1967 *Present :* **H. N. G. Fernando, C.J., and G. P. A. Silva, J.**

THE ATTORNEY-GENERAL, Appellant, *and*
C. KODESWARAN, Respondent

S. C. 408/64—D. C. Colombo, 1026/Z

Public servant—Contract of employment with the Crown—Claim for arrears of pay—Unenforceability by action in the Courts—Relationship between the Crown and its servants—Inapplicability of Roman-Dutch Law—Applicability of English Law as altered or modified in Ceylon—Right of action when a public servant's terms of engagement are laid down by statute—Treasury Circular issued under compulsion of Official Language Act, No. 33 of 1956—Is it valid ?—Ceylon (Constitution) Order in Council, 1946 (Cap. 379), ss. 29, 46, 51, 57, 58, 60, 61.

A public servant in Ceylon has no right of redress by action in the Courts for a breach of any of the covenants and rules governing the salaries and conditions of service of public officers. This principle is operative except in respect of terms laid down by statute, and is unaffected, either expressly or by implication, by the provisions of the Ceylon Constitution.

" The right to sue the Crown in Ceylon upon a contract is not founded on Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply to Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon. "

Plaintiff, who was appointed an officer of the General Clerical Service on 1st November 1952, was promoted on 1st October 1959 to the Executive Clerical Class on the results of a competitive examination, in which Sinhala or, in the alternative, Tamil was a compulsory subject. The plaintiff, who is Tamil by race, chose Tamil as his language subject. According to the Minutes applicable, the salary scales, cadre, and conditions of service were liable to alteration from time to time. On 4th November 1961, a new Treasury Circular No. 560 provided, on pain of suspension of increment falling due, that officers of the category to which the plaintiff belonged must pass a proficiency test in Sinhala.

The plaintiff did not present himself for the requisite examination, and the suspension of the increment which fell due on 1st April 1962 was ordered. He sought in the present action a declaration that the Treasury Circular No. 560 of 4th November 1961 was unreasonable and/or illegal and not binding on him, and that he was entitled to the payment of the increment. It was contended that the Circular was issued under the compulsion of the Official Language Act No. 33 of 1956 and that, inasmuch as the latter Act was *ultra vires* because it transgressed the prohibitions against discrimination contained in Section 29 of the Constitution, the Circular too was invalid.

Held, that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denied to the present plaintiff a right to sue for the increment alleged to be due to him under the Minutes. It was not necessary to consider the submissions as to the invalidity of the Official Language Act, because the plaintiff was not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations provided for such a payment.

1*——H 9788—2,100 (12/67)

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardena, *Q.C.*, Acting Attorney-General, with *H. Deheragoda*, Senior Crown Counsel, and *H. L. de Silva*, Crown Counsel, for the Defendant-Appellant.

C. Ranganathan, *Q.C.*, with *S. Sharvananda*, *S.C. Crossette-Thambiah*, *D. S. Wijewardene*, *N. Kasirajah*, *K. Thevarajah*, *M. Underwood* and *L. A. T. Williams*, for the Plaintiff-Respondent.

Cur. adv. vult.

August 30, 1967. H. N. G. FERNANDO, C.J.—

The plaintiff was appointed an Officer of the General Clerical Class of the General Clerical Service on 1st November 1952, and on 1st October 1959 he was promoted to Grade II of the Executive Clerical Class of the General Clerical Service on a salary scale of Rs. 1,620 to Rs. 3,780 per annum with annual increments of Rs. 120. An increment of Rs. 10 per month fell due to the plaintiff on 1st April 1962, but on 28th April 1962 he was informed by a letter P2 from the Government Agent, Kegalle (at that time the Head of the Department in which the plaintiff was serving), that the increment had been suspended under the provisions of a Treasury Circular No. 560 of 4th December 1961. The plaintiff sought in this action a declaration that the Circular is unreasonable and/or illegal and not binding on the plaintiff, and that the plaintiff is entitled to payment of the increment which fell due on 1st April 1962. This appeal is from the judgment of the learned District Judge granting such a declaration.

At the time when the plaintiff was promoted to the Executive Clerical Class, the Minutes applicable in relation to recruitment, conditions of service, and salary scales were those published in the Gazette of October 1, 1955. Paragraph 5 of the relevant Minute provided that appointments to the Executive Clerical Class will be made from among members of the General Clerical Class (to which the plaintiff belonged until 1959) on the results of a competitive examination. The regulations and syllabus for the examination were set out in Appendix D to the Minute which prescribed three subjects of examination, i.e., (1) Accounts, (2) Regulations, procedure and office system, and (3) Sinhala *or* Tamil. The plaintiff, who is Tamil by race, chose Tamil as his language subject for the examination.

Paragraph 7 of the Minute provided that Officers in Grade II of the Executive Clerical Class must pass an examination in National Languages prescribed in Appendix C before they proceed beyond the Efficiency Bar at the stage of Rs. 3,180. Appendix C required clerks of Sinhala, Tamil or Moor parentage to pass in one language. Thus under Appendix C the plaintiff could have chosen Tamil as his language subject for this examination as well.

I must note here that the Minute clearly states that the salary scales, cadre, and conditions of service are liable to alteration from time to time.

On 4th December 1961 a new Treasury Circular No. 560 provided that Officers of the category to which the plaintiff belonged must pass a proficiency test in Sinhala. According to this Circular a Tamil officer (as the plaintiff is) is required to pass a test in Sinhala at 3rd standard level within one year from 1st January 1961, a test at 5th standard level within two years, and at J. S. C. standard within three years.

The Circular provided for suspension of an increment falling due after February 17, 1962 in a case of an officer failing the test. The plaintiff did not present himself for the requisite examination, and the suspension of his increment which fell due on April 1, 1962 was ordered in pursuance of the Circular on the ground that he had not passed the first of the language tests prescribed in the Circular.

One of the grounds on which the plaintiff's action was resisted by the Attorney-General is that a public servant in Ceylon has no right to sue the Crown for the recovery of wages claimed to be due for service under the Crown. This defence, which was rejected by the learned trial Judge, raises questions of great importance and difficulty, and the Court is much indebted to Counsel for the full and able arguments presented at the hearing of this appeal.

The first question to be decided is whether the relationship between the Crown and its servants in Ceylon is regulated by the Roman-Dutch Law, or else by the English Law as altered or modified in its application in this country. The contention that the Roman Dutch Law applies is supported by two early decisions of this Court which are reported in Ramanathan's Reports 1863–68.

The earlier of the two decisions (*Jansz v. Tranchell*[1]) was in a case in which the question arose whether the salary of a public servant could be seized in execution of a decree against him. The Court there stated that it is certain, and that the Queen's Advocate admitted, that the salary of a public officer, when his service has been properly performed, is due to him as a debt. The Court proceeded to consider the Roman Dutch Law regarding the liability to seizure of the salary of a public servant, and held that the salary was seizable, but only if other assets of the debtor were not available to satisfy the decree, and if a Court in its discretion regarded the seizure as not being contrary to the public interest in the circumstances of a particular case. The order ultimately made was that the salary of the public servant concerned was not, in the circumstances, liable to seizure.

Thus the Roman-Dutch Law was held applicable to the question whether the salary is seizable. But it is not clear from the Judgment on what basis the Court thought it certain that the salary is a debt due

[1] *Ramanathan's Reports (1863-68) p. 160.*

to a public servant. There is no statement that this is a principle of Roman-Dutch Law or else of English Law. Nevertheless, it is a fair implication that the Crown did not in this case contend that no action lies for the recovery of a public servant's salary.

The later decision in *Fraser's case* [1] was in a suit against the Queen's Advocate, for the recovery of balance salary due to the plaintiff as Postmaster of Galle and as a packet agent, on the ground that he had been wrongfully dismissed from those offices. The first of these offices was held under the Ceylon Government, and the second under the Imperial (British) Government. The action was dismissed by the Supreme Court on the ground that the plaintiff held his offices during pleasure, and that he had no right of action at all, so far as the (Ceylon) Postmastership was concerned, as to anything that happened after the date of his dismissal, because it had been shown that he had in fact been paid his salary up to that date.

Nevertheless, in considering the plaintiff's claim for his salary as the holder of an office under the Imperial Government, the Court drew a distinction between the respective rights of such an officer and of one employed under the Ceylon Government. The Court was of opinion that whereas an action would not lie at all in the former case, an action for earned salary would lie against the Queen's Advocate in the latter case. The entire relevant passage in the Judgment has to be cited here :—

> " We humbly consider that Her Majesty's predecessors and Her Majesty have been graciously pleased to lay aside, as to this island, part of the prerogative of the Crown as to immunity from being sued. By proclamation of the 23rd September 1799, it was amongst other things published and declared that the administration of ' justice and police in the settlements and territories in the Island of Ceylon with their dependencies, shall be henceforth and during Her Majesty's pleasure exercised by all courts of jurisdiction, civil and criminal, magistrates and ministerial officers, according to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such other deviations and alterations as shall by these present or by any future proclamation and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice, to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published.'
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> " Afterwards, the Ordinance No. 5 of 1835, (which was allowed and confirmed by Her Majesty) repealed parts of the said proclamation, but expressly reserved and retained so much of it as doth publish and declare that ' the administration of justice and police within the settlements then under the British dominion and known by the designation of the maritime provinces should be exercised by all the courts of judicature, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces.'

[1] *Ram. p. 316.*

" The Ordinance of 1835, itself expressly re-enacts this, and it uses the following words, ' which laws and institutions it is hereby declared are and shall henceforth continue to be binding and administered through the said maritime provinces and their dependencies, subject nevertheless to such deviations and alterations as have been or shall hereafter by lawful authority be ordained.'

" We humbly consider that by these declarations of the royal will, Her Majesty's subjects in this island, who had or might have any money due to them from the local Government for wages, for salary, for work, for materials, in short for anything due on an obligation arising out of contract, were permitted to retain the old right given by Roman Dutch Law to sue the advocate of the fiscal, now styled the Queen's Advocate, for recovery of their money. And if the present plaintiff could have shown that any money was due to him under his colonial appointment as Galle post-master, he might have maintained this action. He might have done so in respect of salary due for any period during which he actually served, and also in respect of the further period for which he, still holding the appointment *de jure*, was ready and willing to serve, but was prevented from serving by the wrongful act of his employer."

This statement of the law of Ceylon cannot be regarded as being merely *obiter*. It is clear that, if any salary earned by the plaintiff prior to the date of his dismissal had not in fact been paid to the plaintiff, the Court would have given judgment for the plaintiff for the unpaid amount; this on the basis that a right to sue for salary had existed under the Roman-Dutch Law.

The general question of the right of the subject in Ceylon to sue upon a contract with the Crown was considered in the case of *Jayawardena v. Queen's Advocate*[1]. The Court there stated that " the right to sue the Crown in the person of the Queen's Advocate for claims arising *ex contractu* has not only been upheld by the Courts of the Colony, but has been recognised by the Legislature in several enactments ". Reference was thereafter made to Ordinances No. 9 of 1852, No. 7 of 1856 and No. 11 of 1868, all of which contemplated the possibility of suits upon contract by private parties against the Queen's Advocate. There followed the following observations :—

"Under these circumstances, we think it too late, at this day, to contest in this Court the validity of this practice. We are bound by the previous decisions of this Court, particularly by the considered decision of the Collective Court in the case of *Fraser v. The Queen's Advocate*. To hold at this date, for the first time, that a practice, which has so long been sanctioned by the Courts and acquiesced in by the Government, is bad in law, and cannot be sustained, would necessarily create widespread confusion and inconvenience, practically amounting in many cases to injustice. If the precedents and decisions upon which this Court acts are wrong, it must be left to the Court of appeal to set us right.

[1] *4 S. C. Circular 77.*

It was urged by the Queen's Advocate that the practice of suing the Crown is an attempt to impugn the royal prerogative, by virtue whereof no suit or action can be brought against the sovereign ; and such, no doubt, it would be if the prerogative has not been waived in this respect. This Court in *Fraser's case* humbly expressed an opinion that it had been so waived, and we humbly venture to share that opinion. It should be observed that the question is, after all, one purely of procedure. If a judgment be obtained against the Queen's Advocate, no execution can issue either against the Queen's Advocate personally or against the Crown. See Marshall, p. 75 ; Thomson's Institutes, p. 12. A judgment in an action or suit *ex contractu* against the Queen's Advocate gives little, if anything, more than a successful petition of right would do in England. It is merely, as it appears to us, a mode of procedure by which a subject is able to prefer and substantiate his claim against the Crown. Compliance with the claim when substantiated must still be, as we take it, a matter of grace. Petitions of right are now in England prosecuted as ordinary actions ; and as a matter of convenience, we see no objection to parties preferring their claims against the Crown here in the form of a suit against the Queen's Advocate."

The learned Acting Attorney-General in his argument before us suggested that *Fraser's case*, while rightly deciding that the Crown could be sued upon a contract in Ceylon, was wrong in basing the decision on the Roman-Dutch Law. He further argued on the authority in the concluding passage cited above from *Jayawardena's case* that the waiver of immunity from suit by the Crown in Ceylon consisted merely of the acknowledgment of a right to sue the Crown in lieu of the right under English Law to proceed by way of a petition of right. His argument, in my opinion, gains support from the observation in *Jayawardena's case* that a suit *ex contractu* against the Queen's Advocate appears to be merely a mode of procedure by which the subject is able to prefer his claim, and is thus the equivalent of the English Petition of Right.

Shortly after *Jayawardena's case*, there was decided in the Privy Council the case of *Siman Appu v. Queen's Advocate* [1], in which it was held that a suit upon a contract can be instituted in Ceylon against the Queen's Advocate as representing the Crown. Their Lordships considered the question whether the Roman Dutch Law entitled a subject to sue an Officer of Government on behalf of the Government. The note of the argument of Counsel in that appeal shows that *Fraser's case* (as reported in Creasy's Reports p. 10) and *Jayawardena's case* (incorrectly cited as *Fernandez v. The Queen's Advocate*) were considered in the discussion of this matter. But their Lordships concluded their consideration of the question with these observations :—

" There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than

[1] *9 App. Cases p. 571.*

existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed. "

" But whatever speculations may be made upon these points their Lordships cannot advise Her Majesty that such was the Roman-Dutch Law, unless it is shewn to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject."

It appears to me that the true *ratio decidendi* of *Siman Appu's case* can be deduced from the following passages of the judgment :—

" That a very extensive practice of suing the Crown has sprung up is certain. In his judgment in the case of *Fernando*, which was decided immediately before the present case came under review, Cayley, C. J., says, 'The practice has been recognised in many hundreds of decisions, and long acquiesced in by the Crown, and so far as I am aware, has not till now been called in question.' It was recognised by the judgment of the Court in *Fraser's case*, decided in the year 1868. "

" In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English petition of right, he says that, the Ceylon Government having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives little more than is given by the petition of right, for no execution can issue against the Crown or against the Queen's Advocate. "

. . . . .

" It is then certain that prior to 1868 there was such an established practice of suing the Crown that the legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is defendant, and though it is the opinion of the Supreme Court, and is probable, that they refer to claims *ex contractu*, it is not clear that they do so."

. . . . .

" Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land."

The reference in the first of the passages just cited to the judgment in *Fraser's case* shows that their Lordships relied on that case, not for the proposition that the Proclamation of 1799 (now chapter 12 of the Revised Edition 1956) had waived the Crown's immunity from suits upon contract, but instead only for the fact that this Court had often recognised the practice of suing the Crown. The judgment of Cayley, C.J., in *Jayawardena's case* (incorrectly referred to as that of *Fernando*) was relied on in the same way.

There is accordingly the highest judicial authority, in the decision of *Siman Appu's case* in 1884, to the effect that (as stated in the head note) : " There is no authority for saying that the Roman Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the Government. Instead the right to sue exists because there had been a very extensive practice of suing the Crown which was recognised by the Legislature and such suits are now incorporated into the law of the land."

The learned Acting Attorney-General has suggested certain other considerations which tend to support the view that the Proclamation of 1799 was not intended to make the Roman-Dutch Law applicable to the relationship between the Crown and public servants in Ceylon. The first is that the Proclamation, in referring to the Civil and Criminal Jurisdiction of the Courts, was not intended to cover matters which are the subject of Constitutional or public law, and that the relationship between the Crown and its servants is such a matter. I do not find it necessary to decide the point thus raised, and am content to observe that an argument which invokes the Proclamation must logically include the proposition that even the right of dismissal at pleasure existed in Ceylon by virtue of Roman-Dutch Law, and not as a principle of English Law. But I see much substance in the other suggestion that, in regard to so fundamental a matter as the relationship between the Crown and its servants (many of whom must at the time have been British by birth and race), the Proclamation could not have intended that such a matter would be regulated otherwise than by the the law applicable in Britain and in other territories of the British Crown. The explanation given in Thompson's Institutes that a suit against the Government had been permitted of necessity and in lieu of the English petition of right, because the Ceylon Government had no Chancellor, is one which is in all the circumstances most acceptable.

When this Court in *Fraser's case* assumed that the wages of a public servant in Ceylon, when earned, are a debt due to him, the Court in so doing did not consider the question whether this principle was a matter of Roman-Dutch Law or else of English law. But it is clear from the judgment that the Court did recognize that *the power to appoint public officers* in Ceylon was a power derived from, and exercised on behalf of, the Crown ; the judgment in this connection refers to the powers of appointment granted to the Governor by his letter of appointment

(presumably Letters Patent) and to Colonial Rules and Regulations (p. 321 Ram. 1863–68). The grant of such powers by the British Sovereign must fairly be presumed to have been an exercise of the Royal Prerogative under the law of England, and not to any authority of a Sovereign under Roman-Dutch law ; if this were otherwise, the Court in *Fraser's case* could not have held that the power to dismiss a public officer at pleasure existed in Ceylon without first deciding that such a power existed in Roman-Dutch law. The efficacy or validity of appointments made by the executive in Ceylon was therefore referable to the law of England ; and it follows in my opinion that the nature and legal effect of the relationship constituted by such appointments had also to be determined by reference to English law.

For these reasons I would hold, applying the judgment of their Lordships of 1884, that the right to sue the Crown in Ceylon upon a contract is not founded on the Roman-Dutch Law. Accordingly, even if it be the case that the ancient laws of the United Provinces entitled a public officer to sue the Government upon a contract of employment under the Government, those laws did not, and do not now, apply in Ceylon. It follows that the question whether the plaintiff in the present case has a right to sue the Attorney-General must be determined under the English law as altered or modified by the laws of Ceylon.

The question whether under English law a Civil Servant has the right to sue for earned wages, whether by way of a petition of right or otherwise, has been referred to by Judges and text writers as one of much doubt and difficulty. But the case of *High Commissioner for India v. Lall* [1] is at the least a definite pronouncement on the law on this question as applicable in British India. In that case Mr. Lall, who had been a member of the Indian Civil Service, was dismissed from service by the appropriate authority, and he claimed in the action a declaration that his removal was *ultra vires*, that he was still a member of the Indian Civil Service, and that as such he was entitled to all rights secured to him by the covenant rules and regulations issued from time to time by the appropriate authorities. After considering the provisions of s. 240 of the Government of India Act 1935, their Lordships held that there had been a breach of a provision of s. 240 which required that a civil servant shall not be dismissed unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him and that the purported removal from office of Mr. Lall was void and inoperative. They accordingly granted a declaration to that effect and to the effect that Mr. Lall remained a member of the Indian Civil Service at the date of the institution of his action.

Their Lordships thereafter considered a submission for Mr. Lall that he was entitled to recover in the action his arrears of pay from the date of the purported order of dismissal up to the date of his action. They said that " it is unnecessary to cite authority to establish that no action

[1] *(1948) A. I. R. (Privy Council), p. 121.*

in tort can lie against the Crown and therefore any right of action must either be based on contract or conferred by Statute ". Reliance was then placed on a judgment of Lord Blackburn in the Scottish case of *Mulvenna v. The Admiralty*[1] in which the matter had been discussed as follows :—

> " These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, and no matter what position he holds in the service, whether exalted or humble. It is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which I have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant (see (1920) 3 K. B. 663, 25 R. 112 and other cases there referred to). It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a Civil Court of Justice, and that their only remedy under their contract lies in an appeal of an official or political kind."

Mulvenna's case itself concerned the question whether the salary of a civil employee of the Admiralty could be arrested in the hands of the Commissioners of the Admiralty at the instance of a person holding a decree against the employee for the payment of a sum of money. Although the Court, including Lord Blackburn, did refer to earlier decisions in which there had arisen the particular question whether the salary of a civil servant is attachable, it seems clear that Lord Blackburn's own conclusion was based firmly on the primary proposition that a civil servant has no right to remuneration which can be enforced in a civil Court. After the passage I have already cited, there occur in the judgment the following observations :—

> " It further appears to me that, if this conception of the effect of public policy on the contract itself had been developed earlier, it would have led to the same conclusions in the numerous cases to which the Lord Ordinary has referred as were reached on different

[1] *(1926) S. C. 842.*

and, in some cases, on somewhat unsatisfying grounds. It would also have avoided the necessity for several statutory provisions applicable to the pay of particular services which must now be regarded as merely declaratory of the common law."

Their Lordships in *Lall's case* referred to the provisions applicable to public servants in India prior to the Government of India Act 1935 and to the relevant provisions of the Government of India Act 1919. Section 96B of that Act had declared that a civil servant " holds office during His Majesty's pleasure, ... but no person in that service may be dismissed by any authority subordinate to that by which he was appointed ". Under sub-section (2) of s. 96B the Secretary of State for India in Council had been empowered to make rules for regulating *inter alia* the conditions of service, pay and allowances, and discipline and conduct, of the Civil Services of India. One such rule had provided certain conditions precedent to the dismissal of a civil servant such as : that he must be afforded an adequate opportunity of defending himself, that charges should be framed and communicated to the person charged, that a written defence must be entertained if made, and that an enquiry must be held if the person charged so desires. These provisions were the subject of consideration in the Privy Council in 1938. In the case of *Rangachari* [1] their Lordships held that the provision in *s. 96B (1) itself* which prohibited the dismissal of an officer by any authority subordinate in rank to the authority that appointed him was peremptory, and that a dismissal purporting to be made in violation of that provision was void and inoperative. But in *Venkata Rao's case* [2] decided on the same day, their Lordships rejected the contention that a dismissal in breach of *the rules made under s. 96B* could give rise to a right of action by the dismissed officer. Reference was made to an observation in *Gould's case* [3] :—

" The argument for a limited and special kind of employment during pleasure, but with the added contractual terms that the rules are to be observed is too artificial and far-reaching. "

Their Lordships regarded " the terms of the section (96B (2)) as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule . . . . . Their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts by action. To give redress is the responsibility of the Executive Government. " Accepting these propositions, the Privy Council decided in *Lall's case* that a public officer had no right to claim arrears of pay under his covenant, or in other words that he had no contractual right enforceable by action.

[1] *(1937) A. I. R. (P.C.) 27.*

[2] *Idem p. 31.*

[3] *(1896) A. C. 575.*

I must note at this stage that at least until the coming into effect of the Ceylon State Council Order in Council, 1931, and perhaps even until the coming into operation of the Ceylon Constitution Order in Council 1946, the position of public servants in Ceylon was regulated in a manner similar to that which had obtained in India under the Government of India Act, 1919. Their Lordships in *Venkata Rao's case* referred to the fact that s. 96B, in sub-section (5), reaffirmed the supreme authority of the Secretary of State over the Civil Service, and relied on this fact for the opinion that rules made under that section did not confer rights enforceable by action in the Courts. A similar supreme authority was formerly vested in the Secretary of State for the Colonies over the public services of Ceylon. For much the greater period of British rule in Ceylon, the right to dismiss at pleasure was implied and recognised in the case of the public service of Ceylon, and the pay and conditions of service were regulated by, or under delegated authority from, the Secretary of State. Such rules and regulations, as also the Pension Minute applicable to the public service, were not statutory enactments, nor (unlike the Indian Rules after 1919) were they even made under empowering statutory provisions.

It is clear to me for these reasons that prior to the operation of the Ceylon Constitution Order in Council, 1946, the nature of the rights of a public servant in Ceylon was similar to that of a public servant of India, and that upon the reasoning in the Indian decisions cited above, a public servant in Ceylon had no right of redress by action in the Courts for a breach of rules and regulations prescribing the salaries and conditions of service of public officers. It would seem to follow therefore that the grounds of the decision in *Lall's case* in particular, holding that a public servant had no right to sue for his wages, were applicable also in the case of members of the public services of Ceylon.

Counsel for the plaintiff in the present appeal referred to several decisions of English and Australian Courts in support of his argument that the Scottish case of *Mulvenna* was wrongly decided, and that accordingly the decision of the Privy Council in *Lall's case* should not be followed. Certain of the English and Australian decisions, it was urged, did acknowledge the right of a public servant to sue for his earned wages. I must refer even briefly to some of these decisions.

In the case of *Carey v. The Commonwealth* [1] the Court did hold that a public servant did have the right to sue for earned remuneration. But the only precedent relied upon by the Judge in *Carey's case* in support of this alleged right was the decision in *Williams v. Howarth* [2]. The report of this latter case, however, shows that the plea was never taken in argument that the Crown could not be sued for wages. The plea if taken would undoubtedly have succeeded, for the suit was one for wages claimed by a member of the Armed Forces of Australia who had served with the British Imperial Forces in South Africa. The only question

[1] *30 Comm. L. R. 132.* [2] *(1905) A. C. 551.*

decided was whether payments made by the Imperial Government should be taken into account in determining whether the plaintiff had received the wages payable to him by the Australian Government. The case should not, I think with respect, have been regarded as authority for the proposition that a military or civil servant of the Crown had a right to sue for earned wages.

The case of *Lucy v. The Commonwealth* [1] was much relied on by Counsel for the plaintiff in support of the alleged right to sue the Crown on a contract of employment. The plaintiff in that case had until March 1901 held office in the Postal Department of South Australia. At that stage the Department was taken over by the Commonwealth and the plaintiff was then transferred to the Commonwealth Public Service. In 1919 the plaintiff was notified that he would be retired from the Commonwealth Public Service upon attaining the age of 65 years, and in May 1919 he was actually so retired. The plaintiff claimed that under a South Australian Act of 1874 he had acquired a right to retain office until death or removal in terms of that Act and that he had been wrongfully retired at the age of 65 years. Section 60 of the Commonwealth Public Service Act provided that an officer transferred to that Service will retain all the existing and accruing rights which he had previously as a member of the South Australian Service, and it had been held in an earlier case that this Section (despite inconsistent provision in section 74 of the Act) preserved to such an officer the right to remain in service after attaining the age of 65 years.

In these circumstances the plaintiff claimed (*a*) a declaration that he had been wrongfully removed from service on 11th March 1919, (*b*) a declaration that he was entitled to retain office until his death or until his office was determined in accordance with the South Australian Act of 1874, and (*c*) damages for wrongful removal or dismissal. A case stated for the opinion of the High Court, after setting out the relevant facts, submitted the question " whether the damages to which the plaintiff is entitled should be measured and ascertained by any one or more of the following considerations ", and thereafter invited the Court to determine whether or not certain specified matters should be taken into account in the assessment of damages.

Despite references in the judgments to the *contract* which the plaintiff had as a member of the Public Service, it seems to me that the question whether a public servant had a right to sue the Crown for his wages was not in fact disputed in this case, for, as I have just stated, the Court was only invited to lay down the measure of damages as for a dismissal from service which was admitted to be unlawful. Indeed the note of the argument of the Counsel for the plaintiff contains this passage :—" the dismissal of the plaintiff was a breach of his statutory right and not a breach of contract ; whichever it is, if the plaintiff's remedy is damages, the

[1] *33 Comm. L. R. 29.*

measure is the same ". I must refer however to an observation in the judgment of Higgims J. that " this position would be beyond question in a case of ordinary contract between employer and employee ; and in my opinion the relation between the Commonwealth and the officer is a relation of contract (cf. *Williams v. Howarth*) ". Higgims J. was the same Judge who had decided the earlier case of *Carey*, and I have already stated my opinion that he had wrongly relied on the decision in *Williams v. Howarth.*

It seems to me that *Lucy's case* is not substantially different in principle from that of *Rangachari* decided by the Privy Council in 1937. In each case the plaintiff had a right of action because he had been dismissed in breach of statutory provision, and not because he was entitled to contractual rights.

The nature of service under the Crown in Canada was considered in the judgment of the Privy Council in the case of *Reilly v. the King* [1]. The suppliant had in 1928 been appointed a member of the Federal Pension Appeal Board for a period of five years. In May 1930 the pension statutes were amended and in consequence the Pension Appeal Board was abolished, and a new Tribunal established in its place. Mr. Reilly was not appointed to the new Tribunal, and in October 1930 he was requested to vacate the premises which he had occupied in pursuance of his office. The following observations of Lord Atkin are important for present purposes :—

> " Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds. Maclean J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract : and the foundation of the petition failed. Orde J.'s judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual ; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.
>
> Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine ' for cause ' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould v. Stuart.* That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.

[1] *(1934) A. C. 176.*

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined."

The dicta of Lord Atkin in *Reilly's case* received careful examination by the Supreme Court of South Africa in the case of *Sachs v. Donges* [1] in which it was sought to equate the case of the revocation of a passport to the Crown's right to terminate at pleasure the employment of a public officer. Referring to Lord Atkin's statement that " if the terms of the appointment definitely prescribe a term, and expressly provide for power to determine for ' cause ', it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded ", two Judges of the South African Court thought it clear that Lord Atkin only contemplated cases of appointments under a statutory power, where the statute itself by implication excluded the prerogative right of dismissal at pleasure. Van den Heever, J.A. said in this connection :—" Once it is established that an act is the exercise of discretionary executive power not regulated by statute *cadit quaestio*, ... the subject's redress, if any, is political, not judicial." Centlivres J. expressed his disagreement with the construction placed on Lord Atkin's dictum in the case of *Robertson v. Minister of Pensions* [2] where Lord Denning had stated that " in regard to contracts of service, the Crown is bound by its express promises as much as any subject ". Let me with great respect state my own reasons for disagreeing with that construction.

In the passage cited above, Lord Atkin first referred to a judgment in which Orde J. in the Canadian Supreme Court, seemed " to admit that the relation might be at any rate partly contractual ; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure ". Lord Atkin then expressed inability to accede to this view of the contract, *if contract there be.* His subsequent statement, that, in certain cases, " any implication of a power to dismiss at pleasure is excluded ", is explained by his reference to the cases of " numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause ". This reference read together with the reference to *Gould v. Stuart* [3], indicate that Lord Atkin had in mind only cases in which the power to dismiss at pleasure

[1] *(1950) (2) S. A. L. R. 265.* [2] *(1948) 2 A. E. R. 767.*
[3] *(1896) A. C. 575.*

becomes excluded by contrary provision in a statutory power of appointment. Had he intended to say that the power could be excluded *by contract*, he would surely not have failed to refer to *de Dohse v. Reg* [1] and to *Dunn v. Macdonald* [2], both cases in which the contrary opinion had been strongly expressed.

In *Gould v. Stuart* itself, Lord Hobhouse, in delivering the judgment of the Privy Council observed that " servants of the Crown hold their offices during pleasure ; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service ". But the case itself concerned an office the tenure of which was regulated by the Civil Service Act of New South Wales, the provisions of which were inconsistent with the power to dismiss at pleasure. The power of dismissal being thus excluded by statute, it was not material to decide the precise base on which the power rested. Moreover, it is not easy to understand why an arbitrary power of dismissal is to be implied in a contract of employment except upon a supposition that such a power exists *aliunde*. And if such a power does exist, it is only the prerogative to which the power is fairly referable. With much respect, therefore, I doubt whether the dictum of Lord Hobhouse can now be regarded as authority for the proposition that the terms of the engagement of servants of the Crown impose on the Crown contractual obligations, the breach of which may properly be the subject of dispute in Petitions of Right or (in Ceylon) in suits against the Attorney-General.

I do not consider it useful to refer to other cases cited during the argument, many of which were concerned with alleged wrongful dismissals of servants of the Crown. It suffices for me that we have not been referred to any decision holding, despite objection directly taken on behalf of the Crown, that a Petition of Right or civil suit lies against the Crown to enforce the performance of the terms of the engagement of a servant of the Crown, not being terms laid down by statute. The Ceylon decision in *Fraser's case* is thus quite exceptional.

The decisions of the Privy Council in the appeals from India lay down clearly the principle that the provisions of the covenants and rules governing the public service are not enforceable by action. This principle must apply to all such provisions, including those which prescribe rates of pay and increments, and it denies to this plaintiff a right to sue for the increment alleged to be due to him under the Minutes.

There remains one possibility to which I must advert, namely whether the provisions of the Ceylon Constitution have affected the operation in Ceylon of the principle formerly applicable.

[1] *(1897) 66 L. J. Q. B. 422.*

[2] *(1897) 66 L. J. Q. B. 423.*

Section 57 of the Order in Council declares that (with some exceptions not here relevant) every person holding office under the Crown holds the office during Her Majesty's pleasure. Sections 58 and 60 establish a Public Service Commission, and vest in the Commission " the appointment, transfer, dismissal and disciplinary control of *public officers* ", i.e., of persons holding a paid office . . . . . as a servant of the Crown in respect of the Government of Ceylon (*vide* s. 3, definition). Section 61 authorises the Commission to delegate any of its powers, subject to the right of appeal to the Commission itself. Thus the powers of appointment and dismissal, which were those of the Sovereign in early English law, are now exercisable by the Commission. It is not disputed that the plaintiff in this case is a public officer within the meaning of these provisions.

Neither in Part VII of the Order in Council, under the title " The Public Service ", nor in any other provision of the Order, is there express statutory declaration vesting in any specified authority the power to prescribe the salaries and conditions of service of public officers. But Part V, which is entitled " The Executive ", vests in Ministers the subjects and functions which may be assigned to them by the Prime Minister. The subject of " the public service " has been so assigned to the Minister of Finance, and I have no difficulty in assuming that the Minutes and Circulars referred to in this case, which were issued by the Secretary to the Treasury or his Deputy, were in fact issued under the authority of the Minister of Finance. Under s. 51, the Secretary to the Treasury, who is also the Permanent Secretary to the Ministry of Finance, exercises control over the departments of Government in charge of his Minister and is thus the head of the Public Service, subject only to the special powers reserved by s. 60 to the Public Service Commission. The Minister of Finance, or his Permanent Secretary, in the exercise of their powers of control and administration of the public service, have necessarily to adhere to decisions of Parliament, particularly those decisions which are incorporated in the Appropriation Acts which appropriate funds for various public purposes ; they have also to adhere to decisions of the Cabinet, which under s. 46 of the Order in Council is charged with the general direction and control of the government of the Island. There has been no suggestion during the argument of this appeal that the act of the plaintiff's head of department in withholding the plaintiff's increment in any way infringes or usurps powers which under the Constitution are vested in Parliament, the Cabinet, the Public Service Commission, or the Minister of Finance. The head of department acted under the provisions of a Circular issued by an authority fully competent to issue it.

I find nothing in the relevant provisions of the Constitution (which have just been examined) which can in any way be construed as altering or affecting, either expressly or by implication, the principle that the terms of a public officer's engagement to serve the Crown in Ceylon do not entitle him to institute a suit to recover earned wages or to enforce the

terms of his engagement. The case of *Silva v. The Attorney-General* [1] is easily distinguishable, for we are not here concerned with anything resembling the dismissal from service of a public officer by an authority not legally competent to dismiss him.

Counsel for the plaintiff argued that, although the Crown or the Executive Government in Ceylon has a power freely to alter the terms and conditions of service prescribed in the relevant minutes in force at the time of the plaintiff's promotion to the Executive Clerical Class, that power was unlawfully exercised when the Treasury Circular No. 560 was issued in December, 1961. The ground of this argument was that the Circular was issued for the purpose of the implementation of the Official Language Act, No. 33 of 1956. Referring to the terms of the Circular itself, and to those of a Cabinet memorandum containing directions as to the implementation of that Act, Counsel submitted that the Treasury Circular had to be issued under the compulsion of the Act ; and, relying upon certain decisions in the United States, he further submitted that anything done under the compulsion of an invalid statute is itself invalid, despite the fact that what is done may be valid if done in the exercise of some ordinary contractual right or other power.

These submissions regarding the Treasury Circular depend on Counsel's other submission that the Official Language Act of 1956 was *ultra vires* on the ground that in enacting it Parliament transgressed the prohibitions against discrimination contained in Section 29 of the Constitution. Indeed the learned District Judge who heard the instant case has held the Act to be void on that ground. In considering whether this Court should now make any pronouncement as to the validity of the Act of 1956, I take note of the reluctance of the American and Indian Supreme Courts to make such pronouncements. The principle is thus expressed in Cooley, Constitutional Limitations (8th Ed. p. 332) :—

> " It must be evident to anyone that the power to declare a Legislative Enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."

In *Burton v. United States* [2] it was observed that " It is not the habti of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of a case ". Again, in *Silver v. Louis Ville N. R. Co.* [3] the Court stated that if a case could be decided on one of two grounds, one involving a constitutional question, and the other a question of statutory construction or general law, the Court will decide only the latter.

[1] *(1958) 60 N. L. R. 145.*

[2] *196 U. S. Reports at p. 295.*

[3] *213 U. S. Reports at p. 191.*

In the instant case, it is not even clear whether the question of the compulsion of a statute does arise. I have already reached the conclusion that under our Law a public servant has no right to sue for his wages. Accordingly the plaintiff is not entitled to a remedy in the Courts for any alleged default in the payment to him of the increment, even if the relevant minutes and regulations had not been altered or modified by the Treasury Circular No. 560.

The position of the Crown here is not that there was an alteration in the terms and conditions of service in consequence of which the plaintiff has become disentitled to the increment. The Crown's position is that the plaintiff cannot sue for the payment of the increment, even if the minutes and regulations provide for such a payment. Since such in my opinion is the correct position in law, this Court should not now venture to rule upon the submissions as to the invalidity of the Language Act. As a note of caution I must say also that the ruling on that submission made by the learned District Judge in this case must not be regarded in any way as a binding decision.

We did not call upon the learned Acting Attorney-General to submit his arguments on the question of the validity of the Language Act. Instead, at the close of the hearing of this appeal, I indicated my intention that if our findings on the other issues arising in this case necessitate consideration of that question, I would in exercise of my powers under Section 51 of the Courts Ordinance refer the question for the decision of a Bench of five or more Judges. That course is not now necessary; but I should here express the firm opinion that a question of such extraordinary importance and great difficulty, if and when it properly arises for decision, must receive consideration by a Bench constituted under Section 51.

The judgment and decree of the District Court are set aside. I do not in the circumstances make any order as to the costs in the District Court, but the plaintiff must pay the costs of this appeal.

G. P. A. SILVA, J.—I agree.

Judgment and decree set aside.