P. C.* B. SURINDER SINGH KANDA . . . APPELLANT;

1962 AND

April 2. GOVERNMENT OF THE FEDERATION OF MALAYA . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE FEDERATION OF MALAYA.

Malaya—Police—Constitution—Power of dismissal—Whether in Commissioner of Police or in Police Service Commission—Conflict between Constitution and existing law—Constitution provisions paramount—Dismissal of inspector by Commissioner of Police void—Police Ordinance (Malaya), 1952, ss. 9 (1), 45 (1)—Constitution of the Federation of Malaya, August 31, 1957, arts. 135 (1) (2), 140 (1), 144 (1), 162 (1) (4) (6).

Natural Justice — Opportunity to meet charge — Dismissal of public servant—Police disciplinary proceedings—Findings of board of inquiry furnished to adjudicating officer but not to accused police officer—Constitution of the Federation of Malaya, art. 135 (2).

Article 135 (1) of the Constitution of the Federation of Malaya, which came into operation on Merdeka Day (August 31, 1957), provided: "No member of any of the services"—which included the police service—"shall be dismissed . . . by an authority subordinate "to that which, at the time of the dismissal . . . has power to appoint "a member of that service of equal rank."

By art. 140 (1): "There shall be a Police Service Commission, "whose jurisdiction shall, subject to article 144, extend to all "persons who are members of the police service."

Article 144 (1) provided: "Subject to the provisions of any "existing law and to the provisions of this Constitution, it shall be "the duty of a Commission . . . to appoint . . . and exercise disci-"plinary control over members of the service . . . to which its "jurisdiction extends."

In July, 1958, the Commissioner of Police in Malaya purported to dismiss the appellant, an inspector of police, on the ground that at an inquiry before an adjudicating officer he had been found guilty on a charge of failing to disclose evidence at a criminal trial. While under the law as it existed before Merdeka Day the commissioner had, pursuant to the Police Ordinance, 1952, power to dismiss an inspector, the appellant contended that after the coming into force of the Constitution that power was only in the Police Service Commission, to which the commissioner was a subordinate authority, and he sought a declaration that his purported dismissal by the commissioner was void and of no effect:—

Held, that the provision in article 144 (1) of the Constitution that the functions of the Police Service Commission were "sub-"ject to the provisions of any existing law" meant only such

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* *Present*: LORD DENNING, LORD HODSON and LORD DEVLIN.

provisions as were consistent with the commission carrying out the duty entrusted to it. Where, however, as here, there was a conflict between the existing law and the Constitution the former would have to be modified so as to accord with the latter, and the court itself, where the Head of the Federation of Malaya had not done so under article 162 (4) of the Constitution within the prescribed time limit, could and would under article 162 (6) make the necessary modification in the powers of the Commissioner of Police. There could not, at one and the same time, be two authorities with concurrent power to appoint members of the police service. The Constitution must prevail and the existing law must be applied with such modification as might be necessary to bring it into accord with it. Accordingly, since Merdeka Day the commission and not the commissioner had power to appoint and dismiss members of the police service and the dismissal of the appellant by the commissioner was therefore void.

Held, secondly, that the failure to supply the appellant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the charge, amounted to a failure to afford the appellant "a reasonable oppor- "tunity of being heard" in answer to the charge within the meaning of article 135 (2) of the Constitution and to a denial of natural justice (post, p. 338).

Order of the Court of Appeal of the Supreme Court of the Federation of Malaya reversed.

APPEAL (No. 9 of 1961) from an order of the Court of Appeal of the Federation of Malaya (December 9, 1960) setting aside a judgment of the High Court at Penang (March 24, 1960).

The following introductory statement is taken from the judgment of the Judicial Committee: The appellant, B. Surinder Singh Kanda, was an inspector of police in the Royal Federation of Malaya Police. On July 7, 1958, he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector Kanda brought an action in the High Court challenging that dismissal. Rigby J. declared that his dismissal was void and of no effect. The Government appealed. The Court of Appeal by a majority (Thomson C.J. and Hill J.A., with Neal J. dissenting) allowed the appeal and held that inspector Kanda was validly dismissed. He now appealed to their Lordships' Board.

The appeal raised two questions: (1) The first question was whether the Commissioner of Police had any power to dismiss him. Inspector Kanda said that under the Constitution the power rested only with the Police Service Commission: (2) The second

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question was whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. Inspector Kanda said they were not.

The Federation of Malaya came into being on Merdeka Day, that was, August 31, 1957. Thenceforward the Constitution was the supreme law of the Federation (article 4). The Supreme Head of the Federation was the Yang di-Pertuan Agong (article 32). Great changes were made in the structure of government. In particular the public services were placed under commissions. Thus a Police Service Commission was set up with jurisdiction over all members of the police service (article 140). But the persons serving in the police force continued in general to have the same powers and functions as before (article 176). And for the most part the existing laws were continued unchanged (article 162).

In September, 1957, after Merdeka Day, two men were charged in the Supreme Court at Penang with uttering forged lottery tickets. The prosecution failed. The reason was because the prosecution called a number of witnesses, including police officers, whose evidence was palpably false. The two accused men were acquitted. The Commissioner of Police ordered an inquiry to be held. The board of inquiry was presided over by Mr. D. W. Yates, a very senior police officer. It reported that false evidence had been fabricated for use at the trial.

After considering the report the Commissioner of Police decided that proceedings should be taken against inspector Kanda. Not criminal proceedings before the courts of law, but disciplinary proceedings under what the Police Regulations called " Orderly Room " Procedure." The commissioner appointed Mr. Strathairn to be the adjudicating officer to inquire into the charges. Mr. Strathairn was junior to Mr. Yates who had conducted the inquiry. Mr. Yates drafted a specimen charge, but Mr. Strathairn preferred his own. He drafted another. The charge, as eventually laid against inspector Kanda, was that he had failed to disclose evidence which to his knowledge could be given for the two accused men: or alternatively, that he had been guilty of conduct to the prejudice of good order and discipline in that he had submitted investigation papers to his superior officer knowing the same to be false. Another charge was afterwards added that he wilfully disobeyed a lawful command to subpoena a witness.

In April and May, 1958, the charges were heard by Mr. Strathairn, the adjudicating officer. He found inspector Kanda guilty on the original charge of failing to disclose evidence and

recommended that he be dismissed from the Force. He also found him guilty on the added charge of disobeying a lawful command and recommended an award of a severe reprimand. The Commissioner of Police approved the recommendations: and on his direction, on July 7, 1958, inspector Kanda was formally notified that he was dismissed from the Force. On July 14, 1958, inspector Kanda appealed to the Ministry of Defence and also to the Police Service Commission. (He did that because he was not sure which was the right authority to hear his appeal.) Over a year later, on July 19, 1959, the secretary to the Police Service Commission informed him that his appeal was dismissed. It was not contended that, by that internal appeal within the administration, he in any way waived his right to apply to the courts.

On October 1, 1959, inspector Kanda brought this action against the Government of the Federation of Malaya claiming a declaration that his dismissal was void, inoperative and of no effect. He put it on two grounds: (1) His dismissal was effected by an authority which had no power to dismiss him, contrary to article 135 (1) of the Constitution; (2) he was not given a reasonable opportunity of being heard, contrary to article 135 (2) of the Constitution.

1962. Feb. 8, 12, 13, 14. *Rodney Bax* for the appellant. The main and short point is that the purported dismissal of the appellant by the Commissioner of Police on July 7, 1958, was, as the trial judge found, invalid because the commissioner on that date no longer had power to dismiss him. Article 4 of the Federal Constitution provides that the Constitution " is the supreme law " of the Federation." Article 135 (1), which is absolutely vital and has no qualification whatever, enacts that " No member of " any of the services "—which includes the police—" shall be " dismissed . . . by an authority subordinate to that which, at " the time of the dismissal . . . has power to appoint a member " of that service of equal rank." Article 140 (1) established a Police Service Commission, and article 144 (1) provided that " Subject to the provisions of any existing law and to the provi- " sions of this Constitution, it shall be the duty of a commission " to appoint . . . and exercise disciplinary control over members " of the service . . ." The submission is that, relating that to article 135 (1), the Police Service Commission had the power and duty to appoint, and therefore no subordinate authority—and the commissioner is an authority subordinate to the commission—

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shall dismiss. The power previously vested in the commissioner by virtue of the provisions of the Police Ordinance, 1952, to dismiss a superior police officer was impliedly revoked by articles 135 (1), 140 and 144 of the Constitution and was thereby transferred to the commission as from Merdeka Day. The power of dismissal has thus clearly been transmitted to the commission and the court must apply the existing law. All that the appellant has to show is that the commission at the relevant date had power to appoint a member of the police force of his grade, and that is enough, because admittedly he was dismissed by a subordinate authority.

Article 162 (6) of the Constitution provides that "Any court "or tribunal applying the provision of any existing law which has "not been modified on or after Merdeka Day under this article "or otherwise may apply it with such modifications as may be "necessary to bring it into accord with the provisions of this "Constitution," and the alternative submission is that the provisions of the Police Ordinance, 1952, must, after Merdeka Day, be modified, that is to say repealed, by the court applying the same, pursuant to article 162 (6), so as to give effect to article 144. The effect of article 162 (6) is to bring any provisions of any existing law into accord with the Constitution. The provisions of the Constitution in that context mean the express provisions to set up bodies and functions themselves. If that is right, then it is plain that the Police Service Commission had the power and, indeed, the duty to appoint. The pre-existing law gives the power to one authority and the Constitution to another, and if the effect of the provisions is to leave the pre-existing law in force, then the Constitution power is merely theoretical.

The second point is that the purported dismissal of the appellant was in any event invalid because he was not given a reasonable opportunity of being heard, in accordance with the provisions of article 135 (2) of the Constitution, in that the terms of the findings of the board of inquiry were before the adjudicating officer but unknown to the appellant, who never had any knowledge of the contents of the report until about the fourth day of the trial of the action. The trial judge rightly found on the evidence that the proceedings before the adjudicating officer were, by reason of the appellant's lack of knowledge, held in a manner contrary to natural justice. If there was in the report of the board of inquiry, as in fact there was, matter to the appellant's disadvantage, strongly prejudicial to him, the existence of which he did not know and with which he had no chance to deal, then it cannot

be said that he was given a reasonable opportunity of being heard. Thomson C.J. in his judgment in the Court of Appeal said that "the charges themselves must have conveyed to him [the appellant] the view regarding himself which the board of inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed . . . the actual words, however, are of little importance." It is submitted that the actual words used in the report here are of the utmost importance. The trial judge said that "the very fact he [the adjudicating officer] was furnished with, and read, the findings of the board must, in my view, to put it at its lowest, have created a very real likelihood that he would have a pre-determined bias or—to use the words of Lord O'Brien L.C.J. in the case of *Rex* v. *Justices of Queen's County* [1]—'an operative 'prejudice, whether conscious or unconscious,' against the plaintiff in respect of the disciplinary charges upon which he was to adjudicate." Those words of Lord O'Brien L.C.J. were adopted by Lord Parker C.J. in *Reg.* v. *Duffy, Ex parte Nash.*[2] At the very least the appellant should have been told what was in the report. It is also submitted that the proceedings were not in conformity with the Police Regulations, and as Hill J.A. said in his judgment in the Court of Appeal: "Such proceedings could invariably result in unconscious bias in the mind of any or all adjudicating officers as a result of knowledge of the proceedings before and the findings of boards of inquiry." There are two cases on bias which may be of assistance: *Cooper* v. *Wilson* [3]; *Reg.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [4]; the present is a stronger case. The judgment of the trial judge was right and should be restored.

Lord Bledisloe Q.C. and *Philip Clough* for the respondent. There are two questions: first, a point of construction, whether the power to appoint and dismiss a superior police officer, which was conferred under the Police Ordinance, 1952, on the Commissioner of Police, remained vested in him after Merdeka Day when the Federal Constitution came into force, or whether the relevant provisions of the Constitution are to be construed as having divested the commissioner of that power and as having conferred

[1] [1908] 2 I.R. 285, 294.
[2] [1960] 2 Q.B. 188, 200; [1960] 3 W.L.R. 320; [1960] 2 All E.R. 891, D.C.
[3] [1937] 2 K.B. 309, 322, 342; 53 T.L.R. 623; [1937] 2 All E.R. 726, C.A.
[4] [1956] 1 Q.B. 36, 41; [1955] 3 W.L.R. 563; [1955] 3 All E.R. 300, D.C.

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it on the Police Service Commission. Secondly, whether or not in the course of the disciplinary proceedings the appellant was given a reasonable opportunity of being heard in compliance with article 135 (2) of the Constitution. It is clear that under the pre-existing law the commissioner had power to appoint and dismiss. It has been conceded, rightly or wrongly, that the commissioner is subordinate in rank to the commission. If he had power to appoint, there must be power to dismiss.

The initial jurisdiction of the commission is conferred by article 140 (1) of the Constitution "subject to article 144," which itself is a general provision and is "subject to the provisions of "any existing law and to the provisions of this Constitution." "Existing law" is defined in article 160 (2) as meaning "any "law in operation in the Federation . . . immediately before "Merdeka Day." That definition must be applied, "unless "the context otherwise requires," throughout the Constitution. Reading article 144 (1) with that definition in it, it reads: "Sub-"ject to the provisions of any law in operation in the Federation "immediately before Merdeka Day . . . it shall be the duty of" the commission, etc. Under article 162 (1) the existing law shall be continued in force, but it may be modified by the Head of the Federation as provided in article 162 (4). In the present case it is common ground that the pre-existing law has not been modified under sub-article (4), and the court should not apply the rather curious power under article 162 (6) to import a modification unless it is absolutely necessary—not merely expedient—to do so, and the submission is that it is not necessary or even desirable. Further, article 176 (1) supports the argument that all existing law in force was to continue and that the same persons should have the same functions. The commissioner's powers have been preserved under article 144 and have not been taken away by legislative modification, and, unless the court thinks it absolutely necessary to modify under article 162 (6), the power remains. If it results that there are two persons with the power, that cannot take away the plain meaning of the words—that power is vested in the commissioner.

The process of appointing the Police Service Commission must necessarily take some time. There was no commission in existence on July 7, 1958 (the date of dismissal). If the appellant's contention that the power of the commissioner came to an abrupt end on Merdeka Day is correct, then there would be an interval of time between that date and when the Police Service Commission was appointed. If that is right, chaos would reign in that

interval, and that illustrates the difficulties which would arise. The matter is a pure question of construction, but reference may be made to *Rex* v. *Churchwardens of St. James, Westminster* [5]— it is rather a long way from the present case. See also *Akisatan Apena of Iporo* v. *Akinwande Thomas*.[6] In *Smith* v. *London Transport Executive* [7] Lord Simonds said: "The words 'subject "'to the provisions of this Act' . . . are naturally words of "restriction. They assume an authority immediately given and "give a warning that elsewhere a limitation upon that authority "will be found." *Suresh Chandra* v. *Himangshu* [8] has no real bearing on this case—the dismissal there was by an officer subordinate in rank. It may be that, as a practical result of the construction contended for, the Police Service Commission looks after the executive officers and the commissioner looks after the junior officers.

In summary on the point of construction: (1) The jurisdiction of the Police Service Commission was from its very inception expressly made subject to existing law: articles 140, 144. (2) The jurisdiction of the commission was also made subject to the provisions of the Constitution: article 144 (1). (3) "Existing "law" is widely defined in article 160 (2) and can be modified. "Existing law" clearly includes the Police Ordinance, 1952, and its meaning cannot be restricted to mere legal procedure or machinery. (4) "Subject to the provisions of the Constitution" refers to provisions such as article 144 (3), (4) and (5) and article 135 (2), and in particular to article 162 (1)–(4), which provided machinery for the modification or amendment of existing law. (5) Article 176 (1) preserves the powers and functions of the pre-Merdeka Day officials, including the commissioner of police. (6) The respondent's construction simply results in the Police Service Commission inheriting the powers of the High Commissioner to deal with gazetted police officers, leaving the power to deal with junior ranks in the Commissioner of Police, and that is a very sensible division of functions. (7) If the Ruler and the Government had wished to alter this state of affairs they would have made an order under article 162 (4). (8) The power of the court or tribunal under article 162 (6) is a power to apply existing law in a particular way, and is only exercisable in a particular way where it is necessary—the word "necessary" is stressed;

[5] (1836) 5 A. & E. 391.
[6] [1950] A.C. 227, 233, P.C.
[7] [1951] A.C. 555, 569; [1951] 1 T.L.R. 683; [1951] 1 All E.R. 667, H.L.
[8] (1951) 55 Cal.W.N. 605, 608.

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there is no such necessity here. (9) There is nothing indefinite about the period during which the existing law must continue in force. If it is not already modified under article 162 (4) it can still be amended under article 162 (1). (10) Article 176 (1) renders it impossible to adopt Neal J.'s view in the court below of the meaning of existing law that it merely relates to procedure or machinery.

With regard to the second point—whether the appellant was in the course of the disciplinary proceedings given a reasonable opportunity of being heard in compliance with article 135 (2)—the principle stated by Blackburn J. in *Reg.* v. *Rand* [9] is applicable in all cases where there is bias or prejudice or poisoned mind —where there is "a real likelihood" of bias. *Frome United Breweries Co. Ltd.* v. *Bath Justices* [10] applies Blackburn J.'s test of real likelihood of bias. The cases are all reviewed in *Reg.* v. *Camborne Justices, Ex parte Pearce*,[11] which is the last word on this subject and makes the principle very clear. Here it comes down to whether there was any real likelihood that the adjudicating officer's mind was in any way poisoned by the fact that he knew the contents of the report of the board of inquiry. In applying the general principle it was assumed in certain of the cases that there was a real likelihood of bias—where, e.g., there was a financial interest. Here the adjudicating officer *had* to read the report; it contained unquestioned statements of witnesses. It may be that there was an outside possibility of bias, but it was not a case of likelihood. If there was bias, and it is submitted that there was not, it could not be put right by supplying the document to the appellant. In *Cooper's* case,[12] which is very near the present case, conflicting views were taken. [Reference was also made to *Byrne* v. *Kinematograph Renters Society Ltd.*,[13] *University of Ceylon* v. *Fernando*,[14] *Russell* v. *Duke of Norfolk*,[15] *Goold* v. *Evans*,[16] *In re an Arbitration between Gregson and Armstrong*,[17] *Ridge* v. *Baldwin* [18] and *Reg.* v. *Duffy, Ex parte Nash.*[19]] The principle to be culled from those cases is that it must be determined whether there is a real likelihood of bias or

[9] (1866) L.R. 1 Q.B. 230, 232.
[10] [1926] A.C. 586, 590; 42 T.L.R. 571, H.L.
[11] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.
[12] [1937] 2 K.B. 309, 357, C.A.
[13] [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.
[14] [1960] 1 W.L.R. 223, 227; [1960] 1 All E.R. 631, P.C.
[15] (1949) 65 T.L.R. 225; [1949] 1 All E.R. 109, C.A.
[16] [1951] 2 T.L.R. 1189.
[17] (1894) 70 L.T. 106.
[18] [1961] 2 W.L.R. 1054; [1961] 2 All E.R. 523.
[19] [1960] 2 Q.B. 188.

prejudice; each case depends on its own circumstances and no general rule can be laid down to cover every case. The underlying principle is that nothing should be done in the name of justice which would strike a reasonable man as unjust. It is more important that justice should be done than that it should be seen to be done. In the present case the adjudicating officer was in fact carrying out the duties of both judge and prosecuting counsel. He was really conducting an investigation, and must necessarily be supplied with all the material which would be available to prosecuting counsel; that is inevitable and one should not shut one's eyes to the reality of the situation. It is unfortunate, but that is the procedure laid down in the regulations. One has to make up one's mind whether there is a reasonable likelihood of bias; the trial judge found in favour of the appellant on this point; the three judges in the Court of Appeal were against him.

Bax in reply. There is no evidence on whether there was a gap before the commission came into existence—it should not be assumed that there was. " Subject to the provisions of any " existing law " is not intending to sweep away existing law, but to apply the provisions of the Constitution to existing law mutatis mutandis, that is, to retain the existing law so far as it can be applied in conformity with the provisions of the Constitution. The Constitution intends to create a new machinery of government. In other words, the police force and other services remain unchanged, but the persons to administer those bodies are henceforth to be the commissions and not whatever other authority it may have been. The Police Regulations which applied before Merdeka Day were thereafter to be applied by the Police Service Commission.

With regard to article 162 (6), if the Ruler of the Federation has not seen fit to make any modification other than that made by the Constitution itself, then the court is entitled to look at the existing law and apply it as provided by the Constitution, and to say here that the commission is the authority to appoint or dismiss. Under the existing law the powers of the commissioner are to be preserved, and preserved also subject to the provisions of the Constitution, but that means not necessarily preserved in their entirety, and his functions of appointing and dismissing members of the police force are transferred to the commission. That is, he held on the same terms as before, but subject to the provisions of the Constitution.

There was here a breach of natural justice. Examination as to previous bad conduct would have been forbidden, and that very

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thing came into the possession of the adjudicating officer by other means—he saw the report. [*Rex* v. *Justices of Bodmin, Ex parte McEwen*[20] was referred to.]

April 2. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships will consider the two grounds of appeal separately.

First. The power of the commissioner to dismiss.

The governing article of the Constitution on this point is article 135 (1), which came into operation at once on Merdeka Day (August 31, 1957): "135 (1): No member of any of the "services mentioned [the police service is one of these] shall "be dismissed or reduced in rank by an authority subordinate "to that which, at the time of the dismissal or reduction, has "power to appoint a member of that service of equal rank."

Inspector Kanda was dismissed on July 7, 1958, nearly a year after Merdeka Day. In order to see who had power to dismiss him, it is necessary under article 135 (1) to ask who had power at that time to *appoint* an officer of his rank: for no one could dismiss who could not appoint.

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint superior police officers, including inspectors of police, see section 9 (1) of the Police Ordinance, 1952; and if an inspector had been found guilty of an offence against discipline, the Commissioner of Police could dismiss him, see section 45 (1) of that Ordinance. Did this law continue to exist after Merdeka Day? In particular, did it continue to exist on July 7, 1958?

Inspector Kanda says that that law did not continue to exist. It was replaced, he says, by the articles of the Constitution which set up the Police Service Commission and entrusted to them the power to appoint members of the police service. The power of appointment was, he says, in the commission. The Commissioner of Police was an authority subordinate to the commission. He could not therefore dismiss him, because he could not appoint him.

Inspector Kanda relies for this contention on articles 140 (1) and 144 (1) of the Constitution which read as follows:

"140 (1). There shall be a Police Service Commission, whose "jurisdiction shall, subject to article 144, extend to all persons "who are members of the police service.

"144 (1). Subject to the provisions of any existing law and to

[20] [1947] K.B. 321, 325; [1947] 1 All E.R. 109, D.C.

" the provisions of this Constitution, it shall be the duty of a " Commission . . . to appoint, confirm . . . promote, transfer " and exercise disciplinary control over members of the service . . . " to which its jurisdiction extends."

In answer to this contention, the Government of Malaya point to the words " subject to " in both articles 140 (1) and 144 (1). Those words give priority, they say, to the existing law and preserve it intact, including the power of the commissioner to appoint superior police officers.

The Government admit that after Merdeka Day a Police Service Commission was established and that since Merdeka Day all superior police officers, including police inspectors, have been appointed by the Police Service Commission. They admit, too, that on July 7, 1958, the Commissioner of Police was an authority subordinate to the Police Service Commission. But, despite these admissions, they say that the existing law as to appointment and dismissal was preserved by the opening words of article 144 (1) which says that the duty of the commission is " subject to the " provisions of any existing law." This gives priority, they say, to the existing law. The Constitution is subject to the existing law, and not vice versa. The words " subject to the provisions " of this Constitution " can be amply satisfied, they say, by reference to article 144 (3) (4) (which refers to special posts) and 135 (2) (which gives a right to be heard).

This argument found favour with Thomson C.J. and Hill J.A.: but their Lordships find themselves unable to accept it. Their Lordships realise that it is a difficult point but they prefer the view taken by Rigby J. and Neal J. It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under article 144 (1) the functions of the Police Service Commission were " subject " to the provisions of any existing law ": but this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it. If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in article 162 which run as follows:

" 162 (1) Subject to the following provisions of this article . . .

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" the existing laws shall . . . continue in force on and after Merdeka Day, with such modifications as may be made therein under this article . . . (4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law . . . as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution . . . (6) Any court or tribunal applying the provision of any existing law (which has not been modified on or after Merdeka Day under this article or otherwise) may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution. (7) In this article 'modification' includes amendment, adaptation, and repeal."

It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under article 162 (4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the court to do so under article 162 (6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And their Lordships are of opinion that they were lawfully made.

Their Lordships do not overlook the argument of the Government that there was no conflict. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting

them with the power to appoint gazetted police officers, leaving the Commissioner of Police to appoint all others. Their Lordships cannot accede to this argument. Under article 140 the jurisdiction of the Police Service Commission extends to *all* persons who are members of the police service: and their functions under article 144 apply to all of them also. The commission has the duty, and therefore the power, to appoint *all* members of the police service, and not merely the gazetted police officers. The Police Service Commission can, of course, delegate any of its functions under article 144 (6), but still it is its own duty and its own power that it delegates. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.

The result is that on July 7, 1958, the Police Service Commission was the authority to appoint an officer of the rank of inspector Kanda: and therefore under article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss inspector Kanda as he did. The dismissal was therefore void.

Second. The reasonable opportunity of being heard.

The governing article of the Constitution on this point is article 135 (2), which came into operation on Merdeka Day (August 31, 1957): "135 (2) No member of such a service as "aforesaid [the police service is one of these] shall be dismissed "or reduced in rank without being given a reasonable opportunity "of being heard."

Several complaints were made by inspector Kanda of a failure to comply with this article, but none of them survived for argument before their Lordships except one complaint which related to the report of the board of inquiry. This complaint was not contained in the statement of claim, but this was because inspector Kanda did not know the contents of the report until the fourth day of the trial. Their Lordships think that an amendment should have been made even at that stage to permit it, but as the case proceeded before Rigby J. and the Court of Appeal as if an amendment had been made, their Lordships think it would be wrong to shut it out now.

The report of the board of inquiry contained a severe condemnation of inspector Kanda. It was sent to the adjudicating officer before he sat to inquire into the charge. He read it and had full knowledge of its contents. But inspector Kanda never had it. He never had an opportunity of dealing with it. Indeed, he never got it until the fourth day of the hearing of this action, when

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this took place between the judge and the legal adviser to the Government:

"*The court to legal adviser*: Am of the opinion that in the "interests of justice the findings of the board of inquiry ought to "be made available to the court and to the plaintiff and privilege "waived thereon. . . .

"*Legal adviser*: Must be some misunderstanding—they have "always been available—and no privilege claimed thereon.

"*Court*: It is my clear impression that both in court and "throughout earlier proceedings in chambers, privilege has been "consistently claimed in respect of the board of inquiry file and "the findings thereon."

The report was then made available to inspector Kanda and his advisers. It dealt in detail with the evidence of each witness heard by the board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It referred to inquiries made by the board itself apart from the evidence given by witnesses. In the result it presented, as Rigby J. said, a most damning indictment against inspector Kanda as an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit perjury. It said: "The board are "unanimously of opinion that inspector Kanda is the 'villain of "'the piece'. . . . The board were forced to the conclusion "that inspector Kanda is a very ambitious and a thoroughly "unscrupulous officer who is prepared to go to any lengths, "including the fabrication of false evidence, to add to his reputa-"tion as a successful investigator. The board could not help "considering how many of his previous successful cases had been "achieved by similar methods."

The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that report without inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and, indeed, before the courts in Malaya proceeded on the footing that this depended on this further question: Was there a "real "likelihood of bias," that is, "an operative prejudice, whether "conscious or unconscious," on the part of the adjudicating officer, Mr. Strathairn, against inspector Kanda? The well-known line of cases was cited from *Reg.* v. *Rand* [1] to *Reg.* v. *Camborne Justices, Ex parte Pearce*.[2] Adopting this test, much effort was

[1] (1866) L.R. 1 Q.B. 230.

[2] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

devoted to showing that Mr. Strathairn was not biased against inspector Kanda. Thus he had not adopted the specimen charge drafted for him by his superior officer, Mr. Yates, but had framed lesser charges of his own. And he deliberately refrained from calling the two accused men as witnesses because he realised that their evidence might be very prejudicial to the accused. He only called them at a later stage because Mr. Yates directed him to do so. The trial judge, Rigby J., was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So inspector Kanda failed on that way of looking at the case.

In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education* v. *Rice* [3] down to the decision of their Lordships' Board in *Ceylon University* v. *Fernando*.[4] It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to

[3] [1911] A.C. 179, 182; 27 T.L.R. 378, H.L.

[4] [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.

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the judge without his knowing. Instances which were cited to their Lordships were *In re an Arbitration between Gregson and Armstrong*,[5] *Rex* v. *Bodmin Justices, Ex parte McEwen*[6] and *Goold* v. *Evans & Co.*,[7] to which might be added *Rex* v. *Architects' Registration Tribunal*,[8] and many others.

Applying these principles, their Lordships are of opinion that inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, "the furnishing of a copy of the findings of the board of inquiry "to the adjudicating officer appointed to hear the disciplinary "charges, coupled with the fact that no such copy was furnished "to the plaintiff, amounted to such a denial of natural justice "as to entitle this court to set aside those proceedings on this "ground. It amounted, in my view, to a failure to afford the "plaintiff a reasonable opportunity of being heard in answer to "the charge preferred against him which resulted in his dis-"missal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby J., it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also. There was some question at one time as to the scope of the declaration, but it was agreed before their Lordships that it should be limited to the date of the dismissal.

Their Lordships will therefore report to the Head of the Federation as their opinion that the appeal should be allowed,

[5] (1894) 70 L.T. 106, D.C.
[6] [1947] K.B. 321; [1947] 1 All E.R. 109, D.C.
[7] [1951] 2 T.L.R. 1189, C.A.
[8] (1945) 61 T.L.R. 445; [1945] 2 All E.R. 131, D.C.

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the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the Federation of Malaya Police Force purported to be effected by one W. L. R. Carbonnell, the Commissioner of Police of the Federation of Malaya, on July 7, 1958, was void, inoperative and of no effect. The respondents should pay the costs of the appellant before their Lordships' Board and in the Court of Appeal and in the High Court.

Solicitors: *Summer & Co.; Wray, Smith & Co.*

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JACK ERIC THORNTON . . . . . PETITIONER;
AND
THE POLICE . . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF FIJI, APPELLATE JURISDICTION.

Nationality—Colonial immigration ordinance—Validity—Regulation of entry into and residence in colony—Not repugnant to Imperial Act extending to colony and conferring citizenship of "United Kingdom "and Colonies" — Colonial Laws Validity Act, 1865 (28 *&* 29 *Vict. c.* 63), *s.* 2—*British Nationality Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *s.* 12—*Immigration Ordinance (Fiji), No.* 33 *of* 1947, *s.* 8.

Colony—Ordinance—Validity—Immigration ordinance—Colonial Laws Validity Act, 1865, *s.* 2—*British Nationality Act,* 1948, *s.* 12—*Immigration Ordinance (Fiji), No.* 33 *of* 1947, *s.* 8.

The Colonial Laws Validity Act, 1865, provides by section 2: "Any colonial law which is . . . in any respect repugnant to the "provisions of any Act of Parliament extending to the Colony to "which such law may relate . . . shall be read subject to such Act ". . . and shall, to the extent of such repugnancy, but not other- "wise, be and remain absolutely void and inoperative."

By section 12 (1) of the British Nationality Act, 1948: "A "person who was a British subject immediately before the date of "the commencement of this Act shall on that date become a citizen "of the United Kingdom and Colonies. . . ."

By section 8 of the Immigration Ordinance, 1947, of Fiji: "(2) "The Principal Immigration Officer may issue a permit to any

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and the RT. HON. L. M. D. DE SILVA.