THE RECEPTION IN CEYLON OF THE ENGLISH TRUST. By L.J.M. Cooray. 1971. pp. 282.

THIS BOOK is an expanded and revised version of the dissertation for which the author was awarded the degree of Doctor of Philosophy of the University of Cambridge. The thesis was written by the author when he was a Commonwealth scholar at Cambridge under the guidance of Professor S. J. Bailey, who has also contributed the foreword.

The law of trust is a very fascinating subject on which many learned treatises have been written. From its home of birth in England the concept of trust has travelled to America,[1] South Africa,[2] India,[3] Ceylon,[4] and several other countries. Although the concept of trust originated and flourished in a country which had two sets of courts *viz.*, common law courts and courts of equity, giving rise to legal rights and estates; and equitable rights and estates, yet it is gratifying to find that the concept of trust has been assimilated in the jurisprudence of the countries like India and Ceylon, where there was only one set of courts—equity courts or their counter-parts being absent—and only one set of rights and estates namely legal rights and estates. *Fideicommissum* of the Roman-Dutch law had for political and historical reasons entrenched itself in the legal system of Ceylon and yet the English trust found its way into the system first through judicial decisions and then by a fairly comprehensive statute in 1917.

The reasons behind the wide reception of the doctrine of trust is its characteristic of elasticity and generality. In the modern times, a trust is an effective device for making family settlements, for employment in complicated business transactions and for transferring property to unborn persons and charitable institutions.

The book opens with a brief survey of laws and legal institutions of Ceylon. It is meant to give a foreign reader and comparative lawyer, not familiar with the legal system of Ceylon, some insight into the Ceylonese laws so that he may intelligently follow not only the contents but also the substance of the book. A short account of the land, its people and history, is given in this part with a view to providing the back-ground against which a foreign reader can appreciate the interaction of the various laws in force in Ceylon on the law of trusts.

A foreign reader is pleasantly amazed to know that about half-a-dozen different systems of law are administered in Ceylon, the chief of them being

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1. *Restatement* (American Law Institute).
2. Honore' A.M., *The South African Law of Trust*, 1966.
3. The Indian Trusts Act, 1882.
4. The Trusts Ordinance (Ceylon) No. 9 of 1917.

Sinhalese law (more commonly referred to as Kandyan law), Buddhist law, Hindu law, Tamil law (referred to as the *Tesawalamai*), Islamic law, Mukkuwa law, Roman-Dutch law and English law. It is still fascinating as well as baffling to learn that the same person is governed by different laws in different facets of life. The author points out, that:

> A Tamil living in Jaffna district would inherit property on his father's death according to Tamil law; he might be called upon to be trustee of a Hindu temple in which case principles which originated in the English courts of equity and Hindu religious law would be relevant to determine his power, rights and duties; he would mortgage his properties according to Roman-Dutch principles; he has a choice to contract a marriage according to the statute law of the land or custom, but his capacity to marry would be determine by statute law; if he brought an action for divorce, he would to some extent, be subject to principles of law originally developed in England, but his claim to custody of children would depend upon Roman-Dutch law, and his wife's right to retain the property she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil law.[5]

In chapter II, the writer deals with 'The Introduction of Trusts into Ceylon.' The author has taken great pains to re-construct the history of the itroduction of the trust law from 1796 up to date, in spite of the fact that there are very scanty sources of information. In this chapter the 'basis and confines' of the law of trusts in Ceylon before 1918 have been very ably examined by the author. Bur for the author's research, the material would have gone into oblivion.

Chapter III deals with the intricate problem of the statute on trust law namely the Trust Ordinance of 1917. This constitutes the most significant part of the investigation. The author has examined thread-bare the relevance of the English authorities and English law in the context of the Ordinance. His recurring complaint is that the English authorities have been followed too often when it should not have been done or could justly been avoided. Section 2, a *Casus Omissus* clause, of the Ordinance, is responsible for the mischief. It reads:

> All matters with reference to any trust, or with reference to any obligation in the nature of trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other enactment, shall be determined by the principles of equity for the time being in force in the high court of Justice in England.

The author has left no stone unturned in establishing his thesis that English

5. Cooray, L.J.M., *The Reception in Ceylon of the English Trust* 1 (1971).

authorities and English law should not be followed unless the language of the section warrants it, and that section 2 should be restrictively employed. In fact, among the suggestions proposed for amending the law the first and foremost which the author makes is that section 2 be repealed and after the repeal, gaps and omissions, if any, may be filled up by enacting additional sections. Such a feeling is natural to the author who is a young Ceylonese scholar of eminence. Following the English law indiscriminately, as illustrated by the author after independence smacks of surveillance to the Britishers and should be avoided. Dr. Cooray's approach, is, however, not emotional but legalistic. He advocates the repeal of section 2 of the Ordinance on the grounds of the 'difficulty of construction'; generally, due to the broad wording of this section and particularly to the phrase, '*principles of equity for the time being in force*'. He feels that under cover of the *casus omissus* clause, the judiciary is not confined to only those principles of equity that are applicable in England *at the time of dispute*, which, alone the court can do. Further, literal interpretation of section 2 involves the application of even those rules of English law of trusts, which were bound up with the English property concept and which cannot be logically assimilated into the law of Ceylon, with its Roman-Dutch foundation. The author also argues that the Trusts Ordinance has been, by now, interpreted for fifty years, the areas of *casus omissus* can, therefore, be determined and after repeal of section 2, gaps and omissions can be plugged by suitable legislation.

The discussion in the aforesaid chapter is illuminating and, it is hoped, would be of great help to the professional lawyer and judges in arguing and deciding the cases on trusts in future without blind dependence on the English law.

Chapters IV to VII cover the different ways in which a trust comes into existence and the factors that are necessary to give it validity. The second clause of the Prevention of Frauds Ordinance, 1840, which prescribes the formalities for the creation of a valid interest in land has been discussed at length in chapter VI being specially relevant to trusts. Chapter VIII reviews the judicial and legislative adaptation of the English concept of the charitable trust to suit the needs of Ceylonese society. Chapter IX speaks about the rules relating to the rights, duties and liabilities of the beneficieries and chapter XI that of the trustees. Chapter X deals briefly with some other sections of the Trusts Ordinance, and considers the relation between trusts and some other aspects of the laws of Ceylon, *viz.*, registration, partition, prescription, insolvency, execution against property. The Trusts Ordinance as amended is reproduced in the appendix.

Except for the provisions relating to charitable trusts, the Ceylonese Trusts Ordinance is a verbatim copy of the Indian Trusts Act, 1882, with minor changes which do not introduce any new principle. Yet it is surprising that the Indian trusts cases are seldom referred to in the Ceylonese courts. The reviewer fully agrees with the author that the Indian Act being

the ancestor of the Ceylone Ordinance, assistance would be derived from the experience of the Indian courts. It may be emphasised that there has been one set of courts *viz.*, law courts both in India and Ceylon. The Indian Trusts Act and the Ceylonese Truts Ordinance recognise only one type of ownership namely legal ownership which rests in the trustee. As such the Indian decisions on the trusts can be of considerable help for the construction of the Ceylon law. Whether this apathy of the Ceylonese legal practitioners is due to the non-availability of the Indian Law Reports in Ceylon or to some other bias is not very clear. Surprisingly enough, even Dr. Cooray has himself rarely referred the Indian decisions in his book.

There is no general law for whole of India relating to charitable trusts. We can do well in taking the cue from the Ceylonese law and enact an all-India law relating to charitable and religious trusts.

The book is not in the form of a text book or commentary on a code, but merely an analytical study of the case law on the subject of trusts—private and charitable—with the single object of examining the manner and extent of reception of the English law in Ceylon. The emphasis is on the case law. According to the author :

> this investigation traces the history and development of the law of trusts in Ceylon, critically analysing the case-law on trusts, the cases which have interpreted the Trusts Ordinance of 1917 and those decided before 1918 and examine some of the significant differences between the law of England and Ceylon.

The author is candid enough to admit that the book does not comprehensively analyse the subject but is an attempt to set out the basic principles of the Ceylon law and to analyse the relevant case law. A reader's impression is the same, for after going through the book carefully, he fails to know the law of trusts in Ceylon and is solely left to the Ordinance published at the end of the book. The book is not a treatise on the Ceylon law of trusts but a specialised work devoted to the critical analysis of case law on the subject. The author ought to have given the summary of the Trusts Ordinance for the benefit of the local and foreign reader. He complains that there are no text books on law in Ceylon because it is not a profitable venture, there being a limited number of readers; a summary added to the book would meet the want to a considerable extent and would immensely enhance the value and utility of the book.

Practising lawyers are in the habit of looking up the law under section-headings whereas the author has attempted to adopt topical essay type method. Again lawyers wish to find all the authorities for and against on a particular section or sub-section collected at one place. This book does not possess these characteristics. The author has given in the index under Trusts Ordinance, a list of sections of the Trusts Ordinance with page reference to the page in his book where each section is analysed and/or referred to. This does not meet the requirement of a busy lawyer.

Referring to the advice given to the author by Professor Glanville L. Williams that 'a writer should not interrupt the flow of a reader's thoughts by compelling him to break his reading in order to look at a footnote; that the footnotes are intended for authorities; that if any sentence is important enough to warrant inclusion in a book it should be inserted in the text; if it was felt that it could be relegated to a footnote, this was an indication that it could be ommitted altogether' Dr. Cooray says that he has tried as far as possible to insert only authorities in the footnotes and has kept the footnotes as brief as possible. The advice is justified in so far as copying paras after paras in footnotes is concerned. But footnotes in a research paper are a must; for it is with the guidance provided by these flag-points that a reader can further probe into the literature on a given point. Dr. Cooray's footnotes are, in fact, copious. In the body of the book he has, (more frequently than necessary) drawn the attention of the reader to *post* and *ante* references which at times compel the reader to run forward and backward, thus breaking the continuity of thought.

Dr. Cooray undertook a poineering and herculean task in writing a thesis on the reception of the English law in Ceylon, in face of insurmountable difficulties and pitfalls, some of them being—

(1) Multiple systems of law administered in Ceylon. Ceylon has been under the influence of common law as well as civil law giving rise to hybrid system of law.
(2) Ceylon is inhabited by a number of communities, each of which is governed by different laws and the same person being governed by different laws in different matters. Sinhalese, Tamils and Muslims are among the major groups and then there is a sprinkling of Europeans and Indians.
(3) There is no uniform system of law for the whole of Ceylon. Ceylon has been under foreign domination being ruled successively by the Portugese, the Dutch and the British. None of these rulers could impose uniform law over the entire island. The legal system in Ceylon is thus a mosaic of various conflicting and competing systems, which makes the task of a researcher intricate and complicated.
(4) The Trusts Ordinance has been copied from the Indian Trusts Act, 1882, *verbatim*, and grafted in the legal system predominted by the Roman-Dutch system, which is at places conceptually and fundamentally different from the Indian law. This has given rise to the difficulties in the interpretation of the Ordinance.
(5) The lack of source material for making research. Law reporting and writing of text Books is most inadequate.

Professor Bailey has done justice to Dr. Cooray in observing that "one feels a special sense of gratitude to Dr. Cooray's clarity and exposition and the manner in which he handles the complications and pitfalls

which beset the subject." Dr. Cooray has taken great pains in digging the case law which but for his efforts would have gone into oblivion, and microscopically analysing and examining the same. The professional lawyers and judges while administering the law of trusts would find the book a haven for them, a useful source of guidance and enlightenment.

The printing and binding of the book is commendable and praiseworthy.

*B.S. Mongia**

* Reader in Law, Panjab University, Chandigarh.