1943 *Present:* **Moseley A.C.J. and Keuneman J.**

DE SILVA, Appellant, *and* DE SILVA, *et al.*, Respondents.

238—D. C. Colombo, 1,286.

Public Service Mutual Provident Association (Cap. 207)—Meaning of word orphan—Rule defining term—Validity of Rule 8 (1).

The word "orphan" in section 3 of the Public Service Mutual Provident Association Ordinance includes the children of a deceased child as defined by rule 8 (1) of the rules of the Association.

Where an Ordinance gives power for the making of rules and provides that the rules if made in a particular manner shall have the same effect as if they were made under the Ordinance, and rules are made in the manner provided, the ordinary question of *intra vires* or *ultra vires* will not apply but it will be permissible for the Courts to consider whether the rules so made are consistent with the provisions of the Ordinance, and to hold that the rules if inconsistent with the provisions of the Ordinance are bad.

THIS was an interpleader action brought by the plaintiff, The Public Service Mutual Provident Association. The plaintiff alleged that one C. A. de Silva was a member of the Association. On his death in November, 1939, the plaintiff paid half the sum payable on his death to the first defendant, the son of C. A. de Silva. As to the other half there was a dispute between the first defendant and the other defendants, the children of a son of C. A. de Silva, who had predeceased him.

N. K. Choksy (with him *R. A. Kannangara*), for the first defendant, appellant.—The chief object of the Public Service Mutual Provident Association is to make provision for the widows and orphans of the members. Section 3 of, and the preamble to, Cap. 207 make this quite clear. The deceased member in the present case left no widow, and the appellant is the only surviving child. The respondents who are the grandchildren of the deceased member cannot claim any share. The word "orphan" has a restricted meaning; the Shorter Oxford English Dictionary defines it as a fatherless or motherless child. The objects of the Association cannot be extended by any rule made under section 16 of Cap. 207. Rule 8 (1), in so far as it benefits grandchildren, is *ultra vires*. A rule going beyond the objects of the main Ordinance cannot be given effect to. It is not possible, by way of a rule, to make a new enactment. "If a rule were really repugnant to the provisions of the Act, the rule, though made under the powers of the Act, would not override its enactments".—*Craies on Statute Law (4th ed.), p. 268.*

H. V. Perera, K.C. (with him *E. B. Wickremanayake*), for the second, third, and fourth defendants, respondents.—The meaning of the word "orphan" may vary according to the context, and is wide enough to include grandchildren.

Section 16 (3) of Cap. 207 provides that all rules made under it shall be as valid and effectual as if they formed a part of the Ordinance. Rule 8, therefore, should be read as part of the Ordinance. In the circumstances no question of *ultra vires* arises. The conflict, if any, between section 3

and rule 8, should be treated as a conflict between two sections to be found in the same Act. See *dictum* of Lord Herschell L.C. in *Institute of Patent Agents v. Lockwood* [1]; *Minister of Health v. The King.* [2]

R. A. Kannangara, in reply.—The passage referred to in *Institute of Patent Agents v. Lockwood* (*supra*) is only an *obiter dictum.* That case was decided in 1894, before the danger of delegated legislation was fully realized. The *obiter dictum* of Lord Herschell L.C. was adopted by Viscount Dunedin, but not by the other Judges, in *Minister of Health v. The King* (*supra*). See also *Perera v. Fernando* [3].

The words "child" and "children" must be deemed to mean descendants of the first degree only, and do not include grandchildren—*Mohamadu Bhai v. David de Silva* [4]; *Steyn on Law of Wills (1935), p. 39; Odgers on Construction of Deeds and Statutes, p. 155; Stroud's Judicial Dictionary, p. 305.*

Cur. adv. vult.

July 2, 1943. KEUNEMAN J.—

This is an interpleader action brought by the plaintiff, The Public Service Mutual Provident Association, now incorporated by Chapter 207 of the Ordinances. The plaintiff alleged that C. A. de Silva was a member of the plaintiff Association, and died on November 9, 1939. The plaintiff Association paid to the first defendant, the son of C. A. de Silva, half the total sum payable on the death, but as the other half, to wit, a sum of Rs. 2,069.80 was in dispute between the first defendant on the one side and on the other the second, third, and fourth defendants, the children of a son of C. A. de Silva who had predeceased him, the plaintiff brought that amount into Court, and the present dispute is between the 1st defendant-appellant and the second, third, and fourth defendants-respondents.

The appellant argued that the benefits payable by the Association are restricted to the widow and orphans of the deceased member. The deceased left no widow, and the appellant is the only surviving child of the deceased member, and the only person who can be regarded as his "orphan". The appellant denied that the grandchildren were entitled to any portion of the benefits.

The appellant depended upon section 3 of the Ordinance which sets out the general objects of the Association as follows:—

> "to promote thrift, to give relief to the members in time of sickness or distress, to aid them when in pecuniary difficulties, and to make provision for their widows and orphans".

The appellant contended that under section 16 (1) there was no power given to make rules in order to extend the objects of the Association, for under section 16 (1) (*g*) it is restricted to "the accomplishment of its objects".

A good deal of the argument turned on the meaning of the word "orphan". The Shorter Oxford English Dictionary defines it as follows. "one deprived by death of father or mother, or (usually) of both; a fatherless or motherless child". This is the strict meaning, but the District Judge

[1] *L. R. (1894) A. C. 347 at 359.*
[2] *L. R. (1931) A. C. 494.*
[3] *(1914) 17 N. L. R. 494 at 499.*
[4] *(1911) 5 Weer 84*

has given instances no doubt derived from America, where a somewhat wider meaning has been given to the term. I further think that, in popular speech, the word orphan denotes some degree of dependence on the parents, and the term is hardly used, where the person deprived of his parents is himself grown up and a bread winner, as is the appellant. Again in the case of this Association, if the word "orphan" is to be given the restricted meaning, the result would be that if the member had left no widow or surviving children, but had left grandchildren, there would be no one who could claim the benefits. This would hardly be in consonance with the other object of the Association, viz., to promote thrift. I am therefore of opinion that the word "orphan" has not a precise and strict meaning, and that further definition of the word was possible, and even desirable.

The respondents argued that under the rules of the Association there has been this further definition. The relevant rule reads as follows :—

> "8. (1) Upon the death of any member the amount to his credit . . . . shall be paid to his widow and legitimate children (which expression shall mean and include the legitimate issue of any deceased legitimate child per stirpes or by representation) . . . . ".

The respondents further pointed that this rule has been confirmed by the Governor, and notice of the confirmation has been published in the *Government Gazette,* and say that the rule must be regarded "as valid and effectual as if it had been enacted" in the Ordinance itself (see section 16 (3)).

The effect of these last words has been considered in the case of *Institute of Patent Agents v. Lockwood* [1] decided in the House of Lords—a considered judgment, but one which is no doubt *obiter* on this point. Lord Herschell L.C. said on this matter :

> "They are to be 'of the same effect as if they were contained in the Act'. My Lords, I have asked in vain for any explanation of the meaning of these words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it . . . . But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament".

The Lord Chancellor added :—

> "No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it".

[1] *L. R. (1894) A. C. 347,*

This matter was again considered by the House of Lords in *Minister of Health v. The King*[1] (on the prosecution of Yaffe). Viscount Dunedin there stated that "the real clue to the solution of the problem is to be found in the opinion of Herschell L.C." in the passage I have already cited. He further referred to a point, also made in this appeal—

> "There is an obvious distinction between that case and this, because there Parliament itself was in control of the rules for forty days after they were passed, and could have annulled them if motion were made to that effect, whereas here there is no Parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. Yet I do not think that that distinction, obvious as it is, would avail to prevent the sanction given being an untouchable sanction".

Viscount Dunedin sums up the matter as follows :—

> "What that comes to is this: The confirmation makes the scheme speak as if it were contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it."

The majority of their Lordships are not in disagreement with the dictum of Lord Herschell, but they emphahise, (1) that the rule must be within the statutory authority, and (2) that the rules should not be inconsistent with the provisions of the Act.

In my opinion the true principle to be derived from these decisions in their application to the present case is that, where there is an Ordinance which gives power for the making of rules, and provides that the rules, if made in a particular manner, shall have the same effect as if they were made under the Ordinance, once the rules are made in the manner provided, the ordinary question of *intra vires* or *ultra vires* will not apply, but it will always be permissible for the Courts to consider whether the rules so made are consistent with the provisions of the Ordinance, and to hold that the rules,if inconsistent with the provisions of the Ordinance are bad. In the present case, we must treat the matter, not on the footing that the rule has to be canvassed as subordinate, because it has to be shown to be *intra vires*, but rather on the footing that both the original provisions of the Ordinance, and the present rule are contained in the same enactment. The question then arises whether the rule is inconsistent with the provisions of the Ordinance. As I have already pointed out, I do not consider that the word "orphan" has been used in its strict meaning, and I consider that the rule gives it a meaning which is not incompatible with the provisions of the Ordinance. In other words there is not such an inconsistency, that we must hold that the rule must give way to the provisions of the Ordinance as strictly interpreted.

One other point has been raised by the appellant. He contends that, if the rules are to be regarded as valid, he is the sole nominee of the deceased member. The rules as originally made had not provided for nomination, but by the *Gazette* of November 21, 1924, the power was given to a member who desired the children's shares to be divided in

[1] *L. R. (1931) A. C. 494.*

other than equal shares, to notify to the Association the shares he desired to be allotted to each child. It is to be noted that this rule did not give the member the right to exclude any child entirely from participating in the benefits. But by a later *Gazette* of July 5, 1929, the member was given the power to assign the benefits to any one or more children to the exclusion of the remainder. The evidence with regard to the alleged nomination of the appellant is as follows :—A letter 1 D 1 of February 25, 1925, alleged to have been signed by the Secretary of the Association, and acknowledging a letter of the "23rd inst", relating to the nomination of the appellant, was tendered, but rightly rejected as not proved. The member's letter of February 23, 1925, was not available. Another letter 1 D 2 of September 4, 1924, by the deceased member purporting to nominate the appellant was admitted. A copy of the nomination register of the Association was also put in, where the name of the nominee is given as the appellant, but the "date of appointment" (by which presumably is meant the date of nomination) is given as "September and 10th November, 1924". Clearly then the only acts of nomination proved were made before the date of the *Gazette* of November 21, 1924, and even if, 1 D 1 can be said to have some effect, the nomination in question was before the *Gazette* of July 5, 1929, which for the first time gave to the member the right to exclude any of the possible beneficiaries. I hold that there has been no valid nomination by the member of the appellant as sole beneficiary.

The appeal is dismissed with costs.

MOSELEY A.C.J.—I agree.

Appeal dismissed.