1975 *Present :* **Tennekoon, C.J., Sirimane, J., and Tittawella, J.**

THE ATTORNEY-GENERAL, Appellant *and* D. W. ABEYSINGHE, Respondent

S. C. 258/71—D. C. Colombo 2140/Z

Pension—No legal right to a pension—Jurisdiction of Court to grant a declaration—Minutes on Pensions—Sections 1, 2 and 15—Civil Procedure Code, Section 217 (G)—Ceylon Constitution and Independence Order-in-Council 1946 and 1947 Section 64(2)—Republican Constitution section 109(1).

The plaintiff was a public servant who held a permanent and pensionable post in the Public Service as an apothecary in the Department of Health. On 1st June 1957 a Board of Inquiry constituted in terms of the Bribery Act. No. 11 of 1954 found the plaintiff guilty of a charge of bribery. He was dismissed from the Public Service with effect from 1st June 1957.

On representations made by the plaintiff, the Public Service Commission, as a merciful alternative varied the Order of dismissal to one of compulsory retirement due to inefficiency. The decision of the Public Service Commission was communicated to the plaintiff by the letter of the Director of Health services dated 31st January 1968. Thereupon the Secretary to the Treasury, in terms of sections 2 and 15 of the Minutes on Pensions, made an award of pension whereby the plaintiff was to receive a pension calculated under the ordinary rules but subject to, (*a*) a reduction of 20 per cent ; and (*b*) the commencement of the payment of his periodical pension only from 1st February 1968.

The plaintiff instituted an action in the District Court praying for a declaration that he is entitled to be paid his full periodical pension calculated according to the Pension Minutes for the period commencing 1st June 1957, which is the date on which his retirement became effective.

Held : (SIRIMANE, J *dissenting*)

(1) The Minutes on Pensions do not create legal rights enforceable in the Courts.

(2) A Court has no jurisdiction to grant a declaration in respect of a pension.

(3) The expression "no absolute right" in the first section of the Minutes on Pensions means "no legal right." In Sri Lanka there is no constitutional provision or any other provision of written law which has the effect of altering the meaning of Section 1 of the Minutes on Pensions.

APPEAL from a judgment of the District Court, Colombo.

G. P. S. de Silva, Deputy Solicitor General, for the Defendant-Appellant.

E. R. S. R. Coomaraswamy, with *C. Chakradaran, S. C. B. Walgampaya, and E. R. S. R. Coomaraswamy (Jnr)*, for the Plaintiff-Respondent.

Cur. adv. vult.

July 2, 1975. TENNEKOON, C.J.—

The plaintiff-respondent was a public servant who held a permanent and pensionable post in the Public Service as an apothecary in the Department of Health.

In April 1957 the plaintiff-respondent was arraigned by the Attorney-General on certain charges of bribery before a Board of Inquiry constituted in terms of Bribery Act No. 11 of 1954 as it then stood. After inquiry the Board found the plaintiff-respondent guilty of one of the charges of bribery on which he was arraigned. This was on the 1st of June, 1957. On the 17th of June, 1957, the Superintendent of Health Services informed the plaintiff-respondent that he was dismissed from the Public Service with effect from 1st June, 1957.

On representations made by the plaintiff-respondent to the Public Service Commission, the Commission decided, as a merciful alternative, to vary the order of dismissal to one of compulsory retirement due to inefficiency. The decision of the Public Service Commission was communicated to the plaintiff-respondent by the letter of the Director of Health Services dated 31st January, 1968. Following upon this the Secretary to the Treasury, in terms of Sections 2 and 15 of the Minutes on Pensions, made an award of pension under which the plaintiff-respondent was to receive a pension calculated under the ordinary rules, but subject, (1) to reduction of 20 per cent; and (2) to the commencement of the payment of his periodical pension only from 1.2.1968.

The plaintiff-respondent instituted this action in the District Court of Colombo praying for a declaration that he is entitled to be paid his full periodical pension calculated according to the Pension Minutes for the period commencing 1st June, 1957, which is the date on which his retirement became effective, and not merely for a period commencing 1st February, 1968, which is the day following that on which the Director of Health Services communicated the decision of the Public Service Commission to the plaintiff-respondent.

Among the defences taken by the Attorney-General were that the Minutes on Pensions created no legal right in favour of a public servant, that the plaint disclosed no cause of action, and that the Court had no jurisdiction to entertain an action in which the only relief prayed for was in effect a declaration in regard to his pension and the date from which he should be paid that pension.

An 'action' is defined in the Civil Procedure Code as 'a proceeding for the prevention or redress of a wrong.' Section 46 of the Civil Procedure Code permits the Court to refuse to entertain a plaint if it does not disclose a cause of action. In section 5, a cause of action is defined as: "the wrong for the prevention or redress of which an action may be brought and

includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury."

The expressions 'wrong', 'right', 'obligation', 'duty', and 'injury' occurring in this definition refer only to legal wrongs, rights, obligations, duties, and injuries. They have no reference, for instance, to rights, wrongs, obligations and duties which are significant only in a social, moral or religious sense. Thus a person instituting action to recover "his pension" or to obtain a declaration of what his pension properly calculated should be, must show that he has a legal right to that pension and that the State's failure to pay the pension is the denial of a legal right or the refusal to fulfil a legal obligation.

Section 6 of the Civil Procedure Code provides that, "every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority or otherwise to invite its interference constitutes an action".

This section is not intended to be a definition of the term "action", for a definition has already been provided for that word in section 5. However, section 6 is illuminative for its description of an action by reference to the Court's power or jurisdiction.

If we now look at section 217 of the Civil Procedure Code we find the kinds of decrees or orders which a Court has jurisdiction to make. Among other kinds of decrees or orders, section 217 (G) empowers a Court, "without affording any substantive relief or remedy, to declare a right or status".

Here again we find that the jurisdiction of the Court to grant declaratory decrees is confined to declarations of rights or status. It is hardly necessary to add that the rights which a Court can declare must necessarily be legal rights.

The first section of the Minutes on Pensions reads as follows:— "Public servants have no absolute right to any pension or allowance under these rules and the Crown retains the power to dismiss a public servant without compensation".

The operative portions of Sections 2 and 15 of the Minutes on Pensions applicable to the plaintiff-respondent's case are as follows:—

> "(2) Subject to the exceptions and provisions hereinafter contained, every public servant holding a permanent office in the service of Sri Lanka which has been declared to be pensionable by a notification published in the Government Gazette, *may* be awarded a pension as under, provided that no officer appointed after January 1, 1905, shall receive from all sources

combined a pension exceeding £ 2000 per annum in respect of his whole public service both in Ceylon and elsewhere:— ....."

" (15) Where a public servant is required by the competent authority to retire on grounds of inefficiency, the Secretary to the Treasury *may, in his discretion,* grant such public servant a pension, gratuity or other allowance: Provided, however, that the amount of pension, gratuity or allowance so granted shall in no case exceed the amount for which his length of service would qualify him."

The expression "no absolute right" to my mind means "no legal right". It is a signal hoisted by the draftsman to indicate both to the beneficiaries under the Minutes on Pensions and to the Courts that the Minutes are not to be taken as creating rights enforceable in the Courts. The "no legal right" concept contained in section 1 of the Minutes is then reinforced by the text of rules 2 and 15 which contain the expressions "may be awarded" and "may in his discretion grant".

It was held as long ago as 1948, in the case of *Gunawardene vs. The Attorney General* 49 N. L. R. 359 that the Minutes on Pensions merely regulates the administration of pensions by those in whose hands that duty is placed and does not confer upon retired government servants any legal rights in respect thereof. I find myself, with respect, in agreement with this decision. In Gunawardene's case Gratiaen, J. was following the decisions of the English Court of Appeal and of the House of Lords in the case of *Nixon vs. The Attorney General* 1930. 1 Chancery 587 in which those two judicial bodies were called upon to examine section 30 of the Superannuation Act (4 and 5 William IV, Chapter 24) of England.

Section 1 of the Minutes on Pensions follows very closely the language of section 30 of the Superannuation Act. I think it would be useful to reproduce a few passages from the judgments in the Court of Appeal 1930. 1 Chancery 537 and of the House of Lords 1931 AC 184. The Court of Appeal said:

"The Act appears to me to be an Act to regulate the administration of the pension and superannuation allowances by those in whose hands that duty is placed, and in no part is there any conferment upon the recipients of a title to claim or receive them. To put the question beyond doubt S 30 is in these terms: 'Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to give any person an absolute right to compensation for past services ....." Words could not be more explicit. An attempt was made to suggest that the use of the word "absolute" left it possible that a

conditional right remained to the civil servants, but I cannot accept that view. *In my judgment the word is used so that a right in any form may be negatived. The Section destroys the possibility of a claim of legal right.*"

The House of Lords in dealing with the submission that the Minutes on Pensions confers a right though it may not be an absolute right said: "My Lords, to get out of a provision that you are not to have an absolute right a positive provision that you are to have a right is an argument which has only to be stated to be rejected."

Again in dealing with the argument that while there may be no right to a pension, once a pension is granted it must be granted according to the provisions of the Superannuation Act, Viscount Dunedin said : "My Lords, that ends the matter, except for what is called the 2nd question, namely, whether even if there is not any right to a pension, nevertheless, if the pension is granted, it must be granted according to certain scales laid down in the Acts. My opinion upon that is there is no second question ; it is only the first question put in another way, because if you have not a right to sue at all to say that you are to recover your pension as such, it does seem to me perfectly impossible to say that you have a right to a declaration that your pension must be so and so. Therefore the second question I think practically has only to be stated to show that it does not exist."

One of the submissions made on behalf of the plaintiff-respondent was that the opening sentence of the Minutes on Pensions which provides that public servants have no absolute right to any pension, says by implication that they have a right, but not an absolute right. Can it be said that they have a conditional or a contingent right ? There is no basis for suggesting that there is a conditional or a contingent right for the rules do not provide for a condition or contingency in which the right becomes a full fledged or perfect right, for that is the ordinary significance of qualifying the word ' right ' by the word 'conditional' or by the word 'contingent.'

To my mind the words ' absolute right ' are used in contradistinction to what are in legal theory known as an " imperfect right ". An imperfect right is one which is unenforceable in the ordinary Courts of Law. One example of an imperfect right is the case where a person having a legal right has lost his right of action by reason of a rule of prescription barring the remedy. It has been urged that the right of a public servant is of this kind, and that it is for that reason that the plaintiff-respondent has not in his plaint asked for an order on the Government to pay his pension. The answer to this is that if a right is unenforceable in the ordinary Courts of Law, it is not one in respect of which even a declaration can be obtained. If

it were otherwise, our Courts would be inundated with declatory actions in respect of causes of action which are prescribed in the hope that by obtaining a declaration from Court the the defendant might be persuaded to do what the Court cannot order him to do. It seems to me that in those cases in which a declaration is prayed for and no substantive relief is asked merely because the substantive relief, if asked for, must necessarily fail, cannot be entertained by our Courts.

The declaration asked for in the present case is not a declaration *quia timet*. A denial of his 'right' is a total denial and the only relief that arises on that denial is a prayer for an order to pay. In a *quia timet* action no substantive relief is asked for, not because a prayer for substantive relief must necessarily fail, but because in the circumstances of the case it becomes unnecessary to ask for substantive relief, or the time is not ripe for claiming such relief.

It has also been suggested that the right to a pension may be a contractual right. Reference was made to the case of *Kodeeswaran v. The Attorney-General* 1969, 72 N.L.R. 337 where the Privy Council held that a Civil Servant in Sri Lanka has a right of action against the Government for arrears of salary in respect of services which he has rendered. But, if it is the position that the right to a pension is based on a contract, one must show what the terms of the contract are and that the State has committed a breach of the terms of that contract. If contract there is, then section 1 of the Minutes on Pensions, and sections 2 and 15 also become part of that contract ; if that document itself contains terms which make it clear that the Minutes on Pensions are not intended to create legal relationships, the only conclusion which a court can come to is that the Minutes on Pensions cannot be the basis of any contractual rights.

The learned District Judge in coming to the conclusion that the plaintiff-respondent is entitled to a declaratory decree relied upon the judgment of Gratiaen, J. in *Attorney-General vs. Sabaratnam* 57 N.L.R. 481.

Gratiaen, J. said in the course of that judgment : " The Minutes on Pensions serves as a reminder that public servants had no absolute right to any pension or allowance under these rules. Accordingly he is entitled only to expect a pension, but this expectation though it might be relied on with full certainty, is nonetheless not a legal right; but Courts of justice have always assumed so far without disillusionment, that their declaratory decrees against the Crown will be respected."

In Sabaratnam's case the plaintiff asked for a decree against the Crown to the effect that " the allegation made by the Government that a sum of Rs. 10,003.57 had been over paid to

the plaintiff on his bill No. 37 for work done in January 1948 was wrongfully made, and that the plaintiff is not liable to refund any monies received on account of the said bill No. 37."

Sabaratnam sought a declaration in this way for the reason that on the basis that there was Rs. 10,003.57 legally due to the Crown from Sabaratnam it was withholding payment of his pension. Not being able to sue for his pension in any way, he sought a declaration in Court that the Crown had no right to a payment of Rs. 10,003.57 from him. The declaration granted in that case was not in respect of a pension claimed by the plaintiff against the Crown. It was a declaration in relation to whether the Crown had or had not a right in law to a payment of a certain sum of money from the plaintiff.

Some further submissions made by Counsel for the plaintiff-respondent need to be examined.

Firstly, it was submitted that although a public servant may not be able to enforce a payment of pension through the courts by asking for a money decree, he may get a declaration. This submission is only a play on words; if a public servant is unable to enforce payment of the pension through the courts, it is because he has no legal right. I have already set out my reasons why I think a declaration in respect of a pension which is not a legal right cannot be had by a public servant. I need only add the quotation from a judgment of H. N. G. Fernando, S.P.J., as he then was, in the case of *Thiagarajah v. Karthigesu* (1966) 69 N.L.R. 73 at 77 :—

> "The declaratory jurisdiction can be invoked for the determination of legal disputes, but not for disputes of a moral, social or political character."

In the present case if the plaintiff-respondent prayed for a declaration coupled with an order directing the State to pay him his pension, the court could not have granted either. It seems to me that courts have no power to grant declarations in cases where the substantive relief if prayed for as consequential on the declaration must necessarily fail.

A declaration granted by court in circumstances such as are present in this case would be a mere *brutum fulmen*, even though the plaintiff-respondent may have a strong expectation of finding a pot of gold where the rainbow ends. Section 15 of the Minutes on Pensions provides that :—

> "Where a public servant is required by the competent authority to retire on grounds of inefficiency, the Secretary to the Treasury may in his discretion, grant such public servant a pension, gratuity or other allowance."

The decision of the Secretary to the Treasury in the context of section 1 of Minutes on Pensions is taken in the exercise of a purely administrative discretion which the courts have no jurisdiction to control. Its only remedy is an appeal of a moral, social or political kind.

Another submission made by counsel for the plaintiff-respondent is based on a case of *R. vs. Criminal Injuries Compensation Board Ex parte* Lain (1967) 2 A. E. R. 770. In that case the wife of a Police Constable Mrs. Lain applied to the Criminal Injuries Compensation Board for compensation under a scheme which was not statutory, but set up by the Executive Government with the concurrence of both Houses of Parliament. This scheme itself provided that payment of compensation would be *ex gratia;* initially, the question whether the application for compensation should be allowed or rejected was taken up by one member of the Board. If the applicant was not satisfied, he was entitled to be heard before three other members of the Board. Mrs. Lain failed on her application before the Board, and she applied for an order of certiorari to quash the decision of the Board. The court of Queen's Bench consisting of Lord Parker, C.J., Diplock, L.J., and Ashworth, J. refused the application on the ground that the decision of the Board disclosed on the face of it no error of law; but they held that if there was an error of law, certiorari would have been granted, even though there was no legal right to compensation under the scheme. This case does not assist the plaintiff-respondent at all. All three judges accepted the position that the applicant had no legally enforceable right to compensation under this scheme. For instance Diplock, L.J. says at page 780 A.E.R :—

> "The concept of *ex gratia* payment by the Crown to subjects is a familiar one. *It gives rise to no rights in the unpaid subject to enforce payment by civil action for a money judgment or a declaration of rights (see Nixon v. A.G.* (1930) 1 *Ch.* 566 *at p.* 587 *or by prerogative order of mandamus (see R. v. Treasury Lords Comrs* (1872) *L.R.* 7 *Q.B.* 387) It does not, however, follow from this, as counsel for the Board contends, that so long as the instructions given by the Executive Government to the Board require the Board to act judicially, the Board are answerable only to the executive government for the way in which they exercise their judicial functions and are free from any control by the High Court." Ashworth J. said at page 784:

> "In the past this court felt itself able to consider the conduct of a Minister when he is acting judicially or quasi-judicially and while the present case may involve an extension of relief by way of certiorari I should not feel

constrained to refuse such relief if the facts warranted it. In the familiar passage from the judgment of Atkin, L.J., in *R. v. Electricity Comrs* (1923) A.E.R. Rep. at p .161 there are included the words : " affecting the rights of subjects " and counsel for the board contended that they constitute an insuperable obstacle to any relief by way of certiorari, because nobody has any legal right to compensation. He argued with force that the payment of compensation is expressly declared to be *ex gratia*: it is bounty and nothing else. For my part I doubt whether Atkin, L.J., was propounding an all-embracing definition of the circumstances in which relief by way of certiorari would lie. In my judgment the words in question read in the context of what precedes and follows them, would be of no less value if they were altered by omitting " the rights of " so as to become " affecting subjects ". I regard the duty to act judicially, in a public as opposed to a private capacity, as the paramount consideration in relation to relief by way of certiorari. "

It will be seen from these passages that this case is no authority for the proposition that refusal to make an *ex gratia* payment was not regarded by the judges who decided that case as affecting the legal rights of the applicant ; on the contrary the court while accepting the position that the decision of the Criminal Injuries Compensation Board did not affect legal rights, held that Certiorari would be available only by modifying Lord Atkin's familiar dictum in *Rex vs. Electricity Comrs* (1923) A.E.R. Rep. at p. 161. Chief Justice Parker, and Ashworth, J. said that, the phrase ' right of subjects ' should be read as ' affecting subjects'. Diplock, L. J, said :—

" I do not find it necessary for the purpose of this case to express any view whether certiorari would lie in respect of a determination which was incapable of having any effect on legal rights in any circumstances. It is, however, in my opinion quite sufficient to attract the supervisory jurisdiction of the High Court to quash by certiorari a determination of an inferior tribunal made in the exercise of its quasi-judicial powers, that such determination should have the effect of rendering lawful and irrecoverable a payment to the subject which would otherwise be unlawful and recoverable. I would therefore, hold that we have jurisdiction to entertain the present application for an order of certiorari against the Criminal Injuries Compensation Board. "

A further aspect of this matter which is worthy of consideration is whether the Ceylon Constitution and Independence Order in Council 1946 and 1947 placed Public Servants who were in service at the date of the enactment of that Constitution in any

better position than they were before the enactment of that Constitution. The appellant was one to whom section 64 (2) of that Constitution would apply. That section reads as follows :—

> " Subject to the provisions of section 63 of this Order all pensions, gratuities and other like allowances which may be granted to persons who, on the date on which this Part of this Order comes into operation, are in the service of the Crown in respect of the Government of the Island, or to the widows, children or dependants of such persons, shall be governed by the written law in force on that date or by any written law made thereafter which is not less favourable. "

The *ex gratia* nature of the pension remains unaffected by this provision. It seems that the position would be the same under the parallel provisions contained in the present Constitution which is substantially the same as section 64 (2) of the previous Constitution. These provisions in our Constitution do not appear to have been intended to convert what was an unenforceable obligation of the State to one which could be enforced through the courts. The case of *Wigg v. The Attorney-General for the Irish Free State* 1927 *A.C.* 627 *is useful for* understanding the position of Public Servants and their pension rights under the Constitution. In that case upon the establishment of the Irish Free State, the two appellants, who were established civil servants of the Crown were transferred to the service of that State. They retired in consequence of the change of Government, and being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought an action against the Attorney-General for the Irish Free State claiming declarations as to their rights.

The Privy Council after referring to the article 10 of the Treaty said : " That article, taken by itself, might not have been enforceable by an individual citizen in the Irish Courts; but by a series of enactments following upon the Agreement for a Treaty, it has been made a part of the municipal law of the Free State." The Judicial Committee then went on to refer to certain orders made under Act 1 of 1922 by which the Treaty was given the force of law. The judgment proceeds: " By the Provisional Government (Transfer of Functions) Order, 1922. clause 7. it was provided as follows:—

> " Where the officer is transferred to the Provisional Government under this order, he shall hold office by a tenure corresponding to his previous tenure, and if he is discharged by the Provisional Government, or if he retired in consequence of the change of Government effected by this Order, he shall be entitled to receive compensation from the Provisional Government and the terms

of such compensation shall not be less favourable to him than such as are accorded in the like circumstances by the Government of Ireland Act. 1920."

Article 78 of Act No. 1 of 1922 provided as follows:—

"Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty."

The Privy Council then said:

"The effect of these enactments, and particularly, Article 78 of the Constitution, was to give every existing officer who was transferred to the Provisional Government. and afterwards to the Free State, a right by Irish Law to the benefit of Article 10 of the Agreement for a Treaty with a corresponding title to enforce that right in the courts of the Irish Free State."

An argument based on the decisions of the English Courts which have laid it down that a servant of the Crown has no legal right under the Superannuation Acts to sue for his super annuation allowances was rejected. The Privy Council said:

"Their Lordships do not question the authority of those decisions, which, indeed, was recognized by the House of Lords in *Considine v. McInerney* 1916, 2 A.C. 162 but those cases turned entirely upon the language of the Superannuation Acts... ....."

The claim of the present appellants rests not upon the Superannuation Acts taken by themselves, but upon those Acts as modified and applied by the Agreement for a treaty between Great Britain and Ireland and Statutes and Orders of 1922. Their Lordships went on to hold that in these circumstances, the appellants were entitled to the declaration they sought.

In Sri Lanka there is no constitutional provision or any other provision of written law which has the effect of altering the effect of section 1 of the Minutes on Pension; the decision in *Wigg vs. The Attorney-General for the Irish Free State* can thus have no bearing on the question before us.

For the reasons stated above I would hold that the learned District Judge was wrong in granting the plaintiff-respondent the declaration which he sought. The appeal is allowed; the judgment of the District Court is set aside. The plaintiff-respondent's action is dismissed. The respondent will pay the appellant costs of the action in the court below and the costs of appeal which I fix at Rs. 350.

SIRIMANE, J.—

The plaintiff-respondent was a Public Servant who held a permanent and pensionable post under the Government as an Apothecary in the Department of Health. Pursuant to certain charges framed against him (which are not material to this case) he was dismissed from service with effect from 1st June 1957. On representations made by the plaintiff-respondent the Public Service Commission (being the competent authority) set aside the order of dismissal and substituted therefor an order of compulsory retirement on grounds of inefficiency. This decision was communicated to the plaintiff-respondent by the Director of Health Services on the 31st January, 1968. Thereafter the Secretary to the Treasury awarded him a pension (reduced by 20 percent) in terms of Regulation 15 of the Minutes on Pensions and fixed the 1st February 1968 as the day from which the pension would be payable. The plaintiff-respondent brought this action against the Attorney-General for a declaration that he is entitled to his full pension and that it should be paid to him as from 1st June, 1957. He later confined his action to a declaration that he was entitled to the pension awarded to him as from 1st June 1957. The defendant appellant took up the position that the declaration sought by the plaintiff respondent was not one which comes within the ambit of Section 217 (G) of the Civil Procedure Code and that the plaintiff-respondent was not in law entitled to maintain an action in respect of his pension or the mode of calculation thereof. The learned District Judge granted the plaintiff respondent the declaration he sought and the Attorney-General appeals against the said judgment.

The learned State Counsel urged that no declaration could be granted to the plaintiff respondent as he had no legal right to a pension and Section 217(G) of the Civil Procedure Code therefore does not apply. He relies strongly on the case of *Nixon vs. Attorney-General* (1930-1 Chancery 587 and the judgment of the House of Lords in the same case reported in 1931 Appeal Cases 184). He also cited the case of *Gunawardene vs. Attorney-General* (49 N.L.R. 359) where Gratiaen J having referred to the case of *Nixon vs. Attorney-General* held that a retired ex-Public Servant has no legal right to a pension enforceable in a Court of Law. Learned State Counsel also pointed out that the case relied on by the learned District Judge namely the *Attorney-General vs. Sabaratnam* (57 N.L.R. 481) was for a declaration in respect of a contract with the Crown and not pension.

I have considered carefully the submissions made by learned State Counsel but find myself unable to agree with him in spite of the high authority cited, which in my view, could be distinguished, and will not apply to a public servant in this country at the present time.

Nixon vs. Attorney-General was a case where the appellants Mr. Nixon (and three others) who were retired Civil Servants and had qualified for the award of superannuation allowances, claimed to be entitled as of right to have superannuation allowances calculated on the full amount of their annual salaries and emoluments including a bonus granted by the Treasury to Civil Servants, in accordance with the scales provided in Section 2 of the Superannuation Act 1859 as amended by the Superannuation Act of 1909. It was there held that the appellants had no legal right enforceable in a Court of law to superannuation allowances calculated according to the scale fixed by the Superannuation Acts. The appellants there also founded their claim (unsuccessfully) on a contract with the Crown and it was held in respect of that claim that the only power of the Lord Commissioners of the Treasury was conferred by statute and that they had no authority to contract themselves out of it. In the course of the Appeal Court judgment Their Lordships referred with approval to the case of *Cooper vs. Queen* (14 Ch. D. 311) and *Yorke vs. King* (1915—1K.B. 852). In the former it was held that

> " Under the Acts regulating the superannuation allowances of the Civil Servants, the decision of the Commissioners of the Treasury as to the amount of an allowance is final, and no Court of law has jurisdiction in the matter,"

and in the latter, that

> " Under the Superannuation Acts 1834-1859, the decision of the Commissioners of the Treasury either as to whether a person is entitled to superannuation allowance or as to the basis upon which an allowance shall be calculated, is final, and no Court of law has jurisdiction in the matter. "

The Privy Council case of *Wiggs vs. Attorney-General* for the Irish Free State (1927 A.C. 274) was also referred to and the following passage from it quoted

> " The English Courts which have laid down that a servant of the Crown has no right under the Superannuation Acts to sue for the superannuation allowances and for this purpose reference was made to *Cooper vs. Queen* and *Yorke vs. King*. Their Lordships do not question the authority of this decision which indeed was recognised by the House of Lords in *Considine vs. McInerny* (1916 2 AC. 162),"

but the judgment in Wiggs case continued as follows,

> " but those cases turned entirely upon the language of the Superannuation Acts. Section 30 of the Act of 1834 (which has not been repealed) enacts that nothing in this Act shall extend or be construed to extend to give any person an absolute right to compensation for past services or to any

superannuation or retiring allowances under this Act, and Section 2 of the Act of 1859 provides that any question as to a claim for superannuation shall be referred to the Commissioners of the Treasury, whose decision shall be final; and, in view of these enactments, it was clear that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. But the claim of the present appellants rests, not upon the Superannuation Acts taken by themselves but upon those Acts as modified and applied by the agreement or a treaty between Great Britain and Ireland and the Statutes and Orders of 1922."

Wiggs case was one whereupon the establishment of the Irish Free State, the two appellants (Wiggs and another) who were established Civil Servants of the Crown, were transferred to the services of that State. They retired in consequence of the change of Government and being dissatisfied with the retiring allowances granted to them by the Ministry of Finance, they brought an action against the Attorney-General for the Irish Free State claiming a declaration as to their rights. It was there held (in view of certain Acts, the treaty between Great Britain and Ireland and certain rules modifying the Superannuation Acts 1834 of 1914) that the appellants could assert their rights by an action against the Attorney-General. I have referred above to further passages in Wiggs case and what was there held to show that the passage from it cited in Nixon's case merely distinguished the cases of *Cooper vs. Queen* and *Yorke vs. King,* but did not follow them, as different considerations applied in the Irish Free State.

There are at least two matters which distinguish Nixon's case from the case before me. Firstly that decision was based purely on the interpretation of the English Superannuation Acts which had provision that the final determination of all questions both as to who is entitled and how far any servant is entitled was by the Treasury, and the decision by the Treasury on all such questions was final. This provision no doubt largely influenced the decision in Nixon's case to exclude an enforceable right in a Court of law. Learned State Counsel has not referred to any such provisions in the Minutes on Pensions which is the relevant "written law" applicable to the instant case. There is no doubt the provisions of Regulation 51 A(2) but that applies only in the case of the exercise of delegated powers and where any person is "dissatisfied" and therefore has no application to the instant case. Secondly it was urged in Nixon's case that there was a contract between the civil servants and the Crown as they entered the civil service relying on a Treasury minute which appeared in the Civil Service Year Book. It was held however that the minute was in no sense an invitation to come into the

Civil Service on the basis of its terms and that the Civil Service Year Book was not published by the authority of the Treasury and that no contract was thereby created. The conclusion I have arrived at in the instant case is based mainly on the difference in this country as regards the second matter above referred to. In this country, it cannot now be doubted that there is a valid contract of service enforceable at law between a Public Servant and the Crown as was held by the Privy Council, in the case of *Kodeswaran vs. Attorney-General* (72 N.L.R. 337). I do not therefore think that we can any longer be guided by the decision in Nixon's case. The decision in Nixon's case also quoted a passage from Lork Buckmaster in the earlier case of *Considine vs. McInerny* on the question of pensions (also quoted by Gratiaen J. in *Attorney-General vs. Sabaratnam*) as follows,

> "He was entitled to expect an annual allowance ..... this expectation, though it might be relied on with full certainty was none the less not a legal right, and no claim for it could be enforced by any legal proceedings."

was purely on the interpretation of the English Superannuation Acts. It was decided at a time when a Civil Servant held office at the pleasure of the Crown and could be dismissed at pleasure and had no enforceable claim for his salary. He had to depend for his salary as also, indeed for his pension, on the bounty of the Crown. The position now, however, even in Great Britain appears to be that in regard to contracts of service the Crown is bound by its express provisions as much as any subject (*Reilly vs. R* 1934 A.C. 176). Learned Counsel for the plaintiff respondent referred to the recent case of *R. vs. Criminal Injuries Compensation Board* (1972 A.E.R. 770). It transpired in that case that the Criminal Injuries Compensation Board was not constituted by statute but by the act of the Crown, that is the executive Government. This Board administered on behalf of the executive Government moneys granted by Parliament to the Crown for distribution by way of compensation to persons who have suffered injury directly attributable to criminal offences. An applicant who had applied for compensation and was dissatisfied with the order of the Board applied to Court for a writ of certiorari. It was argued that the Court has no jurisdiction as the Board did not have authority "to determine questions affecting the rights of subjects" in that a determination of the Board gives rise to no enforceable rights, but only gives the applicant an opportunity to receive the bounty of the Crown. Nixon's case was also cited in support but it was distinguished and the court held that it had jurisdiction,

> "by way of prerogative order to supervise the discharge of these functions notwithstanding that the Board did not

derive their authority from statute, and that their administrative functions, by way of payment, were the distributions of bounty."

So that though at one time both the salary and pension of Civil Servants in England depended on the grace and bounty of the Crown, the foregoing shows that this has gradually given way at least where salary is concerned to enforceable rights in contract and where a non-statutory body decided the distribution of bounty, to the supervisory jurisdiction of the Courts.

The judgments of Gratiaen J. in *Gunawardene vs. Attorney-General* (49 N.L.R. 359) and the *Attorney-General vs. Sabaratnam* (57 N. L. R. 481) were delivered at a time when it was thought that a Public Servant in Ceylon had no right to sue for his salary. In the latter case whilst affirming a declaratory decree against the Crown in respect of the plaintiff's non liability to pay the Crown any sum of money he stated,

> "The Crown enjoys no special immunity from declaratory decrees in cases where they would be appropriate in actions between private litigants. 'The King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.' (*Pawlett v. The Attorney-General.*) It is important to realise that any decree against the Crown for the payment of money to a private individual is itself declaratory in effect though not in form. The Crown is immune from all ordinary modes of enforcing judgments, but in the ultimate result, the obligations arising under the decree are invariably honoured."

and again,

> "The plaintiff has complained that his arrears of salary have not been paid. The Courts cannot assist him ; 'his only claim is on the bounty of the Crown' and his only remedy lies in an appeal of an official or political kind..... by petition, by memorial or by remonstrance, see *High Commissioner for India v. Lall,* where the Judicial Committee entered a decree declaring that the plaintiff was still a member of the Indian Civil Service, but declined to enter a judgment in his favour for arrears of salary upon that basis. Equally, the Courts cannot compel the Crown to pay the present plaintiff any pension which he may have 'earned'. The Minutes on Pensions serves as a reminder that 'public servants have no absolute right to any pension or allowance under these rules.' (*Gunewardene vs. The Attorney-General.*) Accordingly, he is 'entitled only to

expect' a pension, but 'this expectation, though it might be relied on with full certainty, is none the less not a legal right,' (*Considine vs. McInerny*)."

It has now been held by the Privy Council in the case of *Kodesvaran vs. The Attorney-General* (72 N.L.R. 337) that,

"A civil servant in Ceylon is entitled to sue the Crown for arrears of salary which have accrued due, by the terms of his appointment, in respect of services which he has rendered during the currency of his employment. In such a case the fact that his appointment as a Crown servant is terminable at will, unless it is expressly otherwise provided by legislation, is not relevant."

In the course of that judgment Their Lordships stated,

"A general Crown immunity from suit in respect of obligations ex contractu if it existed in the eighteenth century in England might also give rise to the inference that notwithstanding the contractual nature of a civil servant's claim to salary in Ceylon the sovereign attribute of immunity from suit was not intended to be waived by the Proclamation. But by the eighteenth century it had been established that, although no writ could issue against the sovereign, monies due to the subject under a contract with the Crown could be claimed in the English courts by the Procedure of Petition of Right. Their Lordships have not been referred to any case as early as the eighteenth century in which a Petition of Right was brought by a civil servant for arrears of salary; but in 1820 it was taken for granted by Chitty in 'The Prerogatives of the Crown' that a Petition of Right would lie 'where the King does not pay a debt, *as an annuity or wages* etc., due from him.' This was a work of high authority which would be familiar to the judges of Ceylon in the first half of the nineteenth century. Stuart Robertson in his 'Civil Proceedings by and against the Crown' published in 1908 stated categorically that 'payment for services rendered may be claimed by Petition of Right' and cites two such petitions brought in the eighteen sixties of which one was successful and the other settled. It was not until cases decided in 1926 and after that any doubt was cast upon this proposition. Their Lordships will advert to these cases later. It is at present sufficient to state that, as the English law stood at the time of the Proclamation, there was no sufficient ground in constitutional theory to justify the inference that the Crown must have intended to deprive a civil servant engaged in Ceylon of any remedy in the courts of that coun-

try for arrears of salary, if a remedy had previously been available under Roman-Dutch law as applied in the Island."

After referring to the earlier cases in Ceylon Their Lordships continued,

> "Here then is authority dating back more than a hundred years that, under the common law of Ceylon, an action does lie at the suit of a civil servant for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid."

The Supreme Court in Ceylon had in this case held against the public servant's right to recover his salary and relied on the case of *High Commissioner for India vs. Lall* (1948 A.I.R. (P. C.) 121). Gratiaen J. too had cited this case in support of his view in the case of *The Attorney-General vs. Sabaratnam* as stated above. The Privy Council however did not follow Lall's case which had adopted the reasoning of Lord Blackburn in the case of *Mulvenna vs. Admiralty* (126 S. C. 842) and stated.

> "In the opinion of Their Lordships Lord Blackburn's reasoning in Mulvenna's case is defective and his conclusion is contrary to authority and is wrong. That portion of the judgment in Lall's case which adopts it as a correct statement of the law must be regarded as given per incuriam since the relevant and prestigious authorities to the contrary appear not to have been cited to the Board."

It is true no doubt that these are authorities which relate to the recovery at law of the salary of a public servant. In my view however in Ceylon a public servant's pension is so much a part of his contract of service (unlike in Nixon's case) that the authorities in respect of salary will apply with equal force to his pension. In Ceylon it is common knowledge that vacancies in the Public Service are advertised in the Government Gazette—the official publication of the Ceylon Government. In inviting applications for posts in the Public Service it is proclaimed in the advertisements appearing in this Gazette that "the post is permanent and pensionable"—until pensions were done away with in 1972 and a Provident Fund substituted. The applicants relied very much on the fact that the post was pensionable and preferred to join the Government Service even on lower scales of pay than the private sector in order to "earn" a pension. Even their letters of appointment stated that the post to which they were appointed was permanent and pensionable. It is on the faith of these statements that a public servant in Ceylon serves the Government and gives of his best to "earn" not only his salary but also his pension in terms of the Minutes on Pensions which is part of the "written

law" of Ceylon. Can it then be said at the end of his service, as State Counsel contends, that he has no right whatever to a pension and that the Minutes on Pensions are merely guide lines for the Secretary to the Treasury which he is free to follow or disregard? State Counsel who has appeared in the Lower Court has gone so far as to say that the Secretary to the Treasury can act on his own whims and fancies and there is no remedy! For my part I cannot subscribe to such a position, as to my mind there is something inherently unjust and unfair if that were the true position.

Great stress has been laid by learned State Counsel on the opening paragraph of the Minutes on Pensions which states,

> "Public servants have no absolute right to any pension or allowance under these rules, *and the Crown retains the power to dismiss a Public Servant without compensation.*"

and to similar words also found in the English Superannuation Acts and the interpretation given to those words in Nixon's case as denying any right. It must be remembered that in Nixon's case Their Lordships considered such words in the background of the other provisions of those Acts—especially the proviso which declares that the decision of the Commissioner's of the Treasury shall be final on all questions. In my view the words underlined by me in the above provision clearly indicate the limitation placed on the "right" and why therefore it refers to "no absolute right." With great respect I am unable to interpret the words "no absolute right" as being the same as "absolutely no right", which in effect is the decision in the English cases as different considerations apply to a Public Servant in this country at the present time. To my mind this phrase indicates that public servants are not entitled to pensions under all or any circumstance, but only, and subject to such limitations and conditions, as are laid down in the Minutes on Pensions itself. For instance the words "and the Crown retains the power to dismiss a public servant without compensation" referred to above is one instance where a public servant will have no right to a pension, as otherwise even a Public Servant who is dismissed can claim that he has a right to a pension. Then again Regulation 15 lays down that if a public servant is retired for inefficiency, then the Secretary to the Treasury may in his discretion grant a pension or a reduced pension or none at all. In my view the word "may" in Regulation 8 of the Minutes on Pensions dealing with the payment of a pension must be read as "shall" unlike the word "may" in Regulation 15 where a discretion is expressly provided for. On the other hand if a public servant, who has joined the service on the faith of the express provision that the post is pensionable, discharges his duties faithfully and efficiently during

his period of service and thus "earns" his pension and retires on reaching the age of retirement or on any other lawful ground provided by the Minute on Pensions itself, he is in my view entitled as of right to the pension he has "earned" computed in terms of the Minutes on Pensions, as his pension is as much a part of his contract of service as his salary.

Section 64 (2) of the Ceylon Constitution and Independence Order-in-Council 1946 and 1947 which would apply to the appellant reads:—

> "Subject to the provisions of Section 63 of the Order, all pensions, gratuities and other like allowances which may be granted to persons who, on the date on which this part of this Order comes into operation, are in the Service of the Crown in respect of the Government of the Island, or to the widows, children or dependents of such persons, *shall be governed* by the written law in force on that date or by any written law made thereafter which is *not less favourable.*"

The present Constitution of The Republic of Sri Lanka enacts in Section 109 (1) that.

> "All pensions, gratuities or other like allowances payable to persons who have ceased to be in the service of the Government of Ceylon or cease to be in the services of the Republic of Sri Lanka, or to widows, children or other dependents of such persons, *shall be governed* by the written law under which they were granted or by any subsequent written law which is *not less favourable.*"

The Minutes on Pensions has been declared to be a part of the written law of Ceylon by Ordinance No. 2 of 1947. So that the payment of pensions "shall be governed" by the Minute on Pensions and not on the whims and fancies of the Secretary to the Treasury who is free to disregard the minute as has been suggested by learned State Counsel. The Minute on Pensions is binding not only on the public servant but also on those entrusted with the duty of computing and paying his pension. The latter are under a duty in view of the provisions of Sections 64 (2) and 109 (1) above referred to, to pay pensions according to the regulations contained in the Minute on Pensions which even enacts that no subsequent law can make it "less favourable." This creates a corresponding right in the public servant to receive his pension in terms of that Minute. After the Independence Order-in-Council and the decision in the Kodeswaram case above referred to, the old English cases will hardly have any application to present day public servants in Sri Lanka. In the present time the rights of the worker are increasingly recognised and his right to a

gratuity (in addition to provident fund benefits), which formed no part of his contract of service, is now accepted. In this context it would be unjust to construe the Minutes on Pension in such a way that it would leave public servants, who joined the service on the footing that their posts were pensionable, to the "whims and fancies" of those officers entrusted with the duty of paying their pensions. I am therefore of the view that at the present time, a public servant in Ceylon has an enforceable right not only in respect of his salary but also in respect of his pension and he is therefore entitled to a declaration as to the amount and the date from which such pension is payable in terms of the Minute on Pensions.

There remains to consider whether the plaintiff respondent was entitled to receive his pension from 1st June 1957 or whether it was within the discretion of the Secretary to the Treasury to fix it from 1st February 1968 as he has done in the instant case. Regulation 15 of the Minute on Pensions under which the Secretary to the Treasury has acted reads as follows :

> "Where a public servant is required by the competent authority to retire on grounds of inefficiency, the Secretary to the Treasury may, in his discretion, grant such public servant a pension, gratuity or other allowance ; provided, however, that the amount of pension, gratuity, or allowance so granted shall in no case exceed the amount for which his length of service would qualify him."

This regulation authorises the Secretary to the Treasury in his discretion (1) to grant or not to grant a pension (2) if granted it should not exceed (and so it may be less than) the amount for which the length of service of the public servant would qualify him to receive.

There appears to be nothing in this regulation which refers to the date from which such pension should be paid or expressly giving to the Secretary to the Treasury a discretion to fix a date. Pensions are payments made on retirement and it was conceded by learned State Counsel that the date of retirement of the plaintiff respondent for inefficiency dates back to 1st June 1957. Regulation 8(1) of the Minute on Pensions which relates to the mode of computation of pensions reads:—

> "The pension or gratuity awarded to a public servant shall be computed upon the salary drawn by him at the time of his retirement in respect of the permanent office or offices, then held by him, provided that he shall have held such office or offices, or an office or offices, to which the same fixed salary or incremental scale of salary is attached, for at least three years, otherwise the pension shall be calculated upon the

> average of the salaries attached to the *permanent offices held by such person during the three years next preceding the commencement of such pension.....*"

This indicates that ordinarily the commencement of the pension must be immediately after the cessation of his service. There has however been an amendment to Regulation 2A (1) of the Minutes on Pensions by a Gazette notification of 6th June 1971 published in Government Gazette Extraordinary No. 14962-3 of 14th June 1971 by the insertion of a new sub-regulation (iii) and this amendment is deemed to have come into effect on 1st February, 1964. The relevant part of this new sub-regulation reads :—

> " (iii) An officer who is granted a pension from a date later than the date of his retirement under Section 15 of these minutes..... "

This sub-regulation when read along with Section 15 (under which the plaintiff was awarded his reduced pension in this case) by implication, though not in express terms, gives to the Secretary to the Treasury a discretion to fix a date later than the date of retirement when awarding a pension under Section 15. Since this sub-regulation is deemed to have come into effect from February, 1964 it would apply to the plaintiff's case as he was awarded his pension under Section 15 in 1967. The plaintiff's case therefore fails.

For these reasons I would hold that the plaintiff had a right to maintain an action for the declaration he sought but on an interpretation of the "Written Law" (The Minutes on Pensions) applicable to his case it must fail on its merits. The appeal is therefore allowed, the judgment and decree of the District Court is set aside and the plaintiff's action is dismissed with costs both here and below.

TITTAWELLA, J.—

I agree with the Chief Justice that the Minutes on Pensions create no legal right in favour of a public servant and that the Courts have no jurisdiction to entertain an action praying for a declaration in regard to his pension and the date from which he should be paid. I also agree that in Sri Lanka there is no constitutional provision or any other provision of written law which has the effect of altering the provisions of Section 1 of the Minutes on Pensions.

There is however, one matter that calls for consideration before disposing of this appeal and for this purpose a very brief narrative of the facts would be helpful. The plaintiff-respondent was dismissed from the public service on June 1, 1957, after being found guilty on a charge of bribery. On January 31, 1968 he was informed that the Public Service Commission had, as a merciful

alternative to the order of dismissal varied it to one of compulsory retirement due to inefficiency. In a subsequent communication the Director of Pensions informed the plaintiff—respondent that under Section 15 of the Minutes on Pensions he had been awarded a pension reduced by twenty per cent as from February 1, 1968.

It was contended on behalf of the plaintiff-respondent at the trial and in appeal that whilst Section 15 of the Minutes on Pensions gave a discretion to the Secretary to the Treasury on the question of granting a pension and the quantum to be paid, he had no discretion to determine the date from which the pension should become payable. This date it was contended, could be no other than the date of retirement, viz: June 1, 1957. State Counsel on behalf of the defendant-appellant argued that Section 15 of the Minutes on Pensions gave the Secretary to the Treasury an absolute discretion both as regards the quantum and the date of payment of the pension.

The learned District Judge in his judgment of August 31, 1971 holding with the plaintiff-respondent states :—

> Once a competent authority decides to retire a public servant on grounds of ineffiiciency from a certain date it must take effect from that date and he must be paid his pension from that date. It would not be logical to do otherwise. If learned Crown Counsel 's argument is accepted it would lead to a situation like in the present case where a person is retired from a certain date but paid a pension from another date, leaving a hiatus which is not warranted either according to the Minutes on Pensions or by reason.

A plain reading of Section 15 does not lend itself to the interpretation sought to be given to it by the learned District Judge. The granting or withholding of a pension, gratuity or other allowance in the circumstances is entirely in the discretion of the Secretary to the Treasury. The limitations to the exercise of this discretion are spelt out in the proviso to the section itself. It would be strange if the Secretary to the Treasury who is vested with the discretion of granting, not granting or reducing the benefits finds himself not being able to determine the date from which the benefits should take effect. It appears to be a needless fetter on his discretion.

An examination of paragraph (iii) of sub-section (1) of Section 2A of the Minutes on Pensions also makes the position clear. This paragraph was inserted in the Minutes on Pensions by a notification published in Gazette Extraordinary No. 14,962/3 of

June 14, 1971 which deemed the paragraph to have come into effect on February 1, 1964. Sub-section (1) of section 2A deals with the provision whereby an officer to whom a pension is granted may at his option be paid a reduced pension together with a gratuity (commuted pension). The paragraphs in sub-section (1) deal with the several occasions when such an option could be exercised and paragraph (iii) is in the following terms:—

> An officer who is *granted a pension from a date later than the date of his retirement under Section 15 of these Minutes* and who had exercised or who exercises the option referred to in the preceding provisions of this Section may, with effect from the date following the expiry of a period of twelve years and six months from the date on which his pension is granted or from February 1, 1964, whichever date is the later, be paid the full pension which would have been paid to him had he not exercised such option.

It will thus be seen that the Minutes on Pensions clearly contemplate the situation where under Section 15 a person may be awarded a pension from a date *later* than the date of his retirement. This is precisely the position contended for by the defendant-appellant.

The resulting position then is that even if the plaintiff respondent was right in his contention that a declaratory action was available to him in respect of his pension, his action would necessarily have failed because in granting a pension under Section 15 of the Minutes on Pensions from a date later than the date of the plaintiff-respondent's retirement, the Secretary to the Treasury has not acted under any misapprehension of the meaning of that Section.

The appeal must therefore succeed, and I agree with the order proposed to be made by the Chief Justice in his judgment.

Appeal allowed.