1962 *Present* **: T. S. Fernando, J., L. B. de Silva, J., and Sri Skanda Rajah, J.**

THE QUEEN *v.* D. J. F. D. LIYANAGE and others

Trial at Bar No. 1 of 1962

Trial-at-Bar under ss. 4, 8 and 9 of Criminal Law (Special Provisions) Act, No. 1 of 1962—Direction and nomination of Judges effected in the English language only—Communication thereof to Court in English—Validity of procedure—Powers of Minister to direct a Trial at Bar and to nominate Judges—Constitutionality—Inadmissibility of evidence of mala fides *in the Minister—Effect of words " shall not be called in question in any Court "—Constitution of Ceylon—Separation of legislative, executive and judicial powers—" Judicial power "—Criminal Procedure Code, ss. 216, 440A—Official Language Act, No. 33 of 1956, s. 2—Language of the Courts Act, No. 3 of 1961—Ceylon (Constitution) Order in Council, 1946, ss. 29 (1), 52, 88—Courts Ordinance, ss. 6, 21, 51—Applicability of principle that justice should not only be done, but should manifestly be seen to be done.*

Section 2 of the Official Language Act, No. 33 of 1956, reads as follows :—

" The Sinhala language shall be the one official language of Ceylon :

Provided that where the Minister considers it impracticable to commence the use of only the Sinhala language for any official purpose immediately on the coming into force of this Act, the language or languages hitherto used for that purpose may be continued to be so used until the necessary change is effected as early as possible before the expiry of the thirty-first day of December, 1960, and, if such change cannot be effected by administrative order, regulations may be made under this Act to effect such change. "

Sections 8 and 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read as follows :—

" 8. Any direction issued by the Minister of Justice under section 440A of the Criminal Procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of writ or otherwise.

9. Where the Minister of Justice issues a direction under section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three Judges so nominated, shall be the president of the Court.

The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted, and accordingly the constitution of that Court, and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise. "

On the 23rd June 1962 the Minister of Justice, purporting to act under section 440A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, directed that certain persons be tried before the Supreme Court at Bar by three Judges without a jury. Thereafter, on the same day, purporting to act under section 9 of the Criminal Law

(Special Provisions) Act, he filed in the Court a document nominating three Judges to preside over the trial. The direction and nomination, and the communication thereof to the Court, were effected only in the English language and not in the Sinhala language.

Held, (i) that, even assuming that on or after 1st January 1961 official acts of officials could have been or can be performed only in the Sinhala language, as English is still admittedly the language of the Court, the communication by the Minister to the Court by documents made out in English of the direction and nomination of Judges by him was a sufficient compliance with the existing law and was not rendered null and void by the provisions of section 2 of the Official Language Act, read with the Language of the Courts Act, No. 3 of 1961.

(ii) that section 8 of the Criminal Law (Special Provisions) Act empowering the Minister of Justice to issue direction that a Trial at Bar be held by three Judges without a jury, under section 440A of the Criminal Procedure Code, is *intra vires* the Legislature.

(iii) that the provision in section 8 of the Criminal Law (Special Provisions) Act that any direction by the Minister "shall not be called in question in any Court" excludes the admissibility of evidence to establish the existence of *mala fides* in the Minister.

(iv) that section 9 of the Criminal Law (Special Provisions) Act is *ultra vires* the Constitution because (*a*) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order in Council, 1946, or is in derogation thereof, and (*b*) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature.

(v) that the Minister's power of nominating the Judges, even had it been *intra vires* the Constitution, would have offended against the cardinal principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

ORDER made in respect of certain preliminary objections taken to a Trial at Bar which was sought to be held under the provisions of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *K. N. Choksy*, for the 1st and 2nd Defendants, raised certain preliminary objections.—The Criminal Law (Special Provisions) Act, No. 1 of 1962, and more especially sections 8 and 9 was an attempt on the part of the legislature to assume an authority where it had none and to fortify itself by seeking to prevent the constitutionality of the Act being raised in any court. The first question therefore is whether the legislature can by an Act of Parliament immunise itself by withdrawing the powers of the courts to question the validity of an Act.

The (Ceylon) legislature is not supreme and not merely Section 29 but every section in the Constitution is an entrenched clause because an amendment can only be passed by a two third majority..

A country may be politically sovereign without its legislature being supreme; Parliament cannot pass an Act that is ultra vires and at the same time say that the Courts cannot declare it invalid—Hood Phillips, "Constitutional Law of Great Britain and the Commonwealth" 2nd edition at pp. 44, 47; *Harris v. The Minister of the Interior* (1952) 2 S. A. L. R. 428 at 464; *Minister of Interior v. Harris* (1952) 4 S. A. L. R. 769 at 779.

Sections 8 and 9 of Act No. 1 of 1962 shut out the fundamental authority of the courts to examine the validity of an Act. Legislation is bad unless it is for " the peace, order and good government of the Island " (a requirement of Section 29 (i) of the 1946 Constitution Order in Council). The Courts have a right to examine whether a piece of legislation is for " the peace, order and good government of the Island "—*Aziz v. Thondaman* 61 N. L. R. 217 at 222 and 223; *Ashbury v. Ellis* 1893 A. C. 339 (P. C.) (New Zealand Case) at 341 & 344; *P. S. Bus Co. v. C. T. B.* 61 N. L. R. 491.

The Courts cannot avoid considering the question of jurisdiction in spite of Sections 8 and 9. See *The Queen v. Theja Gunawardene* 56 N. L. R. 193 at 206; *Upper Argbid Assessment Comm. v. Gartsides Brewery* 1945 All E. R. Vol. I 338; *In re " Arnaldo da Brescia "* 23 N. L. R. 391 at 395; *Desphande v. Emperor* 1945 A. I. R. (Nag.) 23; *Liversidge v. Anderson* 1931 A. C. 321.

Sections 8 and 9 say that the direction and nomination shall not be questioned in " any " court. " Any court " cannot include the Supreme Court.

The Minister's direction under section 440A of the Criminal Procedure Code was bad in law for the following reasons :—

(i) In the context of the constitutional position of the time, the removal of so fundamental a right as trial by jury in 1915 by section 440A of the Criminal Procedure Code was repugnant to the laws of England, and consequently ultra vires of the Constitution as it stood in 1915. In regard to the history of Sections 216 and 440A of the Criminal Procedure Code dealing with trial at bar and especially the constitutional background to the introduction of Section 440A in 1915, see :—Ordinance No. 18 of 1915 (introducing 440A); Royal Charter of 1810 (esp. clause 10) introducing trial by Jury; Royal Instructions 24th November 1910; Letters Patent 24th November 1910; Ceylon Constitutional Order in Council 1920 (esp. sections 44, 45, 47); Royal Instructions 11th September, 1920; Letters Patent 11th September 1920; Parliamentary Government in the British Colonies (1894) 2nd Edition.

(ii) The substitution of " the Minister of Justice " for " the Governor by warrant under his hand " in section 440A by proclamation under the power given by section 88 of the Constitution Order in Council of 1946 " to modify, add to, or adapt " any written law was ultra vires the Constitution. The Minister of Justice as a politician and a member

of the Cabinet cannot be equated to the impersonal Head of State. In the context of the constitutional background the substitution was invalid and the Minister of Justice was not the proper authority to issue the direction under section 440A.

It is incongruous that the sanction of the Governor-General is necessary for prosecution under section 104 of the Criminal Procedure Code while the hallowed right of trial by jury may be suspended by a mere fiat of the Minister under section 440A.

Other consequences (anomalies and contradictions) would flow from the attempt to substitute the Minister of Justice for the " Governor by warrant under his hand ". Was it proper for the Attorney-General to disclose information to the Minister of Justice and had the Ministers the right to call for information from the Attorney-General who is a non-political person ? Under our Constitution the Minister of Justice has no right and is not expected to interfere with the performance of judicial functions or with the institution or supervision of prosecutions. Nor has he any power to issue any direction to any court. His functions are purely ministerial and administrative. The direction therefore was an unconstitutional and invalid order.

Then there was the form of the Direction ; whom does the Minister direct—the Supreme Court or the Chief Justice ? What happens if the Supreme Court or the Chief Justice ignores it as it transgresses the spirit of the constitution ? Conflict between the executive and the judiciary would inevitably arise if the Chief Justice orders a trial at bar by Jury under section 216 and the Minister under section 440A makes a direction for trial at bar without a jury. A direction as in this case would be in direct conflict with the express provisions of section 5 of the Criminal Procedure Code. See :—Criminal Procedure Code Sections 5, 104, 216, 385, 440A ; Ceylon Constitution Order in Council, 1946 (sections 88, 45, 46, 45 (2) ; Ceylon Independence Order in Council, 1948 ; Soulbury Report, paras. 394–396, 401–405 ; Proclamation in *Government Gazette* No. 9,773 of 24th September, 1947 ; Proclamation in *Government Gazette* No. 9,828 of 5th February, 1948 ; *In Re Agnes Nona* 53 N. L. R. 106.

(iii) The direction of the Minister is also invalid because it is a direction of a member of the Executive in a cause in which he had great personal interest leading to bad faith—mala fides. The jurisdiction of the court flows from the direction of the Minister (of 23rd June 1962). The Court can go into the question of bad faith. On the unquestioned facts as contained in the information laid, there was alleged an attempt to overthrow the Government of which the Minister was a member. This alone is sufficient to establish his personal interest, and bias should be presumed. No person interested in the cause should be a judge. That " justice must not only be done but should seem to be done " may be a hackneyed phrase but has not lost favour.—*Desphande v. Emperor* 1945 A. I. R. (Nag.) 23.

Counsel then went on to deal with what he called " the second limb of the argument ", viz., the jurisdiction and constitution of the court : the nomination of the judges by the Minister. There is no legislation here or anywhere which contains in one small Act principles and devices so fundamentally opposed and abhorrent to the way justice is normally administered in criminal cases. The whole scheme of the Act reveals a purpose different from what appears on the face of the Act. The legislature cannot do indirectly by a subterfuge what it cannot do directly. Some of the objectionable features of the Act are : the creation of new offences making them retroactive ; the creation of a new court specially constituted on the nomination of Judges by a Minister ; the provision that no court can question the direction of the Minister or the constitution and jurisdiction of the court ; the laying down of procedure by the court of trial itself ; confining the authority and jurisdiction of the court to one special case ; providing for the expiry of the provisions of the Act as regards this case ; suspending the operation of certain sections of the Criminal Procedure Code dealing with the investigation of cognizable offences ; amending the Evidence Ordinance and fundamental rules thereunder, admitting hearsay and admitting confessions obtained at a time when the law made them inadmissible ; reposing in the Inspector-General of Police and his associates an uncontrolled power for preventive detention on mere suspicion and not on reasonable grounds ; detention under conditions which were not published ; right to suspend both the provisions of and rules under the Prisons Ordinance ; startling innovation of trial *in absentia*.

Certain dates are significant : On the 22nd two new judges were appointed to the Supreme Court and on the 23rd came the direction, the information and the nomination of the judges of this court.

The nomination of the Judges by the Minister was a violation of the Constitution and ultra vires the Constitution. It was an open attempt to interfere with one of the entrenched institutions in the Constitution, viz., an independent judiciary.

One reason why this cannot be done is that under our Constitution there is a separation of powers. There is clearly a three-fold division of governmental powers between the 3 main organs. The separate headings " The Legislature ", " The Executive " and " The Judicature " (Parts III, V and VI of the Constitution) must be given due weight. See *Inglis v. Robertson* 1898 A. C. 616 at 624. We do not have a complete separation of powers but there is a definite separation and greater than in England See Jennings & Tambiah : Vol. 7 British Commonwealth p. 76. Although the Judicature is dealt with in Part VI it is not complete in itself, for the framers of the Constitution appear to have adopted institutions as they found them at that time. The Constitution does not say what the Supreme Court is. For this purpose we must look to statute law like the Courts Ordinance to complete the picture.

It is quite clear that the Constitution tried to establish the independence of the judiciary by seeing to it that the executive did not have a hand in the appointment, removal and salaries of judges. That was the purpose too of the Judicial Services Commission : to prevent executive interference. See *Senadhira v. Bribery Commissioner* 63 N. L. R. 313 at 317 ; *The Bracegirdle case* 39 N. L. R. 193 at 210.

The relevant sections of the Criminal Law (Special Provisions) Act must be considered in the light of the complete independence of the judiciary well established in the past. Traditional and historical usages and practices must bo taken into consideration in the interpretation of statutes.—*Naim v. University of St. Andrews* 1909 A. C. 147.

When the executive could not and dared not make a frontal attack on the independence of the judiciary, could it by legislation seek a colourable device to establish a court parallel to the Supreme Court and thereby nullify the independence of the judiciary ? This is a case of the executive seeking through an act of the legislature to do indirectly what it cannot to directly. In such cases the Courts will examine the true character of the legislation (the pith and substance) to decide whether it is *intra vires* the Constitution. On examination the Act in question reveals a concealed purpose and endeavours to achieve by a legislation passed by an ordinary majority something prohibited by the well established principle of the independence of the judiciary which the Constitution itself safeguards. See :—*Kodakan Pillai v. Mudanayake* 54 N. L. R. 433 at 438 ; *A. G. Ontario v. Reciprocal Insurers* 1924 A. C. 328 at 337 ; *Union Colliery Co. v. Attorney-General of British Columbia* 1899 A. C. 580 ; *Attorney-General of Ontario v. Attorney-General of Dominion of Canada* 1896 A. C. 348 ; *Canadian Federation of Agriculture v. Attorney-General of Quebec* 1951 A. C. 179 at 195.

The nomination of the Judges by the Minister also destroys the oneness and identity of the Supreme Court. Section 52 of the Constitution refers to " the Supreme Court " but does not say what it is. It seems to have adopted the institution as it was at the time. But the Courts Ordinance 1889 and the earlier Charters (1801, 1810, 1811, 1833) make absolutely clear the " oneness " of the Supreme Court. [In reply to Court, Counsel said it was not necessary for him at this stage to claim that certain sections of the Courts Ordinance were part of the Constitution although that was his view. But he wished to state that section 52 of the Constitution Order in Council, section 6 and section 3 and section 41 of the Courts Ordinance, and clause 5 of the Charter of 1833 were all connected up and established beyond doubt the oneness and identity of the Supreme Court.] Section 52 of the Constitution must be examined against the background of the past. There cannot be two parallel Supreme Courts or a subdivision of the Supreme Court. Although section 9 of the Criminal Law (Special Provisions) Act speaks of the " Supreme Court ", what it brings into existence is not the Supreme Court. Nomination of the Judges by a Minister is totally foreign to

the institution of the Supreme Court. In addition it is repugnant to the concept of the independence of the judiciary and something utterly unknown to and *ultra vires* the Constitution. [Counsel cited various provisions of the Courts Ordinance, the Court of Criminal Appeal Ordinance, and the Parliamentary Elections Order in Council to show that constituting a bench to hear a case has always been a duty of the Chief Justice himself or a matter for the internal arrangement of the Court.]

Nowhere can an " alien " hand interpose itself and attempt to nominate judges. The moment a foreign hand comes in and picks 3 out of the panel of Supreme Court Judges the resulting court loses the character of the Supreme Court, and what it forms is a tribunal of 3 Supreme Court judges—but not the Supreme Court. The reference in section 9 of Act 1 of 1962 to " the Court consisting of three judges " is an appreciation of this fact, and the declaration that it is " duly constituted " arises from an inner consciousness of its inherent weakness. See *Engineer's Case* 1913 A. C. 107.

The position of the Minister of Justice as recommended in Articles 394, 395, 396 of the Soulbury Report is important. There could be no uestion of the Minister of Justice having any power of interference as regards the institution of criminal or civil proceedings. The Manual of Procedure cannot be interpreted to give the Minister such a power. Any Prime Minister allocating functions must allocate them within the bounds of the Constitution.

[In reply to Court, Counsel said that it was particularly section 9 of the Act of 1962, with its power of nomination by the Minister, whic offended the Constitution. It offended Part IV of the Constitution, especially sections 52 and 53. Inherent and implicit in these provisions is the effort of the Constitution to preserve the independence of the judiciary and prevent the taint of influence by the executive. In answer to Court whether it was not the judicial function that was preserved, Counsel said that that could only be done by isolating the judiciary from any possible taint of executive influence. He referred to a lecture by Lord Justice Denning on " Independence and Impartiality of Judges " in 1954 S. A. L. J. 5 Vol. 71 Part IV at p. 351.]

The nomination of Judges is an interference with the judicial process. The judicial process in this case starts with the direction.

[Replying to a question by Court whether Act 1 of 1962 would have been valid if passed by the British Parliament, Counsel replied that the British Parliament was supreme while Ceylon, Australia, New Zealand, etc., had written Constitutions. He submitted that legislation in Ceylon, to be *intra vires* the Constitution, must not only observe section 29 (2) but also section 29 (1) and be for " peace, order and good government ".]

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar*, *E. A. G. de Silva*, *R. A. Kannangara* and *K. N. Choksy*, for the 3rd Defendant.

E. G. Wikramanayake, Q.C., with *A. C. M. Ameer, R. A. Kannangara* and *G. T. Samerawickreme*, for the 4th Defendant.—It is clear law that the court has the power to decide whether it has jurisdiction to hear the case, and if there is anything that has infringed the Constitution, to declare it *ultra vires*. See *Queen v. Theja Gunawardene* 56 N. L. R. 193.

Section 29 of the Constitution Order in Council of 1946 provides that Parliament may " make laws for the peace, order, and good government of the Island ". There is an overwhelming presumption that Parliament legislates for peace, order and good government but it is not an irrebuttable presumption. When in a given case that presumption is rebutted it is the duty of the courts to hold that the piece of legislation in question is *vltra vires* the Constitution. Section 9 of Act 1 of 1962 is not for " good government ". Section 29 (2) provides for further limitations and the opening words of the section " no such law " are significant. Section 29 (3) makes void " such " laws as have already passed the test under section 29 (1) but fall under the prohibited class in section 29 (2).

Even assuming that the direction given by the Minister of Justice was good, the selection of Judges by the Minister to hear the case was *ultra vires* the Constitution. According to the Constitution no one outside can interfere with matters relating to the Supreme Court. Even with regard to the minor judiciary no one outside can interfere with any appointment, dismissal or transfer of a judicial officer. See Part IV of the 1946 Constitution Order in Council.

We have had Constitutions and changes of Constitutions but the constitution (i.e. the functions) of the Supreme Court has always remained the same. There has always been only one Supreme Court and this oneness of the Supreme Court needs to be stressed. See section 3 and section 6 of the Courts Ordinance. Judges sit as representatives of the Supreme Court whether singly or collectively and not as Supreme Court judges. The distribution of work among the judges and the question of who should hear a particular case is entirely an internal matter. When there is any outside interference in the selection of a judge or judges the integrity of the Supreme Court is broken. The picking of three judges by the Minister to hear this particular case had a disintegrating effect and the resulting court is not the Supreme Court but only a panel of three judges of the Supreme Court. Anything that breaks up the Supreme Court is an interference with the independence of the judiciary.

As soon as the information is laid the Supreme Court takes cognizance fo it. In the present case the direction came before the information—a direction to try a non-existing case. The judicial process may be said to begin with the direction and certainly begins with the information. The nomination by the Minister that came after the information was an interference with the judicial process.

The legislature may create new courts but they must not come into conflict with the courts already functioning and recognised by the Constitution. See *Senadhira v. Bribery Commissioner* 63 N. L. R. 313; *Tillekawardene v. Obeyesekera* 33 N. L. R. 193; *Huddart Parker v. Moorehead* 8 Com. L. R. 330 at 357.

The direction and the nomination do not exist in law. Since the direction and the nomination were acts of the Minister, they were official acts. All official acts have to be in the official language: Sinhala. Neither the direction nor the nomination was made in Sinhala. By section 2 of the Official Language Act No. 33 of 1956 "The Sinhala language shall be the one official language of Ceylon." The proviso to section 2 permitted the use of other languages already in use where it was impracticable to commence the use of Sinhala immediately, but the proviso itself fixed 31st December 1960 as the date beyond which only Sinhala was to be used for all official purposes. The word official has not been defined in the Act. The ordinary Oxford English Dictionary meaning of an official act as an act authorized by the Government would apply.

Neither the Tamil Language (Special Provisions) Act No. 28 of 1958, nor the Language of the Courts Act No. 3 of 1961 has in any way altered the position that since 31st December 1960 Sinhala is the one official language for all official purposes.

It is not contended that Sinhala is the language of the legislature or the language of the Courts. English may be the language of the courts but direction by a Minister is an official and an administrative act. If official acts are to be in the official language the direction in the present case does not exist. Since the language of the courts is English, and the direction has to be in Sinhala, a translation in English may be annexed but that is only a matter of convenience.

The nomination too is bad for the same reason. But the nomination would be bad even if it was in Sinhala.

G. G. Ponnambalam, Q.C., with *Stanley de Zoysa, S. J. Kadirgamar A. C. M. Ameer, E. A. G. de Silva, Neville de Jacolyn Seneviratne* and *Manivasagan Underwood*, for the 5th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, R. A. Kannangara, K. N. Choksy* and *R. Ilayperuma*, for the 6th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, G. F. Sethukavalar* and *R. R. Nalliah*, for the 7th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *R. R. Nalliah*, for the 8th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, R. R. Nalliah* and *E. Cooray*, for the 9th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, Lucien Weeramantry* and *K. Viknarajah*, for the 10th Defendant.

S. J. Kadirgamar, with *E. A. G. de Silva, L. Kadirgamar* and *R. L. Jayasuriya*, for the 11th Defendant.

S. J. Kadirgamar with *A. C. M. Ameer, E. A. G. de Silva* and *K. Viknarajah*, for the 12th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, G. F. Sethukavalar* and *R. R. Nalliah*, for the 13th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, R. R. Nalliah* and *E. Cooray*, for the 14th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *R. A. Kannangara*, for the 15th Defendant.

E. G. Wikramanayake, Q.C., with *M. Tiruchelvam, Q.C., J. A. L. Cooray, G. T. Samerawickreme* and *R. A. Kannangara*, for the 16th Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *Sunil Rodrigo*, for the 17th Defendant.

E. G. Wikramanayake, Q.C., with *J. V. C. Nathaniel* and *A. W. N. Sandrapragas*, for the 18th Defendant.

H. W. Jayewardene, Q.C. with *R. A. Kannangara, L. C. Seneviratne* and *P. N. Wikramanayake*, for the 19th defendant.—In examining the Ceylon Constitution it is helpful to ascertain the origin of judicial power in this country.

In the earliest form of society judicial power came into existence before the exercise of legislative power. See *Ancient Law—Mayne 133.* In the growth of civilisation, there was first the institution of the Family which developed into the organisation of the Clan or Race. From here there grew the organisation or institution known as the State or Nation. In each of these institutions it was the head of the respective institution that exercised the judicial power—namely the power to decide disputes. Then there came the Greek and Roman civilisations—during which time the power of judging was transferred by the Head of the State to a few persons who had specialised knowledge—the Senate—who acted as an independent judicial body in deciding disputes between man and man and between man and State.

Next there was the Anglo-Saxon period in England—Henry II made the first attempt to establish judicial power in an independent body by setting up courts and itinerant justices. After the attempt by King Charles to interfere with the judicial process failed the rights and liberties of the subject were decided by a body completely independent of the executive.

In Ceylon before 1796 there existed for a long period an independent judiciary. See *History of Ceylon* published by the University of Ceylon 1960 Edn. Vol. 1 at page 558 ; *Sinhalese Social Organisation*—Ralph Peiris 147 ; *Sketch of the Constitution—Doyly—page 28 ; Jennings and Tambiah—Ceylon Constitution page 101* re the Dutch Courts.

The terms of the capitulation on 5.11.1796— clauses 16, 23 and *Legislative Enactments 1796 to 1873,* referred to. The rights and liberties of the subject already enjoyed were guaranteed. Also a system of courts was to be set up. A further principle was recognised by this capitulation, namely that laid down in *Campbell v. Hall* 98 E. R. 105 (1047) that the fundamental rights of His Majesty's subjects are guaranteed to the people of Ceylon. The source of these fundamental rights is the Magna Carta and one of those rights is that no man shall be punished or dealt with except by due process of law. In accordance with these guarantees the British set up an independent judiciary.

Effect of Sec. 9 of Act No. 1 of 1962 is to undermine all three pillars of the temple of justice—the appointment, tenure and dismissal of a Supreme Court Judge governed by Sec. 52 of the Order-in-Council. For this reason, Sec. 9 is *ultra vires* and contrary to the Ceylon Constitution. See Lord Atkin's judgment in *1938 (2) A. E. R. 601—Toronto Corporation v. York (Township), A. G. for Ontario.*

1. *Appointment.*

Judicial power can only arise by virtue of an appointment by the Governor-General under Sec. 52 of the Constitution Order-in-Council. Any attempt to interfere with that appointment by a later Act by the Executive Authority would undermine this pillar of the temple of justice.

Once a Judge of the Supreme Court is appointed, he is vested with the judicial power of the Supreme Court, i.e. the power to hear and determine any case that comes up in the Supreme Court. The Judge has the discretion to decide as to whether he should in fact hear a particular case. The effect of Sec. 9 is to leave no such discretion in the Judge. The Minister is now given the power to say " Judges A. B. C. shall hear a particular case ". Then the other Judges are disqualified from hearing the case.

The position is that a Judge appointed under Sec. 52 cannot hear this case even though he is vested with the judicial power of the Supreme Court. He derives the power to hear this case by virtue of his nomination and is exercising a power which the Minister has invested in him under Sec. 9 of Act No. 1 of 1962. In other words, the appointment by the Governor General under Sec. 53 of the Order-in-Council becomes irrelevant when it comes to hearing of this case. Therefore the power of nomination in Sec. 9 of Act No. 1 of 1962 is inconsistent with Sec. 52 (1) of the Order-in-Council.

"Nominate" means in fact "appoint". "Nominate" means to appoint by name. See : *Short's Oxford Dictionary ; Letters Patent by which Judges of the Supreme Court are appointed.*

Once the Governor General appoints a Judge of the Supreme Court under Sec. 52 there can be no other appointment or nomination. See *Attorney General, Ontario v. Attorney General of Canada 1925 A. C. 555 ; 133 Law Times 434 ; Waterside Federation of Australia v. Alexander 25 Commn. L. Rep. at page 468.* The former case is exactly in point.

The power of a Judge under Sec. 52 (1) is to hear cases generally ; this power cannot then be limited to the hearing of a particular case as is sought to be done under Sec. 9, because it precludes the other Judges from hearing this case—this results then in a violation of Sec. 52 (1) which gives all the Judges of the Supreme Court the power to hear all cases that come up before the Supreme Court.

2. *Tenure.*

In Ceylon a Judge of the Supreme Court holds office till he is 62 years of age unless he retires earlier or is removed from office. A Judge can be removed by an address of both Houses of Parliament. They do not hold office at pleasure of the Crown.

When the Minister makes his nomination he in effect says "You will hear this case" i.e., once the trial terminates the Judges are *functus officio.* This is an *ad hoc* appointment. See *Alexander's Case* 25 Commn. Law Rep. 447.

3. *Dismissal.*

The right or power to appoint carries with it also the power to dismiss—the incident of the power to appoint is the power to remove. See : Interpretation Ordinance Sec. 14 (*f*) with Sec. 18 and *Myers v. United States 272. U. S. (S. C. R.) 52.*

The Minister can withdraw the nomination on any ground ; there is no restriction on his right to remove a Judge.

. . . .

The vesting of the power of nomination in the Minister under Sec. 9 is also in violation of the judicial power of the Supreme Court which is entrenched in Sec. 52 of the Constitution Order-in-Council. "Judicial power" is the right vested in a Court to determine disputes. As to the definition of judicial power see dicta per Griffiths C.J. in *Huddart Parker Ltd. v. Moorehead 8 Comm. L. R. 330.* Judicial power is created under Sec. 52. Its source is the Governor General who appoints Judges to the Supreme Court and it is this appointment that vests judicial power in the Judges. The definition of "judicial power" in the *Huddart Parker case* was followed in *Shell Company Case* 1931 A. C. 144 and *Labour Relations Board of Sasketchwan v. John East Ironworks* 1949 A. C. 134 (149) P. C.

The power of nomination is an incident in judicial power which is entrenched in Sec. 52 and this section is violated when the Minister is given the power to nominate.

An ancillary power (like the power of nomination) is so inextricably bound up with the exercise of judicial power that it cannot be interfered with. This is a matter for those who exercise that power. See : *In re Wells* 13 E. R. 92 ; *The King v. Davison* 90 Comm. L. R. 353. The latter case deals with the question of the exercise of judicial power and acts which are incidental to the exercise of judicial power.

Separation of Powers. The Ceylon Constitution is one in which the doctrine of the separation of powers has been given effect to. The legislative, executive and judicial functions are placed in three departments and they cannot trespass on the powers or activities of each other—unless they are allowed to do so by legislation passed in the form and manner required by the Constitution.

The doctrine of the separation of powers is part and parcel of the Constitution. This doctrine has been considered in America.—*Kilbourn v. Thompson* 103 U. S. (S. C. R.) 377 ; *Myers v. United States* 272 U. S. (S. C. R.) 52 (116) which deals with the power of removal being implicit in the power of appointment—at p. 161 (110). In this case, on the question of the separation of powers all the Judges were in agreement. See (177) (199) (235) (291) (240). *Springer v. The Government of the Philippine Islands* 277 U. S. Reports 188 ; *Organic Act of the Philippines of 1916 Sec. 12* ; *Sawyer v. Youngstown Steel Co.* 343 U. S. R. 579. (1166 ; 1168 ; 1172 ; 1179 ; 1181).

This doctrine has also been dealt with in Australia. See :— *20 Comm. L. R. 54 (87, 88) ; Waterside Federation of Australia v. Alexander 25 Comm. Law Rep ; Victoria Steel Rolling Co. v. Digman — 46 Comm. L. R. 73 (130) ; Queen v. Kirby —The Boilermaker's Case 1957 Vol. 2 A. E. R. 45 (51 E. 53).*

In Ceylon this doctrine has been recognised from as far as 1833 so far as this Court is concerned. See *Charter 1833.* This Charter was introduced as a result of Reports submitted by Messrs Colebrooke and Cameron. See *Colebrooke Cameron Papers Vol. 1. by G. C. Mendis and Vol. 2 pages 125, 350* and Communication by the Secretary of State to the Governor, accompanying the Charter of 1833.

Under the Donoughmore Constitution there were attempts to join the legislature and the executive but judicial functions were kept distinctly apart. Under the Soulbury Commission the doctrine of separation of powers is recommended—*Soulbury Commission Reports — Sec. 395 and 396 at pages 105 and 106.*

The Ceylon Constitution Order-in-Council deals with separation of Governmental functions in the Constitution—*Part II Governor-General, Part III Legislature, Part VI Judicature.* See : *Agnes Nona's Case, 50 N. L. R. 106 (112)* ; *Senadheera case, 63 N. L. R. 313* ; *Queen Victoria Memorial Hospital v. Thornton, 87 Comm. L. R. 144.*

The function of selecting Judges to hear a particular case is a function that has been hitherto performed by the Judges—this function has now been delegated to the Chief Justice. Therefore this function belongs to that part of the Constitution dealing with the Judicature and the giving of that power, namely, the power to exercise what is a judicial function to an administrative official is a violation of the Constitution. Further, when the Constitution came into being, historically, the function of selecting Judges was vested in the Judges themselves or in the Chief Justice. It is a judicial function and it cannot be conceived that the framers of the Constitution had in mind that a Minister should be vested with the right to select Judges. It is submitted that this is an attempt by the legislature to trench in or encroach into Part VI of the Constitution.

It is also a well known rule of interpretation that where a person is vested with a power, he is necessarily invested also with all those subsidiary and ancillary powers which would enable him to carry out the primary power—*Craie's Statute Law 5th Edn. 239.*

The judicial power is vested in the Supreme Court or the Judges of the Supreme Court. Then all those ancillary powers necessary for the performance of the primary function—the judicial function—are judicial functions too. The question is what are those ancillary powers necessary for the purpose of exercising the primary power. My submission is that the power of appointment is ancillary to the exercise of the judicial power and to vest it in the Minister would be a violation of the Constitution. See : *Queen v. Davison 90 Comm. L. R. 353.* The only way this could be done is to first alter the Constitution by a two-third majority and thereafter by passing necessary legislation—*Cooper v. Commissioner of Income Tax 4 Comm. L. R. page 1304 at p. 1317.*

The tests by which whether an ancillary function is a part of the judicial power may be ascertained, are laid down in *Queen v. Davison* and may be usefully applied to the present case. The historical test as laid down by Dean Roscoe Pound and the Holmes test as laid down by Holmes J., referred to. The answer to either of these tests if applied to the present case would show that the power of nomination is essentially a function of the court and cannot be reposed in the executive.

Section 9.

The nomination is for some of the Judges of the Supreme Court. Once Judges are nominated the rest of the Judges of the Supreme Court are unable to hear the case—they are incapacitated from hearing the case.

The authority for hearing the case is the nomination under Sec. 9. The appointment by the Governor-General under Sec. 52 (1) is not the urce of the power to hear the case—it is derived from the nomination by the Minister.

[T. S. FERNANDO, J.—When a Judge of the Supreme Court is appointed by the Governor-General under Sec. 52 of the Constitution he receives the judicial power ; and if a law is enacted taking that judicial power which is conferred by Sec. 52, then that is a violation of Sec. 52...... Therefore if the Minister has been given a special power of appointment, it is a contravention of the general power of appointment under Sec. 52.]

That is the pith and substance of what I was trying to say.

On the question of separation of powers, in the American, Philippines and Australian Constitutions there is a specific vesting of the legislative, executive and judicial powers in the legislature, executive and the judicature respectively. There is no vesting of judicial power in the Supreme Court because the Supreme Court was already in existence at the time of the Constitution. The authorities are quite clear that once a Constitution creates a separation of powers there need not be express words to say that one branch or function of Government cannot trench in on the other. It can only be done by way of a proper amendment of the Constitution. See : *Marbury v. Madison 1 Cranch Reports 137, 2 U. S. (S. C. R.) 135 (Lawyers' Edition), Myers Case 272 U. S. R. (138–140) (237).*

Once it is recognised that there is a separation, then it follows you cannot exercise the powers of another department. See : *Senadhira's Case, 63 N. L. R. 313; Macaulay v. King, 1920 A. C. 691 ; A. G. New South Wales v. Trethowan, 44 Comm. L. R. 394.*

In regard to the question of the bona fides and mala fides of the Minister in issuing the nomination and direction—Firstly, sec. 9 does not prevent this Court from going into this question— "any court' does not refer to this court but to another court ; the essential condition of the exercise of judicial power by a particular court is to determine whether it has jurisdiction to entertain the litigation and this can only be taken away by express words. If the effect of Sec. 9 is to bar this Court from going into the question of jurisdiction, then it is an interference with the judicial power of this court. See : *Halsbury Vol. 9 (3rd Edn.) p. 350 Sec. 822 ; Chester Bateson, 1920 (1) K. B. 829 ; 122 L. T. 684 ; Theja Gunawardene's Case, 56 N. L. R. 193.*

The question is whether the Minister in exercising his discretion in issuing the direction and nomination has acted bona fide or mala fide. See : *1947 (2) S. A. L. R. 984 ; Malyali v. The Commissioner of Police, 1950 A. I. R. Bombay, 202 (203) ; Suriyawansa v. Commissioner of Local Government, '48 N. L. R. 433 (436) ; de Smith—Judicial Review of Administrative Action, page 229 ; Desphande v. The Emperor, 1945 A. I. R. Nagpur 8.*

A. H. C. de Silva, Q.C., with *S. Alles* and *K. C. Kamalanathan*, for the 20th and 21st Defendants.—When there is a direction under section 440A of the Criminal Procedure Code, a Trial at Bar can be held before the Supreme Court without a Jury and from that moment there can be no interference with the course of that case except by law, provided the law is good.

There is no provision in the Courts Ordinance, the Criminal Procedure Code or in the Constitution, in the absence of any special legislation, for a Minister to interfere with the selection of Judges. But for section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, the Minister's power ends when the direction has been given. Section 9 places a bar, and it is not possible for any Judge of the Supreme Court to hear that case till a nomination of Judges is made by the Minister.

The Governor-General appoints Judges of the Supreme Court under section 52 (1) of the Ceylon Constitution Order-in-Council. When they are thus appointed they are vested with judicial power which continues till they retire or till they are removed by an address of both Houses of Parliament. The Judges can then hear every case which comes before the Supreme Court.

When a direction is given by the Minister, the authority given to Judges of the Supreme Court on appointment under section 52 (1) of the Ceylon Constitution Order-in-Council to hear any case which comes before the Supreme Court is taken away by section 9 of the Criminal Law (Special Provisions) Act. Then, till the Minister makes an appointment of Judges to hear this case, none of the Judges of the Supreme Court have the authority to hear it. In that sense, that nomination is an appointment of Judges to hear that case.

The nomination by the Minister does not constitute a Bench of the Supreme Court. In view of the fact that section 440A of the Criminal Procedure requires a Trial at Bar to take place before the Supreme Court, this Court has no jurisdiction to hear a Trial at Bar. The nomination by the Minister under section 9 of the Criminal Law (Special Provisions) Act is *ultra vires* of the Constitution. If the power to nominate Judges of the Supreme Court is to be given to a Minister, it must be done by amending the Constitution.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, Izadeen Mohamed* and *H. D. Thambyah*, for the 22nd Defendant.

G. G. Ponnambalam, Q.C., with *Stanley de Soyza, S. J. Kadirgamar, E. A. G. de Silva, Neville de Jacolyn, K. Viknarajah* and *R. Ilayperuma*, for the 23rd Defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *Cecil de S. Wijeratne*, for the 24th Defendant.

Douglas St. C. B. Jansze, Q.C., Attorney-General, with *V. Tennakoon*, Deputy Solicitor-General, *Ananda Pereira, L. B. T. Premaratne, T. A. de S. Wijesundere, V. S. A. Pullenayegum* and *Noel Tittawella*, Crown Counsel, for the Prosecution.—The words "Peace", "Order" and "good Government" in Article 29 (1) of the Ceylon Constitution are not words of limitation but are a compendious expression employed for conferring on the Parliament of Ceylon the plenitude of legislative power. The Court will not inquire of any enactment, whether it does in fact promote peace, order or good government—vide *Riel v. The Queen* (1885) 10 Appeal Cases 675 and *Chenard and Company v. Joachim Arissol* (1949) A. C. 127 at page 132.

The direction issued by the Minister of Justice under Section 8 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, and the nomination made by the Minister of Justice under Section 9 of the same Act cannot, if *intra vires* the Constitution, be called in question in any court as the express words of the sections prohibit such a challenge even on the grounds of mala fides—vide *Smith v. East Elloe Rural District Council (1956) Appeal Cases 736.*

There is no separation of powers in the Ceylon Constitution as found in the Constitutions of the United States and of the Commonwealth of Australia. The Constitution of Ceylon has been modelled on the Constitution of the United Kingdom in which there is no such separation of powers—vide paragraphs 408 to 410 of the Report of the Commission on Constitutional Reforms, CMND 6677 of September 1945.

Articles 52 to 56 of the Ceylon Constitution Order in Council which are to be found in the Part headed " The Judicature " do not provide for the establishment of a Judicature. Such provisions are to be found in the Courts Ordinance (Cap. 6). Articles 52 to 56 are primarily concerned with ensuring the independence of the Judiciary. The independence of the Judiciary does not require that Judges should have the freedom to decide *which* case they may hear but it requires that they should have the freedom to decide *any* case which they may hear in any manner that they think the law requires and justice demands.

The term " judicial power " is not used anywhere in the Ceylon Constitution. The concept of judicial power derived from the Constitution of the United States and of the Commonwealth of Australia (where such term is used) must therefore be used with caution. The concept of judicial power derived from these Constitutions has been employed in *Senadhira v. The Bribery Commissioner,* (1961) 63 N. L. R. 313, to provide a definition of the term " Judicial Officer " in the Ceylon Constitution. A scrutiny of the cases on this topic would indicate that the term " judicial power " is used, broadly speaking, in three senses, viz :

(i) the strict sense, i.e. " the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property —" vide *Huddart Parker & Co. Pty. Ltd. v. Moorehead* (1909) 8 C. L. R. 330 at 357 ;

(ii) the power of judicial review ;

(iii) in a wide sense to include any power conferred upon a Judge : vide *Attorney-General of Gambia v. N'Jie* (1961) Appeal Cases, 617.

It is the first sense stated above that the term ' judicial power ' bears when it is used in a constitutional context.

It is conceded, for the purposes of this case, that under the Constitution of Ceylon judicial power in this sense must be exercised by Judges of the Supreme Court or Judicial Officers appointed by the Judicial Service

Commission. The power of nomination of Judges is clearly not an exercise of judicial power in this sense. A power incidental to the exercise of a judicial power is not a judicial power and such power may be vested in the Executive.

The power of nomination exercised by the Chief Justice under section 51 of the Courts Ordinance (Cap. 6) is not an exercise of judicial power. The Chief Justice does not have more judicial power than any of the other Judges of the Supreme Court. He is only *primus inter pares.*

In constitutions such as those of the United States and the Commonwealth of Australia, where there is a rigid separation of powers, the union of judicial and non-judicial powers is not legitimate—vide *Attorney-General of Australia v. The Queen* (1957) Appeal Cases 288. (The Boilermakers' Case.) The so-called Holmes test and the method of historical approach have been employed by the courts of these countries to justify the union of judicial powers with non-judicial powers which are incidental to the exercise of judicial powers—vide *Prentis v. The Atlantic Coastline Co.* (1908) 211, U. S. 210 and *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C. L. R. 144 and *The Queen v. Davidson* (1954) 90 C. L. R. 353 ; but in these cases it should be noted that the non-judicial nature of such incidental powers has always been recognised. These non-judicial powers, although incidental to the exercise of judicial power, could therefore be validly vested in either the legislature or the executive.

Sinhala is an Official Language in the sense that its use is now authorised. The absence of any sanction in the Official Language Act, No. 33 of 1956, indicates that it was not intended to penalise the failure to use such language. The Act must be construed in such a manner as to avoid mischievous consequences. The expression " before the expiry of the 31st day of December, 1960 " is a counsel of perfection, vide *The Queen v. Justices of County of London and London County Council* (1893) 2 *Q. B. 478.* The operative words are " until the necessary change is effected " and no such change has so far been effected.

It is conceded by the defendants that English is the language of the courts. That means that English is not only the language in which the court speaks but also the language in which it must be spoken to. The direction and the nomination are communications to the court and must, therefore, be in English.

A statute cannot be disregarded merely because it may appear to a court to offend against the principles of natural justice. What the legislature in its wisdom decrees must be obeyed by all, even by Judges.

G. G. Ponnambalam, Q.C., in reply.—The Attorney-General based his submissions mainly on the basis that there was no separation of powers in Ceylon. A true appreciation of what is meant by the separation of powers requires a knowledge of the background on which the entire doctrine was based. From the time of Blackstone onwards what is emphasised as objectionable is not an overlapping of functions in the

periphery of the different spheres of government, but the concentration of the powers of one body in another. A complete separation of powers even if theoretically possible would bring government to an end. What is necessary is the prevention of tyranny. The doctrine has received its main application in the securing of the independence of the courts—Constitutional Law of Great Britain and The Commonwealth 2nd edit. p. 15 by Hood Phillips ; Blackstone's Commentaries by Samuel Warren p. 241. The Attorney-General has misdirected himself into thinking that there was no separation of powers in countries mainly influenced by the British Constitution just because there was a certain amount of overlapping in otherwise clearly discernible spheres of governmental functions. Even in America it was found impossible to adhere to a strict separation of powers. A significant feature of the Constitutions of America, England and Ceylon was the practice of committees of the legislature conducting inquiries—hearing evidence etc. This is to enable them to perform the legislative function effectively and it was therefore an implied power of the legislature. See *Mac Grain v. Daugherty* at p. 306 of "Leading Constitutional Decisions" by Robert E. Cushman, 10th edition ; Jennings : Law and the Constitution, p. 25, and Appendix, p. 281.

There were the formal and material doctrines of the separation of powers. Under the former a function is considered to be judicial because it is exercised by a judge. The Attorney-General could not point to a single authority under a Constitution in a non-totalitarian country wherein a member of the executive was considered an appropriate or competent authority to constitute a bench.

Nomination is not an administrative act, as the Attorney-General submitted, but a judicial function. Definitions are difficult, but something that has become historically attached to judges as their proper function becomes a judicial function. Nomination has become attached to the function of judges collectively or otherwise and to remove it from the ambit of the purview of the judges would be to interfere with the independence of the judges and a violation of the Constitution. The constitution of the Court is part and parcel of the judicial function.

The absence of the term " vesting " as regards legislative and judicial power in Ceylon is understandable. Such a term would be necessary only when written Constitutions are promulgated for new political entities which did not exist previously. Prior to the Constitution, the Legislature and the Supreme Court had existed in Ceylon for several years. [Counsel examined the Constitutions of America, Australia, Canada and Ceylon as regards the vesting of the legislative, executive and judicial powers.]

In regard to the Attorney-General's explanation of the judicial function and judicial power, the judicial power of the State is an enormous composite of powers including all except executive and legislative power. The whole of the judicial power becomes indefinable but it is vested in

and distributed through the judiciary. There is a distinction between judicial power of the State and judicial power of the judges, and between judicial power in a unitary State and a federal State. In a qualitative analysis of judicial power, the judicial power of the courts is equal to the judicial power of the judges plus something else. See *Attorney-General of Gambia Case* (1961) 2 All E. R. 504 ; 60 C. L. W. 71.

Judges exercise judicial power not only when they hear disputes between parties but also when exercising those powers properly appurtenant to the functions of a judge. The constitution of a Court is part and parcel of the judicial function. In Ceylon, the judiciary and its functions and powers and independence had been well established. As such those who framed the Constitution may have confined themselves, in dealing with the judiciary, to the three pillars of the temple of justice which establish irrevocably the total independence of the judiciary. The Constitution of Ceylon like the India Independence Act was a skeletal Act. See *(1950) A. I. R. (Allahabad) 11 at p. 14.* [In reply to the Court, "there isn't a more truncated, more incomplete and mutilated Constitution than the Constitution of Ceylon ."]

There is no definition of judicial power which is exhaustive. See however :—

(1) *K. v. Davison* 90 Com. L. R. 368 and the commentary of Prof. Sawyer on the case at p. 342 in 1954 Australian Law Journal, Vol. 28.

(2) *The Rolla Case* (1944) Vol. 69 Com. L. R. 185 at 199.

(3) *(1929) Vol. 42 Com. L. R. 515.*

(4) *211 V. S. 229.*

One test to decide whether an Act involves a judicial function is to find out what and where the particular function was deposited when the Constitution was passed. In the present case in which of the three limbs had the power of nomination been vested in the judiciary.

(5) *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 Com. L. R. 144.

The definition of judicial power as " the power vested in the courts to administer justice according to law " in *211 V. S. 122* is an admirable definition.

The power of making procedural rules is an extreme example of incidental judicial power. According to Dean Pound, it is the function of the Courts to regulate proceedings.

Whatever leads to the final determination of disputes is part of the judicial process and the constitution of the court is part of the judicial process.

But for the Act No. 1 of 1962, the Minister's attempt to nominate the Judges would have been a blatant case of contempt of court. See "Democratic Government and Politics" by Prof. J. A. Corry 2nd Edit. p. 245 (for an explanation of what a court is).

Counsel cited further cases on the nature of judicial power :—

(1) *The Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* 1931 A. C. 275 at 297.

(a court has to be vested with the judicial power of the State. This cannot be said, for example, of the Board of Review on Income Tax which is therefore not a Court).

(2) *Attorney General for Australia v. Regina* (The Boiler makers Case) (1957) 2 All E. R. at 56.

(Difference between judicial powers and powers ancillary to judicial powers examined.)

(3) *Attorney General for Ontario v. Attorney General for Canada*, 1925 A. C. 750, 1925 L. J. (P. C.) 132.

(To assign judges to a particular court means to appoint. By nomination in the instant case, the Minister appoints judges to a particular case and thereby tampers with the judicial power of the State vested in the Supreme Court.)

Rex v. Long. 1923 S. A. L. R. 69.

(What constitutes a Court.)

King Emperor v. Sarma 1945 Vol. 1—All E. R. 203.

Though a particular act may in isolation look like an administrative power, yet by association with the judicial power it becomes part of judicial power.

Queen Victoria Memorial Hospital v. Thornton 87 Com. L. R. 144 at 151.

It is not possible to isolate nomination in this case from the whole complex of judicial process. The nomination of the Judges by the Minister was an interference by the executive with what is fundamentally part of judicial power.

E. G. Wikramanayake, Q.C., in reply.—The Constitution provides for what might be called the "autonomy" of the Supreme Court. The Constitution is a skeletal one which has taken the institutions as they existed at the time the Constitution was framed. The Supreme Court is described not in the Constitution but in the Courts Ordinance. That is why certain sections of the Courts Ordinance can only be amended by a two-thirds majority—the test being anything which affects the independence of the judiciary and the continuity of the Supreme Court dealt with in Section 52 of the Constitution Order in Council. Section 6 of the Courts Ordinance is such a section.

2**——R 6478 (12/62)

The autonomy of the Supreme Court means that in relation to matters necessary for its functioning it must regulate itself. It is essential that it should be kept free from any kind of outside interference amounting to trespass on the independence of the judiciary. When the autonomy of the Supreme Court which regulates itself is interfered with by a person who has a personal interest in the matter or otherwise, that is an interference with the independence of the judiciary. When a Minister, whether he is interested or not in a particular case, presumes to select judges whom he likes the autonomy ceases and the independence is put in doubt.

The history of this country has shown that the judges of the Supreme Court have been and are independent. It is the common knowledge of those who practise in the courts to hear a litigant say that he wishes such and such a judge would hear a case or not hear it, depending on what he rightly or wrongly guesses would be the judge's reaction. For a Minister therefore, in a case like this, to pick and choose judges would tend to shake the confidence one should have in the judges of the Supreme Court. Justice must not only be done but must also seem to be done.

In interpreting a Constitution so truncated as ours one ought also to look into the minds of the Soulbury commissioners who framed it. Their report shows that they sought to prevent, in every way, the interference with the independence of the judiciary.

As regards the direction having to be in Sinhala, the Official Language Act of 1956 leaves no doubt as to the legislature's intention. Even the proviso in section 2 which makes certain concessions for the transitory period uses the terms " immediately ", " as early as possible " and the final and most important phrase " before the expiry of the thirty-first day of December, 1960." All this language and these phrases and the definite date cannot be dismissed as mere " counsel of perfection ". All the words in a statute must be given effect to. The legislature is deemed not to waste its words or to say anything in vain. See *Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry* A. I. R. 1920 P. C. 181 at 186 ; *Baroda Kanta v. Shaik Maijuddi* A. I. R. 1925 Cal. 1 at p. 3 ; *The Queen v. The Bishop of Oxford* (1879) 4 Q. B. D. 245 at 261 ; *Regina v. The Justices of the County of London and London County Council* 69 L. T. 682 (distinguished).

It is no argument to say that if the courts hold that all official acts not in Sinhala are void, it would lead to serious consequences and that the legislature must not be held to intend absurd results. There is nothing absurd about having official acts in Sinhala. If the precise words of a statute are plain and unambiguous, they must be construed in the ordinary sense even though it leads to an absurdity. It is only when there is real doubt and two interpretations are possible without straining the language, that the more reasonable and sensible interpretation would be preferred. We cannot disregard what appears to be the plain meaning of the English language even if in a particular case it does appear to

produce an inequitable result. "Where the language is explicit, its consequences are for Parliament, and not for the Courts, to consider. In such a case the suffering citizen must appeal for relief to the law giver and not to the lawyer."—Craies : "Statute Law" 5th ed., pp. 82, 85.

A Minister therefore must, by the Official Language Act, use Sinhala in all his communications after 31st December, 1960. The direction and the nomination had to be communicated in writing. They could not have been done orally, and they had to be in the official language. He could send an English translation also, but that is a different matter. The direction and nomination therefore are invalid and have no existence in law.

H. W. Jayewardene, Q.C., in reply.—

Sec. 9 is an attempt by the legislature to make an inroad into that part of the Constitution which provides for the independence of the judiciary, namely Sec. 52 of the Order-in-Council. See Sections 52 and 91 of Order-in-Council. The independence of the Judges is preserved in England by the Act of Settlement. The Russian Constitution declares the independence of the Judges by Act 112 of the Constitution. See *Vol. 3 Peasley : Constitutions of Nations p. 497.* This legislation renders sec. 52 meaningless and inoperative. Even legislation to amend the Courts Ordinance by doing away with the Chief Justice, Puisne Judges, Commissioner of Assize and the Supreme Court cannot be passed as it would be repugnant to Sec. 52 of the Constitution. This can only be done by amending the Constitution. See : *Marbury v. Madison 2 U. S. (S. C. R.) 138 ; Cooper v. Commissioner of Income Tax 4 Comm. Rep. 1324 ; Kodakan Pillai v. Mudanayake 54 N. L. R. at 438.* The appointment under Sec. 52 by the Governor-General secures the independence of the Judges. Nothing can come in between the appointment of the judge and the time he delivers his judgment. His sole source of authority is the appointment. The effect of Sec. 9 is that it creates an obstacle between the appointment and the final judgment : namely, in the nomination. For without the nomination, the Judges in spite of their appointment under Sec. 52 cannot hear this case. Thus, the nomination under Sec. 9 is the appointment and is contrary to the Constitution.

Nomination means in effect "appointment". The nomination is the appointment of the Judges to hear this case. It has no special significance. The legislature is attempting to do indirectly what it cannot do directly. This is so even in its attempt to constitute this court as the Supreme Court. This is a mockery of the Constitution. Its effect is to derogate from the power of the Supreme Court. See : *Young v. Bristol European Airways Co. Ltd. 1944 (2) A. E. R. page 293.*

The question of nomination by the Chief Justice and the Minister.

When the Minister makes a nomination it is an administrative act. He is answerable to Parliament. If so, Judges can be discussed in Parliament. The independence of the judiciary will cease to exist,

That is why the Order-in-Council states that Judges will be appointed by the Governor-General, whose acts cannot be questioned in Parliament. See : *Attorney General, Ontario v. Attorney General, Canada 1925 L. J. Privy Council p. 132 ; Schrier v. Bernstein & Labour Std—1962 33 Dominion L. R. page 305.*

If the power of selecting Judges is left to the Chief Justice and the other Judges no one can question their acts. It is a matter within their sole discretion. Further, when a Bench is constituted by the Chief Justice, the other Judges are not deprived of their rights to hear a case. Each is entitled to hear a case though for convenience they make their own arrangements. Assuming that this power of selecting Judges is administrative, it is one which is vested in the Judges as a body.

The power to appoint carries with it the power to revoke ; this is implicit in the power to appoint. The Attorney-General contends that Sec. 18 of the Interpretation Ordinance does not apply. The word " order " in the Section would apply to a nomination which is in effect an order by the Minister.

As to meaning of " court " see *Halsbury Vol. 9 Simonds Edn. page 342—Sec. 809.*

As to what is meant by constituting a court—See *Rex v. Long 1923 A. D.*

Separation of Powers. The Attorney-General contends that there is no separation of powers in Ceylon. One does not find the separation of powers in any particular form in the Constitutions of various countries—the difference lies in the degree of the separation of powers. For instance, in the British Constitution the separation between the executive and the legislature is not as marked as the separation of the judiciary on the one hand and the executive and the legislature on the other. In America, the separation between the executive and the legislature is more marked.

In every Constitution that has followed the British pattern the judiciary is always distinct from the executive and the legislature. See : *Halsbury Vol. 7 page 287 (191) ; Law and Orders—Allen 2nd Edn page 1 ; Committee on Ministers' Powers (1930) Report* (that judiciary is distinct).

Even in America where the separation of powers is more marked than in any other constitution, in practice it is not applied with all its rigour—*Hampton & Co. Ltd. v. United States 276 U. S. Reports 394.*

In Ceylon there is a clear separation of powers. Apart from authorities already cited, see *Provincial Administration Report 1954—C1. 4.* For my purposes it is sufficient to argue that the judicial power is vested in a separate and distinct department consisting of the Supreme Court and the minor Judiciary.

For separation of powers in Canada, see *Labour Relations Board of Sasketchwan v. John East Iron Works 1949 A. C. 134.*

For separation of powers in Australia, see the *Boilermakers Case 1957 (2) A. E. R. 45 (P. C.).*

In regard to the nature of the power of constituting a Bench : is it an incident to the judicial power and therefore a part of the judicial power or is it a purely administrative act ? Judicial power itself is the power to determine the existence or non-existence of pre-existing legal rights. It enforces pre-existing legal rights as between the parties to the dispute. This is the judicial power of a court. In the case of a Labour Tribunal or similar Tribunals, it determines the future terms of employment between master and servant. It creates new terms. It does not seek to enforce pre-existing rights which is the judicial power pure and simple—*Huddart Parker & Co. Ltd. v. Moorehead—8 Comm. L. Rep. 330, per* Griffiths C. J. Now in order to determine whether a particular function is part of the judicial power or not one has to apply certain tests, as already submitted. One of the tests is that you must look at the ultimate end to be achieved ; then all those acts which are incidental to the achievement of the ultimate end belongs to that function of Government, executive, legislative or judicial, as the case may be. If the ultimate end is the judicial function, namely, the enforcement of pre-existing rights between the parties, then all those ancillary functions that lead up to the final judgment are part and parcel of the judicial function and come under the category of judicial power. On the other hand, if the final decision would lead up to a purely administrative decision, all those earlier acts belong to the category of executive power. This is what may be termed as the " Holmes test " or doctrine. See : *Rex v. Davison 90 Comm. L. R. 353 (366) (367) ; Reta Co. v. The Commonwealth 69 Comm. L. R. 185 (199) (203) ; The King v. Federal Court of Bankruptcy Exp. Lowerstein 59 Comm. L. R. 556 (581) ; Alexander's Case 25 Comm. L. R. 434 (447) (468) ; Rex v. Kirby—Boilermakers Case 1957 (2) A. E. R. 45.*

It is submitted that the power to appoint a Judge or to nominate a Judge is a part of the judicial power enacted in Sec. 52 of the Order-in-Council and is a part of the judicial power since it must necessarily lead to a final decision in this case. It cannot be taken out of the judicial power.

Further, every court based on the British system has got a residue of power by which it can do things which are necessary to enable the courts to arrive at a final decision. See *Hukum Chand Boyd v. Kamalanand Singh 33 I. L. R. 927 (930).*

Another test is the historical test—in the interpretation of constitutions, one looks at the date on which the Constitution came into force. If certain acts were done as part and parcel of one particular organ of the State at that date, then you regard that type of function as belonging to that organ of State. It may be an administrative act, but if it was traditionally done as part and parcel of the judicial function of the State, then it should be regarded as belonging to that organ of State. This

approach is also called the Dean Pound doctrine, being first enunciated by Dean Roscoe Pound. For the "Holmes Test" see judgment of Justice Holmes in *Prentis v. Atlantic Coast Line Co. 211 U. S. R. 210.* The "Historical Test" was applied in *Labour Relations Board of Sasketchwan v. John East Iron Works 1949 A. C. 134 (149–153).*

At the time the Constitution was promulgated in 1946 the function of constituting a Bench or nomination of Judges resided in the Judiciary—it was a judicial function. It could never have been intended that when the Queen gave this country its constitution she would have intended that the legislature could take out this function of the court which is necessary for the purpose of giving a final decision and rest it in the executive. See *Rex v. Kirby—Boilermakers Case 1957 (2) A. E. R. 45 (P. C.).*

In regard to the responsibility of the Minister to Parliament, see *Standing Orders of the House of Representatives, Order 31, 36 (7), 139. Erskine May—Parliamentary Procedure 336 (337) (374) (375) (298).* Questions reflecting on the conduct or character of a person in official capacity cannot be asked in Parliament but a question directed at the Minister with regard to the reason or circumstances for making a certain appointment or nomination does not refer to the character or conduct of the Minister at all. See also : *Halsbury Vol. 28 p. 300 Section 446 ; Order-in-Council Section 46 (1) ; Halsbury Vol. 7 p. 233 ; 359 ; Parliament —Jennings 2nd Edn. p. 99 ; Government and Parliament—Sir Herbert Morrison p. 256.*

The other question is the application of the principle that justice must not only be done but should manifestly and undoubtedly be seen to be done. See : *The King v. Edwin 48 N. L. R. 211 ; Sergeant v. Dale 1877 (2) Q. B. 558 ; 37 L. T. 156.*

However much one might be assured that Judges are independent there is the fear lurking in the minds of the defendants that for some reason or other unknown to themselves and best known to the Minister and the Government, the Government has vested itself with the power to select Judges. This fact alone would indicate that the independence of the Supreme Court is sought to be attacked. The question is whether the defendants should so feel since for some reason or other the normal practice of the constitution of the Court has not been followed.

Further, there are facts which indicate that the Minister himself participated in the investigations. If so, a party would be Judge in his own cause by selecting Judges of his own choice. See *Eckles v. Mersey Dock and Harbour Board—71 L. T. 308 (310. 311) ; 1894 (2) Q. B. D. 667.* Later cases apply the test of the reasonable man : whether in a litigation between A and B, A has the power of selecting the Judges while B has no say in the matter. A reasonable man should say that there is bias as a result of such power being vested in A. This is the position in this case. This power vested in the Minister affects the entire independence and integrity of the Court and is likely to create a suspicion in the minds of the public.

[T. S. FERNANDO, J.—And more so in the minds of the defendants.]

See: *Rex. v. Sussex Trustees—1924 (1) Q. B. D. 256 (258)*; *Rex. v. Cambourne Justices—1954 (2) A. E. R. 852 (855).* If the effect of the legislation and the nomination is that justice does not appear to be done then it is regarded as a disqualification of the particular judges because it prevents the judges from acting judicially, i.e., the Supreme Court cannot act judicially and that is a negation of the only purpose for which the Supreme Court has been created. If the legislation is such that it makes the Supreme Court unable to act, then the legislation to that extent is bad. "Judicial power" in itself implies the right to exercise the power, unbiassed, i.e., without even a likelihood of bias existing.

As to " substantive motion " and Questions in Parliament, see *Introduction to House of Commons by Lord Campion ps. 110 (117) (170). May—Parliamentary Procedure p. 336 item 6, p. 201 disqualification of membership; Ministerial responsibility. Questions in the House—Patrick Howarth p. 112, 119. Standing Orders of the Senate—re responsibility of Minister.* Also : *Terrel v. The Colonial Secretary 1953 (2) A. E. R. 419 at 494.*

A. H. C. de Silva, Q.C., in reply.—The Supreme Court is a separate entity. It would appear from section 52 of the Constitution Order in Council (i) that there is one Supreme Court, and (ii) that the provisions of this section clearly indicate that there ought to be no interference by any outsider with the Supreme Court. These provisions seem to ensure that the Supreme Court is an autonomous unit. Its functions have to be regulated by itself. The Supreme Court can function only through its members. It is clear from the Courts Ordinance that, if there is one person who has a right to constitute a Bench of the Supreme Court or to nominate the Judges, it is the Chief Justice. Generally the Bench is constituted by arrangement among the Judges themselves.

Nomination is a function of the Supreme Court. Where the Constitution intends that nomination should be the function of the Court and that the Court should be an autonomous body, then, if nomination is given to an outsider, the Court is not constituted in the way the Constitution requires it to be constituted. The Court so constituted is not the Supreme Court.

In regard to the question of bias, not only actual bias but also the likelihood of bias must be considered. See *Cottle v. Cottle* (1939) 2 All E. R. 535 at 540 ; *Rex v. Essex Justices* (1927) 2 K. B. 475 ; *Rode v. Bawa* 1 N. L. R. 373 ; *King v. Podisingho* 16 N. L. R. 16 at 17 ; *Dingiri Mahatmaya v. Mudiyanse* 24 N. L. R. 377 ; *King v. Caldera* 11 C. L. W. 1 ; *Kandaswamy v. Subramaniam* 63 N. L. R. 574.

Cur. adv. vult.

ORDER

October 3, 1962.

On the twenty-third of June, 1962, the Minister of Justice, purporting to act under section 440A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, by filing document " A "[1] in the Registry of this Court, informed the Court that he directs that the trial of twenty-four persons named therein in respect of three specified offences all falling under Chapter VI of the Penal Code be held before the Supreme Court at Bar by three Judges without a jury. Later that same day the Attorney-General exhibited to the Court an Information—document "B"[2]— informing the Court that the same twenty-four persons had committed the offences which had been specified therein and seeking the issue by the Court of lawful process against the said persons. Thereafter, the Minister of Justice, again on the same day, purporting to act under section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed in the Court document "C"[3] nominating us as the three Judges who shall preside over the trial of the persons referred to above to be held in pursuance of the direction contained in document " A ".

Acting upon the said direction and nomination we ordered summons to issue on the twenty-four persons named in the afore-mentioned documents. On 30th July 1962 all the defendants being present and represented by counsel, we called upon the defendants to make their pleas in answer to the charges contained in the Information. Counsel then raised certain preliminary objections to the trial proceeding before us, and it becomes necessary to set out hereunder the objections as formulated by counsel.

Mr. Ponnambalam who appeared for seventeen of the twenty-four defendants framed his objections in the following form :—

> " This Court cannot take cognizance of the Information laid against the defendants, and it has no jurisdiction to try the case because it is not a validly or properly or lawfully constituted court ; nor is it competent to hold a Trial-at-Bar ".

Mr. Wikramanayake who appeared for two of the other seven defendants objected on the ground that " the nomination of judges is contrary to law and that the Court has no jurisdiction ". He raised an additional objection which was split up by him as follows :—" (*a*) The direction by the Minister is null and void ; and (*b*) The nomination of the Judges by the Minister is null and void ".

[1] *See page 361* (infra). [2] *See page 363* (infra).
[3] *See page 364* (infra).

Counsel for the remaining five defendants, except counsel for the 19th defendant, did not raise any separate objections themselves but indicated that they would be supporting the objection raised by Mr. Ponnambalam. Counsel for the 19th defendant informed Court that he would formulate his objections as follows :—

" (*a*) The constitution of this court is contrary to law, and therefore the court has no jurisdiction to try the case ;

(*b*) In any event, the direction under section 440A of the Criminal Procedure Code and the nomination under section 9 of the Criminal Law (Special Provisions) Act are bad in law. "

He further moved for summons on certain persons whose testimony, he stated, would be required to establish an allegation of *mala fides* on the part of the Minister of Justice in issuing the direction and making the nomination of Judges proof of which was necessary to maintain his objections. We intimated to counsel for the 19th defendant that we would consider the question of ordering summons to issue if he could satisfy us that the evidence he contemplated obtaining was relevant and admissible.

Of these several objections, it seems to us that the additional objection raised by Mr. Wikramanayake requires first consideration as the sustaining of that objection would have the result of terminating the present proceedings. The substance of this additional objection that (*a*) the direction and (*b*) the nomination made by the Minister are null and void was based on an interpretation he sought to place on section 2 of the Official Language Act, No. 33 of 1956, read with the Language of the Courts Act, No. 3 of 1961. He contended that, as a result of the enactment of the Official Language Act, the Sinhala language has on and after the 1st day of January 1961 become the only official language of Ceylon, and that the direction and nomination made by the Minister, being official acts of an official, were required to be done in the Sinhala language. The Language of the Courts Act is designed to provide for the use of the Sinhala language for recording the proceedings and for pleadings filed of record. No Order as contemplated in section 2 of that Act has hitherto been made in respect of any of the Courts and English still continues as the language of the Courts. The direction and nomination of the Judges by the Minister, not being acts constituting proceedings in court nor forming pleadings filed of record, so Mr. Wikramanayake argued, could only have been validly done in the Sinhala language. While he conceded that English was still the language of the Courts and, therefore, that the communication to Court of the direction and the nomination could have been validly done in English, he contended that communication can take place only after the performance of the acts and that there is an admission that the direction and nomination had been effected only in the English language.

Act No. 33 of 1956 is intituled " An Act to prescribe the Sinhala language as the one official language of Ceylon and to enable certain transitory provisions to be made. " Section 2 of the Act enacts :—

" The Sinhala language shall be the one official language of Ceylon :

Provided that where the Minister considers it impracticable to commence the use of only the Sinhala language for any official purpose immediately on the coming into force of this Act, the language or languages hitherto used for that purpose may be continued to be so used until the necessary change is effected as early as possible before the expiry of the thirty-first day of December, 1960, and, if such change cannot be effected by administrative order, regulations may be made under this Act to effect such change."

This Act became law on 7th July 1956, and on that same day the appropriate Minister published a notification in the *Gazette*—(see *Government Gazette Extraordinary,* No. 10,949 of 7th July 1956)—in the following terms :—

" By virtue of the powers vested in me by the proviso to section 2 of the Official Language Act No. 33 of 1956, I, Solomon West Ridgeway Dias Bandaranaike, Prime Minister, being the Minister in charge of the subject of the said Act, do hereby declare that where any language or languages has or have hitherto been used for any official purpose, such language or languages may be continued to be so used until the necessary change is effected in accordance with the provisions of the aforesaid section. "

It is common ground that no regulations have been made as permitted by this Act, and Mr. Wikramanayake contended that, as the time limit permitted by the proviso has now passed, the proviso itself has now ceased to have any force. He argued that the transitory provisions themselves must cease on the expiry of the thirty-first day of December 1960 and the use of the language prescribed by section 2 as the one official language which meant the only official language must prevail over the use of any other language.

It may be mentioned here that Mr. Wikramanayake did not contend that section 2 warranted the proposition that Sinhala became on and after 1st January 1961 the only language in which the acts of all the functions of Government in this country could have been or can be performed. He was content for the purpose of this case to argue that it was the intention of the legislature to confine the operation of section 2 to official acts in the sense of acts of officials as distinguished from acts of the legislature or acts done in court proceedings. The learned Attorney-General himself submitted that the expression " official " in section 2 signified no more than authorised for official use, but he relied on the absence of any provision in Act No. 33 of 1956 in respect of the consequences of a failure to use the Sinhala language as the only official

language as indicative of the intention of the legislature deliberately to refrain from providing any sanction in the event of such a failure. He submitted, further, that the legislature recognised that the change could not be effected immediately and that a period of transition was necessary, but that no limit was placed by the Act on the duration of the period of transition. He was compelled to advance the argument that the effect of the proviso was to retain the period of transition until a change is in fact effected.

Relying upon certain observations contained in the judgment of Bowen L.J. in *The Queen v. Justices of County of London and London County Council*[1], he submitted that the expression " Before the expiry of the thirty-first day of December 1960 " is nothing more than a counsel of perfection involving no consequences if the counsel is not heeded, and that the proviso in effect permitted the Minister to ensure that the language or languages used up to the date of the enactment of Act No. 33 of 1956 may be continued to be so used until the necessary change is effected, although the intention and direction of the legislature was that it be effected as early as possible. He argued that the Act must be read, as all enactments are, subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature, and that if two possible interpretations can be placed of which one is likely to bring about a mischievous result while the other is conducive to peace, order and good government, the court must lean towards the latter interpretation.

It appears to us unnecessary to pronounce on the merits of these respective contentions. Even if one were to assume the correctness of Mr. Wikramanayake's contention that on and after 1st January 1961 official acts of officials could have been or can be performed only in the Sinhala language, as English is still admittedly the language of the Court, the communication by the Minister to the Court by documents made out in English of the direction and nomination of Judges by him is, in our opinion, a sufficient compliance with the existing law. We are therefore unable to sustain the additional objection and, accordingly, overrule it.

We can now turn our attention to the main objections which have been already specified. Although stated in varying forms by the several counsel for the defendants they raise in substance the unconstitutionality of certain provisions of the Criminal Law (Special Provisions) Act, and are designed to obtain from this Court a declaration that Sections 8 and 9 of that Act which relate to the powers of the Minister of Justice to issue respectively a direction that persons accused of certain offences be tried before the Supreme Court at Bar by three Judges without a jury and to nominate those three Judges are *ultra vires* the powers of the Legislature as granted by the Ceylon (Constitution) Order in Council, 1946. It will be convenient to deal with the alleged invalidity of the power to issue

[1] *L. R. (1893) 2 Q. B. at 491.*

a direction separately from the alleged invalidity of the power to nominate as the relevant considerations applicable appear to us to differ materially in the two cases.

First, as to the direction. Section 8 of the Criminal Law (Special Provisions) Act provides as follows :—

> "Any direction issued by the Minister of Justice under Section 440A of the Criminal Procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise."

This objection to the power of the Minister conferred on him by Section 440A of the Criminal Procedure Code (as now amended by Section 4 of Act No. 1 of 1962) to direct that these defendants be tried before the Supreme Court at Bar by three Judges, although outlined by counsel for all the defendants, was finally persisted in only by Mr. Ponnambalam. He pointed to the history of Section 440A, and explained that while the Code always contained provision—Section 216—whereby the Chief Justice may in his discretion order that any trial before the Supreme Court be a Trial at Bar by jury before three Judges, it was only after the religious riots of 1915 that the Legislature introduced provision for Trial at Bar without a jury, and that until the introduction of the 1946 Constitution the power to direct such a Trial at Bar rested with the Governor. The reason for the introduction into our law of the system of trial without jury in cases which up to that time had been triable by jury was understandable as the chances of ensuring an unbiassed jury at times when public feeling is profoundly disturbed, whatever be the cause, are considerably lessened. Mr. Ponnambalam was inclined to question whether the Governor himself could have been granted that power, but it seems to us quite unnecessary to go into that question here. He certainly argued that the substitution of the Minister of Justice in place of the Governor in 1947 was not competent. This argument is, in our opinion, sufficiently repulsed by a reference to Section 88 of the Constitution Order in Council, 1946, itself, which embodied the following transitory provisions relating to the modification of existing laws :—

> 88.—"(1)" The Governor may by Proclamation at any time before the first meeting of the House of Representatives under this Order make such provision as appears to him necessary or expedient, in consequence of the provisions of this Order, for modifying, adding to, or adapting the provisions of any written law which refer in whatever terms to the Governor, the State Council, the Board of Ministers, the Officers of State, a Minister, an Executive Committee or a public officer, or otherwise for bringing the provisions of any written law into accord with the provisions of this Order or for giving effect thereto. —(2) Every Proclamation under " subsection (1) of this section shall have the force of law and may be amended, added to or revoked by further Proclamation within the period specified in that subsection."

Acting under Section 88 the Governor by Proclamation of 18th September 1947 published in Government Gazette Extraordinary No. 9773 of September 24, 1947 directed the substitution for the word " Governor " in Section 440A of the words " Minister of Justice " . It would be wholly unprofitable to attempt to assess, as Mr. Ponnambalam invited us to do, whether the Minister of Justice could have been so substituted for the Governor because the paramount law, the Constitution itself, empowered the Governor to modify, add or adapt the provisions of any law " *as appears to him necessary or expedient.* " In view of the consistent interpretation language such as this has received in recent times in Courts of the highest authority, it is now too late in the day to argue that, when the Legislature confers power on an individual by employing expressions such as " as appear to (the designated individual) necessary " or " as (the designated individual) considers sufficient ", that is not enough warrant to constitute such designated individual the sole judge of what is necessary or sufficient. See, for instance, the Privy Council decision in *Ross-Clunis v. Papadopoullos* [1]. Nor do we think that by itself the fact that we have assembled to hear this case in pursuance of the direction made by the Minister has the effect of constituting us a special Court or Tribunal and not the Supreme Court. We need only refer to the admittedly sole previous instance after the introduction of the 1946 Constitution of a Trial at Bar held before the Supreme Court by three Judges without a jury, viz. *The Queen v. Theja Gunawardene* [2], where the Court stated that " the circumstance that the Minister purported to direct that an Information shall be tried before the Supreme Court at Bar by three judges without a jury does not, in our opinion, have the effect that a Bench of three judges which assembles to hear the Information ceases to be the Supreme Court and becomes a different tribunal created by the Minister. "

Another argument for invalidating Section 8 (an argument which extended in respect of Section 9 as well) advanced by Mr. Ponnambalam was based on the contention that the Legislature of this country not being sovereign it was competent to a Court to examine legislation to decide whether it was actually for the peace, order, and good government of the country, and, if it was not, to pronounce it void. Section 29 (1) of the Order in Council provides that " subject to the provisions of this Order, Parliament shall have the power to make laws for the peace, order, and good government of the Island. " Such a power has been held " to authorise the utmost discretion of enactment for the attainment of the objects pointed to ", and a Court will not inquire whether any particular enactment of this character does in fact promote the peace, order or good government of the Colony—see *Chenard and Co. v. Joachim Arissol* [3]. Mr. Ponnambalam sought to read Section 29 (1) as a limiting clause whereas it appears to us clearly as an empowering clause. Cases decided in Ceylon or other countries of the British Commonwealth at a time when the Colonial Laws Validity Act applied

[1] *L. R. (1958) A. C. at 559.* [2] *(1954) 56 N. L. R. 193 at 205.*
[3] *L. R. (1949) A. C. at 132.*

would be without application today. To agree with the submission made by learned counsel would be to negative the Sovereignty of Parliament which in this country is now limited only in the manner set out in the other sub-sections of Section 29. To extend the scope of judicial review beyond that would appear to us to place in the Courts a new power unrecognized by the Constitution at the expense of a power vested in Parliament by the Constitution. We find ourselves unable to uphold any of the arguments raised by Mr. Ponnambalam in order to impugn Section 8 of Act No. 1 of 1962.

What we have stated above do not, however, dispose of all the objections centering round the direction that a Trial at Bar be held by three Judges without a jury. Counsel for the 19th defendant has raised the objection that, even assuming that the power conferred on the Minister to issue a direction is *intra vires* the powers of the Legislature under the Constitution or is not in conflict with them (since it was a power that existed even before the Order in Council of 1946 was made by His Majesty in Council), *mala fides* of the Minister in making the particular direction in this case vitiates it.

We had intimated to learned counsel that evidence to establish the existence of *mala fides* in the Minister of Justice would have been permitted to be led only if he could have satisfied us that such evidence was relevant and admissible. The learned Attorney-General has, in respect of this question, brought to our notice a decision in an English case, undoubtedly of the highest authority, which appears to us to be an effective bar to our sustaining this particular objection outlined on behalf of the 19th defendant. No attempt was made on behalf of the defendants to distinguish this authority in any way and it affords a complete answer to the point raised. We refer to the case of *Smith v. East Elloe Rural District Council*,[1] where the House of Lords was called upon to consider the interpretation to be placed on paragraph 16 of Part IV of Schedule I of the Acquisition of Land (Authorisation Procedure) Act, 1946, which was in the following terms :—

> 16—" Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part III of this Schedule shall not, either before or after it shall be confirmed, made or given, *be questioned in any legal proceedings whatsoever* . . . ."

The House of Lords held, by a majority, that the jurisdiction of the Court was ousted by reason of the plain prohibition in paragraph 16. Viscount Simonds, who was one of the judges comprising the majority,—at p. 750—expressed himself thus :—

> " My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance

[1] *L. R. (1956) A. C. 736.*

may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested . . . . What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, My Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test that paragraph 16 bars. "

On the same point, Lord Radcliffe, another of the judges who comprised the majority, stated—at p. 769 :—

" At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. And that brings us back to the question that determines this case : Has Parliament allowed the necessary proceedings to be taken ? "

We hold that all the objections taken in respect of the direction issued by the Minister fail, and that Section 8 of Act No. 1 of 1962 is *intra vires* the Legislature.

Next, as to the nomination. Much of the argument before us was centred on an attack on Section 9 of Act No. 1 of 1962 as being *ultra vires* the Legislature's power to make law by a simple majority. It is a novel provision of law raising in this case an interesting but difficult question of law.

Section 9 may conveniently be reproduced here :—

9. " Where the Minister of Justice issues a direction under Section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three judges so nominated, shall be the president of the Court.

The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted, and accordingly the constitution of that Court, and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise."

The decision in *Smith v. East Elloe Rural District Council* (supra) would become applicable even in regard to the attempt to impugn the nomination under Section 9 only if this section is itself *intra vires* the Legislature. It has not been disputed by the Crown that this Court has, notwithstanding the wording of Section 9, jurisdiction to consider whether the section is *ultra vires*. In order to found this attack all counsel who addressed us on behalf of the defendants contended that the Constitution of Ceylon recognised a separation of powers of Government. We were referred to the Constitutions of many countries, notably those of the United States of America, Australia, Canada, South Africa and India. On the other hand, the Attorney-General contended that no separation of powers exists under our Constitution, and that, if a separation of powers exists dehors the written Constitution, it is a separation after the British method because we had been accustomed to that kind of separation throughout the British occupation of this country.

In view of the fact that the Ceylon (Constitution) Order in Council of 1946 itself recites that His Majesty's Government have reached the conclusion that a Constitution on the general lines proposed by the Soulbury Commission (which also conforms in broad outline, save as regards the Second Chamber, with the Constitutional scheme put forward by the Ceylon Ministers themselves) will provide a workable basis for constitutional progress in Ceylon, we permitted counsel on both sides to make reference to the text of parts of the report of the Soulbury Commission itself, a course which Their Lordships of the Judicial Committee approved in somewhat similar circumstances in *Kodakan Pillai v. Mudannayake* [1]. Counsel for the defendants referred us to paragraphs 395 and 396 of that Report (Ceylon—Report of the Commission on Constitutional Reform, Cmd. 6677, September 1945) wherein the Commissioners state :—

395. " In making these recommendations we have fully considered the objections usually raised by those trained in the English tradition to the establishment of a Ministry of Justice, on the ground that a Ministry so designated is apt to blur—at least in the public mind—the line of demarcation prescribed under English practice between the Judiciary and the Executive. We realise that Ceylon is accustomed to the British system and that any departure from British principles would be likely to meet with widespread opposition."

396. " We would therefore make it amply clear that in recommending the establishment of a Ministry of Justice we intend no more than to secure that a Minister shall be responsible for the administrative side

[1] *(1953) 54 N. L. R. at 438.*

of legal business, for obtaining from the Legislature financial provision for the administration of justice, and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of Justice having any power of interference in or control over the performance of any judicial or quasi-judicial function, or the institution or supervision of prosecutions......"

The learned Attorney-General, on the other hand, referred us to the Epilogue to the Report—paragraphs 408 to 410—wherein the Commissioners state that—

"The Constitution we recommend for Ceylon reproduces in large measure the form of the British Constitution, its usages and conventions, and may on that account invite the criticism so often and so legitimately levelled against attempts to frame a government for an Eastern people on the pattern of Western democracy......It is easier to propound new constitutional devices and fresh constructive solutions than to foresee the difficulties and disadvantages which they may develop. At all events, in recommending for Ceylon a Constitution on the British pattern, we are recommending a method of Government we know something about, a method which is the result of very long experience, which has been tested by trial and error and which works, and, on the whole, works well.

Be that as it may, the majority—the politically conscious majority of the people of Ceylon—favour a Constitution on British lines. Such a Constitution is their own desire, and is not being imposed on them....

But we think that Ceylon is well qualified for a Constitution framed on the British model, and we regard our proposals as a further stage in the evolution of the system under which Ceylon was governed prior to 1931—an evolution to some extent interrupted by the experiment of the Donoughmore Constitution of that year......

We think that it should be well within the capacity of a future Government of Ceylon to operate a form of Constitution which does not represent a novel and strange creation, but is the natural evolution of a type of government with which the Ceylonese had for some time been familiar."

While we have referred to the Report of the Soulbury Commission, the question raised as to whether a separation of the three powers or functions of Government is embodied in our Constitution must ultimately be answered by an examination of the provisions of the Order in Council itself. The learned Attorney-General pointed out that under our Constitution the Cabinet of Ministers who are all members of the Legislature (i.e. of the Senate or the House of Representatives) are all executive officers and direct the executive functions of Government. The Chief Justice and at least one other Judge of the Supreme Court are members of the Judicial Service Commission, a body performing executive functions. It must, however, not be overlooked that these are functions assigned to

them under the paramount law, the Constitution itself. It appears to us unnecessary to go into this question at any length except to say that if by a separation of powers or functions of Government is meant a mutually exclusive separation of such powers or functions as obtains in the American Constitution or even in the Constitution of the Commonwealth of Australia, which was itself based on the American Constitution, there is no such mutually exclusive separation of governmental functions in our Constitution. Nor on the other hand do we have a sovereign Parliament in the sense in which that expression is used in reference to the Parliament of the United Kingdom. That a division of the three main functions of Government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature, i.e. the established civil courts of this country.

There is no dispute that the three of us, as constituting, for the purposes of this Trial at Bar, the Supreme Court are called upon to exercise the strict judicial power of the State, and, in fact, we have, all three of us, received at one time or another, but in each case before the Supreme Court was so called upon to exercise judicial power, appointment by the Governor-General acting under Section 52 (1) of the 1946 Order in Council.

It was strongly urged on behalf of the defence that the power of nomination reposed by the impugned section 9 in the Minister is, in pith and substance, a power of appointment of Judges of the Supreme Court in contravention of the said section 52 (1), and that the three of us constituted neither the Supreme Court nor a bench of Judges of the Supreme Court but merely a tribunal appointed by the Minister from the panel of Supreme Court Judges.

Whether or not the power of nomination granted to the Minister is *intra vires* the Constitution, there is, in our opinion, no doubt that this Court is assembled as the Supreme Court holding a Trial at Bar in terms of Section 440A of the Criminal Procedure Code and not as a separate court or tribunal. We have so assembled by virtue of a nomination made by the Minister, and if that nomination be *ultra vires* the Constitution we are agreed that this Court is not a duly constituted panel of Supreme Court Judges to hold a Trial at Bar as representing the Supreme Court.

In support of the argument that this nomination is an appointment, the defence, apart from leaning on a dictionary meaning of the word—" appoint (a person) by name to some office or duty "—relied on the decision of the Privy Council in *Attorney-General for Ontario v. Attorney-General for Canada*[1]. That case related to a conflict between the powers of the Governor-General of Canada to appoint Judges vested in him under Section 96 of the Canadian Constitution and a certain provision

[1] *(1925) 94 L. J. (P. C.) 132—L. R. (1925) A. C. 750.*

in the Judicature Act of Ontario of 1924 passed by the Legislature of the Province of Ontario which had been empowered by Section 92 of the Dominion Constitution to make laws for the administration of justice in the Province, including the constitution, maintenance and organisation of the Provincial Courts.

By the Judicature Act of 1924, the Legislature of Ontario established in lieu of the then existing Supreme Court a Supreme Court of Ontario consisting of 19 Judges to be appointed by the Governor-General as provided in the Constitution. This Court was divided into two Divisions—the Appellate Division and the High Court Division. The rights of the existing Judges were safeguarded, but the Act empowered the Lieutenant-Governor of Ontario to assign some of the Supreme Court Judges to the Appellate Division and some to the High Court Division. He was also authorised to designate the Presidents of the two Divisions and they were to be called the Chief Justice of Ontario and the Chief Justice of the High Court Division respectively.

The powers conferred on the Lieutenant-Governor by this Judicature Act were challenged as being *ultra vires* the Canadian Constitution. Upholding the challenge, Viscount Cave, L. C., stated in the Judicial Committee :—

> " What is the effect of these provisions ? It can hardly be doubted that the result of these was to authorise the Lieutenant-Governor of the Province to assign—that is to say, to appoint certain Judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint certain Judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the Statute, as it appears to be, there can be no doubt that the effect of the Statute, if valid, would be to transfer the right to appoint the two Chief Justices and Judges of Appeal from the Governor-General of Canada to the Lieutenant-Governor of Ontario in Council; and if so, it must follow that the Statute is to that extent inconsistent with section 96 of the Act of 1867 and beyond the power of the Legislature of Ontario. "

It is evident that in spite of the use of the words " assign " and "designate " the effect of the 1924 Act was to restrict the powers of appointment given to the Governor-General by the Constitution to an appointment of the Judges to the Supreme Court generally without allowing him the right to appoint them to the two Divisions of that Court. Clearly the Act purported to give the Lieutenant-Governor the right to appoint Judges to particular offices as such, though his field of selection was limited.

In the case before us the nomination of the Judges by the Minister does not constitute an appointment to any new office or even to any office as such. The Judges nominated by the Minister were already Judges of the Supreme Court, and in holding a Trial at Bar under section 440A of the Criminal Procedure Code they function as Judges of the Supreme Court and in no other capacity.

The power of nomination conferred on the Minister is no different in substance from the power exercised by the Chief Justice to nominate a bench of Judges to hear and determine a cause either by virtue of his statutory power under section 51 of the Courts Ordinance or by virtue of his conventional function in nominating Judges to hear certain other matters. There are various provisions in the Courts Ordinance for the hearing of appeals, applications and other cases in the exercise of the original criminal jurisdiction of the Supreme Court by one, two, three or more Judges. The power to nominate the judges in cases where no express statutory provision has been made therefor appears to us to reside in the Court, although it is correct to say that by convention it is the Chief Justice who, for purposes of convenience, exercises such power. Can it be seriously contended that every time the Chief Justice so nominates a judge or judges, whether by virtue of his statutory or his conventional powers, he is appointing judges to particular offices as distinct and separate from the offices to which they were appointed by the Governor-General ? Had the Minister, of course, purported to nominate any person who did not hold the office of a Judge of the Supreme Court to officiate as a Judge at this Trial at Bar, he would undoubtedly have been purporting to appoint a person to the office of a Judge in contravention of section 52 (1) of the Order in Council. We therefore think that the nomination of the judges by the Minister in this instance is not an appointment by him of any person to the office of a Judge of the Supreme Court. The nomination is not *ultra vires* on that ground. Nor do we think that it is possible for us to uphold the defence contention that the Minister, by this act of nomination, has constituted or created a new tribunal distinct and separate from the Supreme Court.

Another argument advanced by the defence was that the Supreme Court is one and indivisible and that the power of nomination given to the Minister by section 9 violated the unity and indivisibility of the Court. There can be no doubt that the existence of the Supreme Court is impliedly entrenched by section 52 of the Order in Council. The entrenched provisions in the Constitution in respect of the appointment, tenure, salary and removal of Judges of the Supreme Court will have no meaning if the Supreme Court is abolished. We are, however, unable to accept the proposition that the entire jurisdiction vested in the Supreme Court by the Courts Ordinance and other Statutes at the time of the coming into force of the 1946 Constitution is also entrenched as part of the Constitution or that no part of that jurisdiction can be removed and vested in a judicial officer or otherwise abolished by Parliament by law passed by a simple majority.

Section 6 of the Courts Ordinance enacts that there shall continue to be within Ceylon one Supreme Court which shall be called " The Supreme Court of the Island of Ceylon ". There was a similar provision in section 5 of the Charter of 1833 which established the Supreme Court. Under the Courts Ordinance judges sitting apart singly or in various combinations are empowered to exercise the several jurisdictions of the Supreme Court.

powers are expressly or by implication excluded from the scope of Chapter III (The Judicature) but what powers are expressly or by implication included in it ". Is the power of nomination or selection of judges to hear a particular cause an implied power, in this sense, of the judicature. On such occasions as our law (except in this impugned instance) has made express provision therefor it has been reposed in a member of the Judicature, and where no express provision has been made the implication is strong that it is the Court itself that can effect the nomination or selection. That indeed has been the un-questioned practice for about a century and a half in this country.

The impugned section seeks to change this consistent and long-established practice. Is the change *intra vires* the Legislature's powers ? " It is always a serious and responsible duty ", said Isaacs J. in *Federal Commissioner of Taxation v. Munro*[1], " to declare invalid, regardless of consequences, what the national Parliament representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency—as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us—the question is : Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers ? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim ' ut res magis valeat quam pereat '. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down in the organic law of the Constitution, it must be allowed to stand as the expression of the national will ."

Bearing this principle in mind and recalling also that the judicial power of the State is vested in the Judicature (in which is included the Supreme Court), let us examine the question whether the nomination or selection of judges to hear a particular case, while itself not a part of the strict judicial power or the essence of judicial power in the sense of the definition of Griffiths C.J., is yet so much incidental to the exercise of that power or an incident in the exercise of that power as to form part of that power itself.

The Privy Council in the case of *The Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*[2] expressed itself in agreement with Isaacs J. when he stated in *Federal Commissioner for Taxation v. Munro* (*supra*) that " there are many functions which are either inconsistent with strict judicial action, as the arbitral function in *Alexander's case*, or are consistent with either strict judicial or executive action. If inconsistent with judicial action, the question is at once answered. If consistent with either strictly judicial or executive action, the matter must be examined further. "

[1] *(1926) 38 C. L. R. at 180.* [2] *(1931) A. C. at 275.*

Then again, in *The Queen v. Davison* [1], Dixon C.J. and Mc Tiernan J. in the High Court of Australia, in referring to the observation of the Court in *Queen Victoria Memorial Hospital v. Thornton* (*supra*), which we have already reproduced earlier, stated that " it is this double aspect which some acts or functions may bear that makes it so difficult to define the judicial power. . . . An extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court. The proper attribution of this power is a matter that has received much attention in the United States ", where, according to Dean Roscoe Pound's thesis on the subject, historically and analytically it is the function of the courts to regulate their procedure. Said Dean Pound :—

> " In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our Constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the Judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion."

Said Dixon C.J. and Mc Tiernan J. in *Davison's case* (*supra*) at p. 369 :—

> " The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within the judicial power so that Parliament cannot confide the function to any person or body but a court constituted under sections 71 and 72 of the Constitution, and this may also be true of some duties or powers hitherto invariably discharged by courts under our system of jurisprudence but not exactly of the foregoing description. "

In a case arising upon an interpretation of the American Constitution, where the difficulty was in distinguishing between a legislative and a judicial proceeding, it was held that the end accomplished may be decisive. Said Holmes J. in *Prentis v. Atlantic Coast Line Co* [2], " the nature of the final act determines the nature of the previous inquiry ". Though the purpose to which this test was put by Holmes J. was to distinguish a judicial from a legislative function, Dixon C.J. and Mc Tiernan J. thought, and we respectfully agree with them, that it may usefully be applied by analogy to ascertain whether a thing is done administratively or as an exercise of judicial power.

A somewhat different approach to the problem appealed to Kitto J. in the same case—at pp. 381–2—when he stated :—

> " It is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the

[1] *(1954) 90 C. L. R. at 369.* [2] *(1908) 211 U. S. 210.*

terms employed . . . . and it is safe to say that neither in England nor elsewhere had any precise tests by which the respective functions of the three organs might be distinguished ever come to be generally accepted. The reason, I think, is not far to seek. . . . . the separation of powers doctrine is properly speaking a doctrine not so much about the separation of functions as about the separation of functionaries . . . . For it still remains true firstly, that different skills and professional habits are needed at the different levels of law-making; and secondly, that concern for individual liberty will always see one of its chief safeguards in the precautionary disposal of law-making power. It may accordingly be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at a time when the Constitution was framed between classes of powers requiring different " skills and professional habits " in the authorities entrusted with their exercise.

For this reason it seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were in fact treated in this country at the time the Constitution was in fact prepared. Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

As we have already stated, section 9 of Act No. 1 of 1962 is a novel provision of law the like of which does not hitherto appear to have found a place in any recognised system of law. We find ourselves echoing here the words of Bonser C.J. used, in another context, in an old Ceylon case, *Rode v. Bawa*, [1] that " there is no case exactly like this to be found in the books, for I suppose such a case never happened before." The right of a judge to exercise judicial power is so inextricably bound up with the actual exercise of the power and is such an essential step in the exercise of the strictly judicial power that it must, in our opinion, be considered part of the power itself. Unless the Legislature has vested the exercise of any strictly judicial power in the entire Supreme

[1] *(1896) 1 N. L. R. at 374.*

Court, it is necessary that a bench of Judges should be nominated to exercise that judicial power vested in the Supreme Court. If the power of nomination is completely abolished, no judicial power vested in the court can be exercised. If that power is vested in an outside authority, it will legally be open to such authority to exercise that power to prevent a particular judge or judges from exercising any part of the strictly judicial power vested in them by the Constitution as judges of the Supreme Court. The absurdity of such a possible result will be more marked if, instead of the position of a Puisne Justice of the Court, the position of the Chief Justice himself be considered. Under a provision of law of this nature it seems to us legally possible to exclude the Chief Justice himself from presiding in the Court of which he is the constitutionally appointed Head. The exercise of the power to nominate can then in practice result in a total negation of the judicial power of a judge or judges vested in them by the Constitution.

Then, again, if the power to nominate or select judges can be constitutionally reposed in the Minister on the ground that it is no more than an exclusively administrative act, we can see nothing in law to prevent such a power being conferred on any other official, whether a party interested in the litigation or not. The fact that the power of nomination so conferred is capable of abuse so as to deprive a judge of the entrenched power vested in him by virtue of his appointment under section 52 of the Order in Council, or at least to derogate from that power, is a consideration which is not an unimportant one in deciding whether the conferring of this power by section 9 on a person who is not a judge of the Supreme Court is *ultra vires* the Constitution. It may, of course, be contended that the power is capable of abuse even if it is granted to a Judge of the Supreme Court or, for that matter, to the entire Court. However, the proper authority under the Constitution to exercise this power appears to be the Judicature itself.

Although the cases to which we have made reference in this Order have been decided in Australia or the United States of America against the background of their respective Constitutions, it does not appear to us to be illegitimate to apply the tests referred to therein in a solution of the problem with which we are confronted in this case.

Applying the historical test indicated by Dean Pound or following the approach approved in the judgment of Kitto J. we have referred to, we are met with the fact that at all times prior to the enactment of the Criminal Law (Special Provisions) Act, No. 1 of 1962, this power of nomination was invariably vested in the Judicature. Whenever there was no express vesting of this power it was always exercised by Her Majesty's Courts and the Judges thereof. As we have already stated, no instance has been cited either in this country or in any country of the British Commonwealth of Nations where such a right of nomination or selection has been granted to anyone outside the Judicature.

On the other hand, if we were to apply what may be termed, for brevity, as the *Holmes test* and inquire what is the end or purpose in view in making this nomination there can be only one answer, viz. to exercise the strictly judicial power of the State. In this sense too, the Statute has purported to confer judicial power on the Minister.

For reasons which we have endeavoured to indicate above, we are of opinion that because

(*a*) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order in Council, 1946, or is in derogation thereof, and

(*b*) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature,

section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, is *ultra vires* the Constitution.

This conclusion we have reached on the validity of the law conferring the power of nomination on the Minister deprives us of jurisdiction to enter upon a Trial at Bar of these defendants. In ordinary circumstances, therefore, there would have been nothing more to be said at this stage. We, nevertheless, propose to refer to another objection of a fundamental character raised by Mr. Ponnambalam and supported by other counsel for the defence. Even if the power of nomination is *intra vires* the Constitution, does it offend, in the context of this particular case, against that cardinal principle in the administration of justice which has been repeatedly stated by Judges and which was restated in 1924 by Lord Hewart C. J. in *R v. Sussex Justices, ex parte Mc Carthy* [1] as follows :—

> " It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. "

Under section 440A of the Criminal Procedure Code as it stood prior to 1962 the Minister had merely the right to direct that the trial be held before the Supreme Court by three Judges without a jury. But the new legislation, passed, with retroactive effect, after the commission of the offences alleged, has purported to vest in the Minister, a member of the Government which the defendants are alleged to have conspired to overthrow by unlawful means and who, it was not disputed, had

[1] *(1924) 1 K. B. at 259.*

participated in the investigation and interrogation of some of the defendants, the additional power to nominate the three Judges. This power, as indicated already, had hitherto been vested in the Supreme Court as a body or in the Chief Justice, but certainly in no person or body outside the Judicature. This is the first occasion on which an attempt has been made to vest this power in such an outsider, and that too in circumstances where the propriety of the nomination becomes, by reason of the doctrine of ministerial responsibility, discussable in Parliament involving, perhaps, the merits and demerits of respective Judges, whereas under the previous law the Judges enjoyed freedom from being the subject of such a discussion.

A court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this court on enquiry as to whether the ordinary or reasonable man would feel that this court itself may be biassed. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of Judges? Will he not be justified in asking himself, "Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the Judges whereas the other party to the cause has no say whatever in a selection? Have not the ordinary canons of justice and fairplay been violated?" Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?

Examining previous instances where this principle has been applied, we find Swift J. in *R v. Essex Justices, ex parte Perkins*[1] stating that "it is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiassed", and Bucknill J. observing in *Cottle v. Cottle*[2] that the test to be applied is "whether or not a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice." Our own Court of Criminal Appeal has, in *The King v. Beyal Singho*[3], formulated the rule thus :—"Nothing is to be done which raises a suspicion that there has been an improper interference with the course of justice."

Guiding ourselves by these tests and those applied in *other cases*[4] we have examined, we find it difficult to resist the conclusion that the power of nomination conferred on the Minister offends the cardinal principle as restated by Lord Hewart. For that reason, even had we come to a

[1] *(1927) 2 K. B. at 488.*

[2] *(1939) 2 A. E. R. 541.*

[3] *(1946) 48 N. L. R. at 27.*

[4] (a) *Eckersley v. Mersey Docks and Harbour Board, (1894) 2 Q. B. 670.*
(b) *Rode v. Bawa (supra).*
(c) *Dingiri Mahatmaya v. Mudiyanse, (1922) 24 N. L. R. 377.*
(d) *Ruthira Reddiar v. Subba Reddiar (1937) 39 N. L. R. 14.*
(e) *The King v. Caldera (1938) 11 C. L. W. 1.*
(f) *Kandasamy v. Subramaniam (1961) 63 N. L. R. 574.*

different conclusion regarding the validity of section 9 of the Criminal Law (Special Provisions) Act, we would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this country.

Sgd. T. S. FERNANDO,
Puisne Justice.

Sgd. L. B. DE SILVA,
Puisne Justice.

Sgd. P. SRI SKANDA RAJAH,
Puisne Justice.

Preliminary objection as to jurisdiction of the Court upheld.

Document "A".

Direction under Section 440A of the Criminal Procedure Code as amended by Section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962

To the Honourable the Chief Justice of the Supreme Court of the Island of Ceylon.

I, Samuel Peter Christopher Fernando, Minister of Justice, by virtue of the power vested in me by Section 440A (1) (*a*) of the Criminal Procedure Code, as amended by Section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, do hereby direct that the trial of the following persons, to wit,

1. Don John Francis Douglas Liyanage
2. Maurice Ann Gerard de Mel
3. Frederick Cecil de Saram
4. Cyril Cyrus Dissanayaka
5. Sidney Godfrey de Zoysa
6. Gerard Royce Maxwell de Mel
7. Wilmot Selvanayagam Abraham
8. Bastianpillai Ignatius Loyola
9. Wilton George White

10. Nimal Stanley Jayakody
11. Anthony John Bernard Anghie
12. Don Edmond Weerasinghe
13. Noel Vivian Mathysz
14. Victor Leslie Percival Joseph
15. Basil Rajandiram Jesudasan
16. Victor Joseph Harold Gunasekera
17. John Anthony Rajaratnam Felix
18. William Ernest Chelliah Jebanesan
19. Terrence Victor Wijesinghe
20. Lionel Christopher Stanley Jirasinghe
21. Vithanage Elster Perera
22. David Senadirajah Thambyah
23. Samuel Gardner Jackson
24. Rodney de Mel

in respect of the following offences under Chapter VI of the Penal Code, to wit,

1. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did conspire to wage war against the Queen and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with Section 114 of the Penal Code.

2. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

3. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

be held before the Supreme Court at Bar by three Judges without a Jury.

Given under my hand this 23rd day of June, 1962, at Colombo.

Sgd. Sam. P. C. Fernando.
Minister of Justice.

Document " B ".

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Information

Information exhibited by Her Majesty's Attorney-General

THE QUEEN

vs.

1. Don John Francis Douglas Liyanage
2. Maurice Ann Gerard de Mel
3. Frederick Cecil de Saram
4. Cyril Cyrus Dissanayaka
5. Sidney Godfrey de Zoysa
6. Gerard Royce Maxwell de Mel
7. Wilmot Selvanayagam Abraham
8. Bastianpillai Ignatius Loyola
9. Wilton George White
10. Nimal Stanley Jayakody
11. Anthony John Bernard Anghie
12. Don Edmond Weerasinghe
13. Noel Vivian Mathysz
14. Victor Leslie Percival Joseph
15. Basil Rajandiram Jesudasan
16. Victor Joseph Harold Gunasekera
17. John Anthony Rajaratnam Felix
18. William Ernest Chelliah Jebanesam
19. Terrence Victor Wijesinghe
20. Lionel Christopher Stanley Jirasinghe
21. Vithanage Elster Perera
22. David Senadirajah Thambyah
23. Samuel Gardner Jackson
24. Rodney de Mel

Defendants.

This 23rd day of June, 1962.

BE it remembered that Douglas St. Clive Budd Jansze', Esquire, Queen's Counsel, Her Majesty's Attorney-General for the Island of Ceylon, who for Her Majesty in this behalf prosecutes, gives the Court to understand and be informed that—

1. On or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places within the jurisdiction of this Court, the defendants abovenamed with others did conspire to wage war against the Queen and did thereby commit an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with Section 114 of the Penal Code.

2. At the time and places aforesaid and in the course of the same transaction the defendants abovenamed with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and did thereby commit an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act No. 1 of 1962.

3. At the time and places aforesaid and in the course of the same transaction the defendants abovenamed with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and did thereby commit an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

WHEREUPON Her Majesty's Attorney-General prays the consideration of the Court here in the premises, and that due process of law may be awarded against the defendants abovenamed, in this behalf to make them answer to Our Sovereign Lady the Queen touching and concerning the premises aforesaid.

Sgd. D. Jansze,
Attorney-General.

Document " C ".

Nomination made by the Minister of Justice under Section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962

WHEREAS, I, SAMUEL PETER CHRISTOPHER FERNANDO, Minister of Justice, have on the Twenty-third day of June 1962, issued a direction under Section 440A of the Criminal Procedure Code, as amended by Section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, requiring that the trial of the following persons, to wit,

1. Don John Francis Douglas Liyanage
2. Maurice Ann Gerard de Mel
3. Frederick Cecil de Saram
4. Cyril Cyrus Dissanayaka
5. Sidney Godfrey de Zoysa

6. Gerard Royce Maxwell de Mel
7. Wilmot Selvanayagam Abraham
8. Bastianpillai Ignatius Loyola
9. Wilton George White
10. Nimal Stanley Jayakody
11. Anthony John Bernard Anghie
12. Don Edmond Weerasinghe
13. Noel Vivian Mathysz
14. Victor Leslie Percival Joseph
15. Basil Rajandiram Jesudasan
16. Victor Joseph Harold Gunasekera
17. John Anthony Rajaratnam Felix
18. William Ernest Chelliah Jebanesan
19. Terrence Victor Wijesinghe
20. Lionel Christopher Stanley Jirasinghe
21. Vithanage Elster Perera
22. David Senadirajah Thambyah
23. Samuel Gardner Jackson
24. Rodney de Mel

in respect of the following offences under Chapter VI of the Penal Code, to wit,

1. That on or about the 27th day of January, 1962, they with others did conspire to wage war against the Queen and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with Section 114 of the Penal Code.

2. That on or about the 27th day of January, 1962, they with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

3. That on or about the 27th day of January, 1962, they with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under Section 115 of the Penal Code as amended by Section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

be held before the Supreme Court at Bar by three Judges without a Jury :

NOW THEREFORE, I, SAMUEL PETER CHRISTOPHER FERNANDO, Minister of Justice, in pursuance of the power vested in me by Section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, do hereby nominate

(1) THE HONOURABLE THUSEW SAMUEL FERNANDO, C.B.E., Q.C.

(2) THE HONOURABLE LEONARD BERNICE DE SILVA

(3) THE HONOURABLE PONNUDURAISAMY SRI SKANDA RAJAH

Judges of the Supreme Court of the Island of Ceylon, to be the three Judges who shall preside over the trial of the aforementioned persons to be held in pursuance of the aforementioned direction.

Given under my hand this 23rd day of June, 1962.

Sgd. Sam. P. C. Fernando,
Minister of Justice.

To The Honourable the Chief Justice,
Colombo.