

[IN THE COURT OF CRIMINAL APPEAL]

-1963

Present : Basnayake C. J. (President), H_{er}rat, J., and
Abeyesundere, J.

THE QUEEN v. A. D. HEMAPALA

Appeal No. 230 of 1960, with Application No. 253

S. C. 41—M. C. Horana, 27640

Privy Council—Right of appeal thereto in criminal cases from Ceylon—Applicability to Ceylon of the judicial prerogative of the Queen of England—Position of Sovereign of Ceylon—Ceylon (Constitution) Order in Council, 1946, ss. 4, 25, 30, 33, 36, 45—Ceylon Independence Act, 1947, s. 1—Ceylon Independence Order in Council, 1947, s. 4—Royal Titles Act, 1953, s. 2—Royal Executive Powers and Seals Act, 1954, ss. 2, 8, 9, 10—Proclamation of 28th May, 1953—Court of Criminal Appeal Ordinance, ss. 5, 23.

A citizen of Ceylon does not have, since the coming into force of the Ceylon Independence Act and the Ceylon Independence Order in Council, a right to invoke the prerogative power of the Sovereign of England in Council of entertaining an appeal from the Courts of a British Colony in a criminal matter. The prerogative right of the Sovereign of England in Council to entertain appeals from Ceylon ceased on Ceylon becoming an independent country.

Where, in an appeal from a decision of the Court of Criminal Appeal, the Judicial Committee of the Privy Council, reversing the decision of the Court of Criminal Appeal, quashed the conviction of the appellant, and the case was sent back by the Queen in Council with directions to the Court of Criminal Appeal to decide in its discretion whether there should be a new trial—

Held, that the Order in Council passed by Her Majesty in Council was one which She had no power to make in respect of Ceylon. The Court of Criminal Appeal had therefore no power, in obedience to that Order in Council, to order a new trial, as the Order was not legal. Under the Court of Criminal Appeal Ordinance, the Court of Criminal Appeal had no discretion to order a new trial at the present stage. Nevertheless, the reversal of the decision of the Court of Criminal Appeal and the quashing of the appellant's conviction were unaffected by the present decision of the Court of Criminal Appeal, as the present decision could not affect past acts which have taken effect.

APPPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *S. S. Basnayake* and *P. O. Wimalanaga*, for accused-appellant.—The British Sovereign continues to be the Sovereign of Ceylon too and orders made by her in the exercise of her prerogative power have the force of law not by reason of any statute but by reason of a right obtained derivatively and by reason of tradition.

13—LXV

R 18811—1,855 (11/63)

In matters affecting their rights, her subjects can appeal to the Queen in her Council. However, this right of appeal is not confined to her subjects, as evidenced in the case where an alien appealed to the Privy Council in a case arising in India.

The Revised Legislative Enactments of Ceylon were brought into force after the attainment of Independence by Ceylon. It is note-worthy that Sections 333 and 334 of the Criminal Procedure Code, Section 23 of the Court of Criminal Appeal Ordinance and Section 40 of the Courts Ordinance still recognise the undoubted right of appeal to Her Majesty. The phrase "Her Majesty" was not meant to connote merely a person but an Institution. The prerogative of the Queen of England who is also the Queen of Ceylon, and the legality of her orders should be assumed until the contrary is shown.

[ABEYESUNDERE, J.—Is the right of appeal to the Privy Council a right given to the subjects of the Queen only?].

To the extent that the Queen of England is Queen of Ceylon too the appellant is a subject of the Queen of England. The British Nationality Act (1948) of the British Parliament has express provision including Ceylon as one of the countries along with independent countries like Canada, Australia, India, Pakistan and Ghana as countries affected by its provisions. However, it must be conceded that by reason of the operation of the Ceylon Independence Act of 1948 which came into force before the British Nationality Act of the same year the latter would not be a part of the law of Ceylon.

The Executive power in Ceylon is vested in Her Majesty the Queen and it is on her behalf that the Governor-General exercises it. Her Majesty is part of our Constitution. The Cabinet is collectively responsible to Parliament and Parliament to the Queen through her representative. The Cabinet as such is not the body vested with the ultimate executive power. However, since the Parliament of Ceylon is possessed of supreme legislative power, it can legislate out of this situation.

One of the attributes of the Queen is that she is the fountain of Justice. Even the Judges of the Supreme Court are appointed by the Queen.

[ABEYESUNDERE, J.—Courts derive their powers from the Courts Ordinance. . . . Is Ceylon a territory of the Sovereign of England?]

Ceylon is a territory of the Queen of England just as England is but not in the sense that the Government of England has authority over the territory of England. The authority to legislate has been lost to the Queen of England.

[BASNAYAKE, C.J.—Has the Sovereign the ultimate judicial power?]

Right along from ancient feudal times that was the position. This authority has been exercised in various forms—Orders in Council, Letters Patent, or Royal Charter.

Counsel referred also to the following decisions and statutory provisions:—*Pitts v. La Fontaine* (1880) 6 A. C. 482; *Performing Right Society Ltd. v. Urban District Council, Bray* (1930) A. C. 396; *Attorney-General for Ontario v. Attorney-General for Canada* (1947) A. C. 127, (1947) A. E. R. 137; *Gavin Gibson & Co. Ltd. v. Gibson* (1913) 3 K. B. 379, 389; *Britishy Coal Corporation v. King* (1935) A. C. 500, 520; Revised Edition of the Legislative Enactments Act, ss. 3 and 12; Royal Titles Act, s. 2; Ceylon (Constitution) Order in Council, 1946, ss. 36, 39, 45; Interpretation Ordinance, s. 2 (j).

A. C. Alles, Solicitor-General, with R. S. Wanasundere, Crown Counsel, for Attorney-General.—Elizabeth II, who is described in the Royal Titles Act as Queen of Ceylon and of Her other Realms and Territories and Head of the Commonwealth, is our Sovereign. She is at the same time Sovereign of the United Kingdom and of certain other Dominions. The term “Crown” or “Sovereign” is capable of more than one meaning. It may mean the office or concept of Sovereign, it may refer to the person or it may refer to the Government.

In so far as the Sovereign of Ceylon is concerned—meaning the office and concept of Sovereign—we have the same Sovereign as in the United Kingdom. The Governments, however, of the United Kingdom and Ceylon are separate and distinct. Vide The Constitutional Documents—Ceylon Independence Act of 1947, Ceylon (Constitution) Order in Council, 1946, and the Defence and External Affairs agreement, particularly paragraph (1), “the Government of Ceylon declare a readiness of Ceylon to adopt and follow the resolution of past imperial conferences” and the item relating to the succession to the Throne and Royal Title.

By the enactment of the Royal Titles Act, the Sovereign is given a description with reference to Ceylon maintaining at the same time the fact of a co-existing sovereignty of the United Kingdom and some Dominions. The resulting position is that Ceylon, the United Kingdom and some of the Dominions have a single Sovereign with different aspect and Titles.

The Royal Executive Powers and Seals Act was brought into operation only this year—Vide also Jennings : Constitution of Ceylon, pages 16 to 19, 137, 245.

The right of appeal to the Privy Council which existed prior to Independence continued after Independence. It could be justified on the existing local and imperial legislation and also on the basis of the prerogative—Vide Criminal Procedure Code, Section 334; Court of Criminal Appeal Ordinance, Section 23; Courts Ordinance, Sections 39, 40, and 3; Privy Council Appeals Ordinance; and the 1833 Judicial Committee Acts of the United Kingdom.

Regarding the prerogative, a subject in Ceylon can appeal to the Queen who is also described as the Queen of Ceylon. Vide *Nadan v. King* (1928 A.C. 482); *British Coal Corporation v. King* (1935 A.C. 500); *Attorney-General v. K. D. J. Perera* (1953 A.C. 200) where the Privy Council held that the subject in Ceylon has a right to appeal to the Queen in any matter whether civil or criminal.

The Order in Council issued by the Queen is not a legislative Act but an executive or judicial act—Vide Hood Philips: *Constitutional Law*, page 233, and Wade and Philips: *Constitutional Law*, page 168.

Alternatively, the Judicial Committee is nothing but a Court to which an appeal would lie and the original concept of a petition to the Queen has undergone modification in the course of history—Vide *1935 A.C. 500*, *1947 A.C. 127*; *Hull v. McKenna* (1926) Irish Reports 402; Halsbury: *Laws of England* (3rd Edition) 374.

In answer to Court—The question of the Queen's succession need not be considered in this case as—

- (a) King George was considered *de jure* and *de facto* as our Sovereign.
- (b) After the accession of Queen Elizabeth the Second—
 - (1) She authorised her uncle on commission to open our Parliament.
 - (2) She herself came and opened our Parliament.
 - (3) Her succession was proclaimed in Ceylon and at the Palace of St. James in the presence of the Dominion High Commissioners including that of Ceylon.

In any event the definition of 'King' and 'Queen' in our law has been introduced subsequent to Independence and according to law means according to proper law.

Cur. adv. vult.

October 15, 1963. BASNAYAKE, C.J.—

The appeal of the appellant Aluthge Don Hemapala from his conviction for murder was heard by a specially constituted Bench of five Judges of this Court and was dismissed on 11th December 1961 (64 N. L. R. 1). The question that arose for decision was whether the fact that the presiding Judge had directed the proceedings to be conducted in Sinhala when the appellant had elected to be tried by an English speaking jury vitiated his conviction. A majority of the Judges held that it did not. The appellant asked for special leave from Her Majesty the Queen of England to appeal to Her from that decision and was granted special leave to

appeal by Order in Council dated 30th July 1962 (Appendix I). He also asked for and was, by Order in Council dated 11th April 1963 (Appendix II), granted leave to prosecute his appeal *in forma pauperis*.

The appeal was heard in due course and on 27th May 1963 the Judicial Committee delivered their reasons for the advice they proposed to tender to Her Majesty (Appendix III)¹. By Order in Council dated 30th May 1963 (Appendix IV) the Queen in Council, while reversing the judgment of this Court dated 11th December 1961 and quashing the appellant's conviction, ordered this Court to decide in its discretion whether there should be a new trial. The questions we are called upon to decide are—

- (a) whether we have power at this stage to direct a new trial, and
- (b) if so, whether that power is conferred on this Court by the Court of Criminal Appeal Ordinance, and
- (c) if it is not, whether the Order of the Queen of England made with the advice of Her Privy Council confers that power.

The right of appeal in criminal cases to His Majesty in Council (the expression "His Majesty in Council" is used herein with reference to the Sovereign for the time being of England when acting with the advice of His or Her Privy Council) is one that His Majesty's subjects in Ceylon enjoyed from the day Ceylon became a Crown Colony. His Majesty's subjects in England (which expression herein includes Scotland) do not enjoy the right of appeal to His Majesty in Council from the decisions of the Courts in that country, whether civil or criminal, although the Sovereign is regarded as the Fountain of Justice (vide Blackstone's exposition in Appendix V). It is a right peculiar to His Majesty's colonial subjects and the right of His Majesty in Council to entertain such appeals in the case of Ceylon rested on prerogative of His Majesty in Council to entertain appeals from the Courts of His Colonies. The expression "colony" is used herein in the sense in which it is defined in the English Interpretation Act. The origin of the prerogative of appeal in respect of the colonies is not clear; but Chitty [Chitty on Prerogative (1820 ed.) p. 29] states why such a power was necessary in the case of colonies. He states—

" . . . If the judicial superintending power over his colonies, &c., by way of appeal, were not vested in the King, the law might be insensibly changed to the destruction of the superiority of the mother country. The King cannot give a direction to any Court to rehear any cause depending therein; but rehearings are granted or denied by Courts of Equity, on petition of the parties grieved."

It is the prerogative of His Majesty in Council to entertain appeals from His colonial subjects in cases from the colonial courts and at the same time it is the right of the colonial subjects to appeal to His Majesty

¹ 65 N. L. R. 121.

in Council in such cases. The constitutional progress of Ceylon until the country gained independence did not affect that right, because, despite the increasing measure of internal self-government granted from time to time, Ceylon remained a colony in respect of which His Majesty in Council had power to legislate by Order in Council. The right is therefore dependent on the existence of the relationship of colonial subject and Sovereign. Once that relationship is ended, the right also comes to an end.

Till May 1946 Ceylon was a colony of the Sovereign of England and the people of Ceylon were His Majesty's subjects although the Ceylon Government had almost complete control over its domestic affairs. In May 1946 there was granted by Order in Council [The Ceylon (Constitution) Order in Council, 1946] a constitution in a form not intrinsically different from the constitutions of countries which were classed as Dominions in the Colonial Laws Validity Act, although the grant was by prerogative Order in Council and not by Act of Parliament as in the case of those countries. This grant of a further advance on the existing constitutional powers was preceded by a statement of policy by the British Government on Constitutional Reform published on 31st October 1945 (Appendix VI). As stated in its preamble, a direct outcome of the recommendations of the Commission referred to in the statement of policy was the Order in Council of 1946 (Appendix VII). The following year saw a radical change in the constitution that was granted in 1946. In December 1947 there was enacted the Ceylon Independence Act 1947 and at the same time there was promulgated the Ceylon Independence Order in Council 1947. Both instruments came into operation on 4th February 1948 which has since been observed as the day of National Independence. The Independence Act contained two important provisions which have with modification been inserted in subsequent enactments of the Parliament of England granting independence to countries over which the Sovereign of that country and its Parliament had authority. Those provisions are far-reaching. They read—

“ 1. (1) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.

(2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the Government of Ceylon.

(3) As from the appointed day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ceylon.”

The most important change effected by the Independence Order in Council is the cessation of the power of the Sovereign of England to promulgate prerogative Orders in Council in respect of Ceylon. The provision reads—

“ 4. The power of His Majesty, His Heirs and Successors, with the advice of His or Their Privy Council—

- (a) to make laws having effect in the Island for the purposes specified in sub-section (1) of section 30 of the Principal Order ; and
- (b) to revoke, add to, suspend or amend the Principal Order or the Amending Orders, or any part of those Orders,

shall cease to exist. ”

Section 30 of the Ceylon (Constitution) Order in Council 1946 (Appendix VIII) which reserved that power was revoked.

It would appear from the constitutional documents referred to above that on 4th February 1948 there ended not only the right of the Parliament of England and of the Sovereign in Council of that country to make laws binding on Ceylon, but also the responsibility of His Majesty's Government in respect of this country. In other words Ceylon became on 4th February 1948 a country no longer dependent on England or subject to the Sovereign of that country. In brief an independent country as indicated in the short title of the legislative instruments designed to achieve that end. If it is necessary to relate the grant of independence to Ceylon to one of the accepted ways in which British subjects can lose their nationality, the act can be regarded as voluntary abandonment by the Sovereign and Parliament of England of British territory and sovereignty over the subjects therein. Instances of abandonment in the past are rare, but are multiplying with the grant of independence to countries which were once dependent on England.

The present position of Ceylon is that it is an independent country like any other with a monarch at its head. It is an equal partner in that association of nations known as the Commonwealth of Nations. Before Ceylon became independent, King George the Sixth was the Sovereign of Ceylon, and when it passed from subjection to independence, King George the Sixth of England was adopted as Ceylon's Sovereign. On his demise and the succession to the throne of England of Elizabeth the Second as Queen of England, Ceylon adopted her as Queen. Our ambassadors to foreign courts are accredited by Elizabeth the Second as Queen of Ceylon. All our legislative enactments are enacted by Her with the advice and consent of the Senate and the House of Representatives (s. 38 Order in Council), the Governor-General is appointed by Her on the advice of the Prime Minister of Ceylon (s. 4 Order in Council), and every Senator and every Member of the House of Representatives is by law bound to take an Oath of Allegiance to Her (s. 25 Order in Council). The executive power of the Island is vested in Her and is exercised on

Her behalf by the Governor-General in accordance with the laws of this country (s. 45). No Bill can become an Act of Parliament without Her consent [s. 36 (1) Order in Council] which the Governor-General is empowered to give in Her name or refuse as the case may be [s. 36 (2) Order in Council]. Our law requires Her [s. 4 (2) Order in Council] to exercise all Her powers, authorities and functions under the Ceylon (Constitution) Order in Council or any other law as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by the Sovereign of that country. In order to bring out the fact that the Sovereign of England is Queen of this country, not in Her capacity as Queen of England, the Royal Titles Act and the Royal Executive Powers and Seals Act were enacted in 1953 and 1954 respectively. The first named Act provides—

“ 2. The assent of the Parliament of Ceylon is hereby given to the adoption by Her Majesty for use in relation to Ceylon of the style and titles set out in the Schedule to this Act, in lieu of the style and titles at present appertaining to the Crown, and to the issue by Her for that purpose, at the request of the Prime Minister of Ceylon, of Her Royal Proclamation under the Great Seal.

SCHEDULE

(Style and titles referred to)

‘ Elizabeth the Second, Queen of Ceylon and of Her other Realms and Territories, Head of the Commonwealth ’.”

The Queen of Ceylon by a Proclamation dated 28th May 1953 adopted that title in the following terms :—

“ By the Queen

A Proclamation. ”

“ Whereas by the Royal Titles Act, No. 22 of 1953, the assent of the Parliament of Ceylon was given to the adoption by Us, for use in relation to Ceylon, of the Style and Titles set forth in the Schedule to the said Act, in lieu of the Style and Titles at present appertaining to the Crown, and to the issue by Us for that purpose of our Royal Proclamation under the Great Seal :

We have thought fit, and We do hereby at the request of the Prime Minister of Ceylon appoint and declare, that as far as conveniently may be on all occasions and in all instruments wherein Our Style and Titles are used in relation to Ceylon, Our Style and Titles shall henceforth be accepted, taken and used as the same are set forth in the Schedule to the said Act, that is to say—

‘ Elizabeth the Second, Queen of Ceylon and of Her other Realms and Territories, Head of the Commonwealth ’.”

The Royal Executive Powers and Seals Act which came into operation on 20th August 1954 helps to emphasise the fact that, although the same person is Sovereign of both England and Ceylon, the Sovereign of this country derives no powers from the Sovereign of England (s. 2), and that she enjoys only such powers as are conferred on Her by our laws. The provision of a "Royal Signet of Ceylon" (s. 8) of which the Prime Minister of Ceylon is the keeper (s. 9) and which the Prime Minister is empowered to affix to such instruments bearing the Sovereign's Sign Manual and the counter-signature of the Prime Minister as the Sovereign may from time to time by Proclamation specify as instruments to which the Royal Signet shall be affixed (s. 10) further enhances the fact that, though the same person is the Sovereign of both Ceylon and England, the rights, powers and prerogatives of each office are distinct and that the rights, powers and prerogatives of the office of the Queen of England are not enjoyed by the Queen of Ceylon. The case of one person being Sovereign of two different countries with separate powers in respect of each country is not without precedent. William IV was both King of England and King of Hanover, but as King of Hanover he did not enjoy over the Hanoverian subjects the prerogatives of the King of England. On his demise the succession to the throne of England was determined according to the law of England and the succession to the throne of Hanover was determined according to the law of Hanover. The role of being Sovereign of two independent nations at the same time is not difficult so long as there is agreement between the two nations. But if perchance they disagree, and the disagreement results in a rupture of diplomatic relations between them, then the Sovereign will be faced with a difficult situation.

Now the prerogative of Her Majesty in Council to entertain appeals from colonial courts being a prerogative that appertains to Her as the Sovereign of a colony and in respect of decisions of colonial courts, and the right of appeal to Her Majesty in Council being a right that is enjoyed by Her colonial subjects, the prerogative cannot be exercised when the relationship of Sovereign and colonial subject comes to an end. In this connexion it would be useful to cite the following passages from Chalmers' Opinions:—

" . . . the true correlatives are *sovereignty*, and *subjection*: if the *subjection* be withdrawn, and so admitted, the *sovereignty* is gone: if the *sovereignty* be removed, then, is the *subjection* gone; and the *subjection* being gone, the people, owing no *subjection*, are no longer subjects; for they are all correlatives, which cannot exist, without each other." (Chalmers, Vol. II, p. 391).

"When the *sovereignty* of those provinces thus ceased to be in the king of England, the *subjection* of the people, within the same, also ceased." (Chalmers, Vol. II, p. 393).

"When the king, acting in pursuance of a solemn trust, derived from the constitution, renounced all claim of government over you, and of course released your *subjection*, the king thereby signified the

assent of the nation, that you should be no longer subjects, but aliens; for in making every treaty, the king, as trustee for the nation, binds the nation, by his diplomatic acts, and *lex nil jubet frustra*.”
(Chalmers, Vol. II, p. 412).

The Queen of Ceylon has no Privy Council and our law does not enable Her to make decisions or perform any acts with the advice of the Privy Council of the Queen of England. Our Queen does not enjoy the judicial prerogative of the Queen of England in respect of Her colonies. As stated above, even the Queen of England has no right to entertain appeals from the Courts of that country. The right to entertain appeals from the Courts is not a necessary attribute of Sovereign power. It is well established that no appeal lies unless conferred expressly or by necessary implication. The Queen of Ceylon has therefore no right to entertain appeals from our Courts. It is unthinkable that the Queen of England would claim that Ceylon is yet a colony in respect of which She enjoys the judicial prerogative. It is equally unthinkable that the Queen of England would do any act that would in the slightest degree impair the independence of Ceylon. When the Queen of England gave up her right to legislate for Ceylon by Order in Council, it must be presumed that She gave up Her prerogative without reservation, and that She gave up Her prerogative right to promulgate any Order in Council having the force of law in Ceylon, for it is an established rule of construction of legal instruments that the greater includes the less. Apart from that, the right to make an Order in Council embodying the advice of the Privy Council being one that exists only in respect of colonies, that right cannot be exercised in respect of a country which is no longer a colony and is no longer subject to the suzerainty of the Sovereign of England. The resulting position then is that on the attainment of independence the prerogative right of the Sovereign of England to entertain appeals ceased when Ceylon ceased to be a colony.

The fact that Canada [s. 106 of the Supreme Court Amendment Act 1949 (13 Geo. VI, c. 37)], India [The abolition of the Privy Council Jurisdiction Act 1949—10th October 1949], Pakistan [Privy Council (Abolition of Jurisdiction) Act 1950—1st May 1950], and South Africa [Privy Council Appeals Act, No. 16 of 1959 (which substituted for section 106 of the South Africa Act, a new section abolishing appeals to the Privy Council—12th April 1953)] abolished by legislative measure the right of appeal to His Majesty in Council does not make it necessary that this country should do likewise. The laws of no two countries of the Commonwealth are the same. So that the action taken by one country affords no precedent for the other. The question whether the judicial prerogative of the Sovereign of England would continue until it is abolished has to be answered by reference to the laws of each country. In this connexion the provision made in the Malayan Constitution by which the Malayan King, to whom appeal from the Supreme Court of that country lies, is able to obtain the advice of the Judicial Committee

of the Privy Council of the Sovereign of England calls for notice (Appendix IX). As respects Ceylon, there is no need to abolish a right that has ceased to exist, for there is nothing to abolish.

The Order in Council passed by Her Majesty in Council is one which She has no power to make in respect of Ceylon. We have therefore no power, in obedience to that Order in Council, to order a new trial, even if we were so minded, as the order is not legal. Under the Court of Criminal Appeal Ordinance we have no discretion to order a new trial at this stage. That power may be exercised only in an appeal to this Court when exercising its appellate jurisdiction (s. 5 Court of Criminal Appeal Ordinance).

This judgment is limited to the questions whether a citizen of Ceylon has, since the coming into force of the Ceylon Independence Act and the Ceylon Independence Order in Council, a right to invoke the prerogative power of the Sovereign of England in Council of entertaining an appeal from the Courts of a British Colony in a criminal matter, and whether the prerogative right of the Sovereign of England in Council to entertain appeals from Ceylon ceased on Ceylon becoming an independent country.

Before we part with this judgment we think we should not omit to state that the recognition, when Ceylon was a British colony, in the Statutes of Ceylon (Appendix X), of the prerogative right of His Majesty in Council to entertain appeals from the Ceylon Courts, does not have the effect of creating a right of appeal by implication and continuing it even after Ceylon has ceased to be a colony and the judicial prerogative of the Sovereign has ceased in respect of this country. When the very foundation of the prerogative to entertain such appeals is gone, those provisions have no application to what does not exist.

The reversal of the decision of the Court of Criminal Appeal and the quashing of the appellant's conviction are unaffected by our present decision, as our present decision cannot affect past acts which have taken effect.

As we have no power to direct a new trial, we order that the appellant be discharged from custody, if he is still in custody, or be released from bail, if he has given bail in consequence of our order of 27th September last admitting him to bail.

Accused-appellant discharged.

APPENDIX I

The 30th day of July, 1962

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of July, 1962, in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council¹ of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Aluthge Don Hemapala in the matter of an Appeal from the Court of Criminal Appeal Ceylon between the Petitioner and Your Majesty Respondent setting forth : that the Petitioner prays for special leave to appeal

to Your Majesty in Council from the Judgment and Order of the Court of Criminal Appeal of Ceylon dated the 25th October 1961 whereby the Petitioner's Appeal against his conviction of murder and sentences to death on the 20th day of December 1960 by the Supreme Court at Kalutara was dismissed: And humbly praying Your Majesty in Council to grant him special leave to appeal against the Judgment and Order of the Court of Criminal Appeal of Ceylon dated the 25th October 1961 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the Court of Criminal Appeal of Ceylon dated the 25th day of October 1961:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Court of Criminal Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

APPENDIX 1

ORDER IN COUNCIL MAKING CONTINUING ORDER DIRECTING THAT ALL APPEALS TO HIS MAJESTY IN COUNCIL SHALL BE REFERRED TO THE JUDICIAL COMMITTEE

1909 No. 1228

At the Court at Buckingham Palace, the 18th day of October 1909.

Present:

The King's Most Excellent Majesty in Council

Whereas by Section 9 of the Judicial Committee Act, 1844 it is enacted "that in case any Petition of Appeal whatever shall be presented addressed to Her Majesty in Council and such Petition shall be duly lodged with the Clerk of the Privy Council it shall be lawful for the Judicial Committee to proceed in hearing and reporting upon such Appeal without any Special Order in Council referring the same to them provided that Her Majesty in Council shall have by an Order in Council in the month of November directed that all Appeals shall be referred to the said Judicial Committee on which Petitions may be presented to Her Majesty in Council during the twelve months next after the making of such Order and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of Her Majesty in Council. Provided always that it shall be lawful for Her Majesty in Council at any time to rescind any General Order so made and in case of such Order being so rescinded all Petitions of Appeal shall in the first instance be preferred to Her Majesty in Council and shall not be proceeded with by the said Judicial Committee without a Special Order of reference":

And whereas by the Interpretation Act, 1889 it is enacted that "in this Act and in every other Act whether passed before or after the commencement of this Act references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall unless the contrary intention appears be construed as references to the Sovereign for the time being":

And whereas His Majesty was pleased by His Order in Council dated the 21st day of November 1908 and made under and by virtue of the provisions of the said Section 9 of the Judicial Committee Act, 1844, to order that all Appeals or Complaints in the nature of Appeals on which Petitions might be presented to His Majesty in Council during the twelve months next after the date of the said Order should be referred to the Judicial Committee and that the said Judicial Committee

should proceed to hear and report upon all such Appeals or Complaints in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of His Majesty in Council and that the said Order should remain in force for the space of twelve months from the date thereof unless His Majesty should be pleased previously to rescind the same :

And whereas by Section 5 of the Appellate Jurisdiction Act, 1908 it is enacted that " His Majesty may from time to time by Order in Council make a General Order directing that all Appeals shall be referred to the Judicial Committee of the Privy Council until the Order is rescinded and Section 9 of ' The Judicial Committee Act, 1844 ' shall have effect as if any such General Order for the time being in force were substituted in the first proviso to that Section for the Annual Order therein referred to and the time for which the Order remains in force were substituted for the twelve months next after the making of the General Order " and that " the expression ' Appeals ' in this Section means Appeals on Petitions presented to His Majesty in Council and includes any Complaints in the nature of Appeals and any Petitions in the matter of Appeals " :

Now therefore His Majesty is pleased by and with the advice of His Privy Council to order and it is hereby ordered that His Majesty's said Order in Council dated the 21st day of November 1908 be and the same is hereby rescinded and that all Appeals on which Petitions may be presented to His Majesty in Council after the date of this Order shall be referred to the Judicial Committee of the Privy Council until His Majesty shall be pleased to rescind this Order and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a Special Order of His Majesty in Council.

Whereof all persons whom it may concern are to take notice and govern themselves accordingly.

APPENDIX II

The 11th day of April, 1963

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of February 1963 in the words following, viz.,

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Aluthge Don Hemapala in the matter of an Appeal from the Court of Criminal Appeal Ceylon between the Petitioner Appellant and Your Majesty Respondent (Privy Council Appeal No. 30 of 1962) setting forth that on the 30th day of July 1962 Your Majesty in Council granted the Petitioner special leave to appeal against the Judgment of the Court of Criminal Appeal of Ceylon dated the 25th day of October 1961 whereby the Petitioner's Appeal was dismissed against his conviction of murder and the sentence of death passed upon him by the Supreme Court at Kalutara on the 20th day of December, 1960 : that the Petitioner now prays for leave to prosecute his said Appeal *in forma pauperis* : that the Petitioner has been informed by his friends and relatives who have hitherto provided monies for his defence that no further monies are available for the prosecution of his Appeal : that the Petitioner is not worth £100 in the world excepting his wearing apparel and that he is unable to provide sureties : And humbly praying Your Majesty in Council to grant the Petitioner leave to prosecute the Appeal *in forma pauperis* :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to prosecute his Appeal *in forma pauperis*."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

APPENDIX III

Privy Council Appeal No. 80 of 1962

27th May, 1963

This was an appeal *in forma pauperis* by special leave from the judgment and order of the Court of Criminal Appeal of Ceylon dated 25th October 1961 whereby the appellant's appeal against his conviction and sentence of 20th December, 1960 by the Supreme Court at Kalutara was dismissed. The appellant had been found guilty of murder and sentenced to death. He had together with one Babbu Singho been indicted on a charge that on 27th June 1960 he had murdered Mahawattage Don Carolis and that the said Babbu Singho had abetted the murder. On their committal for trial by the Magistrate's Court the accused elected to be tried by an English speaking jury under section 165B of the Criminal Procedure Code. The Code gives an accused person a right to be tried by a jury drawn from any one of three panels. The Fiscal is charged with the duty of preparing three lists of persons who, as well as having certain property or income qualifications can respectively speak read and write (a) the English language, (b) the Sinhalese language (c) the Tamil language. The accused elected to be tried by a jury drawn from the panel the members of which could 'speak, read and write the English language'. Such a jury was empanelled accordingly. But the learned Judge who was presiding at the trial thereupon interrogated the jury in these terms:—

"May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them?"

Foreman: "Yes, My Lord."

"And also address of Counsel if it is made in Sinhala?"

Foreman: "Yes."

"Mr Tampoe (who was Defence Counsel), are you able to follow the proceedings in Sinhala?"

Mr. Tampoe: "Yes, My Lord."

"You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer."

The Crown Counsel opened his case in Sinhala. Thereafter the testimony of the witnesses was taken. The first of these gave his evidence in English. But apparently the evidence of other witnesses was given in Sinhalese and though it would necessarily be translated into English for the Record it is not clear that it was done in such a way as to ensure that the jury heard the translation. It was assumed that the closing address of the Crown Counsel was in Sinhala; the Record was silent as to whether Counsel for the defence addressed in English or Sinhala. The summing up by the learned Judge was in English.

The appellant was found guilty of murder and sentenced to death; the second accused was acquitted and discharged.

On appeal from the conviction it was contended that since the accused had elected to be tried by an English speaking jury the conduct of the case partially in Sinhalese was a contravention of the Criminal Procedure Code. The Court of Criminal Appeal—comprising five Judges—were not altogether in agreement. Basnayake C.J. and L. B. de Silva J. held that there had been an essential departure from the well established Rules of procedure—that the trial had not been 'according to law' and accordingly that the conviction should be quashed and a new trial ordered. Weerasooriya J. and Gunasekara J. held the trial to have been irregular but there to have been no substantial miscarriage of justice and that the appeal should therefore be dismissed. H. N. G. Fernando J. held there had been no irregularity and that the appeal should be dismissed. In the result the appeal was dismissed by the majority of three to two. Special leave to appeal to Her Majesty in Council was granted on 30th July 1962.

The crucial question is whether the accused having elected to be tried by an English speaking jury the conduct of the trial so contravened the Criminal Procedure Code as to vitiate the trial or at the least to amount to a miscarriage of justice. The Criminal Procedure Code provides (section 165B) that an accused person having elected, he "shall be bound by and may be tried according to his election, subject however in all cases to the provisions of section 224". Section 224 (1) enacts that "the jury shall be taken from the panel elected by the accused unless the Court otherwise directs". There was no direction otherwise.

The Court of Criminal Appeal Ordinance in a set of provisions dealing with appeals against conviction enacts in section 5 that—

“The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred”.

A provision in similar terms to this enactment is to be found in many jurisdictions, e.g. in the English Criminal Appeal Act of 1907. There have been many cases in which its application has been discussed.

It has often been held that the adoption of a procedure other than that authorised by the Code under which an accused person is being tried can constitute a miscarriage of justice; but it is a well established principle that this Board will not recommend Her Majesty to review or interfere with the course of Criminal proceedings unless there has been such a disregard of the procedure laid down as to occasion substantial injustice. The question is whether there was, in the trial of the appellant, such a departure from the normal or proper procedure as to amount to a miscarriage of justice.

Their Lordships do not think that the trial in this case can be said to have been a nullity because of the course followed, but there are good grounds for holding that the way in which it was conducted may have resulted in withdrawing from the accused a protection which the Code was designed to secure. As was said by Lord Goddard in *R. v. Neal* (1949) 2 K. B. 590 : 1949 2 All E. R. 438 :—

“There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leaves the Court no option but to quash the conviction”.

The provisions of the Criminal Procedure Code under which the appellant was tried contemplate that where there has been an election to be tried by an English speaking jury (as was the case) the trial will be conducted throughout in the English language. Though the evidence of the witnesses who testified in Sinhala was translated for the purposes of the Record this may not have been heard by the jury, or all of them, and as to the addresses of counsel it is not certain that they were translated at all. The course the learned Judge took was based upon an interrogation of the jury conducted by himself. He accepted an assurance from the foreman that the jury understood Sinhala. But this falls short of establishing that each and every one of the jury had such an understanding. There was a complete absence of any sort of assent by the accused to the course being followed.

There are provisions in the Code which emphasise the importance of the trial being had in a language which the jury is able to understand, e.g., section 225 under which objection may be taken to a juror on the ground “(c) of his inability to understand the language of the panel from which the jury is drawn” and section 229 which authorises where “it appears that any juror is unable to understand the language in which the evidence is given”, the substitution of a new juror or the discharge of the jury. The assurance given by the foreman of the jury to which the other members of the jury gave no more than a mute assent does not, in their Lordships’ opinion provide a sufficiently solid foundation upon which to assume that all the members of the jury were in fact able to understand and appreciate evidence not given in English and the addresses of the defence counsel. Accordingly their Lordships hold that there having been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction.

Ordinarily in such a case as this where a conviction has to be quashed and the sentence set aside because of procedural irregularities a new trial would be directed. But their Lordships think that the discretion as to whether there should be a new trial after so great a lapse of time should be exercised by the Court of Criminal Appeal of Ceylon. Their Lordships therefore do no more as they have done, than humbly to tender to Her Majesty advice that the appeal should be allowed, the dismissal of the appeal by the Court of Criminal Appeal of Ceylon be reversed leaving that Court to exercise a discretion whether there should be a new trial.

APPENDIX IV

The 30th day of May, 1963

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 27th day of May 1963, in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Court of Criminal Appeal Ceylon between Aluthge Don Hemapala Appellant and Your Majesty Respondent (Privy Council Appeal No. 30 of 1962) and likewise the humble Petition of the Appellant setting forth that on the 17th day of October 1960 the Appellant was indicted on a charge of murder by causing the death of Mahawattage Don Carolis being an offence punishable under Section 296 of the Penal Code of Ceylon : that on the 7th July 1960 the Appellant was charged in the Magistrate Court at Horana with murder and the Appellant having elected to be tried by a jury drawn from an English speaking panel of jurors was committed for trial by the Supreme Court of Ceylon : that the said indictment was tried in the Supreme Court of Ceylon and a jury drawn from an English speaking panel and the hearing was conducted in the Sinhala language and on the 20th December 1960 the Appellant was convicted of murder and sentenced to death : that the Appellant appealed to the Court of Criminal Appeal in Ceylon and on the 25th October 1961 that Court dismissed the Appeal ; that on the 30th July 1962 by Order of Your Majesty in Council the Appellant was granted special leave to appeal to Your Majesty in Council : that on the 11th April 1963 by Order of Your Majesty in Council the Appellant was granted leave to prosecute his said Appeal in forma pauperis : And humbly praying Your Majesty in Council to take this Appeal into consideration and to reverse alter or vary the Judgment of the Court of Criminal Appeal of Ceylon dated the 25th day of October 1961 and for further or other relief :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Council on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be allowed and the Judgment of the Court of Criminal Appeal Ceylon dated the 25th day of October 1961 reversed leaving that Court to exercise a discretion whether there should be a new trial.”

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.”

APPENDIX V

III. Another capacity, in which the king is considered in domestic affairs is, as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice, the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift* ; but he is the steward of the public, to dispense it to whom it is *due*. He is not the spring, but the reservoir, from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at large : but, as it would be impracticable to tender complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints ; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature ; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust : it is consequently necessary that courts should be erected, to assist him in executing this power ; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 Will. III.c.2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament.

(Blackstone's Commentaries, 1836 ed., Vol. I, pp. 266, 267 & 268)

APPENDIX VI

(Ceylon Government Gazette Extraordinary No. 9,480 of October 31, 1945)

CEYLON

Statement of Policy on Constitutional Reform

The present Constitution of Ceylon, which is based on the Executive Committee system of the London County Council, was set up in 1931 as a result of the recommendations of a Commission presided over by the Earl of Donoughmore. The Governor has certain reserved powers, the more important of which are in respect of Defence, External Affairs and the rights of minorities: and a considerable measure of self-government in matters of internal civil administration rests with a Legislature very largely elected territorially on the basis of universal adult suffrage.

2. Since the introduction of this Constitution, there has been continuous pressure, especially but not solely from the Sinhalese majority community, for the grant of a further measure of self-government. On the 26th May 1943, His Majesty's Government issued a Declaration on the reform of the Constitution, which reads as follows:—

- “(1) The post-war re-examination of the reform of the Ceylon Constitution, to which His Majesty's Government stands pledged, will be directed towards the grant to Ceylon by Order of His Majesty in Council, of full responsible Government under the Crown in all matters of internal civil administration.
- (2) His Majesty's Government will retain control of the provision, construction, maintenance, security, staffing, manning and use of such defences, equipment, establishments and communications as His Majesty's Government may deem necessary for the Naval, Military and Air security of the Commonwealth, including that of the Island, the cost thereof being shared between the two Governments in agreed proportions.
- (3) Ceylon's relations with foreign countries and with other parts of the British Commonwealth of Nations will be subject to the control and direction of His Majesty's Government.
- (4) The Governor will be vested with such powers as will enable him, if necessary, to enact any direction of His Majesty's Government in regard to matters within the scope of paragraphs 2 and 3 of this Declaration; and his assent to local measures upon these matters will be subject to reference to His Majesty's Government.
- (5) The present classes of Reserved Bills in the Royal Instructions will be largely reduced under a new Constitution. Apart from measures affecting Defence and External Relations, it is intended that these shall be restricted to classes of Bills which—
 - (a) relate to the Royal Prerogative, the rights and property of His Majesty's subjects not residing in the Island, and the trade and shipping of any part of the Commonwealth;
 - (b) have evoked serious opposition by any racial or religious community and which in the Governor's opinion are likely to involve oppression or unfairness to any community;
 - (c) relate to currency.

- (6) The limitations contained in the preceding paragraph will not be deemed to prevent the Governor from assenting in the King's name to any measure relating to, and conforming with, any trade agreements concluded with the approval of His Majesty's Government by Ceylon with other parts of the Commonwealth. It is the desire of His Majesty's Government that the Island's commercial relations should be settled by the conclusion of agreements, and His Majesty's Government will be pleased to assist in any negotiations with this object.
- (7) The framing of a Constitution in accordance with the terms of this Declaration will require such examination of detail and such precision of definition as cannot be brought to bear so long as the whole of the energies of the Service and other Departments of His Majesty's Government remain focussed on the successful prosecution of the war. His Majesty's Government will, however, once victory is achieved, proceed to examine by suitable Commission or Conference such detailed proposals as the Ministers may in the meantime have been able to formulate in the way of a complete constitutional scheme, subject to the clear understanding that acceptance by His Majesty's Government of any proposals will depend:—
- First, upon His Majesty's Government being satisfied that they are in full compliance with the preceding portions of this Statement.
- Secondly, upon their subsequent approval by three-quarters of all Members of the State Council of Ceylon, excluding the Officers of State and the Speaker or other presiding Officer.
- (8) In their consideration of the problem, His Majesty's Government have very fully appreciated and valued the contribution which Ceylon has made and is making to the war effort of the British Commonwealth and the United Nations, and the co-operation which, under the leadership of the Board of Ministers and the State Council, has made this contribution effective."

It will be seen that the declared object of His Majesty's Government in considering further constitutional reform is the grant to Ceylon of full responsible government under the Crown in all matters of internal civil administration. The principal subject, which will continue to be reserved to His Majesty's Government are Defence, External Relations and safeguards ensuring fair arrangements in Ceylon for the minority communities.

3. In accordance with paragraph 7 of the 1943 Declaration, Ceylon Ministers were asked to frame a Constitution for the Island, which would then be examined by a Commission or Conference. The Ministers completed their task of drafting a Constitution in February 1944, but owing to a disagreement with His Majesty's Government as regards the scope of the Commission or Conference which was to examine their Scheme, they withdrew it in August 1944. The difficulty arose from the fact that they claimed the Declaration to mean that the Commission or Conference was to be confined entirely to the examination of the question whether the constitutional Scheme was in conformity with the 1943 Declaration, while His Majesty's Government took the view that the Commission or Conference should have wider terms of reference enabling it to examine the Constitutional Scheme from all angles, and especially that of its suitability in relation to the minorities, and to discuss it with the latter.

4. Notwithstanding the Ministers' withdrawal of their Scheme, therefore, His Majesty's Government proceeded in September 1944 to announce the appointment of a Commission with terms of reference as follows:—

"To visit Ceylon in order to examine and discuss any proposals for constitutional reform in the Island which have the object of giving effect to the Declaration of His Majesty's Government on that subject dated the 26th May, 1943; and, after consultation with various interests in the Island, including minority communities, concerned with the subject of constitutional reform, to advise His Majesty's Government on all measures necessary to attain that object."

The Commission, under the Chairmanship of Lord Soulbury, visited Ceylon from December 1944 until April 1945, and its Report was published on the 9th October.

5. The Constitution recommended by the Soulbury Commission may be briefly summarised as follows, the reference in brackets being to the Soulbury Commission's Report:—

- (a) The Government of Ceylon would consist of a Governor-General, with the reserve powers set out in the 1943 Declaration, and a Cabinet, with an Upper and Lower House.

- (b) Universal adult suffrage would be retained on the present basis. (Paragraph 223)
 (So far as suffrage of immigrants into Ceylon is concerned, the Commission regards this as a matter of internal civil administration, and proposes that the Ceylon Government should be granted the right to determine the future composition of its population with full powers of control in respect of immigration.)
- (c) A Delimitation Commission would be appointed by the Governor-General in his discretion to define new electoral districts. (Paragraph 278)
- (d) The Lower House would be designated the House of Representatives and would consist of 95 elected members together with six members who would be nominated by the Governor-General. (Members of the Lower House would be known as Members of Parliament.) (Paragraph 321)
- (e) The Upper House would be designated the Senate, and would consist of 30 members, of whom 15 would be elected by the Lower House and 15 nominated by the Governor-General acting in his discretion. (Paragraph 310)
- (f) There would be a Cabinet with Ministers possessing full Cabinet responsibility in all matters of internal affairs in Ceylon, subject to the reservations contained in paragraphs 2, 3 and 5 of the 1943 Declaration. (Paragraph 330)
- (g) There would be a Prime Minister appointed by the Governor-General. The Prime Minister would hold the portfolios of External Affairs and Defence. [Paragraphs 325, 330 (ii), 360 (xi)]
- (h) Appointments to the Public Services would be made on the recommendation of a Public Services Commission to be nominated and appointed by the Governor-General in his discretion (i.e., after consultation with the Prime Minister, but without being bound to follow his advice). (Paragraph 392)
- (i) There would be a Judiciary in which the Chief Justice and Judges of the Supreme Court would be appointed by the Governor-General acting in his discretion with a Judicial Services Commission to advise him in regard to subordinate judicial appointments. (Paragraph 407)

The safeguards for minority communities include the proposals for a Second Chamber and for the Public Services Commission. The first can be expected to provide an instrument for impeding precipitate legislation and for handling inflammatory issues in a cooler atmosphere (paragraph 298); while the Public Services Commission is designed as an impartial and authoritative body, free from the taint of partisanship, on whose advice the Governor-General will exercise his powers of appointment to the Public Service and the promotion and discipline of Public Officers. (Paragraphs 374, 379, 389)

The Constitution provides the following safeguards for minority interests (European and Asiatic):—

- (a) Classes of reserved Bills will include any Bills which relate to the Royal Prerogative, the rights and property of His Majesty's subjects not residing in the Island, and the trade or transport or communications of any part of the Commonwealth. (Paragraph 332)
- (b) The Classes of reserved Bills will also include any Bill which has "evoked serious opposition by any racial or religious community and which, in the Governor-General's opinion, is likely to involve oppression or unfairness to any community". (Paragraph 332)
- (c) In regard to immigration into Ceylon, the Report recommends that Bills relating to the prohibition or restriction of immigration will not be regarded as coming within the category of Bills which the Governor-General will reserve for the signification of His Majesty's pleasure, but if any such Bill contains a provision regarding the right of re-entry of persons normally resident in the Island at the date of the passing of the Bill by the Legislature, which, in the opinion of the Governor-General, is unfair or unreasonable, the Governor-General must be required to reserve that Bill. (Paragraphs 332 (ii) (b) and 236)
- (d) The Soulbury Commission's Report further recommends that, in relation to the further class of Bills relating to external affairs which are to come within the category of reserved Bills, there shall be excluded from the category of Bills relating to external affairs "any Bill relating solely to the prohibition or restriction of the importation of or the imposition of import duties upon any class of goods, provided that such legislation is not discriminatory in character. [Paragraph 332 (ii) (d)]

- (e) The Report further recommends that the Order in Council shall provide that the Ceylon Parliament "shall not make any law to prohibit or restrict the free exercise of any religion; or to alter the constitution of any religious body" except at the request of the governing authority of that religious body (Paragraph 334), and "shall not make any law rendering persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable, or confer upon persons of any community or religion any privileges or advantages which are not conferred on persons of other communities or religions." [Paragraph 242 (iii)]

The powers reserved by His Majesty's Government under the 1943 Declaration are to be secured in the Commission's proposals in the following ways:—

- (a) Defence. Any Bills on this subject must be reserved by the Governor-General. [Paragraphs 332 (i) and 349 *et seq.*]
 (b) External Affairs. Bills in this category are also to be reserved. [Paragraphs 332 (ii), 337 and 338]

In both these subjects the Governor-General will have power himself to enact any measures necessary to comply with the directions of His Majesty's Government. (Paragraph 337)

- (c) Currency. Legislation must be reserved by the Governor-General. [Paragraph 332 (iii)]
 (d) Trade, transport and communications affecting any part of the Empire. Any Bill of an extraordinary nature or importance which may prejudice these interests must be reserved. [Paragraph 332 (iv)]

6. The principal reaction of the Sinhalese majority community to a Constitution on these lines has been to take the line that the 1943 Declaration can in the post-war situation no longer be regarded as a satisfactory basis for a new Constitution for Ceylon. Issued as it was during the war, it received a limited degree of acceptance by Ministers, principally as an improvement on the existing Constitution which would enable Ceylon to put forward her full war effort more efficiently. Now that the war is over, however, in their view the principal reason for the retention by His Majesty's Government of such extensive reserved powers, especially in regard to Defence and External Affairs, is no longer operative. Moreover, since Dominion Status as soon as circumstances permit has been promised to Burma, the Ministers claim that Ceylon, in view of her large-scale and valuable war effort, should now be advanced to the status of a Dominion. By April 1945 the Ceylon State Council had already passed by a considerable majority, including minority Members, the so-called Sri Lanka Bill, which framed a Constitution on Dominion lines for Ceylon and immediate Dominion status is now the object of the Sinhalese majority and their supporters. This demand, they say, need not prejudice the legitimate interests of His Majesty's Government in regard to Defence, provided that these can be safeguarded by an agreement to be reached between His Majesty's Government in the United Kingdom and the Government of Ceylon by which His Majesty's Government would be vested with all necessary powers in regard to Defence. The acceptance of a claim for Dominion status would involve the question of the transference of Ceylon affairs from the Colonial to the Dominions Office.

7. The reaction of the Sinhalese majority and their supporters to the individual provisions of the Soulbury Constitution may be briefly summarised as follows:—

The Second Chamber is regarded as unnecessary and undemocratic by an important section.

The Governor-General's Powers as laid down in the Soulbury recommendations would establish a system of diarchy on certain subjects which would give rise to continued difficulty in practice. The solution to this is the conclusion of a separate agreement not appearing in the Constitution between His Majesty's Government in the United Kingdom and the Government of Ceylon, by which in effect the normal constitutional procedure would be set aside for a limited purpose.

Minority Safeguards.—No objection is raised to the provision safeguarding minorities as a whole, but as stated above opposition has been expressed to the proposed Second Chamber which was designed by the Commission to be one of the principal minority safeguards.

8. The principal minority community in Ceylon is the Tamil community, the two main divisions of which, Ceylon Tamil and Indian Tamil, together form about a quarter of the total population of the Island. While the Sinhalese regard the Soulbury recommendations as not going far enough, the Tamils regard them as going too far. In their view, no system of weighted representation combined with powers of the Governor to reserve Bills can, in practice, provide proper safeguards against

the overwhelming power which is to be put into the hands of the Sinhalese community, who will be in a permanent majority in the future Legislature. Moreover, discrimination against minorities occurs in practice not so much overtly in the form of discriminatory legislation, as in less obvious administrative acts. The only satisfactory method of providing for this situation, in the view of the Tamil minority, is the system known as "balanced representation" (described in paragraphs 254-264 of the Soulbury Report), under which half the total number of seats in the Legislature would be reserved to the Sinhalese majority community, the remaining half being divided in agreed proportion between the minorities, the statutory division of seats being extended to the Cabinet, in which each community would have an allotted representation.

9. The scheme of balanced representation is not, however, supported by the remaining minority communities, who are primarily anxious that they should secure adequate representation in whatever new Legislature is set up.

DECISIONS

10. His Majesty's Government are in sympathy with the desire of the people of Ceylon to advance towards Dominion Status and they are anxious to co-operate with them to that end. With this in mind 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.

Experience of the working of Parliamentary Institutions in the British Commonwealth has shown that advance to Dominion Status has been effected by modification of existing constitutions and by the establishment of conventions which have grown up in actual practice.

Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather than the instrument by which they were secured. It is therefore the hope of His Majesty's Government that the new constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion Status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new constitution by the people of Ceylon.

11. The main features of the Constitution under which Ceylon will be governed during this period will follow the general lines of the recommendations of the Soulbury Commission, with the following principal modifications :—

- (a) *Life of the Upper House.*—The provisions as regards the life of the Upper House will be changed so that one-third of the Membership will retire after two years, and a further third after four years, the arrangements proposed by the Soulbury Commission being followed for their replacement.
- (b) *Reserved Powers of the Governor.*—In place of the recommendations of the Soulbury Commission that the Governor shall be empowered to enact special Ordinances dealing with Defence and External Affairs. His Majesty's Government will retain the power to legislate for Ceylon by Order in Council, and the Governor will be provided by Order in Council to be brought into operation by proclamation in case of a public emergency with powers to make regulations for purposes such as those specified in the Emergency Powers (Defence) Act, 1939. During the operation of the new Constitution the present title of Governor will not be altered, and the channel of communication between the Government of Ceylon and His Majesty's Government in the United Kingdom will remain as at present through the Governor and the Secretary of State for the Colonies, who will retain his present ministerial responsibility in regard to Ceylon Affairs.
- (c) *Breakdown of the Constitution.*—Any contingency arising in this respect will be covered by the general power of His Majesty's Government to legislate for Ceylon by Order in Council which will include, if necessary, suspension of the Constitution.
- (d) *Shipping.*—The Ceylon Government will be empowered to establish and regulate shipping services, both coastal and overseas, provided that no action is taken without the concurrence of His Majesty's Government in the United Kingdom, which may be interpreted as subjecting the shipping of other members of the Commonwealth to differential treatment.

- (c) *Public Services*.—The period of exercise of the right of retirement of certain classes of officers specified in paragraph 372 (ii) of the Soulbury Report will be reduced from three to two years from the date of the meeting of Parliament under the new Constitution; and the exercise of the special right of retirement with compensation for loss of career will not extend to officers appointed to the Public Services on agreement for a limited period of years.

The question of the Three-quarters Majority.

12. In Section 7 of the 1943 Declaration His Majesty's Government made it clear that acceptance of any constitutional proposals put forwarded by the Ceylon Ministers would depend upon the subsequent adoption of such proposals by three-quarters of the members of the State Council of Ceylon, excluding the Officers of State and the Presiding Officer. This provision was inserted because the 1943 Declaration contemplated the adoption of a constitution worked out by the Ministers and did not specifically require that they should consult minority interests.

This condition was thus attached in the past to constitutional proposals to be put forward by the Ceylon Ministers and His Majesty's Government have decided not to insist upon the acceptance of the constitution now proposed by the Soulbury Commission (after full consultation with minority interests), by so large a proportion of the State Council as three-quarters, though they earnestly hope that all those with the future interests of Ceylon at heart will co-operate by giving their support to the new constitution now offered as a foundation upon which may be built a future Dominion of Ceylon. His Majesty's Government will take into account the views expressed by the State Council and the number of those in that Council who vote in favour of adopting the new constitution.

APPENDIX VII

WHEREAS by the Orders in Council set out in the First Schedule to this Order provision is made for the constitution of a State Council for the Island of Ceylon.

AND WHEREAS in the years 1944 and 1945 a Commission was appointed by His Majesty's Government under the chairmanship of the Right Honourable Herwald, Baron Soulbury, O.B.E., M.C., to visit the Island of Ceylon in order to examine and discuss proposals for constitutional reform, and the said Commission duly visited the Island and made a report to His Majesty's Government:

AND WHEREAS a Statement of Policy on Constitutional Reform in Ceylon was presented to Parliament by His Majesty's Government in the month of October, 1945:

AND WHEREAS paragraph 10 of the said Statement of Policy contained the following decision:

" His Majesty's Government are in sympathy with the desire of the people of Ceylon to advance towards Dominion status and they are anxious to co-operate with them to that end. With this in mind, 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.

" Experience of the working of Parliamentary institutions in the British Commonwealth has shown that advance to Dominion status has been effected by modification of existing constitutions and by the establishment of conventions which have grown up in actual practice.

" Legislation such as the Statute of Westminster has been the recognition of constitutional advances already achieved rather than the instrument by which they were secured. It is therefore the hope of His Majesty's Government that the new constitution will be accepted by the people of Ceylon with a determination so to work it that in a comparatively short space of time such Dominion status will be evolved. The actual length of time occupied by this evolutionary process must depend upon the experience gained under the new constitution by the people of Ceylon ":

AND WHEREAS, having regard to the matters aforesaid, it is expedient to revoke the said Orders in Council and to make other provision in lieu thereof:

(Government Gazette Extraordinary No. 9,554 of 17th May, 1946)

APPENDIX VIII

30. (1) His Majesty, His Heirs and Successors, with the advice of His or Their Privy Council, may from time to time make such laws as may appear to Him or Them to be necessary—

- (a) for the defence of any part of His Majesty's dominions (including the Island) or any territory under His Majesty's protection or any territory in which His Majesty has from time to time jurisdiction, or for securing and maintaining public safety and order and supplies and services in case of public emergency; or
- (b) for regulating the relations between the Island and any foreign country or any part of His Majesty's dominions or any territory as aforesaid.

(2) Any law made in pursuance of the provisions of subsection (1) of this Section may provide for the making of rules, regulations, orders and other instruments for any of the purposes for which such laws are authorised by this Section to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the law.

(3) No law made in pursuance of the provisions of subsection (1) of this Section shall impose any charge on the revenues or funds of the Island or regulate the importation of goods into or the exportation of goods from the Island, except to give effect to any agreement to which the Government of the Island is a party.

(4) His Majesty hereby reserves to Himself, His Heirs and Successors power, with the advice of His or Their Privy Council, to revoke, add to, suspend or amend this Order, or any part thereof, as to Him or Them shall seem fit.

(*Ceylon Government Gazette Extraordinary No. 9,554 of May 17, 1963.*)

APPENDIX IX

131. (1) The Yang di-Pertuan Agong may make arrangements with Her Majesty for the reference to the Judicial Committee of Her Majesty's Privy Council of appeals from the Supreme Court; and, subject to the provisions of this Article, an appeal shall lie from that Court to the Yang di-Pertuan Agong in any case in which such an appeal is allowed by federal law or by clause (2), and in respect of which provision for reference to the said Committee is made by or under the enactments regulating the proceedings of the said Committee.

(2) Until Parliament otherwise provides, an appeal is allowed under this Article in the following cases, that is to say:—

- (a) in the case of any decision from which an appeal from the Supreme Court of the Federation would have been entertained by Her Majesty in Council (with or without special leave) immediately before Merdeka Day; and
- (b) in the case of any decision as to the effect of any provision of this Constitution, including any opinion pronounced on a reference under Article 130.

(3) Any appeal under this Article shall be subject to such conditions as to leave or otherwise as may be prescribed by federal law or by or under the enactments regulating the proceedings of the Judicial Committee of Her Majesty's Privy Council

(4) On receiving from Her Majesty's Government in the United Kingdom the report or recommendation of the said Committee in respect of an appeal under this Article, the Yang di-Pertuan Agong shall make such order as may be necessary to give effect thereto.

(*The Federation of Malaya Independence Order in Council, 1957.*)

APPENDIX X

Court of Criminal Appeal Ordinance.—

23. Nothing in this Ordinance contained may or shall take away or abridge the undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment, decree, sentence or order of the Court of Criminal Appeal or the Supreme Court on behalf of Her Majesty or of any person aggrieved thereby in any case in which, and subject to any conditions or restrictions upon or under which, Her Majesty may be graciously pleased to admit or receive any such appeal.

Criminal Procedure Code.—

333. Nothing herein contained may or can take away or abridge the undoubted right and authority of Her Majesty to admit or receive any appeal from any judgment, decree, sentence or order of the Supreme Court or any criminal court on behalf of Her Majesty or of any person aggrieved thereby in any case in which and subject to any conditions or restrictions upon or under which Her Majesty may be graciously pleased to admit or receive any such appeal.

334. The Supreme Court and all courts from which an appeal shall be taken in any criminal matter shall in all cases of appeal to Her Majesty conform to, execute, and carry into immediate effect such judgments and orders as Her Majesty in Council shall make thereupon in such manner and by such procedure as any original judgment, decree, or order of such court can or may be executed.

Courts Ordinance.—

39. In all cases of appeal allowed by the Supreme Court or by Her Majesty, Her heirs, and successors, such court shall, on the application and at the costs of the party or parties appellant, certify and transmit to Her said Majesty, Her heirs, and successors, in Her or their Privy Council a true and exact copy of all proceedings, evidence, judgments, decrees, and orders had or made in such causes so appealed, so far as the same have relation to the matter of appeal; such copies to be certified under the seal of the said court.

40. In all cases of appeal to Her Majesty, the Supreme Court and the original court from which any such appeal was first taken shall conform to, execute, and carry into immediate effect such judgments and orders as Her Majesty in Council shall make thereupon, in such manner as any original judgment or decree of such court can or may be executed.

Appeals (Privy Council) Ordinance.—

3. From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court to appeal to Her Majesty in Council against the judgments and orders of such court shall be subject to and regulated by—

- (a) the limitations and conditions prescribed by the rules set out in the Schedule or by such other rules as may from time to time be made by Her Majesty in Council; and
 - (b) such general rules and orders of court as the Judges of the Supreme Court may from time to time make in exercise of any power conferred upon them by any enactment for the time being in force.
-