

1931

[IN THE PRIVY COUNCIL.]

*Present: Viscount Dunedin, Lord Blanesburgh,
and Lord Darling.*

ABEYESEKERE *v.* JAYATILAKA.

Ceylon (Legislative Council) Order in Council—Sovereign's right of legislation—Inherent legislative powers over Colonies—Conquest and cession—Right to indemnify—Ceylon (Legislative Council) Amendment Order in Council, 1928.

His Majesty the King is vested with legislative powers, inherent in him by his title derived from conquest and cession of Ceylon, in so far as he has not parted with any of them by acts of his own.

In exercise of the legislative powers reserved to him, when parting with a portion of the right originally vested in him, His Majesty has the right to indemnify and give relief in respect of penalties incurred under Article XVI. of the Ceylon (Legislative Council) Order in Council, 1923.

A PPEAL from a judgment of the Supreme Court.

November 9, 1931. Delivered by LORD DARLING—

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated March 20, 1930, confirming a decree of the District Court of Colombo dated March 11, 1929, whereby was dismissed an action which the plaintiff (the appellant in this case) had brought against the respondent-defendant. In that action the appellant as common informer, sued the respondent by virtue of Article 16 of the Ceylon (Legislative Council) Order in Council, 1923, alleging that he, having pecuniary interests in a contract with the Government within the meaning of Article 17 of the Order, had sat and voted in the Legislative Council on numerous occasions and had thereby rendered himself liable to penalties. Certain interlocutory matters were decided in the action, but before the action came on for trial an Order in Council, the Ceylon (Legislative Council) Amendment Order in Council, 1928, was passed and came into force on December 14, 1928. This order, after reciting that His Majesty had reserved to himself power to revoke, alter, or amend the order of 1923, enacted as follows:—

“ II. No action, prosecution, or legal proceeding whatsoever under the provisions of article XVI. of the Principal Order or otherwise, shall be brought, instituted, or maintained—

- (a) for the recovery of any penalty incurred, or alleged to have been incurred, under the said Article, whether for the amount prescribed therein, or not; or
- (b) for the recovery of any damages, the enforcement of any forfeiture or penal consequences or the declaration of any vacancy or incapacity—

against the Editor of the Sinhalese Etymological Dictionary

“ for or on account of or in respect of his having sat or voted in the Council as an Elected Member thereof at any time between the 24th day of January, 1924, and the date of the coming into operation of this Order in Council after his seat became, or is alleged to have become, vacant by reason of his having any direct or indirect pecuniary interest in any contract with

the Government of the Island for or on account of the Public Service, or of his having accepted a public office under the Crown in the Island, within the meaning of Article XVII. of the Principal Order; and if any such action, prosecution or legal proceeding has been, or shall hereafter be brought or instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make."

On January 28, 1929, the defendant filed a motion that the action be dismissed; and on March 11, 1929, the learned Judge of the District Court made an order dismissing the action, leaving each party to bear its own costs. This order was confirmed by the Supreme Court.

Against that order the present appeal is brought.

This case is of importance constitutionally, as raising the question of the right of His Majesty in Council to make the order of November 1, 1928. It is necessary, therefore, to state how the jurisdiction of His Majesty over Ceylon arose.

The Island of Ceylon became, in the 18th century, part of His Majesty's dominions by reason of conquest and cession; and since that time has been governed by the Sovereign as a Crown Colony on which certain rights of legislation and executive government have been conferred by letters patent and Orders in Council. That His Majesty's rights are, in these circumstances, well founded is sufficiently established by the judgment of Lord Mansfield in the case of *Campbell v. Hall*¹, where he says on page 211:—

"No question was ever started before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in Parliament. Coke's Report of the arguments and resolutions of the judges in *Calvin's* case, lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent he cannot change the laws of himself without the consent of parliament. It is plain he alludes to his own country because he alludes to a country where there is a parliament."

This status endures merely so long as the Island is not constituted a colony, but remains simply a conquest. Once it becomes a colony the King can act only within the constitution granted and applicable to that colony. Thenceforward the King, by his own act,—from which he may not derogate—has subject to all reservations precluded himself from proceeding otherwise. The constitution of the Island of Ceylon derives from letters patent of September 11, 1920, passed under the Great Seal of the United Kingdom, constituting the office of Governor and Commander-in-Chief of the Island of Ceylon and its dependencies. Paragraph XIII. of those letters patent runs as follows:—

"XIII. We do reserve to Ourselves, Our heirs, and successors, Our and their undoubted right with the advice and consent of Parliament, or with the advice of Our or Their Privy Council, to make from time to time all such laws as may to Us or them appear necessary for the peace, order, and good government of the Island, as fully and effectually as if these presents had not been made."

¹ (1774) 1 Cowper's Reports, P 204.

In 1923 there was made the Ceylon (Legislative Council) Order in Council of December 19, establishing the present Legislative Council and dealing with many matters connected with it. Section 67 of this Order in Council is as follows:—

" His Majesty hereby reserves to Himself, His Heirs and Successors, power, with the advice of His or Their Privy Council, to revoke, alter, or amend this Order as to Him or Them shall seem fit. "

The action which gives rise to this appeal is founded upon clauses XVI. and XVII. of this Order in Council of December 19, 1923, which are as follows:—

XVI. " Every person who . . . shall sit or vote in the Council after his seat has become vacant shall for every day on which he sits or votes after his seat has become vacant be liable to a penalty of Rs. 500 to be recovered by action in the District Court of . . . by any person who shall sue for the same. "

XVII. " If any Elected Member of the Council shall . . . have any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the public service . . . or shall accept any public office under the Crown in the Island his seat in Council shall thereupon become vacant. "

It was alleged in the action that the respondent had rendered himself liable under these sections in that, having been elected a member of the Legislative Council prior to 1927, he had in April, 1927, then being editor-in-chief of the Etymological Dictionary of the Sinhalese language, gained or obtained, and still had, a direct or indirect pecuniary interest in a contract with the Government of the Island for or on account of the public service, or alternatively had accepted and still held a public office under the Crown in the Island within the meaning of the said clause XVII. It was also claimed that by reason of the premises the respondent's seat in the Legislative Council had become vacant in April, 1927, and that he had nevertheless sat and voted in the Council since 1927 on various dates specified and had thereby incurred the penalty amounting to a total of Rs. 23,000, which the appellant, by virtue of clause XVII., was entitled to recover in that action. It is unnecessary to consider whether the claim of the plaintiff in that action was well founded or not, for on November 1, 1928, an Order in Council was made in these terms:—

" Whereas by an Order in Council bearing date the 19th day of December 1923, and known as the Ceylon (Legislative Council) Order in Council, 1923 (hereafter referred to as 'the Principal Order'), provision was made for the constitution of a Legislative Council in and for the Island of Ceylon:

And whereas His Majesty reserved to Himself, His Heirs and Successors, power, with the advice of His or Their Privy Council, to revoke, alter, or amend the Principal Order as to Him or Them should seem fit:

And whereas the Principal Order was amended by an Order in Council bearing date the 21st day of March, 1924, and known as the Ceylon (Legislative Council) Amendment Order in Council, 1924:

And whereas it is necessary to indemnify and relieve the Editor of the Sinhalese Etymological Dictionary from such penal consequences as he may have incurred or suffered by sitting or voting in the Council as an Elected Member thereof between the 24th day of January, 1924, and the

coming into operation of this Order in Council after his seat became, or is alleged to have become, vacant on the ground hereinafter appearing, or as he might hereafter incur or suffer for a like reason:

And whereas it is therefore expedient to amend the Principal Order as hereinafter is set forth:

Now, therefore, it is hereby ordered by His Majesty by and with the advice of His Privy Council, as follows:—

I. This Order may be cited as 'The Ceylon (Legislative Council) Amendment Order in Council, 1928.' It shall be published in the *Ceylon Government Gazette* and shall come into operation on the date of such publication.

II. No action, prosecution, or legal proceeding whatsoever under the provisions of Article XVI. of the Principal Order or otherwise, shall be brought, instituted, or maintained—

(a) for the recovery of any penalty incurred, or alleged to have been incurred, under the said Article, whether for the amount prescribed therein, or not; or

(b) for the recovery of any damages, the enforcement of any forfeiture or penal consequences or the declaration of any vacancy or incapacity—

against the Editor of the Sinhalese Etymological Dictionary for or on account of or in respect of his having sat or voted in the Council as an Elected Member thereof at any time between the 24th day of January, 1924, and the date of the coming into operation of this Order in Council after his seat became, or is alleged to have become, vacant by reason of his having any direct or indirect pecuniary interest in any contract with the Government of the Island for or on account of the Public Service, or of his having accepted a public office under the Crown in the Island, within the meaning of Article XVII. of the Principal Order; and if any such action, prosecution, or legal proceeding has been, or shall hereafter be, brought or instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make.

III. Article XVII.—(1) of the Principal Order is hereby amended by the addition thereto of the following proviso:—

' Provided that nothing in this article shall be construed so as to render vacant the seat of any Elected Member of the Council on the ground that by reason of his being or becoming an Editor of the Sinhalese Etymological Dictionary he has, or may have, any such pecuniary interest in any contract with the Government of this Island as aforesaid, or has accepted any public office under the Crown in this Island within the meaning of this Article. '

IV. His Majesty hereby reserves to Himself, His Heirs and Successors, power, with the advice of His or Their Privy Council, to revoke, alter, or amend this order as to Him or Them shall seem fit. "

The Order in Council of 21st March, 1924, is irrelevant as regards this action, and need not be again mentioned.

If the Order in Council of November 1, 1928, be valid, it is obvious that any rights which the appellant may have had in regard to the matters for which his action was brought exist no longer, and its validity is the sole question to be decided upon this appeal. In their Lordships' opinion, there was power in His Majesty to make the Order in Council now objected to. It was argued that this was an exercise of the Royal Prerogative by the King in Council, as the supreme executive officer of the Island. It appears to their Lordships that this was not an exercise of the Royal Prerogative in that sense. It is indeed the exercise by

His Majesty, as Sovereign, of the legislative powers inherent in him by his title derived from conquest and cession of Ceylon, so far as he had not parted with any of them by acts of his own; and their Lordships are of opinion that it is plain from the letters patent and Orders in Council already recited that His Majesty had expressly reserved to himself the right to do that which, by the Order in Council now in question, he undoubtedly has done. Such right as the plaintiff may have had arose entirely out of the Order in Council of December 19, 1928, which was made by His Majesty in Council by virtue of the same authority as that which justifies the making of the Order in Council of November 1, 1928. Their Lordships are of opinion that, while it would not have been competent for His Majesty, by virtue of the Royal Prerogative alone to make either order, he was perfectly competent and had sufficient right and title to make them both by virtue of the legislative authority he had reserved to himself when parting with a portion of the right originally vested in him.

It was argued that the Order in Council of November 1, 1928, was *ultra vires* as affecting to take away rights already in existence, thus having a retrospective action. The effect, however, of the order of 1928, as expressed on the face of it, was no more than an act of indemnity and relief in respect of penalties incurred. It may be true that "Not Jove himself upon the past hath power"; but legislators have certainly the right to prevent, alter, or reverse the consequences of their own decrees. There is no necessity to give instances to prove that they have frequently done so; even going so far as to restore the heritable quality to blood which had been deprived of its virtue by Acts of attainder. Indeed, in the last Session of the Parliament which has just ended, legislation, precisely similar to that here called in question, was passed to deprive a plaintiff of penalties already accrued by reason of breaches of the Lord's Day Act.

Their Lordships have therefore humbly advised His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

