1968 *Present :* **H. N. G. Fernando, C.J., T. S. Fernando, J., and Tambiah, J.**

IN RE R. RATNAGOPAL

APN/GEN/2 of 68—In the matter of a Rule under Section 47 of the Courts Ordinance

Commission of Inquiry—Power of Commission to summon any person residing in Ceylon to give evidence—Meaning of expression "residing in Ceylon"—Ignorance of legal meaning—Mistake of law or mistake of fact ?—Penal Code, s. 72—Terms of reference—Objection as to their being ultra vires*—Scope—Summons to give evidence—Mode of service—Refusal to be sworn and to give evidence—Punishability as offence of contempt against authority of the Commission—Scope—Allegation of bias against Commissioner—Whether it is relevant—Incapacity of Commissioner to compel attendance of a witness—Determination of Commissioner in relation to offence of contempt—Whether it offends against principle of Separation of Powers—Constitution Order in Council, 1946, s. 4 (2)—Courts Ordinance (Cap.6), ss. 47, 89—Commissions of Inquiry Act (Cap. 393), ss. 2, 7 (c), 10, 12, 16, 21.*

(A) The respondent, who was a citizen of Ceylon, went to England in 1949 after selling all his property and assets in Ceylon and was registered in 1959 as a citizen of the United Kingdom and Colonies. He owned properties in England. In 1955 he married a Ceylon citizen, in Ceylon, and both husband and wife lived in London until 1961. His wife lived in Ceylon since November 1961 with her five children, and since 1963 she resided in her own house in Colombo. She made regular visits to London each year, staying there with her husband for about 3 to 5 months during those visits. Since 1964 she was shareholder in a Company which was incorporated in Ceylon, and was the Chairman of that Company since 1961. The respondent himself was not a shareholder or an officer of that Company but was its Overseas Representative. He visited Ceylon twice a year, on transit visas or holiday visas, for the purpose of performing his functions as the Overseas Representative of the Company and for the purpose of discussing the affairs of the Company with his wife and Company officers. His pattern of life was such that, while he had his permanent residence in England and many business activities there, he also regularly came to Ceylon in the ordinary course because of his business connections with the Company and of his family ties ;

Held, that the respondent was a person residing in Ceylon within the meaning of section 7 (c) of the Commissions of Inquiry Act and was, therefore, liable to be summoned, while he was on a visit to Ceylon, to give evidence at a meeting of a Commission appointed under that Act.

Held further, that refusal by the respondent to be sworn or affirmed amounted to an offence of contempt against the Commission under section 12 (1) of the Commissions of Inquiry Act, although the respondent had been advised and had believed in good faith that he was not a person "residing in Ceylon". Such a mistake is a mistake of law. The provisions, therefore, of section 72 of the Penal Code relating to a mistake of fact could not provide a defence to the respondent.

1*——H 14397—2,130 (6/68)

(B) A commission was appointed under the commissions of Inquiry Act for the purpose of inquiring into and reporting whether abuses of the description referred to in the Warrant had occurred in relation to or in connection with " relevant " tenders for Government contracts, and in relation to or in connection with " relevant " Government contracts, during the period commencing on 1st June 1957 and ending on 31st July 1965.

Held, that the terms of reference were not *ultra vires* of the powers conferred by section 2 (1) of the Commissions of Inquiry Act.

(C) A summons may be considered as served within the meaning of section 12 (1) of the Commissions of Inquiry Act when, even though it has not been served and executed by the Fiscal as required by section 21 of that Act, there is voluntary acceptance of it by the person concerned, when it is served or delivered by some one other than the Fiscal.

(D) The respondent who was summoned to give evidence before a Commission of Inquiry refused to be sworn and to give evidence. When he was called upon to show cause why he should not be punished under section 47 of the Courts Ordinance, read with section 10 of the Commissions of Inquiry Act, for the offence of contempt against and in disrespect of the authority of the Commission, it was contended on his behalf that section 12 (1) of the Commissions of Inquiry Act relieved him of the obligation to be sworn if he could show that he had reasonable cause for the refusal. The particular cause which he relied upon was that he had a reasonable apprehension that the Commissioner would be likely to be biased against him in his consideration of evidence given by him.

Held, (i) that a refusal to be sworn, whatever be the purpose of or the reason for the refusal, is within the scope of the first four words " refuses to be sworn " of paragraph (*b*) of section 12 (1) of the Commissions of Inquiry Act and constitutes the offence of contempt. The second part of paragraph (*b*) does not permit reasonable cause to be shown for a general refusal to give evidence ; it applies only to a refusal to answer particular questions.

(ii) that apprehension of bias on the part of the Commissioner could not in law be relied on by a person for the purpose of showing cause when he is charged with contempt falling under section 12 of the Commissions of Inquiry Act, more especially if that person is only a witness. A commission appointed under that Act is only a fact-finding body and does not exercise judicial or quasi-judicial functions.

(iii) that the provisions of section 12 of the Commissions of Inquiry Act do not conflict with the principle of the Separation of Powers.

(iv) that a Commissioner has no power to compel the attendance of a witness by issuing a warrant or proclamation against him or by causing him to be detained.

RULE under section 47 of the Courts Ordinance, read with section 10 of the Commissions of Inquiry Act.

H. L. de Silva, Crown Counsel, for the Attorney-General, as *amicus curiae*.

E. R. S. R. Coomaraswamy, with *R. R. Nalliah*, *C. D. S. Siriwardene*, *Nihal Jayawickrema*, *Hamavi Haniffa*, *P. A. D. Samarasekera* and *C. Chakradaran*, for the Respondent.

Cur. adv. vult.

April 9, 1968. H. N. G. FERNANDO, C.J.—

On October 22, 1965, His Excellency the Governor-General by Warrant under section 2 of the Commissions of Inquiry Act (Chapter 393) appointed Mr. Emil Guy Wikramanayake, Queen's Counsel, to be his Commissioner for the purpose of inquiring into and reporting whether abuses of the description referred to in the Warrant had occurred in relation to or in connection with tenders for Government contracts, and in relation to or in connection with Government contracts, during the period commencing on 1st June 1957 and ending on 31st July, 1965.

On 28th December 1967, the respondent to the present proceedings in this Court received summons issued under the hand of the Secretary to the Commission for the appearance of the respondent to give evidence before the Commission. On 8th January 1968 the respondent attended before the Commission and made the following statement :—

> " I would like to make submissions to Court because of various stories and reports in the Press and other circles where it was discussed. I made it convenient for the Commissioner to read an affidavit I have made already. "

Thereupon the respondent handed an affidavit to the Commissioner, who having read it made certain observations and directed the respondent to be sworn or affirmed. Thereafter the respondent made certain statements some of which were :—

> " Having heard what the Commissioner said, I think I shall not proceed any further with these proceedings. "
>
> " Having heard you, I wish to withdraw from further proceedings, to give evidence. "
>
> " Having heard it, I am still convinced I am not prepared to give evidence before this Commission. "

The Commissioner then made the following observations :—

> " Mr. Ratnagopal refuses to give evidence. I will make a note of the proceedings and make a report to the Supreme Court immediately for contempt. He has had every opportunity of giving evidence, but he refuses to give evidence, on the grounds he sets out. " " Mr. Ratnagopal : I am not refusing. I am saying I do not want to participate in the proceedings. "

On 16th January, 1968, the Commissioner purporting to act under section 12 of the Commissions of Inquiry Act issued a Certificate containing a determination that the respondent has been guilty of contempt against and in disrespect of the authority of the Commission, and the certificate was transmitted to the Registrar of this Court by the Secretary of the Commission. A Rule was thereupon issued on the respondent stating that the Commissioner had certified that the respondent

" appeared before him on summons on the 8th day of January 1968 but refused to be sworn and to give evidence " and calling upon the respondent to show cause if any why he should not be punished under section 47 of the Courts Ordinance read with section 10 of the Commissions of Inquiry Act for the offence of contempt committed against and in disrespect of the authority of the said Commission.

Counsel who appeared before us on behalf of the respondent to show cause firstly argued that in terms of section 7 (*c*) of the Act a Commissioner has power only to summon " any person residing in Ceylon " and that the respondent was not a person so residing.

In considering this argument it is necessary first to summarise the facts upon which the argument is based.

According to the affidavit of the respondent dated 7th March 1968 and filed in this Court, the respondent was born in Ceylon in 1924 and was at one time a citizen of Ceylon. This statement as to the respondent's former Ceylon citizenship is presumably correct, for the respondent presumably acquired the status of citizen of Ceylon by descent upon the passage into law on 15th November 1948 of the Citizenship Act, Cap. 349.

In 1947 the respondent sold all his property and assets in Ceylon, and in 1949 he left Ceylon and did not return here until 1954. He purchased a property in London in 1949, and now owns other properties in England. Ever since 1949 he has been engaged in business activities in London. In 1955 the respondent married a Ceylon citizen, in Ceylon, but she immediately thereafter accompanied the respondent to London and both husband and wife lived in London until 1961, except for a short visit to Ceylon in 1958.

In 1959 the respondent was registered as a citizen of the United Kingdom and Colonies and he has thereafter held a passport granted by the Government of the United Kingdom. The respondent's wife has been living in Ceylon since November 1961 uptodate, and since 1963 the wife has resided in a house in Colombo which she then purchased.

I should add that the respondent's acquisition of British Citizenship had the effect of depriving him of his Ceylon citizenship, and that his entry into Ceylon is subject to control and restrictions in the same way as is the entry of any alien.

The respondent and his wife have five children :—(1) the eldest son was born in London in 1956 and attended school in Colombo from 1962 until August 1967 and is now being educated at Dulwich College, London; (2) the second child, a daughter, was born in Ceylon in 1958 and has been attending school in Colombo ; (3) the third child was born in London in 1960 and has been in school at Colombo ; (4) the 4th and 5th children were born in Ceylon in 1964 and live with their mother in Colombo.

The wife has from and after 1963 made regular visits to London each year staying there with her husband for about 3 to 5 months during these visits.

Since 1964 the wife has been the largest shareholder of the Equipment and Construction Company Limited, incorporated in Ceylon, and she has been the Chairman of that Company since 1965. The respondent himself is not a shareholder or an officer of this Company but he is its Overseas Representative. The respondent according to his affidavit visits Ceylon twice a year on transit visas or holiday visas. On these occasions he stays with his wife in her Colombo house ; in order to perform his functions as Overseas Representative of the Company he studies its balance sheets and accounts during these visits, and he also discusses the company's affairs and advises its officers when he is in Ceylon. An affidavit from an Inspector of Police of the Aliens Branch of the Criminal Investigation Department in Ceylon sets out a list of the dates of arrival and of departure in and from Ceylon. According to this affidavit, the particulars in which are now not disputed, the respondent was in Ceylon in 1962, for one period of five months and another of one month ; in 1963, for one period of three months, another of seven weeks, and a third of two weeks ; in 1964, for one period of four weeks, for another of seven months, and a third of nine weeks ; in 1965, for two periods of two or three weeks each ; in 1966, for two periods, one of which was ten weeks ; and in 1967 for three periods of seven weeks, three weeks, and again three weeks, respectively.

On the respondent's own showing, visits by him to Ceylon are necessary for the purpose of performing his functions as the Overseas Representative of the Equipment and Construction Company and for the purpose of discussing the affairs of the Company with his wife and Company officers. There is then the fact that the respondent's wife and his children have been living in Ceylon since 1962, and that the children have had their home and their education here. According to the respondent, the decision for his wife and children to live in Ceylon was made by the wife in the interest of her own health and because of her desire to educate the children in Ceylon. Frequent visits to this country have been made by the respondent, whose relations with his family have been apparently quite normal. It is perfectly natural and reasonable that the respondent's interest in and affection for his wife and children have prompted him to come to Ceylon frequently in order to live for some time with them in their Colombo home. Indeed it seems to me to be a perfectly fair inference that the respondent has hitherto entertained a resolve to visit Ceylon whenever practicable and convenient because of the circumstances which have just been mentioned. I trust that the present proceedings in which the respondent has unfortunately become involved will not serve to alter that natural and reasonable resolve.

Counsel for the respondent has, for his argument that the facts of this case do not establish that the respondent was a person "residing in Ceylon", depended much upon a statement of Viscount Cave in *Levene v. Inland Revenue Commissioners* [1] :—

> ". . . . the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." ". . . . . it may be accepted as an accurate indication of the meaning of the word 'reside'."

The matter for consideration in that case was whether a person, whose 'ordinary residence' for a long period had been in the United Kingdom, had ceased to be resident by reason of frequent absence abroad. The decision in the words of Viscount Cave himself was that the expression "ordinary residence" connoted "residence in a place with some degree of continuity and apart from accidental or temporary absences."

I do not find the decision of much assistance in the instant case, because what had there to be decided was not the same question as that which concerns us. In the instant case, there is no doubt whatsoever that the respondent has been permanently resident in England for many years, and the question is whether nevertheless he was also "residing in Ceylon."

Much more akin to the circumstances we have to consider are those which were present in another case, in which the same Bench of the House of Lords which dealt with *Levene's case* delivered judgment on the same day (*Inland Revenue Commissioners v. Lysaght* [2]). There was no doubt that Lysaght had resided in Ireland for a long period, during which he had no definite place of abode in England. He used to visit England once a month for business purposes, he stayed at a hotel for about a week on each occasion and then returned home. Viscount Cave appears to have taken the view that such visits did not have the character requisite to constitute "residence" in England ; but there are many observations in the other judgments in *Lysaght's case* which express the contrary view. Thus Viscount Sumner (page 244) :—

> ". . . . . although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be "resident" here, *it does not follow that keeping up an establishment abroad and none here is incompatible with being "resident here"*, if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are misleading.

[1] *(1928) A. C. 217.* [2] *(1928) A. C. 234.*

Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed. "

" There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference ? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and if so, how does the discontinuity of the days prevent him from being resident in England when he is here in fact, *if the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion.* If the question had been one of ' occasional residence ' abroad in the language of General Rule 3 these facts would have satisfied the expression, *for residence is still residence, though it is only occasional*, and I see no such fundamental antithesis between ' residence ' and ' temporary visits ' as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is ' ordinary ' under the circumstances. "

Lord Buckmaster (at page 248) :

" *A man might well be compelled to reside here completely against his will ;* the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established, ordinarily resident means in my opinion no more than that *the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.* "

It seems to me, applying the dicta just cited (particularly those which I have italicized), that the circumstances of the present case establish the respondent's residence in Ceylon more strongly than the facts which were considered sufficient to establish Lysaght's residence in England. The necessity for the respondent's visits to Ceylon arose, not only for business reasons flowing from his position as Overseas Representative of the Equipment and Construction Company and as advisor to the Company and to his wife as its Chairman : the necessity also arose because his wife and family had their home in Ceylon, and regular visits were necessary to maintain the family relationship and to overlook family affairs. If I may use the language of Lord Warrington in *Levene's case* [1], the respondent's life has been ' usually ordered ' in such a way that there was for him a regular pattern of life according to which, while he had his permanent residence in England and many business activities there. he also regularly came to Ceylon in the ordinary course because of business connections with the Company and of family ties.

[1] *(1928) A. C. at p. 232.*

Counsel for the respondent very properly conceded that if the proper test of residence for the purpose of section 7 (*c*) of the Commissions of Inquiry Act is the same as that applied in *Lysaght's case*, the facts concerning the respondent must then be held to satisfy that test. Counsel however argued that the same test should not here be applied and I will refer to a few of the cases which he cited in this connection.

The decision most favourable to Counsel was that of *Re Adoption Application* [1]. A district officer in the Colonial Service and his wife were permanently in Nigeria because of the officer's employment; but both husband and wife spent three months in England, once in every 15 months, during leave periods. They had no home of their own in England, but used to stay during the leave periods with the parents of either the husband or the wife. The application by them to adopt a child under the Adoption Act 1950 was refused on the ground that they did not reside in England for the purpose of section 2 (5) of the Act:—" An adoption order shall not been made in England unless the applicant and the infant reside in England. " The Court held that in the Act, " residence " denotes some degree of permanence and that, to be " resident ", an applicant must have " his settled headquarters in England ".

In coming to this conclusion, Harman J. took account of other provisions of the Act, particularly section 2 (6) :—

> " An adoption order shall not be made in respect of any infant unless (*a*) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and (*b*) the applicant has, at least three months before the date of the order, notified the welfare authority within whose area he is for the time being resident of his intention to apply for an adoption order in respect of the infant. "

Reference was made to section 27 (1) which prohibits an Adoption Society from placing an infant in the care and possession of a person resident abroad. Harman J. noted also that when a ' custodian ' changes his residence, s. 32 requires him to give notice of the change to the Welfare authority of the area where he has been residing and of the area to which he is moving.

Having regard to such provisions, Harman J. held that throughout the Act, " resident in England " and " resident abroad " are two things which are the converse one of the other. This meant that the applicant's residence abroad was incompatible with his being resident in England for the purposes of the Act. In all the circumstances, it was " difficult to suppose that under the Adoption Act, unlike the Fiscal Acts, a person can be resident in two places ". There were thus many features in the Adoption Act which compelled the Court to the conclusion that an adoption order could not be made in favour of a person who was not permanently resident in England. I am unable to hold, in the absence

[1] *(1951) 2 A. E. R. 931.*

of any special features in our Commissions of Inquiry Act, that the test imposed by the English Adoption Act should be applied in considering the meaning of the expression " residing in Ceylon " occurring in section 7 of our Act.

Counsel also relied on English decisions upon the question whether the Courts have jurisdiction in matrimonial causes on the ground that a wife " has been ordinarily resident in England for a period of 3 years preceding the commencement of the proceedings ".

In *Hopkins v. Hopkins* [1], the parties had married in England in 1943, at a time when the husband had a commission in the Fleet Air Arm. They lived in England until 1949 and had 2 children, both apparently born in England. In April 1949, the parties went to Canada, where the husband found employment in May that year. On 1st September, they moved into a house in Canada which the husband had taken on a yearly tenancy. At this period, the parties had no home in England. The wife left Canada on September 20th and returned to England in October.

The Court held that the husband had at the material time acquired a domicil of choice in Canada. The question was whether the wife had, during the 3 years preceding October 1949, been ordinarily resident in England, despite her stay in Canada for 5 months of that period. It was held that " it would be impossible to say that during these 5 months she was resident anywhere other than in Canada ". The judgment in this case does not explain, by reference to the particular facts, how " ordinary residence " in Canada was thereby established. But a comparison with the facts of a later case readily furnishes the explanation.

In *Lewis v. Lewis* [2] the wife had a flat in London, in which she lived with her husband and her parents from 1942 to 1951. In 1951, the husband went to Australia in the course of his ordinary employment, and his wife and child accompanied him. But she retained the London flat in which her parents continued to reside. In November 1951 she returned to England and resumed occupation of the Flat. The Court accepted the position that the stay in Australia was intended to be temporary, and that both parties had, when they left for Australia, intended to return to England. It was held on these facts that the wife had been ordinarily resident in England, despite her stay with her husband in Australia, for a period of 3 years immediately preceding October 5, 1954.

I agree with Counsel's submission that the decision of these cases turned on the intention with which the wife in each case left England, which had previously been her place of ordinary residence. If there was at that stage no intention to return to England, but instead an intention to stay abroad indefinitely, then England ceased at that stage to be the place of ordinary residence. In the *Hopkins* case, the facts showed such an intention because the wife had no home in England and her only home was that which her husband provided in Australia. If therefore, the

[1] *(1950) 2 A. E. R. 1035.* [2] *(1956) 1 A. E. R. 375.*

question were to arise whether the respondent in the instant case had been ordinarily resident in England during the 3 years preceding December 1967 (when he last visited Ceylon), the answer must probably be in the affirmative, because he had during that period left England with no idea of living elsewhere permanently or indefinitely. On the contrary, he was "ordinarily resident" in England during that period, despite his occasional, though regular, visits to Ceylon.

In the *Hopkins case*, as well as in a later case of *Stransky v. Stransky* [1], reference was made to the tax cases of *Levene* and *Lysaght*, and to observations made by the learned Law Lords in those cases. Pilcher J. in the *Hopkins case* cited a reference by Lord Warrington to the possibility that a person can reside in more than one place within the meaning of the provisions of the Tax laws. Nevertheless it seems to me that the question whether a wife can be held to be ordinarily resident in England for a 3-year period, despite her being "resident" elsewhere for parts of that period, did not call for consideration upon the facts of the cases of *Hopkins*, *Stransky* and *Lewis*. In each of these cases the ground of objection to the jurisdiction of the English Courts was only that a period of ordinary residence in England had either been terminated or else interrupted by a stay abroad ; and the decisions were to the effect that such a termination or interruption can result only by a departure from England with an intention to live elsewhere permanently or indefinitely.

In my opinion therefore the cases concerning matrimonial causes must be distinguished from a case such as *Lysaght*, which decided that a person can in certain circumstances be 'resident' in England for the purposes of the revenue laws, nothwithstanding that his permanent home is in another country. It is at least very doubtful whether, for the purposes of a matrimonial action, Lysaght's connection with England would have sufficed to establish that he had been ordinarily resident in England for a period of 3 years ; if the test applied in the matrimonial actions, namely whether a person left England with the intention of living elsewhere whether permanently or indefinitely, had been applied in *Lysaght's case*, Lysaght could probably not have been held to be ordinarily resident in England during a period of 3 years.

I note also that the Matrimonial Causes Act 1950 confers jurisdiction on the English Courts, firstly on the ground that the husband is domiciled in England, and that the ground of the wife's ordinary residence in England for a period of 3 years is the second alternative ground of jurisdiction. That being so, it is only reasonable that the alternative ground is established only if the wife's intention regarding her place of residence is in some degree comparable to the intention requisite to establish domicile.

In the revenue cases however, there is nothing in the relevant statutes which might indicate that residence cannot be established except when there is an intention to continue such residence permanently or

[1] *(1954) 2 A. E. R. 536.*

indefinitely. Nor is there in our Commissions of Inquiry Act any indication that such an intention to remain in Ceylon is necessary in order to constitute residence in Ceylon. I think therefore the expression any person " residing in Ceylon " in section 7 of our Act must be construed in the same manner as the provisions regarding residence in the English revenue laws have been construed in England. I have already indicated that the facts of the present case establish that the respondent " resides in Ceylon ", even more strongly than the facts of a case such as that of Lysaght.

Counsel's second argument was that the appointment of the Commission was *ultra vires* the powers conferred by the Commissions of Inquiry Act. In considering this argument it is necessary to set out here the relevant part of the warrant appointing the Commission :—

" WHEREAS it appears to me to be necessary to appoint a Commission of Inquiry for the purposes hereafter mentioned :

Now, therefore, I, William Gopallawa, Governor-General, reposing great trust and confidence in your prudence, ability and fidelity, do, in pursuance of the provisions of section 2 of the Commissions of Inquiry Act (Chapter 393), by these presents appoint you, the said Emil Guy Wikramanayake, to be my Commissioner for the purpose of—

(1) *inquiring into, and reporting on, whether, during the period commencing on the first day of June, 1957, and ending on the thirty-first day of July, 1965, all or any of the following acts or things, hereafter referred to as " abuses " occurred, directly or indirectly, in relation to, or in connection with, all such tenders* (including quotations or other offers by whatsoever name or description called) made by persons or bodies of persons (other than any local authority or Government department), hereafter referred to as " contractors ", *for the performance of contracts for the construction of buildings or any other works* (including contracts for the supply of services or equipment in connection with such first-mentioned contracts), by whatsoever name or designation called, for or on behalf of any Government department, *and all such contracts of the description hereinbefore referred* to given to contractors, whether in consequence of the making of tenders or otherwise, *as you the said Commissioner may in your absolute discretion deem to be*, by reason of their implications, financial or otherwise, to or on the Government, *of sufficient importance* in the public welfare *to warrant such inquiry and report* (hereafter referred to as " relevant tenders " and " relevant contracts ", respectively) :—

There immediately follows a long list of matters, each of which is an " abuse " concerning the occurrence of which there is to be inquiry and report by the Commission. I have italicized the sentences or clauses which have to be read together for the consideration of Counsel's argument.

Section 2 (1) of the Commissions of Inquiry Act provides as follows :—

> " Whenever it appears to the Governor-General to be necessary that an inquiry should be held and information obtained as to—
>
> (*a*) the administration of any department of Government or of any public or local authority or institution ; or
>
> (*b*) the conduct of any member of the public service ; or
>
> (*c*) any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare,
>
> the Governor-General may, by warrant under the Public Seal of the Island, appoint a Commission of Inquiry consisting of one or more members to inquire into and report upon such administration, conduct or matter. "

The objection of *ultra vires* was based on certain propositions formulated on the following lines :—

(1) The subject of the inquiry which the Governor-General required in this case is not of the nature specified in paragraph (*a*) or paragraph (*b*) of s. 2 (1) of the Act, because there is no specification in the terms of reference, either particularly or generally, of any department or departments or of any member or members of the public service, the administration of which or the conduct of whom is to be investigated.

(2) Accordingly, an inquiry into the present subject matter could be lawfully required by the Governor-General only if it is within the scope of paragraph (*c*) of s. 2 (1).

(3) A matter is within the scope of paragraph (*c*) only if the Governor-General is of opinion that an inquiry into the matter will be in the interests of the public welfare.

(4) In this case, the Governor-General commits to the Commissioner the function of determining, in his absolute discretion, particular tenders and contracts which are of sufficient importance in the Commissioner's opinion to warrant inquiry and report in the interest of the public welfare.

(5) Hence the actual subject-matter of the inquiry, namely whether abuses occurred in connection with " relevant tenders " and " relevant contracts ", was not within the contemplation of the Governor-General, and was not a matter " in respect of which an inquiry will, in his opinion, be in the interests of the public welfare ".

This objection, which Counsel for the respondent formulated in consequence of certain observations which fell from me during the hearing appeared to me at first to be substantial. But learned Crown Counsel,

appearing as *amicus curiae*, subjected s. 2 of the Act and the terms of reference to a careful examination, which satisfied me that the objection must be rejected.

The maxim *omnia praesumuntur rite esse acta* justifies an assumption that the Governor-General will not appoint a Commission of Inquiry unless he has in mind *some* subject of inquiry ; and such an assumption is justified also on grounds of common sense. The terms of reference in this case do specify generally an ascertainable subject for inquiry, namely whether abuses of a specified description (they are specified in the list numbered (*a*) to (*n*) in the warrant) occurred in connection with tenders for Government contracts, and such contracts themselves, during a specified period.

If the scope of the inquiry as set out in the terms of reference had been thus generally stated without any qualification, the objection would not have been tenable that the Governor-General had not formed the requisite opinion under paragraph (*c*) as to the need for the inquiry. Moreover, I agree with learned Crown counsel that the list of " abuses " mentioned in the terms of reference involves or can involve inquiry into matters referred to in paragraphs (*a*) and (*b*) of s. 2 (1) of the Act, that is to say, into the administration of any Government Department which may be concerned with tenders and Government contracts and into the conduct of public officers who may be so concerned.

The questions which further arise are—

(i) whether the limitation of the subject of the inquiry to abuses in connection with " relevant " tenders and " relevant " contracts contradicts the reasonable assumption that the Governor-General was of opinion that an inquiry was necessary into the subject generally mentioned in the terms of reference ;

(ii) whether it was unlawful for the Governor-General to commit to the Commissioner the function of deciding or selecting which tenders and contracts he would investigate for the purpose of ascertaining whether abuses of the nature contemplated by the Governor-General had occurred in connection with them.

I find it convenient to consider these questions by supposing that the terms of reference in this case had been drafted in a different form thus :—

" Whereas I am of opinion that an inquiry should be held and information obtained as to whether abuses occurred in connection with tenders for Government contracts and with Government contracts during the period . . . . : I hereby appoint . . . . . to be my Commissioner for the purpose of inquiring into all such tenders called for, and all such contracts negotiated, during the aforesaid period, and of reporting whether abuses of the nature referred to in the Schedule hereto occurred in connection with any or some or all such tenders and contracts."

Let me suppose that upon such a Commission, the Commissioner ultimately submits a report—

(*a*) that the number of tenders and contracts during the relevant period was so numerous that he had not been able to inquire into all of them ;

(*b*) that he had inquired into all important tenders and contracts, namely those which related to works involving expenditure by the Government of sums exceeding Rs. 500,000 in each case ;

(*c*) that he had also inquired into 20 other contracts which involved the utilisation of foreign aid, because in his opinion an inquiry into such contracts was of public importance ;

(*d*) that according to his findings, " abuses " specified in the report had occurred in connection with some of the contracts actually investigated.

Upon receipt of such a report, it *may be* open to the Governor-General to require the same Commissioner to investigate all the previously uninvestigated tenders and contracts, and no doubt it *will be* open to appoint another Commissioner to make such an investigation. But the failure of the Commissioner to inquire into all the tenders and contracts in the contemplation of the Governor-General would not taint with illegality or invalidity the inquiry into, and the report of the findings concerning, the tenders and contracts into which an actual investigation took place. In other words, there can be no substance in such circumstances in the contention that the inquiries actually conducted by the Commissioner were not authorised by the Commissions of Inquiry Act.

If then an inquiry and the findings based thereon would not be unlawful or unauthorised on the ground that the Commissioner decides of his own motion to limit the scope of his investigations to some only, but not all, of the contemplated tenders and contracts, it must follow *a fortiori* that such a limitation would be even more innocuous if, as in the instant case, it is imposed in pursuance of special authority conferred by the warrant of appointment.

Since the objection of *ultra vires* has to be rejected for the reasons above stated, it is not necessary to state my reasons for agreeing with certain other answers to the objection which Crown Counsel also submitted. One such answer was that the purpose of the Commission, which is merely to inquire and report on certain matters, does not involve the exercise of judicial or quasi-judicial functions, or even of executive power ; that being so, any failure of the Commission to duly carry out its purpose is a subject for complaint to the Governor-General and not to the Courts.

The offence of contempt which the respondent is alleged to have committed, namely the refusal to be sworn, is one specified in s. 12 (1) (*b*) of the Act, and several arguments of law were adduced in support of the plea that the respondent did not commit that offence.

One such argument was that a refusal to be sworn is an offence only if the person so refusing is (in terms of the opening words of s. 12 (1)) a person " on whom a summons is served under this Act ", and that a summons under the Act was not served on the respondent. Counsel invoked s. 21 of the Act, which provides that " every process issued under this Act shall be served and executed by the Fiscal ", and claimed that there was no compliance with s. 21 in this case. There was undoubtedly no such compliance, for the summons which the respondent received was not served or executed by the Fiscal. What actually occurred was that the summons was issued to a police officer for service, and that, being unable to serve it personally, the police officer affixed a copy of the summons on the respondent's wife's house in Colombo, at which the respondent was admittedly staying at the time. Thereafter, the respondent himself telephoned an appropriate police official, who at the respondent's request, delivered the summons to him. (These facts do not appear on the record, but they were stated to us by Counsel for respondent on instructions from his client.) The argument on this point then is simply that, although the respondent did receive the summons issued by the Commission, it was not *duly* served because he did not receive it from the hand of the Fiscal.

This argument depends on the proposition that the provisions of s. 21 are mandatory and imperative, and not merely directory, and that service of a summons otherwise then by the Fiscal is a nullity.

Having regard to the purpose of the service of a summons on a proposed witness, there can be no doubt that the purpose was achieved in this case, namely that the proposed witness in fact became aware that he was required to give evidence before a Commission which had duly issued a summons for him to appear under statutory power so to do. In fact the summons was delivered to him personally, because of a request which he himself made. The situation is thus not different from what it would have been if the respondent happened to attend before the Commission as a mere spectator, and had then agreed to accept a summons delivered to him by the Commissioner or the Secretary of the Commission. It seems to me that in both situations, when there is voluntary acceptance of a summons served or delivered by some one other than the official specified in that behalf in the statute, the purpose intended by the statutory provision for a mode of service is in fact achieved. Once a summons has been duly issued by a competent authority and has been in fact received and accepted by the proper person, any subsequent objection that there was not a due service is purely technical. Indeed, the respondent did not, when he attended before this Commission, raise the objection which his Counsel formulated only at a late stage of a lengthy argument. I hold that there was a mere irregularity in the mode of service of the summons and that the irregularity was of such a nature as would, in criminal proceedings, have been covered by the saving provisions of s. 425 of the Criminal Procedure Code. I hold also that the respondent by his conduct waived his right that the

summons should be served on him by the Fiscal. It follows that the respondent is a person on whom summons was served under the Act, and to whom the provisions of s. 12 become applicable.

Another argument, for the contention that the respondent committed no offence when he refused to be sworn or affirmed, invoked section 72 of the Penal Code, which declares that " nothing is an offence which is done by a person . . . . . who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it. "

The argument here was that the respondent had been advised and had believed in good faith, that he was not a person " residing in Ceylon " ; and even if that belief was incorrect, it was a mistake of fact and not a mistake of law which induced that belief and the consequent refusal to be sworn or affirmed. It seems to me however, that the mistake, if any, made by the respondent was not a mistake of fact. The mistake concerned the proper meaning, intended by the Legislature, of the expression " any person residing in Ceylon ". The well-known case of *Weerakoon v. Ranhamy* [1] is relevant in this connection.

In that case, a person was charged with an offence under the Forest Ordinance alleged to have been committed by reason of certain acts done by him on land alleged to have been ' chena land ' at the relevant time. One defence in the case depended on section 72 of the Penal Code, the accused claiming that he had believed, on the faith of certain deeds and other matters, that he had a title to the land, and that it was therefore not " chena land ". In rejecting this defence Schneider J. observed :—

> " The title relied upon by the appellant does not come within the above description, and is one therefore which the law would not recognise. The only mistake he made was in being ignorant that this was the law. He was not ignorant as to the facts relating to his title, nor as to the fact that the land was a chena within the Kandyan provinces. He must be presumed to have known the law whether he was actually acquainted with it or not. It seems to me therefore that the mistake which the appellant could plead is a mistake of law and not of fact, and that section 72 therefore does not exculpate him. The word ' mistake ' in section 72 must be taken to include ignorance. Sections 69 and 72 are a paraphrase of the English Common law maxim in its application to criminal law : *Ignorantia facti excusat ; ignorantia juris non excusat.* "

De Sampayo J. discussed the matter as follows :—

> " Ordinarily there is no difficulty about the expression " mistake of fact ". It is a misconception as to the existence of something which in reality does not exist. What, then, is a ' fact ' in this connection ? I should say that it was something external to oneself. It cannot I

[1] *(1921) 23 N. L. R. 33.*

think include a state of mind. It is, indeed, the supposed fact which produces the state of mind. The difference between " objective " and " subjective " well known in mental science is not an inappropriate distinction for the present purpose. Mr. Jayewardene's argument, as I understand it, is that the accused's belief on the strength of his deeds and possession that he had good title is " the fact " about which he was mistaken. I cannot accede to this argument. The mistaken belief is the result of a process of reasoning, whereby he gives legal effect to his deeds and acts of possession. This surely is a mistake of law and not of fact."

In the present case also, the respondent, if he believed that he was not " residing " in Ceylon, had that belief through ignorance of the legal meaning of " residing " or because of a mistake in his process of reasoning. I hold therefore that the provisions of section 72 of the Penal Code do not provide a defence to the respondent.

Counsel for the respondent argued also for a construction of s. 12 (1) of the Act which would relieve him of the obligation to be sworn or affirmed if he could show that he had reasonable cause for the refusal. The particular cause which the respondent had, it is said, is that there was a reasonable apprehension that the Commissioner would be likely to be biased against the respondent in his consideration of evidence given by the respondent, and in his investigation of contracts in which the Equipment and Construction Company had been concerned.

The construction contended for is that, while a refusal *simpliciter* to be sworn is covered by the first four words " refuses to be sworn " in s. 12 (1) (*b*) of the Act, such a refusal, if it involves and is due to a desire not to give evidence, is in substance a refusal to give evidence. Such a refusal, it was argued, is within the scope, not of the first four words in paragraph (*b*) of s. 12 (1), but of the second part of the paragraph, *i.e.* " having been duly sworn, refuses or fails without cause, which in the opinion of the Commission is reasonable, to answer any question put to him touching the matters directed to be inquired into by the Commission ".

There is first a simple but perhaps " technical " answer to this argument, namely that the second part of paragraph (*b*) is not applicable except in the case of a person who has first been duly sworn. But there are other more acceptable and convincing answers to this argument.

The second part of paragraph (*b*) pre-supposes in my opinion that a question must first be put to a witness before there can arise in his mind a reason why he should decline to answer it. For example, a witness will claim that a communication made to him was privileged, only if some question put to him will involve an answer which would disclose some such communication. The language of paragraph (*b*) indicates that reasonable cause for refusing to answer a question is some cause related to the question which is asked and/or to the answer which is sought, and is not some general cause inducing a general refusal to answer any questions whatsoever.

I think also that, while the second part of paragraph (*b*) applies to a refusal to answer a particular question, the first four words of the paragraph were intended to apply to a general refusal to give evidence. Let me take a case in which a person is summoned to give evidence, but the Commission does not require him to be sworn or affirmed. If the person then states that he does not wish to give evidence, the matter might end there if the Commission accedes to that wish. But it will be open to the Commission at that stage to require him to be sworn ; and if he then refuses to be sworn, his refusal would be clearly attributable to his intention not to give evidence. In other words, the requirement that he be sworn will then be the means of compelling him to testify. Indeed, this is the sole means by which any person can be compelled to give evidence before a Commission appointed under the Act.

The oath or affirmation which a witness takes in proceedings in our Courts is that " the evidence I will give in this case will be the truth ". A witness thus makes a twofold undertaking, that he will give evidence, and that his evidence will be true. If then the first part of paragraph (*b*) can be construed to mean that a person who is sworn may nevertheless refuse to testify, the construction would have the absurd consequence that the law permits the person to remain mute and thus evade outright his undertaking to give true evidence.

I hold for these reasons, firstly, that a refusal to be sworn, whatever be the purpose of or the reason for the refusal, is within the scope of the first four words of paragraph (*b*) of s. 12 (1) and constitutes the offence of contempt ; and *secondly*, that the second part of paragraph (*b*) does not permit reasonable cause to be shown for a general refusal to give evidence.

In view of the conclusion just stated, it suffices for me to add that there appears to be much substance in two arguments of Crown Counsel. One was that the ground of bias is not available even to a person whose conduct is the subject of inquiry by a Commission, if its proceedings are neither judicial nor quasi-judicial, and if its findings do not determine or affect the rights of such person. The other argument was that the ground of bias on the part of a tribunal is not available to a *witness* who refuses to testify, even though the proceedings of the tribunal be judicial. I note in this connection that at the present stage of the inquiry by this Commission, the conduct of the respondent is not " a subject of inquiry by the Commission " as contemplated in s. 16 of the Act.

During this hearing, we invited the attention of learned Crown Counsel to a possible challenge of certain provisions of s. 12 of the Commissions of Inquiry Act on the ground that they infringe the principle of the Separation of Powers. If in circumstances referable to paragraph (*a*) or paragraph (*c*) of s. 12 (1), or to the second part of paragraph (*b*), a person pleads some cause as a ground for failure to appear, or to produce a document, or to answer a question, as the case may be, then the section requires the Commissioner to form the opinion whether or not the pleaded

cause is reasonable. In any such circumstances, the Commissioner's determination under sub-section (2) of s. 12 that the person has committed an offence of contempt, the determination will be based on the Commissioner's opinion that the cause shown is not reasonable. The question can then arise whether, in subsequent proceedings in the Supreme Court for the alleged offence of contempt, a relevant ingredient of the offence consists of the fact that the Commissioner has formed the opinion to which reference is here made. If that opinion is a relevant ingredient, then the Court would be bound by the Commissioner's opinion on a question of fact, and to that extent a conviction by this Court would be dependent on a finding of fact reached by a tribunal not competent to exercise judicial power.

I am in agreement with Crown Counsel's submission that the above is not the only construction which may be given to s. 12, and that the Section can and should be construed in such a manner that its provisions do not conflict with the principle of the Separation of Powers. The alternative construction is that the Commissioner's opinion is relevant only for the purpose of the determination made by him under sub-section (2) ; but once the matter is before the Supreme Court, and when the Court decides in its discretion to take cognisance of an alleged offence of contempt, it is for the Court to decide for itself whether or not a person had reasonable cause for any of the failures or omissions now under discussion.

It will be evident that my brother Fernando, in reaching the conclusion that the respondent in this case had no reasonable apprehension of the likelihood of bias on the part of the Commissioner, has considered all the relevant circumstances quite independently of, and without reference to, the opinion entertained by the Commissioner concerning this matter.

The judgment prepared by my brother Fernando relieves me of the task of discussing two further questions which arise for decision. Whether an apprehension of bias on the part of the Commissioner can in law constitute a cause for the respondent's refusal to be sworn or give evidence, and whether the matters specified in the respondent's affidavit filed in this court concerning the Commissioner's business interests, and the Commissioner's actions and remarks affecting the respondent and his wife, sufficed to create a reasonable apprehension that the Commissioner is likely to be biassed against the respondent in the course of the Commissioner's further proceedings. I adopt the reasons stated by my brother for rejecting the contentions urged on behalf of the respondent in relation to both these questions, and I hold accordingly that answers in the negative must be given to both the questions.

I hold that the respondent is guilty of an offence of contempt committed against or in disrespect of the authority of the Commission, and I impose on him for that offence a fine of one thousand rupees, or in default a sentence of simple imprisonment for a term of one month.

T. S. FERNANDO, J.—

I agree, for the reasons set out by my Lord, the Chief Justice, with the findings he has reached and to the making on this matter of the order proposed by him. I wish to deal, at his suggestion, only with the questions of law and fact relating to bias which have not been explored by him in his judgment.

In the course of the protracted argument before us which, I would like to state, was conducted with ability and with acceptance by learned counsel for the respondent and by Crown Counsel, much time was devoted to the question whether bias on the part of the Commissioner would constitute reasonable cause if established by a person charged with contempt falling within section 12 of the Act. Crown Counsel argued that bias would not be relevant in such a situation and that this Court should not, therefore, examine the allegations contained in the affidavit of the respondent. A Commission appointed by the Governor-General under the Commissions of Inquiry Act is only a fact-finding body and, indeed, its report is not required by law to be published. It was held quite recently, in the case of *Dias v. Abeywardene* [1], where a writ of prohibition had been applied for on the ground of a Commissioner's alleged bias, that a Commissioner under the Act does not exercise judicial or quasi-judicial functions. It is now well recognised that the remedies of *prohibition* and *certiorari* are available to disqualify persons or bodies exercising functions of a judicial or quasi-judicial nature if bias in the sense of pecuniary personal or official bias is established. In the case of judges, section 86 of the Courts Ordinance itself provides for a disqualification of a judge who is personally interested in any cause or suit. Crown Counsel brought to our notice a decision of an Indian High Court—*Allan Berry and Co. v. Vivian Bose* [2]—where a petition under Articles 226 and 227 of the Indian Constitution had been directed, inter alia, towards seeking a disqualification of the Solicitor and the Secretary attached to a Commission appointed under the Commissions of Inquiry Act, 1952, on the ground that they are incapable of giving impartial assistance and should not be allowed to be attached to the Commission. The Court there held that, as the proceedings of the Commission are not of a judicial or quasi-judicial nature, it was not possible for it to hold that bias, even if established, disqualified the officers concerned from being associated with the Commission.

Counsel for the respondent attempted to distinguish this and other cases cited by Crown Counsel by pointing out that what he was seeking to do in this Court was, not to establish that bias which would disqualify the Commissioner from performing his functions under the Act, but to point to facts indicating bias as constituting reasonable cause for his client's refusal to testify before this particular Commissioner. I do, however, think that there is much force in Crown Counsel's rejoinder that to permit the respondent, who is not even in a position analogous to that of a party in a judicial or quasi-judicial proceeding but only a witness, to

[1] *(1966) 68 N. L. R. 409.* [2] *A. I. R., 1960, Punjab, 86.*

refuse to testify on the ground alleged is to grant him a right denied even to a party in a proceeding before a court. A witness in a judicial proceeding who attacks the judge on the ground of his bias would be held to be committing the offence of contempt by scandalising the court. Moreover, if bias can constitute reasonable cause for the respondent refusing to be sworn or refusing to testify, the same or similar considerations can be put forward by others, and a logical consequence may ensure a virtual disqualification of the Commissioner. It is not, in my opinion, competent for this court to so disqualify a Commissioner appointed by the Governor-General. It is undeniable that the Governor-General's powers and functions under the Commissions of Inquiry Act are exercised in accordance with the usual constitutional conventions—see section 4 (2) of the Constitution Order in Council, 1946—and he would receive the advice of the appropriate Minister. The proper forum for seeking a disqualification of a Commissioner would appear, therefore, to be Parliament and not the Courts of Law. By upholding the point raised by the respondent we would be attempting to do indirectly what we cannot do directly. Any question that would result in a disqualification or a virtual disqualification of the Commissioner should be left by the court to the proper authority, and I would in this connection adopt with respect the observation of Frankfurter J. in the American case of *Colegrove v. Green* [1], made in the context of the Separation of Powers, that " to sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket ". For the reasons I have indicated, I would uphold the argument advanced by Crown Counsel that bias cannot be relied on for the purpose of showing reasonable cause when charged with commission of a contempt and that it is, accordingly, irrelevant.

The opinion that I have reached that bias on the part of a Commissioner is irrelevant in these proceedings would, in ordinary circumstances, have rendered it unnecessary for me to examine the averments or allegations contained in the respondent's affidavit of 7th March, 1968 presented to this court in support of the ground of bias. Respondent's Counsel, however, urged that, as this is not a proceeding whereby it is sought to disqualify the Commissioner, and as all that the respondent is doing by presenting his affidavit is to establish reasonable cause for refusal generally to give evidence, the court will examine the allegations of bias to the extent necessary to decide whether they would constitute such reasonable cause. As we permitted the matter to be argued, and as we think it expedient to record a finding of fact on this matter in the event of our conclusion that reasonable cause cannot be permitted to be shown where there has been a general refusal to give evidence being wrong, I will shortly state my reasons for holding that the respondent has failed also to establish bias.

In regard to the affidavit of the respondent, his counsel was content to confine himself to the matters set out in paragraphs 6 and 7 thereof, with the further qualification that the averments in sub-paragraph (*o*)

[1] *328 U. S. S. C. Rep. 556 (90 Lawyers' Ed., p. 1436).*

of paragraph 6 may be disregarded by us as that sub-paragraph was included at a stage when the respondent did not have access to certain documents. It was stated that the documents have since been seen and that it is not proposed to pursue the particular matter concerning the offer by Steel Products Ltd. to purchase the estate specified in that sub-paragraph.

It became apparent to us in the course of the argument that no examination of the averments of the respondent's affidavit could be effective without an opportunity being afforded to the Commissioner to submit any material he wished in answer to that affidavit. Section 12 (4) of the Commissions of Inquiry Act does not enable this Court to summon or examine the Commissioner except with his own consent. He is not a party to these proceedings although they commenced on his certificate. Crown Counsel's appearance before us was in the capacity of an *amicus curiae* in response to the notice we had caused to be given to the Attorney-General to assist us at the hearing. In the circumstances we indicated to Crown Counsel that we would be willing to receive any affidavit evidence that the Commissioner may be advised to submit. After that indication was given, we have had submitted to us an affidavit sworn by the Commissioner on March 23, 1968 in which, to put it shortly, he denies all the material allegations in paragraph 6 of the respondent's affidavit. We should add that an affidavit containing substantially the same allegations contained in the respondent's affidavit filed in this court had been submitted by the respondent to the Commissioner on January 8, 1968, before the certificate to this court was signed by the Commissioner. We have had the advantage of examining the record of the proceedings of that day before the Commission, and I observe that the Commissioner appears generally to have thought then that there was not sufficient reason for him not to proceed to examine the respondent as a witness.

Quite apart from the fact that the material allegations, as I have noted above, have been denied by the Commissioner, we have to take account of the fact that the allegations in paragraph 6 are of too general a nature and no specific instances, except those to which I shall refer later, have been mentioned :—vide sub-paragraphs (*g*) and (*h*) thereof. Had specific instances been given, if there were any, the Commissioner would have had an opportunity of considering the allegations and replying thereto, if he was so advised. Moreover, it is indisputable that to be any real assistance in the discussion of the question of bias the allegations would require to be specific ones. One or more of the few specific transactions mentioned in the affidavit—vide sub-paragraph (*k*) of paragraph 6—relate to contracts entered into at a time falling outside the period covered by the terms of reference of the Commission. The matter referred to in sub-paragraph (*r*), viz., that a Mr. de Silva who is a friend of the Commissioner and who has resigned from the Board of Directors of a company of which the respondent's wife is Chairman and who is alleged by respondent to be taking an undue interest in the investigations being

made by the Commission, is of too remote a nature to form a ground capable of contributing towards the establishing of bias on the part of the Commissioner. There is next the allegation in sub-paragraph (*p*) that, as the Commissioner had some years ago acted as counsel for Messrs Socoman in certain arbitration proceedings between the latter and the Government and as the company (Equipment and Construction Co. Ltd.) of which the respondent is the overseas representative is a collaborator with and a sub-contractor of Socomans, the Commissioner may not be able to resist drawing inferences from knowledge gathered by him in his professional and, therefore, confidential capacity as counsel for Socomans. It would appear that Equipment and Construction Co. Ltd. was a sub-contractor of Socomans in respect of the contract entered into between the latter and Government over the Kandy Town Water Supply Scheme which is one of the contracts being investigated into by the Commissioner. The fear which the respondent appears to be entertaining in this regard of a denial to him of what he calls natural justice is, in my opinion, too far fetched to be taken into account when one is considering the existence of bias. Taken altogether, the matters relied on in paragraph 6 of the affidavit as allegations establishing bias in the Commissioner are of so vague, flimsy and general a nature that it is altogether impossible to regard them as constituting reasonable cause for a refusal to give evidence.

There remains only an examination of the matters specified in paragraph 7 of the respondent's affidavit with a view to considering whether the existence of the facts alleged therein and proved would in their cumulative effect add up to such bias or antipathy towards the respondent, and indeed towards his wife as well, as would constitute reasonable cause contemplated in section 12 (1) (*b*) of the Act. These have been examined at some length by us and we even permitted the respondent to lead evidence in proof of such of them as he cared to pursue before us. We had the record of the proceedings of the Commission in so far as they relate to the relevant dates put before us, and we permitted respondent's counsel access thereto so that the facts may be placed before us as accurately as circumstances permitted.

It may be useful now to examine the facts alleged to be proved. For convenience, they may be detailed, in chronological order, under the following five heads :—

(i) An attempt to have summons on the respondent served illegally abroad ;

(ii) An uncalled for suspension of the passport (a Ceylon passport) of the respondent's wife secured on December 8, 1967 on a request made by the Commissioner on December 5, 1967 ;

(iii) A threat uttered on December 13, 1967 to issue a " commission " to a medical officer to examine the respondent's wife in hospital, despite the submission by her of a medical certificate to the effect that she had entered hospital ;

(iv) The Airport incident of December 26, 1967 ;

(v) An illegal order of December 28, 1967 restraining the respondent, a British subject, in possession of a valid British passport, from leaving Ceylon.

In respect of item (i) above, a reference to the record kept by the Commission on September 2, 1967 shows that the Commissioner " directed summons be sent (to the respondent) by registered post to his address in London, and that a copy (of the summons) be sent to the High Commission to have it served (on the respondent) ". Crown Counsel conceded that the High Commissioner would have had no legal authority to serve summons or have summons served outside Ceylon. The Fiscal to whom directions can be given under the Act to effect service of summons cannot do so overseas. He conceded also that the summons directed in these circumstances would have lacked legal efficacy. Even where a person has voluntarily accepted summons reaching him outside Ceylon there would be no legal obligation on him to attend in obedience thereto. The Commissioner appears, however, to have entertained the belief, erroneous as it now turns out to be, that not only had he the power to order service of summons outside Ceylon, but that he had the power even to issue a warrant of arrest and, indeed, to proclaim the respondent. It was proved by the record that on December 27, 1967 (the day after the respondent had arrived in Ceylon) the Commissioner had stated to the respondent's wife who had appeared before him that day as a witness that while he cannot compel her to take the summons on her husband he " can take other steps equally drastic ". This reference to " drastic steps ", I have no doubt, was to the issue of warrant and proclamation, because on the very next day he stated to a proctor who appeared before him on the respondent's behalf that if he failed to secure the attendance of the respondent by effecting substituted service which he was directing that day he would " proceed to take the other steps I am empowered to take to secure the attendance of a witness, such, for instance, as the issue of a warrant, or a proclamation if that also fails ". The Commissioner very probably had in his mind the procedure available to a civil court in terms of section 131 of the Civil Procedure Code, but, as Crown Counsel suggested, overlooked the circumstance that those powers of a court are not vested in a Commission appointed under the Commissions of Inquiry Act.

Turning to item (ii), it was not disputed by Crown Counsel that at the request of the Commissioner made on December 5, 1967, the prescribed authority under the Immigrants and Emigrants Act had on December 8, 1967 ordered the suspension of the passport of the respondent's wife who is a citizen of Ceylon, and that suspension was being continued by another order similarly secured on January 28, 1968. It has been suggested by Crown Counsel that suspension of a passport is a matter which is in the absolute discretion of the prescribed authority. It does not become necessary on this occasion to examine the validity of

the proposition so suggested, and I therefore expressly refrain from doing so here. Speaking for myself, I think it appropriate to add that the right to freedom of movement is an important right of a citizen, and our courts may not be found unwilling on a proper occasion and in appropriate proceedings to consider whether executive discretion can be equated to executive whim or caprice. In the present instance, having regard to the facts that (*a*) the respondent's wife had, in obedience to the summons issued by the Commission, attended and given evidence, and (*b*) the Commissioner himself felt that she was not in a position to give any useful evidence, doubts do arise about the necessity of restricting her movements in the way ensured by the Commissioner.

The next item (iii) also concerns the wife of the respondent. It was pointed out to us that, on December 5, 1967, when a medical certificate was submitted by Counsel appearing for the respondent's wife to account for her inability to attend, the Commissioner inquired whether there was any likelihood of her leaving Ceylon and received Counsel's assurance that there was none. When a second medical certificate was submitted on the lady's behalf on December 13, 1967, the Commissioner remarked that he could issue a " commission " to the Judicial Medical Officer or a gynaecologist to examine the lady, presumably because he entertained some doubt about the bona fides of the reason for non-attendance. The acceptance of an excuse for non-attendance on the ground of illness may be made conditional on the person summoned agreeing to submit himself for medical examination. But there is, in my opinion, no power even in a court for the issue of " commissions " of this kind to compel persons to submit themselves to medical examination. Certainly Crown Counsel did not point to any provision of law enabling this to be done or suggest that it could legally be done. In these circumstances, the respondent's counsel submitted to us that this was another instance of a threat held out by the Commission to do something without legal authority therefor. That such orders for " commissions " have been or are often being made by courts is no good reason for a Commission appointed under the Commissions of Inquiry Act also to resort to them. It was also urged on behalf of the respondent that on December 13 the Commissioner asked of the proctor for the respondent's wife what assurance there is that she will not join her husband abroad. It was suggested that the question was a cynical one considering that some days earlier the Commissioner had ensured she would not be able to leave the country, and I have myself experienced difficulty in appreciating the necessity for it. It appears to have

been in a similar strain that the Commissioner that very day in postponing the taking of the evidence of the respondent's wife for December 27 remarked that he wanted " to see to it that she makes no attempt to go away. I can take sufficient steps to prevent it ".

Let me now turn to item (iv) which concerns the detention of the respondent at the Katunayake airport on the afternoon of December 26, 1967, when he disembarked at Colombo on a transit visa. The Commissioner had been informed by the proctor who had appeared for the respondent's wife on some earlier day that the respondent was expected in Colombo about Christmas time. The Commissioner had not been successful in having summons served in England on the respondent, and obviously (and I must add not unnaturally) the Commissioner desired to have service effected no sooner the respondent arrived in Ceylon. To that end the Commissioner had enlisted the services of the police to provide information as to the correct address of the respondent during his visit to Ceylon. The police officer on duty at the airport to whom fell the duty of obtaining this information was required to make communication with his superior officers at Colombo should the respondent disembark at Colombo. It transpired in evidence before us that this police officer kept with him the respondent's passport until he was able to complete a telephone call to his said superior officers. As a consequence, the respondent would appear to have been detained for about 15 minutes at the airport. While one must appreciate that the respondent, probably tired after a long journey and anxious to get away to his wife's house, was irritated by what he may well have considered uncalled for delay or detention, the entire incident is, in my opinion, trivial, and the connection of the Commissioner therewith is but remote. It appears to me to be a case of " much ado about nothing ".

The final item (v) is of a more substantial nature than the others. There is now no dispute over the fact that, as a result of a request made by the Commissioner, the Police had issued instructions on December 28, 1967—vide document X4—that the respondent should not be allowed to leave Ceylon. He could have been prevented from so leaving only by restraining him, and the circumstances attending that restraint would have rendered the person responsible guilty at least of the offence of wrongful restraint. The respondent had been made aware of this order. Crown Counsel agreed that the order and the request that had prompted it were both quite illegal. The respondent is a British subject who arrived in Ceylon on a British passport, and he was free to leave Ceylon at any time he desired provided he had not by some act or conduct of his rendered himself liable to be arrested or otherwise restrained. It is a matter for no little regret that orders of this nature are issued

apparently without adequate consideration either of their legality or their propriety. It is customary to include in a warrant issued by the Governor-General under the Commissions of Inquiry Act a direction to all police officers and other persons to render such assistance as may be applied for by the Commissioners. But the warrant itself specifies that the assistance that may be rendered is only such " as may be properly rendered ". The police officers and other persons must therefore advise themselves as to the propriety and legality of the assistance that they can grant. It must follow that the Commissioners themselves owe a duty to the police officers and other persons to whom they address requests for assistance or information to confine such requests to proper and lawful ones.

Counsel for the respondent argued that, on the facts I have attempted to outline shortly above, his client was reasonably justified in feeling apprehensive about further illegalities being committed or threatened if he appeared before the Commission to give evidence. He contended that the question of justification must be looked at in the background of the business rivalry alleged between companies in which the respondent was interested and the companies of which the Commissioner is a director. Looked at in this way, he argued, the facts caused the respondent to entertain the belief that the Commissioner was biased, and this belief in a bias constituted reasonable cause for the respondent to refuse to give evidence. We were invited by counsel to apply on this question of the existence of reasonable cause a subjective test, but we felt quite unable to agree that such a test would be the proper one.

If the case had been one of a court or of a person acting in a quasi-judicial capacity, only " a real likelihood of bias ", i.e., " a real likelihood of operative prejudice, whether conscious or unconscious " would have disqualified the court or such other person ;—see *R. v. Camborne Justices, ex parte Pearce*[1]. In that case the Court did not feel itself justified in going so far as Lord Esher, M. R. did in *Eckersley v. Mersey Docks and Harbour Board*[2] when he said " not only must they not be biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed ".

The proper test to be applied is, in my opinion, an objective one, and I would formulate it somewhat on the following lines : Would a reasonable man, in all the circumstances of the case, believe that there

[1] *(1954) A. E. R. 850.* [2] *(1894) 2 Q. B. 670.*

was a real likelihood of the Commissioner being biassed against him? I agree with the respondent's counsel that the burden on a person seeking to show reasonable cause is to satisfy this objective test on a balance of probability. We were invited to have regard to the maxim that everyone is presumed to know the law. Certainly such a presumption is particularly valid in the case of a person like the Commissioner with whom we are concerned on this proceeding. Counsel therefore argued that the acts amounting to illegalities and threats of illegalities complained of by the respondent could be presumed to have been committed with actual knowledge of their illegal nature.

In applying the objective and not the subjective test, the reasonable man would be required to balance such inferences as could be drawn from the proved facts as would go to show that the Commissioner had justification to believe that the respondent was merely placing obstacles in the way of having his evidence recorded with the inferences that would go towards indicating the existence in the Commissioner of a bias or prejudice against the respondent. The record of the proceedings kept by the Commissioner from September 2, 1967 to January 8, 1968 (vide copy produced before us) has been submitted to a very minute examination before us by counsel for the respondent. I think it evidences that the Commissioner's fear that the respondent was endeavouring to avoid giving evidence was intrinsically justified. Therefore, even approaching the question of the illegalities referred to above, on the assumption that the Commissioner acted with a knowledge of their illegality, I do not think that, when the proceedings are considered as a whole, we would be justified in reaching a conclusion that the objective test we are required to apply here is satisfied.

The ordering of service of summons abroad, the suspension of the passport of the respondent's wife, the threat to issue " commissions " for her examination in the hospital by a doctor, the threat to issue a warrant for the apprehension of the respondent and to " proclaim " him, and the observations made by the Commissioner on more than one occasion suggestive of a belief by him that the respondent is not desirous of giving evidence are, all consistent, more with an anxiety on the part of the Commissioner to get on with the work entrusted to him and investigate quickly any alleged " abuses " connected with Government contracts than with the existence of any real bias towards the respondent. It may be that in his enthusiasm for the performance of the task entrusted to him he may well have felt irritated by what appears to have struck him as obstruction on the part of the respondent.

I am not unmindful of the fact stressed by counsel for the respondent that the record shows that lawyers appearing for the respondent as well as for his wife had indicated right up to the time of the respondent's arrival in Ceylon on December 26 that he was willing to give evidence. Nevertheless, all the matters complained of except the order to prevent the respondent leaving Ceylon are consistent more with the anxiety I have referred to above on the part of the Commissioner than to any real likelihood of bias, and no reasonable man could have thought otherwise. In these circumstances, could the illegal order (item v) have sufficed to tilt the balance in favour of the probability of the reasonable man reaching the contrary conclusion. This question, I am free to state, is not devoid of difficulty ; but, always bearing in mind that the burden of establishing reasonable cause is on the respondent, I do not consider it could because, in the context of the relevant proceedings, this illegal order was itself but the outcome of a continuing and pressing desire to secure the evidence of the respondent, if need be, at any cost. In that view it must follow that the respondent has failed in establishing reasonable cause even on the basis of such of the allegations in paragraph 7 of the affidavit as have been proved.

Before concluding this judgment it is right to add one word more. With a view to avoiding recurrences of illegalities and irregularities of the kind that these contempt proceedings have brought to light, we hope that the Government will in the future ensure to Commissioners appointed under the Commissions of Inquiry Act legal advice in regard to the several steps that may require to be taken from time to time by Commissions in the discharge of their duties. Neglect to ensure this could expose police officers and other persons to prosecutions and civil suits at the instance of parties affected.

TAMBIAH, J.—

I had the benefit of reading the judgments of my Lord the Chief Justice and my brother T. S. Fernando, J. I am in agreement with their findings and the views expressed by them. However, I wish to add my own observations on a few matters.

There is overwhelming evidence to show that, despite the fact that the respondent abandoned Ceylon citizenship, and acquired British citizenship and resided in England, he has a residence in Ceylon where his wife and children are living. In deciding the question of residence the fact of residence as well as the intention to reside are factors which should be taken into account. It is possible for a citizen of the United Kingdom

to have residence in another country for a particular period either for purposes of holiday or business. The facts proved in this case show that the respondent's wife and children had a permanent residence in Ceylon and the respondent himself, whenever he came to Ceylon, resided here with his wife.

Counsel for the respondent urged that the visits of the respondent to Ceylon were in the nature of sojourns, but the evidence clearly establishes that he came and resided with his wife for a particular period of time each year ever since he abandoned Ceylon citizenship. Further there is evidence that for business purposes it was necessary for him to have a residence in Ceylon. Therefore I hold that he was a person resident in Ceylon within the meaning of section 7 (*c*) of the Commissions of Inquiry Act (Cap. 393).

My brother T. S. Fernando J. has fully dealt with the facts relating to the alleged bias referred to by Counsel for the respondent in the course of his submissions. Although some of the acts of the Commissioner are illegal and cannot be justified, yet after very careful consideration, it is difficult for me to take the view that he had a bias against the respondent. It is not in evidence that the respondent was known to him before. Some of the steps taken by the Commissioner, although not justified in law, were perhaps taken by him as he was apprehensive. The respondent who was a citizen of the United Kingdom and whose visits to this country are unpredictable, could not be got at in order to be examined by him. It is regrettable that the Commissioner should have adopted some stringent methods which are against the rule of law and which are illegal. But the important question is whether the Commissioner has formed a bias to disbelieve any answer which would be given by the respondent to questions put by him.

I fully agree with the findings of my brother T. S. Fernando J. that in an inquiry of this nature the Commissioner does not act judicially or quasi-judicially (vide *Dias v. Abeywardena*[1]). Proceedings of this nature are inquisitorial (vide article on " Reports of Committees " by A. E. W. Park, Modern Law Review, Vol. 30 (July 1967), p. 426 at 428). Even an adverse finding against the respondent could not in any way alter the legal rights of the respondent. The Commission is a fact-finding Commission and has no legal consequences. (Vide *Allen Berry & Co. v.*

[1] *(1966) 68 N. L. R. 409.*

Vivian Bose[1]; *The King v. Macfarlane.*[2]) Therefore the question of bias is not a factor that any reasonable man should take into account in refusing to give evidence.

Further an analysis of section 12 (1) (*b*) of the Commissions of Inquiry Act (Cap. 393) read with section 12 of the same Act shows that this court will take cognizance of contempt of court only where a person refuses to give an answer to a question put by a Commissioner, which is reasonable or when he refuses to be sworn. The questions put by a Commissioner may be unreasonable if they did not touch on the matters directed to be inquired into by the Commission.

In this case it is too premature for us to find out the nature of the questions which may be asked by the Commission. The evidence given by the respondent's wife shows that, although she is the Chairman of the company known as the Equipment and Construction Company Limited, she was unable to say where the books were or give any details about this business. The Commissioner appears to have been at pains to get at the books of this Company. In these circumstances, the Commissioner rightly thought that the respondent, who was perhaps the brains behind this business, would have been in a better position to give information regarding the books. If the Commissioner had asked the question as to where the books of the Company were, could it be said that it was an unreasonable question and that a reasonable man in the position of the respondent could have possibly objected to give an answer ? We are now in the realm of speculation as to what questions the Commissioner would have asked from the respondent. Therefore it was not reasonable for the respondent to refuse to give evidence before the Commission. In these circumstances, it cannot be said that he had reasonable cause in refusing to give evidence. In my view therefore, the respondent has committed the offence of contempt as envisaged in section 12 (1) of the Commissions of Inquiry Act (Cap. 393) and this court should take cognizance of such contempt under the provisions of section 12 (3) of the Commissions of Inquiry Act (Cap. 393). For these reasons I convict the respondent of the offence of contempt of which he is charged and sentence him to pay a fine of Rs. 1000/- ; in default of fine he will serve a term of one month's simple imprisonment.

Rule made absolute.

[1] *(1960) A. I. R., Punjab, 86.* [2] *(1923) 32 Commonwealth Law Reports 518*