Present: Shaw J. and De Sampayo A.J.

1915.

BASNAYAKE NILAME *v.* THE ATTORNEY-GENERAL.

245—D. C. Kandy, 22,466.

Kandyan Convention of 1815, Article 5—Subsequent legislation relating to processions and music—Actions in Municipal Courts to enforce rights under the Convention.

Article 5 of the Kandyan Convention does not invalidate the provisions of subsequent legislative enactments relating to processions and music.

THE facts appear from the judgment.

Anton Bertram, K.C., Attorney-General, and *van Langenberg, K.C., Solicitor-General* (with *V. M. Fernando, C.C.*), for defendant, appellant.

Bawa, K.C. (with him *E. W. Perera* and *D. R. Wijewardene*), for plaintiff, respondent.

Cur. adv. vult.

February 2, 1915. SHAW J.—

The plaintiff brought this action in his capacity as Basnayake Nilame of the Wallahagoda dewale against the Attorney-General as representing the Crown, claiming a declaration that he as such Basnayake Nilame is entitled to the right and privilege of holding and conducting a perahera procession, by which the Basnayake Nilame of the Wallahagoda temple, with the retainers and tenants of the said temple, has the right and privilege of marching to and from and through all the streets of the town of Gampola, including that part of Ambagamuwa street with which this action is concerned, with elephants, to the accompaniment of tom-toms, drums, and other musical instruments. He further claimed a declaration that he was entitled to damages Rs. 25, and further damages of Rs. 25 per year until the said right and privilege should be granted. The plaint alleged that the right and privilege claimed is a very ancient one, enjoyed in connection with the temple prior to the cession of the Kingdom of Kandy to the British Government, and that the rights and privileges of the temple were acknowledged, recognized, and confirmed to the temple when all the inhabitants of the Kingdom of Kandy were by the Crown, on the cession of the Kingdom of Kandy under the Kandyan Convention of 1815, confirmed in and allowed to enjoy the rights and privileges they had enjoyed under the Kandyan Government; that the rights and privileges claimed were, after the Kandyan Provinces came under the British Government, enjoyed and exercised by the temple through its various Basnayake Nilames,

1915.

SHAW J.

Ramanyaka Nilame v. Attorney-General

and are necessary for its proper dignity and prestige and for the proper conducting and carrying out of the ceremonies to be performed by the temple, and further claimed that the temple has acquired a right by prescription to the performance and enjoyment of the said rights and privileges.

It then proceeded to allege that the Government Agent for the Central Province, on August 27, 1912, wrongfully and in breach of the said Kandyan Convention and agreement and of the rights and privileges enjoyed by the temple, refused to allow the plaintiff permission to proceed through that portion of Ambagamuwa street within a hundred yards of either side of the Muhammadan mosque in the town of Gampola, to the accompaniment of tom-toms, drums, and other musical instruments, and still refuses to do so though thereto often requested, and went on to claim the declaration, damages, and costs.

The defendant by his answer submitted—

(1) That the plaint discloses no cause of action against the defendant.

(2) That, even if the Government Agent of the Central Province was guilty of any wrongful act, which the defendant denies, the defendant is not liable to be sued in respect thereof.

(3) That the right claimed is not one which is known to or recognized by law.

(4) That the plaintiff is not vested with the said right, and cannot maintain any action in respect thereof.

(5) That, assuming such a right to exist, the present action is not maintainable against the defendant.

He further denied various allegations in the plaint, and submitted that all assemblies and processions in the public roads, streets, and thoroughfares of the town of Gampola are governed by the provisions of section 69 of the Police Ordinance, No. 16 of 1865, and section 64 of the Local Boards Ordinance, No. 13 of 1898, and that the right, if any, of any person to hold and conduct the perahera ceremony of procession and to beat tom-toms in the streets of Gampola is subject to such provisions, however ancient such right may be, and that the licenses referred to in the Government Agent's letter of August 27, 1912, were the licenses referred to in the said Ordinances. That for many years past it has been thought necessary that music and the beating of tom-toms in all processions passing the Muhammadan mosque situated in Ambagamuwa street should be stopped, and licenses for processions have been issued subject to the condition that music and tom-toms should be stopped within fifty yards on either side of the said mosque.

The answer then admitted that in answer to an application made to the Government Agent asking for " the removal of the obstruction

to beat tom-toms opposite the Muhammadan mosque in Ambagamuwa street, Gampola, on the occasion of the perahera of the Wallahagoda dewale," the Government Agent replied that licenses for the use of music and for the assembly of the body of persons joining the procession would be issued on condition that the music was so stopped in passing the said mosque, and submitted that the fact of the Government Agent sending such replies did not itself constitute an interference with any right, and further alleged that the right, if any, has been lost by prescription through non-user, and also submitted that plaintiff is not, as Basnayake Nilame, clothed with the right claimed, or with the right to maintain an action in respect of it.

The case put forward at the hearing on behalf of the plaintiff was as follows.

That at the time the Kandyan Kingdom was taken over by His Majesty King George III. in 1815 a Convention was made between His Majesty and the principal chiefs of the Kandyan Provinces, acting on behalf of the inhabitants, agreeing to the terms of cession of the kingdom and the rights to be enjoyed by the inhabitants of the Kandyan Provinces in the future, which Convention was given effect to by the Proclamation of March 2, 1815. It was contended that this Convention and the Proclamation giving effect to it constitute a treaty binding and immutable, which can neither be annulled or varied by His Majesty or by any legislative authority to whom he might subsequently delegate his powers of legislation, and that any subsequent legislation varying this Proclamation or limiting any rights under it is consequently invalid. That by paragraph 5 of the Convention and Proclamation it is declared that " the religion of Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected."

That prior to 1815 and from time immemorial the Basnayake Nilames of the Wallahagoda temple at Gampola have had and exercised the right, on the occasion of the annual Esala perahera, on the occasion of the water-cutting ceremony, of proceeding from the dewale to a spot called Bothalapitiya on the Mahaweli-ganga, where the ceremony takes place, with elephants and tom-tom beating, and that it is an essential rite in the perahera procession that the route to be taken should pass through Ambagamuwa street, and that the music and beating of tom-toms should be continuous from the time the perahera starts until it arrives at the place where the ceremony takes place, and that this perahera with its necessary essentials is a rite of the religion of Buddha existing at the date of the Convention of 1815, and therefore inviolable under the provisions of paragraph 5 of the Convention, and that there is no power to annul or abridge the rights granted by the Convention by any subsequent legislation.

1915.

SHAW J.

Basnayake Nilame v. Attorney-General

The learned Acting District Judge having heard a large quantity of verbal evidence, and having received in evidence a large number of documents, found that this Esala perahera was a rite of the religion of Buddha which was undertaken to be maintained and protected under the Convention, and that the accustomed route of the perahera and the continuous performance of the music was an essential part of the rite, and held that the Kandyan Convention constitutes a law or compact binding and unalterable in all following times, however urgent might be the motives, and however extreme the exigency demanding the alteration of it. He held that so much of the claim as claims damages against the Government could not be sustained, but that the plaintiff was entitled to maintain an action against the Government for a declaration of the rights claimed, and that he was the proper person to sue. Accordingly he gave judgment for the plaintiff granting the declaration asked for, with costs against the defendant.

From this judgment the defendant appealed, raising many objections to the judgment, which I will not at the moment recapitulate, but the most important of which I will deal with later.

I am of opinion that the appeal must be allowed. The letter of the Government Agent of August 27, 1912, upon which the cause of action is based, is to the effect that the licenses and permissions required on the occasion of the perahera under sections 69 and 90 of the Police Ordinance, 1865, for the use of music and to beat tom-toms in the streets, and under section 64 of the Local Boards Ordinance, 1898, for the holding of a religious procession and the performance of music in the streets of the town, would only be issued on the condition that the music was stopped fifty yards on one side of the Muhammadan mosque in Ambagamuwa street and was not resumed before a point fifty yards beyond the mosque was reached. I think that this letter and the condition mentioned in it are amply justified by the terms of the Ordinances referred to. The sections apply generally to all occasions when it is desired to have religious processions and music in the streets, and there is no exception in favour of this or any other particular perahera. On behalf of the respondent it was contended that these sections were not intended to, and did not in fact apply to, this particular perahera, because the Wallahagoda Esala perahera is a religious rite of the Buddhist religion which existed prior to the Convention of 1815, at which continuous music along a particular route is essential, and that paragraph 6 of the Convention of 1815 must be read as giving a particular right to this especial perahera, which the general terms of the sections of Ordinances referred to did not take away, and even if in fact they did purport to take it away, they were to that extent invalid, because rights acquired under a Convention by which a territory is ceded to the Crown are inviolable, and cannot afterwards be annulled or varied by the Crown by subsequent legislation.

I am unable to accede to either of these propositions. The enactments are in general terms, and include all occasions on which it is desired to hold religious or other processions in the streets accompanied by music; moreover, I do not think that the paragraph of the Convention referred to does in fact give any special right to this particular perahera. The paragraph reads: "The religion of Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected."

In my opinion the paragraph means that the religion of Buddha generally as practised in the ceded provinces will be maintained and protected, not that every local custom of particular towns or districts should for ever remain unaltered; and I do not think that the paragraph gives, or was intended to give, this particular perahera any right to be conducted in a manner different to other religious processions in the Colony, or to be for ever conducted apart from the ordinary police supervision for the protection of the public peace and safety which may appear to the Government to be necessary. But even supposing that the particular right claimed was reserved by the Convention to this particular perahera, such right is now controlled and varied by the provisions of the Police and Local Boards Ordinances, and I am unable to agree with the argument that the Kandyan Convention of 1815, whether it be considered as a treaty of cession or as a piece of legislation, is immutable and not subject to alteration by subsequent legislation.

The sovereign powers of legislation delegated by the King to the Imperial Parliament and to local Legislatures, to be exercised with his consent as to matters within their competence and subject to the control of the Imperial Parliament, are absolute and unlimited. "If," says Blackstone at *Volume I., Comm., p. 91,* "Parliament would positively enact a thing to be done which is unreasonable, there is no power in the ordinary forms of the Constitution that is vested with authority to control it." And as to the power of Colonial Legislatures, Willes J., in delivering the judgment of the Full Court of King's Bench in *Phillips v. Eyre* [1] says: "We are satisfied that it is sound law that a confirmed act of the local Legislature lawfully constituted, whether in a settled or ceded Colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

It was suggested that under the Royal Instructions regulating legislation by the local Legislature in this Colony the authority to legislate contrary to any obligations imposed by treaty was restricted. When, however, we look at the Royal Instructions of 1833, which were in force when the Police Ordinance was passed, we find they contain no such restriction; and those of 1889, which were

[1] *L. R. 6 Q. B., at p. 20.*

1915.

SHAW J.

Bamayake Nilame v. Attorney General

in force when the Local Boards Ordinance was passed, merely contain instructions to the Governor not, *inter alia*, to assent to any bill the provisions of which shall appear inconsistent with obligations imposed upon the Sovereign by treaty, unless the bill contains a suspending clause. As, however, the Royal Assent has been given to both the Ordinances referred to, the objection seems to have no force.

The only authority I know of which may appear to in any way to restrict the powers to legislate in abrogation or derogation of rights conferred by treaty are the much-quoted dictum of Lord Mansfield in *Campbell v. Hall* [1] and the case of *White & Tucker v. Rudolph.* [2] In *Campbell v. Hall* [1] Lord Mansfield says: "The articles of capitulation upon which the country is surrendered, and the articles of peace upon which it is ceded, are sacred and inviolable according to their true intent and meaning."

This dictum was in no way necessary for the decision of the point involved in the case. The facts of that case were that the Island of Grenada was taken by British arms from the French King. The island surrendered on capitulation, one of the terms of which was that the inhabitants should pay no other duties than what they before paid to the French King. After the capitulation His Majesty appointed a Governor, with power to summon an assembly to make laws with the consent of the Governor in Council, in the same manner as the other assemblies of the King's Provinces in America. Having done this, and before any legislative assembly met, the King purported by letters patent to impose an export duty of 4½ per centum on all produce exported from the island in lieu of all customs and export duties hitherto collected.

The decision in the case was that His Majesty having delegated his power of legislation in the island to an assembly, the subsequent legislation by the King himself was invalid, and that the plaintiff, who had paid certain duties to the collector of customs, was entitled to recover them back. The dictum of Lord Mansfield did not, and was never intended to mean, that the articles of capitulation could never be altered by competent legislation, and this, I think, appears clear from the words used by him at the end of the judgment: "it can only now be done by the Assembly of the island, or by an Act of the Parliament of Great Britain."

As a matter of fact I know, as having been at one time Acting Chief Justice of the Island of Grenada, that the duties have been frequently altered by the local Legislature, and now stand at a very much higher rate than at the time of the capitulation. The decision in *White & Tucker v. Rudolph* [2] turned on practically the same point as *Campbell v. Hall.* [1] There the crown, by Proclamation dated April 12, 1877, proclaimed that the Transvaal should remain

[1] *1 Cowp. 204.*

[2] *Kotze's Trans. Rep. 115.*

a separate Government " with its own rights and Legislature," and that " the laws now in force in the State should be retained until altered by competent legislative authority." After the Crown had done this and given up all claim to legislate in the ceded country in favour of the Legislature to be appointed for the separate government of the Transvaal, the Administrator sought by an order to alter the licensing laws of the country; this it was held, following *Campbell v. Hall*, [1] he had no power to do, the Crown having given up all claim to legislate for the territory. Looking at the Kandyan Convention itself, we find it has been varied in several respects by subsequent legislation, apart from the Ordinances bearing on this case, and no question has ever been raised as to the validity of such legislation. I refer as instances to the Proclamation of May 31, 1816, which was prior to the time when His Majesty had delegated his powers of legislation in the Kandyan Provinces to the Legislative Council of this Colony; also to the Buddhist Temporalities Ordinance and to various other Ordinances passed by the local Legislature relating to the administration of justice which apply to the Kandyan Provinces.

Another example of treaty rights being altered by subsequent legislation will be found in this Colony in the alteration of Article 15 of the Treaty of Colombo as to the payment of the clergy, by Ordinance No. 14 of 1881. In my opinion it is clear that it was within the competence of the Legislature of the Colony to vary any rights acquired under the Convention of 1815.

The view I have taken on this point renders it unnecessary for me to go to any length into the other points raised in the case, and without reviewing the whole of the evidence, I will only say that I do not agree with the finding of the Acting District Judge on the facts. I do not think that the evidence satisfactorily shows that it is an essential part of the rite of the water-cutting ceremony either that the perahera should pass down Ambagamuwa street, or that the music should be continuous during the whole of the route; all that it seems to me to show is that, in the opinion of the witnesses called for the plaintiff, the route and continuance of the music was essential because they were customary, and the evidence shows that similar customary proceedings in respect of the similar ceremony in the town of Kandy, the headquarters of the Buddhist religion, such as the purification of the town prior to the ceremony and the continuance of the ceremony for fifteen days without a break, have been discontinued without demur; and even in the town of Gampola itself the evidence seems to me to satisfactorily establish that since the year 1907, although there have been protests from the persons having the management of the perahera, the route of the procession has either not passed the mosque concerning which the present dispute arises, or the music has stopped when passing the mosque.

[1] *1 Coup. 204.*

1915.

SHAW J.

Basnayake Nilame v. Attorney-General

In the course of the appeal the Attorney-General pressed upon the Court the contention that the claim in the case, involving as it does the construction of a treaty and the acquisition of personal rights under it, was not within the jurisdiction of the Court.

There can be no doubt that the law on this point is as laid down by Lord Alverston in *West Rand Central Gold Mining Co. v. Rex*, [1] where he says: "There is a series of authorities from the year 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the Municipal Courts, and that rights supposed to to be acquired thereunder cannot be enforced by such Courts"; and a little lower down on the same page, where he says: "it is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which Municipal Courts administer."

Similar principles were applied in *Rustomjee v. The Queen*,[2] *Cook v. Sprigg*,[3] and other cases quoted by the Attorney-General. It does not seem to me, however, that these cases or the principles laid down in them apply to the present case. What the Court was here asked to construe and to enforce were alleged rights under the Proclamation of March 2, 1815. In my opinion this Proclamation is not a Treaty. The Treaty or Convention was entered into prior to the Proclamation, and is contained in a separate document signed by the various chiefs of the Kandyan Provinces. The original bulletin of March 2, 1815, printed at page 180 of Legislative Acts of the Ceylon Government printed in 1856, sets out the preamble to the Proclamation, which concludes as follows: "On those grounds His Excellency the Governor has acceded to the wishes of the chiefs and people of the Kandyan Provinces, and a Convention has in consequence been held, the result of which the following Act is destined to record and proclaim."

The Proclamation affirming what was agreed to by the Convention appears to me to be a piece of legislation by His Majesty, who then had the sole power of legislating in the ceded Provinces, to give effect to the agreements arrived at, and is subject to be construed and enforced by the Courts in the same manner as any other act of legislation.

Three other points were taken by the Attorney-General and argued before us:—

(1) That no action lies against the Crown in respect of the cause of action alleged;

(2) That the plaintiff has no cause of action as Basnayake Nilame and trustee of the Wallahagoda temple; and

[1] (1915) 2 *K.B., at pp. 408-9.*

[2] 2 *Q. B. D. 69.*

[3] (1899) *A. C. 572.*

(3) That the letter from the Government Agent of August 27, 1912. did not constitute any infringement of a right, even if such right existed.

At the conclusion of the case the Attorney-General stated that he did not wish to take any technical points, and withdrew his objections to the judgment on these grounds. I will, therefore, not deal with them beyond saying that nothing in this case must be construed as inferring any acquiescence on my part to any view that a claim of this character lies against the Government of this Colony or could be enforced in England under a Petition of Right.

In my opinion the appeal should be allowed, and judgment entered for the defendant with costs.

DE SAMPAYO A.J.—

The plaintiff is the Basnayake Nilame and trustee of the Wallahagoda dewale within the Local Board limits of the town of Gampola. It is customary for the annual Esala perahera or procession of that dewale to march through the streets of Gampola, including what is known as Ambagamuwa road, with elephants, to the accompaniment of tom-toms and other music. For some years the procession has been conducted on license issued by the authorities under the provisions of the Police Ordinance, No. 16 of 1865, and the Local Boards Ordinance, No. 13 of 1898. In the Ambagamuwa road is situated a Muhammadan mosque, and some trouble having arisen between the Muhammadans and the Buddhists in connection with the beating of tom-toms when the procession passed the mosque, and a riot having taken place in consequence, a condition came to be insisted on that music should be stopped within a certain distance on either side of the mosque, and in order to mark the distance the authorities in 1911 placed two posts with signboards notifying that the beating of tom-toms should be stopped between these two posts. On August 17, 1912, when the procession of that year was about to take place, the President of the District Committee, appointed under the Buddhist Temporalities Ordinance wrote to the Government Agent of Kandy, a letter in which he claimed for the dewale the right to conduct the procession without any interruption of music, and requested the Government Agent to remove the posts, which were described as an " obstruction " to the beating of tom-toms opposite the mosque. Apparently the Government Agent was addressed either in his capacity as Chairman of the Local Board of Gampola or as having police authority. In reply, the Government Agent informed the President that the license would be issued as usual, subject to the condition above referred to. Thereupon the procession was abandoned and the plaintiff brought this action against the Attorney-General as representing the Crown. The plaint asserted that the right of the plaintiff as Basnayake Nilame of the dewale to conduct the perahera without any restriction was

1915.

DE SAMPAYO A.J.

Basnayake Nilame v. Attorney-General

acknowledged and confirmed by the Kandyan Convention of 1815, and stated as a cause of action that the Government Agent had wrongfully, and in breach of the Kandyan Convention and of the rights and privileges of the said temple, refused to allow the plaintiff permission to conduct the Esala procession within one hundred yards of either side of the mosque in Ambagamuwa road, and proceeded to pray that "the plaintiff, as Basnayake Nilame of the Wallahagoda temple, may be declared entitled to the right and privilege claimed by him, together with Rs. 25 as damages already incurred, and Rs. 25 as further damages per year until the said privilege and right is granted." The plaintiff's case was put in the Court below as a matter of contract constituted by Article 5 of the Kandyan Convention, but the District Judge, rejecting the theory of a contract, but purporting to act on what he considered the analogy of an action *rei vindicatio*, which was held to be maintainable against the Crown in *Le Mesurier v. The Attorney-General*,[1] declared that the plaintiff as Basnayake Nilame and trustee of the Wallahagoda temple was entitled to conduct the procession with elephants, to the accompaniment of tom-toms, drums, and other musical instruments, through all the streets of Gampola, including that portion of Ambagamuwa road with which this action is concerned, and he entered judgment for the plaintiff accordingly with costs of action, but without damages. From this judgment the Attorney-General has appealed.

Among other defences the Attorney-General pleaded that this action, being one *ex delicto*, was not maintainable against the Crown, that the plaintiff as Basnayake Nilame or trustee had no right to sue on the alleged cause of action, and that no cause of action had in fact arisen. These points were argued before us at great length on both sides. But on the last day of argument the Attorney-General intimated to us that for the purposes of the present appeal he waived these points and desired a decision on the other questions involved in the case, and it is therefore unnecessary to express any opinion on them, though I would have been quite prepared to do so. The questions remaining to be considered are: (1) whether the evidence satisfactorily shows the Buddhist rite in connection with the Esala perahera to extend to the use of an unvarying route and continuous beating of tom-toms; (2) whether such a privilege can be said to have been secured by Article 5 of the Kandyan Convention; (3) whether on the footing that the Kandyan Convention is a treaty the plaintiff is not bound by subsequent legislation relating to processions and music; and (4) whether the rights under the treaty, whatever they are, can be enforced by action in a Municipal Court.

The District Judge has gone at length into the history of dewales and the institution of the Esala perahera, but his citations are

[1] 5 *N. L. R.* 65.

remarkable only for the absence of any statement that any particular route or the unceasing beating of tom-toms during the whole course of the procession is essential to the ceremony. The District Judge chiefly relies, however, on the oral evidence of the dewale tenants, such as the kapurala, tom-tom beaters, and trumpeters, who speak of the practice during their period of service and of the tradition in regard to the matter. They add that unless the perahera proceeds along the Ambagamuwa road, and unless the tom-toms are beaten continuously without any interruption for any cause whatever, the god in whose honour the ceremony takes place will send great calamities upon the people, and they even attribute to this cause the recent floods at Gampola and the sudden death of a certain kapurala. The District Judge seriously accepts all this evidence, though he himself says in a moment of critical exercise of judgment that "all this sounds artificial, unreal, forced for the purposes of this case," but he rejects his own doubt, and adds that the matter has to be judged, not according to modern standards, but according to the ideas of a Sinhalese Buddhist before 1815. The problem of a sick person lying at the point of death, or of a restive horse or elephant becoming dangerous to the processionists themselves is considered by him, and is disposed of by the remark that it was "utterly impossible for the Sinhalese mind to conceive of the stopping of the music for a horse or a sick man," and that "everything had to give way to the perahera." I confess that I find it difficult to believe that the religion of Buddha, which so insistently preaches the doctrine of gentleness and regard for life, has anything to do with this species of inhumanity. It is curious that even the more intelligent witnesses, like the Dewa Nilame of the Dalada Maligawa, the priest of the Niyangampaha Vihare, and the Secretary of the Buddhist Committee, proceed on the same lines as the dewale tenants. A possible and even probable explanation is that they are (to use the District Judge's expression) "forced for the purposes of this case" to give the evidence they have given, because any admission as to the stoppage of music on account of a special emergency, such as was put to them, would seriously prejudice the whole case. For, then, it may have to be logically admitted also that the necessities of public order and peace would be a good ground for such stoppage. Moreover, these witnesses who were apparently called as experts, have not been able, any more than the illiterate dewale tenants, to point to any religious or historical work for the proposition that an unvarying route and unceasing music are of the essence of the Esala perahera. Taking the oral evidence as *bona fide*, it seems to me that it amounts to no more than saying that, so far as the knowledge of the witnesses goes, the custom has been such as they describe, and that they argue from what has been to what ought to be. Even this, as will presently be seen, is negatived by facts proved in the case; but before alluding to these facts, I may mention a bit of evidence which has been given

1915.

DE SAMPAYO A.J.

Basnayake Nilame v. Attorney-General

by Mr. Ekneligoda, the Kachcheri Mudaliyar of Anuradhapura, but which the District Judge has failed to notice. The Mudaliyar says that at the Ellala Sohana (the tomb of King Ellala at Anuradhapura) Buddhist processions stop their music as a mark of respect in accordance with an order made by Dutugemunu. The allusion no doubt is to the story recorded in the *Mahawansa*, how that King Dutugemunu, having killed King Ellala in single combat, erected a monument in honour of the dead king, and ordained that all processions when passing the monument should as a mark of respect stop the music. The order appears to be observed to this day. So that ancient authority shows that the custom in connection with the Esala or any other procession is not "adamantine," as the learned District Judge puts it, but is subject rather to regulation by those in power, and that the unvarying character claimed for it is not founded upon any rule of religious obligation, for otherwise King Dutugemunu, the great patron of Buddhism and himself a pious Buddhist, would hardly have interfered with it for a mere sentimental or personal reason. Quite in harmony with this view of the matter is the practice under the British Government. The evidence indicates that for a great many years, probably ever since the provisions of the Police Ordinance relating to processions and street music were put into active operation, the Wallahagoda dewale authorities have applied for and obtained a license, and the procession has been conducted under the supervision of the police, and for some years—certainly since 1902—the license has been granted subject to the condition that the procession shall stop the beating of tom-toms when passing the Ambagamuwa road mosque, or shall take another route. In 1912—the year with which we are particularly concerned—the plaintiff himself applied for and obtained a license to conduct the procession avoiding the Ambagamuwa road, though the procession was abandoned, it is said, owing to the protests of the dewale tenants. It is true that in a previous year also the procession was abandoned for the same reason, but that does not diminish the force of the effect of the imposition and observance of the condition on the general question. The plaintiff's very case is that he has an absolute right, secured by the Kandyan Convention, to conduct the procession, and that no license to do so is required. And yet Basnayake Nilames of the dewale, including plaintiff himself, have hitherto acknowledged the necessity of a license being obtained from the constituted authorities. The power to grant a license necessarily implies the power to withhold it or to impose conditions. Similarly, in Kandy, where the great perahera is participated in not only by the various dewales, but by the Maligawa itself, it has been the practice, not perhaps to obtain a licence, but to inform the Government Agent, who thereupon takes the necessary steps to keep order by means of the police. To bring elephants into the town for the purpose of the perahera a

license is absolutely required, and is invariably applied for, and the chiefs of the Maligawa and the dewales even enter into a security bond to answer for any injury or damage that may be caused by the elephants. Here it may be noted that the claim being to have a procession with elephants as well as tom-toms, the circumstance just mentioned seriously affects the plaintiff's case. One important admission made by the Dewa Nilame is that, though according to the right contended for it is imperative that the perahera should take place during fifteen consecutive days without interruption, the perahera has, at least since the seventies of the last century, been intermitted on all Sundays during the period of the festival. The Dewa Nilame explains that this originated from the fact that Mrs. Parsons, wife of the then Government Agent, was ill, and the procession was stopped on a Sunday at the request of Mr. Parsons. Why Mrs. Parsons's illness should require the stoppage of noise on a Sunday only does not appear. But this explanation, such as it is, does not account for the intermission ever since. The District Judge, however, suggests that the Anglican Church of St. Paul being in the neighbourhood of the temple, and the Church of England being at one time the established church, the representatives of the Government were able to interfere with the perahera in that manner. The suggestion does not adequately explain the matter either. I have no doubt that the Sunday procession was stopped at the desire of some Government official, but I entertain a serious doubt that, if the right claimed is of vital importance as represented, the Dewa Nilame, the four Basnayake Nilames, and the numerous worshippers would have complacently agreed for the last thirty-five years and more to perform a maimed rite. The same departure from the alleged unvarying and invariable custom is exhibited at Anuradhapura, the sacred city of Buddhism. In 1905 certain arrangements were agreed upon in conference by the High Priest with the Government Agent, and were embodied in a notification by the Governor (see document D 10), whereby various restrictions were laid down with regard to the beating of tom-toms in connection with the Esala and other annual festivals; *inter alia*, that " in case of processions having to pass any place of public worship in which service is proceeding, the beating of tom-toms, music, and all noise likely to disturb the service must cease within one hundred yards of such building " This, again, shows that the High Priest of the sacred shrines and the Buddhist generally, who have since acted up to the arrangements so made, did not consider that the cessation of tom-toms and other music in front of places of worship was a violation of the rites of the Esala perahera. After examining the whole evidence, I have come to the conclusion that the plaintiff has failed to establish the claim for the unceasing use of tom-toms during the whole course of the procession, and that the evidence rather proves the contrary.

1915.

DE SAMPAYO A.J.

Bamayake Nilame v. Attorney-General

This being my view of the facts, it is, perhaps, hardly necessary that I should deal with the legal points involved in the case, but as they were debated at great length on both sides, and as they are in themselves important, I think it is right for me to do so. The Convention of March 2, 1815, was entered into between the British Sovereign and certain chiefs on behalf of the people in connection with the establishment of His Majesty's Government in the Kandyan Provinces. The nature of the instrument is a matter of some difficulty to determine. The official bulletin of that date calls it a "Public Instrument of Treaty," and the Attorney-General was willing that it should be so treated in this case. I shall deal with the case on that footing, though I am bound to say that there is good ground for thinking that the instrument, whatever it may be called, derives all its efficacy and virtue from its being recorded and proclaimed by the Proclamation of the same date. Now, Article 5 of the Convention runs thus: "The religion of Boodho, professed by the chiefs and inhabitants of these provinces, is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected." What does this mean? Does it rigidly provide that, even in matters touching the general peace and safety of the country and the various classes of its people, the hands of the British Government should ever after be tied? Does it necessarily mean that the rites of the Buddhist religion in all their external details, even where they affect public order, should be invariably maintained? I think it will appear otherwise when the matter is regarded in the proper historical perspective. It is an invariable rule of British policy to respect the religion of a conquered country. Quite the contrary policy had been followed by the Governments of the Portuguese and the Dutch, who preceded the English, and the Buddhists of those parts of the Island which were occupied by them had various causes of grievance in that respect. This state of things was doubtless in the minds of those who entered into the Convention, and it seems to me that the essence of the article in question is to assure freedom of worship to the Buddhists of the Kandyan Provinces which were then annexed to the British territories. This freedom cannot, however, be absolute, but must necessarily be subject to higher considerations of State and the fundamental principles of government. This is so in all cases. For instance, the practice of *suttee* had by inveterate custom acquired the force of religious obligation among the Hindus of India, and was even protected by the provision of the Statute Geo. III., c. 142, s. 12, and yet it was by the Regulation 18 of 1829 declared illegal and made punishable as an offence, the preamble to that Act reciting that the Legislature did not intend to depart "from one of the first and most important principles of the system of British Government in India, that all classes of the people be secure in the observance of their religious usages, so long as that system can be adhered to without

violation of the paramount dictates of justice and humanity." Applying these considerations to the present case, I cannot think that Article 5 of the Kandyan Convention according to its purpose and meaning justifies the conclusion that if the Esala perahera, in the course which it pursues or the manner in which it is conducted, threatens danger to public health or safety, the duly constituted authorities shall not have the power to regulate it. The first article of this very Convention recites that the oppressions of the King of Kandy "in the general contempt and contravention of all civil rights" had become intolerable, "the acts and maxims of his Government being equally and entirely devoid of that justice which should secure the safety of his subjects," and by the second article the king was accordingly "declared fallen and deposed from the office of king." It would be strange if this same Convention be construed as introducing a new species of tyranny under the protection of the British Government, namely, the tyranny of processions conducted without any regard to the safety of the processionists themselves and the common rights of all other classes of the subjects. That this is not the effect of Article 5 is shown from what was declared almost immediately afterwards by the British Government. In the year 1817 some of the chiefs became unfaithful, and the insurrection which arose having been put down, the Proclamation of November 21, 1818, was issued laying down various regulations for the government of the Kandyan Provinces. Clause 16 of this Proclamation declared that "As well the priest as all the ceremonies and processions of the Budhoo religion shall receive the respect which in former times was shown them; at the same time it is in nowise to be understood that the protection of Government is to be denied to the peaceable exercise by all other persons of the religion which they respectively profess", &c. This, indeed, is the spirit which may be said to have inspired the terms of the Convention when it guaranteed to the people of Kandy the right of free exercise of their religion; that is to say, that it should be exercised consistently with the performance of the supreme duty of Government towards the rest of His Majesty's subjects. The precaution of requiring a license and of imposing a condition in the license for the Esala perahera of the plaintiff's dewale was to conserve public order and to prevent riots between the different religious bodies, such as took place at Gampola in connection with this perahera. For the British Government to have bound itself by the Convention not to take such precautions would be to have deliberately abandoned one of the chief and essential functions of sovereignty. It is obvious that such could not have been the true intent of the Convention.

The next point to consider is the effect of subsequent legislation relating to processions and tom-toms. The argument on behalf of the plaintiff is that Article 5 of the Convention is fundamental law, and that any legislation inconsistent with it is unconstitutional

1915.

DE SAMPAYO A.J.

Basnayake Nilame v. Attorney-General

and inoperative. Before I refer to the chief authority upon which this argument is founded, I should like to say that, in my opinion, there is within the four corners of the Convention itself sufficient reservation of power to the British Government to effect alterations and reforms. After providing that the Kandyans shall enjoy their civil rights "according to the laws, institutions, and customs established and in force amongst them" (Article 4), and that the religion of Buddha and its rights shall be protected (Article 5), and after prohibiting every species of bodily torture (Article 6), and any sentence of death except by the warrant of the British Government (Article 7), the Convention proceeds in Article 8 to provide as follows: "Subject to these conditions, the administration of civil and criminal justice and police over the Kandyan inhabitants of the said Provinces is to be exercised according to established forms and by the ordinary authorities. *Saving always the inherent right of Government to redress grievances and reform abuses in all instances whatever, particular or general, where such interposition shall become necessary.*" It is clear to my mind that herein is contained an express reservation of power to introduce changes in respect of the matters provided for in the previous articles. Even if the saving clause, which I have italicized, is limited, as I think it should not be, to Article 8 itself, the regulation of public processions and street music is a matter touching the "administration of police," and, therefore, the provisions in question in the Police Ordinance, 1865, and the Local Boards Ordinance, 1898, are quite within the purview of the saving clause. The larger operation of that clause, however, is illustrated by the laws enacted and applied without any demur from the date of the Convention down to the present time. I have already referred to the Proclamation of November 21, 1818, by which the jurisdiction conferred upon the ancient tribunals of Kandy by Article 8 was entirely swept away. As to other instances, I need only mention the Ordinances which interfere with or modify the Kandyan law, the tenure of lands, including those of the temples themselves, the system of marriages and their solemnization and dissolution, and the administration of the Buddhist temporalities. There are Ordinance No. 5 of 1852, Ordinance No. 13 of 1859, now superseded by Ordinance No. 3 of 1870, Ordinance No. 4 of 1870, and, lastly, Ordinance No. 3 of 1889, now superseded by Ordinance No. 8 of 1905. This last is the most important in this connection, because it relates to matters intimately affecting the Buddhist priesthood, who under the Buddhist ecclesiastical laws were the rightful administrators of the affairs of the temples and their property and offerings, but from whom, though the Convention provided for their protection, the right was wholly taken away and vested in popularly elected lay committees and trustees. Not only so, but the Ordinance by one of its clauses prohibits the acquisition, by purchase, gift, or otherwise, of immovable property by the

temples except with the consent of the Governor, though the temples equally with the priests were to be maintained and protected under the Convention. It is interesting to note that the plaintiff in this action is himself a creature of the Buddhist Temporalities Ordinance, No. 8 of 1905, and would have no right to sue at all but for his status as Basnayake Nilame and trustee appointed under that Ordinance. It was stated at the Bar, in avoidance of the difficulty arising from the enactment and acceptance of this Ordinance, that the Buddhists themselves had asked for it. If so, the fact makes the matter worse for the plaintiff, because then it would appear that in the estimation of the Buddhists themselves Article 5 of the Convention has not the inviolability which is now claimed for it. The course of legislation to which I have referred seriously interferes with other articles of the Convention, *e.g.*, Article 4. If one article of the Convention is sacred, so must another be, and yet no one has said or can say that Ordinance No. 5 of 1852 and Ordinance No. 3 of 1870, which according to the argument contravene Article 4 of the Convention, are invalid and inoperative. It was in this connection suggested that mistaken acquiescence in all this legislation did not disentitle a party to take the objection when it arose in an action. I should say rather that the course of legislation for a whole century which has been uniformly and freely accepted and acted upon by the Kandyans in their relations amongst themselves and with the Government throws a reflex light upon the nature of the Convention itself, and shows it not to be of the inviolable character claimed for it.

In this part of the case Mr. Bawa, for the plaintiff, mainly relies on the judgment in *Campbell v. Hall*,[1] in which Lord Mansfield, referring to the consequences of the conquest of a country, lays down six preliminary propositions, the third of which is in the following terms: " That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. " The Attorney-General, however, points out that this is an *obiter dictum*, and contends that it is therefore not binding. The point of the decision in that case is undoubtedly different, but as to those propositions, Lord Mansfield says that they were propositions in which both sides were agreed, and which were too clear to be controverted. The proposition above quoted is reproduced as indisputable in recognized text books on the Royal Prerogative and Constitutional Law, and I think we ought to accept it as absolutely correct. I have already ventured to state what, in my opinion, is " the true intent and meaning " of the Kandyan Convention, and the proposition in question may, I think, be applied to this case without the plaintiff being able to derive any benefit from it. But further, when the articles of capitulation and of peace are declared to be " sacred

[1] *1 Cowp. 204.*

1915

DE SAMPAYO A.J.

Bamayake Nilame v. Attorney-General

and inviolable" according to their true intent and meaning, there remains the question whether they are so in the domain of law as administered by the Courts, or only in the international and political sphere. In the former case the Court must interpret the treaty, and ought to have the power to hold that any legislative act is *ultra vires* as being a violation of the treaty. No case has, however, been cited to us in support of the contention that the Court can do so. There are indeed cases, such as *In re Adam*,[1] in which it has been decided that on a question as to what system of law governs a particular subject-matter, the treaty, if it contains a provision on the subject, determines the matter. This may be illustrated in the present case by reference to Article 4 of the Convention, by which it is agreed that the civil rights of the Kandyans shall be governed by the Kandyan law. But for the Court to enforce the treaty as against subsequent acts of the Sovereign or of the Legislature is quite a different matter. Mr. Bawa referred us also to the South African case of *White & Tucker v. Rudolph*,[2] but that case by no means supports his contention. There, in 1879, after the first annexation of the Transvaal, the defendant as Landdrost of Utrecht had, upon the order of the Administrator of the Transvaal, forcibly entered the plaintiff's shop and seized the stock of liquor therein, in order to prevent sale of liquor to the soldiers then engaged in the Zulu war, notwithstanding the fact that the plaintiff had a license to deal in wines and spirits issued to him by the Government of the Transvaal, and it was held that the Administrator had no authority to issue the order to the defendant, and that the defendant's acts were illegal, inasmuch as it was provided by the Annexation Proclamation that the Transvaal should remain a separate Government with its own laws and legislature, and inasmuch as the Crown, whom the Administrator represented, had no longer any legislative authority by reason of the existence of the Legislature which had been confirmed and continued by the Proclamation. This is, in fact, the point decided by Lord Mansfied in *Campbell v. Hall*,[3] namely, that when the king delegates to a legislative assembly in a conquered country the power of legislation vested in him, he thereby deprives himself of the right of exercising it again. It will be seen that these decisions have no bearing on the present case, except so far as they uphold the supremacy of a local legislature. The cases cited by the Attorney-General further confirm the view that the laws enacted by a competent legislature in a conquered or ceded colony have force and validity, even though they may be inconsistent with the provisions of a treaty. The local case of *Government Agent v. Suddhana* [4] is a direct authority bearing on this case. For there also, in answer to a charge of beating tom-toms without a license in contravention of section 90 of the Police Ordinance, 1865, Article 5 of the Kandyan

[1] *1 Moore P. C. 461.*
[2] *Kotze's Trans. Rep. 115.*
[3] *1 Cowp. 204.*
[4] *5 Tamb. 89.*

Convention was invoked as justifying the beating of tom-toms without a license on the occasion of a Buddhist religious ceremony, and Layard C.J. held, *inter alia*, that the Convention did not, and could not, control the Legislature so as to exempt the Buddhists from the operation of the Police Ordinance, and the learned Chief Justice suggested that, if there was any grievance on the subject, the remedy should be constitutional and not judicial. On the general question of the power and authority of a local Legislature, it is sufficient to quote the following passage from the judgment in *Phillips v. Eyre* [1]: "A confirmed act of the local Legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament." The matter of competence and jurisdiction of a local Legislature is to be determined by the act constituting it. The Legislative Council of Ceylon was constituted by the Letters Patent of March 19, 1833, with plenary power to make laws subject only to Royal Instructions, and subject to the power and authority of the King to disallow any such laws, and to make, with the consent of Parliament or with the advice of the Privy Council, such laws as may appear necessary. The Instructions of 1833 were those in operation when the Police Ordinance, 1865, was passed, but they contain nothing which may affect the validity of that Ordinance. In the later Instructions of December 6, 1889, which were in force at the time of the enactment of the Local Boards Ordinance, 1898, there is a provision which requires notice. Clause XXV. directs that the Governor shall not assent to certain specified classes of Ordinances unless they contain a clause suspending their operation until the signification in the Island of the King's pleasure. One of the classes specified is any Ordinance "the provisions of which shall appear inconsistent with obligations imposed upon Us by treaty." The reference is, I think, to treaties with Sovereign Powers, and not to such instruments as the Kandyan Convention. However that may be, the Local Boards Ordinance, 1898, though it contains no suspensory clause, was duly sanctioned, and no question can now arise as to the validity of section 64 of the Ordinance, which, notwithstanding Article 5 of the Convention, gives power to the Board to grant permission for religious or public processions and street music and to regulate and restrict such processions and music. The Attorney-General reminded us of another instance of an Ordinance overriding the articles of an instrument similar to the Kandyan Convention. In Article 18 of the Dutch Capitulation it was provided "that the clergy and other ecclesiastical servants should receive the same pay and emoluments as they had from the Company," and yet the Ordinance No. 14 of 1881, providing for the discontinuance

[1] *40 L. J. Q. B. 28.*

1915.

DE SAMPAYO A.J.

Busnayake Nilame v. Attorney-General

of ecclesiastical stipends, equally affected the chaplains of the Dutch Presbyterian Church. The authorities show that treaties and legislation are on quite different and independent planes; in other words, a treaty is a political and not a legal document, and its sanctions are other than those which a court of law recognizes or enforces. In harmony with this is the principle that the ordinary civil courts have no jurisdiction in such matters as rights founded on treaties. In *Cook v. Sprigg* [1] it was successfully argued that as between the treaty-making Powers the acts done are acts of State not to be interpreted or enforced by Municipal Courts, and that the same principle applied as between either Sovereign Power and its own subjects in respect of the same matters; and the Privy Council observed: "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which Municipal Courts administer"; and again, even as regards private property, their Lordships said: "If there is either an express or a well-understood bargain between the ceding potentate and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by Sovereign against Sovereign in the ordinary course of diplomatic pressure." Further, in *West Rand Central Gold Mining Co. v. Rex* [2] it was observed: "There is a series of authority from the year 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or an act of State are not subject to the jurisdiction of the Municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts." The same principle was laid down by the Privy Council in the Indian case of *Rajah Salig Ram v. The Secretary of State for India* [3], which was concerned with the effect of the arrangements made with Shah Allum, the King of Delhi, on the annexation of that kingdom to the British Crown. In the judgment of the Privy Council this important passage occurs: "If, shortly after the arrangements had been made, the British Government had found it necessary as a matter of political expediency to alter, without the consent of Shah Allum, the arrangements introduced into the assigned territory, it is impossible to conceive that a court of law would have had jurisdiction to enforce the arrangements in a suit brought by His Majesty (late King of Delhi) either by granting a specific performance or by awarding damages for the breach of it." This observation has special application to the circumstances of this case, and it should, I think, be held that, if the provisions of the Police Ordinance, 1865, and the Local Boards Ordinance, 1898, in respect of licenses for processions and tom-toms in any way contravene the Kandyan Convention, which, as I have already ventured to express my opinion, they do not neither the

[1] (1899) *A. C. 572.* [2] (1905) *2 K. B. 391.*

[3] *18 Sutherland Weekly Reports 389.*

District Court nor this Court has jurisdiction to enforce the Convention as against the Ordinances.

For the above reasons, I am of opinion that the judgment appealed against is erroneous, and I would set it aside, and dismiss the plaintiff's action with costs in both Courts.

Set aside.