1965 *Present*: **Sansoni, C.J., H. N. G. Fernando, S.P.J., T. S. Fernando, J., Tambiah, J., and Sri Skanda Rajah, J.**

WALKER SONS & CO., LTD., and others, Appellants, and **F. C. W. FRY** and others, Respondents

S. C.No.9 of 1962 (LT/1/6209), S. C. Nos. 18-23 of 1962 (LT/6/9088-9093), S. C. Application No. 319 of 1963, S. C. Application No. 144 of 1964, S. C. Application No. 158 of 1964, and S. C. Application No. 37 of 1965

Industrial disputes-Labour Tribunals, Industrial Courts and Arbitrators-Mode of appointment-Labour Tribunals exercising judicial powers-Requirement of appointment by Judicial Service Commission-" Judicial power "-" Judicial officer "-Difference between arbitral power and judicial power-Power of Court to make a "just and equitable order "-Effect-Industrial Disputes Act (Cap. 131), as amended by Act No. 62 of1957, ss. 3 (7), 4, 4 (7) (2), 5-31A, 31B (1) (4) (5) (S), 310 (7) (2), 31D, 33(l) Ceylon (Constitution) Order in Council, 1946 (Cap. 379), as amended by Ceylon Independence Act of 1947, as. 3, 53, 55 (1) (5).

Held by SANSONI, C.J., H. N. G. FERNANDO, S.P. J., and T. S. FERNANDO(TAMBIAH, J., and SRI SKANDA RAJAH, J., dissenting), that a Labour Tribunal exercises judicial power when it acts under Part IVA, particularly section 3IB, of the Industrial Disputes Act (as amended by Act No. 62 of 1957). Therefore, as it is also a holder of a public office, it is a " judicial officer " within the meaning of section 55 of the Ceylon (Constitution) Order in Council, 1946, and has no jurisdiction to exercise its judicial power unless it has been appointed by the Judicial Service Commission.

Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya (65 N. L. R.185) overruled.

When a Labour Tribunal hears and determines an application under section 31B of the Industrial Disputes Act, it exercises, in respect of a contract of service entered into between a workman and his employer, a jurisdiction concurrently vested in the ordinary Courts. Provisions similar to those which state that a Labour Tribunal has, in the exercise of its jurisdiction, power (a) to grant relief or redress to a workman notwithstanding anything to the contrary in the contract of service (section 31B (4)), (6) to make such order as may appear to the tribunal to be " just and equitable " (section 31C (1)), and (c) to grant the new remedy of re-instatement, and other ancillary or alternative remedies (sections 31B and 33 (1)), do not make the Tribunal any the less a tribunal exercising judicial functions or judicial power.

The jurisdiction of Labour Tribunals set out in Part IVA of the Industrial Disputes Act is not the only power given to them. The Act, in sections 3 (1) (d) and 4 (1), contemplates a Labour Tribunal acting as an arbitrator. A Labour Tribunal need not be appointed by the Judicial Service Commission if it performs only arbitral functions.

The invalidity of the appointment of a Labour Tribunal authorising it to exercise judicial functions in a question of law in respect of which an appeal to the Supreme Court lies under section 31D of the Industrial Disputes Act. Insuch a case, it cannot be contended that the appointment can only be challenged by an application for a writ of Quo Warranto and in no other way.

Section 340 (2) of the Criminal Procedure Code (Cap. 20), which requires a statement of the matter of law and a certificate by an Advocate or Proctor, does not apply to the form of a petition of appeal filed under section 31D of the Industrial Disputes Act.

Held further (by the whole Court), (i) that an Industrial Court to whom an industrial dispute is referred by the Minister under section 4 (2) of the Industrial Disputes Act exercises only arbitral power when it acts within the terms of sections 22 to 31. Even though it holds a paid office, it is not a " judicial officer " within the meaning of section 55 of the Ceylon (Constitution) Order in Council, 1946. It does not, therefore, require to be appointed by the Judicial Service Commission.

(ii) that an arbitrator to whom an industrial dispute is referred by the Minister under section 4 (1) of the Industrial Disputes Act or by the Commissioner of Labour under section 3 (1) (d) acts under sections 15A to 21. He holds no office and is not a " judicial officer ". He does not, therefore, require to be appointed by the Judicial Service Commission.

APPEALS and applications against orders made in respect of certain industrial disputes. They were referred to a Bench of five Judges under section 51 of the Courts Ordinance.

S. C. No. 9 of 1962 (LT/1/6209)-

H. F. Perera, Q.C., with R. A. Kannangam, Lakshman Kadirgamar and R. L.Jayasuriya, for the Employer-Appellant.

G. E. Chitty, Q.C., with George Candappa, K. Thevarajah, Norman Weerasooria andKumar Amarasekera, for the Applicant-Respondent.

F. Tennekoon, Q.C., Solicitor-General, with R. S. Wanasundera, V. S. A Puttenayegum, H. L. de Silva and G. G. D. de Silva, Crown Counsel, as amicus curiae.

H. W. Jayewardene, Q.C. with G. T. Samerawickreme, Q.C., N. R. M. Daluwatte andMark Fernando, as amicus curiae.

S. C. No. 18-23 of 1962 (LT/6/9088-9093)-

C. Ranganathan, Q.C., with S. C. Crossette-Thambiah, for the Employer-Appellant.

N. Satyendra, with J. Perisunderam, for the Applicant-Respondent.

F. Tennekoon, Q.C., Solicitor-General, with R. S. Wanasundera, V.S. A.Pullenayegum, H.L.de Silva and G. G. D. de Silva, Crown Counsel, as amicus curiae.

S. C. Application No. 319 of 1963-

If. V. Perera, Q.C., with S. J. Kadirgamar, Lakshman Kadirgamar, K. Viknarajah, R. Illeyperuma, Mark Fernando and D. C. Amarasekera. for the Petitioner.

Colvin R. de Silva, with NimalSenanayake, Prins Rajasooriya, (Miss) Manouri de Silva, Bala Nadarajah and /. S. de Silva, for the 2nd Respondent.

F. Tennekoon, Q.C., Solicitor-General, with R. S. Wanasundera, V. S. A. Pullenayegum, H. L. de Silva and G. G. D. de Silva, Crown Counsel, for the 1st and 3rd Respondents.

S. C. Application No. 144 of 1964-

H. V. Perera, Q.C., with Lakshman Kadirgamar and Mark Fernando, for the Petitioner

Nimal Senanayake, for the 2nd Respondent.

F. Tennekoon, Q.C., Solicitor-General, with R. S. Wanasundera V. S. A. Pullenayegum, H. L. de Silva and G. G. D. de Silva, Crown Counsel, for the 3rd Respondent.

S. C. Application No. 158 of 1964-

H. V. Perera, Q.C., with Lakshman Kadirgamar and Mark Fernando, for the Petitioner.

Nimal Senanayake, for the 2nd Respondent.

F. Tennekoon, Q.C., Solicitor-General, with R. S. Wanasundera, V. S. A. Pullenayegum, H. L. de Silva and G. G. D. de Silva, Crown Counsel, for the 3rd Respondent.

S. C. Application No. 37 of 1965-

H. W. Jayewardene, Q.G., with G. T. Samerawickreme, Q.C., and

N, R. M. Daluwatte, for the Petitioner.

S. S. Sahabandu for the 2nd Respondent.

Cur. adv. vult.

November 30, 1965. **SANSONI, C.J.-**

These six cases were referred by me under section 51 of the Courts Ordinance to a Bench of five Judges. The question that has been argued is whether the Tribunals concerned, all of which are mentioned in the Industrial Disputes Act, Cap. 131, have been validly appointed. In S. C. No. 9 of 1962 and S. C. Nos. 18 to 23 of 1962, the Tribunals concerned are Labour Tribunals. In S. C. No. 319 of 1963 the Tribunal is an arbitrator to whom the dispute was referred by the Minister of Labour and Nationalised Services under section 4 (1) of the Act. InS. C. No. 144 of 1964 and S. C. No. 158 of 1964, the Tribunal concerned is an Industrial

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Court of one person to whom the dispute was referred by the Minister under section 4 (2) of the Act. In S. C. No. 37 of 1965 the Tribunal is an arbitrator to whom the dispute was referred by the Commissioner of Labour under section 3 (1) (d) of the Act.

The arguments of counsel appearing in each case were directed to the question whether each Tribunal was a judicial officer as that term is used in the Ceylon (Constitution) Order in Council, 1946, Cap. 379 ; and if so, whether it was validly constituted in that it had not been appointed by the Judicial Service Commission.

The Industrial Disputes Act No. 43 of 1950 was the first legislative enactmentin Ceylon to

contain legislation " for the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto "- to quote the long title. Ceylon came very late into this field, which covers collective agreements and settlement by conciliation and arbitration. Before 1950 practically all countries had established some form of conciliation or arbitration for dealing with industrial disputes. It had been known for a long time that parties to such disputes should be assisted by the State in arriving at amicable settlements through conciliation and arbitration procedures.

The Act No. 43 of 1950, after providing in Part III for collective agreements,and settlement by conciliation and arbitration, provided in Part IV for the constitution of Industrial Courts, from a panel of not less than five persons appointed by the Governor-General, to whom such disputes might be referred for settlement. The original Act provided also for the reference of disputes for settlement by arbitration. An amending Act No. 62 of 1957 which introduced Labour Tribunals also gave them in Part IVA, and particularly section 31B, power which, it has been argued, amounts to judicial power. By the same amending Act, Labour Tribunals were included among those to whom disputes could be referred for arbitration, but that amendment merely added one more kind of arbitrator to those already in existence.

Since the first two cases we were dealing with, viz., S. C. No. 9 and S. C. Nos.18 to 23 concern Labour Tribunals, I shall deal with them at this stage. Section31B of the Act enables a workman, or a trade union on behalf of a workman who is a member of it, to apply in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :-

(a) the termination of his services by his employer ;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;

(c) such other matters relating to the terms of employment or the conditions of labour of a workman as may be prescribed.

It will be seen that the application is made directly to the Tribunal, and in this respect is similar to the procedure prescribed for filing a plaint in a civil Court. In the case of Industrial Courts or arbitrators there is no such provision enabling a workman to make such a direct application for relief, and an order of reference to an arbitrator or an Industrial Court can only be made by the Commissioner of Labour or the Minister.

An application to a Labour Tribunal is described as one " for relief or redress ". In this respect also it resembles an action in a civil Court which, according to section 5 of the Civil Procedure Code, is " a proceeding for the prevention or redress of a wrong "; and according to section 6 of the Code is an " application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority ".

Items (a), (b) and (c) already set out cover the whole range of matters which come within a contract of service entered into between a workman and his employer. Although the subject of wages is not specifically mentioned, I have no doubt that a Labour Tribunal can make an order in respect of wages as well. Section 31B (6) states that notwithstanding that any person has ceased to be an employer, a Labour Tribunal may, on an application under sub-section (1), order such person to pay the workman any sum as wages in respect of any period during which that workman was employed by such person.

Section 31B (5) provides that when a Labour Tribunal has concluded the hearingof an

application under sub-section (1), the workman shall not be entitled to any other legal remedy in respect of that particular matter; and where the workman has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection (1). Thus Labour Tribunals have been given concurrent jurisdiction with the ordinary Courts over matters which form the subject of dispute between a workman and his employer.

Section 31D provides that an order of a Labour Tribunal shall be final and shall not be called in question in any Court, though a party dissatisfied with the order may appeal to the Supreme Court on a question of law. This means, in effect, that a Labour Tribunal is empowered to make an order which finally determines the dispute between the parties to the contract.

Section 31B (4) provides that any relief or redress may be granted by a Labour Tribunal to a workman notwithstanding anything to the contrary in any contract of service between him and his employer. Much time was spent during the arguments on an elucidation of the meaning of this provision. One view which was expressed was that a Labour Tribunal need not determine the rights of the parties as known to the civil law; that the contract could be entirely ignored by the Tribunal; and that matters of policy could also be considered by it. I do not read the provision in that way. It certainly does not say that the contract should, or

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even may, be ignored. It seems to me to empower the Tribunal to give relief against any harsh terms that the employer may have imposed in the contract. The Tribunal has been given, I think, a discretion to be exercised judicially to give relief against such terms. It is similar to the relief a Court of equity would give when it has before it an unconseientious or oppressive contract; this is sometimes done in cases of specific performance ; similarly, in cases covered by the Money Lending Ordinance a Court can relieve a borrower against unconscionable terms appearing in the contract. The point I make is that a provision such as sub-section (4) is entirely consistent with the Tribunal that is exercising the power of granting equitable relief being one that exercises judicial functions or judicial power.

Section 31C (1) empowers the Labour Tribunal, after making inquiries and hearing evidence, " to make such order as may appear to the tribunal to be just and equitable ". It was sought to be argued that a Tribunal which makes an order that is just and equitable is not analogous to a Court of justice exercising judicial functions, but is a tribunal exercising arbitrary functions of an entirely different order from judicial functions. On the other hand, it was pointed out that an order which is just and equitable is the very sort of order which is often made by the ordinary Courts of justice. We were referred to the Partnership Act and the Companies Act, by which the Court is empowered to make an order of dissolution or winding up when it considers such a course to be " just and equitable ". Such an order is clearly one which can only be made by a tribunal exercising judicial and not arbitrary power.

All persons exercising judicial power and responsibility must act so as to produce a result which is both' bonum' and' aequum', and if a statute reminds a tribunal of that duty it is no argument to say that the tribunal is by that circumstance given jurisdiction to make a purely arbitrary decision. Dr. J. Duncan M. Derrett has said, when writing of justice, equity, and good conscience: " Contrasted with the office of the Judge is the so-called arbitrium rusticorum, which seems to have been the Komanic counterpart of' palm tree justice', whereby ' the arbiter' divided the disputed property equally between the two parties; here no juridical activity can be seen and he splits it between them like the monkey in Aesop's fable, as the simplest way of appeasing the noisier party. It is not even 'rough justice' or 'substantial justice', forno judicial discretion whatever has been used, and where there is no judicial discretion there is no justitia." To enact that a Labour Tribunal should exercise its power according to justice and equity, for that is what the phrase "just and equitable" connotes, is to remind it of the maxim "bonus judex secundum aequum et bonum judicat aequitatem stricto juri praefert" (Co. Litt. 24 B). "I commend the Judge that seems

fine and ingenious, so it tend to right and equity", observed Lord Hobart. (Hob. 125). I find it impossible to treat seriously an argument that suggests that a Tribunal that is empowered to make a just and equitable order is not, for that reason, exercising judicial power. On the contrary, it is by those very words

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required to do what a Court of law and equity is required to do, and that is to hold an even hand between conflicting interests. It must conform to that standard, and has no power to act in a purely arbitrary manner.

Mr. Satyendra, in support of his argument that a Labour Tribunal is not a Courtand does not exercise judicial functions, relied on the Privy Council decision in Moses v. Parker [1 (1896) A. C. 245.]. That case dealt with a Statute of1858, which vested in the Supreme Court of Tasmania jurisdiction to deal with disputes regarding claims to grants of land. Such disputes had, prior to the Statute, been dealt with by certain Commissioners, and they reported to the Governor who was, "in equity and good conscience", entitled to make a grant. It was expressly provided in the Statute that the Supreme Court should not "be bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever". In an appeal from an order of the Supreme Court, the Privy Council held that the decision of the Supreme Court was not a judicial decision. The Privy Council in the later case of Canadian Pacific Railway v.Toronto Corporation[2(1911) A. C. 461.] explained the earlier decision, and said that "as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the Judges as the persons from whom the best opinions might be obtained, and not as a Court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals ". I do not think that the functions of a Labour Tribunal acting under Part IVA bear any resemblance to the functions performed by the Supreme Court of Tasmania in the case relied on.

Thus when one considers the manner of making the application to a Labour Tribunal, the subject matters which may be covered by such an application, the order which may be made by the Tribunal, and the final effect of such an order, it is plain that disputes which had always fallen within the jurisdiction of ordinary Courts of law have been assigned to Labour Tribunals for hearing and determination. The Tribunal is required to determine facts in dispute, to interpret contracts, to apply the relevant rules of law, to adjudicate on the respective rights of the parties, and to make a just and equitable order which finally binds them. This is what any ordinary Court does when hearing a dispute that goes up before it. After all these years, during which contracts of service were justiciable by the ordinary Courts, the Legislature chose in 1957 to take them out of the jurisdiction of those Courts, or at any rate to establish Courts of concurrent jurisdiction calling them Labour Tribunals. True it is that the Act in terms enables a Labour Tribunal to grant equitable relief, notwithstanding the express terms of the contract, and requires it to make a just and equitable order : it could well have imposed the same terms on the ordinary Courts which dealt with such disputes. The imposition of such terms would not have

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changed the character of such Courts in any way ; they would still have been exercising judicial power. And I do not see how the conferment of the power to grant equitable relief and to make a just and equitable order on a Labour Tribunal makes the power it exercises anything other than judicial. Section 31C (2) makes the Tribunal master of its own procedure, just as Bribery Tribunals were made, in another Act enacted at about this time, the masters of their procedure.

What we have to consider is whether a Labour Tribunal is a judicial officer within section 55 (1) of the Order in Council, that is to say, the holder of any judicial office, for section 55 (5) defines

"judicial officer " for the purposes of this section as the holder of any judicial office except a Judge of the Supreme Court or a Commissioner of Assize.

Labour Tribunals are appointed, we were informed by the Solicitor-General, bythe Public Service Commission, and they are permanent officers drawing salaries. I have no doubt therefore that they are the holders of an office, as that term was defined by the Privy Council in the Bribery Commissioner v. Eanasinghe [1 (1964) 66 N. L. R. 73.]

Apart from being holders of an office, I hold that when acting under Part IV Aof the Act they act as holders of judicial office. They are given power in that Part to try disputes, to modify existing legal relationships, to make orders which confer legal rights and impose Iegal liabilities, and to determine, as between a woil man and his employer, whether one of them possesses as against the other some existing legal right or is subject to some existing legal liability. As Isaacs J. said in Federal Commissioner of Taxation v. Munro[2 (192S) 38 C. L. R. 173.] " some functions are appropriate exclusively to the judicial power, for example, the punishment of crime, or adjudication in actions in tort or contract." And as Dixon, C.J. and MeTiernan J. said in The Queen v. Davison [(1954) 90 C. L. R. 353 at 369.], "The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power."

It is true that Labour Tribunals have jurisdiction to inquire into and determine only disputes of a particular class, viz. those arising between a workman and his employer. But the fact remains that a Labour Tribunal is given jurisdiction to apply the law, to interpret the agreement, to decide the facts, and by its adjudication to create an instant right or liability, on the basis of some previously existing legal standard. It is not merely under a duty to act judicially and observe the principles of natural justice: that is a feature common to all tribunals, whether they exercise judicial or arbitral power. A Labour Tribunal under Part IV A of the Act corresponds in every respect to a Court as described by Blackstone in his Commentaries (Vol. 3, p. 23) : " In every court there must beat least three constituent parts, the actor, reus, and judex : the actor, or plaintiff, who complains of an injury

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done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon the fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy." I adopt and apply the view of Isaacs J. that Blackstone's Commentaries are " a legitimate source of instruction for the purposes of our own Constitution .... a key to the meaning of the terms we are now considering." A Labour Tribunal has " power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected, by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact." This is the famous dictum of Palles C.B. in The Queen v. Local Government Board[1 (1902) 2 f. B. 349 at 373.], where the learned judge had to consider what made a tribunal a " Court " or " jurisdiction " so as to make it a determination judicial. As the Privy Council tersely put it in Attorney-General for Australia v. The Queen [2 (1957) A. G. 288.]: " The exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue."

The Solicitor-General argued that the Order in Council vested only jurisdictionand not judicial power in Part VI which is entitled " The Judicature ". He alsoargued that only the Courts existing at the time the Constitution was enacted were contemplated. It is not necessary to decide the first point. I cannot accept the second. In Part III which is entitled " The Legislature ", Parliamentand the power and procedure appertaining to Parliament are dealt with. In Part Vthe Executive and the executive power are referred to. Part VI makes no specific mention of the judicial power

(unlike the case of some other written Constitutions) but I have no doubt that one essential characteristic of the authorities mentioned in Part VI, viz. the Supreme Court, Commissioners of Assize, and " judicial officers " is that they exercise judicial power.

The judicial power is the power " which every Sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." This is the definition given by Griffiths C.J. in Huddart,Parker & Co. Proprietary Lid. v. Moorehead[3(1908) 8 C. L. R. 330 at 357.], andis the one most frequently cited. It has been approved more than once by the Privy Council.

Jurisdiction, on the other hand, denotes the type of case, according to subject-matter or value or situation or the character of the parties, with respect to which a Court can judicially act. Judicial power is the

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whole mass of the judicial authority which can be exercised by the Court within the area of its jurisdiction : it is the power with which the Court is clothed in order to try and determine causes, to determine rights and obligations, and to grant a remedy. It is enough for me to point out that the judgment of the Privy Council in The Bribery Commissioner v. Ranasinghe[1 (1964) 66 N. L. R. 73.] is decisive against any argument that the jurisdiction which the Courts earlier possessed can validly be superseded by creating new tribunals which are not appointed by the Judicial Service Commission. There is no room now for anybody to argue that the jurisdiction of the Courts can be eroded in such a fashion.

I derive no assistance from being told that there are many trappings of a tribunal which do not make it a Court exercising judicial power. This negative approach does not help me to decide the question whether a particular tribunal is exercising judicial power.

I take the view that the tribunal which is required to be appointed by the Judicial Service Commission must be the holder of a paid judicial office, in the sense that it exercises judicial power, and a Labour Tribunal acting under Part IVA of the Act clearly falls within this category. In the result, the orders made in S. C. No. 9 of 1962 and S. C. Nos. 18 to 23 of 1962 must be set aside since the tribunals were not appointed by the Judicial Service Commission.

I shall now turn to the earlier provisions of the Act which appear to me to indicate that the whole purpose of the Act, as the long title indicates, was to provide for the settlement of industrial disputes. Part II sets out that suchdisputes may be referred by the Commissioner or the Minister for settlement by conciliation or by arbitration or by an Industrial Court. Indeed, the heading of Part II of the Act specifically mentions " settlement by conciliation or byarbitration or by an Industrial Court", and the provisions of this Part whichdeal with these matters put the issue beyond doubt.

When the Commissioner of Labour apprehends or is satisfied that an industrial dispute exists he may (according to section 3) use one of four methods, viz.-

(a) use the machinery of a collective agreement, if such an agreement exists between the employers and workmen;

(b) and (c) endeavour to settle the dispute himself by conciliation or refer it to an authorised officer for that purpose;

(d) with the consent of the parties refer the dispute for settlement by arbitration to an arbitrator

nominated by them, or in the absence of such nomination to an arbitrator or a body of arbitrators appointed by himself or to a Labour Tribunal.

I draw attention again to this reference to a Labour Tribunal acting as an arbitrator because it shows that the jurisdiction of Labour Tribunals set out in Part IVA, which I have already dealt with earlier in this judgment, is not the only power given to them. The Act in section 3 (1) (d) contemplates a Labour Tribunal acting as an arbitrator to settle an industrial dispute.

Section 4 gives further instances of how a dispute may be settled when the Minister chooses to intervene. Under section. 4 (1) he may refer a minor dispute for settlement by arbitration to an arbitrator appointed by himself or to a Labour Tribunal-note the function allotted again to a. Labour Tribunal-even if the parties do not consent. He may also, under section 4 (2), refer any industrial dispute to an Industrial Court for settlement.

I need not refer to the provisions of sections 5 to 15 which deal with collective agreements and settlement by conciliation, because they do not arise for consideration on the cases before us.

Sections 15A to 21 deal with settlement by arbitration. Under section 17, an arbitrator is required to make all such inquiries as he may consider necessary, and hear such evidence as may be tendered by the parties and thereafter make such award as may appear to him just and equitable. Under section 18 the award must be transmitted to the Commissioner to be published in the Gazette, and it comes into force on the date it was made or on such date, if any, as may be specified therein, but " not being earlier than the date on which the industrial dispute to which the award relates first arose." Where the award specifies the period for which it shall have effect, it "shall continue in force with effect from the date on which it comes into force until the end of the period," unless it ceases to have effect under section 20. If no period is specified it continues in force indefinitely again unless it ceases to have effect under section 20. Under section 19 an award shall be binding on the parties, trade unions, employers and workmen referred to in it, " and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award." It seems clear to me from the provisions of sections 18 and 19, which I have just set out, that an award is to have effect only in the future and not for any period prior to the date on which the dispute first arose, and it continues in force for such future period, which may be either definite or indefinite. Its terms become, because of the peremptory provisions of section 19, implied terms of the contract of employment, and bind the parties to it.

All these characteristics of an award which I have just set out are entirely consistent with the view that what is exercised by an arbitrator in settlement of industrial disputes is purely arbitral power, the function of which is " to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other." This is an entirely different power

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from the judicial power which is concerned with " the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist, at the moment the proceedings are instituted "-see the judgment of Isaacs and Rich JJ.in Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.[1 (1918) 25 O. L. R. at 462 and 463]. These dicta were approved in The Queen v. Kirby and Others [2(1955-66) 94 C. L. R. at 281.], and also cited with approval in Attorney-General for Australia v. The Queen [. 3 (1957) A. C. 288 at 310.]. Isaacs and Rich JJ. went on to say in their judgment that an industrial disputeis a claim by one of the disputants that existing relations should be altered, and by the other that the

claim should not be conceded. It is therefore a claim for new rights, and the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part. As Professor Sawer has said, " the doctrine that it is not judicial power to determine whether a rule should be created, or shall be brought into operation in particular circumstances, has had and will have a powerful influence in limiting the scope of the doctrine of separation of judicial power " : see Essays on the Australian Constitution (2nd Edition) p. 74.

As provided in our Act in section 19, the arbitrator's decision is given the character of a legal right or obligation. The arbitrator's power is to say what, in his opinion, ought to be the respective rights and liabilities, and when he says so they become their mutual rights and liabilities because the award is given binding force by the statute. That is why it has been said that it partakes of the character of legislative power. The creation of such rights or liabilities is not the ordinary work of a court of law. The arbitrator declares what he thinks just and expedient. The functions exercised by a judge and an industrial arbitrator are quite distinct. To quote from the same judgment of Isaacs and Rich JJ., " the arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law. "

The distinction drawn between the two functions is plain to see. The industrial arbitrator creates a new contract for the future, a judge enforces the rights or liabilities arising out of an existing contract. This distinction has been drawn over and over again in judgments which have dealt with the distinct and separate nature of the two powers. An industrial arbitrator settles disputes by dictating new conditions of employment to come into force in the future where he cannot get the parties to agree on them ; a judge determines the existing rights and liabilities of the parties. This is no new theory. As Isaacs J. said in Federated Saw Mill &c. Employees of Australasia v. James Moore & Son ProprietaryLtd. [4 (1900) 8 C. L. R. at 521.] : "As far back as 1882 Professor Jevons, in distinguishing this class of arbitration (in settlement of trade disputes) from

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arbitration relating to past contracts, states : ' Here the freedom of industry is at stake, for the arbitrator will now have to decide, not what agreement was made, but what is to be made.....' ' in regard to the future an arbitrator in assigning the terms on which the disputants are to agree necessarily restricts their liberty. ' Isaacs J. said : " If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties-in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for nonconformity- then the determination that so prescribes, call it an award, or arbitrament, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorized it. ".....Then the learned judge says : " If a dispute is industrial, it is not an ordinary legal dispute, i.e., it is not a dispute as to what are the rights and liabilities of the parties with respect to past or existing facts. It necessarily looks to the future, and therefore it is not, as I conceive, legally possible to say that all disputes lead to an ordinary judicial decree, and therefore that every settlement of every dispute is necessarily an ordinary judicial decree "....." A federal award prescribing industrial conditions expounds nothing and interprets nothing, but introduces new obligations. This is legislation by means of a subordinate body..... there is not, and never can be, any resemblance between,-an ordinary judgment and such an award, except in the procedure by which they are arrived at."

Under section 20 of the Act, any party, trade union, employer or workman bound by an arbitrator's award may repudiate it by notice given to the Commissioner and the other parties.

Upon the expiration of 3 months succeeding the month on which the notice is so given, or upon the expiration of 12 months from the date on which the award came into force, whichever is later, the award ceases to have effect. The principle underlying this provision is that an arbitrator's award i s a mere temporary settlement of an industrial dispute, which does not have the effect of preventing new disputes arising or new conditions of work, wages, etc., being laid down in the future.

Part IV of the Act deals with Industrial Courts and consists of sections 22 to31. Section 22 provides for the appointment by the Governor-General of a panel of not less than five persons from which Industrial Courts shall be constituted. Such persons hold office for a period not exceeding 3 years. The Minister in his discretion selects from the panel either one person or three persons to constitute the Industrial Court.

The provisions of sections 23, 24, 25, 26 and 27 contain provisions corresponding to sections 16, 17, 18, 19 and 20 which refer to arbitrators. Section 23, like section 16, requires the order referring the dispute for settlement by an Industrial Court to be accompanied by a statement setting out each of the matters in dispute between the parties. Section 24 requires the Industrial Court to make all such inquiries and hear all such evidence as it may consider necessary, and make such award as appears to it to be just and equitable. The Court may lay down its own procedure for the conduct of the inquiry. This section corresponds to section 17 which applies to arbitrators.

Section 25 requires the award of the Industrial Court to be transmitted to the Commissioner, who shall cause it to be published in the Gazette. The award comes into force on the date it was made or on such date, if any, as may be specified therein " not being earlier than the date on which the industrial dispute to which the award relates first arose." Where the award provides that it shall have effect for any period or until any dates specified in it, it continues in force until the end of that period or the dates so specified, otherwise it continues in force indefinitely. Under section 26 evety award of an Industrial Court is binding on the parties, trade unions, employers and workmen referred to in it, " and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award."

Sections 25 and 26, like sections 18 and 19 which apply to an arbitrator's award, make it clear that the award of an Industrial Court is to have effect only for the future and not for any period prior to the date on which the dispute first arose. It continues in force for a future period, which is definite or indefinite according to the period specified in it. Its terms are made binding on the parties, and become implied terms of the contract of employment by reason of the provisions of section 26.

As in the case of an arbitrator, I am satisfied that an Industrial Court, whenit acts within the terms of these sections, exercises only arbitral power, viz., the power of examining the circumstances of a particular dispute and making an award which provides for the variation of the terms of a, contract of employment in the interests of industrial peace, such variation to take effect at some date after the date on which the dispute arose between the parties. The Industrial Court, like an arbitrator, decides only what agreement should be made in regard to the future.

Section 27 provides, as does section 20 (which applies to an arbitrator's award) for any party, trade union, employer or workman bound by an award of an Industrial Court, who desires such award to be set aside or replaced or modified or altered, to apply to the Minister, who may then ask the Industrial Court to review the award and make a decision on such an application in terms of sections 28, 29 and 30.

All these provisions indicate plainly that an Industrial Court was never intended to exercise judicial power in the sense in which that expression has always been used. It follows that such a Court is not a judicial officer, even though it holds a paid office. But a perusal of the orders made in S. C. No. 144 of 1964 and S. C. No. 158 of 1964shows that the Industrial Court, misapprehending its functions and powers and the true nature of the duties it was authorised to perform under the Act, heard evidence and ultimately made orders which only a duly appointed judicial officer is entitled to make. In S. C. No. 144 it decided certain disputed questions offact, viz., (1) whether certain workmen were in fact employed by the petitioner, (2) whether the discontinuance of certain workmen was justified or not, (3) whether the claim of the petitioner ci that of the workmen was correct in regard to the rates of wages to be paid. It then made order giving relief on these matters which only a duly appointed judicial officer could have done. Indeed, the Industrial Court appears to have acted in much the same way as a Labour Tribunal functioning under Part IVA of the Act.

A similar misconception of its functions appears from the proceedings and the order made by it in S. C. No. 158 of 1964. There also there were disputed questions of fact which arose for decision, viz., (1) whether certain workmen were employed by the petitioner or not, (2) whether the discontinuance of certain workmen was justified or not, and if not, what relief they were entitled to, (3) what compensation should be paid to certain workmen. The Industrial Court, having decided these issues, made an order granting relief on these matters. Its order is one which a Court of law alone can make, for the declaration and enforcement of rights, and the imposition of liabilities, under a contract, is of the essence of judicial power.

What remedy is the petitioner entitled to against such an unwarranted assumption of jurisdiction ? We have here a statutory body, holding a paid office, whose powers are strictly defined by the Act, acting completely outside the ambit of those powers. The Industrial Court which is expected to act and did act quasi-judicially, but which was never intended or authorised to exercise judicial power, has wrongly assumed jurisdiction and exercised such power. The petitioner in each such case, subject to any arguments that may be urged against this view, would be entitled to the grant of Certiorari to have the orders so made quashed on the ground that they were made without jurisdiction. But since this aspect of the matter was not argued before us, but only the question whether an Industrial Court is under the Act authorized to exercise judicial power, I would set these two applications down for further argument before a Bench of two Judges.

There remain the two applications No. 319 of 1963 and No. 37 of 1965. In each of these cases an industrial dispute was referred to arbitration, under section 4(1) and section 3(1) (d) respectively. The order made by each arbitrator has been attacked on the ground that the appointment of the arbitrator was not made by the Judicial Service Commission, and the application for Certiorari to quash it is based on that ground. The short, and I think adequate, answer to this argument is that an arbitrator appointed under either section 4(1) or section 3(1) (d) does not hold an office, and in view of the test set out in the Privy Council decision in The Bribery Commissioner v. Ranasinghe [1 (1R64) 63 N. L. R. 73.] no doubt can exist on this point.

The submission for the petitioners was that since he has in fact exercised judicial power he should have been appointed by the Judicial Service Commission. But the Commission cannot appoint anyone and everyone who exercises judicial power: it appoints only those who hold any judicial office.

There is one aspect of the matter that I have already adverted to in dealing with the impugned orders of the Industrial Court, which concerns these orders of the arbitrators as well, and it is this. Whether it is an Industrial Court or an arbitrator acting under this Act, that is concerned, it

seems to me that the only power they are authorized to exercise is arbitral power, that is, to make an award which decides what the agreement between the parties should be in the future. They are not authorized to exercise judicial power, which is what they have done in the cases before us. But since this particular point was not argued before us, I would set these two applications also down for further argument before a Bench of two Judges.

Before I conclude there are two objections in the nature of preliminary objections which I have to deal with.

Mr. Chitty argued that no appeal lay in S. C. No. 9 of 1962 because (1) theappellant was attacking the order of the Labour Tribunal as having been made bya tribunal which was not validly appointed, and (2) the petition of appeal did not set out the questions of law on which the order of the Labour Tribunal was challenged. I do not think there is substance in either objection. With regard to the first, the appellant was exercising a right of appeal on a question of law which section 31D conferred upon him. The invalidity of the appointment of the Labour

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Tribunal is such a question. It is not the whole Act that is attacked as invalid, and 7this distinction makes the Privy Council decision from India, which Mr. Chitty cited, inapplicable. With regard to the second, nowhere does section 31D require that the petition of appeal should state the question of law. Nor does the manner of drawing up a petition of appeal come within the expression " the hearing and disposal of an appeal"; consequently section 340 (2) of the Criminal Procedure Code, Cap. 20, which requires a statement of the matter of law and a certificate, by an advocate or proctor, does not apply to the form of a petition of appeal filed under section 3ID, Cap. 131.

The Solicitor-General referred us to the judgments in Re Toronto Railway Co. v.City of Toronto[1(1919) 46 D. L. R. 547.] and Parameswaran v. State Prosecutor[2A. I. R. (1951) Travancore 45.] and argued that the validity of the appointment of the Labour Tribunals, Industrial Courts and arbitrators in these cases before us could only be challenged by applications for a writ of Quo Warranto and in no other way. In view of my earlier findings, this objection is relevant now only to the attack on the appointment of the Labour Tribunals, since I hold that the other tribunals do not require to be appointed by the Judicial Service Commission because they are not the holders of judicial office. But even the objection to the attack on the appointment of the Labour Tribunals must fail because, as I have shown, a Labour Tribunal has other functions to perform apart from those in Part IVA. It can act as an arbitrator, as it did in No. 319 of 1963. When so appointed to act it need not be appointed by the Judicial Service Commission. In short, a Labour Tribunal must be appointed bythat Commission only when it performs judicial function- under Part IVA. It need not be appointed by that Commission if it performs only arbitral functions. There is thug no total lack of validity in the manner of its appointment, such as, on the two decisions cited, could only be shown by a writ of Quo Warranto to which the Labour Tribunal would also be a party.

A further answer to the Solicitor-General's argument is that this Court and the Privy Council have previously entertained, in appeal, objections to the validity of the appointment of Bribery Tribunals. The practice in other countries may be different.

To sum up my findings, I would allow the appeals in S.C. Nos. 9 and 18 to 23 of 1962 with costs. I would set down the applications in S. C. Nos. 144 and 158 of1964 and S. C. Nos. 319 of 1963 and 37 of 1965 for further argument, on the point indicated by me, before a Bench of two Judges.

H. N. G. FERNANDO, S.P.J.-

As a sequel to the recent decisions of this Court concerning the validity of appointments to Bribery Tribunals and Quazi Courts, there has been a number of other cases in which the exercise of what is said to be judicial power by officers or tribunals not appointed by the Judicial Service Commission has been challenged. These cases were reserved by order of His Lordship the Chief Justice for consideration by a Bench of five Judges. After arguments commenced, however, it was decided to hear only cases affecting tribunals functioning under the Industrial Disputes Act. It is to be hoped that the decision of this Bench of those cases will enable Benches constituted in the ordinary manner to dispose of the other cases in which the same question arises for determination.

What has now to be decided is whether any of the different tribunals established under the Industrial Disputes Act is or is not a " judicial officer " within the meaning of Section 55 of the Constitution, If any such tribunal is a " judicial officer ", then in accordance with the decisions of this Court which were affirmed by the Privy Council in Bribery Commissioner v. Ranasinghe[1 (7964) 66 N. L. R. 73.], the tribunal must be held to have no jurisdiction on the ground that the appointment to the tribunal was not made by the Judicial Service Commission.

It is helpful in the first instance to examine the provisions of the Industrial Disputes Act as originally enacted in 1950, read with amendments thereto enacted prior to Act No. 62 of 1957. The purpose of the principal Act, as stated in its long title, was " to provide for the Prevention, Investigation and Settlement of Industrial Disputes.". For this purpose, the Act recognises " collective agreements " between employers and workmen or trade unions and workmen as to the terms and conditions of employment, which agreements, obviously, tend to prevent disputes ; it authorised the Commissioner of Labour to investigate existing or apprehended disputes and to endeavour to settle such disputes by conciliation ; it provided for reference of such disputes for settlement to arbitrators or to the Industrial Court. The Minister had the power in Section 4 to make such a reference, but Section 3 (1) shows that the Minister's power is one of last resort exercisable only if conciliation fails, and if the parties themselves do not agree to reference to abritration. Settlement of a dispute by conciliation is only possible if the parties agree to a settlement, the terms of which have to be set out in a memorandum of settlement. In the case of arbitration, whether voluntary or compulsory, or in the case of a reference to the Industrial Court, the object in each case being settlement of the dispute, what follows is an award of the arbitrator or the Industrial Court.

Turning now to the effect of collective agreements, settlement by conciliation, and awards of arbitrators or of the Industrial Court, it is clear that the most important purpose secured by such means is that the

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terms and conditions of employment are determined for the future-In each of these cases, the Act provides (Sections 8, 14, 19 and 26) that the agreement, settlement, and award will be binding on specified employers and workmen, and will be implied terms of their contracts.

The arguments of counsel appearing on behalf of the respondents, that the object of the Act was to enable disputes to be settled by means of what have been described in the Australian Cases as " arbitral awards ", are borne out by a consideration of Section 33 which sets out (although not exhaustively) the decisions which an award may contain. Subsection (1) (a) mentions the most important and most common decision, namely " as to wages and all other conditions of service ". Manifestly, such a decision will be operative for the future. The decision may also provide that the specified wages or conditions shall be payable or applicable from a date earlier than the date of the award ; this earlier date, in my opinion, cannot be earlier than the date on which the relevant dispute arose, since that is the limit set by Section 25 (2) for the retrospective operation

of an award. In thus making new terms and conditions effective retrospectively, an award clearly does not determine pre-existing rights, and has instead the character of a legislative or administrative act creating rights and duties.

Much of the argument was based upon Section 33 (1) (6), which authorises provision in an award for the re-instatement or dis-conticuance of workmen. On the one hand it was argued that, since a Court cannot order re-instatement, the power to provide for re-instatement in an award is of a legislative or administrative character. For the appellants, it was argued that Section 33 (1) (6) has altered the Common Law in permitting provision for re-instatement to be made in an award. In my opinion, there has been no such alteration of the Common Law : the appropriate mode of making such an alteration would be to declare that specific performance may be granted of contracts of employment. Section 33 (1) (b) contains provision also for the discontinuance of workmen from service, i.e. for a prima facie arbitrary power to terminate a contract which neither employer nor employee had voluntarily terminated. Considered together, these powers to provide for re-instatement and discontinuance can be explained only on the basis that the Legislature intended them to be used as a just and equitable means of settling industrial disputes, but did not intend to confer rights capable of determination and enforcement by the Courts. If a contract of employment does not provide for re-instatement, and if neither the common law nor the statute law confers a right of re instatement in specified circumstances the existence or non-existence of which are capable of being determined by a tribunal, then there is no pre-existing right to re-instatement, and the decision of the tribunal upon the question of re-instatement lacks the essential characteristics of a judicial determination. Instances such as Section 2 of the Money Lending Ordinance (and such instances are comparatively few), which empowers a Court to re-write a

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contract considered to be harsh and unconscionable, are in my opinion merely exceptions to the general principle that the function of the judicial office is the determination of pre-existing rights. In such an exceptional instance, the power though in character not judicial, may nevertheless be regarded by the Courts as being judicial, on application of the " historical criterion " discussed by Dean Roscoe Pound :-

" We ask whether, at the time our Constitutions were adopted, the power in question was exercisable by the Crown, by Parliament, or the Judges."

The same question, if asked in respect of the power to order re-instatement and thus to create a new contract of employment, cannot receive the answer that the power was exercisable by the Judges, since the power is itself the creation of a new statute and was not previously exercisable by any authority. Indeed, the matter of discontinuance (which is linked with re instatement in Section 33 (1) (6) of the Act) well illustrates how vitally such a decision lacks the character of being "judicial". The power to decide in favour of discontinuance would not only be in conflict with the desire of both employer and workmen to maintain their contractual relationship. Far from ascertaining facts from the existence of which pre-existing rights are determined, such a decision abolishes pre-existing contractual rights.

The other provisions of Section 33 are well suited to the concept of a settlement. When new terms and conditions of employment are set out in an arbitral award, it is only reasonable that those terms and conditions can be made applicable from the time when the dispute arose, i.e. when the new terms and conditions were formally demanded. So also, if a dispute is settled by an award, it may be appropriate that absence from work during a strike or lock-out arising in the course of the dispute should be disregarded.

It is well to repeat at this stage that I have been considering the Industrial Disputes Act without reference to the amendments made by Act No. 62 of 1957 and thereafter. In its unamended form,

the Act did not in my opinion create a new judicial power, in providing that in the course of " settling " an industrial dispute, the Industrial Court or an arbitrator may decide not only upon new terms and conditions of employment, but also on re-instatement. back wages and similar matters.

The Amending Act No. 62 of 1957 made many changes in the principal Act. The mostimportant of these was the addition of a new Part IVA providing for the establishment of Labour Tribunals and for the special and primary purpose of their establishment. That purpose is to be ascertained from Section 31B, although amendments in other parts of the Act secured in addition that Labour Tribunals may be utilised for the purpose of settlement by arbitration previously contemplated in the principal Act.

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Compared with the machinery and the powers of settlement contained in the principal Act, the innovations introduced in Part IVA are significant:-

(1) Recourse may be had by a workman direct to the Tribunal as of right, whereas recourse to the machinery of settlement can be had only of consent, and through the intervention of the Minister under Section 4 acting presumably in the public interest and in a " neutral " capacity.

(2) The application to the Tribunal is for relief or redress. According to the Concise Oxford Dictionary the primary meaning of " relief " is " alleviation of or deliverance from pain, distress, anxiety ". But it is clear that in the present context the only Dictionary meaning which can reasonably attach to the word is " redress of hardship or grievance". In substance therefore the application is for " redress ", which means " to remedy, get rid of, or rectify some distress, wrong, damage or grievance "; the noun " redress " means " reparation for a wrong ".

If then the purpose of the application is to secure reparation for a wrong, and whether the application relates to the termination of services (paragraph (a) of Section 31 (B)) or to gratuity or other benefits due (paragraph (6), what is involved is the allegation of a wrong suffered in the past in respect of the subject-matter of the application. The investigation of such an allegation is surely different from the process of settlement of industrial disputes by arbitral awards, which are concerned not with reparation for wrongs, but instead with the determination of future terms and conditions.

(3) It is clear beyond doubt that the redress claimed in an application to a Tribunal can be identical with that claimed by a workman in a civil court, e.g. damages for breach of contract, payment of a gratuity due under contract, etc. As Mr. H. V. Pereira suggested, the sole purpose of an application under Section 31B can well be to obtain a decision on a question of fact, e.g. whether a workman had been guilty of theft or incompetence and therefore rightly dismissed, or whether a contract of employment expressly or impliedly provides for the payment of a gratuity on retirement. In application No. 9 of 1962, wrongful and unlawful dismissal was alleged, and a good part of the order of the Tribunal is devoted to a discussion of the actual or implied terms of the contract of employment; some redress granted by the order is referable to a finding as to the implied terms of the contract. In application No. 21 of 1962, the order relates almost wholly to the question whether the workman was guilty of insubordination and whether his contract was terminated on that ground, and the ultimate finding is that the workman was guilty of disobedience, but not wilful disobedience. Arbitral awards under the principal Act could not ordinarily, and would only incidentally, provide for " redress " of the nature which might commonly be granted by a Labour Tribunal under the new Part IVA of the Act.

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(4) The term " industrial dispute " is widely defined in Section 48, but Section 31B specifies as

the subject matter of an application to a Labour Tribunal two precisely stated matters having reference to existing or past facts. In Richard Pieris v. Wijesiriwardene[1 (1960) 62 N. L. R. 233.] it was held that paragraph (b) of Section 31B permitted an application only in respect of a gratuity or other benefit legally due to a workman. The Concise Oxford Dictionary states the primary meaning of " due " to be " Owing, payable as a debt or obligation". Other meanings attach to the word only when used in special contexts mentioned in the Dictionary. I know of no statute in which reference to a thing due to or from a person has been construed otherwise than in the primary sense of the word. It is fallacious to argue that the decision in the case just cited involves the interpolation of the word "legally" before the word "due". The word " due" carries the intrinsic connotation of something owing or payable as a debt or obligation, that is, something owing or payable legally.

(5) A workman who makes an application under Section 31B is debarred by sub-section (5) from claiming a legal remedy in a civil court in respect of the same matter; so too, an application under Section 31B cannot be made by a workman who has already sought another legal remedy. In regard to the process of settlement by arbitration by an Industrial Court, there was and is no corresponding exclusion of the jurisdiction of the Courts in matters referred for settlement under the principal Act. (This appears to be a significant expression of the intention of the Legislature to commit for determination by the Labour Tribunals matters which are within the scope of the jurisdiction of Civil Courts.) The absence from the original Act of provision similar to sub-section (5) of Section 31B shows that the reference of a dispute for settlement by arbitration would not, in the intention of the Legislature, involve the determination of matters in respect of which civil actions lie.

(6) Part IVA introduced into the Act the term "order", which was not previously used in the Act in connection with the machinery for the settlement of disputes, and which indeed is inconsistent with the concept of "settlement". In cases of the nature which I mention at paragraph (3) above, "order" is perfectly appropriate as an alternative for "decree", having regard to the fact that there is not available to a Labour Tribunal its own machinery for execution.

I have thus far examined features in the new part IVA of the Act which distinguish the case of a workman's application to a Labour Tribunal under Section 31B from the modes of settlement of disputes originally prescribed in the Act. It is perfectly clear that a workman, who is aggrieved by what he regards as wrongful termination of his employment or the wrongful failure of his employer to pay him a gratuity or other benefit legally due to him, is given by Section 31B a right of recourse to a Labour Tribunal in lieu of his existing right of action in a

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Civil Court. It is equally clear that a Labour Tribunal can in such a case determine the facts and rights of the parties in just the same way as would a Court. While Section 31C (1) requires a Tribunal to make a just and equitable order, it does not follow that a determination of a Tribunal will often be different from those of a Civil Court; for a Tribunal may often consider it just and equitable to make an order merely giving effect to the contractual rights and obligations of the parties.

The argument that a Labour Tribunal does not exercise judicial power depended heavily on the provision in Section 31C that a tribunal shall make a " just and equitable order ". I cannot agree that the criterion which distinguishes an administrative tribunal from a judicial tribunal is that the former makes just and equitable orders, while the latter does not. The Courts surely administer justice and equity, save that in so doing they adhere to standards of justice and equity set by written or unwritten law.

Some instances were cited during the argument of statutory provisions requiring established judicial tribunals to make orders consistent with equity and good conscience. But the best

example has been brought to notice only after the conclusion of the arguments. Ordinance No. 10 of 1843 was our earliest statute which provided for the establishment of Courts of Requests of Inferior Civil Jurisdiction. Section 5 of this Ordinance provided that these Courts shall beCourts of Record, " and shall hear and determine in a summary way, and according to equity and good conscience, all actions, plaints and suits for the payment and recovery of any debts, demands or damages or matter not exceeding five pounds in value ". Here then was a clear instance of a tribunal bound to act in accordance with equity and good conscience, but which was in all respects a judicial tribunal. The provisions of the Ordinance show that in determining whether or not a particular tribunal is judicial, mere labels like "justice and equity " and " good conscience " are apt to mislead, and that it is necessary to examine what precisely is the nature and scope of the powers conferred on the tribunal.

In the first place, I have already stated my opinion that an order of a Labour Tribunal granting redress to which a workman is entitled under the Common Law governing his contract can be a just and equitable order. But what other orders could lawfully be made by a Tribunal ? Let me take for example a case where, in terms of a contract, the employment of a workman paid a salary of Rs. 200 a month is terminated upon his reaching the final retirement age and he is granted the full retirement benefits for which the contract provided. Can a Labour Tribunal in such a case make order that some small extra payment or benefit must be paid or provided ? Suppose that on identical facts one Tribunal makes such an order, while another does not, can it be said that both Tribunals have made just and equitable orders ? Or if it must be said that one has acted rightly and the other wrongly, then which tribunal was right and which wrong ? The absurdities which can arise on the basis that

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a Tribunal can lawfully make orders for some small ex gratia relief are the same in principle as the absurdity of orders which might require the employer of a workman to purchase a residence with a swimming pool for the retired workman, or to entertain him periodically in the employer's home, or to provide employment to all his sons, or to dower his daughters, or to pay him a capital sum of a million rupees ex gratia ? No counsel contended that Section 31C enabled a Tribunal to make such orders, and it seems to me that such a wide and absurd construction of Section 31C is precluded in two different ways by the Act itself.

Firstly, there are the terms of Section 31B which define the scope of a application to a Labour Tribunal. Under paragraph (a), the workman can raise the question of the termination of his employment; and under paragraph (b) he can raise the question whether any gratuity or benefit is due to him. Consideration of paragraph (c) does not arise because no additional matters of dispute have been prescribed under the Act. When therefore, Section 31C requires a just and equitable order to be made, it has in contemplation an order which allows relief or redress reasonably connected with the subject matter of the workman's application. Section 31B does not permit him to raise the question of dowries for his daughters, and equally Section 31C does not contemplate that justice and equity require his employer to provide such dowries, or other benefits not legally due to the workman. The scope of the relief or redress required by Section 31C to be granted in any case is in my opinion limited to the matters in respect of which relief or redress may be claimed under Section 31 B.

While it was conceded in some arguments for the respondents that a workman cannot in an application under Section 31B ask for any benefit not due under his contract, it was nevertheless contended that in disposing of such an application a Tribunal has power to grant some benefit not sought by the applicant. With respect, I know of no tribunal, judicial or administrative, which has such power, nor can I see any sense in the intention thus imputed to the Legislature that a workman who asks for a stone may instead receive bread.

Secondly, there is Section 33 in which the Legislature has attempted to set down the nature of the

relief or redress which a Labour Tribunal may grant in an order made under Section 31C. Let me first take paragraph (b) of the Section 33 (1), which provides for re-instatement or for discontinuance from service. Clearly re-instatement is relief or redress of a character connected with an application which raises the question of the termination of a workman's services (cf. Section 31B (1) (a)). But although Section 33 (1) appears to contemplatethat such an order may provide for discontinuance from service, it is manifest that an order under Section 31C can never include such a provision. The possibility of ordering discontinuance upon an application under Section 31B cannever arise, because the application can only be made after termination of a workman's service.

It will be seen that paragraph (c) of Section 33 (1) is only incidental to paragraph (6). It provides only that where re-instatement is ordered, a period of absence from work shall be either taken into account or else disregarded for certain purposes. In other words, paragraph (c) merely enables an order of reinstatement to be made fully effective.

Paragraph (d) of Section 33 (1) is also connected with paragraph (6). This pointis expressly illustrated in Section 33, sub-sections (3) and (4), which provide for compensation as an alternative to re-instatement. Having regard to the limitation in Section 31B of the subject-matter of an application to a Labour Tribunal, the " compensation " specified in Section 33 (1) (d) is only appropriate as a relief alternative to the relief of re-instatement. Compensation means " amends or recompense for something ", and the subject matter of an application under Section 31B cannot involve anything, other than termination of employment, which requires to be compensated.

Paragraph (e) of Section 33 (1) provides for an order for payment of a gratuityor pension or bonus. Such an order can be made when the question raised in an application under Section 31B is " whether any gratuity or other benefit is due " to a workman. I have already stated my opinion that a workman may thus raise only the question whether a gratuity or other benefit is legally due, i.e. due under his contract. Paragraph (a) of Section 33 (1) appears to empower a Tribunal to make an order as to wages and other conditions of service. Here again, there is little connection between this apparent power and the subject-matter of an application under Section 31B, for wages and conditions are not in terms of Section 31B, the subject of such an application. But where re-instatement is ordered, then paragraph (a) of Section 33 (1) will permit the Tribunal also to make order as to the wages and conditions of service to be applicable on reinstatement. It will be seen therefore that in practice paragraph (a) has a much more limited and incidental scope than appears on its face, in so far as it operates in cases of applications to Labour Tribunals under Section 31 B.

To summarise the scope of Section 33 in cases of applications under Section 31B, and reading the two Sections together :-

(1) A Tribunal may (Section 33 (1) (a)) order a gratuity, bonus or pension to a retired employee if a gratuity, bonus or pension is due.

(2) A Tribunal may order re-instatement of a workman whose employment has been terminated.

(3) Where re-instatement is ordered, but not otherwise, a Tribunal may in addition prescribe (Section 33 (1) (a)) the wages and conditions of employment, order that absence from work may be disregarded (Section (1) (c)), or order payment of compensation in lieu of re-instatement.

There is to my mind a simple explanation for the appearance that the powers of a Labour Tribunal are wider than I hold them to be. Section 33 in its original form applied only to awards made in the process of settlement of disputes, and it was undoubtedly intended to state very widely in Section 33 the decisions which an award may contain. When, however, the new Part IVA was introduced, there was no separate statement of the powers of a Labour Tribunal under that Part. Instead the draftsman adopted the method of merely adding, in the first lines of Section 33, the words " or in any order of a labour tribunal ", without considering whether each and every power already specified in Section 33 could be exercised by a Tribunal under Part IVA. Thus I have shown already the absurdity of the apparent power of a Tribunal to order discontinuance from service, when in fact the possibility of discontinuance can never arise upon an application under Section 31B. While this method was perfectly appropriate to provide for awards which the new Tribunals may make when required to undertake the process of settlement of disputes, it leaves room for misconception as to the scope of the orders which a Labour Tribunal may make upon an application under Section 31B. " Patchwork "legislation (such as was the Amending Act of 1962) not uncommonly gives occasion for such misconceptions.

I have referred to the fact that in many cases the just and equitable order which a Labour Tribunal may make can be precisely the same order as a Civil Court would make in an ordinary action for breach of contract. An order for the payment of a gratuity, bonus or pension would also be of the same character. Hence it will be seen that the only new power conferred on a Tribunal is to order reinstatement and to make other orders ancillary to a re-instatement order. Now if the Legislaturs had chosen to make a general amendment of the law relating to contract of employment by conferring on all employees a right to re-instatement, it could not reasonably have been argued that a Civil Court which applies the new law in deciding an action would not be doing so in exercise of judicial powers. What the amending Act of 1962 did was to vest in Labour Tribunals powers to make orders of precisely the same character as a Court may make in the same circumstances with the addition of a new power to order re-instatement. In substance the Act set up new Tribunals to administer some part of the law relating to contracts of employment, while at the same time amending that law in order to permit such tribunals to grant reinstatement. But even this new power is circumscribed ; sub-section 3 of Section 33 selects cases in which orders for re-instatement must compulsorily include the alternative of compensation, thus limiting the apparently wide power conferred by the terms of Section 31C.

Another pro vision upon which the respondents depended was sub-section (4) of Section 31B :-

"Any relief or redress may be granted by a labour tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employer."

It was assumed on all sides during the argument that this subsection means that the content of the relief or redress granted by a tribunal may be something not contemplated or something even prohibited by the contract of service between a workman and his employer; and that accordingly a tribunal, not being bound to accept the rights and obligations created by contracts of service, does not merely determine preexisting rights.

It is unfortunate that a quite different construction of this sub-section occurred to me only after conclusion of the hearing of these cases, and that it would be highly inconvenient (particularly when Election Petitions have been fixed for trial), for the Bench to re-assemble to hear further argument on this point. But without benefit of argument, I venture with some confidence to adopt this different construction.

In my opinion, sub-section (4) of Section 31B was intended to overcome objection to the jurisdiction of a Labour Tribunal which might otherwise have been taken on the ground that a

contract of service precluded recourse to that jurisdiction. Such an objection would have been tenable in the case of a contract which expressly provides for reference of disputes to arbitration or to a Civil Court, or which expressly excludes the jurisdiction of a Labour Tribunal.

The powers of a Labour Tribunal, as opposed to its jurisdiction, are conferred by Section 31C and Section 33 ; and if the provision in subsection (4) of Section 31B was intended to reinforce those powers, one would expect the reinforcing provision to be placed together with or after Sections 31C and 33. Instead this provision in fact occurs in Section 31B which deals with applications to a Tribunal and their entertainment by the Tribunal. What immediately follows subsection (4) of Section 31B is subsection (5) which itself quite clearly deals with a question of jurisdiction.

I have previously stated what is in effect the opinion that Section 31C, inrequiring " just and equitable " orders to be made by Labour Tribunals, does not allow to such a Tribunal the freedom of the wild ass in making its orders, and that the scope of a " just and equitable order " is limited by the nature of the matters which may be submitted to a Tribunal in an application under Secton 31B, and by the provisions in Section 33 as to the

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content of orders of such Tribunals. Section 31B (4), if given the meaning which was assumed for it during the argument, would lend support to the contention that the Legislature did intend to vest Labour Tribunals with unbridled, unreasonable and unnecessary powers. I much prefer, in the context, to attribute to the Legislature the moderate and reasonable intention which appears from the interpretation which I place on Section 31B (4).

I hold that a Labour Tribunal, hearing and determining an application under Section 31B, exercises judicial power, and is therefore a judicial tribunal. A Labour Tribunal is admittedly a paid office. Nevertheless, the learned Solicitor-General argued that the person appointed to a Labour Tribunal, even if he does exercise judicial power, is not a " judicial officer " within the meaning of Section 55 of the Constitution. The argument was, briefly, that Section 55 only entrenched the jurisdiction of the Courts in existence at the time of the enactment of the Constitution, and required that appointments to those Courts should be governed by Section 55. That argument was rejected by the Judicial Committee in Bribery Commissioner v. Ranasinghe[1(1964) 66 N.L. R.73.]. The effect of that decision is (in my understanding) that if any jurisdiction hitherto vested in any Court, is to be vested in some new tribunal which is a paid office established for the purpose of exercising that jurisdiction, then appointments to that office will be governed by Section 55. For the reasons set out at length above, I am of opinion that a Labour Tribunal is by Part IVA of the Industrial Disputes Act established for the purpose of exercising a jurisdiction concurrently vested in the District Courts and Courts of Requests. The fact that a Labour Tribunal has in the exercise of that jurisdiction power to grant the new remedy of re-instatement, and other ancillary or alternative remedies, makes no difference of substance. If for instance, the Bribery Act, in its form as considered by the Judicial Committee, had contained some special provision for a Bribery Tribunal to make some order imposing some new civil liability, in addition to fine and imprisonment, on a person convicted of bribery, their Lordships would surely not have held on that score that members of Bribery Tribunals are not " judicial officers ".

In one of the applications before us, a Labour Tribunal established under Part IVA of the Act functioned as arbitrator by virtue of a reference made by the Minister under Section 4 of the Act. Since the Minister has the power to refer a dispute to any person for arbitration, it does not appear to me that any irregularity in the appointment of the member of that Labour Tribunal can affect the validity of that reference.

In two of the applications, reference to arbitration had been made to Industrial Courts. As stated

in earlier parts of this judgement, Industrial Courts were established for the purpose of making " arbitral awards " within the meaning of that expression in decisions of the Australian Courts. An Industrial Court is therefore not a " judicial office ".

In the case of one of the applications, a dispute had been referred to the arbitration of a selected individual. Even though the individual was paid by the state for his services in that connection, he held no office and was not a " judicial officer ".

The four applications to which I have just referred fail on the ground that the functions of arbitration were in each case exercised by a person or body not being the holder of a " paid judicial office ". Nevertheless, I feel bound to direct attention to the fact that, in all these cases, the terms of reference to arbitration did not involve matters which properly call for the making of " arbitral awards " in the sense understood in the Australian Cases. On the contrary, each of those cases involves a question whether a termination of a contract of service had been wrongful, and was therefore not different in character from the case of an application made to a Labour Tribunal under Section 31B of the Act. For that reason, each such case called for the exercise of judicial power in the same way (as I hold) as a Labour Tribunal exercises judicial power under an application under Section 31B, and was also one in which an ordinary civil court would have had jurisdiction. Each of these cases called for the determination of contested questions of fact as to the conduct of workmen or employers or as to the terms and conditions of pre-existing contracts of service. In my view, the framers of our Constitution expected that determinations of that nature should ordinarily be made by Judges of Courts, whose appointments should be made under Section 55 of the Constitution. That expectation has not been fully realized in the brief terms of Section 55. But it is at least discordant with the spirit of Section 55 that a considerable number of disputes between employers and employees, ordinarily justiciable by the established Courts, should be regularly determined by tribunals which are not appointed under that section. The Solicitor-General argued that the purpose of Section 55 was only to secure that the choice of persons to be appointed as Judges should be made by a Commission the members of which have special knowledge of the ability and capacity of persons competent to function as Judges. Accepting that argument for present purposes, I see in these four cases a practice whereby persons chosen by some other authority have functioned as substitutes for Judges of ordinary Courts.

Section 55 of the Constitution, as I have indicated, failed to preclude the possibility of the entrustment of judicial power to some authority bona fide established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on grounds of expediency with judicial power, there would not in my opinion be conflict with Section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply. That principle will also apply if there is frequent entrustment of judicial power to unpaid functionaries. I do not hold that the practice of entrusting to

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Industrial Courts and to arbitrators the power to adjudicate in cases of termination of an individual's employment and upon rights alleged to arise on such termination calls for the application of that principle. But the question whether that practice should continue merits consideration by the authorities responsible for the administration of the Act. Experience certainly has not shown that cases of that kind, which so closely resemble or are even identical with cases instituted in the ordinary courts, have been dealt with more expeditiously by Industrial Courts, arbitrators and Labour Tribunals.

I would allow with costs the appeals in Cases Nos. S. C. 18 to 23 of 1962 andNo. 9 of 1962, and set aside the orders of the Labour Tribunals in those cases.

I hold that in applications Nos. S. C. 319/63, 144/64, 158/64 and 37/65, theCourt or Arbitrator had in each such case jurisdiction to entertain the reference. The applications will be set down for further hearing upon other matters raised by the Petitioners.

T. S. FERNANDO, J.-

I have had the advantage of reading the judgment prepared by my Lord, the Chief Justice. I agree with the views expressed therein and agree also to the making of the orders proposed by him.

TAMBIAH, J.-

These six cases were referred by my Lord, the Chief Justice, under section51 of the Courts Ordinance to a Bench of five Judges. Although several points have been raised in the petitions of appeal, the question which was referred for the determination of this court is whether the tribunals which heard these cases were exercising judicial power, and if so, whether the persons who presided over these tribunals were validly appointed. The contention of the appellant in these cases is that these tribunals exercised judicial power and therefore should have been appointed by the Judicial Service Commission. In S.C. 144 of 1962 and S.C.158 of 1964 the tribunals concerned are Industrial Courts to which the disputes were referred to by the Minister under section 4 (2) of the Act; in S.C. 9 of1962 and S.C. 18-23 of 1962 the tribunals concerned are Labour Tribunals; in S.C. 319 of 1963 the tribunal is an arbitrator to whom the dispute was referred by the Minister of Labour and Nationalised Services under section 4 (1) of theAct and in S.C. 37 of 1965 the tribunal is an arbitrator to whom the dispute had been referred to by the Commissioner of Labour under section 3 (1) (d) of the Act.

These cases were argued on the footing that if this court holds that the tribunals referred to were not validly appointed, then the orders should be quashed. But should it hold otherwise the cases should be remitted to be heard by a Bench consisting of two judges in order to hear and determine the other points raised in the petitions of appeal filed in these cases.

I have read through the judgment of my Lord, the Chief Justice, and I regretthat I am unable to agree with the orders made by him in these cases and therefore it has become necessary to express my dissenting views.

I shall first deal with the appeals in S.C. 9 of 1962 and S.C. 18-23 of 1962where the tribunals concerned are the Labour Tribunals. In the Ceylon TransportBoard Ltd. v. Samasfha Lanka Motor Sevaka Samithiya[1 (1963) 65 N. L. R 185.]mybrother Sri Skanda Rajah J. has already dealt with this matter and held that the Labour Tribunal need [not be appointed by the Judicial Service Commission.

The point of law raised in these cases is not free from difficulty and requires careful consideration. This court had the benefit of hearing a full argument in these cases and I thank all counsel for the able arguments presented by them and the help rendered to this court.

The question raised before us is whether the persons who presided over- the Labour Tribunals in these cases should have been appointed by the Judicial Service Commission. The answer to this question will depend on the precise meaning which has to be given to the words " judicial officer" in section 55 of the Ceylon (Constitution) Order in Council (Cap. 379 as amended and adopted by the Ceylon Independence Act of 1947, which will hereinafter be referred to as the "

Constitution ").

Section 53 of the Constitution constitutes the Judicial Service Commission andconfers on this body the powers of appointment, transfer, dismissal and disciplinary control of the judicial officers.

It has been strenuously contended by counsel for the appellants in these two cases that the Labour Tribunal exercises judicial power of the State and therefore the person who fills in this office has to be a judicial officer within the meaning of section 55 (1) of the Constitution. The term " judicial officer " is nowhere defined but section 3 of the Constitution defines " judicial office " as any " paid judicial office ". Therefore the short point to be decided is as to what is meant by " judicial office " in section 55 of the Constitution.

In order to place the correct construction on the words " judicial officer " it is necessary to set out briefly the legal system and the constitution of the courts in Ceylon prior to the attainment of Dominion.

Status in 1947. During the earlier period there were in existence a number of courts such as the Supreme Court, District Courts, the Courts of Requests, the Magistrates' Courts and theRural Courts which administered civil and criminal justice in Ceylon. These courts administered the law of this country and determined the rights of parties, whether the dispute was between subject and subject, or the State and the subject and granted the remedies provided by law. There also existed at the time the Constitution came into force, and still exist, a number of officers and persons who preside over tribunals, who in addition to their executive and administrative functions also perform the strict functions of a court within a limited scope. Thus, the Divisional Registrar under the Kandyan Marriage and Divorce Act (Cap. 113), apart from his other multifarious duties, also sits as a judge in contested divorce proceedings between Kandyans whose marriages have been registered under the Kandyan Marriage and Divorce Act (vide section 32 of Cap. 113 for grounds of divorce).

The Workmen's Compensation Ordinance (Cap. 139) provides for tribunals which are empowered to grant compensation to a workman who receives injuries in the course of his employment, or if he is dead, to give relief to his dependants. The Registrar of Trade Marks, apart from his administrative functions, also performs judicial functions when he acts under section 19 of the Trade Marks Ordinance (Cap. 150). Special officers could also constitute a Court Martial to try offences committed by persons who are governed by the military or naval law. These officers have the power to inflict punishment on those who have been found guilty by sentencing them to a term of imprisonment or by giving other forms of punishment. A tribunal consisting of the District Judge and two visitors also have jurisdiction to try prisoners who commit offences against prison discipline and inflict punishment on them (vide section 81 of Cap. 54 and sections 42 and 43 of Cap. 357). The Rent Restriction Tribunal and the Board of Appeal exercise judicial functions (vide Cap 274). It is not necessary to set out all the tribunals, which apart from other functions, administered justice in Ceylon at the time Ceylon attained Dominion Status.

Before Ceylon attained independence, a Royal Commission, referred to as theSoulbury Commission, was sent to Ceylon to advise His Majesty on the type ofconstitution that Ceylon should get. There was the Ministers' Draft which servedas a guide to the Soulbury Commissioners. The Commission heard evidence and made its recommendations to His Majesty. The recommendations they made were intended to preserve the independence of the Supreme Court and to prevent political interference of the minor judiciary consisting of the District Judges, Magistrates, Commiflsioners of Requests and the Presidents of Rural Courts. Theysuggested that these minor judges should be appointed by the Judicial Servict. Commission consisting of two

judges of the Supreme Court and a retired judge or three judges of the Supreme Court. In order

to preserve the independence of the Supreme Court they recommended that the Judges of this court could only be removed from office for misconduct by the Governor-General after a resolution in both Houses of Parliament and that their salaries should not be diminished during their tenure of office.

The Order in Council of 1946 was enacted giving effect to these recommendations and provisions were made that persons who hold judicial office should be appointed by the Judicial Service Commission. Any interference with this body was made a penal offence.

The learned Solicitor-General who appeared as amicus curiae, Mr. Chitty and Mr. Satyendra submitted that the term " judicial office " in this context means the office held by judges of the courts of law that were in existence at the time the Constitution came into force, or the offices which may be held by those who preside or hear cases in analogous courts or courts performing similar functions. After a careful consideration of the arguments presented by counsel I am inclined to accept the contention put forward by Mr. Satyendra and the learned Solicitor-General.

Much reliance was placed by Counsel for the appellant on the case of the Bribery Commissioner v. Ranasinghe[1 (1964) 66 N. L. R. 74.]in which it was held that the Bribery Tribunal exercised purely judicial functions and therefore the person who presided over it should have been appointed by the Judicial Service Commission. It was held that since he was appointed only by the Public Service Commission he had no power to make an order sentencing a person accused of bribery to a term of imprisonment. It was urged that the ratio decidendi in that case applies to these cases. It was also contended by Mr. Jayewardene that judicial power of the State is vested in the Supreme Court and the Judges appointed by the Judicial Service Commission and the exercise of this power by any other person or body would be illegal. In this case although it is sufficient to decide the question whether a Labour Tribunal is a judicial office within the meaning of the Constitution, in view of the submissions made, I shall express my opinion on the question whether the judicial power of the State is vested in the Judges of the Supreme Court and the Judges appointed by the Judicial Service Commission.

In the case of the Bribery Commissioner v. Ranasinghe (supra) Their Lordships of the Privy Council did not express the view that the judicial power of the State is vested in the Supreme Court and the Judges appointed by the Judicial Service Commission. In that case they were dealing with a statute which created a special tribunal and vested it with powers of a court in hearing cases of bribery after depriving the courts of the jurisdiction to try this offence. There was a clear usurpation of the jurisdiction of the courts by the Bribery Tribunal which performed the

same functions as a court. Since the person who constituted the tribunal was not appointed by the Judicial Service Commission, it was held that if such a course was allowed there will be an erosion of the jurisdiction of the courts, and the Legislature, without amending the constitution, can create a number of such tribunals and take away the jurisdiction of the courts conferred by the Constitution. The effect of the legislation creating the Bribery Tribunals is in pith and substance an attempt to create a rival court (vide Toronto Corporation v. York Corporation[1 (1938) A. C. 415.]). In dealing with the Bribery Tribunal I have expressed a similar view in Piyadasa v. The, Bribery Commissioner[(1962) 64 N. L. R 385.]. The two cases which we are dealing with presently are clearly distinguishable.

The constitutional law of Ceylon is found not merely in Ceylon (Constitution) Order in Council and the Ceylon Independence Act of 1947 but has to be gathered from the various instruments and statutes. The Courts Ordinance provides for the constitution of courts. For the determination of the meaning of the term " judicial officer " the pertinent question may be posed : what did the framers of the Constitution intend by the use of the words " judicial officer "?

In the construction of doubtful provisions of the Constitution, the historical test has been adopted. Dean Pound said : (cited in Queen v. Liyanage and others[(1962) 64 N.L. R at 356.]) " In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our Constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the Judges. " The historical test has been applied in Ceylon in construing the Constitution (vide dictum of T. S. Fernando J. in Queen v. Liyanage and others (supra) at pp. 357, 358, where this test has been applied in Ceylon ; vide also The Queen v. Davison [(1954) 90 Commonwealth Law Reports at 382.].

Where the words are not clear it is permissible to look at the objects and reasons of the framers of the constitution (vide Maxwell's Interpretation of Statutes, 9th Edn. p. 22). In order to ensure that the minor judiciary should be free from political influence the Soulbury Commissioners recommended that District Judges, Commissioners of Requests, Magistrates and Presidents of Rural Courts should be appointed by the Judicial Service Commission, an independent body which is not amenable to political interference (vide para 358 of the Soulbury Commissioners Report, CMd. 6677). Mr. Ranganathan contended that although the Soulbury Commissioners specifically referred to the Judges who functioned in the District Courts, Courts of Requests, Magistrate's Courts and the Rural Courts as persons who should be appointed by the Judicial Service Commission, yet in the Constitution it is provided that a person who holds a paid judicial office should be appointed by the Judicial Service Commission. Therefore he urged that any person who performs any judicial function either solely or in addition to his executive functions

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should be appointed by the Judicial Service Commission. It appears to me that this process of reasoning is a non sequitur and does not help the court in determining the meaning of the words "judicial officer ". Further if this line of reasoning is adopted the whole structure of the administrative and judicial system of Ceylon will be in a state of chaos and many provisions of statutes will become inoperative. A Court in considering a statute should construe it in such a way that its provisions are not repugnant to other statutes.

In my view the term " paid judicial office " in section 55 of the Constitution does not apply to the post held by the Divisional Registrar under the Kandyan Marriage and Divorce Act who, in addition to his duties as Government Agent, hears and decides contested cases of divorce between Kandyans, the office of the persons who preside over tribunals constituted under the Workmen's Compensation Act, the Rent Restriction Act, the Registrar of Patents and Trade Marks and even jurors who strictly perform purely judicial functions. If the contention of the appellants is to be accepted, all these persons should be appointed by the Judicial Service Commission. The learned Solicitor-General submitted that if the term " judicial officer " is given the construction given by the counsel for the appellants, then the Court of Criminal Appeal is wrongly constituted, since its members are not appointed by the Judicial Service Commission. He further submitted that should there be a higher court established by the Legislature to review the orders of the Supreme Court, then the members of such court should be appointed by the Judicial Service Commission. Such a result appears to be untenable.

The term " judicial officer" had a specific connotation which was well understood at the time the constitution came into force although no definition could be found in any of the statutes of Ceylon at the time the constitution came into force. In the Courts Ordinance a Commissioner of Assize is referred to as a " judicial officer " (vide section 22 of the Courts Ordinance, Cap. 6). The Oaths

Ordinance (No. 7 of 1869) requires judicial officers to take oaths. The Municipal Councils Ordinance (Cap. 252) enacts that a Municipal Magistrateshould take a judicial oath. A judicial oath was taken by all the judges who presided over courts. All other officers who perform executive functions but occasionally performed judicial functions, such as the officers mentioned earlier, were not required to take judicial oaths but only the oath of allegiance.

Applying the historical test it is clear that the framers of the Constitution meant by the term " judicial office " the post held by a District Judge, Commissioner of Requests, Magistrate, President of a Rural Court and other officer performing similar functions.

The Labour Tribunal does not have the same functions as a court. It cannot be said that it is deciding a lis between parties. The reasoning laid down in the decision of the Privy Council in the case of Labour Relations Board of Saskatchewan v. John East Iron WorksLtd.[1 (1949) A. I. R. (P. C.) 129.] is equally applicable to the two appeals under consideration. In that case the question decided was whether a Provincial Act in Canada constituting a labour tribunal, whose members were to be appointed by the Governor-General, was ultra vires the Canadian Constitution which came into existence by the British North America Act of 1867. Under section 96 of that Act the Judges of the " superior, district and county Courts " were to be appointed by the Governor-General of the Dominion. Their Lordships of the PrivyCouncil, after examining the provisions of that Statute creating the Labour Relations Board, held that the Board is not a tribunal analogous to the Courts envisaged by section 96 of the Act. In the view they took it was found unnecessary to decide the question whether judicial power was vested in the courts and tribunals envisaged by section 96 of that Act.

After stating that the border line in which the judicial and administrative functions overlap is a wide one and the boundary is more difficult to define in the case of a body such as the Labour Relations Board, Lord Simonds said : (vide 1949 A. I. R. P. C. at 133).

"It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board, for, as the Act contemplates and the Rules made under it prescribe, anytrade union, any employer, any employers' association or any other person directly concerned may apply to the Board for any order to be made (a) requiring any person to refrain from the violation of the Act or from engaging in an unfair labour practice, (6) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (c) requiring an employer to disestablish a company dominated organisation or (d) requiring two or more of the said things to be done. Other rules provide for the discharge by the Board of other functions. It is sufficient to refer only to (6) supra, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe

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an issue thus raised as a lit, and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or county Courts of Upper Canada. "

Some of these functional differences exist between a Court in Cerlon and the Labour Tribunal.

Counsel for the appellant referred to some similarities between the Labour Tribunal and a Court of law. The mere fact that a tribunal has some of the trappings of a Court of Law does not make it a court vested with judicial power. As Lord Sankey said in Shell Company of Australia v. Federal Commissioner of Taxation[1 47 The Times Law Reports 115 at 117.], a tribunal may have all the trappings of a court and still may not exercise judicial power. A careful perusal of the relevant provisions of the Industrial Disputes Act shows that the Labour Tribunal functions differently from a court.

The qualifications necessary to function as an officer presiding over an Industrial Court are of a special nature. Such an officer must be acquainted with labour practices. Industrial disputes can spark off a general strike and it is the clear function of a Labour Tribunal, Industrial Court or arbitrator, appointed under this Act, to settle the disputes in a just and equitable manner and bring about industrial peace. But a court is vested with powers of adjudication of existing rights and granting reliefs provided by law. Judges should have different qualifications. They are appointed by the Judicial Service Commission, the members of which are competent to select suitable persons from the Bar who are learned in the Law and acquainted with the practice in Courts.

The provisions of the Industrial Disputes Act (Cap. 131) dealing with theconstitution and powers of the Labour Tribunal may be examined with a view to finding out whether the Tribunal is performing the functions of a court. The Industrial Disputes Act was enacted to preserve industrial peace. The preamble to the Act reads as follows : " An Act to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto." The provisions governing Labour Tribunals came into existence by the amending Act No. 62 of 1957. It was not seriously disputed that before the amending Act of 1957 came into existence the provisions of the Industrial Disputes Act, as enacted in 1951, contained provisions for the objects set out in the preamble to the Act. But it was contended that the amendment of 1957 brought into existence a tribunal in the nature of a court of law, and that the preamble to the original Act did not apply to the provisions of the amending Act. If the intention of the legislature was to make a radical change in the structure of our courts there is no reason why the preamble to the original Act was not altered when the amending Act was passed or the Courts Ordinance amended But the preamble remained the same and it is a clear rule of construction that

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the preamble to an Act applies not only to the original Act but also to all amendments. " The preamble of the Statute ", says Coke, in 1 Inst. 79a, "is a good means to find out the meaningof the statute, and as it were a key to open the understanding thereof ". (vide Craies on Statute Law, 5th Edn., by Sir Charles E. Odgers, p. 186). I am of theview that the preamble governs as much the provisions of the original Act as the provisions contained in the amending Act of 1957 which brought into existence the Industrial Tribunals and is a guide to enable this court to find out the objects and purposes for which the amending Act was enacted.

The scheme of the Act shows that it was the intention of the legislature to bring about industrial peace by the settlement of industrial disputes by means of collective agreements (vide sections 5 to 10), settlements by conciliation (sections 11 to 15), settlement by arbitration (sections 16 to 21), by awards by Industrial Courts and Labour Tribunals and by decisions of an arbitral nature by the Labour Tribunals (sections 22 to 30). There is also provision for industrial courts to make arbitral orders which are " just and equitable " in order to prevent strikes, lockouts etc., and to ensure industrial peace between employer and employee.

Under section 4 of the Industrial Disputes Act, the Minister may, if he is ofopinion that the industrial dispute concerned is a minor one, refer it by an order in writing for settlement by arbitration by an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding that the parties to such dispute do not consent to such reference. The creation of Labour Tribunals

with the power to make orders of an arbitral nature is for the same purpose.

Section 31 (A) enables the Minister to appoint a number of Labour Tribunals ashe may determine and each Labour Tribunal is to consist of one person. The Minister is also empowered to make regulations for prescribing the manner in which applications under section 31 (B) may be made to the Labour Tribunal. Section 31(B) sets out the matters in respect of which relief or redress may be obtained by a workman or by a trade union on behalf of the workman who is a member of the trade union. The matters set out are-

" (a) the termination of his services by his employer ;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;

(c) such other matters relating to the terms of employment or the conditions of labour of the workman as may be prescribed ".

It was conceded at the argument that the provisions of section 31B (a) applies both to a legal as well as an illegal termination of services of an employee by his employer. Such a view has been taken by this Court (vide Shell Company of Ceylon Ltd. v. Pathirana[1(1962) 64 N. L. R 71]). In granting relief or redress under section 31B (1) (a) the Tribunal can make an order reinstating or discontinuing the services of any workman whose dismissal or continuance in employment is the matter in dispute. Thus, although the termination may be lawful, yet the Tribunal is empowered to order a reinstatement and such an order will take effect from the date of dispute. Thus a new contract is brought about by the order of the Tribunal from that date. When a Tribunal makes an order of this kind there is no question that it gives relief by creating new rights between parties. Could it be said that the Tribunal, as a court of law does, only declares and adjudicates on the existing rights of parties and grants relief or redress for the infringement of such rights ?

Another matter in respect of which the Tribunal is given power to inquire into and give relief or redress is when there is a question whether any gratuity or other benefit is due to the workman from the employer on the termination of his services. In such cases the Tribunal is given the power to fix the amount of such gratuity and set out the nature and extent of such benefits. In two judgments of this court the view had been taken that the word " due " in section 31B must be interpreted as legally due, and therefore a tribunal cannot grant anything more than what a court of law could do when giving relief to a workman (vide Richard Peiris & Co. Ltd. v. Wijesiriwardena [2(1960) 62 N. L. R 233.] ;Electric Equipment and Construction Co. and Cooray[. 3(1961) 63 N. L. R 164.]).With respect I am unable to agree with this restrictive construction. As Mr. Satyendra contended, nowhere in section 31B (1) is it stated that this tribunal is empowered to consider what amount is legally due by way of gratuity or benefits. Section 31B (1) sets out the matters in which the Tribunal has the power to act. The section empowering the Tribunal to make an order is set out in section 31C (1) which enacts as follows :

" Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as may appear to the tribunal to be just and equitable. "

No doubt in making an order which is just and equitable, as is stated in an earlier case, a Tribunal cannot mis-state the law of the Courts and completely ignore the provisions of the contract (vide Hayleys Ltd. v. E. W. Crossette Thambiah [4 (1961) 63 N. L. R. 248.]).

It seems to me that a Tribunal in making an order which is just and equitable is not fettered by the terms of the contract and therefore is not bound by the strict letter of the law of contracts. Industrial peace cannot be secured if another court is created merely to enforce legal rights. The employer, being in a position to dictate terms of employment to the workman, could always provide terms in the contract in such a way that no gratuity or other benefits would be payable to the workman or he may contract that such benefits should be paid on a niggardly basis.

Fears have been expressed that in view of the wide powers given to a Labour Tribunal, the person appointed by the Public Service Commission who officiates as President of the Labour Tribunal can order an arbitrary sum to be paid to the workman according to his whim and fancy and will not observe the rule of law. These fears are unjustified in view of the fact that any order that he has to make has to be just and equitable. An arbitrary order cannot be just and equitable. No order which penalises an employer by ordering him to give a penal sum is just and equitable. If such an order is made, there is a right of appeal to the Supreme Court on a point of law. The employer could contend that an arbitrary order made according to one's whim and fancy is not a just and equitable order within the meaning of section 31C of the Industrial Disputes Act. This contention would apply equally to a President of a Labour Tribunal who is appointed by the Judicial Service Commission. Both the Public ServiceCommission and the Judicial Service Commission are independent bodies and it cannot be said that an officer appointed by the Judicial Service Commission will act with greater restraint than an officer appointed by the Public Service Commission. Both these bodies were designed to be free from political control or influence.

Legislation which is intra vires is good although it may have ill effects (vide 1945 A.C. 14 at 27 and 28). It is an accepted rule of construction that nothing should be read into a statute on the ground that there could be an abuse of the provisions of a statute (vide 1943 A.I.R. 30 Fed. 36 at 57; Legislative, Executive and Judicial Powers in Australia by W. A. Wynes 2nd Edn. at page 16).

It may be contended that section 31B (4) was enacted to ensure a Labour Tribunal to make an order which is just and equitable despite the terms of the contract between parties that the dispute should not be taken before the Labour Tribunal. Counsel who appeared in these two cases and the other cases referred to, did not venture to put forward such a construction. If that was the intention of the Legislature, then the wording of section 31B (4) would have been different. It should have been as follows :

" Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under subsection 31B (1) notwithstanding anything in the agreement to the contrary between the employee and the employer. "

The words " relief" and " redress " in section 31B (4) are also significant. Redress is a word that is used with reference to grievance. A grievance arises when something legally due is not given. The word relief clearly indicates cases where a person is not enforcing a legal right. Relief may be given to a workman although the employer has adhered to the terms of the contract and has fulfilled his legal obligation.

The scope and ambit of the powers of the Labour Tribunal become clear when one examines section 33 of the Act. Section 33 sets out the contents of the relief or remedy which could be granted by a Labour Tribunal. Under section 33 (1) (a) the order of a tribunal may contain decisions as to wages and all other conditions of service, including decisions that any such wages and conditions shall be payable or applicable with effect from any specified date, which

may, where necessary, be a date prior to the date of such award or such order and decisions that wages shall be payable in respect of any period of absence by reason of any strike or lockout. Under this provision the Tribunal can order wages, although an employee's services have been legally terminated, and it could also order his reinstatement. As stated earlier, in making such an order the Tribunal creates new rights and is not determining or enforcing existing rights.

A company may retrench some of its employees after lawfully terminating their services. But if in all the circumstances of the case it is just and equitable to give compensation to such employees, a Tribunal is not precluded from granting such relief. If the Tribunal follows such a course it creates new rights which did not exist under the law because when there is an unlawful strike the strict legal position is the employer is not bound to pay any wages to the employees.

Under section 33 (1) (6) the Tribunal could order reinstatement of a workman who has been dismissed either legally or illegally. If the dismissal was legal still the Tribunal may find that it is just and equitable that a workman should be reinstated as from a date anterior to the date of the dismissal. Here again, as stated earlier, new rights are created as a result of this order. The tribunal could also order the discontinuance from service of any workman as a result of whose employment there has been labour unrest. Here again the tribunal does not enforce any rights but terminates the rights that existed under the contract. An employer may cause a justifiable lockout if the workmen have acted in an illegal manner. But there may be a workman who is prepared to go for work but was prevented from doing so as a result of the lockout by the employer. If such a workman asks for relief, a tribunal can give relief to him by ordering that his wages should be paid as from a particular date if such a course is just and equitable. By such an order new rights are created between parties.

Under section 33 (1) (c) the Tribunal may also make order containing decisions as to the extent to which the period of absence from duty of any workman, who it has decided should be reinstated, should be taken into account or disregarded for the purpose of his rights to any pension, gratuity or retiring allowance or to any benefit under any provident scheme. Such orders create new rights.

A court of law declares existing rights of parties whether vested or contingent and grants relief or redress for a breach. A court administers justice according to law. But a tribunal in giving relief or redress to a workman upon an application made under subsection 1 of section 31B may do so notwithstanding anything to the contrary in any contract of service between a workman and his employer. Therefore how could it be said that a Labour Tribunal is a court whose function is to administer the law of the land between parties and give judgment declaring the rights and obligations of the parties and grant them relief for breach of contract ? Any Tribunal which alters the rights of parties and not declares the rights is not a court (vide 67 Commonwealth Law Reports 28).
In dealing with the distinction between arbitral and judicial power, Isaacs and Rich JJ stated as follows: (vide Waterside Workers' Federation of Australia v. Alexander Ltd.[1 (1918) 25 Commonwealth Law Reports 434 at 463.])

" But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist, at the moment proceedings are instituted; whereas the function of an arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

This distinction has been approved by the Privy Council (vide Attorney-Generalof Australia v. Reginam[2 (1957) 2 A. E. R. 45.]). It has been held that thefunctions of an arbitral tribunal are

different from those of a court and the requirement that both of them should not act without hearing both sides of the case, does not weigh against the proposition that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue (vide supra at p. 55).

Other differences between Courts functioning in Ceylon and the Labour Tribunal are as follows :

1. A Labour Tribunal is not open to an employer. It is only the employee who can seek relief or redress under the provisions of section 31B of the Industrial Disputes Act, but a court of law is open to both an employer and employee.

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2. The Labour Tribunal has to suspend proceedings when it is satisfied, after such inquiry as may be necessary, that the matter in respect of which the application is made under section 31B (1) (a) is one under discussion with the employer of the workman to whom the application relates by a trade union of which that workman is a member. Further upon conclusion of such inquiry, if a settlement is reached in the course of the discussion, the tribunal is bound to make an order according to the terms of such settlement. It may be noted that a settlement may be brought about between the employer and such trade union by considerations of policy with which the workman may be not in agreement. But a court of law has to hear the case instituted till a final decision is reached. A court of law is not influenced by matters of policy.

3. Where the tribunal is satisfied that such matter constitutes or forms part of an industrial dispute referred by the Minister under section 4 for settlement by arbitration, or for settlement by an Industrial Court, it may make order dismissing the application without prejudice to the rights of parties to the dispute. But a party before a Court is entitled to have a full hearing and have his case decided according to its merits.

4. Where an application under section 31B (1) relates (a) to any matter which, in the opinion of the tribunal, is similar to or identical with the matter constituting or included in the industrial dispute to which the employer to whom that application relates is a party and to which an inquiry under the act is held or (b) to any matter the facts affecting which are, in the opinion of the tribunal, facts affecting any proceeding under any other law, the tribunal should make an order suspending its proceeding. After such conclusion the tribunal could resume proceedings. But in making an order upon such application it shall have regard to the award or decision of the said inquiry or proceeding under any other law. It is significant that under the provisions referred to above an employee is affected by orders made in proceedings to which he is not a party. The mere membership of a Labour Union which has taken part in the proceedings does not make the Union the agent of the employee. The Labour Union, in effecting a settlement or collectively bargaining, may be influenced by policies. Here again there is a clear distinction between a court of law and a tribunal. In a court of law the parties are not bound by settlement and orders made in proceedings in which they are not parties and & court of law cannot be influenced by matters of policy but is under a duty to adjudicate according to law. A tribunal which has to consider a matter of policy is not a court.

5. A court of law is bound to interpret the contract and hear only the parties, whereas the Labour Tribunal is bound to hear the Commissioner of Labour who may set out the policy of the government. Here again a Labour Tribunal may be influenced by matters of policy in determining an application before it.

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6. The orders of a Tribunal cannot be enforced by it. But the court is given the power to enforce

its orders.

From these differences it is clear that the functions of a Labour Tribunal and a court of law are entirely different and the objects for which they are created and their powers are not the same.

In amending the Industrial Disputes Act and providing for Labour Tribunals inaddition to the existing machinery for the peaceful settlement of strikes and lockouts, which can paralyse the country, it could never have been the intention of the Legislature to provide an additional court which administers the law of contract since such courts were in existence and are still functioning.

In this context the dictum of Powers J. in the case of Waterside Workers' Federation of Australia v. J. W. Alexander Ltd[1 25 C. L, R. 435 at 483.] isapposite. In dealing with the courts and arbitration tribunals of Australia he said :

" I find, on looking at the Act to see if it was intended to make it a Court ofthe Judicature, six very strong grounds why I am satisfied that it was only intended to make it a Court of compulsory arbitration- and not a Court of judicature : (1) the title of the Act (section 1) ; (2) the declared objects of the Act; (3) the fact that no power has been given to the Court to punish for any breach of the Act; (4) the fact that by section 25 it declares that ' in hearing and determination of every industrial dispute and in exercising any duties or powers under or by virtue of this Act the Court of the President shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform'; (5) that the only power given to it as to penalties is to impose penalties for breaches of its awards or orders made as an Arbitration Court (this power, I assume, was conferred because Parliament considered it incidental to the power to make awards) ; (6) that no power of execution to enforce even the power to impose penalties was given to the Arbitration Court-(under section 46 orders made by the Arbitration Courtimposing penalties are to be enforced by execution only in Federal or State Courts of judicature, not by the Arbitration Court). "

These observations, mutatis mutandis, apply equally when the functions of a court of law in Ceylon are compared with those of a Labour Tribunal.

As stated earlier, at the time the Constitution came into force, many tribunals and officers exercised judicial power although they were not functioning as courts. The canon of construction which should be adopted in interpreting a constitution is set out as follows : " In doubtful cases, however, we employ a historical criterion. We ask whether at the time

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our Constitution was adopted, the power in question was exercised by the Crown, by Parliament or by the Judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion. " This view has met with approval in our Courts (vide Queen v. Liyanage [1 (1962)64N.L.R.313at356.]). Applying this test the term " judicial office " in section 55 of the Constitution means the office of a District Judge, Commissioner of Requests, Magistrate, Presidents of Rural Courts and other similar offices and does not apply to a Labour Tribunal.

Mr. Jayewardene in the course of his argument strongly urged that judicial power of the State has vested in the Supreme Court and the other Courts constitutedunder the Courts Ordinance. He contended that there is a separation of judicial, executive and legislative powers in Ceylon. As a corollary, he submitted that where a Tribunal which has functions of an executive and arbitral nature performs a limited judicial function, then the person who presides over it must be appointed by the Judicial Service Commission in order to perform the judicial functions,

otherwise the judicial orders he makes are null and void. Although in view of the interpretation I have placed on the words " judicial officer " it is unnecessary to decide this point; yet in view of its importance I would like to express my views.

After a careful consideration of the arguments put forward by counsel I am of the view that the judicial power of the State is not vested in the Supreme Court and the other courts in Ceylon. In some cases we have ventured to express the view that judicial power is vested in the Supreme Court and the minor courts (vide Queen v. Liyanage [2 (1962) 64 N.L.R.313.]; Senadhira v. Bribery Commissioner [3(196l)63N.L.R.313 at318.] ; Piyadasa v. Bribery Commissioner[4(1962) 64 N.L.R. 385 at 390.]). But for the decision of these cases it was not necessary to hold that judicial power of the State vested in the Judges only. In Piyadasa's Case I did not have the benefit of a full argument as there was no counsel for the appellant. In the present appeals this matter has been fully argued and I am of the view that judicial power of the State is vested in Her Majesty who exercises it through the Judges in Ceylon but has reserved to Herself the right to exercise this power as the final Court of Appeal.

In this connection a distinction has to be drawn between a jurisdiction of a Court and the judicial power of the State. In England there is no separation of judicial, executive and legislative powers, though in political theory political institutions are ceremoniously divided into three groups. As Sir Ivor Jennings remarks : (vide The Law and the Constitution, 4th Edn. p. 9) " It is not a political theory but political experience, the logic or accident of events which caused England to develop this three-fold division. " As regards administrative bodies, it is to be noted that in England from the earliest days of its legal history a mingling of

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administrative and judicial powers is to be found. Before the end of the 12th century the King's Court had become the dominant governing authority in England and it had at one and the same time powers which were judicial, administrative and financial. By the mediaeval period the chief administrative organ-the King's Council-came to be regarded as an administrative body. Referring to the separation of powers in the English Constitution Professor Holdsworth said : " But as yet boundaries between the executive functions on the one hand, judicial and legislative functions on the other hand were very indistinct. " (vide History of English Law by W. S. Holdsworth, Vol. I, pages 478 to 479). Gradually with the increase of work and pressure of judicial business a large amount of judicial work was placed on the King's Council when it began to split into two parts, a judicial court and an administrative court. The powers of the Common Law Courts and the importance of the King's Council was stressed. The administration of law shifted to the Courts of Requests and to the Courts of Chancery, which were at that time for all intents and purposes administrative tribunals. The 17th century, however, witnessed the ascendancy of justices of the peace, a small group of country gentlemen who were appointed to keep the peace and to arrest wrongdoers. They gradually acquired extra-ordinary collection of judicial and administrative duties which, as Maitland remarks, "No theorist could attempt to classify since their rich variety was not the outcome of theory but experience. "

The mingling of powers arose more as a result of convenience until Montesquieu apparently mis-read the English legal system and in his famous chapter " esprit des lois " Book II Cap. 6 adumbrated the doctrine of separation of powers. But even in modern times, in strict legal theory, such separation of powers does not exist in England or Ceylon. The blending of the executive and judicial functions is not confined to the lowest grades but extends to the highest officials. Responsible ministers now often perform a variety of functions which sometimes frequently overlap with judicial functions.

In the Australian and American Constitutions there is a clear separation of powers. But even there, as has been pointed out, the constitution cannot be worked if there is a strict separation of powers (vide Administrative Law by David, Vol. I page 64). The Constitution of Ceylon is based

on the English Constitution (vide the observations of the Soulbury Commissioners-Soulbury Commissioners' Report, Cmd 6677, paras 408 to 410). At no time in the history ofour legal system has there been in theory any separation between judicial, administrative and legislative powers.

Before the constitution came into force judges were appointed by the Governor on the recommendation of a Judicial Service Commission which served only as an advisory body at that time. Under the Ceylon (Constitution) Order in Council, subject to certain limitations, the legislative function is no doubt now delegated to the Queen in Parliament. The executive function still remains in Her Majesty (vide section 45 of the Constitution). The judicial power is still vested in Her Majesty and not in the courts. Her Majesty exercises this power directly with the advice of the Privy Council and through the Judges of the Supreme Court and the other Courts. If judicial power is vested in the Supreme Court and the other courts functioning under the Courts Ordinance, then the Privy Council will have no power to advise Her Majesty to affirm or allow appeals which are taken from the decisions of the Supreme Court to Her Majesty in Council. Although such a view was taken by this court, it has been held by the highest tribunal of this Island that Her Majestystill retains her prerogative rights to hear appeals from the courts of Ceylon (vide The Queen v. Hemapala [1 (1963) 65 N. L. R. 313.]). This power can be withHer Majesty only if judicial power of the State is still vested in Her.

If the contention of Mr. Jayewardene is to prevail, as the learned Solicitor-General submitted, should Ceylon abolish appeals to the Privy Council, then only the Judicial Service Commission can appoint a court higher than the Supreme Court, unless the constitution is amended. It could hardly be conceived that the Judicial Service Commission which consists of at least two Supreme Court Judges and a third member who is either a judge of the Supreme Court or a retired judge, should appoint judges to the highest tribunal which will have jurisdiction over the Supreme Court in such an event. If Mr. Jayewardene'sargument is carried to its logical conclusion the Court of Criminal Appeal is badly constituted. Therefore it is permissible under the Constitution of Ceylon, for administrative tribunals to have a residuum of judicial powers and the existence of such judicial powers will not be a criterion to draw the line of demarcation between a court of law and a tribunal. The correct line of demarcation between a judicial office and a non-judicial office, is to apply the functional test and ask the question whether an officer or tribunal is performing analogous or same functions as a judge, before determining whether such tribunal or office is a judicial office.

It remains to consider some of the arguments put forward by counsel in these cases. Mr. Ranganathan submitted that the duty to make an order which is just and equitable imposes on a judicial tribunal the functions of a judge who presides in a court of law since he has to act according to this norm. In the case of legislation he stated that there was no norm or limitation placed. Although these observations may be justified in considering legislation by a Supreme Parliament, it is not true of delegated legislation. When a Supreme legislature delegates legislative

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functions to a body of persons it sets out the scope and ambit of such legislation and the norms or standards which the delegated body has to conform in enacting subordinate legislation. Any legislation in excess of the powers given to a delegated body would be ultra vires. The duty to act judicially imposed on a tribunal does not make it a Court of Law exercising judicial power.

It was also contended that it is only a court which is under a duty to act justly and equitably and the use of such a phrase is not appropriate in the case of arbitral tribunals. The duty to act " in

equity and good conscience is not a decisive test to differentiate between a court of law and an administrative tribunal. " Thus in Moses v. Parker [1 (1896) A. C. 245.] the Privy Council held that the Supreme Court of Tasmania which is vested with jurisdiction to deal with disputes regarding claims to grants of land was not pronouncing judicial decisions from which there was a right of appeal to the Privy Council. Such disputes had, prior to the statute, been dealt with by certain Commissioners and they reported to the Governor who was bound to act " with equity and good conscience ". Although it was expressly provided that the Supreme Court is not bound by strict rules of law and equity in any case or any technicalities or legal forms whatsoever, yet it was not absolved from acting in good conscience. Despite this restriction it was held that the Supreme Court in exercising this jurisdiction was not performing the functions of a court.

Mr. Jayewardene also placed reliance on a passage from an article contributed by Dr. Duncan Derret in " Law in the Changing World ", who while writing on justice, equity and good conscience said, " Contrasted with the office of Judge is the so called arbitrium rusticorum which seems to have been the Romanic counterpart of palm tree justice whereby the arbitrator divided a disputed property equally between two parties; here no juridical activity can be seen and he splits it between them like the monkey in Aesop's Fables, as the simplest way of appeasing the nullity of parties. It is not even rough justice or substantial justice. For when there is no juridical discretion, there is no justice." This passage cannot be taken out of its context and given a meaning which the writer does not intend. At no stage does the writer apply this as a test to distinguish between a court of law and an arbitral tribunal. If this is a distinguishing feature, then all tribunals could act arbitrally-a proposition which is not tenable.

I did not understand Mr. Satyendra's argument to mean that a tribunal that is empowered to make a just and equitable order, is not for that reason exercising judicial power. His argument, as I understand, is that this provision taken along with the other provisions of the Industrial Disputes Act authorises the Tribunal to make an order which is just and equitable, notwithstanding the terms of the contract.

Further, arbitral functions must be distinguished from arbitrary functions. When a tribunal is given the power to act in a just and equitable manner, it cannot act in an arbitrary manner. A number of administrative tribunals in England and Ceylon cannot act in an arbitrary way but have to act judicially and yet they are not courts, although their orders could be reviewed by the Supreme Court on an application by way of writ of certiorari or prohibition.

It was contended by counsel for the appellants that the power to alter the terms of the contract is no decisive test to determine whether a tribunal is an arbitral tribunal or a court of law. Mr. Jayewardene cited section 2 of the Money Lending Ordinance which enables a court to re-open the transaction and take an account between the lender and the person sued, and relieve a debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges as the court, having regard to the risk and all the circumstances may adjudge to be reasonable. This jurisdiction can only be exercised if the court is satisfied on the evidence led that-" (a) the return to be received by the creditor over and above what was actually lent, having regard to the sums already paid on account, is excessive, and that the transaction was harsh and unconscionable, or as between the parties thereto, substantially unfair; or, (6) that the transaction was induced by undue influence, or is otherwise such that according to any recognised principle of law or equity the court would give relief; or (c) that the lender took as security for the loan a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious or the amount due was left blank."

It must be noted that it is only after a judicial finding that one or more of the matters set out in section 2 (1) of the Money Lending Ordinance are satisfied that the court is enabled to re-open the account. Here the court of law is not disregarding the provisions of law or the terms of the

contract in granting relief but enforcing the rights granted by the law in favour of the debtor.

It was also contended that the term " rights deemed to exist " must be construed as rights which are given under section 31B to the workman. Under section 31B ofthe Industrial Disputes Act there are no vested or contingent rights in the workman co-relating the reliefs that are set out. The relief being entirely discretionary, may be refused or granted. Therefore in granting relief or redress under seection 31B the Tribunal does not decide existing rights or rights deemed to exist and give relief as a court of law, but creates new rights which grant relief or redress, provided it acts in a just and equitable manner.

Mr. Satyendra submitted that the function of the Labour Tribunal in making an arbitral order is not judicial but legislative. It was however contended by counsel for the appellants that legislative function

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cannot be exercised in favour of a single individual. I am unable to accept this contention since there are a number of private Acts in the statute book which affect single individuals or corporations.

Reference was made to the provisions of the Companies Act (Cap. 145) and the Partnership Act (Cap. 83) under which Courts may dissolve Companies or Partnerships, as the case may be, among other grounds, on the ground that it is just and equitable to make such an order (vide Davis v. Brunswick (Australia) Ltd.[1 (1956) I A.E.R.299.]). These provisions were cited as instances to show that merely because a tribunal is empowered to act justly and equitably it does not cease to be a court. But it must be noted that when a court is empowered to wind up the company on specific grounds, one of them being that it is just and equitable, the court is exercising a judicial function and determining existing rights. But when the Labour Tribunal acts under section 31B (4) a discretion is given to the Tribunal to act justly and equitably notwithstanding anything to the contrary in any contract of service between the employer and employee. This subsection sets out the power of the Tribunal and not the ground of its decision.

Apart from the powers under section 31B of the Industrial Disputes Act, a LabourTribunal may also be appointed as an arbitrator if the dispute is of a minor nature under section 4 of the Act. This provision again shows that it was never the intention of the legislature to regard a Labour Tribunal as a court of law. It is no part of a function of a court of law to act as an arbitrator.

Further it was contended that a right of appeal was given from a decision of the Industrial Tribunal on a point of law and therefore this Tribunal is a court. But there are many administrative tribunals from the decisions of which a right of appeal is given to the Supreme Court, yet they are not courts of law. Thus a right of appeal is given to a party who is dissatisfied by an order of the Registrar of Trade Marks under the Trade Marks Ordinance, by the Registrar of Patents under the Patents Ordinance, by an order made under the Workmen's Compensation Ordinance etc. Yet these officials or Tribunals are not courts.

Mr. Jayewardene also contended that by an order of the Labour Tribunal instant liability is imposed on the employer to either pay wages or compensation etc. He therefore urged that it was a court of law and relied on the ruling in The Waterside Workers' Federation of Australia v. Alexander Ltd.[25 C. L. R. 434.]for his proposition. The case relied on is from Australia where there is clear severability of judicial, executive and legislative power. In Australia where the judicial power is vested in the courts, instant liability cannot be created by a tribunal which is not a court by creating the right and enforcing it. A tribunal cannot adjudicate upon

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a right that has been brought into existence by its action and grant relief in countries where is no separation of powers and there is nothing repugnant to the provisions of our constitution for the Legislature, by a simple majority, to create a body which could not only create rights but also could give relief or remedy on the footing that the rights created bind the party so long as there is no direct or indirect attempt to erode the jurisdiction of the established courts.

In enacting the Industrial Disputes Act, the Parliament of Ceylon was no doubtconcerned to bring about industrial peace for the welfare of the nation. Both the employer and employee were benefited by the Industrial Disputes Act. A serious responsibility is cast on the Court to declare invalid a statute passed by the Parliament for the welfare of the nation. The views expressed by Isaacs J. in the Federal Commissioner of Taxation v. Munro [(1926) 38 C. L. R. at180.]are equally applicable to Ceylon. In this context he said : " It is always a serious and responsible duty to declare invalid, regardless of consequences, what the National Parliament representing the people of Australia has considered necessary or desirable for the public welfare. "

For these reasons I am of the view that the Labour Tribunal does not exercise judicial power. The orders in S. C. 9/62, S. C. 18-23/62, S. C. 144/64 and S. C.158/64 are not null and void for the reason that the persons who presided over these tribunals were not appointed by the Judicial Service Commission. In view of the fact that the other points taken up in the petitions of appeal have not been argued, I would remit these cases to a Bench of two Judges to hear these matters.

I shall now deal with applications Nos. 158 of 1964 and 144 of 1964. In S. C.Application 144 of 1964 a writ of certiorari has been asked for to quash the orders of the Industrial Court. In this case the Hon. Minister of Labour and Nationalised Services, by his order dated 16th November 1964, has referred an alleged industrial dispute between the petitioner and the second respondent union to an Industrial Court for settlement. The question the Industrial Courthad to decide was whether the non-employment of a number of workers set out was justified and to what relief they are entitled to. The Industrial Court held that the Company was justified in retrenching the workers but their not being paid any compensation was not justified. Therefore it awarded in respect of each of these workers a sum representing three months salary to be paid as relief.

In S. C. No. 158 of 1964 also a writ of certiorari is asked to quash theproceedings of the Industrial Court. In this case the alleged industrial dispute is whether notice of discontinuance of four persons set out in the petition was insufficient and whether they are entitled to any compensation. The Industrial Court held that the notice was insufficient

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and they should have been given at least two months notice before retrenchment and ordered that each of them be paid Rs. 200 as compensation. One of the points relied on in both these applications is that the Industrial Courts in these two cases were not appointed by the Judicial Service Commission and since they exercised judicial power their orders are null and void. This was the only point argued before the Court.

Section 4 (2) of the Act provides that a Minister may by an order in writing refer any industrial dispute to an Industrial Court for settlement. Thus, the very purpose for which the matter is referred to an Industrial Court is for settlement and not adjudication. Section 22 (1) of the Act provides for the constitution of the Court. Every order of the Minister referring a case to an Industrial Court should be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute (vide section 23). The duties and powers of the Industrial Court are set out in section 24 (1) which enacts :

" 24 (1). It shall be the duty of an industrial court to which any dispute, application or question or other matter is referred or made under this Act, as soon as may be, to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make

such award as may appear to the court just and equitable. "

It is significant to note that the Industrial Court is only empowered to make anaward and not deliver a judgment. Section 25 provides for the publication of the award on a date from which it comes into force.

The effect of an award is set out in section 26 which enacts that every award of an industrial court or tribunal, for the purpose of this Act, shall be binding on the parties, trade unions or workmen referred to in the award in accordance with the provisions of section 24 (3) and the terms of the award shall be the implied terms of the contract of employment between the employers and workmen bound by the award.

Under section 25 (2) the award of an Industrial Court is made effective from the date of the dispute. Thus the effect of an award is not to give a judgment which would be enforced but to introduce terms which become implied terms of the contract.

Provision is also made for reconsidering an award by an Industrial Court. After hearing, an Industrial Court to which an application is made, may in its decision (a) confirm the award, (6) set aside the award, (c) set aside the award and make a new award in place therof, or (d) vary or modify the award in such a manner as may be necessary (vide section 27 of Cap. 131). Section 30 (1) sets out the effect of such a decision. It enacts that " every award which is set aside by a decision of an

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industrial court under section 28 (1) (b) shall cease to have effect on the date of that decision or on such later date as may be specified in the decision.

Section 30 (2) enacts that every award which is varied or modified on an application made under section 27 by a decision of an industrial Court shall on and after the date of such decision or on or after such other date, if any, as may be specified in that decision, not being earlier than the date of such application, have effect and continue in force as so varied or modified.

It is clear therefore, from these provisions, that the effect of an award is merely to make the terms of the award, implied terms of the contract from the date the award comes into force and the award may be repudiated later. It was conceded by Mr. H. V. Perera in the course of the argument that if the effect of the award is merely to create future rights, then it will be an arbitral tribunal, but he urged that if it imposes instant liabilities on rights created, then it exercises judicial power. I see no reason why such a limited interpretation should be given to the provisions of the Industrial Disputes Act, in a country where there is no separation of legislative, executive and judicial powers. Further, the reasons given by me to differentiate a Labour Tribunal from a Court equally apply to an Industrial Court.

For these reasons I hold that the Industrial Court in these cases did notexercise judicial power. Therefore these cases should be sent before a Bench oftwo Judges for adjudication on the other points raised in the appeal.

In S. C. Application 319/'63 a writ of certiorari is asked for to quash the order of the arbitrator appointed by the Hon. Minister of Labour and Nationalised Services under section 4 (1) of the Industrial Disputes Act (Cap. 131). In S. C. 37/'65 an application for a writ of certiorari is made to quash the order of an arbitrator appointed by consent of parties under sections 3 (1) (d) of the Industrial Disputes Act. The only point argued before us was whether the arbitrator should have been appointed by the Judicial Service Commission. Iam of the view that the arbitrators appointed in both these cases are not judicial officers within the meaning of the Constitution. Therefore their appointment is valid.

Where a matter is referred to for settlement by an arbitrator, the duties and powers of an arbitrator are set out in section 17 of the Industrial Disputes Act. The effect of an award of an arbitrator is to make the terms of an award implied terms of the contract entered into by the employer and employee bound by the award (vide section 19).

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Any party, trade union, employer or workman bound by an award made by an arbitrator under the Industrial Disputes Act may repudiate the award by a written notice in the prescribed form sent to the Commissioner and every other party bound by the award subject to the provisions set out in the proviso to section 20 (1). It is enacted that where a valid notice of repudiation of an award is received by the Commissioner, subject to the proviso to section 20, (a) the award to which such notice relates shall cease to have effect upon the expiration of three months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of twelve months from the date on which the award came into force as provided in section 18 (2) whichever is the later, and (6) the Commissioner shall cause such notice to be published in the Gazette together with the declaration as to the time at which the award shall cease to have effect as provided in paragraph (a).

I have already given my reasons for holding that an officer presiding over an Industrial Court or Tribunal is not a judicial officer and therefore need not be appointed by the Judicial Service Commission. Where the effect of an award is to make the terms of the award implied terms of the contract which may be repudiated later, I fail to see how it could be said that an arbitrator is exercising judicial power and acting as a judge and determining the rights of parties.

In S.C. Application 37 of 1965 the arbitrator was appointed by consent of parties. If it is held that such an arbitrator holds a judicial office, by the same process of reasoning an arbitrator appointed under the provisions of the Civil Procedure Code should also be appointed by the Judicial Service Commission. When a party consents to refer a matter to an arbitrator, such party waives the jurisdiction of the court and agrees to abide by the decisions of the arbitrator. The reasons given by me for holding that an Industrial Court or Tribunal is not a Court of law apply with greater emphasis when an arbitrator's functions are examined.

The learned Solicitor-General adumbrated that orders made by Judges who actunder colour of office are valid. He developed the doctrine which gives validity to acts of officers, whatever defects there may be in the legality of their appointment. In support of his contention he cited the dictum in the case of Norton v. Shelby County (United States Supreme Court Reports, Book 30, page 178 at 186). Although I am attracted by this submission it is unnecessary to decide this point in view of the orders I have made in these cases.

For these reasons it cannot be said that the arbitrators in these two cases were acting as judicial officers within the meaning of the Constitution. Therefore Ihold that this application should not be allowed on the ground that since the arbitrator was not appointed by the Judicial Service Commission, the orders are null and void.

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These two applications shall be remitted for hearing before a Bench of two judges on the other points raised in the petitions. The costs will abide the event in all these cases.

SRI SKANDA RAJAH, J.-

Careful consideration of the arguments of Counsel for the appellants and the petitioners and the

judgments of My Lord the Chief Justice and H. N. G.Fernando, S.P.J., has not persuaded me to change the view that I expressed in Ceylon Transport Board v. Samastha Lanka Motor Sevaka Samithiya[1 (1963) 65 N. L. R. 185.], viz., that the Labour Tribunal need not be appointed by the Judicial Service Commission. On theother hand, the arguments of Counsel for the respondents and the judgment of my brother Tambiah confirm me in that view.

I agree with Tambiah, J., that appeals No. 9/1962 and Nos. 18-23/62 should beset down for hearing in due course.

Also, I agree with H. N. G. Fernando and Tambiah, JJ., that applications Nos319/63, 144/64, 158/64 and 37/65 should be set down for hearing in due course.

In each of these appeals and applications costs will abide the event.

Appeals in S. C. Nos. 9and 18/23 of 1962 allowed.

Applications in S.C. Nos. 319/63, 144/64,158 /64 and 37/65 set down for further argument on the matters indicated.

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