of any title or right whatsoever; it can only be used to prevent the opposite party from denying the title or right. It cannot prevent a third party from doing so, and therefore can confer no legal title.

> "It is true that a title by estoppel is only good against the person estopped and imports from its very existence the idea that there is no real title at all." Per Farwell, L.J. in *Bank of England vs. Cutler* (12).

The plea of estoppel raised by the Deputy Solicitor General involves the admission that the letters of appointment issued on 15th September, do not in fact confer or establish a legal title, though it is not open to the Judges who accepted them to make that assertion. On this view of the Deputy Solicitor General's argument, Mr. Nadesan was justified in submitting that his client who is a third party is not bound by this estoppel and that it is open to him to demonstrate that the legal authority of the Judges to function as such Judges does not stem from the letters of appointment granted on 15th September, but from their original letters of appointment and that, at all relevant times, they functioned *de jure*.

Assuming that the acceptance of the letters of appointment dated 15th September, from the President lends itself to spelling out a representation, sufficient factually to support a plea of estoppel by conduct (there are difficulties in the way of such assumption) the question then arises whether such plea can be sustained in law. This doctrine of acquiescence, waiver or estoppel is based on principles of justice and equity and hence is limited in its operation.

Spencer Bower at page 140 states lucidly the limits of the doctrine.

> "Just as it is a good affirmative defence to an action on a contract that it cannot be performed without directly contravening the provisions of a statute and that, by enforcing it or otherwise judicially treating it as valid, any court would be sanctioning and condoning such contravention, so also it is a good affirmative answer to a case of estoppel by representation that any closure of the representor's mouth would result in a like judicial recognition of, and connivance at a statutory illegality. The private rights and interests of the individual must yield in such circumstances to the higher rights and interests of the State. In accordance with these paramount considerations of public policy, it has been held that no estoppel can be allowed which will preclude the representor from asserting and bringing to the notice of the Court the statutory illegality of such acts, proceedings and instruments as are sought to be validated by the estoppel put forward."

The law precludes a Court from allowing an estoppel, if to do so would be to act in the face of a statute and to give recognition through the admission of one of the parties to a state of affairs, which the law has positively declared is not to subsist. A party cannot set up an estoppel in the face of a statute. Thus a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel by conduct from performing its duty and asserting legal rights accordingly. See *Maritime Electric Co. Ltd. vs. General Dairies Ltd.* (13) and *Southend-on-sea Corporation vs. Hodgson Ltd.*(14). Given a statutory obligation of an unconditional character it is not open to a court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. The question whether an estoppel is to be allowed or not, depends on whether an enactment or rule or law relied on is imposed in the public interest or "on grounds of a general public policy."

(See Re a Bankruptcy notice - Per Atkin, L.J.(1924) 2 Ch. 76 at 97)

> "The truth is that it can no longer be treated as axiomatic that in the absence of explicit language the Courts will permit a contracting out of the provisions of an Act of Parliament where that Act, though silent as to the position of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. Such acts are not necessarily to be treated as simply *"Jus pro se introductum"*, as "a private remedy and a private right" which an individual member of the class may simply bargain away by reason

of his freedom of contract". Per Lord Hailsham in *Johnson vs. Moraton* (15).

"Quilbet potest renunciare juri pro se introducto" (any one may at his pleasure renounce the benefit of a stipulation or other right introduced entirely in his own favour). This maxim has no application in a matter where the public have an interest. See Brooms' Legal Maxims, 10th Ed., page 481.

"An individual may renounce a law made for his special benefit." It was pointed out by Lord Westbury in *Hunt vs. Hunt* (16), that the words "pro se" were introduced into the maxim to show that no man can renounce a right of which his duty to the public or the claims of society forbid the renunciation.

> "The key, however to the interpretation of the maxim lies, as Lord Simon of Glaisdale pointed out in *National Westminister Bank Ltd. vs. Halesowen Press Works Ltd.*, (17), in discovering whether the particular liberty or right conferred by the statute or rule of law is entirely for the benefit of the person purporting to renounce it. If there is a public as well as a private interest, a contrary Latin maxim applies."
>
> Per Lord Hailsham at page 47 of (1978) 3 A.E.R. 37. (15)

It is clear that the rule expressed in the maxim has no applicability if the matter of an alleged private waiver is one in which the public has an interest.

Article 107 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 provides :

(1) "Every Judge of the Supreme Court and Court of Appeal shall be appointed by the President of the Republic by warrant under his hand.

(2) ***Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament,*** supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity.

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity."

The main aspirations of the Constitution are set down in its luminous preamble. Rule of law is the foundation of the Constitution and independence of the judiciary and fundamental human rights are basic and essential features of the Constitution. It is a lesson of history that the most valued constitutional rights pre-suppose an independent judiciary, through which alone they can be vindicated. There can be no free society without law, administered through an independent judiciary. It is and should be the pride of a democratic government that it maintains and upholds independent courts of justice where even its own acts can be tested. The supremacy of the Constitution is protected by the authority of an independent judiciary to act as the interpreter of the Constitution. So solicitous were the framers

of the Constitution to make the position of the Judges independent and entrenched that they invested them with the status of irremovability save on the limited grounds and manner specifically set out in its provisions. The Judges of the Supreme Court and of the Court of Appeal, unlike Public Officers of whatever rank, do not hold office during pleasure. The Constitution endeavours to secure the independence of the judiciary by setting up well-known mechanisms to assure their security of tenure. The vital need of security of tenure can scarcely be over-emphasised. It is significant that the Article 107 appears under the caption "Independence of the Judiciary". A Judge of the Supreme Court or of the Court of Appeal is entitled to hold office until he attains the age of 65 or 63 respectively (Article 107(5)). He is not removable by the Executive; the only way he can be removed is by an order of the President in terms of Article 107(2). Of course he may resign his office - resignation is a voluntary act different in quality and is far from removal.

Article 108 provides that their salaries shall be determined by Parliament and are charged on to the Consolidated Fund and that the salary payable to and pension entitlement of a Judge of the said Courts shall not be reduced after his appointment. It is manifest that these provisions are designed to safeguard the independence of the Judges by affording them security of tenure. These provisions have not been put into the Constitution merely for the individual benefit of the Judges; they have been put there as a matter of public policy. The security of tenure of Judges has been vouched to the Judges, not only for their own protection but for the protection of the State itself. The framers of the Constitution had considered it to be in the interest of the public and not merely of the individual Judges that their security of tenure should be sacrosanct and

sanctioned by the Constitution. The office of a Judge has become a matter of status rather than a creation of a contract. A Judge of the Supreme Court or the Court of Appeal can cease to hold office only in terms of the provisions of the Constitution and not by operation of any rule of estoppel. In this perspective the submission of the Deputy Solicitor General that the Judges should be deemed to have ceased to hold their office and to have elected on 15th September to accept fresh letters of appointment appears to be jarring and is untenable. The doctrine of estoppel invoked by him is out of place in the area of constitutional provisions. The provision of the Constitution that confronts the estoppel represents a State policy to which the Courts must give effect. The interest of the public, despite any rule of evidence as between themselves that the Judges and the President may have created by their conduct, is supreme. The basic concept of judicial independence would be exposed to very great jeopardy if rules of estoppel are permitted to modify it. The Judges, once they accept appointment under Article 107(1) of the Constitution are not free to contract out of the provisions of the Constitution and waive the constitutional protection which is warranted to them in order to protect their integrity and impartiality. Any such waiver is null and void. Hence no rule of estoppel or of approbation and reprobation precludes the Judges from referring their title to their office to their original letters of appointment which had been issued to them by the President on the terms and conditions of Article 107 of the Constitution.

In view of the conclusion that the Judges had not vacated their office by reason of their omission to take the prescribed oath before the President in terms of Article 157(A)(7) read with Article 165 of the Constitution, Article 107 orda s that their original letters of appointment

continue to be valid and binding and that the Judges may continue to hold office until they are removed under Article 107(2) or reach their age of retirement. The new letters of appointment granted on the 15th September 1983 do not supersede the original letters of appointment and do not in any way detract from the legal import of the earlier letters.

In my view, the Judges did not cease to hold office on the 9th September but continued to hold office without any break and the proceedings of both 8th and 9th September are valid on the basis that the Judges who heard the proceedings were de jure Judges.

I agree also with the Chief Justice in his reasoning and conclusion that Article 126(3) of the Constitution that the Supreme Court should hear and finally dispose of the application made under that Article within two months of the filing of such petition is directory only and not mandatory, and that failure by the Supreme Court to dispose of the application within the prescribed period will not nullify the petition.

We have heard conflicting arguments on the computation of the time limit of one month prescribed by Article 157(A)7(a) of the Sixth Amendment. Counsel for the petitioner submitted that the 9th September was the last date for taking the oath in terms of 7th Schedule, while the Deputy Solicitor General submitted that the 7th September was the last date, though he was prepared to concede that, according to authorities, 8th September can also be regarded as the last date of the month. The authorities relied upon by parties edify us on how the period of a month is computed in ordinary parlance, in the English Common Law, in commercial transactions and under the English Interpretation Act but no authority was cited by

either side on how when a month is stipulated in a written Constitution, the period is to be calculated. In view of the fact that I have already held that the Judges had lawfully taken oath in terms of the 7th Schedule prior to the 7th September. and their default in taking the said oath before the President within the prescribed time would not have the consequence of their ceasing to hold their office, the question whether the month stipulated by the Sixth Amendment ended on the 7th or 9th September, is not of material importance to call for a pronouncement thereon and I do not propose to determine that question as it is not necessary.

> "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of a case." *Burton vs. United States* ,(18).

Before concluding my judgment I must refer to a preliminary objection raised by the Deputy Solicitor General. It was contended by the Deputy Solicitor General that this Court is precluded from directly or indirectly calling in question or making a determination on any matter relating to the performance of the official acts of the President. He supported this objection by reference to Article 35 of the Constitution. I cannot subscribe to this wide proposition. Actions of the executive are not above the law and can certainly be questioned in a Court of Law. Rule of Law will be found wanting in its completeness if the Deputy Solicitor General's contention in its wide dimension is to be accepted. Such an argument cuts across the ideals of the Constitution as reflected in its preamble. An intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President

cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law. Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden.

WANASUNDERA, J.,

I have seen the judgment of the Chief Justice and, while I agree generally with many of the conclusions he has reached, it seems desirable, however, that I should briefly clarify my own position on some of the matters that were argued before us.

First, I would like to emphasise that the issues before us are undoubtedly of great constitutional importance having far-reaching consequences in the working of the Constitution. Being matters of constitutional law and in particular, affecting the authority of the judges and the jurisdiction of the Supreme Court, these issues, because of their importance, had necessarily to be disposed of on the first occasion they were raised or brought to our notice. What is in issue is a direct challenge to the authority and jurisdiction of the Supreme Court in the hearing and disposal of a matter before it. These issues arise inescapably for consideration, for they could have been raised at any time - at a later stage of even these same proceedings or in any of the other cases which had been left incomplete on 8th September, 1983.

It was the position of the learned Deputy Solicitor General that we had ceased to be judges between the 8th September and the 15th September

1983. He sought to argue that the gap between the 8th of September and the 15th of September could be bridged on the principle of *de facto* judges for a part of the period and the balance period by reference to section 48 of the Judicature Act. None of the arguments or citations relied on by him, I am afraid, has any direct application to the situation before us. It is therefore idle to believe that this issue involving the constitution and the jurisdiction of this court could have been glossed over and evaded or that we should have proceeded to hear the matter before us, leaving aside the question of our very jurisdiction wrapped in uncertainty.

I am in total agreement with the Chief Justice in his reasoning and conclusion that the requirement that judges should take their oath before the President is merely a directory provision. He has examined the relevant constitutional and statutory provisions with great care and thoroughness and rightly concluded that in circumstances such as this, whenever the law has required an oath to be administered in this country, it has always been administered by a person in his capacity either as a Justice of the Peace or as a Commissioner of Oaths. An oath administered by either of such persons, irrespective of his official position, whether high or low, must have equal sanctity and operation in the eye of the law. It cannot be otherwise for an oath is an oath. That a Justice of the Peace holding a particular office or post is designated as the person before whom the oath should be taken in a given instance, may have something to do with the dignity of the office of the person required to take the oath, or to give solemnity to the occasion; but I cannot see how that fact can increase, diminish or affect the sanctity of the oath, which has been solemnly taken in every such case. But even in the case of such designations we

search in vain for a consistent principle. Most of the Supreme Court Judges took their oaths before the Chief Justice or a brother judge. His Excellency the President took his oath, as he lawfully may, before a junior judge of the Supreme Court. The law permits the Prime Minister or any Cabinet Minister to take his oath before an ordinary Justice of the Peace or Commissioner of Oaths. Every indication in the relevant provisions points to the fact that the requirement that the Supreme Court judges should take their oath before the President is of a directory nature. The judges therefore, by taking the oath under the Seventh Schedule before the Chief Justice or before a brother judge before the expiry of the first week of September, have substantially complied with the law.

In dealing with this particular question, Mr.Nadesan did not stop there but went much further and sought to analyse the relevant provisions of the Constitution in greater depth.It was his submission that, apart from whatever view we may take as to the nature of the conditions for taking the oath, a proper interpretation of the relevant provisions does not admit of the view that a judge would automatically vacate his office or be removed therefrom by a mere failure to take the oath prescribed by the Seventh Schedule. It was his submission that only a failure which amounts to a wilful or contumacious refusal to take the oath, and not a mere omission, may, in appropriate circumstances, provide a ground for disciplinary action against a judge. This argument appears to be of some substance.

The Chief Justice has already drawn our attention to the fact that Article 165(1), on which hinges the power of cessation of office, is a transitional provision in the Constitution. It is a provision dealing with a particular state of

affairs that existed at the time of the coming into operation of the Constitution. These transitional provisions, as the name indicates, were designed primarily to connect the present state of affairs with the past, so that the new Constitution could be brought into operation without any dislocation. Article 165, at the time it came into operation, did not have to deal with the situation of officers already functioning or officiating in any post. The Constitution started as it were with a clean slate. In the case of appointments to offices newly created by the Constitution like Supreme Court Judges, a letter of appointment had to be issued. Most public officers however continued under the new constitutional structure in practically the same form and accordingly the provisions of Article 164 provided for the continuance in service of the persons who were holding such offices at the time of the coming into operation of the Constitution. This was tantamount to a letter of appointment.

Article 107(4) provides that a Supreme Court judge and a judge of the Court of Appeal, after his appointment, "shall not enter upon the duties of his office until he takes and subscribes or makes and subscribes before the President, the oath or the affirmation set out in the Fourth Schedule." In the case of the President, Article 32(1) states that -

> *"The person elected or succeeding to the office of President shall assume office upon taking and subscribing the oath or making and subscribing the affirmation, set out in the Fourth Schedule....."*

In the case of Cabinet Ministers, Acting Ministers, Deputy Ministers, the Secretary to the Cabinet, and Secretaries to Ministries, Article 53 likewise provides that -

> *"A person appointed to any office referred to*

in this Chapter shall not enter upon the duties of his office until he takes and subscribes the oath or makes and subscribes the affirmation set out in the Fourth Schedule."

"Article 61 makes similar provision for public officers.

It would therefore be evident that a distinction has been drawn in the Constitution between a person receiving an appointment - an entitlement to an office - and such appointee "entering upon the duties of his office", which involves a further step to perfect and consolidate that appointment. What Article 165(1) provides is a bar or hurdle between these two stages involving the taking of an oath. Until that bar is surmounted, Article 165(1) states a person, although he may have an entitlement to the office, "shall cease to be in service or hold office". But, it would be noted that at no time did that officer actually function in that office. He was never a functionary in the true sense of the word.

Article 165(1) therefore does not purport to deal with the case of a person who had already entered upon the functions and duties of his office. That is the case before us and the precise situation of the Supreme Court judges. There can be no serious objection to a person who delays entering upon his duties being told that he is no longer wanted or that he has ceased to be in service or hold office. Such a person has not perfected his appointment. In fact, in such a case the office continues to remain vacant and it calls for a declaration of this kind to enable a new appointment to be made. But it would be a very different thing to tell an officer functioning in an office (especially a judicial officer whose tenure of office is assured), that he is no longer

in office. In truth and fact that would amount to a vacation of office or a removal from office. The proper term in that context would be to use the word 'vacate'. This word 'vacate' however can be used in a comprehensive sense even to include both the stages indicated above. The wording of Article 165(1) therefore is inadequate to catch up the present situation.

The correctness of this view is to some extent borne out by the other provisions of Article 165. When we examine Article 165(2), we see that it provides that the Minister of Public Administration "may, in his sole discretion, permit any public officer, judicial officer, person or holder of an office to take the oath or make the affirmation after the prescribed date, if he is satisfied that the failure to take the oath or make the affirmation within the time prescribed was occasioned by illness or some other unavoidable cause. On his taking such oath or making such affirmation, he shall continue in service or hold office as if he had taken such oath or made such affirmation within the time prescribed....."

Are not the above provisions more consistent with the position of the requirement of the oath taking being a bar or fetter on a person entitled to an office but who has not yet entered upon his duties rather than being the vacation of office of a person already officiating in a post and his being "reappointed" thereafter? In the first type of case mentioned above, a delay in taking office is not of great moment and could be rectified without giving rise to any complications. So, this power to remedy the situation on the two specified grounds can be safely entrusted to the Minister of Public Administration, and such a provision violates no provision of the Constitution.

On the other hand, if this provision is

intended to apply to a person who had already entered upon his duties, then it gives rise to a number of important questions. I have already referred to the fact that in the case of a judge there would be a conflict between Article 165(1) and Article 107(2) which ensure him continuity of tenure. If a judge has ceased to hold office, he cannot thereafter continue in office without a fresh appointment. When the Constitution prescribes the President as the appointing authority, could the Minister of Public Administration reinstate him or make such an appointment? Is it consistent with the independence of the judiciary, entrenched by the Constitution, that the Minister of Public Administration should be the appointing authority and in his sole discretion be allowed to pick and choose the judges who should continue in office and those who should not.

The distinction I have sought to draw can be tested by two obvious examples. First, let me take the case of the President. How would the President be affected in the event of a failure to take the Seventh Schedule oath? The President, who is the Head of the State, the Head of the Executive and of the Government, and Commander-in-Chief of the Armed Forces is selected by the People at an election. Article 30(2) states that he "shall hold office for a term of six years". If, after such a country-wide election and assumption of office, is it conceivable that the Legislature intended that the President should be made to vacate office merely because he has omitted to take the new oath prescribed by the Seventh Schedule? Incidentally, the Fourth Schedule oath taken by him is an undertaking to be faithful to the Republic of Sri Lanka and to defend the Constitution to the best of his ability. Article 2 of the Constitution already contains a statement regarding the unitary nature of the State. The present oath is only supplementary to it and an elaboration of that

provision, although the Sixth Amendment deals with other matters too.

In this connection an examination of the provisions in Article 38(1) can throw some light on the resulting position. It deals with the vacation of office by the President. One of the grounds is -

> "(d) if the person elected as President wilfully fails to assume office within one month from the date of commencement of his term of office,"

This provision is clearly referable to Article 32 where the President assumes office on taking the oath of office. It would be observed even in this situation - which should be regarded as more than a mere entitlement since the President has already been elected by the whole of the People of Sri Lanka - it is only a wilful failure that can give rise to the sanction.

Let us now take the case of the judges of the Supreme Court. Article 107(2) states that a judge, once he begins to function -

> "...shall hold office during good behaviour, and shall not be removed except by an order of the President made after an address of Parliament, supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity."

This is the only provision in the Constitution dealing with the removal of a judge who is already holding office. If the wording of Article 165(1) is held to be appropriate to catch up the case of a functioning judge, it would then

be in clear conflict with the provision of Article 107(2), which is a special and specific provision. There is nothing in the amending Article 157 A (7) as for example by the use of prefatory words such as "notwithstanding any other provision of the Constitution" to show that this provision should prevail over any other provision of the Constitution. As in the case of the President, is it conceivable that a judge, who may fail through an oversight or some mistake to take the Seventh Schedule oath, should have to vacate office?

Mr. Nadesan conceded that the requirement of taking the Seventh Schedule oath is nonetheless a legal requirement, in the sense that where a person who is required to take the oath and has through negligence or oversight failed to do so, should at that stage be required to comply with the law. If however there is a wilful refusal to take the oath, then there is undoubtedly a transgression of the law. But, even this would not lead to an automatic vacation of office but could only provide a ground for disciplinary action. A wilful refusal to take the oath could amount to misconduct or misbehaviour, but not a mere omission or mistake. This interpretation, eminently reasonable, prevents any conflict arising between Article 157 A (7) on the one hand and Articles 38 and 107(2) etc. on the other and would tend to reconcile the various provisions of the Constitution rendering them harmonious in operation. Any other interpretation would result in upsetting a number of basic concepts embodied in the Constitution.

I am therefore inclined to think that this is another reason, even more cogent than the one referred to by the Chief Justice, for holding, as Mr. Nadesan contended, that the judges could not have functioned otherwise than as *de jure* judges during the period under consideration.

In regard to the defence of estoppel, waiver or the prohibition against approbation and reprobation (or in whatever way that defence is expressed) taken by learned Deputy Solicitor General, in my opinion such a defence is not tenable in the circumstances of the present case. Let us remind ourselves again that the question before us is the very constitution of the Supreme Court, the validity of the continuation of the service of the judges, and the legality of the acts of this court and the judges, and not with any private right of the judges as individuals.

An examination of the case law both local and from other jurisdictions makes it abundantly clear that the courts have uniformly excluded the application of such a defence where an authority or person against whom the estoppel is pleaded owes a duty to the public or a section of the public or even to some other individual against whom the estoppel cannot fairly operate. In the case of a constitutional provision such a presumption is generally inevitable.

Halsbury's Laws of England (4th Edn.) Vol. 16 at paragraph 1575 sets out the legal position in England. The U.K. of course does not have a written Constitution.

> "1515. *Estoppel against Statute*. The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged

with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers....."

Spencer Bower and Turner in their work Estoppel by Representation (2nd Edn.) at page 134 deal with the waiver of the protection of a statute. Where a certain transaction or a course of action is illegal and void and absolutely prohibited, no question of waiver can arise. In other cases it has been contended that a statutory provision for the benefit of a party could be waived. They state :

". The soundness of this contention in any particular case, whether of express contract or of estoppel (for the principles which govern the former obviously govern the latter also) depends upon the question whether the right which is abnegated is the right of the party alone, or of the public also, in the sense that the general welfare of the community, or the interests of the class of persons whom it is the object of the law to protect, cannot be secured in the manner intended without prohibiting the waiver or estoppel. In the case of express contract to waive it has always been held that the doctrine embodied in the familiar formula, *quilbet potest renuntiare juri pro se introducto*, is subject to the limitation that the renouncing party must be able to establish that the 'jus' was intended by the legislature for his benefit only *pro se solo*. If the public, or a class or section of the community, are interested, as well as himself, in the general observance of the conditions prescribed by statute, it has always been held on the ground of public policy that there can be no waiver, even by express contract or consent, of the right to

such observance by any individual party; but where, on the other hand, no public interest, and no interest intended to be promoted or protected by the statute, is in the least affected by the contract or consent to waive, and the matter is one which concerns the parties alone, such contract or consent has never been interfered with, but on the contrary has always been enforced. So also, in cases of waiver by conduct which gives rise to an estoppel, the same essential distinction has always been observed. On the one side of the line are the cases where the estoppel or waiver, if allowed, would defeat the objects of the statute, and injure the interests of the public, or of persons other than the immediate parties, and where therefore the affirmative answer of illegality has prevailed, and the estoppel has been defeated. On the other side of the line are the cases in which no interests, other than those of the immediate parties, can possibly be affected by allowing the estoppel, which accordingly has in such cases usually prevailed.

Estoppel as to Jurisdiction

142. Not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal; it is equally plain that the same result cannot be achieved by conduct or inaction or acquiescence by the parties. Any such attempt to create or enlarge jurisdiction is in fact the appointment of a judicial officer by a subject, and as such constitutes a manifest usurpation of the Royal prerogative....."

Vide Martime Electric Co. Ltd. vs. General Dairies Ltd.,

Customs & Excise Commissioner vs. Hebson Ltd., Society of Medical Officers of Health vs.Hope, N.W. Gas Board vs. Manchester Corporation, Southend-On-Sea Corporation vs.Hodgson (Wickford) Ltd.,

Welch vs. Nagy.

Even in the case of legal provisions which ostensibly appear to confer rights solely in favour of individuals, a deeper analysis of the relevant constitutional or statutory provisions might indicate that they contain an element of public interest or are really based on grounds of public policy. This is the view taken by the Indian Supreme Court in regard to the question of fundamental rights guaranteed by the Indian Constitution. The American courts however have taken a different view.

The leading Indian case on the subject is *Basheshar Nath vs. Commissioner of Income Tax* (23). In that case S.R. Das C.J., Bhagwati J., Kapur J. and Subba Rao J. held that the fundamental right under Article 14 involved a matter of public policy and could not be waived. Bhagwati J. and Subba Rao J. were prepared to extend the proposition to cover all fundamental rights.

The majority declined to follow the American decision. S.K.Das J. alone dissenting took the view that the doctrine of waiver could apply in that case and that there was no such vital distinction between the American and the Indian Constitutions necessitating a different treatment of the matter. Seervai in his well known work Constitutional Law

of India (2nd Edn.) p.186 criticises the majority judgment. He writes -

> "S.K.Das,J. dissented, holding that there were no such differences between the U.S. and the Indian Constitutions as would make the doctrine of waiver applicable to the former and not to the latter. The correct test to apply to each fundamental right was to inquire whether it conferred a right on a person primarily for his benefit. If it did, that right could be waived. It is submitted that the view of S.K.Das,J.is correct".

This criticism, it would be seen is in no way directed against the legal principles applicable to waiver enunciated earlier in this judgment. The difference in views of the majority and the dissenting judge S.K.Das appears to me not one of principle but in the manner of their application to a given set of facts. Indian State Courts have followed this judgment. Vide *Ram Gopal vs. National Housing Corporation*,,(24), *Bhaskar Moharana vs. Arjun Moharana*, (25).

The issues before us are undoubtedly matters of high constitutional law. How can it ever be contended that this is a matter of private rights when our very status and our capacity to function as judges are in dispute? It is the view of the learned Deputy Solicitor General that we had ceased to be judges between the 8th and 15th September 1983, although he was prepared to concede for the purpose of the application before us that on the 8th and 9th September the proceedings had before us could be treated as valid on the principle of *de facto* judges. The challenge to our jurisdiction nevertheless remained.

The issues relating to the legality of the court, its judges and the acts performed by them

are issues which when presented leave us no choice but to decide them according to law by virtue of our position as judges who are constitutionally vested with the power and duty to decide such legal issues. Our powers of decision in this matter are also referable to a lawful authority we held from a time prior to 8th September which is reinforced if necessary by the appointment of 15th September 1983. This fact is of decisive importance in this case. There can be no estoppel against an authority or power vested in an officer of State that is to be exercised in the interests of the People. Our decision that the judges continued to hold office without interruption or break under the original letters of appointment finally concludes this matter.

The appointment of the 15th September, in my view, does not derogate from the authority with which we had been clothed anterior to such date. In this context I would also like to remark that there is an ever present duty vested in all of us, whether we be judges, public officers, or members of the public, to uphold the Constitution and to safeguard the rights of the People in whom alone the Sovereignty of the State is vested. It behoves all of us therefore to take such action which we may consider lawful and proper to protect those rights and to ensure the smooth and harmonious functioning of the machinery of State.

In view of the rulings given earlier as regards the directory nature of the requirement contained in Article 157A and the effect of its non-compliance, it appears to me quite unnecesary to consider the question (which was really raised by Mr. Aziz and not by Mr. Nadesan) determining the last date for taking the oath prescribed by the Seventh Schedule. As to what are the precise principles of the English law in regard to the computation of

time, to what extent they apply or should apply here and as to how a constitutional provision relating to time as is contained in Article 157 - A (7) should be interpreted are difficult questions on which reasonable men can differ. In my view this question could be safely left for a future occasion.

On the second question referred to this bench, I am again in agreement with the Chief Justice that the provisions of Article 126 are also directory and not mandatory.

In the result I would hold that we have continued and continue to be judges *de jure* from the inception of the hearing of this case until now without any break and that it would be competent for a bench of judges nominated by the Chief Justice comprising all or some of us to hear and dispose of this application for relief under Article 126.

WIMALARATNE, J.

I have had the benefit of reading the judgments prepared by the Chief Justice and by Sharvananda, J. I agree with them that since the Judges of the Supreme Court and of the Court of Appeal had taken the oath in the form set out in the Seventh Schedule before the Chief Justice or before another Judge of the respective courts prior to the expiry of one month from the date on which the Sixth Amendment came into force, their failure to take the same oath before the President of the Republic did not result in their ceasing to hold office on the termination of the said one month.

The failure of the Judges to take the oath before the President was due to the unfortunate circumstance that the printed copy of the Sixth Amendment reached the Judges on or about 7th September 1983. The Bill which was examined on

3.8.83 for its constitutionality by a Full Bench of the Supreme Court did not contain a requirement that the oath should be taken by them before the President. That requirement had been introduced by Parliament at the Committee stage and was unknown to the Judges. Hence the failure to take the oath before the President was not deliberate but due to undfortunate circumstances.

The above decision makes it necessary to determine the question whether the period of one month for taking the oath ended on the 8th or the 9th of September. There are decided cases some of which support the 8th whilst others support the 9th. They relate mostly to computation of time limits in contracts between parties such as tenancy agreeements, or in cases where parties had been criminally involved or to time limits imposed into statutes or Rules of Court. But here we are called upon to interpret a time limit contained in a Constitutional provision. The Chief Justice has taken the view that "the final date appears to be the 8th September". I would, however, like Sharvananda, J. prefer not to determine that question as it is now not neccessary, and as it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.

Both the Chief Justice and Sharvananda,J. have given cogent reasons for overruling the two preliminary objections raised by the learned Deputy Solicitor General. I am in entire agreement with them and I overrule the objections.

My conclusion on the first of the two matters referred to the Full Court is that the Judges did not cease to hold office at any time, and that therefore the proceedings of the 8th and 9th September 1983 are valid proceedings.

The second of the two questions referred to us relates to the legal validity of an order that is made after the expiration of the two month period referred to in Article 126 (5). The Judges have so far complied with this requirement and given their orders within the stipulated period. But there could be occasions where unfortunate circumstamces such as illness of a Judge or other unforseen event may render compliance with this requirement not possible. I am therefore of the view that the provisions of Article 126(5) as to the time limit are directory only, and not mandatory. The Court will, of course, be conscious of its resposibility and will undoubtedly not delay an order unnecessarily.

RATWATTE, J.,

I have had the privilage of reading the judgments of my Lord the Chief Justice and my brother Sharvananda, J. The circumstances which led to this Full Bench being constituted and the issues that arose for consideration by the Full Bench have been set out in the judgment of the Chief Justice.

I am in agreement with the Chief Justice, for the reasons set out by him, that the provision in sub-Article 7(a) of the Article 157A of the Sixth Amendment to the Constitution which requires the oath or affimration set out in the Seventh Schedule, to be taken "before such person or body if any, as is referred to " in the Articles of the Constitution specified in sub-Article 7 of Article 157A, by the categories of officers or persons referred to in those Articles, is directory and not mandatory. It may be mentioned that this provision in sub Article 7(a) of Article 157A which requires certain categories of officers and persons to take the oath in the Seventh Schedule before a particular person or body was not in the Bill that was referred to this Court for its special

determination by His Excellency the President in terms of Article 122(1) of the Constitution. This provision is contained in an amendment that had been made at the Committee stage of the debate on the Bill. I have nothing further to add to the reasons set out by the Chief Justice for his finding that this provision referred to above is directory and not mandatory.

I am of the view that as the Judges of the Supreme Court and the Court of Appeal took their oaths in the form set out in the Seventh Schedule before each other well within the period prescribed in the Sixth Amendment, they did not cease to hold office by reason of their failure to take the oath before the President.

The Sixth Amendment was certified by the Speaker on the 8th of August, 1983. Conflicting arguments were adduced by Mr.Nadesan and the Deputy Solicitor-General as to when the period of one month prescribed in Article 157A(7) expired. The question that arose was whether the last day was the 7th, the 8th or the 9th September. To resolve this question it is necessary to decide how time by "calender month" is to be reckoned. In my view a decision on this question now is purely academic, in view of the finding that the Judges lawfully took their oaths in terms of the Seventh Schedule long prior to the 7th September 1983, i.e. well within the prescribed time. I accordingly agree with Sharvananda, J. that it is not necessary for this Court to pronounce a finding on this question.

As regards the issue whether the requirement in Article 126(5) of the Constitution that the Supreme Court should hear and finally dispose of an application made under that Article within two months of the filing of such petition, is directory or mandatory, I concur with the finding of the Chief Justice for the reasons given by him, that

the said requirement is directory and not mandatory. That does not mean that the Judges will totally disregard the time limit of two months. They will continue to abide by the time limit as they have hitherto done, unless they are prevented from doing so due to circumstances beyond their control.

There now remains the preliminary objections raised by the Deputy Solicitor-General. The Chief Justice and Sharvananda, J. have dealt with the matter exhaustively and I am in agreement with their findings on both the objections. I accordingly agree that both the preliminary objections be dismissed.

SOZA, J.,

I have had the advantage of reading in draft the judgments prepared by the Chief Justice and Sharvananda, J. I agree with the Chief Justice that for the reasons given by him the stipulation in Article 157A(7) of our Constitution that the oath in terms of the Seventh Schedule should be taken and subscribed by the Judges of the Supreme Court and Appeal Court before His Excellency the President is directory and that the oath in terms of the Seventh Schedule which the Judges of these two Courts in fact took before their fellow Judges well before the expiry of one month of the date on which the said Article came into force is valid and a sufficient compliance with the Constitutional requirements.

On the pleas of estoppel, waiver and acquiescence I agree with what has been said on them by the Chief Justice and Sharvananda, J. I would like to emphasise that judicial office is a status and transcends the bounds of private contract. The principle applicable is embodied in the *maxim privatorum conventio juri publico non derogat*. It is almost universally acknowledged that

estoppel cannot operate against a statute. Much less will it operate against provisions in a Constitution. Security of tenure of office of the Judges of the Supreme Court and Court of Appeal is an essential component of judicial independence and is entrenched in our Constitution as a principle of State Policy for the benefit of the Sovereign People. No amount of waiver or acquiescence even by the judges themselves can defeat the security of tenure of judicial office enshrined in the Constitution.

Accordingly I concur with the conclusion of the Chief Justice that the Judges of the Supreme Court and Court of Appeal did not cease to hold office at any time.

I also agree with the Chief Justice that the provision in regard to time in Article 126(5) of our Constitution is directory.

On the controversy regarding the mode of computation of the terminal date for taking the oath in terms of the Seventh Schedule I agree with Sharvananda, J. that our decision that the Judges took a valid oath and did not cease to hold office renders it unnecessary to express an opinion on the question.

The preliminary objections raised by the learned Deputy Solicitor-General have been dealt with by the Chief Justice and Sharvananda, J. and I agree with them that they are unsustainable and should be dismissed. I too would dismiss these objections.

RANASINGHE, J.,

I have had the advantage of perusing, in draft, the judgment of my Lord the Chief Justice, and as I find myself in respectful disagreement with the

majority view of this Court, I now set down my approach to the several matters that were argued at the hearing before this Court.

The two matters, which were referred to a full Bench of this Court, are :

(1) The legal validity of the proceedings of the 8th and 9th September 1983.
(2) The legal validity of an Order that is made after expiration of the period of two months referred to in Article 126 of the Constitution.

Are the provisions of paragraphs 7(a) and 7(b) of Article 157A of the Constitution, as set out in the Sixth Amendment, imperative or directory?

The provisions of paragraphs 7(a) and 7 (b) of the said Article 157(1) of the Constitution, which have been brought into operation by the Sixth Amendment, require any officer and person referred to therein to "make and subscribe, or take and subscribe, an oath or affirmation in the form set out in the Seventh Schedule, before such person or body if any, as referred to in that Article, within one month of the date on which this Article comes into force"; and they further proceed to provide that : "the provisons of Article 165 and Article 169(12) shall, mutatis mutandis, apply to, and in relation to, any person or officer who fails to take and subscribe, or make and subscribe, an oath or affirmation as required by this paragraph".

The provisions of paragraphs 7(a) and 7(b), in so far as the judges of the Supreme Court are concerned, set forth three requirements : (1) that the oath or affirmation set out in the Seventh Schedule be made or be taken and subscribed, (2) that such oath or affirmation be made or be taken and subscribed before the President of the

Republic, and (3) that such oath or affirmation be made or be taken and subscribed within one month of the date on which the said Article 157(A) comes into force. The said Article 157(A) came into operation on 8.8.1983.

The submission put forward by learned Queeen's Counsel appearing for the Petitioner is that, of the three requirements referred to above, only two requirements, viz, the first - relating to the making or taking and subscribing an oath or affirmation -, and the third -. relating to the period of time within which such oath or affirmation is to be made or taken and subscribed - are mandatory, and that the second requirement - relating to the person before whom such oath or affirmation be made or taken and subscribed - is only directory. This contention is founded upon the argument : that, when recourse is had to the provisions of Article 165(1) and the necessary changes made upon the basis of the term mutatis mutandis, what transpires is that Article 165(1) provides the consequences only in regard to a failure to take the prescribed oath within a specified period ; that, that being so, the Legislature has set out a penalty for defaults in complying with only the the first and third requirements of Article 157A (7)(a) and (b) ; that, as no sanction has been provided for a failure to comply with the second-the requirements of making or taking and subscribing the prescribed oath before the President of the Republic - of the three said requirements, it must in law be held to be directory ; that a substantial compliance with such direction would suffice ; that, therefore, the oaths and affirmations made or taken and subscribed by the judges of the Supreme Court, before either the Chief Justice or another of the other judges of either the Supreme Court or the Court of Appeal within the said period of one month, are valid.

This contention thus requires a consideration of the meaning and the application of the phrase "mutatis mutandis". *Wharton's Law Lexicon* (4th edt.) p. 677 explains the rule as : "with the necessary changes in points of detail". *Jowitt's Dictionary of English Law* also explains the rule in the same way.

Black's Law Dictionary (4th edt.) 1951, at p.1172, explains it as : "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, office and the like".

Of the three authorities - all of which are from the courts in India - cited to us as being relevant to this particular question, the case of *Kushi Ram Ragunath Sahai vs. Commissioner of Income Tax* ,(26) decided by the Punjab High Court is the most helpful. Falshaw, J. with whom Kapur, J. agreed, has, in his judgment, referred to the other two authorities cited to this court at the hearing of this matter. The provisions of law which were considered in that case were : Rule 36, of the Appellate Tribunal Rules framed under the Income Tax Act of 1922 provided that, inter alia, Rule 7 of the said Rules - which provided that a memorandum of appeal to the Tribunal which is sent by post, shall be deemed to have been presented on the day on which it is received in the office set out therein - should apply mutatis mutandis to "an application made under sub-section (1) of S.66 : Sec. 66(1) of the said Act provided for application for reference to be made in the prescribed form to the Income- Tax Appellate Tribunal within six days. The principal point of consideration was how the principles set out in Rule 7, in regard to the presentation of a memorandum of appeal, should be applied to an application made under Sec. 66(1). The manner in which it should be done was set out quite lucidly and succinctly by Falshaw,J. as follows:-

" There would seem to be no doubt that in this context the phrase *'mutatis mutandis'* has its usual meaning, that is, that only such verbal changes are to be made in the rules mentioned in Rule 36 as would make the principles embodied in these Rules applicable to applications under sub-section (1), S. 66. The only change which appears to me to be necessary is the substitution of the word "application under sub-section (1) of S. 66" for the words "memorandum of appeal" wherever they occur. The net result would thus appear to be that anyone who wishes to move the Tribunal under S. 66 (1) is required to post his application in time for it to reach the office of the Tribunal within sixty days of the receipt by him of a copy of the appellate order of the Tribunal and, indeed,. I should hardly have thought that the point admitted of any doubt, or was even capable of argument, ..."

Feetham, A.J.A., in the case of *"Touriel vs. Minister of Internal Affairs Southern Rhodesia,* (27) (which said authority I gathered from the judgment of My Lord the Chief Justice) at page 545, cites with approval the interpretation given in *Wharton's Law Lexicon* (5th Edt.) of the phrase *mutatis mutandis* as "with the necessary changes in points of detail" as supporting the view that the test to be applied, for the purpose of ascertaining in any particular case what are "*mutanda*", is "necessity" rather than "fitness". The approach adopted by me in the application of the rule *mutatis mutandis* to the two relevant provisions in the Constitution, 157(A)(7) and 165(1) does not in any way, in my opinion, offend against the principles set out in the judgment of Feetham, A.J.A. The changes made are only those that have of "necessity" to be changed, as contemplated by the framers of the Constitution and those who adopted

it. No change has been made on the basis that such a change is a "fitting" change - as was done in the original court in the South African case (supra) where changes were effected by the substitution of words, which were not found in the enabling section, which, in that case, was Sec. 8 of the Southern Rhodesia Naturalisation Act.

That part of paragraph (7) of Article 157(A), which is relevant to this particular question, sets out that the provisions of Article 165 shall, mutatis mutandis "*Apply to* and *in relation to*", a *person or officer* "who fails to take and subscribe, or make and subscribe, an oath or affirmation as required by this paragraph". This provision clearly set out the nature and the scope of the changes which should be effected in the provisions of Article 165(1). Such changes should only apply to and be in relation to a person or officer who has failed to do the act as required by this paragraph. Such changes are not to be made to apply to and be in relation to a failure to comply with each one of the said requirements set out in that paragraph. The determination of the question, whether a person or officer is in default, has to be made with reference to the provisions of Article 157A and not with reference to Article 165. A default under the provisions of Article 157A arises when there is a non-compliance with any one or more of the three requirements - detailed earlier - set out in the said Article. The failure is to be determined by reference to the requirements set out in Article 157A and not by reference to any requirements set out in Article 165. A violation of or a non-compliance with any one of the three requirements set out in Article 157A would constitute a failure to take and subscribe or make and subscribe an oath or affirmation as required by paragraph (7) of Article 157A. Once such a failure arises, resort has then to be made to Article 165 to discover the consequence (or consequences), if any, of such

failure. The consequence – or consequences – so being looked for is the consequence of a failure to comply with the requirements of Article 157A, and not that of a falure to comply with the requirements of Article 165. It is not an exercise to discover the consequence of a non-compliance with each one of the three requirements set out in Article 157A. It is not to find out what non-compliance with each one of such requirements would entail. It is rather an exercise to find out what would be the fate of a person or officer who is already in default because he had not complied with one or more of the three aforementioned requirements of Article 157A. The principles set out in Article 165 are to be made applicable not for the determination of either what constitutes a default in terms of the provisions of the Article 157A, or what, if any, a failure to comply with each one of the aforementioned three requirements set out in Article 157A would entail, but for the specific determination of the consequence, if any, of the failure of a person (or officer) to take and subscribe, or make and subscribe, in the manner set out in Article 157A, the oath or affirmation set out in the said Article 157A. Therefore, the changes, which are necessary to be made in Article 165 (1), would be : in the first sentence appearing therein by the substitution for all the words "set out in the Fourth Schedule", the words "as required by paragraph (7) of Article 157(A)"; and, in the second sentence therein, by the substitution for all the words beginning with the words "any" and ending with the word "Gazette", the words "any person or officer who fails to take and subscribe or make and subscribe, an oath or affirmation as required by paragraph 7 of Article 157A". The resulting position would be that a person or officer, who fails to comply with even one of the aforesaid three requirements set out in paragraph (7) of Article 157A, being a person or officer who has failed to take and subscribe, or to make and

subscribe, an oath or affirmation as required by the said paragraph(7) of Article 157A, would "cease to be in service or hold office". The second of the three requirements set out in paragraph (7), and referred to earlier, of Article 157A is also, therefore, a provision of law the non-observance of which would attract to it the penalty set out in Article 165(1).

Although in this view of this matter, it is not necessary to consider further this question, it appears to me that, even if the penalty set out in Article 165(1) does not apply to a non-observance of the aforementioned second requirement set out in Article 157A (7), there is a further aspect to this question, whether the said requirement is in itself a mandatory provision. The question whether a statutory provision, setting out the manner in which a particular act, ordained to be carried out, has to be done, is imperative or directory arises for consideration only when the consequence of a failure to comply with such direction is not set out in such enactment - *Bindra : Interpretation of Statutes -6 edt -ps 546-549, 561, 565, Maxwell : Interpretation of Statutes* (9 edt) p 373-4.

In this connection it seems to me to be helpful to bear in mind the following principles which appear in *Bindra's Interpretation of Statutes (supra) page 549 et.seq.*. : Whether a statutory provision is mandatory or directory depends upon the intention of the Legislature and not upon the language in which the intent is clothed : The meaning and intentions of the Legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would flow from construing it one way or the other : Further to this end, an enquiry into the purpose behind the enactment of the Legislature must always be made : It is the

duty of the Court to get at the real intention of the Legislature by carefully attending to the whole scope of the enactment ; No universal rule could be laid down ; It depends not on the form, but upon the intention of the framers ; Where a power or authority is conferred with a direction that certain regulation or formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority. Lord Campbell, L.C., formulated the test to be adopted in regard to this question, in the case of The *Liverpool Borough Bank vs. Turner* (28), as : ".....in each case you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory."

In regard to the interpretation of a Constitution it has to be remembered that, although a Constitution, being essentially in the nature of a statute, the general rules governing the construction of statutes in the main apply to the construction of Constitutions also, and that the fundamental rule of interpretation is the same, namely that the Court will have to ascertain the intention gathered from the words of the Constitution, yet, by reason of the special nature of a Constitution as being the fundamental law, there are some special rules for the interpretation of a Constitution - *Bindra* (supra) *pages 14, 808 et sec.* : The language of a Constitution should be interpreted as if it were a living organism capable of growth and development, if interpreted in a broad and liberal spirit, and not in a narrow and pedantic sense - *Bindra p.807* ; That, although a broad and liberal spirit should inspire those who interpret a Constitution, they are however not free

to interpret or pervert the language of the enactment in the interests of legal or constitutional theory - *Bindra – 825* : Where two constructions are possible, that one which would ensure a smooth and harmonious working of the Constitution should be adopted, and that the Court should adopt that which will implement, and discard that which will stultify the apparent intention of the makers of the Constitution - *Bindra: p 820* : That before making a choice between two alternative meanings, the Court must read the Constitution as a whole, take into consideration its different parts and try to harmonise them : that the Court should proceed on the assumption that no conflict or repugnancy between different parts was intended by the framers of the Constitution. That, if the simplest and most obvious interpretation of a Constitution is in itself sensible, it is then most likely to be that which was meant by the people in its adoption ; and that words or terms used in a Constitution must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting Statutes and Acts of Parliament - *Bindra: p 810,818.*

The judgment of Cwyer,C.J., in the case of *In re C.P.Motor Spirit Act*,(29) sets out, at page 4, several of the principles, referred to above, as follows :

> "The Judicial Committee has observed that a Constitution is not to be construed in any narrow and pedantic sense : per Lord Wright in 1936 AC 578 at 64 - *James vs. Comm. of Australia*.The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject matter

of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:

> Although we are to interpret the words of the Constitution on the same principle of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and the scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be' - 1908, 6 Com. L.R.469, per Higgin,J."

Where the provision of law, which has to be decided on as being mandatory or directory, is one contained in a Constitution, the principles relevant to such a determination have been set down by Bindra - supra - at pages 860-861 as : "It is an established rule that constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication a different intention is manifest. Some cases even go so far to hold that all constitutional provisions are mandatory. But more accurately, the test as to whether a provison is mandatory or directory is the intention of those who framed and adopted it. The intention is to be gathered not so much from a technical construction of particular words, as from a consideration of the language and purpose of the entire clause. There is a strong presumption in favour of it being mandatory. But if it appears from the express terms of a provision or by necessary implication from the language used that it was intended to be directory only it will be so construed..... As a general rule, all provisons that designate in express terms the time or manner of doing particular acts and that are silent as to performance in any other manner are

mandatory and must be followed. It is from the context, along with the other circumstances that the nature of the provisions is to be ascertained, and the mere use of the words such as "shall" is not conclusive in this respect.

The principles referred to above are also set out in the *Corpus Juris Secundum American re-Statement - Vol 16 - Constitutional Law Secs. 61, 63 pages 174- 176, 177.*

When the question, whether the aforesaid second requirement set out in paragraph (7) of Article 157A - dealing with the person before whom the said oath or affirmation is to be made or taken and subscribed - is mandatory or directory, is considered upon the basis of the principles set out above, it seems to be clear that the Legislature did intend that the judges of the Supreme Court (and of the Court of Appeal) should make or take and subscribe even the oath or affirmation set out in the Seventh Schedule before the President of the Republic and no other. A consideration of the question, whether the aforesaid second requirement is mandatory even though no penalty for not complying with such requirement has been expressly set out, will be on the assumption that the consequence set out in Article 165(1) is applicable only to the first and third of the aforementioned requirements and not to the second. Even so, there are, as far as the judges of the Supreme Court at any rate are concerned, several significant circumstances the cumulative effect of which is to indicate clearly that the Legislature did intend that the said second requirement should also be just as imperative as the other two requirements.

The Supreme Court is vested, under the Constitution, with a sole and exclusive constitutional jurisdiction in respect of Bills to be exercised, inter alia, on being invoked by the

President of the Republic, and also with a sole and exclusive jurisdiction in the interpretation of the Constitution. The President of the Republic is also entitled to refer to the Supreme Court, in order to obtain the view of the Supreme Court thereon, any question of fact or law, which, in the opinion of the President of the Republic, is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. The Supreme Court alone has jurisdiction to hear and determine legal proceedings relating to the election of the President of the Republic. The Chief Justice is vested with the power to express, in certain circumstances, his opinion in regard to the inability of the President of the Republic to exercise temporarily the powers, duties and functions of the President of the Republic. In the Constitution, as it stood before the Sixth Amendment, the Oath of Office - as set out in the Fourth Schedule - to be taken or made and subscribed by every person appointed to be or act as the Chief Justice, President of the Court of Appeal or a Judge of the Supreme Court or Court of Appeal had to be taken before the President of the Republic, who is also the person who appoints all such judges.

One of the Articles referred to by the provisions of Sub-Article (7) of Article 157A is Article 32. Article 32(1) sets out the person before whom the President of the Republic is required to take or make and subscribe the oath or affirmation before the President of the Republic assumes office. It is not unreasonable to suppose - having regard to the circumstances in which it passed the Sixth Amendment - that the Legislature did intend that the President of the Republic should take or make and subscribe the oath or affirmation, set out in the Seventh Schedule also, in the same manner as the President of the Republic

was required to do by the provisions of Article 32(1).

A consideration of the foregoing provisions leads one to the conclusion - a conclusion which is both reasonable and irresistible - that the Legislature, even if it had failed to state expressly that the consequence of the failure to comply with the aforesaid second requirement should be the same as that which is prescribed for failures in regard to either the first or the third of such requirements, did, nevertheless, intend that the judges of the Supreme Court should take or make and subscribe the oath or affirmation set out in the Seventh Schedule also before the President of the Republic, the same person before whom the oath or affirmation was taken or made and subscribed, in terms of Article 107(4), by them before they entered upon the duties of their office.

There is yet another circumstance which also tends, though on a lower note, to support this view of what the intention of the Legislature was. The said second requirement was not found in the Bill that was presented to the Parliament for discussion. It has been introduced only at the Committee stage - a stage which is reached after a discussion of both the principles of the Bill and the provisions of the Bill by the members of the House.

Reference must be made to two circumstances which would seem to detract from the view that the said requirement was intended to be strictly complied with. One is the absence of an express direction in regard to certain very responsible and key members of the Government, viz. the Prime Minister and the Cabinet Ministers, that they should take or make and subscribe the oath or affirmation set out in the Seventh Schedule in a

specific manner. It must, however, be noted that, as far as the persons holding such offices are concerned, the oath or affirmation they were required to make or take and subscribe, in terms of Article 53 of the Constitution, before they entered upon the duties of their respective offices, was also not required by that Article to be taken before any particular person. As far as I have been able to discover, the only person, who has not been expressly required to take or make and subscribe the oath or affirmation set out in the Seventh Schedule before the "person or body" before whom such person was required to take the official oath or affirmation under the Constitution prior to the Sixth Amendment, is a person who was, on the date Article 157(A) came into operation, a sitting Member of Parliament. In this connection it has to be noted that, whilst paragraphs (a) and (b) of Sub-Article (7) of Article 157A speak of "such person or body", not one of the Articles set out in Sub-Article (7) itself speaks of "a body" before whom an oath or affirmation is to be taken or made and subscribed. It would seem that the "body" set out in the aforesaid paragraphs (a) and (b) was meant to be the body, viz. Parliament, referred to in Article 63 and before which body a Member of Parliament had to take or make and subscribe the official oath or affirmation. That being so, the non reference to Article 63 in paragraph (7) of Article 157A would seem to be an omission. Under Sub-Article 10 of Article 157A Parliament can extend the provisions of Sub-Article (7) to other categories of persons. Be that as it may, having regard, however to the background and the circumstances - of which this Court can well take judicial notice - in which Parliament came to pass the Sixth Amendment, it is quite resonable to suppose that Parliament attached the utmost sanctity and solmnity to the oath and affirmation set out in the Seventh Schedule, and did treat it

as sacrosanct and as important as the oath or affirmation that a person had to take or make and subscribe before such person assumes the duties of his office - whether public, judicial or otherwise.

The resulting position then is that the said requirement - that the oath or affirmation embodied in the Seventh Schedule be taken or made and subscribed by the judges of the Supreme Court (and of the Court of Appeal) before the President of the Republic - is imperative, and must be strictly complied with.

The last date on which the said oath or affirmation could have been taken or made and subscribed by the Judges of the Supreme Court.

Paragraph (7) of Article 157A requires - the third of the three requirements referred to above - an officer or person who is holding office on the date on which the said Article comes into force to make or take and subscribe the said oath or affirmation "within one month of the date on which the said Article comes into force". The said Article came into operation on 8.8.83. It has been contended before this Court, on behalf of the Attorney-General, that the last date on which the judges of the Supreme Court could have made or taken and subscribed the said oath or affirmation was the 8th September 1983, and that the period of one month expired at mid-night on the night of 8-9th September,1983. That, in the computation of the period of one month referred to in this sub-Article (7) of Article 157A , the first day, namely the 8th August, the date on which the said Article 157A came into operation, has to be excluded is made clear by the judgment of (E.H.T.) Gunasekara,J. in the case of *S.V.Kunasingham vs. G.G. Ponnambalam* (30) - a view which is sound both in principle and in law and should be followed. The word "month" appearing in the said sub-Article (7) should, in

view of the provisions of Sec.2(1) of the Interpretation Ordinance (Chap.2), be construed in the context in which it appears to be a "calendar month". The question which arises now for determination in this case is what the last date of the said period of one calendar month was ? Was it the 8th September ? Or, was it the 9th September '83 ? Having regard to the principles embodied in the judgments in the cases of *Burne vs. Munisamy* (6), *Imperial Tea Company Ltd. vs. Armady* (31), *Highland Tea Company of Ceylon vs. Jinadasa* (7) decided by the Supreme Court, and also the judgment of the House of Lords in *Dodds vs. Walker* (8) and having also considered the submissions made by learned Counsel to this Court, I am now of opinion that the last date was 8.9.83, and that the period of the calendar month contemplated by Sub-Article (7) of Article 157A, expired at midnight of the 8th September, on the night of the 8th-9th September 1983. At this stage I think it fit and proper to place on record that, when I concurred in the opinion expressed in the letter forwarded by the Judges of this Court to the President of the Republic on 9.9.83 in regard to the last date on which such oath or affirmation could be made or taken and subscribed was the 9th September 1983, I, for one, had been labouring under a misconception in regard to the effect of the judgment of the House of Lords in the said case of *Dodds vs. Walker* (supra). "It does not seem to have appeared to me then, as it appears to me now".

Although the learned Queen's Counsel contended that the said letter addressed by the judges of this Court to the President of the Republic constitutes an exercise of the power vested in the Supreme Court under and by virtue of the provisions of Article 118(a) of the Constitution, suffice it to say that it was not so intended by me, and that it cannot and must not be so construed. Article 118 spells out, in paragraphs (a) to (g), the various

jurisdictions conferred upon the Supreme Court by the Constitution. Thereafter, the Constitution proceeds to set out, from Article 120 to Article 131, in detail the manner and form in which the various jurisdictions so conferred should be exercised. The exercise of the jurisdiction in respect of constitutional affairs, vested by Article 118(a), is provided for and regulated by the provisions of Article 120 to 125. Similarly, the succeeding Articles 126 to 130 provide for and regulate the exercise of the other jurisdictions vested by paragraphs (b) to (g) respectively of Article 118. When the Supreme Court exercises its jurisdiction under, inter alia, Article 120, 121, 123 and 125, the Supreme Court is required, by the provisions of Articles 134, to notice the Attorney-General who has under and by virtue of the said Article the right to be heard in all such proceedings in the Supreme Court. The Attorney-General was not heard, nor even noticed, on the 9th September by the judges of this Court in regard to any of the matters set out in the said letter, before the said letter was addressed to the President of the Republic. It was pure and simple an expression of opinion of the judges of this Court - and also of several judges of the Court of Appeal. It was not, in law, a determination made by this Court in the exercise of the jurisdiction vested in this Court under and by virtue of the provisions of paragraph (a) of Article 118 of the Constitution.

Whether the period of the two months set out in the Article 126 (5) of the Constitution is mandatory or directory.

A consideration of the principles, set out in *Bindra (supra)* and also in the *Corpus Juris Secundum* (supra), relating to the determination of whether a direction contained in a Constitution is mandatory or directory, makes it clear that a

provision in a Constitution setting out in express terms the time for the doing of a particular act, and is silent as to it being done at any other time or in any other way, is mandatory and must be followed. Furthermore, *Bindra (supra)* also, *at page* 574, deals with the interpretation of statutes relating to judicial duties and proceedings, and states : that a statute directing judicial action, although it may be expressed in positive and imperative terms, will be read as directory only when the subject to which it relates is embraced within the sphere of judicial discretion, for to hold that the Legislature has the power to issue a command as to a matter involving the excercise of judicial discretion would be to permit the Legislature to usurp the judicial function ; that a statutory requirement relating to a matter of practice or procedure in the Courts should be interpreted as mandatory if it confers upon a litigant a substantial right the violation of which will injure him or prejudice his case ; that a statutory provision regulating a matter of practice or procedure will, on the other hand, generally be read as directory when the disregard of it or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him of a substantial right.

The Fundamental Rights, which are declared and recognized and set out in detail in Chapter 3 of the Constitution, have been, by Article 4(d) of the Constitution, directed to be respected, secured and advanced by all the organs of government. Provision is made by Article 126 (2) for a person, who alleges that a fundamental right of his has been infringed or is about to be infringed, to present a petition, within one month thereof, to the Supreme Court for relief or redress. Sub-Article (5) of the said Article 126 states that the Supreme Court "shall hear and finally dispose of" any such petition for relief "within two months of the

filing of such petition". The party aggrieved has, therefore, to come before the Supreme Court within one month of the alleged infringement or the threatened infringement, and the Supreme Court itself is directed to bring to an end all proceedings in respect of such petition within the period specified therein, viz. within a period of two months.

The jurisdiction, in respect of Fundamental Rights, is a jurisdiction vested in the Supreme Court for the first time by the Constitution of 1978. It places time limits in regard to the taking of steps by an aggrieved party, and to the performance of specified duties by the Supreme Court. The reason why such limits in regard to time have been placed is not far to seek. The State is immediately and considerably concerned in proceedings under Article 126. The act or acts in respect of which relief is sought are acts of the officers of the State. The relief granted in the ultimate analysis, is an award against the State. It is, therefore, in the best interests of the State that such proceedings be expeditiously proceeded with and determined once and for all within a period, which is clearly specified and known beforehand to every citizen and the State Officers. The most powerful argument against the fixing of a rigid and unalterable date for the performance of the acts and duties imposed upon the Court is that such step is bound to cause unfair and undue hardship to those seeking relief from Court against the State, and make them pay for the faults of others over whom they have no control, and also penalise them for no fault of their own. That such situations could and do arise does not admit of any doubt or argument. That hardship could and would be suffered by innocent parties is fairly clear and unquestionable. They are so plain and obvious that it is reasonable to suppose that they would also have been evident to those who were

responsible for the making of such laws, and that they would not have been unmindful of such dire consequences. Such considerations would have received the due attention of the legislators. Yet, the Legislature, in its wisdom, has thought it fit and proper to lay down such directions. The Constitution has imposed time limits for the performance of various acts by the Supreme Court ; and where the Legislature considered it necessary to do so, it had mitigated the rigours of such inflexible directions, as for instance, in Articles 122 (1)(c) and 129. True it is that members of the public are not parties to such proceedings. Yet, it provides an insight to the intention of the Legislature. Hapless victims of the working of such inflexible rules would often find themselves unable to obtain the relief which they hoped to obtain. A petitioner, who is unable to obtain the relief within the time limit imposed by a provision of law, which also gave him the substantive right to sue for such relief, would find himself deprived of a substantial right. That then is all the more reason why such a direction - particularly when it is a direction embodied in a Constitution - should be strictly complied with.

The provision contained in Sub-Article (5) of Article 126 of the Constitution - setting out a time limit of two months within which a petition or reference referred to therein should be heard and finally disposed of - is, therefore, an imperative provision and must be strictly complied with.

No submissions were made by either Counsel as to the legal effect - e.g. : whether void, voidable, nullity - of an Order made after the effluxion of the period of two months where the direction regarding the two month period is mandatory. The argument proceeded on the footing that, if the said provision was mandatory, then an Order delivered after the expiry of the said period

would not be valid.

Validity of the proceedings of the 8th and 9th September 1983.

When this matter was taken up for hearing, both Counsel - learned Queen's Counsel appearing for the Petitioners and the learned Deputy Solicitor-General appearing for the Respondents - agreed that the proceedings held on 8.9.83 were valid. There was also agreement between them as to the basis upon which they state that such proceedings are valid. They both agreed that the five judges of this Court, before whom the proceedings were held on 8.9.83, were all de jure judges. In regard to the proceedings of 9.9.83, once again both Counsel agreed that the proceedings of that date - which did not last more than half an hour at the most, and throughout the whole of which period learned Queen's Counsel for the Petitioners was on his feet addressing Court, and also referred to the written submissions, which he had submitted to Court the previous day, and during which period no order was made by the Court, no evidence recorded, and no document produced and marked in evidence - are also valid. They are, however, at variance in regard to the basis on which each accepts such validity ; for, whilst learned Queen's Counsel accepts it on the basis that the judges were de jure judges on the 9th as well, learned Deputy Solicitor-General bases his acceptance on the ground that the judges, though not de jure, were nevertheless "de facto judges".

Although they are at variance in regard to the basis upon which they say so, they are both, nevertheless, agreed that the proceedings in question - ie. of the 9th September 1983 - are valid. That being so, the answer to the question posed, is thereby supplied. It is not, in my

opinion, necessary to probe further. An examination of the merits and demerits of the respective bases upon which the answer is so supplied, is really, for the purpose of answering the specific question referred to this Court, superfluous. It is quite unnecessary. The Courts will ordinarily refuse to go into constitutional questions except when such decision is necessary to the final disposition of the case, or where the record discloses other grounds of decision -, *Bindra (supra) page 882.* Although the aforesaid statements made by both Counsel, in regard to the validity of the proceedings of the two days referred to, would be sufficient to answer the first of the two questions referred to this Court, yet, in view of the fact that learned Counsel did make submissions at considerable length on several issues which were considered relevant for a decision of this question, I shall proceed to consider them as well.

The concept of de facto judges, upon which the learned Deputy Solicitor-General founds his argument, is a doctrine which does not seem to have been considered by our Courts earlier. Yet, it is a doctrine which "has a long history and has been applied to a wide variety of offices" for several centuries in the United States of America and in England - United States of America even during the time of the Civil War, and England from about the eighteenth century. Dealing with this doctrine, Rubinstein : Jurisdiction and Illegality (1965) quotes at page 206 the following summary from the *Corpus Juris Secundun* : "A judge de facto is one acting with colour of right and who is regarded as, and has the reputation of exercising the judicial function he assumes ; he differs, on the one hand, from a mere usurper of an office who undertakes to act without any colour of right ; and on the other, from an officer de jure who is in all respects

legally appointed and qualified to exercise the office. In order that there may be de facto judges, there must be an office which the law recognises, and when a court has no legal existence there can be no judges thereof, either de jure or de facto. There cannot be a de facto judge when there is a de jure judge in the actual performance of the duties of the office". Rubinstein thereafter proceeds to discuss the several decisions of the Courts in which this doctrine has been applied - among which is the decision of the House of Lords in the case of *Scadding vs. Lorant* (32). This doctrine is also discussed in Wade : Administrative Law (4 edt) p. 287-289, where, at page 289, the learned author quotes the definition of a 'de facto' officer given by Lord Ellenborough C.J. in the case of *R. v. Bedford Level Corporation* (33) :

> "An officer de facto is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law".

This doctrine is also discussed by A.J.Markose : Judicial Control of Administrative Action in India (1956), where, at page 356, the learned author states that the validity of a de facto office cannot be questioned in a collateral proceeding and that the application of this rule is mainly to judicial offices. The case of *Bhaskara Pillai vs. The State of Travancore* (34), which involved a retired puisne judge of the High Court of Madras, who was subsequently appointed to be the Chief Justice of the High Court of the United State of Travancore and Cochin, and the dismissal of a criminal appeal by a Divisional Bench, of which the said Chief Justice was a member, is cited as a good illustration of this doctrine.

It seems to be clear that the essence of this

doctrine is that the person (who is to be regarded as a de facto judge) should act with colour of right, and should be regarded as and should have the reputation of exercising the functions of the judicial office he assumes, and that both such person and those who regard him as having the right to hold the office he holds should be unaware of the defect which renders such tenure no longer valid. The moment the defect, which renders such tenure invalid, becomes known - either to the holder himself or to those who have regarded it as being valid - the de facto character would forthwith cease. If, as is borne out by the authorities set out in the textbook referred to above, even a defect in the original appointment is not a bar to the operation of this doctrine, then the doctrine should apply with even stronger force in the case of an initially valid appointment which is subsequently rendered defective by a supervening factor. Having regard to the principles underlying this doctrine and their application to the relevant facts and circumstances of this case - and also in view of the opinion I have already expressed regarding both the mandatory nature of the second of the three requirements set out in Sub-Article (7) of Article 157A, and the last date of the period of one month referred to in the selfsame Sub-Article (7) - it seems to me that the contention of the learned Deputy Solicitor-General - that, during the period the five judges of this Court sat on the Bench on 9.9.83 the said judges had ceased to be de jure judges and were only de facto judges - is entitled to succeed, and that, at any rate by midnight of the 9th September, 1983 - on the night of the 9th-10th September - the judges had ceased to be de facto judges as well.

The preliminary objections put forward on behalf of the Respondents.

Several preliminary objections were put

forward, on behalf of the Respondents, to the judges of this Court determining any question relating to their status as *de jure* judges of the Supreme Court from the midnight of 8th September, 1983 up to the time the judges accepted the letters of appointment from the President of the Republic on 15.9.83. The objection, which was strongly urged, is : That the judges of this Court are precluded from determining any question relating to their status as de jure judges of this Court from the midnight of the 8th September to the time at which fresh letters of appointment were given by the President on the 15th September, by reason of their conduct on the 9th September, and up to and including the 15th September, and also by reason of the fact that, as they now derive their authority from the letters of appointment granted by the President on the 15th September, they cannot seek to exercise their judicial power on some other basis.

This particular question really does not arise to be considered by me in view of the opinion I have already expressed in regard to the several issues already dealt with by me. Yet, I would very briefly indicate my views on this matter too. The letter addressed by the Judges of this Court to the President of the Republic on the afternoon of the 9th September, 1983 - and which is said to have been delivered to the President of the Republic around 3.30 p.m. - has been referred to at the argument before this Court, and it speaks for itself. The first step in this "transaction", which commenced around 11 a.m. on 9.9.83 and ended shortly after 8.30 a.m. on 15.9.83, was, in fact, taken by the judges themselves. It is also a fact that the oath or affirmation, set out in the Seventh Schedule, was not taken or made and subscribed by the judges before the President of the Republic even on the 9th September. It is indeed profitless now to consider why the judges

could not in fact do so. Indeed, several facts and circumstances relevant and necessary for a full and effective determination of it are not before this Court, and may indeed not be legally available and admissible. Thereafter, on the 15th September, 1983 the judges of this Court took or made and subscribed both the Fourth Schedule oath or affirmation and the Seventh Schedule oath or affirmation before the President of the Republic, and the President of the Republic issued to each of the judges a fresh Act of Appointment, in terms of Article 107 of the Constitution, as a Judge of the Supreme Court with effect from 15.9.83. This appointment was accepted by me, without demur. No indication was given by me to the President of the Republic that I considered myself still a judge of the Supreme Court under and by virtue of the earlier Act of Appointment, which had earlier been issued by him, and that that Warrant was still valid and effective. If that were my position, it behoved me at least to acquaint the President of the Republic, who was taking steps to appoint me afresh with effect from that day, of my position. Furthermore, if that were my position, then my conduct amounted to no more than this : I, being aware that my earlier appointment was still valid, stood by silently, whilst the President of the Republic, purporting to act under the provision of the Constitution under which the President of the Republic could appoint judges to the Supreme Court, took steps to appoint me afresh with effect from that date, and then, without any form of demur or even any indication of my position, I proceeded to accept such appointment. That being the factual position - quite apart from the legal position - I entertain grave doubts about the propriety of thereafter proceeding to maintain that I derive authority to function as a Judge of this Court not from the appointment made on the 15th September 1983. but from the earlier appointment made on 7th September 1978.

Learned Deputy Solicitor-General relies mainly on Estoppel to support his contention on this point. *At paragraph 1515 Halsbury (4 edt)* refers to the non availability of a plea of estoppel as against a Statute. Having regard to the discussion contained in that paragraph, I do not think that the matter before us is covered by that principle. In regard to the principles of Estoppel it has to be noted that, although Estoppel has often been described as a rule of evidence, the modern approach has been to view the whole concept as a substantive rule of law, and as a principle of justice and equity - *Halsbury (4 edt) Vol. 16 paragraph 1501, Page 1008, note 4. At paragraph 1507, Halsbury (supra),* discusses the species of Estoppel known as "approbation and reprobation"; and sets out the two propositions expressed by this principle viz : the person having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

Halsbury (supra) also discusses, under the chapter on *Equity, at paragraph 1473,* the term "acquiescence", and states that this term is properly used "where a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent can be reasonably

inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable". *Spencer Bower and Turner on Estoppel by Representation (2 edt)* in discussing the principles relating to the concept of "acquiescence", at page 263, quotes the following passage from the judgment of Thesiger L.J. in the case of *De Bussche vs. Alt* (35) :

> "If a person having a right and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term 'acquiescence' and in that sense it may be defined as quiescence under such circumstance as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct".

The Act of Appointment granted by the President of the Republic, and accepted by me, on 15.9.83 does affect my rights under the original Act of Appointment granted to me on the 7th September 1978 ; for, it expressly states that it is an appointment with effect from 15.9.83.

The principle urged by the learned Deputy Solicitor-General does not affect the Supreme Court as such, it only affects the judges, who constitute this Bench, individually.

Having regard to the facts and circumstances

relevant to this matter, and to the principles relating to the legal concepts of "approbation and reprobation", and "acquiescence", it seems to me that, had it been necessary for me to rule on the preliminary objection raised on behalf of the Respondents by the learned Deputy Solicitor-General - that I cannot be heard to say that I am exercising my authority as a Judge of this Court, from and after 15.9.83, upon an appointment other than the appointment granted to me by the President of the Republic on 15.9.83 - I would have been inclined to hold that it is entitled to succeed.

Re removal of judges as set out in Article 107 (2) and (3) of the Constitution.

It was submitted that, even if a Judge of the Supreme Court "shall cease to hold office", the procedure set out in Article 107 (2) and (3) had to be followed to remove such judge, and that, if such procedure is not followed, such judge still remained a judge. Article 107 of the Constitution is a provision which guarantees the independence of the judiciary by assuring security of tenure, and lays down that a judge is removable only "on the ground of proved misbehaviour or incapacity", and that too only by following the procedure so laid down. This Article, therefore, provides for the "removal" of a judge. This is the only way in which a judge, who is in office, could be removed. Upon being so removed the judge would cease to hold office. This was the position until the Sixth Amendment brought in paragraph (7) of Article 157(A), which by the operation of the rule mutatis mutandis provides for a situation in which a judge would "cease to hold office". Such cessation is by operation of law. It does not call for the intervention of another agency. The law itself states that, the moment a certain situation arises, it would result in a loss of office. It is an automatic result brought about by operation of law.

The result is a total deprivation of all the authority which is attached to such office. It is not merely a case of ceasing to discharge the functions of the office. Thus the Sixth Amendment provided an additional ground upon which a judge would cease to hold office - in addition to the cessation brought about by a removal from office in terms of Article 107. A judge who, by operation of the Sixth Amendment, has, in law, ceased to hold office, does not have to be "removed" by the procedure laid down in Article 107. He has "removed" himself ; and no further "removal" is required. These two Articles - 107 and 157A - are not inconsistent with one another. There is no conflict as between them. They can both stand together, and work and be worked harmoniously.

Answers to the two questions referred to this Court.

1. The proceedings of both 8th and 9th September, 1983 are valid.

2. The provisions of Article 126(5) of the Constitution - relating to the period of two months - being imperative, an Order delivered after the expiration of the said period will, in law, be invalid.

ABDUL CADER, J.

Though the Judges of this Court had taken their oaths under the Sixth Amendment before themselves in August, they wrote to the President intimating that fact, but, nevertheless, offering to take the oath before him (the President) on the 9th, stating that that was the last date within which this oath can be taken. In this letter, there was no suggestion whatsoever that the requirement to take the oath before the President was directory.

The Deputy Solicitor-General told us at the hearing that the Attorney-General had advised the President that since the oath had not been taken before the President on or before the 7th, the Judges had ceased to hold office in terms of Article 165 (1) of the Constitution.

It was in these circumstances that the President decided to re-appoint the same Judges on fresh warrants of 15.9.83 and administered the two oaths, one under Article 107 (4) as on assumption of office and the other in terms of the Sixth Amendment. Clearly this act was intended to be a fresh appointment on the basis that we had ceased to hold office for failure to take the oath in terms of the Sixth Amendment before the President, though we had taken this oath before ourselves.

When the Chief Justice referred the two matters in issue to the Full Bench, in respect of the question whether the oath before the President is mandatory or directory, the task of deciding the basis of our own status came up for consideration.

It is an unpleasant task to sit as a Judge in my own cause and to discuss the proprieties of my own conduct.

The Deputy Solicitor-General raised two preliminary objections:

(1) The Court is precluded from discussing the conduct of the President (Article 35); and

(2) The Judges cannot look behind their fresh appointments and decide whether they hold appointments in any capacity other than their fresh appointments.

I wish I could have accepted these

objections, but the law appears to be otherwise and it has become necessary to discharge my duty, however unpleasant it be. In doing so, I have attempted to consider the matters in issue with the utmost objectivity "without fear or favour, affection or ill-will."

As regards the first objection, I agree with Sharvananda, J. To hold otherwise will negate the fundamental concept of the sovereignty of the people.

As regards the second objection, when the question as regards the mandatory nature of the oath comes up, whatever time it be, as it is the Supreme Court that alone is empowered to decide this issue, it is the Judges of this Court who will be called upon to decide it. While the Deputy Solicitor-General conceded that a bench of new Judges can hear this question, he maintained that we cannot hear it. Now that the question has been raised at this present moment, we are the only Judges available to decide this dispute. Therefore, the capacity in which the Judges hold office gives way to the duty of the Court to decide the issue. It is the Court that decides it, though it consists of Judges who hold office on the appointments of the 15th September.

The principal judgments of the Chief Justice and Sharvananda, J. deal with the nature of the oath extensively. It will be sufficient if I add the following:
(Craies on Statute Law at pp.266 and 267)

> "Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to

> be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. For "there is a known distinction", as Lord Mansfield said in *R. v. Loxdale* "between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory." In *Bearse v. Morrice*, Taunton J. said that he understood "the distinction to be, that a clause is directory where the provisions contain a mere matter of direction and nothing more, but not so where they are followed by such words as, 'that anything done contrary to these provisions shall be null and void to all intents'."

He states as follows at pp. 532 and 534:

> Where there is an enactment which may entail penal consequence, you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language."
>
> "If the words have a natural meaning, that is their meaning and it is not to be extended by any reasoning based on the substance of the transaction. If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which avoids the penalty is to be adopted."

Taking all these into consideration, I agree with the Chief Justice that the oath to be taken before the President is directory and not mandatory.

I agree with the order made by His Lordship the Chief Justice that the two months provision in Article 126 (5) is directory.

As I have said earlier, the date 9th we gave the President was wrong. This was done inadvertently as there was absolutely no time to refer to the various authorities. The date of certification being the 8th August, it was considered that a calendar month from 9th August (excluding the 8th August which the Deputy Solicitor- General conceded was correct computation) would be 9th September. I now know that the correct last date will be 8th September. However, this has now no bearing on the question of the nature of the oath.

In the letter of the 9th. there was no suggestion whatsoever that the oath was anything other than mandatory.

A quotation from Hidaytullah, C.J. is apt:

> "This Court does not claim to be always right although it does not spare every effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others..."

RODRIGO, J.,

The matters that have arisen for decision in these proceedings relate to the jurisdictional capacity of this Court to continue the hearing of the application before us which alleges a breach of certain alleged fundamental rights of the peti-

tioners on its merits. The application commenced its hearing on 8th Sept. 1983 on a preliminary matter of law and adjourned at the end of the day to be resumed on the following day, namely, 9th September, without any premonition of the "Cassandra Crossing" to which it was to be diverted by circumstances completely extraneous to the application itself.

A copy of the Sixth Amendment to the Constitution that had reached the Judges' Chambers on 8th September, was discovered by the Bench after 20 minutes of hearing of the application on 9th September, to require the Judges to take the prescribed Seventh Schedule oath before His Excellency. They had taken, every one of them, this oath much earlier before fellow Judges, being unaware of this particular requirement. The Bench then adjourned to resume its sittings at 1 p.m. on the same day to enable them (and the other Judges) to take the oath before the President in the meantime. This was, however, not to be for reasons appearing later on. The Bench resumed its sittings only on 19 Sept. when it became evident that the deadline of 22 Sept. could not be met which was the last date of the two month period stipulated in the Constitution for the final disposal of this application. See Art 126(5). So, Counsel for the petitioners, not surprisingly, contended that the said stipulation is only directory and accordingly the Court had jurisdiction to continue to hear the application and deliver its order after the expiry of the two months' period. Counsel for the respondents, the Deputy Solicitor-General (D.S.G.) would not agree. In the upshot, the point became crucial. A subsidiary point questioning the validity of the proceedings of 20 minutes on 9th September was also raised. Both sides agreed that the short proceedings on this day were valid but each for a different reason and the reason it was that became controversial. In the result, My Lord

the Chief Justice, referred both these points and two others for consideration by a 9-Judge Bench. Hence these proceedings.

The 9-Judge Bench sat on 22 Sept. (which was the deadline specified as stated earlier) to hear the four preliminary matters of law referred to it for decision and not to hear the petition on its merits. If the matter of the 2 month period is decided against the petitioners it will finally dispose of this application without a hearing on its merits. Besides, the other subsidiary matters raised will not need to be decided for disposing of the application.

A preliminary objection was taken by the Deputy Solicitor-General to the Court hearing submissions from the petitioners' Counsel in support of the reasons advanced by him for his submission that the proceedings of 9th September were valid. To understand this contention it is necessary to elaborate what was foreshadowed earlier as to the nature of the interruption of the proceedings of 9th September. The 5-Judge Bench adjourned its sitting in the morning of 9th September intending to resume its sitting at 1 p.m. I have referred to this earlier. The appointment with the President requested for oath-taking before him on 9th September did not materialize, His Excellency being advised by the Attorney-General (A/Gen), as it transpired subsequently, that the Judges were tardy by two days, the last lawful point of time being the midnight of 7th September. The President by a separate warrant dated 15th September restored the Judges or so it seems to their office in the morning of 15th September at 9 a.m.

Now this simple act of restoring the Judges to their office is looked at in opposing ways by the two Counsel. One would think that it did not

matter how each looked at it as long as both would agree that the proceedings of 9th September were valid. For a matter of that the proceedings of both 8th and 9th September might well have been written off, it being remembered that the hearing started initially only on 8th September, one day before the 9th September and the hearing itself was only into submissions of a preliminary nature. The inquiry whether as a continuation or de novo could not be completed in the circumstances within the period of the two months prescribed. Any way, each would stick to his ground and each for a different reason and the reason now becomes more important than the validity of the proceedings itself which it had been meant to support. The reason advanced by petitioners' Counsel which I will set out presently was observed by His Lordship the Chief Justice to stir up a hornet's nest and the Deputy Solicitor-General would rather avoid, if he could, that kind of controversy.

The hornet's nest is this. The Sixth Amendment it is argued, states with reference to Judges of the Supreme Court (and of the Court of Appeal) that if they failed to take the Seventh Schedule oath or make the affirmation within a calendar month of the date on which the new Article 157(A) comes into force before the President they shall cease to hold office. See Art.157(A)(7) and Art.165 of the Constitution. The "month" mentioned here is understood as a calendar month. See the Interpretation Ordinance s.2(p). Assuming that the oath taken before the President on 15th September is not an oath taken within a calendar month specified in the Article, petitioners' Counsel contends that notwithstanding such non-compliance the Judges never ceased to hold office as they had admittedly taken the oath itself well within time and the requirement that it should be taken before the President, being only directory, no forfeiture

of office resulted therefrom. To support and develop this contention, it was rightly feared by the Deputy Solicitor-General, his opponent would have to make long and arduous excursions into fields of law covering a wide range and resurrect facts which he would rather let lie in their graves. Hence his preliminary objection to stirring up a hornet's nest. The Deputy Solicitor-General would therefore object to any argument that the Judges did not cease to hold office on 9th September and support his objection on the principal ground (he had three grounds of objection) that the Judges were new appointees deriving their new appointments from the warrants dated 15 September and, they having accepted their new warrants without so much as even a murmur, are now precluded from reprobating it, asserting or rather adopting a submission which so asserts, that they continued in office without a break throughout.

It must be recalled that the whole body of Judges of the two Courts communicated in writing to the President that they were within time when seeking to take oath before him on 9th September. The President on receipt of this communication acted constitutionally by putting it before the Cabinet. The Cabinet left the matter in the hands of the President. Thus the President had the authority of the Cabinet to do what he eventually did. He was now faced with the opinion of the two Courts expressed in the communication addressed to him.

The President may have accepted this opinion in issuing fresh warrants to the Judges, to everyone of them, on 15th September. True they were dated as of that date. That may be as a true record of the event, and may not have been meant to break the continuity in office of the Judges. Be that as it may. We now know that 9th September was too late by one day, the calendar month reckoned from 8th

August ending as it does in law on 8th September midnight. See *Kunasingham v. Ponnambalam* (30), *Dodds v. Walker* (8). We are however not unanimous in this view. Therefore the question whether it was mandatory to take the oath before the President becomes crucial on this aspect of the case. It was the easiest thing for the Draftsman to have added just another line at the end of each paragraph (a) and (b) of s.7 of Art.157(A) of the Sixth Amendment to say that "where such oath or affirmation is not taken, such officer shall cease to hold office." Instead, a "mutatis mutandis" provision is introduced at the end of the two paragraphs making the limits of the effect to be given to them uncertain and controversial. See *Touriel v. Internal Affairs Southern Rhodesia* (27). What is applied to the two paragraphs is Art.165. This Article is a transitional provision in the Constitution and when once it's transit was over it was meant to be ineffectual and dead. It at no time applied to Judges of the Superior Courts. That this is so becomes abundantly clear from Art.165(2) as it is the Minister of Public Administration that can exercise his discretion in excusing non-compliance and the Minister is not the proper authority to exercise his discretion in respect of Judges of Superior Courts. I am of the view however that the proviso to the two paragraphs (a) and (b) of Art. 157(A) makes a difference in so far as it seeks to apply Art. 165 to Judges of the Supreme Court and the Court of Appeal. *"Mutatis mutandis"* means "with necessary alterations in point of detail". See Wharton's Law Lexicon. It may be still more different if what is made applicable is Art. 157(A)(7) to Art.165, assuming Art.165 was a permanent provision. When a transitional provision has served its purpose it ceases to exist. It is no longer a living provision of law in the Constitution. In effect it is like a repealed statute or law. But an enactment cannot seek to revive a provision of a repealed law *mutatis*

mutandis or otherwise to one of its provisions. However, neither side rested his submission on that basis and, I will, therefore, leave it out of account. So I will look at this problem in the way it was put: Art.165(1) speaks of a judicial officer who fails to,

(a) take the oath
(b) within a time and,
(c) losing office.

There is no reference to the person before whom it is to be taken in this Article. The opening words are " every.....judicial officer.....as is required by the Constitution to take the oath". It is significant that it does not say " to take the oath as required by the Constitution". But Art.165, is made applicable to such a person holding office on the date of coming into force of this Article (157(A)) - *who must* make the oath in the form set out in the Seventh Schedule before such person.....as is referred to in that Article.

The person to whom Art.165 is to be applied is given namely, a person who has failed to take the oath as required by the paragraph 7(a)(b) of Art.157(A). What then is the detail in Art.165 that has to be applied to this person who has failed to take the oath as required in the paragraph? What is the requirement in the paragraph? That is that he should take the oath (where he is a Judge of the Supreme Court or the Court of Appeal - Art.107) before the President. Given then that the person has not met the requirement the only detail is the one relating to the penalty prescribed under Art.165. That penalty is forfeiture of office.

The "test to be applied for the purpose of ascertaining in any particular case what are "mutanda" is "necessity" or "fitness". I think the answer to

this question must be that "necessity" is the test and that considerations of "fitness" are not sufficient to justify a change...unless they are so cogent as to establish "necessity". See the case of *Touriel* referred to.It is said again that "it is an elementary rule of construction of statutes that the judicature in their interpretation have to discover and act upon the *mens or sententia legis*. Normally Courts do not look beyond the *litera legis*. See *Motilal* v. *Commissioner of Income Tax* (4). When we examine the *sententia legis* of the proviso and indeed of the Sixth Amendment, it does seem so obvious that the legislature intended to penalise persons who did not take the Seventh Schedule oath in the time prescribed and this when coupled with the proviso containing the *mutatis mutandis* clause brings in the *litera legis* element unavoidably making it unnecessary to do anything more than to give effect to what the words plainly say. In the result I reached the view that the Judges ceased to hold office on 9th September.

In view of the opinion I have already reached as stated, it is a futile exercise, though argued at length, to consider the position arising from the D.S.G.'s submission that the oaths already taken by Judges before fellow Judges who are exofficio J.Ps are also not valid since J.Ps (Justices of Peace) do not administer constitutional oaths or that arising from the submission that the Judges are estopped from considering their status on 9th September by their conduct in accepting warrants of appointment dated 15th September.

There is still to be considered the two months requirement specified in Art.126. It is said on behalf of the petitioners that this is only a directory provision and that it must necessarily be so firstly because no sanction is prescribed for non-compliance and secondly the legislature could

not have been so unreasonable as to visit a petitioner with the extreme penalty of no-relief if relief is not obtained within the two months for no fault of his where his application has not been disposed of within the said period owing to the conduct of the Court over which he has no control and, as in this instance, over which even the Court had no control. What has happened on this occasion is said to be a classic illustration of the need for flexibility in the application of this provision.

Art. 126 appears in a Chapter (Chap.XVI) that contains Article 121, 122, 125 and 129 each of which stipulates time limits for the thing specified therein to be done. Art. 121 requires the President or a citizen to invoke the jurisdiction of the Supreme Court, if he is so minded, within one week of a Bill placed on the Order Paper of the Parliament and the Supreme Court is required to make and communicate its determination on such reference within 3 weeks of the making of the reference. Art. 122 requires the Supreme Court to make and communicate its decision within 24 hours or such longer period not exceeding three days as the President may specify on an urgent Bill referred to it for determination. Art. 125 provides for determination by the Supreme Court of any question of a constitutional nature referred to it by any judicial tribunal within two months of the date of reference. Art. 129(1) states that the Supreme Court shall give its opinion on any matter of public importance, be it a matter of law or fact, referred to it by the President for its opinion within the time specified by him in such reference. In all these cases the Attorney-General is required to be noticed and heard; what is more, any party to any proceeding under any of these sections is also given the right to be heard either in person or by an Attorney-at-Law. What is still more noticeable is that any other person who is

neither a party nor the Attorney-General also may have the right in the discretion of the Court to be heard in person or by his legal representative. If the time limits specified in the said sections are mandatory and are meant to be strictly obeyed then so are the requirements that the various persons and parties referred to must also be heard.

These are weighty considerations. As against this, I cannot ignore the feel, as it were, of the provisions in the Chapter on Fundamental Rights that the legislature was so obsessed with a passion to protect and safeguard the fundamental rights of the citizens of this country, that it was basic to their thinking that relief delayed and not given within the time stipulated is no relief at all to the extent of making it an article of faith that the Courts will find a way of giving relief within the specified time. This is the first time that the Court was not able to meet the deadline through fortuitous circumstances and a philosophical way of looking at it is that one or two may fall by the wayside but the procession will continue.

I am accordingly of the view that the time limit of two months specified in Art. 126 is mandatory and we have no jurisdiction to entertain this application any longer.

Preliminary objections overruled.