1960 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

M. W. SILVA, Petitioner, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 601—Application to dismiss the appeal to the Privy Council in S. C. 785/D. C. Colombo 34746 for non-prosecution

Privy Council—Appeal thereto—Dismissal for non-prosecution—" Due diligence "—Printing of record in Ceylon—Entrustment of it to Government Printer—Time limit for delivery of prints to Registrar—Crown—Immunity from laches—Prerogative rights of Sovereign—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rules 11, 12, 13, 15, 16, 23, 25—Appellate Procedure (Privy Council) Order, 1921, paragraphs 6, 10, 11, 12, 13, 17, 18—Interpretation Ordinance (Cap. 2), s. 3—Adoption of Roman Dutch Law Proclamation (Cap. 9), ss. 1, 2—Prescription Ordinance (Cap. 55), s. 15.

In an appeal to the Privy Council, final leave to appeal was granted on 25th February 1959. The appellant (the Attorney-General) elected to print the record in Ceylon. He did not, however, deliver the prints of the record to the Registrar for examination and certification within the two months specified in paragraph 11 of the Appellate Procedure (Privy Council) Order, 1921. On 15th April an application was made for extension of time for the delivery of the prints. On 28th April an extension till 28th July was granted. On 16th July an application for further extension of four months' time for the delivery of the prints was lodged on the ground that typewritten copies of the record for transmission to the Government Printer had not been prepared by the Registrar. It was heard on 18th September and on 21st December was dismissed on the ground that it was not properly constituted and was not duly made as required by the statutes governing it. On the same day the respondent filed the present application for dismissal of the appeal on the ground of non-prosecution. Until the date of this application no affidavit or statement had been filed by the appellant or on his behalf explaining the failure to deliver the prints of the record to the Registrar. But on 24th December the appellant lodged a motion applying for further four months' time for delivery of the prints of the record to the Registrar on the ground that, although the typewritten copy of the brief had been forwarded by the Registrar to the Government Printer on 25th August 1959, the Registrar had informed, in reply to an inquiry made by the Crown Proctor on 5th December 1959, that he was compelled to give priority to certain other more urgent work and hoped to send the proof of the prints of the record by 20th December only.

Held, by BASNAYAKE, C.J., and SINNETAMBY, J. (H. N. G. FERNANDO, J., dissenting), that the Attorney-General (appellant) did not exercise due diligence within the meaning of Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance. The fact that the Government Printer is selected to print the record does not release an appellant from his duty to deliver the prints to the Registrar within the two months specified in paragraph 11 of the Appellate Procedure (Privy Council) Order, 1921, or within such extended time as may be granted under paragraph 18. The obligation is on the appellant and not on the Registrar to have the record prepared subject to the Court's supervision.

Per BASNAYAKE, C.J.—The Crown was not exempt from the duty to show due diligence in taking all the necessary steps for the purpose of procuring the

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dispatch of the record to England. It was not open to the Crown to rely on the maxim *nullum tempus occurrit regi.*

Per SINNETAMBY, J.—Even though there was a lack of due diligence on the part of the officers of the Crown, the maxim *nullum tempus occurrit regi* applied. Laches cannot be imputed to the Crown unless the Crown has expressly or impliedly agreed to be bound by all the terms of the Schedule Rules of the Appeals (Privy Council) Ordinance.

APPLICATION made under Rule 25 of the Schedule to the Appeals (Privy Council) Ordinance.

E. R. S. R. Coomaraswamy, with *Neville Wijeratne* and *F. C. Perera*, for Plaintiff-Petitioner.

M. Tiruchelvam, Q.C., Solicitor-General, with *V. Tennakoon*, Senior Crown Counsel, and *H. L. de Silva*, Crown Counsel, for Defendant-Respondent.

Cur. adv. vult.

June 10, 1960. BASNAYAKE, C.J.—

This is an application under Rule 25 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance which reads as follows :

> " Where an appellant having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England, the court may, on an application in that behalf made by the respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the court may think fit to direct."

On 25th February 1959 final leave to appeal to the Privy Council was granted to the Attorney-General, the defendant in the action (hereinafter referred to as the defendant). Although Rule 11 of the Appellate Procedure (Privy Council) Order, 1921, (hereinafter referred to as the Order), makes it obligatory on the appellant, where he elects to print the record in Ceylon, to deliver the prints thereof to the Registrar for examination and certification within two months after obtaining final leave to appeal, he did not do so. On 15th April an application was made for an extension of time for the delivery of the prints. On 28th April an extension till 28th July was granted. On 16th July a motion for a further extension of four months' time for the delivery of the prints was lodged in the Registry. Although the rules do not provide for such a course the plaintiff filed objections to this application on 24th August. The objections were to the following effect :—

(*a*) that the defendant had not shown due diligence in taking the necessary steps for the purpose of procuring the despatch of the record to England,

(*b*) that no proper application had been made for extension of time within the time allowed by the rules,

(*c*) that the application was not properly constituted and was not duly made as required by the statutes governing it.

Those objections were heard on 18th September and on 21st December this Court upheld the third ground of objection taken by the plaintiff and refused with costs the defendant's application for a further extension of time. On the same day the plaintiff filed this application. In an affidavit lodged with the motion of 16th July 1959 by the Proctor for the defendant it was stated that typewritten copies of the record for transmission to the Government Printer had not been prepared by the Registrar and that a further four months would be required for delivery of the prints to him.

The question for decision is whether the defendant has failed to show due diligence in taking all the necessary steps for the purpose of procuring the despatch of the record to England. Until the date of this application no affidavit had been filed by the defendant or on his behalf explaining the failure to deliver the prints of the record to the Registrar. But on 24th December the defendant lodged the following motion in the Registry :—

> " I file herewith my affidavit and on the facts and for the reasons stated therein move in terms of Rule 18 of the Appellate Procedure (Privy Council) Order 1921 that Your Lordships' Court be pleased to grant an extension of further four months' time for delivery of the prints of the record to the Registrar under Rule 18 of the aforesaid Order."

The affidavit referred to in the motion does not explain the delay. It merely recapitulates the steps taken since the date of the grant of final leave. The following are the relevant statements in it :—

> " 3. As the prints were not ready for delivery to the Registrar, Supreme Court, for examination and certification, an application for extension of time for delivery of the said prints to the Registrar, Supreme Court, was made on behalf of the Defendant-Respondent-Appellant by Solomon Christoffel Obeysekere de Livera, Proctor of the Supreme Court, on the 16th day of July, 1959.
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> " 4. The said application came up for hearing on the 18th day of September, 1959, and the Supreme Court by its Order dated the 21st day of December, 1959, refused to entertain the said application on the grounds that the said Solomon Christoffel Obeysekere de Livera was not a Proctor duly appointed by the Defendant-Respondent-Appellant to act for him.
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> " 5. The Defendant-Respondent-Appellant by his writing dated the 22nd day of December, 1959, filed in these proceedings appointed me to act for him in connection with all matters relating to the application for leave to appeal to Her Majesty in Council.

"6. Typewritten copy of the brief in the above numbered case was forwarded by the Registrar, Supreme Court, to the Government Printer on the 25th day of August, 1959.

"7. On inquiry from the Government Printer for the reasons for the delay in printing the said record in this case, I received his reply dated the 11th day of December, 1959, which is annexed hereto marked 'X'."

The letter of the Government Printer referred to in paragraph 7 reads:

"Reference your letter of the 5th instant, I have to inform you that due to the Printing requests for the forthcoming Parliamentary Elections the production programme of this department had been severely disorganized. Highest priority has to be given to the printing of Election work, however, it is hoped to send you the proof of the above by the 20th instant."

To answer the question whether the defendant has failed to show due diligence in delivering the prints of the record to the Registrar, it is necessary to ascertain the meaning of the expression "due diligence" in this context. The rule of the interpretation of statutes is that where words or expressions are not defined in a statute they should be given their ordinary meaning having regard to the context in which they occur. It is proper to have recourse to standard dictionaries for the purpose of ascertaining the ordinary meaning of words. According to Webster's New International Dictionary "diligence" means "persevering application, devoted and painstaking effort to accomplish what is undertaken, assiduity." According to the New Standard Dictionary "diligence" means "assiduous and constant application to one's business or duty, careful and persevering effort to accomplish what is undertaken; proper heed or attention; care; caution; especially in law, the degree of personal care, attention or effort due from one in a given situation; opposed to negligence." According to the Oxford Dictionary the word "diligence" means "constant and earnest effort to accomplish what is undertaken; persistent application and endeavour; industry, assiduity." The word "due" when used as an attribute is defined in the last mentioned dictionary "Such as ought to be, to be observed, or to be done; fitting, proper, rightful, such as is necessary or requisite for the purpose; adequate; sufficient." It is not necessary to quote the meanings given in the other two dictionaries as there is no material difference between them and the one in the Oxford Dictionary. The New Standard Dictionary defines "due diligence" as "the degree of care or diligence which one is lawfully bound to exercise." This expression is defined in Black's Law Dictionary thus: "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case".

When the steps taken by the defendant are examined in the light of the meanings appropriate to the context it is to my mind clear beyond doubt that no diligence whatsoever has been shown "in taking all necessary steps for the purpose of procuring the despatch of the record to England".

The judgment of this Court was delivered on 14th November 1958 and for over one year the defendant with all the resources of the Crown at his disposal has not been able to get a record consisting of 100 typewritten pages printed for despatch to England. The expedition with which those who wish to appeal to the Privy Council should act is indicated by Rule 11 of the Order which provides that "If the appellant elects to print the record or any part of it in Ceylon, he shall deliver the prints thereof to the Registrar for examination and certification within two months after obtaining final leave to appeal". It is only in exceptional cases that this period may be extended by the Court under the power granted by Rule 18 of the Order which reads : "The Court may, for *good cause*, extend the time allowed by this Order for doing any act, notwithstanding that the time has expired". The defendant has not only failed to deliver the prints within the time prescribed in Rule 11 but he also failed to do so within the further period of three months and what is more even at the end of a further four months for which period he unsuccessfully sought an extension the prints had not been delivered.

The position at the date of this application was that the defendant had neither delivered the prints nearly five months after the expiry of the extension given to him nor had he obtained further time to do so. In these proceedings the defendant has not chosen to file an affidavit or even a statement to show what efforts he had made to get the printing done in time. The plaintiff's allegation of the lack of due diligence therefore stands unrefuted and unexplained. Even if it were permissible to introduce into this application the facts stated in support of the defendant's subsequent motion of 24th December for a further four months' time, they do not show due diligence. With the affidavit attached to the motion he has filed a letter from the Government Printer, in which the latter states in answer to an inquiry made by the Crown Proctor on 5th December 1959 that owing to other urgent work he has not been able to print the record. If the Government Printer was too busy with other work the defendant should have found another printer who was less busy. Even as it would not be proof of due diligence, if a private individual were to say that the printer of his choice regards his other work as more urgent and is unable to deliver the prints in time, so will it not show due diligence on the part of the defendant who has chosen to employ the Government Printer when he says that the printer of his choice is too busy to attend to the work in time. There is no provision of the statute or the rules that requires the records of cases to which the Crown is a party to be printed by the Government Printer and no other. If the Government Printer was unable to print the record with the expedition with which it should have been done the defendant should have employed a printer who was able to do so. If he satisfied us that

he approached all the available printers who undertook this class of work and that there was no one who would undertake to deliver the prints within the time allowed therefor, that would be a circumstance that can properly be taken into account in deciding whether there has been due diligence on the part of the defendant. There is no evidence that any attempt was made to get the printing done by another printer, nor is there any material before us that any other printer would not have done the work within the specified period of two months or if that were impossible within the extended period of three months. The successful litigant is not to be kept away from the fruits of his success owing to the tardy methods of his opponent especially when the opponent is the Crown with all the resources that it has at its command. The defendant has in this case not only not shown due diligence in taking the steps necessary for the purpose of procuring the despatch of the record to England but he has also been positively negligent in doing so. The Crown which should set an example to other litigents in acting timeously in regard to steps which it has to take in legal proceedings has failed to do so in this case and far from being a good example has displayed a tardiness which even a private individual should be ashamed of.

Before the expiration of the further three months' time granted to him the defendant moved for an extension of a further four months. That motion was rejected as it was made by a Proctor who had no authority to act on his behalf.

Learned counsel for the Crown stated from the Bar that he believed that the prints were ready on the date on which we heard the plaintiff's application, but there was no proof that they had been delivered to the Registrar. Even if they were ready the defendant would not be able to proceed without further application for an extension of time beyond the four months he has asked for. There can be no clearer indication of the defendant's negligence than this. The motion he has filed is futile. No useful purpose would be served by granting an extension of four months when it is evident that the defendant cannot satisfy the requirements of the law even if it is granted. There is no other application before us nor has there been any application to amend the motion. I cannot escape the feeling that in the instant case the defendant has fallen far below the standard one is entitled to expect of the Crown as a litigant.

As an alternative argument the learned Solicitor-General submitted that the Crown was not bound to act within the time prescribed by the rules in the Schedule to the Appeals (Privy Council) Ordinance or in the Appellate Procedure (Privy Council) Order, 1921, because one of the prerogative rights of the Sovereign was that laches did not operate against her. The maxim *nullum tempus occurrit regi* (no time runs against the Sovereign), which expresses the same right in another form, is, subject to the limitations placed on it from time to time by statute, a part of the prerogative of the Sovereign of England and part of its common law. In the course of years it has been radically altered in that country.

The prerogative rights of the Sovereign of England, being a part of the Common Law of that country, do not automatically become the law of Ceylon ; because Ceylon being a ceded country the law of the country continues until the Sovereign or the legislature changes it (*Mayor of the City of Lyons v. Hon. East India Co.* [1]). The law of England obtains in Ceylon only to the extent to which it has from time to time been introduced by express enactment (vide Civil Law Ordinance Vol. II Legislative Enactments p. 138). In the case of this country it is only the prerogative rights declared in the Letters Patent constituting the office of Governor-General (1947) that have been expressly introduced by an act of the Sovereign. Another of the prerogative rights of the Sovereign is a matter of express legislation by our Legislature (s. 3 Interpretation Ordinance). In other respects the law governing the Sovereign's rights is the Roman-Dutch Law. In fact far from introducing the common law of prerogative of England the Sovereign expressly by the Proclamation of 1799 declared that the Roman-Dutch Law was to be the law of the land. This is what the Proclamation says :

> " Whereas it is His Majesty's gracious command that for the present and during His Majesty's will and pleasure the temporary administration of justice and police in the settlements of the Island of Ceylon, now in His Majesty's dominions, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure thereform either absolutely necessary and unavoidable or evidently beneficial and desirable . . .
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> " 2. We therefore, in obedience to His Majesty's command, do hereby publish and declare, that the administration of justice and police in the said settlements and territories in the Island of Ceylon, with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all courts of judicature, 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 we shall by these presents 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." (Vol. I, Legislative Enactments, p. 108.)

This very question of the prerogative that time does not run against the Sovereign has been decided by this court as far back as 1870 in a case reported in Vanderstraaten's Reports, 1870. After declaring that in

[1] *1 Moore, Indian Appeals, 270.*

Roman-Dutch Law, the property of the Fisc is subject to the ordinary law and that the subject could acquire a prescriptive title to land as against the Fisc in the same way as he was entitled to acquire a title by prescription as against a fellow subject under the common law, the judgment of the court proceeds thus :

> " The title to public lands in this country being notoriously a communicable and transferable right,—not being ' extra commercium ', and not pertaining or inherent to the ' majestas ' or dignity of the Sovereign power, are identical in their nature with such property of the ' Fisc ' as it is certain was subject by Roman-Dutch law to the ordinary term of prescription, and being so identical are subject to the same general law of prescription as governed private lands prior to the Ordinance 8 of 1834, viz., the ordinary Roman-Dutch Law term in case of immovable property, namely one-third of a century."

The subsequent Prescription Ordinance No. 22 of 1871 which is the one now in force has not affected the legal position of the Crown as stated above for the reason that the provision that saved the statute from applying to the Crown then and in 1874, though not identical, is, in so far as it affected the Crown, not substantially different. The former reads :

> " Provided, that nothing in this Ordinance shall in any way affect the rights of the Crown, or shall be taken to alter or annul any of the provisions of any law now in force in this Island, or which may hereafter be passed for the prevention of frauds and perjuries."

The latter states :

> " Nothing herein contained shall in any way affect the rights of the Crown, or shall be taken to apply to any proceedings in any action for divorce, or to any case in which special provision has been or may hereafter be made for regulating and determining the period within which actions may be commenced against any public officer or other person."

In dealing with the question whether the *nullum tempus* rule is part of the law of Ceylon this court stated :

> " The case has next to be considered with reference to the question whether that branch of the Royal Prerogative which is founded on the maxim ' nullum tempus occurrit regi ' is in force in Ceylon—for, if so, the Roman Dutch law will not apply. I think it is not. The maxim in question is a part of the Prerogative Law of the English Crown, which Prerogative is a part of the Common Law of the ' Realm of England ', of which Ceylon forms no part : and Blackstone says, respecting these territories which belong to the Crown, but which are

no part of the Kingdom ' the common law of England (as such) has no allowance (nor authority), they being no part of the mother country, but distinct, though separate dominions', (1 Blackstone 108), a passage which Stephen in his New Commentaries more precisely connects with ' conquered or ceded countries that have already laws of their own ' (1 Stephen Com. 99). It follows from the Common Law of England having no authority here, and from the Royal Prerogative of the English Crown deriving its authority from the Common Law of England, that neither has that prerogative any authority in Ceylon, except so far as the particular branch of it claimed is (1) one necessarily incident to Sovereignty, or except (2) it has been imposed on this Colony by the Crown in its legislative capacity, as a new law, or (3) unless it already formed part of the law of the country, as the prerogative of its rulers, before conquest or cession. But each of these three positions is entirely independent of the prerogative of the English Sovereign in particular, and of the Crown Law of England of which the latter is part."

This decision has remained unchallenged since 1870 and is undoubtedly the law of Ceylon. The considerations that govern a decision of long standing, especially one which affects the rights of the Crown, are stated by Lord Sumner in *Great Western Railway Company v. Bater* (8 T. C. 231 at 253) thus :

" Where a decision which limits the right of the Crown has long been unquestioned, far more practical weight attaches to this consideration of lapse of time than would have been the case had the decision been the other way. In these contests the subject is always at a great disadvantage. Decisions in favour of the Crown may often go unchallenged not because their correctness is generally recognised, but because no private person can face the cost of disputing them. Decisions to the contrary effect stand in a very different position. The Crown is always very ably advised, in Revenue as in other matters, and for an appeal against the doubtful ruling affecting income tax the funds can always be found."

With those observations I am in entire agreement.

The contention of the learned Solicitor-General is against our law and cannot be upheld. The Crown cannot claim immunity from its laches.

It seems incongruous that the Sovereign should appeal to herself, for that is what the Crown is seeking to do, unless it is claimed that the Queen of Ceylon is appealing to the Queen of England, in which case there would arise the question what jursidiction has the Queen of England over Ceylon ? Be that as it may, if the Crown cannot reach the Judicial Committee of the Privy Council except through the procedure prescribed in the statute and the rules whose aid it is seeking to invoke, may it invoke the aid of those provisions that are to its advantage and ignore

those that are not? If that were permitted the Crown would be in a position to delay justice to the subject and deprive him of the benefit of decisions in his favour by applying for leave to appeal to the Privy Council and taking no steps thereafter. The British Sovereign was bound by the Magna Carta not to deny or delay justice to the subject. The successor of that Sovereign has not been clothed with greater powers and is therefore bound by those same restrictions. Acting timeously is an essential part of the appellate procedure prescribed in the Appeals (Privy Council) Ordinance and its rules The Crown is therefore not entitled to ignore the rules designed for the speedy despatch of legal business if it invokes the aid of that Ordinance. Section 3 of the Interpretation Ordinance is of no avail in this instance. That section reads :

> " No enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby."

The right of the Crown means the existing right (*Dominion Building Corporation v. The King* [1]). If the Crown has a right to go to the Privy Council independently of the Appeals (Privy Council) Ordinance it is free to do so and that Ordinance does not bar such a right. It is not claimed in the instant case that it has such a right. There is therefore no right of the Crown that is affected by the Ordinance or its rules. The word " affect " in a context such as this means affect injuriously (see re *Silver Bros. Ltd* [2]). The Crown is seeking to take advantage of the Ordinance, which it is perfectly entitled to do. It must then comply with its provisions and cannot claim to disregard the very law whose aid it invokes. If it seeks to appeal under the Ordinance it must show due diligence in taking all the necessary steps for the purpose of procuring the dispatch of the record to England. If it does not, then the consequence prescribed in the Ordinance will visit it in the same way that it does any other litigant.

The plaintiff's prayer for a declaration that the appeal of the defendant do stand dismissed for non-prosecution is granted with costs.

H. N. G. FERNANDO, J.—

This is an application made under Rule 25 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance, (Cap. 85), for an order declaring that an appeal to Her Majesty in Council stand dismissed for non-prosecution. The appeal in question, which was from a judgment of this Court delivered on 14th November 1958, was preferred by the Attorney-General, to whom I will for convenience refer as " the appellant ". The opposite party who is the present petitioner is the respondent to that appeal and will be referred to as " the respondent ". The ground of the applica-

[1] *(1933) A. C. 533 at 549.* [2] *(1932) A. C. 514 at 523.*

tion under Rule 25 is that the appellant failed to show due diligence in taking all necessary steps for the purpose of procuring the dispatch of the record to England. For the purpose of considering the application it is useful to set out seriatim certain relevant dates :—

9th December 1958—Application for conditional leave.

19th December 1958—Application for conditional leave granted.

15th January 1959—Application for final leave.

25th February 1959—Application for final leave granted.

9th March 1959—Request by appellant's proctor to the Registrar of the Supreme Court for arrangements to be made " to let the Government Printer have the record as early as possible so that the print may be taken in hand immediately ".

6th August 1959—The Registrar informed the appellant's proctor that the typescript (of the record) was ready and the proctor was requested to examine the typescript before transmission to the Government Printer.

25th August 1959—The Registrar forwarded the typescript to the Government Printer for printing.

5th December 1959—The appellant's proctor inquired from the Government Printer why the printing had been delayed.

11th December 1959—The Printer replied that it was hoped to send the proof by 20th December and stated that " due to printing requests for the forthcoming parliamentary elections the productions programme of this department had been severely disorganized ". By affidavit the Government Printer has also stated that the printing of the record had to be delayed because of priority work in connection with the Emergency (presumably the Emergency declared under the Public Security Act and in existence during October and November 1959).

14th December 1959—A proof of the printed record was forwarded by the Printer to the Registrar.

9th January 1960—The final proof of the record was forwarded by the Printer to the Registrar.

21st December 1959—The respondent filed the present application.

Of the grounds relied on in the application dated 21st December 1959 counsel for the respondent was not able to press those set out in

paragraphs 11 (*d*) and (*e*) of his petition. The following were the grounds set out in paragraphs (*a*), (*b*) and (*c*) :—

> " (*a*) the Defendant-Appellant and his Agent have generally failed to show due diligence in taking the necessary steps for the purpose of procuring the dispatch of the record to England, and in the prosecution of the appeal, and in particular, in regard to the typewritten copies of the record ; (*b*) the time for the delivery of the prints of the record of the appeal to the Registrar of Your Lordships' Court expired on the 28th July 1959, and there being no application now pending for further extension of time, the Defendant-Appellant and his Agent have failed to exercise due diligence in the matter as required by Law ; (*c*) the delay in procuring the dispatch of the record to England and in the prosecution of the appeal is mainly due, inter alia, to the negligence of the Defendant-Appellant and his Agent in regard to the filing of Proxies, as set out in paras 8 and 9 hereof ; "

It is convenient to dispose firstly of the grounds set out in paragraph (*c*). The Appellate Procedure (Privy Council) Order, 1921 (Subsidiary Legislation Vol. 1 page 468) provides in paragraph 11 that if the appellant elects to print the record in Ceylon, he shall deliver the print thereof for examination and certification within two months after having obtained final leave to appeal. In the present case therefore the record was due for delivery on 21st April 1959. But an application for the extension of the time was made under paragraph 18 of the same Order on 15th April 1959 and this Court on 28th April 1959 extended until 28th July 1959 the time for the delivery of the printed record. In anticipation of this extension being insufficient an application for a further extension of time was made on 16th July 1959, but objection to that application was taken by the respondent on the ground that it had not been made by the proctor for the time being empowered in terms of pargraph 6 of the same Order to act for the appellant in connection with the appeal. Argument was heard on this objection and this Court on 21st December 1959 upheld the objection and refused the appellant's application for a further extension of time on the ground that the application had not been made by the proctor on record.

It should be apparent that the respondent cannot substantiate the allegation in paragraph 11 (*c*) of his present petition that the delay in procuring the dispatch of the record to England was mainly due to the negligence of the appellant or his agent in regard to the filing of Proxies. Even if the proper proctor had made the application in July 1959 for a further extension of time and such an extension had been granted, would it have followed that the Registrar of the Supreme Court could or would have provided the typescript of the record on a date earlier than 25th August 1959, and would it have followed that the Government Printer would have completed the printing earlier than 9th January 1960 ? In my opinion the refusal of the application for the further extension, on the ground of the lack of the proper appointment of the proctor making

it, was quite unconnected with the activity or want of activity on the part of the Registrar and the Government Printer, and cannot in any sense be regarded as the cause for the delay, if any, in the preparation and printing of the record.

The above summary relating to the appellant's application for extensions of time for delivering the record show that at the time when the respondent made his present application under Rule 25 there was not in force any order of this Court extending beyond 28th July 1959 the time allowed for the delivery of the record. In paragraph 11 (*b*) of his petition the respondent relies on this circumstance as showing a lack of due diligence. Expressed in different language, the ground urged is that if a respondent to an appeal comes to this Court under Rule 25 on the day after the expiration of the period previously allowed for the delivery of the printed record to the Registrar, he must succeed for the simple reason that on that day no "extension order" is in force. I think the answer to this argument is to be found in paragraph 18 of the 1921 Order :—"The Court may, for good cause, extend the time allowed by this Order for doing any act, *notwithstanding that the time has expired*". That paragraph contemplates that an extension of time may be allowed for good cause "notwithstanding that the time has expired"; but the paragraph could be rendered a mere nullity by a wary respondent if the true position is that he must necessarily succeed if his application under Rule 25 is made before the appellant invokes paragraph 18. In the present case moreover the appellant's application of 16th July 1959 was pending in this Court until 21st December 1959 when the reserved judgment was delivered. The reason for the omission of the appellant to make a fresh application for a further extension of time is apparent. The appellant's proctor presumably awaited the judgment of this Court before filing a fresh application under paragraph 18 which he did with sufficient expedition on 24th December 1959. In my opinion therefore the fact that no application for a further extension of time was pending on 21st December 1959 does not establish any want of due diligence contemplated in Rule 25. In fact counsel for the respondent did not argue that the omission of the appellant to file under paragraph 6 of the 1921 Order an appointment of the proctor who made the application of 16th July 1959 constituted want of diligence.

Rule 25 contemplates that an appellant must show *due diligence in taking all necessary steps for the purpose of procuring the dispatch of the record* to England. The steps required by the Rules and the Order comprise (in a case where the record is to be printed in Ceylon) :—

(i) the preparation of the record, i.e. of "the aggregate of papers relating to an appeal . . . proper to be laid before Her Majesty in Council on the hearing of the appeal" (Vide definition of "record" in section 2 of Cap. 85),

(ii) the payment of the fees prescribed by the 1921 Order for the preparation, examination, certification, and transmission of the record,

(iii) the exclusion (in consultation with the Registrar and the opposite party) of documents which are not relevant to the subject-matter of the appeal.

(iv) the delivery of the printed record to the Registrar within two months after the date of the grant of final leave to appeal, or within such further time as the Court may allow under paragraph 18 of the Order.

Rule 11 states that the preparation of the record shall be subject to the supervision of the Court, and Rule 12 that the Registrar as well as the parties and their legal agents shall endeavour to exclude from the record all unnecessary documents. These provisions read together with the definition of "record" appear to indicate that the aggregate of relevant papers has to be collected together and when so collected will constitute "the record", which is ultimately to be printed and thereafter transmitted to the Privy Council. Having regard to the fact that the original papers would be in the custody of the Registrar and should not except in very special circumstances be allowed out of his custody, and having regard to the provision in Schedule 1 to the 1921 Order which imposes a charge payable to the Registrar "for fair copying the record and examining the transcript thereof", it would seem that the practice prevailing in the office of the Registrar is, in the absence of any explicit provision in the Rules or in the Order, the only appropriate practice which could have been adopted. That practice is for the Registrar to prepare in accordance with instructions given by the appellant a transcript of the aggregate of relevant papers, which transcript is utilized for the purposes of printing the record. And where the Government Printer is the chosen agency for the printing, it is the Registrar who transmits the transcript to the Printer, though of course he would do this as the agent of an appellant.

In my view, what Rule 25 contemplates is that the steps which I have mentioned in the two last preceding paragraphs are the steps which should be taken with diligence by an appellant. The ground relied on by the respondent in paragraph 11 (*a*) of the present petition is that they were not diligently taken.

It has not been urged that the appellant delayed to apply to the Registrar for the preparation of the record for printing; he made the necessary request to the Registrar on 9th March 1959, ten or twelve days subsequent to the date when final leave to appeal was granted. But it is urged that there was a lack of diligence in that the appellant did not between 9th March 1959 and 25th August 1959 (on which date the Registrar transmitted the typescript to the Government Printer) communicate with the Registrar with a view to having the preparation of the typescript expedited. In this connection it was even suggested that the appellant should, when he did not for some time receive notice from the Registrar that the transcript was ready, have written again

to the Registrar to ascertain whether his request for the preparation of the record had been received by the Registry. With respect I see little or no justification for this suggestion. Whether the letter of 9th March 1959 had been sent by post or else by hand, and notwithstanding the delays and failures of postal delivery experienced in this country for some time, I think that a person who forwards a letter through normal channels to a Government department would be quite entitled to assume that the letter would be duly received. In any event paragraph 17 of the 1921 Order provides for the keeping in the Registry of a Minute Book open to inspection by parties and the Minute Book shows that the letter of 9th March was duly received, so that there was nothing which the appellant need have done in anticipation of a hypothetical failure of delivery. The principal suggestion in this context is that (to employ a word I used during the argument) the appellant should have kept on *harassing* the Registrar in order to persuade or compel him to conclude the preparation of the transcript earlier than the actual date of completion. Keeping in mind that the Registrar is a public officer, that it was his duty as such to have the transcript prepared, that he was paid the statutory fee for a transcript, and that he is the principal officer of the Supreme Court which is charged by Rule 11 with the supervision of the preparation of the record, I cannot agree that Rule 25 requires an appellant to make any special effort to expedite the preparation of a transcript. I think on the contrary that any party-appellant is quite entitled to assume that the Registrar would have a transcript prepared as expeditously as the exigencies of his department would permit. In the absence of any evidence indicating any undue delay on the part of the Registrar and of further evidence indicating that under pressure of constant reminders the Registrar would have given special preference to the preparation of this particular transcript, I would hold that the relevant Rules did not require the appellant to address any communication to the Registrar other than his letter of 9th March 1959. The length of the period 9th March 1959 to 25th August 1959 does not operate as a *res ipsa loquitur* establishing that the period was extraordinarily long or that either the Registrar or the appellant was guilty of any lack of diligence.

The present case was one in which the appellant elected to print the record in Ceylon. According to the practice as I have pointed out above the printing could not commence until the Registrar furnished the necessary transcript of the record. That function, of furnishing the transcript, cannot be said to be performed by the Registrar as the agent of the appellant, and must be regarded as an official function of the Registrar in his capacity as such. In a case where the appellant elects to print the record in England the Judicial Committee Rules of 1957 expressly regulate the procedure. The Ceylon Registrar in such a case prepares the transcript just as he does in a case where the record is to be printed in Ceylon. That transcript is transmitted to the Registrar of the Privy Council who furnishes a certified copy of it to the appellant to be utilized for the preparation of the print. The procedure expressly

provided for in the Judicial Committee Rules makes it abundantly clear that the Registrar of the Ceylon Court in preparing the transcript performs an official duty and is not merely the agent of the appellant. If then in the present case the appellant had elected to print the record in England could it possibly be suggested, having regard to the time actually taken by the Registrar of the Supreme Court to prepare the transcript, that the transcript would have been ready for transmission to England earlier than 25th August 1959 ? Rule 25 surely would not have operated against the appellant in that event. In my opinion the fact that in the present case the transcript prepared by the Registrar was intended for delivery to the appellant *in Ceylon, and not to the Registrar of the Privy Council,* cannot in reason make any difference in determining the question whether the appellant was or was not diligent.

I pass now to the question whether or not the appellant was diligent in the matter of having the record printed by the Government Printer. Here again it would be in my opinion arbitrary to hold that the mere length of the period August 25th 1959 to January 9th 1960 conclusively establishes that the time taken by the Printer was unduly long. Two circumstances cannot be ignored in this connection : the first that the Government Printer is the normal agency entrusted with printing for Government departments, and the second that there is no room for the supposition that the Government Printer may not have dealt with this request for printing as expeditously as lay in his power. While *prima facie* one might have expected the printing in the present case to have been completed much earlier than it actually was, the statement by the Government Printer in his letter of 11th December 1959 and the statement in his affidavit satisfactorily establish the reason for the apparent delay in the completion of the work. I do not agree that the appellant showed lack of diligence in omitting to remind the Printer of the urgency of the work, nor, having regard to the Printer's explanation, can I agree that reminders would necessarily or probably have resulted in greater expedition.

For these reasons I would hold that the want of diligence referred to in Rule 25 has not been established. In view of this conclusion it is unnecessary to consider the further submissions of the Solicitor-General that the Crown cannot be held guilty of laches.

I would dismiss the application with costs.

SINNETAMBY, J.—

I have seen the judgment prepared by my brother H. N. G. Fernando, J. but I regret that I am unable to agree with his view that the Attorney-General has, in the prosecution of this appeal, exercised due diligence within the meaning of Rule 25 of the Schedule to the Privy Council

Ordinance No. 31 of 1909 (Cap. 85). I propose to follow the nomenclature adopted by my brother for the purpose of convenience, and refer to the Attorney-General as the appellant and the petitioner of this application as the respondent in what follows.

The appellant applied to this Court for leave to appeal to the Privy Council from a judgment which was pronounced in favour of the respondent. Conditional leave was granted on 19th December, 1958, in terms of the Schedule Rule No. 3 of the Appeals (Privy Council) Ordinance No. 31 of 1909 (Cap. 85) and final leave to appeal on 25th February, 1959.

The matters which require the consideration of this Court relate to the steps taken thereafter by the appellant. Rule 25 of the Schedule Rules expressly states that

> " the appellant who has obtained final leave to appeal shall prosecute his appeal in accordance with the Rules for the time being regulating the general practice and procedure in appeals to Her Majesty in Council."

It will be seen that this Rule imposes on the appellant the obligation to take the necessary steps *in accordance with the Rules* and the necessary steps required to be taken are to be found in the Schedule Rules as well as in an Order made by the Supreme Court, under the provisions of Section 4 of the Ordinance. The Order, which carries the short title of " Appellate Procedure (Privy Council) Order 1921 ", is in numbered paragraphs. The steps to be taken by an appellant must therefore be in accordance with this Order as well as with the provisions of Cap. 85. There are also certain Rules mainly confined to procedure in England and regulating the steps to be taken when the record is printed in England : they are to be found in the Judicial Committee Rules 1957. In the main, where the printing of a record is to be done in Ceylon, the requirements of the Judicial Committee Rules have been incorporated in the Schedule Rules as well as in the Order.

After the granting of final leave to appeal, paragraph 11 of the Order impliedly imposes upon the appellant the duty of electing to print the record either in Ceylon or in England. If the record is to be printed in England, all that the appellant is required to do is to see that the record required for the purpose of the appeal is prepared by the Registrar in accordance with the Rules laid down by the Judicial Committee, which, as I said earlier, are the same as those set out in Rules 11, 12 and 13 of the Schedule Rules and in paragraph 10 of the Order. For the purpose of meeting the costs of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of that record, and for

the purpose of meeting the fees payable to the Registrar for examining and certifying the record, the conditions imposed under Schedule Rule 3 required the defendant to deposit Rs. 300 in Court. This had been done prior to the grant of final leave. There was thus left to the appellant the duty of getting the record, as defined in the Ordinance, prepared either for the purpose of transmitting it to England for printing there or for the purpose of getting it printed here. Schedule Rule 23 in my opinion imposes on the appellant, and none other, the obligation to take these steps. No doubt Schedule Rules 12 and 13 place on the Registrar as well as on the parties the task of reducing the bulk of the record by excluding unnecessary documents etc ; but the obligation to see that the record is prepared correctly is, nevertheless, upon the appellant. That is made clear by paragraph 10 of the Order which provides that the appellant shall serve on the respondent a list of the documents that he considers necessary, and after receipt of the respondent's list, if there are any additional documents that the respondent considers necessary, within 3 days of its receipt, to lodge the same with the Registrar. It seems to me that the Registrar's function under Schedule Rules 12 and 13 is to assist the parties in deciding what documents are necessary but he cannot, on his own, leave out any document which either party wants included ; for under Rule 12 he has to indicate in the index of papers that a particular document is included at the request of one party and has been objected to by the other. Where a dispute arises in connection with the preparation of the record, it has to be referred to the Court under Schedule Rule 11, which states that the preparation of the record shall be subject to the supervision of the Court. Section 2 of Cap. 85 defines a " Court " to mean one, two or three Judges of the Supreme Court, and clearly " Court " does not mean the Registrar. Paragraph 11 of the Order imposes upon an appellant, not only the duty of electing whether the printing is to be done in Ceylon or in England, but also the duty of delivering the prints, if they are printed in Ceylon, for examination and certification by the Registrar within 2 months of the granting of final leave. That is a necessary step which has to be taken before the record can be transmitted to England for under paragraph 12 of the Order : " if a necessary requirement of the Order or of the Schedule Rules have not been complied with, the Registrar is prohibited from forwarding the record to the Privy Council."

In my opinion, therefore, the steps which the appellant is required to take with due diligence after obtaining final leave, for the purpose of procuring the despatch of the record to England, may be summarised as follows :—He has first to take steps for the preparation of the record in terms of Schedule Rules 12 and 13, and in terms of paragraph 10 of the Order. He has then, if he elects to print the record in Ceylon, to deliver the prints to the Registrar for examination and certification within *two* months of the final leave being granted. He has also to take such steps as are necessarily incidental to the performance of these two functions. It is to be noted that, where the record is to be printed in England,

Schedule Rule 16 requires the Registrar to transmit one certified copy only of such record; while if the record is to be printed in Ceylon, Schedule Rule 15 requires the Registrar to transmit to the Privy Council forty copies one of which shall be certified. Paragraph 11 of the Order suggests that what has to be certified is one of the printed copies where the printing is done in Ceylon and not the transcribed typed copy. This is consistent with the Judicial Committee Rule 13, which obviously refers to the printed copies as it provides that forty copies of the record shall be forwarded one of which only shall be certified by the Registrar. Having regard, therefore, to the fact that it is the appellant who has to deliver the prints to the Registrar within two months under paragraph 11 of the Order, it is his duty to see that all the steps necessary for the purpose of fulfilling this obligation are taken within the time allowed.

In the present case having obtained final leave on 25th February, 1959, all that the appellant did was to request the Registrar to forward the record as early as possible to the Government Printer; vide document R I annexed to the affidavit of the Crown Proctor. Having done that, he had taken no further steps to see that the printed copies were available within the two months provided for in paragraph 11 of the Order. The practice obtaining in the Registry, as my brother Fernando, J. has pointed out, is for the parties to leave it to the Registrar to inform them when the typed script is ready and to request them to examine it before it is certified. That examination is generally done no doubt in the Registry but the obligation nevertheless to send it to the printer for printing is upon the appellant. He could select his own printer, though under the Judicial Committee Rule 24, where the printing is done in England, it is the Registrar of the Privy Council who has to get the printing done. In this case the appellant being the Attorney-General, the printer selected was the Government Printer, though it would have been quite open to the appellant to have selected a private Press. The mere fact that there has been in existence the practice of parties availing themselves of the services of the Registrar in the preparation of the record does not, in my opinion, afford an excuse for non-compliance with the express provisions of the Order: a practice, however convenient, cannot override the law. It is the appellant's duty to obtain a copy of the record, get it printed, corrected, and submit the printed copies to the Registrar for certification under paragraph 11 of the Order. He is not entitled to fall back upon a practice, which came into existence for his own convenience and which he followed at his own risk, and put the blame on the Registrar for the delay. In my view, it was his duty to see that a type-script copy was ready for printing in sufficient time to enable him to deliver the prints to the Registrar within two months or within such extended time as may be granted under paragraph 18. Schedule Rule 25 requires an appellant to show due diligence in taking the necessary steps. Due diligence, I take it, means that degree of care and attention which the "pater familias" of the Roman Law or "the reasonable man" of the English Law is expected to take in matters

relating to his own personal affairs. What then is the care one would expect an appellant to take when he has obtained final leave. One would expect him to take all such steps as are necessary and within his power to comply with the requirement that within two months the prints should be in the hands of the Registrar.

In the present case, the appellant obtained an extension of time for delivery of the prints under paragraph 18 of the Order till 28th July, 1959. One may assume, therefore, that when the application for extension of time was made on the 15th April, 1959, the Court did not consider the appellant guilty of lack of due diligence; one may also assume that the Supreme Court as well as the appellant considered that the extended time granted was sufficient for the purpose. The Registrar is a busy man with many duties to perform and unless he is reminded of the Order of the Supreme Court the preparation of the record in an appeal may either escape his attention or be put off and preference given to some other duty. No evidence has been placed before this Court to establish inability on the part of the Registrar to attend to this work earlier; the record incidentally when printed comprises of only 69 folios. The least one would have expected of an appellant was for such a person to ascertain from time to time what the position was in order to see whether the Supreme Court Order would be complied with. The Attorney-General did nothing of that kind. He kept perfectly quiet and left it to the Registrar to take his own time in the preparation of the record. He did not for a moment consider the possibility of any further application for extension of time being resisted nor did he contemplate the need for a "good cause" to exist in order to support any further application for extension of time. It should be noted that the Rules, as I have endeavoured to show, cast the obligation on the appellant and not on the Registrar to have the record prepared subject to the Court's supervision, and if the Registrar performs certain functions in order purely to assist a party to do so, it seems to me that delay or slackness or just indifference on the part of the Registrar will not afford an excuse sufficient to meet an allegation that the appellant had failed to exercise due diligence. The delay that often takes place in Government departments is well known and the appellant must be aware of it. He made no effort to cause the preparation of the record to be expedited. A request from the Attorney-General for early attention and a reminder that an order of the Supreme Court had to be complied with within a specified time coupled with an offer of assistance would, I have not the slightest doubt, have resulted in the matter being given prompt attention.

In this case, apart from writing a letter to the Registrar on the 9th March, the appellant did nothing except to apply twice to this Court for extension of time, one was in April, 1959 and the second in July, 1959. The second application was refused because the proctor who made the application on behalf of the Attorney-General had not been properly appointed. So far as the Registrar was concerned, the appellant did

nothing either to ascertain what the present position was or to inquire why there had been a delay or to remind him that time had been granted only till 28th July, 1959. It was only on the 25th August, 1959, that the Registrar, acting, as one must on the facts assume, as agent of the appellant, forwarded a copy to the Government Printer for printing. I note that my brother Fernando, J. has referred to steps the Registrar is required to take under the Judicial Committee Rules. The Registrar under Rule 14 of the Judicial Committee Rules is required to forward a certified copy of the Record to the Registrar of the Privy Council and Rules 17 and 18 contain provisions similar to Schedule Rules 12 and 13 of Cap. 85, but I take it that the Privy Council Rules only deal with steps that have to be taken after a certified copy has reached England. In regard to the steps to be taken prior to that the parties are governed by the provisions of Cap. 85 and by the Appellate Procedure (Privy Council) Order of 1921. It is to be noted that Schedule Rule 11 rather suggests that the preparation of the record is a matter requiring the attention of the parties and not of the Registrar. Even if one is to infer from the rates fixed in the Schedule to the Appellate Procedure (Privy Council) Order that the duty of fair copying the record is cast on the Registrar, I do not, with great respect, agree that the appellant is thereby absolved from any responsibility in regard to the performance of his duty.

For the above reasons I would hold that there has been lack of due diligence on the part of the appellant, and ordinarily the appeal should under Schedule Rule 25 be declared to stand dismissed for non-prosecution ; but it was urged on behalf of the appellant that, even if the Crown was guilty of not exercising due diligence, the maxim " nullum tempus occurrit regi " applies and laches cannot be imputed to the Crown. The King, it has been said by high judicial authority, is not bound by the omissions, neglects and blunders of his officers. This privilege was originally founded upon the preoccupation of the King with the welfare of the whole Kingdom and the injustice of prejudicing the Crown because of the remissness of his officers. What ever the origin, the rule is perfectly well established and has been long acted upon, vide *Crown Proceedings by Bell (1948 edition) at page 77.* That clearly is the law in England. It was at one stage contended that in so far as the privileges of the Crown are concerned it should be governed, so far as Ceylon is concerned, not by the English law but by the Roman Dutch Law. This point appears to have been first taken in a case reported in *Vanderstraaten's Reports (1869-1871) at page 83.* In that case, the Supreme Court held that the Common law of England had no authority in Ceylon and that the Royal Prerogative of the English Crown does not exist in Ceylon except in so far as a particular branch of it (1) is claimed as necessarily incident to sovereignty, or (2) has been imposed on this Colony by the Crown as new law, or (3) unless it forms part of the law of the country before conquest. For these reasons the Court held in that case that prescription in respect of immovable property can be made the basis of a claim against the Crown and gives rise to title based on adverse

possession for a third of a century. Whatever the true position may be in regard to the grounds of that decision, it has long been accepted that prescription in respect of immovable property can always be pleaded against the Crown. The ratio decidendi of the case reported in Vanderstraaten's Reports does not support the view taken by our Courts in respect of the Crown's liability in tort. That immunity is well established as a prerogative right which the Crown enjoys. It is neither a necessary incident of sovereignty, nor has it been imposed as a new law, nor is it claimed to be part of the law of the country before conquest. It is based solely on the Royal prerogative which the King enjoys in England, vide *The Colombo Electric Tramway Co. v. The Attorney-General* [1]. In the latter case, the dictum of Lord Watson in *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick* [2] to the following effect was quoted with approval :—

> "The prerogative of the Queen when it has not been expressly limited by local law or statute is as extensive in Her Majesty's colonial possessions as in Great Britain."

It was also held that the immunity of the Sovereign from liability to be sued in tort was not abandoned either expressly or by necessary implication. The same view has been taken in South Africa where also the Roman Dutch Law prevails. In *Union Government of South Africa v. Tonkin* [3] Innes, C.J., while holding that prescription would run against the Crown in respect of property readily alienable, the King's prerogative, save where duly modified, is the same in the several parts of the Empire, and the position of the Crown under a Statute to which the Crown is a party must be interpreted according to the English principles of construction. Both the South African Courts and our Courts have recognised the prerogative of the Crown in other matters ; for instance, the priority over subject creditors in respect of debts of equal degree : but as in Ceylon, in South Africa too it has been held that a subject may plead prescription in respect of immovable property against the Crown, and that the Crown must be taken to have abandoned so much of its prerogative as would lead to a contrary view, vide *Union Government (Min. of Lands) v. Estate of Whittaker* [4]. The view has been expressed both by the Privy Council and by the Supreme Court of South Africa that the Royal Prerogative remains unaffected in the Queen's dominions except in so far as the Crown by consent has agreed to waive it. This agreement may be either expressed or implied. Sometimes, there is express legislation, as in the case of the Crown Proceedings Act of 1947, by which in the United Kingdom a subject was permitted to institute an action in tort against the Crown, or it may be implied from the terms of the Statute itself. Indeed, our Interpretation Ordinance expressly provides in Section 3 that no enactment shall in any manner affect the

[1] *(1913) 16 N. L. R. 161.*
[2] *1892 A. C. 437.*
[3] *1918 A. D. 533 at 539.*
[4] *1916 A. D. 194.*

rights of the Crown unless it is therein expressly stated or unless it appears by necessary implication that the Crown is bound thereby. The mere enactment of legislation to which the Crown gives its assent does not mean that the Crown has abandoned any of its prerogatives. The term " necessary implication " has received judicial interpretation by the Privy Council in the case of *Province of Bombay v. Municipal Corporation of the City of Bombay* [1]. In that case Lord du Parcq who delivered the judgment of the Judicial Committee stated as follows :—

> " The Crown may be bound, as has often been said, ' by necessary implication'. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provision."

Elaborating on this, Lord du Parcq went on to say :—

> " Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholely frustrated unless the Crown were bound, then it would be inferred that the Crown has agreed to be bound. Their Lordships will add that when the Court is asked to draw this inference, it must always be remembered that if it had been the intention of the Legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

Applying those principles to the Schedule Rules of the Privy Council Ordinance No. 31 of 1909 and the Appeal Procedure (Privy Council) Order of 1921, it cannot, it seems to me, be said that unless the Crown agrees to be bound by the rules in regard to due diligence the beneficent purpose of the Rules would be wholely frustrated. In my opinion, therefore, the Crown has not expressly or impliedly agreed to be bound by all the terms of the Schedule Rules of the Privy Council Ordinance. Indeed, there are other branches of Civil Procedure where the prerogative has been recognised. I may mention two instances that came immediately to mind. I refer to the rule in regard to discovery of documents which it has been held, both in India and in Ceylon, despite the provisions of the Civil Procedure Code, does not apply to the Crown : likewise, the Crown has never been called upon to give security for costs in appeal from the subordinate Courts to the Supreme Court or from the Supreme Court to the Privy Council.

[1] *1947 A. C. 58.*

It was also urged that the Crown being unitary and indivisible, the Queen cannot in one part of her domain forego a privilege without also foregoing it in every other part of it. I expressed a contrary view in *Nadaraja v. Attorney-General* [1] and see no reason to differ from what I stated there.

I would accordingly hold that, although there has been, in the circumstances of this case, a lack of due diligence on the part of the officers of the Crown, laches cannot be imputed to the Crown; and, therefore, that the provisions of Schedule Rule 25 do not apply to the Crown. For that reason I would dismiss the present application. I would, however, not allow any costs to the Crown.

Application dismissed.

[1] *(1956) 59 N. L. R. 136.*