1940 *Present :* **Soertsz J.**

PAYAN BHAI *v.* GUNATHILEKE

21—C. R. Colombo, 44,746.

Public Servants (Liabilities) Ordinance (Cap. 88)—Action against public servant—Retirement from service pending action—Right to plead the Ordinance.

A public servant, who was sued at a time when he was a public servant but who retired from service during the pendency of the action, is entitled to plead the benefit of the Ordinance.

THIS was an action on a promissory note against the defendant who was a public servant at the time he was sued.

At the date on which he pleaded the benefit of the Public Servants (Liabilities) Ordinance he had retired from the Public Service. The Commissioner of Requests dismissed the plaintiff's action.

***N. Nadarajah,* for plaintiff, appellant.—The previous decisions do not apply or can be distinguished.**

In this case at the date on which defendant respondent took the plea under the Ordinance he had ceased to be a public servant.

Section 3 of the Public Servants (Liabilities) Ordinance shows that the Ordinance did not contemplate a complaint by a party who had ceased to be a public servant.

Section 3 lays down the only means by which the existence of proceeding in contravention of the Ordinance may be brought before the Court, *i.e.*, by a public servant or the head of his department. Here the defendant was not a public servant at the time of making complaint inasmuch as he had retired. The only remedy open to defendant was to apply by way of *restitutio in integrum*. Provision is made by the section for a complaint to a superior court.

***O. L. de Kretser,* for defendant, respondent.—*Perera v. Perera*[1]; *Wijesinghe v. de Silva*[2]; *Madawela v. Madawela*[3]; *Samsudeen Bhai v. Gunawardene*[4], are in point and in view of sections 2 and 3 of the Ordinance, the fact that the defendant had retired at the time he took the plea is immaterial. The sections must be read as a whole.**

It is the duty of the Court to refuse to allow steps to be taken when the fact that defendant is a public servant comes to its notice and the section enacts only some of the means by which the fact is brought to the notice of the Court. *Karuppen Chetty v. Harrisons & Crosfield, Ltd.*[5]

The reference to Supreme Court in the sections is to meet cases that the Supreme Court has to deal with in appeal.

Cur. adv. vult.

[1] *13 N. L. R. 257.*
[2] *2 C. W. R. 121.*
[3] *6 C. L. W. 94.*
[4] *37 N. L. R. 367.*
[5] *24 N. L. R. 317.*

July 5, 1940. SOERTSZ J.—

I have considered very carefully the submissions made to me by Counsel for the appellant in the course of his interesting argument, and I have come to the conclusion that the learned Commissioner took a correct view of the meaning and effect of sections 2 and 3 of the Public Servants (Liabilities) Ordinance. That view is supported by a large volume of case law. See *Perera v. Perera* (*supra*); *Wijesinghe v. de Silva* (*supra*); *Parangdoun v. Raman and another*[1]; *Madawela v. Madawela* (*supra*); *Samsudeen Bhai v. Gunawardene* (*supra*). Counsel's heroic attempt to distinguish this case from those on the ground that at the date on which the defendant-respondent took the plea under the Ordinance, he had ceased to be a public servant, having retired six months earlier, cannot succeed in view of the fact that section 3 of the Ordinance enacts, "all proceedings and documents in or incidental to an action in contravention of this Ordinance shall be void . . . . " and section 2 says "no action shall be maintained against the public servant . . . . upon any bond, bill of exchange, promissory note . . . .". It is admitted that this was an action on a promissory note, and that the defendant was, at the date of the action, a public servant within the meaning of the Ordinance.

It seems to me that the crucial time for ascertaining the decisive fact in the matter, namely, whether the defendant is or is not a public servant, is the time covered by the pendency of the action. If, at any point during that time the defendant is, or becomes a public servant, the proceedings are automatically rendered void, for the Ordinance says "no action shall be *maintained* (not instituted) against a public servant". The fact that pending an action a defendant ceases to be a public servant is, in my judgment, immaterial, for, the proceedings having once become void, do not revive, so to speak, on a defendant ceasing to be a public servant. At any rate, the Ordinance makes no such provision, and it would be unreasonable to read such a provision into it Counsel relied on the words "all proceedings and documents in or incidental to an action in contravention of this Ordinance shall be void, *and where complaint is made by a public servant or the head of his department*", and contended that the Ordinance does not contemplate a complaint by a party who had ceased to be a public servant. I am unable to entertain this contention. It is, I think, the duty of a Court which becomes aware at any stage and in any manner at all, that the proceedings in an action are or have become void by operation of the Ordinance, to refuse to allow further steps to be taken in that action. See for instance *Karuppen Chetty v. Harrisons & Crosfield, Ltd.*[2]. The words I have quoted as relied on by appellant's Counsel for his contention, provide for the case of one particular method by which a Court is made acquainted with the existence of proceedings in contravention of the Ordinance, and the section goes on to enact that in such a case the Court "shall if necessary discharge such public servant, and may award reasonable costs to the complainant". Section 3 does not in my opinion mean, as Counsel submitted it did, that

[1] *6 C. L. W. 39.*

[2] *24 N. L. R. 317.*

the existence of proceedings in contravention of the Ordinance may not effectively be brought to the notice of a Court by a person other than a public servant actually in service at the time or by the head of his department. Counsel also sought to base an argument on the fact that provision is made by section 3 for a complaint to a "superior court". He argued that that indicated that a party in the position of the present defendant should apply for relief by way of *restitutio in integrum* to the Supreme Court. It seems to me a futile proceeding, and in the nature of a contradiction to ask for relief from something that the law has declared void.

In my view "superior courts" are mentioned in that section to meet cases that have been dealt with by the Supreme Court on appeal. The appeal fails. I dismiss it with costs.

Appeal dismissed.